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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

Honorable Michael S. Holt, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRY L. SANDERS,

APPELLANT

APPELLATE CASE NO. 2023-001100

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting a hospital emergency department record and portions of the testimony from the doctor that included hearsay statements from a minor witness identifying Appellant because the evidence exceeded the scope of the hearsay exception provided in Rule 803(4), SCRE, for statements made for the purpose of medical diagnosis or treatment?

STATEMENT OF THE CASE

In February of 2016, the Darlington County Grand Jury indicted Appellant, Terry Lee Sanders, for criminal sexual conduct with a minor first degree and kidnapping, indictments #2016-GS-16-0190, 0191. (R. pp. **). In June of 2022, the Darlington County Grand Jury indicted Appellant for criminal sexual conduct with a minor third degree, indictment #2022-GS-16-0680. (R. pp. ***). On September 12, 2022, Appellant proceeded to jury trial before the Honorable Michael S. Holt. Tonya Copeland-Little represented Appellant at trial. Patti Parker prosecuted the case. The jury returned verdicts of guilty. Judge Holt sentenced Appellant to twenty-five (25) years for criminal sexual conduct with a minor first degree, twenty-five (25) years concurrent for kidnapping, and fifteen (15) years concurrent for criminal sexual conduct with a minor third degree. (R. pp. **). On September 20, 2022, Appellant filed a motion for new trial. (R. p. **). Judge Holt denied the motion on June 29, 2023. On July 6, 2023, Appellant served a notice of intent to appeal. This appeal follows.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494–95 (2013) (quoting State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (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. at 349, 737 S.E.2d at 495 (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848). State v. Simmons, 423 S.C. 552, 561, 816 S.E.2d 566, 571 (2018).

ARGUMENT

The trial judge erred in admitting a hospital emergency department record and portions of the testimony from the doctor that included hearsay statements from a minor witness identifying Appellant because the evidence exceeded the scope of the hearsay exception provided in Rule 803(4), SCRE, for statements made for the purpose of medical diagnosis or treatment.

Immediately following the testimony of the minor witness, the State called Dr. Michelle Huxford. (Tr. p. 130, line 5-24). Dr. Huxford was qualified, without objection, as an expert in emergency medicine. (Tr. p. 132, line 19 – p. 133, lines 1-4). Dr. Huxford examined the minor witness in the emergency department of McLeod Hospital on October 3, 2015. (Tr. p. 133, lines 6-12). During the direct examination the doctor referenced an emergency department record. (Tr. p. 135, lines 1-13). The prosecutor referred to the record as State's Exhibit #1 and then said, "Your Honor, at this time the State would move State's Exhibit 1 into evidence. I would like to move these records into evidence." (Tr. p. 135, lines 14-16). The prosecutor also said, "For the Court, I have redacted any statements may in, in the gathering of the history for the purposes of medical diagnosis, anything the mother said has to be redacted. So what remains is only what the child said." (Tr. p. 135, lines 18-22).

Counsel for Appellant objected stating, "Your Honor, I – I would object to introducing any report. This doctor is here to testify in person and Ms. McKenzie can ask her any questions about her treatment without putting the report into evidence?" (Tr. p. 135, line 24 – p. 136, lines 1-3). The judge ruled, "All right. All right. I respectively overrule the objection and I'll allow this in as Plaintiff's, I mean, State's Number 1." The prosecutor added, "And Your Honor, also just to keep the record clean, I, -- it comes, I believe it – I believe it comes under 803(4) of the July statements made with purposes of medical diagnosis and treatment ---" (Tr. p. 136, lines 7-11). Counsel for Appellant again objected stating, "Your Honor, just, just to note for the record,

I would object that the report would be cumulative to her testimony here today." (Tr. p. 136, lines 15-17). The emergency department record was admitted as State's Exhibit #1. (Tr. p. 136, lines 19-20; R. p. **).

The prosecutor then asked the doctor to read from the emergency department record that had already been admitted in evidence, over objection. (Tr. p. 137, lines 10-14). The prosecutor asked what the Minor told her and the doctor testified:

> In the ED the patient states "Terry touched my tutu. It throwed up. He was in the bathroom and Terry hurt me." The patient – I'm just reading the note just as it goes. Patient report, "Terry pulled my hair and covered my mouth and put me under the covers and wouldn't let me see the TV and pulled my pants down." Patient states, "my tummy started hurting. He touched me right here." And then I have noted that she was pointing at her vagina, "with his hands and he pulled his pants down too". The patient notes, "he put my hand on his tutu."

(Tr. p. 137, line 16 – p. 138, line 1).

Later in the trial the judge admitted, over objection and pursuant to S.C. Code §17-23-175, the video from the forensic interview with the minor conducted on October 6, 2015. (Tr. p. 207, line 1 – p. 208, lines 1-10). The video was marked as State's Exhibit #3. (Tr. p. 208, lines 8-9). During deliberations the jury asked to review the video[1]. (Tr. p. 464, lines 15-20). One of the jurors asked about the redaction of the emergency department record, State's Exhibit #1. (Tr. p. 464, line 20 – p. 465, lines 1-17). In response the judge told the jury, "We understand there was a question with regard to State's Exhibit Number 1 which is McLeod Regional Medical Center document and that there was a, on the second page of said document, the last sentence as I understand the question from the jury, 'was when asked did Terry', and then if you flip the page there is no, the sentence is not competed. That portion of the sentence was redacted and is not for you to consider. That was redacted for the purpose." (Tr. p. 466, line 23 – p. 467, lines

[1] It appears, however, that the video was not replayed for the jury.

1-7). The jury then had a question about Dr. Hexford's testimony with regard to State's Exhibit #2 that was admitted in evidence without objection. (Tr. p. 144, lines 1-3; p. 468, lines 3-8). The jury's question was marked as Court's Exhibit #1. (Tr. p. 469, lines 9-10).

The trial judge erred in admitting the hospital emergency department record containing inadmissible hearsay, including inadmissible statements of the minor. The emergency department record was erroneously admitted under the medical diagnosis exception to the rule against hearsay provided in Rule 803(4), SCRE. The emergency department record was not, and should not have been, admitted as a business record pursuant to Rule 803(6), SCRE[2]. The trial judge additionally erred in allowing the doctor to testify about portions of the emergency department record that included the inadmissible hearsay statements of the minor.

In State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011), the South Carolina Supreme Court wrote, "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." Rule 801(c), SCRE. Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute. Rule 802, SCRE." The minor's statements in the emergency department record and testified to by the doctor constitute inadmissible

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[2] Rule 803(6), SCRE, known as the business records exception, provides: A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however*, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

hearsay. The statements made by the minor were out of court statements offered to prove that Appellant did what the minor alleged.

The South Carolina Rules of Evidence do not provide an exception to the admission of minor's statements. Both the emergency department record and the testimony exceeded the time and place hearsay exception provided in Rule 801(d)(1)(D) and exceeded the hearsay exception provided by Rule 803(4), SCRE, for statements made for the purpose of medical diagnosis or treatment. As the South Carolina Supreme Court noted in State v. Simmons, 423 S.C. 552, 563, 816 S.E.2d 566, 572 (2018):

> The primary method of providing corroborating testimony regarding an alleged sexual assault is through the specific rule created for CSC cases—Rule 801(d)(1)(D), SCRE. See id., Note ("Subsection (D), which is not contained in the federal rule, was added to make admissible in criminal sexual conduct cases evidence that the victim complained of the sexual assault, limited to the time and place of the assault."). 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) (citation omitted).

During the cross examination of the minor's mother[3] the State used Rule 801(d)(1)(D) to question the mother about statements made by the minor, limited to time and place. (Tr. p. 293, lines 4 – 17). The hospital emergency record admitted as State's Exhibit #1 and Dr. Hexford's testimony, however, went beyond the time and place exception provided by Rule 801(d)(1)(D), SCRE. The emergency room record contains statements from the minor that "terry touched my too too" and "terry hurt me." (State's Exhibit #1, p. 2, R. p. **). At trial the doctor read to the jury from the emergency department record, including the minor's statements naming "Terry"

[3] Surprisingly, the defense called the Minor's mother as a witness when the State did not call her during their case. (See Tr. pp. 247-254).

twice. Appellant's name is Terry. The hearsay evidence identified Appellant. The hearsay in the hospital emergency record admitted as State's Exhibit #1 and Dr. Hexford's testimony went beyond time and place provided by Rule 801(d)(1)(D).

The State argued that the emergency department record met the hearsay exception provided in Rule 803(4), SCRE, as a statement made for the purpose of medical diagnosis or treatment. The judge admitted the evidence pursuant to Rule 803(4). The trial judge erred. State's Exhibit #1, the emergency department record, although redacted, still included six pages of mostly inadmissible hearsay, including statements by the minor identifying Appellant, and should have been excluded entirely. Both the emergency department record and the doctor's testimony reading portions from the emergency department record exceeded the scope of Rule 803(4). The record should have been excluded and the testimony limited.

Rule 803(4), SCRE, provides that, "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion" are not excluded by the hearsay rule. The trial judge erred in admitting the emergency department record, State's Exhibit #1, because the medical record contained six pages of mostly inadmissible hearsay, including statements made by the minor identifying Appellant, that were not pertinent to a medical diagnosis or treatment. The doctor's testimony, reading from the emergency department record included the same statements made by the minor that identified Appellant and were not pertinent to a medical diagnosis or treatment. The medical record should have been excluded entirely and

the doctor's testimony should have been limited to the statements made by the minor that the doctor relied upon in reaching her medical conclusion.

In State v. Simmons, 423 S.C. 552, 564, 816 S.E.2d 566, 572–73 (2018), the South Carolina Supreme Court explained the limits of Rule 803(4), SCRE, writing:

> 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 when performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment. 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); see also Rule 803(4), SCRE, Note (stating a "physician's testimony should include only those statements related to him by the patient upon which the physician relied in reaching medical conclusions" (citing State v. Camele, 293 S.C. 302, 360 S.E.2d 307 (1987)).

In the present case the State, as the proponent of the hearsay testimony, failed to prove that the minor's statements identifying Appellant were pertinent to the doctor's medical diagnosis and treatment of minor. The State failed to prove that the doctor relied on the minor's statements identifying Appellant in reaching her medical conclusions. The hearsay statements by the minor identifying Appellant exceeded the scope of Rule 803(4), SCRE.

In State v. Brown, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985), the South Carolina Supreme Court wrote, "The perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim." Unlike the finding in Brown, the error in admitting the hearsay statements of the minor in the present case was not harmless. In State v. Camele, 293 S.C. 302, 304–05, 360 S.E.2d 307, 308 (1987), the South Carolina Supreme Court wrote:

> A physician's testimony as to a patient's history should only include those statements related to him by the patient upon which the physician relied in reaching medical conclusions. See, State v. Hudnall, supra; and State v. Brown, 286 S.C. 445, 334 S.E.2d 816 (1985). Dr. Chesire testified that the victim stated that the appellant had performed fellatio upon him. We find error in the admission of Dr. Chesire's testimony because the statement implicating the appellant did not assist in her finding that the child had been sexually abused. Id.

As in Simmons, Brown, and Camele, the judge erred in admitting the hearsay statements by the minor identifying Appellant in both the emergency department record and portions from the testimony of the doctor because the doctor did not rely on these statements for diagnosis or treatment. The evidence exceeded the scope of Rule 803(4). SCRE. The admission of the evidence was not harmless.

"'Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice.' State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct.App.2010). Such error is deemed harmless when it could not have reasonably affected the result of trial, and an appellate court will not set aside a conviction for such insubstantial errors. Id." State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011). The identification of Appellant by the Minor was a critical factor for the jury to determine. The jury's determination about the credibility of the identification should have been made without the introduction of the inadmissible hearsay statements included in the emergency department report and testified to by the doctor. During closing argument the prosecutor relied on the inadmissible hearsay, reading to the jury the minor's statements from the emergency department record identifying Appellant, the same statements the doctor read to the jury during trial. (Tr. p. 414, lines 1-20). The error was compounded by the incomplete redaction that included Appellant's name that the jury asked about during deliberations. (Tr. pp. 464-467, R. p. ** State's Exhibit #1, p. 2). The error in

admitting the hearsay testimony of the minor was not harmless. The trial judge abused his discretion in admitting the hearsay statements of the minor.

CONCLUSION

Based on the above argument this Court should reversed the convictions and remand for a new trial.

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ATTORNEY FOR APPELLANT

This 25th day of March, 2024.