STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODRIQUES CARTER,

APPELLANT

Appellate Case No. 2011-192646

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in finding Appellant opened the door to inadmissible hearsay statements by the alleged victim concerning the identity of her perpetrator and the circumstances of the assault based upon Appellant questioning the alleged victim's mother about the mother's conduct as a result of the alleged victim's statements?

II. Did the trial court err in permitting the prosecutor to shift the burden of proof to Appellant, in violation of Appellant's state and federal constitutional rights, during his closing argument by remarking upon Appellant's failure to elicit testimony concerning DNA testing?

STATEMENT OF THE CASE

During its October 2009 term, a Hampton County Grand Jury issued three true billed indictments against Appellant. The first, 2009-GS-25-00508, charged Appellant with criminal sexual conduct in the first degree. The second, 2009-GS-25-00509, charged Appellant with kidnapping. The third, 2009-GS-25-00510, charged Appellant with burglary in the first degree. R.135. The state, represented by Randolph Murdaugh, III, Tameaka Legette, and Richard A. Murdaugh, called the case for trial on May 16, 2011 before the Honorable Carmen T. Mullen. Stephen T. Plexico represented Appellant. R. 1. On May 18, 2011, the jury returned its verdict finding Appellant guilty on all counts. R. 129 line 20 – R. 130 line 7. Judge Mullen sentenced Appellant to thirty years on the criminal sexual conduct conviction, thirty years on the kidnapping conviction, and life imprisonment on the burglary conviction. R. 133 line 22 – R. 134 line 6.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred in finding Appellant opened the door to inadmissible hearsay statements by the alleged victim concerning the identity of her perpetrator and the circumstances of the assault based upon Appellant questioning the alleged victim's mother about the mother's conduct as a result of the alleged victim's statements.

The prosecutor called the victim's mother, Teresa Brantley, to testify during his case-in-chief. R. 27 line 3. During the direct examination, Teresa stated that she saw the victim at Marie Dunbar's home, and then went to the victim's home. R. 30 lines 4-17. At the victim's home, she found Appellant in the victim's bed. R. 30 lines 20-21. Teresa then began beating Appellant with a lamp she found in the house. R. 31 lines 11-16; R. 32 lines 12-18. On cross examination, Teresa admitted she beat Appellant for about ten minutes and he was bloody as a result of her beating him. R. 35 lines 11-22. Defense counsel asked if she beat him "based on what your daughter said, right?" Teresa responded, "No. Based on what I said." R. 35 lines 23-25. Later, defense counsel asked if she was going to kill Appellant, and Teresa responded affirmatively. R. 36 line 25 – R. 37 line 1. Defense counsel asked if that was based upon what her daughter said and Teresa responded, "My daughter didn't say that. I did." R. 37 lines 2-3.

On re-direct examination, the prosecutor asked "What did your daughter tell you?" R. 37 line 9. Teresa answered "My daughter couldn't tell me anything but - - [Appellant] raped her." R. 37 lines 10-12. Defense counsel objected immediately on the basis of hearsay. R. 37 line 11; R. 37 lines 13-14. The prosecutor agreed the statement would be hearsay, but argued the defense opened the door. R. 37 line 15. Defense counsel denied opening the door. R. 37 line 16. The judge stated: "Let's just move past it. Let's just move

past it." The prosecutor indicated he had not heard the judge's ruling. R. 37 line 19. The judge ruled "That's okay." R. 37 line 20. When the prosecutor asked for clarification, the judge responded, "Let's ask the next question. Just don't ask that question." R. 37 lines 22-23. The prosecutor then asked Teresa why she got upset. R. 38 lines 6-8. Teresa responded that she was upset because her child was raped. R. 38 lines 11-13. Defense counsel objected, moved to strike. R. 38 lines 15-17. The trial judge overruled the objection. R. 38 lines 18-19.

The prosecutor admitted Teresa's testimony regarding who raped her daughter was hearsay.[1] Thus, the question is whether Appellant opened to door to the testimony. South Carolina permits the introduction of otherwise inadmissible evidence when the opposing party opens the door to that evidence. State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004); State v. White, 361 S.C. 407, 415-416, 605 S.E.2d 540, 544 (2004); State v. Dunlap, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003); State v. Taylor, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998). Whether the opposing party opens the door to the admission of otherwise inadmissible evidence is left to the sound discretion of the trial judge. State v. Adcock, 194 S.C. 234, 234, 9 S.E.2d 730, 732 (1940); State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008). In State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984), our Supreme Court explained that opening the door occurs "[w]here one party introduces evidence as to a particular fact or transaction," which entitles the other party "to

[1] A statement by the alleged victim in a criminal sexual conduct case, limited to the time and place of the incident, is not hearsay as long as the alleged victim testifies at trial and is subject to cross-examination concerning the statement, and the statement is consistent with the alleged victim's testimony. Rule 801(d)(1)(D), SCRE.

introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially."

In Page, 378 S.C. at 483, 663 S.E.2d at 360, the trial judge permitted the prosecution to elicit testimony of the chief investigating officer that "the other guy" identified in the co-defendant's statement was the defendant after determining the defendant had opened the door during cross-examination of the detective by challenging the investigation. This Court held the trial judge abused his discretion "in finding that Page's counsel's zealous representation of his client required the admission of this inadmissible evidence in order to rehabilitate Detective's investigative techniques." Id.

Our Supreme Court held a defendant opened the door to the admission of testimony about his two prior convictions for trespassing in public women's restrooms and a note that he had left in one of those restrooms where the defendant testified to his passive character and lack of mature sexual desires. State v. Doby, 273 S.C. 704, 710, 258 S.E.2d 896, 899-900 (1979). Similarly, the Supreme Court held the defendant opened the door to the admission of his prior conviction for possession of cocaine by denying he ever used the drug. State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990). In Dunlap, 353 S.C. at 541, 579 S.E.2d at 319, the Court held defense counsel's opening statement, in which he asserted the defendant had been in trouble with the law and was hooked on crack but had never sold crack, opened the door to the introduction of the defendant's prior convictions for conspiracy to possess crack cocaine with intent to distribute, distribution of an imitation drug, simple possession of marijuana, and shoplifting.

The trial judge in the instant case abused his discretion in determining Appellant opened the door to hearsay statements by the victim concerning the identity of her alleged

perpetrator and the circumstances of the alleged assault. Appellant's questions concerned whether Teresa's conduct of beating Appellant bloody were the result of statements by the victim. Appellant never questioned Teresa regarding the substance of those statements. Appellant's questions of Teresa did not introduce evidence concerning a particular fact or transaction, which would entitle the prosecutor to explain or rebut the evidence. In an effort to avoid eliciting hearsay testimony, trial attorneys routinely ask witnesses what action the witnesses took as a result of conversations, which would be inadmissible hearsay.

Admittedly the testimony from Teresa was cumulative to the testimony of the alleged victim; however, it is not harmless. "Improper corroboration testimony that is merely cumulative to the victim's testimony, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).

II. The trial court erred in permitting the prosecutor to shift the burden of proof to Appellant, in violation of Appellant's state and federal constitutional rights, during his closing argument by remarking upon Appellant's failure to elicit testimony concerning DNA testing.

During closing argument, defense counsel asked the jury "where's the testimony of the DNA [Appellant] had for this criminal sexual conduct?" R. 92 lines 13-14. He answers that although vaginal swabs were taken, there was no evidence that the vaginal swabs "came back with any sperm that matched [Appellant]." Defense counsel asked if any doctor or forensic scientist testified that there was sperm found. R. 92 lines 20-22. The prosecution countered defense counsel's closing with the following:

> [Defense counsel] made mention of the fact that there was no sperm found in her. You know something? And again, y'all help me remember because I'm getting old and I'm wore out, and my memory ain't so good. But do y'all remember anybody asking anybody whether that's true or not? Do you remember anybody - - and that'd be either me or Mr. Plexico - - do you remember either one of us asking anybody that got on that stand whether or not they found sperm in [the victim]? Anybody?

R. 106 line 21 – R. 107 line 4. Defense counsel objected on the basis that the prosecutor was shifting the burden of proof to the defense. R. 107 lines 5-6. The trial judge overruled the objection. R. 107 line 7. The prosecutor responded "I didn't say they had to prove - - anybody, did anybody, did anybody on that witness stand testify to that? Not one person." R. 107 lines 8-10.

A prosecutor who comments upon a defendant's failure to testify or call witnesses commits a grave error. State v. Primus, 349 S.C. 576, 583-584, 564 S.E.2d 103, 107 (2002) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Posey, 269 S.C. 500, 504, 238 S.E.2d 176, 177 (1997). "This rule stems from the

constitutional presumption of innocence and the State's burden of proving the accused guilty." Primus, 349 S.C. at 584, 564 S.E.2d at 107. As explained by our Supreme Court:

> It is elementary that an accused is presumed innocent until proven guilty and that the burden is upon the State to prove the accused committed the crime charged. An accused has the right to rely entirely upon this presumption of innocence and the weakness in the State's case against him. He would clearly be deprived of that right if an adverse inference is permitted to be indulged against him because of its exercise.

Posey, 269 S.C. at 503, 238 S.E.2d at 177.

In Primus, the prosecutor erred by commenting that the defendant failed to produce his uncle as a witness when the defendant claimed the uncle could provide an alibi for him. Id. at 584, 564 S.E.2d at 108. Similarly, by asking the jurors if anyone had asked any witness about DNA testing and/or results of such testing, the prosecutor's closing argument in the instant case shifted the burden to Appellant to prove he was innocent of the charged offense.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand the case to the trial court for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of December, 2012.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 19th, 2012

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of December, 2012.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of December, 2012.

Emily Bryan (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.