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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-002069

THE STATE, Respondent,

v.

OTIS EDWARD GIBSON Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. The trial judge did not abuse his discretion in ruling a statement inadmissible because it was hearsay, and even if it fell under an exception to hearsay, it was not admissible as a prior inconsistent statement

STATEMENT OF THE CASE

Appellant was indicted by a Greenville County Grand Jury for two counts of criminal sexual conduct with a minor first degree. Appellant proceeded to a jury trial on December 2-5, 2019, in the Greenville County Court of General Sessions before the Honorable Robin B. Stilwell. The State was represented by Assistant Solicitor Elizabeth Major. Chris Shipman, Esquire, and Teal Johnson, Esquire, represented the Appellant. The jury found Appellant guilty as charged on each count. Appellant was sentenced to twenty five years' imprisonment on each charge to run concurrently. This appeal follows.

STATEMENT OF FACTS

On November 24, 2017, Thomas Ferris with the Greenville City Police Department went to the house of Otis Edward Gibson (Appellant) in response to a criminal sexual conduct case. (R. 14). When Ferris arrived, Victim (a minor) and Elizabeth Parker (Victim's mother) were standing outside Appellant's house. (R. 15). Ferris informed Appellant the reason for Ferris being there and that Appellant would be detained until it could be determined what happened. (R. 17).

Jessica Crawford with the Greenville City Police Department also responded to Appellant's house. (R. 39). Crawford interviewed Victim, during which time Victim disclosed two incidents of sexual abuse by Appellant. (R. 42). Victim stated the first incident occurred a couple of months prior, after her grandfather had a heart attack, and the second incident occurred "last Sunday" [November 11, 2017].

Rebecca Lindler, an investigator with the Violent Crimes Against Children unit, received the report of criminal sexual conduct by Appellant and requested a forensic interview of Victim. (R. 117). The forensic interview was conducted by Christine Carlburg and was recorded and introduced at trial. (R. 230, State's Exhibit 8). During the interview Victim disclosed that Appellant sexually abused her on two occasions. (State's Exhibit 8).

Victim testified at trial that Appellant was like a father to her and that Victim and her mother lived with Appellant for a while. (R. 141). At trial, Victim maintained that Appellant sexually abused her on two occasions. (R. 145). Victim testified at trial that Appellant put his "private part" in her "bottom" on two separate occasions. (R. 145-46). Both of these incidents occurred in Appellant's bed. (R. 145). On Thanksgiving night, Victim disclosed these incidents to her mother, who then contacted the police. (R. 153). Appellant was arrested and charged with two counts of criminal sexual conduct with a minor first degree.

STANDARD OF REVIEW

"In criminal cases, the Appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "A trial judge has considerable latitude in ruling on admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). "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). "To warrant reversal based on the admission or exclusion of evidence, the [A]ppellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

ARGUMENT

The trial judge did not abuse his discretion in ruling a statement inadmissible because it was hearsay, and even if it fell under an exception to hearsay, it was not admissible as a prior inconsistent statement.

Appellant contends the trial judge erred in refusing to allow a law enforcement officer to testify that while investigating an alleged sexual assault against one of the Victim's siblings, the sibling stated that Victim's mother had told the sibling to fabricate the sexual assault. Specifically Appellant argues that this statement by Victim's sibling was admissible as a prior inconsistent statement under Rule 613 SCRE because the Victim's mother denied telling the sibling to fabricate the sexual assault against the sibling. Appellant's argument lacks merit because the statement by Victim's sibling is hearsay and the issue of whether the statement is hearsay was not appealed, and therefore is the law of the case. Even if this appeal is based on admissibility under the exception to hearsay, it was not established that the witness was not unavailable.[1] Further, the statement is not admissible under Rule 613 SCRE because it is not a prior inconsistent statement by Victim's mother. It is a statement made by another witness (Captain Cheryl Cromartie), about a statement allegedly made by a witness (Victim's sibling), about the Victim's mother. Such a statement is certainly not contemplated as admissible under Rule 613 as the Victim's mother's prior inconsistent statement.

The statement attempting to be introduced was hearsay.

Under the law of the case doctrine, an unappealed ruling is the law of the case and requires affirmance. Transportation Ins. Co and Flagstar Corp. v. South Carolina Second Injury Fund., 389 S.C. 422, 699 S.E.2d 687 (2010). In the current case, Appellant has not raised the issue of whether the statement in question was hearsay. Therefore, the ruling by the trial judge

[1] The whereabouts of the Victim's sibling at the time of the trial were unknown.

that the statement was hearsay is the law of the case. Even if the hearsay issue had been appealed, the statement was hearsay and did not fall into any exception, therefore it was inadmissible.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c) SCRE. The rule against hearsay prohibits the admission of evidence of an out of court statement by someone other than the person testifying which is used to prove the truth of the matter asserted. State v. Vick, 384 S.C. 189, 199, 582 S.E.2d 275, 280 (Ct. App. 2009). Out of court statements made by an unavailable witness are admissible if they fall into one of the exceptions. Rules 804(b) SCRE. "Unavailable" is defined in Rule 804(a) and includes situations in which the declarant is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means. Rule 804(a) SCRE. "The party offering the statement bears the burden of establishing unavailability." Dodd v. Berlinksky, 344 S.C. 172, 177, 543 S.E.2d 237, 240 (Ct. App. 2001). The court in State v. Kinloch, held that the mere fact that the whereabouts of the declarant were unknown did not establish unavailability in a case where the Appellant failed to offer any reason for the witness' unavailability and failed to show evidence of efforts to locate the missing witness. State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705 (2000).

Here, there is no evidence offered to show that the witness was unavailable. The trial judge stated, "If I find, if I find under 804 that he's unavailable, which I've made no finding of that. And there's been no evidence or argument put into the record that suggest Victim's sibling was unavailable." (R. 345). Defense Counsel responded "Your Honor, I believe Ms. Jennings testified that nobody in the family knows where he is. And I can call my investigator to say that

he made a search for him and haven't been able to find him as well." (R. 345). That was all of Defense's evidence to show that the witness was "unavailable" and as the court in Kinloch held, simply not knowing the whereabouts of a witness does not classify him as unavailable. Further, even if the trial judge had found the witness unavailable, it does not fall under the exceptions to hearsay under Rule 804(b) SCRE.

Rule 804(b) SCRE states the exceptions for which statements made by an unavailable witness would be admissible:

> (b) *Hearsay Exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former Testimony*. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the court of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.
>
> (2) *Statement Under Belief of Impending Death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
>
> (3). *Statement against Interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
>
> (4) *Statement of Personal or Family History*. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

In this current case, even if the declarant had been found unavailable, none of these exceptions would apply to the declarant's statement. The statement Appellant was attempting to enter was given to an officer by a five year old (sibling) during an interview. (R. 505). Defense counsel attempted to enter the statement into evidence during trial through the statement against interest exception. (R. 339). "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." State v. Young, 420 S.C. 608, 617, 803 S.E.2d 888, 893 (Ct. App. 2017). The statement by the sibling was not a self-inculpatory statement because even if the statement saying that sibling's mother told him to lie were true, it did not self-implicate sibling. Therefore, because the statement would not fall into the statement against interest exception to hearsay it is inadmissible hearsay.

The statement is not admissible as a prior inconsistent statement.

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.

"A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination." State v. Stokes, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009). Appellant relies heavily on State v. Barnes, which held that a proper foundation was laid to introduce a prior inconsistent statement, when the declarant was confronted with the previous statement, the time and place it was made and the person to whom it was made and then denied making the statement. State v. Barnes, 421 S.C. 47, 804 S.E.2d 301 (Ct. App. 2017). Appellant also relies on the holding in State v. Bixby allowing the state to introduce extrinsic

evidence of defendant's mother's prior inconsistent statements. State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010). In Bixby, the State was able to introduce defendant's mother's prior inconsistent statements in three separate instances because once she testified, she denied making the statements that she had previously made. Id. This allowed the State to introduce her previous statements because proper foundation was laid as they were her statements and were inconsistent with her current testimony. Id.

Both Barnes and Bixby can be distinguished from the current case because in each it was the declarant's own statement that was being used against them as a prior inconsistent statement, whereas in this case it is someone else's words (Victim's sibling) to a third party (Cromartie) being used as a prior inconsistent statement of Victim's mother. This would not be admissible as a prior inconsistent statement because it is not mother's statement, meaning she would not be the declarant. It is a statement by sibling that just so happens to be inconsistent with mother's statement, but it is not her statement. Therefore, the trial judge did not err in ruling that sibling's statement was inadmissible as a prior inconsistent statement of mother.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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