

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2014-002519

RECEIVED

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S.C. Supreme Court

The State,

Respondent,

v.

Jefferson Perry,

Petitioner.

Opinion No. 5257 (S.C. Ct. App. filed August 6, 2014)

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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STATEMENT OF QUESTIONS PRESENTED

- I. The majority of the Court of Appeals properly found the trial court did not commit an error in charging the jury on the correct and applicable law of the case, including the correct statement of law that time is not a material element of the crime.
- II. The Court of Appeals properly found the trial court did not err in admitting the video recording of the forensic interview pursuant to Section 17-23-175 of the South Carolina Code because it did not impermissibly bolster the child's testimony.

STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's procedural Statement of the Case.

Factual Background

The minor victim, nine years old at the time of the incident, visited her Uncle Bryan around Christmas time. (T.47-48; R. pp. 26-27) On December 29, 2007, several days before the minor victim's father's birthday, she slept in the living room of her Uncle's house. Petitioner entered the room with the minor victim's uncle, but only Petitioner remained. (T.49-50; R. pp. 28-29).

Petitioner put his hand up the minor victim's pants. His hand was between her pants and her panties over her vagina. He only touched the outside of her panties and not skin, but touched her "private part." (T.54-55; R. pp. 33-34). The minor victim awoke and moved from the floor where she was sleeping to the couch. Petitioner followed her to the couch. (T.52; R. p. 31). Petitioner asked to lay his head in the minor victim's lap. She did not respond because she was scared and shaking. (T.53; R. p. 32). He put his head in her lap and fell asleep. She was able to get up and move to her father's bedroom. (T.54; R. p. 33).

The minor victim testified she went back to her mother's house after her father's birthday on December 31, which is how she remembered the incident happened on December 29. Petitioner also indicated he could have been at the house December 29 or 30th. (T.125; R. p. 101). He did admit it was in 2007 between Christmas and New Years. (T.131; R. p. 107). He also admitted he had been drinking that night and woke up with the minor victim on the couch with him. (T.134-136; R. pp.110-112).

ARGUMENT

- I. The majority of the Court of Appeals properly found the trial court did not commit an error in charging the jury on the correct and applicable law of the case, including the correct statement of law that time is not a material element of the crime.**

The majority of the Court of Appeals correctly found the trial court's charge was a correct statement of the law in South Carolina. The majority of the Court of Appeals also correctly concluded any reference to the correct statement of law did not prejudice Petitioner as it was not unduly emphasized and the trial court gave a full and correct charge on the overall law including the State's burden of proof and the jury's responsibility to determine the credibility of the witnesses. As a result, the trial court did not err in charging the jury.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 479, 697 S.E.2d at 583

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when

the charge is read as a whole, it contains the correct definition and adequately covers the law.” Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted).

Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

During the charge conference, the State asked the trial court to charge the jury that time is not a material element of the crime and the minor victim’s testimony did not need to be corroborated. (T.171-172; R. pp. 147-148). Counsel indicated the child testified the lewd act occurred on a specific day and to give the charge that time is not a material element “is giving, carving out another special consideration for a child victim that cuts into the rights of my client.” (T:172; R. p. 148). After Petitioner’s counsel objected, the trial court indicated he would give the requested charges. (T.172-173; R. pp. 148-149). During his charge to the jury, the trial court stated: “Additionally, time is not a material element of the offense of criminal sexual conduct with a minor.”¹ (T.197; R. p. 172).

Petitioner argues this case is analogous to State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). In Jones, during the charge conference prior to closing argument, the trial court specifically indicated he would provide the Manning reasonable doubt charge

¹ Neither party corrected the judge’s reference to criminal sexual conduct with a minor as opposed to lewd act charge for which Petitioner was tried and convicted. The law is a correct statement for either crime. If anything, the fact the charge related to criminal sexual conduct and not lewd act, the crime for which the judge told the jury Petitioner was charged, lessens any possible prejudice to Petitioner.

to the jury. As a result, defendant's counsel tailored his argument to the "hesitate to act" language in Manning. Jones, 343 S.C. at 576-577, 541 S.E.2d at 820-821. The State asked the trial court to change the reasonable doubt charge and the court removed that language. Id. at 577, 541 S.E.2d at 821. The South Carolina Supreme Court found it fundamentally unfair for the charge to be altered after counsel relied on the court's statement it would give a specific charge. Id. at 578, 541 S.E.2d at 821-822.

First, this specific issue raised by Petitioner was not preserved for review on appeal and should not have been addressed by the Court of Appeals. Counsel never objected regarding the charge being fundamentally unfair or unfairly restricting the effect of his argument to the jury. He never maintained the court's ruling was similar to the one in Jones. Instead, he simply argued it would give special consideration to the child and that the evidence only indicated a specific date for the incident to have occurred. Petitioner cannot raise one ground at trial and attempt to raise another unrelated ground on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (defendant may not argue one ground below and another on appeal); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground below and then argue different ground on appeal). As a result, this issue was not preserved for review on appeal.

On the merits, Petitioner's counsel knew prior to closing argument exactly what charge would be given to the jury. The trial court made it clear the evening before closing arguments were to be given what he would charge. (T.171-173; R. pp. 147-149) Counsel had the benefit of knowing the full charge, including the language that time is not a material element, prior to beginning his closing argument. (T.175-178; R. pp. 150-

153). The trial court charged the jury with the same language the court indicated in the charge conference would be used. (T.197; R. p. 172). In this case, unlike Jones, counsel could have tailored his closing argument to address the language charged and, because no change was made by the trial court in the jury instructions proposed and given, counsel's argument would not have been rendered superfluous as in Jones. In Jones, counsel tried to tailor his argument and then was thwarted by the trial court's change in the jury instruction. The Jones opinion is completely inapposite to the case at hand.

Further, the court gave an appropriate charge on the law of South Carolina. "It is well settled that it is not necessary to prove the precise day, or even year, laid in the indictment, except where time enters into the nature of the offense, or is made part of the description of it." State v. Reynolds, 48 S.C. 384, 26 S.E. 679 (1897). The only exception is when the defendant has noticed an alibi defense.

While it is true that the State need not prove the exact date set forth in the indictment unless time is an essential element of the offense or is made a part of the description of it ... the State should not be allowed to prove a different date than that set forth in the indictment where the defendant relies upon the defense of alibi. . . .

State v. Pierce, 263 S.C. 23, 27, 207 S.E.2d 414, 416 (1974) (citation omitted).

"Time is not a material element of . . . committing a lewd act on a minor." State v. Tumbleston, 376 S.C. 90, 101, 654 S.E.2d 849, 855 (Ct. App. 2007); see also, State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 443 (Ct. App. 2010) ("time is not a material element of committing a lewd act on a minor"). As a result, the State need not prove the exact date the lewd act occurred.

The trial court charged the jury on the elements of committing a lewd act upon a minor as well as the State's burden of proof. (T.190-197; R. pp.165-172). The court then

explained in a single reference to the disputed charge: “Additionally, time is not a material element of the offense of criminal sexual conduct with a minor.” (T.197; R. p.172). This is a correct charge of the law because time is not a material element and does not have to be proven beyond a reasonable doubt by the State.

Additionally, the trial court gave an analogous charge in State v. Anderson, 59 S.C. 229, 37 S.E. 820 (1901). In Anderson, the defendant was charged with larceny, which did not require time as a material element similar to Petitioner’s lewd act charge.

The trial court charged the jury:

Time is not what we term of the essence of a crime when a theft or other criminal offense is said to have been committed at a certain time. The gist of the charge does not consist in proving that it was done at the exact time laid in the indictment. The gist is whether or not the crime as alleged was committed, and, if the state proves that it was committed at any time,-the particular charge contained in the indictment prior to the finding of the true bill,-that would be sufficient; but the state must prove the charge as contained in the indictment. It is not necessary, and the state is not required, to prove the exact time laid in the indictment; but, still, it must prove that substantial charge as having been committed at some date, certainly before the finding of the true bill.

Anderson, 37 S.E. at 821. This Court found the charge was proper and in accordance with the law of the state which does not require the State to prove the exact time where it is not a material element of the crime. Id. This Court should find the charge by the trial court in the instant case was not an improper charge, but instead was a proper charge of the law as it currently exists.

Finally, as the majority found, this case is analogous to the case of State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006). In Rayfield, the trial court charged the jury that the victim’s testimony need not be corroborated. This Court found the charge to

be a correct statement of law, but one which need not always be given. The Court concluded, however, when the charge is given it is not prejudicial as long as the charge is not unduly emphasized and the trial court properly charged the jury on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses. *Id.* at 117-118, 631 S.E.2d at 250. This is exactly what happened in the instant case. The charge was a single mention of the fact time is not of the essence. The trial court fully charged the State's burden of proof, the elements of the charge the jury did have to determine the State proved beyond a reasonable doubt, and the duty of the jury to find the facts and judge the credibility of the witnesses. As a result, the majority of the Court of Appeals, consistent with Rayfield, correctly determined any possible error in giving the charge did not prejudice Petitioner.²

Counsel was entitled to argue any alleged inconsistencies in the testimony, and did fully argue regarding the alleged inconsistencies, to the jury. He was free to argue regarding the credibility to assign to witnesses, including the victim. It was for the jury to determine what version of the facts to believe. The court, in instructing the jury, appropriately and correctly told the jury in making its determination of guilt that the exact date or time was not an element of the crime which the jury had to determine.

² See also, State v. Schumpert, 312 S.C. 502, 508, 435 S.E.2d 859, 863 (1993) (finding a charge that included: "I charge you that time is not a material element of a sexual assault involving a child" was not prejudicial even when the appellant's defense was alibi).

II. The Court of Appeals properly found the trial court did not err in admitting the video recording of the forensic interview pursuant to Section 17-23-175 of the South Carolina Code because it did not impermissibly bolster the child's testimony.

The Court of Appeals correctly found the trial court properly admitted the video recording under section 17-23-175 of the South Carolina Code and the videotape did not impermissibly bolster the victim's testimony.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

First, this Court found section 17-23-175 to be a valid legislative enactment that did not run afoul of either the United States or South Carolina Constitutions. State v. Whitner, 399 S.C. 547, 559-560, 732 S.E.2d 861, 867 (2012). Specifically, the Court held:

Unless a legislative enactment concerning a matter of evidence violates the constitution, the legislative enactment is valid. See City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (holding that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the state or federal constitutions).

.....

Section 17-23-175 is a valid legislative enactment.

Id.

Additionally, the Court of Appeals has previously found the bolstering effect of the video recording does not preclude its admission under the statute. See State v. Russell, 383 S.C. 447, 451, 679 S.E.2d 542, 544 (Ct. App. 2009). As the Court of Appeals discussed, in general, the admission of a prior consistent statement has been held to be hearsay and, when the statement has been admitted for the sole purpose of bolstering the credibility of a crucial witness, the error in admission is not harmless. See e.g., State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (holding the admission of a witness's prior consistent statement, which clearly bolstered her crucial trial testimony, could not be considered harmless error). The statute in this case, however, has made a specific allowance for these out-of-court statements by child victims provided the above requirements have been met.³ Russell, 383 S.C. at 451, 679 S.E.2d at 544.

Further, the South Carolina Rules of Evidence specifically state they can be preempted by statute or other rule. See Rule 101, SCRE ("Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina to the extent and with the exceptions stated in Rule 1101."). The hearsay rules or any other rules of evidence are superseded by the statute in determining the admissibility of the video recording.

It is clear the legislature intended to allow the video recording into evidence even though it will likely constitute hearsay under Rule 801, SCRE, and may run afoul of other rules of evidence. The legislative enactment requires the child to testify prior to allowing the video recording into evidence, which demonstrates the Legislature presupposed some

³ It should be noted Petitioner has not challenged the trial court's ruling that the requirements for admission of the videotape has been met. Accordingly, the unappealed finding of the trial court that the videotape met the requirements for admissibility under the statute is the law of the case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case).

bolstering will naturally occur and the bolstering was deemed acceptable. Additionally, the statute shows the Legislature of our State has made a public policy decision that admitting evidence of the child's prior statement will be beneficial to finding the truth in sexual crimes where there is a child victim. As a result, the court need not partake of the same analysis required of other evidence, and the video recording should not be excluded on the basis that it bolstered the minor victim's testimony. The trial court did not err in admitting the video recording because it did not impermissibly bolster the victim's testimony.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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January 5, 2015

STATE OF SOUTH CAROLINA

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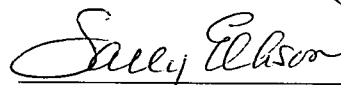
Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 5th day of January, 2015.



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S.C. Supreme Court

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Re: State v. Jefferson Perry
Appellate Case Tracking No. 2014-002519

Dear Mr. Dudek

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari to the Court of Appeals in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General
S.C. Bar No. 15608

cc: ✓ Honorable Daniel E. Shearouse (original and six enclosed)
Honorable Jenny A. Kitchings
Victim Services (enclosure)