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Jun 03 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN THOMAS BASILE,

APPELLANT.

APPELLATE CASE NO. 2021-000731

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether, in violation of the rules proscribing hearsay, the trial court erred in allowing a nurse to testify about the specific sexual acts the complainants told her the defendant committed?

STATEMENT OF THE CASE

Appellant was charged with four counts of first-degree criminal sexual conduct with a minor and two counts of third-degree CSC with a minor in Beaufort County. R. 13, l. 21 – 14, l. 4. On June 21, 2021, appellant was tried before the Honorable R. Ferrell Cothran and a jury. R. 1. Julie K. Keeney and Rachel Janowski represented the State. R. 1. Jeffrey Stephens represented appellant. R. 1. Appellant admitted committing the two third-degree CSCs and pled guilty to them after jury selection. R. 47, l. – 55, l. 9. The jury convicted appellant on the other four charges. R. 256, l. 11 – 22. Judge Cothran sentenced appellant to a cumulative forty-five years' imprisonment. R. 259, l. 10 – 260, l. 4. This appeal follows.

STANDARD OF REVIEW

This Court reviews the admission of hearsay evidence under the abuse of discretion standard. See State v. Jennings, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

ARGUMENT

In violation of the rules proscribing hearsay, the trial court erred in allowing a nurse to testify about the specific sexual acts the complainants told her the defendant committed.

Appellant was charged with six separate counts of criminal sexual conduct (four 1st degree, two 3rd degree) stemming from allegations made by his very young granddaughters, Minor 1 and Minor 2. R. 13, l. 21 – 14, l. 4. Appellant admitted committing the two third-degree CSCs and pled guilty to them after jury selection. R. 47, l. – 55, l. 9. Therefore, the central issue in the case was the specific nature of the acts performed by appellant.

Minor 1 testified appellant licked her "private" and touched her chest and bottom. R. 98, l. 1 – 100, l. 3. She denied ever touching appellant's penis. R. 101, l. 10 – 25. She also testified that appellant used a vibrator on her one time, but no vibrator was found when the police searched appellant's home. R. 102, l. 9 – 103, l. 3. R. 207, l. 18 – 21.

Minor 2 testified appellant had vaginal and anal intercourse with her, digitally penetrated her, and performed cunnilingus on her. R. 122, l. 10 – 124, l. 22. Appellant denied abusing Minor 2 in his interrogation by police and only admitted licking Minor 1's genitals. State's Ex. 14. Both girls admitted practicing their testimony in the courtroom with the solicitor. R. 106, l. 11 – 17. R. 126, l. 6 – 15.

Kristen Dalton, a pediatric nurse practitioner, testified about the sexual assault examinations she performed on the girls. Tr. 165, l. 25 – 172, l. 9. Nurse Dalton was qualified "as an expert in the field of child abuse medical provider." Tr. 158, l. 11 – 17. The solicitor asked her, "Can you tell me the areas of the body that Minor 2 said had been touched and what you were looking for in her medical exam?" R. 168, l. 7 – 9. The nurse responded that Minor 2 "disclosed to me that she had been touched in her privates." R. 168, l. 10 – 11.

Appellant objected. R. 168, l. 12 – 13. The court held a bench conference. R. 168, l. 14 – 17. After the bench conference the solicitor said:

> Q. I am going to ask you a few specific questions. You can just say yes or no to them. Did she disclose oral contact to her genitalia?
> A. Yes.
> Q. Did she disclose oral contact with someone else's genitalia?
> A. Yes.
> Q. Did she disclose digital anal penetration?
> A. Yes.
> Q. Digital vagina penetration?
> A. Yes.
> Q. And penile anal contact?
> A. Correct.
> Q. Penile vaginal contact?
> A. Correct.

R. 168, l. 17 – 169, l. 6. The solicitor asked similar questions about oral sex, fondling, and "anal and genital contact with an object" regarding Minor 1. R. 170, l. 15 – 22.

The trial judge erred in allowing this hearsay testimony over appellant's objection. Hearsay is an out-of-court statement offered for the truth of the matter asserted. See Rule 801(c), SCRE. The State clearly offered these statements by the minors for their truth—that appellant sexually abused them in these specific ways.

Rule 801(d)(1)(D) has a limited exception for criminal sexual conduct cases. See Rule 801(d)(1)(D), SCRE. It allows statements that are "consistent with the declarant's testimony" as long as the statements are "limited to the time and place of the incident." Id. These statements mentioned no time. These statements mentioned no place. They describe the specific acts of abuse. These statements do not fall under this exception.

Nor do these statements fall under the medical diagnosis/treatment exception. See Rule 803(4), SCRE. This exception provides: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the

inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion." Id. The statements were made to Nurse Dalton in her role as an investigator, not as a medical provider.

The girls' aunt took them to the hospital when she learned of the allegations. R. 83, l. 11 – 23. The police came to the hospital. R. 83, l. 11 – 23. So did DSS. R. 83, l. 11 – 23. The children then went to their forensic interviews. R. 84, l. 1 – 6. Only after going to the forensic interviews did the children see Nurse Dalton. R. 84, l. 7 – 11.

The nurse had a contract with the forensic interview center in Beaufort. R. 157, l. 11 – 18. When abuse is suspected in this judicial circuit, Nurse Dalton does "pretty much all" of the exams. R. 157, l. 19 – 22. When describing the general process of the exams, she said that she first reviewed reports from the police, then from DSS, and then from the forensic interviews. R. 159, l. 1 – 6. The exams were conducted in a special room, not an ordinary treatment room. R. 159, l. 7 – 16. The "victim advocate from the child advocacy center" is present during the child's medical exam. R. 160, l. 8 – 15.

Nurse Dalton's exam was no ordinary doctor's visit. It was part of law enforcement's investigation. Therefore Rule 803(4)'s exception does not apply. The police cannot manufacture hearsay testimony by substituting a nurse for a police officer.

Our Supreme Court recognized this problem in State v. Simmons, 423 S.C. 552, 816 S.E.2d 566 (2018). The Court called this kind of testimony "hearsay shrouded in a white coat." Simmons at 556, 816 S.E.2d at 568. "This Court will not sanction the State's use of [the doctor] as a conduit for this glaringly inadmissible hearsay to be brought before the jury." Id. at 565, 816 S.E.2d at 573. "If this tactic were permitted, the legitimate use of the Rule 803(4), SCRE, medical diagnosis

and treatment exception would be undermined and the general approach of Rule 801(d)(1)(D), SCRE, would be thwarted. Id.

In Simmons, the witness was a doctor and the children's treating physician. Id. The doctor had treated the children since they were eight months old. Id. He was not part of the State's child abuse prosecution infrastructure. See State v. Kromah, 401 S.C. 340, 356-57, 737 S.E.2d 490, 498-99 (2013) (describing the role forensic interviewers play in child abuse prosecutions). If the testimony from a real doctor and treating physician was inadmissible in Simmons, then the testimony from a nurse who contracts with law enforcement's *de facto* investigators certainly cannot be admitted. This Court should reverse appellant's convictions and remand for a new trial.

CONCLUSION

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

s/David Alexander
Appellate Defender

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ATTORNEY FOR APPELLANT

This 3rd day of June, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Thomas Basile states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge R. Ferrell Cothran, which was held on June 21 - 23, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, he asks the Court to relieve him as counsel for John Thomas Basile.

Respectfully Submitted,

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of June, 2022.

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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) Trial transcript;
(2) Indictments;
(3) Sentence sheets;
(4) State's Exhibit No. 1 (DVD children's forensic interviews – to be transported); and
(5) State's Exhibit No. 14 (DVD interview of defendant – to be transported).

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

s/David Alexander
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."

s/David Alexander
Appellate Defender

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This 3rd day of June, 2022.