STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Fairfield County
Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2012-212501

THE STATE,

Respondent,

vs.

MICHAEL D. WILLIAMS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

The trial court properly excluded the evidence regarding the sexual abuse against Oldest Victim committed by Stepbrother because the evidence was barred by the Rape Shield Statute, not relevant under Rules 401 and 402, SCRE, and inadmissible under Rule 403, SCRE. Regardless, even if the trial court erred in excluding the evidence, any error was harmless.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In 2003, Youngest Victim and Oldest Victim[1] attended daycare at Appellant's home. (R. p. 6.) At the time of trial, Youngest Victim was eleven years old, and Oldest Victim was seventeen years old. (R. p. 33; R. p. 82). Because of financial reasons, Youngest Victim and Oldest Victim's mother ("Mother") placed them in a cheaper daycare, which was operated by Donna McManus. (R. pp. 7-8.) When McManus died, Youngest Victim returned to the daycare operated by Appellant and his wife. (R. pp. 8-9.) Oldest Victim stopped going to daycare after McManus died, but she would occasionally visit Appellant's home. (R. pp. 109-110.)

In September of 2008, Youngest Victim disclosed that Appellant sexually assaulted her. (R. p. 9; R. p. 28; R. pp. 152-153.) According to Youngest Victim, Appellant touched her on her private part on more than one occasion. (R. pp. 36-37.) On one occasion, Appellant touched Youngest Victim on her private part when she was in the computer room on top of Appellant's lap. (R. pp. 37-38.). Appellant told Youngest Victim that "[i]t's supposed to feel good." (R. p. 37.) On a few occasions, Appellant touched the "inside" of Youngest Victim's private part. (R. p. 38; R. p. 44.) On another occasion, Appellant touched Youngest Victim's private part while she was in Appellant's bed. (R. p. 45.) On a different occasion, Appellant told Youngest Victim to "get on [her] knees and [she] was beside him on [her] knees on the floor and [Appellant] was in the chair and [Appellant] was wearing those short orange shorts and [his penis] fell out and [Appellant] told [her] to stick it back into his shorts, but after that there was like this stuff that came out . . . of his private part." (R. p. 50.)

[1] Youngest Victim and Oldest Victim are half-sisters. (R. pp. 4-5.)

Sometime after Youngest Victim disclosed the sexual abuse, which was in September of 2008, Oldest Victim disclosed that she was also sexually abused by Appellant.[2] (R. p. 91.) According to Oldest Victim, Appellant touched Oldest Victim inappropriately on multiple occasions. (R. p. 85.) On at least one occasion, Appellant "put his finger down in [Oldest Victim's] bikini, then he put his finger inside [her]." (R. p. 86.)

According to defense counsel, in April of 2004, Youngest Victim's father (not Oldest Victim's father) filed a police report alleging that his son ("Stepbrother") admitted to forcing Oldest Victim to perform oral sex. (R. p. 40.) Defense counsel stated that "[t]he matter was discussed with the family, the family said they would handle the matter internally , did not want to go through the court system and as a result of that DSS did not do an investigation nor did the Fairfield County Sherriff's Department do anything further, they closed their file." (R. p. 41.) The State did not dispute these facts but maintained that the evidence was inadmissible. (R. p. 42.) Ultimately, the trial judge found that the evidence was not relevant, the probative value was substantially outweighed by the prejudicial effect, and inadmissible under the Rape Shield Statute because the sexual abuse that Oldest Victim alleged Appellant committed was not similar to the sexual abuse committed by Stepbrother. (R. p. 42; R. p. 200; R. p. 229.)

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[2] Oldest Victim made it clear that she first disclosed the sexual abuse after she stopped going to daycare altogether. (R. p. 91.) In Appellant's brief, Appellant points out that Oldest Victim made a statement to DSS that said the following: "The last time he touched me I told my mom [that Appellant's granddaughter] told me that he touched on her. I basically told her everything he did to me, then Donna [McManus] died." (R. pp. 133-138.) Appellant claims that "[i]f the time of this claimed disclosure in the DSS statement was correct, that meant that [Oldest Victim] told her mother about the alleged abuse before the mother returned Younger Sister to the Williams' daycare and almost two years before the allegation were reported to the police." (App. Br. p. 8.) However, in an attempt to explain her statement to DSS, Oldest Victim testified that she made up the sexual abuse against granddaughter to see how her mother would react. Oldest Victim essentially told her mother all of the sexual abuse that Appellant committed on Oldest Victim but said it happened to granddaughter instead. (R. pp. 135-136.)

ARGUMENT

I.

The trial court properly excluded the evidence regarding the sexual abuse against Oldest Victim committed by Stepbrother because the evidence was barred by the Rape Shield Statute, not relevant under Rules 401 and 402, SCRE, and inadmissible under Rule 403, SCRE. Regardless, even if the trial court erred in excluding the evidence, any error was harmless.

Appellant's argument on appeal fails for four reasons: First, the evidence regarding the sexual abuse of Oldest Victim committed by Stepbrother was inadmissible under the Rape Shield Statute. Second, the evidence was not relevant under Rules 401 and 402, SCRE. Third, the probative value of admitting the evidence was substantially outweighed by the danger of unfair prejudice; therefore, the evidence was inadmissible under Rule 403, SCRE. Finally, even if the trial court erred in excluding the evidence, any error was harmless because Oldest Victim's source of sexual knowledge was not in issue considering she was seventeen years old when she testified, defense counsel did an extremely thorough job impeaching Oldest Victim on cross-examination, the fact Oldest Victim was sexually abused by Stepbrother had no bearing on Youngest Victim's source of sexual knowledge, and Mother's credibility was not in issue.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). An appellate court will not reverse a trial court's ruling absent a prejudicial abuse of discretion. State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial court's decision lacks evidentiary support or is controlled by an error of law. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002).

Analysis

A. Rape Shield Statute

First, our Legislature did not provide a source of knowledge exception to the Rape Shield Statute.

Our Legislature created what is commonly called the "Rape Shield Statute" in order to protect victims of sexual assault from in-court attacks regarding their prior sexual conduct. See S.C. Code Ann. § 16-3-659.1. Our Rape Shield Statute provides the following:

> 1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced **to show source or origin of semen, pregnancy, or disease** about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.

Id. (emphasis added).

In South Carolina, the primary and cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). "Whenever possible, legislative intent should be found in the plain language of the statute itself. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory

interpretation are not needed and the court has no right to impose another meaning." State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008).

Our Legislature provided certain exceptions to the general prohibition against admitting evidence regarding a victim's prior sexual conduct. See S.C. Code Ann. § 16-3-659.1 ("[T]o show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible . . . ."). Under our rules of statutory construction, if the legislature provides for certain exceptions in a statute, then there is an implication that the legislature intended to exclude any other exception not listed in the statute. See German Evangelical Lutheran Church v. City of Charleston, 352 S.C. 600, 607, 576 S.E.2d 150, 153 (2003) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'").

But in State v. Finley, our Supreme Court held, ***in dicta***, that the evidence regarding the victim's sexual conduct was relevant because it showed the victim's motive for fabricating the charge against the defendant. State v. Finley, 300 S.C. 196, 200-201, 387 S.E.2d 88, 90 (1989). A few years later, in State v. Lang, the Court of Appeals held that the defendant was entitled to question the victim regarding the victim's sexual preferences because the evidence was being offered to impeach the victim's credibility. State v. Lang, 304 S.C. 300, 301, 403 S.E.2d 677,678 (Ct. App. 1991).

Approximately nine years later, in State v. Grovenstein,[3] the Court of Appeals held that the "child victim's prior sexual experience [was] relevant to demonstrate that the defendant [was] not necessarily the source of the victim's ability to testify about alleged sexual conduct." State v. Grovenstein, 340 S.C. 210, 219, 530 S.E.2d 406, 411

[3] Notably, our Supreme Court granted certiorari in Grovenstein, but the appeal was dismissed due to other reasons.

(Ct. App. 2000). At the time of trial, the three victims were ages fifteen, ten, and nine. Id. at 212, 530 S.E.2d at 407-08. The oldest victim alleged that the defendant anally penetrated the oldest victim with his penis. Id. at 213, 530 S.E.2d at 408. The other two victims alleged that the defendant anally penetrated them with rolled-up paper. Id. At trial, the defendant wanted to introduce evidence that the victims had been accused of sexual misconduct similar to the conduct the victims alleged the defendant committed. Id. The victims were accused of inserting objects in the vagina and rectum of a girl. Id. In reaching its holding, the Court of Appeals noted that there was a split in authority regarding whether such evidence was admissible under the rape shield law. Id. at 217, 530 S.E.2d at 410.

In 2011, our Supreme Court addressed an issue relating to the Rape Shield Statute in State v. Tennant, 394 S.C. 5, 714 S.E.2d 297 (2011). In Tennant, our Supreme Court pointed out that Montana's rape shield statute was very similar to South Carolina's Rape Shield Statute, and the Court relied upon Montana case law to reach its holding. Id. at 19, 714 S.E.2d at 304. Notably, in Montana, the courts recognize a "false accusation" exception to its rape shield statute based on the defendant's constitutional right to confront witnesses. See State v. Anderson, 686 P.2d 193, 200 (Mont. 1984) ("Indeed, limiting or barring a defendant's cross-examination of a complaining witness in a sex crime case where there is evidence of prior false accusations restricts defendant's enjoyment of the worth of his constitutional right to confront witnesses."). In Anderson, the Supreme Court of Montana stated the following:

> Our inquiry in the immediate case is directed to whether the trial court properly restricted mention of the offered evidence of the prior sexual assault charges. We emphasize that Hurlburt and related cases hold only that evidence of similar sexual offenses claimed to have been committed

> against the victim by other individuals is admissible *if the offenses were proven or admitted to be false.* **If the charges are true or reasonably true, then evidence of the charges is inadmissible**, mainly because of its prejudicial effect but certainly because of its irrelevance to the instant proceeding. Furthermore, evidence of prior charges which have not been adjudicated to be true or false; i.e., which may be true *or* false is also inadmissible, primarily because its introduction circumvents the interest in preserving the integrity of the trial and preventing it from becoming a trial of the victim. These limitations do not infringe upon a defendant's right to confrontation.

Id. (internal citations omitted) (second emphasis added).

Although this case is distinguishable from Grovenstein (see subsection B below), the rule pronounced in Grovenstein needs to be revisited in light of our rules of statutory construction. Simply put, our Legislature included certain exceptions to the Rape Shield Statute, and the source of knowledge exception the Court of Appeals created was not one of those exceptions. The State respectfully submits that the holding in Grovenstein seems questionable when looking at the plain meaning of the statute and applying the expressio unius est exclusio alterius canon of construction. Moreover, unlike the false accusation exception that Montana courts recognize, the source of knowledge exception does not have a constitutional basis. This Court should follow the Supreme Court of Montana's reasoning in Anderson and hold that if the prior sexual assault is true, then the evidence is inadmissible because it is not relevant to the current proceeding. Anderson, 686 P.2d at 200.

B. Rules 401 and 402, SCRE

Second, even if the Rape Shield Statute did not prohibit the admission of the evidence, the evidence in this case was inadmissible under Rules 401 and 402, SCRE.

Under the South Carolina Rules of Evidence, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Further, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE.

In this case, the evidence was not relevant because it neither tended to prove Appellant's innocence or exclude him as the perpetrator of the sexual assaults. Oldest Victim was approximately thirteen years old when she first disclosed the sexual abuse committed by Appellant and seventeen years old when she testified. (R. p. 82.) Moreover, the evidence Appellant sought to admit related to oral sex, not digital penetration. Because Oldest Victim was seventeen at the time of trial, it was unlikely that jury would infer that Oldest Victim could only describe the act because Appellant had, in fact, sexually abused her. See State v. Jones, 490 N.W.2d 787, 791 (Iowa 1992) ("Given the age [13] of the victim at the time she testified, the education and counseling she had received in the interim between the abuse and the trial, and the rather inexplicit nature of the testimony . . . we find it unlikely that a jury would infer that the victim could only describe the act because [defendant] had, in fact, done it.") (alterations in the original).

Unlike Grovenstein, where the victims alleged they were anally penetrated by the defendant and there was evidence that the victims anally penetrated a young girl, the allegations of abuse by Appellant were not similar to the prior abuse by Stepbrother. The fact that Oldest Victim claimed Appellant digitally penetrated her and Stepbrother

performed oral sex further illustrates why the evidence of prior abuse by Stepbrother was not relevant to the trial. See People v. Hill, 683 N.E.2d 188, 191 (Ill. App. Ct. 1997) ("The prior sexual conduct must be sufficiently similar to defendant's alleged conduct to provide a relevant basis for its admission. It must engage the **same sexual acts** embodied in the child's testimony. Further, if the prior sexual conduct cannot fully rebut the knowledge displayed, if it fails to account for certain sexual details unique to the charged conduct, its admission should be precluded. Simply put, the prior sexual conduct must account for how the child could provide the testimony's sexual detail without having suffered defendant's alleged conduct.) (emphasis added).

Appellant argues that Mother's failure to disclose the prior abuse by Stepbrother was relevant to the integrity of the investigation. (App. Br. p. 17.) In support of his argument, Appellant relies on Simpson v. Moore, 367 S.C. 587, 598-99, 627 S.E.2d 701, 707-08 (2006). But Appellant's reliance on Simpson is misplaced. The facts of Simpson are completely different than the facts involved in this case. Moreover, the holding in Simpson was in the context of a Brady v. Maryland, 373 U.S. 83 (1963), violation. In this case, Appellant's "integrity of the investigation" argument relates to the forensic interviewer's questioning of Youngest Victim. Although the forensic interviewer testified that she "would have most likely asked . . . [Youngest Victim if] . . . she witnessed something," (R. p. 218) the fact the forensic interviewer was unable to ask that question or any related questions did not had any bearing on Appellant's innocence or exclude him as the perpetrator of the sexual assaults.

Moreover, Appellant argues that the evidence of sexual abuse against Oldest Victim by Stepbrother "was relevant because it showed that Younge[st] [Victim] had a possible source of information about sexual activity other than [Appellant]." (App. Br. p.

17.) But Appellant's argument is purely speculative. Further, there is absolutely no evidence in the record to make the inference that Oldest Victim taught Youngest Victim about sexual activity. As a result, the fact Stepbrother sexually abused Oldest Victim has no relevance to Youngest Victim's knowledge regarding sexual activity. The sexual abuse committed by Stepbrother was entirely unrelated to Youngest Victim. Nothing in the record suggests Oldest Victim disclosed the sexual abuse committed by Stepbrother to Youngest Victim.

In addition, the trial court properly refused to allow Appellant to impeach Mother because it would have been collateral impeachment. See State v. Beckham, 334 S.C. 302, 321, 513 S.E.2d 606, 615 (1999) (stating "[w]hen a witness denies an act involving a matter collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness"). Appellant claims that "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." (App. Br. p. 19.) However, as discussed above, the evidence regarding the prior abuse of Oldest Victim by Stepbrother was not relevant to either victim's sexual knowledge and not relevant to the integrity of the investigation.

C. Rule 403, SCRE

Third, even if our Rape Shield Statute did not prohibit the evidence regarding the prior sexual abuse against Oldest Victim and the evidence was relevant, the evidence would have still been inadmissible under Rule 403, SCRE.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

presentation of cumulative evidence." Rule 403, SCRE. Notably, "[a] trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in **exceptional circumstances.**" State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) (emphasis added).

Any probative value of admitting the evidence of sexual against Oldest Victim by Stepbrother was minimal. As discussed above, Oldest Victim was seventeen when she testified at trial. Thus, where Oldest Victim obtained her sexual knowledge has little to no relevance in this case. Further, the sexual abuse committed by Stepbrother (oral sex) was of a different nature than the sexual abuse committed by Appellant (digital penetration). On the other hand, the danger of unfair prejudice was substantial. The fact that the Legislature enacted the Rape Shield Statute demonstrates the extremely prejudicial nature of such evidence. Further, introducing evidence of prior sexual abuse of Oldest Victim by Stepbrother could lead to confusion of the issues by shifting the focus of the jury to a completely unrelated sexual abuse.

D. Harmless Error

Finally, assuming that the exclusion of the evidence was error, any error was harmless. See State v. Holder, 382 S.C. 278, 289, 676 S.E.2d 690, 696–97 (2009) (holding the erroneous admission of evidence is harmless beyond a reasonable doubt where it is minimal in the context of the entire record and cumulative to other testimony admitted without objection); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (the admission of improper evidence is deemed harmless if it is merely cumulative to other evidence); see also State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318–19 (2002) (noting whether an error is harmless depends on the particular facts of each case,

including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case). "'Harmless beyond a reasonable doubt' means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt." Id. 349 S.C. at 334, 563 S.E.2d at 319.

Here, Appellant wanted the trial court to admit the evidence regarding the prior sexual abuse of Oldest Victim committed by Stepbrother in order to show the victims' source of knowledge and to impeach Mother. However, as discussed above, Oldest Victim's source of knowledge was not an issue at trial considering she was seventeen years old when she testified. Further, the sexual abuse by Stepbrother (oral sex) differed than the abuse by Appellant (digital penetration). Additionally, the fact Oldest Victim was sexually abused by Stepbrother had no bearing on Youngest Victim's source of knowledge. Finally, Mother's testimony was not crucial to the case and did not have any bearing on Appellant's guilt or innocence for the charged offenses. This case came down to whether the jury believed Oldest Victim and Youngest Victim. Thus, the fact Appellant was unable to impeach Mother with this evidence did not contribute to the verdict.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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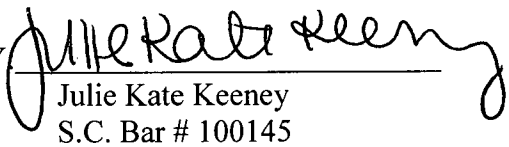
BY 
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October 15, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 15th day of October, 2013.

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