STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County
Edgar W. Dickson, Circuit Court Judge

THE STATE,

Respondent,

vs.

JASON A. BAUMAN,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Bauman was indicted and tried by jury for criminal sexual conduct with a minor in the first degree. The jury convicted Bauman and he was sentenced by the Honorable Edgar W. Dickson to twenty-five years imprisonment.

STATEMENT OF FACTS

Victim's mother (Mother) was giving Victim a bath with Victim's brother when Mother saw Victim, with mouth open, lean forward to her brother's lap. Mother described what happened as follows:

> I was giving [Victim] and [Brother] a bath one evening and [Victim] was sitting in the tub facing [Brother]. And she proceeded to lean forward with her mouth open and I stopped her. . . . Her mouth opened towards Jeremy's lap and I stopped her and I asked her what she was doing.

ROA. p. 90, lines 9-13. Victim said "I'm going to suck his pee pee." Mother asked her where she learned that from and she said "Uncle Jason". ROA. p. 90, lines 22-24. Victim's Uncle Jason is Appellant Bauman, Mother's brother-in-law. ROA. pp. 90-91.

Before the bath tub incident, Mother had noticed Victim was "becoming aggressive at home, acting out and hitting, and . . . had noticeable behavior changes at school reported by her teachers." ROA. p. 94, lines 1-3. Mother also testified that one time she found Bauman and Victim alone after Mother and her husband returned from seeing a movie. Bauman and Victim were alone in the living room on the couch. The other two people present in the house, Bauman's father and Victim's sister, were asleep in the back bedroom. ROA. pp. 92-93.

Mother also noted Victim "was displaying interest in body parts as far as breasts and genitals. She also was flashing her private part . . . to her brother." ROA. p. 94, lines 4-7. Mother also noted other disturbing behavior. Victim would gag a lot when she ate a meal. She wet the bed twice one night. ROA. p. 95.

Mother described how Victim acted around Bauman as follows:

> She would show signs of not wanting him around.

> She would become agitated, angry; not really wanting to have anything to do with him.
>
> But it was more like a – kind of like a love hate relationship. She would talk to him but yet she didn't feel comfortable.

ROA. p. 95, lines 6-11.

Unsure what to do, Mother discussed the bathtub incident with Nurse Practitioner Amy Young. Pursuant to mandatory reporting laws, Nurse Young contacted law enforcement. Law enforcement in this case was the nurse's husband, a Summerville Police Officer. ROA. pp. 162-163.

Law enforcement did its duty and investigated the allegation. This included interviewing Bauman. He was interviewed by Detective Gebhardt and Detective Gibbons. Detective Gebhardt testified that Bauman appeared to understand the Miranda warnings and what was happening. Bauman appeared to be able to read – Detective Gebhardt noted Bauman was following each line as they went along. ROA. p. 172. Detective Gebhardt testified that Bauman's intelligence was not an issue during the interview. ROA. p. 193. Initially, Gibbons started to interview Bauman, but the interview was not productive, so Gebhardt started interviewing Bauman instead. ROA. p. 175.

Detective Gebhardt advised Bauman that four-year olds do not make these things up – four-year olds do not have the experience to make an allegation like that, something had to have happened. ROA. p. 176. Bauman told the detective that children do not always tell the truth. Bauman then told Detective Gebhardt that Victim is a sexual person and suggested that Victim learned this at school. ROA. p. 178. Bauman told the detective that Victim "stick[s] her tongue out at him and tries to grab his dick." ROA. p.

178, lines 4-22. Bauman told Detective Gebhardt that Victim is "a very attractive girl" and "that when she sits on his lap it makes him hard." ROA. p. 179, lines 1-3. Bauman told Detective Gebhardt that Victim pulled his penis out of his pants, that she put her mouth on the tip his penis "just for a second" and that it took Bauman "a lot of willpower to make her stop." ROA. p. 179, lines 5-17. Bauman told Detective Gebhardt, "he thought it was wrong but at first he thought it felt good." ROA. p. 179, lines 18-20. Bauman, at Detective Gebhardt's suggestion, wrote an apology letter to Victim's mother. ROA. pp. 180-182.

Dr. Allison Foster testified as an expert in forensic clinical psychology. She testified that pre-school children will often engage in what she termed "imitative play" where children will act out things they are learning. "Imitative play is sort of their first language really before the spoken word." ROA. p. 137, line 19 – p. 138, line 3. Dr. Foster would later explain imitative behavior is how children will learn, "it's literally kind of reenacting behavior to make sense out of it." ROA. p. 143, lines 5-7.

Dr. Foster further testified that a sexually abused child will often exhibit behavioral changes, termed adjustment reactions. Children may become more clingy or needy, they may regress in their skills – such as wetting their beds again, and having increased fear and anxiety. They also may become preoccupied with their private parts. ROA. pp. 138-139.

The State then elicited the following testimony from Dr. Foster:

> Q: In your opinion as an expert Doctor Foster if a little girl four years old goes down on her brother as if she is going to perform oral sex on him and states to her Mom I was going to suck his pee pee, in your opinion as an expert in that hypothetical question what significance does that event have with regard to any sexual abuse?

> A: It has significance and is the sort of imitative behavior that is not typical of preschool age children and would give rise to the hypothesis that sexual abuse or exposure something that – some kind of environmental exposure to a behavior that we do not typically observe in preschool age children.

ROA. p. 142, lines 16-21.

Adam Buhle has had trouble with the law in the past and he was in jail when Bauman told him all about the things he did to Victim. At first, Bauman fibbed and said he was in jail for stealing cars. But he then told Buhle he was there for his niece. He started touching his niece and having her touch him. He would watch pornography with her and try to have her play with him. ROA. pp. 215-216. "And after he would gradually move her into it she would start sucking his dick." ROA. p. 216, lines 17-20.

Buhle gave a statement on August 12, 2010 relating this information. That was before Bauman even received his discovery. Buhle testified that neither the prosecution nor law enforcement promised Buhle anything for his statement. ROA. pp. 217-218.

Buhle testified that he later pled to forgery and his probation was concomitantly revoked. Buhle testified it was an open plea, he was facing zero to eight years at the discretion of the judge, and received three years imprisonment. ROA. pp. 220-221. Buhle was interviewed by the prosecutor nine days before he was released from prison. ROA. p. 229. When Buhle testified at trial, he was no longer incarcerated and was employed. ROA. p. 213, lines 19-23. It appears at the time of trial he had nothing to gain but the satisfaction of seeing justice done for Bauman's sexual predations.

ARGUMENT

I.

Any error in admission of hearsay testimony is harmless in light of Bauman's confession to law enforcement and his detailed admission of sexual conduct with Victim to a jailhouse informant.

Bauman complains testimony by Mother was improper hearsay testimony. Specifically, after Victim told Mother she was going to "suck [her brother's] pee-pee"[1], Mother asked where she learned that and Victim responded "from Uncle Jason".

Even if assuming error, this testimony was harmless in light of the fact that Bauman confessed to law enforcement and offered a detailed account of his grooming and abuse of Victim to fellow inmate Buhle.

"When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Admission of improper evidence is harmless where it is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989).

In the instant case, Bauman's admissions to law enforcement and Buhle provided ample evidence of guilt. When other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless. State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-555 (2001). Therefore, reversal on this ground is not warranted.

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1 This portion is indisputably admissible under SCRE, Rule 803(3) as a statement of the declarant's then existing state of mind.

II.

Bauman's allegation of improper influence during cross-examination of the State's witness opened the door and ultimately made the witness's written statement admissible as a prior consistent statement.

Bauman argues the trial court erred in admitting Buhle's statement (State's Exhibit #3) into evidence, arguing the defense had not made an allegation of recent fabrication sufficient for the statement to be admissible as a prior consistent statement. However, any error was subsequently cured as the statement became admissible to rebut the allegation made during cross-examination that Buhle relied on Bauman's S.C.R.Crim.P. Rule 5 discovery materials in providing information in the statement.

On cross-examination, Bauman's counsel questioned Buhle about whether Bauman received his discovery and whether Bauman reviewed this discovery before giving his statement. ROA. pp. 231-232. The prosecution established that Buhle gave his statement on August 12 and that Bauman did not receive his discovery until August 25. See State's Exhibit 4; ROA. p. 234; p. 236, ROA. pp. 258-259.

The statement was admissible to show that Buhle's statement preceded receipt of discovery, refuting the allegation that the statement was fabricated by Buhle utilizing Bauman's discovery materials. Accordingly, the statement became admissible under both Rule 801(d)(1)(B), SCRE and under the open the door doctrine.

When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003). "When a party introduces evidence about a particular matter, the other party is

entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012).

Further, the statement was admissible to rebut the allegation of improper influence (use of discovery to manufacture the jailhouse confession). Under Rule 801(d)(1)(B), SCRE, "a hearsay statement is potentially admissible if it is consistent with declarant's trial testimony and 'is offered to rebut an express or implied charge against the declarant of recent fabrication or **improper influence** or motive.'" State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002) (emphasis added).

In Jeffcoat, the defense raised the issue of coaching by asking the victim if she practiced before testifying and whether anyone told her what to say. Defense counsel specifically asked whether the victim's mother and the solicitor told the victim what to say at trial. This Court found the statement was admissible as the line of questioning constituted an allegation of improper influence. This Court further found that the statement arose before the improper influence arose. Id., 350 S.C. at 397-98, 565 S.E.2d at 324.

United States v. Pena, 949 F.2d 751 (5th Cir. 1991) is instructive. In that case, the Fifth Circuit found that admission of a DEA agent's handwritten notes from an interview with Pena following Pena's arrest was not error. The Fifth Circuit found the notes were admissible under Federal Rule of Evidence 801(d)(1)(B) to rebut assertions that the agent inserted information learned after the interview into Pena's statement. Pena, at 757. The opinion quoted favorably the advisory notes to the rule as follows: "If the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it

should not be received generally." Id. (quoting FED. R.EVID. 801 advisory committee's notes). The Fifth Circuit concluded: "Defense counsel clearly intimated that McDaniel may have attributed his own knowledge of the drug operation to Pena." Id.

In the instant case, by suggesting that Buhle relied on discovery documents to make his statement to law enforcement, defense counsel opened the door to the statement coming into evidence to show that it was made before discovery was provided to Bauman. Therefore, any error is not prejudicial as the statement ultimately became admissible, even if initially inadmissible on direct examination. Any error was subsequently waived by defense counsel's cross-examination.

III.

The requested charge concerning jailhouse informants is an unconstitutional charge on the facts and the trial court did not err in declining to charge the instruction nor was Appellant prejudiced by the failure to give the instruction where the trial court gave a sufficient instruction to the jury concerning the determination of credibility of the witnesses.

Bauman argues the trial court erred in giving an instruction to the jury that a jailhouse informant's testimony should be reviewed with particular scrutiny and weighed with greater care than the testimony of an ordinary witness. This charge is an impermissible comment on the facts of the case and invades the province of the jury. Further, the trial court more than adequately instructed the jury on their responsibility in determining the credibility of a witness and the weight to assign a witness's testimony.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattision, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id., at 479, 697 S.E.2d at 583.

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472-73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006).

On review of a jury charge, an appellate court considers the charge as a whole in

view of the evidence and issues presented at trial. State v. Lee-Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

The Supreme Court has rejected similar requests for instructions. In State v. Steadman, 257 S.C. 528, 186 S.E.2d 712 (1972), the State relied largely on the uncorroborated testimony of a coconspirator. The trial court was asked "to instruct the jury that in determining the credibility of the testimony of the witnesses, 'they have the right if not the duty to take into consideration any bias or prejudice or hope of reward that a witness might have.'" Id., at 524, 186 S.E.2d at 717. The trial court denied the request and instead charged the jury "that it was their duty to pass upon the credibility of the testimony of the witnesses and that they could reject any part of the testimony if they found good reason for so doing." Id. The Supreme Court held: "The instructions clearly left to the jury the determination of the credibility of the testimony of the witnesses and the record shows no prejudice from the failure to give the requested instruction." Id.

In State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976), the appellant asserted the trial judge erred in "refusing to charge that the testimony of a codefendant should be carefully scrutinized and that the jury may consider whether the witness is fearful of retribution or has any hope of leniency from the prosecution." Id., at 573, 225 S.E.2d at 193. The South Carolina Supreme Court found "the trial judge's overall instruction that it was the jury's duty to pass upon the credibility of the testimony of witnesses, and that they could reject any part of the testimony if they found reason for doing so, was adequate." Id. (citing Steadman). The Supreme Court also held: "Any further instruction on this point might have invaded the province of the jury to draw inferences from the evidence." Id.

The charge in this case is unnecessary in light of the extensive instructions to the

jury by the trial court on determining the credibility of witnesses. During his initial remarks to the jury, the trial court advised the jury as follows:

> In determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable. It will be my responsibility to rule as a matter of law as to whether certain testimony is admissible at all. But once the testimony is admitted whether or not you believe it is solely for you to determine.
>
> In deciding whether to believe a witness you have the right to consider the interest of any witness, the bias of any witness, the prejudice of any witness, the opportunity for the witness to have seen the matters and things about which the witness may testify and the way the witness acts on the witness stand.
>
> You have a right to consider anything that is in the record that will help you evaluate the testimony of each witness. That means that it is your duty to pay close attention to the witnesses, to observe them, and listen to them. . . .

ROA. p. 80, line 10 – p. 81, line 2. Prior to jury deliberations, the trial court instructed the jury as follows:

> To determine the facts of this case you will have to evaluate the credibility that means the believability of each witness. Some of the things you may consider as you decide whether or not to believe a witness's testimony about a particular matter include what was the manner and appearance of the witness who testified. Was he or she straightforward or hesitant in answering? Was the testimony of a witness consistent or inconsistent? How did the witness come to know the facts that he or she testified to? What was his ability to know these facts?
>
> Is there some reason a witness would want to give testimony which would help or hurt one side or the other? In other words was the witness biased or prejudiced. Was the testimony of a witness strengthened or weakened by the other testimony or evidence.

ROA. p. 284, line 19 – p. 285, line 9.

The instructions in the instant case were more than adequate to evaluate Buhle's

testimony. The jury could decide how he came to know the facts about which he testified. The jury could decide the motive for Bauman to testify. The jury did not need a specific instruction for Buhle as opposed to an "ordinary witness" -- a troublingly vague and undefined term. However, Bauman's proposed instruction is an impermissible charge on the facts that would invade the province of the jury. Our state constitution commands that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. The South Carolina Supreme Court earlier this year determined that an instruction that included the language "strong evidence" was an impermissible comment on the weight of the evidence by the court. State v. Cheeks, 401 S.C. 322, 329, 737 S.E.2d 480, 484 (2013).

Bauman's requested charge offends the holding of Cheeks and the trial court did not err in declining the charge. Further, as in Collins, the trial court's instruction to the jury adequately advised the jury on how to judge credibility of the witnesses presented to it. Accordingly, Bauman's conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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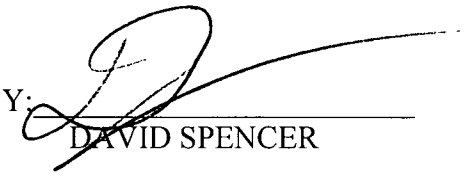
BY: 
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January 28, 2014

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Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 28th day of January, 2014.

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