

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

RECEIVED

Honorable Roger M. Young, Circuit Court Judge

MAR 22 2018

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CARLOS A. RUIZ,

APPELLANT

APPELLATE CASE NO. 2017- 000214

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

ARGUMENT

The court erred by allowing the testimony of DSS worker Letrice Smalls that the agency determined that the child’s mother was a “non-supportive” mother, and erroneously “non-believing” of her accusing daughter’s allegations where appellant continued to live in the household since this testimony was irrelevant, and it improperly bolstered the state’s contention that the minor was telling the truth, and that appellant was guilty3

DSS involvement6

Other testimony.....8

The mother testifies.....8

Discussion.....10

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010)..... 12

State v. Alexander, 303 S.C. 377, 401 S.E.2d. 146 (1991)..... 13

State v. Anderson, 412 S.C. 212, 776 S.E.2d 76 (2105)..... 13

State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) 12

State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) 13

State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) 11

State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) 11

State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986)..... 13

Rules

Rule 401, SCRE..... 13

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing the testimony of DSS worker Letrice Smalls that the agency determined that the child's mother was a "non-supportive" mother, and erroneously "non-believing" of her accusing daughter's allegations where appellant continued to live in the household since this testimony was irrelevant, and it improperly bolstered the state's contention that the minor was telling the truth, and that appellant was guilty?

STATEMENT OF THE CASE

Appellant was indicted by the Charleston County Grand Jury for three counts of criminal sexual conduct with a minor in the first degree, and three counts of criminal sexual conduct in the second degree. R. 480 – 491. His case was called to trial on January 9, 2017, before the Honorable Roger M. Young, and a jury. R. 1.

Mary Ford and Nicholas Smit represented appellant. Deborah Herring-Lash and Nina Savas were the assistant solicitors. Court interpreters worked the trial. R. 1.

On January 13, 2017, the jury found appellant guilty on all counts. R. 470, ll. 14-25. Judge Young sentenced the then sixty-one year old appellant to life imprisonment on each count of criminal sexual conduct with a minor in the first degree, and twenty years imprisonment on each count of criminal sexual conduct in the second degree. R. 473, ll. 10-15; R. 479, ll. 13-17.

This appeal follows.

ARGUMENT

The court erred by allowing the testimony of DSS worker Letrice Smalls that the agency determined that the child's mother was a "non-supportive" mother, and erroneously "non-believing" of her accusing daughter's allegations where appellant continued to live in the household since this testimony was irrelevant, and it improperly bolstered the state's contention that the minor was telling the truth, and that appellant was guilty.

The minor girl in this case was born in 2003. R. 19, ll. 10-16. She was living in a foster home at the time of the trial. She was in the eighth grade. R. 20, ll. 7-21.

The minor alleged at the time of the sexual abuse she lived with her mother, appellant (the stepfather), her sister and brother, and her two "baby brothers," who were her stepbrothers. R. 20, ll. 3-13. The minor's allegations were that appellant began sexually abusing her when she was six years old. He would, according to the minor, offer her candy in exchange for oral sexual acts. R. 32, l. 11 – 34, l. 4. The minor said that she did not tell anyone because she thought appellant would be mad at her, and that her mother would also get mad "and think I was lying or something." R. 36, ll. 7-18.

The minor testified that around the sixth grade, the oral sex became sexual intercourse. R. 44, l. 4 – 50, l. 21. The minor also alleged that appellant would hoard food in his bedroom, and that he would give her food in exchange for sex. R. 93, ll. 18-25.

The evidence was undisputed that appellant at one point was in an extremely damaging accident -- he was hit by a car -- and the minor said "he completely stopped [the alleged sexual activity] because he was immobile." R. 56, l. 21 – 58, l. 6. However, the minor claimed after some time appellant again engaged in oral sex with her. R. 58, ll. 7-14.

On cross-examination, the minor admitted that she sometimes heard voices that no one else could hear. The voices called her name, among other things. At trial, the minor said “that doesn’t [happen] anymore.” R. 78, l. 24 – 79, l. 14.

The minor denied that she was “acting” the entire time in an attempt to get appellant removed from the home. However, one thing was clear, her brother and sister also admitted, as will be seen infra, that they did not like appellant, who was an older man, and indeed they hated him. The minor said she did not like being accused of being a chronic liar as her mother often did. The minor also said that she enjoyed writing “narratives,” and she added: “Well, that’s my career when I grow up, a writer and an activist; but it was just using different words instead of using baby words.” R. 107, ll. 2-22. The minor admitted she would rather -- at least in the past if not still -- be with boys, and that girls “were too much drama, and “they start too much stuff.” R. 109, ll. 2-8.

As for lying, the minor said “maybe when I was younger I lied a lot to my mom. I didn’t ever have a good bond with her. I didn’t really like her that much . . . I don’t like people to say I’m a liar. That doesn’t -- That doesn’t go right with me.” R. 74, l. 24 – 75, l. 7.

An incident occurred in February, 2015 when the minor was again arguing with her mother. The minor said her mother told her appellant was “just trying to protect you,” from harm where she was caught coming out of the woods with a boy. The minor told her mother that appellant was not trying to protect her, and she said her mother “started hitting me with a belt and grabbed a broom.” The following occurred on direct-examination of the minor about these explosive allegations:

So my mom was -- like, started hitting me with a belt, I think, or -- I don't know. And then when she pulled out the broom, that's what triggered it, because I was really upset already, and just the fact

that she wasn't listening to me and I was trying to convince her to, like, listen to me -- she wasn't listening.

So she grabbed the broom and she was about to hit me, and when she did that, I was upset, and I said, You don't have to worry about me. Why are you so worried about me? Why do you hate me?

I was yelling at her, saying, You hate me. You don't care about me, trust me. You don't like me. You don't want me, saying things -- I was just yelling.

Q. What did you end up saying?

A. I ended up yelling at her and saying, You should be worried about him. He's raping me.

Q. What did she do when you told her he was raping you?

A. She didn't understand me because I said it in English, obviously, so I'm guessing she didn't understand what that word meant, so she just continued on hitting me. So that's what told me -- I felt like she didn't care at all.

I told her one of the biggest secrets, and she didn't care. I yelled at her and said, You don't care at all. I understand that. I was yelling at her. She yelled at me, saying, What do you mean, raping? What does that mean?

So my older brother came out of his room, and he started -- he looked scared, but he started explaining to her, and she was, like, Are you sure? Are you for real? She's telling me, am I being serious?

And so --

Q. Did anything happen after that? Did y'all go to the police or anything?

A. No.

Q. Why not?

A. She asked me, and I was scared, but she told me that I can't call the police because then our family would be separated and be all messed up and that everybody's going to go. The whole place is going to go.

R. 65, l. 7 – 66, l. 22.

The minor claimed on redirect-examination that appellant was rude and violent to everyone in the family. R. 132, ll. 11-20. The allegations were quickly repeated to a friend, then at the minor's school, to DSS, and the police. R. 274, l. 12 – 302, l. 18.

DSS involvement

When the state went to call Department of Social Services worker Letrice Smalls as a witness, defense counsel Ford objected that her testimony would only be vouching for the alleged victim and bolstering. However, Ford did not challenge the qualifications of the witness, so the Smalls testimony **immediately** proceeded before the jury over appellant's objection. R. 239, l. 10 – 240, l. 6.

Smalls testified that she was a foster care worker with the Charleston County Department of Social Services. R. 240, ll. 1-25. She was assigned to the minor's case in March of 2015. R. 241, ll. 11-17. The minor and her siblings all resided in foster care at the time of the trial. R. 241, ll. 18-25.

Smalls testified that the mother had visitation with all of the children and visited with them regularly as urged. However, as to the minor in question, Smalls said there was an "incident" in January of 2016 where the mother was reading Bible verses. Defense counsel's objection to this testimony was sustained. However, Smalls said the mother's visits with the minor in question ceased after that "incident." R. 242, l. 4 – 243, l. 7.

The following then occurred on direct examination of Smalls:

Q. How long -- I think you've already said it. You've been a foster care worker how long?

A. Nine years.

Q. And have you worked with lots of families where the supportive parent of -- the non-abusive parent is non-supportive and non-believing?

MS. FORD: Objection. I'm not quite sure where she's going.

MS. HERRING-LASH: That's it about.

MS. FORD: Well, relevance to this case, Your Honor.

THE COURT: Is she offering some sort of opinion? What is she testifying about?

MS. HERRING-LASH: That it's not unusual at this point the children remain in foster care.

THE WITNESS: They remain in foster care?
Yes, ma'am.

BY MS. HERRING-LASH:

Q. What would have to happen for the Department of Social Services to return them - --

A. There would have to be a change of circumstances. **Currently Mr. Ruiz resides in the home with Ms. Lorenzo**, and *the other issue is that Ms. Lorenzo doesn't believe [Minor], and because of this, the agency would feel that she's unable to protect.*

R. 243, l. 12 – 244, l. 11. (emphasis added).

On cross-examination, Smalls was evasive of direct questions but she managed to add that there had been “a finding against Mr. Ruiz” by DSS, and apparently the family court. Smalls admitted that for “clarification needs” – to get her children returned from the agency -- that the mother had to admit she believed the minor. When asked to admit that the family court was a very different court than criminal court, Smalls attempted to turn the tables, and said that the plan was to terminate the parental rights of the mother and put the children up for adoption. When asked to admit that the mother could get her children back if appellant was not in the house, Smalls claimed that she was not an expert on that subject. However, Smalls continued

with the theme that DSS strongly believed appellant was guilty and that the mother was a bad mother for continuing to allow appellant to live in the family home, and for not stating that she believed the minor was telling the truth. R. 245, l. 16 – 248, l. 18.

Other testimony

The minor's fifteen-year-old brother, Sergio, testified and admitted he did not like appellant. R. 204, l. 5 – 205, l. 22. Sergio admitted his sister, the minor in question, could become real violent, aggressive, and she could be a bully in their household. R. 208, ll. 11-19.

The minor's ten-year-old sister, Leansy, claimed she looked underneath appellant's bedroom door one time, and essentially said she saw appellant and her minor sister having sex, even though they both had their clothes on. R. 218, l. 10 – 231, l. 6. Leansy admitted she later told a DSS worker that she never, in fact, looked under the door. R. 231, ll. 3-6.

Leansy remembered the day that her sister accused appellant of raping her. Leansy claimed her mother was "kind of laughing but she was like -- her face was, like, nervous, but she was laughing, like, she didn't want to believe what was happening." R. 223, l. 7 – 224, l. 2. Leansy said she wanted appellant out of their home, and she said she hated him "because of what he did to my sister and because he ruined my life." R. 235, l. 23 – 237, l. 15.

The mother testifies

The children's mother testified in appellant's defense. She testified the minor accuser was always aggressive, and "confronted" her even as a young child. She said the minor did not understand consequences that flowed from her lying. R. 336, l. 8 – 337, l. 4.

The mother also testified that after appellant was hit by a car he could no longer have sex, which was another reason she asserted proved that her minor daughter was not telling the truth about sex between them. R. 329, l. 10 – 337, l. 4.

The mother noted that on the day the minor accused appellant of rape, she was earlier scolded that day because appellant revealed the minor was seen coming out of the woods with a boy, and “she was doing it [the accusation] out of revenge.” R. 349, l. 13 – 350, l. 19. The mother explained that the minor was upset and angry. The minor said that appellant was lying about her coming out of the woods with a boy. The mother said when minor accused appellant of rape she told her “what you’re telling me is really serious . . . And so from that point everything changed. It was Carlos that was accusing her, but then it was her accusing him.” R. 350, l. 20 – 351, l. 24.

The mother also said she told the minor that her allegations were impossible, and that appellant could not perform sexually. R. 353, l. 1 – 355, l. 25. The following occurred on direct examination of the mother:

THE WITNESS: And I said, [minor], you seem to be acting and playing like nothing was going on, and look at the situation we're in.

And, again, she said, What?

I said, [minor], look at the situation we're in.

It's serious, and there was a word that she used that left me in shock. She said, I'm acting.

And I said, How can you be playing with this serious situation?

She just said, I'm acting.

And so I said, What are you trying to achieve with all this, that Carlos leaves? And then what?

MS. HERRING-LASH: Your Honor, I think we just had hearsay over and over, and I would object to this.

THE COURT: No, not her saying what [the minor] said. Go ahead.

THE WITNESS: And so she said, I'm acting.

So I said, What are you trying to do here?

And she said, We want Carlos to leave, and then the others started joining in: We want Carlos to leave. They were yelling: He should leave, he should leave. They said, Let's call the police and get him to leave.

And I told her, [minor], I know you're lying. I wish I could believe you, but this situation is what it is, and these are lies. So I said, What do you want? What are you trying to make happen?

I want Carlos out.

And I said, Then what?

My father will come back.

And I said, [minor], that's behind us.

R. 356, l. 3 – 357, l. 9.

The natural father of the children the minor was referring to had been deported, apparently for among other things, criminal domestic violence.

The essence of the mother's testimony was that the minor accuser hated appellant, she and her siblings wanted him out of the house, and they had idealistic and unrealistic ideas that their deported father had changed, and that he could return to the household when appellant was gone.

Discussion

Defense counsel Ford correctly objected that the testimony of DSS worker Smalls would only vouch for the credibility of the victim and bolster the testimony she had already given. There was no delay between this objection and the immediate testimony of Smalls. Nonetheless, defense counsel Ford correctly objected to the relevance of the Smalls testimony regarding the

non-abusive parent (here, the mother) also being “non-supportive” and “non-believing.” Further, the minor here and the other children could not be returned to the mother because she did not believe the minor, and therefore her agency, DSS, thought the mother would be unable to protect the minor from appellant, who she made no doubt DSS believed was a guilty child rapist. R. 242, l. 21 – 244, l. 11.

As stated, Smalls would continue to stress that there had already been a finding by DSS and/or the family court that appellant was guilty, and that the mother could not have her children returned from foster care unless she said she believed, as did DSS, that the minor was telling the truth.

It is clear at this point in the jurisprudence of our state on child sex abuse cases that it is improper for a witness to state or imply that they believe the alleged victim is telling the truth in their allegations of sexual abuse.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the Supreme Court held that testimony by a forensic interviewer that the victim had given a “compelling finding” of child abuse was inadmissible. In Kromah, our Supreme Court noted that while experts are permitted to give an opinion, they cannot offer an opinion regarding the credibility of others.

The Court further stated that it was undeniable that the primary purpose of calling a “forensic interviewer” as a witness was to lend credibility to the victim’s allegations. Nonetheless, the Court stressed that the assessment of the credibility of witnesses is within the exclusive province of the jury, and that witnesses generally were not allowed to testify another witness was telling the truth. State v. Kromah, 401 S.C. at 358, 737 S.E.2d at 499-500. See, also, State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

In Smith v. State, 386 S.C. 562, 564-65, 689 S.E.2d 629-631 (2010), the Court found a forensic interviewer improperly bolstered the alleged victim's testimony, where the forensic interviewer testified the alleged victim told her the defendant had sexually assaulted her, and the interviewer found the allegation "believable."

Here, Smalls was testifying as an employee of the Department of Social Services that the children, including the minor accuser, could not be returned to live with their mother because appellant was still living there, that the mother [improperly] did not believe the minor, and therefore DSS did not think the mother could protect the minor from the guilty appellant. There is no other credible reading of this testimony, or the purpose of the DSS employee's reason for being called as a witness.

Prior to the testimony of Smalls, defense counsel Ford correctly argued that the testimony was only meant to bolster the allegations of the accusing minor, and to vouch for her credibility. Counsel further and correctly objected on the grounds of relevance when Smalls did precisely what defense counsel Ford objected to prior to her testimony.

Appellant submits it is extraordinarily difficult for a defendant to obtain a fair trial when he is accused of sexually abusing a child. Our Supreme Court, and this Court, have warned against explicit and more subtle testimony which indicates that the witness believes the child, and thus believes that the defendant was guilty.

In State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), the Supreme Court held it was error to allow a witness to testify that her recommendation was that the victim was not supposed to be around the defendant for any reason. This improperly bolstered the credibility of the victim.

The precise thing happened in this case, as shown above. This testimony can only be interpreted as the witness, here Smalls, representing the Department of Social Services, believed the alleged victim's claim that the defendant, -- here appellant -- had sexually abused her. The children could not be returned because the mother did not believe the minor, and she had appellant, whom she believed, living with her. This testimony was improper. See, also, State v. Anderson, 412 S.C. 212, 776 S.E.2d 76 (2105).

In State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), the Court held that the lower court incorrectly allowed a witness to testify the child provided a compelling disclosure of abuse by the defendant. This was the functional equivalent of testimony that the witness believed the child was telling the truth.

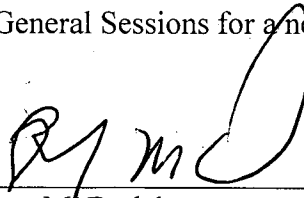
The testimony here of DSS foster care worker Smalls was totally improper because it bolstered and vouched for the alleged victim's testimony, and it was irrelevant because the opinion of a DSS witness (a lay one at that) that the alleged victim was telling the truth did not legally make it more or less probable that the jury should believe appellant was guilty. See Rule 401, SCRE; State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986); State v. Alexander, 303 S.C. 377, 401 S.E.2d. 146 (1991).

The error here was not harmless because the objectionable testimony signaled to the jury that a state agency vested with protecting children, the Department of Social Services, believed the child was telling the truth, that appellant therefore was guilty, and he should not continue to be living in the household. Further, the minor's mother was a bad mother because she supported appellant, and she did not believe the minor's allegations. For those reasons she could not get her children back from foster care. The termination of her parental rights, and he children being adopted, would be her just deserts from DSS.

The defense contended from the beginning of the trial to the end of the trial that the minor orchestrated the allegations to get appellant out of the household because she hated appellant, as did the other children, for different reasons. They wanted him gone. The mother of the children said that the minor admitted she "was acting," she testified that the minor was a perpetual liar and rebellious from the time she was a young child forward. She also said that the allegations against appellant were in part, physically and factually, impossible. This respectfully is not a case where the errors in bolstering, vouching and offering irrelevant evidence should be found harmless.

CONCLUSION

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

A handwritten signature in black ink, appearing to read 'R M D', is written above a horizontal line.

Robert M. Dudek
Chief Appellate Defender

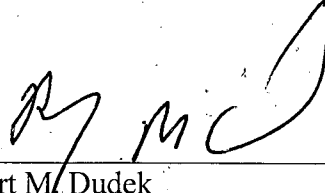
ATTORNEY FOR APPELLANT

This 22nd day of March, 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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 22, 2018



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