STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STANLEY MILLER,

APPELLANT

APPELLATE CASE NO. 2016-001086

FINAL BRIEF OF APPELLANT

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2.

Whether the court erred by admitting evidence of the prior alleged Hunter's Ridge lewd acts under State v. Lyle since the "similarities" between the prior alleged bad acts, and the allegations in this case, did not establish a common scheme or a plan?

STATEMENT OF THE CASE

Appellant was originally charged with criminal sexual conduct with a minor in the third degree. R. 28, ll. 4-5. However, the solicitor later obtained an indictment against appellant for criminal sexual conduct in the first degree -- alleging penetration occurred. Sup. R. 1-2. As will be seen infra, defense counsel noted there was no allegation of penetration on the forensic interview, and that the penetration allegation only occurred after a "closed door meeting" with the solicitor. It was undisputed that the child alleged appellant molested her after she was caught simulating sex with a boy, and she told the forensic interviewer that her mother would "whip her" with a belt when she did something wrong. See Forensic interview on file with this Court.

Appellant's case was called to trial on May 16, 2016 before the Honorable Carmen T. Mullen, and a jury. Charles Cochran and Megan Enrlich represented appellant. Shannon Elliott and Deborah Herring-Lash were the assistant solicitors.

Judge Mullen directed a verdict on the charge of criminal sexual conduct in the first degree. On May 18, 2016 the jury found appellant guilty of criminal sexual conduct in the third degree. R. 229, ll. 6-9. Judge Mullen sentenced appellant to fifteen years imprisonment. R. 230, ll. 7-11.

This appeal follows.

ARGUMENT

1.

The court erred by admitting the forensic interview since it was not sufficiently reliable or trustworthy given the child's inconsistent statements, and given the leading or suggestive questions by the forensic interviewer, since the forensic interview should not have been admitted pursuant to S.C. Code § 17-23-175 (B) given these problems

Relevant Facts

The defense objected to the forensic interview being admitted into evidence. R. 27, ll. 13-17. Defense counsel Cochran argued that the alleged victim had given a prior inconsistent statement on the accusation "of pain" – penetration --where the solicitor used the belated "closed door" allegation of penetration to obtain an indictment for criminal sexual conduct in the first degree. R. 27, l. 18 – 29, l. 5.

During the pre-trial hearing, the minor testified that she did not remember telling the forensic interviewer that the alleged lewd act did **not** hurt. R. 13, ll. 11-17. She **did** remember telling the forensic interviewer "it felt more like a tickle or a rub," and that there was no penetration. R. 13, ll. 15-23. During her testimony before the jury the minor stated that "it hurt" when describing the alleged anal sex rather than a lewd masturbating act. R. 58, ll. 1-22.

On cross-examination of the minor before the jury she admitted she told the forensic interviewer that there was no pain involved during the lewd act, and that there was no penetration. R. 65, ll. 8-11.

In his argument against admission against the forensic interviewer defense counsel also noted that the alleged victim "denied pain or penetration to both *the responding officer* and to the *LCC interviewer.*" R. 27, l. 18 – 28, l. 7. Defense counsel also told the judge that when the minor got

behind "behind closed doors with the solicitors" for the first time she alleged that there was penetration – anal sex. R. 28, ll. 8-22.

Counsel noted that the state was now arguing that that part of the forensic interview "is unreliable while also speaking out of the other side of their mouth and saying it is reliable enough to come in as evidence. So what we would say in our agreement would be is they can either go forward with the video just on the CSC third degree (no penetration) or go forward on both accusations with no video. To do otherwise I don't think makes sense." R. 28, l. 15 – 29, l. 5.

The solicitor responded that the judge had to decide for herself if the forensic interview was suggestive. The judge stated that she found the forensic interview not suggestive, and she said she thought it was coherent. The solicitor argued that the defense could impeach the alleged victim with her prior inconsistent statements. That -- according to the solicitor -- was the remedy for the alleged victim's prior inconsistent statements. R. 29, l. 10 – 31, l. 25.

Defense counsel countered that in addition to the inconsistent statements in the forensic interview it was also marred by leading or suggestive questions from the forensic interviewer. In one significant respect -- involving the matter of "spit" or semen. Counsel argued the forensic interviewer suggested a "more sensible explanation" to the minor's allegations, and that the forensic interviewer was leading or suggestive in her questioning on these important matters. Defense counsel repeated his most strenuous objection that the state was going to argue the forensic interviewer was unreliable regarding the critical matter of "pain" which meant *penetration*. Yet the state maintained the forensic interview was reliable enough in other respects to be admissible. R. 32, l. 1 – 33, l. 20. The forensic interview is before this Court for viewing.

The judge said in her experience that she thought the remedy for inconsistent statements was "cross-examination," and that it was for the jury to determine issues of credibility. R. 33, l. 6 – 34, l. 23.

Discussion

S.C. Code § 17-23-175 provides, inter alia, that an out-of-court statement of a child is admissible if the statement was given in response to questioning conducted during an investigative interview of the child, the child testifies at the proceeding, is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and the court finds, "in a hearing conducted outside of the presence of the jury, and that the totality of the circumstances surrounding the making of the statement **provides particularized guarantees of trustworthiness**.

S.C. Code § 17-23-175 (B) provides "in determining whether a statement possesses *particularized guarantees of trustworthiness*, the court may consider, *but is not limited to,* the following factors: (1) whether the statement was elicited by *leading questions*. . ."

Defense counsel here correctly argued that the forensic interview should not have been admitted because it was not reliable or trustworthy. Counsel also accurately argued that the child's statements in the forensic interview were elicited by suggestive or leading questions.

First, the forensic interview was not reliable or trustworthy because it contained inconsistent statements, particularly on the key issue of penetration. The child did not allege penetration. In fact, the child referred to "tickles," and the forensic interviewer thereafter asked leading questions or suggestive questions about this subject. See, Forensic Interview at, 18:28 and 19:32.

Defense counsel also argued the forensic interviewer was asking suggestive or leading questions on the issue of "spit" which was the internal forensic interviewer term for semen. See, Forensic Interview at 19:34. Also, the forensic interviewer asked leading questions as to the issue of

"threats" allegedly made by appellant. See, Forensic Interview regarding the "punishment" of "reading" if the alleged victim spoke about the alleged molestation. Forensic Interview at 19:35.

A forensic interview under the statute allows a minor's prior consistent statement to be admitted as a prior *consistent statement* outside the rules of evidence by statute. See, Rule 101, SCRE; State v. Whitner, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012). "Generally, a prior consistent statement is not admissible unless the witness is charged with fabrication or improper motive or bias." State v. Whitner, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012) (citing Rule 801(d)(1), SCRE). "However, in CSC cases involving minors, the Legislature has made specific allowances for such hearsay consistent statements of child victims under the proper circumstances." Id. (citing S.C. Code Ann. § 17-23-175 (Supp.2010)). Inconsistent statements are anathema to reliability, trustworthiness, and admissibility.

It is noteworthy that in State v. Whitner, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012) the Court stated that "the forensic interviewer did not improperly *lead or influence the victim in anyway*, and the victim answered the questions on her own accord. (emphasis added).

The solicitor and the judge *both erroneously reasoned* that the minor's inconsistent statements *were irrelevant* to the analysis of the admission of the forensic interview because defense counsel could impeach the minor with her prior inconsistent statements. Inconsistent statements go the heart of the analysis as defense counsel argued -- this was his most strenuous objection -- and the state should not have been allowed to argue *that part* of the forensic interview was reliable and trustworthy, and the inconvenient parts of the forensic interview should be disregarded. The state wanted the jury to disregard parts of the forensic interview in favor of the minor's subsequent statements to the solicitor -- "behind closed doors" -- which resulted in her in testimony to the jury, particularly that the lewd acts "hurt her," meaning penetration allegedly occurred.

The prior inconsistent statements made the forensic interview not reliable or trustworthy and it should not have been admitted. In addition, the forensic interview should not have been admitted because the interviewer engaged in suggestive and leading questions during the interview. The judge erred by admitting the forensic interview as reliable or trustworthy given the inconsistent statements, and the suggestive or leading questions involved. Appellant should be granted a new trial.

2.

The court erred by admitting evidence of the prior alleged Hunter's Ridge lewd acts under *State v. Lyle* since the "similarities" between the prior alleged bad acts, and the allegations in this case, did not establish a common scheme or a plan

Relevant Facts

The judge held an in-camera hearing prior to trial on the State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923) issue. R. 2, ll. 2-16. The evidence would show that the minor, her mother and her two brothers lived at two prior locations before the allegations in this case allegedly occurred on Reed Street in Charleston County.

The minor testified that while at Hunter's Ridge she lived with her mother, appellant, and her two brothers. There were two bedrooms in the apartment, and she shared a room with her brother. R. 4, ll. 6-16.

The minor slept in a bunk bed. She was in the top bunk, and "my brother was at the bottom." R. 4, ll. 20-23. Because her mother worked at night appellant -- her mother's boyfriend -- and the father of her two brothers "watched her." The mother was never in the apartment when the alleged molestation occurred. R. 4, ll. 24-25.

The minor alleged that "Stanley would come and take me out of my bed and put me inside my mom's bed." R. 5, ll. 5-8. She further said that appellant would take her into her mother's room, lay her on the bed on her back, take off her clothes, and masturbate on her body from behind. R. 5, l. 5 – 6, l. 25.

The minor also alleged, in response to questioning from the solicitor, that "it hurt" when appellant did this to her, that he would wipe her off with "a cold rag," and tell her "not to tell no one." R. 7, ll. 1-25.

The minor also alleged that appellant molested her later on Reed Street in Charleston County. R. 8, ll. 3 – 10, l. 9. The minor alleged that the sexual acts on Reed Street occurred while her mother was home. She said her mother was inside "her room," and she knew "because I could hear her snoring."

The bedroom on Reed Street was different because the minor's bed was not a bunk bed, and "there was like a space between the two beds" where her brother slept. The minor acknowledged at Hunter's Rudge her mother was working during the night when the alleged abuse occurred, but on Reed Street she was in the next bedroom when the alleged abuse occurred. On Reed Street her brother was also in the side-by-side bed, and the minor did not remember if appellant even bothered to close the door separating her mother's bedroom before allegedly molesting her. R. 8, l. 3 – 12, l. 4.

The minor admitted that between living at Hunter's Ridge and Reed Street she lived at another house, and that no abuse occurred at that other house. Appellant was not living in the house at the time, and the record is silent on when he visited -- if at all. R. 12, l. 18 – 14, l. 25. Although the minor maintained she did not remember telling the forensic interviewer that the lewd acts did not hurt she did remember telling the forensic interviewer that no penetration was involved. R. 13, ll. 11-23.

Defense counsel argued that the Hunter's Ridge incidents were not admissible under State v. Lyle. Counsel also noted the evidence, since it did not result in a conviction, had to be "clear and convincing evidence."

Counsel argued that Lyle dealt with proving "identity." "So if you go back to the original case with Lyle he is writing bad checks in a very specific way that tends to point to the person who is committing these crimes. They are proving his identity." Counsel further argued that Lyle dealt with a signature crime. Counsel said it was improper for the state to offer evidence on prior bad acts to prove "he's done something like it before." Defense counsel argued that the state in effect wanted to

enormously prejudice appellant by using the "Dorchester County accusations . . . to try to prove his guilt in Charleston County because what they are doing in effect is bootstrapping the Dorchester contacts of the abuse with the much weaker case her in Charleston County." R. 18, l. 1 – 20, l. 18.

Counsel argued that the alleged incidents on Hunter's Ridge and Reed Street were not sufficiently similar. In Dorchester County "he was home alone with the kids all night long. The mother was working the night shift." R. 20, l. 19 – 21, l. 14. In Dorchester County appellant allegedly took the minor out of her bunk bed, and took her into a different (private) room.

Conversely, in Charleston County appellant allegedly went into the minor's room "with side-by-side beds with her brother who was also interviewed by LCC and the mother's sleeping with an infant who would awaken at any moment across the hallway in Charleston County." In the charges appellant was indicted for the child's mother was in a nearby bed, and the mother was in the bedroom next door. There was nothing private about the situation. R. 20, l. 9 – 22, l. 6. Defense counsel said the state was attempting to bolster its Charleston County case -- which had many problems -- with the stronger case from Dorchester County, and that this was improper under a common scheme or a plan analysis. R. 21, l. 15 – 22, l. 19.

The judge reasoned that the incidents in Dorchester and Charleston County were more similar than dissimilar that under State v. Wallace and State v. Lyle the evidence was admissible. R. 26, ll. 1-25.

Jury in

In the presence of the jury the minor testified that she was in the fifth grade at the time of trial, and she said while living at Hunter's Ridge. She called appellant "Daddy." R. 49, l. 1 – 50, l. 19. When the solicitor began to question the minor about Hunter's Ridge allegations defense counsel

objected, and he repeated his objection "to the entire line of questioning." The judge told appellant the issue was preserved, and that he "was protected" for the record. R. 51, l. 4 – 52, l. 5.

The minor then testified she shared a room with her brother at Hunter's Ridge and that his mother was working the night shift as a nurse in a nursing home. She repeated her in-camera accusations that appellant would take her out of the top bunk bed, carry her into her mother's room in her mother's absence, and molest her. She now said the molestation hurt, appellant would take a cold rag, wipe off "spit," and put her back inside her room. R. 52, l. 6 – 55, l. 12. She also said appellant told her not to tell anyone. The minor also acknowledged she did not tell her mother anything while they were living in Hunter's Ridge. R. 55, l. 6 – 56, l. 1.

The minor testified that when they moved to the next house nothing occurred of a sexual nature. R. 56, ll. 2-13. The family then moved to Reed Street in Charleston County. The minor said her mother was home in the next room during the alleged incidents on Reed Street. She slept in side-by-side beds with her brother beside her. She said appellant molested her while in the same room with her brother. R. 56, l. 2 – 58, l. 22. The minor also said she could not remember if appellant closed the door when he came back into her or her brother's room on Reed Street to molest her. R. 66, ll. 15-17. The minor said she knew her mother was in the next room because "I could hear her snoring." R. 59, ll. 9-19.

The minor acknowledged she revealed the alleged abuse for the first time when she was caught dirty dancing -- or simulating sex -- with another boy who went to her school. R. 59, l. 16 – 63, l. 22. The minor admitted her mother was very angry with her about the dirty dancing or simulating sex. She said during the forensic interview that her mother would beat her with a belt when she did something wrong. She denied she actually saw the simulating sex she was mimicking on a music video.

The minor claimed at trial that her mother "only beat her one time," and that it did not leave marks. Again, this contradicted the forensic interview where the minor said her mother would hit her with a belt on her hands, legs and other places. The child also admitted she had seen appellant and her mother fighting, including with a knife. Defense counsel stated it was apparent that the child wanted appellant out of her life. R. 67, l. 12 – 73, l. 5.

Discussion

Defense counsel correctly pointed out that State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), is best understood as an *identity* case. It involved a signature crime. This case illustrates how State v. Lyle has been stretched far beyond its initial holding.

In State v. Wallace, 384 S.C. 428, 683 S.E.2d 285 (2009) the Supreme Court noted that there must be a close degree of similarity between the prior bad act and the crime charged for the evidence of the prior crime to be admissible. "Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery."

As the defense in this case argued, the alleged abuse at Hunter's Ridge involved appellant allegedly going into the minor's bedroom where she was on the top bunk, where her mother was at work, and taking her into a separate private bedroom. From there, the molestation allegedly followed.

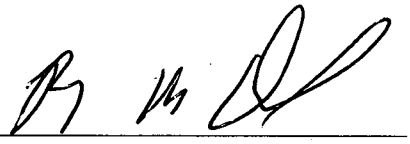
Conversely, on Reed Street, in Charleston County, the mother was present in the next room. The alleged molestation happened in *the same room with her brother in the side-by side bed, and with*

her mother her in the next room. The minor could not even remember if appellant closed the door before molesting her. These are major differences.

These are distinctive factual similarities, and defense counsel correctly argued the state was bolstering a very hard to believe factual scenario about appellant allegedly molesting the minor while her brother was in a nearby bed in the same room, and the minor's mother was in the next bedroom, in order to obtain a conviction. Respectfully, State v. Lyle cannot be stretched as precedent for what occurred in this case. Appellant should be granted a new trial.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2017.

CERTIFICATE OF COUNSEL

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

August 14, 2017

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