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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2019-001417

THE STATE,

Respondent,

vs.

KAYLA MARIE COOK,

Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING

On June 28, 2023, this Court issued a published opinion in which a two-judge majority affirmed Appellant Kayla Marie Cook's conviction for homicide by child abuse. State v. Cook, Op. No. 5995 (S.C. Ct. App. filed June 28, 2023). In affirming Cook's conviction, the majority correctly concluded the trial judge did not err by refusing to grant a mistrial in response to objectionable testimony from Agent Baird because—under the case-specific circumstances involved—the trial judge's stern curative instruction sufficiently cured the error caused by the admission of that swiftly-stricken, non-specific, and never-repeated testimony. Likewise, both the majority and the dissent correctly concluded the evidence related to the minor victim's earlier arm injury was properly admitted pursuant to Rule 404(b) of the South Carolina Rules of Evidence.

Following the issuance of this Court's decision in her case, Cook submitted a petition for rehearing. Through that petition, she has challenged this Court's determinations on both the

issues raised and addressed on appeal. On July 14, 2023, this Court asked the State to file a return to Cook's petition.

Initially, looking to Cook's contentions in her petition for rehearing as to the issue regarding the trial judge's denial of the mistrial motion, Cook maintains this Court should have found the trial judge reversibly erred by denying the mistrial motion because the curative instruction given purportedly could not have cured the error caused by Agent Baird's improper testimony. As support for that, Cook alleges Agent Baird's testimony "specifically indicated that [Cook]'s own daughter thought her mother caused the death" of the minor victim and "provided information that [Cook] caused the fatal injuries to the" minor victim.[1] To the contrary and just as the trial judge and a majority of this Court accurately recognized, Agent Baird's brief remark—although improper—was not sufficiently prejudicial to necessitate the grant of a mistrial because: (1) the remark was vague, isolated, and never repeated or referenced again throughout the remainder of the multi-day trial; (2) no testimony or evidence was ever presented revealing the specific substance of the purported out-of-court statement alluded to by the remark; and (3) the trial judge used alternative means to cure the error by quickly striking the remark from the record and by repeatedly instructing the jurors they could not give it any consideration at all when deciding Cook's case. See State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-

[1] The challenged portion of Agent Baird's testimony was: "The forensic interview, along with all the other evidence in the case, reinforced the fact that Kayla Cook did cause [the minor victim]'s death." (R. p. 602). Due to the substance of that vague testimony, it remains unclear what precisely was stated during the forensic interview and how what was stated reinforced the fact Cook was the one who caused the minor victim's death. As a result, it certainly did not—as Cook now maintains—*specifically* indicate Cook's daughter *thought* Cook caused the minor victim's death and, instead, merely suggested Cook's daughter said *something* that—when considered in conjunction with all the other evidence—provided reinforcement for law enforcement's investigation in the case. Cf. State v. George, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996) ("[George]'s possible drug dealing was merely suggested and no testimony was presented concerning such behavior. We conclude that the judge's instruction to disregard statements suggesting [George]'s involvement with drugs sufficiently cured any alleged error.").

912 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured."); cf. State v. Dawkins, 297 S.C. 386, 393-394, 377 S.E.2d 298, 302 (1989) (concluding the trial judge did not abuse his discretion by refusing to grant a mistrial in a criminal sexual conduct with a minor case even though the solicitor elicited testimony from a psychiatrist expressing a personal belief the victim's symptoms were "genuine" because the trial judge presented a curative instruction to the jurors advising them to disregard the testimony and the testimony—although improper—"was not of such magnitude to effect the outcome of the trial"). Under such circumstances, the trial judge did not abuse his broad discretion by pursuing a less extreme remedy than the granting of a mistrial to address a vague and isolated trial error, and nothing was presented supporting a conclusion the jurors did anything other than scrupulously adhere to the trial judge's stern and unambiguous instructions to disregard the testimony entirely. See State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) (instructing a trial judge's ruling on a mistrial motion "will not be disturbed on appeal absent an abuse of discretion amounting to an error of law"); see also Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice." (citations omitted)). Therefore, this Court properly affirmed the trial judge's ruling declining to grant a mistrial, and there is no legitimate need for a grant of rehearing on the matter.

Furthermore, looking to Cook's contentions in her petition for rehearing as to the issue regarding the trial judge's ruling admitting the evidence related to the minor victim's earlier arm injury, Cook maintains this Court should have found the trial judge reversibly erred by admitting

that evidence because: (1) it was irrelevant; (2) it was inadmissible; and (3) its probative value was substantially outweighed by the danger of unfair prejudice. To the contrary, the evidence regarding the minor victim's arm injury and Cook's response to it was relevant, probative, and admissible because—just at the trial judge recognized—it demonstrated a "pattern of . . . indifference" toward the minor victim on Cook's part. (R. pp. 176-177). In light of that, it constituted evidence of Cook's mental state and attitude towards the minor victim, which was a critical issue due to the fact extreme indifference was an element of the indicted offense of homicide by child abuse, and, thus, could properly be admitted pursuant to Rule 404(b).[2] Cf. State v. Holder, 382 S.C. 278, 289, 676 S.E.2d 690, 696 (2009) ("The State's purpose for offering the testimony [regarding Holder's behavioral changes in the weeks preceding her child's death] was not to show Holder had a propensity to abuse her child in conformance with a character trait. Rather, it was to show Holder's strong desire to please Martucci instead of protecting the welfare of her child and to establish an element of the offense, that she manifested an extreme indifference to the well-being of her son."); State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004) (finding prior bad act evidence of a domestic violence incident between Sweat and his purported wife was admissible to establish intent in a subsequent prosecution arising from an incident where Sweat attempted to attack his wife and her boyfriend). Likewise, the probative value of that evidence was not substantially outweighed by its potential for undue prejudice under the circumstances involved. Cf. State v. Dial, 405 S.C. 247, 261, 746 S.E.2d 495, 502 (Ct. App. 2013) ("We find the photographs were highly probative to the issues of whether Victim was abused and whether the abuse was the cause of his death,

[2] Although this Court focused its analysis on appeal on Rule 404(b)'s "common scheme or plan" exception, the State continues to assert the evidence was more appropriately admissible—and admitted during trial—pursuant to the rule's "intent" exception for all the reasons that have previously been advanced by the State. (Resp. Br. pp. 35-45).

which are integral elements to the charge of homicide by child abuse. Thus, we find the danger of unfair prejudice did not outweigh the photographs' probative value, and the trial court did not abuse its discretion by admitting them." (citation omitted)). As a result, the trial judge did not abuse his broad discretion by admitting the evidence for the limited purpose of establishing Cook's intent, and, therefore, this Court properly affirmed the trial judge's ruling admitting the limited evidence that was allowed to be introduced concerning the minor victim's earlier arm injury.[3]

Accordingly, for all those reasons coupled with the reasons already more thoroughly articulated in the State's appellate brief and during oral argument, this Court should decline to grant rehearing in Cook's case. Cook's petition for rehearing should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Deputy Attorney General

By:_____
Mark R. Farthing
S.C. Bar Number 76901

July 20, 2023

[3] Moreover, as previously noted by the State, any conceivable error in the admission of that evidence was entirely harmless because the challenged portion of the evidence regarding the minor victim's arm injury was merely cumulative to other unobjected-to evidence presented during trial, including to virtually-identical testimony offered by Cook and her own defense witnesses. See State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence."); cf. State v. Braxton, 343 S.C. 629, 635, 541 S.E.2d 833, 836 (2001) (concluding the trial judge's erroneous admission of "inadmissible character evidence" was harmless because the improperly-admitted evidence was cumulative to other evidence presented).

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PROOF OF SERVICE

I, Grace Sommer, certify I have served the within Return to Appellant's Petition for Rehearing on Appellant by sending an electronic copy via email to the addresses listed in AIS for the following individuals:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
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I further certify all parties required by Rule to be served have been served.
This 20th day of July, 2023.

Grace Sommer

GRACE SOMMER
Legal Assistant
Office of the Attorney General

Grace Sommer

From: Grace Sommer
Sent: Thursday, July 20, 2023 10:27 AM
To: khudgins@sccid.sc.gov; hendrick@rand.org; dan.westbrook@nelsonmullins.com
Cc: Mark Farthing; Stock, Chris
Subject: The State v. Kayla Marie Cook (2019-001417)
Attachments: Cook.Return to Pet for Rehearing (03337677xD2C78).PDF

Good Afternoon Ms. Hudgins, Ms. Hendrick, Mr. Westbrook,

Attached please find a copy of the Return to Appellant's Petition for Rehearing in The State v. Kayla Marie Cook (2019-001417). This return will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

Grace Sommer, Legal Assistant
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