STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LESLIE DAVIS,

APPELLANT.

APPELLATE CASE NO 2019-000071

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in admitting Appellant's prior "rape in the first degree" conviction in his criminal sexual conduct with a minor first degree trial where Appellant offered to stipulate to this element of the offense and the state refused to accept the stipulation and therefore Appellant was substantially and unfairly prejudiced in violation of Rule 403, SCRE?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County grand jury for criminal sexual conduct with a minor first degree. R. *. Appellant's jury trial was held before the Honorable Benjamin H. Culbertson and a jury from January 7 – 10, 2019. Tr. 1. Appellant was represented by Kia Wilson, and the state was represented by C. Leigh Andrew and Mary-Ellen Walter. Tr. 1.

The jury found Appellant guilty as charged and the judge sentenced him to thirty years imprisonment.

This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

STATEMENT OF FACTS

At the time of the allegations in this case, Minor lived with Appellant, her biological father, in a mobile home park in Conway, S.C. Tr. 188, l. 22 – 189, l. 6. Minor was eight years old. Tr. 166, ll. 1 – 2. Brooke Squires, the granddaughter of the couple who owned the mobile home park, babysat Minor at times and began staying at Appellant's house. Tr. 190, l. 2 – 191, l. 4. Squires described herself as a heroin addict with an unstable life during this time period. Tr. 189, ll. 7 – 15. Minor recalled Squires' use of drugs by witnessing Squires sticking a needle in her arm. Tr. 181, l. 19 – 182, l. 15.

Squires claimed that Minor was exhibiting strange behavior, stating: "[S]he always wanted clothes on, you know, she wanted to be fully dressed." Tr. 191, ll. 15 – 24. Squires then recalled that she saw Minor in her bed sick one morning without clothes on and she "knew something was wrong there that moment." Tr. 191, l. 25 – 192, l. 3. She further claimed that a few days prior she found bloody underwear in Minor's room, which she threw away after Minor told her it was from a cut. Tr. 192, ll. 4 – 8.

Squires recalled that when she found Minor in bed with no clothes, she was throwing up, so Squires decided to keep Minor home from school. Tr. 192, l. 19 – 193, l. 8. Squires then stated: "I went shopping with my friend, me, Minor and Britney, a friend of mine went shopping that day, and, and I had a very good time with her." Tr. 193, ll. 9 – 12. After they got home from shopping, Squires claimed that Minor told her "she was being messed with." Tr. 193, ll. 12 – 22. That day, March 14, 2016, Squires called 911 and two officers and an ambulance responded and took Minor to the hospital. Tr. 197, l. 16 – 198, l. 19; tr. 221, l. 22 – 222, l. 8.

When Minor arrived at the hospital, she was examined by a nurse, Janet Moore, who stated that Minor's labia majora was reddened but "there were no bruises or cuts or rashes or

anything like that." Tr. 260, ll. 14 – 20. Moore admitted that her notes did not reflect the presence of blood anywhere on Minor and if she had seen blood, she would have made a note of it. Tr. 266, ll. 5 – 11. Moore collected a vaginal and rectal swab from Minor for DNA testing. Tr. 260, ll. 24 – 25; tr. 265, ll. 13 – 19. Minor also received a physical medical exam by Dr. Carol Rahter who said "[s]he had a totally normal exam." Tr. 337, l. 19 – 340, l. 4.

Sara Goodman, who was qualified as an expert in DNA analysis and was employed with SLED, tested the vaginal and rectal swabs taken from Minor and determined that only Minor's DNA was present in the samples. Tr. 328, l. 19 – 329, l. 10. Goodman admitted that Appellant's DNA was not present in the samples collected from Minor. Tr. 332, ll. 19 – 24.

Minor was referred to the Children's Recovery Center in Myrtle Beach, S.C. and interviewed by Dianne Nordeen. Tr. 352, ll. 4 – 11. The interview of Minor was videotaped and in it, Minor claimed to have been sexually assaulted by Appellant from January until March of 2016. State's Ex. 17 (Video recording of Minor's interview on file with this Court).

ARGUMENT

The court erred in admitting Appellant's prior "rape in the first degree" conviction in his criminal sexual conduct with a minor first degree trial because Appellant offered to stipulate to this element of the offense and the state refused to accept the stipulation and therefore Appellant was substantially and unfairly prejudiced in violation of Rule 403, SCRE.

Relevant Facts

Defense counsel made a pretrial motion to suppress the introduction of Appellant's prior conviction for rape. Tr. 109, l. 18 – 116, l. 5. Counsel argued that admission of this conviction would be unfairly prejudicial to Appellant and that it was improper character evidence. Counsel specifically cited to Old Chief v. U.S., 519 U.S. 172 (1997) in arguing that the "name and nature of a prior offense raises a risk of a verdict tainted by improper considerations." Tr. 110, ll. 1 – 11. Counsel continued: "[T]he bottom line is that the State could very simply choose to try [Appellant] under 16-3-655(a)(1), but it's proceeding under (a)(2) because it is prejudicial and everyone is aware of the resulting bias against [Appellant] . . ." Tr. 110, l. 1 – 111, l. 16. Counsel further offered to stipulate to the prior conviction and stated "[t]he Court is made aware of it and it's a sentencing matter." Tr. 112, ll. 10 – 18.

The assistant solicitor argued that the prior conviction was an element of the offense for which Appellant was charged and the jury was required to find the state had proven that element beyond a reasonable doubt before it could find him guilty. Tr. 114, ll. 17 – 23. The solicitor cited to State v. Benton, 338 S.C. 151 (2000) and refused defense counsel's offer to stipulate. Tr. 114, l. 23 – 115, l. 5. The court denied defense counsel's motion to suppress and her offer to stipulate, ruling that the prior conviction was an element and therefore had to be proven by the state. Tr. 115, ll. 22 – 25.

The state called Michael Keville, who was the clerk of court for Madison County, New York, to introduce Appellant's prior conviction. Tr. 229. The state introduced State's Exhibit 5, which was a certified record of Appellant's prior conviction over defense counsel's objection. Tr. 230, l. 13 – 237, l. 15. This document revealed that Appellant was convicted of "Rape in the First Degree" on October 21, 1986 and that he was sentenced to "five (5) to fifteen (15) years in State Prison." R. * (State's Ex. 5). After Keville finished testifying, defense counsel again renewed her pretrial objections. Tr. 242, ll. 11 – 17. The state also called Christopher Graham, who was a sergeant with the Horry County Sheriff's Office. Tr. 251. Graham testified that Appellant was required to register as a sex offender because of his rape in the first-degree conviction from New York. Tr. 253, ll. 3 – 20.

Discussion

Under Rule 403 of the South Carolina Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). Furthermore, Rule 404(b) of the South Carolina Rules of Evidence provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Prior bad character evidence that is otherwise admissible under Rule 404(b) is still subject to the balancing test under Rule 403. State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009).

It is important to note at the outset that, in this case, the Minor was eight years old at the time of the alleged abuse. The first-degree CSC with a minor statute is broken into two parts: (1)

sexual battery on a minor *under the age of eleven*; and (2) sexual battery on a minor under the age of sixteen *and* where the defendant has been previously convicted "for an offense listed in Section 23-3-430(C)." S.C. Code Ann. § 16-3-655(A). The state could have proceeded on the first-degree CSC charge by arguing to the jury that Appellant committed a sexual battery on Minor who was under the age of eleven. Instead, the state chose to proceed by arguing Appellant committed a sexual battery against Minor who was under the age of sixteen, even though minor was in fact only eight. The state did this so that it could introduce evidence that Appellant had a prior conviction.

The state thus intentionally manipulated the statutory construction of S.C. Code Ann. § 16-3-655(A) in order to inflict the maximum possible prejudicial effect against Appellant while adding no probative value to its case. The assistant solicitor even made the preposterous statement that proceeding under subsection (A)(2), which requires a prior conviction, was actually beneficial to Appellant because the sentencing range under (A)(2) is ten to thirty years imprisonment whereas the sentencing range under (A)(1), which requires the victim to be under the age of eleven but does not require a prior conviction, is twenty-five years or life imprisonment. Tr. 31, l. 5 – 32, l. 17. This contention was disingenuous given the obvious and extreme prejudice that resulted from the jury being informed that Appellant, who was on trial for raping a child, had previously been convicted of "rape in the first degree."

The Supreme Court recently held in State v. Cross, 832 S.E.2d 281 (2019) that the trial court erred in refusing the defendant's request to bifurcate his CSC with a minor trial. Although Cross was decided several months after the trial in this case, it still warrants discussion here. The Cross Court noted that because having a prior conviction for CSC was an element of the offense that the state had to prove, "evidence of Cross's prior conviction had insurmountable

probative value; however, the prejudicial effect of that evidence was exceedingly high." Id. at 286. The Court went on to point out that "[t]he admissibility of Cross's prior conviction remains subject to a trial court's Rule 403 gatekeeping duty to determine whether and when that evidence should be admitted." Id. at 287 (emphasis omitted).

Cross was distinguished from State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003) and State v. Benton, 228 S.C. 151, 526 S.E.2d 228 (2000) which both allowed evidence of the defendant's prior burglary convictions where the prior convictions were an element of the first-degree burglary offense. However, in James, the Court found that the probative value of the defendant's seven prior burglaries was substantially outweighed by the danger of unfair prejudice. The James Court therefore limited the state to introducing evidence of only two prior convictions, which is all that is required by the first-degree burglary statute. James, 355 S.C. at 35. Cross found the burglary cases distinguishable "because of the inherently prejudicial stigma a prior sex-related offense undoubtedly carries." Id. at 288. The Court went on to rely on Rule 611, SCRE, in holding that the trial court must control when such prejudicial evidence is admitted.

The Court found that the prejudicial effect of such evidence could be eliminated by bifurcating a first-degree CSC with a minor trial when the state is relying on a prior conviction or sex offender registry in enhancing the charge. Id. A bifurcated trial would proceed such that the jury first would be asked only to determine whether the state had proven beyond a reasonable doubt that the defendant committed a sexual battery on a minor under the age of sixteen. Id. at 291. If the jury found the defendant guilty, then it would proceed to the second stage of the trial in which the state would be permitted to introduce evidence of the defendant's prior conviction in order to satisfy that element of the first-degree CSC with a minor charge. Id.

In this case, there was no physical evidence of guilt. The only direct evidence of guilt came from the Minor's testimony that Appellant committed the crime. This being the only direct evidence of guilt, the state sought to introduce Appellant's prior conviction for the sole purpose of smearing Appellant's character and to use it as improper propensity evidence. In Cross, the minor was thirteen years old at the time of the alleged abuse, which meant that the state could only convict the defendant of first-degree CSC if it proved he had a prior conviction. However, in this case the state did not need such evidence to convict Appellant of first-degree CSC because Minor was *under the age of eleven.*

Minor's age was not in dispute. She was eight years old at the time the alleged abuse occurred. The assistant solicitor, however, wanted to ensure that Appellant would not receive a fair trial by finding a way to introduce his prior conviction. The solicitor most likely believed that evidence of the prior conviction was necessary to obtain a conviction because this was a "he said she said" case with no physical evidence of guilt. This is why the solicitor proceeded under S.C. Code Ann. § 16-3-655(A)(2) instead of (A)(1) and also why she refused to accept Appellant's offer to stipulate.

Cross found that *one* proper remedy for this problem was for the trial court to bifurcate a first-degree CSC with a minor trial. Cross did not hold that bifurcation was the *only* way to ensure compliance with Rule 403, SCRE. In this case, Appellant did not request a bifurcated trial but instead offered to stipulate that the element of the prior conviction was met. Had the judge accepted Appellant's stipulation, the jury would not have needed to hear about his prior conviction. The judge could have found that the element of the prior conviction was met such that the jury would only need to determine whether the state proved beyond a reasonable doubt that Appellant committed a sexual battery on Minor. If the jury found Appellant guilty of this,

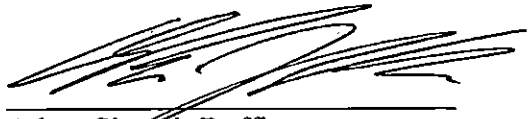
then the judge could proceed in sentencing Appellant as having been convicted of first-degree CSC with a minor.

The judge had a duty as a gatekeeper of the evidence presented to the jury to ensure that the state could prove its case while complying with the mandates of Rule 403, SCRE. A stipulation would have satisfied that element of the offense while eliminating the prejudicial impact to Appellant. While our courts have previously rejected this kind of forced stipulation in the past, as noted in Cross, prior convictions of sex-related crimes are simply in a category of their own. Compare State v. Cross, 832 S.E.2d 281 (2019) with State v. Benton, 228 S.C. 151, 526 S.E.2d 228 (2000). The probative value of State's Exhibit 5, which not only showed that Appellant was convicted of "rape in the first degree" but also that he received a prison sentence of five to fifteen years, was substantially outweighed by the prejudicial effect. The judge could have and should have reduced this prejudicial effect, while not reducing the probative value, by granting defense counsel's request to stipulate that Appellant had a requisite prior conviction.

The judge erred in refusing Appellant's offer to stipulate that he had a prior conviction. The judge further erred in allowing the state to present such incredibly and extremely prejudicial evidence when, because of the minor's age, it was not even a necessary element of the offense. Appellant's conviction should be reversed. See Rule 403, SCRE; Old Chief v. U.S. 519 U.S. 172 (1997); State v. Cross, 832 S.E.2d 281 (2019).

CONCLUSION

By reason of the foregoing argument, Appellant's conviction should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of October, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LESLIE DAVIS,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Leslie Davis, #378750, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 23rd day of October, 2019.

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of October, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.