STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON A. BAUMAN,

APPELLANT

Appellate Case No. 2012-212285

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred in allowing the child's mother to testify the child told her she learned how to perform oral sex from "Uncle Jason," appellant, since this testimony was highly prejudicial hearsay?

2.

Whether the court erred by admitting the statement of jailhouse informant, Adam Buhle, into evidence since it was cumulative to his testimony and therefore impermissibly bolstered his testimony?

3.

Whether the court erred by refusing to charge the jury on the requested written jury instruction on analyzing a jailhouse informant's credibility from *State v. Arroyo*, 292 Conn. 558, 973 A.2d 1254 (2009) since the standard credibility of the witnesses instruction did not adequately enlighten the jury on how to evaluate the highly unusual special circumstances a jailhouse informant's testimony presents?

STATEMENT OF THE CASE

Appellant was indicted by the Dorchester County Grand Jury for the offense of criminal sexual conduct with a minor in the first degree. R. 309. His case came on for trial on June 11, 2012 before the Honorable Edgar W. Dickson, and a jury. Scott J. Bischoff, II, represented appellant. Russell Hilton and Matt Austin were the assistant solicitors. R. 1.

On June 13, 2012, the jury found appellant guilty of this offense. R. 296, ll. 5-10. Judge Dickson sentenced appellant to twenty five years imprisonment. R 297, ll. 11-15.

This appeal follows.

ARGUMENT

1.

The court erred in allowing the child's mother to testify the child told her she learned how to perform oral sex from "Uncle Jason," appellant, since this testimony was highly prejudicial hearsay.

Relevant Facts

Tara Bauman is the alleged female child victim's mother. Appellant Jason Bauman is her brother-in-law. R. 88, ll. 9-22. The child at issue was four-years-old, and her brother was two-years-old in May of 2010. R. 89, ll. 1-5.

Ms. Bauman testified she was giving both children a bath that day in May of 2010 when she said she saw the child's mouth open towards the male child's "lap and I stopped her and asked her what she was doing." The defense had earlier objected to hearsay statements that the child made to her mother while in the bathtub. The solicitor contended they were admissible as a present sense impression which the defense strongly contended the child's statement was not. It was further noted that the child apparently was not even going to testify. R. 56, l. 10 – 67, l. 4.

The judge noted the defense objected to this line of testimony earlier, and defense counsel renewed those objections, but the judge allowed the witness to continue. R. 90, ll. 8-18. Ms. Bauman then testified the child said "I'm going to suck his pee-pee. And I asked her where did you learn that from and she said 'Uncle Jason.'" R. 90, ll. 4-24.

Ms. Bauman then identified appellant in the courtroom as "Uncle Jason." R. 90, l. 25 – 91, l. 6. The child indeed did not testify.

On cross-examination Ms. Bauman admitted her child had been diagnosed with Pervasive Developmental Disorder, which involved cognitive defects that also affected the child's speech. R. 96, ll. 11-19. Her reasoning skills were below the first percentile in testing. R. 97, l. 21 – 98, l. 4.

Ms. Bauman testified she mentioned this exchange with her daughter in the bathtub to Amy Young, her nurse practitioner. Young told Ms. Bauman that she had to report the child's statement to the police. R. 103, l. 8 – 104, l. 21.

Ms. Bauman was not present when her child was subsequently interviewed by the police. Ms. Bauman admitted she did not know at the time her child was "in the spectrum of Autism." R. 106, l. 10 – 108, l. 12.

Dr. Allison Foster was hired by both the defense and the prosecution to evaluate the child. R. 135, l. 6 – 136, l. 25. Dr. Foster was qualified as an expert in forensic clinical psychology. She diagnosed the child with Pervasive Developmental Disorder Not Otherwise Specified. The child was also "within the Autism spectrum." However, the child did meet the minimal threshold to be competent to testify in her opinion. R. 144, l. 3 – 147, l. 10.

Dr. Foster testified that after reviewing the child's records she came to the conclusion there were significant amounts of behavioral disorders or behavioral actions that were inappropriate **both prior to the bathtub incident and** then **after** the bathtub incident. R. 151, ll. 17-22.

Appellant was interviewed by the police. Detective Gebhardt testified that appellant told him that children do not always tell the truth. He also told Gebhardt that the child

involved in this case was a real "sexual person." For example, the child stuck her tongue out at people and that she had tried to grab him by his penis. R. 178, l. 8 – 182, l. 6.

Appellant acknowledged at one point the child "for a second" attempted to perform oral sex on him by putting her mouth over his penis. The detectives had appellant write a letter of apology to the child's mother, his sister-in-law. R. 178, l. 8 – 182, l. 6.

On cross-examination, the Gebhardt said he had received training on interviewing people such as appellant who were cognitively delayed. He had also been taught that people with mental disabilities can easily be susceptible to coercion and persuasion. Gebhardt maintained he had never encountered a person he thought falsely admitted committing a crime, and he refused to admit that it happened. He also offered that appellant did not act like what he thought a person with an IQ of only 71 would act like while interacting. R. 184, l. 3 – 196, l. 17.

The Jailhouse informant

Adam Buhle was working as a tattoo artist after just getting out of prison for a "violation of probation and forgery." Buhle admitted he also been convicted of grand larceny, burglary, and "some shopliftings." R. 213, l. 11 – 214, l. 16.

Buhle testified on August 12, 2010, he was in the Dorchester County Detention Center and appellant was one of his cellmates. R. 214, l. 17 – 215, l. 7. Buhle claimed appellant told him he was in jail because he would "play around with his niece and he started touching his niece and having his niece touch him." He maintained appellant told him he watched pornographic movies with the child. He confirmed to the solicitor that he gave the police a written statement on August 12, 2010. R. 215, l. 19 – 218, l. 17.

When the solicitor went to introduce Buhle's statement into evidence, defense counsel objected on the grounds that it was cumulative to his testimony. The judge overruled the objection. R. 218, l. 18 – 219, l. 6. The written statement was admitted into evidence over appellant's objection. R. 218, l. 18 – 219, l. 11. R. 302(Statement)

On cross-examination Buhle drew a distinction between people who robbed other people and people who stole from people. Buhle admitted he was a thief, but not a robber. Larceny, grand larceny, two counts, shoplifting third, and forgery were among his convictions but "not robbing somebody." R. 219, l. 16 – 220, l. 19.

Buhle denied he got any kind of deal or consideration from the solicitor for his testimony. "I didn't make no deal. I came here with a zero to eight open plea." R. 221, ll. 1-10. Buhle also denied he had access to appellant's discovery which obviously would have contained the accusations against appellant. R. 232, ll. 14-22.

In his statement to the police that was admitted over appellant's objection, Buhle said he learned the child's mother had seen her attempt to grab her brother's penis and the child said that "Uncle Jason" had taught her to do that. In the statement Buhle also stated appellant allegedly told him he had had the child perform oral sex on him on other occasions. R. 302.

Request to Charge

The following occurred between defense counsel and the judge regarding his request to charge:

> The Court: For the record Mr. Bischoff, you were kind enough to submit a motion requesting a special jury instruction on the credibility of jailhouse informants. I marked it as the Court's exhibit number 2.

And I have looked it over and I am going to decline to give that charge. But I wanted to preserve this on the record so that you would - - so that my - - your objection to my failure to charge this would be preserved on the record.

Mr. Bischoff: Thank you, Your Honor.

The Court: And I've got your memorandum in the record. Now other than that just for the record I have reviewed the jury charge with both the State and the defense. And y'all have gone over my charge and y'all are in agreement with my charge, is that correct Mr. Hilton?

Mr. Hilton: We talked about several things. I just wanted to ask was creditability of witnesses in the general charge?

The Court: It is.

R. 277, l. 14 – 278, l. 8. R. 298 (Request to charge).

Appellant's request to charge contained the standard language on determining the credibility of the witnesses and added:

> **You the jury may also consider the extent to which a jailhouse informant's testimony is confirmed by other evidence; the specificity of the testimony; the extent to which the testimony contains details known only by the perpetrator; the extent to which the details of the testimony could be obtained from a source other than the defendant; the informant's criminal record; any benefits received in exchange for the testimony; whether the informant previously had provided reliable or unreliable information; and the circumstances under which the informant initially provided the information to the police or the prosecutor, including whether the informant was responding to leading questions.** (Instruction in **bold** taken from State v. Arroyo, 292 Conn. 558, 973 A.2d 1254 (2009), cert. denied Arroyo v. Conn., 2010 U.S. LEXIS 958 (U.S., Jan. 25, 2010)).

R. 298. (Court's Exhibit 2)

Discussion

In State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006), the Supreme Court found error in the admission of hearsay testimony. Witness Hicks testified in the early morning of April 18, 2000 he was selling cocaine in the area when he heard Defendant Davis and two other men arguing. Hicks then heard a gunshot and saw the three men running from the area. Hicks testified Davis had a shotgun with him and wanted to sell it to Hicks. Hicks was allowed to testify that one of the men involved told him not to buy the shotgun from Davis because the victim had been shot with it. The Supreme Court held this testimony was not admissible as an excited utterance, and it was inadmissible hearsay.

The testimony of the child's mother in this case that the child told her while taking a bath with her brother that she learned the sexual behavior "from Uncle Jason" was inadmissible hearsay. It was not a present sense impression as defense counsel correctly argued at length. It was devastating testimony particularly since the child, who had many difficulties and problems, did not testify and was not subject to cross-examination.

The child's alleged statement to her mother was an out-of-court statement offered to prove the truth of the matter asserted. It was therefore inadmissible hearsay. See State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991). See Rule 801(c), SCRE; Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972).

The jury heard the child's mother testify the child told her appellant taught her how to perform oral sex. That rank hearsay went directly to the only matter at issue during this trial.

The error was not harmless. This is a strange case where both the child and appellant had mental and other disabilities. The jury never heard from the child, and

appellant with an IQ of 71 and other difficulties. Appellant appeared to be tricked or coerced into writing a letter of apology given the context of his statement. See Colorado v. Connelly, 479 U.S. 157 (1986). Although it did not rise to the level of suppression of the statement, it is nonetheless problematic given appellant's mental limitations and the other two issues involved in this case.

Further, the testimony of the jailhouse informant, which the jury should have been instructed on how to evaluate, also does not provide comforting or overwhelming evidence of appellant's guilt such that any of the errors can be found harmless beyond a reasonable doubt. Appellant should be granted a new trial.

2.

The court erred by admitting the statement of jailhouse informant, Adam Buhle, into evidence since it was cumulative to his testimony and therefore impermissibly bolstered his testimony.

Relevant Facts

As seen above, the judge allowed the solicitor to introduce the written statement of the jailhouse snitch, Buhle, while he was testifying. The statement was cumulative to his testimony and therefore did unfairly bolster his credibility.

Buhle testified appellant told him he was in jail because he would "play around with his niece and he started touching his niece and having his niece touch him." R. 215, l. 19 – 218, l. 17.

As seen, in his written statement Buhle claimed he learned from appellant that the child's mother had seen her attempt to grab her brother's penis and the child said that "Uncle Jason" had taught her to do that. In the statement Buhle also stated appellant allegedly told him he had had the child perform oral sex on him on other occasions. R. 302.

Buhle's prior statement to the police was offered to bolster his credibility by giving the illusion to the jury that because Buhle had made some of the same accusations against appellant, about what appellant allegedly told him, in the past that the jury should believe Buhle's in-court testimony. That is what makes cumulative evidence so dangerous and bolstering.

In State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003), the Supreme Court found the admission of a witness's prior statement to the police was error. In the prior statement the witness told the police that Randal Scott Foster had shot her mother. The Court found

error and held the statement was not admissible as a prior consistent statement. Prior consistent statements are not admissible to attempt to "rehabilitate" a witness from proper cross-examination by competent counsel. See State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). There was not even an assertion in this case that this statement was admissible a prior consistent statement, and no foundation for it to be one was made regardless.

Further, the cumulative nature of this testimony and its bolstering effect on the jailhouse snitch's testimony was exacerbated because once it was made a trial exhibit the jury had Buhle's statement with it in the jury room. This further unduly emphasized the prejudicial effect of the evidence. See State v. Gulledge, 277 S.C. 368, 287 S.E.2d 498 (1982).

The solicitor knew what most juries do not: That jailhouse snitches curry favor with the prosecution to help themselves. Many of them are pathological liars. Their assertions are often not credible, and they should be subject to more scrutiny than a person who might do anything to regain his freedom.

The bolstering of Buhle's testimony by the introduction of his prior statement to the police was prejudicial error in this case. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003); State v. Gulledge, 277 S.C. 368, 287 S.E.2d 498 (1982). Appellant should be granted a new trial.

3.

The court erred by refusing to charge the jury on the requested written jury instruction on analyzing a jailhouse informant's credibility from *State v. Arroyo*, 292 Conn. 558, 973 A.2d 1254 (2009) since the standard credibility of the witnesses instruction did not adequately enlighten the jury on how to evaluate the highly unusual special circumstances a jailhouse informant's testimony presents.

Relevant Facts

As seen, defense counsel asked for a general jury instruction on the credibility of the witnesses, and an instruction on weighing the credibility of a jailhouse informant that had been approved by the Connecticut Supreme Court.

In State v. Arroyo, 292 Conn. 558, 973 A.2d 1254 (2009) the Supreme Court of Connecticut held that a special credibility instruction on the testimony of a jailhouse informant should be given regardless of whether the jailhouse informant has received a promise of a benefit in exchange for his testimony.

In State v. Arroyo the Court noted that there had been a number of recent high profile cases involving wrongful convictions based on the false testimony of jailhouse informants. *Citing* R. Bloom "Jailhouse informants," 18 Crim. Just. 20 (Spring 2003). State v. Arroyo, 973 A.2d at 1260.

The Court also wrote that approximately twenty one percent of wrongful capital convictions were influenced by jailhouse informant testimony. *Citing* A. Natapoff, "Beyond Unreliable; How Snitches Contribute to Wrongful Convictions," 37 Golden Gate U. L. Rev. 107, 109 (2006). The Court in State v. Arroyo relied on State v. Patterson, 276 Conn. 452,

886 A.2d 777 (2005) where the Court had concluded the defendant was entitled to a jury instruction on jailhouse informants substantially in accord with the one he had sought.[1]

The proposed instruction on jailhouse informant testimony instructed the jury that such testimony must be reviewed with particular scrutiny and weighed with greater care than the testimony of an ordinary witness. State v. Patterson, 886 A.2d at 787. In State v. Arroyo the Court noted that the jury could be instructed to consider "the extent to which the informant's testimony is confirmed by other evidence; the specificity of the testimony; the extent to which the testimony contains details known only by the perpetrator; the extent to which the details of the testimony could be obtained from a source other than the defendant; the informant's criminal record; any benefits received in exchange for the testimony; whether the informant has previously provided reliable or unreliable information; and the circumstances under which the informant initially provided the information to the police or the prosecutor, including whether the informant was responding to leading questions." State v. Arroyo, 973 A.2d at 1263.

Here, Buhle presented as a typical jailhouse snitch to experienced criminal defense attorneys and prosecutors. He had a long history of crimes involving dishonesty. Therefore there is every reason to think he knew how to manipulate the system by striking deals -- plea agreement in more polite company -- with the police and solicitor's office. See State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001).

[1] Patterson was limited to those cases where the informant received a benefit or seemingly admitted he received or expected a benefit for this testimony. It is painfully obvious jailhouses snitches often lie about their true expectations.

The instruction requested in this case on the credibility of jailhouse informants should have been given because it would have assisted -- enlightened the jury -- in evaluating the testimony of a jailhouse informant:

> You the jury may also consider the extent to which a jailhouse informant's testimony is confirmed by other evidence; the specificity of the testimony; the extent to which the testimony contains details known only by the perpetrator; the extent to which the details of the testimony could be obtained from a source other than the defendant; the informant's criminal record; any benefits received in exchange for the testimony; whether the informant previously had provided reliable or unreliable information; and the circumstances under which the informant initially provided the information to the police or the prosecutor, including whether the informant was responding to leading questions. (Instruction in bold taken from State v. Arroyo, 292 Conn. 558, 973 A.2d 1254 (2009), cert. denied Arroyo v. Conn., 2010 U.S. LEXIS 958 (U.S., Jan. 25, 2010)).

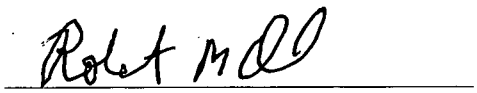
R. 302. (Court's Exhibit 2)

The purpose of a jury instruction is 'to enlighten the jury and to aid it in arriving at a correct verdict.'" State v. Blurton, 352 S.C. 202, 207, 573 S.E.2d 802, 804 (2002) *citing* State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). The jury was not given such guidance by way of a more particular credibility instruction on evaluating the testimony of a jailhouse informant. That jailhouse informant testimony was prominent in the facts of the case presented to the jury -- Buhle testified that appellant confessed to him. See State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989)(the judge has to consider all of the evidence when fashioning a correct instruction). Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Dorchester County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of February, 2014.

STATE OF SOUTH CAROLINA
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THE STATE,

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Appellate Case No. 2012-212285

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 Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of February, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of February, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.