STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AUGUST BYRON KREIS, III,

APPELLANT

APPELLATE CASE NO. 2015-002340

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court committed reversible error by instructing the jury that "the testimony of the victim need not be corroborated" since this was an impermissible instruction, and appellant is entitled to the benefit of State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) on direct appeal?

2.

Whether the court erred by admitting the testimony of daughter #3, and Eddie Kreis regarding alleged subsequent bad acts committed by appellant since they were not admissible under State v. Lyle, or Rule 404, SCRE, they were dissimilar, and even if this evidence was relevant, the probative value of it was substantially outweighed by its unfair prejudice?

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County Grand Jury for committing a lewd act upon a minor, attempting to commit a lewd act upon a minor, and criminal sexual conduct with a minor in the second degree. R. 391-399. His case was called to trial on November 2, 2015 before the Honorable Doyet A. Early, III, and a jury. Thomas Shealy represented appellant. Suzanne Mayes and Christopher Samellas were the assistant solicitors. R. 1.

On November 5, 2015 the jury found appellant guilty on all three counts. R. 356, l. 19 – 357, l. 7. Judge Early sentenced appellant to twenty years imprisonment for criminal sexual conduct with a minor in the second degree, fifteen years imprisonment for committing a lewd act upon a minor, and fifteen years imprisonment for attempting to commit a lewd act upon a minor. He ordered the sentences served consecutively for a total sentence of fifty years. R. 377, ll. 4-5.

This appeal follows.

ARGUMENT

1.

The court committed reversible error by instructing the jury that "the testimony of the victim need not be corroborated" since this was an impermissible instruction, and appellant is entitled to the benefit of *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) on direct appeal.

Introduction

When arguing why the probative value of allowing the testimony of the youngest daughter should be admitted under State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), Assistant Solicitor Mayes urged: "[H]ere there's no physical evidence in this case, there's no medical evidence, there's no forensic evidence. *It's a case that simply comes down to the testimony of these three children* who - - at least they were children at the time, who all experienced nearly identical assaults by the father in the family home." R. 129, ll. 15-22. (emphasis added).

In ruling that the proffered alleged Lyle evidence could be admitted, the judge observed: "We have, as we have in so many of these cases, *it's a he said/she said.*" R. 134, ll. 13-22. (emphasis added). These statements from the solicitor and the judge, supported by the trial record, show why charging the jury that the "victim's testimony did not have to be corroborated" - - that unconstitutional charge on the facts - - could not be harmless error.

Trial facts

Minor 1 was twenty-one years old at the time of the trial. She was appellant's oldest daughter. She was living in Bethune, South Carolina with her fiancé at the time of the trial. R. 17, l. 1 – 18, l. 16.

She testified that the family moved to six different states when she was a child. R. 20, ll. 7-13. She noted that when she was between the ages of ten and thirteen appellant was not

working. He was disabled and receiving a government pension. At the time of the trial appellant was in a wheelchair since both of his legs had been amputated. She said appellant was "mobile" when he allegedly molested her. R. 22, l. 4 – 24, l. 5.

She testified that: "[M]y father and I actually didn't have a horrible relationship during the day." R. 23, ll. 20-24. Her accusation was that the molestation occurred at night when appellant had oral sex with her. She said that she was thirteen-years-old the last time it happened. R. 27, l. 22 – 31, l. 13.

She offered that she did not report these alleged incidents to anyone because her mother did not have a job, and appellant was living "off of his pension off of the government." R. 31, ll. 11-21. She also maintained that when she brought her allegations to the attention of her mother, the mother asked her younger sister "if anything had happened, and she [the younger sister] said yes." R. 39, ll. 20-25.

Minor 2, younger sister, was nineteen-years-old at the time of the trial. R. 81, l. 9 – 82, l. 23. She maintained that appellant "put his finger inside me." She also said appellant tried to get her to perform oral sex but she kept her mouth shut. She recalled another alleged incident where appellant tried to grab her, and get her on the bed, she ran away, and she claimed appellant laughed when she ran away. R. 85, l. 12 – 88, l. 23.

She recalled that her older sister, Minor 1, often fought with appellant. Minor 2 said that she did not like these violent disagreements. R. 93, l. 16 – 96, l. 8; R. 99, ll. 22-24.

As will be seen in issue two infra, the judge also allowed the testimony of fourteen-year - old Minor 3, another one of appellant's daughters to be heard by the jury over defense objections. She was fourteen at the time of trial. R. 136, l. 14 – 137, l. 11; R. 139, ll. 19-23.

Minor 3's claim was that she was in the master bedroom watching the Wizard of Oz, "and he [appellant] pulled me up on the bed and then he touched my lower area." R. 141, l. 9 – 145, l. 12; R. 147, ll. 12-14.

Her brother, Eddie Kreis testified that he went into the bedroom and he said his father, appellant, and his younger sister, Minor #3, were "under the covers and the blanket was moving." R. 158, ll. 12-25. Eddie testified: "There was something wrong with that." R. 159, ll. 8-10.

In essence, the remainder of the testimony was three different forensic interviewers and law enforcement officials giving time and place reporting for the two daughters that were the subject of the indictments, and the third daughter that was the alleged Lyle witness. R. 170, l. 20 - 248, l. 17

Appellant took the stand in his own defense. Appellant denied that he ever harmed or sexually touched his daughters. "If they would have told me they didn't want anything to do with me or didn't want me there, I would have left a long time ago. I could have started enjoying myself a lot easier." R. 261, l. 23 – 264, l. 11. Appellant explained the letters he wrote from the jail to his family. These letters were not admitting guilt but rather just telling his family that he loved them, apologized for the turmoil in the family, and his "anti-government actions that contributed to the turmoil through the years." R. 264, l. 7 – 273, l. 5.

The solicitor cross-examined appellant at length about his "anti-government beliefs," and the "fringe" organizations he belonged too. R. 275, l. 5 – 280, l. 18; R. 285, l. 18 – 286, l. 14.

Charge conference

During the charge conference, Defense Counsel Shealy objected to the judge instructing the jury that the victim's testimony did not have to be corroborated. Defense counsel correctly

stated that such a jury instruction would be a charge on the facts since it was "a comment on the evidence." The judge stated that he did not see how it would be a charge on the facts. R. 294, l. 7 – 296, l. 18.

Jury charge

In his charge on the law the judge instructed: "I might add there's a statute also that says, enacted by our legislature, that in a prosecution under this particular section, 16-3-655, II and III, *that the testimony of the victim need not be corroborated in prosecutions under these code sections*." Tr. 399, ll. 13-18.(emphasis added). After the jury instruction, Defense Counsel Shealy again reiterated his objection to the "no corroboration" instruction. R. 342, ll. 16-22.

Discussion

In State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), our Supreme Court held that the jury instruction involved in this case, "that the testimony of the victim need not be corroborated" under the statutes was an impermissible charge on the facts, and therefore unconstitutional. The Court therefore abrogated its majority opinion in State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006).

As seen above, both the solicitor and the judge acknowledged this case was a swearing contest a - - "he said/she said." Consequently, the error cannot not be harmless.

Appellant offered a defense, and he testified in his own defense. It was clear this was a dysfunctional family. Appellant complained that if he knew his daughters did not like him he would have left "earlier." It seemed apparent that appellant's anti-government activities unfortunately caused friction in the family, and they were embarrassing for his young daughters. Appellant explained that his letters from the jail were genuinely written to say that he loved his family -- "still does" -- and that he wanted to provide for them economically in the future. It

respectfully cannot be said that this unconstitutional charge on the facts - - the "no corroboration instruction" -- was harmless beyond a reasonable doubt in this "he said/she said" case.

Moreover, since this case is on direct appeal appellant is entitled to the benefit of the Supreme Court's decision in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). Appellant should be granted a new trial.

2.

The court erred by admitting the testimony of daughter #3, and Eddie Kreis regarding alleged subsequent bad acts committed by appellant since they were not admissible under *State v. Lyle*, or Rule 404, SCRE, they were dissimilar, and even if this evidence was relevant, the probative value of it was substantially outweighed by its unfair prejudice

Relevant Facts

Prior to trial, the judge noted that the state wanted to offer the testimony of the third daughter, Minor #3, alleging that "there are charges similar to [what] occurred outside of this jurisdiction." The judge stated that the solicitor contended that this evidence was admissible under State v. Lyle, and Rule 404, SCRE. Defense Counsel Shealy noted he understood the state wanted to call the third daughter as a witness even though there had not been any criminal charges regarding her allegations. The solicitor incorrectly stated "her charges are nearly identical to the situation involving both Minor 1 and Minor 2." R. 4, l. 16 – 5, l. 7. The judge asked the solicitor to explain the allegations against the two witnesses involved in the indictments. R. 5, l. 8 – 7, l. 11.

Defense counsel argued that the alleged incidents involving the third daughter, Minor 3, occurred after the incidents in that case, and they could therefore not be "*prior* bad acts." He argued that the third daughter's allegations about being touched above and below her clothes were not identical to the other allegations, and "are less graphic than what's alleged in the first two cases." R. 7, l. 14 – 8, l. 19.

The solicitor responded, as she would later during the trial, claiming that the cases were similar, and a legal "common scheme" because it involved "a pattern' of appellant molesting his daughters. R. 8, l. 21 – 9, l. 12. The judge stated he was not going to rule before the trial started

so he did not want any mention of the third daughter prior to a proffer being offered during the trial. R. 9, l. 12 – 10, l. 2.

The proffer

As seen above, the allegations of Minor 3 were not similar to the other allegations of Minor 1 and Minor 2. Minor 3 said she was watching the Wizard of Oz, and "he tried to grab me up onto the bed, like, next to him, next to him, he starts touching me." She said appellant touched her underneath her clothes on "my lower part" with "his hand." R. 106, l. 8 – 107, l. 22.

Minor 3 also said she did not think that anyone saw this alleged event but that her brother Eddie, claimed he opened the door, and saw them both underneath the blankets on the bed. Eddie, as seen above, said he knew something improper must have been happening. R. 108, l. 15 – 111, l. 13. Minor 3 also alleged that on another date appellant attempted oral sex with her "but I wouldn't let that happen." R. 111, l. 14 – 113, l. 3.

Defense counsel again argued State v. Lyle involved "prior bad acts" which constituted a common scheme or plan with the later charged offense. The acts here were subsequent, and were "dissimilar" since none of the other allegations involved an incident under the covers on a bed during a movie. R. 124, l. 4 – 126, l. 8.

The solicitor argued the facts were "substantially similar" because "what we know [the] similarities are that all three girls are the biological daughters of August Kreis; as a result, he shared the same relationship with all three girls. He had access to them in the family home as a result of that relationship, and he abused his parental role and authority in each of these cases by carrying out these planned sexual assaults against his three daughters." The solicitor also said the girls "were at similar ages" and, as seen above, she noted there was no forensic or other evidence outside the word of the girls that the assaults occurred. She urged the "he said/she

said" nature of this case was another reason Minor 3's allegations should be allowed before the jury. R. 126, l. 10 – 130, l. 6.

Defense counsel added that even if the judge found the incident with Minor 3 was relevant, that it should be excluded given that its unduly prejudicial effect outweighed its probative value. R. 130, ll. 8-24. Counsel also noted that the subsequent bad act in this case involved a different alleged victim, and not the same alleged victim the solicitor urged while citing case law. R. 130, ll. 8-24.

The judge ruled that the evidence was relevant. He also ruled that the probative value of the evidence outweighed its prejudicial effect. The judge cited the State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), factors on similarities, and found the Minor 3 incident sufficiently similar. In addition, as seen above, the judge noted this case was a "he said /she said," and the jury had to decide the credibility of the witnesses. These were the reasons the judge ruled this evidence was admissible. R. 132, l. 7 – 134, l. 22.

As seen above, the proffered testimony was substantially similar to the testimony given by Minor 3, and Eddie in the presence of the jury.

Discussion

Evidence of other bad acts are not admissible to prove the defendant's guilt but they can be admissible to show motive, identity, evidence of a common scheme or plan, absence of mistake or accident, or intent. State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923); Rule 404 (b), SCRE.

In State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), the Supreme Court held that when analyzing bad acts evidence the trial court must first determine whether the evidence is relevant pursuant to Rule 401, SCRE. If the trial court determines the evidence is relevant, it

must then decide whether the bad act evidence fits within an exception of Rule 404 (b), SCRE. "Common scheme or plan" evidence is admissible if they similarities between the evidence outweigh the dissimilarities.

Some of the factors to be considered on similarities are the: (1) age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) manner of occurrence, for example, the type of sexual battery. State v. Wallace, 384 S.C. 428, 433-434, 683 S.E.2d 275, 278 (2009).

The Court in Wallace cited State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984), which involved a signature crime where the defendant would enter the stepdaughter's bedroom at night, wake them up, and take one of them to his bedroom. McClellan would explain the biblical verse that children were to honor their father, and he would also indicate he was teaching them how to be with their husbands. The method of attack was common in all three daughters.

The same can be said of the original case, State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), where the prior bad acts evidence removed all doubt as to the defendant's intent although it obviously is also often cited for a common scheme or plan case.

The major problem is this: The solicitor here essentially argued that all three girls were minors, they were appellant's daughters, and that appellant improperly touched, or molested all three of them in some manner. He "abused" his parental role, he had access to the girls, and he was a bad person for abusing his role and a parent.

While the two older sisters which were the subject of the indictments against appellant had allegedly similar experiences, the same was not true of Minor 3. The alleged common scheme or plan proffered involving Minor 3 was that appellant allegedly forced her under the

covers during a movie, and touched her lower body. There was also another alleged attempt at oral sex which the third daughter said she successfully repelled. This was not sufficiently consistent with the testimony of Minor 1 or Minor 2.

Minor 1 alleged a continuous – and always at night history – of appellant having oral sex with her that she did not realize was improper for a long time. Minor 2 alleged that appellant "put his finger inside me." He also tried to get her to perform oral sex but she kept her mouth shut. Another alleged time appellant tried to grab her, and get her on the bed, she ran away, and appellant laughed as she ran. R. 85, l. 12 – 88, l. 23. The allegations of Minor 3 were simply not similar to the indicted charges for which appellant was on trial for Minors 1 and 2.

The term "sexual assault" is a very broad term. It encompasses a lewd act of touching a victim outside of her clothing in an improper manner to the other extreme of forced sexual intercourse. The similarities here were simply insufficient here to allow the proffered evidence. The solicitor's contention was that all three minors were appellant's young daughters, and he was sexually lewd or improper with all three of them in one way or another, he abused his parental role, and that was good enough for the admission of the proffered evidence. Respectfully, if that is enough, then the exception swallows the rule of Lyle on a common scheme or plan.

However, even if this evidence was relevant under Lyle and Rule 404, SCRE, it should also have been excluded under Rule 403, SCRE which was the evidentiary rule which controlled defense counsel's objection and the court's ruling. Defense counsel correctly argued that even if the judge found the evidence relevant that its unduly prejudicial effect dictated that Minor 3's proffered testimony should be excluded. Unlike Wallace, the sex acts were not similar, they did not necessarily occur when the mother was absent since she did not work, they did not always

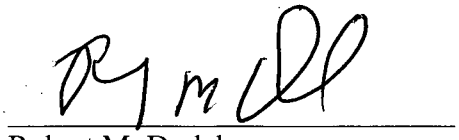
happen at night as they allegedly did to Minor 1, there was no admonishment to each of the alleged victims not to tell.

Further, defense counsel argued that the allegations regarding daughter 3 occurred *after* the allegations involved in the allegations which were indictments of Minors 1 and 2. Counsel correctly argued this was an additional reason to exclude them since they were not "prior bad acts" in the true sense to show that the indicted charges were part of a common scheme or plan. That was a *factor* for the trial court to weigh heavily. Evidence of *subsequent bad acts* are much more apt to be *impermissible propensity evidence* pursuant to Rule 404 (a), SCRE, since they constitute evidence that "he continues to do it therefore that proves he is a pervert" who needs to be removed from society regardless of proof beyond a reasonable doubt of the indicted charges. See Rule 403, SCRE. See State v. Scott, 405 S.C. 489, 508, 748 S.E.2d 236, 247 (Ct. App. 2013) (Acts occurring *prior* to the crimes charged were not too remote and were sufficiently similar, and were admissible under a Rule 403, SCRE analysis also).

The solicitor took full advantage of Minor 3's dissimilar allegations of a "sexual assault." She brought in a different forensic interviewer for each daughter to give the largest illusion of strong evidence of appellant's guilt. The admitted proffered evidence regarding the third daughter was gratuitous, inadmissible, and it should not have been allowed. State v. Lyle, supra. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of March, 2017.

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."

March 2, 2017

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