ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAURICE M. HARRIS

APPELLANT

APPELLATE CASE NO. 2016-000621

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In a child sexual abuse case where the defendant testified and categorically denied wrongdoing, where no physical evidence existed, and where the solicitor admitted in closing argument that "this case boils down to credibility," whether the trial judge erred in charging the jury that the testimony of a victim need not be corroborated in violation of State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016)?

STATEMENT OF THE CASE

In February 2016, a Charleston County grand jury indicted appellant for third-degree criminal sexual conduct with a minor and two counts of second-degree criminal sexual conduct with a minor. R. 384 – 389. On February 29, 2016, appellant was tried before the Honorable Diane S. Goodstein and a jury. R. 1. Shannon N. Elliott and Truc Thi T. Tran represented the State. R. 30. John Kozelski and Mary Ford represented appellant. R. 30. The jury convicted appellant. R. 371, ll. 5 – 20. Judge Goodstein sentenced appellant to concurrent terms of twenty years' imprisonment on the second-degree CSC charges and fifteen years' imprisonment on the third-degree CSC charge. R. 372, l. 21 – 373, l. 20. This appeal follows.

ARGUMENT

In this child sexual abuse case where the defendant testified and categorically denied wrongdoing, where no physical evidence existed, and where the solicitor admitted in closing argument that "this case boils down to credibility," the trial judge erred in charging the jury that the testimony of a victim need not be corroborated in violation of *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).

Introduction

The error in this case is clear under State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). The error is preserved. The State will likely argue that the error is harmless, but nothing about this case is amenable to harmless error analysis. No physical evidence of abuse existed. The complainant's story was difficult to believe. Another witness, complainant's sister, admitted she had no independent memory of abuse but only knew what her sister told her (with one notable exception—a memory recovered a week before trial). Appellant testified and vehemently denied abusing complainant. As the solicitor admitted in her closing argument, this case was a credibility contest. Therefore, the Stukes error cannot be harmless and this Court should reverse.

The Erroneous Charge, Appellant's Objection, and the Trial Court's Ruling

The Stukes error in this case is preserved. Before closing arguments, the trial court held an informal charge conference off the record. R. 319, ll. 10 – 16. When court resumed, appellant asked whether he should place his objection on the record. R. 319, ll. 24 – 25. Judge Goodstein told trial counsel not to place his objection on the record at that time because "if you put them on the record now then they—you put them on at the wrong time, and I don't want you to have a problem." R. 320, ll. 1 – 3. Trial counsel asked if the parties were going to deliver closing arguments and then proceed "directly into the charge." R. 320, ll. 4 – 6. Judge

Goodstein replied, "Yes. And then after I deliver the charge then you will do your objections, okay?" R. 320, ll. 7 – 8. Trial counsel replied, "That's perfect." R. 320, l. 9. Judge Goodstein added, "And I don't want you to not have it preserved." R. 320, ll. 13 – 14.

The court gave the prohibited Stukes charge. R. 358, ll. 8 – 12. The court charged the jury:

> Now, ladies and gentlemen, I further charge you **that the testimony of a victim need not be corroborated** in prosecutions under Section 16-3-652 through 16-3-658. And, ladies and gentlemen, **these three indictments lie within these sections.**

R. 358, ll. 8 – 12 (emphasis added). The court gave the Stukes charge immediately after its charge on the credibility of children, inconsistent statements, and the ability to accept or reject part of a witness's testimony. R. 356, l. 20 – 358, l. 7. The Stukes charge was immediately followed by a reading of the indictments. R. 358, l. 13 – 360, l. 2.

Judge Goodstein dismissed the jury after completing her charge and asked for "exceptions or additions." R. 367, l. 2 – 368, l. 3. Trial counsel placed his objection to the Stukes charge on the record pursuant to the court's earlier instruction: "Your Honor, our earlier objection to the charge would be the one on the victim corroboration, the statutory charge. We do think that is a comment on the facts." R. 368, ll. 4 – 7. The trial judge overruled the objection, finding that her charge was "a statement of the law" and noting appellant's "exception for the record."[1] R. 368, ll. 8 – 10.

Appellant's objection to the Stukes charge is preserved. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court." Id. "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact

[1] Appellant notes that the trial judge did not have the benefit of Stukes at the time of her ruling.

error." Id. It is clear that trial counsel informed the court of his objection at the informal charge conference and then complied with the trial judge's instructions in placing his objection on the record after the charge. The objection was specific. The trial judge had an opportunity to correct the charge, but overruled the objection.

The trial judge erred in giving the "no corroboration" charge. In Stukes, the Court ruled this charge "is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of the case." Stukes at 499, 787 S.E.2d at 483 citing S.C. Const. art. V, § 21. The Court reasoned that 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. The trial judge's charge in Stukes is not materially different from the charge given in this case. Id. at 497, 787 S.E.2d at 482 ("'The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence.'"). The error in this case is clear, which leaves the State to prove that it was harmless beyond a reasonable doubt, which it cannot do.

The Stukes *Error in this Case is Not Harmless*

Like Stukes, the error in this case is not harmless. The Stukes Court found that the error was not "amenable to a harmless error analysis." Id. at 500, 787 S.E.2d at 483. "Our review of the record indicates this case hinged on credibility." Id. The alleged victim and Stukes both testified and gave conflicting versions of events. Id. at 496-97, 787 S.E.2d at 481-82. These factors are present in this case and the error here cannot be "harmless beyond a reasonable doubt." Id. at 500, 787 S.E.2d at 483. See also State v. Anderson, 413 S.C. 212, 219-20, 776 S.E.2d 76, 79-80 (2015) (reversing a sexual abuse conviction because the "case turned solely on the credibility of the minor and of Appellant."); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d

91, 94-95 (2011) (reversing a sexual abuse case because "no physical evidence" was presented and the "children's credibility was the most critical determination of this case.").

The solicitor admitted this case was a credibility contest in her closing argument. The solicitor told the jury, "And **this case boils down to credibility** like so many other sexual assault cases, **do you believe that what [complainant] says happened happened.**" R. 336, ll. 22 – 25 (emphasis added). The solicitor then immediately emphasized the coming Stukes charge by telling the jury, "**You don't need any other further corroboration to—for a conviction.**" R. 336, l. 25 – 337, l. 1 (emphasis added). When explaining why the jury would not see complainant's forensic interview (the complainant was too old), the solicitor argued, "You have to rely on her testimony." R. 344, ll. 14 – 23.

No physical evidence of abuse existed. The police collected no evidence from the residence where the abuse allegedly occurred. R. 139, l. 25 – 142, l. 7. A physician's assistant conducted a physical examination of the complainant and found no evidence of abuse. R. 151, ll. 1 – 3. The State then called a "child-abuse pediatrician" to inform the jury that a normal physical examination did not necessarily mean that no abuse occurred. R. 161, l. 15 – 173, l. 24. The "child-abuse pediatrician" could not remember ever testifying that sexual abuse is not possible. R. 173, ll. 10 – 24.

The complainant's allegations were contradictory and somewhat implausible. Complainant's middle school guidance counselor knew her well. R. 18, l. 21 – 19, l. 7. In October 2013, complainant's little brother began misbehaving at school in a sexual manner. R. 15, ll. 10 – 20. The guidance counselor filed a DSS report. R. 14 l. 23 – 15, l. 20. DSS came to the school and interviewed complainant and her little brother. R. 15, ll. 21 – 23. The children did not disclose any sexual abuse. R. 16, ll. 2 – 5. During the guidance counselor's questioning,

complainant told her that appellant played pornographic movies for them. R. 19, ll. 18 – 25. Complainant told the guidance counselor that appellant forced her to watch the pornographic movies. R. 20, ll. 16 – 19. During the DSS questioning of the children, it turned out that the so-called pornographic movie was actually an Adam Sandler movie entitled *That's My Boy*. R. 21, l. 1 – 22, l. 2. Defendant's Ex. 1. Complainant denied that anyone had molested her. R. 23, ll. 1 – 14.

Complainant then told her mother that appellant sexually abused her while they watched *That's My Boy*. R. 119, l. 17 – 120, l. 9. Complainant told the forensic interviewer that all of her siblings (three of them), including her older brother Tre Brown ("Tre") were in the room. R. 189, l. 17 – 191, l. 8. Tre was "17 or 18" at the time. R. 105, ll. 13 – 14. Tre never saw "anything inappropriate" at appellant's house. R. 107, ll. 1 – 6. Tre remembered watching *That's My Boy*. R. 112, l. 20 – 113, l. 6. Appellant did not make the children watch the movie. R. 113, ll. 10 – 15. During the time the movie was on, Tre was "in and out talking on the phone with [his] girlfriend." R. 113, ll. 16 – 18. Tre remembered a scene in *That's My Boy* depicting oral sex.[2] R. 115, ll. 1 – 6.

By the time complainant testified, the only person in the room when appellant allegedly groped her after *That's My Boy* was her little sister. R. 41, l. 12 – 42, l. 20. Tre was outside and her little brother was in another room. R. 41, l. 12 – 42, l. 20. During the next episode of abuse, Tre and her little sister were in the room when appellant made complainant perform oral sex on him. R. 43, l. 11 – 45, l. 10. Complainant described several more instances of oral sex and digital penetration. R. 45, l. 19 – 50, l. 7. Complainant's little sister testified that she had also been abused, but admitted she never saw or felt appellant abuse her, but only relied on what

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[2] Complainant watched *Law and Order* almost on a daily basis according to her mother. R. 126, ll. 1 – 9.

complainant told her. R. 93, l. 5 – 102, l. 20. Complainant's little sister testified that she witnessed complainant perform oral sex on appellant, but admitted on cross-examination that the first time she told anyone about the oral sex was a week before trial when she told the solicitor. R. 103, l. 17 – 104, l. 5.

Trial counsel impeached complainant's testimony with inconsistencies in her forensic interview during his cross-examination of the forensic interviewer. R. 188, l. 24 – 194, l. 7. In her interview, complainant was asked what appellant's penis looked like and complainant said she could not see it because it was dark. R. 192, ll. 20 – 25. The interviewer asked how complainant knew it was appellant and she replied that she heard appellant talking to her little brother on the couch. R. 193, ll. 3 – 7. Complainant did not testify to this fact during her direct-examination. R. 40, l. 2 – 50, l. 7.

While Complainant testified that something came out of appellant's penis at trial, she admitted that she did not tell the forensic interviewer this fact when asked. R. 72, ll. 10 – 19. Complainant admitted that it was only recently that she remembered that something came out of appellant's penis and she told the solicitor. R. 72, ll. 10 – 12. Complainant alleged appellant told her she would "always be my Little Nasty." R. 42, ll. 21 – 23. As pointed out by trial counsel in closing, in *That's My Boy*, a teenage Adam Sandler impregnates his older teacher who tells him that he will "always be my Dirty Boy." R. 327, l. 15 – 328, l. 4.

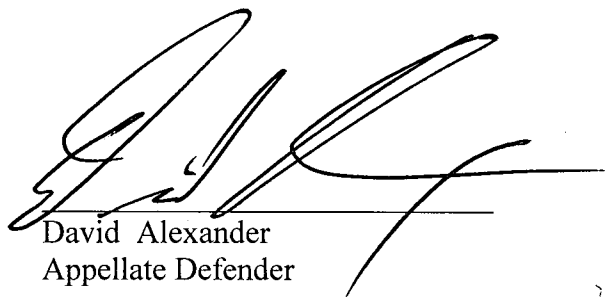
Appellant testified in his own defense and denied molesting complainant or anyone else. R. 293, l. 23 – 294, l. 5. Appellant regretted watching *That's My Boy* in front of the children. R. 305, ll. 16 – 22. Appellant testified that he did not know why complainant made up her allegations, but guessed that she did not like being at his house because the "lifestyle they were

living" when they were with her mother and her mother's boyfriend was "better than what I could offer them, so she didn't want to give that up." R. 309, ll. 4 – 19.

As shown by the above, complainant's story was contradicted by her forensic interview. Parts of her allegations mirrored the movie *That's My Boy*. Her allegations included appellant exposing himself and forcing her to perform oral sex on him in full view of her siblings and with the potential that her older brother, Tre, could walk in at any moment. Appellant testified and vehemently denied the abuse allegations. No physical evidence of abuse existed. The case was a credibility contest between complainant and appellant. The trial court's erroneous Stukes charge cannot be harmless in this case 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
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of June, 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."

June 15, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant 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, this 15th day of June, 2017.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of June, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023