STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JACOB MICHAEL HENDRICKS,

APPELLANT

APPELLATE CASE NO. 2016-001652

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to instruct the jury that appellant's prior criminal record could not be used as proof he committed the crime alleged in this case, that it could only be considered as to his credibility, particularly where the judge found the solicitor improperly argued appellant was capable of committing this offense because he had two prior burglary and two grand larceny convictions, and because he used illegal drugs while on probation, since appellant was entitled to this specific credibility instruction regarding his prior record?

STATEMENT OF THE CASE

Appellant was indicted by the Pickens County Grand Jury for the offense of criminal sexual conduct with a minor in the first degree. R. *. His case was called to trial on July 27, 2016, before the Honorable Thomas A. Russo, and a jury. David Cantrell represented appellant. Courtney Landsverk was the assistant solicitor. Tr. 1.

On July 29, 2016, the jury found appellant guilty. Tr. 368, ll. 3-9. Judge Russo sentenced appellant to twenty-five years imprisonment. Tr. 380, ll. 7-10.

This appeal follows.

ARGUMENT

The court erred by refusing to instruct the jury that appellant's prior criminal record could not be used as proof he committed the crime alleged in this case, that it could only be considered as to his credibility, particularly where the judge found the solicitor improperly argued appellant was capable of committing this offense because he had two prior burglary and two grand larceny convictions, and because he used illegal drugs while on probation, since appellant was entitled to this specific credibility instruction regarding his prior record.

Relevant Facts

The alleged victim (hereinafter "minor"), was eleven years old at the time of the trial. She was in the fifth grade. Appellant had lived with her, her mother Kristy, "and the boys and me." Tr. 86, ll. 4-24. The boys were her minor brothers "Blake and Brantley." Tr. 87, ll. 4-7.

The minor's allegation was during a camping trip a couple years prior to her "reporting it" that appellant came into her tent during the night time, and sexually molested her with his finger. There would be evidence offered that Blake and Brantley were both in the tent with her that night, but that Blake was "in and out" of the tent all night. Tr. 87, l. 4 – 88, l. 21. The minor claimed appellant told her not to "ever tell anybody." Tr. 89, ll. 11-12. As will be seen infra, Appellant would testify in his own defense, and offer witnesses who were camping with them on their annual camping trip in his defense. Tr. 89, ll. 11-12.

The minor admitted she did not like living in the home with appellant because "the house was very trashy. The house was hardly ever cleaned . . . and sometimes Jake [appellant] and Kristy [her mother] would get in fights and I'll grab the boys and lock myself in my room in this house." The minor said she did not trust her mother because "she went places and took medicine from people and stuff." Tr. 90, l. 20 – 91, l. 7.

The minor also maintained that when she told her mother what allegedly happened during the camping trip, she "shrugged her shoulders and said 'don't worry about it.'" The minor further claimed that her mother tried to get her to "change my story." Tr. 92, ll. 10-24.

The minor went to live with her aunt, Dawn Young after DSS became involved, and she had been in foster care. Young worked for Pickens County EMS. Tr. 105, l. 19 – 107, l. 2.

Young maintained that the minor was wary of men and "she would cling more to women for a long time." Young said that the minor "trusted her," and therefore the minor told her about the alleged camping trip incident. Young acknowledged that the minor had panic attacks and other problems as a child. She was apparently abused by her mother, and possibly one of her brothers. Tr. 107, l. 1 – 111, l. 25.

Jennifer Stehl was a DSS employee. She testified that the minor and her brothers were removed from the home on August 7, 2014, "and then they re-entered foster care again after they had gone to live with a relative. And they re-entered care December 17 of 2014." Tr. 119, ll. 6-22.

Stehl recalled: "The foster parents reported that [Minor] had been looking up porn when she was at foster care. She was caught looking up porn on an iPad that had been given by the school. And there had additionally been a concern that she had been humping another foster child in the home at that foster home." Tr. 120, ll. 7-14.

Pickens County investigator J.B. Kelley testified that appellant acknowledged being on the family camping trip with the minor, and many others. Appellant told Kelly that Kristy, the minor's mother, unfortunately did not want to go on this camping trip because she was pregnant. She was not feeling well. Appellant denied any wrongdoing on the camping trip, and he

maintained, as did other defense witnesses infra, that the children were all having fun, and the minor seemed happy. Tr. 132, l. 10 – 141, l. 20.

Pickens County Sherriff's Deputy Adam McJunkin testified the police obtained an arrest warrant for appellant based on the accusation. McJunkin located appellant at a friend's house. McJunkin said he found appellant hiding under a bed inside the house. Tr. 146, l. 19 – 147, l. 21.

Appellant later explained that he thought the police came to the house to arrest him for a probation violation because "I failed a drug test for my probation like a couple weeks before, and I felt like that's what they were looking for me for. I was just scared." Appellant admitted that hiding from the police was not a good idea for any reason. Tr. 229, l. 17 – 232, l. 1.

The minor was given a forensic interview, which was shown to the jury, and is now before this Court to review.

Appellant testifies

Appellant took the stand in his own defense. Appellant quickly admitted he had been convicted, after pleas of guilty, of two counts of burglary and two counts of grand larceny. Tr. 230, ll. 13-23.

Appellant testified regarding the events at the Mile Creek campsite in May or June of 2012. Tr. 234, ll. 6-21. Appellant explained that the camping trip was a yearly event for the family, and friends. It served as an annual birthday event for one of the children. Appellant recalled the minor going to bed in a tent with her brothers, Blake and Brantley. Appellant acknowledged that Blake was in and out of the tent that evening. However, appellant said that the minor was never alone in the tent by herself, and appellant never entered her small tent. Tr. 245, ll. 2-11.

As far as other problems in the family home, appellant said when he got out of jail for his prior convictions, he found out Kristy was getting evicted for not paying the rent. DSS was involved in the household, and appellant had to report immediately – and deal with probation -- upon his release. Kristy assaulted Blake by hitting him in the face, and DSS took the children into custody. Tr. 254, ll. 8-24. However, appellant said that the minor, as well as the other children, were happy during the camping trip away from home, and that nothing of a sexual nature occurred. Tr. 255, l. 16 – 257, l. 12.

On cross-examination, the solicitor again had appellant admit he had pled guilty to two counts of burglary, and two counts of grand larceny. Tr. 264, ll. 9-17.

Defense witnesses

Pam Aiken identified appellant as a cousin of her daughter's ex-husband. Tr. 268, ll. 3-17. Pam was on the camping trip, and she testified that appellant never went in a tent with any of the children. Pam also said that the minor and other children were having fun, and that the minor did not exhibit any sign of trauma. Tr. 273, l. 1 – 278, l. 22.

Robert Galloway was also on the camping trip. Robert said appellant had a hammock to sleep in during the camping trip, and that there was no reason for him to go in any tent. Tr. 295, ll. 5-7. Robert candidly admitted that the minor was in the tent by herself when he went to sleep one night. However, he also stated appellant had a hammock to sleep on. Tr. 299, ll. 9-11.

Stephen and Brayden Cain gave similar testimony in appellant's defense. Tr. 279-288; tr. 306-312.

Closing Argument

The solicitor argued that the minor had been consistent in telling "the same story to every person she talked to." Tr. 348, ll. 2-5. The solicitor told the jury that appellant had been convicted of two burglaries and two grand larcenies. He had shown "a willingness" to break into the property of another, and steal over two thousand dollars, which was the definition of grand larceny. Appellant, she reminded the jury, also admitted using illegal drugs because he failed a drug test while on probation. Tr. 348, l. 24 – 349, l. 9.

Charge on the Law

The judge did **not** instruct the jury that the defendant's prior criminal record could only be considered as to his credibility, and that it could not be considered against appellant when determining whether he was guilty of the crime in this case. Tr. 353, l. 1 – 362, l. 19.

Exceptions and Objections

After the judge charged the jury, he asked for objections or exceptions to his instructions. Defense counsel Cantrell asked the judge to instruct the jury that appellant's prior record could not be considered "as proof of this crime or this offense." Defense counsel noted the solicitor had talked about appellant's prior record as being proof of this crime. Consideration of appellant's prior record was legitimate, but "only for the issue of credibility, not for – and it cannot be used as proof of this crime." Counsel requested for that jury instruction. Tr. 363, ll. 1-18.

The judge told defense counsel that he agreed that the solicitor's argument was improper in this respect. However, the judge reasoned because appellant did not make a contemporaneous objection to what the judge also considered an improper closing argument, " *I don't think I can give a curative instruction, and it's only because of the timeliness of the objection, not to the*

validity of it, so I'm going to respectfully deny your motion." Defense counsel also reminded the judge, in addition to the prior convictions argument, that the solicitor talked about appellant using illegal drugs as well. The judge said his ruling remained the same despite the additional illegal drugs aspect to the solicitor's closing argument. Tr. 363, l. 1 – 364, l. 19.

Discussion

Rule 609(a)(1) and (2), SCRE, provides "for the purpose of *attacking the credibility of a witness*" . . . evidence that an accused has been convicted of such a crime (punishable by death or imprisonment in excess of one year) shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. Rule 609(a)(2), SCRE, provides that credibility can be attacked with "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment."

It is elementary that a criminal conviction is only admissible as impeachment on the credibility of the defendant or a witness. A prior criminal conviction is not admissible or probative on the issue of whether the defendant was capable of committing the present offense. A prior criminal conviction is not admissible to show propensity or behavior in conformance with that propensity. See, State v. Howard, 396 S.C. 173, 179-80, 720 S.E.2d 511, 514 (2011).

In Howard, the Court stated "a reading of the record indicates Howard's prior convictions were admitted to show he was capable of committing the charged offense." State v. Howard 396 S.C. 173, 181, 720 S.E. 2d 511, 515 (2011).

The judge in this case found that the solicitor was similarly using appellant's convictions for the same erroneous reasons articulated above – to show appellant was capable of committing the crime in this case. The judge agreed that the solicitor was urging the jury to use appellant's

prior record to conclude he was the type of person who essentially could take advantage of a minor such as the alleged victim in this case. That was improper.

The solicitor's argument was *dangerous in its impropriety* because it had powerful impermissible spurious tendency to have the jury conclude that appellant was a bad person who was capable of committing a crime such as the one charged in this case. Certainly, a normal person or juror would conclude that someone with a serious prior criminal record was more apt to commit another serious crime than a person without a prior criminal record. That is why we have rules in the trial court on how certain kinds of evidence can be considered.

Again, the judge did not give the standard jury charge that a prior criminal record could only be considered for impeachment purposes as to credibility. That jury instruction became particularly important here, since defense counsel correctly pointed out the solicitor's highly questionable argument regarding appellant's prior criminal record.

The judge erred by apparently reasoning that since defense counsel did not object to what he – the judge and defense counsel -- considered an improper closing argument by the solicitor, that he waived his right to a normal, proper, and standard jury instruction that a defendant's prior record could only being considered for purposes of weighing his credibility. The judge had the discretion to give this credibility instruction based on the prior record of the defendant regardless of whether the solicitor's argument was improper, proper, or whether the solicitor made no comment on the defendant's prior record at all. Cf. Tr. 223, l. 11- 224, l. 6.

The judge erred by ruling he did not have the discretion to give this proper jury instruction, and indeed he had the duty to give this instruction, since it was a proper instruction on the law, and it was requested. See State v. Alexander, 309 S.C. 495, 499, 424 S.E.2d 526,

529 (1992) (The refusal to exercise discretionary authority because the judge erroneously believes he or she does not have such discretion is an abuse of discretion warranting reversal).

"The general rule is that when a conviction of a crime is introduced to impeach the credibility of a witness, the party who offered the witness is entitled to an instruction that the crime is admissible only for impeachment. State v. Brown, 296 S.C. 191, 371 S.E.2d 523 (1988) (failure to charge jury that evidence of defendant's prior convictions could only be used for impeachment constituted reversible error); State v. Smalls, 260 S.C. 44, 194 S.E.2d 188 (1973)(where a defendant testified on direct examination as to prior convictions in anticipation of cross-examination as to such offenses, the court should have given requested instruction that such testimony could be considered only on issue of credibility and not on issue of guilt, and failure to give this instruction was prejudicial error). See, Collins, South Carolina Evidence, § 5.11 at p. 151 (2d Edition, 2000).

"[W]here the evidence of other crimes is admissible only to impeach an accused when he testifies, the court, particularly on request, should instruct the jury that such evidence shall be considered by the jury only on the question of the credibility of the accused, and not to show his guilt. 23 C.J.S. Criminal Law § 1032(2)." State v. Smalls, 260 S.C. 44, 47, 194 S.E.2d 188, 189 (1973).

Further, the error in this case was not harmless. Appellant testified in his own defense, he certainly was not incredible in his testimony, or in what he told the police. Appellant also offered witnesses Pam Aiken, Stephen Cain, Robert Galloway, and Brayden Cain as witnesses to show the strong unlikelihood that appellant committed this crime at the campsite. Tr. 274 – 311.

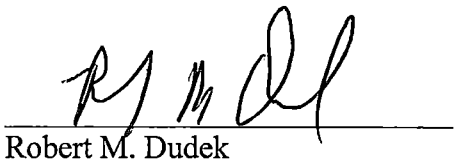
Further, and respectfully, the minor in this case was a very troubled young girl. She came from a background of abuse, and she had become "sexual" at a very young age, including

viewing pornography and "humping" other foster children. She lived around violence, had panic attacks, and other abnormalities. While the state will undoubtedly attempt to point the finger at appellant for all of these dysfunctions, the issue of guilt or innocence is far from certain.

Finally, while prior convictions under Rule 609, SCRE, obviously cannot be used to prove the defendant probably committed the present offense, or was capable of committing such an offense, such "bad acts" evidence is admissible under Rule 404(b) to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. See State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). There was no State v. Lyle evidence of prior sexual misconduct in this case, but the solicitor nonetheless urged that appellant's prior convictions showed he was capable of committing this sexual offense against a child. Under the highly unusual facts of this case, appellant is entitled to a new trial.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of June, 2017.

STATE OF SOUTH CAROLINA

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial 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 Initial Brief of Appellant and Designation of Matter have been served on Jacob Michael Hendricks, #369154, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 14th day of June, 2017.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of June, 2017.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.