STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

OTIS EDWARD GIBSON,

APPELLANT

APPELLATE CASE NO 2019-002069

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in refusing to allow a law enforcement officer to testify that while investigating an alleged sexual assault against one of Minor's siblings, it was discovered that Minor's mother had instructed the sibling to fabricate the sexual assault where Minor's mother testified that she had not instructed her child to fabricate a sexual assault and therefore, the officer's testimony was admissible as a prior inconsistent statement?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County grand jury for two counts of criminal sexual conduct with a minor first degree. R. *. Appellant's jury trial was held before the Honorable Robin B. Stillwell and a jury from December 2 – 5, 2019. Tr. 1. Appellant was represented by Chris Shipman and Teal Johnson. Tr. 1. The state was represented by Elizabeth Major. Tr. 1.

The jury found Appellant guilty as charged on each count. Tr. 624, l. 1 – 625, l. 8. The judge sentenced Appellant to twenty-five years imprisonment on each charge, with both sentences to run concurrently. Tr. 632, ll. 18 – 24.

This appeal follows.

STANDARD OF REVIEW

"A decision to admit extrinsic evidence of a prior inconsistent statement will not be reversed absent a manifest abuse of discretion that prejudiced the appellant." State v. Carmack, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012).

STATEMENT OF FACTS

On November 24, 2017, at approximately 1:00 a.m., Thomas Ferris with the Greenville City Police Department went to Appellant's house in response to a call about an alleged criminal sexual conduct with a minor. Tr. 81, l. 21 – 82, l. 24; tr. 90, ll. 11 – 16. When Ferris arrived, he observed Minor and her mother, Elizabeth Parker, standing outside the house. Tr. 83, ll. 2 – 9. Ferris knocked on the door of the house and Appellant answered and was detained. Tr. 84, l. 8 – 85, l. 18.

Jessica Crawford with the Greenville City Police Department also responded to Appellant's house. Tr. 107, ll. 2 – 21. Crawford said that she spoke with Minor and Minor "said she was mad . . . [a]t what her daddy did to her." Tr. 109, ll. 7 – 14. Crawford went on to say that Minor claimed she had been sexually abused twice; the first time was "a couple of months ago" and the second time was "last Sunday." Tr. 110, l. 14 – 111, l. 2. Law enforcement collected Minor's pajamas that she was allegedly wearing during the incident and Appellant's bedding where Minor claimed the incident happened. Tr. 130, l. 20 – 131, l. 15.

Minor testified that Appellant was like a father figure to her and that she and her mother lived with Appellant when Minor was seven years old. Tr. 218, l. 1 – 219, l. 7. Minor claimed that Appellant put his "private part" in her "bottom" on two different occasions. Tr. 222, l. 19 – 223, l. 17. Minor maintained that this happened in Appellant's bedroom on his bed. Tr. 222, ll. 3 – 8. On Thanksgiving night, Minor told her story to her mother who then contacted the police. Tr. 228, l. 1 – 230, l. 14. Minor also claimed that she was sexually assaulted by her stepbrother, Josiah, who did to her the "same thing [Appellant] did." Tr. 236, ll. 2 – 24. The state introduced the video recording of Minor's forensic interview as well. Tr. 337, ll. 2 – 24; State's Ex. 8 (video recording of forensic interview on file with this Court).

Appellant's semen was found on his own bedding but none of Minor's DNA was found on the bedding. Tr. 314, l. 3 – 315, l. 20. Minor had a medical exam done in February, three months after Appellant was arrested, and "her exam was normal." Tr. 354, l. 6 – 356, l. 18. The doctor maintained that she was not surprised that Minor had a normal exam given the delay in time between the alleged penetration and the exam. However, the doctor admitted that Minor's hospital records taken from the night Appellant was arrested also did not indicate any acute or healing trauma to Minors rectal area. Tr. 359, ll. 1 – 25; tr. 362, ll. 17 – 20.

ARGUMENT

The trial judge erred in refusing to allow a law enforcement officer to testify that while investigating an alleged sexual assault against one of Minor's siblings it was discovered that Minor's mother had instructed the sibling to fabricate the sexual assault because Minor's mother testified that she had not instructed her child to fabricate a sexual assault and therefore, the officer's testimony was admissible as a prior inconsistent statement.

Relevant Facts

Minor's mother, Parker, testified that she had five children, with Minor being the youngest. Tr. 366, l. 18 – 367, l. 11. Parker recalled that in 2005, four years before Minor was born, an allegation of sexual abuse was made by one of her sons. Tr. 367, l. 25 – 368, l. 2. Parker said that at the time, she had a transgender boy living in her house and the babysitter called Parker while she was at work and told her that the transgender boy had "touched" one of Parker's sons. Tr. 368, l. 4 – 369, l. 4.

Parker claimed that she later discovered that her son was not sexually assaulted but instead her children just wanted the transgender boy out of the house. Tr. 369, l. 21 – 370, l. 13. On cross-examination, Parker denied telling her son to tell the police that the transgender boy had touched him. Tr. 425, l. 24 – 426, l. 2. Parker did however admit that she had taken her son to meet an investigator about the allegations on August 3, 2005. Tr. 425, ll. 3 – 18.

After the state rested its case, defense counsel sought to call Cheryl Cromartie with the Greenville County Sheriff's Department to impeach Parker with a prior inconsistent statement. Specifically, counsel explained that Cromartie would testify that she investigated the allegation of sexual abuse made by Parker's son and the son told Cromartie that the abuse never happened, but that Parker told him to say he was abused. Tr. 457, l. 3 – 458, l. 13; R. * (Defense Exhibit 1

– police report). The state argued that this was inadmissible as extrinsic evidence of specific instances of conduct under Rule 608, SCRE. Tr. 459, ll. 7 – 25.

Defense counsel responded that extrinsic evidence of the statement was admissible because Parker denied making the statement in her testimony. Tr. 461, ll. 11 – 19. Counsel maintained that the extrinsic evidence of Parker's prior inconsistent statement was Cromartie's investigation where she discovered that Parker's son stated that Parker told him to fabricate a sexual assault. Tr. 461, l. 20 – 462, l. 3. The judge ruled that counsel had not strictly complied with Rule 613, SCRE and therefore the prior inconsistent statement was not admissible. Tr. 464, l. 10 – 465, l. 5.

Counsel called Cromartie as a witness and she testified that she had investigated an allegation of sexual abuse by one of Parker's sons. Tr. 474, l. 13 – 474, l. 25. Cromartie testified that after interviewing Parker's son, she contacted the rape crisis center to request a forensic interview and a medical exam. Tr. 478, ll. 1 – 5. Cromartie informed Parker about the appointments but Parker did not take her son to the medical exam. Tr. 478, ll. 9 – 19. Cromartie further testified that she closed the case after she reviewed the forensic interview report because she did not believe she could make a case based on what Parker's son said. Tr. 478, l. 20 – 481, l. 5.

Discussion

Rule 613 (b), SCRE, provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

"Under Rule 613(b), extrinsic evidence of the statement is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made." State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004). "When the issue is whether the witness admitted making the prior inconsistent statement, the admission must be unequivocal." State v. Carmack, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010). See also State v. Sullivan, 43 S.C. 205, 21 S.E. 4, 7 (1895) (noting that if a witness does not directly admit or deny the prior statement but instead simply states that she does not remember, then extrinsic evidence of the prior inconsistent statement is admissible).

In State v. Barnes, 421 S.C. 47, 58, 804 S.E.2d 301, 307 (Ct. App. 2017), this Court noted that Rule 613, SCRE does not require the immediate introduction of extrinsic evidence of a prior inconsistent statement because "the avenue of its admissibility may not always run through the witness to be impeached by it, for that witness may not be competent to authenticate the extrinsic evidence." In Barnes, the state questioned the mother of the defendant about a recorded phone call she had with an investigator. Id. at 57, 804 S.E.2d at 307. While the mother admitted the statement occurred, she denied the content of the statement. The state then called the investigator as a witness who testified to the content of the mother's prior inconsistent statement. Id.

This Court rejected Barnes' argument on appeal that the state should have played the recording to his mother while she was on the stand in order to give her an opportunity to explain it. Id. Specifically this Court found that the foundation was laid once the mother was confronted with the substance of her previous statement, the time and place it was made, and the person to whom it was made, and she denied making the statement. Id. at 57-58, 804 S.E.2d at 307.

Similarly, here, once Parker denied making the statement, Cromartie should have been permitted to testify to the substance of Parker's prior inconsistent statement.

Here, the judge erred in refusing to allow Appellant to impeach Parker with her prior inconsistent statement. When Parker was called as a witness by the state, the assistant solicitor specifically asked Parker about the allegations of sexual abuse regarding her son that happened in 2005. Parker claimed that the allegation was fabricated by her children because they wanted the transgender boy out of the house. Tr. 367, l. 25 – 370, l. 1.

Defense counsel laid the proper foundation by confronting Parker with the substance of her prior statement along with the time and place the statement was made and to whom the statement was made. Parker clearly and unequivocally denied making the statement. Therefore, pursuant to Rule 613 (b), SCRE, counsel should have been allowed to introduce extrinsic evidence of Parker's statement to her son where she told her son to fabricate a sexual assault allegation.

In State v. Bixby, 388 S.C. 528, 550, 698 S.E.2d 572, 584 (2010), the Supreme Court ruled that the trial judge properly allowed the state to introduce extrinsic evidence of the defendant's mother's prior inconsistent statements through several different witnesses. The defendants in Bixby were accused of murdering two law enforcement officers over a dispute regarding the government taking the Bixby's land in order to widen a highway. First, after the defendant's mother, Rita, denied knowing the officer who apprehended her, the officer was permitted to testify to his interaction with her, including her prior inconsistent statement that she was not present at the defendant's house because she needed to "tell the world" why her son and husband were killed. Id. at 550-551, 698 S.E.2d at 584. Because Rita denied making this

statement after she was confronted with the substance, time, place, and to whom the statement was made, extrinsic evidence of the statement was admissible. Id.

Secondly, Rita denied making several statements to the defendant's girlfriend regarding her and her son's involvement in the murders. Id. Subsequently, the state was permitted to call the defendant's girlfriend to the stand who had recorded these prior inconsistent statements made by Rita which were played to the jury. Id. at 551-552, 698 S.E.2d at 584-585. Finally, Rita denied making statements to the sheriff on the phone during the standoff that took place between law enforcement and the defendants. The Bixby Court ruled that because Rita had been apprised of the substance of the statement and denied making it, extrinsic evidence of the sheriff's testimony regarding Rita's prior inconsistent statements was admissible. Id. at 552-553, 698 S.E.2d at 585.

Here, Parker was confronted with the fact that she took her son to law enforcement in August of 2005 to report an allegation of sexual assault. Parker acknowledged that this had taken place but denied telling her son to fabricate the sexual assault. Having been advised and confronted with the time, place and to whom the statement was made, counsel laid the proper foundation for impeachment. Parker was made fully aware of what prior statement counsel was referring to in his cross-examination of her. Parker knew that counsel was referring to her prior statement in which she told her son to lie about sexual assault. Because Parker denied making this statement, extrinsic evidence of this statement was admissible as proper impeachment. The trial judge erred in ruling otherwise and Appellant's convictions should be reversed. See State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010); State v. Barnes, 421 S.C. 47, 804 S.E.2d 301 (Ct. App. 2017).

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Greenville County Court of General Sessions for a new trial.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the initial brief of appellant and designation of matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS) and a copy of the initial brief of Appellant and designation of matter has been served on Otis Edward Gibson at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC, this 4th day of November, 2020.

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT