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May 29 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Fairfield County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARLOS ALEJANDRO CESMAS-GOMEZ,

APPELLANT

APPELLATE CASE NO. 2023-001192

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting the hearsay report of the sexual assault nurse examiner?

STATEMENT OF THE CASE

Appellant was indicted in Fairfield County for second degree criminal sexual conduct with a minor. On July 17, 2023, appellant was tried before the Honorable Brian M. Gibbons and a jury. R. 1. Julie Hall represented the State. R. 1. Kay Boulware represented appellant. R. 1. The jury found appellant guilty. R. 243. Judge Gibbons sentenced appellant to twenty years' imprisonment. R. 249. 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. 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 429–30, 632 S.E.2d at 848.

ARGUMENT

The trial court erred in admitting the hearsay report of the sexual assault nurse examiner.

Complainant accused appellant of raping her on the night of April 16, 2019. R. 74. Complainant was staying at her grandmother's ("Grandmother") house for a visit. R. 72. Grandmother was appellant's aunt. R. 109. Appellant was living with Grandmother temporarily and had been there approximately six weeks. R. 109.

Appellant came home to Grandmother's house at 10:00pm and brought Complainant some coffee. R. 110. Complainant then went to bed and was on her phone. R. 74. Appellant came into the room and grabbed her. R. 76. He pulled Complainant to the floor and began raping her. R. 78-81. Complainant began making noise "so my grandma could hear me." R. 82.

Grandmother testified that she heard Complainant "say no" and went into her room. R. 112. Complainant grabbed her pants and pointed to appellant. R. 112. Grandmother claimed to have seen appellant "standing there with his penis erected." R. 112. Grandmother made appellant leave the house and took Complainant back to her parents' home. R. 113-14.

Complainant and her family waited two days before making a report to the sheriff in Fairfield. R. 134. R. 141. The police obtained no DNA implicating appellant. R. 136-37. Even though Complainant told the police that incriminating evidence could be found on her phone, none was. R. 137-38. R. 141.

The police told Complainant's family to take her to a hospital in Columbia for a sexual assault examination. R. 136. The investigating officer did not accompany the family to the examination. R. 136.

Before trial, appellant moved to exclude the nurse examiner's questionnaire and report. R. 47. The State contended the report was a business record and contained statements made for

purposes of medical treatment and was admissible. R. 47. Defense counsel conceded that the medical diagnosis hearsay exception applied, but said the report contained information that was “irrelevant, prejudicial, and cumulative.” R. 48-49. She cited this Court’s unpublished Opinion in State v. Lowery, No. 2017-UP-023, 2017 WL 164492 (S.C. Ct. App. Jan. 11, 2017), in support of her objection to the nurse’s report. R. 49-50. Judge Gibbons indicated his “gut” reaction was to admit the evidence, but that he would need a contemporaneous objection and would need to see the report and compare it with Complainant’s testimony before making a final ruling. R. 48-49.

After Complainant testified, Judge Gibbons ruled that the nurse’s report was admissible. R. 100. He ruled, “I find it’s both relevant as well as more probative than prejudicial.” R. 100. Appellant made a contemporaneous objection when the State offered the report. R. 173. The Court overruled the objection and entered the report as State’s Ex. 1. R. 173. R. ____ (State’s Ex. 1).

The nurse’s report is replete with inadmissible hearsay. R. ____ (State’s Ex. 1). Our hearsay rules contain a specific provision allowing statements in criminal sexual conduct cases but limiting these statements to the time and place of the incident. Rule 801(d)(1), SCRE. Details of the assault and the perpetrator’s identity have been consistently held inadmissible. See State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002); Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013).

The report goes well beyond what is allowed by the hearsay exception and improperly bolstered the testimony of Complainant and Grandmother. R. ____ (State’s Ex. 1). On page 4 of the report, it identifies Grandmother as a witness who saw the assault, bolstering her testimony. R. ____ (State’s Ex. 1). Page 4 also contains, in quotes, a complete narrative by Complainant of

the assault. R. ___ (State's Ex. 1). On page 6, under the space for "Assailant's Name," it has appellant's name, his age, his gender, and his ethnicity. R. ___ (State's Ex. 1). "Yes" is checked on page 6 and contains, again in quotes, a narrative by Complainant about "Grabbing/holding/pinching" with the nurse's comments describing Complainant's demonstration. The report continues with quotations from Complainant about the assault. R. ___ (State's Ex. 1).

Admission of this report cannot be harmless. Grandmother admitted that she omitted a key detail from her testimony in her initial statement to the police. R. 121. The report itself contradicts Complainant's account of the assault. R. ___ (State's Ex. 1). In her testimony, Complainant claimed vaginal penetration, but the report alleges anal penetration. R. ___ (State's Ex. 1). The nurse's testimony concerning injuries to the child's genitals was only that they were "consistent with" a sexual assault, not that they were caused by a sexual assault. R. 179. Therefore, this clear error cannot be harmless, and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand this case for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of May, 2024.

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IN THE COURT OF APPEALS

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Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARLOS ALEJANDRO CESMAS-GOMEZ,

APPELLANT

APPELLATE CASE NO. 2023-001192

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carlos Alejandro Cesmas-Gomez states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Brian M. Gibbons, which was held on July 17 - 19, 2023, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Carlos Alejandro Cesmas-Gomez.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of May, 2024.

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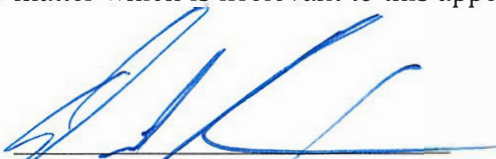
APPELLATE CASE NO. 2023-001192

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial transcript;
- (3) State's Ex. 1

I certify that this designation contains no matter which is irrelevant to this appeal.


David Alexander
Appellate Defender

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This 29th day of May, 2024.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”



David Alexander
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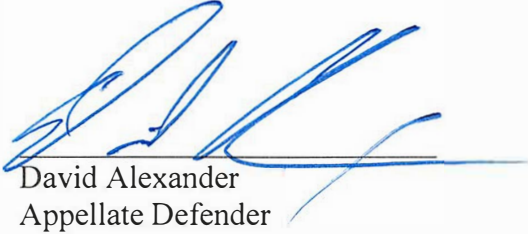
CARLOS ALEJANDRO CESMAS-GOMEZ,

APPELLANT

APPELLATE CASE NO. 2023-001192

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Carlos Alejandro Cesmas-Gomez, #391510, at Allendale Correctional Institution, 1057 Revolutionary Trail, Fairfax, SC 29827, this 29th day of May, 2024.



David Alexander
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ATTORNEY FOR APPELLANT

From: [Pollard, Shelby](#)
To: [Mark Farthing](#); [Caroline Collins](#)
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Subject: 2023-001192 The State v. Carlos A. Cesmas-Gomez - Anders Brief of Appellant
Date: Wednesday, May 29, 2024 4:52:00 PM
Attachments: [Cover Letter to AG 5.29.24.pdf](#)
[2023-001192 The State v. Carlos A. Cesmas-Gomez - Anders Brief of Appellant.pdf](#)

Good Afternoon,

Please find attached for service in the above-referenced case the Anders Brief of Appellant and Designation of Matter. This will be filed today, May 29, 2024, with the Court of Appeals via email filing.

Thank you,
Shelby

Shelby Pollard

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