STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MATTHEW JOSEPH HOGAN,

APPELLANT

APPELLATE CASE NO. 2023-000565

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Where this entire sexual abuse case rested on the credibility of the complainant, did the trial court's witness credibility charge, which included explanations excusing "simple mistake[s]" that a witness might make, violate the constitutional provision against charges on the facts and the evidence?

STATEMENT OF THE CASE

Appellant was indicted in York County for twelve counts of second-degree criminal sexual conduct with a minor, two counts of third-degree criminal sexual conduct, and one count of incest and on March 27, 2023, appellant was tried before the Honorable William A. McKinnon and a jury. Erin Joyner and Jessica M. Russo represented the State. Tr. 1. Melissa Inzerillo represented appellant. Tr. 1. The jury convicted appellant and Judge McKinnon sentenced him to a total of thirty-five years' imprisonment. Tr. 649, l. 3 – 9. This appeal follows.

STANDARD OF REVIEW

The question of whether a jury charge is an improper charge on the facts is a question of law and should be reviewed *de novo*. Reversal is required if the trial court abused its discretion and the charge as a whole remains prejudicial to the defendant. State v. Brown, 438 S.C. 146, 881 S.E.2d 771 (Ct. App. 2022).

ARGUMENT

Where this entire sexual abuse case rested on the credibility of the complainant, the trial court's witness credibility charge, which included explanations excusing "simple mistake[s]" that a witness might make, violated the constitutional provision against charges on the facts and the evidence.

Factual Background

Appellant Matthew Hogan's ("Hogan") biological daughter ("Complainant") accused him of years of sexual abuse in a small house that had no interior doors (just sheets) and two other people living in it and present when the abuse supposedly occurred. Tr. 339, l. 9 – 340, l. 7. Tr. 218, l. 25 – 219, l. 6. Tr. 372, l. 21 – 25. Complainant said the abuse began when she was fourteen. Tr. 219, l. 12 – 22. On direct, she testified about very specific dates of abuse that she recalled by using pictures from her cell phone. Tr. 221, l. 2 – 236, l. 8. On cross-examination, Complainant admitted that she did not give anyone these dates until after meeting with the solicitor's office and going through the photos. Tr. 377, l. 2 – 380, l. 4.

Complainant's mother was not a constant presence in the house during Complainant's youth. Tr. 332, l. 22 – 334, l. 16. The two were not close. Tr. 332, l. 22 – 334, l. 16. When Complainant's mother was in the house, she worked long hours. Tr. 458, l. 7 – 460, l. 23. Hogan was responsible for the house. Tr. 386, l. 20 – 22. He took Complainant to her doctor's appointments. Tr. 386, l. 23 – 387, l. 5. Hogan was in charge of discipline for Complainant. Tr. 460, l. 19 – 461, l. 10. Discipline included putting Complainant on restriction or taking away her cell phone. Tr. 460, l. 19 – 461, l. 10.

Complainant's brother was eighteen months older and lived in the house during the time of the alleged assaults. Tr. 338, l. 4 – 20. Her brother also worked long hours, but was home

when some of the abuse took place. Tr. 339, l. 2 – 340, l. 7. Complainant never told her brother about the abuse. Tr. 388, l. 22 – 23.

Complainant first told her mother about the alleged abuse. Tr. 472, l. 3 – 473, l. 24. Complainant and her mother worked together at a restaurant. Tr. 472, l. 3 – 473, l. 24. She told her mother that Hogan assaulted her right before she left for work. Tr. 472, l. 3 – 474, l. l. 3. Her mother called the police and an ambulance took Complainant to the hospital for a sexual assault exam. Tr. 474, l. 4 – 16. Tr. 402, l. 1 – 4.

Complainant's account of that assault was that she slept until about noon, got something to eat, then returned to her room. Tr. 352, l. 17 – 360, l. 4. While she was getting ready for work, Hogan supposedly whistled for her and told her to "come here." Tr. 352, l. 17 – 360, l. 4. They went into Hogan's room and had sex even though Complainant was menstruating. Tr. 352, l. 17 – 360, l. 4. Complainant was wearing a feminine pad. Tr. 352, l. 17 – 360, l. 4. After sex, Hogan told Complainant to "Put that back on so it doesn't run out." Tr. 352, l. 17 – 360, l. 4.

Complainant went to the bathroom, threw the pad in the trash, and inserted a tampon. Tr. 352, l. 17 – 360, l. 4. She put her clothes on and went to work, where she told her mother. Tr. 359, l. 3 – 360, l. 22. Complainant did not shower and the tampon she inserted immediately after the assault was collected at the sexual assault exam along with her underwear. Tr. 369, l. 23 – 370, l. 15.

Complainant's exam did not reveal any injury. Tr. 413, l. 14 – 16. The nurse collected fingernail scrapings, oral swabs, vaginal swabs, rectal swabs, the tampon, and the underwear. Tr. 403, l. 1 – 9. The police went to Hogan's house and retrieved the feminine pad from the trash can. Tr. 162, l. 17 – 19.

The trash can where the police recovered the pad was in the home's only bathroom. Tr. 350, l. 17 – 351, l. 1. The trash can was plastic and old. Tr. 287, l. 1 – 12. When asked if the trash can had "some white stuff in it, maybe not scrubbed completely clean, the policeman said, "Maybe." Tr. 287, l. 1 – 12.

The State entered a photograph of the small bathroom and trash can into evidence. (State's Ex. 9). The bathroom had two sinks, a toilet, and a tub/shower combination in very close quarters. (State's Ex. 9). Several toothbrushes and toothpaste tubes are on the counter and several razors are on the wall.. (State's Ex. 9). The cabinets are dirty. (State's Ex. 9). Undergarments and towels hang from shelves. (State's Ex. 9). A plastic shelf holds a hairbrush and beauty supplies next to the trash can. (State's Ex. 9). The trash can is not clean, does not have a plastic liner, and appears to have multiple items in it. (State's Ex. 9).

The State's DNA expert tested the pad found in the communal, dirty trash can as well as items collected by the nurse. Tr. 500, l. 1 – 9. No semen stains were found on Complainant's underwear. Tr. 524, l. 3 - 4. Semen was not detected in the oral swabs. Tr. 523, l. 25 – 524, l. 2. The vaginal sand rectal swabs were inconclusive and the expert admitted she did not know if seminal fluid was present.[1] Tr. 524, l. 5 – 17. Hogan was excluded as a contributor to any DNA found on the tampon. Tr. 514, l. 18 – 24. The expert did not test the tampon applicator. Tr. 525, l. 3 – 4.

On the pad, the expert testified that her testing showed that semen was present. Tr. 511, l. 3 – 22. The expert did a DNA test and found a mixture of two people—Complainant and a person who could not be identified. Tr. 512, l. 8 – 21. Subsequently, the lab acquired the ability

[1] The expert looked for sperm in addition to seminal fluid and none were found, but the State presented evidence that Hogan had a vasectomy many years before the alleged assaults. Tr. 289, l. 12 – 16. The doctor explained that after a vasectomy, a man still produces semen, but does not ejaculate sperm. Tr. 290, l. 7 – 18.

to use Y-STR testing, which only analyzes the male portion of the chromosome. Tr. 512, l. 22 – 513, l. 9. Tr. 495, l. 7 – 496, l. 14. The expert's later Y-STR test showed a match for Hogan's DNA on the pad from the dirty trashcan. Tr. 518, l. 15 – 22. Importantly, the expert clarified that she could not say that the Y-STR match from the pad came from seminal fluid. Tr. 518, l. 23 – 25.

Discussion

At the charge conference, Hogan objected to Judge McKinnon charge on witness credibility. Tr. 576, l. 21 – 578, l. 5. Defense counsel objected to a paragraph that said when a witness makes a "simple mistake" it does not mean the witness is not telling the truth. Tr. 576, l. 21 – 578, l. 5. The judge replied, "That's standard charge language." Tr. 576, l. 21 – 578, l. 5. The judge continued, "[Y]ou're basically telling the jury that if the witnesses made a statement that's contradicted by other evidence, doesn't necessarily mean they're intentionally intending to deceive the Court." Tr. 576, l. 21 – 578, l. 5.

Defense counsel responded that she had not seen such language in other jury charges. Tr. 576, l. 21 – 578, l. 5. She also argued that the charge could be construed as a comment on whether the judge thought the witness made a mistake. Tr. 576, l. 21 – 578, l. 5. The charge did not advance any issue nor was it necessary. Tr. 576, l. 21 – 578, l. 5. Judge McKinnon overruled the objection and again overruled defense counsel when she renewed the objection after the charge was given. Tr. 576, l. 21 – 578, l. 5. Tr. 603, l. 20 – 22.

The trial court's charge on "believability of witnesses" spans three paragraphs. Tr. 595, l. 7 – 596, l. 8. The entire charge is set forth below and the objectionable portion is the third paragraph, which is italicized:

> Believability of witnesses. When I say you must consider all the evidence, I do not mean you must accept all the evidence as true or accurate. You should

> decide whether you believe what each witness had to say and how important their testimony was. In making those decisions, you may believe or disbelieve any witness in whole or in part. The number of witnesses testifying concerning a particular point does not necessarily matter.
>
> To decide whether you believe a witness, I suggest you ask yourself a few questions. Did the witness impress you as someone telling the truth? Did they have any particular reason not to tell the truth? Do they have a personal interest in the outcome? Do they seem to have a good memory? Did they have the opportunity and ability to accurately observe the things they testified about? Did the witness appear to understand the questions clearly and to answer them directly? Did the witness's testimony differ from other testimony or evidence?
>
> *However, please keep in mind that a simple mistake does not mean a witness was not telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or unimportant detail.*

Tr. 595, l. 7 – 596, l. 8 (emphasis added).

Appellant correctly argued that the above-quoted language was an improper comment on the facts. "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. Art. V, § 21. Charges concerning the believability of witnesses in child sexual abuse cases are particularly problematic because these cases almost always turn into a referendum on whether the jury believes the complaining witness. See State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

In Stukes, the Supreme Court eliminated the charge that a victim in a sexual assault case's testimony need not be corroborated. Id. at 498-500, 787 S.E.2d at 482-83. The Court found that charge violated Article 21's prohibition on courts commenting on the facts to the jury. Id. "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." Id. "The charge invites the jury

to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Id.

Just like the charge in Stukes, the "simple mistake" charge could only mean Complainant in this case. Appellant put up no witnesses, so he had no one who could have made a "simple mistake" to be forgiven. The charge told the jury they could overlook "simple mistakes" made by Complainant. The solicitor was free to argue that Complainant made mistakes and was still telling the truth, but this language had no place in the trial court's charge.

Complainant gave the police a twelve-page written statement the day after the report to the police, had her phone while she wrote it, but never included any of the dates or the connection to the phone's photographs until after she met with the solicitor's office. Tr. 370, l. 16 – 372, l. 6. Complainant had inconsistencies in what she told police she was wearing before the assault on the day of the report. Tr. 373, l. 23 – 374, l. 19. Defense counsel emphasized this point in closing. Tr. 623, l. 14 – 24. Complainant first told police the abuse occurred "two to three times" a week but later changed it to "three to six times a week." Tr. 388, l. 17 – 20.

Our Supreme Court has recently emphasized the importance of not "elevating facts" in jury charges. See State v. Brown, 438 S.C. 146, 151, 881 S.E.2d 771, 774 (Ct. App. 2022) (noting trend in cases). "Recent precedent has directed circuit courts to refrain from giving instructions that guide juries on the inferences they can draw from evidence or that tells the jury to consider particular evidence and how to construe it." Id.

Brown cites the recent cases paring down jury charges and leaving comments and inferences to lawyers in argument. Id. In State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the Court eliminated the charge that malice can be inferred from a deadly weapon. The Burdette Court frowned on giving juries "examples of conduct the jury may consider when

determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven." Burdette at 502, 832 S.E.2d at 582. Burdette cited with approval cases eliminating the charge that a defendant's flight is evidence of guilt, the refusal to charge specific examples of legal provocation, and eliminating a charge on inferences a jury can draw from a defendant's actual knowledge of the presence of a drug. Id. citing State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980) (flight); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (legal provocation); State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013) (drug knowledge). See also Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) (restricting use of good character charge).

The line of cases dealing with improper comments on victim credibility in child sex cases further shows the prejudice of the trial judge's "simple mistakes" charge. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); State v. Jennings 394 S.C. 473, 716 S.E.2d 91 (2011). Kromah and Jennings both dealt with forensic interviewers opining—directly or indirectly—on the credibility of a child witness. These cases, together with Stukes, show the importance of leaving the credibility of the complainant within the province of the jury.

During her closing argument, the solicitor tried to explain away the mistakes made by Complainant. Concerning the dates and times, the solicitor told the jury that Complainant was "not a detective" and would not know the importance of dates and times. Tr. 606, l. 6 – 17. She said Complainant "rather innocently mixed up" the shirts she wore on the day of the report. Tr. 617, l. 8 – 20. The solicitor also said, "There might be things over the last three to five years that [Complainant] has forgotten, but the things that that she remembers are true and real, and she has no reason to come in here and tell you about them (indiscernible)." Tr. 618, l. 6 – 12. These arguments by the solicitor track the judge's charge concerning "an innocent lapse in memory"

and whether misstatements are "about an important fact or unimportant detail." Tr. 595, l. 25 – 596, l. 8.

"Because the trial judge is the authority figure in the courtroom, jurors look to the trial judge for guidance not only on the law, but for matters such as courtroom conduct and protocol, even permission for breaks, meals, and telephone calls." State v. Taylor, 427 S.C. 208, 215-16, 829 S.E.2d 723, 727 (Ct. App. 2019). Taylor, an Allen[2] charge case, emphasizes that jurors "scrutinize the trial judge's statements and instructions" and that this scrutiny elevates during deliberations. Id. The juror's deliberations resulted in questions about the testing of the tampon. Tr. 632, l. 1 – 2. The jury also wanted to see the Complainant's statement—which defense counsel contrasted against her detailed testimony with the pictures from her phone—but the State did not enter the statement into evidence. Tr. 632, l. 13 – 15. The statement the jury wanted to see bore directly on Complainant's credibility and whether she made "simple mistakes."

This error cannot be harmless. The only physical evidence favorable to the State was the Y-STR DNA testing of the feminine pad. But the State's expert admitted the DNA matching Hogan could not be traced to seminal fluid. The pad was found in a dirty trashcan used by the entire family and could easily have been contaminated by Hogan's DNA from an innocent source. See State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020) (explaining problem of touch DNA).

The glaring piece of physical evidence that was unfavorable to the State was the house. The house was small and had no interior doors. Complainant's mother and brother lived in the house and were supposedly present during some of the assaults. As defense counsel argued, it was difficult to believe that Hogan assaulted his daughter six times a week and neither the

[2] Allen v. United States, 164 U.S. 492 (1896).

brother nor the mother heard or suspected anything. This Court should add the "simple mistakes" language to the list of proscribed jury charges on the facts, reverse this case, and grant appellant a new trial.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.

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David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of January, 2024.