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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN J. MCKINNON,

APPELLANT.

APPELLATE CASE NO. 2020-001378

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this child sexual abuse case the complainant's co-complainant, her cousin, recanted her allegations against appellant. The cousin had previously been abused by another individual, Daniel Shaub, who pled guilty and was convicted. The cousin testified in this case that she and the complainant made up her allegations against appellant, their grandfather, based on this prior abuse by Daniel Shaub. Did the trial court err in refusing to allow appellant to identify Daniel Shaub as the convicted perpetrator of this abuse?

STATEMENT OF THE CASE

Appellant Kevin McKinnon was indicted in Horry County on sexual abuse charges and on March 2, 2020, the State called his case for trial before the Honorable Steven H. John. R. 1. After pretrial hearings, Judge John quashed an indictment for first-degree criminal sexual conduct with a minor. R. 14, l. 1 – 16, l. 5. Judge John continued a charge for disseminating obscene material to a minor so the State could obtain a new indictment. R. 14, l. 1 – 16, l. 5.

On September 29, 2020, appellant was tried for first-degree criminal sexual conduct with a minor and disseminating obscene material to a minor before Judge John and a jury. R. 17. Mary-Ellen Walter and George Henry Martin represented the State. R. 17. Casey M. Brown represented appellant. R. 17. The jury acquitted appellant of the dissemination charge, but convicted him on the CSC charge. R. 657, l. 19 – 658, l. 6. Judge John sentenced appellant to thirty-five years' imprisonment. R. 666, l. 4 – 8. This appeal follows.

STANDARD OF REVIEW

"'In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous.' State v. McEachern, 399 S.C. 125, 135, 731 S.E.2d 604, 609 (Ct. App. 2012). 'The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.' State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). '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. Jennings, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011)." State v. Spears, 403 S.C. 247, 252, 742 S.E.2d 878, 880 (Ct. App. 2013).

ARGUMENT

In this child sexual abuse case the complainant's co-complainant, her cousin, recanted her allegations against appellant. The cousin had previously been abused by another individual, Daniel Shaub, who pled guilty and was convicted. The cousin testified in this case that she and the complainant made up her allegations against appellant, their grandfather, based on this prior abuse by Daniel Shaub. The trial court erred in refusing to allow appellant to identify Daniel Shaub as the convicted perpetrator of this abuse.

Factual and Procedural Background

Appellant's granddaughter, Complainant, had a female cousin ("Cousin") who was a year older than her. R. 384, l. 11 – 15. Cousin said she and Complainant were "very close." Tr. 446, l. 7 – 8. When Complainant was asked if she and Cousin were close, she replied, "Kind of." R. 137, l. 15 – 16. When Complainant was about eight years old, in the summer of 2015, she and Cousin attended a summer camp run by the Horry County parks department. R. 123, l. 15 – 124, l. 3.

Another girl who attended the camp was friendly with Complainant. R. 95, l. 2 – 22. This girl heard Cousin talking about being sexually abused and that Complainant had also been abused. R. 96, l. 14 – 98, l. 2. Complainant joined the conversation and began crying. R. 98, l. 1 – 16. When another camper went home, she told her mother what she heard. R. 98, l. 17 – 20. The mother called the camp staff, who were mandatory reporters. R. 186, l. 6 – 187, l. 14. Both Complainant and Cousin accused appellant Kevin McKinnon ("McKinnon"), their paternal grandfather, of sexually abusing them. R. 247, l. 13 – 250, l. 15.

About a week after the allegations came to light, Complainant underwent a forensic interview with Dianne Nordeen ("Nordeen"). R. 332, l. 7 – 15. She alleged McKinnon abused her during the interview with Nordeen. R. 340, l. 7 – 349, l. 22. Cousin also went for a forensic

interview and alleged her grandfather sexually abused her. R. 467, l. 18 – 468, l. 4. R. 482, l. 19 – 490, l. 12. The State indicted McKinnon for abusing both girls. R. 66, l. 24 – 71, l. 6.

Cousin recanted her allegations against her grandfather. R. 420, l. 10 – 422, l. 16. R. 465, l. 1 – 466, l. 25. On January 11, 2016, Cousin wrote that she and Complainant "did make up the grandpa thing." Def. Ex. 14. Cousin's stepmother informed the solicitor's office "that [Cousin] told the truth and we heard nothing else after that." R. 421, l. 16 – 422, l. 13.

Cousin testified as a defense witness. R. 439, l. 8 – 17. She testified that she and Complainant made up the allegations about their grandfather because they "both wanted to get attention." R. 465, l. 1 – 10. She testified that McKinnon "never harmed us in any way." R. 466, l. 19 – 25. Cousin admitting lying about her grandfather during her forensic interview. R. 467, l. 23 – 468, l. 4. Defense counsel asked Cousin why she continued to lie about her grandfather and Cousin replied:

> Because I was really scared that **if I said I was lying, I was going to get in a lot of trouble,** and I really didn't want to get into a lot of trouble. And then, I realized how much cause this was causing the families, so then that's when I finally said it wasn't true.

R. 468, l. 5 – 10 (emphasis added).

Cousin was also afraid of getting into trouble for something else—sexual activity with Complainant. R. 456, l. 6 – 464, l. 25. Cousin drew pictures and wrote notes back and forth with Complainant about their sexual activity. R. 456, l. 6 – 464, l. 25. Def. Ex. 6-13. Complainant did not remember writing notes back and forth with Cousin. R. 156, l. 4 – 7. A drawing with a date of March 8, 2014, says "I had sex with [Complainant] I love sex." Def. Ex. 11. Complainant testified that McKinnon had sometimes abused the girls at the same time, but also said that Cousin would force her into sex when McKinnon was not present. R. 126, l. 3 –

17. Before the abuse allegations were made against McKinnon, Cousin's stepmother caught the girls "acting out sexually" and notified Complainant's mother. R. 424, l. 16 – 426, l. 6.

Prior Abuse of Cousin by Daniel Shaub

Appellant's case was tried in September of 2020, but was originally called in March 2020. R. 1. At the original call of the case, Judge John quashed one of the State's indictments and the case did not proceed. March 2, 2020, R. 13, l. 23 – 16, l. 5. Before deciding the motion to quash, Judge John heard argument on other pending pretrial motions, including a motion to admit prior statements of Cousin. R. 2, l. 23 – 11, l. 13.

Defense counsel gave the trial judge the necessary background for his motion. R. 2, l. 23 – 11, l. 13. Prior to the allegations against grandfather, Cousin was sexually abused by Daniel Shaub ("Shaub"), her mother's boyfriend. R. 2, l. 23 – 11, l. 13. R. 380, l. 12 – 16. Defense counsel wanted to use Shaub's abuse of Cousin (and Cousin's subsequent sexual activity with Complainant) as the source of Complainant's sexual knowledge. R. 2, l. 23 – 11, l. 13.

Shaub was indicted in June 2014 for first-degree criminal sexual conduct with a minor. R. 669. Shaub ultimately pled guilty to first-degree assault and battery in November 2014. R. 669. The court sentenced Shaub to ten years' imprisonment. R. 669 .

At the March motion hearing, defense counsel informed Judge John that he would show through Cousin that Cousin told Complainant about being abused by Shaub and that the girls eventually made up their allegations against their grandfather. R. 2, l. 23 – 11, l. 13. The solicitor claimed confusion at appellant's strategy, stating that the statements appellant wanted to introduce were Complainant's "statements against a different defendant in a different case." R. 6, l. 3 – 6. Judge John then said, "There's nothing gonna be placed in evidence in this case that has anything to do with [Cousin's] case against that other defendant. We're not talking about that case." R. 6, l. 9 – 12.

Defense counsel attempted to explain that Cousin "was molested or sexualized by [Shaub]. [Cousin] and [Complainant] act out sexually and it's the same allegations that [Cousin] says with [Shaub]…." and the court interrupted him to find out the time frame. R. 7, l. 1 – 10. Defense counsel said, "I just want to be able to say, look, [Cousin] and [Complainant] talked about it. [Complainant] knew about [Shaub], knew about the allegations. It's the same allegations that [Complainant] and [Shaub] had, I mean, almost exact[ly] the same." R. 7, l. 11 – 24. [Complainant] and [Cousin] then used the knowledge from Shaub's abuse to "create this game—they wrote it down, and then they said let's blame grandpa, and it's the same." R. 7, l. 11 – 24.

Defense counsel also explained that Cousin's forensic interviewer for the abuse by Shaub was the exact same interviewer for Complainant's interview for the allegations against her grandfather, Dianne Nordeen. R. 2, l. 23 – 11, l. 13. Defense counsel wanted to use portions of Cousin's interview with Nordeen about Shaub to show the similarity. R. 2, l. 23 – 11, l. 13. Judge John ruled that the defense could cross-examine Complainant about the writings and whether she made up a game about her grandfather, but then said, "That's all you can ask. We're not playing any videos, we're not talking about [Complainant] and [Shaub]." R. 9, l. 3 – 23. After further attempts by the defense to explain, the court again reiterated that he could ask the girls whether they talked about it, but said, "You're not talking about [Complainant's] allegations against [Shaub]. Okay? So, that's where we are. Okay?" R. 9, l. 24 – 10, l. 21.

Before the case came up for trial in September, appellant filed a Motion to Admit Evidence of Victim's Specific Prior Sexual Instances. R. 669. Appellant's motion referenced <u>State v. Grovenstein</u>, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000) and stated that he intended to introduce evidence of Complainant's sexual experiences with Cousin and Cousin's abuse by Shaub. R. 669. Appellant attached Shaub's indictments and sentencing sheet as part of his

motion. R. 669. Appellant filed his motion on September 18, 2020, eleven days before the trial began. R. 669.

Appellant filed six other motions the day before trial and after jury qualification. R. 35, l. 18 – 22. The trial judge expressed his displeasure at the last-minute filing. R. 39, l. 9 – 40, l. 16. One of the motions concerned redactions to the forensic interview video and the solicitor referenced the March hearings, telling the court, "Your Honor has already ruled on what redactions should be made. The state – this was back in March, Your Honor." R. 53, l. 7 – 10.

Appellant brought his motion concerning Shaub to the court's attention and again explained it was "to show that the defendant is not necessarily the source of the complainant's ability to testify about sexual conduct." R. 66, l. 1 – 11. The solicitor explained that Cousin had recanted her allegations against McKinnon. R. 66, l. 24 – 67, l. 23. The State agreed that if Cousin testified, appellant could present evidence of "child-on-child abuse." R. 67, l. 1 – 23. The solicitor then argued, "And, abuse by Daniel Shaub on [Cousin], that has absolutely nothing to do with [Complainant]. Certainly, that should not be allowed. And I believe that Your Honor has already ruled that [Cousin's forensic] interview, due to the abuse by Daniel Shaub, is inadmissible." R. 67, l. 10 – 14. The solicitor continued, "I think that the logic there carries forward that there should be no testimony as to in [Complainant's] case of abuse perpetrated by a different defendant on a child who does not claim to be a victim." R. 67, l. 15 – 18.

Judge John ruled, "I'm not gonna allow you to talk about Daniel Shaub." R. 68, l. 8 – 69, l. 2. The court said appellant could ask Cousin about what she told Complainant, "but not—we're not talking about some other defendant. We're not talking about some other defendant. We're not talking about somebody else. **Daniel Shaub's name is not coming up in this trial in any shape, manner, or form. Is that clear?**" R. 68, l. 8 – 69, l. 2 (emphasis added). Judge

John then allowed appellant to proffer further argument for the record. R. 69, l. 3 – 17. Appellant argued:

> That the jury is gonna know these two girls were complainants at the onset. The jury is gonna want to know were this came from, if not the defendant. Daniel Shaub pled guilty to molesting and abusing [Cousin]. [Cousin] then took that, told [Complainant] everything about Daniel. [Complainant] asked about Daniel, knows about Daniel, they acted out sexually in the same manner that Daniel molested [Cousin] via—and then Daniel molested [Complainant] via [Cousin]. So the same things that this guy did with [Cousin], [Cousin] told [Complainant] everything; she showed her everything that he did to her. He coerced her and she coerced [Complainant] in the same manner that Daniel did to her. It's all the same thing and that's the defense's entire case, is that this guy molested both—"

R. 69, l. 5 – 17. Judge John interrupted defense counsel and said, "His name is not coming up. Okay? You can question her about what she told him without his name coming up. He's not on trial." R. 69, l. 18 – 20. Defense counsel asked for clarification: "So just an unnamed – Okay. All right. May I proffer—" R. 69, l. 21 – 22. The judge again interrupted and said, "His name is not coming up; he's not on trial." R. 69, l. 23. The court said defense counsel could proffer what he needed at a later time and defense counsel asked, "So I just can't mention Daniel?" R. 69, l. 24 – 70, l. 3. Judge John replied, "No, sir." R. 70, l. 4. The trial judge reiterated that Shaub's name could not be mentioned several more times before the hearing ended. R. 70, l. 8 – 72, l. 15. The trial court entered a Form 4 Order stating, "The name Daniel Shaub shall not be mentioned in any way shape or form." R. 667.

Discussion

The trial judge erred in accepting the State's argument and refusing to allow the defense to explain the real source of the abuse: Daniel Shaub. This error prevented appellant from presenting a full and complete defense. U.S. Const. amends VI, XIV. Appellant could not fully explain the source of the children's sexual knowledge without telling the jury about Shaub and could not fully examine his witnesses nor cross-examine the State's witnesses. See State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008) (discussing constitutional protections for an accused); Davis v. Alaska, 415 U.S. 308 (1974) (discussing constitutional dimensions of right to cross-examination). As defense counsel argued, the abuse by Shaub was the defense's "entire case." Tr. 105, l. 5 – 17. Sustaining the State's objections to identifying Shaub substantially impaired appellant's right to present his defense.

The trial judge's error also violated the rules of evidence. Shaub's name and identity were relevant and admissible. "'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 probable or less probable than it would be without the evidence." Rule 401, SCRE. Shaub's identity made appellant's defense more credible in that Shaub's abuse of Cousin was the real source of Complainant's sexual knowledge and caused the fabrication of allegations. Shaub's identity lended authenticity and credibility to appellant's defense and Cousin's testimony. "All relevant evidence is admissible. . . ." Rule 402, SCRE.

Evidence showing a young victim has a source of sexual knowledge other than the defendant is admissible in a sexual abuse case. State v. Grovenstein, 340 S.C. 210, 213-21, 530 S.E.2d 406, 408-12 (Ct. App. 2000). In Grovenstein, three boys accused the defendant of molesting them. Id. Grovenstein sought to introduce evidence the boys had abused a young girl in a similar way and was prepared to call the girl as a witness. Id. After surveying case law

from other jurisdictions, this Court agreed with Grovenstein that the evidence of the other abuse was relevant and admissible. Id. The Court explained that the evidence "was even more significant" because the case was a credibility contest. Id.

Here, the credibility contest was Complainant versus Cousin. Appellant's defense largely rested on Cousin's testimony that the girls fabricated their allegations against McKinnon to get attention. Cousin's testimony that she persisted in the lie, even through a forensic interview, because she was afraid she would get into trouble exposes the pressure placed on children by the machinery of the state in sexual abuse cases once an allegation is made. Nothing could be more relevant than evidence tending to show that the alleged victim made up her allegations in a child sexual abuse case.

A case from the Supreme Court of Connecticut that favorably cited Grovenstein bears a strong similarity to appellant's case. State v. Rolon, 777 A.2d 604 (Conn. 2001). In Rolon, the complainant accused her maternal grandfather of sexually abusing her. Id., 777 A.2d at 610-13. The allegations were made after "social workers observed 'sexual play'" between the complainant and her brother while they were living in foster care. Id. The social workers separated the children into different foster homes. Id. Subsequently, the complainant accused her maternal grandfather of molesting her. Id.

The defense in Rolon discovered the complainant had been sexually abused by her *paternal* grandfather while living in Puerto Rico. Id. The state admitted that abuse occurred, but nevertheless successfully convinced the trial judge to exclude this evidence. Id. The Rolon court reversed, citing "the critical nature of prior sexual abuse evidence in the defendant's effort to rebut the inference that he is the source of [the victim's] sexual knowledge or behavioral characteristics." Id., 777 A.2d at 624. Like the brother and sister in Rolon, here Cousin and Complainant were sexually active with each other and then accused a grandfather of abuse.

Appellant's ability to identify Shaub as the abusive source of the allegations and sexual knowledge of Complainant and Cousin was critical to his defense and to Cousin's credibility.

In a case cited in Grovenstein, the Maine Supreme Judicial Court reversed a sexual abuse conviction because the defense was not allowed to cross-examine the complainant about prior sexual abuse. State v. Jacques, 558 A.2d 706 (Me. 1989). The defendant's accusers in Jacques had both been abused by others, but the prosecutors successfully excluded the evidence. Id., 558 A.2d at 707-08. Jacques "wished to show the circumstances in which he was first accused by the victims" and the source of the children's sexual knowledge. Id. at 708. The Maine court reasoned that the state's interest in protecting victims "must be weighed against the defendant's constitutional right of effective cross-examination and to present a proper defense." Id. The court said that the rulings preventing Jacques from fully examining his accusers "curtailed [his] effort to generate doubt as to his participation in abuse of the children." Id. Appellant needed to explain the circumstances of his accusation and the inability to identify and discuss Shaub curtailed his rights. Further, the State's interest in protecting Complainant under the Rape Shield Law was nonexistent because Shaub abused Cousin, not Complainant. Judge John contradictorily ruled that appellant could present this evidence euphemistically, but with an illogical limitation that undermined the defense case. Once the fact of the abuse was introduced it made no sense to tell the complete story about Shaub or, at the very least, identify him so the jury knew who the real abuser was. No prejudice would have accrued to the State from identifying Shaub.

Appellant was able to tell the jury that Cousin had been abused, but without being able to identify Shaub, the jury was left wondering about the credibility of the defense. Defense counsel's opening statement shows the dilemma. R. 84, l. 23 – 90, l. 19. His opening is a strongly worded defense of appellant, but is crippled by the trial judge's ruling forbidding the

identification of Shaub. R. 84, l. 23 – 90, l. 19. He tells the jury that the abuse "did happen, but it was not Kevin McKinnon." R. 84, l. 23 – 90, l. 19. He said "there's a monster in this case" but that appellant was not the monster and did not harm his granddaughters. R. 84, l. 23 – 90, l. 19. Defense counsel said, "They were harmed though, just not by Kevin." R. 84, l. 23 – 90, l. 19. Near the end he tells the jury, "There was a monster in their closet, he is gone, the kids are safe." R. 84, l. 23 – 90, l. 19. When defense counsel finishes, the jury is left wondering that if there is a monster why defense counsel could not tell them who it was. It was as if the jury was given a "whodunit" mystery to read and the book's ending was redacted.

Appellant continued through the trial to identify Shaub or give the jury more detail, but was continually hamstrung by the Court's ruling and the State's continued objections. Defense counsel had to refer to Shaub euphemistically and confusingly as "someone who was not McKinnon." Complainant denied any conversation with Cousin "about someone that abused her, not Grandpa." R. 156, l. 11 – 13. Appellant asked Complainant's father if he was aware Cousin "had been abused by someone, not Kevin McKinnon." R. 239, l. 10 – 12. He testified he did know about the prior abuse. R. 239, l. 10 – 12. Defense counsel asked Complainant's mother if she knew that Cousin "had previously been abused by someone not Kevin McKinnon." R. 206, l. 25 – 207, l. 2. Complainant's mother admitted she knew about the abuse, but that Complainant did not. R. 207, l. 3 – 14. The mother did admit finding Complainant watching pornography on a cell phone. R. 207, l. 22 – 208, l. 1.

When appellant cross-examined the lead investigator, he asked whether he "later learned" that Cousin "had been molested by someone, not Kevin McKinnon previously." R. 272, l. 12 – 16. The officer responded that Cousin and her stepmother told him about the "earlier incident." R. 272, l. 12 – 16. Defense counsel then asked, "You've learned that that person is in prison?" and Judge John sustained the State's objection and struck the question. R. 272, l. 12 – 21.

When the defense cross-examined the forensic interviewer, Nordeen, he first confirmed that Nordeen had also conducted Cousin's interview after the Shaub abuse. R. 351, l. 21 – 25. Defense counsel then attempted to ask a question concerning what Cousin had said about sexual activity with Complainant and the State's objection was sustained. R. 352, l. 1 – 12.

The defense called Cousin's father. R. 370, l. 13 – 16. Cousin's biological mother had custody of her until 2012. R. 379, l. 3 – 381, l. 2. Cousin's father testified that he became aware of some "issues" regarding Cousin when he got "emergency custody of her for a couple of weeks, while **he was in jail** and her mother had to go try to help him." R. 379, l. 12 – 16 (emphasis added). Defense counsel confirmed "we're not talking about Kevin McKinnon" and that "we're not gonna talk about that person." R. 379, l. 17 – 24. When asked the "topic of that issue," Cousin's father said, "She was molested by her mother's boyfriend." R. 380, l. 12 – 16. The State's objection was sustained and the answer struck by Judge John. R. 380, l. 12 – 16. Appellant similarly had to dance around Shaub's identity when Cousin's stepmother testified. R. 411, l. 3 – 412, l. 23.

The most prejudicial effect of the trial judge's error was the solicitor's aggressive use of the ruling in her cross-examination of Cousin. On direct-examination, Cousin admitted to sexual acts with Complainant, telling Complainant about her abuse at the hands of Shaub, and that the girls fabricated the allegations against appellant. R. 449, l. 7 – 479, l. 18. The solicitor then spent nearly her entire cross-examination going step-by-step through the allegations Cousin made against appellant in her forensic interview. R. 482, l. 19 – 490, l. 6. The solicitor asked Cousin if she remembered telling the forensic interviewer that appellant put "his front bottom" into her "front bottom." R. 484, l. 12 – 18. The solicitor asked about telling the forensic interviewer about pornographic websites. R. 484, l. 25 – 485, l. 16. Cousin was asked about whether she said her "front bottom" hurt after the abuse. R. 488, l. 24 – 489, l. 4.

The cross-examination's purpose was to discredit Cousin and tell the jury that appellant really had abused Cousin instead of this unidentified other person. On re-direct, appellant was left only with confirming that everything in the interview was a lie and that Cousin did not learn about "sex stuff from Grandpa," but instead "learned it from the other prior family member . . . that actually did it." R. 491, l. 7 – 13. The ruling that forced defense counsel to refer to the "other prior family member" instead of a real, identifiable person took all of the power out of his questions and bolstered the solicitor's attempt to discredit Cousin. This Court should reverse and grant appellant a new trial to present his complete defense without the effect of this erroneous evidentiary ruling.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and this case remanded for a new trial.

s/David Alexander
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This 16th day of February, 2022.

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."

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s/David Alexander
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This 16th day of February, 2022.