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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-GS-10-02511
Appellate Case No. 2012-208388

State of South Carolina,.....

Respondent,

v.

Kenneth Thomas Gahagan.....

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

Nelson Mullins Riley & Scarborough, LLP
Patrick C. Wooten
S.C. Bar No. 77985
E-Mail: patrick.wooten@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200
LEAD COUNSEL

South Carolina Commission on Indigent Defense
Robert M. Dudek
E-Mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1343

Attorneys for Appellant Kenneth Thomas Gahagan

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Appellant Kenneth Gahagan (“Appellant”) hereby replies to the brief of the Respondent, the State of South Carolina (“the State”).

Argument

I. The trial court abused its discretion in refusing to allow Appellant’s trial counsel to re-cross Pierre Nelson regarding a new matter brought out during re-direct examination.

As explained in Appellant’s initial brief, the trial court abused its discretion by improperly restricting the scope of Appellant’s re-cross examination of Mr. Pierre Nelson in violation of the Confrontation Clause of the Sixth Amendment and the natural extension of South Carolina Rule of Evidence 611(d). *See* Appellant’s Initial Brief at 4-9. In its Response brief, the State makes three counterarguments as to why this Court should deny Appellant’s appeal on this ground. For the reasons explained below, this Court should reject each of the State’s counterarguments and reverse and remand for a new trial.

A. Appellant’s argument is preserved for review.

The State first asks this Court not to reach the merits of Appellant’s argument because Appellant did not attempt to proffer the excluded testimony at trial. But a proffer is not necessary to preserve an objection to excluded testimony “where the appellate court is able to determine from the record what the testimony was intended to show and that prejudice clearly exists.” *State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 20 (Ct. App. 2009); *see also State v. Jenkins*, 322 S.C. 360, 474 S.E.2d 812, 816 (Ct. App. 1996) (holding that proffer was not required to preserve argument on appeal where “the proffer was not necessary to enable us to discern prejudice”).

Here, the record establishes what the excluded testimony was intended to show—namely, that Mr. Nelson told the police that he did not know if there had been penetration. Specifically, the question objected to by the State was: “When you went to the police to report this you had indicated to them that you did not know if there had been penetration, correct?” (Tr. 67:4-6). This Court can easily determine from this question what the excluded testimony was intended to show, and the State does not even argue otherwise. Further, the exclusion of this testimony, which should have been admitted, was clearly prejudicial to Appellant for the reasons discussed below in Section I.C.

B. A new matter was brought out during re-direct examination.

The State next argues that no new matter was brought out during Mr. Nelson’s re-direct examination. In support of this argument, the State cites testimony from the cross-examination of Mr. Nelson in which Appellant’s counsel asked Mr. Nelson about what the alleged victim (hereinafter, “Child”) told Mr. Nelson about the alleged incident, and in which Appellant’s counsel had the following exchange with Mr. Nelson:

Q. Right. So saying that she was sexually assaulted, that was the interpretation you took from the words that she told you?

A. Yes.

(Tr. 65:8-11). In this testimony, Mr. Nelson agrees that he interpreted what the Child told him to mean that the Child *was saying* that she was sexually assaulted. However, nowhere in Mr. Nelson’s direct or cross examination did he testify that he concluded that a sexual assault actually occurred, nor did he otherwise opine about what actually happened the night of the alleged incident. (*See generally* Tr. 54:8 – 66:12).

In the State's re-direct, however, Mr. Nelson testified for the very first time at trial that *he concluded* that a sexual assault actually occurred, and that no other conclusion could be drawn. (Tr. 66:20-23). In other words, Mr. Nelson opined that a sexual assault was, in fact, committed by Appellant on the Child, and opined that no other conclusion could be drawn. Testifying that the Child told him that a sexual assault occurred is not the same as testifying that he concluded that a sexual assault did, in fact, occur, and that no other conclusion could be reached. Thus, a new matter was brought out during Mr. Nelson's re-direct examination, and the Court's refusal to permit Appellant's counsel to re-cross Mr. Nelson about this testimony violated Appellant's rights under the Confrontation Clause and under Rule 611(d) of the South Carolina Rules of Evidence.

C. The trial court's error was not harmless.

Finally, the State argues that, even if the Court erred in refusing to permit Appellant's counsel to re-cross Mr. Nelson regarding a new matter brought out in re-direct, such error was harmless. This error was not harmless.

“A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error' if the 'error was harmless beyond a reasonable doubt.’” *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (internal citation omitted). “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. Whether an error is harmless depends on the particular facts of each case and upon a host of factors 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 of course the overall strength of the prosecution's case.

Id., 349 S.C. at 333, 53 S.E.2d at 318.

Here, Mr. Nelson's testimony was critical to the prosecution's case. Mr. Nelson is the Child's father and the person to whom the Child allegedly first reported the incident when the Child was only three years old. (Tr. 56:21 – 57:18). Mr. Nelson is the person who informed others of the alleged incident and was responsible for reporting the incident to the authorities. (Tr. 59:19-25, 60:17-23). Mr. Nelson was the first witness called by the State after the Child, and he is the only witness in the case other than the Child who opined as to what actually happened the night of the alleged incident. (See Tr. 66:20-23 (stating that no other conclusion could be drawn other than that a sexual assault occurred)). Further, Mr. Nelson's testimony regarding the facts surrounding the alleged incident, the Child's account of the alleged incident, and in particular, Mr. Nelson's testimony that no other conclusion could be drawn except that a sexual assault occurred, was not cumulative, as no other witness gave this testimony.

Also, this Court should consider the overall strength (or lack thereof) of the prosecution's case when determining whether this error was harmless. *Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). A review of the record in this case demonstrates that this is not the type of case in which "no other rational conclusion can be reached" other than the conclusion that Appellant is guilty. Rather, this is a case in

which the evidence against Appellant is very weak and unclear. The only witness to the alleged incident who testified was the Child, who was three years old at the time of the alleged incident and five years old at the time of trial. (Tr. 63:15-17, 35:21-23). Ms. Gardner, who interviewed the Child shortly after the alleged incident, testified that the Child told her that she never even saw Appellant during the alleged incident. (Tr. 144:1-2). Yet, Ms. Gardner never asked the Child whether it was possible that the person she felt touch her the night of the alleged incident could have been her older brother, whom the Child says was sleeping in the bed with her at the time of the alleged incident. (Tr. 141:24 – 142:7, 38:18-23). Further, the Child testified that her older brother never woke up during this alleged incident, even though it allegedly happened while her brother was in the bed with her. (Tr. 41:2-3). Also, the medical examination of the Child did not reveal any medical evidence of a sexual assault. (Tr. 175:6-8, 181:4-10). In sum, the evidence against Appellant at trial was very weak, weighing against a finding of harmless error. Under these circumstances, the Court cannot conclude beyond a reasonable doubt that this error did not contribute to the jury's verdict. *Mizzell*, 349 S.C. at 334, 563 S.E.2d at 319 (“‘Harmless beyond a reasonable doubt’ means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt.”).

Moreover, while the State argues that the excluded question related only to penetration, this is an oversimplification. The excluded question, in which Appellant's counsel asked Mr. Nelson to confirm that he told the police that he did not know if there had been penetration, sought to both impeach Mr. Nelson's prior testimony and to show that Mr. Nelson was not able to determine what happened at the time of the alleged incident from talking with the Child. While the State argues that Mr. Nelson's credibility

was not material to the case because Mr. Nelson did not personally witness any sexual abuse, such argument is belied by the record, which shows that Mr. Nelson was a key witness for the State who was the first person to discuss the alleged incident with the Child, who reported the alleged incident to the authorities, and who offered unique testimony about the facts surrounding the incident. His credibility was absolutely material to the case, and the excluded question would have undermined Mr. Nelson's credibility with respect to his assertion that no other conclusion could be reached other than that a sexual assault occurred. Also, to the extent Mr. Nelson could not be sure that there was penetration when he spoke to the police, such testimony establishes that Mr. Nelson could not determine what happened the night of the alleged incident from talking with the Child, even with respect to something as fundamental as whether penetration occurred. This point could have colored the jury's view of all of Mr. Nelson's testimony based on his conversations with the Child.

In sum, the trial court's error was not harmless, and Appellant respectfully requests that this Court reverse and remand for a new trial based on this error.

II. The trial court erred in denying Appellant's motion for directed verdict as to the charge of first degree criminal sexual conduct with a minor because the State failed to produce any evidence of sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion of any part of Appellant's body or any object into the genital or anal openings of the alleged victim's body.

As explained in Appellant's initial brief, the trial court erred in denying Appellant's motion for directed verdict as to the charge of first degree criminal sexual conduct with a minor. *See* Appellant's Initial Brief at 10-14. In its Response brief, the State makes two counterarguments as to why this Court should deny Appellant's appeal on this ground. For the reasons explained below, this Court should reject both of the

State's counterarguments and reverse and remand for a new trial on the State's charge of lewd act on a minor only.

A. The issue is not moot.

The State first argues that Appellant's appeal on this ground is moot because the jury ultimately acquitted Appellant on the charge of first degree criminal sexual conduct with a minor. The issue is not moot. Any criminal defendant, including Appellant, would much prefer to have a single charge submitted to the jury, rather than that single charge plus a greater charge. The reason is simple and rational—a jury is less likely to convict a criminal defendant of a charge if that charge is the only available option than if that charge is the lesser of two charges. Where a greater charge and a lesser charge are submitted to the jury, the jury may reach a “compromise verdict” in which they convict the defendant of the lesser charge even though they would have granted the defendant an acquittal if the lesser charge had been submitted by itself. The term “compromise verdict” is well-known among lawyers because of this phenomenon. Thus, to the extent a greater charge is submitted to the jury improperly, the defendant is prejudiced, even if the defendant is ultimately acquitted of the greater charge, if the defendant is convicted of the lesser charge.

As held by the Michigan Court of Appeals: “To be entitled to reversal based on the jury's consideration of an unwarranted higher charge, a defendant must show persuasive indicia of jury compromise, such as logically irreconcilable verdicts, a clear record of unresolved jury confusion, or *where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense.*” *People v. Owens*, 288668, No. 288688, 2010 WL 1565566 (Mich. Ct. App. Apr. 20, 2010) (emphasis added). Here,

Appellant was convicted of the next-lesser offense after the improperly submitted greater offense of criminal sexual conduct. Because the State was unable to produce any evidence of criminal sexual conduct, Appellant should be tried by a jury deciding between conviction for a lewd act only, and acquittal, not a jury deciding between conviction for criminal sexual conduct and lewd act, conviction for a lewd act only, and acquittal.

B. The State did not present sufficient evidence of criminal sexual conduct to submit the charge to the jury.

The State argues that it presented sufficient evidence of criminal sexual conduct to survive Appellant's directed verdict motion because the Child testified that Appellant put his penis "on" her butt and it hurt. The State cites *State v. Mathis*, 287 S.C.589, 340 S.E.2d 538 (1986) in support of this argument. But in *Mathis*, the alleged victim testified that she could not remember whether or not the defendant put his penis inside her body. *Id.*, 287 S.C. at 593, 340 S.E.2d at 541. Here, the Child did not testify that she could not remember whether Appellant put his penis inside her body, or otherwise testify that she could not remember any aspect of the alleged incident. Rather, the Child testified that Appellant placed his penis "on" on her bottom. (Tr. 38:17). If Appellant only placed his penis "on" the Child's bottom, then no penetration—even slight penetration—occurred. The State's counsel could have asked the Child if Appellant also placed his penis "in" her bottom. If the State's counsel had asked this question and the Child had answered that she did not remember, then that testimony would have likely been sufficient to survive a directed verdict motion under *Mathis*. But the State's counsel did not ask such a question, so the record only contains testimony that Appellant placed his penis "on" the Child's bottom, which is not evidence that Appellant did place or may have placed his

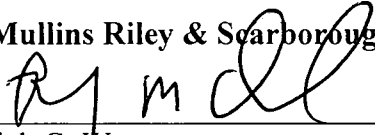
penis “in” the Child’s bottom. Accordingly, *Mathis* is distinguishable, and this Court should find that the State failed to present sufficient evidence of criminal sexual conduct to survive Appellant’s motion for directed verdict.

Conclusion

For the reasons stated herein and in Appellant’s initial brief, Appellant respectfully requests that this Court reverse Appellant’s conviction and order a new trial only as to the State’s charge of lewd act on a minor.

Respectfully submitted,

Nelson Mullins Riley & Scarborough, LLP

By:  _____

Patrick C. Wooten
S.C. Bar No. 77985
E-Mail: patrick.wooten@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200
LEAD COUNSEL

South Carolina Commission on Indigent Defense

Robert M. Dudek
E-Mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1343

Attorneys for Appellant Kenneth Thomas Gahagan

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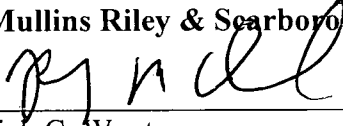
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Reply Brief of Appellant in the above referenced case has been served upon Salley Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of March, 2014.

Nelson Mullins Riley & Scarborough, LLP

By: _____


Patrick C. Wooten
S.C. Bar No. 77985
E-Mail: patrick.woten@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200
LEAD COUNSEL

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South Carolina Commission on Indigent Defense

Robert M. Dudek
E-Mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1343

Attorneys for Appellant Kenneth Thomas Gahagan

SUBSCRIBED AND SWORN TO before me
this 25th day of March, 2014

Bentley Reed (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021