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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
The Honorable Stephen H. John, Circuit Court Judge

Appellate Case No. 2020-001378

THE STATE, Respondent,

v.

KEVIN J. MCKINNON, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENTS OF ISSUE ON APPEAL

The trial judge did not abuse his discretion when he did not allow Appellant to identify a prior abuser of someone other than the Victim because it was not relevant and even if it was it would have confused the issues and misled the jury.

STATEMENT OF THE CASE

Appellant was indicted by an Horry County Grand Jury for disseminating obscene material to a minor and criminal sexual conduct with a minor in the first degree. Appellant proceeded to a jury trial on September 29 - October 2, 2020, in the Horry County Court of General Sessions before the Honorable Steven H. John. The State was represented by Assistant Solicitors Mary Ellen Walter and George Henry Martin. Casey M. Brown represented the Appellant. The jury acquitted Appellant of the dissemination charge, but convicted him of the criminal sexual conduct with a minor charge. Appellant was sentenced to thirty-five years' imprisonment. This appeal follows.

STATEMENT OF FACTS

During the summer of 2015, Minor 1 (Victim) and Minor 2 (Cousin) attended a summer day camp. (Tr. 139). While at camp, Victim, Cousin and Minor 3 had a conversation about sexual abuse. (Tr. 140). During the conversation, Cousin told Minor 3 she was being sexually abused. (Tr. 141). Minor 3 testified at some point in the conversation Victim's name was also mentioned and as the conversation continued Victim began crying. (Tr. 141-142). Minor 3 testified that she told her mother about the conversation when she went home that day. (Tr. 142).

Theresa Callahan (Callahan), camp leader of the summer day camp, testified that she was notified by the mother of Minor 3 of information concerning Victim and Cousin. (Tr. 233). Callahan then reported that information to her supervisors. (Tr. 233). Eric Mckinnon (Victim's father) testified that he spoke with Victim and was informed that she was sexually abused numerous times at Appellant's house. (Tr. 276). Victim's father notified detectives. (Tr. 277).

Marcus Rhodes, a detective with Horry County Police Department, was assigned the case. (Tr. 293). Rhodes conducted a minimal information interview with Victim. (Tr. 294). Victim told Rhodes that she was touched in an inappropriate manner. (Tr. 295). She indicated this occurred at Appellant's house. (TR. 296). Rhodes requested an interview with Children's Recovery Center. (Tr. 295). Rhodes conducted a minimal information interview with Cousin, who also indicated that she had been touched inappropriately. (Tr. 295). Cousin also indicated that the abuse occurred at Appellant's house. (Tr. 296).

Victim's interview was scheduled for July 22, 2015. (Tr. 298). Cousin's interview was scheduled for August 11, 2015. (Tr. 298). Both minors disclosed in their interviews that they had been sexually abused by Appellant. (State's Exhibit 2, Tr. 550). Based on Rhodes' observations in the interviews, Kevin McKinnon (Appellant) was identified and ultimately charged. (Tr. 299).

Cousin recanted her allegations prior to trial against Appellant. She testified for the defense at trial that she and Victim made up the story about Appellant for attention. (Tr. 532.) She testified that there had been a prior incident of abuse that did not involve Appellant. (Tr. 511).

Victim testified at trial that when she turned 6, Appellant began touching her in inappropriate places. (Tr. 159). Victim testified that Appellant would touch her boobs with his hands, mouth, and penis. (Tr. 161). Victim stated that Appellant would touch her vagina using his mouth, hands, and penis. (Tr.163). Appellant also forced Victim to touch his penis with her hands and mouth. (Tr. 165). Victim testified that this abuse occurred almost every time she was at Appellant's house and that the abuse occurred from ages 6 to 8. (Tr. 159). Victim also testified that Appellant made her watch pornography during some of the instances of sexual abuse. (Tr. 174-175). The jury found Appellant guilty of the criminal sexual conduct with a minor first degree charge. (Tr. 727-728). Appellant was sentenced to thirty-five years. (Tr. 736).

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). The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." State v. Howard, 396 S.C. 173, 177, 720 S.E.2d 511, 514 (Ct. App. 2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). "To warrant the reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

ARGUMENT

The trial judge did not abuse his discretion when he did not Appellant to identify a prior abuser of someone other than the Victim because it was not relevant and even if it was it would have confused the issues and misled the jury.

Appellant contends that the trial judge erred in refusing to allow the defense to explain the "real source of abuse: Daniel Shaub." (IBOA pg. 10). Cousin had been abused by Daniel Shaub in a prior incident and Appellant wanted to use Shaub's abuse of Cousin as the source of Victim's sexual knowledge. (IBOA pg. 6). Appellant's argument lacks merit because the identity of Cousin's prior abuser is not relevant to whether Victim was sexually abused by Appellant. Further, even if the prior abuse of Cousin was relevant, the identity of the abuser would confuse the issues and mislead the jury.

"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)). "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE. "Evidence that can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Brooks, 428 S.C. 618, 634, 837 S.E.2d 236, 244 (Ct. App. 2019). In this case, the fact that Cousin was abused in the past by Daniel Shaub does not make the fact of whether Victim was sexually abused by Appellant more or less probable. Victim has no connection to Daniel Shaub whatsoever and it is

completely irrelevant to whether Victim was sexually abused by Appellant. Even if the abuse of Cousin could be relevant to show Victim's sexual knowledge or for any other reason, the name of Cousin's abuser is not relevant. Even if this information was relevant to the case at hand, it would be inadmissible under Rule 403 SCRE.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Probative value is the measure of the importance of that tendency to the outcome of the case." State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App 2014). "Unfair prejudice does not mean the damage to a defendant's case that results from legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." Id. at 616, 168. In this case there is no probative value in admitting the name of the prior abuser of someone who is not the victim in the current case. At best it is a means of trying to back door third party guilt and confuse the jury.[1] The name of the abuser of the Cousin does not affect the outcome of Victim's case against Appellant. This information would simply confuse the issues and mislead the jury.

Appellant refers to State v. Lyles in an attempt to argue that Appellant was prevented from presenting a full and complete defense. (IBOA Pg. 10). "However in the exercise of this

[1] "At any rate the evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534 (1941)

right [to present a defense], the accused, as is required of the State, must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." State v. Lyles, 379 S.C. 328, 342, 665 S.E.2d 201, 209 (Ct. App. 2008). The trial judge properly denied evidence of the identity of Cousin's prior abuser because his identity was irrelevant and even if it was relevant the probative value did not outweigh the prejudicial effect of confusing the issues and misleading the jury.

Appellant relies on the court holding in State v. Grovenstein that the trial court erred in excluding evidence that the victims had been previously accused of sexual misconduct similar to the conduct they alleged against defendant. The Court made this decision stating that "The State in its closing argument emphasized the inference that the young victims' knowledge was based on their experience with Grovenstein. State v. Grovenstein, 340 S.C.210, 530 S.E.2d 406 (Ct. App. 2000). Specifically, the assistant solicitor stated, 'If you're six and you're seven and you don't know anything about sex, all you know is what you've perceived."' Id. at 220, 412. This case differs because the State did not claim or infer that the only way that Victim had this sexual knowledge was because of the sexual abuse by Appellant. There was evidence presented in the case that Victim had been caught watching porn on her own and acting out sexually with her cousin. (Tr. 170, 248) Therefore admitting the evidence of prior abuse of cousin by Daniel Shaub was not necessary to rebut the fact that Victim received her sexual knowledge only from the instances with Appellant.

Similarly, Appellant relies on State v. Rolon holding that the court erred in prohibiting defendant from presenting evidence of Victim's prior sexual abuse because it could have demonstrated an alternative source for Victim's sexual knowledge and resulted in Victim's confusion of the identity of the perpetrator. State v. Rolon, 257 Conn. 156, 777 A.2d 604 (Conn.

2001). In this case the State did not infer that the only reason for Victim's sexual knowledge was because of interactions with Appellant. Further, in State v. Rolon, the defendant tried to introduce evidence of a prior sexual assault of the victim, where in this case, Appellant tried to introduce evidence of prior abuse of a defense witness, not the victim herself. "A trial [court]'s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.' " State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct.App.2008). "A trial [court]'s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." Id. at 339, 665 S.E.2d at 207. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Green, 412 S.C. 65, 79, 770 S.E.2d 424, 432 (Ct. App. 2015). Therefore the trial judge did not abuse his broad discretion in excluding the identity of Cousin's abuser.

Harmless error

Even if the identity of Cousin's prior abuser was relevant and admissible, the exclusion of his identity was harmless because evidence of the prior abuse did in fact come in therefore the exclusion of simply the name of said person did not result in prejudice to Appellant. "To warrant the reversal based on the admission or exclusion of evidence, the Appellant 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) Appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Byers, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011). The jury was presented with evidence multiple times that Cousin was previously abused

by someone other than Appellant. Trial counsel for Appellant mentioned references to the abuse by someone other than Kevin Mckinnon four times in its opening. (Tr. 128-135). It was also mentioned at least six other times throughout trial. (Tr. 200, 254, 286, 319, 440, 558). Therefore, whether or not the identity of Cousin's prior abuser was admitted, it would not have influenced the jury's verdict.

CONCLUSION

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

Respectfully submitted,

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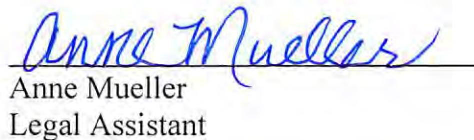
PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on David Alexander, counsel of record for Appellant, by sending one copy by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 12th day of January, 2022.



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Good afternoon, Mr. Alexander.
Attached to this email is a copy of the State's Initial Brief of Respondent and Designation of Matter in the above criminal appeal. This brief and designation will be filed with the Court electronically later today.
If you would, please acknowledge receipt of this email and the attachment by return email.
Thank you for your cooperation.
Sincerely,
Anne Mueller, Legal Assistant for Assistant Attorney General Ambree M. Muller

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