ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT WILLIAM WAZNEY,

APPELLANT

APPELLATE CASE NO. 2015-000884

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing appellant's co-worker to testify about inadmissible character evidence that appellant had a vibrator and a safe at his office?

STATEMENT OF THE CASE

A Sumter County grand jury indicted appellant for four counts of second degree criminal sexual conduct with a minor. R. 260. On April 13, 2015, appellant was tried before the Honorable Maite D. Murphy and a jury. R. 1. John P. Meadors represented the State. R. 1. John S. Keffer represented appellant. R. 1. The jury convicted appellant. R. 250, ll. 7 – 23. Judge Murphy sentenced appellant to four consecutive terms of twenty years' imprisonment. R. 257, l. 16 – 258, l. 1. This appeal follows.

ARGUMENT

The trial court erred in allowing appellant's co-worker to testify about inadmissible character evidence that appellant had a vibrator and a safe at his office.

Complainant ("Minor") was appellant's step-granddaughter. R. 59, ll. 16 – 23. She testified that appellant sexually abused her beginning in the seventh grade. R. 67, ll. 10 – 13. Minor claimed that appellant abused her at his workplace, Batteries Plus, where appellant was the manager. R. 83, l. 17 – 84, l. 18. Minor's most prejudicial claim was an incident of abuse involving a plunger in the storage room at Batteries Plus. R. 83, l. 22 – 87, l. 14.

On cross-examination, Minor admitted previously denying that appellant abused her during a forensic interview. R. 134, l. 17 – 135, l. 23. She did not mention any abuse occurring at Batteries Plus. R. 135, ll. 24 – 25. She never mentioned anything about a plunger to the interviewer. R. 136, ll. 1 – 2.

Minor also wrote a letter to her mother regarding the alleged abuse. R. 138, ll. 15 – 23. Minor gave the letter to Kami Wright (née Wilds). R. 138, l. 24 – 139, l. 6. R. 163, ll. 1 – 2. Kami Wright turned the letter over to the police. R. 163, ll. 3 – 7. Minor admitted that the letter said nothing about Batteries Plus or a plunger. R. 140, ll. 5 – 11. On the back of the letter, Minor wrote that her mother should give the letter to "the lawyer." R. 142, ll. 12 – 24. Minor never mentioned a plunger until after she spoke with the police. R. 144, l. 4 – 145, l. 19.

The State called appellant's co-worker from Batteries Plus, Travis Porter ("Porter") to testify. R. 176, ll. 3 – 5. Prior to his testimony, appellant moved that testimony from Porter regarding character evidence and prior bad acts be excluded pursuant to Rule 404(b).

R. 176, l. 3 – 177, l. 10. Defense counsel stated that he expected Porter to testify regarding: emails, text messages, and telephone calls between appellant and Minor; that appellant was terminated for downloading pornography; that customers and employees made sexual harassment complaints against appellant; and that a remote control vibrator and a secret wall safe were found in appellant's office. R. 176, l. 10 – 177, l. 10. Citing State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998), defense counsel argued this testimony was an improper attack on appellant's character. R. 177, ll. 7 – 10.

The trial judge excluded much of this testimony, but ruled that testimony about the remote control vibrator and the safe were admissible. R. 178, l. 11 – 179, l. 10. Judge Murphy stated that the vibrator was admissible because Minor testified about it. R. 178, l. 11 – 179, l. 10. The trial judge stated that the "safe is, it is what it is." R. 178, l. 11 – 179, l. 10. The court reasoned that, "If it was found after he left, obviously there's no contents in it so that's not prejudicial and that is admissible." R. 179, ll. 3 – 10.

When Porter testified, the solicitor asked whether the store had its own safe and Porter said it did. R. 185, ll. 13 – 14. The solicitor then asked whether appellant "put in another safe." R. 185, ll. 15 – 16. Porter testified that there was a safe behind a calendar in appellant's office and the safe did not belong to the store's owner. R. 185, ll. 17 – 23. The safe was empty after appellant left his job at Batteries Plus. R. 186, ll. 3 – 6. Porter also testified that he previously found a remote-controlled vibrating egg in a desk drawer. R. 187, l. 7 – 188, l. 4. The egg was not there after appellant's employment ended. R. 189, ll. 5 – 8.

The trial court erred in admitting this evidence. Evidence of the safe and vibrator were only relevant as propensity evidence, and therefore barred by Rule 404. SCRE 404.

Rule 404(a) plainly states that evidence "of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith. . . ." SCRE 404(a). Rule 404(b) repeats this logic. It states that evidence "of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE 404(b). State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

The case cited by trial counsel, Nelson, demonstrates that the evidence in this case was inadmissible. In Nelson, a child sex case, the State introduced the following evidence seized from the defendant's bedroom: stuffed animals, videotapes of children's television shows; photo collages of young girls cut from magazines; a membership card in the Punky Brewster fan club. Nelson at 4, 501 S.E.2d at 717-18. Holding that admission of the evidence was error, the Court stated that, "In a criminal case, the state cannot attack the character of the defendant unless the defendant first places his character in issue." Id. at 6, 501 S.E.2d at 718. "[C]haracter evidence is not admissible 'for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.'" Id. at 6, 501 S.E.2d at 718-19 *quoting* State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362. 363 (1990). The Court reversed because of the admission of this propensity evidence. Nelson at 6-8, 501 S.E.2d at 718-19.

A similar result in State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979) demonstrates the propensity evidence in this case was not admissible. In Rivers, the defendant was charged with kidnapping and criminal sexual conduct. Id. at 76, 254 S.E.2d at 299. The opinion does not offer many details about the prosecutrix or the crime, but does say that the defendant hit her in the face and stomach. Id. at 76, 254

S.E.2d at 300. The defense was consent to intercourse and oral sex. Id. The Lyle witness was the defendant's wife. Id. The wife testified that the defendant used a vibrator on her, burned cigarettes on her upper thighs, and got angry when he could not get an erection. Id. at 76-77, 254 S.E.2d at 300.

The State argued that the evidence was admissible under the common scheme or plan exception because of "demonstrated similarities" between the sexual conduct with the wife and with the prosecutrix. Id. at 77-78, 254 S.E.2d at 300. The Rivers Court stated that a connection and "logical relevancy" must be present, such as whether the defendant or another person committed the crime. Id. at 78, 254 S.E.2d at 300. Then, quoting from two out-of-state cases, the Court stated "Other courts have generally held that a defendant's previous sexual conduct with persons other than the named prosecutrix is inadmissible unless the close similarity of the charged offense and the previous act enhances the probative value of the evidence so as to overrule the prejudicial effect." Id. "The rationale for this rule is that the overwhelming result of admitting unconnected sexual relationships is to establish an accused's character or propensity to engage in the alleged sexual conduct as a basis for inferring that he committed the charged crime." Id. The Court then stated that the crime and the sex acts with the wife had little in common and ultimately held it could not "clearly perceive the connection between the acts as required by Lyle." Id. at 78-79, 254 S.E.2d at 301.

Just as in Nelson and in Rivers, the admission of Porter's testimony about the vibrator and the safe had no logical connection to the case except as forbidden propensity evidence. While Minor had testified regarding a vibrator, Porter's testimony was of such little probative value that the prejudice of its admission as propensity evidence

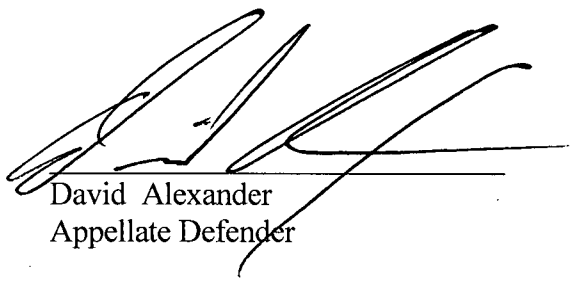
necessitated its exclusion. The safe had no probative value at all. Allowing Porter to testify about the safe invited speculation from the jury that appellant was committing crimes at work or hiding things from his employer. This testimony was propensity evidence in its purest form and had nothing to do with Minor's allegations.

The admission of this evidence was highly prejudicial as it invited the jury to connect appellant's character at work with the graphic events described by Minor that she claimed took place in the storage room. Minor previously denied any abuse occurred. In her initial statements, she never mentioned anything about the alleged abuse at Batteries Plus. But for the admission of Porter's testimony, the jury would not have believed Minor's allegations. This Court should reverse.

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 25th day of May, 2016.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert William Wazney states:

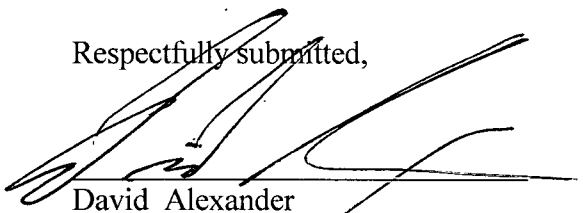
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Maite Murphy, which was held on April 15, 2015, 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 Robert William Wazney.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of May, 2016.

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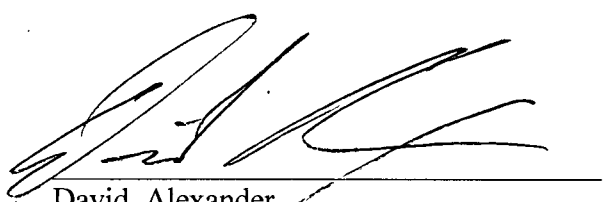
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True–billed indictment(s);
(2) Trial transcript.

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

May 25th, 2016



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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."

May 25, 2016

David Alexander
Appellate Defender

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