ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MANUEL ANTONIO PACHECO

APPELLANT

APPELLATE CASE NO. 2014-001671

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in charging the jury, over objection, that the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence because, under the facts of this case, the charge confused and misled the jury, shifted the burden of proof, improperly bolstered the testimony of the minor prosecuting witness and constituted an improper comment on the facts?

STATEMENT OF THE CASE

In May of 2014, the Greenville County Grand Jury indicted Appellant for criminal sexual conduct with a minor first degree, indictment #2014-GS-23-2609. On July 14, 2014, Appellant proceeded to jury trial before the Honorable Robin B. Stilwell. John Erwin represented Appellant at trial. Lisa Bentley prosecuted the case. The jury returned with a verdict of guilty. Judge Stilwell sentenced Appellant to thirty (30) years. A timely notice of intent to appeal was served on July 29, 2014. This appeal follows.

STATEMENT OF FACTS

Appellant lived with Sabrina Martinicorena and her minor son from 2006 until 2009. (R. p. 43, lines 1-25). Appellant went to federal prison in 2009 for drug charges. (R. p. 53, lines 10-21). Martinicorena testified that in March of 2011, two years after Appellant went to prison on drug charges, her son told her that Appellant inappropriately touched him. (R. p. 59, lines 15-24). The mother admitted that at the time she did not report the allegations. (R. p. 54, lines 19-25). The mother testified that she discussed the allegations with her boyfriend at the time, Roger Flatus, and they decided not to report the allegations to the police. The mother is from Uruguay and is undocumented. (R. p. 50, lines 12-23). The mother testified that she and Roger Flatus planned to get married and Flatus had a green card. (R. p. 47, line 16 – p. 48, lines 1-8; R. p. 55, lines 17-23). The mother confirmed that once they married, she too would have a green card that would allow her and her son to stay in the country. (R. p. 55, line 24 – p. 56, lines 1-6). The marriage, however, did not take place. (R. p. 48, lines 9-10).

On Halloween of 2011, the mother and Flatus had a physical altercation and Flatus called immigration authorities. (R. p. 57, line 18 – p. 58, lines 1-7). As a result, mother and son fled into the woods where they hid for three hours. (R. p. 58, lines 8- p. 59, lines 1-4). A few days after the Halloween incident the mother reported the earlier allegations made against Appellant in March. (R. p. 59, lines 5-9) In November of 2011, a victim's advocate in Simpsonville, South Carolina referred the son to see counselor Robert Taylor. (R. p. 38, lines 6-25). In March of 2012, the son was interviewed at the Julie Valentine Center. The interview was recorded and the video introduced in evidence at trial, without objection, as State's Exhibit #2. (R. p. 93, lines 1-8).

ARGUMENT

> The trial judge erred in charging the jury, over objection, that the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence because, under the facts of this case, the charge confused and misled the jury, shifted the burden of proof, improperly bolstered the testimony of the minor prosecuting witness and constituted an improper comment on the facts.

At the close of the case the judge asked for any requests to charge the jury. The prosecutor stated, "I do not have any to hand up, Your Honor. The State would request the noncorroboration charge, the Rayfield charge, but their charge is fine." (R. p. 100, lines 1-3). Appellant objected stating, "Judge, I'd object to that charge being included. That is the case in every criminal case, the victim's testimony does not have to be corroborated. By highlighting that fact in this case – there, essentially, should be the burden from the State to us in a jury's mind, I think, and I believe that's improper. And, also, in a way it's bolstering the victim's testimony just by highlighting that fact, in particular, in these CSC cases. It just seems to me it's going to cause all kinds of problems and, therefore, I would object to that particular charge." (R. p. 100, lines 10-19). The judge overruled the objection and stated:

> I understand. And I understand your objection. It makes perfect sense. And I think in a vacuum you may be right. I'd be concerned about burden shifting. But in the context of the entire charge and in the context of this case – and I've explained to the jury very clearly who has the burden of proof and what the burden is, I'm not concerned with burden shifting. The only thing I will say to them after I charge the actual law with respect to the first degree criminal sexual conduct with a minor is the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other evidence or testimony. That's all I'm going to say and I don't think that's prejudicial in any way, shape or form. And I think it is an accurate statement of the law and I'll charge the same.

(R. p. 100, line 20 – p. 101, lines 1-9).

During the charge to the jury the judge stated, "Now let me comment again, briefly, on the Defendant's failure to testify. You are going to review all of the evidence in this case

and attach value to the evidence that was presented. You cannot consider the fact that the Defendant failed to testify. As I told you, that's a constitutional right. You can't hold it against him that he elected to exercise a constitutional right. Matter of fact, it's not even appropriate that you discuss it in your juror deliberations. (R. p. 125, line 22- p. 126, lines 1-5). There was no objection to the **failure** to testify language. After charging the jury with the law of criminal sexual conduct with a minor first degree, the judge instructed, "The testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence." (R. p. 130, lines 9-11). Appellant renewed the objection to the charge at the close of the jury instructions stating, "Judge, after hearing the charge in context, I renew my prior objection to the no need for corroboration portion of the charge." (R. p. 132, lines 5-7). The trial judge erred in charging the jury that the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence.

S.C. Code §16-3-657 provides that, "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), Schumpert argued that charging the jury with S.C. Code §16-3-657 was error as an improper charge on the facts. The South Carolina Supreme Court disagreed and wrote:

> The trial judge properly charged the jury it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt. Taking the charge as a whole, we find no reversible error. Accord Lottie v. State, 273 Ind. 529, 406 N.E.2d 632 (1980). Id. 312 S.C. at 509, 435 S.E.2d at 863.

The dissent in Schumpert noted:

> I would also hold that the "no corroboration" charge based on S.C.Code Ann. § 16–3–657 (1985) was reversible error. It is axiomatic that a trial judge must not indicate an opinion or express a view reasonably calculated to influence the jury in deciding a material issue of fact because such comment is forbidden by S.C. Const. art. V, § 21. State v. Simmons, 209 S.C. 531, 41 S.E.2d 217 (1947). Since the charge specified only that the victim's testimony need not be corroborated, it appears to express an opinion on her credibility. In State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244 (1943), this Court rejected a similar "no corroboration charge" in the context of accomplice testimony. The law found in Section 16–3–657 should not be charged to the jury. S.C. Const. art. V, § 21.
>
> The majority does not discuss the propriety of the "no corroboration" charge itself, but instead holds that the jury charge as a whole did not constitute reversible error. I disagree. We have rejected such analysis in State v. Bagwell, supra. Further, the charge was especially prejudicial in this case because it was the victim's word against the defendant's. I would hold that the giving of this charge was reversible error. Accord Cox v. State, 44 S.W. 157 (Tex.Crim.Ct.App.1898).

Id. 312 S.C. at 510, 435 S.E.2d at 864.

In State v. Weldon, 89 S.C. 308, 71 S.E.2d 828, 828 (1911), the South Carolina Supreme Court addressed a jury charge on the uncorroborated testimony of an accomplice and wrote, "The law in this state for a long number of years was declared by our Supreme Court to be that it was unsafe to convict upon the uncorroborated testimony of an accomplice. But our Supreme Court has recently changed that doctrine, and it is not the law now. The law in regard to the testimony of an accomplice is just like it is as to the testimony of any other witness in a case. That is to say, that you are the sole judges of the weight you should give to such testimony." As noted by the dissent in Schumpert, in the same way that it is improper to instruct the jury that it is unsafe to convict based on the uncorroborated testimony of an accomplice, it is improper to instruct the jury that the prosecuting witness' testimony need not be corroborated because in giving such a charge it appears that the judge is commenting on the credibility of the witness.

In State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), Rayfield argued that charging the jury with S.C. Code §16-3-657 constitutes an impermissible comment on the facts of the case, improperly emphasizes the testimony of one witness, and carries a strong possibility of unfairly biasing the jury against the defendant. The South Carolina Supreme Court disagreed and wrote:

> A trial judge is not required to charge § 16–3–657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law. The jury in this case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses. The trial judge in this case, as shown in the above portions of the charge, fully and properly instructed the jury on these principles.

Id. 369 S.C at 117-118, 631 S.E.2d at 250. The dissent in Rayfield noted:

> In general, the trial court is required to charge only the current and correct law of South Carolina. ... A jury charge is correct if it contains the correct definition of the law when read as a whole." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462,472 (2004) (citations omitted). Some principles of law, however, are not to be charged to a jury. See, e.g., State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (holding that although evidence of a defendant's flight is admissible as circumstantial evidence of guilt, it is improper for the trial judge to instruct the jury on the law of flight, because such an instruction "oftentimes has the potential for creating more problems than solutions," as it "places undue emphasis upon that part of circumstantial evidence").
>
> Contrary to the majority opinion, we did not hold in Schumpert that this no-corroboration charge was proper. Rather, "[t]aking the charge as a whole, we [found] no reversible error." 312 S.C. at 509, 435 S.E.2d at 863. We observed that the trial judge, in addition to charging the jury under section 16–3–657, had charged "the jury it could believe any single witness over several, it was the sole judge of the facts, [the trial judge] had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt." Id.
>
> I would hold that it is error for a trial court to charge the jury that an alleged victim's testimony needs no corroboration. Although section 16–3–657 contains current and correct law, it is not a proper subject of a jury charge.

Section 16–3–657 prevents courts, either on a dispositive motion at the trial level or on appellate review, from finding a lack of sufficient evidence to support a conviction because the alleged victim's testimony is uncorroborated. See James Cranston Gray, Jr., Criminal Law—Rape Reform in South Carolina, 30 S.C. L.Rev. 45, 55–60 (1979) (discussing the no-corroboration rule as governing judicial review of the sufficiency of the evidence); cf. Ludy v. State, 784 N.E.2d 459, 463 (Ind.2003) (holding that the no-corroboration rule is a legal standard for a court reviewing a conviction). Charging this rule does not assist the jury in fulfilling its function of deciding the facts and determing whether the state has proved the charged offense beyond a reasonable doubt. In fact, it "has the potential for creating more problems than solutions," for it might cause confusion when read with the general charge on witness credibility.

More important, charging this rule carries a strong possibility of biasing the jury against the defendant. No witness's testimony need be corroborated. By specifically charging that the alleged victim's testimony need not be corroborated, the trial court singles out the alleged victim and "appears to express an opinion on her credibility." State v. Schumpert, 312 S.C. 502, 510, 435 S.E.2d 859, 864 (1993) (Finney, J., dissenting); see also S.C. Const. art. V, § 17 (providing that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law"). I would therefore hold that charging a jury on the contents of section 16–3–657 constitutes error.

Further, I would overrule the holding in Schumpert that the charge as a whole can render this no-corroboration charge harmless. Separately instructing the jury that it may believe one witness against many or many against one does not ameliorate or remove the favorable emphasis on the alleged victim's testimony.

Furthermore, this case is different from Ludy, supra, in which the Supreme Court of Indiana held that although the trial court had erred in giving the no-corroboration charge, the error was harmless because: "[T]he testimony of the victim was not uncorroborated.... [A]side from the victim's testimony there was substantial probative evidence establishing the elements of the charged offenses." 784 N.E.2d at 463. Here, the only evidence of Petitioner's committing CSC was the testimony of the alleged victims. The jury had to determine whether it believed the purported victims or Petitioner.

For these reasons, I would hold that the circuit court committed reversible error in charging the jury. I would therefore reverse the decision of the Court of Appeals and remand the case to the circuit court for a new trial.

Id., 369 S.C. at 119-121, 631 S.E.2d at 251 - 252 (footnotes omitted).

As noted by the dissent in Rayfied in footnote 4, in Ludy, the Supreme Court of Indiana overturned Lottie v. State, 273, Ind. 529, 406 N.E.2d 632 (1980), the decision relied upon by the Schumpert majority. Ludy 784 N.E.2d 459, 462 and n.2 (Ind. 2003). The Court found that giving the following instruction was an error despite a long history of appellate approval: "A conviction may be solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." Id. at 61. The Ludy court reasoned that "To expressly direct a jury that it may find guilt based on the uncorroborated testimony of a single person is to invite it to violate its obligation to consider all the evidence." Id. at 462. The court also commented on the potential harms that may occur when a jury attributes meaning to the legal term "uncorroborated":

> Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness's testimony, and ignore evidence that conflicts with the witness's version of the events. Use of the word "uncorroborated" without a definition renders this instruction confusing, misleading, and of dubious efficacy.

Id. at 462.

In Ludy v. State, 784 N.E.2d 459 (Ind. 2003) while the Indiana Court found that instructing the jury that a conviction may be based solely on the uncorroborated testimony of the alleged victim constituted error, the error did not require reversal because there was substantial probative evidence establishing the elements of the charged offenses. In Anderson v. State, 790 N.E.2d 146 (Ind. Ct. App. 2003), however, the Indiana Court of Appeals found that the error in instructing the jury that a conviction may be based solely on the uncorroborated testimony of the alleged victim required reversal. The Indiana Court of Appeals wrote, "Aside from the testimony of M.H. and that of

others who simply recounted or repeated the incident as M.H. had reported to them, we cannot say that there was substantial evidence of probative value establishing the elements of the charged offense. Thus, we can only conclude that the instruction error here affected Anderson's substantial rights to the extent that reversal is warranted. Thus, we grant the petition for rehearing, set aside Anderson's conviction and remand this cause to the trial court for a new trial." Id. 790 N.E. 2d at 148.

The error in the present case requires reversal because the State failed to provide substantial probative evidence, other than the testimony of the minor, establishing the elements of the charged offense. The State's evidence in the present case was based solely on the word of the minor. The minor waited two years after Appellant was no longer a part of the minor's life before reporting the allegation to the mother. The mother did not immediately report the allegation to the authorities and only reported when it appeared her immigration status was in jeopardy. Appellant exercised his constitutional right to remain silent at trial but the judge instructed the jury that Appellant failed to testify. While, based on the minor's testimony at trial, Appellant was not entitled to a directed verdict of acquittal, the judge erred in instructing the jury that the minor's testimony need not be corroborated. The error was not harmless.

In State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct.App. 2011), Hill argued that the judge erred in allowing the prosecution to unduly emphasize the no-corroboration rule found in S.C. Code §16-3-657 and then the judge further erred in choosing to instruct the jury on the no corroboration rule. The South Carolina Court of Appeals disagreed and wrote, "Accordingly, the single instruction on 'no corroboration,' was not unduly

emphasized, and the charge as a whole comported with the law, such that there was no reversible error in the 'no corroboration' charge." Id. 394 S.C. at 299, 715 S.E.2d at 379.

The present case presents an opportunity for the Court to re-visit the holdings in Schumpert, Rayfield and Hill as this case demonstrates that the instruction, despite the charge as a whole, is confusing, places undue emphasis on the testimony of the alleged victim, creates an improper implication that the jury must accept the alleged victim's testimony as true and constitutes an improper comment on the facts, especially in cases such as Appellant's where the evidence is based solely on the testimony of the alleged victim. The South Carolina Constitution states: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. Art. V, § 21. Instructing the jury that the alleged victim's testimony need not be corroborated constitutes a charge on the facts in violation of S.C. Const. Art. V, § 21.

In State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980) the South Carolina Supreme Court addressed the jury instruction on flight and wrote:

> The charge on flight oftentimes has the potential for creating more problems than solutions. While we no longer sanction this charge by the judge, we recognize that evidence of flight remains proper. We also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight. However, we believe that the "law of flight" in a judge's charge places undue emphasis upon that part of circumstantial evidence and it should not be charged hereafter.

Id. 275 S.C. at 408-409, 272 S.E.2d 171-172. As the Court did in Grant in reference to the instruction on flight evidence, this Court should find that judges should not instruct the jury that the testimony of the alleged victim need not be corroborated.

In State v. Blurton, 352 S.C. 203, 207-208, 573 S.E.2d 802, 804 (2002) the South Carolina Supreme Court wrote, "The purpose of a jury instruction is 'to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)." The charge in the present case that the testimony of the victim need not be corroborated confused and misled the jury into believing that they had to accept the minor's testimony as true. The charge improperly bolstered the testimony of the minor witness. The error was particularly prejudicial under the facts of this case where the State's case was based solely on the testimony of the minor and credibility was a critical determination for the jury.

In State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480, (2013), the South Carolina Supreme Court found that instructing the jury that actual knowledge of the presence of a drug is strong evidence of intent to control its disposition and use was improper as an expression of the judge's view of the weight of certain evidence. In Cheeks the Court wrote:

> Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts. For example, it is well-settled that while evidence that a criminal defendant evaded arrest or absconded from the jurisdiction may be admissible as evidence of guilt, and may be argued to the jury as such, it is improper to charge the jury on this evidentiary inference because such a charge places "undue emphasis" on that piece of circumstantial evidence. E.g., State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980). Similarly, charging a jury that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence.

Id. 401 S.C. at 328-329, 737 S.E.2d at 484.

Instructing the jury that the victim's testimony need not be corroborated improperly emphasizes that testimony in the same way the charges in both Grant and Cheeks improperly emphasized certain evidence. This Court should find that instructing the jury that the victim's testimony need not be corroborated is no longer proper and reverse Petitioner's conviction and sentence. The no corroboration charge confuses and misleads the jury, shifts the burden of proof, improperly bolsters the testimony of the alleged victim and constitutes an improper comment on the facts.

In addition to the Indiana cases cited above, other jurisdictions have also found the instruction improper. In Brown v. State, 11 So. 3d 428, 430 (Fla. Dist. Ct. App. 2009) approved sub nom. Gutierrez v. State, No. SC14-799, 2015 WL 3887354 (Fla. June 25, 2015) the Florida appellate court reversed the judgments and sentences finding that instructing the jury in accordance with section 794.022(1) that the testimony of the victim need not be corroborated in a prosecution for sexual battery is misleading and constitutes an improper comment on the evidence by the trial court.

In State v. Johnson, 679 N.W.2d 378, 388 (Minn. Ct. App. 2004), the Minnesota Court of Appeals wrote:

> Although the testimony of a victim of criminal sexual conduct need not be corroborated, Minn.Stat. § 609.347, subd. 1, it is improper to instruct the jury that corroboration is not required because the lack of corroboration is an evidentiary matter, rather than a substantive matter. State v. Williams, 363 N.W.2d 911, 914 (Minn.App.1985), review denied (Minn. May 1, 1985). But where the jury is properly instructed on the burden of proof and the state's need to prove its case beyond a reasonable doubt, we have held that the erroneous instruction was not prejudicial. Id. Here, the court instructed the jury as follows: "The testimony of an alleged victim need not be corroborated but a lack of corroboration may be a relevant consideration in determining believability." The state contends favors Johnson and offsets the error. We agree. Moreover, the record establishes that corroboration was abundant here. When the challenged

> instruction is considered in conjunction with the district court's proper instruction of the jury on the state's burden of proving its case beyond a reasonable doubt, we do not find prejudicial error. See id.

This Court should find, as the Minnesota Courts have found, that it is improper to charge the jury that testimony of an alleged victim need not be corroborated. Unlike the charge in Johnson, the charge in the present case was prejudicial. The charge in the present case did not include the additional language "but a lack of corroboration may be a relevant consideration in determining believability." Additionally, the State in Johnson introduced substantive evidence in addition to the testimony of the alleged victim. In contrast, in the present case the State's case was based solely on the testimony of the minor witness.

In State v. Schmidt, 276 Neb. 723, 728, 757 N.W.2d 291, 295 (2008), the Nebraska Supreme Court addressed jury instruction No. 14, which provides; "The testimony of a person who is the victim of a sexual assault, as charged in this case, does not require corroboration. It is for you to decide what weight to give the testimony of [M.C. and K.S.]." In Schmidt the Nebraska Supreme Court held:

> It is undisputed that the challenged jury instruction is a correct statement of the law as set forth in Neb.Rev.Stat. § 29–2028 (Cum. Supp. 2006). We agree with the Court of Appeals that the giving of the instruction in this case was not prejudicial and did not constitute reversible error, because when read as a whole, the jury instructions fairly presented the law and were not misleading. We also agree with the concurrence that while it was not prejudicial, this instruction was redundant and unnecessary, and that in the absence of special circumstances in a particular case, an instruction similar to instruction No. 14 should not be given.

State v. Schmidt, 276 Neb. 723, 730, 757 N.W.2d 291, 297 (2008). As the Court in Schmidt found, this Court should find that the "no corroboration" instruction should not be given. Unlike the charge in Schmidt, the charge in the present case was prejudicial.

The charge in the present case was not followed by the instruction, "It is for you to decide what weight to give the testimony of the [minor witness]."

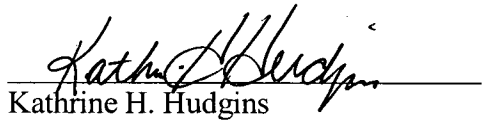
In Garza v. State, 2010 WY 64, ¶ 20, 231 P.3d 884, 890 (Wyo. 2010), the Wyoming Supreme Court addressed jury instruction No. 17, which provides that, "Corroboration of a victim's testimony is not necessary to obtain a conviction for sexual assault." The instruction constitutes a correct statement of law, as it mirrors the language of Wyo. Stat. Ann. § 6–2–311 (LexisNexis 2009). The Wyoming Supreme Court, however, found the instruction was improper but harmless as the testimony of the victim was corroborated by other evidence. The minor's testimony in the present case was not corroborated by other evidence. The instruction was improper and prejudicial in the present case.

The instruction given in the present case that the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence mirrors the language of S.C. Code §16-3-657. As noted, however, by the dissent in Rayfield and found by courts in Florida, Minnesota, Nebraska and Wyoming, a "no corroboration" statute is not a proper subject of a jury charge. Based on the facts of this case, instructing the jury that the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence was improper and requires reversal.

CONCLUSION

Based on the argument above Appellant's sentence and conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
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ATTORNEY FOR APPELLANT

This 23rd day of November, 2015.