STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

-VS-

GEORGE BRANHAM,

APPELLANT.

Appellate Case No: 2011-203389

APPELLANT'S PRO SE BRIEF

GEORGE BRANHAM, #347471
Appellant

Lee Correctional Institution
Kershaw Unit, Rm. No: 2141
990 Wisacky Highway
Bishopville, South Carolina
29010

APPELLANT, Pro Se

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Introduction

Appointed appellate counsel submitted a Brief on October 26, 2012, pursuant to ANDERS -vs- CALIFORNIA, 386 U.S. 738, 87 S.Ct. 1396(1967). The issue presented by counsel was preserved for appellate review during trial and does in fact have clear legal merit. The right to present a complete defense is guaranteed by the Due process clause of the Fourteenth Amendment to the United States Constitution and by Article 1, § 14 of the South Carolina Constitution.

Submission of the issue in ANDERS form was improper in that counsel failed to address several crucial points vital to a full and clear presentation of the issue.

Appellant respectfully asks this Court to consider this Pro Se submission, not in lieu of, or contrary to counsels argument, but in addition to the issue presented by counsel.

PRESERVATION OF ISSUE

Excluded testimony must be proffered to the trial court to preserve the issue of its exclusion for appellate review. STATE -vs- JACKSON, 384 S.C. 29 at 34, 681 S.E.2d 17 at 20 (Ct.App. 2009). This requirement was met.

Trial counsel attempted to cross-examine mother of victim concerning prior false allegations by victim's sibling that appellant had sexually abused him. The trial court sustained

State's objection without explanation. (Record, page 156, Line 21 - page 158, line 3).

Prior to presentation of State's next witness, defense requested to make a proffer. The trial court apparently chose instead to hear the State's next witness, forcing defense to recall victim's mother. (Record, page 166, line 23 - page 167, line 2; and page 184, lines 5-6).

Following the proffer and without allowing any arguments, the trial court ruled to exclude the evidence referring to it as "...chasing rabbits..." and as "...totally irrelevant as it relates to this case." (Record, page 190, lines 5-11).

Trial Counsel's second attempt to present the issue was through State's witness, Dr. Kathy Saunders. A proffer was made in-camera. (Record, page 344, line 18 - page 351, line 7). Trial counsel then moved to question Dr. Saunders before the jury. (Record, page 351, lines 8-10). Following arguments, the trial court once again ruled not to allow the proffered evidence. (Record, page 357, lines 17-18).

A timely "MOTION FOR NEW TRIAL" was filed arguing that the exclusion of the evidence of the prior false allegation was improper. (SEE Motion for New Trial). The trial court denied the motion.

The issue of the excluded evidence is solidly preserved for this Court's review.

LEGAL MERIT OF ISSUE

A. ERROR OF LAW

It is well settled that in criminal cases appellate courts review errors of law only and that an appellate court is bound by the trial court's factual findings, unless they are clearly erroneous. SEE: STATE -vs WILSON, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001).

Here, the trial court made several errors of law and fact.

First, ... the trial court did not even allow counsel to explain the relevance of the evidence he was seeking to introduce. (Record, page 190, lines 5-11). By not knowing the purpose for the desired evidence, there is no way for the trial court to make a proper determination of it's relevance, probative value or admissibility.

Second, ... as argued in the ANDERS Brief, the trial courts' reliance on STATE -vs- SPROUSE, 325 S.C. 275, 478 S.E.2d 871 (Ct. App.1996), which is based on STATE -vs BOITER, 302 S.C. 381, 396 S.E.2d 364 (1990), was clearly erroneous. Both SPROUSE and BOITER , are cases involving the admissibility of evidence of a victim's prior accusation. There was no such issue in the present case, so the trial court's application of the BOITER test was a clear error of law.

The closest case for comparison to the present issue is STATE -vs- SCHMIDT, 288 S.C. 301, 342 S.E.2d 401 (1986), which is

properly argued in the ANDERS Brief.

Appellant's counsel however, overlooked two very important points: In SCHMIDT, there was a threat of a vendetta against the defendant, and the South Carolina Supreme Court found that threat to be relevant and admissable. In the present case there was not just a threat of a vendetta because of appellant's extra martial affair, but an actual previous attempt by the victim's father to exact his revenge. Victims' mother was obviously aware that her estranged husband had told their son to accuse appellant and not the actual perpetrator, father's own brother. (See: Record, page 185, line 23 - page 187, line 3). When asked directly by the State if she was denying any knowledge of her son being coached, the witness clearly avoided answering the question. (Record, page 189, Lines 15-20).

Father accompanied victim to the forensic interview and was present during child's physical examination. (Record, page 313, lines 8-9 and page 315, line 24 - page 316, line 3). Father had full custody of victim for approximately one-and-a-half years leading up to trial. (Record, page 140, line 15 - page 141, lines 20). To assert that this child was not influenced by her father's hard feelings toward appellant would be illogical.

The trial court also erred in relying on the testimony of forensic interviewer, Debbie Elliott, and victim's mother, Jessica Scott.

As to Debbie Elliott, the court relied on Elliott's assertion that the victim was credible. (Record, page 354, line

19 - page 355, line 2). This was error. Even though defense counsel failed to make a timely objection, on this point of law, Elliott's testimony was clearly impermissable vouching. (Record, page 234, lines 2-21). Trial counsel's failure to object does not lend itself to the trial court as an excuse to rely on clearly inadmissable evidence.

As to mother, her testimony is wholly unreliable. At first it may seem as though the mother witnessed the abuse of her daughter. The trial judge made this very same assumption; however, nothing is farther from the truth. At no time in her testimony does mother claim to have seen anything other than appellant stand up. In fact she even claims to have had to ask her daughter "...<u>what he was doing to her</u>..." after returning to the bedroom. (Record, page 125, lines 2-3).

Further, even a cursory review of mother's testimony concerning her criminal convictions - and more tellingly - her explanations for those convictions - reveal a clear inability to be truthful. (Record, page 137, line 22 - page 138, line 21 and page 152, line 10 - page 153, line 24).

Mother was throughly impeached by her own testimony. It was prejudicial error for the trial court to rely on her credibility in any way when making such a crucial decision; especially, one determining the credibility of some other party.

The trial court's reliance should rest squarely on its own observation of the testimony from the <u>victim</u> to determine her credibility. This was not done in the present case.

In STATE -vs- GRAHAM, 314 S.C. 383, 444 S.E.2d 525 (1994), our Supreme Court cautioned that "...before a criminal defendant can be prohibited from engaging in cross-examination designed to show a prototypical form of bias on the part of the witness, the record must clearly show that the cross-examination is somehow inappropriate." id at 385, 444 S.E.2d at 527. As in GRAHAM, the record here is deviod of any such showing.

The trial court even went so far as to admit that the proffered testimony would give the defendant "...some type of advantage..." (Record, page 356, lines 19-20).

Inexplicably however, the court ruled that to allow the evidence "...would prevent the State from having a fair and impartial trial..." (Record, page 357, lines 14-15).

Where the trial judge gleaned this nugget from is unclear, because the State carries the burden of proof. In the United States it is the defendant's right to a fair and impartial trial that has been the basis of our criminal justice system since our founding.

The appellant's Sixth Amendment right to effective cross-examination outweights the - rights of the State where there is no logical reason to limit the witness' testimony.

At some point it becomes clear that the appellant's adversary was the trial judge and not the prosecution.

B. PREJUDICE

In DELAWARE -vs- VAN ARSDALL, 475 U.S. 673, 106 S.Ct. 1431 (1986), the Supreme Court set forth certain factors an appellate court should consider in determining whether the erroneous exclusion of evidence of a witness' bias constitutes harmless error, these include: the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, whether other evidence corroborates or contradicts the witness' testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case.

In STATE -vs- HOLMES, 320 S.C. 259, 464 S.E.2d 334 (1995), our State's Supreme Court held that the VAN ARSDALL factors apply with equal force in determining a harmless error violation relating to any issue of witness credibility. Id., at 265, 464 S.E.2d at 337.

The list of factors as set out in VAN ARSDALL is not exhaustive. GRAHAM, supra.

Considering the VAN ARSDALL factors: the victim's testimony was crucial to the State's case; the sought after testimony was not cumulative; mother's corroborative testimony of victim is highly suspect; no cross-examination was permitted on the issue of the prior false allegation; and the State's case lacked any physical evidence and was solely based on credibility of witness.'

As in SCHMIDT, supra., appellant's entire defense at trial

was that he did not commit the alleged act and that the child's story was concocted by her parents: by the mother in a panic to keep her children; then carried on by the father to exact his revenge on appellant. the evidence was relevant and necessary to present a complete defense. Clearly, the trial court's ruling to limit cross-examination effectively denied appellant a fair and impartial trial because he was not allowed to present his defense. Accordingly, the trial court committed prejudicial error.

CONCLUSION

Every attorney has an ethical duty to diligently and zealously advocate the cause of his client. They must also, however, use care not to overstep the bounds of candor and good judgement with respect to the court.

Appellate counsel, Mr. Breen Stevens, is the third attorney appointed to this appeal in less than one year. While both of the previous attorneys made verbal assurances to discuss the case with appellant before submitting a brief, Mr. Stevens filed an ANDERS BRIEF prior to even notifying appellant of his appointment.

Submission of this clearly meritorious issue in an ANDERS BRIEF can only be explained by the prejudicial effect of the nature of the allegation and therefore a "guilt-free" means to "clear the docket."

When asked, Mr. Stevens could not articulate a clear reason why he submitted such a well crafted argument as a no merit issue. He instead insisted that his hope was that this court would deny his petition to be relieved as counsel; thereby, giving "...a green light on the issue..." presented.

This is an improper reliance on the court as a safety net, as it is well known that an ANDERS BRIEF is nothing more than a rubber-stamp through to the waste-bin.

Finally, it should be noted that the circumstances of this case are novel; (i.e., no published case could be found dealing with siblings being coached at different times to make similar allegations against the same defendant). These circumstances should be addressed for further clarification of law.

For the foregoing reasons appellant respectfully requests that this Honorable Court deny counsel's petition to be relieved as counsel and order further briefing on the issues presented.

APPELLANT FOREVER PRAYS

Respectfully submitted,

George S. Branham II

George Stanley Branham, II

APPELLANT, Pro Se

EXECUTED this 6th day of December, 2012.