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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL DEANGLO CORBITT,

APPELLANT

APPELLATE CASE NO. 2022-000361

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing an expert witness to testify beyond the scope of Rule 801(d)(1), SCRE, in a criminal sexual conduct case, where the witness exceeded the lawful bounds of the rule and told the jury in Appellant's case about much more than time and place of the incident?

STATEMENT OF THE CASE

On July 14, 2021, an Orangeburg County grand jury indicted Appellant on four different offenses: carjacking, criminal sexual conduct in the first degree, assault and battery in the first degree, and kidnapping. R. __ (Indictments). Represented by Jason Turnblad and Breen Stevens, Appellant proceeded to trial before the Honorable Clifton Newman on March 7, 2022. Catherine M. Hunter and W. Phillip Giese appeared on behalf of the state.

After a three-day trial, the jury found Appellant guilty as indicted. Tr. 401, l. 19 – Tr. 402, l. 6. Judge Newman sentenced Appellant to sixteen years on the criminal sexual conduct, kidnapping, and carjacking offenses, concurrent. Tr. 433, l. 17 – Tr. 434, l. 4. He sentenced Appellant to ten years on the assault and battery charge. Id.

This appeal follows.

STANDARD OF REVIEW

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

ARGUMENT

The trial judge erred in allowing an expert witness to testify beyond the scope of Rule 801(d)(1), SCRE, in a criminal sexual conduct case, where the witness exceeded the lawful bounds of the rule and told the jury in Appellant's case about much more than time and place of the incident.

Relevant facts

At trial, the state alleged that on September 23, 2018, Appellant was in the car with Keandra Nickens when he assaulted and kidnapped her. Tr. 122, l. 24 – Tr. 123, l. 2. Nickens was dating Appellant and Johnny Brown at the time. Tr. 123, l. 3 – Tr. 124, l. 12. Nickens and Appellant went to eat that morning at the Sonic in Orangeburg, South Carolina. Tr. 125, ll. 3 – 24.

Nickens testified that on the way back to Appellant's house, while Appellant was driving, he hit her "out of the blue." Tr. 127, ll. 16 – 22. After striking her, he allegedly grabbed her by the hair for the remainder of the drive. Tr. 128, ll. 2 – 10. Instead of driving to his mother's house, Appellant drove down a side road. Tr. 128, ll. 11 – 24.

Nickens claimed Appellant resumed hitting her and began with verbal threats as well. Tr. 130, l. 4 – Tr. 131, l. 4. He then sexually assaulted her, according to her testimony. Id. She managed to get away, and Appellant leapt onto the hood of the car as Nickens drove off. Tr. 132, l. 5 – Tr. 133, l. 23. A struggle ensued until two passersby stopped in a truck; Appellant then drove off. Tr. 134, l. 16 – Tr. 138, l. 20.

Nickens was treated at the hospital and seen by a sexual assault nurse. Tr. 145, l. 17 – Tr. 147, l. 22. The nurse, Cadey Keigans, was called by the state during its case-in-chief. Tr. 200. Keigans is a registered nurse with a Bachelor's Degree from Exercise Science from the

University of South Carolina. Tr. 201, ll. 4 – 9. She also has a Bachelor's in Nursing from the University of South Carolina in Aiken. Id. At the time of trial, she worked in the labor and delivery department; she was previously a nurse in the emergency room. Tr. 201, ll. 10 – 18. She worked in the emergency room for approximately two-and-a-half years. Tr. 201, ll. 19 – 23.

Keigans was the "SANE" nurse, or sexual assault nurse examiner. Tr. 202, ll. 1 – 6. In order to be elevated from a registered nurse to a sexual assault nurse examiner, she received forty hours of classroom time, an undisclosed number of clinical hours, and ten supervised cases. Tr. 202, ll. 7 – 17.

The state sought to qualify Keigans as an expert in sexual assault exams. Tr. 203, ll. 4 – 6. Following an objection from defense counsel, Keigans was cross-examined. She told the trial judge that she had never been qualified as an expert before. Tr. 203, l. 17 – Tr. 402, l. 6. She had never written any articles or been published in any scientific journals. Id. She had never done any peer review studies. Id. She testified that she had performed approximately fifty sexual assault "cases" while in the emergency department, although it was unclear how many of those were performed before Nickens' evaluation. Tr. 205, ll. 19 – 22. Keigans referenced her psychology minor but admitted she had not participated in any training in that area. Tr. 206, ll. 7 – 18.

Defense counsel posited that "it's [not] necessary to be an expert just to tell [the jury] what you did." Tr. 210, ll. 4 – 6. He continued, "it's not necessarily whether she's qualified as an expert witness, but whether this is necessary … for her to be an expert for the jury to understand the evidence." Tr. 210, l. 22 – Tr. 211, l. 1. Counsel twice referenced Rule 702, SCRE, and argued it was not necessary for Keigans to be qualified as an expert to discuss her actions as they relate to this case. Tr. 211, l. 2 – Tr. 213, l. 9.

The trial judge ruled that he would qualify her as an expert. Tr. 215, ll. 6 – 21. Keigans then testified before the jury regarding the typical procedures related to a sexual assault examination. Tr. 216, ll. 1 – 25. She then got more specific and referenced the examination she did on Nickens on September 24, 2018. Tr. 217, ll. 1 – 9.

The assistant solicitor asked the expert witness who did not witness the alleged altercation to "explain to the jury how the assault occurred." Tr. 217, ll. 19 – 20. Defense counsel immediately objected on a hearsay basis. Tr. 217, ll. 21 – 22. The state suggested that the expert's testimony could fall under Rule 803(4), SCRE. Tr. 218, ll. 18 – 19. In response, defense counsel articulated how Rule 801(d)(1) placed a limitation on this type of testimony. Tr. 219, ll. 11 – 21. Counsel specifically argued:

> Your Honor, and I just wanted to point out in my argument just that it's limited. I'm not saying that it isn't necessarily hearsay, I'm saying under 801(d)(1), **it's limited to the time and place of the incident, no more**. Looking at the last part of (d)(1)(d).

Tr. 220, ll. 19 – 25 (emphasis added).

The trial judge overruled defense counsel's objection and allowed the testimony. Tr. 221, l. 6. Keigans was then asked by the state to "tell the jury about how … [Nickens] described how she was assaulted and how that's pertinent to your medical exam?" Tr. 221, ll. 11 – 14. Her response exceeded the limited scope of the South Carolina Rules of Evidence and was unrelated to the state's relied-upon exception:

> Sure. Ms. Nickens described to me that she was in a vehicle when she was initially physically assaulted by being punched in the face and having her hair pulled. Then after she was driven to a wooded area, she was pulled out of the vehicle where she was sexually assaulted when the alleged assailant penetrated her vagina with his finders and then followed with his penis.
>
> She was pulled back into the vehicle by her hair and her arm. And she was continued to be physically assaulted until they came to a gas station. And [at] that point she was able to get into the driver's seat to attempt to drive away.

Tr. 221, l. 15 – Tr. 222, l. 2.

Following the above testimony, the trial judge interjected and pointed out how the question pertained to medical treatment. Tr. 222, ll. 3 – 5. Nonetheless, the state questioned Keigans about the assault and Nivens' physical appearance and demeanor. Tr. 222,ll. 19 – Tr. 224, l. 5.

Discussion

Under Rule 801, SCRE, a statement is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony in a criminal sexual conduct case ... where the declarant is the alleged victim and the statement is limited to the time and place of the incident.

Rule 801(d)(1)(D), SCRE.

The corroborative testimony is limited to the time and place of the alleged assault and cannot include details regarding the assault. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010). Stated differently, this rule "limits corroborating testimony ... to the time and place of the assault(s)" and considers it to be nonhearsay whereas "any other details or particulars, including the perpetrator's identity," are generally considered hearsay and must be excluded unless they fall within an exception. Thompson v. State, 423 S.C. 814, 814 S.E.2d 487 (2018).

In State v. Smith, this Court found error when Kendra Twitty, a forensic interviewer, "identified the perpetrator by testifying the victim reported he was about six or seven years old 'when hie dad started to do these things to him.' " 411 S.C. 161, 169-70, 767, S.E.2d 212, 217-17 (Ct. App. 2014). This Court held "[w]e agree with Smith this constituted error because it went beyond time and place." Id. This Court elected not to reverse based on other testimony held to be cumulative. Id.

"[S]hould the proponent desire more information beyond the permissible 'time and place' evidence, a rule or statute must allow for the admission of the additional evidence." State v. Simmons, 423 S.C. 552, 563, 816 S.E.2d 566, 572 (2018). The additional evidence typically constitutes hearsay, both in Simmons and the matter *sub judice*. "Hearsay is 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." Rule 801(c), SCRE. "Hearsay is inadmissible, except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute." State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011). After an objection is raised, the proponent of hearsay testimony has the burden of showing it fits appropriately within a hearsay exception.

In Simmons, supra, the state sought to fit the testimony of a doctor within Rule 803(4), the hearsay exceptions for "[s]tatements made for purposes of medical diagnosis or treatment." 423 S.C. 552, 816 S.E.2d 566 (2018). Our Supreme Court instructed:

> Rule 803(4), SCRE, may well apply in a CSC case, but there must be a nexus between the information provided by the patient and the diagnosis or treatment of the patient. For example, after recent trauma, these type of statements can provide the doctor with specific areas to focus on or specific conditions to search for wen performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment.

Id. at 563, 816 S.E.2d at 572.

In this regard, "a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim." State v. Burroughs, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997). However, "[a] doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be

used as a tool to prove facts properly proved by other witnesses." State v. Brown, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985).

As in Simmons, the statement here by Keigans regarding Nivens' conveyance to her exceeded the scope of Rule 803(4), SCRE, and the objection was improperly overruled. Keigans' testimony about being in a vehicle, driven to a wooded area, continued assault, and escape were all beyond the scope of the rule. The trial judge erred in allowing the jury to hear this testimony.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse and remand for a new trial.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of March, 2023.