STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SCOTT RICHARD ROWAN,

APPELLANT

APPELLATE CASE NO. 2018-000813

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in refusing to admit an email sent by the complainants' mother's divorce attorney that wrongfully accused appellant of giving Complainant 1 and her mother a sexually transmitted disease?

STATEMENT OF THE CASE

An Horry County grand jury indicted appellant for second-degree criminal sexual conduct with a minor and third-degree criminal sexual conduct with a minor. R. 746-749. On April 9, appellant was tried before the Honorable Larry B. Hyman and a jury. R. 1. Mary Ellen Walter and George Henry Martin represented the State. R. 1. John M. Hilliard and Sara Brinson represented appellant. R. 1. The jury convicted appellant on both counts. R. 660. Judge Hyman sentenced appellant to concurrent terms of fifteen years' imprisonment. R. 669. This appeal follows.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (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. at 429–30, 632 S.E.2d at 848.

ARGUMENT

The trial judge erred in refusing to admit an email sent by the complainants' mother's divorce attorney that wrongfully accused appellant of giving Complainant 1 and her mother a sexually transmitted disease.

Appellant was the stepfather of both complainants, sisters, in this sexual abuse case. R. 547. The older sister (Complainant 2) alleged appellant would give her marijuana in exchange for touching her breasts. R. 347-51. The younger sister (Complainant 1) alleged appellant forcibly raped her vaginally and made her perform manual and oral sex. R. 186-195. Complainant 1 said appellant had vaginal sex with her at least twelve times. R. 195. Of those twelve times, she said appellant only used a condom "about two times." R. 195.

Appellant testified in his own defense and adamantly denied sexually abusing the girls. R. 557-59. He agreed that he was a strict disciplinarian but denied engaging in physical abuse. R. 548. The abuse allegations came to light about one month after Complainant 1 got into trouble for stealing marijuana and alcohol and about a week after being disciplined for smart-mouthing her mother regarding chores. R. 217. R. 231-34. Complainant 1's mother said of her, "She lies." R. 329.

On October 15, 2015, Complainant 1 went to the Children's Recovery Center and was examined by Dr. Carol Rahter. R. 256-59. Complainant 1 tested positive for chlamydia. R. 259. She did not have any other sexually transmitted diseases. R. 262. Dr. Rahter testified that chlamydia "is the most common sexually transmitted disease among female adolescents and young adults." R. 259. Dr. Rahter had permission to tell Complainant 1's mother about the chlamydia. R. 262.

On December 1, 2015, Complainant 1's mother's attorney, Lori Jones, emailed defense counsel regarding the divorce. (Def. Ex. 12). The email discusses visitation and spousal support. (Def. Ex. 12). Jones' email then says, "My client and her daughter were both recently diagnosed with STDs which they allege come from your client." (Def. Ex. 12). Complainant 1's mother actually had herpes, not chlamydia. R. 312-13.

Appellant obtained an expert witness who explained that testing revealed appellant never had chlamydia. R. 111-122. Appellant got tested immediately after his wife accused him of cheating on her and giving her an STD. R. 552. The testing was negative. R. 552. Appellant's expert explained the results of that test meant that appellant did not have an active chlamydia infection at the time of the test. R. 111-122. The expert performed further testing of appellant's antibodies to determine whether appellant ever had chlamydia within the past five years. R. 111-122. The testing showed no antibodies and the expert testified that "there is no evidence to indicate that he gave or received chlamydia." R. 117. The expert also testified that chlamydia lives on the surface of the skin and is easy to contract even if a condom is worn. R. 117-122. Studies showed that if a woman is infected with chlamydia, the chance of a man contracting it from her from one sexual encounter was 28%. R. 117-19. This made the probability of appellant contracting chlamydia from ten or more sexual encounters with Complainant 1 extremely high.

During the mother's cross-examination, defense counsel showed her the email from her attorney Jones stating that appellant gave her and Complainant 1 an STD. R. 309-311. The mother read it and admitted it was an email from her attorney and confirmed its contents. R. 309-11. The mother denied telling her attorney that her daughter's STD came from appellant.

R. 310. Complainant 1 previously denied telling the attorney that appellant gave her an STD. R. 222-23.

When appellant offered the email into evidence, the State objected on hearsay grounds. R. 310-11. Judge Hyman said no foundation had been established and defense counsel marked the email for identification. R. 310-11. At the conclusion of the State's case, defense counsel revisited the email and stated his intention to enter it into evidence during the defense case. R. 493-98. After a lengthy discussion of the hearsay rules, the trial court ruled the email was not admissible. R. 493-509. Judge Hyman ruled it was not a statement by a party opponent, not a business record, and barred by Rule 403. R. 493-509.

The court erred in excluding the email for multiple reasons. First, the email was not hearsay because it was not offered for the truth of the matter asserted. Rule 801(c). Appellant was not offering the email to show that the mother and Complainant 1 had an STD or that the STD came from appellant. Appellant was offering the email to show they falsely accused appellant of giving them an STD and sought advantage in a civil action. This removes the email from the definition of hearsay and resorting to the exceptions was error.

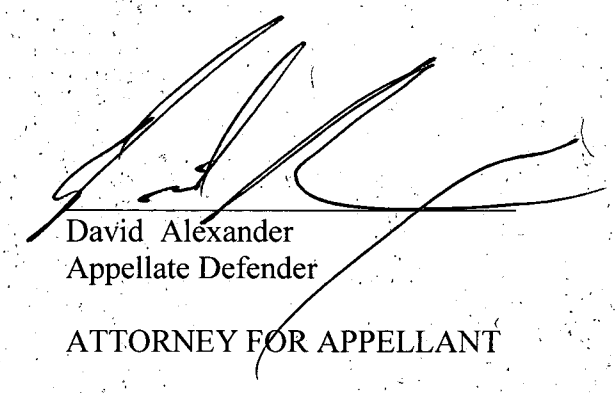
Rule 801(d) further defines statements that are not hearsay and both provisions apply to the email. Rule 801(d), SCRE. Rule 801(d)(1) says that a prior statement by a witness which is inconsistent with the witness's testimony is not hearsay. The statement of the attorney, Jones, is properly attributed to the mother under this section of the rules.

The email is also admissible under Rule 801(d)(2), admission by party-opponent. Judge Hyman improperly ruled that the mother was not a party-opponent and found that only the complainants were party-opponents. At the time the email was sent, the mother was the party-opponent of appellant in a divorce action. The email by the mother's attorney was therefore

admissible as "a statement by a person authorized by the party to make a statement concerning the subject" or as "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Rule 801(d)(1)(C) and (D). A store clerk's statements were admissible under this rule in South Carolina Dep't Rev. v. Meenaxi, Inc., 417 S.C. 639, 655-56, 790 S.E.2d 792, 800-01 (Ct. App. 2016). If a store clerk's statements are admissible, then statements by an attorney—an agent *nonpareil*—must also be admissible. The trial judge erred in refusing to admit the email from the attorney and this error requires a new trial.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of March, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Scott Richard Rowan 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 the Honorable Larry B. Hyman, which was held on April 9-12, 2018, 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 Scott Richard Rowan.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 4th day of March, 2019.

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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) Trial Transcript dated April 9-12, 2018
(2) Pre-trial Transcript dated December 11, 2017
(3) Motion *In Limine* for Compliance with Rape Shield Law
(4) Motion to Exclude Testimony by Forensic Interviewer
(5) Motion to Quash Indictments
(6) Defendant's Request for Voir Dire
(7) Defendant's Exhibit #12 (E-mail)
(8) State's Motion to Amend Sentence Sheets
(9) Indictments

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

March 4, 2019

David Alexander
Appellate Defender

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Division of Appellate Defense
PO Box 11589
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(803) 734-1330

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 4, 2019.

David Alexander
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned 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 J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Scott Richard Rowan, 375994, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of March, 2019.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of March, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.