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**CHILDREN'S
LAW OFFICE**

Insights

A glimpse into timely topics affecting the investigation and prosecution of child abuse in South Carolina

Courts Keep Scrutinizing CSC Convictions

Child sexual abuse convictions continue to receive the attention of appellate courts, with both the Court of Appeals and Supreme Court clarifying or, in some cases, reiterating, rulings on issues that frequently arise.

Supreme Court

Instructions on *Lyle* Evidence

State v. Warren, No. 25160 (S.C. filed July 1, 2000)
(Shearouse Adv. Sh. No. 26 at 48)

Defendant was convicted of second degree CSC with a minor for acts committed against his stepdaughter. While cross-examining the victim, defense counsel repeatedly brought up the fact that the victim's sister alleged defendant also had abused her. After these prior acts were brought out by the defendant, the solicitor highlighted this information to the jury on several occasions. The Court of Appeals reversed defendant's conviction based on the trial court's failure to instruct the jury not to consider prior bad acts as proof of the crime with which defendant was charged. The Supreme Court reversed the Court of Appeals, holding such an instruction was not necessary since the defendant's attorney first introduced the evidence.

Closed-Circuit Television Testimony

State v. Bray, No. 25176 (S.C. filed July 31, 2000)
(Shearouse Adv. Sh. No. 31 at 8)

In this child sexual abuse case, the seven-year-old victim was allowed to testify by closed-circuit television (CCTV). The Court of Appeals reversed the conviction, holding that the trial court's factual findings were inadequate to support the use of CCTV. The Court of Appeals focused on the fact that the trial court did not personally interview the child, but rather relied on the testimony of the child's therapist, who testified the child would "shut down and not talk at all" if forced to testify in open court.

Contrary to the view of the Court of Appeals, the Supreme Court found that the record contained sufficient evidence to support the necessity of the child testifying by CCTV. The expert testimony of the child's therapist as well as testimony from the child's mother demonstrated the child would be traumatized by testifying in front of the defendant.

In spite of finding an adequate factual basis in the record for allowing use of CCTV, the Supreme Court nonetheless reversed defendant's conviction because the trial court did not make clear, case-specific findings on the record. That is, the trial judge did not articulate in his ruling which specific factors led him to conclude that the child would be traumatized by testifying in the presence of the defendant. According to the Court, the language the trial judge used in his ruling could be interpreted to mean that he was allowing the CCTV testimony because of the child's fear of testifying in front of other family members, whereas the only permissible basis is trauma caused by testifying in front of the defendant.

Subject Matter Jurisdiction

Campbell v. State, No. 25183 (S.C. filed August 14, 2000)
(Shearouse Adv. Sh. No. 33 at 17)

Defendant was indicted for first degree CSC with a minor for fondling a seven-year-old girl. He pled guilty to committing a lewd act with a minor. Since lewd acts is not a lesser included offense of first degree CSC with a minor and defendant was neither indicted for lewd acts nor waived indictment, the trial court did not have subject matter jurisdiction to accept the plea. The court went out of its way to remind prosecutors to be sure subject matter jurisdiction is present when a defendant pleads to an unindicted offense.

Court of Appeals

Expert Testimony

In re Robert R., 340 S.C. 242, 531 S.E.2d 301 (Ct. App. 2000)

The juvenile was adjudicated delinquent on two counts of first degree CSC with a minor. Prior to trial, the juvenile passed a polygraph examination. The family court judge applied a per se rule of inadmissibility and refused to admit evidence of the results of the polygraph. Citing *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), the Court of Appeals reversed, holding that admissibility of scientific evidence must now be analyzed under Rule 702, SCRE and factors identified in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979). Thus, it was error for the family court judge to apply a per se rule rather than conducting a hearing under *Council*. The court affirmed the adjudication, but remanded for the trial judge to determine if the polygraph results are admissible under a *Council* analysis (and, if so, to order a new trial).

Commenting on Child's Credibility

State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000)

Defendant was convicted of first degree CSC with a minor for acts committed against a 10-year-old boy. At trial, the solicitor asked the child's therapist if he was able to determine whether the child was telling the truth. The therapist also stated that, when children say they have been sexually abused, "95 to 99 percent of the time, that's the truth." When the expert commented on credibility again on cross-examination, the court instructed the jury to disregard the expert's testimony regarding the "percentage of truthfulness in these kinds of cases."

The Court of Appeals held that the trial court properly denied defendant's mistrial motion. While the expert's statements concerning the child's credibility were clearly improper, the court found that the instruction "sufficiently cured any prejudice to Dempsey flowing from the improper vouching." Thus, the court affirmed the conviction.

Legislative Wrap-Up

In the May newsletter, we reported on the amended child homicide law and new great bodily injury upon a child statute passed this year. While further legislative activity on child maltreatment issues was limited, solicitors and law enforcement officers should know about three other bills enacted this session.

Safe Haven for Abandoned Babies Act, H4743, R390

The Safe Haven Act allows a person to leave a newborn at a hospital without being prosecuted for "any criminal offense on account of such action," provided: (1) the person is the infant's parent or is acting at the direction of the parent; (2) the person leaves the infant in the physical custody of a hospital employee; and (3) the infant is not more than 30 days old.

The new law imposes numerous duties on hospitals and DSS and provides a procedure for termination of parental rights. This act took effect June 6 and is to be codified at S.C. Code Ann. § 20-7-85.

Minimum Age for Marriage, H3465, R452

This act amends the Children's Code to provide that no child under the age of 16 may enter into a valid marriage. Previously, the law allowed 14 and 15-year-olds to get married with parental consent. The amendment eliminates the parental consent provisions for any child under 16, making any such marriage void. This act amends S.C. Code Ann. §§ 20-1-100 and 20-1-250 and took effect August 17.

HIV Testing, S126, R214

This Act substantially amends S.C. Code Ann. § 16-3-740, which provides for HIV testing upon conviction of sexual and other offenses involving transmission of bodily fluids. One of the primary effects of the amendments is to allow a victim who has been exposed to bodily fluids to request such a test before conviction. Upon receiving such a request at any point after the defendant is charged, the solicitor *must* file the petition to have an offender tested.

New subsection (F) allows, upon a showing of probable cause, contemporaneous collection of other physical evidence, "including blood, saliva, head or pubic hair." In contrast to the samples collected for purposes of the HIV/Hepatitis tests, the results of tests on substances collected pursuant to this subsection may be used for evidentiary purposes. The amendment also repeals S.C. Code Ann. § 16-15-255. The Act took effect February 25.

Medical Notes

Advice on Evidence Collection

A recent medical journal article reviewed records from 273 prepubertal children examined in Philadelphia hospitals from 1991 through 1996. The researchers analyzed the type of forensic evidence discovered during rape kit exams.

The authors reported several important findings: (1) No swabs taken from any child more than 13 hours after the assault found any blood or semen. (2) With the exception of one child (on whom a pubic hair was found 44 hours after the assault), all children with forensic findings were examined within 24 hours of the assault. (3) Sperm was found in 32 percent of the 19 children who reported ejaculation, but was found in an additional 12 children who did not report ejaculation. (4) Most of the forensic evidence (64%) was found in children's linens or clothing.

Although the study has numerous implications, the findings provide three important reminders to law enforcement officers when a prepubertal child is a victim of a sexual assault: (1) The medical exam needs to take place as soon as possible after the assault (within 12 hours, if possible); and (2) Collection of clothing and linens is as important as the exam itself. (3) The person conducting the exam cannot assume the child has fully disclosed every act.

Contact the CLO for a copy of the article: Cindy W. Christian et al., *Forensic Evidence Findings in Prepubertal Victims of Sexual Assault*, 106 *Pediatrics* 100 (2000).

CDC Revises Growth Charts

Earlier this year the Centers for Disease Control released new growth charts for measurements such as weight, height, head circumference, and body mass for children aged birth through 18 years. The growth charts provide a useful tool in cases of child neglect to demonstrate visually how a child compares to other children the same age. Download the new charts and accompanying report at www.cdc.gov/growthcharts/.

For More Medical Updates . . .

The Child Abuse Quarterly: Medical Update, published by the Massachusetts Society for the Prevention of Cruelty to Children, is an excellent source of information on medical issues. A yearly subscription is \$90.00. Subscription information is available online at www.msppcc.org/Quarterly.cfm or by writing MCPCC, 399 Boylston Street, Boston, MA 02116.

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