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ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD DAVIS, SR.,

APPELLANT

APPELLATE CASE NO 2018-001628

ANDERS BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the court erred in appellant's trial for third degree criminal sexual conduct with a minor where it admitted the hearsay testimony of Officer Platt and Ms. Ellington, in which they repeated the accusations made by the minor, including the details and particulars of the alleged offense and identity of the perpetrator, since this improperly corroborated the minor's testimony and was inadmissible hearsay under Rule 801(d)(1)(D), SCRE?

## STATEMENT OF THE CASE

On July 9, 2018, appellant was indicted by a Lexington County Grand Jury for the offense of criminal sexual conduct with a minor in the third degree. R. 321 – 322. Appellant was tried before the Honorable Eugene C. Griffith, Jr., and a jury from August 20 – 22, 2018. R. 1. Jason Chehoski and Edward Dawson represented appellant. R. 1. Sutania Fuller and Kate Usry represented the state. R. 1. Appellant was convicted as indicted and he was sentenced to seven years imprisonment. R. 305, ll. 21-25; R. 318, ll. 10-12.

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 court erred in appellant's trial for third degree criminal sexual conduct with a minor where it admitted the hearsay testimony of Officer Platt and Ms. Ellington, in which they repeated the accusations made by the minor, including the details and particulars of the alleged offense and identity of the perpetrator, since this improperly corroborated the minor's testimony and was inadmissible hearsay under Rule 801(d)(1)(D), SCRE.

The state alleged that appellant touched his twelve-year-old granddaughter in a lewd and lascivious manner. Although the minor testified about the alleged offense, the court admitted hearsay testimony by two witnesses of prior consistent statements by the minor. The admission of this testimony was error, as it was not limited to the time and place of the incident.

### ***Relevant facts***

Pretrial, defense counsel moved to limit any hearsay testimony to "time and place." R. 40, ll. 17-21. The court ruled that the prosecution was so "limited to time and place" unless something else arose, such as the "door be[ing] open[ed]." R. 42, ll. 7-10.

Appellant's granddaughter, the minor, testified at appellant's trial. The minor claimed that after playing in the sprinkler, she took a shower in her grandparents' bathroom and appellant, her grandfather, came into the bathroom and touched her "bottom." R. 172, l. 4 – 173, l. 1; R. 174, ll. 14-21. According to the minor, after she was dressed, appellant told her to sit on his lap and kissed her. R. 176, ll. 12-18. The minor claimed appellant "laid [her] back," told her to take her pants off, and offered her eighty dollars. R. 178, ll. 8-17. The minor alleged appellant lifted up her shirt and kissed her chest, and she alleged he touched her vagina through her pants. R. 177, ll. 1-2; R. 178, ll. 20-22. According to the minor, appellant stopped touching her and

sometime later he apologized, began sweating, and fainted, so she phoned another family member and 911 was called. R. 180, l. 5 – 181, l. 4.

It was undisputed that paramedics were called to the house because appellant fainted. When paramedics arrived and asked what happened, appellant said he fell ill after he “inappropriately touched his granddaughter.” R. 84, ll. 3-7. Appellant said the touch was by accident. Appellant explained that “he gave her a hug, and [his] hand slipped and [he] touched her on the butt.” R. 114, ll. 8-11.

Karen Ellington, a paramedic with Lexington EMS, called law enforcement because she said the situation “didn’t sit right” with her and she was a mandated reporter of child abuse. R. 99, ll. 4-20. Due to her call, Officer Platt came to the house. R. 100, ll. 23-25. Ellington met with Officer Platt, the minor, and the minor’s father, while the minor’s father had his lawyer on speakerphone. R. 102, ll. 2-10. Ellington said the minor was only asked a single question for medical purposes—whether “there had been sexual intercourse”—but the minor said no. R. 105, ll. 7-13.

The rest of the minor’s remarks were not made for purposes of medical diagnosis or treatment but were instead given in response to questioning by Officer Platt.<sup>1</sup> R. 103, ll. 3-5. Ellington said that she heard the minor tell Officer Platt the details and particulars of the alleged assault as well as the identity of the perpetrator:

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<sup>1</sup> Nor were the minor’s remarks an excited utterance. The alleged offense had ended, and the minor had gone outside to watch her sisters play. R. 179, ll. 1-8; R. 216, l. 4 – 217, l. 17. Appellant subsequently fainted and the minor phoned her father, who phoned the minor’s grandmother. R. 180, l. 24 – 181, l. 4. The minor’s father came home. R. 181, ll. 8-9. Then the minor’s grandmother came home. R. 185, ll. 24-25. Paramedics arrived. R. 186, ll. 15-17. Paramedics called police, who then arrived. R. 99, ll. 1-23. The minor’s father called his lawyer. R. 102, ll. 4-10. Thus, a substantial amount of time had elapsed before the minor made the statements at issue to Officer Platt, and her statements were made in response to questioning rather than blurted out while startled.

[The minor] started explaining that she was in the shower and her grandfather was touching her bottom. She stated when she got out of the shower and her towel was on, her grandfather asked her to sit on his lap facing him. So forward, facing like straddling his lap. She said that she said no to that. She said that he described for her to lay down on the bed and then he tried to touch her vagina. That he raised her shirt and touched her breast. He also—she said that he said real women take their pants off, but she didn't do that either. She stated that the grandfather told her not to tell anyone because it would upset them, and that he would buy her anything that she wanted whenever they went places. And that he would give her \$80.00 dollars. To which she said to him, you can't pay me \$80.00 dollars for sex.

R. 104, l. 11 – 105, l. 2.

Officer Shaun Platt was a deputy with the Lexington County Sheriff's Department and a former military police officer. R. 129, l. 11 – 130, l. 5. He confirmed Ellington's testimony as to the particulars of the alleged assault, and the identity of the perpetrator, and went even further into detail. According to Officer Platt, the minor:

[S]tated that while at her grandfather's she got finished playing in the sprinkler and wanted to take a shower. When she went into the bathroom her grandfather stated he was going to take a shower with her, then turned off the lights and began to feel around asking [the minor] where she was, in turn touched her—touched her bottom.

R. 138, ll. 7-13.

Officer Platt said the minor:

[C]ontinued by stating she took a shower, and after getting out of the shower her grandfather, Edward, Sr., [appellant] asked her to sit on his lap. [The minor] stated Edward was sitting on a chair near the foot of the bed. [The minor] stated she sat on Edward's left leg, but he wanted her to sit on his lap frontways, "quote/unquote." I asked her what she meant. She in turn stated facing him. She then left the room, put her pants on. After putting her pants on she returned to the bedroom. He asked her to lay on the bed so that he could show her something. He began to grab her legs near her vagina on the outside of her pants. While she was laying on the bed he lifted her shirt trying to grab her breasts. He

then asked her to take her pants off. She again replied no. She stated her grandfather said . . . he would give her \$80.00 dollars and she replied \$80.00 dollars for sex. He also said he would get her what she wanted wherever they went and not tell—

R. 155, l. 14 – 156, l. 6.

At that time the court stopped Officer Platt and interjected, “Time and place. He can’t just read the entire statement, can he?” R. 156, ll. 7-8. The court said, “I mean, I feel like I’ve got a PCR issue right now.” R. 157, ll. 3-4. The state argued the testimony was admissible under Rule 106, SCRE, the rule of completeness.<sup>2</sup> R. 156, ll. 9-10. The court subsequently broke for the evening, and Officer Platt did not testify any further.

The jury deliberated for less than thirty minutes before returning a guilty verdict. R. 304, ll. 20-21; R. 305, ll. 9-10.

### *Discussion*

Officer Platt and paramedic Karen Ellington repeated what the minor said happened in great detail. This type of improper corroboration testimony is forbidden under South Carolina law. Rule 802, SCRE provides, “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute.” Although Rule 801(d)(1)(D), SCRE allows hearsay consistent with the declarant’s testimony in a criminal sexual conduct case where the declarant is the alleged victim, the rule specifies that the statement must be “limited to the time and place of the incident.”

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<sup>2</sup> In response to the argument about Officer Platt’s hearsay testimony, defense counsel said, “I did not make a formal objection to the line of questioning [but] the Court did stop that.” R. 162, ll. 20-23. Appellant is aware that this Court may find this issue was unpreserved because there was no contemporaneous objection, and it should therefore be raised in post-conviction relief (PCR). However, appellant asserts that fairness weighs in favor of finding the issue preserved, as does counsel’s pretrial objection.

“When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; **however, such evidence is limited to the time and place of the assault and cannot include details or particulars or the identity of the perpetrator.**” *Sanchez v. State*, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002) (emphasis added). *Accord Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001) (overruling recognized by *Thompson, supra*); *Jolly v. State*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994) (overruling recognized by *Thompson, supra*).<sup>3</sup>

“Testimony from other witnesses regarding the victim’s identification of the perpetrator does not fall within this hearsay exception.” *Dawkins v. State*, 346 S.C. at 156, 551 S.E.2d at 262-63. “This rule obviously limits corroborating testimony . . . to the time and place of the assault(s); **any other details or particulars, including the perpetrator’s identity, must be excluded.**” *Thompson v. State*, 423 S.C. at 241, 814 S.E.2d at 490 (emphasis added).

These statements were inadmissible hearsay, as they were out-of-court statements offered to prove that appellant did, in fact, touch the minor in the way she claimed. The statements did not fall under the Rule 801(d)(1)(D), SCRE hearsay exception in criminal sexual conduct cases, since the hearsay was not limited to time and place. The statements included the identity of the alleged perpetrator and included an incredible number of details and particulars—such as what the minor said, where appellant allegedly touched the minor’s body, how they were seated, how the minor was clothed, and even the lighting in the room.

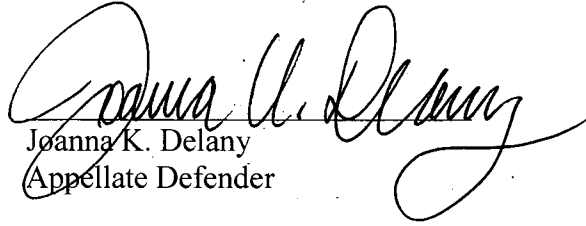
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<sup>3</sup> In *Thompson v. State*, 423 S.C. at 246, 814 S.E.2d at 492, the South Carolina Supreme Court clarified that *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011), “overrul[ed] *Jolly* and its progeny to the extent those cases impose a categorical or per se rule precluding a finding of harmless error.” However, the main rule of those cases—the so-called “time and place” hearsay limitation in criminal sexual conduct cases—remains the law. *Thompson*, at 241, 814 S.E.2d at 490.

The admission of the extensive and detailed hearsay testimony was an error that improperly corroborated the minor's testimony. Given that the case turned on the minor's credibility, the error was not harmless. This case should be reversed.

**CONCLUSION**

Based on the foregoing argument, appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

A handwritten signature in black ink, appearing to read "Joanna K. Delany". The signature is fluid and cursive, with a large loop at the end.

Joanna K. Delany  
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of July, 2019.

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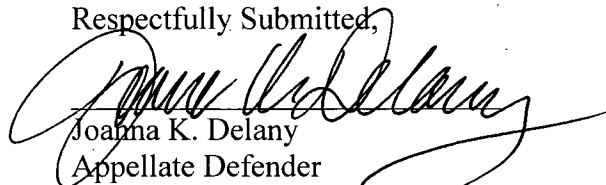
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PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Edward Davis states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Eugene C. Griffith, which was held on August 20 - 22, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, She asks the Court to relieve her as counsel for Edward Davis.

Respectfully Submitted,

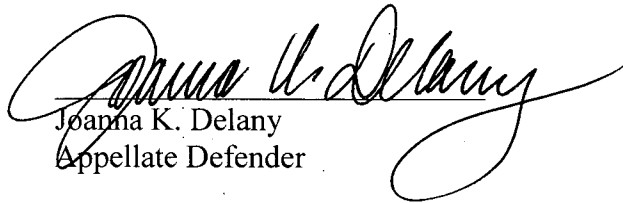
  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 16th day of July, 2019.

**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."

July 16, 2019.



Joanna K. Delany  
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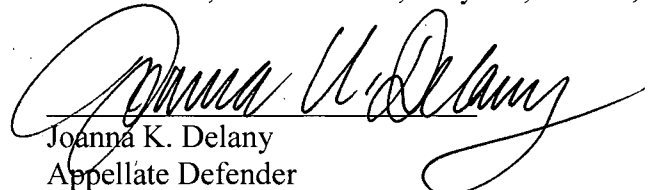
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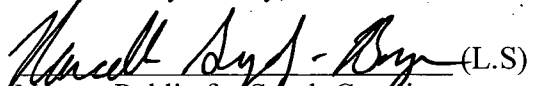
APPELLANT

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Edward Davis, 377477, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 16th day of July, 2019.

  
\_\_\_\_\_  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 16th day of July, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028