STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LARRY HEYWARD,

APPELLANT

APPELLATE CASE NO. 2016-002033

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexual abuse case, whether the trial court erred in refusing to allow appellant to cross-examine the complainant about a civil lawsuit he filed regarding his allegations where the civil case demonstrated a financial motive which related to his bias and credibility?

STATEMENT OF THE CASE

On June 18, 2015, appellant was indicted by a Hampton County grand jury for lewd act, second-degree criminal sexual conduct with a minor, and third-degree criminal sexual conduct with a minor. R. 579 – 582. On August 18, 2016, appellant was indicted for misconduct in office. R. 583 – 584. On September 19, 2016, appellant was tried before the Honorable Thomas W. Cooper and a jury. R. 1. The Honorable Jean H. Toal also presided. R. 1. Sean P. Thornton and Brian Hollen represented the State. R. 2. Scott W. Lee and Christopher W. Lempesis represented appellant. R. 2. The jury acquitted appellant of second-degree CSC. R. 536, l. 4 – 537, l. 14. The jury convicted appellant of lewd act, third-degree CSC, and misconduct in office. R. 536, l. 4 – 537, l. 14. Judge Cooper sentenced appellant to concurrent terms of fifteen, ten, and ten years' imprisonment, respectively. R. 563, ll. 12 – 21. This appeal follows.

ARGUMENT

In this sexual abuse case, the trial court erred in refusing to allow appellant to cross-examine the complainant about a civil lawsuit he filed regarding his allegations where the civil case demonstrated a financial motive which related to his bias and credibility.

Appellant was a school resource officer at a middle school in Hampton County. R. 158, ll. 6 – 10. Complainant was a student at the middle school. R. 215, ll. 7 – 24. Complainant had a long disciplinary history at the school. R. 392, l. 20 – 395, l. 14. He was disciplined for putting hot sauce on his penis. R. 394, ll. 15 – 23. He was also disciplined for spreading rumors about teachers. R. 394, ll. 4 – 6.

On January 4, 2016, Complainant got into trouble in one of his classes and was sent to the principal's office. R. 163, l. 19 – 164, l. 11. Complainant refused to speak with the principal. R. 164, ll. 9 – 11. The principal asked him to write his problem on a piece of paper, and Complainant complied. R. 164, l. 12 – 165, l. 5. The note claimed appellant was molesting Complainant. R. 165, ll. 10 – 16. R. 263, ll. 5 – 10.

Complainant anticipated that the principal would not believe him. R. 166, ll. 5 – 11. He told the principal, "If you don't believe me, I have proof." R. 166, ll. 5 – 11. Complainant played a recording from his iPod that allegedly contained a sexually explicit conversation between him and appellant. R. 166, l. 12 – 167, l. 7. (State's Ex. 1).

This approximately two-minute recording of a telephone call begins midway through the conversation. (State's Ex. 1). While the recording does contain sexually explicit conversation, it is difficult to understand the context of the conversation without hearing the earlier part of the call. (State's Ex. 1). The recording was published to the jury with an overlay of a transcript prepared by a SLED employee. R. 232, ll. 4 – 7. Complainant testified he made the recording

on December 28, 2012. R. 227, l. 23 – 228, l. 8. However, the State's computer expert admitted on cross-examination that it was possible to alter the time an iPod displays something was recorded. R. 285, ll. 12 – 21.

Complainant testified that the very first time he met appellant, appellant sexually assaulted him in appellant's office at the school. R. 216, l. 23 – 218, l. 13. Supposedly within minutes of entering appellant's office at the school, appellant began rubbing Complainant's penis. R. 216, l. 23 – 218, l. 13. Appellant claimed they had oral sex on the floor of his office. R. 216, l. 23 – 218, l. 13. Appellant's office was "just around the corner from the assistant principal's office" and "directly across from . . . the cafeteria." R. 160, ll. 6 – 14. The school's social worker agreed the area where appellant's office was located had "a lot of coming and going." R. 160, ll. 15 – 18.

Complainant alleged he had sex with appellant "hundreds of times" at various location. R. 251, ll. 4 – 14. He claimed they had oral and anal sex at appellant's office at the school, at his office in a new school (which was in the library), at appellant's house, and at appellant's deceased father's house. R. 251, ll. 4 – 14. Complainant admitted he wanted to move away from the small town in Hampton County and was able to move to Jacksonville, Florida after making these allegations against appellant. R. 246, l. 4 – 247, l. 19.

Complainant's mother was the State's first witness. R. 141, ll. 22 – 24. During cross-examination, appellant asked her to identify a "gentleman with the purple tie" sitting in the courtroom. R. 154, ll. 19 – 23. Complainant's mother identified him as "Attorney Mario Pacella." R. 154, ll. 19 – 23. The State objected and the court sustained the objection. R. 154, l. 25 – 155, l. 4. Appellant asked to be heard and Judge Cooper stated he would take it up out of the presence of the jury at the next break. R. 155, ll. 8 – 17.

When the court took up appellant's argument, appellant explained that Mario Pacella was "the civil lawyer" for Complainant's family. R. 184, l. 7 – 185, l. 11. Complainant's family filed suit "pretty quickly" after Complainant made the allegations against appellant. R. 184, l. 7 – 185, l. 11. Appellant argued that the civil suit was relevant and related to motive, bias, and credibility. R. 184, l. 24 – 193, l. 8. Trial counsel argued that introduction of the lawsuit was his "best and primary defense." R. 192, ll. 9 – 14. Judge Cooper indicated he would do further research. R. 192, ll. 21 – 25.

During Complainant's testimony, appellant asked for a ruling from the court before beginning cross-examination. R. 242, ll. 5 – 7. Judge Cooper ruled that the civil suit "has no bearing, really, on this particular case." R. 242, l. 11 – 243, l. 5. The court stated that the existence of the civil suit had "very limited" relevance to Complainant's credibility. R. 242, l. 11 – 243, l. 5. Appellant proffered the civil complaint. R. 275, l. 7 – 277, l. 11. R. 567 – 576.

The complaint alleged that appellant "at all times . . . acted under color of state law, in the course and scope of [his] employment." R. 567. Complainant alleged four causes of action under 42 U.S.C. § 1983. He asked for actual damages, punitive damages, and attorneys' fees. R. 576.

The trial judge erred in sustaining the State's objection and refusing to allow cross-examination regarding Complainant's financial motive for making the allegations against appellant. Witnesses can always be cross-examined for bias. U.S. Const. amend. VI; Davis v. Alaska, 415 U.S. 308 (1991). "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." SCRE 608(c). "Rule 608(c) . . . permits a party to impeach a witness by establishing bias or prejudice wither through examination or otherwise." State v. Starnes, 340 S.C. 312, 325, 531

S.E.2d 907, 914-15 (2000). "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." Id.

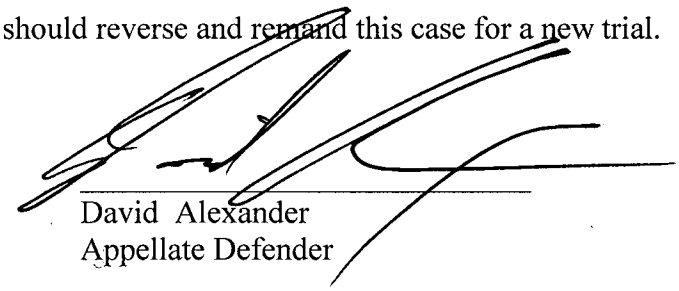
"Considerable latitude is allowed in the cross-examination of an adverse witness for bias." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). In Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001), the trial court erred in prohibiting cross-examination of a doctor for financial bias. The lawsuit stemmed from a car wreck and the only issue was the extent of the plaintiff's injuries. Id. at 363, 548 S.E.2d at 585. The defense intended to call a doctor who had a significant business and consulting relationship with the defendant's insurer, Nationwide. Id. The plaintiff wanted to cross-examine the doctor on the extent of his financial dealings with Nationwide. Id. at 364, 548 S.E.2d at 585. The Supreme Court reversed because the trial judge refused to permit cross-examination for the doctor's financial bias. Id. at 365-66, 548 S.E.2d at 585-86.

"Testimony that the witness is contemplating a lawsuit may indicate the witness is biased, and may be relevant and admissible." State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 612 (1983). In McFarlane, the defendant was charged with lewd act. Id. The trial judge refused to allow the defendant to cross-examine the victim's mother about a contemplated lawsuit. Id. While the defense in McFarlane failed to make an adequate proffer, the Court clearly believed that it was error to bar the cross-examination because it conducted a harmless error analysis. Id.

Here, not only was litigation contemplated, it had already been initiated. Unlike McFarlane, appellant made a correct proffer by entering the civil complaint into the record. McFarlane shows that the trial judge erred in refusing to allow appellant to cross-examine Complainant on his financial motive to bring these allegations. In this close case where the jury acquitted appellant of the most serious charge, the error cannot be harmless and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Larry Heyward states:

1. He is 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 Thomas W. Cooper, which was held on September 19 - 21, 2016, 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 Larry Heyward.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 7th day of July, 2017.

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SC Court of Appeals

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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) Trial Transcript;
(3) Court's Exhibits No. 2, 4, 7, and 8;
(4) State's Exhibit 1 (to be transported)

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

July 7, 2017

David Alexander
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."

July 7, 2017.

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