

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Greenville County

FEB 22 2017

Honorable Letitia H. Verdin, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TOMMY LEE WISEMAN,

APPELLANT

APPELLATE CASE NO 2016-000278

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

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

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by instructing the jury that “the testimony of a victim in a criminal sexual conduct case need not be corroborated, since it was an impermissible charge on the facts and confusing?”

STATEMENT OF THE CASE

Appellant Tommy Lee Wiseman was indicted by the Greenville County Grand Jury for two counts of criminal sexual conduct in the third degree. R. 249. His case was called to trial on February 3, 2016 before the Honorable Letitia H. Verdin. Amanda Wicker represented appellant. Lisa Bentley was the assistant solicitor. R. 1.

On February 4, 2016 the jury found appellant guilty on one count of criminal sexual conduct in the third degree, and the judge declared a mistrial due to a hung jury on the other count. R. 243, ll. 11-15. Judge Verdin sentenced appellant to eleven years imprisonment. R. 246, ll. 22-23.

This appeal follows.

ARGUMENT

The court erred by instructing the jury that “the testimony of a victim in a criminal sexual conduct case need not be corroborated, since it was an impermissible charge on the facts and confusing.

Relevant Facts

Approximately ten children and about four adults were living in the household when appellant, a neighbor, allegedly molested the eight-year-old minor 1, a girl. The adults would admit during the trial it was difficult to “keep up” with all of these children. Jennifer Flores testified that the minor girl at issue in this case -- and her minor brother who was eleven-years-old -- moved in with her after their mother lost custody because a meth lab was being operated on her property. R. 69, l. 19 – 76, l. 3.

Appellant Tommy Wiseman lived across the street at the time. Forty-five-year-old Kathy Perez was grandmother of the two minor children. She had lived with her children, and grandchildren at times. R. 179, l. 13 – 184, l. 8.

Kathy testified that she noticed appellant “was all alone. Nobody visited him. He was just all alone.” Consequently, Kathy began taking food to appellant Wiseman on holidays. “I even bought him groceries. I mean, that’s how I got to know him.” Kathy said her grandchildren: “[L]oved Tommy, he would play with them. . . . Minor 1 was his pick. Minor 1 was, as he would say, his pride and joy.” R. 184, l. 9 – 185, l. 23.

Appellant’s competence to defend himself

Appellant’s lawyer during the trial would assert appellant was competent -- he had been evaluated by DDSN -- but his ability to defend against these charges was called into question by the trial judge. Defense counsel said; “Sometimes, we have to explain a little bit more. But I think he

understands what's going on." The judge ultimately accepted that assertion. R. 152, l. 4 – 154, l. 23.

Flores remembered when the children had to move because of the meth arrest of her daughter -- the children's mother -- that appellant was in tears. Flores opined she thought appellant was going to miss the minor girl the most of all of the children. R. 77, ll. 1-24.

Flores testified that the allegations by the minor girl in this case arose when a couple of the adults in the household learned that the young girl had asked Flores's son, Ian -- who was three at the time -- if he would give her "gummy worms" if she let him touch her underneath her underwear. Flores said: "I grabbed my son and went to talk to him. And then my sister grabbed the minor girl and went to talk to her. And after the talking, I called the social worker and asked her what to do." R. 78, l. 13 – 79, l. 24. Law enforcement and DSS became involved, and the two minor children, minor girl 1, and minor boy 2, were taken to the Julie Valentine Center for forensic interviews. R. 80, ll. 2-15.

Eighteen-year-old Jessica Selgado was also a friend of the family. She remembered the "gummy worms incident." She said the only time the young minor 1 had ever "acted out" was "where she had offered my nephew to touch her for gummy worms." R. 88, ll. 13-16.

Selgado said she tried to remain calm and talk minor 1 in the laundry room after she learned of the incident. Selgado said the young girl "was really upset. She was crying. She then accused appellant of sexually touching her." R. 88, l. 13 – 89, l. 9. Selgado recalled that they were told to inform law enforcement of the minor's allegation against appellant. R. 89, l. 22 – 90, l. 7.

The brother of the young girl was eleven-years-old at the time of the trial. He testified that the appellant "would always give my grandma rides and my mom rides to go to the store. We didn't have a car." The minor testified that appellant was over at their house "a lot." Appellant

would push them on the swings in the backyard. However, the minor boy said that appellant one time “jerked me by the arm” when he allegedly learned that the young girl had accused appellant of sexually touching her. R. 92, l. 25 – 99, l. 15. The minor boy said he told his mother about appellant “jerking his arm.” R. 99, l. 18-20.

The accusation of the eight-year-old minor girl was that appellant would put her on the back of his truck and touch her in a sexual manner. R. 106, ll. 22-23; R. 113, l. 1 – 115, l. 16.

Greer Detective Dale Arterburn testified that he received a report that appellant had sexually touched a minor girl. After appellant was arrested, the detective interviewed appellant. Appellant “just stated he didn’t do it. He had never been left alone with her.” R. 133, ll. 2-8.

The state introduced the forensic interviews of the young girl and the young boy through Julie Valentine forensic interviewer Sarah Davis. They are on file for viewing with this Court. R. 138, l. 3 – 142, l. 13; R. 162, ll. 1-2.

The mother of the young girl and the young boy, Christina Whitted, testified that she had four children, and she was the mother of the young girl and young boy at issue in this case. She was twenty-six- years old, and she acknowledged her children did not currently live with her because of her meth addiction. R. 162, l. 18 - 164, l. 24.

Whitted said she did her best to watch all of the children in the household but it was very difficult. Whitted remembered appellant lived across the street, and that her mother, Ms. Perez, felt sorry for appellant. Appellant had no family and no one to visit him, and her mother began taking food over to appellant’s house. Appellant started giving members of their large household rides because he had a truck, and they had no transportation. He also bought the children clothes and toys. R. 168, l. 2 – 178, l. 22.

Kathy Perez, the mother of Whitted, testified she was never worried about appellant, and she noted that appellant bought minor 1 an Easter dress. On cross-examination, Perez admitted with eight children in the household at one point there were a lot of things “going on,” and that the minor girl and minor boy were old enough to “play outside alone.’ R. 188, l. 11 - 195, l. 4.

The jury instruction

At the end of the first day of trial the solicitor asked the judge if she would be charging the jury that the testimony of the alleged victim did not have to be corroborated. The judge confirmed that she would give the jury that instruction. R. 155, l. 13 – 155, l. 20. The judge thanked the solicitor for reminding her of the “no corroboration instruction” because it apparently was not in her original charge.

The judge instructed the jury that: “The testimony of a victim in a criminal sexual conduct case need not be corroborated. I will give you a copy of these instructions in written form.” R. 233, ll. 1-9; R. 236, ll. 1-2.

Discussion

In State v. Witherspoon, Op. No. 27675, 2016 WL 6520168 (filed November 2, 2016), the Supreme Court reversed the defendant’s conviction because the “no corroboration” jury instruction given in that case -- and the identical one in this case -- was found to be reversible error. The Court noted that during Witherspoon’s trial for first degree criminal sexual conduct the judge instructed the jury on S.C. Code § 16-3-675 which provided that *the testimony of the victim did not have to be corroborated in prosecutions for criminal sexual conduct*.

The Supreme Court explained that after the Court of Appeals had affirmed the convictions in Witherspoon, that Court held in the intervening case of State v. Stukes, 416 S.C. 493, 787 S.E.2d

480 (2016), that the jury charge which included the language of S.C. Code § 16-3-657 on “no corroboration being necessary” was confusing, and it was an unconstitutional charge on the facts.

The Court also emphasized that in South Carolina a judge could only charge the jury on matters of law, and not with respect to matters of fact. See, S.C. Const. Art. V, § 21.

If ever there was a case where the jury instruction -- that the testimony of the alleged victim need not be corroborated -- was **extremely prejudicial it was in this case**. Although appellant may have “competent,” this record does not show confidence in appellant’s ability to present a defense.

The minor complaining child in this case only made the allegation against appellant when she was confronted with evidence that she would allow her cousin to touch her sexually if he would buy her candy. The child then became very upset and started crying when confronted with this evidence. She then accused appellant of touching her sexually.

The record in this case respectfully presents a possible false allegation by a deflecting minor 1, who was “in trouble,” against a defendant unable to defend himself.

CONCLUSION

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

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of February, 2017.

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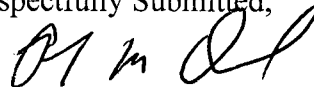
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tommy Lee Wiseman 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 Letitia H. Verdin, which was held on February 3, 2016 (trial), 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 Tommy Lee Wiseman.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 22nd day of February, 2017.

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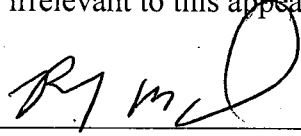
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s):
- (2) Entire Trial Transcript
- (3) State's Exhibit No. 4 (DVD of Forensic Interview)
- (4) State's Exhibit No. 5 (DVD of Forensic Interview)

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

February 22, 2017



Robert M. Dudek
Chief Appellate Defender

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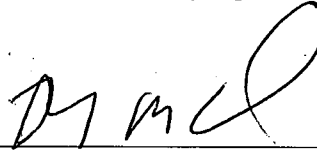
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SC Court of Appeals

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 22, 2017.



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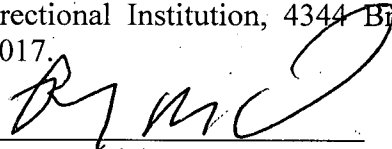
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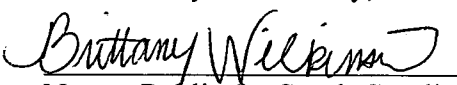
APPELLANT

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 Tommy Lee Wiseman, #366936, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 22nd day of February, 2017.


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of February, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: November 3, 2026.