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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenville County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT WILSON WOODS,

APPELLANT

APPELLATE CASE NO. 2013-000814

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in precluding appellant from cross-examining the complainant concerning a prior false allegation of sexual abuse in violation of both State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990) and appellant's Sixth Amendment rights to confront witnesses and present a complete defense?

STATEMENT OF THE CASE

On March 19, 2013, a Greenville County grand jury indicted appellant for first degree criminal sexual conduct with a minor and a separate count of lewd act. R. 243. On April 8, 2013, appellant was tried before the Honorable Robert E. Hood and a jury. R. 1. Christy Sustakovitch represented the State. R. 1. Tim Sullivan represented appellant. R. 1. The jury convicted appellant. R. 221, ll. 14 – 20. Judge Hood sentenced appellant to twenty-five years' imprisonment for criminal sexual conduct. R. 229, l. 5 – 230, l. 22. The court sentenced appellant to a consecutive term of ten years' imprisonment suspended upon the service of five years' probation for lewd act. R. 229, l. 5 – 230, l. 22. This appeal follows.

ARGUMENT

The trial court erred in precluding appellant from cross-examining the complainant concerning a prior false allegation of sexual abuse in violation of both *State v. Boiter*, 302 S.C. 381, 396 S.E.2d 364 (1990) and appellant's Sixth Amendment rights to confront witnesses and present a complete defense.

Relevant Facts

No physical evidence of abuse exists in this case. Appellant denied the abuse to the police. R. 142, l. 1 – 144, l. 19. R. 147, l. 16 – 149, l. 8. The complainant, Minor, alleged that appellant anally raped her. R. 102, l. 20 – 105, l. 20. She testified this only happened one time. R. 106, ll. 5 – 7. Minor claimed appellant did not touch any other part of her body. R. 111, ll. 21 – 23. Her brother was in the next room, but she did not make any noise or ask for help. R. 111, ll. 5 – 6. She had heard her mother having sex with appellant. R. 112, ll. 10 – 20. She had also seen pornography that her mother admitted she kept in her closet. R. 112, ll. 21 – 24; R. 128, ll. 12 – 14.

Minor first reported the allegation at school. R. 74, l. 14 – 75, l. 7. Minor was living with her aunt at the time. R. 107, ll. 8 – 12. When the police informed her mother about the allegations, her mother was reluctant to help the police. R. 137, ll. 12 – 23. The mother confronted Minor on the telephone and was "screaming" at her. R. 159, ll. 12 – 15.

Prior to trial, appellant moved to admit Minor's prior false allegations of abuse. R.232. The State moved to exclude such evidence pursuant to South Carolina's Rape Shield Law, S.C. Code Ann. § 16-3-659.1. R. 234. Judge Hood heard argument on both motions prior to trial. R. 13, l. 2 – 15, l. 25. The State argued that Minor's prior allegation was not false, but admitted that "law enforcement did not elect to pursue any charges." R. 13, ll. 3 –

24. Appellant cited State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990)[1] and State v. Sprouse, 325 S.C. 275, 478 S.E.2d 871 (Ct. App. 1996) in support of its admissibility.

The solicitor then called Investigator Cheryl Cromartie ("Cromartie") of the Greenville County Sheriff's Office. R. 16, l. 3 – 17, l. 2. She investigated Minor's prior complaint, which was lodged with law enforcement by a family friend. R. 17, ll. 9 – 23. Cromartie interviewed Minor. R. 19, ll. 5 – 17. Minor told Cromartie that a man named "Kevin" touched her on her breast and vagina. R. 19, ll. 5 – 17. The State's physician performed a medical examination. R. 19, ll. 18 – 24. At some point, the allegation became that a man named "Calvin" had touched her. R. 20, ll. 3 – 19. A forensic interview was done. R. 20, l. 22 – 21, l. 25. After the interview, Cromartie decided not to pursue charges. R. 22, ll. 5 – 14. Cromartie claimed that her decision was based on "the totality of the circumstances" and not any disbelief of Minor. R. 22, ll. 5 – 24. She also claimed she "could not prove who the actual subject would have been at the time and I just didn't have enough information or details to pursue criminal charges." R. 22, ll. 9 – 14.

On cross-examination, Cromartie admitted that Minor's father's name was "Kevin." R. 23, ll. 14 – 21. She never interviewed Kevin. R. 25, ll. 12 – 23. Cromartie also admitted that Minor's mother had a boyfriend named "Calvin" who the family friend identified as the abuser. R. 26, l. 11 – 27, l. 16.

After Cromartie's testimony, Judge Hood asked defense counsel, "Tell me how you have shown that that statement is false." R. 28, ll. 13 – 14. Defense counsel argued that the

[1] The transcript reflects counsel cited to "DeBorder(ph)." R. 14, l. 7. Appellate counsel's research did not reveal a case by that name and "Boiter" appears to be the closest case phonetically that is relevant to this issue. During later argument, the transcript reflects discussion of the "Boyer" case, but Judge Hood's citation to the Southeastern Reports reveals that Boiter was the case being discussed. R. 36, ll. 11 – 25.

police did not believe Minor because they "never followed up and a similar situation in this case and they proceeded to go to trial." R. 28, l. 15 – 29, l. 6. Defense counsel further argued that "nobody believed" Minor. R. 29, ll. 3 – 6. Judge Hood stated that just because the police did not charge anyone did not mean they did not believe Minor. R. 29, ll. 7 – 8. Defense counsel argued, "I have no other way to show it. I can't get up here and hold her down and say you lied. That's the only thing I can do." R. 29, ll. 9 – 11.

The State argued that the defense had not met their "high" burden of proving Minor's statements were false under Boiter. R. 30, l. 8 – 31, l. 10. The State also argued that the defense needed to show a recantation by the child. R. 30, ll. 8 – 17.

Judge Hood ultimately ruled "nothing from the 2009 case is coming in." R. 36, ll. 11 – 12. Citing the test from Boiter, the court found that defendant had not proven to his satisfaction that the prior accusation was false. R. 36, ll. 11 – 25. Defense counsel again objected, arguing, "I believe I've presented enough with her direct statements and the police not following up, that it must have been false and that's all I know how to do." R. 37, ll. 15 – 19. The court noted for the record that appellant preserved his objection during a bench conference when Minor testified. R. 152, l. 13 – 153, l. 9.

Discussion

The trial court erred in finding that appellant did not prove the prior allegation from 2009 was false. "[I]n deciding admissibility of evidence of a victim's prior accusation, the trial judge should first determine whether such accusation was false." Boiter at 383, 396 S.E.2d at 365. "If the prior allegation was false, the next consideration becomes remoteness in time." Id. "Finally, the trial court shall consider the factual similarity between prior and present allegations to determine relevancy." Id. at 383-84, 396 S.E.2d at 365.

Minor's allegation was false because she accused two people—Kevin and Calvin—of the same offense. Both could not have been true. Either Kevin abused her, Calvin abused her, or neither abused her. Under any of these scenarios, Minor made a false accusation against someone. No extraneous proof was necessary. To the extent other proof of falsity was necessary, Cromartie's testimony showed that police did not prosecute even though the evidence in 2009 was the same as the evidence in this case. The only reasonable inference is that the police did not believe Minor.

Furthermore, the "high" burden of proving the accusation was false from Boiter, as applied by the court, was incorrect and also violates appellant's Sixth Amendment rights under the Confrontation Clause. As recognized in Boiter, the Confrontation Clause applies to attacks on a witness's bias or credibility. Boiter at 383, 396 S.E.2d at 365. See also U.S. Const. amend. VI and XIV. Trial counsel argued the trial judge applied a burden that was too high when he told the court that he had no other way to prove the falsity of Minor's prior statements.

The United States Supreme Court recognized the primacy of the Confrontation Clause in confronting accusers in sexual abuse cases in Olden v. Kentucky, 488 U.S. 227 (1988). In Olden, the defendant was not allowed to introduce evidence that the complainant had a motive to lie about her accusations. She wanted to prevent her boyfriend from learning that she had been cheating on him. Id. at 229-30. The complainant was dropped off at her boyfriend's house after a sexual encounter with the defendant. Id. The defendant wanted to cross-examine the complainant on whether she lived with her boyfriend, but the trial court excluded this evidence. Id.

The Court held that exclusion of the evidence in Olden violated the defendant's rights under the Confrontation Clause. Id. at 231. One of the grounds for excluding the evidence was that its prejudicial effect would outweigh its probative value (the complainant and her boyfriend were of different races and the trial judge believed disclosure of the interracial relationship would prejudice the jury against her). Id. at 232. The Court ruled that the defendant's constitutional rights trumped such concerns. Id.

In a case from the Seventh Circuit, Judge Posner found that exclusion of prior false allegations violated the defendant's Sixth Amendment rights. Redmond v. Kingston, 240 F.3d 590, 593 (7th Cir. 2001). The complainant admitted she had fabricated a prior rape allegation to get her mother's attention. Id. at 591. Analyzing the case on a habeas petition under AEDPA review, the court held that exclusion of such evidence violated the established precedent under Olden. Id. at 592-93.

In White v. Coplan, 399 F.3d 18 (1st Cir. 2005), the First Circuit examined New Hampshire's "demonstrably false" standard for admitting such evidence. White at 22. The White court differentiated between the rights of cross-examination and presenting extrinsic evidence. Id. at 25. The court said, "The ability to ask a witness about discrediting prior events—always assuming a good faith basis for the question—is worth a great deal." Id. The court noted the defendant had "almost no way to defend himself except by impeachment." Id. Citing Olden, the court said, "Evidence suggesting a motive to lie has long been regarded as powerful evidence undermining credibility, and its importance has been stressed in Supreme Court confrontation cases. Id. at 26 *also citing* Delaware v. Van Arsdall, 475 U.S. 673 (1986); Davis v. Alaska, 415 U.S. 308 (1974). The court determined that on the facts before it, the exclusion of the

complainant's prior allegations violated the defendant's constitutional right to cross-examination. White at 26.

The White court did not hold that New Hampshire's "demonstrably false" requirement was *per se* unconstitutional. Id. Indeed, it stated that a general constitutional challenge to New Hampshire's standard would be "'an uphill struggle,'" quoting its own precedent dealing with extrinsic evidence. Id. *quoting* Ellsworth v. Warden, 333 F.3d 1, 6 (1st Cir. 2003). The First Circuit's analysis suggested the necessity of a case-by-case determination as to the level of proof required regarding falsity and a need to recognize the difficulties of proof in each case for the defendant.

The First Circuit dealt with this issue again in 2012. Abram v. Gerry, 672 F.3d 45 (1st Cir. 2012). Interpreting its holding in White, the court wrote:

> We thus held in White that a defendant may have a Sixth Amendment right to cross-examine a witness regarding prior allegations of sexual assault on a lesser showing than "demonstrable falsity," but only where multiple factors in combination weigh heavily in favor of allowing such questioning. It is significant that the accusations in White, while falling short of the New Hampshire standard, **nonetheless were false to a high degree of likelihood, i.e., to a "reasonable probability." Such prior accusations will only be relevant to the victim's credibility if the jury concludes they are false.**

Abram, 672 F.3d at 50 (emphasis added). The court then applied the "reasonable probability" standard to the facts of that case. Id. at 50-51.

Under the White and Abrams court's "reasonable probability" approach, the evidence in this case should have been admitted. Boiter does not set a definitive standard for the admission of false allegation evidence and it is likely that a *per se* rule would not pass constitutional muster. The "reasonable probability" standard harkens to traditional rules limiting cross-examination which impose a good-faith basis for the defense to show

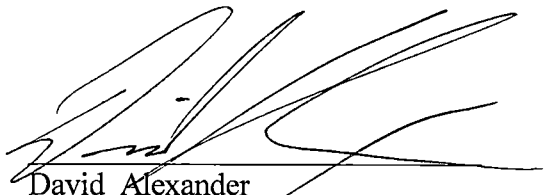
the allegations were false. See State v. Baker, 411 S.C. 583, 769 SE2d 860 (2015) ("[T]he class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles.")

In this case, the child had accused two men of committing a single crime. Both allegations could not be true. Furthermore, the lack of police investigation raises a strong inference that Minor's prior allegations were, at a minimum, not credible. Cromartie's explanation for why charges were not pursued—that they could not identify a suspect—was exposed on cross-examination when she admitted that "Kevin" was the child's father and "Calvin" was a prior boyfriend of the mother. Cromartie claimed that the "totality of the circumstances" led her not to pursue charges, but by far the totality of her investigation consisted of interviewing Minor, having a physical examination performed, and a forensic interview done. R. 22, ll. 9 – 14. It therefore seems that Minor's credibility was the "totality of the circumstances" in 2009. Appellant had both a constitutional right under the Sixth Amendment and under Boiter to cross-examine Minor about her prior allegations. The evidence that the allegations were false was sufficient to allow cross-examination and allow the jury to be the ultimate arbiter of their falsity and Minor's credibility. Since this case hinged solely on Minor's credibility, this error was prejudicial and requires reversal.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

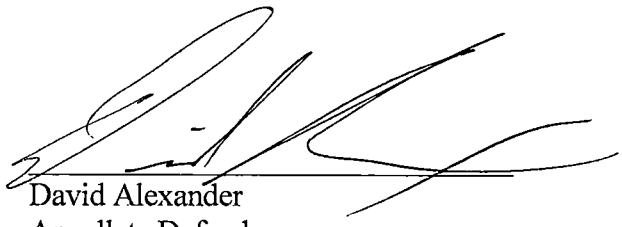
ATTORNEY FOR APPELLANT

This 17th day of June, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

June 17th, 2015



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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 Christina C. Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Robert Wilson Woods, #305393, Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 12th day of February, 2015.

David Alexander
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ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of June, 2015.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.