STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEONARD EUGENE JENKINS,

APPELLANT

APPELLATE CASE NO. 2013-001753

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

Other Authorities

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing Appellant's request to use a video tape of an interview between the prosecution's key witness and a police investigator to impeach the witness regarding her inconsistent statements about an alleged lewd act in violation of Appellant's right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

On June 13, 2013, a York County Grand Jury indicted Appellant for a lewd act upon a child. The lewd act allegedly occurred "during or about the month of May 2011 through on or about the month of August 2011." R. 228. Assistant Solicitor Jennifer Desch called the case for trial before the Honorable Donald Hocker and a jury on August 13, 2013. Daniel Hall represented Appellant. R. 1. After a two day trial and three witnesses, the jury found Appellant guilty as charged. R. 219, lines 5-10. Judge Hocker sentenced Appellant to ten years' imprisonment suspended upon the service of three years' imprisonment and probation for three years. R. 227, lines 4-10; R. 230.

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

ARGUMENT

Violating Appellant's right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, the trial judge erred in refusing Appellant's request to use a video tape of an interview between the prosecution's key witness and a police investigator to impeach the witness regarding her inconsistent statements about an alleged lewd act.

Relevant facts

Appellant, his wife, and his three children lived across the street in a double-wide trailer from Minor 1 in 2011. R. 21, lines 6-22; R. 41, lines 14-16. Appellant's daughter and Minor 1 were friends and played together often. R. 21, line 25 – R. 22, line 1; R. 24, lines 2-8. Minor 1 claimed that on an unknown day during the summer of 2011 she was playing with Appellant's daughter when the two decided to enter Appellant's house to cool down. Although Minor was unable to give a specific day, she recalled that she went to Georgia to stay with her grandmother approximately two weeks after summer started and remained there until about a week before school started again. Later, Minor 1 testified that the alleged incident occurred before she went to Georgia for the summer. According to Minor 1, Appellant, his wife, and all three of his children were in the home when the alleged touching occurred. While Appellant's daughter used the bathroom, Minor 1 sat on the couch. Minor 1 claimed that at some point, Appellant sat down on the couch beside her. Appellant, who had been holding his toddler when he entered the room, placed the toddler on Minor 1's lap. Minor 1 claimed that while she was playing with the toddler, Appellant reached over and touched her. Specifically, Minor 1 claimed

that three of Appellant's fingers went into the front of her shorts. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25.

Minor 1 claimed she was wearing blue jean shorts with a blue and white striped top when this occurred. Additionally, Minor 1 claimed that Appellant put his hands "right in front where the zipper is" underneath her shorts and underwear. She elaborated that this was "right in the front, not between the legs but just like right down there in the front." Minor 1 referred to this area as "the privates." R. 29, line 11 – R. 30, line 6; R. 32, lines 19-24. All of this allegedly occurred while Minor 1 still had the toddler on her lap. When Appellant's daughter walked into the room from the bathroom, Minor 1 put the toddler on Appellant's lap and walked outside. She and Appellant's daughter played for the rest of the day. R. 30, lines 9-17. Even when Minor 1 returned from Georgia later in the summer, she and Appellant's daughter continued to play together. R. 36, lines 4-7.

Minor 1 never revealed this alleged encounter to Appellant's daughter. R. 33, lines 14-24. In fact, Minor 1 told no one because she "didn't want to lose one of [her] friends that [she] had on that road." R. 35, lines 9-19. When Minor 1 turned thirteen in February of 2012, she and her mother were watching a television program about a sexual assault. When her mother advised Minor 1 to confide in her if something like that ever happened, Minor 1 "blurted it out." Her mother called the police immediately. R. 36, line 19 – R. 37, line 13; R. 39, lines 16-18. When the police arrived, Minor 1 did not write a statement; instead, her mother wrote the official statement to police without Minor 1 even present. R. 37, lines 14-20; R. 45, lines 4-14.

On cross-examination, Minor 1 admitted she was interviewed by Detective Neely and the interview was videotaped.[1] R. 38, line 20 – R. 39, line 2. When she spoke to Neely, the alleged incident would have occurred eight or nine months earlier according to her trial testimony. However, she told Neely that it occurred "two to three months ago." In fact, she said "it happened right before school started." When asked about this inconsistency, she explained that "it slipped [her] head because [she] was so nervous." R. 39, line 10 – R. 40, line 7. Later, Minor 1 testified that she realized she had "slip[ped] up" regarding the date after she was interviewed by Neely or the solicitor. She did not believe that Neely or the solicitor told her she had slipped up, but she did try "to get [her] story right." R. 46, line 5 – R. 47, line 2. Finally, Minor thought she had told Neely that she did not tell anyone what happened because of her friendship with Appellant's daughter, but she was unable to give a definitive answer because she had not seen the video. R. 47, lines 16-23.

Additionally, Minor 1 testified at trial that she had on a blue and white top when the incident allegedly occurred, but on the video she told Neely she was wearing the top she had on at the time of the interview. R. 40, lines 16-24. When Appellant asked if the top she had on during her interview with Neely was an olive green t-shirt, Minor 1 responded, "I mean, I can't remember exactly what the top was. It was - - it was either blue or green. I can't really remember." R. 40, line 25 – R. 41, line 7. Further, on the video, Minor 1 told Neely that when Appellant touched her, she had her "knees almost up to [her] chest" and her legs were spread. This contrasted greatly with her trial testimony

[1] Defense counsel proffered the video as defendant's exhibit #2. The exhibit is on file with this Court.

that Appellant had placed his toddler on Minor 1's lap. R. 43, line 16 – R. 44, line 4. Minor 1 did not remember telling Neely that she only thought Appellant's hand had touched her. R. 48, lines 2-9. Despite the stark contrast between her trial testimony and her video interview, Minor 1 testified that she told Neely "exactly what happened." R. 45, lines 17-19.

On re-direct examination, the prosecutor emphasized that Minor 1 had not watched the video of the interview and had not discussed the video with the prosecutor. To challenge the cross-examination, the prosecutor asked: "When you are answering Mr. Hall's questions, are you just trusting he is giving you what happened or do you have a recollection of what you talked about?" Minor 1 responded, "I was pretty confused about what he was saying is what he had gotten from the report." R. 53, line 25 – R. 54, line 11. This line of questioning continued with the prosecutor asking "When Mr. Hall is asking you questions about what is in the video, do you independently remember or do you understand or trust that he is telling you what he viewed on the video?" Minor responded, "kind of what he viewed on the video." R. 54, lines 19-23.

During a break, the solicitor argued that although the video was inadmissible due to the statute and case law because Minor 1 was thirteen-years old at the time of trial, the video was admissible as a prior consistent statement to rebut an allegation of recent fabrication. However, the solicitor determined that the admissibility was limited to time and place. R. 60, line 7 – R. 66, line 8. When the judge inquired if the solicitor wanted the "whole video to come in," the solicitor responded, "It is not that I don't or I do. If he would like to put it in, he could put it in. He could put it in as a defense exhibit." R. 66, lines 13-17. After the judge ruled that portions of the video would be admissible as a

prior consistent statement to rebut an allegation of recent fabrication as long as it was limited to time and place, Appellant moved to admit the entire video pursuant to Rule 613, SCRE. Appellant argued that the video contained prior inconsistent statements made by Minor 1 and he should be permitted to impeach her with those statements. R. 71, line 7 – R. 75, line 1.

The prosecution countered that there were no "outright denials" and argued that only an "outright denial" would "trigger[] extrinsic evidence." However, the prosecutor admitted Minor 1 repeatedly testified that she could not remember what her statements in the video had been. R. 75, line 10 – R. 76, line 24.

When Neely testified, Appellant moved to introduce the video of the interview between Neely and Minor 1 into evidence pursuant to Rule 801(d)(1)(A). Appellant explained the video contained inconsistent statements made by Minor 1. Additionally, Appellant argued that the rule of completeness required the admission of the entire video. R. 109, line 25 – R. 111, line 15. Appellant noted Minor 1's testimony differed from the video interview in multiple respects, including the timing of the alleged incident, how she was sitting, and how the alleged touching occurred. R. 112, lines 5-25. Although the prosecutor admitted the video contained inconsistent statements, the prosecutor opposed the introduction of the video because Appellant cross-examined Minor 1 as to those inconsistencies. R. 119, lines 3-21.

The judge ruled first that Minor 1 was advised of the time and place of the statement and to whom the statement was made satisfying part of Rule 613(b). Next, the judge ruled that Minor admitted that in the video that "she had the same top on during the video." He further found that Minor 1 admitted that she said in the video that her knees

were to her chest and that her legs were spread at the time of the alleged incident. Additionally, Minor 1 acknowledged that she did not tell anyone about the alleged incident because she did not want it to affect her friendship. However, the judge concluded that Minor 1 "neither admits nor denies telling Detective Neely that the defendant's hand was touching her. She said she did not remember." Based upon those findings, the trial judge ruled the video was not admissible for impeachment. R. 137, line 1 – R. 138, line 23; R. 154, lines 8-23.

Discussion

The South Carolina Rules of Evidence permit the introduction of extrinsic evidence of prior inconsistent statements of a witness when

> the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613, SCRE (emphasis added); see also State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998)(finding error in failing to admit extrinsic evidence of a statement where the witness denied making the statement). A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).

This Court observed that "[i]n determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification." State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003)(citing State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118

(1973) & C.J.S. Witnesses 727 (2002)). This Court explained that "[g]enerally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. Id. at 80, 591 S.E.2d at 636.

> If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not recollect, or, or as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Id. (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Nothing short of an absolute unequivocal admission satisfies Rule 613(b). In Blalock, 357 S.C. at 80, 591 S.E.2d at 636, this Court held the witness's response to questions about her prior statement did "not meet the standard of a clear and unequivocal admission that the precedent case law demands." Acknowledging that the witness did "admit that she said the portion of the statement quoted" toward the end of the examination, this Court held such an admission was not sufficient because the witness was adamant throughout her testimony that the statement as recorded by the detective was incomplete. Id. at 81, 591 S.E.2d at 636.

Similarly, in State v. Carmack, 388 S.C. 190, 201-202, 694 S.E.2d 224, 230 (Ct. App. 2010), this Court held that a prior inconsistent statement by a witness who said his prior statement was "'accurate,'" that "certain details were not in his original statement because such details were not inquired into at the time and 'everything was chaotic'" was admissible because the witness "did not unequivocally admit making a prior inconsistent statement." In State v. Moses, 390 S.C. 502, 523, 702 S.E.2d 395, 406 (Ct. App. 2010), this Court held the trial court properly admitted a prior inconsistent statement by a witness who

testified she "could not remember" having made the prior statement because such was "not an unequivocal admission."

The trial judge erred in finding Minor 1's videotaped interview with Neely was not admissible pursuant to Rule 613(b), SCRE because Minor 1 admitted all of the inconsistencies or stated she did not remember. A review of the entirety of Minor 1's testimony reveals Minor 1 did not admit unequivocally the inconsistent statement. As an initial matter, the trial judge clearly erred in finding the video inadmissible concerning whether Minor 1 told Neely that she only thought Appellant's hand was touching her where the trial judge concluded that Minor 1 "neither admit[ted] nor denie[d] telling Detective Neely that the defendant's hand was touching her. She said she did not remember." This finding required the trial judge to allow the introduction of the video as extrinsic evidence. Although the judge found that Minor 1 neither admitted nor denied telling Neely that she only thought Appellant's hand was touching her, the transcript revealed that Minor 1 actually and unequivocally denied that statement:

> Q. Do you remember telling Detective Neely on the video, that - - I think your words were, I think that his hand was touching - - do you remember saying that? You don't remember that?
>
> A. No.

R. 48, lines 2-5. This denial required introduction of extrinsic evidence of the inconsistent statement pursuant to the plain language of the statute and controlling case law.

Additionally, the trial judge's other findings that Minor 1 admitted the inconsistent statement in the video were incorrect when the entire testimony is reviewed. Although Minor 1 stated that she told Neely that the alleged incident took place two to

three months prior to her interview with Neely, she explained her answer by saying "I mean, I hadn't really a good time - - I was trying to remember exactly when it happened because I tried as best as possible, but it slipped my head because I was so nervous." R. 39, line 19 – R. 40, line 2. Concerning her response about the telling Neely she was wearing the same top on the date of the interview as she wore on the date of the alleged incident, Minor 1 responded, "I believe so, yes." R. 40, lines 20-24. When Appellant queried Minor 1 on the color of the shirt she wore on the date of the interview, Minor 1 responded, "I mean, I can't remember exactly what the top was. It was - - it was either blue or green. I can't really remember." R. 40, line 25 – R. 41, line 7. When Appellant asked if Minor 1 had told Neely that she had not told anyone about the alleged incident because of her friendship with Appellant's daughter, Minor responded, "I thought I had." R. 47, lines 16-22. None of the above responses were unequivocal admissions; in fact, at least, one of the responses was an obvious and unequivocal denial and the others were clear equivocations.

Although on cross-examination, Minor 1 admitted she told Neely that her knees were almost to her chest and that her legs were spread when the alleged touching took place, R. 43, line 20 – R. 44, line 4, the state's re-direct examination of Minor 1 revealed that even these admissions could not be construed as unequivocal admissions due to Minor 1's lack of memory of the interview with Neely. Essentially, the re-direct examination turned the unequivocal admissions into equivocations. The state's re-direct examination of Minor 1 reinforced and highlighted the equivocation of Minor 1's responses relative to her prior inconsistent statements. After the prosecutor made clear that Minor 1 had not seen the video, she asked, "So the video that was taken a year and a

half ago - - when you are answering Mr. Hall's questions, are you just trusting he is giving you what happened or do you have a recollection of what you talked about?" Minor 1 responed that she was "pretty confused about what he was saying is what he had gotten from the report." R. 54, lines 5-11. Unabashed, the prosecutor continued: "When Mr. Hall is asking you questions about what is in the video, do you independently remember or do you understand or trust that he is telling you what he viewed on the video?" Minor 1 responded, "Um, kind of what he viewed on the video." R. 54, lines 19-23. Turning to Minor 1's statement on the video regarding when the incident occurred, the prosecutor asked "how narrow" was Minor 1's answer to Neely on the timeframe. Minor 1 responded that she was trying to narrow it down and told Neely all that she could remember. R. 55, lines 10-21. In response to the prosecutor's questioning on re-direct examination, Minor 1 testified that she could "not remember a lot of [the video interview] because it was about maybe - - it was just a while ago" and she could "not really remember exactly." R. 58, lines 11-21.

During the argument on the admissibility of the video interview, the prosecutor argued Minor 1 had made no "outright denials." According to the prosecutor, only an "outright denial" would "trigger[] extrinsic evidence." Therefore, the prosecutor admitted Minor 1's repeated testimony that she could not remember what her statements in the video had been were not relevant to the analysis. R. 75, line 10 – R. 76, line 24. The trial judge seemed to buy the prosecutor's argument despite clear precedent to the contrary.

The case law is clear that unless a witness unequivocally admits to making the prior inconsistent statement, then extrinsic evidence of the prior inconsistent statement is

admissible. The trial judge clearly erred in excluding the video interview containing Minor 1's prior inconsistent statements because Minor 1 failed to unequivocally admit to making those statements. The prosecutor's re-direct examination portrayed defense counsel as dishonest in his cross-examination by suggesting that what defense counsel said was on the video was not in fact on the video. This was particularly disingenuous in light of the prosecutor's repeated objections to Appellant's attempts to introduce the video into evidence. The prosecutor misled the jury in her questioning of Minor 1 as to what was contained on the video and how the Minor 1's statements to Neely differed from her trial testimony. The deceitful questioning created a false impression for the jury regarding the veracity of Minor 1 and of defense counsel personally.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction for lewd act and remand for a new trial based upon the trial judge's erroneous ruling that the video interview of the prosecution's key witness was not admissible as extrinsic evidence of prior inconsistent statements where the witness failed to admit unequivocally that she made the prior inconsistent statements.

Respectfully submitted,

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Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of December, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

December 8, 2014

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