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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALVIN D. ARNOLD,

APPELLANT

APPELLATE CASE NO. 2013-002511

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to continue Appellant's trial where the prosecutor disclosed a mental health expert witness and the expert's materials one day prior to trial despite the case being three-years old and having an "open file" policy preventing Appellant from having a meaningful opportunity to review the materials and rebut the expert in violation of Appellant's right to due process of law?

STATEMENT OF THE CASE

On July 31, 2012, a Greenville County grand jury indicted Appellant for lewd act upon a child (2010-GS-23-10177) and criminal sexual conduct with a minor in the first degree (2010-GS-23-10178). R. 232.[1] The prosecutor, Kris Hodge, called the case for trial before the Honorable C. Victor Pyle, Jr., and a jury on November 12-14, 2013. Amanda Wicker represented Appellant. R. 1. The jury found Appellant guilty on both charges. R. 227, lines 9-15. Judge Pyle sentenced Appellant to the mandatory minimum of twenty-five years' imprisonment for criminal sexual conduct and to ten years' imprisonment for lewd act. R. 229, line 19 - R. 230, line 6; R. 234.

Appellant filed a timely notice of appeal. This brief follows.

[1] Petitioner was also indicted for incest (2010-GS-23-10176), which was called for trial with the criminal sexual conduct and lewd act charges. R. 14, lines 13-16; R. 31, lines 20-25; R. 49, lines 12-14. However, the prosecutor withdrew the charge when Appellant rested his case because no evidence supported the charge. R. 192, lines 15-25; R. 215, lines 15-18; R. 224, lines 8-24.

STATEMENT OF THE FACTS

Following a very contenious divorce, Appellant's wife obtained custody of the couple's three children. R. 162, lines 7 – 17. After the two older children were sexually assaulted while in their mother's custody, Appellant was awarded custody of all three. R. 162, line 18 – R. 163, line 13. Appellant, his new wife, her son and his girlfriend, and Appellant's three children resided together. R. 55, lines 3 – 4; R. 163, lines 14 – 20. However, the children visited their mother on some weekends. R. 164, lines 11 – 19; R. 177, lines 15 – 17.

On August 4, 2010, a DSS investigator responded to Appellant's ex-wife's home because Appellant's youngest child, Minor, claimed Appellant sexually abused her. Thereafter, the ex wife regained custody of the children. R. 57, line – R. 58, line 24. Minor underwent a forensic interview and medical exam. R. 73, lines 3 – 7. On November 22, 2010, the police arrested Appellant. R. 79, lines 9 – 12.

At Appellant's trial, the prosecution played a video of Minor's forensic interview in which she claimed Appellant sexually assaulted her between the ages of five and seven. R. 91, lines 1 – 9. Minor testified about the alleged abuse as well, but her testimony was greatly different than what she claimed during the interview. For example, she denied Appellant's finger entered her private part at the trial, but had made such a claim during the forensic interview. She also denied anything happened with her mouth, whereas, she claimed otherwise at the time of her forensic interview. R. 124, line 23 – R. 125, line 6.

Appellant denied abusing Minor, and his wife and adult stepson testified that Appellant had not been alone with Minor. All three testified that Appellant worked nights at the Greenville News and would not have been able to abuse Minor when she claimed the

abuse occurred. R. 156, line 3 – R. 157, line 19; R. 168, line 10 – R. 169, line 13; R. 184. line 9 – R. 185, line 4; R.186, lines 2 – 8.

ARGUMENT

The trial judge erred in failing to continue Appellant's trial where the prosecutor disclosed a mental health expert witness and the expert's materials one day prior to trial despite the case being three-years old and having an "open file" policy preventing Appellant from having a meaningful opportunity to review the materials and rebut the expert in violation of Appellant's right to due process of law.

Relevant facts

Prior to the start of the jury trial, Appellant moved for a continuance. Defense counsel explained the Public Defender opened the file on November 24, 2010, and moved for discovery on December 1, 2010. Thereafter, discovery was received in December of 2010, August of 2011, and June of 2012. At the end of June of 2013, the case was transferred to defense counsel. On November 1, 2013, defense counsel requested copies of the curriculum vitaes of the prosecution's expert witnesses. In response, on November 5, 2013, the prosecutor provided one. However, the prosecutor also informed defense counsel that she intended to call Minor's therapist as a witness. Then, on November 11, 2013 – one day prior to trial – the prosecutor informed defense counsel that she planned to call the therapist to discuss her treatment of Minor and to qualify her as an expert in the area of "child sexual abuse dynamics and treatment of children of sexual abuse." R. 8, lines 6-25. On that same day, the prosecutor provided thirty-four additional pages of discovery. These were medical documents from the therapist. Tr. 9, lines 4-9. Defense counsel explained she was not an expert and could not "decipher" the discovery. Based upon the late revelation of an expert witness and disclosure of medical records requiring expert analysis, defense counsel moved for a continuance to allow ample time to review the materials and to hire an expert. R. 9, lines 10-13.

The prosecutor countered that documents revealed only the day before were "not medical records," but were "the therapist's notes and the therapist's documents." Further, the prosecutor stated that she was "not required to provide those under discovery." She gave the materials as a "professional courtesy." According to the prosecutor, the case had been going on for three years and Appellant knew Minor had been in therapy and the name of the therapist. R. 10, lines 1-18.

When defense counsel confronted the prosecutor with the cover letter accompanying the materials, which called them "medical records" and stated they were being provided pursuant to Rule 5, SCCrimp., the prosecutor "attributed" the word choices to her "secretary." R. 10, line 20 – R. 11, line 3. Despite the trial judge's concerns about the late disclosure and the need for an expert, the judge denied the motion, but required the prosecution to make the witness available to the defense for an interview. R. 12, lines 12-21.

The following day, the Circuit Public Defender, John Mauldin, appeared to supplement the record concerning the continuance motion. Regarding the prosecutor's contention that the documents were not subject to discovery, Mauldin explained that "for the last seventeen years," the Public Defender Office "operated under essentially an open file discovery policy" in cooperation with the Solicitor's Office. R. 41, line 7 – R. 42, line 2. In essence, the public defenders relied upon the existing relationship that "what [they] received from discovery was what was in the state's file" with only limited exceptions for work product and the like. R. 42, lines 3-9. Mauldin argued that the separate discovery packets provided over the years demonstrated that the prosecution "was supplementing the discovery material as they received additional information" in accordance with the "open file policy." R. 42, line 20 – R. 43, line 11.

The trial docket listing Appellant as a potential case to be called for trial was published on October 25, 2013. Subsequent to that publication, defense counsel received additional discovery

and learned of the state's intention to call an expert witness. According to Mauldin, this late disclosure gave Appellant "zero opportunity for a meaningful rebuttal of that evidence. He's got no chance to rebut that evidence." R. 43, lines 12-21. Due to the late disclosure of the expert witness and the expert's documentary materials, Appellant had "no opportunity for a meaningful rebuttal of that witness." As a result, Appellant was denied due process of law. R. 44, lines 10-18.

The prosecutor claimed "counselor's and therapist's notes" were not part of the prosecutor's file because they were "not the product of law enforcement." Rather, "those [were] things that a prosecutor finds as the case goes to trial." In fact, the prosecutor "would not have met with the counselor had this case not been going to trial." R. 44, lines 21-25. Then, the prosecutor cited case law to support the prosecutor's conclusion that the therapist's records were not subject to disclosure pursuant to Rule 5, SCCrimp. R. 45, lines 1-12. The state's position was to protect the "private privileged information between a counselor and a victim" "until such time we have to turn it over for a fair trial." R. 45, lines 8-18.

The judge, thereafter, denied the renewed request for a continuance and the trial proceeded. R. 46, lines 9-11. Prior to the prosecution calling Erica VanWagner, Minor's therapist, to the stand, Appellant renewed the continuance request based upon the late disclosure of the expert witness and the expert's materials. R. 133, lines 2-5. Despite this request, the judge allowed the prosecution to present the testimony of VanWagner. The judge qualified VanWagner as "an expert in child sex abuse dynamics and the treatment of children with sex abuse." R. 138, lines 3-8.

VanWagner claimed to be a mental health therapist for the Greenville Mental Health Center focusing on therapy for children and families involved with the Department of Social Services, primarily dealing with abuse and neglect. R. 136, lines 1-11. In this role, VanWagner was treating Minor. R. 138, line 10 – R. 139, line 1. According to VanWagner, Minor presented symptoms of

trauma, such as sexualized behaviors, nightmares, intrusive thoughts, and fear. She claimed a "classic" sign of post-traumatic stress disorder was "avoidance" associated with the trauma – this meant avoiding thoughts, feelings, and things that remind them of the trauma. R. 139, line 19 – R. 140, line 5. VanWagner opined "these symptoms ... [were] consistent with a person who had been sexually abused" and a person who had post-traumatic stress disorder. R. 140, lines 9-14. The symptom most commonly displayed by Minor was avoidance because she resisted discussing anything related to the alleged abuse. R. 140, line 23 – R. 141, line 13.

VanWagner also discussed "child sex abuse dynamics," which she explained included "delayed disclosure." According to VanWagner, "delayed disclosure" is a term used to label when "the child doesn't immediately disclose any sort of abuse or trauma." In her experience, it was "very common for a child to delay disclosure." R. 141, lines 14-25. She further elucidated multiple factors for delaying disclosure, including fear, shame, guilt, and age. R. 142, lines 1-11. VanWagner claimed the "process for disclosure" began with "denial," leading "to more tentative disclosing," until finally resulting in "a more active stage of disclosure." R. 143, lines 20-24. "A victim is typically more likely to delay disclosure if it is a family member." Tr. 142, lines 15-16. Coincidentally, she also claimed that "[i]t is more often for a family member or a close family friend to be the perpetrator of abuse." R. 142, lines 17-20.

Going directly to the inconsistencies in Minor's story, the prosecutor asked VanWagner: "So would it be common or uncommon in your experience for a child to tell, say, the DSS worker an initial piece of what happened, then tell a forensic interviewer another piece or a separate piece? Is that what we're talking about here?" R. 145, lines 17-21. VanWagner responded, "Right. That is still part of that tentative disclosure stage that a child may be in." R. 145, lines 22-23. Due to the

very late revelation of VanWagner as a witness and of her materials, defense counsel's cross-examination consisted of a mere six questions. R. 147, line 24 – R. 148, line 16.

In her closing argument, the prosecutor relied upon VanWagner's testimony to explain the inconsistencies in Minor's story. R. 206, lines 13-17. She reinforced VanWagner's claim that Minor "had symptoms of flashback, she ha[d] symptoms, obviously, of regression, she talked more like a baby, she had fears, she had fear of her dad, she had fear of men. So she didn't want to talk about this." R. 206, lines 13-17.

Discussion

The Fourteenth Amendment to the United States Constitution guarantees criminal defendants the right to due process of law. U.S. Const. Amend. XIV. "The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). Further, the South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon "a showing of good and sufficient legal cause." Rule 7, SCRCrimP.

Failing to present expert testimony in response to the State's case prejudices a criminal defendant and the court should have granted a continuance in this matter. In McKnight v. State, 378 S.C. 33, 43-44, 661 S.E.2d 354, 359 (2008), the defendant received a new trial in part because he was prejudiced by counsel's failure to seek a continuance to secure a favorable expert's testimony. In State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002), the Court reversed based on the trial court's denial of a continuance to obtain transcripts of a previous trial.

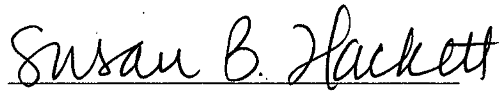
Although a review of South Carolina's jurisprudence reveals reversals for failure to grant a continuance are rare, most of the cases upholding the denial point to some failure on defense counsel's part. See, e.g., State v. Register, 323 S.C. 471, 482, 476 S.E.2d 153, 160 (1996) (defense counsel waited until a month before trial to investigate DNA evidence); State v. Colden, 372 S.C. 428, 641 S.E.2d 912 (Ct. App. 2007)(finding no abuse of discretion in failing to grant the requested continuance where the case had been continued twice previously and the record revealed the depth of trial attorneys' understanding of the nature of the case). In this case, defense counsel was blameless. The State admitted not informing the defense of the expert testimony until it was too late for the defense to obtain its own expert.

Appellant acknowledges this Court's decision in State v. Nicholson, 366 S.C. 568, 579, 623 S.E.2d 100, 105-06 (Ct. App. 2005) finding that prosecution had no obligation to disclose a sexual abuse expert. Further, Appellant notes the South Carolina Supreme Court's decision that counseling notes are not subject to disclosure pursuant to Rule 5, SCRCrimP. State v. Trotter, 322 S.C. 537, 540-541, 473 S.E.2d 452, 454 (1996). However, this case does not involve a claim of a discovery violation. Rather, this case concerns a prosecutor's agreement with the defense that the entire prosecution file is open and available to the defense coupled with the provision of the disclosure of an expert witness and the witness's notes the day before the trial. Counsel's request to continue the case to investigate and rebut the critical evidence was reasonable and should have been granted by the trial judge. The prosecution relied heavily on the expert to explain Minor's inconsistencies and to give evidence of so-called "rape trauma." Appellant merely sought an opportunity to complete a full and complete defense, including a fair rebuttal of the expert's testimony.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of September, 2014.

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C. Victor Pyle, Jr., Circuit Court Judge

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ALVIN D. ARNOLD,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Alvin D. Arnold states:

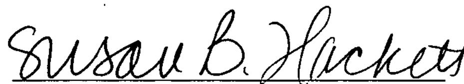
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge C. Victor Pyle, Jr., which was held on November 12 - 14, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Alvin D. Arnold.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

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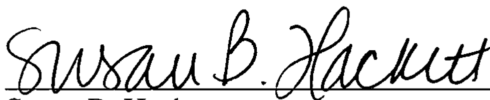
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Entire Trial Transcript
(2) True–billed indictments;
(3) Sentence Sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

September 2nd, 2014



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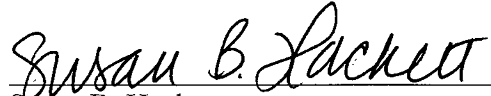
Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 2, 2014



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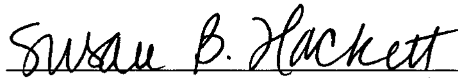
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Alvin D. Arnold, #357842 at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 2nd day of September, 2014.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of September, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .