

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

**ORIGINAL
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SEP 26 2019

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

WILLIAM HOWARD HEATH,

APPELLANT

APPELLATE CASE NO. 2018-000938

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether, under Rule 403, SCRE, where appellant was accused of sexually abusing his daughter, the trial court erred in admitting into evidence and allowing the State to display highly inflammatory images of pornography found on appellant's iPad with watermarks from websites called "IncestTV.com" and "daughterdestruction.com" where the unfair prejudice grossly outweighed the probative value?

2.

Whether the trial court erred in admitting as a hearsay exception the complainant's responses to questions from police officers after the alleged assault?

3.

Where the criminal sexual conduct with a minor in the first-degree statute was amended to increase the maximum penalty from thirty years' imprisonment to life imprisonment during the middle of the date range alleged in the indictment, did the trial court err in sentencing appellant to life imprisonment under the amended statute?

STATEMENT OF THE CASE

In August 2016 and April 2018, a Lexington County grand jury indicted appellant William H. Heath for first degree criminal sexual conduct (“CSC”) with a minor, second degree CSC with a minor, and two counts of third-degree CSC. R. 534. On May 7, 2018, appellant was tried before the Honorable R. Knox McMahon and a jury. R. 1. Suzanne Mayes and Kate Usry represented the State. R. 1. Wayne Floyd and Colin Spangler represented appellant. R. 1. The jury convicted appellant. R. 517, l. 7 – 518, l. 5. Judge McMahon sentenced appellant to consecutive sentences of life imprisonment for first-degree CSC, ten years’ imprisonment on each count of third-degree CSC, and twenty years’ imprisonment for second-degree CSC. R. 231, l. 20 – 532, l. 21. This appeal follows.

STANDARD OF REVIEW

The standard of review on issues one and two is abuse of discretion. “The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id. at 429–30, 632 S.E.2d at 848. The standard of review on issue three is de novo as it is a pure question of law. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005).

ARGUMENT

1.

Under Rule 403, SCRE, where appellant was accused of sexually abusing his daughter, the trial court erred in admitting into evidence and allowing the State to display highly inflammatory images of pornography found on appellant's iPad with watermarks from websites called "IncestTV.com" and "DaughterDestruction.com" where the unfair prejudice grossly outweighed the probative value.

Introduction

In this sexual abuse case, the jury's ability to rationally judge appellant's guilt based on the evidence was overwhelmed by the admission of highly inflammatory pornographic images. (State's Ex. 22, 34, 35, 36, 37, and 38). Not only were the images themselves sexually explicit and needlessly prejudicial, but the images contained "watermarks" of webpage names whose admission attacked appellant's character and portrayed him as interested in deviant, incestual sex. (State's Ex. 22, 34, 35, 36, 37, and 38). The images were pulled from appellant's iPad and displayed the names "IncestTV.com" and "DaughterDestruction.com." (State's Ex. 22, 34, 35, 36, 37, and 38). Neither the images nor the names of these websites were admissible under Rule 403, SCRE and because this error nullified the jury's decision-making, it cannot be harmless.

Factual and Procedural Background

The State indicted appellant on four counts of sexually abusing his daughter. R. 534 (Indictments). The four indictments included the following time periods: (1) September 16, 2004, through September 15, 2007; (2) September 17, 2011, through September 15, 2013; (3) on or about December 1, 2014; and (4) on or about April 26, 2016. R. 534 (Indictments).

Appellant's daughter ("Complainant") was twenty years old at the time of trial. R. 104, ll. 12 – 14. She lived with her mother, older brother, and her father, appellant. R. 104, l. 15 – 108, l. 22.

Complainant claimed the sexual abuse began when she was "[s]even or eight" and in the second grade. R. 107, ll. 10 – 15. She said, "My father came into my room and just—you know, he used his mouth on me and then he left and that was it." R. 107, l. 21 – 108, l. 1. She described appellant performing oral sex on her and digital penetration. R. 109, l. 9 – 111, l. 7. Appellant also forced her to perform oral sex on him. R. 113, ll. 12 – 23. Appellant told her "not to tell," would get angry, hit her, and threaten to kill her. R. 111, l. 15 – 112, l. 4.

Despite having moved out of the house and away from appellant for periods of time and a DSS intervention in her childhood where complainant was assigned a counselor, she waited until she was seventeen years old to report the alleged abuse. R. 146, l. 16 – 147, l. 20. A "Dr. Luberoff" worked with appellant during this period. R. 147, ll. 15 – 16. Complainant agreed she had "a lot of counselors" and remembered the involvement of social workers, but never told any of these child welfare specialists that her father was sexually abusing her. R. 147, l. 8 – 148, l. 2. Nor did complainant ever tell her older brother, who was serving in the military in South Korea at the time of the trial, whose bedroom was always next door to complainant's. R. 151, l. 14 – 153, l. 15. R. 105, ll. 22 – 25. Complainant acknowledged that her older brother might have been awake "but unaware" during the alleged abuse occurring in the room next door. R. 105, ll. 5 – 17.

The police learned about complainant's allegations on the night of April 26, 2015, and an officer was dispatched at 11:22 PM. R. 38, l. 12 – 39, l. 4. After an alleged assault that night, complainant texted her aunt and told her about the abuse. R. 128, l. 15 – 129, l. 16. Her aunt called her mother and the police were notified. R. 246, ll. 22 – 23. R. 129, ll. 11 – 16.

However, at the beginning of the school year, between August and October, complainant lived with this same aunt. R. 118, l. 13 – 119, l. 21. Complainant's mother left appellant and they lived with the aunt. R. 118, l. 13 – 119, l. 21. Despite being in a house away from appellant, complainant did not tell her mother or her aunt about the alleged abuse at that time. R. 154, l. 7 – 156, l. 8. R. 267, ll. 18 – 23. Her mother eventually moved them back in with appellant and complainant still said nothing. R. 154, l. 7 – 156, l. 8.

On the night the police were called, complainant testified that her mother was at work and she was home with appellant. R. 119, l. 22 – 121, l. 6. She refused to have sex with appellant, so appellant gave her "stuff" to do, such as "clean up, like, the dishes or the tables, taking stuff outside." R. 119, l. 22 – 121, l. 6. Appellant had been drinking. R. 119, l. 22 – 121, l. 6. Appellant became angrier and "really forceful" and she performed oral sex on appellant on the couch in the living room. R. 122, l. 15 – 123, l. 22. Appellant wanted complainant to go into the bedroom, but she refused and he made her do more chores. R. 123, l. 23 – 124, l. 6.

Complainant thereafter went into the bedroom with appellant. R. 124, l. 3 – 128, l. 1. She said appellant "would just rub his private parts against mine from the back." R. 124, l. 3 – 128, l. 1. He also digitally penetrated her and performed oral sex on her. R. 124, l. 3 – 128, l. 1. Complainant left and locked herself in her room. R. 124, l. 3 – 128, l. 1. At that point she began texting her aunt and the police eventually arrived. R. 128, l. 15 – 129, l. 16. R. 38, l. 12 – 39, l. 4.

A detective interviewed appellant at the scene and told him about his daughter's allegations. R. 294, l. 25 – 295, l. 25. Appellant denied the allegations and "said that he did not know why [complainant] would say something like that." R. 294, l. 25 – 295, l. 25. Appellant talked to complainant "about helping out more around the house because she stays shut up in her

bedroom.” R. 294, l. 25 – 295, l. 25. After that conversation, complainant went to her room. R. 294, l. 25 – 295, l. 25.

Complainant testified that during the sexual assault that night, appellant was watching pornography on his iPad. R. 124, ll. 16 – 22. She said appellant had done this in the past, as well. R. 124, l. 20 – 125, l. 10. The solicitor had complainant identify State’s Ex. 22 as an image from a video she saw on appellant’s iPad during the assault. R. 139, l. 14 – 140, l. 16.

As its last witness, the State called Detective Michael Phipps (“Phipps”), who conducted a forensic examination of the iPad. R. 360, l. 2 – 363, l. 4. The State had Detective Phipps identify State’s Ex. 30, which was a disc that contained the extraction from the iPad. R. 363, l. 5 – 364, l. 20. When the solicitor offered the disc into evidence, appellant objected and Judge McMahon excused the jury to hear argument. R. 364, l. 21 – 365, l. 17.

Appellant explained that he objected to the pornography on the iPad. R. 365, l. 20 – 370, l. 7. Appellant first objected that pornography found at 10:00 PM on December 2, 2014, had no relevance because it was outside of the time frame of the indictment, which only alleged an assault on December 1, 2014. R. 365, l. 20 – 370, l. 7. Appellant then argued that displaying the pornographic images to the jury, including the April 26, 2015, images, were no necessary, not probative, and would unfairly prejudice him with the jury. R. 365, l. 20 – 370, l. 7.

Judge McMahon overruled the objection, finding under Rule 403, SCRE, that the images corroborated complainant’s testimony. R. 369, l. 10 – 370, l. 16. The court cited State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014), and ruled that the images from April 26, 2015, were not unduly prejudicial. R. 369, l. 10 – 370, l. 16. As for the December 2, 2014, image, the court ruled the timing was an issue of weight, not admissibility. R. 369, l. 10 – 370, l. 16. The entire extraction was not admitted into evidence, but when the images were separately admitted and

enlarged in size before the jury, appellant renewed his objections.¹ R. 385, l. 15 – 399, l. 22. Detective Phipps was the State’s last witness and the last evidence discussed in the State’s case were the pornographic images. R. 385, l. 15 – 399, l. 25.

DISCUSSION

The trial court erred in admitting these pornographic images because their unfair prejudice—attacking appellant’s character and portraying him as a deviant interested in incestual sex—grossly outweighed the images’ probative value. Collins lays the framework for a proper Rule 403, SCRE, analysis. Collins at 534-37, 763 S.E.2d at 28-29. The trial court must examine the specific probative value and determine whether the unfair prejudice substantially outweighs such value. Id. The Collins Court emphasized that simple prejudice is not sufficient, but the objecting party must show *unfair* prejudice. Id.

Here, the probative value of the images was to corroborate complainant’s testimony that appellant was watching pornography during assaults. However, what is probative is not the images themselves, but their existence on appellant’s iPad at the times complainant alleged she was assaulted. Importantly, one of the images was outside the scope of the indictment and had no probative value as it could not corroborate complainant’s testimony as to that count. The State could have easily limited its questioning of Detective Phipps to tell the jury that such images existed (within the parameters of the indictment) and the probative value would be the same.

The unfair prejudice is the images’ inflammatory subject matter which attacked appellant’s character and is simple propensity evidence. The image from December 2, 2014—which had no probative value because it was outside the scope of the indictment—portrays a

¹ The specific exhibits to which appellant objected and are the subject of this appeal were State’s Exhibits 22, 34, 35, 36, 37, and 38, all of which have been transported to this Court.

man lying on his back having sex with a young woman while an older woman sits beside them on the bed watching. State's Ex. 37, 38. But even more inflammatory than the image is what Detective Phipps called a "watermark." R. 391, ll. 5 – 6. The image says "IncestTv.com." State's Ex. 37, 38. Detective Phipps further described the website for the jury:

The videos that are hosted on that website all deal with incest in some form. It's more of adult role-playing type. All the images are people of legal age, consenting age. They're categorized three categories; there's a category for mother-son, father-daughter, and brother-sister.

R. 391, ll. 12 – 18.

State's Exhibit 22, an image from April 26, 2015 is not as sexually explicit in its image, but the watermark is far more inflammatory: "DaughterDestruction.com." State's Ex. 22. The image shows an older man fondling a partially clothed younger girl's genitals. State's Ex. 22. It is hard to conceive of something more unfairly prejudicial to a father accused of molesting his daughter than the jury seeing a website called "DaughterDestruction.com." While the fact that the image existed is undeniably relevant and probative, the image itself—combined with the watermark—served only to attack appellant's character and is rank propensity evidence.

Such highly inflammatory propensity evidence is inadmissible under Rule 403. See State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998). While Nelson is a Rule 404 case, it explains the inflammatory nature of the unfair prejudice in this case. In Nelson, the State prosecuted the defendant for molesting a three year old child. Id. The State introduced evidence that portrayed the defendant as a pedophile. Examples of the evidence were videotapes of the Mr. Knozit show, Save the Children advertisements, a photo album of young girls, and the defendant's membership in the Punky Brewster fan club. Id. "Punky Brewster" was a sitcom from the time featuring a child actress in the titular role as Punky Brewster. Id.

None of the evidence improperly admitted in Nelson was pornographic, but the Court reversed because it was only reflected “on an aspect of Petitioner’s character, i.e. that he is a pedophile.” Id. The evidence here is far more unfairly prejudicial than photo albums and a fan club membership.

The State will undoubtedly argue this error is harmless in light of the physical evidence introduced. A SANE nurse examined complainant on the night of April 26 and found appellant’s saliva inside complainant’s underwear and two hairs from appellant gleaned from the examination of complainant’s genital and anal regions. R. 336, l. 6 – 352, l. 12. However, the SLED expert was forced to admit that hairs can transfer when people live in close proximity from sharing towels or otherwise. R. 350, l. 17 – 354, l. 5. Furthermore, the names of the websites alone unequivocally portrayed appellant as a deviant interested in incest. This evidence was improper and unfairly prejudiced the jury against appellant. No reasonable jury could judge appellant’s guilt by the properly admitted evidence and this Court should reverse.

2.

The trial court erred in admitting as a hearsay exception the complainant’s responses to questions from police officers after the alleged assault.

Officer Caleb Black responded to appellant’s home on the night of April 26. R. 270, l. 16 – 271, l. 5. Appellant opened the door and allowed the police into his home to conduct a welfare check on complainant. R. 271, ll. 3 – 25. Officer Black knocked on complainant’s bedroom door. R. 272, ll. 1 – 5. Complainant answered and Officer Black described her: “Her eyes were red. She was crying. She was obviously upset.” R. 272, ll. 6 – 11. When the solicitor asked a question about what complainant said, appellant objected on hearsay grounds. R. 272, ll. 20 – 23. The solicitor declined the judge’s invitation to rephrase her question and

said, “I’d argue time and place and excited utterance.” R. 272, l. 25 – 273, l. 4. Appellant responded, “I don’t think it’s an excited utterance,” and Judge McMahon excused the jury. R. 273, ll. 5 – 9.

The solicitor told the court she was “planning to go into the full information that [complainant] gave Caleb Black on scene that night, which I would argue would be under the excited utterance exception.” R. 273, l. 11 – 277, l. 1. The solicitor argued that complainant was still under the stress of the assault and fell under the excited utterance exception to the prohibition against hearsay. R. 273, l. 11 – 277, l. 1. Appellant argued there was “no kind of testimony the declarant was excited,” she was laying on her bed, and the officer’s interview occurred a half hour after the alleged assault. R. 273, l. 11 – 277, l. 1. The trial judge overruled the objection, finding that the statement was admissible as an excited utterance, *res gestae*, and present sense impression. R. 273, l. 11 – 277, l. 1. Officer Black then testified before the jury that complainant told him that appellant “had rubbed his penis on her” and that “in the past her father had physically forced her to perform oral sex on him.” R. 277, l. 13 – 280, l. 5. Officer Black also testified complainant told him she had performed oral sex on appellant that night. R. 277, l. 13 – 280, l. 5. Complainant then filled out a written statement. R. 277, l. 13 – 280, l. 5.

The statements in response to the officer’s questions were not a present sense impression. Rule 803(1), SCRE states that a present sense impression is, “A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” Rule 803(1), SCRE. The alleged assault had been over for at least a half an hour, so by the text of the rule, the trial judge erred in allowing the hearsay under present sense impression. The statement “must be contemporaneous with the event.” State v. Washington, 424 S.C. 374, 399, 818 S.E.2d 459, 472 (Ct. App. 2018). In Washington,

the Court held that a statement made 20-25 minutes after the event did not qualify as a present sense impression. Id. Under the similar time frame here, present sense impression does not apply.

Nor were the statements admissible as an excited utterance or res gestae. An excited utterance is, "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE. As appellant argued below, the testimony was not that appellant was excited, but that she was upset and in her room. See Washington at 403-04, 818 S.E.2d at 474. The excitement must be to the point where it suspends reflective thought, "reducing the likelihood of fabrication." Id. No evidence shows that complainant's ability to have reflective thought was suspended. A police officer was on scene and conducting an interview. Complainant wrote a statement for the officer. In between the alleged assault and the officer's arrival, complainant had a text message conversation with her aunt. The case cited by the trial judge to support his ruling, State v. Dennis, 321 S.C. 413, 468 S.E.2d 674 (Ct. App. 1996), does not apply. In Dennis, decided under res gestae, the Court held that statements made by a sexual assault victim to a nurse at a hospital were admissible. However, the nurse noted the victim was so hysterical the nurse had to stop the interview. Complainant was not hysterical, but was upset. Dennis shows that neither excited utterance nor res gestae apply and this Court should reverse.

3.

Where the criminal sexual conduct with a minor in the first-degree statute was amended to increase the maximum penalty from thirty years' imprisonment to life imprisonment during the middle of the date range alleged in the indictment, the trial court erred in sentencing appellant to life imprisonment under the amended statute.

When Judge McMahon asked the solicitor for the sentencing range for first-degree CSC, she explained that the current statute provides a range of twenty-five years to life imprisonment, but that this statute was enacted during the middle of the time frame alleged in the indictment. R. 524, ll. 1 – 25. S.C. Code Ann. § 16-3-655(D)(1). The indictment alleged one count that occurred between September 16, 2004, and September 15, 2007. R. 541.

The first-degree CSC with a minor statute was amended in 2005. See S.C. Act No. 94, § 1 (eff. June 1, 2005). Prior to this amendment, as the solicitor conceded, the sentencing range was 0-30 years' imprisonment. R. 525, ll. 1 – 4. The statute as it existed in 2004 did not contain a sentencing provision, therefore sections 16-1-90 and 16-1-20(A) controlled, which stated that the penalty for a Class A felony was not more than thirty years. S.C. Code Ann. §§ 16-1-90 and 16-1-20(A)(1) (2004). Judge McMahon asked if the solicitor had any authority to support that appellant could be sentenced under the higher range and the solicitor had none, but said she talked with an attorney at the Department of Probation and Parole and he told her that the higher range could apply because it was an ongoing activity. R. 524, l. 1 – 525, l. 15. Appellant objected to the higher sentencing range and argued that “the time she said it happened and what was before the jury to determine would have been under the old law.” R. 528, ll. 10 – 19. Judge McMahon sentenced appellant to life imprisonment. R. 532, ll. 16 – 21.

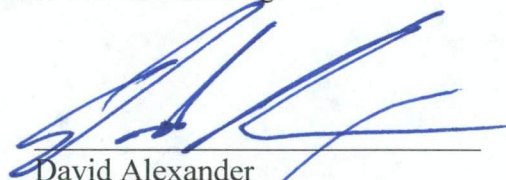
The trial judge erred in sentencing appellant under the higher range. Under the indictment, the jury could have found the acts occurred under the old statute. If the sentence at the time of the crime is committed is less severe, that sentence applies. See State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992) (“In the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced,

unless it is greater than the punishment provided when the offense was committed.”). Under the black letter rule stated in Varner, the trial court erred in imposing life imprisonment.

Furthermore, without action by the State to ensure the jury’s verdict was under the new range, due process and the Sixth Amendment right to a jury trial also require appellant to be sentenced under the 2004 version. Apprendi v. New Jersey, 530 U.S. 466 (2000). As explained in Apprendi, which struck down sentencing departures that exceed the statutory maximum, every fact which increases a defendant’s sentencing exposure past the statute’s range must be found by a jury beyond a reasonable doubt. Id. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id. at 490. The State could have asked for a special verdict form, but failed to do so. Because the State failed to ask for a specific finding by the jury, Apprendi controls and the court’s sentence is invalid. The current version of § 16-3-655 expressly provides for asking the jury to make specific findings of fact under certain circumstances, so the State could not have been unaware of its ability to avoid the due process problem. See S.C. Code Ann. § 16-3-655(D)(1) and (E)(2). The jury rendered a general verdict and appellant must be sentenced under the prior statute. Therefore, even if this Court does not reverse all of appellant’s convictions for the grounds raised in Issues 1 and 2, his sentence on first-degree CSC must be vacated and this case remanded for resentencing under the prior range.

CONCLUSION

For the foregoing reasons, appellant's convictions must be reversed and this case remanded for a new trial. In the alternative, appellant's sentence for first-degree CSC with a minor must be vacated and that conviction remanded for resentencing.



David Alexander
Appellate Defender

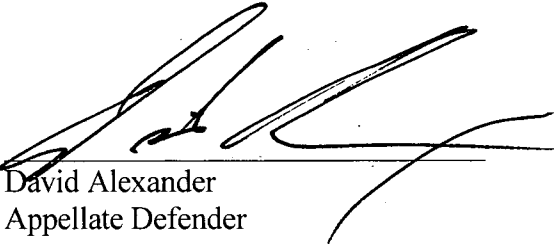
ATTORNEY FOR APPELLANT

This 26th day of September, 2019.

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."

September 26, 2019



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