STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALBERT BRANDEBERRY,

APPELLANT

APPELLATE CASE NO. 2012-212841

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by qualifying Shauna Galloway-Williams as an expert in "child abuse and treatment" so she could testify about "delayed disclosure" and common traits of sexually abused children since her testimony improperly bolstered the child's testimony by raising the improper spurious inference that the alleged victim in this case was acting in conformity with those common traits?

2.

Whether the court erred by instructing the jury that it could convict appellant based on the alleged victim's uncorroborated testimony since this instruction improperly emphasized the testimony of one witness, it was a charge on the facts, and it was fundamentally unfair and infringed on appellant's right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County Grand Jury for the offenses of criminal sexual conduct with a minor in the first degree, and lewd act upon a minor. R. 459 His case came on for trial on August 6, 2012 before the Honorable Letitia H. Verdin, and a jury. Jim Bannister represented appellant and Lisa Bentley was the assistant solicitor. R. 1

On August 9, 2012 the jury found appellant guilty of both offenses. R. 449, l. 21-450, l. 3. Judge Verdin sentenced appellant to twenty years imprisonment for criminal sexual conduct with a minor, and fifteen years imprisonment for committing a lewd act upon a minor. R. 451, ll.5-10.

This appeal follows.

ARGUMENT

1.

The court erred by qualifying Shauna Galloway-Williams as an expert in "child abuse and treatment" so she could testify about "delayed disclosure" and common traits of sexually abused children since her testimony improperly bolstered the child's testimony by raising the improper spurious inference that the alleged victim in this case was acting in conformity with those common traits

Motion

Appellant filed a "motion to exclude testimony of non-treating expert." R. 454. Appellant asserted the testimony of Galloway-Williams[1] should be excluded because the expert was not qualified to render an opinion on this particular subject, the expert's testimony is not necessary to the trier of fact, and the reliability of the basis for the opinion is not sufficient to support the opinion. Appellant cited Rule 703, SCRE: State v. Council 335 S.C. 1, 515 S.E.2d 508 (1999) Watson v. Ford Motor Company Inc, 389 S.C. 434, 699 S.E.2d 169 (2010) ; State v. Douglas 380 S.C. 499, 671, S.E.2d 606 (2009); State v White 382 S.C. 265, 676 S.E.2d 684 (2009). R. 454.

Trial Facts

Detective Matthew Tuttle of the Finley, Ohio Police Department testified that Greenville County Sheriff Detective Heather Hubert asked him to interview appellant at appellant's home in Ohio. R. 117, l.13- 119, l.21. Tuttle said he explained to appellant he wanted to talk to him about an investigation in South Carolina. Appellant readily agreed, and invited Tuttle into his house. The alleged victim in this case was appellant's minor

[1] Galloway-Williams is hereinafter referred to as "Williams" for ease of reference.

niece. Her father, Harold, had confessed to Detective Hubert in Greenville that he sexually assaulted his daughter, appellant's niece. R. 95, l.20- 96, l.5.; R. 121, ll.6-10.

Tuttle recalled that appellant denied he had done anything improper with the alleged victim. R. 122, ll.4-13. Appellant said the niece was usually "truthful and honest except for this allegation where he said she had lied." R. 122, ll.4-23.

Tuttle maintained that the more he talked to appellant about the allegations the more upset appellant became. Tuttle said at one point appellant started talking "about killing himself" so Tuttle ended the interview. Tuttle testified that he had appellant talk to a counselor about "his feelings. So that is ultimately what happened." R. 123, ll.1-12

The niece -- and alleged victim -- testified that appellant came down from Ohio to South Carolina in his truck to visit a few times. She claimed in the summer of 2001 and the summer of 2002 when she was six or seven-years-old that appellant began touching her improperly. R. 137, l. 20- 139, l. 2. She said: "I didn't think there was anything wrong," and she maintained the improper touching continued. R. 139, l.3- 143, l.12; R. 145, l.6- 147, l.5. However, she stated that she wanted appellant to continue visiting because "my family loved him and I liked to get toys also." R. 153, ll. 1-11.

"Expert" Testimony

The court heard the testimony Williams and legal arguments out of the presence of the jury. The solicitor stated that witness would testify that the abuse starts off with "innocuous touching or confusing touching. So just back rubs or massages [that] confused the child to the point that they do not tell. And it could also play a part in the way disclosure...." R. 209, l. 23- 210,. l. 6.

Defense counsel Bannister noted that the proposed witness, Williams, was not treating the alleged victim, and she was going to testify about other sexual assault victims in generalities. Counsel said her testimony was "implicitly saying that's what perpetrators typically do in all cases that I am working on." Counsel said this lumped all perpetrators and victims into one category. "I don't think it's necessary for an expert opinion. I'm – it's a little bit of a pig in a poke." R. 210, l. 12- 212, l. 4.

The solicitor argued that unlike defense counsel the jurors were "not legal experts. They are not experts of child sexual abuse." The solicitor argued the testimony was necessary, and the judge said she would review the case law on the subject before ruling. R. 212, ll. 7- 24.

Defense counsel then noted the more recent cases of State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. Tapp, 398 S.C. 376, 728, S.E.2d 468 (2012), as the now controlling case law. R. 212, l.23- 213, l.17.

Williams then testified in camera. Williams admitted she had no personal knowledge about this case. R. 224, ll. 23-25. She said the "time spans" involved in "delayed disclosure" . . . "just varies." R. 226, l. 1- 227, l. 2. Williams speculated "it could be days. It could be weeks. It could be years before a child may tell." R. 227, ll. 1-2

On cross-examination Williams said she continues to conduct forensic interviews but acknowledged "I don't conduct research…" R. 234, l. 17- 239, l. 24. Her opinions were "based on my experience and knowledge of the children that I have worked with and the interviews that are being conducted daily in our center that I am aware of." R. 243, l. 24- 244, l. 12. However, Williams maintained that she did read writings in the area of child abuse R. 245, l. 12- 249, l. 1.

Williams testified that nondisclosure rates among women range from thirty-three to ninety-two percent "and among men from among forty-two to eighty-five percent." R. 249, ll. 2-12. The "vast majority" of individuals that "we have seen have been abused by a close family member or a friend, someone known to the child. There are very few cases we see where the child has been abused by a stranger or someone that is unknown to them." R.251, ll. 10-18

When questioned about any follow-up to determine which of the cases ever led to a conviction, Williams could only respond: "We could track that. We became accredited in 2007." R. 253, l. 18- 254, l. 7. Williams admitted she was not aware of any statistics on how many accused people were "indicated for DSS," had their cases dismissed, or referred to law enforcement. She was also not aware of how many of those accused pled guilty or went to trial. Regarding those that went to trial she was not sure of any statistics on what verdicts were rendered. R. 254, ll. 14-22.

After hearing the testimony the judge ruled that she would not allow any questioning about whether it was more common for a family member to abuse a child than a stranger. She would also not allow testimony about whether a child who had been victimized was likely to become again become "a victim later." R. 258, ll. 8-22. It was undisputed that the father of this minor admitted he abused her.

Defense counsel objected that this testimony constituted improper bolstering of the child's disclosure. He argued that the "expert" opinion in essence was that the alleged victim in this case "fits into what we understand to be a kind of the common way that children disclose, [therefore] she should be given credibility." R. 259, l. 4- 260, l .5. The judge ruled she would allow this testimony about "delayed disclosure." R. 260, ll. 6-11.

Defense counsel then stated that Williams had maintained she did not have time to talk with the defense prior to her testimony. He therefore asked for an opportunity to review her notes. The judge asked Williams to make herself available "over the lunch hour" to talk to defense counsel. R. 260, l. 16- 262, l. 25.

Williams agreed in the presence of the jury that she had never met the alleged victim or her family. She did not know anything about this case. R. 310, ll. 11-19. She was qualified as an expert in "child abuse and treatment" over appellant's objection. R. 309, ll. 1-23.

Williams then offered her opinions on the subject. "Children do not tell right away." She said the delay could be "a day, a week, a year, or months." "There are many reasons why children don't tell right away." R. 311, l. 1- 312, l.9.

Williams maintained that disclosure was "a process," and that "a lot of times, children are abused by someone that is known, loved, and trusted by them. That may be a family member." R. 312, l. 10- 314, l. 25. She then testified about how the "proximity that the child has to the perpetrator" could play a part. She added that once the perpetrator was away the child may feel "safer to disclose." R. 315, l. 1- 316, l. 4.

Williams offered that forty-two percent of children did not delay disclosure but that fifty-eight percent of children did delay telling anyone. R. 330, ll. 15-25.

Discussion

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), our Supreme Court noted that while forensic interviewers may be useful as a tool to aid law enforcement their work is "not appropriate for use in a courtroom." Appellant understands that in this case Williams was not testifying as a forensic interviewer, although she is one. Regardless, what occurred

in this case was not occurring in a vacuum. The approach for the state, given the case law from this Court and the Supreme Court, is to now have the witness, here Williams, not appear as a forensic interviewer but as an expert in "delayed disclosure" or some other "child abuse" expert title. Here, Williams allegedly did not know anything about the case, and had not even interviewed the alleged victim. Nonetheless, defense counsel here correctly argued this was simply a backdoor attempt to improperly bolster the child's testimony.

In State v. Douglas 380 S.C. 499, 671 S.E.2d 606 (2009), our Supreme Court held there was no need for the testifying witness to be qualified as an expert. The Court then noted the impropriety of such a witness testifying that she believed the child.[2] The Supreme Court and this Court have warned of "expert" testimony on "a compelling disclosure of abuse." See State v. Jennings 394 S.C. 473, 716 S.E.2d 91 (2011). See, also, State v. McKerley 397 S.C. 461, 725 S.E.2d 139 (2012).

Williams here testified with the aura of an expert. She largely admitted her conclusions and opinions were based on her own experience. She did, as seen above, claim that statistics showed that 58% of abused children delayed telling anyone. This could be "for a day, months, years."

Further, as defense counsel correctly argued, the purpose of this testimony was to improperly bolter the credibility of the accusing witness. It was meant to have the jury conclude that the accusing witness in this case fit into a "normal pattern" of an abused person. That was improper, and it was highly prejudicial. Appellant should be granted a new trial. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); State v. Jennings 394 S.C.

473, 716 S.E.2d 91 (2011). See, also, State v. McKerley 397 S.C. 461, 725 S.E.2d 139 (2012)

[2] In Douglas, the Supreme Court determined that witness Herod did not convey to the jury that she believed the child was telling the truth.

2.

The court erred by instructing the jury that it could convict appellant based on the alleged victim's uncorroborated testimony since this instruction improperly emphasized the testimony of one witness, it was a charge on the facts, and it was fundamentally unfair and infringed on appellant's right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution

Relevant Facts

Appellant filed a motion to preclude the court from charging the jury instruction contained in S.C. Code §16-3-657 that the testimony of the alleged victim need not be corroborated. R. 453. Appellant wrote in the motion that he was aware of State v. Rayfield 369 S.C. 106, 631, S.E.2d 244 (2006) which permitted, but did not require, the court to instruct based on this statute. The motion noted that the alleged victim's allegation was the sole evidence in this case, and that the appellant is, and has been, impotent since 1996. R. 453.

The defense further argued in the motion that the instruction would be an impermissible comment on the facts, it would improperly emphasize the testimony of one witness, it would unfairly bias the jury against the appellant and detract from the presumption of innocence and the requirement that the state prove its case beyond a reasonable doubt. This denied appellant his due process right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution. R. 453.

Defense counsel renewed his objection at trial. He again argued that the "uncorroborated testimony of the alleged victim alone was enough to conviction" jury instruction violated appellant's "substantial rights" including his Sixth Amendment right to

a fair trial. Defense counsel argued judge did **not have to instruct** the jury under the statute. R. 335, l. 23- 337, l.1.

Once the judge stated she would charge the statute over appellants objection, appellant asked that the judge include some other language that other evidence did not need to be ignored merely because the statue stated the alleged victim's testimony did not have to be corroborated. The judge did agree to that limited damage control after overruling the objection, inadequate on the facts here. R. 445, ll. 14-25.

As seen above, appellant's niece testified that appellant improperly touched her, and had oral sex with her. Appellant's wife, Noreen Brandeberry, had been married to appellant since 1983. R. 340, ll.5-20. Mrs. Brandeberry said appellant never admitted to any abuse and that he ultimately said he wanted nothing more to do with that portion of his family because of the untrue allegation. R. 352, l. 16- 354, l. 11. Mrs. Brandeberry also said that appellant told the investigator that he did not abuse his niece and "he said he might as well shoot his brains out" because of the untrue allegations. R. 353, ll. 1-10.

Mrs. Brandeberry testified appellant had been unable to perform sexually since the beginning of their marriage in 1983. R. 341, ll.10-19. Mrs. Brandeberry said they attempted surgery in the mid-1980's but that it caused appellant a great deal of pain, and the surgery apparently had to be reversed. R. 342, l. 4 - 348, l. 11.

As stated, the judge ruled she was charging South Carolina Code Section 16-3-657 over appellant's objections. She did add some language that was requested by appellant if she charged this code section over his objection. R. 365, l. 1 - 369, l. 2; R. 445, ll. 14-25. The judge flatly instructed the jurors "the testimony need not be corroborated and the defendant can be convicted solely on the basis of the victim's testimony." R. 445, ll.12-16.

The judge added that "uncorroborated" does not mean the jury should ignore inconsistencies and testimony or credit baseless testimony. R. 445, ll.12-25.

Discussion

In State v. Rayfield 369 S.C. 106, 631, S.E.2d 244 (2006), the Supreme Court held that the judge could, but was not required to charge South Carolina Code Section 16-3-657, that the alleged victim need not be corroborated. Appellant noted that in Rayfield the defendant had argued the instruction was a charge on the facts, it improperly emphasized the testimony of one witness, and it carried a strong possibly of unfairly biasing the jury against the defendant. See, State v. Hill, 394 S.C. 280, 298, 715 S.E.2d 368, 378 (Ct.App. 2011). The dissenters in State v. Rayfield noted this jury instruction did not assist the jury in fulfilling its function of deciding whether the state had proven the charge beyond a reasonable doubt. In fact, they observed, the instruction created more problems than solutions, and it was confusing as a whole.

Appellant Brandeberry is not aware of any other jury instruction that favors the testimony of one witness. That is true particularly where the jury is instructed under its oath that it can convict a defendant based merely on the uncorroborated testimony of the alleged victim. It is anthema to our criminal justice system wherein a defendant is presumed innocent and he may only be convicted by evidence beyond a reasonable doubt. This instruction favors the testimony of a single witness over all others and unfairly prejudices the defendant in the eyes of the jury. It was a charge on the facts and it denied appellant his Sixth Amendment right to a fair trial. See State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244, 249, (1942) (similar instruction on "uncorroborated' statements of accomplices should be

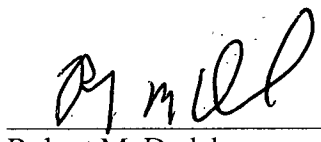
received with caution and should be scrutinized by the jury with great caution was a charge on the facts which violated the state constitution).

A judge should not direct a verdict of acquittal because the alleged victim's testimony is not corroborated, but charging a jury this language denied appellant a fair trial. Appellant should be granted a new trial.

CONCLUSION

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

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of June, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Letitia H. Verdin, Circuit Court Judge

THE STATE,

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APPELLANT

APPELLATE CASE NO. 2012-212841

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 17th day of June, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of June, 2014.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.