STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
May 21 2020
SC Court of Appeals

Appeal from Pickens County

Honorable Perry H Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID SCOTT BAGWELL,

APPELLANT

APPELLATE CASE NO 2017-001844

PETITION FOR REHEARING

Opinion No. 2020-UP-128
Submitted March 1, 2020- Filed May 6, 2020

On May 6, 2020, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Bagwell, 2020-UP-128 (S.C. Ct. App. filed May 6, 2020). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing of the two issues raised in Appellant's brief based on the significant points overlooked and or misapprehended by this Court in arriving at its conclusions and holdings.

Prejudicial Opening Remarks by the Court.

In ruling on this issue this Court held that the trial court did not make a comment regarding controverted facts but was merely reading from the indictment while introducing the case to the

jury panel. The indictment contained the following language: *At a court of General Sessions convened on Feb 10 2015 the Grand Jurors of Pickens County present upon their oath: That David Scott Bagwell did in Pickens County, between the dates of August 28, 2013 and October 30, 2013, commit the sexual battery upon REDACTED who was less than eleven years of age. This is in violation of § 16-3-655(A) (1) [formerly 16-3-655(1)] of the South Carolina Code of Laws (1976) as amended.* (R. p. 384).

The trial court's remarks were not a verbatim reading of the indictment, rather Judge Gravely stated:

> I'm going to read you just very brief facts (sic) from the indictment. I always make sure to say before I ever mention an indictment that an indictment does not mean that a person is guilty. In fact, the Defendant has pled Not Guilty in this matter. This is merely the formal paper that brings the charges before the court. This is a matter that happened in Pickens County on August 28th, 2013— I'm sorry, between the dates of August 28th, 2013 and October 30th, 2013 regarding a sexual battery on a minor.

Had the trial court uttered a verbatim account of the indictment allegations and then followed that account by advising the jury that the indictment is merely a charging document it would have been clear that the court was introducing the case to the jury panel. However by stating only that *this is a matter that happened…* and making no other reference to the language in the indictment, it would have been reasonable for a juror to infer that the existence of an *actus reus* was uncontroverted, and that the only issue for the jury to decide was the identity of the perpetrator.

This court need not determine whether the trial court intended to imply that the Minor Child was in fact molested. The trial court's intent in making the statement is not determinative of whether the Defendant was prejudiced by the remark. *It has long been recognized that even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight*

in shaping the opinion of the jury. Vested as the trial judge is, with superior authority, disinterested, and possessing experience not available to the ordinary layman, jurors, as a rule, are anxious to catch his view, upon which to found their conclusions. State v Pruitt, 187 S.C. 58, 196 S.E. 371, 372 (1938). A court's improper comment on a contested fact can suffice to provide the justification for granting a criminal defendant a new trial. See State v Ates, 297 S.C. 316, 377 S.E.2d 98 (1989); State v Campbell, 297 S.C 24, 374 S.E.2d 668 (1988)

Defendant did not confess to the assault and the State could not offer any forensic evidence to corroborate Minor Child's accusation. Therefore in order to prove that the Minor Child was assaulted and that the Defendant was the assailant, the State was forced to rely upon the Minor Child's testimony, both in-court and via the forensic interview. In cases such as this where witness credibility is crucial, comments from the trial court regarding controverted facts become highly prejudicial. See. Sosebee v Leeke, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987).

During the trial Defendant's trial counsel asserted that the prejudice resulting from the trial court's comments could not be remedied by a curative instruction. (R. p. 27, l. 20-24). The issuance of a curative instruction will not automatically cure the prejudice resulting the jury's exposure to incompetent evidence. Pruitt, *supra* 196 S.E. at 374. In reversing defendant's conviction the Pruitt court cited the following language from China v Sumter, 51 S.C. 453 29 S.E. 206 (1898).

> It is contended, however, that this error was obviated by the fact that the circuit judge in several other portions of his charge told the jury that all the questions of fact were exclusively for them. But this view cannot be accepted, for if, as we have seen, the real object of this constitutional provision was to leave all questions to the jury, to be decided according to their own judgment, unbiased by any expression, or even intimations, of opinion from the judge, it is manifest that such object would

> be defeated if a circuit judge should be allowed to express his own opinion upon any material question of fact, and then undertake to wipe out the impression made upon the minds of the jury by telling them that all questions of fact were for them. The impression having once been made, it would be very difficult, if not impossible, thus to obliterate it, and the result would be that the jury would be more or less influenced by an opinion coming from so high a source as an intelligent judge, whose mind had been trained to weigh testimony, and determine its force and effect, and thus the very object of the constitutional provision-to preserve the minds of the jury from being in any way influenced by the opinion of the judge as to a question of fact-would be defeated.

Pruitt, *supra* 196 S.E. at 374.

Even an immediate curative instruction can be insufficient to eliminate the prejudice caused by the trial court's comments concerning controverted facts. State v Kennedy, 272 S.C. 231, 234, 250 S.E.2d 338, 340 (1978).

Admissibility of unreliable forensic interview

In reaching its decision this court held that the record does not indicate that the interviewer used leading questions or improperly bolstered the victim's testimony. At trial the court reporter did not transcribe the content of Minor Child's forensic interview while the video was being published to the jury. The only record of Minor Child's forensic interview is contained on State's Exhibit 2. Appellant asks the court to reconsider whether the following questions posed by the forensic interviewer both lead and improperly bolstered the Minor Child's testimony.

1. Question: "So when he had you tied up in the home that was white and he had you tied up on the bed, what room did that happen in?" (Exhibit 2 at 50:40).

2. Question: "So when he had you tied up on the bed in his bedroom…now you said he touched you with his hands on your lower breast or chest, your front and back private parts,

and it hurts, what did he do with his hands on your private parts and your chest?" (Exhibit A at 51:35)

3. Question: "He touched you on top of your private parts inside your private parts or somewhere else?" (Exhibit A at 53:10)

4. Question: "Now you said that he used his hands to touch you on your lower breast or chest and on your front private part inside and on top of and on top of your back private part, did he use any other part of his body to touch your private parts?" (Exhibit A at 54:05).

5. Question: "Now you said he would tie you with the rope each time and it would happen at the white house?" (Exhibit A at 65: 25).

6. Question: "So you said this happened more than one time, he would tie you up with the rope and um touch you on your private body parts and you know his mouth touched you on your front private part on top on top of it and his hand touched you on your private parts and he touched himself in front of you, what was going on in the room when he ties you up, did you see anything, did you watch anything did he tell your anything?" (Exhibit A at 65:55).

7. Question: "Did he ever say it was a secret or anything?" (Exhibit A at 69:25).

8. Question: "So are you tied laying down or sitting up (the interviewer gesticulates the suggested positions) so how are your arms are they down like that or are they up like this (interviewer gesticulates the suggested positions) or something else. (Exhibit A at 80:40)

The interviewer followed the same technique throughout Minor Child's interview. The interviewer's constant repetition of the Minor Child's prior testimony as a preamble to the interviewer's subsequent questioning not only lead the witnesses responses but served to bolster the consistency of the witnesses' testimony by constantly reminding her of her prior testimony.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its ruling.

Respectfully Submitted,

/S/ James K Falk

James K Falk
Robert Dudek, Esq.

ATTORNEYS FOR APPELLANT

May 21, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
May 21 2020
SC Court of Appeals

Appeal from Pickens County

Honorable Perry H Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID SCOTT BAGWELL,

APPELLANT

APPELLATE CASE NO 2017-001844

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this May 21, 2020 a true copy of the Petition for Rehearing in this case was filed with the South Carolina Court of Appeals via email at CTAPPFILINGS@SCCOURTS.ORG and copies were served via email upon William F. Schumacher, IV, Esq. at bschumacher@scag.gov; and William W. Wilkins, III Esq. at wwilkins@greenvillecounty.org. A copy was served by mail upon David Scott Bagwell, SCCID # 373733 at Ridgeland Correctional Institution, 5 Correctional Way, Ridgeland, SC 29936.

/S/ James K Falk
James K Falk, Esq.
Robert Dudek, Esq.
ATTORNEYs FOR APPELLANT