STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Appeal from Pickens County

Honorable Alex Kinlaw, Circuit Court Judge

JUSTIN RYAN CONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000437

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

1.

Did the trial judge err in allowing the solicitor to argue that the complaint's testimony need not be corroborated pursuant to S.C. Code Ann § 16-3-657 where the judge found that instructing the jury on that statute was improper?

2.

Did the trial judge err in barring defense counsel from cross-examining the minor about specific punishments she received for lying, ruling the matter not relevant and, if relevant, barred under Rule 403, SCRE and in failing to perform the requisite Rule 403 analysis on the record?

STATEMENT OF THE CASE

In May 2010 Appellant was indicted by the Pickens County Grand Jury for one count of Criminal Sexual Conduct with a Minor in the First Degree. App. 460-461. An amended indictment was later true billed during the August 2014 Grand Jury Term, revising the time frame in which the allegation was said to have occurred. App. 457-458.

On November 17, 2014 Appellant proceeded to trial on the charge in front of the Honorable William P. Keesley, and a jury. App. 30. Sam Tooker appeared on behalf of the state and Steven Sumner represented Appellant. Id. After a two-and-a-half-day trial the jury found Appellant guilty as indicted. App. 383. Judge Keesely sentenced Appellant to a term of imprisonment for thirty years. App. 388.

Defense counsel did not file a notice of intent to appeal Appellant's conviction or sentence. App. 409. On August 1, 2017 Appellant filed a PCR application alleging, inter alia, that trial counsel was ineffective for failing to file a direct appeal. App. 391-408. The state made its return on January 12, 2018. App. 408-415. An amended return and motion to dismiss was filed by the state on February 22, 2018. App. 416-425.

An evidentiary hearing was held before the Honorable Alex Kinlaw, Jr. on February 21, 2019. App. 426. R. Mills Ariail, Jr. represented Appellant and Kelly Oppenheimer appeared on behalf of the State. Id. Judge Kinlaw's order granting a belated Appellate review pursuant to White v. State[1] was filed on March 12, 2019. App. 447-455. This brief pursuant to White v. State, and a simultaneously filed petition for writ of certiorari, follow.

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[1] White v. State, 263 S.C. 110, 208 S.E.2d 35

ARGUMENT

1.

The trial judge erred in allowing the solicitor to argue that the complaint's testimony need not be corroborated pursuant to S.C. Code Ann § 16-3-657 where the judge found that instructing the jury on that statute was improper.

Standard of Review

"The trial court has broad discretion when dealing with the propriety of the solicitor's argument" State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." Id. "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997); State v. Copeland, supra; United States v. Wilson,* 135 F.3d 291 (4th Cir.1998). "The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Johnson, supra; Copeland, supra.* "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Patterson,* 324 S.C. 5, 482 S.E.2d 760, *cert. denied,* 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997).

Relevant Facts

Appellant met Mr. and Mrs. Miller, the parents of Minor, in the early 2000s through a shared interested in stockcar racing. App. 283, ll. 18; 20-25. The three adults eventually became good friends, with Mr. Miller describing the relationship between himself and Appellant as

"close as brothers." App. 284, ll. 1-4; App. 221, ll. 21. Appellant spent many weekends overnight at the home of the Millers. App. 178; App. 285.

Over the course of the friendship a sexual relationship developed between Mrs. Miller, Mr. Miller, and Appellant. App. 179, ll. 1-8. The three would engage in "threesomes" which typically began with Mrs. Miller and Appellant engaging in the sex act known as the "sixty-nine" position. App. 179, ll. 18; App. 200, ll. 16-18. The sex acts occurred regularly over the course of six to eight years and either took place in the Miller's master bedroom or the living room of the home. App. 179, ll. 1-8; App. 180, ll. 10-12. None of the bedrooms in the home had doors, but the bedrooms belonging to the children had sheets tacked up over the doorway. App. 194, ll. 1-3 & ll.15-25; App. 195, ll. 6-12.

Shortly before Christmas 2011, Mrs. Miller noticed her youngest daughter playing with a doll in a "sexually inappropriate" manner. App. 183, ll. 10-11. When she asked her youngest daughter where she had learned this behavior, she indicated from her older sister, Minor. App. 183, ll. 15-17. Mrs. Miller informed Minor there was something she wanted to discuss with her after Christmas and subsequently had a conversation with Minor on January 1, 2012. App. 183, ll. 21-23; App. 184, ll. 6-7. During the conversation Minor claimed that she had been sexually abused. App. 185, ll. 2-4. Minor repeated the allegation to her father and a family friend, Robert Odom. App. 96-97.

Minor was referred to the Julie Valentine Center to undergo a forensic interview as well a medical exam. App. 207. During the forensic interview Minor alleged that Appellant would have her sit on top of him facing his feet while she was naked, and his pants and underwear were pulled down. (State's Exhibit 2 – Forensic Interview DVD). Appellant would then have Minor perform oral sex on him while he "licked her butt." Id. Minor stated this first occurred when she

was four or five and stopped when she was nine when she told her mother. App. 85, ll. 4-12. The medical exam did not reveal any acute or chronic changes of Minor's genital area and no sexual transmitted diseases were found. (State's Exhibit 3 – Stipulation regarding report of Dr. Mary Fran Crosswell).

Prior to the start of the presentation of evidence the trial judge gave a preliminary instruction to the jury panel where he outlined both the juror's duties and his duties. App. 55-65. In explaining his role, he stated,

> "***The law comes from me.*** It's my job to decide what law applies to the case and to tell it to the jury at the end of the trial...at the end of the case, I'll tell you the law and you will determine the facts...I'm the judge of the law."

App. 57, ll. 7-9; ll. 11-12; ll. 15. (emphasis added)

Towards the end of his opening remarks the judge admonished the jurors to not do any independent research into the case. He again clarified his role in the proceedings stating,

> "Don't go look up the law. One of my favorite expressions is a little knowledge is a dangerous thing. You have to be able to understand the context, and the law has all kind of nuances and things in it. And that's why they put me here, to sort through all that. And if I'm wrong, there's a procedure for that. ***But I tell you the law.*** So don't go look up law."

App. 61, ll. 14-23. (emphasis added)

At trial Appellant took the stand in his own defense. App. 282. Appellant denied the allegations and stated when confronted by Minor's father about the allegations, Appellant had "no idea what he was talking about." App. 282, ll. 1-3; App. 289, ll. 20-25 – App. 290, ll.1-3; App. 29,1 ll. 1-7. Appellant also testified to the sexual encounters that occurred at the home, inappropriate images, such as sex scenes, on the television that Minor may have seen and the amount of time he spent around Minor. App. 286; App. 287-289; App. 290.

At the close of all evidence the state requested the trial court to charge S.C. Code § 16-3-657 regarding corroboration of a victim's testimony in criminal sexual conduct cases. App. 309, ll. 8-13. Defense counsel objected to the charge of the no corroboration statute arguing it was an improper comment on the facts from the bench. App. 310, ll. 1-10. The court ruled that it would not charge the no corroboration statute, noting in a thoughtful discussion that:

> "That instruction has always bothered me and that language there is from charges I've given before... And it bother's me that I'm going to single out one witness and talk about one witness. I tell the jury that they may believe one witness against many or many against one. Which is the same thing... The last couple of times I have not charged this, I believe that's my recollection is I have not charged this, and my intent is not to charge it in this case. But if the state objects and the state request the charge and it's denied. Now, that doesn't stop you from arguing it. It's the law. You can argue it to the jury."

App. 327-328.

The state then requested to close first only on the law and specifically reference the statute and use the language of the statute. App. 328, ll. 8-19. Defense counsel again objected to the use of the statute and argued that the only law the state should be able to argue to the jury is the law of the charge that Appellant was facing. Id.; App. 330, ll. 1-2. The court ruled that the solicitor could argue the specific "no corroboration" statue, overruling defense counsel's objection. App. 328, ll. 20-24; App. 330, ll. 1-13. After a short break the state decided not to open on the law and defense counsel presented his final argument. App. 331, ll. 1-2. The state then presented its closing argument and stated in part:

> "Now I'll give you this in a minute but if you determine that she's telling the truth, that Minor is telling the truth, the elements are satisfied. So your decision them becomes is she telling the truth? So there was sexual batter [sic], as is testified, and she was less than eleven years of age at the time as the testimony shows. Now, there's another section in our law. *Section 16-3-657, criminal sexual conduct, testimony of a victim need not be corroborated. The testimony of the victim need note be corroborated in prosecutions under section 16-3-652 to 658, which are the sections governing criminal sexual conduct.* And I've said this before and I'll say it again, if anything I've misstated, His Honor will correct me.

> If I've said something wrong about the law, His Honor will correct me. But if I'm not mistaken, he will make plain to you that you can believe one person over many. You can put whatever weight on any piece of testimony you want to put. That's your prerogative. That's what you're permitted to do as jurors. And that's what we expect you to do."

App. 350, ll. 20-25 – App. 351, ll. 1-13. (emphasis added).

After the court finished its charge on the law, defense counsel, for the third time, renewed his objection to the state referencing the "no corroboration" statute during closing arguments. App. 379, ll. 12-14.

Discussion

The trial judge improperly allowed the solicitor to recite and argue S.C. Code Ann. § 16-3-675, the "no corroboration" statute, to the jury during closing arguments. Allowing the solicitor to argue the specific statute that was not included in the jury charge and that was enacted solely for judicial guidance lessened the state's burden of proof. The solicitor misstated the law in his closing argument by improperly arguing § 16-3-675 to the jury indicating that the testimony of the victim is to be viewed and treated differently than the testimony of other witnesses. The solicitor framed the recitation of the statute by telling the jury it only had to decide if the alleged victim was lying or not. This argument effectively told the jury to ignore all other evidence and focus solely on whether the uncorroborated statement of the alleged victim was true.

While a solicitor has broad latitude in making arguments to the jury, the practice is not without limits. See State v. Cartwright, 425 S.C. 81, 93 n.3, 819 S.E.2d 756, 762 n.3 (2018) (noting that the law provides limits to a party's jury argument as enhanced by Due Process protections). A solicitor cannot inject material outside of the evidence or the judge's charge but must confine their argument to the evidence in the record and the reasonable inferences that may be drawn from the evidence. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

Further, it is the exclusive role of the trial judge to declare the law and in doing so inform the jury of all the law that applies to a given case. S.C. Const. Art. V § 21. While no party is banned from arguing the general law applicable to a case, a party cannot misstate or misinterpret the law and is confined to arguing the principles that will be later charged to the jury. See U.S. v. Williams, 526 F.3d 1312 (11th Cir. 2008).

During the charge conference the trial court properly concluded that it would not charge the "no corroboration" statute but then permitted the solicitor to argue the statute during closing arguments. App. 327-328. This was error. In directly citing the legislative code and repeating the statute verbatim the solicitor injected improper legal considerations into the jury's deliberations. The "no corroboration" statute was not intended to be a jury consideration but a purely judicial one. State v. Stukes, 416 S.C. 493, 499, 787 S.E.2d 480, 482 (2016). In reciting the statute to the jury, the solicitor gave the impression that the Legislature singled out Minor's testimony to be believed over all others.

Allowing the solicitor to argue the specific statutory reiteration would be akin to allowing the solicitor to argue that the rules of admissibility meant that the evidence the state presented was trustworthy simply because it was admitted. A solicitor could not argue to the jury that a statement, admitted pursuant to a Jackson v. Denno[2] hearing, was found by the judge to be voluntary by a preponderance of the evidence and therefore the jury should find the statement voluntary. Nor could a solicitor argue to a jury that in admitting a prior bad act the judge ruled the prior bad act occurred through clear and convincing evidence.

This is not to say that the solicitor could not have argued that there is no need for corroboration in general terms. As this Court recently noted in State v. Burdette, Op. No. 27910

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[2] Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

(S.C. Sup. Ct. Filed July 31, 2019) (Shearouse Adv. Sh. No. 31 at 8-19), while it was improper for the court to charge inferred malice the state and defense were "free to argue the existence or nonexistence of malice based on the evidence in the record." The solicitor was free to argue the principle contained in the statute but citing the legislative enactment and stating the statute verbatim created error in this case.

A review of this Court's holdings in cases[3] dealing with the propriety of a trial judge charging § 16-3-657 are instructive in analyzing the propriety of a solicitor arguing the statute to a jury when it will not be included in the charge on the law. In Schumpert, this Court ruled that when the jury charge, which included the no corroboration charge, was reviewed as a whole it contained no reversible error. This Court did not, at that time, make a specific ruling about the propriety of charging the statute but then Justice Finney found that the "no corroboration" charge was not meant to be given to a jury, in part because it singled out the testimony of one witness over other. Schumpert at 510, 435 S.E.2d at 864 (1993) (Finney, J., dissenting).

This Court again examined the propriety of charging the "no corroboration" statute in Rayfield. In again holding the charge as a whole was proper this Court expanded the legislative intent of the statute finding that it was the intent of the legislature to signal to both the judge and the jury that a defendant can be convicted solely on the basis of a victim's testimony. Rayfield at 117, 631 at, 250 (2006). However, then Justice Pleicones dissented, arguing, that "Section 16–3–657 prevents courts...from finding a lack of sufficient evidence to support a conviction because the alleged victim's testimony is uncorroborated." Rayfield at119, 631 S.E.2d at 251 (2006) (Pleicones, J., dissenting) citing James Cranston Gray, Jr., Criminal Law—Rape Reform in South Carolina, 30 S.C. L.Rev. 45, 55–60 (1979) (discussing the no-corroboration rule as

[3] State v. Schumpert 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Rayfield, 396 S.C. 106, 631 S.E.2d 355 (2006); State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016)

governing judicial review of the sufficiency of the evidence); cf. Ludy v. State, 784 N.E.2d 459, 463 (Ind. 2003) (holding that the no-corroboration rule is a legal standard for a court reviewing a conviction).

Finally, this Court reexamined the propriety of charging §16-3-657 in Stukes. There, this Court found the dissent from Rayfield to be persuasive and held that the "no corroboration" was not proper. The court reasoned that,

> "By addressing the veracity of a victim's testimony in its instructions, the trial court *emphasizes the weight of that evidence in the eyes of the jury.* The charge invites the jury to believe the victim...*Specifying this qualification applies to one witness creates the inference the same is not true for the others.*"

Stukes, at 499, 787 S.E.2d at 483 (2016). (emphasis added).

The trial judge, anticipating Stukes, properly declined to charge the "no corroboration" statute to the jury. However, the court permitted the solicitor to achieve an end-run around the Stukes' reasoning by allowing the solicitor to argue the specific statue to the jury during closing arguments. First, the legislative intent of §16-3-175 is to signal the *judicial bench* that it should not direct a verdict or overturn a conviction when there is no corroboration of a victim's statement. Stukes, at 499. The statute is not appropriate for a jury and should not be a part of jury deliberations.

Second, this law does not help the jury in fulfilling its function of "*deciding the facts and determining whether the state has proved the charged offense beyond a reasonable doubt.*" Rayfield, at 120, 631 S.E.2d. at 251. (emphasis added). As then Justice Pleicones noted in his dissent in Rayfield, placing the statute before the jury actually "has the potential for creating more problems than solutions," for it might cause confusion when read with the general charge on witness credibility. Id. Citing *State v. Grant,* 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980).

Third, arguing the "no corroboration" statutory citation to the jury creates a "strong possibility of biasing the jury against the defendant." Rayfield, at 120, 631 S.E.2d. at 251. The statute singles out the alleged victim's testimony and appears to "express an opinion on the alleged victim's credibility." Id. See also, State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d. 805, 818 (2001) (stating prosecutors cannot vouch for a witnesses' credibility).

A solicitor's words carry the prestige of the government in the view of a jury. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (stating that improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit or implicit assurances of a witness' veracity). In allowing the solicitor to specifically cite and argue the "no corroboration" statute, the trial judge effectively lowered the state's burden of proof. Just prior to reciting the code section and statute the solicitor stated,

> "Now I'll give you this in a minute but if ***you determine that she's telling the truth, that Minor is telling the truth, the elements are satisfied. So your decision then becomes is she telling the truth?*** So there was sexual batter [sic], as is testified, and she was less than eleven years of age at the time as the testimony shows."

App. 350, ll. 20-25. (emphasis added). The solicitor then proceeded to state the *legislative statute* that a victim's testimony does not require corroboration in prosecutions for criminal sexual conduct.

Later in his closing the solicitor reiterated,

> "So first, what do we have? And again, let me say this too. The question seems to be is the victim telling the truth? ***I mean that's what this boils down to, is the victim telling the truth in this case?*** Like I said before your verdict has got to speak the truth. Veritas dico, to speak the truth. ***So is the victim telling the truth?*** What did her emotions say? When she talks to her mom she's crying, she's trembling, she's communicating things physical that people don't communicate with words. She's not saying, oh, yeah, this happened, he did this to me. I mean people lie in courts, put people don't lie with emotions. She's crying and she's trembling."

App. 353, ll. 8-19. (emphasis added). The solicitor's argument told the jury to merely determine whether the alleged victim was telling the truth, further, her testimony need not be corroborated. The entire case "boiled down" to the truthfulness of the victim's statement, regardless of the other evidence.

Appellant testified that he did not sexually abuse Minor and his testimony mirrored that of Minor's mother regarding their relationship, the set up of the house, and where the sex acts between the adults usually occurred. App. 282-291. However, in arguing the "no corroboration" statute the solicitor indicated to the jury that they were to value the testimony of Minor over that of Appellant, or any other witness. The solicitor argued that the *legislature* did not require corroboration of a victim's statement, thereby "inviting the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Stukes at 499. The standard in the criminal courts of this state is not "what is true" but "beyond a reasonable doubt."

By arguing the "no corroboration" statute, when it would not be charged to the jury, the solicitor essentially entered the purview of the judge, usurping the judge's role to declare the applicable law, and interjecting into deliberations an improper legal consideration. The solicitor appropriated the prestige and power of the Legislature to circumvent the trial judge's charge on the law, prejudicing Appellant and dening him a fair trial.

2.

The trial judge erred in barring defense counsel from cross examining the minor about specific punishments she received for lying, ruling the matter not relevant and, if relevant, barred under Rule 403, SCRE and in failing to perform the requisite Rule 403 analysis on the record.

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

"The scope of cross-examination is within the discretion of the trial judge, whose decision will not be reversed on appeal absent a showing of prejudice." State v. Pradubsri, 403 S.C. 270, 276, 743 S.E.2d 98, 101 (Ct. App. 2013) (reversing the trial judge's refusal to allow cross-examination regarding mandatory minimum sentences witness avoided to show bias). "Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate." State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002).

Relevant Facts

The state called Minor to the stand. Before defense counsel had fully asked his first question the state objected and asked that the jury be excused. App. 89, ll. 1-4. After excusing the jury and Minor from the courtroom the solicitor objected to the line of questioning he thought defense counsel was about to pursue. App. 89, ll. 20-25. According to the state, the father of Minor inflicted certain punishments on her that resulted in DSS being contacted and a temporary

plan set up. App. 89, ll. 24-25 – App. 90, ll. 1. The state objected to any questioning about the corporal or physical punishment Minor received as not relevant and subject to Rule 403 analysis. App. 90, ll. 1-9.

Defense counsel agreed that it would be improper to bring up the DSS investigation, but he intended to elicit testimony about the specific corporal punishment Minor received. App. 90, ll. 11-24. Specifically, he intended to ask Minor if she reported that her father would try to drown her when she was having behavioral problems and that when she would lie, he would put her under a shower of very cold water with her clothes on. Id. Defense counsel argued the information was relevant in that it went to Minor's veracity. App. 90, ll. 25 – App. 91, ll. 1-2.

He contended that if Minor underwent severe treatments for lying it would be very unlikely that she would recant a false accusation for fear of punishment. App. 91, ll. 3-15. Defense counsel argued that since the case came down to credibility the line of questioning went to her veracity and was proper. App. 92, ll. 13-17.

The solicitor agreed that defense counsel could ask if Minor was afraid of getting in trouble if her story changed but argued defense counsel could not get into the specifics of the punishments. App. 91, ll. 16-22. The court conducted a proffer of Minor's testimony where defense counsel asked, among other questions,

> Q. Minor, did your father ever put you in the shower and turn the water on cold when he felt like you were not telling the truth?
>
> A. Yes, sir,
>
> Q. Did your father ever tell you when you would come near the television to shut your eyes and close your ears because he didn't want you to see something that was on the television?
>
> A. Yes, sir.

Q. Minor, you mentioned this for Mr. Tooker, and that is that you have told this story regarding Justin Cone to a lot of different people. Is that true?

A. Yes, sir.

...

Q. And your parents were with you during a large number of these conversations?

A. Yes, sir.

App. 93, ll. 12-20; App. 94, ll. 2-5; App. 95, ll. 6-8. After the proffer of Minor's testimony, the court ruled the line of questioning was not relevant. The court stated,

> "The question about her being pushed in the shower and put under cold water, **the courts finds that not relevant. If it is relevant it's excluded under 403**. Now, I could see how it could become relevant, but based on the proffer that was given, I do not see that it is."

App. 95, ll. 11-16. The court conducted no further analysis and made no further rulings on the matter.

Discussion

It is well settled that relevant evidence is "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. All evidence that is relevant is admissible with the caveat that relevant evidence may be excluded on grounds of prejudice, confusion, or waste of time. Rule 402, SCRE; Rule 403 SCRE. In a criminal sexual conduct case, the main piece of evidence is the alleged victim's testimony which makes the alleged victim's credibility and veracity a fact of consequence necessary to the determination of the matter. Any evidence that goes toward a witness's credibility and veracity is admissible subject to the requisite balancing test. State v. Brewington, 267 S.C. 97, 101, 266 S.E.2 249, 250 (1976).

Defense counsel sought to impeach Minor's credibility and veracity by talking about the punishments she received for various behavioral problems and lying. The punishments Minor reported, "almost drowning" and "having to stand in a very cold shower fully dressed," were unusual and extreme. Defense counsel argued that it would be reasonable to conclude that Minor would not recant a false allegation out of fear of receiving such a severe punishment and that this weighed on the credibility of her testimony.

The testimony that defense counsel sought to elicit was relevant to Minor's credibility and veracity. There was no physical evidence in the case, no corroboration of Minor's testimony and no other eye witnesses. The credibility and veracity of Minor was a central issue. It was therefore incumbent upon the trial judge to do a proper, on the record, Rule 403 analysis before ruling on the admissibility of the punishments. As the record shows the trial judge made a perfunctory ruling that the evidence was not relevant or "*if it was relevant, excluded under 403.*" There was no discussion on the record of the relevance of the testimony and no balancing test was performed under Rule 403, SCRE.

This Court has held that failure of the trial court to conduct an on-the-record Rule 403 balancing test was error. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). In Spears a prior bad act of the defendant was used by the state under Rule 404(b). In ruling on the admissibility, the trial court failed to conduct the requisite Rule 403 prejudice analysis. This Court held that this error was not harmless and required a remand to the trial court to conduct the proper analysis.

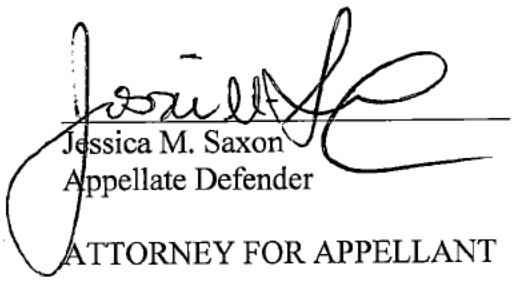
Similarly, in Hamrick v. State, 426 S.C. 638, 651, 828 S.E.2d 596, 602 (2019), the trial court's failure to conduct a full relevancy inquiry and the requisite Rule 403 balancing test was acknowledged as improper. Hamrick attempted to offer a videotape re-creating the accident that

led to his criminal charges. Id. The trial court failed to determine the relevancy of the evidence and only expressed concerns about the propriety of admitting the videotape. The court declined to allow the videotape ruling, in part, that it could mislead the jury. Id. This Court held that "if the trial court was concerned the video would mislead the jury, it was required to conduct an on-the-record Rule 403 analysis." While this Court overturned Hamrick's conviction on other grounds, it admonished the trial court to *conduct the balancing test and analyze objections under the proper legal framework.* Id. at 652.

Appellant finds himself similarly situated to the defendants in Spears and Hamrick. Appellant sought to admit relevant evidence and was barred from doing so without any specific findings on the record as to why the testimony was not relevant or what the prejudicial effect versus the probative value of the testimony was. Further the succinct ruling and brief mention of Rule 403 is not a "compressed Rule 403 analysis" with "some indicia of [the trial court's] consideration." State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002). There is nothing in the record, either explicitly or impliedly, that indicates that the trial court considered the relevance of the testimony and whether the probative value outweighed any possible prejudicial effect. This failure on the part of the trial judge constituted error.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Pickens County Court of General Sessions for a new trial.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Pickens County

Honorable Alex Kinlaw, Circuit Court Judge

JUSTIN RYAN CONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Appellant Pursuant to White v. State have been served on Justin Ryan Cone, #362238, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 20th day of September, 2019.

Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of September, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.