

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Nov 30 2020

SC Court of Appeals

Appeal from Marion County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM BRUCE CLARK, JR.

APPELLANT

APPELLATE CASE NO 2020-000385

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in denying appellant's motion for a mistrial after it became apparent that the oldest sister was not competent to testify as a witness at trial.

STATEMENT OF THE CASE

Appellant William Bruce Clark was convicted of two counts of first degree criminal sexual conduct with a minor¹ per jury trial held during the February 2020 term of the Marion County General Sessions Court before Judge Thomas A. Russo, who sentenced appellant to an aggregate fifty-year term of imprisonment. Attorney Thurmond Brooker represented appellant at trial, and Assistant Solicitors David A. Richardson and James H. Scruggs, III, appeared on behalf of the state. Appellant appealed his convictions and sentences. This brief follows.

¹ Appellant was found not guilty on the remaining two counts (#3 and #4) of the indictment charging criminal sexual conduct with a minor, first degree, and second degree, respectively.

STANDARD OF REVIEW

In criminal cases, an appellate court may review only errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). “The admission or exclusion of evidence is left to the sound discretion of the trial [court],” and the court’s “decision will not be reversed on appeal absent an abuse of discretion.” State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the decision of the trial court is controlled by an error of law or lacks evidentiary support. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

In other words, the abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court’s assessment of witness credibility. Cf. State v. Mitchell, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009) (equating the “any evidence” standard of review in criminal cases to the abuse of discretion standard of review and emphasizing that, under this standard, the appellate court “does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court’s ruling is supported by any evidence.

ARGUMENT

The trial judge erred in denying appellant's motion for a mistrial after it became apparent that the oldest sister was not competent to testify as a witness at trial.

Both sisters testified in court regarding the alleged criminal sexual conduct that the state claimed appellant perpetrated upon them from April 2014 through July 2015 while at their homes on Bond and Northside Streets in Marion County, South Carolina.

The youngest sister testified that appellant pulled her underwear down and put something in her butt on the inside. Tr. 176, 1.16-p. 179, 1.13.

The children's mother, Kelly Clark, testified that she filed a police report in 2017 after learning about the sex events. Tr. 208, 1.2-p. 217, 1.5.

Appellant testified at trial and stated that he never touched his children sexually I the way they claimed. Tr. 263, 1.17-p. 288, 1.15.

Also, at trial, appellant's oldest daughter described the sexual encounter with appellant as follows:

Solicitor: What do you remember telling Ms. Robin what happened in the [Bond Street] house?

Oldest Sister: (No Response)

Solicitor: Okay. Then I'll put it this way. Did something happen to you in the [Bond Street] house that caused you to talk to Ms. Robin.

Oldest Sister: My dad raped me. Tr. 89, 1.11-17.

Solicitor: In the [Bond Street] house, can you tell us what part of your body was affected or touched?

Oldest Sister: My butt.

Solicitor: Okay. Now did something touch on the outside or inside?

Oldest Sister: I don't understand the question. Tr. 90, lines 7-11.

Also, on cross-examination, the following colloquy occurred:

Defense Counsel: Okay. Tell me what happened at Bond Street.

Oldest Sister: No Response

Defense Counsel: Alright. What about Northside [Street] house...what happened at Northside.

Oldest Sister: No Response Tr. 93, 1.23-p. 94, 1.4.

At the close of this testimony, defense counsel moved for a mistrial on the ground that Rule 601 and the Sixth Amendment Confrontation Clause were violated due to the oldest sister's status as an incompetent witness in the case in that she was incapable of answering questions, and in fact did not answer the defense's questions, and appeared incapable of telling the truth. Tr. 99, 1.7-p. 103, 1.21. In response to the state's position that defense counsel's questions were not artfully asked, the defense's reply was that it was the state's burden to present its case. Tr. 104, 1.1.-p. 106, 1.22. The trial judge denied the mistrial motion on the ground that the witness in question was made available in the case and on the basis that the opportunity to cross-examine was made available to the defense. Tr. 106, 1.25-p.109, 1.16.

Under Rule 601, SCRE, all witnesses are presumed competent (even a child) per 19-11-25), but nonetheless, a child's competency to testify depends on whether the child is substantially rational and responsive to the questions asked, and is sufficiently aware of the moral duty to tell the truth and the probability of punishment if he or she lies. S.C. Dept. of Social Services v. Doe, 292 S.C. 211, 355 S.E.2d 543 (Ct. App. 1987); State v. Givens, 267 S.C. 47, 225 S.E.2d 867 (1976). A child is competent to testify if the child is mature enough to understand the questions and narrate answers, to perceive facts accurately through the medium of senses to recall them correctly, to relate a true version of the facts presented, to know the difference between right and

wrong, good and bad and to understand that it is right and good to tell the truth and wrong or bad to lie, and then be willing to tell the truth. S.C. Dept. of Social Services v. Doe, *supra*. Moreover, the competency of a child witness is determined by the trial judge based on his personal observations of the child during voir dire. S.C. Dept. of Social Services v. Doe, *supra*.

Under Rule 601(b) SCRE, a witness can be disqualified if the judge determines that 1.) the witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or the witness is incapable of understanding the duty of a witness to tell the truth. And finally, a witness' competency is within the sound discretion of the trial judge. In Re Robert M. 204 S.C.69, 362 S.E.2d 639 (1987).

In the case at bar, the oldest sister had no answer/no response for questions about the criminal sex assaults against her and basically gave a summary statement that she had been "raped." Either she did not comprehend the questions or she did not understand the matter of a sexual assault and if that applied or happened to her. The answers given on the stand by this witness showed she was clearly not comprehending the offense allegedly committed against her. She was incompetent to testify at trial.

In addition, the trial judge failed to examine this witness for competency and make an assessment without a voir dire of said witness. Finally, this incompetency resulted in appellant's inability to cross-examine the witness. See Davis v. Alaska, 415 U.S. 308 (1974). The prejudice was obvious in that the charges were serious offenses (16-1-60).

CONCLUSION

Based on the foregoing argument, counsel for appellant requests that the case be reversed and remanded to the lower court for a new trial.

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of November, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for William Bruce Clark states that:

1. She is Deputy Chief 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 Thomas A. Russo, which was held on February 18 - 21, 2020, 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 William Bruce Clark.

Respectfully Submitted,

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 30th day of November, 2020.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Entire Transcript

I certify that this designation contains no matter which is irrelevant to this appeal.

November 30, 2020

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

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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.”

November 30, 2020.

s/Wanda H. Carter
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