31A01-1703-PC-547

ORIGINAL

IN THE

SUPREME COURT OF INDIANA

Case No.: _____

Lawrence E. NUNLEY

Appellant (Defendant Below)

vs.

STATE of Indiana

Appellee (Plaintiff Below)

Court of Appeals Cause No:
31A01-0902-CR-00088

Appeal from Harrison
Superior Court

Case No.: 31D01-0805-FA-389

The Honorable Roger D. Davis,
Judge

APPELLANT'S PETITION TO TRANSFER

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ISSUES WARRANTING TRANSFER

Nunley presents two issues for this Court's review:

First, whether the trial court violated Nunley's right to present a defense when it mechanistically applied Indiana Evidence Rule 608(b) to preclude Nunley from introducing evidence that A.Y. made a prior false allegation of physical abuse against her stepfather, whether the State opened the door to this evidence when it declared in closing arguments that A.Y. could not lie, and concomitantly, whether the opinion below contravenes this Court's precedents on these issues?

Second, whether the Court below neglected to address Nunley's argument that the drumbeat repetition of A.Y.'s single accusation was unfairly prejudicial and whether the failure of the Court below to address this argument renders its opinion in contravention of this Court's holding in *Modesitt v. State*?

TABLE OF CONTENTS

BACKGROUND AND PRIOR TREATMENT OF ISSUES

Mr. Lawrence E. Nunley lived with his teenage son, Kyle. *(Tr. 426, 535).* On April 13, 2007, Tonya and Richard Caves along with their six year-old daughter, A.Y., visited Nunley at his home. *(Tr. 459, 506-08, 532).* Kiki, Kyle's teenage girlfriend, was also at the home. *(Tr. 459, 535).* A.Y. would sometimes "hang out" with Kiki, and she visited with her that night. *(Tr. 426, 459).* Following the visit, A.Y. received permission to stay the night and to have Kiki watch her. *(Tr. 427, 459, 461, 534).*

At some point, A.Y. went into Nunley's bedroom and watched television. *(Tr. 430, 464).* According to A.Y., Nunley showed her a pornographic movie. *(Tr. 432, 469-70).* A.Y. testified that during the movie, Nunley made her "suck on his weenie bob[,]" and "licked [her] pee pee." *(Tr. 450, 472, 497).* A.Y. testified that a "pee pee" was a girl's private parts and that a "weenie bob" was a boy's private parts. *(Tr. 424).* A.Y. stated that Nunley threatened to hurt her parents if she did not suck his penis. *(Tr. 499).*

When her parents picked her up the next day, A.Y. told her that she and Nunley had a secret. *(Tr. 436, 477-78, 508, 537).* A.Y. told her parents that if she told the secret, Nunley threatened to call the police. *(Tr. 436-37, 487).* A.Y. wrote the accusation on an envelope and handed it to her parents. *(Tr. 437, 450-51, 477-78, 508, 538, 558).* When her mother read the note, she returned to Nunley's home to confront him with a baseball bat. *(Tr. 540).* A.Y.'s mother beat Nunley's motorcycle and truck with the bat and beat on his door. *(Tr. 542).* When Nunley answered his door and was confronted with the molestation accusations, Nunley repeatedly denied the accusations. *(Tr. 543).*

Thereafter, A.Y. and her parents went to the police and handed over A.Y.'s written statement on the envelope to Trooper Kevin Bowling with the Indiana State Police. *(Tr. 452,*

481, 511-12, 626, 635). The envelope was misplaced, but Trooper Bowling recalled that it stated that "I was sucking his weenie-bob and he was licking my pee-pee." *(Tr. 626-27, 693).* Trooper Bowling interviewed A.Y. in the presence of her mother *(Tr. 512, 545-46, 627-28).* He later interviewed Nunley. *(Tr. 633).* The trial court would not allow defense counsel to ask whether Nunley denied the allegations, but when she asked Trooper Bowling whether he would have arrested Nunley if he had confessed, Trooper Bowling indicated that he would have done so. *(Tr. 642).* Nunley was not arrested until over one year later. *(Appellant's App. 2, 113).*

A.Y.'s mother dropped the case for a significant amount of time. *(Tr. 548-49, 568, 705, 711).* A.Y. was later interviewed on her own at a child advocacy center over one year later on April 18, 2008. *(Tr. 550, 588, 590).* Donna Black, the executive director of the center, conducted and recorded this interview. *(Tr. 586, 686).* In this interview, A.Y. reiterated that Nunley touched her in her private parts, and also stated that Nunley touched her "pee-pee" with his "weenie-bob," and that he touched her "pee-pee" both on the outside and the inside. *(Tr. 688-89); (Supp. Tr. 14-16, 21, 23).*

In the course of its investigation, the State did not attempt to collect any DNA or forensic evidence to implicate Mr. Nunley. *(Tr. 697, 708).* The State also failed to have A.Y. examined physically to determine if she had been sexually assaulted. *(Tr. 698, 708-09).* At trial, Nunley vehemently denied each of the allegations against him. *(Tr. 727-28).*

On May 19, 2008, the State charged Nunley with counts I-III, Child Molesting, as class A felonies, count IV, child molesting as a class C felony, and count V, dissemination of matters harmful to minors as a class D felony. *(Appellant's App. 9-13).* Following a trial by jury, Nunley was found guilty on all counts. *(Appellant's App. 71-75).* The trial court sentenced Nunley as follows: on counts I-III, to 35 years each, on count IV, to 4 years and 8 months, and count V, to

21 months. The trial court ordered counts I, II, IV, and V to run consecutively and count III to run concurrently with counts I and II, for an aggregate sentence of 76 years and 5 months. *(Appellant's App. 83).*

Nunley filed his notice of appeal from this judgment on February 16, 2009. *(Appellant's App. 88).* He argued that the trial court violated his right to present a defense when the trial court forbade him from cross-examining A.Y. about her prior false allegation of abuse against her stepfather, that the State committed misconduct by attesting to A.Y.'s veracity during closing arguments when it was aware of A.Y.'s prior false allegation, that the State violated Nunley's right of confrontation when it introduced the drumbeat repetition of hearsay statements, and that the trial court abused its discretion when it refused to declare a mistrial after a State's witness referenced other alleged acts of Nunley's child molestation.

On November 16, 2009, the Court of Appeals issued a published opinion in which it reversed in part and affirmed in part. It held that the trial court abused its discretion when it admitted A.Y.'s videotaped statement because it was unreliable. As the tape formed all of the evidence against Nunley under counts III and IV of the information, it reversed those convictions. Finding no other error, the Court affirmed the remainder of Nunley's convictions.

ARGUMENT

I. NUNLEY HAD A SIXTH AMENDMENT RIGHT TO PRESENT HIS DEFENSE THAT A.Y. LIED WHEN SHE ACCUSED HIM OF CHILD MOLESTING

At trial, defense counsel made an offer of proof regarding A.Y.'s false accusation against her stepfather. *(Tr. 715-17).* Specifically, A.Y. lied to the police on another occasion, accusing her stepfather of hurting her. *(Tr. 716); (Appellant's App. 202-03).* She requested permission to use this evidence to impeach A.Y. *(Tr. 377-85).* The trial court overruled defense counsel's request and excluded this evidence. *(Tr. 385, 717-18).* Thereafter, the State commented in closing arguments that A.Y. did not lie and, in fact, did not know how to lie. *(Tr. 797).* The trial court refused to allow this evidence, holding that it was inadmissible under Indiana Evidence Rule 608(b).

A. The Court Below Contravened this Court's Precedent that the Mechanistic Application of a Rule of Evidence Cannot Defeat a Defendant's Rights to Present a Defense and to Cross-Examination

Under Evidence Rule 608(b), specific acts of misconduct not resulting in a criminal conviction may not be inquired into. The rule states as follows:

> For the purpose of attacking or supporting the witness's credibility, other than conviction for a crime as provided in Rule 609, specific instances may not be inquired into or proven by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Ind. Evid. R. 608(b). Noting this Court's opinions in *Hubbard v. State, 742 N.E.2d 919 (Ind. 2001),* and *Griffin v. State, 763 N.E.2d 450 (Ind. 2001),* Nunley noted on appeal that a mechanistic application of Rule 608(b) should not defeat his right to present a defense, *i.e.,* that A.Y. was lying when she accused him of child molesting. In both *Hubbard* and *Griffin*, this Court enunciated the principle that the mechanistic application of a rule of evidence should not

defeat a defendant's right to present a defense or to cross-examination. Hubbard, *742 N.E.2d at 922;* Griffin, *763 N.E.2d at 454-55, Boehm, J., dissenting.* To be sure, in both cases, this Court upheld the exclusion of evidence; however, as noted in Brief of Appellant, this Court did so on the basis that the proffered evidence was unreliable. *See* Hubbard, *742 N.E.2d at 922-23;* Griffin, *763 N.E.2d at 451.*

In this case, there is no issue regarding reliability. A.Y.'s prior false accusation was not disputed by the State. The trial court simply applied Rule 608(b) mechanistically with no regard to whether application of the rule would defeat his right to present a defense. Indeed, such an application did defeat this right.

The Court below dismissed Nunley's claim, holding that it had already decided this issue in Saunders v. State, *848 N.E.2d 1117 (Ind. Ct. App. 2006), trans. denied.* In Saunders, the Court of Appeals relied upon this Court's holding in Stephenson v. State, *742 N.E.2d 463 (Ind. 2001).* In Stephenson, this Court held that the trial court did not violate the defendant's right to cross-examine witnesses when it applied Evidence Rule 609(a) and thereby precluded the defendant from cross-examining a witness about stale convictions. This Court found that the application of Rule 609(a) did not violate the defendant's rights because the defendant was able to cross-examine the witness thoroughly, and in the process, to reveal many of the witness's lies. Stephenson, *742 N.E.2d at 486-87.*

In this case, the defendant had no such opportunity. Indeed, the State was actually able to attest to the veracity of A.Y. during closing arguments, leaving the jury with the false impression that A.Y. was unable to lie. *(Tr. 797).* Because the opinion below sanctioned the mechanistic application of Rule 608(b) and thereby defeated Nunley's right to present a defense and to cross-

examination, this Court should conclude that the Court below contravened this Court's precedents on this issue. Therefore, transfer is warranted pursuant to Indiana Appellate Rule 57(H)(2).

B. The State Opened the Door to this Evidence

During closing arguments, the Prosecution stated as follows:

> So, I'm gonna talk about a few reasons as to why you should believe [A.Y.]. First of all, she has no reason to lie. She's six years old. I submit she hasn't even been taught how to lie. She knows what's the truth and what's a lie. When you tell the truth, you don't get into trouble. When you tell a lie, you get into trouble she said. Her and [Mr. Nunley] were friends. She wanted to go spend the night at his house. She liked going over there and playing with the Nintendo. She liked hanging out with Kiki. She has no reason to lie.

(Tr. 797). Defense counsel objected to this statement, arguing that the this blatantly false comment opened the door to Nunley's proffered evidence of A.Y.'s other false accusation. *(Tr. 799, 816).* In *Quarles v. State, 493 N.E.2d 1297 (Ind. 1986),* this Court articulated the well-established rule that a party "opens the door" to otherwise inadmissible evidence if it leaves the jury with a false impression of the facts. *Quarles, 493 N.E.2d at 1248.* In this case, the State expressly informed the jury that A.Y. could never lie when it was aware of evidence to the contrary. This Court should conclude that the Court below contravened this Court's precedent in *Quarles* by holding that the State did not open the door to the evidence of A.Y.'s prior false allegation of physical abuse.

II. THE COURT OF APPEALS CONTRAVENED THIS COURT'S OPINION IN *MODISETT v. STATE*, WHEN IT PERMITTED THE DRUMBEAT REPETITION OF A SINGLE ACCUSATION

In Brief of Appellant, Nunley argued that the State's drumbeat repetition of a single accusation violated the principle enunciated by this Court in *Modesitt v. State, 578 N.E.2d 649*

(Ind. 1991). In *Modesitt*, the this Court reversed the defendant's convictions for child molesting and criminal deviate conduct. At trial, the State's first three witnesses testified as to the victim's accusations, and the State thereafter presented the testimony of the victim, herself. *Modesitt, 578 N.E.2d at 651.* This Court held that by first calling the three witnesses to testify about the victim's allegations prior to presenting the victim's testimony, the State "effectively precluded [the defendant] from effective cross examination of these charges." *Id.*

As noted in Brief of Appellant, at trial, A.Y. vocalized her child molestation accusations on only one occasion and thusly:

"He made me suck on his weenie-bob."

...

"He licked my pee-pee."

(Tr. 450). Thereafter, the State was permitted to present the following ten pieces of evidence: Joint Exhibits 1, 2, and State's Exhibit 5, all A.Y.'s written accusations from which A.Y. read as her testimony on direct examination, *(Appellant's App. 308-310); (Tr. 444, 454),* testimony of A.Y.'s mother, father, and Trooper Bowling, all restating A.Y.'s accusations that she wrote on the missing envelope, *(Tr. 508, 538-39, 626),* the testimony of the director of the child advocacy center who testified regarding A.Y.'s drawing of a "weedy-bob" and the word "suck" during the director's videotaped interview, *(Tr. 599),* State's Exhibit 6, the drawing itself, *(Appellant's App. 311),* A.Y.'s videotaped statement, *(Supplemental Transcript)*, and the testimony of Detective William Wibbles, who was present during the videotaped interview, regarding the A.Y.'s allegations therein. *(Tr. 688).* In all, the State presented 10 (ten) pieces of evidence that restated

or referenced A.Y.'s single accusation that Nunley licked her "pee-pee" and made her suck his "weedy-bob."

This overwhelming drumbeat repetition should be considered highly prejudicial. These ten pieces of evidence were simply restatements of A.Y.'s thirteen-word accusation. *See (Tr. 450).* The Court below neglected to address this argument, and having failed to do so, its opinion stands in contravention of this Court's decision in *Modesitt*. For this reasons, transfer should be warranted under Indiana Appellate Rule 57(H)(2).

CONCLUSION

Wherefore, Appellant, by and through counsel, respectfully requests this Honorable Court to accept transfer of this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing has been served upon the following counsel of record by first class United States Mail, postage prepaid, this 16th day of December, 2009: Joby D. Jerrells, Indiana Deputy Attorney General, Government Center South, 402 West Washington Street, Indianapolis, IN 46204.

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