

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Marion County

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Honorable William H. Seals, Circuit Court Judge

FEB 08 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

LINDELL DAVIS,

APPELLANT

APPELLATE CASE NO 2015-002448

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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1.

The Court erred by allowing Investigator Jackson to testify the fifteen-year-old minor told her that “sexual penetration” occurred in this case since this testimony went beyond the “time and place exception,” and it was highly prejudicial hearsay testimony where the alleged victim admitted she wanted to have sex with appellant, but where appellant told the police penetration never occurred before the minor’s Aunt walked into the room..... 3

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STATEMENT OF ISSUE ON APPEAL

Whether the Court erred by allowing Investigator Jackson to testify the fifteen-year-old minor told her that “sexual penetration” occurred in this case since this testimony went beyond the “time and place exception,” and it was highly prejudicial hearsay testimony where the alleged victim admitted she wanted to have sex with appellant, but where appellant told the police penetration never occurred before the minor’s Aunt walked into the room?

STATEMENT OF THE CASE

Appellant was indicted at the November 2014 term of the Marion County grand jury for the offenses of criminal sexual conduct with a minor in the second degree, and criminal solicitation of a minor. R.187-188. His case was called to trial on November 16, 2015, before the Honorable William H. Seals Jr., and a jury. Hank Anderson represented appellant. David Richardson and Lauren Hummel were the assistant solicitors. Tr. 1.

At the conclusion of the trial on November 17, 2015, the jury found appellant guilty on both counts. Tr. 183, ll. 17-24. Judge Seals sentenced appellant to fifteen years imprisonment for criminal sexual conduct with a minor in the second degree, and eight years, concurrent, on the solicitation conviction. Tr. 185, ll. 10-13.

This appeal follows.

ARGUMENT

The Court erred by allowing Investigator Jackson to testify the fifteen-year-old minor told her that “sexual penetration” occurred in this case since this testimony went beyond the “time and place exception,” and it was highly prejudicial hearsay testimony where the alleged victim admitted she wanted to have sex with appellant, but where appellant told the police penetration never occurred before the minor’s Aunt walked into the room.

The minor was in eleventh grade at the time of appellant’s trial. She testified that she knew appellant had been friends with her aunt’s boyfriend. The aunt’s boyfriend died when the minor was in the ninth grade, but appellant continued to work out daily – lift weights – in the boyfriend’s shed even after the boyfriend died. That is how the minor got to know appellant. Tr. 55, l. 7 – 56, l. 14.

The minor testified that on May 31, 2014, when she was fifteen-years-old, she was living with her aunt in a mobile home. The shed outside the mobile home had been used as a two car garage. There was weight lifting equipment and a “weight bench” in this shed. Tr. 57, ll. 2-24.

Minor remembered that May evening that appellant was lifting weights in the shed. Tr. 59, ll. 2-23. The minor said she received a text message from appellant, and she said that she sent a text message back to appellant. Tr. 60, l. 2 – 63, l. 9.

The minor went to the shed, and “I believe he was lifting weights.” The minor said she willingly was going to the shed to have sex with appellant, and she claimed they in fact had sex, and that “he penetrated me.” Tr. 63, l. 4 – 66, l. 16. The minor said while they were having sex her aunt walked into the shed. The minor maintained she “got up,” and she claimed appellant told her aunt: “I already know I’m going to jail.” The minor said appellant and her aunt then started “fussing” at each other. Tr. 65, l. 12 – 67, l. 7.

The minor recalled that her aunt telephoned her mother to inform her about what she had seen. The minor testified she then cut herself with a knife, and she was taken to the hospital. Tr. 67, l. 9 – 68, l. 13; 74, ll. 2 – 16.

On cross-examination, the minor denied that her mother called her derogatory names, and hit her when she arrived at the aunt's mobile home after being called that night. Tr. 84, ll. 14-17. However, the "forensic interviewer," Sally Williamson, later testified that the minor told her that her mother hit her repeatedly after the mother was told about the incident. Tr. 148, ll. 23-25.

Williamson admitted that when describing the incident the minor told her: "We were just fucking -- that's it basically." Tr. 147, l. 23 – 148, l. 1. Williamson also acknowledged that the minor told her she did cut herself "sometimes." The minor also complained that her mother did not listen to her or let her explain events. Tr. 149, ll. 11-24.

Investigator Samantha Jackson testified that she was assigned the case three days later. She immediately obtained an arrest warrant for appellant for criminal sexual conduct with a minor in the second degree. She and another detective arrested appellant on June 2, 2013. Tr. 109, l. 22 – 110, l. 24.

Investigator Jackson testified that appellant told her he was lifting weights in the shed when the minor came into the shed desiring to initiate sexual relations with him. Appellant denied that he actually had sex with the minor. Appellant told Jackson that the minor's aunt walked in "the door and I was standing up. She [the minor] was lying on the bench with her clothes down. I've never done nothing like that in my life." Tr. 122, ll. 2-7.

The solicitor asked Investigator Jackson what the minor told her as "part of your investigation." The defense objected to the specifics of the minor's allegations being repeated by Jackson. The solicitor claimed this hearsay testimony of what the minor told Jackson fell within

the “time and place exception.” The judge agreed, and he overruled the objection. Tr. 122, l. 24 – 123, l.8. Investigator Jackson then testified that the minor told her that appellant sexual penetrated her in the shed that evening. Tr. 123, ll. 10-12.

Discussion

The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the hearsay rule exists.. Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991). An exception to the hearsay rule exists in criminal sexual conduct cases when the alleged victim testifies, and another witness can then testify that the alleged victim complained of the sexual assault. However, this testimony is **limited** in corroboration to the **time and place of the assault**. The details or particulars of the alleged assault are not admissible. Simpkins v. State, 303 S.C. 364, 367, 401 S.E. 142, 143 (1991).

The minor in this case testified that she willingly had sex with appellant. She claimed that the sex actually occurred, and that penetration occurred before her aunt interrupted by entering the shed. As seen, appellant acknowledged the minor wanted to have sex with him in the shed but he denied it actually took place. In fact, appellant told the police that he told the minor that she was not going to get him in trouble by having underage sex. It was undisputed that the minor’s aunt walked in the shed, and she thought the minor did not have her clothes on.

The testimony of Investigator Jackson that the minor told her appellant allegedly penetrated her went beyond the time and place exception to the hearsay rule. Therefore, it impermissibly bolstered the minor’s claim that penetration did occur.

In Jolly v. State, 314 S.C. 17, 443 S.E. 2d 566 (1994), the Supreme Court found defense counsel was ineffective for failing to object to the testimony of one of the alleged victim’s relatives that the minor told him that Jolly had abused her. The Supreme Court found this went

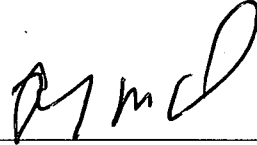
beyond the “time and place exception” of the report or “outcry” evidence, and it impermissibly delved into the hearsay details of the alleged abuse.

Here, the only matter in dispute was whether sexual relations between appellant and the minor actually occurred. The minor claimed to the forensic interviewer that the sexual relations occurred, and occurred with her approval, and she dismissed the significance of the sex. Conversely, appellant said while the minor wanted to have sexual relations with him, there was never any sex between the two.

Thus, the minors claim that “penetration occurred” was the key fact in this case, and Investigator Jackson impermissibly bolstered the child’s testimony by stating the minor told her “penetration occurred.” Defense counsel correctly objected to this testimony, and this Court should grant appellant a new trial given the highly unusual facts of this case where penetration was the only issue for the jury to determine.

CONCLUSION

By reason of the forgoing arguments, appellants conviction should be reversed, and this case remanded to the Marion County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of February, 2017.

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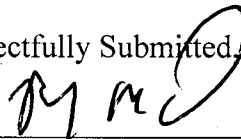
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lindell Davis 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 William H. Seals, which was held on November 16-17, 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 Lindell Davis.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 8th day of February, 2017.

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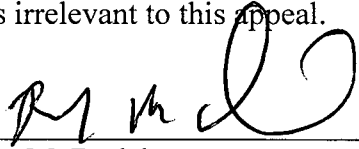
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment:
- (2) Entire trial transcript

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

February 08, 2017



Robert M. Dudek
Chief Appellate Defender

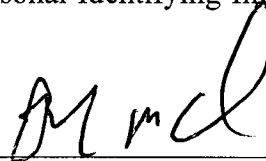
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ATTORNEY FOR APPELLANT

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."

February 08, 2017.



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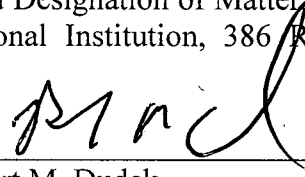
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CERTIFICATE OF SERVICE

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 Lindell Davis, #366106, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 8th day of February, 2017.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of February, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: November 3, 2026.