

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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BC SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

ROBERT S. HORTON,

APPELLANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001608

BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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ISSUE PRESENTED

Did the trial court err in preventing Appellant from cross-examining the complainant concerning a prior false allegation of sexual abuse in violation of 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

During its November 2011 term, a Spartanburg County grand jury indicted Appellant for criminal sexual conduct with a minor in the second degree. App. 678-679. The state, represented by Jennifer Jordan and Susan Reese, called the case for trial before the Honorable J. Derham Cole on July 9, 2012. App. 1. Michael D. Brown represented Appellant. App. 1. The jury found Appellant guilty as charged. App. 549, lines 16-20.¹ Judge Cole sentenced Appellant to eighteen years' imprisonment. App. 554, lines 12-17; App. 680.

On April 29, 2013, Appellant filed a pro se notice of appeal, which was dated April 15, 2013. App. 568. Appellant's proof of service indicated he served the notice on the South Carolina Court of Appeals and the Spartanburg County Clerk of Court. App. 569. Appellant's filing included a letter to the Court of Appeals explaining he had instructed his trial lawyer to file the notice of appeal, but the request was refused unless Appellant paid an additional sum. App. 571-572. On May 6, 2013, the Court of Appeals dismissed the notice because it was not timely served. App. 574. Remittitur was issued on May 24, 2013. App. 575.

On July 17, 2013, Appellant filed an application for post-conviction relief (PCR). App. 576-604. On March 26, 2015, an evidentiary hearing was held before the Honorable Roger L. Couch. App. 610. Leah B. Moody represented Appellant, and Suzanne H. White represented the state. App. 610. By an order filed on July 7, 2015, Judge Couch granted Appellant's request for a belated review of his direct appeal issues, but denied relief as to all other grounds. App. 668-677.

¹ The jury was unable to reach a unanimous verdict on one count of criminal sexual conduct with a minor in the second degree. Thus, the judge granted a mistrial on that count. App. 546, line 20 – App. 547, line 22; App. 550, lines 17-22.

Appellant filed a notice of appeal. In compliance with this Court's directive in Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), Appellant is filing this brief addressing his direct appeal issue, and Appellant is filing a petition for writ of certiorari addressing the issue of the waiver of his direct appeal as well as an additional post-conviction relief issue simultaneously.

ARGUMENT

The trial court erred in precluding Appellant from cross-examining the complainant concerning a prior false allegation of sexual abuse in violation of *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

Prior to trial, the state moved to exclude any prior false allegations by Minor. App. 9, lines 12-15. Appellant moved to admit evidence of prior allegations by Minor as investigated by the Department of Social Services in 1999. App. 9, line 18 – App. 10, line 2. According to Appellant, Minor made a similar allegation against someone else that was investigated; however, Appellant was unable to ascertain at that time whether the allegations were “found or unfound.” App. 10, lines 12-22. Appellant explained that the activity surrounding the prior activity could explain how Minor learned about sexual activity and explain the allegations in the current case. App. 10, lines 23-25. The trial judge took the matter under advisement until a proffer could be made.

Appellant married Minor's mother, Stephanie Horton, in 2004. App. 70, lines 5-8; App. 126, lines 13-23; App. 375, lines 5-6. Initially, Appellant worked outside of the home while Stephanie homeschooled the children. App. 72, line 22 – App. 74, line 13; App. 128, lines 11-16; App. 129, lines 9-11; App. 380, line 23 – App. 381, line 5. In November of 2007, Appellant injured his back. The subsequent surgery and recovery rendered him unable to work for months and reduced his ability to be sexually intimate. App. 74, lines 14-15; App. 131, lines 9-14; App. 140, lines 3-10; App. 140, lines 18 – App. 141, line 23; App. 377, line 22 – App. 378, line 11; App. 394, line 21 – App. 395, line 7.

Appellant convalesced at home, and Stephanie continued to homeschool the children. App. 74, lines 16-18; App. 131, line 9 – App. 133, line 7; App. 140, lines 11-16; App. 378, lines 12-18; App. 379, line 15 – App. 380, line 15; App. 382, lines 6-10. In February of 2008, Appellant was able to resume limited sexual activity with his wife. In the summer of 2008, Appellant returned to work. App. 132, lines 13-18. During the approximate same time period, Minor contracted mononucleosis, restricting her ability to leave the residence. App. 139, lines 13-22; App. 382, line 14 – App. 384, line 21.

At the trial, Minor, who was seventeen-years old, claimed that Appellant sexually abused her for approximately one and a half years with the abuse starting when she was twelve-years old. App. 69, lines 4-5; App. 79, lines 17-19 App. 84, line 24 – App. 85, line 1; App. 91, lines 21-24. According to Minor, the abuse involved (1) Appellant making her rub and lick his “private part” and (2) Appellant licking her “private part.” App. 78, lines 8-15; App. 79, line 6 – App. 80, line 18. Further, Minor claimed the abuse occurred when she was home alone with Appellant *and* when her mother and siblings were in the home. App. 76, lines 5-22; App. 80, line 11 – App. 81, line 15. One incident, Minor claimed, occurred while her mother was in the next room with Minor’s infant brother. App. 81, line 16 – App. 82, line 24. Minor alleged that when Appellant made her lick and rub his penis in her bedroom closet, “stuff came out” and went onto the floor. App. 83, line 11 - App. 84, line 18.²

² Testing by SLED on a portion of the carpet from Minor’s closet floor was positive for semen and the DNA profile developed from the carpet matched Appellant. App. 351, lines 16-22; App. 354, lines 11-16. Appellant explained how his semen was found on the closet floor: While alone in his home, Appellant viewed digital pornographic material until he reached a physical climax. Hearing a noise outside, he ran to Minor’s room to look out the window to determine the source. When the screen door slammed, he walked into Minor’s closet to avoid detection because his penis remained erect and visible. While in the closet, he was unable to control his physical reaction to the pornography resulting in his ejaculation. App. 425, line 17 – App. 427, line 16.

During the time of the alleged abuse, Minor engaged in “chat room” discussions with unknown older boys. App. 97, line 20 – App. 98, line 12; App. 160, line 24 – App. 161, line 23. Additionally, Minor saw pornography on the family’s shared computer. App. 98, lines 13-21. Further, the testimony revealed that while Minor had mono, her biological father stopped visiting her and this estrangement continued even after she got well. App. 95, line 15 – App. 96, line 23; App. 150, lines 1-23; App. 386, line 1 – App. 387, line 10. Minor was distraught over her biological father’s abandonment. App. 96, line 22 – App. 97, line 9; App. 150, lines 5-8; App. 391, line 4 – App. 392, line 12.

Appellant proffered evidence relating to Minor’s prior allegations “as relates to past learned behavior.” App. 177, lines 21-25. Stephanie testified that she caught Minor masturbating. App. 179, line 9. When she asked Minor about it, Minor told her that it was okay because her stepmother did it. App. 179, lines 9-10. Stephanie confronted Minor’s biological father who “denied everything.” App. 179, lines 10-12. During this time, Stephanie observed that Minor was regressing with toilet training after visits with her biological father. App. 179, lines 20-24. Minor confided that they walked around naked and slept naked at her father’s house. App. 180, lines 18-25. Stephanie learned there had been an investigation into allegations of sexual abuse of Minor related to the incidents concerning Minor’s biological father. App. 181, lines 10-20. The allegations were unfounded. App. 181, line 18.

The state argued the evidence was not relevant and did not concern a false allegation. According to the state, Minor “was roughly [four]-years old” and there was an “unfounded report.” App. 184, lines 1-6. Appellant argued the evidence was relevant because the investigation was revealed to Stephanie during the criminal investigation of Petitioner and the report corroborated Stephanie’s observations of Minor over the years when she returned from her father’s home. App.

184, lines 7-18. Nevertheless, the judge sustained the state's objection and precluded Appellant from presenting evidence of Minor's prior false allegation of sexual abuse. App. 184, lines 19-23.

Discussion

The trial court erred in precluding Appellant from presenting evidence of Minor's prior false allegation of sexual abuse and the circumstances surrounding Minor at the time of the prior allegation. Further, the trial judge erred in his analysis of the evidence presented because he failed to engage in the specific and rigorous analysis contained within Boiter, supra. There is no question that "[e]vidence of prior false accusations by a complainant may be probative on the issue of credibility." Boiter, 302 S.C. at 383, 396 S.E.2d at 365. This Court held "that in deciding admissibility of evidence of a victim's prior accusation, the trial judge should first determine whether such accusation was false." Id. "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.

Furthermore, the analysis must take into consideration 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. Id. at 383, 396 S.E.2d at 365. See also U.S. Const. amend. VI; U.S. Const. amend. XIV. Exclusion of an alleged sexual assault victim's prior false accusations may violate an accused's right to cross-examine the witnesses against him. See Olden v. Kentucky, 488 U.S. 227, 231-232 (1988) (finding error when a defendant was not allowed to introduce evidence that the complaining witness lived with her boyfriend to demonstrate her motive to lie about her sexual encounter with the defendant); Abram v. Gerry, 672 F.3d 45, 50-51 (1st Cir. 2012)(rejecting a requirement of showing "demonstrable falsity" and requiring a showing of a "reasonable probability" of falsity); White v. Coplan, 399 F.3d 18, 22-26 (1st Cir. 2005)(finding

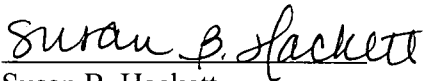
exclusion of the complainant's prior allegations violated the defendant's constitutional rights and the requirement that a defendant show the prior allegations were "demonstrably false" was *per se* unconstitutional); Redmond v. Kingston, 240 F.3d 590, 591-593 (7th Cir. 2001)(finding exclusion of a complainant's prior false rape allegation, which was made to garner attention, violated clearly established Supreme Court law); State v. Long, 140 S.E.3d 27, 31 (Mo. 2004)(holding that a defendant may introduce extrinsic evidence of prior false allegations made by a complaining witness).

In this case, Minor had accused falsely her stepmother of demonstrating masturbation to her when she was a mere four-years old. According to Stephanie, the DSS investigation determined the accusations were without merit and Minor's biological father categorically denied any such conduct occurred. This evidence was sufficient to show the prior allegations of sexual misconduct were false. Appellant's constitutional right under the Sixth Amendment to cross-examine Minor about her prior allegations was violated by the trial court's ruling. The entire case centered on Minor's credibility; thus, Appellant's ability to explore fully her prior false accusations was necessary for the jury to make its determination as to the evidence before it.

CONCLUSION

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

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT.

This 8th day of January, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

ROBERT S. HORTON,

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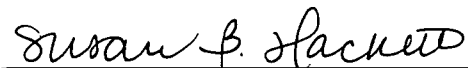
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

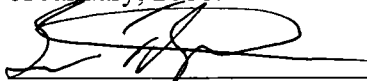
I certify that a true copy of the brief of Appellant pursuant to White v. State, in this case has been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Robert S. Horton #351540, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 8th day of January, 2016.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 8th day
of January, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.