

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County

Honorable R. Knox McMahon, Circuit Court Judge

ORIGINAL

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DEC 20 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CLEVELAND EDWARD YOUNG,

APPELLANT

APPELLATE CASE NO. 2016-000770

ANDERS BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether, in this child sexual abuse case, the trial court erred in denying appellant's motion to sequester the State's witnesses?

STATEMENT OF THE CASE

In August 2015, a Union County grand jury indicted appellant for first-degree criminal sexual conduct with a minor and third-degree criminal sexual conduct with a minor. R. 382. On March 28, 2016, appellant was tried before the Honorable R. Knox McMahon and a jury. R. 1. John Cleveland Anthony represented the State. R. 1. Erik Daniel Delaney and Jennifer Nichols Williams represented appellant. R. 1. The jury convicted appellant. R. 365, l. 14 – 366, l. 16. Pursuant to South Carolina's recidivist statute, Judge McMahon sentenced appellant to consecutive terms of life imprisonment without the possibility of parole. R. 378, l. 1 – 380, l. 7. This appeal follows.

ARGUMENT

In this child sexual abuse case, the trial court erred in denying appellant's motion to sequester the State's witnesses.

Before opening statements, appellant moved to sequester the witnesses for both the State and the defense. R. 45, l. 24 – 46, l. 1. Judge McMahon denied appellant's request for full sequestration, stating that he followed the rule of State v. Carmack, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010), that witnesses should not be sequestered if they have given sworn statements. R. 46, ll. 2 – 11. Trial counsel interpreted this as a final ruling and did not ask for any specific witnesses to be sequestered. R. 46, ll. 12 – 16.

Appellant was prejudiced by the trial judge's denial of the sequestration order because of the inconsistencies in the testimony. Minor testified that appellant sexually abused her at her great aunt, Anita Kinard's ("Kinard") house. R. 70, l. 1 – 79, l. 4. Minor alleged that appellant had both anal and vaginal sex with her. R. 70, l. 1 – 79, l. 4. The assaults allegedly took place behind a building in the yard. R. 70, l. 1 – 79, l. 4. On cross-examination, Minor denied telling her Kinard about the assaults until after the allegations came to light. R. 85, ll. 13 – 24. However, this testimony was flatly contradicted by the State's forensic interviewer who confirmed that during the interview, Minor claimed she told Kinard about the abuse every time it happened. R. 119, ll. 14 – 21.

The State's expert pediatrician performed an examination of Minor. R. 150, ll. 13 – 16. Minor had no injuries to her vagina or anus. R. 152, l. 2 – 153, l. 14. Minor tested positive for rectal chlamydia. R. 155, ll. 5 – 25. Appellant consented to being tested for chlamydia and for the State to obtain any medical records from DHEC. R. 228, l. 16 – 231, l. 9. Appellant tested

negative for chlamydia. R. 212, ll. 2 – 4. DHEC had no record of appellant ever having an STD. R. 230, l. 24 – 231, l. 9.

The State attempted to counter appellant's negative chlamydia test with testimony from the pediatrician that chlamydia can be asymptomatic. R. 157, l. 6 - 158, l. 4. The pediatrician reported that a study of pregnant women with chlamydia revealed that the infection often resolved on its own. R. 158, l. 12 – 169, l. 25. The State raised the mere suspicion that appellant had received the antibiotic used to treat chlamydia from Kinard. R. 156, ll. 5 – 11. The police obtained pharmacy records showing that Kinard obtained a prescription for azithromycin. R. 212, l. 16 – 213, l. 18. No records showed that appellant ever received such a prescription. R. 212, l. 16 – 213, l. 18.

Kinard testified that the azithromycin (or Z-pak) had been prescribed to her for bronchitis and respiratory issues. R. 268, l. 1 – 270, l. 20. Her medical records were introduced into evidence by the defense. R. 270, ll. 21 – 25. The State attempted to impeach Kinard with her medical records and other prescription medication she took in an effort to portray her ability to perceive events as diminished, but Kinard rebutted the solicitor's attempt and demonstrated that her medications made her more alert and gave her the ability to be more mobile and more functional. R. 282, l. 4 – 293, l. 25.

Kinard never saw anything unusual between appellant and Minor. R. 265, l. 14 – 266, l. 15. Minor never told Kinard about any alleged abuse. R. 266, ll. 3 – 7. Kinard stated that if Minor had ever reported such abuse "we'd be having a different trial." R. 266, ll. 8 – 15.

Kinard stated that she and appellant had a "couple of intimate encounters very early" in their relationship. R. 258, ll. 12 – 22. However, that activity ceased and they devoted themselves to working to help their rescue dogs. R. 258, l. 12 – 259, l. 4. Kinard testified that it

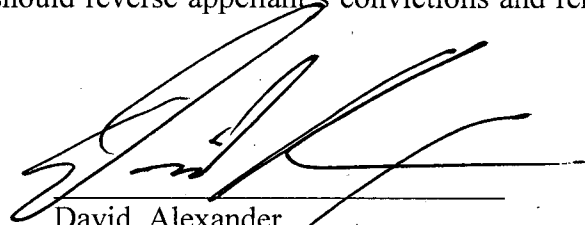
had been six years since she had sex with appellant. R. 281, ll. 7 – 20. The State attempted to impeach Kinard, asking if she had told an investigator that she and appellant had never had sex. R. 300, l. 11 – 301, l. 6. Kinard denied telling the investigator this, explaining that she said they were not currently having sex. R. 300, l. 16 – 301, l. 6. The State called the investigator in rebuttal who claimed Kinard previously told her that they appellant had “never touched her” and that they had never had sex. R. 308, ll. 5 – 9.

The trial court erred in denying appellant’s sequestration motion. Carmack does not stand for the broad principle cited by the trial judge. Carmack was a shooting case. Carmack at 194-98, 694 S.E.2d at 226-28. The Court in Carmack ruled that any prejudice was “alleviated” by the defense’s ability to cross-examine witnesses on statements. Id. Carmack does not stand for the proposition that the defense must prove potential taint of witnesses before being entitled to sequestration. Id.

Furthermore, the need for sequestration is much greater in a sexual abuse case. As the Supreme Court has repeatedly noted, child sex cases frequently turn wholly on the credibility of the witnesses. See State v. Anderson, 413 S.C. 212, 219-20, 776 S.E.2d 76, 79-80 (2015) (reversing a sexual abuse conviction because the “case turned solely on the credibility of the minor and of Appellant.”); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) (reversing a sexual abuse case because “no physical evidence” was presented and the “children’s credibility was the most critical determination of this case.”). It was error for the trial court not to sequester witnesses in a sex case which turned on credibility. Appellant was prejudiced by the State’s witnesses ability to view each other’s testimony. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand this case for a new trial.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of December, 2016.

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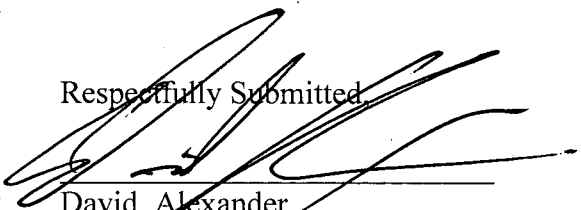
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Cleveland Edward Young states:

1. He is an 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 Honorable R. Knox McMahon, which was held on March 28 - 31, 2016, 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 Cleveland Edward Young.

Respectfully Submitted,

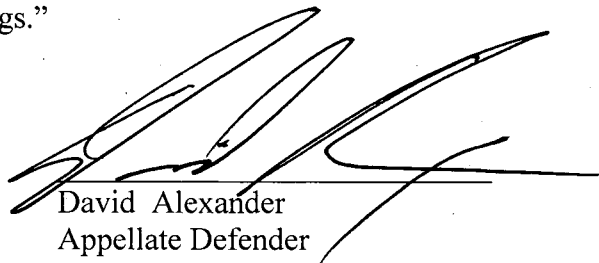

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 16th day of December, 2016.

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."

December 16, 2016.



David Alexander
Appellate Defender

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