

ORIGINAL

RECEIVED

OCT 13 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Fairfield County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL D. WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2012-212501

FINAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<u>Simpson v. Moore</u> , 367 S.C. 587, 627 S.E.2d 701 (2006)	17
<u>State v. Finley</u> , 300 S.C. 196, 387 S.E.2d 88 (1989).....	20
<u>State v. Grovenstein</u> , 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000)	17, 19, 20, 21
<u>State v. Lang</u> , 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991)	20
<u>State v. Mekler</u> , 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005).....	18, 19
<u>States v. Beauchamp</u> , 986 F.2d 1 (1 st Cir. 1993).....	19

Statutes

S.C. Code Ann. § 16-3-659.1	19
-----------------------------------	----

Other Authorities

<u>Wigmore on Evidence: Impeachment and Rehabilitation</u> , § 5.9	18, 19
--	--------

Rules

Rule 403, SCORE.....	17
----------------------	----

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred because it excluded undisputed evidence that complainant's stepbrother had sexually abused her when such evidence was relevant to the integrity of the investigation and forensic interview, to show an independent source of complainant's sexual knowledge, and complainant's mother falsely denied that such abuse occurred?

STATEMENT OF THE CASE

On December 16, 2008, Michael D. Williams (“Williams”) was indicted in Fairfield County for two counts of criminal sexual conduct with a minor, first degree, and five counts of committing a lewd act upon a child. R. 243. On May 29, 2012, the indictments were amended. R. 243. On July 9 – 12, 2012, Williams was tried before the Honorable Brooks P. Goldsmith and a jury. R. 1. Sandra Sutton and Curtisha Mingo represented the State. R. 1. Jack Swerling represented Williams. R. 1. The jury convicted Williams on all counts. R. 237, l. 7 – 238, l. 13. Judge Goldsmith sentenced Williams to twenty-five years’ imprisonment for criminal sexual conduct charges and fifteen years’ imprisonment on the lewd act charges. R. 242, ll. 2 – 10. Judge Goldsmith imposed concurrent sentences. R. 242, ll. 2 – 10. On July 16, 2012, Williams served a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred because it excluded undisputed evidence that complainant's stepbrother had sexually abused her when such evidence was relevant to the integrity of the investigation and forensic interview, to show an independent source of complainant's sexual knowledge, and complainant's mother falsely denied that such abuse occurred.

Relevant Facts

Complainants are half-sisters, Older Sister and Younger Sister, who began attending Dorothy and Mike Williams' daycare in 2003. R. 6, ll. 8 – 14. Younger Sister was eleven years old at the time of trial. R. 33, ll. 1 – 2. Older Sister was seventeen years old at the time of trial. R. 82, ll. 22 – 23. Older Sister and Younger Sister both testified that they had a close relationship with the Williams and loved attending their daycare. R. 101, ll. 13 – 25 (Older Sister); R. 52, l. 17 – 87, l. 20 (Younger Sister). Both children testified that the Williams treated them like grandchildren. R. 101, ll. 24 – 25 (Older Sister); R. 62, ll. 12 – 14 (Younger Sister). Their mother then placed them in a cheaper daycare run by Donna McManus ("McManus"). When McManus died, Younger Sister returned to the Williams' daycare. R. 60, l. 3 – 62, l. 11. When Younger Sister returned, her close relationship with the Williams continued. R. 62, ll. 9 – 14. Older Sister continued to visit the Williams after enrolling in the cheaper daycare. R. 109, l. 23 – 110, l. 15. The alleged abuse occurred before the children left and then returned to the Williams' daycare. R. 71, ll. 7 – 20.

The Reporting of the Alleged Abuse

Younger Sister did not report the alleged abuse to her parents at the time she returned to the Williams' daycare. R. 71, ll. 23 – 25. Instead, she testified that she was happy to return to the Williams' daycare and looked forward to having fun there. R. 71, ll.

17 – 22. After her return, Younger Sister attended the Williams' daycare for over a year before the abuse allegations were made. R. 26, ll. 15 – 21.

The testimony about how and when the allegations of abuse arose was contradictory. The children's parents divorced in 2004. R. 6, l. 21 – 7, l. 1. Jeffrey Rowles, Younger Sister's father, filed a report with the Fairfield County Sheriff's Office on Monday, September 15, 2008. R. 152, ll. 3 – 24. Rowles claimed to receive a phone call from his ex-wife, Susan Rowles, the previous Wednesday. R. 152, l. 25 – 153, l. 19. That Friday, Jeffrey Rowles claimed he spoke with Younger Sister about the allegations. R. 153, ll. 7 – 24.

Susan Rowles, mother of both children, claimed that Younger Sister was the first to tell her about the alleged inappropriate touching. R. 8, ll. 5 – 13. Susan Rowles said she contacted her ex-husband and did not ask her children further questions about the alleged abuse. R. 10, l. 12 – 11, l. 11; R. 28, ll. 7 – 16. Susan Rowles said she never did any "in-depth questioning" of her children about the incidents. R. 29, ll. 5 – 11.

Susan Rowles' testimony was contradicted by that of her children. Younger Sister claimed that Older Sister asked her if Williams had ever touched her and she responded "yes." R. 48, ll. 6 – 10. Younger Sister testified that Older Sister then told her parents about the allegations. R. 48, ll. 11 – 18. Younger Sister testified that she "talked to [her] mom a lot of times about" the alleged abuse. R. 74, ll. 2 – 3. She said her mom was "curious as to what happened." R. 74, ll. 11 – 13. Younger Sister also testified that she talked to her father "a lot of times" about the alleged abuse. R. 74, ll. 4 – 5. Younger Sister claimed that she had not discussed the incidents very often with Older Sister. R. 73, l. 1 – 74, l. 1.

Older Sister's testimony about when the alleged abuse was disclosed was even more confusing. On direct examination, Older Sister stated that she first disclosed the alleged abuse to her counselor. R. 91, ll. 9 – 14. She said this disclosure was made after Younger Sister told her about the alleged abuse. R. 91, ll. 5 – 8. Older Sister then stated that after her discussion with Younger Sister, she told her mother about the allegations related to Younger Sister and herself. R. 92, l. 17 – 93, l. 8.

On cross-examination, Older Sister testified that Younger Sister had been around whenever she discussed the abuse allegations with her mother. R. 97, ll. 12 – 17. She stated that Younger Sister had “a number of discussions” about the allegations with her mother. R. 97, ll. 18 – 20. Older Sister also claimed that during her original enrollment at the Williams’ daycare, she told her mother that Williams’ granddaughter said that Williams “touched her butt.” R. 111, l. 23 – 112, l. 25. Older Sister admitted that this claim about the granddaughter was a lie. R. 112, ll. 1 – 5. Older Sister claimed that she made up the story about the granddaughter because she “wanted to see how my mom would act.” R. 112, ll. 1 – 25. Older Sister stated that she never told her mother that this allegation about the granddaughter was not true “until recently.” R. 114, ll. 13 – 14.

Older Sister also repeated the false allegation about the granddaughter to the Department of Social Services. R. 127, l. 16 – 128, l. 14. She did not tell DSS that the allegation about the granddaughter was a lie. R. 127, l. 20 – 128, l. 14. Older Sister claimed that the reason she repeated the lie to DSS was because she “thought it would make a difference.” R. 128, ll. 8 – 14. Backtracking, Older Sister then said that she thought her statement “might have said it was a lie.” R. 128, ll. 11 – 14. The statement to DSS said, “The last time he touched me I told my mom [that Williams’ granddaughter] told me that he

touched on her. I basically told her everything he did to me, then Donna [McManus] died.”

R. 133, l. 13 – 172, l. 19. If the timing of this claimed disclosure in the DSS statement was correct, that meant that Older Sister told her mother about the alleged abuse before the mother returned Younger Sister to the Williams’ daycare and almost two years before the allegations were reported to the police.

The statement to DSS was written approximately one week after Younger Sister made the allegations of abuse to her mother. R. 134, ll. 20 – 24. The DSS investigator who took the statement testified that Older Sister never told her that the allegation regarding the granddaughter was a lie or that Older Sister had transposed granddaughter’s name with her own. R. 186, l. 24 – 187, l. 5. Older Sister again attempted to explain this contradiction in her statement:

Q. Whoever asked you to write this, you said you explained it to your mom because you wanted her to think it was [granddaughter], correct?

A. Not –

Q. You are testing.

A. I was testing what she would do, yes.

Q. What her reaction would be about [granddaughter] being touched, correct?

A. Yes, sir.

Q. Why didn’t you tell that to DSS?

A. Why didn’t I?

Q. Why didn’t you? Because in your statement to DSS you don’t tell them that you told your mother about what was happening to you but using [granddaughter’s] name, why didn’t you tell that to DSS four years ago?

A. I wasn't looking at it the way, I knew it.

Q. Okay. But you knew it that way, but don't you think DSS or whoever was taking your statement or was going to use the statement wanted to know what you told your mother?

A. I didn't think that.

Q. So you lied to them, too.

A. I didn't lie to them.

Q. Well, you didn't tell them that you are now saying – what you're saying now is that it really wasn't [granddaughter] – let me ask you something, you know [granddaughter] doesn't agree with you here, don't you?

A. Okay.

Q. [Granddaughter] never told you that and you know that.

A. Okay.

R. 146, l. 20 – 147, l. 23.

The Abuse Allegations

The particulars of the alleged abuse were also contradictory. Both children testified they did not remember exactly when the alleged incidents occurred. R. 37, ll. 5 – 8 (Younger Sister); R. 85, ll. 13 – 14 (Older Sister). Interestingly, both children kept journals after the reporting of the abuse at the suggestion of counselors. R. 66, ll. 1 – 22 (Younger Sister); R. 93, l. 24 – 95, l. 8. Both children wrote about the allegations in their journals. R. 67, l. 19 – 68, l. 8 (Younger Sister); R. 95, ll. 2 – 5; R. 130, ll. 14 – 20 (Older Sister). Despite being subpoenaed, neither journal made its way to trial or was ever viewed by the defense. Older Sister claimed her journal was lost. R. 94, l. 1 – 95, l. 8. Younger Sister said her father ripped the pages containing the details of the abuse out of her journal and threw them away. R. 66, l. 25 – 67, l. 5. Jeffrey Rowles unapologetically admitted to

removing these pages and telling his daughter not to write anything else down about the incidents. R. 162, l. 5 – 164, l. 4.

Younger Sister claimed that Williams touched her vagina several times. R. 36, l. 22 – 37, l. 4. She claimed that Williams “mostly did it outside, there was only a few times when he did it inside.” R. 38, ll. 21 – 24. Usually Dorothy Williams was in the house when the events allegedly happened. R. 47, ll. 9 – 10. The house was small. R. 57, ll. 16 – 17. The doors to the rooms where the abuse allegedly occurred were never closed or locked. R. 58, ll. 5 – 12. Dorothy Williams would come and go throughout the house. R. 58, l. 9 – 59, l. 4. Younger Sister never told anyone that Williams digitally penetrated her until her forensic interview. R. 78, ll. 10 – 21. She also testified in a way that contradicted her forensic interview. In the interview (and as alleged in Indictment No.2008-GS-20-506), Younger Sister claimed that she put her hands on Williams’ penis. In her trial testimony, Younger Sister denied ever touching Williams’ penis. R. 50, ll. 2 – 16.

During her direct-examination, Older Sister claimed that Williams digitally penetrated her three times: in the swimming pool, in the computer room, and in the bedroom during the daytime while his granddaughter was also in the bed. R. 86, ll. 20-25; R. 88, ll. 2 – 18; R. 89, ll. 6 – 21. On cross-examination, Older Sister admitted that she did not put anything in her prior statement about Williams inserting his finger into her vagina in the swimming pool. R. 120, ll. 2 – 20. As for the incident in the bedroom, Older Sister could not remember why she was spending the night at the Williams’ house, what anyone was wearing when the incident occurred, or where Dorothy Williams was. R. 122, l. 19 – 126, l. 1. In her handwritten statement, she never mentioned digital penetration. R. 141, ll. 4 – 7. She admitted that she told a DSS investigator Williams left his finger in her vagina

for over an hour. R. 140, l. 15 – 141, l. 7; 143, ll. 8 – 11. Older Sister also admitted that Younger Sister never mentioned digital penetration to her. R. 143, ll. 12 – 17.

The Stepbrother

In 2003, when she was eight or nine years old, Older Sister's stepbrother ("Stepbrother") forced her to perform oral sex on him. R. 40, l. 2 – 43, l. 14. This abuse happened at the same time as the abuse allegedly committed by Williams. R. 40, l. 2 – 43, l. 14. Jonathan Rowles reported the matter to the Fairfield County Sheriff's Office. R. 40, l. 2 – 43, l. 14; Court's Ex. 2. The sheriff's office closed their investigation after the family told them they wanted to handle it internally. R. 40, l. 2 – 43, l. 14; Court's Ex. 2. After defense counsel summarized Stepbrother's abuse and the investigation (or lack thereof) for the trial court, the solicitor said, "Judge, we don't dispute the facts." R. 42, l. 2.

In 2008, when Susan Rowles took Younger Sister to the Assessment and Resource Center ("ARC") for a forensic interview by Heather Smith ("Smith"), she filled out a questionnaire. R. 30, l. 12 – 31, l. 14; Court's Ex. 1. Question 5 asks, "Has there ever been a child abuse investigation involving this child or family before? If YES, describe." Court's Ex. 1. Susan Rowles checked the box beside "NO." Court's Ex. 1. Susan Rowles was the State's first witness. During the cross-examination of Susan Rowles about the ARC form, the following occurred:

Q. This is what they call an intake form questionnaire for the forensic interview, correct?

A. Yes.

Q. And did you answer all of these questions accurately and truthfully?

A. Yes.

MR. SWERLING: Judge, can I approach the bench with Ms. Hickman for a moment and discuss something with you?

THE COURT: Sure.

(Bench Conference was held.)

THE COURT: You may continue.

MR. SWERLING: Thank you, Judge.

BY MR. SWERLING:

Q. The form that I just showed you, you recognize that form as the assessment and resource center caregiver questionnaire for a forensic interview?

A. Yes.

Q. And this is the form that you filled out on October 3rd when you went down for the ARC interview, where your daughter went down for the ARC interview; is that correct?

A. Yes.

Q. And directing your question to number five, "Has there ever been a child abuse investigation involving this child or the family before," your answer that you checked was no; is that correct?

A. There was never any investigation on [Younger Sister] before.

Q. I didn't ask you that. You said has there ever been a child abuse investigation about the child or the family before and you checked no.

A. Yes.

R. 30, l. 23 – 32, l. 2. Defense counsel asked two more questions of Susan Rowles and then she was dismissed. R. 32, ll. 4 – 17. The State then immediately called Younger Sister to the stand. R. 32, ll. 17 – 22.

After some questioning of Younger Sister by the State, defense counsel asked to approach and the trial judge held a bench conference. R. 39, ll. 7 – 10. The court then excused the jury. R. 39, ll. 11 – 15. Defense counsel then placed on the record the arguments and ruling made at the time of the bench conference during Susan Rowles' testimony about the ARC form:

THE COURT: Well let's – the reason for the sidebar that we had last was?

MR. SWERLING: Judge, while Ms. Rowles was on the stand I showed her a document which was the Assessment Resource Center caregiver questionnaire for the forensic interview, it was done on October 3rd of 2008. This is a – she said she filled it out, I guess we ought to make this a Court Exhibit.

THE COURT: Okay.

MR. SWERLING: So Judge, this is a document that is used when someone goes for the ARC interview and Ms. Rowles was the reporter, filled it out in her own handwriting. On question number five it says, "Has there ever been a child abuse investigation involving this child or family before? If yes describe?" and she answered no. My intent at that time was to go ahead and impeach her about the events that we discussed yesterday that actually are not on the record yet, but in – and I don't know that there is a dispute about what happened in 2004 but let me state what I think would be an acceptable stipulation, if they would stipulate rather than have to put up this testimony. But in April of 2004 there was a report made to the sheriff's department – Fairfield County Sheriff's Department through DSS by Jeffrey Rowles, the father, that said that he had had a conversation with a – that his son, [Stepbrother], who is his son, admitted to requiring or forcing [Older Sister] to have oral sex with him over a period of time. . . . And it was – it has been our contention that that conduct is very relevant in this case because [Older Sister] at the age of eight or nine was exposed herself to sexual abuse. We're certainly not offering it for – to impugn her chastity under the Rape Shield Statute but to be able to show that a child at the age of eight or nine goes through incredible psychosexual changes, psychological changes

which could affect her in her development and would have an impact on this case. Also it shows that she would have a source of knowledge about sexual activity independent completely of whatever she alleges Mr. Williams did. We haven't gotten to that point yet, I know about [Grovenstein] and we discussed that case actually informally in chambers, but what I'm seeking to do now is use that information for impeachment purposes since the document was not answered truthfully because there was, in fact, an investigation involving the family before. Let me just add, does anybody have any dispute about what the facts were in 2004?

MS. SUTTON: Judge, we don't dispute the facts. . . . but there were other reasons as far as the State objecting to that information coming in.

MR. SWERLING: I'm just at this point – just for the offer of proof that we all accept that's what happened. And I will offer a copy of the incident report as an accurate report of what happened in 2004. So my purpose was for impeachment purposes that the questionnaire was not filled out properly.

THE COURT: Right. And at the side bar the Court sustained an objection to that request finding that that was not relevant at least at this time, that it would be a collateral impeachment, that she did answer the question by saying that how she had answered – how she had answered that questionnaire, and I think that whether or not it was truthful or not has not been shown to be relevant at this stage. That was the ruling at the side bar and it continues to be the ruling on the record.

MR. SWERLING: Your Honor, this is the 2004 incident report.

THE COURT: Yes. You may still as I understand it make another motion at the conclusion of the State's case concerning the admissibility of that investigation separate and apart from this; is that correct?

MR. SWERLING: Yes, sir. And I may depending upon what's presented by the State in the case see if I can establish the relevancy of it.

R. 39, l. 18 – 43, l. 7. The jury then returned to the courtroom and the State continued its direct examination of younger sister. R. 43, ll. 14 – 22.

The issue of Stepbrother's abuse arose again during the cross-examination of Shanay Moore ("Moore"), the DSS investigator. Moore testified that it would be important for DSS to know about prior familial abuse during an investigation. R. 188, ll. 15 – 20. The State objected, the court held a bench conference, then excused the jury. R. 188, l. 24 – 189, l. 1. The State objected to the admissibility of any questioning regarding Stepbrother or the investigation concerning stepbrother. R. 189, ll. 4 – 190, l. 3. The State also objected on relevancy grounds. R. 190, ll. 1 – 3. The court allowed defense counsel to question Moore outside the presence of the jury. Moore testified *in camera* that it was important to get a history of sexual abuse inside the family and that Jeffrey Rowles disclosed Stepbrother's abuse to DSS, and that the previous abuse was not disclosed on the ARC interview form. R. 190, l. 8 – 200, l. 15. The trial judge sustained the State's objection, finding that this questioning was not relevant and the evidence was more prejudicial than probative. R. 200, ll. 18 – 23. After the trial court ruled, defense counsel stated that he was laying a foundation for the admissibility of this evidence to which the court responded, "I understood." R. 200, l. 24 – 201, l. 1.

The next witness was the forensic interviewer, Smith. During *in camera* questioning, Smith testified that it was important to know whether there was a past history of abuse. R. 214, l. 14, 215, l. 25. Smith stated that knowledge of a past history of abuse in the family would be important because she would want to ask about that during a forensic interview. R. 215, ll. 4 – 16. Smith testified that at the time of the forensic interview she did not know that Stepbrother had sexually abused Older Sister. R. 216, ll. 7 – 19. She

agreed that the answer given on the ARC intake form was not true and was inconsistent with the family's history of abuse. R. 216, l. 7 – 217, l. 2. Smith testified that had she known about this abuse it would have changed the way she conducted the forensic interview and would have resulted in an additional line of questioning. R. 218, l. 7 – 220, l. 24. She agreed that she could not ask those questions during the interview because the information was not given to her on the ARC intake form. R. 220, ll. 16 – 24.

Trial counsel then renewed his request to introduce evidence regarding the prior abuse and Susan Rowles' failure to provide truthful answers on the ARC intake form. R. 224, l. 21 – 229, l. 15. Trial counsel stated that the information was clearly relevant because it would have influenced the investigation, and would have shown an independent source of knowledge concerning sexual activity. R. 224, l. 21 – 226, l. 8. Trial counsel offered to limit his questioning such that "the gory details" of the abuse would not be mentioned in front of the jury. R. 226, ll. 2 – 8. The State maintained its objection on relevancy grounds and that it was barred by the Rape Shield Statute. R. 226, l. 10 – 228, l. 9. Defense counsel stated that the purpose of admitting this evidence was not to impugn the character or chastity of Older Sister and therefore it was not precluded by the Rape Shield Statute. R. 228, l. 10 – 229, l. 15. The trial court ruled that this evidence was inadmissible. R. 229, ll. 16 – 25. The basis for the trial court's ruling was that the probative value was outweighed by the prejudicial effect and that it was barred under the Rape Shield Statute. R. 229, ll. 16 – 25.

Discussion

The trial court's refusal to allow Williams to question the State's witnesses or present evidence regarding Stepbrother's abuse was error. The trial court's rulings that this evidence was inadmissible this evidence were based on four grounds: (1) relevance; (2)

collateral impeachment; (3) the Rape Shield Statute; and (4) Rule 403. On each of these points, the trial court abused its discretion. Had the evidence been admitted, it would have made a difference in this case where the children and adults' testimony was contradictory and problematic.

Evidence of Stepbrother's Abuse was Relevant

Evidence that has "any tendency" to make the existence of any consequential fact more or less probable is relevant. SCRE 401. Evidence of Stepbrother's abuse was relevant for several reasons. First, the failure of the mother to disclose the prior abuse was relevant to the integrity of the investigation. See Simpson v. Moore, 367 S.C. 587, 598-99, 627 S.E.2d 701, 707-08 (2006) (holding in a PCR case that the police's sloppy investigation conducted in which they gave key evidence to the victim's brother without telling the defense prejudiced defendant). It is undisputed that the mother provided false information on the ARC intake form. The forensic interviewer, Smith, testified that she needed truthful information concerning the family's history in order to conduct an accurate forensic interview. R. 218, l. 7 – 220, l. 24. The DSS investigator testified that it would be important for DSS to know about prior familial abuse during an investigation. R. 188, ll. 15 – 20. The mother's concealment of this information from the authorities makes it more probable that the investigation was flawed.

Second, this information was relevant because it showed that Younger Sister had a possible source of information about sexual activity other than the defendant. This Court has held that such evidence is relevant and admissible in child sex abuse cases. State v. Grovenstein, 340 S.C. 210, 219, 530 S.E.2d 406, 411 (Ct. App. 2000). Had this evidence been admitted, it would have shown that such abuse occurred in this family and raised the

possibility that Younger Sister learned about sexual activity either from Older Sister or even from Stepbrother. Younger Sister said in her forensic interview that she saw Stepbrother and his children (Stepbrother was twenty years old at the time of the interview) on a regular basis. (State's Ex. 1.)

Finally, this evidence was relevant because it dealt with the credibility of the State's first witness, Susan Rowles. Not only did Susan Rowles make a false statement on the ARC form, she testified falsely to the jury that all of the information on the form was correct. She even attempted to cover up her false statement by trying to make it sound as if she had only answered the question as related to Younger Sister. When defense counsel asked her about her answer whether there had been an investigation concerning the child **or the family**, Susan Rowles responded, "There was never any investigation on [Younger Sister] before." R. 31, ll. 19 – 23. The court's ruling prevented the defendant from impeaching this important witness.

*Questioning Susan Rowles Concerning Stepbrother's Abuse and Her Answers on the
ARC Form Was Not a Collateral Impeachment*

The trial court also erroneously ruled that impeaching Susan Rowles would have been a collateral impeachment. The collateral impeachment rule prevents use of extrinsic evidence to impeach a witness on matters that are not germane to the case. See Wigmore on Evidence: Impeachment and Rehabilitation, § 5.9. The purpose of the collateral impeachment rule is to prevent a party from attacking a witness's credibility with evidence that the witness was inaccurate about some detail that has no bearing on the case. Id.

For example, in State v. Mekler, 368 S.C. 1, 10-12, 626 S.E.2d 890, 894-96 (Ct. App. 2005), this Court found that an intended impeachment was collateral. A wife was a

witness to the shooting of her husband. At trial, the wife denied that she had ever said she was afraid of her husband. The defense attempted to impeach her by calling a police officer who would testify that she had made such a remark. Id. The defense offered the evidence solely to impeach the wife's credibility. Id. Mekler held that such evidence was properly excluded as collateral because it was offered solely on the issue of credibility and was not related to "bias, prejudice, or any motive to misrepresent." Id.; see also SCRE 608(c).

Unlike Mekler, the extrinsic evidence concerning the ARC form was not offered solely on the issue of credibility and concerned a matter central to the case: the children's sexual knowledge and the integrity of the investigation. Whether an inconsistent statement is collateral is determined by whether the fact could be introduced into evidence independently of the self-contradiction. See Wigmore, § 5.9; see also United States v. Beauchamp, 986 F.2d 1, 3-4 (1st Cir. 1993) (refusing defendant's request to call a witness to demonstrate that a witness testified falsely about his address). This was not a question on a collateral matter where a party "must take [the] answer." Id. The evidence concerning Stepbrother's abuse was highly relevant to central issues in the case and should have been admitted at several points during the case. Therefore, the trial court erred in holding that extrinsic evidence was inadmissible under the collateral impeachment rule.

The Rape Shield Statute Does Not Bar Evidence of Stepbrother's Abuse

Despite acknowledging that it had reviewed this Court's opinion in Grovenstein, the trial court found that the Rape Shield Statute, S.C. Code Ann. § 16-3-659.1, barred admission of Stepbrother's abuse. R. 229, ll. 16 – 25. The Rape Shield Statute bars the admission of specific instances of a victim's sexual conduct or opinion evidence regarding a

victim's sexual reputation. See S.C. Code Ann. 16-3-659.1(1). However, there are exceptions to this rule and this case falls squarely within one of them.

In Grovenstein, the victims accused the defendant of anally penetrating them with rolled-up paper. Grovenstein at 213, 530 S.E.2d at 408. Before the victims knew the defendant, they had been "accused of inserting objects in the vagina and rectum of a young girl." Id. This Court held that evidence of these accusations prior to meeting the defendant "should have been admitted because it provided an alternate explanation of how the young victims would be familiar with the sexual conduct they alleged [the defendant] committed." Id. at 220, 530 S.E.2d at 412. The Court ruled that the Rape Shield Statute "is not a blanket exclusion of evidence concerning alternative sources of a child victims of sexual knowledge." Id. at 219, 530 S.E.2d at 411. See also State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991) (holding that evidence of other sexual acts was admissible when offered for a purpose other than to attack the victim's morality); State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989) (holding that evidence of a sexual encounter was admissible because was offered for purposes other than to attack the complainant's character).

Nothing about the offered evidence concerning Stepbrother shows that its purpose was to impugn Older Sister's chastity or morality. No one holds an abused child morally responsible for abuse. Just as in Grovenstein, the evidence concerning Stepbrother was offered to show an alternative source of a child's sexual knowledge. It was also offered to show that the investigation of the crime was flawed. Both the forensic interviewer and the DSS investigator testified this information would have been important to their investigations. Defense counsel even offered to limit what he introduced to prevent inclusion of "the gory details." R. 226, ll. 2 – 8. Because the information about

Stepbrother was not offered for the reasons contemplated by the Rape Shield Statute and because it falls under the specific exception articulated in Grovenstein, the trial court erred.

Evidence of Stepbrother's Abuse Was More Probative than Unfairly Prejudicial

The trial court also held that evidence of Stepbrother's abuse was more prejudicial than probative. SCRE 403. In Grovenstein, the evidence offered consisted merely of accusations. Grovenstein at 220-21, 530 S.E.2d at 412. The accusations also alleged that the victims had committed crimes – horrible crimes. Id. This court held that the danger of unfair prejudice did not outweigh the probative value of this evidence. Id.

In this case, the allegations regarding Stepbrother were not disputed by the State. Nothing about the evidence concerning Stepbrother accused the victims of committing any crimes or any act that made them culpable in any way. The unfairly prejudicial value therefore was low. Conversely, the probative value was high because it affected the way the State's investigators acted and showed an independent source of sexual knowledge for younger sister. The trial court's balancing test was erroneous.

Refusing to Admit this Evidence Was Not Harmless

Preventing the jury from hearing the evidence of Stepbrother's abuse and that this knowledge was kept from the State's investigators was not harmless. The harmless error analysis conducted in Grovenstein is instructive in this case. No forensic evidence existed in this case to corroborate the victims' testimony. Therefore this case hinged on the victims' testimony. These same factors were used in Grovenstein to find that the error prejudicial.

Here, the children's testimony was contradictory. Older Sister did not withstand cross-examination and admitted to lying about the allegation of abuse concerning Williams' granddaughter. Her testimony also made little sense when compared with her prior

statement. She could not keep her story straight about when she disclosed the abuse allegations. She also failed to include evidence that was used to convict Williams on the most serious charge—digital penetration—in her earlier statement. Finally, her allegation that Williams inserted his finger into her vagina and left it there for over an hour when his granddaughter was also in the bed beside is difficult to believe.

An additional reason why the error was not harmless was because the jury clearly credited what they heard during younger sisters forensic interview. From the witness stand, Younger Sister denied ever touching the defendant's penis. R. 76, l. 25 – 77, l. 21. The only evidence that Younger Sister ever touched the defendant's penis was contained in the forensic interview. (States Exhibit 1) The jury convicted Williams on Indictment 506 which specifically alleged that Younger Sister had been forced to place her hands on Williams' penis. R. 238, ll. 5 – 8. Indictment 2008 – GS – 20 – 506. Had the jury heard that the forensic interviewer did not have all of the facts concerning the family's history of abuse and would have conducted additional questioning during the interview, it would have allowed the defendant to attack the reliability of the forensic interview. Considering the importance the jury obviously placed on the forensic interview, it is impossible to say that any fact which would have made the interview seem unreliable was not important. Therefore, the error in refusing to admit the evidence regarding Stepbrother cannot be considered harmless.

It also appears that the trial judge did not agree with the jury's verdict. At sentencing, the trial judge addressed Williams:

THE COURT: Mr. Williams, as you heard your attorney say the jury has spoken in this case, the law does not permit me to comment on my personal opinion about the verdict of the jury.

THE DEFENDANT: I understand.

THE COURT: I'm not permitted to say whether I agree or disagree with the jury's verdict. The legislature has determined that I cannot sentence you to any less than 25 years on the criminal sexual conduct first degree cases, which I am going to do.

R. 241, l. 22 – 242, l. 7. The trial judge's comments show that he thought the evidence in the case was suspect and highlights the difference that the evidence regarding Stepbrother might have made.

CONCLUSION

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

Respectfully submitted,



David Alexander
Appellate Defender

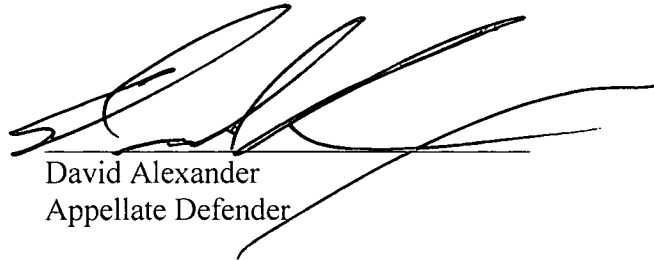
ATTORNEY FOR APPELLANT

This 16th day of October, 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."

October 16th, 2013

A handwritten signature in black ink, appearing to read "David Alexander", is written over a horizontal line.

David Alexander
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
OCT 16 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Fairfield County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

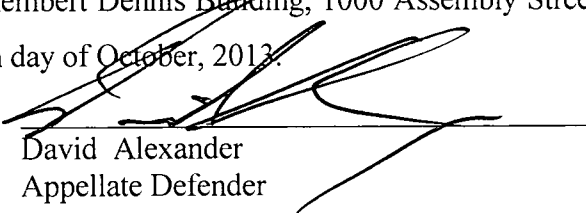
MICHAEL D. WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2012-212501

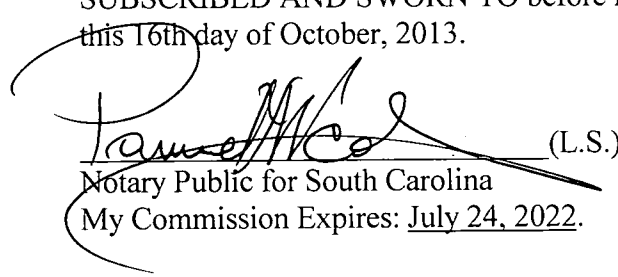
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Julie Kate Keeney, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of October, 2013.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of October, 2013.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

RECEIVED
OCT 16 2013
SC Court of Appeals