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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Edgar W. Dickson, Circuit Court Judge

Opinion No. 2014-UP-346 (S.C. Ct. App. filed 10/1/2014)

10-GS-18-1144

THE STATE,

RESPONDENT,

V.

JASON A. BAUMAN,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 17, 2014.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in finding harmless error where the child's mother testified the child told her she learned how to perform oral sex from "Uncle Jason," petitioner, since this testimony was highly prejudicial hearsay, and it was error to find it "cumulative?"

2.

Whether the Court of Appeals erred by finding no error in the admission of the statement of jailhouse informant, Adam Buhle, into evidence since it was cumulative, where the fact that the written statement was cumulative to Buhle's oral testimony improperly bolstered that testimony and gave it impermissible significance?

STATEMENT OF THE CASE

Petitioner was indicted by the Dorchester County Grand Jury for the offense of criminal sexual conduct with a minor in the first degree. R. 309. His case came on for trial on June 11, 2012 before the Honorable Edgar W. Dickson, and a jury. Scott J. Bischoff, II, represented petitioner. Russell Hilton and Matt Austin were the assistant solicitors. R. 1.

On June 13, 2012, the jury found petitioner guilty of this offense. R. 296, ll. 5-10. Judge Dickson sentenced petitioner to twenty-five years imprisonment. R 297, ll. 11-15.

The Court of Appeals affirmed in State v. Jason Bauman, 2014-UP-346 (filed October 1, 2014). App. 1-2. A petition for rehearing was filed October 16, 2014. App. 3-7. Rehearing was denied on December 17, 2014. App. 8. This petition for writ of certiorari follows.

ARGUMENT

1.

The Court of Appeals erred in finding harmless error where the child's mother testified the child told her she learned how to perform oral sex from "Uncle Jason," petitioner, since this testimony was highly prejudicial hearsay, and it was error to find it "cumulative.

Relevant Facts

Tara Bauman is the alleged female child victim's mother. Petitioner Jason Bauman is her brother-in-law. R. 88, ll. 9-22. The child at issue was four-years-old, and her brother was two-years-old in May of 2010. R. 89, ll. 1-5.

Ms. Bauman testified she was giving both children a bath one day in May of 2010 when she said she saw the child's mouth open towards the male child's "lap and I stopped her and asked her what she was doing." The defense had earlier objected to hearsay statements that the child made to her mother while in the bathtub. The solicitor contended they were admissible as a present sense impression, and the defense strongly contended the child's statement was not. It was further noted that the child apparently *was not even going to testify*. R. 56, l. 10 – 67, l. 4.

The judge noted the defense objected to this line of testimony earlier, and defense counsel renewed those objections, but the judge allowed the witness to continue. R. 90, ll. 8-18. Ms. Bauman then testified the child said: "I'm going to suck his pee-pee. And I asked her where did you learn that from and she said `Uncle Jason.'" R. 90, ll. 4-24.

Ms. Bauman then identified petitioner in the courtroom as "Uncle Jason." R. 90, l. 25 – 91, l. 6. The child did not testify, and this rank highly prejudicial hearsay was the compelling memory in the jury's mind that child said petitioner taught her how to perform oral sex.

On cross-examination Ms. Bauman admitted her child had been diagnosed with Pervasive Developmental Disorder, which involved cognitive defects that also affected the child's speech. R. 96, ll. 11-19. Her reasoning skills were below the first percentile in testing. R. 97, l. 21 – 98, l. 4.

Ms. Bauman asserted that she mentioned this exchange with her daughter in the bathtub to Amy Young, her nurse practitioner. Ms. Bauman maintained that Young told her that she had to report the child's statement to the police. R. 103, l. 8 – 104, l. 21.

Ms. Bauman was not present when her child was subsequently interviewed by the police. Ms. Bauman admitted she did not know at the time her child was "in the spectrum of Autism." R. 106, l. 10 – 108, l. 12.

Dr. Allison Foster was hired by both the defense and the prosecution to evaluate the child. R. 135, l. 6 – 136, l. 25. Dr. Foster was qualified as an expert in forensic clinical psychology. She diagnosed the child with Pervasive Developmental Disorder Not Otherwise Specified. The child was also "within the Autism spectrum." However, the child did meet the minimal threshold to be competent to testify in her opinion. As stated, the state chose not to call the child as a witness, and to rely on the admission of this rank hearsay to its unfair advantage in this case. R. 144, l. 3 – 147, l. 10.

Dr. Foster testified that after reviewing the child's records she came to the conclusion there were significant amounts of behavioral disorders or behavioral actions that were inappropriate **both prior to the bathtub incident and** then **after** the bathtub incident. R. 151, ll. 17-22.

Petitioner was interviewed by the police. Detective Gebhardt testified that petitioner told him that children do not always tell the truth. He also told Gebhardt that the child involved in this case was a real "sexual person." For example, the child stuck her tongue out at people and that she had tried to grab him by his penis. R. 178, l. 8 – 182, l. 6.

Petitioner acknowledged at one point the child "for a second" attempted to perform oral sex on him by putting her mouth over his penis. The detectives had petitioner *write a letter of apology* to the child's mother, his sister-in-law. As argued to the Court of Appeals the crime of CSC with a minor requires *criminal intent*, and what petitioner told the police was not an admission to a crime. R. 178, l. 8 – 182, l. 6.

On cross-examination, Gebhardt said he had received training on interviewing a person, such as petitioner, who was "cognitively delayed." He had also been taught that people with mental disabilities can easily be susceptible to coercion and persuasion. R. 184, l. 3 – 196, l. 17. Gebhardt offered that petitioner did not act like what he thought a person with an IQ of only 71 would act while talking with him. Gebhart, in short, denied that he manipulated petitioner. R. 184, l. 3 – 196, l. 17.

The Jailhouse informant, and his written statement

Adam Buhle was working as a tattoo artist after just getting out of prison for a "violation of probation and forgery." Buhle admitted he also been convicted of grand larceny, burglary, and "some shopliftings." R. 213, l. 11 – 214, l. 16.

Buhle testified on August 12, 2010, he was in the Dorchester County Detention Center and petitioner was one of his cellmates. R. 214, l. 17 – 215, l. 7. Buhle claimed petitioner told him he was in jail because he would "play around with his niece and he started touching his niece and having his niece touch him." He maintained petitioner told him he watched pornographic movies with the child. He confirmed to the solicitor that he gave the police a written statement on August 12, 2010. R. 215, l. 19 – 218, l. 17.

When the solicitor went to introduce Buhle's statement into evidence, defense counsel objected on the grounds that it was cumulative to his testimony. The judge overruled the objection.

R. 218, l. 18 – 219, l. 6. The written statement was admitted into evidence over petitioner's objection. R. 218, l. 18 – 219, l. 11. R. 302(Statement of jailhouse snitch Buhle).

On cross-examination Buhle drew a distinction between people who robbed other people and people who stole from people. Buhle admitted he was a thief, but not a robber. Larceny, grand larceny, two counts, shoplifting third, and forgery were among his convictions but "not robbing somebody." R. 219, l. 16 – 220, l. 19.

Buhle denied he got any kind of deal or consideration from the solicitor for his testimony. "I didn't make no deal. I came here with a zero to eight open plea." R. 221, ll. 1-10. Buhle also denied he had access to petitioner's discovery, which obviously would have contained the accusations against petitioner. R. 232, ll. 14-22.

In his statement to the police that was admitted over petitioner's objection, Buhle said he learned the child's mother had seen her attempt to grab her brother's penis and the child said that "Uncle Jason" had taught her to do that. In the statement Buhle also stated petitioner allegedly told him he had had the child perform oral sex on him on other occasions. R. 302.

Court of Appeals

The Court of Appeals, in its summary opinion, held that the error in admitting hearsay testimony of the child's mother that the child allegedly told her petitioner allegedly taught her how to perform oral sex was harmless because it was cumulative. As petitioner argued in his rehearing petition, the problem with this opinion is that **what it is allegedly cumulative to** is the strongly contested written statement of the jailhouse snitch, Buhle, and a mischaracterization of what

petitioner admitted happened with the child.[1] Petitioner did not confess to sexually abusing the child. He simply said he quickly stopped her when she unexpectedly tried to perform oral sex upon him, which implicitly meant that the child had learned to perform oral sex from someone else. Petitioner did not have the criminal intent necessary to commit the crime of CSC with a minor in the first degree. App. 3-6.

Discussion

The Court of Appeals found the admission of this hearsay testimony harmless. App. 2. First, it was hearsay testimony.

In State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006), this Court found error in the admission of hearsay testimony. Witness Hicks testified that in the early morning of April 18, 2000 he was selling cocaine in the area when he heard Defendant Davis and two other men arguing. Hicks then heard a gunshot and saw the three men running from the area. Hicks testified Davis had a shotgun with him and wanted to sell it to Hicks. Hicks was allowed to testify that one of the men involved told him not to buy the shotgun from Davis because the victim had been shot with it. This Court held this testimony was not admissible as an excited utterance, and it was inadmissible hearsay.

The testimony of the child's mother in this case that the child told her that she learned the sexual behavior "from Uncle Jason" was inadmissible hearsay. It was not a present sense impression as defense counsel correctly argued at length. It was devastating testimony particularly

[1] Petitioner does not continue to maintain in this appeal that a special jury instruction on jailhouse informants should be given. However, if ever testimony should be carefully scrutinized it is testimony of a jailhouse snitch who is gaming the system in the belief – usually correct – that he will be rewarded for testifying for the state against a defendant on trial.

since the child, who had many difficulties and problems, did not testify and was not subject to cross-examination.

The child's alleged statement to her mother was an out-of-court statement offered to prove the truth of the matter asserted. It was therefore inadmissible hearsay. See State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991). See Rule 801(c), SCRE; Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972).

The jury heard the child's mother testify the child told her petitioner taught her how to perform oral sex. That rank hearsay went directly to the **only matter** at issue during this trial.

The Court of Appeals respectfully erred by finding the error was harmless. This is a strange case where both the child and petitioner had mental and other disabilities. The jury never heard from the child, and petitioner had an IQ of only 71 and other difficulties. Petitioner appeared to be tricked or coerced into writing a letter of apology given the context of his statement. See Colorado v. Connelly, 479 U.S. 157 (1986).

Again, petitioner's statement was not an admission of the purposeful breaking of the law. Even with petitioner's mental limitations, he was able to tell the police that he quickly stopped the child when she tried to perform oral sex on him.

Further, the admission of the jailhouse snitch's written statement was improper because it impermissibly bolstered his testimony. See State v. Gulledge, 277 S.C. 368, 287 S.E.2d 498 (1982) (Issue two below). The snitch's testimony also does not provide comforting or overwhelming evidence of petitioner's guilt such that the evidentiary errors in this case can be found harmless beyond a reasonable doubt. See State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).

In Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994) the defense at least had the opportunity to cross-examine the child about her accusation. Petitioner here did not have the opportunity to cross-examine the child, and the rank hearsay testimony of her mother that the child allegedly told her that petitioner taught her how to perform oral sex was extraordinarily prejudicial. The opinion of the Court of Appeals should respectfully be reversed.

2.

The Court of Appeals erred by finding no error in the admission of the statement of jailhouse informant, Adam Buhle, into evidence since it was cumulative, where the fact that the written statement was cumulative to Buhle's oral testimony improperly bolstered that testimony and gave it impermissible significance.

Relevant Facts

As seen above, the judge allowed the solicitor to introduce the written statement of the jailhouse snitch, Buhle, while he was testifying. The statement was cumulative to his testimony and *therefore it did unfairly bolster his credibility.* State v. Gulledge, 277 S.C. 368, 287 S.E.2d 498 (1982). Defense counsel properly objected that the written statement was cumulative, and that is why it was not admissible. R. 218, l. 18 – 219, l. 9.

The Court of Appeals apparently held the trial judge did not abuse his discretion in admitting the Buhle statement, and in the alternative that is was not reversible error, if it was error, *because it was cumulative.* App. 2. Petitioner respectfully submits that this Court should grant certiorari because there is confusion amongst the bench and bar as to when a cumulative prior statement is prejudicial *because it is cumulative* to the testimony of the witness, and when a cumulative prior statement is *not prejudicial because it is cumulative.* See Rule 242 (b)(1) & (3).

Whatever Buhle's written statement was *cumulative too, it was undoubtedly cumulative to his oral testimony.*

In State v. Gulledge, 277 S.C. 368, 371, 372, 287 S.E.2d 498, 490 (1982), this Court wrote and held that: "During trial, the State presented testimony that Patrolman Murphy returned to his patrol car and radioed patrol headquarters that he'd been shot and needed help. The radio communication was *recorded and transcribed.* Donald Ray Lane, the highway patrolman who

received the call, testified about the conversation, as did the Highway Department telecommunications supervisor. The tape was also played in court. We find no error in the admission of this evidence as part of the res gestae exception to the hearsay rule. However, we hold that the judge abused his discretion in allowing the jury **to take the transcript of the tape into the jury room because it unduly emphasized that evidence**. See State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980)." (emphasis added).

Buhle testified petitioner told him he was in jail because he would "play around with his niece and he started touching his niece and having his niece touch him." R. 215, l. 19 – 218, l. 17. As seen, in his written statement Buhle also stated that petitioner told him he sexually touched the child, and that the child sexually touched him. R. 302. Buhle's prior cumulative written statement to the police was offered to bolster his credibility by giving the illusion to the jury that because Buhle had made some of the same accusations against petitioner, about what petitioner allegedly told him, in the past that the jury should believe Buhle's in-court testimony. The prior written statement was obviously cumulative to Buhle's oral testimony the jury just heard, it unduly emphasized that testimony, and the jury was allowed to have the bolstering written statement in the jury room.

In State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003), this Court found the admission of a witness's prior statement to the police was error. In the prior statement the witness told the police that Randal Scott Foster had shot her mother. The Court found error and held the statement was not admissible as a prior consistent statement. Prior consistent statements are not admissible to attempt to "rehabilitate" a witness from proper cross-examination by competent counsel. See State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001).

There was not even an assertion in this case that this statement was admissible a prior consistent statement that was admissible to rehabilitate Buhle from an unfair attack of recent fabrication, and no foundation for it to be one was made regardless.

In State v. Foster, 354 S.C. 614, 622, 582 S.E.2d 426, 430 (2003), this Court held that "the written consistent statement was inadmissible hearsay, and the trial court erred in allowing the statement. Id. This error served only to improperly bolster Michelle's testimony See Tome v. United States, 513 U.S. 150, 157–58 (1995)[2] (discussing federal Rule 801(d)(1)(B) and stating that the purpose of the rule is to rebut an alleged fabrication or motive, not to "*bolster[ ] the veracity of the story told.*"). (emphasis added).

Further, the cumulative nature of this testimony and its bolstering effect on the jailhouse snitch's testimony was exacerbated because once it was made a trial exhibit the jury had Buhle's statement with it in the jury room. This further unduly emphasized the prejudicial effect of the evidence. See State v. Gulledge, 277 S.C. 368, 287 S.E.2d 498 (1982).

The solicitor knew what most juries do not: That jailhouse snitches curry favor with the prosecution to help themselves through sentencing consideration or favorable treatment while in jail. Many of them are pathological liars. Their assertions are often not credible, and they should be subject to more scrutiny. than a person who might do anything to regain his freedom.

The bolstering of Buhle's testimony by the introduction of his prior statement to the police was prejudicial error in this case because the statement was cumulative, and therefore impermissible bolstering, and the bolstering written statement going to the jury further unduly emphasized its

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[2] Other internal citations deleted.

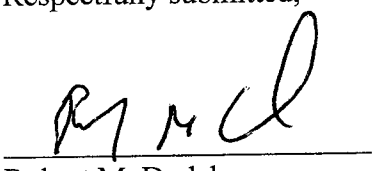
significance. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003); State v. Gulledge, 277 S.C. 368, 287 S.E.2d 498 (1982).

The opinion of the Court of Appeals should respectfully be reversed.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 26th day of January, 2015

STATE OF SOUTH CAROLINA

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THE STATE,

RESPONDENT,

V.

JASON A. BAUMAN,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 26th day of January, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of January, 2015.

Rhonda Denise Faysworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021

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January 26, 2015

David Spencer, Esquire
Senior Assistant Attorney General
Office of the Attorney General
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Columbia, South Carolina 29211

Re: The State v. Jason A. Bauman

Dear David:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

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

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/rdf

Enclosures

cc: Court of Appeals ✓