STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRUCE DEWAYNE HALL,

APPELLANT

APPELLATE CASE NO. 2013-002390

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting numerous statements made by Minor to an emergency room nurse that were documented in a sexual assault examination report into evidence since the statements were hearsay, were not limited to the time and place of the alleged incident, and contained information not necessary for any medical diagnosis or treatment of Minor?

STATEMENT OF THE CASE

An Aiken County Grand Jury indicted Appellant at the January 22, 2007 term of General Sessions for second degree criminal sexual conduct (CSC) with a minor, lewd act upon a child, and possession of a weapon during the commission of a violent crime. R. 268 – R. 273. His case was called to trial on April 22, 2008 before the Honorable D. Garrison Hill, and a jury. R. 1. Assistant Solicitors Brenda Brisbin and Rochelle Oldfield represented the state, and Robert T. Williams, Sr. represented Appellant. R. 1.

At the conclusion of the trial on April 23, 2008, the jury found Appellant guilty of second degree CSC with a minor and lewd act upon a child, but acquitted him of the weapons offense. R. 240, l. 16 – 241, l. 8. Judge Hill sentenced Appellant to twenty years imprisonment for second degree CSC with a minor and ten years consecutive for lewd act. He was also ordered to register as a sex offender. R. 245, ll. 14-22.

On April 28, 2008, Appellant filed a Motion for Reconsideration of Sentence "on the grounds that, under all the facts and circumstances, a lesser sentence should have been imposed."[1] R. 265 – R. 266. Judge Hill denied the Motion for Reconsideration of Sentence

[1] Presumably, one of "the facts and circumstances" defense counsel refers to in his Motion for Reconsideration of Sentence is the fact that Appellant is mentally retarded. The solicitor informed the court pretrial that Appellant underwent two court ordered competency evaluations: one at the South Carolina Department of Mental Health (DMH) and a follow up evaluation at the South Carolina Department of Disabilities and Special Needs (DDSN). The reports from these evaluations were made a court's exhibit. See R. 255 – R. 264 (Court's Exhibit No. 1). The report from DMH indicated Appellant was mildly retarded and that his I.Q., based on an intelligence test from 2004, was 51. DMH therefore referred Appellant to DDSN for an evaluation of his competence to stand trial. DDSN also found Appellant was mildly retarded based on his prior I.Q. scores. However, the DDSN report states, "Mr. Hall [Appellant] was uncooperative with the evaluation to the extent that an opinion about the matter of possible competency to stand [trial] cannot be rendered." See R. 255 – R. 264 (Court's Exhibit No. 1). Despite the results from the DMH and DDSN evaluations, defense counsel did not have Appellant

by order dated October 24, 2013 indicating, "This motion was not served on the undersigned judge." R. 267.

This appeal follows.

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independently evaluated and he informed the court he would not be contesting Appellant's competency to stand trial. R. 8, l. 14 – 9, l. 3.

ARGUMENT

The court erred by admitting numerous statements made by Minor to an emergency room nurse that were documented in a sexual assault examination report into evidence since the statements were hearsay, were not limited to the time and place of the alleged incident, and contained information not necessary for any medical diagnosis or treatment of Minor.

Relevant Facts

Minor, who was thirteen years old at the time of the trial, was the first witness to testify for the state.[2] Based on her testimony, it appears Minor and her extended family live in a small grouping of mobile homes that are located on two separate dirt roads. These dirt roads are separated by a wooded area. See R. 17, ll. 1-23; see also R. 29, l. 8 – 32, l. 5. Minor testified that Appellant is her uncle. Specifically, he is her mother's brother. R. 16, ll. 9-12.

Minor explained she was at her cousin's home on August 5, 2006 and that, when it was time for her to go home, her aunt told her she had to walk home with her uncle, Appellant. She claimed while she and Appellant were walking through the wooded area that separated the two dirt roads, Appellant made her pull her pants down to her knees and get on the ground. According to Minor, Appellant then "put his private part in [her] private part" and did not stop until a substance like "water" came out of "his private part" and went "inside of [her]." Minor also alleged that Appellant had a silver knife during the incident and put it close to her neck, but did not actually touch her neck with the knife. R. 19, l. 17 – 22, l. 18. After he stopped, Minor said Appellant continued to walk her home and, when

[2] The name of Minor is redacted pursuant to the April 15, 2014 order from our Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

they came out of the woods, her mother, her Aunt Theresa, and her Uncle Gary were all there. She told her Aunt Theresa that "Bruce [Appellant] messed with [her]" and Theresa called the police. R. 22, l. 19 – 23, l. 22. After the police arrived, Minor testified she went to the hospital and was examined by a doctor and a nurse. She also said she spoke to a law enforcement officer at the hospital and told her what happened. R. 23, l. 23 – 25, l. 5.

On cross-examination, Minor clarified that she had spent the night at her cousin's house and that it was the next morning when she was walking home that this incident allegedly occurred. She testified that her Aunt Ella told her it was time to go home and asked Appellant, who was out in the yard, to walk Minor home. Minor explained that she was in the woods with Appellant for a "long time." She originally maintained they were in the woods for three to four hours, but ultimately said they were in the woods for eight hours and did not arrive at her house until after dark. R. 37, l. 21 – 39, l. 7. According to Minor, she and Appellant were in the woods for seven hours before Appellant allegedly "raped [her]," which occurred when "[i]t was getting night." She said Appellant was drinking beer and smoking cigarettes the entire time and that she eventually started screaming for Ted, a law enforcement officer that lived nearby, because she wanted to go home. According to Minor, it was at this point that Appellant allegedly took out the knife and assaulted her. He then walked her home. R. 41, l. 18 – 45, l. 2.

Theresa Hendrix, Minor's aunt, testified that she received a telephone call sometime after eight o'clock on the night of August 5, 2006 and that, as result, she went to Minor's mother's home. R. 48, l. 18 – 49, l. 4. After speaking with Minor's mother, Theresa learned Minor was not home and the two went looking for her. R. 49, ll. 10-21. Theresa said they looked for Minor for approximately thirty minutes to an hour until they eventually saw

Minor walking up the dirt road with Appellant. She claimed Minor "had straw all in her hair and her clothes were dirty." R. 49, l. 23 – 51, l. 9. Because of her appearance, Theresa said she asked Minor if "he [Appellant] mess[ed] with her" to which Minor responded, "Yes." Theresa then called 9-1-1 and an ambulance came and took Minor to the hospital. R. 51, l. 10 – 52, l. 18.

Betsy Sue Hendrix, Minor's mother, testified next. She explained that Minor spent the night at her sister's house and was supposed to come home around noon the next day to be watched by Minor's step-father because Hendrix had to work. Hendrix testified that when she got home from work around 7:30 that evening, Minor was still not home. Consequently, she went to her sister's house looking for Minor. R. 56, l. 4 – 57, l. 4. When she discovered Minor was not at her sister's house, she returned home. She then called her other sister, Theresa, and Theresa came over to help her look for Minor. The two looked in the woods, but could not find Minor. R. 57, l. 5 – 58, l. 9. Eventually, around ten o'clock, Hendrix claimed she and Theresa saw Minor "coming down the road with Bruce Hall [Appellant]." Hendrix testified that when Minor reached them she mostly talked to Theresa and that Theresa ultimately called 9-1-1. R. 58, l. 11 – 59, l. 25.

David Blevins, a juvenile investigator with the Aiken County Sheriff's Office, testified that he responded to Minor's residence on August 5, 2006 in reference to an alleged sexual assault. Blevins testified that he began "canvassing" the area between the two roads, which was a "pretty good sized wooded area," but could not find the location where the alleged assault took place. R. 63, l. 7 – 66, l. 9. Blevins said that all law enforcement found were "a set of foot tracks that were barefooted and a pair of foot tracks that were what

appeared to be tennis shoes exiting this wooded area [near Minor's residence]." R. 66, l. 19 – 67, l. 5. He photographed these tracks. R. 67, l. 8 – 70, l. 23.

Blevins testified that his only other involvement in the case took place after Appellant was arrested. He said he "secured a search warrant for [Appellant's] person where I took him to a certified medical facility and had blood and pubic hairs withdrawn from his body to be analyzed against the evidence we had collected." R. 71, ll. 14-25.

Kim Sievers, also a juvenile investigator with the Aiken County Sheriff's Office, testified that she responded to the emergency room at the Aiken Regional Medical Center on August 5, 2006 to interview Minor in reference to an alleged sexual assault. Sievers said she conducted a forensic interview and utilized the "RATAC protocol." However, she maintained the interview was not videotaped because "[w]e responded in the middle of the night and interviewed her at the ER where we didn't have that capability." R. 94, l. 16 – 95, l. 13. According to Sievers, Minor claimed she had been sexually assaulted and said the alleged assault occurred earlier that evening when she was walking home on a path through the woods that connected her home to another residence. R. 95, l. 21 – 97, l. 3.

On cross-examination, Sievers testified that her notes from her interview with Minor indicate Minor told her Appellant did not produce a knife until after he allegedly assaulted her. R. 107, l. 18 – 108, l. 22.. She also testified that Minor told her Appellant penetrated her three different times and that he masturbated afterwards. R. 108, l. 23 – 110, l. 4.

Sylvia Scott, a nurse in the emergency room at Aiken Regional Hospital, was the next to testify. R. 118, ll. 22-25. She explained that she examined Minor around 12:30 in the morning on August 6, 2006 concerning a complaint that she had been sexually assaulted. R. 119, l. 10 – 120, l. 10. When asked by the solicitor what Minor told her that could be

used for medical diagnosis and treatment, Scott said, "She [Minor] stated that she was told to go down this other path, and that when she went down this other path that he grabbed her and he held her hands down. And she stated he told her to pull her pants down prior to that, and to pull her pants off, and she did, and said that he, her words were, and he stuck his wiener in me." R. 121, ll. 8-20. Scott also testified that Minor "was very scared because he had told her that if she told anyone that he would kill her or he would slit her throat." R. 123, ll. 20-22.

After getting this detailed information from Minor, Scott testified that she completed a sexual assault kit. Specifically, she collected a urine sample and swabs from Minor's mouth and rectum. However, Scott said that the doctor collected a swab from Minor's vagina and cervical area. R. 123, l. 23 – 125, l. 18.

Walter Jackson, the doctor who examined Minor at the emergency room on August 6, 2006, testified that he observed dirt on "the external part of her genitals" and that inside her vagina it was red and irritated. He also maintained there was a "white, stringy discharge" present. R. 141, l. 8 – 142, l. 14. Furthermore, Jackson explained that he completed the "sexual assault kit," which included vaginal and rectal swabs. R. 147, ll. 13-25.

During Dr. Jackson's testimony, the state sought to admit into evidence a written report titled, "Adult Victim Sexual Assault Information and Examination Form," which documented the doctor's findings. R. 143, l. 11 – 144, l. 4. This form also contained notes taken by Sylvia Scott, the nurse who examined Minor, about what Minor alleged occurred. R. 148, l. 11 – 159, l. 1; R. 246 – R. 250. The first page of this report contains Minor's basic information, her medical history, a brief summary of the alleged assault, and other

questions and answers regarding details of the alleged assault, such as whether coercion was used, the identity of the alleged assailant, and whether the assailant was a relative. R. 246 – R. 250.

The notes taken by Sylvia Scott under the "Brief Summary of Assault" section state, "Aug 5, 2006 – late evening – right before dark, in woods far from her house – with uncle who told her to go down another path – into woods – he pulled me down – told me to take my pants off – to pull them down – open my legs – and he stuck his 'wiener' in me – I was crying – he forced his wiener in me – I told him to stop." The report identifies the alleged assailant as "Uncle." It also indicates Minor claimed "verbal threats" were made and that she "states he would kill her if she told anyone – he would slit my throat." See R. 246 – R. 250.

Defense counsel objected to this exhibit arguing, "The problem I have is not really with the findings of the doctor, with his physical findings . . . , because I think that certainly is appropriate. The problem I have is with the history that is reported. And obviously any time a doctor sees a patient or sees someone then they take a history. But it appears to be another way in which the testimony from an alleged victim could be changed, it could be put down. It's not coming from her in regards to what has happened. It's actually coming from the written page. So my basic objection, Your Honor, is really only to the first page." R. 144, l. 3 – 145, l. 8.

The solicitor argued in response, "Your Honor, the nurse already testified to what's on that first page. Under the medical diagnosis and treatment exception to the rules, the hearsay rules. And this is a business record, if you want to call it that. That's a business record that's routinely kept in the course of business at the emergency department. And I

believe it is admissible. Actually, I don't think there's anything on that first page that Ms. Scott didn't already testify to." R. 145, ll. 10-18.

Defense counsel later clarified that he was objecting to the first page of the report because it contained hearsay, the contents were "redundant," and "it's certainly not necessary." R. 145, l. 25 – 146, l. 10.

The court ultimately overruled Appellant's objection finding that the contents of the first page of the report "has already been in evidence." He said, "There was a foundation laid at that time for it being information taken in, for purposes of medical diagnosis and treatment."[3] R. 146, ll. 11-17.

Lilly Gallman, a SLED agent who was qualified as an expert in DNA analysis, testified that she found semen on the vaginal and rectal swabs collected from Minor during her examination at the hospital. R. 160, l. 9 – 162, l. 3; R. 169, l. 5 – 170, l. 2. Gallman also testified that DNA profile she developed from the vaginal and rectal swabs matched the DNA profile of Appellant. She maintained that "the probability of randomly selecting an unrelated individual having a DNA profile matching these items is one in 16 quadrillion." R. 173, l. 22 – 174, l. 12.

The jury ultimately found Appellant guilty of second degree CSC with a minor and lewd act upon a child. R. 240, l. 16 – 241, l. 8. During sentencing, the solicitor listed Appellant's prior record, which consisted of only a handful of magistrate convictions, specifically trespassing, driving under the influence, criminal domestic violence, public

[3] The court is presumably referring to Sylvia Scott's testimony. Scott was the nurse who obtained Minor's medical history at the emergency room and took notes regarding what Minor alleged took place on August 5, 2006. See R. 118, l. 22 – 137, l. 9. Additionally, the court is likely citing to Rule 803(4), SCRE, which is an exception to the hearsay rule for "Statements for Purposes of Medical Diagnosis or Treatment."

disorderly conduct, and an open container. R. 243, ll. 5-12. Defense counsel informed the judge that Appellant is mildly retarded and has an IQ of only 51. He also said that Appellant is "very limited intelligence-wise." R. 243, l. 21 – 244, l. 10. The only thing Appellant said during sentencing was "Can I go to the crazy house?" R. 245, ll.5-12. Despite Appellant's limited prior record and the fact that he is mildly retarded, the court sentenced him to an aggregate of thirty years imprisonment. R. 245, ll. 14-22.

Discussion

The court erred by admitting numerous statements made by Minor to the emergency room nurse that were documented in a sexual assault examination report into evidence since the statements were hearsay, were not limited to the time and place of the alleged incident, and contained information not necessary for any medical diagnosis or treatment of Minor. Furthermore, Appellant was prejudiced by this error because the contents of this report improperly bolstered Minor's testimony.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. Under Rule 801(d)(1)(D), SCRE, "[a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony in a criminal sexual conduct case . . . where the declarant is the alleged victim and the statement is limited to the time and place of the incident . . ." See Jolly v. State, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994) (citing Simpkins v. State, 393 S.C. 364, 367, 401 S.E.2d 142, 143

(1991)) ("[I]n criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration, limited to the time and place of the assault and excluding details or particulars."); see also State v. Burroughs, 328 S.C. 489, 497, 492 S.E.2d 408, 411-412 (Ct. App. 1997).

Minor's statements contained on the first page of the examination report are hearsay because they are "out of court statement[s]" offered by the state "to prove the truth of the matter asserted." See Rule 801(c), SCRE. Specifically, the state sought to admit these statements into evidence to corroborate Minor's allegations and prove Appellant sexually assaulted her. Furthermore, Minor's statements contained in the report were not limited to the time and place of the incident.[4] See Rule 801(d)(1)(D), SCRE; see Jolly, 314 S.C. 17, 20, 443 S.E.2d 566, 568; see also Burroughs, 328 S.C. at 497, 492 S.E.2d at 411-412.

Minor's statements describing the details of the alleged sexual assault that were recorded by Sylvia Scott on the examination form fall outside the scope of the medical diagnosis or treatment exception to the hearsay rule. See Rule 803(4), SCRE. This rule permits the introduction of hearsay for the "purpose of medical diagnosis or treatment." It states, "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (4) Statements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or

[4] Appellant acknowledges that Minor's statements contained in the report that are "limited to the time and place of the incident" are not considered to be hearsay under Rule 801(d)(1)(D), SCRE. This would *only* include the portion of the report that states, "Aug 5, 2006 – late evening – right before dark, in woods far from her house." See R. 246 – R. 250.

sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment . . ." See Rule 803(4), SCRE.

Our supreme court "stated in Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 154 S.E.2d 112 (1967), that the patient's history as told to the doctor was admissible *only* as information upon which the doctor relied in reaching his professional opinion. It is not admissible as substantive proof of the facts stated." State v. Brown, 286 S.C. 445, 446, 334 S.E.2d 816, 816-817 (1985) (emphasis in original).

In Brown, our supreme court held that the admission of a doctor's testimony identifying the defendant as the perpetrator, based on statements of the child, was error. Id. at 446-447, 334 S.E.2d at 816-817. The court stated, "The perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim. A doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses." Id. at 447, 334 S.E.2d at 817.

Based on Brown, it is clear the court in this case erred by admitting the contents of the report that identified "Uncle" as the alleged perpetrator since the identity of the perpetrator was not, and could not have been, relied on by the doctor or nurse in diagnosing or treating Minor. See R. 246 – R. 250. Furthermore, it was error for the court to admit the portion of the report regarding whether "any coercion" was used. The report indicates that Minor alleged "verbal threats" were used and that she said, "[H]e would kill her if she told anyone – he would slit her throat." See R. 246 – R. 250. This information also could not have been relied on by the doctor or the nurse in diagnosing or treating Minor.

Likewise, it was error for the court to admit Minor's statements contained in the report that she was "with uncle who told her to go down another path – into woods – he pulled me down – told me to take my pants off – to pull them down – open my legs" and "I was crying" and "I told him to stop" since these statements were also inadmissible hearsay and could not have been relied on by the doctor or nurse in reaching any medical conclusions or diagnosing and treating Minor. See R. 246 – R. 250.

If anything, all of these hearsay statements were used as a tool to prove facts that should have properly been proved by other witnesses, specifically through Minor's testimony. See Brown at 447, 334 S.E.2d at 817.

The error in admitting Minor's statements recorded in the sexual exam report was prejudicial to Appellant because the inadmissible hearsay was used by the state to improperly bolster Minor's testimony and suggest she was telling the truth since she had previously told the nurse allegations consistent with her testimony. See Jolly, 314 S.C. at 21, 443 S.E.2d at 569 ("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.") (emphasis in original); see also State v. Barrett, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989).

CONCLUSION

Based on the foregoing argument, Appellant's convictions and sentence should be reversed and this case remanded to the Aiken County Court of General Sessions for a new trial.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of January, 2015.

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 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."

January 16, 2015

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APPELLANT

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 Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of January, 2015.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of January, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.