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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAMARQUIS ANTWAIN WINGATE,

APPELLANT

APPELLATE CASE NO. 2014-002717

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by not declaring a mistrial where state's witnesses Stone and Jenco testified the alleged victim told them the details of his alleged sexual encounters with appellant, since this was highly prejudicial hearsay that impermissibly bolstered his testimony?

STATEMENT OF THE CASE

Appellant was indicted by the Florence County Grand Jury for two counts of first-degree criminal sexual conduct with a minor. R. 255-256. His case was called to trial on December 9, 2014, before the Honorable Donald B. Hocker, and a jury. Daniel Jordan represented appellant. David Richardson was the assistant solicitor. R. 255-256.

On December 10, 2014, the jury found appellant guilty on both counts. R. 239, l. 23 – 240, l. 5. Judge Hocker sentenced appellant to concurrent twenty-year prison terms. R. 252, l. 22 – 253, l. 1.

This appeal follows.

ARGUMENT

The court erred by not declaring a mistrial where state's witnesses Stone and Jenco testified the alleged victim told them the details of his alleged sexual encounters with appellant, since this was highly prejudicial hearsay that impermissibly bolstered his testimony

Relevant facts

The alleged male victim in this case was fifteen-years-old at the time his mother went to jail for a probation violation. His mother arranged for her next door neighbor, Linda McLean, to care for him and his fourteen-year old brother, while she served her ten-month prison sentence in prison. Appellant Wingate was the adult son of McLean. R. 52, l. 15 – 55, l. 7.

The minor remembered his mother went to prison on a Thursday because they had a program at his Pamplico church that night. Appellant took the minor to the church that evening. R. 55, ll. 4-22.

The minor maintained that appellant became angry at the church and began "fussing and all that." When he returned home, the minor claimed appellant was still angry, and asked him why he was standing near "gay dudes" while they were in church. R. 56, l. 9 – 57, l. 25.

The minor maintained that appellant committed a lewd act on him -- "rubbed his butt" -- that first night they spent together in his mother's absence. R. 61, ll. 5-21. The minor claimed that for the next ten months -- until the mother returned from prison -- he performed anal sex on the appellant at the appellant's request. R. 65, l. 3 – 66, l. 24. The minor also maintained when his brother attempted to enter the room during these many

sexual acts, that appellant would yell at him to get back into his bedroom. R. 68, ll. 2-7. In addition, the minor claimed that before his mother was released, appellant threatened to harm him if he told anyone about their sexual relationship. R. 70, l. 6 – 71, l. 1.

The minor testified that his family moved after his mother was released from prison. The minor said he reported the prior sexual relationship to his stepfather because he later became angry at appellant when he said "something about my Mama." His stepfather took him to the police station. R. 71, l. 2 – 74, l. 7.

The minor readily admitted on cross-examination that he had accused another man, "Coop Brown," another stepfather of having a very similar sexual relationship with him in 2010. R. 79, l. 13 – 80, l. 5; R. 89, l. 19 – 91, l. 24. The minor's mother would later admit her son's accusations towards appellant were "eerily similar" to those he earlier made against Coop Brown. R. 129, l. 19 – 131, l. 9; R. 134, ll. 9-12.

The state then called minor number two, the brother of the minor as a witness. Minor number two, admitted he never saw any sexual acts occurring between minor one and appellant. R. 102, ll. 6-8. Minor number two also said that his brother had never made any accusations against appellant. R. 96, l. 3 – 98, l. 3.

The mother of the minor teenagers was Mary Ann Brown. She had a criminal record for ABHAN and arson. She testified when she went to prison for her probation violation, she expected Linda McLean, her next door neighbor, to take care of the two teenage boys. R. 109, l. 4 – 111, l. 24.

Brown was friends with appellant, but she denied they were in a romantic relationship. She also denied that she knew appellant was on the sex-offender registry.[1] R. 112, l. 23 – 113, l. 10. Brown acknowledged appellant was not dating anyone when she went to prison, but that appellant was in a relationship with another woman when she was released from prison. R. 120, l. 17 – 126, l. 20.

As stated, Brown admitted that the accusations against appellant by her son were very similar to the accusations he made against another stepfather, Coop Brown. R. 129, l. 19 – 131, l. 9; R. 134, ll. 9-12.

Hearsay testimony

The prosecution called Pamplico police officer Robby Stone as a witness. Stone testified that Mary Ann Brown brought in minor number one to the police station to fill out a report about criminal sexual conduct. R. 138, l. 7 – 139, l. 9. Stone testified that he was told appellant started the sexual abuse "about the time his Mama had gone to prison." R. 139, ll. 5-9.

Stone said that minor number one said he was scared of appellant and that appellant had committed lewd acts on him, and "had had oral sex with him." Defense counsel objected on the basis of hearsay. The judge responded that the defense objection was sustained except "as to time and place." He vaguely instructed the jury to disregard testimony that did not fit under this "time and place" exception as if the jury were expected to understand the legal difference. R. 139, l. 12 – 140, l. 9.

[1] The attorneys agreed on a limiting instruction as to this sex offender registry "element" of the crime.

The prosecution also called Florence County sheriff's Investigator Renea Jenco as a witness. R. 146, l. 7 – 147, l. 13. Jenco testified that appellant had the alleged victim perform anal sex on him. The objection to this testimony was also sustained, and the judge again vaguely told the jury to disregard it. R. 148, l. 15 – 149, l. 14.

Appellant was convicted on both counts of criminal sexual conduct with a minor in the first degree.

Discussion

The hearsay testimony in this case that a police office and a police investigator were told by the alleged victim that appellant committed various sex acts with him was incredibly prejudicial. The judge should have declared a mistrial, and ordered a new trial where appellant could be tried based upon competent evidence.

Hearsay is not admissible unless it falls within a recognized exception to the hearsay rule. In criminal sexual conduct cases, this allows witnesses such as Stone and Jenco to testify **only** as to time and place reporting pertaining to acts of criminal sexual conduct. See, Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).

The primary basis for the hearsay rule is that the declarant is not present and is unavailable for cross-examination. However, other witnesses simply repeating the declarant's accusations has the impermissible effect of bolstering the alleged victim's allegations. See, State v. Whitner, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012); State v. Barrett, 299 S.C. 485, 486-487, 386 S.E.2d 242, 243 (1989); State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999).

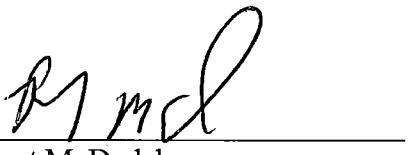
Hearsay testimony, such as that in this case, that impermissibly bolsters the credibility of the alleged victim through repetition of the allegations is highly prejudicial. See, Vail v. State, 402 S.C. 77, 88, 738 S.E.2d 503, 509 (Ct.App. 2013); Dawkins v. State, 346 S.C.151, 157, 551 S.E.2d 260, 263 (2001).

The prejudice from the hearsay bolstering testimony in this case could not be cured by vague instructions to disregard portions of evidence that were not admissible. Consequently, the judge abused his discretion by failing to declare a mistrial. See, State v. Chisholm, 395 S.C. 259, 274, 717 S.E.2d 614, 622 (Ct.App. 2011). Finally, "improper corroboration testimony," such as that here, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994).

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed, and this case should be remanded to the Florence County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of October, 2015.

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THE STATE,

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V.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tamarquis Antwain Wingate states:

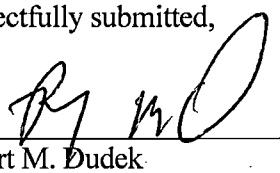
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Donald B. Hocker, which was held on December 9-10, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Tamarquis Antwain Wingate.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of October, 2015.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictments;
(2) Entire Trial Transcript December 9-10, 2014

I certify that this designation contains no matter which is irrelevant to this appeal.

October 23rd, 2015

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

October 23, 2015

Robert M. Dudek
Appellate Defender

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Columbia, South Carolina 29211-1589

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APPELLATE CASE NO. 2014-002717

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Tamarquis Antwain Wingate, #315016 at Lee Correctional Institution, this 23rd day of October, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of October, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .