STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM EARL SHERLEY,

APPELLANT.

APPELLATE CASE NO. 2019-000302

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing seven witnesses to testify about hearsay statements of the complainant under the "time and place" exception of Rule 801(d)(1)(D), because this narrow rule only applies to criminal sexual conduct cases and appellant was charged only with lewd act?

STATEMENT OF THE CASE

A Pickens County grand jury indicted appellant William Earl Sherley for lewd act on a minor and on February 19, 2019, Sherley was tried before the Honorable Perry H. Gravely and a jury. R. 1. Brandi Hinton represented the State and Scott Dover represented Sherley. R. 1. The jury convicted Sherley. R. 285, ll. 1 – 13. Judge Gravely sentenced Sherley to ten years' imprisonment, suspended upon the service of three years' imprisonment and three years' probation. R. 291, ll. 21 – 24. This appeal follows.

STANDARD OF REVIEW

The standard of review is de novo because the issue presented is a question of law. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.").

ARGUMENT

The trial court erred in allowing seven witnesses to testify about hearsay statements of the complainant under the "time and place" exception of Rule 801(d)(1)(D), because this narrow rule only applies to criminal sexual conduct cases and appellant was charged only with lewd act.

Factual and Procedural Background

The Complainant in this lewd act case waited approximately six years to accuse appellant William Earl Sherley of molesting her. R. 40, l. 21 – 42, l. 23. No physical evidence existed. R. 127, ll. 7 – 18. Sherley had no prior criminal record. R. 180, ll. 11 – 14. By the time of the trial, Sherley had been employed at the same business for twenty-four years and was a shift supervisor. R. 185, ll. 10 – 25. Sherley strenuously denied Complainant's allegations and had no explanation for why she would accuse him. R. 198, l. 10 – 200, l. 8.

Complainant was a freshman in college by the time she took the stand. R. 39, ll. 15 – 22. Sherley formerly dated Complainant's mother, but the couple broke up amicably in August 2012. R. 87, ll. 18 – 23. Four years after Sherley ceased being a daily presence in her life, Complainant was returning from a trip to Atlanta with her mother when she accused Sherley of molesting her. R. 42, l. 10 – 44, l. 13. What was originally intended as a "mother/daughter weekend" became an argument with her mother because Complainant saw a boy she liked in Atlanta, but also quarreled with him. R. 42, l. 24 – 43, l. 10. Complainant's mother compared the boy to Sherley, as someone you might "care about," but "they are not necessarily the right person for you." R. 87, ll. 9 – 17.

Complainant said the comparison "set me off." R. 43, ll. 6 – 10. She was "floored" that her mother would compare the boy to Sherley "because of what had happened," even though her mother had no knowledge of Complainant's claims. R. 43, ll. 16 – 24. Complainant told her

mother that "she never listened to me whenever I said I didn't like him, and that I knew what he was doing to me wasn't okay." R. 44, ll. 1 – 3. When her mother pressed for details, Complainant refused to give specifics, but told her about the alleged abuse in broad terms. R. 44, ll. 1 – 13.

The "first thing" Complainant's mother did was call her own mother, who was a Pickens County guardian ad litem. R. 89, ll. 8 – 18. The grandmother/guardian ad litem testified that she "was very insistent that they go immediately to the Sheriff's Department and file a report." R. 103, ll. 13 – 18. She told Complainant's mother that she "would meet them there." R. 103, ll. 13 – 18.

Complainant's mother took her to the Sheriff's Department, where the grandmother/guardian ad litem was waiting. R. 90, ll. 7 – 17. When asked whether she wanted "to press forward with these charges," Complainant responded, "Not really, but it wasn't an option at this point." R. 44, l. 25 – 45, l. 3. On cross-examination, Complainant admitted that taking back such an accusation after blurting it out was not easily done. R. 76, ll. 5 – 8.

Officer Jonathan Wallace of the Pickens County Sheriff's Office was on the road when he was summoned by dispatch to return to the office to take Complainant's report. R. 114, l. 25 – 115, l. 9. Officer Wallace "spoke to [Complainant] initially with her mother and grandmother there." R. 115, ll. 18 – 24. Complainant then asked to speak to the officer alone, so "her grandmother and mother stepped into the hallway." R. 115, ll. 18 – 24. Once alone with Complainant, she told Officer Wallace that she had been molested between 5-10 times when she was between nine and twelve years old. R. 116, l. 23 – 117, l. 3.

Complainant's statement to the officer about 5-10 incidents was inconsistent with her trial testimony, which only described two alleged instances of abuse. R. 60, l. 25 – 61, l. 7. The

first instance occurred in the living room of her mother's house while Sherley, Complainant, and Complainant's brother were watching a NASCAR race. R. 46, ll. 8 – 14. Sherley "groped" Complainant on her "rear end" on top of her clothes with his hand. R. 49, ll. 11 – 23. Complainant was "uncomfortable and got up and went upstairs and went to bed." R. 49, ll. 11 – 18.

The second incident occurred in Complainant's bedroom. R. 48, l. 25 – 49, l. 13. Sherley came into Complainant's bedroom to tuck her in, then laid down on the bed and told her to spread her legs. R. 51, ll. 7 – 13. Sherley put his hands under Complainant's clothes and inserted his fingers into her vagina. R. 51, ll. 7 – 17. After asking Complainant if it "felt good" or if she ever performed similar acts on herself, Sherley left the room. R. 52, ll. 1 – 20. Complainant said she was either ten or eleven years old when the incidents happened. R. 49, ll. 8 – 11. R. 46, ll. 3 – 4.

When the police investigator called Sherley, he voluntarily came to the police station without a lawyer. R. 128, ll.8 – 19. He specifically denied touching Complainant in the two ways described. R. 129, ll. 3 – 8. The investigator described Sherley as "straightforward," showing no emotion, cooperative, and making "general conversation." R. 123, ll. 2 – 15. R. 128, ll. 16 – 17. Sherley "said he had no idea why she would say this." R. 127, ll. 3 – 6. He did not deny being left alone with Complainant. R. 126, l. 10 – 127, l. 2. Showing no acrimony toward Complainant's mother, with whom he said he had a "good relationship," Sherley said "if it was his daughter, he would believe it also." R. 126, ll. 2 – 9.

Sherley testified and, as he did in his interview with the police, denied abusing Complainant. R. 199, l. 21 – 200, l. 5. Sherley was fifty-four years old. R. 183, ll. 21 – 22. He graduated from Walhalla High School and described himself as always having a job, "even in

high school." R. 184, ll. 6 – 17. He worked as a park ranger for Oconee County for nine years and then worked for BASF for the twenty-four (24) years up to the trial (he was still employed by them during the trial). R. 185, ll. 2 – 20. He was a shift supervisor responsible for fourteen employees. R. 185, ll. 23 – 25. Sherley loved the outdoors and liked sports, hiking, and kayaking. R. 187, l. 18 – 188, l. 1. He attended church at Foothills Community Church. R. 187, ll. 6 – 12.

Sherley was divorced and remarried, with two children who were in their twenties. R. 186, l. 19 – 187, l. 2. Sherley dated Complainant's mother in 2002, then the relationship ended, then "started dating again later," at the end of 2008. R. 188, ll. 2 – 22. R. 84, ll. 16 – 24. Complainant was approximately eight years old when they began dating the second time. R. 84, ll. 23 – 24.

Sherley said the breakup with Complainant's mother was amicable and they remained friends. R. 189, l. 20 – 190, l. 16. Complainant's mother agreed the breakup was "cordial." R. 91, ll. 4 – 6. Complainant's mother was financially independent and did not rely on Sherley for support. R. 100, l. 17 – 101, l. 1. While they dated, the couple maintained separate residences, but Sherley stayed over at Complainant's mother's house "[f]airly often." R. 84, ll. 2 – 21. Complainant's mother agreed she had no problem leaving her children alone with Sherley and he would stay with her children when she traveled for work. R. 86, ll. 1 – 12.

Sherley said he "was shocked" by the allegations and was unaware that Complainant did not like him. R. 189, ll. 16 – 17. He described Complainant in glowing terms, as "[v]ery smart," and "very talented." R. 193, l. 17 – 194, l. 3. Sherley said when he first learned about the allegations from DSS, he did not even know they were talking about Complainant because the DSS worker used her full name and Sherley knew her by a nickname. R. 195, l. 19 – 196, l. 4.

He said the only time he had ever been alone with Complainant in her room was when he would turn off her television. R. 197, ll. 13 – 20. When asked whether he committed the specific acts alleged by Complainant, Sherley responded, "Absolutely not." R. 198, ll. 7 – 22.

Three character witnesses testified on Sherley's behalf. Michael Stone worked with Sherley for sixteen years at BASF and had seen him interact socially with his own family, including his daughter. R. 208, ll. 3 – 24. Stone never saw any "inappropriate" conduct and described Sherley as truthful and trusted him "completely." R. 208, l. 25 – 209, l. 13. William Wald and Sherley were friends for twenty-four years and Wald testified similarly to Stone about Sherley's conduct around his children. R. 213, l. 8 – 214, l. 9. Lisa Smith worked as a speech therapist in the public schools and had known Sherley for about four years. R. 216, l. 21 – 217, l. 22. Sherley was married to Smith's "dear friend." R. 217, ll. 8 – 12. Smith never saw any inappropriate conduct by Sherley toward anyone and described him as "a kind and generous guy." R. 217, l. 15 – 218, l. 24. She said Sherley was "truthful and honest." R. 219, ll. 11 – 16.

Prior to opening statements, appellant moved to prohibit witnesses from testifying about prior hearsay statements of Complainant about the abuse. R. 12, l. 13 – 20, l. 20. Sherley listed the State's witnesses who he expected to offer bolstering testimony under Rule 801(d)(1)(D), SCRE. R. 12, l. 13 – 13, l. 7. Sherley argued that, based on its text, the hearsay exception in Rule 801(d)(1)(D) only applied to criminal sexual conduct cases, and not lewd act cases. R. 13, l. 14 – 20, l. 17. Judge Gravely understood Sherley's motion to be "two-part." R. 20, ll. 2 – 7. "One, you're saying that exception doesn't apply, so therefore they shouldn't be able to testify about anything. But if it does apply, then they should be instructed to limit it to just time and place." R. 20, ll. 2 – 7.

After a break, the court confirmed an earlier "tentative ruling" that Rule 801(d)(1)(D) "would apply in this case." R. 22, ll. 2 – 9. After Complainant testified, the State then called seven witnesses in a row who made full use of the exception in Rule 801(d)(1)(D). Complainant's mother and grandmother (the guardian ad litem) both testified that Complainant told them the time and place of the abuse. R. 88, ll. 13 – 24. R. 104, ll. 2 – 8. The State then called two of Complainant's ex-boyfriends, one of whom testified that Complainant told him about the time and place of the abuse when she was a freshman in high school, and the other who said Complainant told him about it on the same day she told her mother during the trip to Atlanta. R. 112, l. 18 – 113, l. 10. Two police officers then made use of the exception. R. 116, ll. 3 – 20. R. 122, ll. 10 – 23. And as its final witness before the child abuse expert, the State called a DSS worker who made use of the exception. R. 132, ll. 9 – 15.

The jury had a difficult time deciding this case. They began deliberating at 2:22 PM. R. 268, l. 2. They asked to rehear Complainant's testimony. R. 268, l. 4 – 272, l. 10. They sent a note saying, "The jury is deadlocked and we do not believe further deliberations will be productive." R. 272, ll. 17 – 20. The court gave them an Allen v. United States, 164 U.S. 492 (1896) charge and, after further deliberations, sent them home for the evening at 6:20 PM. R. 272, l. 17 – 278, l. 18. The jury reentered the courtroom the next morning at 10:24 AM with a verdict of guilty. R. 284, l.1 – 285, l. 9. Out of a possible fifteen years, Judge Gravely only imposed an active three-year sentence of imprisonment, with the balance of ten years suspended. R. 291, ll. 21 – 24.

Discussion

The trial court erred, as a matter of law, in finding that the "time and place" hearsay exception in Rule 801(d)(1)(D), SCRE, applies in lewd act cases.[1] By its plain language, the rule only applies to criminal sexual conduct cases. Rule 801(d)(1)(D), SCRE. The rule 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.

The Court need look no further than the plain language of the rule to decide this case. "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The rule states it applies to two crimes: (1) criminal sexual conduct, and (2) attempted criminal sexual conduct. The rule does not say it applies to sexual assault cases in general or, much less, specifically to lewd act cases. Therefore, under the plain meaning rule, the trial court erred in allowing the State to benefit from this hearsay exception in a lewd act case.

Even if the canons of statutory construction are applied, the canons indicate error. The "time and place" exception existed before South Carolina adopted the Rules of Evidence in 1995. 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)

[1] The State will likely attempt to evade addressing the merits of this issue by complaining that it is not preserved for review because of a failure to make contemporaneous objections. However, any such objections would have been futile as Judge Gravely's ruling only concerned a purely legal issue about the applicability of the rule and no additional facts (or any facts at all) that arose during the witnesses' testimony had any relevance to the legal argument. Judge Gravely's ruling on this exclusively legal issue was final, and this Court should reject any invitation by the State to avoid the merits which were squarely addressed and understood by the trial court.

("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 lewd act statute under which Sherley was prosecuted was S.C. Code Ann. § 16-15-140, which the notes show existed as early as 1962. See S.C. Code Ann. § 16-15-140 (2009) (history showing it appeared in the 1962 version of the code). The lewd act statute was repealed in 2012. See State v. Perry, 410 S.C. 191, n.1, 763 S.E.2d 603, n.1 (Ct. App. 2014) (stating that § 16-15-140 was repealed by 2012 Act. No. 255, § 14). "Criminal Sexual Conduct with a Minor" existed in 2009 and was codified (as it is today) at § 16-3-655. S.C. Code Ann. § 16-3-655.

The existence of a separate offense, lewd act, codified in a different section under a different name shows that the usage of the specific language of criminal sexual conduct and attempted criminal sexual conduct excludes lewd act from the rule's operation when the rule was adopted in 1995. Failure to enumerate lewd act when the rule enumerates two other crimes shows the Legislature's intent to exclude it under the maxim *expressio unius est exclusio alterius*. Evins v. Richland Cty. Historic Pres. Comm'n, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000). This maxim means, "When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred." Id. (internal quotations omitted).

Furthermore, lewd act was not a lesser included offense of first-degree criminal sexual conduct with a minor. See State v. Norton, 286 S.C. 95, 96, 332 S.E.2d 531, 532 (1985). Because of the Norton decision in 1985, it was known by the Legislature that lewd act was not a lesser included of criminal sexual conduct. "The General Assembly is presumed to be aware of the common law . . . and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." State

v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197–98 (1997) (internal citation omitted). The crime that was lewd act was repealed and codified as third-degree criminal sexual conduct with a minor in 2012. See State v. McGaha, 404 S.C. 289, n.3, 744 S.E.2d 602, n.3 (Ct. App. 2013). After its recodification, Rule 801's exception would likely apply, but not to Sherley's charge of lewd act.

As the solicitor did below, the State will likely point to cases where the Rule 801(d)(1)(D) was discussed in cases where lewd act was charged. See, e.g., State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999). However, appellant's research has been unable to locate any case where the applicability of the rule to only lewd act cases was challenged as it is here. Many of the cases discuss charges for both CSC and lewd act. See, e.g., State v. Watson, 370 S.C. 68, 70, 634 S.E.2d 642, 643 (2006) (discussing time and place hearsay rule where defendant was charged with both CSC and lewd act) abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Without this exception, the seven witnesses' testimony about what Complainant told them was improperly admitted hearsay and error.

The erroneous admission of multiple instances of "time and place" hearsay was highly prejudicial because of the overwhelming cumulative effect of hearing seven witnesses in a row testify about it. "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). While Jolly's rule of automatic reversal no longer applies, its logic still shows that cumulative corroboration hearsay is devastating. See 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).

The solicitor emphasized all the people Complainant told during her closing argument. R. 228, ll. 21 – 24 (police officer). R. 230, ll. 8 – 9 (ex-boyfriends). R. 231, ll. 1 – 2 (police officer). R. 236, ll. 17 – 18 ("The State's case, [Complainant] told her friends."). R. 241, ll. 21 – 24 ("going through DSS"). In this case with no physical evidence, a six-year old allegation, and a deadlocked jury that required an Allen charge, the error certainly contributed to the verdict. The sole reason the State called many of these witnesses was to take advantage of this hearsay exception and its case was built around this error in the law. This Court should reverse.

CONCLUSION

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

This 29th day of May, 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."

May 29, 2020.

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