STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ELIDORO CARILLO ONTIVEROS,

APPELLANT

APPELLATE CASE NO. 2017-000430

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by finding Appellant's statements to law enforcement were knowingly, intelligently, and voluntarily given where the law enforcement officer whose role it was to translate for the Spanish speaking Appellant also independently interrogated Appellant thereby failing to maintain impartial, and where the circumstances surrounding the interviews, including the use of a polygraph and Appellant's incarceration and lack of an attorney, led to a coercive environment?

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant on July 21, 2016 for two counts of first degree criminal sexual conduct (CSC) with a minor. R. 466-469. His case was called to trial on November 14, 2016 before the Honorable Carmen T. Mullen, and a jury. R. 1. Assistant Solicitors Julie Kate Keeney and Daniel Lynch represented the state, and Kate Cappelmann and Jessica Saxon represented Appellant. R. 2.

The jury ultimately found Appellant guilty as indicted. R. 442, l. 16 – 443, l. 4. He was sentenced to thirty years imprisonment. R. 452, ll. 13-22.

This appeal follows.

STATEMENT OF THE FACTS

In July 2015, Appellant's brother, Julio Cesar Ontiveros Carrillo, pled guilty to sexually abusing Older Sister and Younger Sister when they were approximately six and seven years old. He was sentenced to twenty years imprisonment. R. 232, ll. 16-18; R. 311, ll. 6-17. At trial, the state alleged Appellant also sexually assaulted Older Sister, now seventeen years old, and Younger Sister, now sixteen years old, during the same time period. R. 232, ll. 6-15.

In 2006, the children and their mother, Rosa Villalobos, lived with Appellant and his then girlfriend in Appellant's three bedroom house in Beaufort for approximately six months. R. 250, ll. 15-20; R. R. 251, l. 15 -252, l. 21. During this time period, Rosa began dating Appellant's brother, Julio Cesar, who also eventually moved into Appellant's home. R. 252, ll. 14-18; R. 260, l. 22 – 261, l. 7. Three months later, Rosa, her children, and Julio Cesar moved out of Appellant's house and into a mobile home. R. 253, ll. 4-19; R. 261, ll. 5-7.

At trial, Older Sister claimed that during the spring or summer of 2006 while the family was living with Appellant, Appellant would take her into his bedroom and "do inappropriate stuff." R. 267, l. 15 – 268, l. 10. She alleged Appellant would undress her, fondle her buttocks and vagina, and engage in oral sex with her. Specifically, she claimed Appellant "shoved his penis in [her] mouth" until "liquid [came] out." R. 268, l. 11 – 268, l. 1. According to Older Sister, this happened on multiple occasions. R. 269, ll. 6-12.

Older Sister made the *exact same* allegations against Appellant's brother, Julio Cesar. She claimed that after the family moved out of Appellant's house and into the mobile home with Julio Cesar, Julio Cesar would take her into his bedroom, undress her, fondle her buttocks and vagina, and engaged in oral sex with her. Specifically, she testified that Julio Cesar would put

his penis in her mouth and "as soon as he was done, liquid would be in [her] mouth." R. 270, l. 4 – 271, l. 16.

Younger Sister made similar allegations. She claimed that while the family was living with Appellant in 2006, Appellant would tell her to go to his bedroom where he would undress her, fondle her buttock and vagina, and ultimately put his mouth on her vagina. R. 282, l. 14 – 284, l. 21. Younger Sister testified that after the family moved out of Appellant's house and into the mobile home with Julio Cesar, Julio Cesar would likewise take her into his bedroom and put his penis in her mouth until he "peed." R. 284, l. 22 – 285, l. 25.

The allegations surfaced in January 2014 when Younger Sister disclosed to her therapist at Coastal Empire Community Health Center in Walterboro. Her therapist, who was a mandatory reporter, reported the allegations to law enforcement. R. 244, l. 21 – 247, l. 11. Appellant and his brother were both arrested on February 6, 2014 after Older Sister and Younger Sister attended a forensic interview at Hope Haven of the Lowcountry. R. 297, l. 8 – 298, l. 23; R. 303, ll. 2-15.

Appellant vehemently denied the allegations. He argued at trial that his brother, who had pled guilty to the charges over a year before, was the only person who sexually abused the children and that the children's memories were hazy due to the passage of time, which led to their confusion as to the perpetrator. R. 396, l. 8 – 397, l. 21.

The jury ultimately found Appellant guilty of first degree criminal sexual conduct with a minor as to each complainant. R. 442, l. 16 – 443, l. 4. He was sentenced to thirty years. R. 452, ll. 13-22.

ARGUMENT

The trial judge erred by finding Appellant's statements to law enforcement were knowingly, intelligently, and voluntarily given where the law enforcement officer whose role it was to translate for the Spanish speaking Appellant also independently interrogated Appellant thereby failing to maintain impartial, and where the circumstances surrounding the interviews, including the use of a polygraph and Appellant's incarceration and lack of an attorney, led to a coercive environment.

How the Issue was Presented Below

Appellant moved pretrial to suppress the statements he gave to law enforcement shortly after his arrest. The trial judge held an *in camera* hearing pursuant to Jackson v. Denno, 378 U.S. 368, 377 (1964) in response to Appellant's motion. Appellant was interviewed on February 6, 2014 immediately after his arrest. R. 127, l. 24 – 128, l. 6. Present during this first interview, in addition to Appellant, was Sergeant Angie Boland Crumpton, Investigator John Kelleher, and Lieutenant Robert Arbelo. Lieutenant Arbelo, who is fluent in Spanish, interpreted for Appellant, who only speaks Spanish. R. 120, l. 6 – 121, l. 10.

Arbelo testified *in camera* that he presented Appellant with an advisement of rights form written in Spanish and read Appellant his rights from this form. According to Arbelo, Appellant indicated he understood his rights and agreed to waive those rights. R. 121, l. 15 – 122, l. 19. Arbelo also claimed that neither he nor any of the officers present during the interview threatened Appellant or made him any promises in order to induce him to make a statement. R. 123, ll. 5-14; See R. 128, l. 21 – 129, l. 3.

During this first interview, which was audio and video recorded, Appellant denied sexually assaulting Older Sister or Younger Sister. R. 125, ll. 16-18; R. 128, ll. 11-13. At the

end of the interview, the officers asked Appellant whether he was willing to take a polygraph examination. Appellant supposedly agreed. R. 129, l. 21 – 130, l. 9.

Five days later, on February 11, 2014, Sergeant Boland and Corporal Angel Machado, who is fluent in Spanish, picked Appellant up from the detention center where he was incarcerated and transported him to sheriff's office for the polygraph. R. 130, ll. 7-23; R. 148, ll. 19-23. Lieutenant Brian Baird conducted the polygraph, which was audio and video recorded. R. 148, l. 24 – 149, l. 4. Corporal Machado testified *in camera* that before the polygraph he read Appellant his rights from an advisement of rights form that was written in Spanish and that Appellant agreed to waive his rights. R. 150, ll. 1-23. Machado further claimed that neither he nor Lieutenant Baird threatened Appellant or made him any promises in exchange for his cooperation. R. 153, ll. 3-10.

After the polygraph, Lieutenant Baird told Appellant that some of his answers were indicative of deception. R. 152, l. 24 – 153, l. 2. Corporal Machado, with the assistance of Baird, then interrogated Appellant. Appellant supposedly admitted during this interview that on one occasion Younger Sister entered his bathroom after he had gotten out of the shower, reached her hand under the towel that was wrapped around his waist, and grabbed his penis. However, Appellant immediately stopped her and removed her from his bathroom. R. 154, l. 5 – 155, l. 9.

After Appellant made this statement, he was immediately transported to the northern investigation office where the interrogation continued. Present during this third interview was Sergeant Boland, Investigator John Kelleher, and Corporal Machado, again whose role it was to translate for Appellant. R. 155, ll. 12-22; See R. 156, ll. 16-19. Machado testified *in camera* that at the beginning of this third interview he read Appellant his rights from an advisement of rights form that was written in Spanish, and that Appellant acknowledged his rights and agreed to

waive them. R. 156, ll. 1-15. Machado claimed that neither he nor any of the officers present threatened Appellant or made him any promises in exchange for his statement. R. 156, l. 25 – 157, l. 8.

During this third interview, Appellant allegedly said that on another occasion Younger Sister entered his room late at night while Appellant was lying in bed watching television, reached through the seam on his boxers, grabbed his penis, and put it in her mouth. However, Appellant immediately stopped her. R. 158, ll. 10-23.

The third interview was also audio and video recorded. However, due to a mistake by Sergeant Boland, the recording was erased and therefore not available. R. 132, ll. 1-25.

The defense called Beverly Neiderhiser to testify *in camera*. Neiderhiser, who is fluent in Spanish, had previously watched the recordings of Appellant's first and second interviews. She explained that during the second interview, which took place immediately after the polygraph with Lieutenant Baird and Corporal Machado present, Machado, whose role it was to translate or interpret for Appellant, repeatedly engaged in his own interrogation of Appellant without translating what he and Appellant were saying for the benefit of Baird. Specifically, Neiderhiser testified, "[T]hey're [Appellant and Machado are] having a conversation in Spanish . . . And it's not being interpreted into English. That was one of the big things that I did notice when I listened to it." R. 90, l. 4 – 93, l. 12; See R. 97, ll. 11-17. There were times during the interview when Appellant repeatedly denied guilt, but his denials were not translated into English. R. 96, ll. 8-11.

The defense also called Freddie Ayala, who was sworn to interpret for Appellant during trial, to testify *in camera*. Ayala testified that he listened to the recording of Appellant's second interview with law enforcement while it was being played in the courtroom and heard Corporal

Machado tell Appellant "cual fue la oracion que ter escuchaste, which translates to English literally as "it doesn't have to do anything with anything." R. 203, ll. 4-14. Ayala asserted that in some dialects of Spanish this phrase means "don't worry about it, buddy; it's going to be okay." R. 203, l. 19 – 204, l. 3. He further maintained that this expression in Mexico "automatically puts a person at ease" and informs the person "that there will be no accountability." Essentially, the phrase means Appellant could say anything without repercussion. R. 204, ll. 3-11.

At the conclusion of the testimony, defense counsel argued that Appellant's statements to law enforcement were not freely and voluntarily given due to the coercive environment. In support of this argument, counsel emphasized Appellant's incarceration, his lack of an attorney, the multiple interviews, the polygraph, the fact that Appellant was always outnumbered by law enforcement, and the statement made by Corporal Machado that Appellant could say anything without repercussion. R. 214, l. 9 – 216, l. 20.

The trial judge ultimately found under the totality of the circumstances that Appellant's statements were freely and voluntarily given based upon a preponderance of the evidence. She emphasized that Appellant was advised of his Miranda rights and waived his rights before each interview. She also informed defense counsel that she could cross-examination Corporal Machado about his dual role as both an interpreter and an interrogator. R. 219, ll. 9-18.

Discussion

The trial judge erred by failing to suppress Appellant's statements to law enforcement because they were not knowingly, intelligently, and voluntarily given due to the coercive environment in which the statements were made, particularly where Appellant was incarcerated, did not have an attorney, was interviewed on multiple occasions for several hours at a time, and

was told he gave deceptive answers during the polygraph. Moreover, it is undisputed that during the second and third interviews, which took place immediately after the polygraph examination, Corporal Machado, whose role was to translate for Appellant, engaged in his own independent interrogation of Appellant thereby failing to remain impartial.

"A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing Jackson v. Denno, 378 U.S. 368, 377 (1964)). "A determination whether a confession was 'given voluntarily requires an examination of the totality of the circumstances.'" State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) (quoting State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694-695 (1996)).

"As the United States Supreme Court has instructed, the totality of the circumstances includes 'the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.'" Pittman, 373 S.C. at 566, 647 S.E.2d at 164 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). "Furthermore, no one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances." Id. (citing Schneckloth v. Bustamonte, 412 U.S. at 226.

"This voluntariness requirement is in addition to the intelligent waiver mandate of Miranda." State v. Trapp, 420 S.C. 217, 243, 801 S.E.2d 742, 756 (Ct. App. 2017) (quoting State v. Miller, 375 S.C. 370, 380, 652 S.E.2d 444, 449 (Ct. App. 2007)) (internal quotation marks omitted). "Under Miranda v. Arizona, a statement obtained as a result of a custodial

interrogation is inadmissible unless the defendant was advised of and voluntarily waived his rights." Id. (citing Miranda v. Arizona, 384 U.S. 436, 498-499 (1966)).

Based on the totality of the circumstances, Appellant's statements to law enforcement should have been suppressed because they were not freely and voluntarily given. Appellant, who was incarcerated and had no prior experience with the criminal justice system, was interrogated on multiple occasions by several officers without an attorney. He was forced to undergo a polygraph examination after which he was told his answers showed he was being deceptive. He was also advised by Corporal Machado that there would be no repercussion for anything he said.

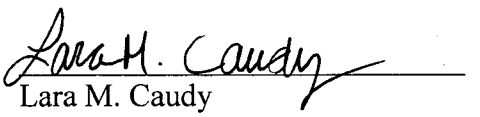
Moreover, Appellant was deprived of a neutral and impartial interpreter. It is undisputed that Corporal Machado, whose role was to translate or interpret for Appellant, engaged in his own independent interrogation of Appellant and failed to translate Appellant's repeated denials of guilt.

Respectfully, this Court should hold the trial judge erred by failing to suppress Appellant's statements to law enforcement, reverse his convictions and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Elidoro Carillo Ontiveros states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before the Honorable Carmen T. Mullen, which was held on November 14-17, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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, she asks the Court to relieve her as counsel for Elidoro Carillo Ontiveros.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of November, 2017.

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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) Complete Trial Transcript Dated November 14-17, 2016;
(3) Court's Exhibit No. 1 (Defendant's Voir Dire Requests);
(4) Court's Exhibit No. 2 (DVD Recording of Defendant's First Interview);
(5) Court's Exhibit No. 3 (February 6, 2014 Miranda Waiver Form);
(6) Court's Exhibit No. 4 (DVD Recording of Defendant's Second Interview);
(7) Court's Exhibit No. 5 (February 11, 2014 Miranda Waiver Form);
(8) Court's Exhibit No. 6 (Consent for Polygraph Examination Form);
(9) Court's Exhibit No. 7 (February 11, 2014 Miranda Waiver Form).

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

November 30, 2017

Lara M. Caudy

Lara M. Caudy
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."

November 30, 2017.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant, Designation of Matter, and Record on Appeal in the above referenced case have 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 Anders Brief of Appellant, Designation of Matter, and Record on Appeal have been served upon Elidoro Carillo Ontiveros, #370600, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 30th day of November, 2017.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of November, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.