STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODNEY MICHAEL ALEXANDER,

APPELLANT

APPELLATE CASE NO. 2016-000112

FINAL BRIEF OF APPELLANT

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2.

Whether the trial court erred in allowing a social worker who provided counseling to the complainant to testify about "sex abuse dynamics" and her treatment of complainant where such testimony improperly bolstered the complainant's credibility?

STATEMENT OF THE CASE

On August 27, 2013, a Greenville County grand jury indicted appellant Rodney Michael Alexander for two counts of second-degree criminal sexual conduct with a minor and one count of lewd act. R. 589 – 594. On October 6, 2015, appellant was tried before the Honorable R. Keith Kelly and a jury. R. 1. Kristie Bjorndal Hodge and Katherine Weaver Patterson represented appellant. R. 1. Alex R. Stalvey represented appellant. R. 1. The jury convicted appellant. R. 576, ll. 4 – 22. Judge Kelly sentenced appellant to concurrent twenty-year terms of imprisonment for CSC and a consecutive five-year term for lewd act. R. 487, l. 14 – 498, l. 4. This appeal follows.

ARGUMENT

1.

In this sex abuse case with no physical evidence and where the complainant's credibility was very much in question, the trial court erred in charging the jury that the testimony of the victim need not be corroborated, violating the rule of *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).[1]

Factual Background

The credibility of the complainant was in question from the very beginning of this trial. R. 8, l. 24 – 11, l. 16. In her opening statement, the solicitor told the jury that the State's "case is going to be testimonial." R. 9, ll. 15 – 16. The solicitor stated "we will have an eyewitness testify and tell you exactly what happened here. And that will be [complainant]." R. 9, ll. 22 – 23. Anticipating the defense, the solicitor told the jury, "It will be a trial of the victim. Not of the defendant, of the victim. They will try to portray her probably in a bad light or make her have some credibility issues." R. 10, ll. 17 – 24.

The complainant, who was thirteen at the time she alleged appellant abused her and sixteen at the time of trial, admitted that in the past she had "told stories," but denied that she "ever told a story that I know could ruin somebody's life. I would never do that." R. 152, l. 21 – 153, l. 1. Contradicting this claim, complainant later admitted that she once accused a man at her group home of abusing his wife and this allegation was proved false by video evidence. R. 204, l. 6 – 205, l. 21. Complainant said she did not want appellant "to get in trouble. I don't want

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[1] In fairness to the trial judge, he did not have the benefit of Stukes at the time this case was tried.

him to get in trouble now. I just want him to be castrated so he can't hurt anybody else." R. 135, l. 21 – 136, l. 1.

Complainant's mother admitted complainant had lied about her. R. 78, l. 25 – 79, l. 2. One of complainant's foster parents testified for the defense that complainant "was not truthful." R. 412, l. 2 – 413, l. 13. The director of Southeastern Children's Home in Greenville, where complainant lived for a time, also testified for the defense about complainant's truthfulness: "[Complainant] is very intelligent. **When she has an agenda for something that she wants, she will manipulate and lie to make sure that it furthers her agenda.**" R. 402, l. 25 – 404, l. 8 (emphasis added).

As the solicitor described it, complainant was "in and out of DSS custody" throughout her life. R. 4, l. 19 – 5, l. 2. She considered appellant and his wife her grandparents. R. 96, l. 15 – 97, l. 11. R. 99, ll. 3 – 13. Not until complainant was eight years old did she learn that appellant and his wife were not her biological grandparents. R. 110, l. 9 – 112, l. 8. Appellant's wife, Nora Alexander ("Nora"), did not find out that she was not complainant's biological grandmother until complainant was three years old. R. 425, ll. 11 – 14. Complainant's mother told Nora's son that complainant was his child, but this was not true. R. 427, l. 25 – 428, l. 11. R. 95, l. 1 – 96, l. 12.

Complainant originally claimed that appellant began abusing her from the time she was two years old. R. 158, ll. 15 – 17. She claimed the abuse began as a "touching game" in which they would touch each other's genitals. R. 99, l. 22 – 103, l. 24. The alleged abuse escalated to sexual intercourse when complainant was approximately eleven or twelve years old. R. 121, l. 17 – 129, l. 7. Appellant had intercourse with her "[p]ossibly four" times. R. 129, ll. 11 – 15. Complainant had lived with the Alexanders off-and-on throughout her life, but went to live with

them after her mother physically abused her in April 2012. R. 265, l. 11 – 268, l. 9. After this violent incident where her mother pulled complainant by her hair down the street, complainant later "pled" with her guardian ad litem to go live with the Alexanders. R. 265, l. 21 – 268, l. 9.

Complainant had multiple opportunities to tell someone about her grandfather's abuse, but declined to do so until after being punished by her grandparents for being suspended from school and for conduct with a seventeen year-old boy ("QC"). R. 188, l. 12 – 193, l. 21. R. 448, l. 19 – 449, l. 7. Complainant, who was then thirteen, considered herself QC's girlfriend. R. 182, ll. 21 – 23. Complainant's friends thought QC "was the cutest guy in school." R. 223, ll. 5 – 17. Her grandmother found out about QC and told complainant they should "just be friends." R. 182, l. 24 – 183, l. 22. Appellant called QC's grandmother to let QC's family know they should not be involved with each other due to the difference in their ages. R. 183, l. 23 – 184, l. 9.

During the DSS investigation of the mother's physical abuse, complainant told the caseworkers she wanted to live with her grandparents. R. 167, l. 24 – 168, l. 14. One of the DSS caseworkers testified for the defense and said that complainant never expressed any concerns about how things were going with the Alexanders. R. 401, ll. 21 – 23. Complainant told the workers at her group home, Pendleton Place, that she wanted to live with her grandparents. R. 167, ll. 19 – 23. Complainant had a close relationship with the school resource officer and never told the officer that her grandfather was abusing her. R. 187, ll. 6 – 188, l. 11.

Even in a forensic interview at the Julie Valentine Center about her mother's abuse, when complainant was specifically asked if she had been sexually abused or ever had sexual intercourse, complainant answered no. R. 169, ll. 3 – 173, l. 8. When the forensic interviewer asked her who she would tell if she were molested, complainant told the forensic interviewer,

"My grandma **or my grandfather** or a teacher." R. 179, ll. 14 – 22 (emphasis added). Complainant also had six sessions with a counselor before making her allegations and did not tell the counselor about any abuse by her grandfather. R. 379, ll. 1 – 3. R. 361, l. 19 – 365, l. 19.

Complainant made these allegations against her grandfather to her grandmother while they were at a meeting at DJJ. R. 129, l. 24 – 133, l. 16. Complainant was at DJJ because of a fight she had been in "a year before." R. 130, l. 25 – 131, l. 2. She had also been suspended from school that week because she "got into a physical altercation with a guy at my school." R. 130, ll. 19 – 24. Complainant took her grandmother into the bathroom at DJJ and told her that appellant had been molesting her. R. 131, l. 23 – 132, l. 5.

Complainant and her grandmother's accounts of their conversation in the bathroom differed. Complainant said her grandmother held her and told her appellant would never do it again. R. 132, ll. 5 – 9. The grandmother testified that she immediately knew complainant was lying and told her so. R. 439, ll. 10 – 20. When they returned home, appellant's wife told him about complainant's allegations. R. 51, l. 20 – 52, l. 8. He denied abusing her and told his wife to call the police. R. 52, ll. 6 – 8. The grandmother confronted complainant, complainant said she "didn't care," went back up to her room, broke a window and ran away. R. 52, l. 22 – 53, l. 18. The grandmother called the police. R. 53, ll. 23 – 25.

Complainant said she ran away because she had "seen a lot of CSI Miami shows" and did not "want to be the evidence he was getting rid of." R. 133, ll. 4 – 10. Despite being in fear for her life, instead of calling the police, the first person complainant called when she ran away was QC. R. 194, l. 22 – 195, l. 5. QC told her he had another girlfriend and complainant got angry. R. 197, ll. 4 – 16.

Complainant then called another boy ("GF"). R. 196, ll. 22 – 25. GF's mother picked her up, took her to McDonald's, then back to their house. R. 32, l. 4 – 33, l. 14. GF's mother had complainant call her grandmother to let her know that she was safe, and then GF's mother spoke to the grandmother. R. 33, l. 6 – 34, l. 20. The grandmother was angry with complainant and GF's mother agreed to take complainant to McDonald's to meet her. R. 34, l. 21 – 35, l. 23. After making the plan to return complainant to the Alexanders, complainant then told GF's mother she had been sexually abused. R. 36, ll. 1 – 12. GF's mother called the police. R. 37, ll. 21 – 24. Complainant and GF's mother had never met before that night. R. 40, ll. 14 – 18. Complainant later told her DSS caseworker that she wanted to be adopted by GF's parents. R. 223, l. 21 – 224, l. 4.

Discussion

The trial court erroneously charged that a sexual abuse victim's testimony does not need to be corroborated. R. 564, l. 25 – 565, l. 2. Judge Kelly charged, "Section 16-3-657 of the South Carolina code provides that the testimony of the victim in criminal sexual conduct prosecutions need not be corroborated by other testimony or evidence." R. 564, l. 25 – 565, l. 2. Appellant objected to this charge. R. 570, l. 19 – 571, l. 4. The solicitor told Judge Kelly the charge was proper under State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006). Judge Kelly noted appellant's objection and ruled "it is a proper charge." R. 571, ll. 8 – 15.

In State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), our Supreme Court reversed, finding the "no corroboration" charge improper. The Court held, "By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury." Id. at ___, 787 S.E.2d at 483. "The charge invites the jury to believe the

victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Id. Here, trial counsel anticipated the Court's ruling in Stukes when he argued that the charge "focuses the jury's attention on the victim's testimony." R. 570, ll. 22 – 25.

The Stukes Court also held that the giving of this charge cannot be harmless when the case hinges on credibility. Id. No physical evidence existed in this case. As shown above, the complainant's credibility was the central focus of the entire trial. Complainant only claimed appellant abused her after her grandparents disciplined her for being suspended at school and forbade her relationship with the seventeen-year old QC. QC was the first person complainant called when she ran away. The director of a group home said complainant would manipulate and lie to further her own agenda. R. 402, l. 25 – 404, l. 8.

The solicitor said in closing that "[w]itness credibility in this case is hugely important." R. 540, l. 19. When arguing to the jury about how they should judge complainant's credibility, the solicitor told them, "What motive does she have to make this story up? What reason does she have to lie?" R. 541, ll. 10 – 15.

Furthermore, the solicitor specifically emphasized the improper Stukes charge as she ended her closing argument. R. 552, l. 23 – 553, l. 5. The solicitor argued:

> **[Complainant] is the only one you have to believe in this case to find the defendant guilty.**
>
> **As the judge will tell you, her testimony doesn't have to be corroborated,** although it has been by the State's other witnesses, by LaQuinta telling you what she saw the defendant doing to the child, by the defense and State witnesses telling you that this defendant had access to the child, by Erica Van Wagner describing exactly the symptoms that [complainant] has experienced. **But [complainant] is the only one you have to believe.** She's the eyewitness in this case. . . .

> **I submit to you that [complainant] is telling the truth.** She has told you her story. Take that story, find the defendant guilty, hold him accountable and give this child the justice she desires.

R. 552, l. 21 – 553, l. 21 (emphasis added). Because complainant's credibility was the centerpiece of the State's case and the solicitor's emphasis on the improper charge in closing, the error in this case cannot be harmless under Stukes. This Court should reverse.

2.

The trial court erred in allowing a social worker who provided counseling to the complainant to testify about "sex abuse dynamics" and her treatment of complainant where such testimony improperly bolstered the complainant's credibility.

The State called Erica Van Wagner ("Van Wagner") as an expert in "child sex abuse dynamics." R. 286, ll. 22 – 24. Van Wagner was not a psychiatrist, nor a psychologist, but a social worker. R. 282, ll. 2 – 10. The trial judge held an extensive *in camera* hearing on the admissibility of her testimony. R. 281, l. 9 – 287, l. 8.

The State proffered her testimony at the hearing, which consisted of cherry-picked sexual abuse characteristics that matched complainant's testimony. Van Wagner testified about "grooming" and buying gifts, which matched complainant's claim that her grandfather bought her "a new toy every day." R. 292, l. 15 – 293, l. 11 (Van Wagner). R. 99, ll. 14 – 16 (complainant). Van Wagner testified about why children do not report abuse right away, explaining that children fear foster care and the breakdown of the family. R. 293, l. 15 – 294, l. 17. This matched complainant's long history with DSS. The social worker also testified children do not disclose abuse because they are not sure whether the "non-offending caregiver" would be supportive. R. 298, l. 15 – 299, l. 1. This matched complainant's testimony that she only told her grandmother about the abuse when she saw her grandmother vigorously defending her at DJJ. R. 130, l. 9 – 133, l. 16. Van Wagner also corroborated complainant's testimony that she would have something akin to out-of-body experiences during the abuse by discussing the concept of "disassociation." R. 113, ll. 5 – 9 (complainant). R. 305, l. 19 – 306, l. 7 (Van Wagner).

Van Wagner was complainant's counselor. R. 306, ll. 8 – 12. Van Wagner began treating complainant because of her mother's physical abuse. R. 306, ll. 8 – 22. Complainant did not disclose the sexual abuse to Van Wagner until after the report to the police. R. 308, l. 14 – 309, l. 23. Van Wagner did "a new trauma assessment" which showed scores that "were elevated for sexual distress in sexual concerns, general sexual concerns." R. 309, ll. 8 – 23.

At the conclusion of the hearing, trial counsel objected to Van Wagner's testimony because she had treated complainant and her testimony would "improperly bolster the credibility of the witness." R. 320, l. 20 – 321, l. 18. Relying on this Court's analysis in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App., 2015), appellant argued that "a blind expert" would be required under the circumstances of this case because having treated complainant, Van Wagner "would be indirectly vouching for the credibility of the victim in the case." R. 321, l. 19 – 323, l. 5. The trial judge took the motion under advisement overnight. R. 326, l. 25 – 327, l. 8.

The next morning, Judge Kelly ruled that Van Wagner's testimony was admissible. R. 334, l. 4 – 338, l. 1. Judge Kelly ruled that improper bolstering "occurs when the expert witness is allowed to give her opinion as to the truthfulness of the complaining witness." R. 336, ll. 8 – 17. The trial judge stated that, "Here, the expert witness is testifying to her personal observations and interactions with the complaining witness, not her truthfulness." R. 336, ll. 14 – 17. Appellant objected again in front of the jury, and the objection was overruled. R. 339, ll. 11 – 14. Appellant again objected when the State offered Van Wagner as an expert. R. 345, ll. 21 – 22. Trial counsel also objected when the State began questioning Van Wagner about her treatment of complainant. R. 361, ll. 5 – 11. These objections were overruled. Van Wagner testified before the jury consistent with her testimony during the proffer. R. 340, ll. 7 – 368, l. 8.

Van Wagner also testified that she recommended that complainant continue treatment after her last session. R. 368, ll. 1 – 8.

Allowing Van Wagner's testimony was error under State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015) and State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). Anderson stated that to "allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility." Id. at 218-19, 776 S.E.2d at 79. "The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert." Id. Here, appellant objected under precisely this reasoning: that the State should use a "blind expert" to testify about child abuse dynamics. Despite this warning, the State persisted in using Van Wagner for the exact reasons condemned in Anderson: to indirectly bolster complainant's testimony.

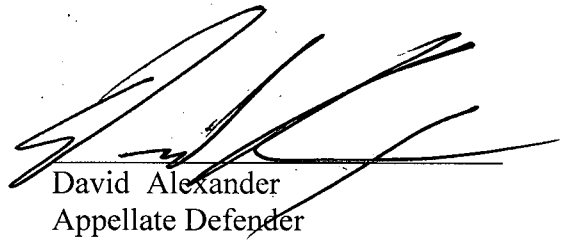
The forensic interviewer in Anderson "vouched for the minor when she testified only to those characteristics which she observed in the minor." Id. The same thing happened in this case. Van Wagner testified about giving gifts, delay in disclosure because of fear of foster care and the reaction of another caregiver, and disassociation. These selected "sex abuse dynamics" mirrored complainant's testimony. Anderson compels reversal.

The solicitor's final question to Van Wagner, which elicited her recommendation for more treatment, also violates Chavis. In Chavis, the Court held it was error to allow an expert in child abuse assessment to testify regarding her recommendation that the victim "'not be around [Appellant] for any reason.'" Chavis at 108, 771 S.E.2d at 340. The Court held that the expert's "recommendation that Appellant not be around Victim for any reason, can only be interpreted as [the expert] believing Victim's claim that Appellant sexually abused her. This type of testimony is improper." Id. at 109, 771 S.E.2d at 340. The Court further held that even if the qualification

of the expert was not error, allowing her to testify about her recommendation was erroneous. Id. The reason for the error was that it improperly bolstered the complainant's credibility. Id. Van Wagner's testimony that she recommended continuing treatment is analogous and this Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.



David Alexander
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ATTORNEY FOR APPELLANT

This 30th day of March, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

March 30, 2017

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