ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AARON VAN HENDRIX,

APPELLANT

APPELLATE CASE NO 2016-000208

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in granting the State's request, over appellant's objection, to redact portions of the children's forensic interviews where they alleged their father and his girlfriend were present during sexual abuse, participated in the sexual abuse, and were told about the sexual abuse where this evidence was relevant as it tended to disprove the children's claims because the father testified in appellant's case that if he had known about any abuse, the defendants "would not be here. They would be dead" and its removal violated the rule of completeness?

STATEMENT OF THE CASE

On June 9, 2015, appellant was indicted in Pickens County for two charges of first degree criminal sexual conduct with a minor and one charge of third degree criminal sexual conduct with a minor. R. 573 – 578. On January 25, 2016, appellant was tried along with his co-defendant, Stacy Carol Riden, before the Honorable Perry H. Gravely and a jury. R. 1. Christopher Jones represented the State. R. 1. Richard Warder represented appellant. R. 1. Caroline Horlbeck represented the co-defendant. R. 1. The jury convicted appellant. R. 556, l. 15 – 557, l. 20. Judge Gravely sentenced appellant to concurrent terms of twenty-five years' imprisonment on the first degree CSC charges and a consecutive term of twelve years' imprisonment on the third degree CSC charge. R. 563, l. 22 – 564, l. 10. This appeal follows.

ARGUMENT

The trial court erred in granting the State's request, over appellant's objection, to redact portions of the children's forensic interviews where they alleged their father and his girlfriend were present during sexual abuse, participated in the sexual abuse, and were told about the sexual abuse where this evidence was relevant as it tended to disprove the children's claims because the father testified in appellant's case that if he had known about any abuse, the defendants "would not be here. They would be dead," and its removal violated the rule of completeness.

In this child sex case, the State's case rested primarily upon the complainants' allegations in their forensic interviews. (State's Ex. 1-4). The children's testimony was summary and brief and the State relied on the forensic interviews for the details of the abuse. Three children, a brother and two sisters, alleged that appellant and his co-defendant, Stacy Riden ("Riden") molested them, often with both participating in the abuse at the same time. R. 141, l. 23 – 206, l. 14. The children were very young at the time of trial: the brother was nine; the older sister was nine; the younger sister was five. R. 142, ll. 5 – 7. R. 168, ll. 7 – 10. R. 195, ll. 21 – 22.

Appellant testified in his own defense and vigorously denied molesting Riden's children. R. 443, l. 13 – 446, l. 6. Appellant was Riden's boyfriend and he moved in with her and her children. R. 442, ll. 15 – 443, l.16. Appellant lived at Riden's house from January or February 2012 until December 2012. R. 444, l. 19 – 445, l. 2. Appellant moved out because he and Riden "had come to a mutual agreement that it was not working for us." R. 447, ll. 1 – 5. Appellant remembered that the house always had food and power and the utilities were always on. R. 447, l. 17 – 448, l. 2. He did not know if anyone else moved in with Riden after he moved out. R. 448, ll. 3 – 6.

The children's biological father, Mark Lusk ("Lusk"), would sometimes stay at the apartment when appellant lived there. R. 449, ll. 2 – 6. Riden's sister, Jessie, would also stay at the house when she and her boyfriend fought. R. 449, ll. 7 – 15. The solicitor asked appellant if he told the police that "Jessie was kind of crazy." R. 449, ll. 21 – 23. Appellant responded, "To put it lightly, yes." R. 449, ll. 21 – 23. Appellant also told the police that another of Riden's sisters, Jennifer, would "bring guys" to Riden's house. R. 450, ll. 10 – 14.

Riden did not show up for the first day of the trial. R. 401, ll. 10 – 16. She denied that appellant ever molested her children. R. 418, ll. 17 – 419, l. 13. She admitted that after she and appellant broke up her life went "downhill." R. 419, ll. 14 – 16. She began using drugs. R. 419, ll. 17 – 19. Lusk stayed with Riden after appellant left and brought his girlfriend and her two children. R. 420, ll. 8 – 15. Lusk's brother would also come over to Riden's house while she was at work. R. 420, l. 23 – 421, l. 8.

In the videos, the children described various sexual acts, including both Riden and appellant performing oral sex and forcing the children to perform oral sex on them. (State's Ex. 1-4). The children also said that their father and Jennifer witnessed and participated in the abuse. (State's Ex. 1-4). After completing the forensic interviews, their grandparents took them to Disneyworld. R. 162, ll. 12 – 21.

The videos were redacted on the motion of both the co-defendant and the solicitor. R. 92, l. 17 – 114, l. 7. Near the end of the colloquy with the trial judge about the redactions, the solicitor asked that portions of the videos where the children discuss their father's role in the abuse be redacted. R. 111, ll. 3 – 20. The solicitor cited no legal theory to support the redaction of this information. R. 111, ll. 3 – 20. The trial judge said, "Oh, okay. Yeah. I think that would be appropriate to redact back." R. 111, ll. 21 – 23.

Appellant objected. R. 111, l. 24 – 112, l. 5. Appellant argued that what the children claimed about their father was relevant to his defense. R. 111, l. 24 – 112, l. 5. Trial counsel stated, "And I guess when they ask is the father there, you know, the child says the father is there. The father is going to testify he was not there." R. 112, ll. 1 – 5. The judge originally stated that "Anything to where the children said when something was going on father was there and mother was there" would be allowed because it was relevant to a charge of unlawful neglect against Riden. R. 112, ll. 6 – 12. The judge then ruled that "just general stuff about the father, I don't think that would be appropriate on these videos." R. 112, ll. 13 – 15.

The State originally intended to electronically redact the videos. R. 316, ll. 2 – 13. The electronic redaction did not work. R. 316, ll. 2 – 13. The solicitor was forced to manually stop and start the video. R. 316, ll. 2 – 13. Appellate counsel for both appellant and the State contacted the solicitor concerning what portions were redacted from the video and he provided an affidavit which the parties have agreed shows the times of the videos that were redacted. R. 567 – 573. The entire unredacted videos were admitted into evidence in the trial and have been transported to this Court.

The redacted portions of the videos contain allegations that the father, Jennifer, and Jessie were all aware of the abuse. (State's Ex. 2, 4). In the sister's video dated April 11, she states that Lusk was present on an occasion when the abuse occurred, but appellant and Riden quickly put on their clothes to keep them from knowing. (State's Ex. 2, between 25:30 and 28:38). The children told their father, but he did nothing. (State's Ex. 2, between 25:30 and 28:38). The sister also told the interviewer that Lusk and Jennifer saw appellant and Riden abuse the children. (State's Ex. 2, between 34:57 and 39:10). Lusk and Jennifer sat on the couch and laughed while appellant and Riden molested them. (State's Ex. 2, between 34:57 and 39:10).

The father and Jennifer also began abusing the children because they thought it was funny to copy appellant and Riden. (State's Ex. 2, between 34:57 and 39:10). The forensic interviewer asked the sister why she did not report the father's abuse in an earlier interview and the child said she forgot. (State's Ex. 2, between 34:57 and 39:10). The child said Riden was also touching the children with the father and they thought it was funny. (State's Ex. 2, between 45:35 and 45:53).

In the redacted portions of the brother's forensic interview, the interviewer asks if the father was there during the abuse and the child says he was standing there watching. (State's Ex. 4, between 49:25 and 52:40). The father did not participate in the abuse, but watched and laughed. (State's Ex. 4, between 49:25 and 52:40). Jessie also witnessed appellant and Riden abuse the children. (State's Ex. 4, between 49:25 and 52:40). The father witnessed more than one instance of abuse. (State's Ex. 4, between 49:25 and 52:40).

Appellant called the father, Mark Lusk, as his first witness. R. 424, ll. 4 – 5. Lusk testified that he never saw any abuse at Riden's house. R. 426, ll. 9 – 11. Lusk found a drug needle at Riden's house after appellant moved. R. 426, l. 12 – 427, l. 9. He never saw appellant use drugs. R. 427, ll. 13 – 16. After appellant moved out, Lusk said the conditions in the house went "Downhill." R. 427, l. 17 – 21. The power and water were turned off, there was not much food in the house, and the "furniture was just piled in the living room." R. 428, ll. 1 – 6. Lusk asked Riden's mother to take the children. R. 428, ll. 7 – 22. When Riden's attorney asked whether Lusk and appellant were on such good terms that they would get into bed together, Lusk replied "Hell no. Excuse my language but, no." R. 436, ll. 9 – 12. Lusk emphatically testified about what would have happened if he had known or seen any abuse of his children: "They would not be here. They would be dead." R. 429, ll. 5 – 8.

The court erred in excluding the portions of the video in which the children claim the father was involved in the abuse. The children's claims were relevant, and therefore admissible. Rule 401, SCRE. "'Relevant evidence'" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The fantastic claim that Lusk participated and watched the abuse of his children by another man made the children's allegations less credible. Furthermore, the children's claims made the father an important witness. Whether he witnessed the abuse was at issue in this trial and the jury was entitled to compare the credibility of Lusk against the children's allegations. Because appellant testified and denied the abuse, the children's credibility was the central matter in the trial. State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (reversing in a sex case because it "hinged on credibility").

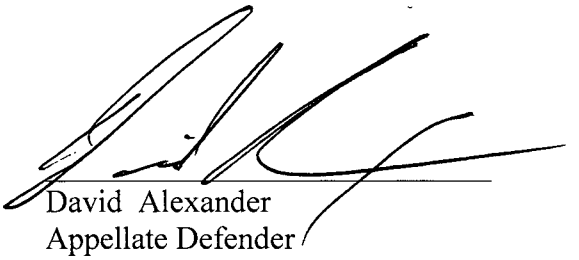
The children also contradicted their interviews in their trial testimony. The brother said, "I don't think so," when he was asked if his father was present when the abuse occurred. R. 165, ll. 5 – 11. He denied that his father was present and laughing during the abuse. R. 165, ll. 14 – 19. When the older sister was asked if her father was there, she replied, "He was but he didn't see this ever happen." R. 185, ll. 8 – 14. She also denied that her father brought his girlfriend to the house. R. 186, ll. 6 – 8. The children's contradictory statements on the videos certainly would have affected their credibility.

Furthermore, excluding these portions of the videos violates the rule of completeness and impaired appellant's defense. Rule 106, SCRE. "When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered

contemporaneously with it." Rule 106, SCRE. See also State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004). The Court in Cabrera-Pena ruled that the exclusion of favorable portions of a defendant's recorded statement when unfavorable portions were admitted violated "fundamental fairness." Id. at 379, 605 S.E.2d at 525. The same reasoning applies to appellant's case. The redaction of the children's more fantastic claims—that essentially their mother, father, mother's boyfriend, and father's girlfriend all participated in sex acts with these children at the same time—rendered the children's remaining claims more believable. This Court should reverse.

CONCLUSION

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



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ATTORNEY FOR APPELLANT

This 24th day of January, 2018.

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."

January 24, 2018.

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