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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID RAY BROWN,

APPELLANT

APPELLATE CASE NO 2016-000170

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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The court erred by not admitting the sexual text messages the alleged victim was exchanging with other men at the same time she was communicating with appellant, since appellant had the right, under the rule of completeness, to introduce the text messages as a whole for context in support of his defense that the alleged victim used him as the “fall guy” for having sex with her to protect the other men. 3

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by not admitting the sexual text messages the alleged victim was exchanging with other men at the same time she was communicating with appellant, since appellant had the right, under the rule of completeness, to introduce the text messages as a whole for context in support of his defense that the alleged victim used him as the “fall guy” for having sex with her to protect the other men?

STATEMENT OF THE CASE

Appellant was indicted by the Aiken County Grand Jury for four counts of criminal sexual conduct with a minor in the second degree. R. 566-573. His case was called to trial on January 19-21, and 25, 2016 before the Honorable R. Knox McMahon, and a jury. Benjamin Stitely represented appellant. Rhonda Patterson and Shannon Davis were the assistant solicitors. R. p. 1

At the conclusion of the trial on January 25, 2016 appellant was found guilty on all counts. R. 487, l. 23 - 488, l. 18. Judge McMahon sentenced appellant to twenty years imprisonment concurrent on the counts. However, he imposed an eight year consecutive sentence on the final count for an active sentence of twenty-eight years. R. 516, ll. 8-20.

This appeal follows.

ARGUMENT

The court erred by not admitting the sexual text messages the alleged victim was exchanging with other men at the same time she was communicating with appellant, since appellant had the right, under the rule of completeness, to introduce the text messages as a whole for context in support of his defense that the alleged victim used him as the “fall guy” for having sex with her to protect the other men.

Relevant Facts

Prior to trial, the attorneys argued which of the minor's various sexually explicit text messages would be admissible. Defense counsel argued that the minor's phone showed she had exchanged sexually explicit text messages with Robert Arddd and Dalton Harcy during the same time period the state claimed appellant was texting and having a sexual relationship with the minor. R. 90, l. 2- 92, l. 23.

The judge said he wanted to know under the rule of completeness [Rule106, SCRE] specifically which text messages the defense alleged, in fairness, it should be allowed to introduce. Defense counsel noted the DNA allegedly involving appellant and the minor in this case was only a “one in two hundred and ten match potential,” very weak, and that this was far from an open and shut case. The context of these text messages was important. R. 92, l. 24 – 93, l. 16.

The solicitor argued that appellant was texting under the name “Justin Goodwin,” and she asserted that **none** of the other texts involving other men and the minor should be allowed to be mentioned, or entered into evidence. R. 95, ll. 14-24.

Defense counsel countered that during the same time period contained in the indictment against appellant there were text messages involving sexual acts and a pregnancy test “with Mr. Arddd.” Arddd was apparently very interested in knowing the results of the minor's pregnancy

test. R. 96, ll. 7-17. Defense counsel argued this evidence went to the identity of the real perpetrator, and the text messages were also possible impeachment evidence as to the minor's **allegations of identity** [of the person she was having sex with at the time]. R. 96, l. 21 – 99, l. 11.

The solicitor then argued that these were just text messages and “there’s no evidence that that [sex acts] actually took place. She’s going to testify it didn’t. There merely just having those sexting conversations via text messages.” R. 99, l. 20 – 100, l. 5. The same, of course, could be said of the text messages attributed to appellant and the minor.

Defense counsel responded that the text messages about the pregnancy test were relevant, and he noted that the minor had deleted “tons of stuff before they [law enforcement] got her phone. So even this log [of text messages] is by no means complete would be my argument.” Defense counsel again argued to present a complete defense the context of all of the text messages was necessary. R. 100, l. 13 – 101, l. 8. The judge said -- at that point during the trial -- he did not think the text messages not involving appellant were admissible. The state then called the minor as a witness in the presence of the jury. R. 101, l. 19 – 104, l. 10.

The minor testified she was sixteen at the time of trial. She said she began using Facebook and met one “Justin Goodwin” online that the state alleged was, in fact, appellant. The minor apparently sent nude pictures of herself to the Goodwin character when she was thirteen-years-old. R. 104, l. 13 – 107, l. 15.

The minor said she thought Justin was probably seventeen or eighteen-years-old, and she testified she agreed to sneak out of her house at night on four different occasions to have sex with Justin in a field near a deer stand. R. 107, l. 9- 110, l. 14.

The minor said she was surprised to see appellant when she expected to meet a seventeen or eighteen-year-old boy near the deer stand. She maintained she did not scream or call attention to

herself because she did not want her mother to know she had snuck out of the house. She claimed appellant forced her to have sex at that time. R. 110, l. 19 – 111, l. 25.

The minor admitted she did not cut off contact with appellant, the alleged rapist, because “I liked the attention he gave me. He was nice and I did what he wanted me to do and then when I refused he got abusive, but I liked the attention he gave me.” R. 112, ll. 21-24. The minor also claimed she tried to invent excuses not to continue to meet “Justin” but she maintained that appellant was persistent in meeting her. She testified regarding three other occasions where she snuck out of the house, and “he forced me into sex.” R. 114, l. 21 – 119, l. 14.

The minor told the jurors that appellant “said I was beautiful and I was perfect, things like that . . . he just said that if I didn’t sneak out that he would expose the pictures [and this made her] scared and hurt because I wanted to go to college and he knew I had goals and I know (sic) if college found out about people sending nudes [photographs], then they probably [would] not accept them and I didn’t want my college goal to be ruined.” R. 116, ll. 10-20.

The minor’s maintained that she finally “blocked him on Facebook and he got really mad and I made excuses that my brother did it; not me.” The minor said she then reported the sexual relationship to counselors and the resource officer at school. R. 119, l. 17 - 126 l. 19.

At one point when the jury was excused from the courtroom defense counsel complained the state was only admitting partial text messages. Further, the minor had already admitted she deleted many of the other text messages. In short, the defense was being forced to defend “with only partial evidence with no ability to attack the foundation.” R. 136, l. 4 – 137, l. 15.

Defense counsel told the judge that he understood the minor could make an in court identification of appellant as the alleged sex partner if she chose to do so. However, he argued the defense had a right on cross-examination to provide a defense that appellant was not the person

having sex with the minor. The defense accused the state of manipulating text message evidence to prove its case. R. 137, l. 16 – 145, l. 25.

The solicitor led the minor through various text messages that were allegedly from appellant. R. 163, l. 3 – 167, l. 3. At the conclusion of direct examination, the judge took up a matter of law. The defense asked the judge to revisit his pretrial ruling that none of the text messages between the minor and other men were relevant. Defense counsel noted that the minor, within two hours of the alleged sexual assault, texted another man with a smiley face and discussed her clothing size. R. 170, l. 11 - 178, l. 25.

The judge seemed to anger at the assertion that the state was manipulating the evidence the judge chose to admit. He asked defense counsel to show him “where I have been sold a bill of goods that these are documents from Justin Goodwin, whoever that may be? [were fraudulent].” Defense counsel pointed to state’s exhibit nine in particular as “a fabrication by the solicitor’s office.” R. p. 519-565. The judge asked defense counsel why he had not notified the Grievance Committee if the state was presenting fraudulent evidence. Defense counsel responded that the state was deliberately and selectively placing a misleading case before the jury by way of the telephone records. R. 179, l. 10 – 185, l. 7.

The solicitor argued that any attempt by the defense to introduce or use other text messages between the minor and other men was merely an attempt to get around the rape shield statute. R. 185, ll. 9 -13. The judge ruled that he would not allow the defense to get into the substance of any text messages between the minor and a third party, or third parties. The judge said all the defense would be allowed to do on cross-examination of the minor was attempt to elicit the fact the minor had “a pleasant conversation with a third party” during this same time period. The judge ruled any

text messages regarding sex with someone else, or the inference of sex with another man, was not admissible. R. 185, l. 14 – 186, l. 19.

On cross-examination, the minor testified she feared she would have been “grounded,” and had her telephone taken away if she admitted to her mother that she was sneaking out of the house, and having sex. R. 188, l. 13 – 189, l. 22. The minor also asserted that her mother knew she was dating Robert Ardddd, and she said it was “possibly true” that she was having “very pleasant conversations” with other men, including Robert, when she alleged the sexual assaults were occurring. R. 196, l. 13 – 198, l. 22. The minor readily admitted she deleted photographs and text messages from her phone so those photographs and text messages could not be found. R. 198, l. 21 – 207, l. 15.

Deputy Michael Griggs served as a school resource officer at Sand Hills Middle School in Gaston, South Carolina. R. 208, l. 14 – 209, l. 12. Griggs remembered that Elizabeth Park-Floyd was a mental health worker at the school. She informed him the minor had reported being in a sexual relationship. R. 211, l. 6 – 214, l. 17.

Griggs told the minor not to delete any of the text messages. Griggs said he called the telephone number that the minor gave him, and he left a telephone message introducing himself as a police officer. He told the person in the voice mail “not to disseminate the photographs at all,” and not to contact the minor again. R. 214, l. 18 – 215, l. 22.

Griggs said he started investigating the “Justin Feels Good Goodwin” Facebook account. R. 217, ll. 8-11. On cross-examination Griggs admitted that the minor told him the majority of her text messages had already been deleted, and “I only saw a few.” R. 223, ll. 14-18.

Lexington Police investigator Renee Strickland remembered she was assigned the case on November 18, 2003. Strickland said they did a “cell phone dump” on the minor’s phone to attempt

to find the deleted text messages. R. 227, l. 15 – 232. Strickland said she learned that the minor had allegedly recognized appellant under a Facebook page named “David the Guitarist.” R. 232, ll. 13-22.

Strickland testified she was ultimately able to identify appellant through a pre-paid telephone card that was purchased by one of appellant’s relatives. This phone number was listed on a booking report. The jury therefore learned this relative had a criminal record, or had been arrested. The judge said he did not think the fact that one of appellant’s relatives had been arrested was very prejudicial.¹ The judge gave a limiting instruction that, *inter alia*, “we aren’t responsible for other people’s conduct and other people’s choices they make good or bad.” R. 233, l. 11 – 243, l. 14.

Strickland said appellant voluntarily came to the police station, and he willingly gave a DNA sample. R. 244, l. 16 – 247, l. 19. The minor also turned over three pairs of her underwear for DNA testing at that time. Strickland opined the minor’s demeanor was “not unusual” in that she was “not upset, smiled, laughed a few times, she didn’t seem scared, embarrassed, or disturbed in anyway.” R. 256, ll. 6-17.

The sexual assault nurse examiner at Palmetto Health Hospital, Temple Hart, admitted the minor did not report to the hospital with any injuries. Hart told the jurors that did not mean the minor had not been sexually assaulted. R. 266, l. 22 – 270, l. 10.

On cross-examination, Hart acknowledged the minor told her the person she had sex with was named Justin Goodwin, and that he was sixteen to eighteen-years-old. R. 279, ll. 19-25. Hart said she was learned at some point the Facebook page “was fake.” R. 280, ll. 6-8.

¹ The relative was appellant’s mother. The defense argued admitting this evidence that the “relative” had a criminal record was highly prejudicial, and it cast appellant and his family in a bad light with the jury. R. 238, l. 2 – 243, l. 20.

As stated above, the DNA testing on one sample showed a one in two hundred forty chance the contributor was appellant, and the other sample showed a one in two hundred and ten chance that the sample matched appellant. Although the DNA statistics would seem to prove little in comparison with other cases before this Court, the SLED DNA expert maintained these samples excluded ninety-nine percent of the population. R. 375, l. 3 – 377, l. 24.

The defense maintained in its closing argument that the minor named appellant as a person having sex with him because it was convenient to accuse him as her sex partner, and that she was scared of getting “grounded,” and having her telephone confiscated. R. 426, l. 4 – 432, l. 24.

Discussion

Rule 106, SCRE, the Rule of Completeness, states “when a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

The point of the Rule of Completeness is that one party, here the solicitor, should not take part of writings or recordings and present only a select part of it to the trier of fact -- which leaves a misleading impression -- without the other party [the defendant] being allowed to introduce other portions of the writings or recording which puts the entire subject matter in context.

The opinion in State v. Cabera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004), is instructive in this case. In that case, the solicitor also successfully excluded any evidence which provided context to the facts of the shooting. In Cabera-Pena, the defendant told the police that he had shot his wife. However, when the defendant wanted to introduce his other statement to the police that: “I do not know how she took the gun out of my pants pocket. I tried to grab and force her, but the gun went off and fired,” the state successfully precluded its admission.

Thus, solicitor had one statement where the defendant admitted to shooting his wife. The state successfully argued that was all the jury should consider. However, the second statement provided context that the shooting may have been voluntary or involuntary manslaughter.

On appeal, Caber-Pena asserted the trial court erred in prohibiting him from questioning the police officer about the statement he made to the officer that his wife had somehow gotten the gun out of his pants pocket, and that the gun had gone off. The lesser-included offense statement.

The Supreme Court agreed this was fundamentally unfair, citing State v. Jackson, 365 S.C. 278, 284, 217 S.E.2d 794, 797 (1975), for the proposition that “the plainest principles of justice requires that if one of the statements is used against the party, **all of the other statements tending to explain it or qualify the issues should be shown and considered in conjunction with it.**” (emphasis added).

Although the majority of the Court found this was a fundamental error, it found the error harmless. In dissent, Justices Moore and Pleicones agreed that the trial court erred in refusing to allow the defendant’s statement in its entirety. They dissented because they would not have found this fundamentally unfair evidentiary ruling harmless error.

Here, Appellant Brown was prevented from providing the jury context to the minor’s text messages which showed she was sexually active. Consent was obviously not a defense so the only question involved was the identity of the man who was having sex with the minor. While eliciting sex on the internet with a minor, or one thought to be a minor, was a crime in and of itself, the crime was not criminal sexual conduct with a minor in the second degree. Appellant is serving twenty-eight years in prison for that crime.

The evidence here showed the minor was sending sexually explicit text messages to at least three men at the time she alleged appellant was the one who had illegal sex with her. Defense

counsel argued that he could not present a defense that the minor was defending one or both of the other two men, one being her alleged boyfriend, when she named appellant as the man who met her when she snuck out of the house to have sex near the deer stand. The text messages the jury never saw or heard about also contained the fact her apparent boyfriend was concerned about her pregnancy test. The defense had a right to present a complete defense, and the judge erred by only admitting those text messages from the minor which supported the state's theory of the case.

Holmes v. South Carolina, 547 U.S. 319 (2006); Crane v. Kentucky, 476 U.S. 683 (1986). This was the same error as in State v. Cabera-Pena. Appellant should be granted a new trial.

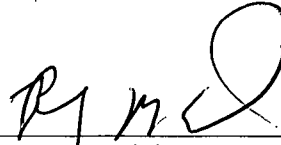
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CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of January, 2017.

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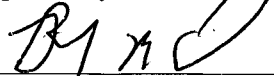
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Ray Brown 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 R. Knox McMahon, which was held on January 19-21 and 25, 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 David Ray Brown.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 20th day of January, 2017.

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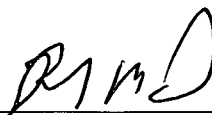
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments;
- (2) Entire trial transcript;
- (3) State's exhibit 9 (Text messages).

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

January 20, 2017



Robert M. Dudek
Chief Appellate Defender

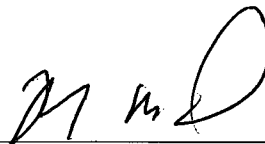
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ATTORNEY FOR APPELLANT

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."

January 20, 2017.



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent
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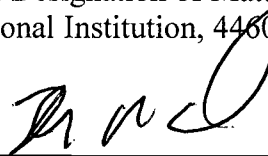
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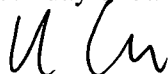
CERTIFICATE OF SERVICE

The undersigned 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 J. Benjamin Aplin, 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 have been served on David Ray Brown, #166900, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 20th day of January, 2017.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of January, 2017.



(L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2025.