

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2019-000084

THE STATE,

Respondent,

v.

MICHAEL SULLIVAN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Whether Appellant suffered any prejudice from the testimony of Shannon Richards, when Richards' testimony exceeded the time and place limitations of Rule 801(d)(1)(D) SCRE, but her statements did not affect the outcome of Appellant's trial? And whether Richards' statements were cumulative to other evidence that was not objected to by Appellant, therefore making any error by the trial judge in overruling Appellant's objection harmless?

STATEMENT OF THE CASE

In June 2018, the Greenville County Grand Jury indicted Appellant for two counts of criminal sexual conduct with a minor, third degree. On January 9-10, 2019, a jury trial was held in the Greenville County Court of General Sessions with the Honorable Alex Kinlaw, Jr. presiding. Appellant was represented by John M. Mussetto, Esq. The State was represented by Assistant Solicitor Elizabeth Major of the Thirteenth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of both counts. The trial judge sentenced Appellant to two concurrent terms of ten years' imprisonment. Appellant filed a timely notice of appeal and an initial brief.

STATEMENT OF FACTS

The victim (Victim) in this case was born in 2010. (Tr. 126). Appellant and Victim's grandmother (Grandmother) were married in 2008. (Tr. 89-91). Victim's mother (Mother) worked the third shift at BMW and required Grandmother and Appellant to watch Victim while she was at work. (Tr. 128-29). Occasionally, Victim would spend the night at a friend's house. (Tr. 77). On one such night in January 2017, Victim disclosed that she had been sexually abused by Appellant to her friend's mother, Shannon Richards. (Tr. 78). Richards immediately contacted Mother and conveyed what Victim told her. (Tr. 83-84). Mother was at Grandmother's house along with Appellant when she received Richards' phone call. (Tr. 136-37). After learning of the allegations of abuse, Mother confronted Appellant about the allegations. Appellant denied that he abused Victim. (Tr. 137). Mother left Grandmother's house to return home where she met Richards and Victim. (Tr. 139). Victim disclosed to Mother that Appellant had sexually abused her. (Tr. 139).

In response to Victim's disclosure, Mother called Appellant and asked him to come over to her house so he could hear Victim's allegations in person. (Tr. 140-41). Victim repeated her allegations to Appellant in person. Mother described Appellant's demeanor upon hearing Victim's allegations as "nonchalant" and stated that he was "fumbling in the candy bowl" as Victim confronted him. (Tr. 142, lines 3-9). After Victim and Appellant's confrontation, Mother took Victim to the hospital, however because of the nature of the allegations, no examination was performed. (Tr. 143). On January 18, 2017, Appellant sent Mother the following text message "Hey. [Mother] call me please we both getting played by someone close to the family. Think about it the timing of the incident was too perfect. Everything is going THE WAY they planed it (sic)" (State's Exhibit #1).

Victim was referred to the Julie Valentine Center for a forensic interview. Victim met with Christine Carlberg for an interview on February 13, 2017. During the interview, Victim stated that Appellant would abuse her at Grandmother's house when Grandmother was at bingo. (State's Exhibit #8). Victim stated that Appellant would put his hand down her pants and rub her private. Victim clarified that Appellant's hand went underneath her pants but did not go inside her underwear. Victim stated that Appellant abused her multiple times when she was five years old as well as when she was six years old. (State's Exhibit #8). Victim's forensic interview was played for the jury at trial. (Tr. 214). At trial, Victim described similar abusive acts by Appellant. Victim alleged that Appellant would rub his hand on her private while she was in the front seat of his car. (Tr. 188-89). Additionally, Appellant would force Victim to bounce on his lap. When Victim bounced on Appellant's lap, sometimes his pants would be on, but other times he would pull his pants down while leaving his underwear on. (Tr. 183-85).

Appellant was interviewed by Investigator Cheri Lyda of the Greenville County Sheriff's Office. Appellant told Lyda that someone in his family was attempting to set him up. However, Appellant choose not to specify who was setting him up and used the word "they" when describing who was responsible. (Tr. 253). Appellant eventually said that Grandmother was behind the accusations, but subsequently backed off of that assertion. (Tr. 254). Appellant testified in his own defense at trial. Appellant testified that Grandmother's sister did not like him and may have encouraged Victim to fabricate the allegations against him. (Tr. 292, 307-08). At the conclusion of trial, Appellant was convicted of both charges.

STANDARD OF REVIEW

The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

Even though the testimony of Shannon Richards exceeded the time and place limitations of Rule 801(d)(1)(D) SCRE, Appellant did not suffer any prejudice from her statements because her statements did not affect the outcome of Appellant's trial. Furthermore, Richards' statements were cumulative to other evidence that was not objected to by Appellant, therefore any error by the trial judge in overruling Appellant's objection was harmless.

Appellant argues the trial judge erred by overruling Appellant's objection to hearsay statements made by Shannon Richards. Specifically, Appellant argues Richards' statements exceeded the time and place limitations of Rule 801(d)(1)(D) SCRE. Appellant further argues that because of the lack of physical evidence presented by the State any error in the admission of Richards' statements cannot be harmless. Richards' testimony exceeded the time and place limitations of Rule 801(d)(1)(D) SCRE; however Appellant suffered no prejudice from Richards' statements because Richards' statements did not affect the outcome of his trial. Furthermore, Richards' statements were cumulative to other evidence that was not objected to by Appellant. Therefore, any error on behalf of the trial judge in overruling Appellant's objection was entirely harmless because it did not affect the outcome of Appellant's trial.

Rule 801(d)(1)(D) of the South Carolina Rules of Evidence provides that a statement is not hearsay if it is "consistent with the declarant's testimony in a criminal sexual conduct case...where the declarant is the alleged victim and the statement is limited to the time and place of the incident." Rule 801(d)(1)(D)-SCRE. "Improperly admitted hearsay which is cumulative to other evidence may be viewed as harmless." State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011). "[I]n a direct appeal, a harmless error analysis should be employed when reviewing the admission of hearsay testimony that improperly corroborates the victim's testimony in a sexual assault case." Thompson v. State, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018). The introduction of inadmissible evidence is harmless when the evidence is merely

cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008). “In order for an error to warrant reversal, the error must result in prejudice to the Appellant.” State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005). When an appellate court considers whether any issue of witness credibility was harmless error, the court “will consider the importance of the witness’s testimony to the prosecution’s case, whether the witness’s testimony was cumulative, whether other evidence corroborates or contradicts the witness’s testimony, the extent of cross examination otherwise permitted, and the overall strength of the State’s case.” State v. Fossick, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998).

Here, Appellant did not suffer any prejudice from Richards’ testimony because her statements did not affect the outcome of Appellant’s trial. Appellant complains about the following testimony:

Assistant Solicitor Major: Did she say where it happened?

Shannon Richards: In the living room. She told me in the living room. And she said that she would wear gown – gowns. (sic) She would have a gown on. And he would have her to sit on top of him. And I said, well, what do you mean? You know, I need details. And she said she would— she would—he—she would be facing out to the door and her back is to him. And I said, Well, what else would go on? And she said he would make her put her hands down his pants. And he would put his hands down her private area. And I said, Okay. And I said—

Mr. Mussetto: Judge, I’m going to object on the grounds of hearsay. All of the testimony that’s being told goes directly to the truth of the matter asserted in this case. I mean, she’s repeating what her recollections are verbatim as to what this child has disclosed to her. And that’s hearsay, your Honor.

(Tr. 81, lines 4-15). The solicitor’s response to Appellant’s objection plainly demonstrates that she merely intended to ask Richards about the time and place of disclosure. The following exchange took place after Appellant’s objection:

The Court: All right. Do you want to respond?

Assistant Solicitor Major: Yes, Your Honor. Under—I don't have the rule in front of me. But under one the hearsay rules—

The Court: Exceptions?

Assistant Solicitor Major: Yes. One of the exceptions under the definition of hearsay, I believe it's eight—I'll find the rule. But it allows a witness to testify as to time and place of sexual abuse allegations. And I believe that her testimony is — is laying the foundation that this was sexual abuse that was disclosed. But—but that is—I can move on because—it is 801(d)(1)(D).

The Court: All right. For the record, A statement which is not hearsay—a statement is not hearsay as it—as it relates to this case, you're talking about 801(d). It's consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to time and place of the incident. Is that what you're—

Assistant Solicitor Major: Yes, Your Honor. And I'm laying the foundation that sexual abuse was disclosed and that it will be consistent with the victim's testimony. But I think we've laid that foundation. And I'm prepared to move on from the question.

The Court: Well, I'm going to—and—and that's fine. I'm going to just overrule his objection on the record. Then we'll just move on.

(Tr. 82-83, lines 1-25, lines 1-5).

In the preceding exchange the State asked a question that is appropriate under Rule 801(d)(1)(D) SCRE. The State asked Richards where Victim said the abuse took place. Richards' answer was non-responsive to the State's question. Richards initially answered the question but then proceeded to provide superfluous detail and in doing so exceeded the bounds of Rule 801(d)(1)(D) SCRE. However, Richards' superfluous testimony did not prejudice Appellant because it did not affect the outcome of the trial. There was ample evidence presented at trial to support the jury's verdict notwithstanding Richards' testimony. The jury likely determined Appellant's guilt based on Appellant's testimony, the testimony of Victim, and Victim's forensic interview. The jury had the opportunity to evaluate Victim's credibility after seeing her on the witness stand and hearing her forensic interview. Likewise, the jury had the opportunity to hear

Appellant from the witness stand and determine his credibility. In light of the guilty verdict they returned, the jury was not convinced by Appellant's story that an unknown family member had encouraged Victim to fabricate allegations of sexual abuse against him. Furthermore, Richards' recitation of Victim's allegations did not match Victim's testimony at trial or her statements in the forensic interview. For example, Richards claimed that Victim said Appellant made her put her hands down Appellant's pants. (Tr. 81). However, Victim never made that accusation in her testimony or in her forensic interview. The State did not ask any further questions of Richards regarding what Victim told her or repeat Richards' testimony in their closing argument. (Tr. 81-87, 325-37). Therefore, it is unlikely that Richards' unsolicited statements in response to an appropriate question from the State affected the jury's verdict in any way.

Additionally, Richards' testimony was merely cumulative to other testimony that was unobjected to by Appellant. Multiple witnesses other than Victim repeated Victim's accusations beyond the scope of time and place without objection. For example, on direct examination Mother testified to the following without objection from Appellant:

Mother: And [Shannon Richards] had mentioned that [Victim] had said that she didn't like going to her grandparent's house. And so [Richards] asked [Victim] why. And [Victim] said that her papa—that's what she used to call [Appellant] – her papa touches her. And so as soon as I heard that, I just immediately took the phone from my ear and just started screaming [Appellant's] name at the top of my lungs several times.

(Tr. 137, lines 9-16). In a similar fashion, Grandmother also testified about Mother hearing the allegations and yelling Appellant's name. (Tr. 96.). Appellant himself acknowledged the allegations during his direct testimony when he said he was accused of "fondling" Victim. (Tr. 286, lines 24-25). Therefore, to the extent that Appellant claims he was harmed by Richards' testimony exceeding Rule 801(d)(1)(D) SCRE because she identified Appellant as the abuser or because she specified the abusive acts Appellant was accused of, Richards' testimony was

cumulative to other evidence that was un-objected to by Appellant. To the extent that Appellant claims Richards' testimony bolstered Victim's testimony, Appellant bolstered Victim's testimony himself when he asked the following question of Mother on cross examination:

Mr. Mussetto: Okay. When [Shannon Richards] first made this disclosure to you—and I understand—well , when [Shannon Richards] first made the disclosure to you, why did you automatically assume that the disclosures were true?

Mother: Because it's my daughter. It's my daughter. And she's six. And she has no reason to even know about anything like that, unless it's something that has happened to her. And she's my daughter. So I was going to believe it.

(Tr. 157, lines 11-19). Therefore, Appellant bolstered Victim's testimony through his questioning of Mother far more than Richards' testimony possibly could have. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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March 23, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2019-000084

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THE STATE,

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MICHAEL SULLIVAN,


Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
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Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This twenty-third day of March, 2020.



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SC Court of Appeals

RE: State v. Michael Sullivan
Appellate Case No. 2019-000084

Dear Mr. Alexander:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Scott Matthews
Assistant Attorney General
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JSM/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services