STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

ORIGINAL

THE STATE,

RESPONDENT,

V.

MICHAEL SULLIVAN,

APPELLANT.

APPELLATE CASE NO. 2019-000084

RECEIVED
APR 13 2020
SC Court of Appeals

FINAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

ARGUMENT

The trial court erred in overruling appellant's objection to hearsay describing the manner of sexual abuse which exceeded the limitations allowed by Rule 801(d)(1)(D), SCRE. 4

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994) 6

State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989) 6

State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006) 3

State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) 6

State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) 8

Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018) 5, 6

Rules

Rule 801(d)(1)(D), SCRE 1, 4, 5

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in overruling appellant's objection to hearsay describing the manner of sexual abuse which exceeded the limitations allowed by Rule 801(d)(1)(D), SCRE?

STATEMENT OF THE CASE

A Greenville County grand jury indicted appellant for two counts of third-degree criminal sexual conduct with a minor and on January 9, 2019, appellant was tried before the Honorable Alex Kinlaw, Jr. and a jury. R. 1. Elizabeth C. Major represented the State. R. 1. John M. Mussetto represented appellant. R. 1. The jury convicted appellant. R. 308, l. 17 – 309, l. 2. Judge Kinlaw sentenced appellant to concurrent terms of ten years' imprisonment. R. 316, ll. 2 – 16. 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. "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.

ARGUMENT

The trial court erred in overruling appellant's objection to hearsay describing the manner of sexual abuse which exceeded the limitations allowed by Rule 801(d)(1)(D), SCRE.

Minor first accused appellant of molesting her to the State's first witness, Shannon Richards. R. 24, l. 11 – 27, l. 14. At the time, Minor was six years old and spending the night at Richards' house because she was friends with Richards' daughter. R. 23, l. 3 – 24, l. 16. Richards testified that she was ironing clothes and was talking to the children about their grandparents. R. 23, l. 19 – 27, l. 14. Richards asked Minor if she liked going to her grandparents' house and Minor said she did not. R. 23, l. 19 – 27, l. 14. Appellant is Minor's step-grandfather. R. 35, l. 5 – 37, l. 20.

Richards asked Minor why she did not like going to her grandparents' house and Minor "kind of froze up." R. 25, ll. 1 – 3. Richards continued to press Minor for a reason. R. 25, l. 4 – 26, l. 5. Minor eventually told her that appellant "does the nasty." R. 26, ll. 12 – 17.

Richards continued to testify regarding what Minor told her about the alleged abuse. R. 26, l. 18 – 27, l. 14. She said the abuse happened while she would stay with her grandparents and when her grandmother would go to bingo. R. 27, ll. 1 – 3. The solicitor asked where the abuse occurred and Richards responded, "In the living room," but then said she pressed Minor, telling her, "I need details." R. 27, ll. 5 – 9. Richards testified that Minor told her the following:

> 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—

at which point defense counsel objected "on the grounds of hearsay." R. 27, ll. 10 – 21. Appellant argued that the hearsay was for the truth of the matter asserted and that Richards was just repeating Minor's allegations. R. 27, ll. 16 – 21.

Judge Kinlaw excused the jury to hear argument on the objection. R. 27, ll. 22 – 25. After the jury left, the court gave the solicitor a chance to respond to the objection. R. 28, l. 1. The solicitor cited a hearsay exception and initially argued that she was "laying the foundation that this was sexual abuse that was disclosed." R. 28, ll. 6 – 13. The solicitor then said she could move on and cited Rule 801(d)(1)(D), SCRE. R. 28, ll. 6 – 13.

The trial court read the exception and the solicitor responded that she had "laid that foundation. And I'm prepared to move on from the question." R. 28, l. 14 – 29, l. 2. Judge Kinlaw then ruled, "Well, I'm going to—and—and that's fine. And I'm going to just overrule his objection on the record. Then we'll just move on." R. 29, ll. 3 – 5.

The trial judge erred in overruling appellant's objection because the hearsay testimony by Richards exceeded the time and place limitation of Rule 801(d)(1)(D). See Rule 801(d)(1)(D), SCRE. Rule 801(d) defines statements which are not hearsay and includes statements "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." Id. "This rule obviously limits corroborating testimony in this case to the time and place of the assault(s); and other details or particulars, including the perpetrator's identity, must be excluded." Thompson v. State, 423 S.C. 235, 240-41, 814 S.E.2d 487, 489-90 (2018).

Richards' testimony that appellant "would make her put her hands down his pants" and that appellant "would put his hands down her private area" are details and particulars excluded by the hearsay rule. In Thompson, a DSS caseworker, Trina Elfering, testified that she spoke

with the victim about "each allegation against Petitioner" and that the victim "'revealed to me that she was being sexually abused by [Petitioner].'" Id. A clinical psychologist, Dr. Alicia Benedetto who performed victim's forensic interview "testified Victim disclosed chronic sexual abuse by Petitioner in the form of vaginal penetration, anal penetration, and oral sex." Id. The Thompson Court ruled, "The foregoing testimony from Ms. Elfering and Dr. Benedetto was clearly inadmissible hearsay." Id.

The hearsay in appellant's case is inadmissible under the analysis in Thompson and the trial court erred in overruling appellant's objection. The State will likely argue that harmless error applies, but the error cannot be harmless beyond a reasonable doubt in this case because of the lack of overwhelming evidence of appellant's guilt. Thompson at 246, 814 S.E.2d at 493. See also State v. Jennings, 394 S.C. 473, 483, 716 S.E.2d 91, 95-96 (2011) (Kittredge, J. concurring). In Jennings, the Supreme Court overruled the categorical rule finding prejudice from the improper admission of this kind of hearsay. Id. *overruling* Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994). However, as the Court's opinion in Thompson makes clear, the Jolly analysis of why such testimony is prejudicial still stands. Thompson compared the hearsay in that case to the hearsay in State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989) and held, "As was the case in Barrett, the cumulative effect of the hearsay testimony undeniably enhanced its devastating impact." Thompson at 249, 814 S.E.2d at 494. Here, the cumulative effect was similarly devastating because it came from Richards, a disinterested witness, and contained details of the abuse.

The State did not present overwhelming evidence of appellant's guilt. Minor testified that appellant made her bounce on his lap at appellant's house with his pants "sometimes" removed. R. 128, l. 24 – 131, l. 7. She also alleged appellant would fondle her in

his car. R. 134, l. 14 – 135, l. 12. This contradicted appellant's description given at the forensic interview during which she never mentioned any abuse occurring in appellant's car. R. 161, ll. 16 – 22. R. 201, ll. 18 – 20.

Appellant's wife testified that appellant was frequently left alone with Minor while she played bingo. R. 41, ll. 3 – 7. Minor's mother ("Mother") worked night shift and Minor spent many nights with her grandparents. R. 40, ll. 3 – 14. Appellant's wife did not witness any abuse and said she "was just shocked" when Mother received a call from Richards telling her about Minor's allegations. R. 43, ll. 14 – 18.

Mother immediately and forcefully confronted appellant because she was at appellant's house when Richards called. R. 42, l. 20 – 43, l. 24. Appellant's wife said appellant denied the allegations, calling them "crazy." R. 43, ll. 8 – 13. Mother also testified that appellant denied the allegations during this initial confrontation. R. 83, l. 9 – 84, l. 2. Mother told Richards to bring Minor home. R.85, ll. 4 – 14. After talking with Minor, Mother called appellant and told him to come to her house so that he could hear Minor describe the abuse. R. 87, l. 16 – 88, l. 7. Appellant came to the house and listened to Minor's allegations and denied them. R. 88, ll. 3 – 19. Mother took issue with appellant's denial, describing him as "nonchalant," fiddling with a candy bowl, and asking her if she was "going to listen to a six-year-old." R. 88, ll. 3 – 21.

The State introduced no physical evidence. Appellant voluntarily went for an interview at the police station without a lawyer and denied the abuse. R. 198, ll. 15 – 18. Appellant theorized that someone must have been behind the allegations. R. 199, l. 1 – 24.

Appellant took the stand in his own defense and denied abusing Minor. R. 240, l. 15 – 241, l. 16. Appellant recalled telling the police during his interview that either his wife or

wife's sister was behind the allegations. R. 238, ll. 2 – 14. Appellant had caught his wife lying about her bingo attendance and saw her car at another man's house. R. 243, l. 3 – 245, l. 7. His wife moved out the day after the allegations were made. R. 236, l. 21 – 237, l. 2.

This case without any witnesses, any physical evidence, and where appellant took the stand and denied abusing Minor was a classic credibility contest. The error in this sexual abuse case that "hinged on credibility" cannot be harmless. See State v. Stukes, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) (finding erroneous jury charge could not be harmless beyond a reasonable doubt in a sexual assault case). This Court should reverse.

CONCLUSION

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

This 8th day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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."

April 8, 2020.

s/David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

RECEIVED
APR 13 2020
SC Court of Appeals