STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PEDRO A. GRADO TORRES-SHAW,

APPELLANT.

APPELLATE CASE NO. 2019-001234

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexual abuse case, did the trial court err in allowing the State to abuse the "time and place" exception for hearsay under Rule 801(d)(1)(D), SCRE by making repeated references to it in opening statement and closing argument and in allowing the testimony of a victim advocate, in violation of Rule 403, SCRE?

STATEMENT OF THE CASE

A Sumter County grand jury indicted appellant Pedro A. Grado Torres-Shaw for first-degree criminal sexual conduct with a minor and on July 15, 2019, appellant was tried before the Honorable George M. McFaddin and a jury. R. 1. John P. Meadors represented the State. R. 1. Michael Routzong and J. C. Bridges represented appellant. R. 1. The jury convicted appellant. R. 441, l. 7 – 442, l. 3. Judge McFaddin sentenced appellant to twenty-five years' imprisonment. R. 450, ll. 4 – 9. This appeal follows.

STANDARD OF REVIEW

"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. "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. Collins, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014) (internal quotations and citations omitted).

ARGUMENT

In this sexual abuse case, the trial court erred in allowing the State to abuse the "time and place" exception for hearsay under Rule 801(d)(1)(D), SCRE by making repeated references to it in opening statement and closing argument and in allowing the testimony of a victim advocate, in violation of Rule 403, SCRE.

Beginning with his opening statement, the solicitor began abusing the exception for "time and place" hearsay in child sexual abuse cases. The solicitor told the jury that in criminal sexual conduct cases, "the law allows what's called time and place witnesses." R. 59, ll. 19 – 22. "If a victim tells somebody well, I was assaulted, **the law doesn't allow** for you to repeat who she said it was, but the law does allow witnesses, if a victim told them to say well, I was assaulted at this time, at this place. The law allows that in these cases. They're called time and place witnesses if it happened around the incident, and, and we'll present some of those."[1] R. 59, l. 22 – 60, l. 4 (emphasis added).

The solicitor's statements about what the rules of evidence did not allow were improper because they invited the jury to speculate about evidence that would not be presented. The State also gave the jury the impression that facts were being withheld from them, injecting an arbitrary and dangerous factor into the jury's deliberations. A solicitor cannot inject material outside of the evidence or the judge's charge. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). The error was compounded by the solicitor's prior improper reference to the trial being a "search for the truth." R. 58, ll. 18 – 25. See State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) ("However, we agree with Appellant that a trial judge should refrain from informing

[1] Appellant acknowledges trial counsel failed to object to the solicitor's statements and the victim advocate's testimony, and, under traditional rules of error preservation, this issue may be procedurally barred and may need to be raised in post-conviction relief.

the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict.").

The State's first witness was complainant, who was twelve years old by the time of the trial. R. 69, ll. 3 – 6. Appellant was complainant's mother's boyfriend. R. 176, ll. 12 – 16. On January 27, 2018, complainant was home with her brother, appellant, and appellant's two sons and one daughter. R. 70, l. 1 – 74, l. 14. Appellant told his daughter to take a shower. R. 74, ll. 18 – 24. Complainant said appellant then anally raped her while his daughter was in the shower. R. 75, l. 4 – 77, l. 15. Complainant also testified that appellant had repeatedly molested her since April of 2017. R. 77, l. 16 – 81, l. 3.

Appellant's mother and older sister returned home from running an errand and complainant told her older sister about the alleged abuse. R. 137, l. 15 – 139, l. 5. The solicitor had the sister relate the time and place of the assaults pursuant to Rule 801(d)(1)(D), SCRE. R. 138, l. 8 – 139, l. 5. The older sister then called her mother into a different room from appellant. R. 139, l. 11 – 140, l. 5. The mother testified that complainant told her about the abuse, then testified about the time and place of the assaults. R. 185, l. 1 – 187, l. 4. The mother confronted appellant and she claimed he responded that he had blackouts, and that if complainant said it, it must be true, and that the mother should call the police. R. 187, l. 21 – 189, l. 2. The mother also claimed that, months later, she visited appellant at the jail where he admitted abusing complainant and asked the mother if they could "move on." R. 194, l. 1 – 196, l. 7. The State's last witness in its case-in-chief was a police officer who testified that he heard appellant talk about his blackouts and that "whatever she said he did is what he did." R. 309, ll. 12 – 21.

Appellant testified and denied making these statements to the mother. R. 350, ll. 18 – 24. Appellant also vehemently denied abusing complainant in any manner. R. 349, ll. 1 – 8. He did,

however, tell the mother to inform the police because he was certain a competent investigation would exonerate him. R. 351, l. 11 – 355, l. 3. Appellant did not take a shower that day and the police's intrusive, extensive search for evidence on his person found none. R. 353, l. 4 – 355, l. 3. Appellant discredited the State's DNA evidence obtained from sperm cells on complainant's underwear (pulled from a laundry basket where it had been sitting for hours) by contradicting prior testimony that every resident of the house had their own laundry basket, stating that he was the only person who had a laundry basket. R. 285, l. 7 – 290, l. 7. R. 355, ll. 4 – 11. SLED's serologist admitted that clothing from the same household could carry the DNA of all residents if there had been "cross-contamination." R. 272, ll. 15 – 19.

Appellant also specifically denied making the statements about blacking out to the police officer and described the officer as wearing a body camera at the time. R. 352, l. 22 – 353, l. 3. After hearing this testimony, the State was forced to call the officer as a reply witness to correct his earlier erroneous testimony. R. 389, l. 11 – 390, l. 25. The officer admitted that complainant's mother, not appellant, made these statements to him. R. 389, l. 11 – 390, l. 25.

The State's next-to-last witness before the officer who recanted his testimony was Amanda Wiley, a victim advocate employed by the Sumter Police Department. R. 303, ll. 6 – 14. She had "trainings on dealing with certain victims of, of crime." R. 303, ll. 6 – 14. Wiley had a master's degree in professional counseling. R. 303, ll. 6 – 14. The police arrived at the scene at 8:30 and Wiley was called to the house by the police within an hour. R. 308, ll. 22 – 25. R. 305, ll. 15 – 22.

The solicitor then asked the victim advocate, "And did you learn from the victim a time and place of a sexual assault?" R. 303, ll. 22 – 23. After the victim advocate's affirmative response, the solicitor asked, "And can you tell us, with those parameters, **and you know very**

well what we have to do, what were you told as far as a time and place of a sexual assault." R. 303, l. 25 – 304, l. 2 (emphasis added). The victim advocate then relayed the hearsay statement from complainant that she had been sexually assaulted that day at her house. R. 304, ll. 3 – 4.

During his closing argument, the solicitor returned to the improper theme of what the rules of evidence allowed the jury to be told. R. 393, ll. 18 – 24. He said, "Well, [complainant] told [older sister], and we're allowed, as you heard, time and place. We're not allowed to go in—we're not allowed to elicit testimony that says it was so and so and this. But you're allowed to say I was a victim of an assault at a time and place." R. 393, ll. 18 – 24. Later in his argument, he specifically referenced the victim advocate as "Another time and place witness." R. 396, ll. 5 – 7. After describing in graphic detail the sexual assault examination performed on complainant, the solicitor said, "Tell another person about time and place." R. 396, ll. 10 – 25. In his reply, the solicitor again said, "Oh, by the way, yeah, here's the time and place." R. 426, ll. 14 – 16.

While the rules of evidence allow "time and place" evidence, the State cannot contrive extra witnesses in contemplation of abusing this exception. Rule 801(d)(1)(d) states, in relevant part, "A statement is not hearsay if . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (D) 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 the time or place of the incident." Rule 801(d)(1)(D), SCRE. While the rules of evidence apply to all cases tried in this state, civil and criminal, this rule carves out an exception from the hearsay exclusion that only applies in sex cases.

The exception existed long before South Carolina adopted the rules of evidence. See State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 687 (2009) (noting Rules of Evidence

adopted in 1995); State v. Harrison, 236 S.C. 246, 250, 113 S.E.2d 783, 785 (1960) ("The particulars or details are not admissible but so much of the complaint as identifies 'the time and place with that of the one charged' may be shown."). The origin of the rule comes from outdated laws making rape more difficult to prove. See Michelle J. Anderson, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault, 84 Boston Univ. L. Rev. 945, 953-61 (Oct. 2004).

As explained by Professor Anderson, courts required complainants in rape cases to promptly report the rape under the early English common law theory of "hue and cry," which assumed that a victim would immediately broadcast a crime. Id. While courts abandoned "hue and cry" as a requirement for other crimes in the 1700s, it survived in rape cases. Id. In the late 1880s, legislatures in America began enacting statutes requiring the corroboration of a rape victim's testimony. Id. See also State v. Black, 204 S.C. 414, 29 S.E.2d 675 (1944) ("It is a material part of the State's case in a prosecution for rape to show complaint at the first opportunity."). In State v. Sudduth, 52 S.C. 488, 30 S.E. 408 (1898), the Court dealt seriously with, but ultimately rejected the appellant's argument that the victim's mother could not testify in corroboration because **twenty hours** had elapsed since the rape was allegedly committed.

In 1977, South Carolina's Legislature passed a law eliminating the corroboration requirement. See S.C. Code Ann. § 16-3-657 (stating, "The testimony of the victim need not be corroborated [in sexual assault cases]."). During the era when "hue and cry" and the corroboration requirement were in place, the only way prosecutors could satisfy those elements was with hearsay testimony. Yet, after the elimination of the reason for the exception, it persists. The exception carves out one type of witness's prior consistent statement for different treatment than almost any other witness. See Rule 801(d)(1), SCRE (listing types of prior consistent

statements that are admissible). The exception in Rule 801(d)(1) for prior consistent statements to rebut a defendant's claims of recent fabrication or improper influence would adequately cover situations where the State needs to counter a defendant's case.

The origins of the time and place exception demonstrate that what was once necessary to allow the State to prove its case has now become a tool with which the State can repeatedly bolster a victim's testimony. In appellant's case, the State used a government employee, a "victim advocate," whose job was unrelated to investigation of crime, as "Another time and place witness." R. 396, ll. 5 – 7. Allowing the State to use a "victim advocate" under the time and place exception stretches the rule past its breaking point and should have been excluded under Rule 403, SCRE.

The victim advocate's testimony was of limited probative value especially because it was artificially manufactured by the police. The victim advocate had been employed by the police since 2011. When the solicitor began his questioning, he commented that she "knew very well" what they were doing with the time and place exception. R. 303, l. 25 – 304, l. 2.

The hearsay of the victim advocate in this case is similar to the rule prohibiting self-serving hearsay contrived by a criminal defendant. See State v. Sweet, 270 S.C. 97, 240 S.E.2d 648 (1978). In Sweet, the victim claimed she was had been violently raped by a stranger and the defendant's defense was consent. Id. at 99-100, 240 S.E.2d at 649. The defendant sought to bolster his consent defense by testifying that he knew certain intimate facts disclosed to him by the victim (the Court does not say what these facts were). Id. The victim admitted the facts were true. Id. To corroborate that he learned the intimate facts from the victim, defense counsel called his law clerk to testify that the defendant related the intimate facts shortly after the incident. Id. The trial court's refusal to allow the law clerk's testimony was upheld because of

the rule prohibiting self-serving hearsay of a defendant. Id. Here, just like in Sweet, a nonessential witness in the employ of the State produced hearsay that was self-serving in the State's favor. Neither the State nor the defense should be allowed to artificially manufacture witnesses for hearsay exceptions.

The victim advocate's testimony was manifestly prejudicial because of the well-known devastating effect of cumulative corroboration testimony. "Improper corroboration testimony that is *merely cumulative to the victim's testimony,* however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) rev'd in part Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018) (recognizing that Jolly was overruled to the extent it precluded a finding of harmless error). Furthermore, the solicitor injected arbitrary and speculative factors with his improper arguments about what the rules of evidence allowed the jury to hear. He repeatedly emphasized the witnesses who testified about time and place, including the victim advocate. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial.

This 15th day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Pedro A. Grado Torres-Shaw states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge George M. McFaddin, which was held on July 16-19, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Pedro A. Grado Torres-Shaw.

Respectfully Submitted,

This 15th day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial Transcript dated July 15-19, 2020;
(2) Defense Exhibit Nos. 1-4;
(3) Court's Exhibit Nos. 1-3
(4) Indictment
(5) Sentence Sheet

I certify that this designation contains no matter which is irrelevant to this appeal.

April 15, 2020

s/David Alexander
Appellate Defender

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

April 15, 2020.

s/David Alexander
Appellate Defender

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