STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of General Sessions
The Honorable James R. Barber, III

Appellate Case No.: 2013-002799

State of South Carolina,

Respondent,

vs.

Dwayne Lee Rudd,

Appellant.

INITIAL BRIEF OF APPELLANT

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IV. **DID THE TRIAL JUDGE ERR IN ALLOWING TWO PICTURES TO BE INTRODUCED, DIPICTING WRITTEN APOLOGIES FROM THE APPELLANT TO THE MINOR CHILDREN?**

STATEMENT OF THE CASE

On June 6, 2013, Dwayne D. Rudd was arrested and charged with the offense of five counts of Criminal Sexual Conduct with a Minor 2nd Degree (2013-GS-02-1681, 2013-GS-02-1680, 2013-GS-02-1679, 2013-GS-02-1642, 2013-GS-02-1643) and five Counts of Criminal Sexual Conduct with a Minor in the 3rd Degree (2013-GS-02-1640, 2013-GS-02-1644, 2013-GS-02-1638, 2013-GS-02-1639, 2013-GS-02-1645). Appellant was true billed for these charges on October 3, 2013. At trial, the State moved to withdraw Indictment No. 2013-GS-02-1640, 2013-GS-02-1644. Subsequently, the Appellant went to trial on three Counts of CSC with a Minor 3rd and five Counts of CSC with a Minor 2nd. Appellant was found guilty by Jury and was sentenced as follows: Indictment 2013-GS-02-1681 – CSC with a Minor 2nd Degree, sentenced to a term of fifteen (15) years. On Indictment 2013-GS-02-1679 – CSC with a Minor 2nd Degree, sentenced to a term of fifteen (15) years. On Indictment 2013-GS-02-1680 – CSC with a Minor 2nd Degree, sentenced to a term of fifteen (15) years. On Indictment 2013-GS-02-1642 – CSC with a Minor 2nd Degree, sentenced to a term of fifteen (15) years. On Indictment 2013-GS-02-1643 – CSC with a Minor 2nd Degree, sentenced to a term of fifteen (15) years On Indictment 2013-GS-02-1638 – CSC with a Minor 3rd Degree, sentenced to a term of five years. On Indictment 2013-GS-02-1639 – CSC with a Minor 3rd Degree, sentenced to a term of five years. On Indictment 2013-GS-02-1645 – CSC with a Minor 3rd Degree, sentenced to a term of five (5) years provided upon a payment of costs and assessments as applicable, the balance was suspended with probation for three (3) years. These sentences were to be run concurrent to each other, except for

Indictment 2013-GS-02-1645 where the Appellant was given three years' Probation, was to be run consecutive. Appellant was given credit for time served.

A timely Notice of Appeal was filed.

STATEMENT OF FACTS

The Appellant was tried before a Jury by the Honorable James R. Barber, III in Aiken County on December 9, 2013 through December 12, 2013. The Appellant went to trial on three counts of CSC with a Minor 3rd Degree and five counts of CSC with a Minor 2nd Degree.

The Appellant was charged with inappropriately touching and digitally penetrating his daughters who were ages eleven (11) and fourteen (14) at the time of this allegation.

Pre-Trial Motions were made before the Court:

1. To quash and or sever the Indictments. Counsel argued that the dates on the Indictments were deficient and that there was no sufficiency of information on the Indictments. Counsel argued that the Indictments needed to be clarified regarding the dates and/or date ranges in which these alleged acts had occurred. The State argued that the Indictments were based upon the minor children's birthdays and spans from one birthday to another (Tra. p. 7)
2. Counsel further argued that the Indictments were defective in that they did not say exactly where these crimes occurred. (Tra. p. 8) The Court ruled that the Indictments did not have to say exactly where the crime occurred,

they just have to allege the offenses and how it occurred. (Tra. p. 10) The Court found that the Indictments where sufficient. (Tra. p. 10)

3. Defense Counsel argued that the Defendant had not been provided certain medical records. It appears that the State was not in possession of these records. The Court found that the Appellant's signature would authorized his attorney to get any necessary medical records as he was the father of the children. (Tra. p. 11)
4. Motion was made to suppress photographs and to sequester the witnesses. Sequester of the witnesses was granted by the Court. (Tra. p. 13)
5. The Appellant made Motion and filed memorandum in support of his Motion to Suppress a statement made by Appellant when Police and DSS arrived at the scene. Counsel argued that no Maranda rights were given. Appellant's statement was taken by an employee of the Department of Social Services. Argument was made by Defense Counsel that the DSS Investigator arrived with the officers and that she questioned him in front of the Officers that were present at the scene. It appears that the Appellant made statements to two different DSS workers on separate occasions. One was at the residence as a result of the initial DSS Supervisor who came to the marital home to investigate the allegations. Another one was made to a DSS caseworker who visited him in the jail after his arrest. (Tra. p. 15). In the second statement the Appellant had counsel. (Tra. p. 15)

   The question raised before the Court was whether the DSS Supervisor is an agent of the State. (Tra. p. 16) Argument was made that the Appellant

believed that the DSS Supervisor was there questioning him with law enforcement, as law enforcement officers were standing around. That he was not free to move (Tra. p. 15) and that this was a way to get the Appellant to talk without having to advise him of his rights.

Testimony was taken in camera of Ester Timmerman, who was the DSS employee who interviewed the Appellant. She testified that she met at a Bi-Lo close to the marital home with officers from Law Enforcement and the children's Mother. They left that location to go to the home. (Tra. p. 21) She testified that she asked the Appellant to describe to her what happened and that he voluntarily spoke with her. (Tra. p. 23)

Officer Christopher Evans stated that he arrived at the scene. That he patted Mr. Rudd down to determine whether he was in possession of a weapon and that he was one of three officers who was at the scene. He testified that he did not tell the Appellant that he could go, nor did he tell him that he could not go. The officer did tell him that he, the officer, was not to go into any details about the allegation until the Appellant was advised of his Miranda Rights and agreed to signed a waiver. The officer testified that the Appellant would not sign. (Tra. p. 33) The officer further testified that he asked the Appellant to stand by the car. He additionally stated that the Appellant would have been allowed to leave and that the only place he was not allowed to go was inside the house where the alleged victims and his spouse were. (Tra. p. 35) The officer stated that he received the Appellant's statement from Ms. Timmerman. (Tra. p. 35)

The Appellant, testified in camera, that Officer Evans asked him to put his hands on the car. That he did so and they patted him down and asked him if he had a gun (Tra. p. 35) The Appellant never left the front of the car. (Tra. p. 37) He thought he was under arrest (Tra. p. 38) and that the Police Officer remained next to him within five (5) feet. (Tra. p. 38). He remembered them asking him to sign a consent form and that he did not sign anything. (Tra. p. 38) He was not free to leave (Tra. p. 39) and that when asked whether he thought the worker from DSS was a Police Officer, he indicated that she came with them. The Appellant was not arrested until about three weeks after the initial contact. (Tra. p. 40)

The Court found that the DSS investigator was not an agent of the State. Miranda warnings would not be necessary.

On June 3, 2013, the Appellant was asked if he would like to give a statement or come take a polygraph. He responded that he would like to retain counsel. Three days later, on June 6, 2013, a Warrant was sworn out and on June 10, 2013, he turned himself in to law enforcement. (Tra. p. 43)

6. A number of photographs were attempted to be introduced by the State. Within these photographs were two pictures of writing the Appellant had placed on the wall in each child's bedroom. Motion was made by trial counsel to prevent the introduction of these pictures based on relevance. Counsel argued the only reason they were trying to introduce these pictures was to prejudice the Defendant (Tra. p. 45)

The State was attempting to introduce pictures of these writings on the children's walls. When the Appellant's wife and two minor children went to the marital home on June 10, 2013 they discovered these writings in the children's bedrooms. These writings were a statement of apology with the Appellant saying his was sorry to the victims. (Tra. p. 47) Objection was made by Defense Counsel that these pictures where to be introduced solely for the purpose of saying that the Appellant was sorry as an indication that he was guilty of these crimes. (Tra. p.)

7. Defense counsel further moved to exclude the testimony of the oldest daughter based on a learning disability. Trial Counsel asked that her competency be evaluated prior to her testimony. (Tra. p. 50) As a result, the Trial Court asked both children prior to their testimony whether or not they understood the difference between being truthful and telling a lie. The children answered to the satisfaction of the Court.

The State presented the testimony of both children, their Mother, Jennifer Rudd, Ester Timmerman, the DSS worker at the scene and Shannon Brown, SDD Human Service's Specialist. The State further presented testimony from Jeffrey M. Donahoe, M.D. and Captain Nick Gallam, Aiken County Jail Administrator.

The Appellant Dwayne Rudd testified on his behalf. He stated that his older daughter suffered from Congenital Adrenal Hyperplasia. That she had undergone corrective surgery. That he had been instructed by the doctor to apply an antibiotic cream twice daily and that he had removed the children's underpants to compare the two girl's private areas to make sure that the surgery and healing

were proper. He testified that he was a stay at home dad and felt these actions were normal under the circumstances.

The Appellant's theory of defense appears that he was acting in the best interest of his daughter and that any intrusion was as a result of the medically recognized treatment of applying the antibiotic cream. That at no time was any action an action of lust, passion or sexual desire.

The Jury found the Appellant guilty on all counts and he was sentenced by the Court.

ARGUMENT

I. DID THE TRIAL JUDGE ERR IN DENYING DEFENSE COUNSEL'S MOTION TO SUPRESS THE STATEMENT MADE BY THE APPELLANT TO THE DEPARTMENT OF SOCIAL SERVICES INVESTIGATOR, BASED UPON THE FACT THAT HE WAS NOT GIVEN HIS MIRANDA WARNINGS?

Pre-trial Motion was heard by the Court to suppress statements made by the Appellant to the Department of Social Services during the initial investigation at the marital home. The Police and DSS Worker arrived at the location and no Miranda Warnings were given and a statement was taken by the DSS investigator. (Tra. p. 13)

The Court heard the testimony of Ester Timmerman, Supervisor from the Department of Social Services in camera. (Tra. p. 13) Ms. Timmerman testified that she received a report of sexual abuse. That law enforcement was notified. That law enforcement was involved in cases where they had to secure the safety of the children. (Tra. p. 21) Ms. Timmerman testified that she met with the children's Mother and law enforcement at a local Bi-Lo prior to going to the marital home. She testified that she

went to the residence in a State car, by herself and that she was accompanied by law enforcement officers in separate cars. (Tra. p. 26) Ms. Timmerman testified that the Appellant spoke with her freely. He indicated that he was willing to speak with her (Tra. p. 23) and that he spoke with her for approximately 15 to 20 minutes. She identified herself as working with the Department of Social Services. She testified that she did not have a gun, handcuffs and that she did not work for law enforcement. (Tra. p. 21).

The Court took in camera testimony of Christopher Evans, investigator for Aiken County Sheriff's Department. Officer Evans testified that he arrived at the scene prior to DSS (Tra. p. 30) Upon his arrival, he patted the Appellant down to determine if he possessed a weapon. (Tra. p. 23) That he did not tell him that he could go, nor did he tell him that he couldn't go. He did tell him that he could not go into any further detail about the allegations until he was advised of his Miranda rights and signed a waiver that he had been advised of these rights. (Tra. p. 33) The Defendant refused to sign. (Tra. p. 33) Officer Evans further testified that the Appellant was asked to stand by the car (Tra. p. 34) He acknowledged that a statement was given to Ms. Timmerman and that he received a copy of that statement (Tra. p. 35)

The Appellant testified in camera and stated that he was told to put his hands on the car and that he never left the front of the vehicle. (Tra. p. 37) That he thought that he was under arrest and that the Police remained next to him. (Tra. p. 38) He further testified that he did not sign any documents from the Police (Tra. p. 38) He testified that he felt like he was not free to leave and that he thought that the lady from the Department of Social Services was with the Police Officers, because she came with them. (Tra. p. 39)

He was not arrested until about three weeks after the initial contact by the Police. (Tra. p. 40)

The Court ruled that the Appellant was not in custody. They only took permitted steps to secure the safety of the Police officers and everyone else at the scene. The mere patting down of the Appellant for a weapon was not placing him in custody and that if he did not want to talk with them, they did not pursue him. (Tra. p. 41)

Testimony of Ester Timmerman from the Department of Social Services was presented at trial by the State. She testified that when they do an investigation, they are supposed to talk with everyone in the household, which would include the Appellant. (Tra. p. 235) That because of the allegations of abuse or neglect, she had to speak with him to get his side of the story and that was the Department of Social Services policy. (Tra. p. 236) She read out the allegations to Mr. Rudd (Tra. p. 237) and he was not handcuffed nor was he in a police car. (Tra. p. 238) She stated that the Appellant did speak with her, but he did not have to. (Tra. p. 238) That the Defendant denied the allegations. He informed her that his oldest daughter had had surgery in 2012 and that he was checking her to make sure that she was healing properly. He said that he had examined his younger child as well, because she was normal and he wanted to compare the two. He further testified that he made the statement that he was the father of the children and that he could touch their vagina if he wanted to. (Tra. p. 239-240) Ms. Timmerman stated that she told law enforcement what he had said and she ultimately had written a witness statement for law enforcement. (Tra. p. 240-241)

The Fifth Amendment provides, no person shall be compelled in any criminal case to be a witness against himself. The United States Supreme Court held that the

prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards... Miranda v. Arizone, 384 U.S. 436, 86 S.Ct. 1602. Miranda rights attach only if the suspect is subject to custodial interrogation. State v. Kennedy, 325 S.C. 295, 479 S.E. 2d 838 (Ct. App 1996). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda Interrogation is either express questioning or its functional equivalent. Kennedy 325 S.C. at 303, 479 S.E. 2d at 842.

In this case, the Appellant had every right to believe that he was in custody. There were a number of both marked and unmarked police cars. There were both uniformed and plain clothes officers. He testified that he was asked to place his hands on the car and was searched for weapons. He believed that the Department of Social Services Investigator was "with the police".

Clearly, the Appellant should have been given his Miranda Warnings prior to the questioning by the DSS investigator. State v. Lynch, 375 S.C. 628, 654 SE2d 292 (2007). His statements were later used against him in Court and were prejudicial.

II. DID THE TRIAL JUDGE ERR IN ALLOWING TWO PICTURES TO BE INTRODUCED, DIPICTING WRITTEN APOLOGIES FROM THE APPELLANT TO THE MINOR CHILDREN?

During Pre-Trial Motions, Trial Counsel objected to the State's intent to admit two pictures showing writings by the Appellant on the two minor children's bedroom walls. Objection was made by trial counsel that she not see the relevance in these pictures. The Appellant was not allowed to have any contact with the children, but that he had left a message on the wall that his daughters might see. (Tra. p. 44) In particular,

trial counsel was objecting to State's Exhibits 3 and 4. Trial Counsel argued that the pictures were going to be used by the State to indicate that he was sorry, as an indication of guilt. (Tra. p. 48) The Court ultimately allowed the State to admit the two writings and that Trial Counsel would be able to indicate to the Jury that he was only apologizing to the children for having to go through this process. (Tra. p. 48)

In the Trial, the Mother of the children testified that on June 10, 2013, she went back to the marital residence and that there were writings on the girls walls (Tra. p. 201) The handwriting was of their father (Tra. p. 202) On cross examination Jennifer Rudd testified that she was not saying the Appellant had written "please forgive me" as an admission that I'm sorry for abusing you. Mrs. Rudd testified that she wasn't saying that this is what it meant, but that "you could read into it how you would see it." (Tra. p. 223)

Relevant 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 evidence." State v. Hamilton 344 SC 344, 543 SE2d 586 (2001) All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, rules of evidence, or by other rules promulgated by the Supreme Court of South Carolina.

Evidence which is not relevant is not admissible. However 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.

When evidence prejudicial effect outweighs its probative value, it should be excluded, even if otherwise relevant. State v. Beckham, 334 S.C. 302, 573 SE2d 606

(1999) "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 496 SE2d 424 (1997). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Gillian, 373 S.C. 601, 646 S.E. 2d 872, 876 (2007). To make this finding, trial judges are given wide discretion in ruling on the relevancy of evidence. State v. Alexander, 303 S.C. 377, 401 S.E. 2d 146, 148 (1991).

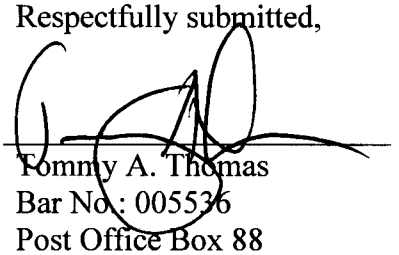
Clearly the writings are prejudicial. They can easily be interpreted to mean that the Appellant is making an admission that he did in fact commit the crimes for which he has been charged. If we take the above analysis, even relevant evidence may be excluded if it is incompetent as creating a danger of confusion or tendency to mislead the Jury. The Court speaks of unfair prejudice which has been defined as an undue tendency to suggest a decision on an improper basis. The trial Judge in balancing the probative value of the writings verses the danger of unfair prejudice should have concluded that the writings were clearly too prejudicial State v. Lyles 379 SC 328, 665 SE 2d 201 (2009).

In this case it is easy to interpret the writings as an admission when we compare the probative value of the writings against the dangers of unfair prejudice. Clearly the Appellant was prejudiced by the admission of the photographs.

CONCLUSION

For the above stated reasons, Appellant respectfully requests that this Court reverse his convictions.

Respectfully submitted,



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