ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GEORGE BRANHAM,

APPELLANT

Appellate Case No. 2011-203389

ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred resulting in a violation of Appellant's Due Process right to present a complete defense by prohibiting Appellant to introduce evidence of a prior false allegation of abuse made by Child complainant's older sibling against Appellant thus depriving Appellant of the ability to show that Child's family had a history of coaching alleged sexual assault victims?

STATEMENT OF THE CASE

Appellant George S. Branham, II, was indicted by the Kershaw County Grand Jury on July 13, 2011, for first degree criminal sexual conduct with a minor (CSCM 1st). R. 6, lines 4-13; R. 490—R. 491 (Indictment). Appellant's case proceeded to trial before the Honorable Clifton Newman and a jury from August 22 through 25, 2011. Jason Kirincich (Counsel) represented Appellant, while Ron Moak and Debra Barry represented the State. R. 1.

The jury found Appellant guilty as charged, and the trial court imposed a sentence of fifty years. R. 472, lines 13-20; R. 488, lines 4-6; R. 492. Counsel filed a post-trial motion for a new trial on September 2, 2011, as well as a separate post-trial motion to reconsider the sentence. R. 493 (Motion for New Trial); R. 497 (Motion to Reconsider). On November 7, 2011, the trial court filed orders denying Appellant's motion for a new trial, and motion for reconsideration. R. 499 (Order Denying Defendant's Motion for a New Trial); R.500 (Order Denying Defendant's Motion to Reconsider).

ARGUMENT

The trial court reversibly erred resulting in a violation of Appellant's Due Process right to present a complete defense by prohibiting Appellant to introduce evidence of a prior false allegation of abuse made by Child complainant's older sibling against Appellant thus depriving Appellant of the ability to show that Child's family had a history of coaching alleged sexual assault victims.

The trial court erroneously forbade Appellant from entering testimonial evidence of prior false allegations of sexual abuse made by the older sibling (Sibling 1) of the complaining witness (Child). Specifically, the court erred by preventing Appellant from examining Jessica Scott (Mother), the mother of Child and Sibling 1, and Dr. Kathy Saunders (Dr. Saunders), the former forensic medical examiner for Carehouse of the Pee Dee in Florence, regarding prior allegations by Sibling 1 that Appellant sexually abused him, yet which was actually shown to be committed by the uncle of Sibling 1 and Child. Appellant sought the introduction of such evidence as part of his defense to show the jury that Child's family had a history of coaching alleged sexual assault victims. As a result, Appellant was denied his Due Process right to present a complete defense. Accordingly, Appellant requests reversal of his conviction, and remand for a new trial.

In plain terms, the right to present a defense includes the right to offer testimony of witnesses, and if necessary to compel their attendance, and the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967). "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process law." Id.

Further, a person's basic Sixth Amendment rights are applicable to the states through the Due Process Clause of the Fourteenth Amendment. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986). "The Amendment essentially 'constitutionalizes' the right to present a defense in an adversary criminal trial." Id. (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975)); see also State v. Mabe, 306 S.C. 355, 358, 412 S.E.2d 386, 388 (1991) ("Due process requires that a criminal defendant be afforded a meaningful opportunity to present a complete defense") (citing California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984)).

In the present case, Appellant's defense was based on introducing evidence prior false accusations of sexual abuse against him by Child's family to establish coaching or fabrication by Child for the current charge. Counsel proffered the testimony of Mother and Dr. Saunders regarding the prior allegation made by Sibling 1 against Appellant. R. 156, line 13—R. 158, line 4; R. 184, line 14—R. 190, line 4. Mother confirmed not only that Sibling 1 previously accused Appellant of sexual abuse, but also that the subsequent investigation indicated the real alleged perpetrator was the uncle of Sibling 1. R. 185, line 14—R. 186, line 11.

Counsel also proffered testimony from Dr. Saunders regarding the prior allegation by Sibling 1, as she was the person who later examined him on January 8, 2010. R. 345, lines 4-12; R. 347, line 16—R. 348, line 20. Under the clinical history of Dr. Saunders' report, which was provided to Dr. Saunders by the grandmother of Sibling 1, Dr. Saunders annotated that Sibling 1 disclosed molestation by Appellant, which "[t]urned out not to be true." R. 349, lines 1-15.

Counsel moved to present this testimony to the jury pursuant to his Due Process right to present a complete defense. In particular, Counsel sought to establish a history of false accusations of sexual abuse by the Scott family against Appellant. R. 351, lines 8-10; R. 353, line 1—R. 355, line 2. Counsel further asserted the importance of such testimony where, as here, the Child complainant "admitted that somebody had helped her with her story." R. 177, lines 1-13; R. 354, lines 17-18. In fact, Child indeed indicated someone helped her with her story:

[Counsel]:	Has anybody been helping you with your story?
[Child]:	I think it's no.
[Counsel]:	Who's been helping you with your story?
[Child]:	I don't know. I don't know his name.
[Counsel]:	You don't know his name, but somebody's been helping you?
[Child]:	Yes.
[Counsel]:	Okay. And where did you meet this somebody?
[Child]:	Here.
[Counsel]:	Here at the courthouse you met this somebody?
[Child]:	Yes.
[Counsel]:	He's been helping you with your story?
[Child]:	Yes, I think.

R. 177, lines 1-13.

The State argued such testimony by Mother and Dr. Saunders regarding prior false accusations by Sibling 1 were irrelevant and forbidden under State v. Sprouse, 325 S.C. 275, 478 S.E.2d 871 (Ct. App. 1996). R. 351, line 25—R. 352, line 21.

The trial court rejected Counsel's argument, and ruled that the testimony was irrelevant and would not lead to anything probative regarding the case. As a result, the trial court prevented Counsel from presenting the testimony, stating that Sprouse was directly on point to the issue. R. 190, lines 5-11; R. 355, line 6—R. 357, line 18.

The trial court's ruling, including its reliance on State v. Sprouse, was erroneous. First, the South Carolina Supreme Court ruled in State v. Schmidt that similar evidence was "clearly relevant and should have been admitted." Id. 288 S.C. at 303, 342 S.E.2d at 403. In Schmidt, the defendant was charged with CSCM1st, as is Appellant here. There, the trial court precluded any testimony on either direct or cross-examination regarding hard feelings between the child's family and the defendant's family. "Schmidt argued that he could establish the existence of a 'vendetta' which stemmed from the child's mother from an extramarital affair between the child's mother and him." Id. 288 S.C. at 302, 342 S.E.2d at 402. Thus, the defendant there "planned to introduce evidence of the 'vendetta' to establish motive, bias, and prejudice on the part of the alleged victim and her family." Id. 288 S.C. at 303, 342 S.E.2d at 403.

As the Schmidt Court stated, the "entire defense at trial was that he did not commit the alleged act and that the child's story was concocted by her parents because of a vendetta against him." Under these circumstances, even where the bias and motive to fabricate the allegation was from the parents of the child, "the trial court's ruling to limit the testimony and its refusal to allow Schmidt's proffer of testimony effectively denied Schmidt a fair and

impartial trial because he was not allowed to present his defense." Id. 288 S.C. at 303-04, 342 S.E.2d at 403 (emphasis added).

In the case at bar, Appellant's defense at trial was also that he did not commit the alleged act and that the child's story was fabricated through coaching. In fact, Child's testimony readily indicates there is some substance to the allegation. R. 177, lines 1-13. Moreover, Counsel sought to show this motive or pattern of false allegations of sexual abuse within Child's family eliciting testimony on the issue. Thus, the evidence was relevant because it would tend to establish or make more or less probable some matter in issue upon which it directly or indirectly bears: namely to establish that Appellant did not commit the alleged act and that the child's story was fabricated through coaching. Such evidence would have assisted the jury in arriving at the truth of whether Appellant truly committed the act of which he was accused, or whether the allegation was simply yet another false accusation. As in Schmidt, Appellant had the right to present evidence that he did not commit the alleged act and that the child's story was fabricated by a third party. Id. Therefore, the trial court's ruling denied Appellant of his due process right to present a complete defense.

Additionally, the trial court's reliance on State v. Sprouse was misplaced. In Sprouse, the legal issue before the Court of Appeals was about the proper scope of cross-examination. Id. 325 S.C. at 279, 478 S.E.2d at 873-4. Thus, the procedural posture of Sprouse is a challenge falling under the Confrontation Clause, not an assertion of the defendant's Due Process right to present a complete defense.

Specifically, the defendant there sought to impeach child's credibility by cross-examining her regarding a prior doctor's visit that uncovered no signs of physical abuse in

an attempt to show "a prior false allegation of sexual abuse." Id. 325 S.C. at 278, 478 S.E.2d at 873. However, the only suspicion of sexual abuse came from the child's grandmother. After applying the test from State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990) regarding evidence of prior false accusations by a complainant, the Sprouse Court determined grandmother's suspicions were never carried forward into a formal accusation, and no investigation was ever conducted. Additionally, there was no evidence that the child made a prior false accusation either. Therefore, the trial court's limitation of Sprouse's cross-examination was upheld.

In Appellant's case, the issue is fundamentally different: as in Schmidt, Appellant sought admission of evidence from Mother and Dr. Saunders under his Due Process right to present a complete defense. Moreover, as indicated by Child's own testimony, along with the proffered statements of Mother and Dr. Saunders, there is a basis in the record supporting Appellant's contention that Child's story was fabricated or coached. Therefore, the trial court's reliance on Sprouse was both legally and factually misplaced; rather, the controlling law is that of Schmidt.

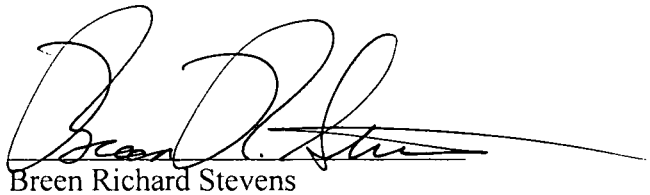
Finally, Appellant was prejudiced by the trial court's error. Appellant never challenged whether he was present the night of the alleged incident; rather, as in Schmidt, Appellant asserted the story was concocted. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). Yet, the trial court's ruling effectively stripped him of fully presenting that defense to the jury. Had the jury heard the proffered testimony from Mother and Dr. Saunders, the outcome of the trial would likely be different. See, e.g., Arnold v. State, 309 S.C. 157, 166,

420 S.E.2d 834, 838 (1992) ("The requirement that harmlessness of federal constitutional error be clear beyond reasonable doubt embodies a standard requiring reversal if there is a reasonable possibility that the evidence complained of might have contributed to the conviction.") (internal quotations omitted). Accordingly, Appellant was prejudiced by the trial court's error.

CONCLUSION

For the foregoing reasons, Appellant George Branham respectfully requests reversal of his conviction and remand for a new trial.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of October, 2012.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for George Branham states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Clifton Newman, which was held on August 25, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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, he asks the Court to relieve him as counsel for George Branham.

Respectfully submitted,

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of October, 2012.

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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 indictment;
(2) Trial transcript (August 22-25, 2011), pp. 1-489;
(3) Motion for New Trial;
(4) Motion to Reconsider;
(5) Order Denying Defendant's Motion for New Trial;
(6) Order Denying Defendant's Motion to Reconsider;
(7) Sentence sheet.

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

October 26th, 2012

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and on George Branham, #347471 at Lee Correctional Institution, 990 Wisacky Highway Bishopville, SC 29010, this 26th day of October, 2012.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of October, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.