

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Feb 25 2022

SC Court of Appeals

Appeal from Colleton County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT WAYNE EAVES,

APPELLANT.

APPELLATE CASE NO. 2019-001683

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting the forensic interview?

STATEMENT OF THE CASE

Appellant was indicted at the June 27, 2019 term of the Colleton County grand jury for the offense of criminal sexual conduct with a minor in the third degree. R. 259-260. His case was called to trial on September 9, 2019 before the Honorable Thomas W. Cooper, Jr., and a jury. L. Scott Harvin and Robert Bonds represented appellant. Assistant solicitors Katherine Orville and Ceth Utley represented the state. R. 1-2.

On September 11, 2019, the jury found appellant guilty of criminal sexual conduct in the third degree. R. 244, ll. 20-25. Judge Cooper sentenced appellant to five years' imprisonment. R. 257, ll. 18-23.

On appeal, Appellate counsel filed an Anders brief on the same issue – whether the forensic interview was improperly admitted -- that this Court ordered re-briefing on in its order dated January 26, 2022. Appellant had previously framed the issue thusly in the Anders brief:

The court erred by admitting the forensic interview, where the interviewer impermissibly had the child promise to tell the interviewer the truth, thereby improperly bolstering the credibility of the child, and where the interviewer asked leading questions since the forensic interview was not admissible, pursuant to the statute given these fundamental defects.

This brief of appellant follows.

STANDARD OF REVIEW

“Because the admissibility of forensic interviews and the testimony based thereon at trial has been the subject of several recent appeals, we believe it would be helpful to set forth, by way of example, the kinds of statements that a forensic interviewer should avoid at trial:

- that the child was told to be truthful;
- a direct opinion as to a child's veracity or tendency to tell the truth;
- any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a “compelling finding” of abuse;
- any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
- an opinion that the child's behavior indicated the child was telling the truth.

A forensic interviewer, however, may properly testify regarding the following:

- the time, date, and circumstances of the interview;
- any personal observations regarding the child's behavior or demeanor; or
- a statement as to events that occurred within the personal knowledge of the interviewer.

These lists are not intended to be exclusive, since the testimony will of necessity vary in each trial, but this may serve as a general guideline for the use of this and other similar testimony by forensic interviewers.” State v. Kromah, 401 S.C. 340, 350, 737 S.E.2d 490, 495-96, (2013).

ARGUMENT

The trial court erred in admitting the forensic interview.

Relevant Facts

Prior to trial, a hearing was held on the admissibility of the forensic interview. The judge stated, “The forensic interviewer’s testimony, of course, will stand on its own.” Defense counsel Harvin replied, “Right. Well, assuming the forensic interviewer hasn’t tried to suggest or bolster.” R. 36, l. 20 – 37, l. 22.

Defense counsel emphasized his concern that the forensic interviewer did not bolster the child’s testimony by suggesting “she believes the child witness, which is improper.” R. 38, ll. 3-11. The solicitor claimed the state was not “[t]rying to bring in anything that would be bolstering.” R. 38, l. 15 – 39, l. 10.

The state then proffered the testimony of forensic interviewer Trina Elfering in camera. Elfering testified she was a licensed social worker. R. 40, ll. 17-24. Prior to that, she had worked at DSS as a “Child Protective Services investigator.” R. 40, l. 25 – 41, l. 7. Presently, she worked at the Dickerson Children’s Advocacy Center in Lexington. R. 41, ll. 10-11.

Elfering said the protocol for her forensic interview was to make the child comfortable “and then moving into possible disclosure or no disclosure” using “open-ended questions at all time[s].” R. 42, ll. 7-15.

Elfering saw the alleged victim, B.C., on September 13, 2017. She thought B.C.’s father and/or her step-mother brought her to the forensic interview. R. 43, ll. 1-4.

Elfering related that the child told her she had been assaulted in the summer of 2017 at her grandmother’s house in Walterboro. R. 43, l. 5 – 44, l. 19. Before the tape was introduced during the pretrial hearing, defense counsel told the judge he was concentrating on whether there

were leading questions and whether there was “enough indicia of truthfulness in the statement and in the recording.” R. 45, ll. 15-20. The following occurred on cross-examination of Elfering by Defense Counsel Harvin:

Q: And you don't basically you're not testifying yourself. Is that correct?

A: That's correct.

Q: *So what you're not supposed to do is not the best practice to repeat what the child says and ask them if that's true -- true or false. Is that correct?*

A: *No, we do that all the time.*

Q: You say that is that is part of the protocol?

A: Yes.

Q: Are you familiar with some literature called *Child Abuse and Neglect, the Use of Paraphrase by Investigators*, by Angela Evans, Kim Roberts, Heather Price, in 2010?

A: I don't think I've ever seen that.

Q: What literature do you use for this?

A: There -- there's -- there are new studies all the time that we use. Each of the steps of the protocol is related to different literature in the field. And I did not study all the literature before I came here.

Q: Well, I mean, what, just in general, for certification, whatever that may be --

A: Um-hmm.

Q: -- what literature do you use?

A: There's an article by Sorensen and Snow about how children disclose. There's research on -- there's new research probably every two years on different ways to ask different questions.

Q: Is that Sorensen -- now, that's going back from the eighties. Is that correct?

A: Way back.

Q: Way, way, way, way, way, way back.

A: Yeah. But it's been re-tested.

Q: *But you agree it's probably not the best practices to paraphrase what the child is saying and repeating it to them?*

A: *We always do that.*

R. 49, l. 17 – 50, l. 25. (emphasis added).

Elfering testified that by repeating what the child had already told her that she was not suggesting something new to the child. R. 51, ll. 3-13.

Elfering admitted that the child told her that her grandmother had informed the child if they called the police about the alleged lewd act by appellant that she would “have to answer questions, many, many times if she -- if they called the police, I believe.” R. 52, ll. 9-13.

Arguments and ruling

The solicitor argued that the forensic interview was admissible pursuant to S.C. Code § 17-23-175. The solicitor contended that Elfering was not asking leading questions in violation of the statute. He maintained that Elfering asked open-ended questions and only asked the child to clarify what she was saying was correct “if she misunderstood something.” The solicitor also said that the forensic interviewer was not bolstering “the child’s testimony in any way. And the interviewer doesn’t express [any] opinion at all about -- about the child’s truthfulness or whether she believes her, none of that. She’s simply eliciting a narrative from the child.” R. 54, l. 4 – 55, l. 13.

Defense counsel Harvin disagreed about the interviewer not leading the child. “I believe that she was . . .using leading questions . . . What she would do is, she would ask a question. Then she would come back and ask it again, yes or no, as a leading question, just as I did with her. I think it was pretty clear to the Court that my questions of her were leading, the same way she was leading the child.” Counsel argued the forensic interview was essentially the interviewer testifying rather than the child, and he argued the interview should not be admitted. R. 55, l. 17 – 56, l. 17.

The judge said that he thought Elfering was “paraphrasing” or “repeating” what the child said, and he did not think that “[v]iolates the provisions of the statute against leading questions.” The judge said it would be up to the jury to decide if the forensic interviewer’s questioning influenced the child’s responses. “The jury will be able to decide whether or not Ms. Elffering’s responses and questions change the answer[s] of the child.” That respectfully was an abdication of the judge’s gatekeeping function under the statute. The judge ruled the forensic interview was admissible.¹ R. 56, l. 19 – 58, l. 8.

Jury in

The child’s father, Dominick Carlini, testified that his daughter, B.C., was the victim. In the summer of 2017, he let B.C. and her brother go to Walterboro to visit their mother and grandmother. It was apparent Dominick had custody of B.C. and her brother. R. 77, l. 9 – 78, l. 11.

Dominick recalled that he received a phone call from Rob, who was Samantha, his ex-wife’s, husband, “just saying that my kids weren’t safe here [in Walterboro], that I should try to

¹ The defense also argued that the forensic interviewer statute was unconstitutional, and a violation of due process given its cumulative nature of the child’s tape testimony being played for the jury and then the child testifying live before the jury. The judge denied that motion, as well. R. 58, l. 9 – 59, l. 4.

keep them away from here . . .” R. 78, ll. 15-22. Dominick added that he was led to believe that his daughter had been molested by Wayne, appellant. R. 78, l. 23 – 79, l. 1.

Dominick maintained that he talked to B.C. “and she broke down and told me what had happened. And then I called the Ridgeland [Richland] County Sheriff’s Department.” R. 79, ll. 2-10. The Richland County Sheriff’s Department “[g]ot me in touch with somebody at Colleton County.” R. 79, ll. 9-10. Colleton County Law Enforcement “instructed me to take her and have a forensic therapist to talk with her, and they did a medical exam.” R. 79, ll. 14-17. Dominick offered that B.C. had become a lot quieter and withdrawn, and that she was not as eager to meet and talk to people since the incident, whereas she used to be “real friendly with everyone.” R. 79, ll. 20-25.

Dominick acknowledged he thought that when Rob, his ex-wife’s current husband, called him about the alleged abuse that he believed Rob and his ex-wife, Samantha, were fighting. R. 80, ll. 9-16. There would later be testimony that Samantha, B.C.’s mother, informed Rob during this time that she had an affair with appellant. There was even a physical confrontation between Rob and Samantha, in which Samantha apparently shot at Rob. Dominick said he filed an order of protection in Richland County against his ex-wife, Samantha. R. 81, ll. 19-22.

The forensic interview

The state next called the forensic interviewer, Trina Elfering. The forensic interview was introduced and played for the jury over defense objection. R. 84, l. 5 – 87, l. 17. In the forensic interview, Elfering had B.C. promise to tell her the truth in everything she said and to tell Elfering if Elfering had any of the facts wrong. State’s exhibit 1, (DVD of B.C. Interview at 9:43 – 9:44. (hereinafter “Tape”).

B.C. related that she lived with her father and her stepmother, Crystal. Once she started middle school, she had a habit of waking up early in the morning. B.C. told the jurors about an incident, in which appellant allegedly got into bed with B.C., her grandmother, and her brother and appellant rubbed her legs. B.C. also alleged that appellant pulled her pants down and touched her "private part." B.C. maintained that appellant also licked her chest.

B.C. said she did everything she could to wake up her grandmother sleeping next to her to no avail. The next morning, she told her grandmother, but her grandmother did not believe her. Tape at 9:48. B.C. said she wanted her grandmother to call the police, which her grandmother eventually did. B.C. said her grandmother told her the police officer she called told her that B.C. would be repeating her story often for the next two years if she went forward with a prosecution.

Elfering then asked B.C. several questions. Tape at 9:50. B.C. said she was lying on her back, and appellant was on his belly when the lewd act occurred. She repeated that she tried to wake up her grandmother, but she could not. B.C. said the next morning she told her grandmother, her mother, and brother what had happened. B.C. stated that her grandmother did not believe her but called the "cops" because B.C. wanted her to call them. The interviewer repeated the police officer said the child would go through "a lot" if a formal report were made. B.C. said her grandmother was lying about the police officer offering that the child would go through two years of problems if she tried to prosecute appellant. Tape at 9:59 – 10:50. B.C. said her grandmother told her that she saw appellant crying about the allegations at one point but stated that she "did not care about that." Tape at 10:02.

The interviewer on cross-examination

Elfering on cross-examination that she prepared for the interview by reading the police report. Elfering acknowledged that B.C. claimed during the interview that her grandmother was lying about what the police officer supposedly told her. Elfering said it was not her job to figure out whether the grandmother had indeed lied or whether the deputy actually said what the grandmother related. R. 89, l. 6 – 90, l. 13.

The alleged victim

B.C. then testified that she lived with her father and stepmother in Columbia. She was ten years old in 2017 when the lewd act allegedly occurred at her mother and grandmother's house in Walterboro. R. 93, l. 14 – 100, l. 24.

B.C. testified on the night in question that she was sleeping with her grandmother and her brother in the same bed. She claimed appellant tried to wake her up, touched her leg, her "private part," her "breast area," and then quickly left the trailer. B.C. said she told her grandmother and mother the next morning about the incident. B.C. did not immediately tell her father because she reasoned that her mother and grandmother both had said "[I] would have to be on the news, and I would have to repeat myself, and I would have to like go to court and testify." B.C. said this scared her. R. 102, l. 6 – 109, l. 2. B.C. had not seen her mother or grandmother since that summer of 2017. R. 109, ll. 22-24.

B.C. admitted she had stayed at appellant's house in the past. She related that when her mother did not have a place to live or a job, they would go and live with appellant. Appellant would even drive her mother to Columbia to pick her B.C. R. 110, l. 24 – 111, l. 19.

B.C. said that her mother, grandmother, and appellant all drank during these family get-togethers. R. 113, l. 25 – 115, l. 1. B.C.'s little brother, ten-year-old D.C., testified he was "half-

asleep” when he saw appellant get into the bed with B.C., him, and their grandmother that night. R. 120, l. 12 – 122, l. 4. D.C. admitted he told his mother and grandmother the following morning that he slept the entire time and did not see anything. R. 124, ll. 5-7.

The prosecution called Dr. Susan Lamb, who was a pediatrician. Dr. Lamb testified B.C. was referred to her because of sexual abuse. Even though the only evidence in this case was that the child disclosed immediately, Dr. Lamb testified that sexual abuse is not something that is typically disclosed immediately, and she told the jury about delayed disclosure. R. 128, l. 17 – 129, l. 17. Dr. Lamb also told the jurors that formal physical exams, such as B.C.’s exam, were usually perfectly normal following sexual abuse.

Samantha Russo, the mother of B.C. and the ex-wife of Rob, admitted that B.C. and her brother loved appellant, their Uncle Wayne. R. 170, l. 25 – 171, l. 5. Samantha acknowledged that she had a terrible fight with Rob when she disclosed that she had had a sexual relationship with appellant. This was at the same time the allegations in this case arose. R. 178, l. 3 – 179, l. 22.

Samantha said that her then husband Rob had tried to kill her, and she grabbed a gun and shot at him. He was charged with criminal domestic violence in the first-degree after that incident. R. 180, l. 5 – 182, l. 22. Samantha said that she was not surprised her mother, B.C.’s grandmother, did not believe B.C. was telling the truth. She alleged: “Mother didn’t believe me either.” Samantha claimed to defense counsel that she was now telling the truth. R. 182, ll. 7-22.

Detective Kelly Padgett of the Colleton County Sheriff’s Department testified that appellant denied the allegation he committed a lewd act on B.C. R. 188, ll. 14-24.

At sentencing, appellant's children spoke on his behalf. Defense counsel Harvin noted that appellant had no prior record, and he had done many good things for the community. The allegations were "completely out of character," and he asked the judge for a probationary sentence. R. 252, l. 19 – 257, l. 23.

Discussion

A forensic interviewer may not offer an opinion regarding the credibility of others. State v. Kromah, 400 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). The forensic interviewer may not in any way signal to the jury that the child is telling the truth or that the forensic interviewer believes the child is telling the truth. See State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). See, also, State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

At the very beginning of the forensic interview that is on file with this Court, the forensic interviewer had the child promise to tell her the truth during the interview and even correct the forensic interviewer if she is wrong about anything during the interview. This was highly improper. Such "tell the truth" language at the beginning of forensic interviews is routinely redacted so that the jury is not impermissibly tainted by viewing the child promising to tell the truth to the forensic interviewer. This improperly bolsters the child's credibility and also signals to the jury that the forensic interviewer, who conducts these interviews for a living, believes the child is telling the truth.

Further, in State v. Kromah, the Supreme Court held the forensic interviewer should always avoid telling the jury in any manner that the child was told to be truthful in any statement or opinion that indicates the interviewer believes the child or indicates the child is telling the truth. State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013).

Defense counsel correctly objected that the forensic interview should not have been admitted because B.C.'s statement, the bolstering aside, was elicited by leading questions. See S.C. Code § 17-23-175 (B)(1). These leading questions in violation of the statute distinguishes this case from State v. Perry, 410 S.C. 191, 763 S.E.2d 603 (Ct. App. 2014) wherein the majority of this Court noted that there was no basis for an "improper bolstering" objection when the child's testimony was properly admitted pursuant to the statute. Here, the testimony was not properly admitted pursuant to the statute, and the forensic interview itself improperly bolstered the child's testimony by strongly suggesting the experienced interviewer believed the child was telling the truth.

As seen above, defense counsel argued that the forensic interviewer's tendency to repeat the testimony of the child and ask her if that was indeed her point was in essence leading the child to the conclusions the forensic interviewer sought. That was improper, and, as stated. the forensic interviewer also improperly bolstered the child by signaling that she believed the child. The forensic interview should not have been admitted.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Thomas W. Cooper, Circuit Court Judge

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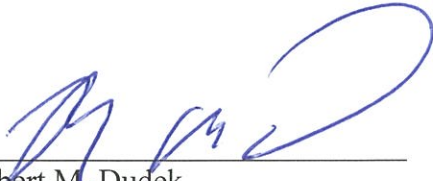
ROBERT WAYNE EAVES,

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APPELLATE CASE NO. 2019-001683

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the brief of appellant in the above-referenced case has been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 28th day of February, 2022.



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