

COURT OF APPEALS OF GEORGIA

Kendricks v. The State

No. A20A1954 (Ga. Ct. App. Feb. 3, 2021) · No. A20A1954 · Decided February 4, 2021

SUMMARY

The Georgia Court of Appeals affirmed Jonathan Kendricks’s convictions and sentence for rape and aggravated sexual battery. The court held that the victim’s therapy journal was admissible as a prior consistent statement and did not violate the Confrontation Clause, rejected the challenges to the State’s closing argument and exclusion of the victim’s sister’s forensic interview, and found no cumulative error.

CASE DETAILS

COURT	Court of Appeals of Georgia
WRITING FOR THE COURT	Miller, Presiding Judge; Mercier, Judge; Herbert E. Phipps, Senior Appellate Judge
JURISDICTION	Georgia
DECIDED	February 4, 2021
DOCKET	A20A1954
DISPOSITION	affirmed
PROCEDURAL POSTURE	Direct appeal from convictions and sentence for rape and aggravated sexual battery following denial of a motion for new trial.
STANDARD OF REVIEW	Evidentiary rulings are reviewed for abuse of discretion when properly objected to at trial. Unpreserved challenges to improper closing argument were deemed waived under controlling Georgia precedent. The court also reviewed the exclusion of defense evidence for abuse of discretion.
PRECEDENTIAL VALUE	Published Georgia Court of Appeals opinion
PARTIES	Jonathan Kendricks v. The State

TOPICS

hearsay evidence sixth amendment due process appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the trial court properly admitted J. C.'s therapy journal as a prior consistent statement and whether its admission violated the Confrontation Clause.
2. Whether the appellate court could review the State's allegedly improper closing argument when Kendricks failed to object contemporaneously, and whether the trial court's sustaining of an objection to another argument presented reversible error.
3. Whether excluding the video of J. C.'s sister's forensic interview violated Kendricks' due-process right to present a complete defense.
4. Whether the cumulative effect of the alleged errors required a new trial.

HOLDINGS

1. The journal was admissible as a prior consistent statement because J. C. was the declarant, testified at trial, was subject to cross-examination, and defense questioning affirmatively placed her veracity at issue by implying that she had changed or fabricated details for trial.
2. Admission of the journal did not violate the Confrontation Clause because J. C., rather than the therapist, was the declarant, and J. C. testified at trial and was subject to cross-examination.
3. The challenge to the State's first allegedly improper closing argument was waived because Kendricks did not make a timely objection. The challenge to the Thanksgiving-table argument presented nothing for review because the trial court sustained Kendricks' objection and he did not contend that further relief was required.
4. Excluding the video of J. C.'s sister's forensic interview did not violate due process or constitute an abuse of discretion because Kendricks was allowed to present the substance of the sister's denial through testimony and extensive cross-examination.
5. Kendricks was not entitled to a new trial based on cumulative error because the court found no reversible error in admitting the journal or excluding the sister's interview, and the closing-argument claims were either waived or resolved without demonstrated error.

KEY QUOTATIONS

“Under these circumstances, we conclude that the trial court did not abuse its discretion in allowing the journal because it was not hearsay under OCGA § 24-8-801 (d) (1) (A).” (4)

“Under these circumstances, “we find that defense counsel’s questioning placed [J. C.’s] veracity at issue, by implying that she had changed her story for trial.”” (6)

“Therefore, “the admission of [J. C.’s] recorded statements did not violate the Confrontation Clause because she testified at trial and was subject to cross-examination.”” (7)

“Kendricks was thus able to present evidence to the jury to support his defense that J. C. was either not being truthful or had mistaken him for the real perpetrator.” (9)

FACTUAL BACKGROUND

Kendricks was the maternal uncle of J. C., a child who spent time at her grandparents' and parents' homes, where Kendricks lived. While J. C. was in the custody of Kenna Reed, J. C. reported that Kendricks had taken her to an attic, removed her pull-up, and had sex with her; she repeated the account to police and a forensic interviewer. Medical examinations revealed a urinary tract infection, genital redness, and a notch on her hymen. At trial, the State introduced a journal created during therapy in which a therapist typed J. C.'s statements, while the defense sought to introduce a forensic interview in which J. C.'s sister denied that Kendricks had molested her.

PROCEDURAL HISTORY

A grand jury indicted Kendricks for rape and aggravated sexual battery. A jury found him guilty on both counts, and the trial court imposed 25 years' imprisonment followed by life probation. The trial court denied his motion for new trial, and Kendricks appealed. The Court of Appeals of Georgia affirmed.

DISPOSITION

affirmed

CASES CITED

- Jackson v. Virginia, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979)
- State v. Parks, 350 Ga. App. 799, 807 (830 SE2d 284) (2019)
- Hawkins v. State, 350 Ga. App. 862, 872-873 (7) (830 SE2d 301) (2019)
- Sullins v. State, 347 Ga. App. 628, 632 (1) (820 SE2d 468) (2018)
- Silvey v. State, 335 Ga. App. 383, 389 (2) (780 SE2d 708) (2015)
- Nguyen v. State, 294 Ga. App. 67, 71-72 (668 SE2d 514) (2008)
- Varner v. State, 306 Ga. 726, 730 (2) (b) (i) (832 SE2d 792) (2019)
- Gates v. State, 298 Ga. 324, 328-329 (4) (781 SE2d 772) (2016)
- Etkind v. Suarez, 234 Ga. App. 108 (505 SE2d 831) (1998)
- State v. Burns, 306 Ga. 117, 121-122 (2) (829 SE2d 367) (2019)
- State v. Lane, 308 Ga. 10, 14 (1) (838 SE2d 808) (2020)

OPINION

PER CURIAM.

SECOND DIVISION MILLER, P. J., MERCIER, J., and SENIOR APPELLATE JUDGE PHIPPS
NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed. <https://www.gaappeals.us/rules>
DEADLINES ARE NO LONGER TOLLED IN THIS COURT. ALL FILINGS MUST BE SUBMITTED WITHIN THE TIMES SET BY OUR COURT RULES.

February 3, 2021 In the Court of Appeals of Georgia A20A1954. KENDRICKS v. THE STATE. MILLER, Presiding Judge. Jonathan Kendricks seeks review of his convictions and sentence after a jury found him guilty of rape and aggravated sexual battery.

On appeal, he argues that (1) the trial court erred in allowing into evidence a statement from the victim in a journal that was typed by an anonymous therapist; (2) the State's closing argument was improper; (3) the trial court erroneously excluded a forensic interview with the victim's sister; and (4) the cumulative effect of these errors was prejudicial.

After a close review of the record, we reject all of Kendricks' claims of error and affirm his convictions and sentence. Viewed in the light most favorable to the verdicts,¹ the evidence adduced at trial showed that Kendricks was the maternal uncle of J. C. J. C. lived part of the time at her grandparents' house and part of the time at her parents' house. At all relevant times, Kendricks lived at J. C.'s parents' house.

Following a juvenile court case, Kenna Reed, J. C.'s father's cousin, eventually obtained sole custody over J. C. J. C.'s two sisters were separately placed in the custody of a maternal aunt. While J. C. was in Reed's care, she complained about pain and itchiness whenever she used the restroom. Reed examined J. C. and saw redness and blistering around her private parts.

A doctor diagnosed J. C. with a urinary tract infection that had lasted for at least six months. Reed asked J. C. if anything had ever happened to her, and J. C. responded that, one day, Kendricks had taken her upstairs to the attic, removed her pull-up, and had sex with her. Reed took J. C. to the police station, and J. C. repeated the story to a police officer.

Elizabeth Mallory, a forensic interviewer with the Edmonson-Telford Child Advocacy Center, conducted an interview with J. C.² J. C. told Mallory that, one day, she saw Kendricks with a "box of big, long rubber thingies. Later, while she was 1 Jackson v. Virginia, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979). 2 Video footage of the interview was admitted and played for the jury.

2 asleep, Kendricks came into her room with "the thingy on" and then "ripped the covers off and he did it." During the interview, J. C. drew a picture on an anatomical drawing of a penis, vagina, and condom, and she indicated to Mallory on the drawing that she felt pain afterwards in her stomach area. A gynecologist examined J. C. and saw redness and a little notch on her hymen.

A grand jury indicted Kendricks on one count of rape (OCGA § 16-6-1) and one count of aggravated sexual battery (OCGA § 16-6-22.2). At trial, the jury found Kendricks guilty of both counts, and the trial court sentenced Kendricks to 25 years' imprisonment, followed by probation for life. Kendricks filed a motion for new trial, which the trial court denied after a hearing.

This appeal followed. 1. Kendricks first argues that the trial court erred by allowing a journal entry from J. C. into evidence. Kendricks argues that the journal entry was inadmissible hearsay and

violated his rights under the Confrontation Clause because it was transcribed by an anonymous therapist who did not testify at trial.

We disagree. “Where a party has objected to a trial court’s evidentiary rulings at trial, we review the evidentiary rulings for an abuse of discretion.” (Citation omitted.) *State v. Parks*, 350 Ga. App. 799, 807 (830 SE2d 284) (2019). 3 (a) Hearsay is defined as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” OCGA § 24-8-801 (c). “An out-of-court statement shall not be hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a prior consistent statement... or is otherwise admissible[.]” OCGA § 24-8-801 (d) (1) (A).

The journal in question was a book that J. C. created during therapy sessions. The therapist typed what J. C. said. The State initially introduced the journal during its direct examination of J. C. as a document to refresh J. C.’s memory as to what a condom was and whether Kendricks used a condom.

On cross-examination, Kendricks questioned J. C. about the creation of the journal and whether J. C. had told others about the details of what she discussed in therapy and wrote in the journal. On re-direct examination, the State sought to introduce the journal into evidence, which the trial court allowed over Kendricks’ objection.

The State then used the journal to question J. C. as to whether she was aware of the meaning of the term “cum” and then questioned J. C. as to some of the pictures that she drew in the journal. 4 Under these circumstances, we conclude that the trial court did not abuse its discretion in allowing the journal because it was not hearsay under OCGA § 24-8-801 (d) (1) (A).

First, the trial court correctly concluded that J. C. was the declarant of the information of the journal. J. C. testified that, when writing the journal as part of her therapy classes, “I said it and my therapist typed it.” J. C. thus had personal knowledge about the creation of the journal, and her testimony alone was competent and sufficient to establish the circumstances of its creation.

OCGA § 24-14-8 (“The testimony of a single witness is generally sufficient to establish a fact.”). We see no indication from the evidence that the therapist had any role in creating the journal or the content of the journal outside of memorializing J. C.’s statements by typing them. Compare *Hawkins v. State*, 350 Ga. App. 862, 872-873 (7) (830 SE2d 301) (2019) (accountant was an author or declarant of the information in a financial chart depicting the defendant’s finances when the accountant “worked together on the content of the chart” with the defendant).

Thus, J. C. was the declarant of the information in the journal, she testified at trial, and Kendricks was able to cross- examine her about the statements she made in the journal. Finally, the journal was admissible as a prior consistent statement. “Generally speaking, unless a witness’s veracity

has affirmatively been placed in issue, the 5 witness's prior consistent statement is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury." (Citation and punctuation omitted.)

Sullins v. State, 347 Ga. App. 628, 632 (1) (820 SE2d 468) (2018). [A] witness's veracity is placed in issue so as to permit the introduction of a prior consistent statement only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination. Where such an attack occurs, evidence is admissible that the witness told the same story before the motive or influence came into existence or before the time of the alleged recent fabrication.

In those circumstances, the prior consistent statement is defined as not hearsay and thus is admitted into evidence. (Citation, punctuation, and emphasis omitted.) *Silvey v. State*, 335 Ga. App. 383, 389 (2) (780 SE2d 708) (2015); see OCGA § 24-6-613 (c). During Kendricks' cross-examination of J. C., he extensively questioned J. C. about whether the details of her story were consistent each time she told someone what happened, and he asked her whether, before trial, she had mentioned certain details that she testified to on direct-examination, such as whether Kendricks had penetrated her with a Coke bottle.

Under these circumstances, "we find that defense counsel's questioning placed [J. C.'s] veracity at issue, by implying that she had 6 changed her story for trial." *Nguyen v. State*, 294 Ga. App. 67, 71 (668 SE2d 514) (2008).³ Thus, the journal entry was admissible to rebut the implication that J. C. had fabricated these details for trial. See *id.* at 71-72 (videotaped interviews of the victim were admissible as prior consistent statements when defense counsel questioned the victim about a key difference between her testimony at trial and her statements to a doctor, placing her veracity at issue). (b) Finally, as for Kendricks' Confrontation Clause argument, "[a] Confrontation Clause violation occurs when an out-of-court statement admitted into evidence is testimonial in nature and the declarant is unavailable at trial and was not previously subject to cross-examination." (Citation omitted.)

Varner v. State, 306 Ga. 726, 730 (2) (b) (i) (832 SE2d 792) (2019). Kendricks' Confrontation Clause argument relies entirely on his conclusion that the therapist was the author of the information, but as noted above, we agree with the trial court that J. C. was the maker of the statements in the journal, not the therapist.

Therefore, "the admission of [J. 3 "[OCGA § 24-6-613 (c)] represents a codification of existing Georgia law on prior consistent statements," rather than conforming to the relevant Federal Rule of Evidence, and so our prior law on consistent statements still applies despite the enactment of our current Evidence Code. *Silvey*, *supra*, 335 Ga. App. at 389 (2). 7 C.'s] recorded statements did not violate the Confrontation Clause because she testified at trial and was subject to cross-examination." *Id.* The journal was therefore properly admissible under OCGA § 24-8-801 (d) (1)

(A), and so the trial court did not abuse its discretion or violate the Confrontation Clause by allowing it into evidence.

2. In his second enumeration of error, Kendricks argues that the State made an improper closing argument that injected extrinsic, prejudicial matters that had no basis in the evidence. Kendricks specifically refers to the State's two arguments that the jury would have to explain to the victim why they did not believe her and that, if the jury voted to acquit, they would have to consider "the idea of [J.

C.] sitting in the Thanksgiving table with [Kendricks]." Kendricks did not timely object to the first argument, and so he has waived appellate review of that argument. *Gates v. State*, 298 Ga. 324, 328-329 (4) (781 SE2d 772) (2016).⁴ As for the "Thanksgiving table" 4 In *Gates*, the Supreme Court of Georgia concluded that plain error review does not apply to challenges to improper closing arguments, and so the lack of a contemporaneous objection waives any appellate review.

Gates, *supra*, 298 Ga. at 328-329 (4). Kendricks briefly argues that the Supreme Court's conclusion on this point was wrongly decided, but since *Gates* is direct and binding precedent from the Supreme Court of Georgia, as Kendricks acknowledges, we cannot entertain any argument that it should be overruled. See *Etkind v. Suarez*, 234 Ga. App. 108 (505 SE2d 831) (1998) ("[T]his court has no authority to overrule or modify a decision of the Supreme Court of Georgia as the decisions of the Supreme Court of Georgia shall 8 argument, Kendricks timely objected to this statement, and the trial court sustained his objection.

Kendricks does not argue that the trial court should have done more or that the trial court otherwise erred in sustaining his objection. This enumeration therefore presents nothing for us to review. 3. Kendricks next argues that the trial court erred when it denied his motion in limine to introduce evidence of J. C.'s sister's forensic interview. He argues that the trial court violated his right to present a complete defense when it allowed the evidence of J. C.'s interview (in which J. C. accused Kendricks of molesting both her and her sisters) but not the sister's interview (where the sister denied that she had been molested).

We are not persuaded. [T]he Due Process Clause in the Fourteenth Amendment [guarantees] criminal defendants a meaningful opportunity to present a complete defense. However, a defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions.

The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.... [O]nly rarely has [the Supreme Court of the United States] concluded that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence. bind all other courts as precedents.") (citations and punctuation omitted).

9 (Citations and punctuation omitted.) *State v. Burns*, 306 Ga. 117, 121-122 (2) (829 SE2d 367) (2019). Although the trial court denied Kendrick's motion to introduce video footage of the sister's interview, at trial, both the forensic interviewer and J. C.'s sister testified that J. C.'s sister had denied that Kendrick had done anything to her. Kendrick was allowed to extensively question both the sister and the forensic interviewer about the sister's interview and how the sister's statements contradicted J. C.'s statements.

Kendrick was thus able to present evidence to the jury to support his defense that J. C. was either not being truthful or had mistaken him for the real perpetrator. Kendrick does not identify any particular statement or fact that was not presented to the jury that was critical to his defense.

Under these circumstances, Kendrick has not demonstrated that the trial court abused its discretion by excluding this evidence. 4. Finally, Kendrick argues that the cumulative effect of the trial court's errors warranted a new trial. "Georgia courts considering whether a criminal defendant is entitled to a new trial should consider collectively the prejudicial effect of trial court errors and any deficient performance by counsel—at least where those errors by the court and counsel involve evidentiary issues." *State v. Lane*, 308 Ga. 10, 14 (1) (838 10 SE2d 808) (2020).

As discussed above, the trial court did not abuse its discretion when it allowed into evidence the victim's journal entry nor when it disallowed evidence of the victim's sister's interview. Additionally, Kendrick's claim of error regarding the State's closing arguments does not involve an evidentiary issue or deficient performance by counsel.

Moreover, as noted in Division 2, Kendrick waived appellate review of one of the State's allegedly improper arguments, and the trial court sustained his objection on the other argument. Accordingly, Kendrick's claim of cumulative error fails.

For these reasons, we reject Kendrick's enumerations of error and affirm his convictions and sentence. Judgment affirmed. Mercier, J., and Senior Appellate Judge Herbert E. Phipps, concur.