STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MATTHEW RYAN HENDRICKS,

APPELLANT.

Appellate Case No. 2011-203730

FINAL BRIEF OF APPELLANT

DAYNE C. PHILLIPS
Appellate Defender

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

Did the trial court err in admitting the 911 recording of the complaining witness' mother when it was hearsay and impermissibly bolstered the complaining witness' trial testimony?

STATEMENT OF THE CASE

On September 6, 2011, the Pickens County Grand Jury indicted Appellant Matthew Hendricks for kidnapping and two counts of first-degree criminal sexual conduct. R. 354.

On November 14, 2011, Appellant proceeded to trial before the Honorable Letitia H. Verdin and a jury. R. 1. Chuck Allen[1] represented Appellant, and Assistant Solicitor Sam Tooker represented the State. The jury found Appellant guilty as charged. R. 347, l. 23 – 460, l. 7. The trial court sentenced Appellant to eight years imprisonment on each conviction and ordered that the sentences run concurrently. R. 353, ll. 7-9.

[1] The transcript incorrectly indicates that Charles Franklin Turner, III, represented Appellant at trial. R. 1; R. 10.

ARGUMENT

The trial court erred in admitting the 911 recording of the complaining witness' mother when it was hearsay and impermissibly bolstered the complaining witness' trial testimony.

Background

Appellant was charged with kidnapping and two counts of first-degree criminal sexual conduct. R. 354. The complaining witness, Brittany Wardlaw, admitted on cross-examination that she knew Appellant for four years and had lived with him "[a] numerous amount [sic] of times." R. 46, ll. 4-10. The complaining witness also admitted that she sent text messages of a sexual nature and nude pictures of herself to Appellant on the same day she claimed Appellant sexually assaulted her. R. 98, l. 18 – 49, l. 8.

Relevant Facts

Pre-trial, the State described the contents of the two 911 recordings to the trial court. Specifically, Assistant Solicitor Tooker stated, "The first call is placed by the victim [Brittany Wardlaw] . . . she called the police from her residence when she thought someone was breaking in the back door [of her trailer]." R. 14, ll. 6-13; State's Exhibit #2 (911 recording). Notably, the complaining witness told the 911 operator before she ended the call, "No, it's my fiancé, he came in from out-of-town." State's Exhibit #2 (911 recording). Assistant Solicitor Tooker then stated, "The second recording is one from the victim's mother [Lisa Gilstrap] after the victim gets out, gets her mother and they are on the way to the hospital asking for a police officer to meet them at the hospital." R. 14, ll. 13-17. The relevant statements from the mother's call to 911 are as follows: (1) "My daughter's boyfriend just broke into her house . . . and raped her[;]" (2) "She has bruises all over and he sodomized her[;]" (3) "Her two boys were there[;]" (4) "His name is Matthew Hendricks[;]"

(5) "He has beat her up before but he has never raped her[;]" (6) "He has charges pending[;]" (7) "Matthew Hendricks[;]" and (8) "I have a trespassing notice on him here." State's Exhibit #3 (911 recording). The trial court ultimately did not rule on the admissibility of the 911 recordings prior to trial. R. 15, ll. 1-10.

During direct examination of the complaining witness, Brittany Wardlaw, the State entered a recording of her call to 911 prior to the alleged sexual assault into evidence. R. 23, l. 16 – 25, l. 21. Prior to calling the complaining witness' mother, Lisa Gilstrap, to testify, the State requested the trial court to make an *in camera* ruling on the admissibility of the mother's subsequent call to 911. R. 57, ll. 2-10. Defense counsel objected, arguing that the recording of the mother's subsequent call to 911 bolstered the complaining witness' testimony. R. 57, ll. 15-21. The State cited *State v. Cox*, 274 S.C. 624, 266 S.E.2d 784 (1980) as supporting authority and maintained:

> [T]he court says pretty specifically that there's a long line of jurisprudence that says any time you've got a victim that testifies as to allegation of sexual assault and subsequent witnesses that she told about who did it, various basic questions or statements as to what happened, that is admissible . . . [The mother] calls 911 and then it's a present sense impression.

R. 58, ll. 3-17. The State further argued, "[T]he mother's] responding to traumatic events when it's fresh in her head. She's got no reason to lie or make up a story . . . That's why the State believes that evidence should be admissible." R. 58, ll. 20-24.

Defense counsel argued, "[The mother is] going to testify. She can relate to the same thing with her testimony. It's simply a different method of doing it." R. 59, ll. 3-5. The State responded, "Again, any time you've got a present sense impression or an excited utterance, at least to my understanding, it's recorded." R. 59, ll. 9-11. The trial court ruled,

"I'm going to allow it. For what it's worth, I'm going to allow it." R. 59, ll. 18-19. Over defense counsel's objection, the trial court subsequently admitted the recording of the mother's 911 call into evidence. R. 70, ll. 1-25; State's Exhibit #3 (911 recording).

Discussion

"'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; *see State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) (holding hearsay is defined as an out of court statement offered to prove the truth of the matter asserted). Notably, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. Under Rule 805 of the South Carolina Rules of Evidence, "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

In *State v. Burroughs*, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997), "the trial court allowed the police officer who first took the victim's statement and a nurse who examined the victim in the emergency room to testify about the victim's statements to them describing the assault." This Court held that "the testimony was hearsay and amounted to impermissible bolstering of the victim's trial testimony." *Id.* Specifically, this Court held that the testimony was "double hearsay, or hearsay within hearsay" and that there was no exception to the hearsay rule that would support the admission of the challenged testimony. *Id.* at 498 n. 5, 492 S.E.2d at 412 n. 5.

In this case, to support the admissibility of the mother's call to 911, the State cited *Cox*, 274 S.C. 624, 266 S.E.2d 784, which addressed the common law *res gestae* exception

to the hearsay rule because it was prior to the adoption of the South Carolina Rules of Evidence. The State argued that the recording of the mother's call to 911 was admissible under the present sense impression or excited utterance exceptions to the hearsay rule. R. 58, l. 3 – 111, l. 11. In *Burroughs*, this Court compared the common law *res gestae* exception to hearsay rule to the Rules of Evidence and noted that the Rules of Evidence established two separate exceptions: (1) present sense impression under Rule 803(1), SCRE, and (2) excited utterance under Rule 803(2), SCRE. *See Burroughs*, 328 S.C. at 498-99, 492 S.E.2d at 412-13.

Here, the recording of the mother's call to 911 was hearsay because it was not "limited to time and place of the incident." Rule 801(d)(1)(D), SCRE; *see also Jolly v. State*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994) ("[I]n criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration, limited to the time and place of the assault of excluding details or particulars."). Specifically, the complaining witness' mother told the 911 operator the following information: (1) "My daughter's boyfriend just broke into her house . . . and raped her[;]" (2) "She has bruises all over and he sodomized her[;]" (3) "Her two boys were there[;]" (4) "His name is Matthew Hendricks[;]" (5) "He has beat her up before but he has never raped her[;]" (6) "He has charges pending[;]" (7) "Matthew Hendricks[;]" and (8) "I have a trespassing notice on him here." State's Exhibit #3 (911 recording). Therefore, the next step in the analysis is to determine whether the mother's call to 911 or the complaining witness' statement to her mother is admissible under any exceptions to the hearsay rule.

The complaining witness stated that it was "at least an hour or two" between when the last alleged sexual assault occurred and when Appellant left her trailer. R. 40, ll. 22-25. The complaining witness recalled that after Appellant left her trailer, she called Jason White and decided to take a shower because "there was blood everywhere." R. 42, ll. 5-8. The complaining witness also revealed that after she finished taking a shower, she got her children out of their beds and went to her mother's home. R. 42, ll. 13-16. The complaining witness noted that she told her mother about the alleged sexual assault and that her mother called 911 while on the way to the hospital. R. 43, ll. 12-16.

The complaining witness' mother maintained that her daughter was distraught and crying when her daughter called her after the alleged sexual assault. R. 61, ll. 12-16. The complaining witness' mother also testified, "She [her daughter] told me that, uh, Matt [Appellant] showed up at her house and that he had beaten her up and raped and sodomized her." R.61, ll. 20-25. The complaining witness' mother further recalled that when her daughter arrived at her home, she first put her grandchildren to bed, then she and her daughter left for the hospital, and that is when she called 911. R. 62, ll. 4 – 116, l. 10.

Despite the State's argument to the contrary, the complaining witness' statement to her mother and the mother's 911 recording were not admissible under the present sense impression exception of the hearsay rule because the complaining witness did not speak to her mother until several hours *after* the alleged sexual assault and the complaining witness had already called and spoke to Jason White about the alleged sexual assault. R. 40, l. 22 – 43, l. 16; *See* Rule 803(1), SCRE (admissible hearsay "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter").

Furthermore, the complaining witness' statements were not spontaneous, but rather a product of reflective thought, as evinced by the time lapse between the alleged sexual assault and when she spoke to her mother as well as the complaining witness' decision to call Jason White and to take a shower before calling her mother. R. 42, ll. 5-8; *Cf.* Rule 803(2), SCRE (admissible hearsay "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). Thus, under the circumstances of this case, the complaining witness' statements to her mother were not admissible under the excited utterance exception to the hearsay rule because "the time interval between the event and the statement is long enough to permit reflective thought[.]" *Burroughs*, 328 S.C. at 500, 492 S.E.2d at 413 (quoting 2 John William Strong, *McCormick on Evidence* § 272 (4th ed. 1992)); *see also State v. Whisonant*, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999).

The improperly admitted 911 recording prejudiced Appellant because it was important to the State's case and it impermissibly bolstered the complaining witness' trial testimony. The trial court's error was not harmless because it was cumulative to the complaining witness' testimony, "which enhances the devastating impact of improper corroboration." *Whisonant*, 335 S.C. at 156, 515 S.E.2d at 772 (quoting *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994) ("Improper corroboration testimony that is *merely cumulative to the victim's testimony*, . . . cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration"). The prejudice to Appellant was enhanced by the jury's request to rehear the 911 recordings. R. 343, l. 3 – 344, l. 24; Court's Exhibit # 5 (Jury Note); *See State v. Blassingame*, 271 S.C. 44, 244 S.E.2d 528 (1978) (jury had "focused critical attention").

Appellant was also prejudiced by the State's closing argument because Assistant Solicitor Tooker highlighted the improper hearsay evidence and improperly vouched for all of the State's witnesses.[2] R. 319 – 342. Assistant Solicitor Tooker improperly argued, "Now, why would she lie? What reason would she have to lie to you about this event. *The State says there is no reason. She has no reason to lie.*" R. 322, ll. 14-16 (emphasis added). Assistant Solicitor Tooker also referenced the improperly admitted hearsay evidence twice when vouching for the mother's trial testimony during his closing argument. R. 323, l. 9 – 324, l. 2; R. 341, ll. 13-14. For example, Assistant Solicitor Tooker stated:

> You heard the 911 tape . . . Why is it that she would lie? I mean, what reason would she have to lie about those events? . . . There's nothing beneficial to her about lying. All she really does is open herself up to perjury charges if she does like while she's on the stand. So she gets up there and promises to tell the truth because that's what's right. That's what's expected and that's her duty as a witness.

R. 323, l. 15 – 324, l. 2. Accordingly, the trial court's error was not harmless.[3]

---

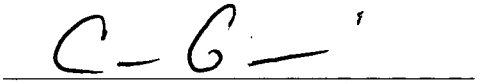
[2] Assistant Solicitor Tooker referenced the word "lie" twenty-five times in his closing argument. R. 319 – 342. *See State v. Shuler,* 344 S.C. 604, 545 S.E.2d 805, *cert. denied,* 534 U.S. 977, 122 S.Ct. 404 (2001) (noting "a solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. . . . Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity . . . .") (citations omitted).

[3] Appellant was further prejudiced by Assistant Solicitor's improper comments about defense counsel: "Now, uh, [defense counsel] was up here talking a lot. A lot of hand gestures. It kind of reminded me of a magician . . . They use slight of hand. . . . [B]ut the purpose of course is to distract." R. 330, l. 22 – 331, l. 5. *See State v. Inman,* 395 S.C. 539, n. 18, 720 S.E.2d 31, n. 18 (2011) ("[T]his Court is concerned with the 'win at all costs' attitude that appears to permeate the Solicitor's office."); *see also State v. Quattlebaum,* 338 S.C. 441, 527 S.E.2d 105 (2000) (finding "[p]rosecutors are ministers of justice and not merely advocates … [that] has special responsibilities to do justice and is held to the highest standards of professional ethics. . . . We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice").

CONCLUSION

For the foregoing reasons, Appellant Matthew Hendricks respectfully requests that this court reverse his convictions and remand this case to the Pickens County Court of General Sessions for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 26th, 2013

Carmen V. Ganjehsani
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED
AUG 26 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MATTHEW RYAN HENDRICKS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201, this 26th day of August, 2013.

C_C_

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of August, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.