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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DUSTIN GEOFFREY READY,

APPELLANT.

APPELLATE CASE NO. 2021-000598

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court abused its discretion by refusing to ask the venire during *voir dire* whether anyone would believe a child just because they were a child since defense counsel informed the court, as an officer of the court, that this *voir dire* had been useful in the past in identifying potential jurors who would always believe a child since appellant was entitled to identify jurors who would not be impartial in this child sex case?

STATEMENT OF THE CASE

Appellant was indicted at the March 20, 2018, term of the Greenville County grand jury for the offense of criminal sexual conduct with a minor in the first degree. R. 282. His case was called to trial on May 17, 2021, before the Honorable Edward W. Miller, and a jury. Hunter Chase Harbin represented appellant. Alexa Kluska and Julia Hendricks were the assistant solicitors. R. 1.

On May 19, 2021, the jury found appellant guilty as charged. R. 278, ll. 4-10. Judge Miller sentenced appellant to thirty years imprisonment. R. 281, l. 23-24.

This appeal follows.

STANDARD OF REVIEW

In general, the scope of *voir dire* and the manner in which it is conducted are within the trial judge's sound discretion. State v. Wise, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004).

ARGUMENT

The court abused its discretion by refusing to ask the venire during *voir dire* whether anyone would believe a child just because they were a child since defense counsel informed the court, as an officer of the court, that this *voir dire* had been useful in the past in identifying potential jurors who would always believe a child since appellant was entitled to identify jurors who would not be impartial in this child sex case.

Prior to trial defense counsel Chase Harbin presented the court with his proposed *voir dire* questions which he shared with the solicitor. R 15, l. 20 – 17, l. 3. Harbin asked the trial judge to inquire whether anyone in the venire would believe a child just because they were a child. R. 19, l. 5 – 21, l. 2.

Harbin informed the judge that he had another case in Pickens a year or two prior to this trial, perhaps with the same judge, where this question was asked about believing a child just because they were a child and several people in the venire responded to that question. Harbin said that those potential jurors standing up and honestly saying they would always believe a child was very material to the selection of a jury. Harbin added that this was a legitimate inquiry in this child sex case. It also was not a comment on the facts, and the alleged victim in this case was obviously a child. R. 19, l. 9 – 20, l. 14.

The judge ruled that he was not going to make this inquiry of the jury during *voir dire* or another related version of this inquiry. Defense counsel Harbin objected to the judge's refusal to ask this question during *voir dire*. R. 20, l. 15 – 21, l. 3.

Trial evidence

The child's mother, Jessica Ball, was in the Air Force and she lived with appellant, her boyfriend. Appellant cared for the alleged victim while Ball was away on deployments, as well

as the child they had together. R. 65, l. 14 – 66, l. 15. Ball acknowledged she later learned that her sister Kerri, the child's aunt, had asked the child if she had ever been touched improperly which was when the child made the accusation. R. 77, l. 13 – 79, l. 6. Ball said she never had any reason to think anything improper happened between appellant and the child. The child seemed to be "always happy" with appellant whom the child always considered to be her father until she was told otherwise. R. 78, l. 9 – 79, l. 6.

As stated, Ball's sister, Kerri Farmer, was very open in acknowledging she did not like appellant. Farmer admitted she made a prior unfounded accusation involving a gun against appellant to DSS. Farmer offered and alleged that she was a former victim of child abuse. Farmer said the child made the current allegation of sexual abuse when Farmer was in the car with the child and Farmer asked her "about good and bad touches." R. 89, ll. 4-20.

Farmer alleged on cross-examination that the child always knew appellant was not her father. This directly contradicted the testimony of the child's mother that the child always considered appellant to be her father until she learned otherwise around the time of the allegation. R. 95, l. 20 – 98, l. 3.

Farmer acknowledged she had been committed to a mental hospital on three prior separate occasions. Farmer offered that she continued to be suicidal: "I don't want to be alive to this day, and there are times when I try to take that into my own hands." R. 97, ll. 1-3.

Farmer admitted that she told the police investigators in 2017 that appellant was an angry and violent man who had access to guns. Farmer said that appellant was insane. R. 107, ll. 10-18.

Investigator Airien Grimstad of the Greenville County Sheriff's Department admitted that if a child made an allegation of sexual abuse which came under the statutory definition of

criminal sexual conduct that she would obtain a warrant for that person's arrest. She admitted that what appellant said to her about the allegation would not make any difference once the allegation was made. He was going to be arrested. R. 118, ll. 7-14.

On redirect examination and recross-examination the investigator said the allegation that was made, including during the forensic interview, was the basis for her obtaining an arrest warrant against appellant. She admitted the allegation from the child was the only evidence she had of sexual abuse. R. 120, l. 3 – 121, l. 2.

The alleged victim was thirteen years-old at the time of trial and in the seventh grade. She alleged appellant touched her "inappropriately" more than one time in the living room of their home, and in the "computer room" she referred to as "the server room." R. 155, l. 22 – 158, l. 24.

The child alleged appellant had oral sex with her on more than one occasion. R. 158, l. 12 – 164, l. 19. The child said on cross-examination that when she alleged the abuse to her aunt, Kerri Farmer, she still thought appellant was her natural father. She said when she later learned when appellant was not her natural father she was "devastated." R. 168, l. 23 – 169, l. 11.

The defense presented the testimony of clinical psychologist Dr. David Price as an expert in forensic psychology and in child sex abuse dynamics. R. 220, l. 6 – 221, l. 19. Dr. Price testified that in criminal cases between two to ten percent of allegations made by children were false. Dr. Price also said that in custody proceedings in family court false allegations of abuse ranged from sixteen to twenty percent and as high as twenty-five percent. Price admitted he had earlier in his career testified that the rate of false allegations was one to five percent in criminal sex cases. R. 223, l. 4 – 224, l. 2.

Dr. Price testified in 2008 there were sixty-eight thousand claims of sexual exploitation made in the United States. Dr. Price said: "If you think ten percent [were false allegations], that's about six thousand eight hundred [false allegations]. So that is a substantial problem that we have to be concerned about."[1] R. 224, ll. 3-10.

The defense also called Tina Driver who was one of the child's teacher's during daycare. Driver said she interacted with the alleged victim every day. The child was always excited when appellant picked her up at daycare to take her home. Driver remembered that appellant was always excited to see the child as well. She considered them to be a normal family. R. 230, l. 20 – 233, l. 12.

Conversely, Driver said the child was very unsure of her aunt, Kerri Farmer, when the aunt would come to her daycare. "She almost treated her like a stranger," and Driver noted this reaction from the child was very different than her positive behavior around appellant. R. 234, ll. 5-8.

Discussion

Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled. See Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) *citing* Connors v. United States, 158 U.S. 408, 413 (1895).

It seems beyond dispute that a trial judge has the inherent authority to ensure a criminal defendant receives a fair trial, and it is now well known that child sex offense cases are uniquely difficult for the defense just as prior sex related offenses carry a "inherently prejudicial stigma."

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[1] Appellant designated much of the trial record – beyond just the *voir dire* -- for the Record on Appeal because it was necessary to substantiate his argument.

See State v. Cross, 427 S.C. 465, 478, 832 S.E.2d 281, 288 (2019); State v. Bellardino, 429 S.C. 563, 569, 841 S.E.2d 62, 624 (2020); State v. Langford, 400 S.C. 421, 435, 735 S.E.2d 471, 479 (2012). Child sex cases have correctly been treated differently for that reason as alleged harm to a child is an extremely emotional matter to many people. See State v. Cross, 427 S.C. 465, 478, 832 S.E.2d 281, 288 (2019).

That was all appellant wished to uncover with this one simple inquiry on a potential juror believing a child because they were a child. This was not a question about believing one type of witness over other witnesses. Cf. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992)("Would you give more weight to the testimony of a uniform officer than [you] would give to a lay person."). It simply inquired whether a potential juror would believe a child simply because they were a child where it is known from experience that certain jurors admit they would always believe a child.

In State v. Lottmann, 762 S.W.2d 539 (1988) the Missouri Court of Appeals held that the judge properly allowed the state during *voir dire* in a sex abuse trial to inquire whether any member of the jury panel would tend to disbelieve a child or disbelieve a child because of delayed reporting. The court rejected the defense contention that the question was calculated to affect the prospective jurors as far as them being inclined to believe the child.

The court found no abuse of discretion in allowing this *voir dire* because the question on believing a child did not purport to commit the members of the jury to an advance decision. Instead, the question explored the legitimate interest the state had in determining whether any prospective jurors harbored any prejudice against the witness E.B. because of her delay in reporting the incident of sexual abuse to her mother such they would not fairly and impartially consider her testimony when that testimony was offered.

In State v. Clark, 981 S.W.2d 143, 147 (Mo. banc 1998), the court held that the defendant should have been allowed to ask potential jurors about the age of the three-year-old victim. The court noted that in a case involving a child victim that the young age of the victim can implicate the personal bias necessary to disqualify prospective jurors.

In McIntosh v. State, 413 S.W.3d 320, 330 (Mo. En Banc) the Missouri Supreme Court wrote that "a case involving a child victim can implicate personal bias and disqualify prospective jurors." (*Quoting* State v. Antwine, 743 S.W.2d 51, 58 (Mo. banc 1987)). The Court held that there was no legitimate basis for trial counsel to object to legitimate *voir dire*, including a question about the young victim's age to the venire.

Here, as seen, the investigator admitted the child's accusation against appellant was the only probative evidence in this case. The investigator admitted that the accusation of sexual abuse alone was enough to garner an arrest warrant against a defendant, and there was nothing a suspect could say to law enforcement about the allegation that would save him from being arrested.

Further, defense counsel, as an officer of the court, told the trial judge that in the past this inquiry on *voir dire* had been helpful to the defense to identify which potential jurors would always believe the testimony of a child.

It is intuitive, and experience also teaches, that cases involving child victims evoke very strong emotions in people - - jurors. The judge abused his discretion under the highly unusual facts of this case by refusing to ask the question on *voir dire* whether any prospective juror would believe a child merely because that person was a child. This could have identified jurors, from trial counsel's prior experience, who would be disqualified for cause or were the subject of an intelligent use of a peremptory challenge to remove them for their inability to be impartial and

to give the defendant a fair trial. While the police investigator is apparently free to seek an arrest warrant solely on the basis of the child's accusation, despite whatever compelling statement or evidence the suspect provided to the contrary, appellant had the right to a fair and impartial jury. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

The jury also heard evidence in this case that between two and ten percent of allegations of sexual abuse in criminal court were false. A juror who would always believe a child was not qualified to serve on appellant's jury because he or she could impartially consider the evidence. In order to ensure appellant received a fair trial he had to be able to at least identify potential jurors who would openly admit they would always believe a child.

Further, the facts of this case are very strange in that the alleged victim's aunt appeared to be the driving force behind the allegations, and that aunt respectfully, had apparent severe mental problems. Appellant is well aware that *voir dire* in our state is much more limited than in many other states. However, the right to a fair and impartial jury, and the right to identify and remove prospective jurors who cannot be impartial applies to all of the states. Rosales-Lopez v. United States, 451 U.S. 182 (1981). Appellant's conviction should be reversed and he should be granted a new trial given the highly unusual circumstances and evidence involved in this case.

CONCLUSION

By reason of the forgoing arguments, appellant's conviction should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 8th day of December, 2022.

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APPELLATE CASE NO. 2021-000598

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the final brief of appellant in the above-referenced case has been served upon Ambree M. Muller., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 8th day of December, 2022.

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT