STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Abbeville County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2017-001861

The State, Respondent,

vs.

George Anthony Clark, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly concluded the portions of Appellant's statement to police were relevant and not unduly prejudicial. As a result, the trial court properly admitted his statements regarding his willingness to plead and his attempt to establish an involuntary intoxication defense. Even if admitted in error, any possible error was harmless.

II. The trial court properly admitted the portions of the interview which established the child's background and the res gestae of the crime. The background was important to assist the jury in understanding the family dynamics and placing the events in context. Further, any error in admitting the portions of the interview was entirely harmless.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On April 22, 2016, the victim woke up to Appellant touching her. Appellant rubbed the chest and vagina of the nine year old victim. (T.118-120; R.___). Initially, he rubbed her on her chest, but the little girl told Appellant to stop and leave her alone. He went to the other end of the trailer for a short time. However, Appellant returned, put his hand down her underwear, and rubbed the nine year old girl's vagina. The nine year old victim again told him to leave and he left. She then went to try and sleep with her mom, but was told to go back to the couch she was sleeping on with her younger brother. (T.120-121; R.___). The victim, her mom, and her brother were staying with the victim's great aunt. Appellant was her aunt's boyfriend and also stayed at her aunt's house.

Later, her mom woke up and talked with the victim. (T.121; R.___). The victim's mom indicated her daughter woke her up saying "[Appellant] keeps coming in here touching me." (T.139; R.___). The victim told her mom that Appellant kept touching her on her chest and in her private area. (T.139; R.___). Her mom woke up her aunt. (T.143; 121; R.___). They confronted Appellant who indicated he wasn't trying to hurt the victim. (T.122; R.___). After Appellant maintained he loved the kids and would not have touched the victim, the victim screamed: "Yes, you did. You did touch me. You came in here twice and touched me." (T.145; R.___).

Several days after the incident, Appellant went to the Sheriff's Department on his own and spoke with Sergeant Ashley. (T.173; R.___). She recorded her interview of Appellant. (State's Exhibit 4). Appellant repeatedly indicated he did not do anything to the victim, but also indicated he was willing to plead guilty to prevent her from testifying as long as it did not include the registry. He repeated his willingness to go to prison as long as she did not testify if he

got a deal he could agree with. (State's Exhibit 4). Sergeant Ashley told him during the interview not to plead guilty if he was not guilty and Appellant's counsel brought out this point:

> Q. And you, in fact, encouraged him not to plead if he was, in fact, not guilty?
>
> A. Correct.
>
> Q. And here we are at trial, right?
>
> A. Yes, ma'am.

(T.184-185; R.___).

The victim's great aunt indicated she got a call around 1:00 am from Appellant asking to pick him up from his brother's apartment, where he was hanging out. When she left, everyone in the house, including the victim, was asleep. (T.196-197; R.___). She indicated Appellant was "pretty tipsy" and looked like "he had had a lot to drink." (T.197; R.___). He got some food and stayed up after she went to bed. He knocked a picture off the wall, which did not wake anyone up, but caused the victim's great aunt to come out of her bedroom. The victim's great aunt went back to bed, and after a while the victim's mother knocked on her door to wake her up. (T.201; R.___).

The nine year old victim met with Katie Strickland, a forensic interviewer, to discuss the events and her interview was recorded. (State's Exhibit 5). In the forensic interview, after providing some background information on her family and what she likes to do, the child victim explained how Appellant rubbed her chest and her vagina.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling [on such] will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). "A trial court has particularly wide discretion in ruling on Rule 403 objections." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). An appellate court reviews a trial court's Rule 403, SCRE ruling pursuant to an abuse of discretion standard and gives great deference to the trial court's determination. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014). Thus, "[a] trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." Id. (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 357-58, 543 S.E.2d 586, 593-94 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

ARGUMENT

I. The trial court properly concluded the portions of Appellant's statement to police were relevant and not unduly prejudicial. As a result, the trial court properly admitted his statements regarding his willingness to plead and his attempt to establish an involuntary intoxication defense. Even if admitted in error, any possible error was harmless.

Appellant contends the trial court erred in failing to redact additional portions of Appellant's recorded interview with Sergeant Ashley. He maintains his statements regarding a willingness to plead guilty and explaining his understanding of drugs in his system found after checking himself into a hospital should have been excluded. Initially, he waived any argument regarding the redaction of his willingness to plead because he brought out the issue on cross-examination of Sergeant Ashley. Additionally, both statements were relevant and probative of Appellant's guilt. Further, any prejudice from playing Appellant's own statements did not significantly outweigh their probative value. As a result, the trial court properly admitted the interview and did not need to redact the statements.

Waiver

Initially, Appellant waived any argument with regard to his willingness to plead as he elicited testimony regarding Appellant's statements during his cross-examination of Sergeant Ashley. Even if a party raises an objection during trial and the objection is overruled, a party may still waive his right to argue error in regard to that objection on appeal under certain circumstances. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived). Significantly, a party can waive an objection to an issue by eliciting similar testimony to previously objected-to testimony without reserving that earlier objection. See State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30, 30 (1972) ("During

the course of the trial certain testimony was admitted over the objection of [McKinney's] counsel. Thereafter, counsel for [McKinney] cross-examined the witness thereabout without reserving the objection previously made. The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured."). In the instant case, while Appellant objected to the portion of the interview in which Appellant discusses his willingness to plead guilty, he later elicited the following testimony from Sergeant Ashley regarding that same testimony:

> Q. And he said several times that he didn't commit the crime?
>
> A. Yes, ma'am.
>
> Q. But he would plead to protect Dlaziah?
>
> A. Correct.
>
> Q. And you, in fact, encouraged him not to plead if he was, in fact, not guilty?
>
> A. Correct.
>
> Q. And here we are at trial, right?
>
> A. Yes, ma'am.

(T.184-185; R.___). By eliciting this testimony, Appellant waived any argument regarding its inadmissibility. See McKinney, 258 S.C. at 571, 190 S.E.2d at 30.

Merits

Pursuant to 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." Additionally: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by

the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is **substantially** outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE (emphasis added).

"Probative" means "[t]ending to prove or disprove." Black's Law Dictionary 1323 (9th ed. 2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. State v. Gray, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014). "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." Id. at 610, 759 S.E.2d at 165. "[T]he more essential the evidence, the greater its probative value." Id. (quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007)) (internal quotation marks omitted). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." Gray, 408 S.C. 610, 759 S.E.2d 165.

Appellant complains about two main lines of questioning and statements in Appellant's interview. First, he asserts his discussion of a willingness to plead guilty is unduly prejudicial and not relevant because it was not an admission. His willingness to plead guilty to a charge that would subject him to fifteen years in prison to prevent her from testifying is certainly relevant and a statement from which the jury is free to infer his guilt. Additionally, he makes it clear that he is willing to plead guilty if he would not have to go on the sex offender registry. This statement is also relevant and one which the jury may infer his understanding of what he did to the nine year old victim and his guilt of committing the actions. His statement he would accept a good deal to prevent the child victim from testifying, especially in light of his discussion of avoiding the sex offender registry and his willingness to accept even seven years in prison, is

certainly something the jury should be allowed to consider in determining Appellant's guilt of the crime of criminal sexual conduct with a minor in the third degree.

Additionally, if this Court finds the statements are not probative of his knowledge of the incident and his guilt of the incident, then no prejudice could occur from the statements given his repeated denial of doing anything to the child and the fact that his counsel specifically used the statements regarding his willingness to plead to his benefit during trial. As a result, even if the evidence was not relevant to the issue of Appellant's knowledge and guilt then any error in admitting the statements was entirely harmless. See State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.").

The second statements he argues should have been redacted concern his self-admission into the hospital with suicidal thoughts and his understanding of a report that he believed showed he had lots of different drugs in his system. The full context of this discussion is important because it is clearly an attempt to create an excuse for any behavior he may have committed when he arrived home from his brothers.

The victim's great aunt testified Appellant had been drinking before he arrived home and that she had picked him up around 1:00 am from his brother's apartment. In his interview he indicated he had to be picked up by the victim's great aunt because he had been hanging out with his brother. He indicated he was picked up late, around 12:30 or 1:00 am and that he had not been home that night. On the video, he then indicates: "I was drugged." Appellant explains he did not take the drugs that he believed were found in his system the day after the incident. He questioned how any of the drugs got into his system. (State's Exhibit 4). He then raises the

specter of whether the drugs he believed were found in his system would be used against him to say he committed the crime against the child victim.

As the solicitor noted, Appellant bringing up the drugs found in his system sounds as an excuse or a possible involuntary intoxication defense. He paints a picture of arriving late at night after hanging out with his brother, not knowing what happened to the child victim, and then finding out later he had been drugged without his knowledge. The jury is certainly entitled to consider his proposed excuse or defense to the crime in judging both his credibility as well as his guilt of the underlying charge.

As with the other statements, any possible error in admitting the statements made by Appellant would be entirely harmless. The jury did not convict him because he alleged he had drugs in his system and vehemently denied knowing how they got there. See Pagan, 369 S.C. at 212, 631 S.E.2d at 267 ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.").

Also, Appellant's counsel apparently had the report from the doctor which, based on counsel's assertions to the court, showed Appellant was not positive for any of the drugs he mentioned. (T.71-72; R.___). He cannot now claim the testimony was unduly prejudicial when he could have cured any possible prejudice by admitting the report and chose not to do so. See e.g., State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) ("A party cannot complain of an error which his own conduct created."). The trial court properly allowed the portions of the interview into evidence because the jury could infer Appellant had knowledge of the crime and could infer his guilt of the crime after considering his statements. Even if improperly admitted, any error was entirely harmless.

II. The trial court properly admitted the portions of the interview which established the child's background and the res gestae of the crime. The background was important to assist the jury in understanding the family dynamics and placing the events in context. Further, any error in admitting the portions of the interview was entirely harmless.

Appellant maintains the trial court erred in admitting portions of the forensic interview of the child victim because they were irrelevant or invited a verdict based on the impermissible basis of sympathy or empathy. The statements in the forensic interview included descriptions of the child's family life and whether improper touching of the child had ever occurred before. The portions of the interview were relevant to the case, presented the res gestae of the crime, and explained established that only Appellant had impermissibly touched her dispelling any notion of a misidentification. Further, any possible error did not cause the jury to render its verdict based on sympathy or empathy with the child instead of based on the child's direct testimony explaining that Appellant rubbed her chest and vagina.

As discussed above, pursuant to 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." "Although relevant, evidence may be excluded if its probative value is **substantially** outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE (emphasis added).

"Probative" means "[t]ending to prove or disprove." Black's Law Dictionary 1323 (9th ed. 2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. State v. Gray, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014). "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues."

Id. at 610, 759 S.E.2d at 165. "[T]he more essential the evidence, the greater its probative value." Id. (quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007)) (internal quotation marks omitted). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." Gray, 408 S.C. 610, 759 S.E.2d 165.

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)). "[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574, 587–88 (1997).

In the instant case, the testimony by the child victim during her forensic interview was certainly relevant and should have been considered by the jury. Her testimony established the background context for the crime. She detailed who she lived with, the types of interactions she had with the various family members, and allowed the jury to understand the context in which she was making the allegations against Appellant. The background information served almost as res gestae testimony. It provided the "factual context" to the jury of who was involved and how things occurred. See e.g., State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370 (1996) (finding testimony proper where it "furnishes part of the context of the crime" or is necessary to

a "full presentation" of the case). As Old Chief indicates, the State is entitled to paint the picture of the crime and to provide the jury with a full understanding of what occurred. Old Chief, 519 U.S. at 187 ("Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict."). The trial court properly allowed the background information into the record, just as he properly allowed it from the witness stand when the child victim testified. (T.113-116; R.___). The jury is not required to decide the case in a complete vacuum devoid of an understanding of who the participants are and their roles in the victim's life.

Additionally, Appellant complains on appeal about her discussion with the interviewer about punishments she receives from her parents, the interactions between her parents, the child victim's knowledge of drugs, and seeing Appellant smoke cigarettes and drink beer. At trial Appellant never asserted these discussions should be redacted on the basis of relevance or prejudice. As a result, this assertion is not preserved for review on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

The discussions complained did not impact the jury or appeal to the sympathy or emotion of the jurors such that their verdict was compromised. It is illogical to believe a jury convicted Appellant because the child victim talked about her family background or that she had seen Appellant smoke a cigarette or drink a beer. None of the discussions, even if irrelevant, prejudiced Appellant such that their admission warrants a reversal and grant of a new trial. See Pagan, 369 S.C. at 212, 631 S.E.2d at 267 ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a

reasonable doubt where it did not contribute to the verdict obtained."). The trial court did not abuse his wide discretion in denying Appellant's motion to redact the forensic interview when much of what was discussed provided needed context to the jury and none of the discussions could reasonably have prejudiced Appellant.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Solicitor, Eighth Judicial Circuit

BY: _____
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ATTORNEYS FOR RESPONDENT

September 20, 2018

STATE OF SOUTH CAROLINA

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Appeal from Abbeville County
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The State, Respondent,

vs.

George Anthony Clark, Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 20th day of September, 2018.

Anne Mueller

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ALAN WILSON
ATTORNEY GENERAL

September 20, 2018

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RE: State v. George Anthony Clark
Appellate Case Tracking No. 2017-001861

Dear Mr. Dudek:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division