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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Court Of General Sessions
The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2024-000439

THE STATE, Respondent,

v.

CODY HUDSON, Appellant.

INITIAL BRIEF OF RESPONDENT

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II. The trial court acted within its discretion in not removing Juror No. 81 after determining the juror could be fair and impartial.

III. The trial court properly did not quash the indictments for second degree criminal sexual conduct with a minor. Additionally, the crimes are separately punishable and not impermissibly consecutive.

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Appellant Cody Hudson for six counts of criminal sexual conduct with a minor, second degree, three counts of criminal sexual conduct with a minor, third degree, and one count of incest. He proceeded to a jury trial on July 17-21, 2023, before the Honorable R. Keith Kelly. Appellant was convicted of two counts of criminal sexual conduct with a minor, second degree and incest. Appellant was acquitted of four counts of criminal sexual conduct with a minor, second degree and three counts of criminal sexual conduct with a minor, third degree. Regarding one count of criminal sexual conduct with a minor Appellant received a twenty-year sentence. Appellant also received a consecutive five-year sentence for the other criminal sexual conduct charge and a concurrent one-year sentence for incest. Appellant filed a timely notice of appeal. This direct appeal follows.

STATEMENT OF FACTS

Appellant married Mother in 2013. (Tr. p. 122). Victim stated she did not have a relationship with her biological father. (Tr. p. 361). She testified that she lived with Appellant when he married Mother. (Tr. p. 362-3). Victim stated that she did not have the best relationship with Appellant and that the two often argued. (Tr. p. 364). Victim testified about several instances of ongoing abuse. First, Victim testified that Appellant touched her inappropriately during a game of hide and seek, when she was just eleven years old. (Tr. p. 365). Victim stated Appellant "started rubbing [her] butt" and asked if it felt good. (Tr. p. 365-6). She also testified that later that evening Appellant asked her to sit on his lap and touched her inappropriately again. (Tr. p. 366-7). She testified that this time, Appellant rubbed her breasts, held her head, pulled her close, and kissed her. (Tr. p. 367). Victim testified she made it known to Appellant that she was uncomfortable. (Tr. p. 368). She testified that later that night Appellant kissed her goodnight "on the lips." (Tr. p. 370).

Victim testified that while the family was in the process of moving Appellant asked her to help move some items. (Tr. p. 372-3). Victim stated that while Appellant was driving, he unzipped his pants and asked her to perform oral sex. (Tr. p. 373). Victim testified that she told Appellant it made her uncomfortable. (Tr. p. 373-4). Victim stated Appellant then put his pants back on and finished the drive. (Tr. p. 374). Victim further stated that after they arrived at the house, Appellant performed oral sex on Victim. (Tr. p. 374-5). She testified that before performing oral sex Appellant penetrated her vagina with his penis. (Tr. p. 374-5). She testified that he did not stop the penetration at first, but after she continued to express her pain, he had her perform oral sex on him. (Tr. p. 375; 378).

Victim testified that after the move was complete the assaults persisted. (Tr. p. 377-9). She stated Appellant would put her hand on his penis, had Victim perform oral sex, touched her vagina, and attempted anal sex. (Tr. p. 378-9; 388). Victim testified that Appellant would push her head down to "that area" when he wanted oral sex. (Tr. p. 378). She testified that sexual abuse was ongoing and regular. (Tr. p. 379). Victim also testified that Appellant forced her to engage in sexual intercourse multiple times. (Tr. p. 384). Victim testified that Appellant made her watch pornography, had her film an encounter, and then forced Victim to watch the recording. (Tr. p. 390-2). Ultimately, Victim stated that at this time sexual abuse occurred either every day or every other day. (Tr. p. 384). She stated it occurred from August of 2016 to March of 2019. (Tr. p. 392-3). She estimated the total number of assaults to be "way over a hundred, probably close to two [or] three [hundred]." (Tr. p. 393).

Victim testified that State's Exhibit 10, taken from her phone, was a picture of Appellant's penis. (Tr. p. 399). Lieutenant Letterman testified the photo was downloaded on her phone shortly after the picture was taken. (Tr. p. 264). Victim also testified that she sent sensitive pictures to Appellant. (Tr. p. 394).

Mother testified that after Appellant had moved out she found concerning emails between Victim and Appellant. (Tr. p. 141-7). In the emails, Appellant referred to Victim as "baby girl" and said "I love you." (Tr. p. 141-3). Victim disclosed the relationship to Mother and law enforcement. (Tr. p. 149-50). Mother found a journal in Victim's room. (Tr. p. 152). In the journal, Victim wrote about her emotional response, including statements "I can't take it anymore. I can't keep pretending like I don't know anything" and "I don't give a damn about life anymore." (Tr. p. 429). Mother also found a washcloth in Victim's closet which tested positive for semen. (Tr. p. 331). DNA testing indicated that the sperm fraction was found to be 25

septillion times more likely to be contributed by Appellant than a randomly selected male. (Tr. p. 343-4). Victim testified that after intercourse they often would use a washcloth to clean up and she would throw the washcloth in a dirty clothes basket. (Tr. p. 403).

Dr. Clune testified that Appellant's vaginal and rectal examinations resulted in normal findings. (Tr. p. 215). Clune testified that a normal examination did not rule out prior sexual abuse. (Tr. p. 216). Clune stated that an injury to the area can heal within forty-eight hours. (Tr. p. 215).

Appellant testified that he never assaulted Victim. (Tr. p. 528). Appellant confirmed he married Mother and moved in with her. (Tr. p. 532). Appellant denied that the picture on Victim's phone was of his penis. (Tr. p. 538). Officer Brewster testified that he took pictures of Appellant's genitalia to compare to the picture taken from Victim's phone. (Tr. p. 275).

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

I. The trial court properly exercised its discretion in implementing security measures during the reading of the verdict and polling of the jurors.

The trial court acted within its discretion in allowing Appellant to be shackled during the reading of the verdict because any risk of prejudice was minimal after the verdict had been decided. Even if the court erred, any error is harmless because the State presented overwhelming evidence of guilt by introducing Victim's testimony, a sensitive picture Appellant sent Victim, and DNA evidence of Appellant's semen on a washcloth found in Victim's closet.

Before the Jury was brought back to the courtroom for the reading of the verdict, Appellant's counsel noted that Appellant was in "full chain" and requested it be removed. (Tr. p. 675). After determining it was customary, the court ruled Appellant would remain shackled. (Tr. p. 675).

The trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes. State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995). However, "the Constitution forbids the use of visible shackles during the ... guilt phase [of trial], unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." Deck v. Missouri, 544 U.S. 622, 624 (2005). "The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security." Tucker, 320 S.C. at 209, 464 S.E.2d at 107. "The reviewing court should not determine whether less stringent security measures were available to the trial court, but rather whether the measures applied were reasonable and whether they posed an unacceptable risk of prejudice to the defendant." Hunt v. State, 583 A.2d 218 (Md. Ct. App. 1990). While shackling before the jury has reached a verdict may be prejudicial, shackling after

the jury has reached a verdict presents minimal risk. See Wagner v. State, 74 A.3d 765, 800 (Md. Ct. App. 2013) ("requiring a defendant to wear shackles during the rendering of the jury verdict, after the jury has reached a guilty verdict and the presumption of innocence has been overcome, is not inherently prejudicial").

Here, Appellant was only shackled for the reading of the verdict and polling of jurors, limiting the risk for any prejudice. The court properly exercised its discretion in implementing appropriate and customary courtroom security measures.

Even if the court erred in allowing Appellant to be shackled for the reading of the verdict, any error is harmless. An error in improperly shackling a defendant can be deemed harmless. See State v. Heyward, 441 S.C. 484, 506, 895 S.E.2d 658, 670 (2023) ("In light of this overwhelming evidence of Heyward's guilt, we find the trial court's error in shackling him in the presence of the jury was harmless.").

There is no definitive rule of law governing harmless error, rather the prejudicial character of the error is determined from its relationship to the entire case. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). When examining harmless error courts may consider "the factual guilt or innocence of the defendant in light of the untainted evidence in the record" and "whether the error at trial influenced the jury and thus contaminated its verdict." Harry T. Edwards, To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated? 70 N.Y.U. L. Rev. 1167 (1995).

Here, the State presented overwhelming evidence of Appellant's guilt. Victim testified in detail about the assaults, Victim was in possession of a photograph of Appellant's penis, and DNA evidence found Appellant's sperm on a washcloth in Victim's closet. Additionally, the risk

of prejudice is limited given that Appellant was not shackled until after the jury had rendered a verdict.

II. The trial court acted within its discretion in not removing Juror No. 81 after determining the juror could be fair and impartial.

The court was within its discretion in not removing the juror in question because the hearing conducted did not uncover evidence that revealed a potential for bias.

One of the jurors recognized Mother when she testified. (Tr. p. 569). He told another juror that he recognized the witness and the court became aware around the time Appellant rested. (Tr. p. 568-72). After the defense rested, the court questioned Juror No. 81 about whether he could be fair and impartial despite knowing Mother. (Tr. p. 568-70). The Juror stated that he recognized Victim's Mother when she testified. (Tr. p. 569). The Juror explained that Mother worked for a convenance store thirteen years prior when he worked for a beverage company. (Tr. p. 569). The Juror explained that this would not inhibit his ability to be fair and impartial. (Tr. p. 569).

"Where a party claims a juror has withheld material information in response to a voir dire question, the trial court must determine, preferably after a hearing, whether the juror's withholding suggests bias." State v. Rowell, 444 S.C. 109, 115, 906 S.E.2d 554, 557 (2024). The ultimate question is whether a juror was biased and if that bias resulted in prejudice. Id. An implication of bias may rise in "extreme situations," such as "when a juror is a close relative of one of the participants in the trial," or is "an actual employee of the prosecuting agency ...." Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring).

Under Rowell, when a party asserts a claim for *new trial* based on a juror's withholding of information the trial court must determine whether the juror's withholding suggests bias. State v. Rowell, 444 S.C. 109, 906 S.E.2d 554 (2024). Hence, Rowell is uniquely concerned with "analyzing a claim for new trial based on a juror's concealment of information" Rowell, 444 S.C. 109, 906 S.E.2d 554.

Prior to Rowell, it was first imperative to determine whether the withholding of information was intentional or unintentional. Rowell, 444 S.C. 109, 115, 906 S.E.2d 554, 557 ("[w]e believe the time has come to abandon the intentional versus unintentional distinction"). Now, the focus of the inquiry centers around the information that is withheld. Id. In the past, if a juror's nondisclosure of information during voir dire was determined unintentional, the court was awarded discretion in determining whether to proceed with the jury as is, replace a juror, or declare a mistrial. State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014), overruled by Rowell, 444 S.C. 109, 906 S.E.2d 554 (2024). Now, while the intentional or unintentional inquiry is no more, the discretion of the trial court remains.

Here, the court properly conducted a hearing and was satisfied with the Juror's ability to be fair and impartial. The court noted that the juror could have known the witness by a different name, because it was changed as the result of a marriage. (Tr. p. 574). The court was within its discretion in proceeding with the jury as it were, because the questioning did not divulge information that this was an extreme situation which gives rise to the implication of bias. The juror explained in the hearing that the two were not particularly close friends or family. Rather, he recognized a witness from a relation stemming from his employment more than a decade before. The court properly examined the ability of Juror 81 to be fair and impartial and acted within its discretion in declining to excuse the juror.

III. The court properly did not quash the indictments for second degree criminal sexual conduct with a minor. Additionally, the crimes are separately punishable and not impermissibly consecutive.

The court properly denied Appellant's motion to quash because the indictments explained the two distinct acts with sufficient certainty and apprised Appellant with the elements of the charged offense. Accordingly, the corresponding sentences are valid as separately punishable.

Prior to trial, Appellant objected to the indictments as "multiplicitous" claiming they had "taken one crime and broken it into two separate crimes." (Tr. p. 74). The State argued that the case law supported the position that successive acts of rape or assault are distinct crimes which are separately punishable. (Tr. p. 74-6).

In South Carolina, an indictment issued by a grand jury is generally required before an individual can be held to answer in any court for a criminal offense. See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."). Generally speaking, an indictment's primary purpose is "to put the defendant on notice of what he is called upon to answer." State v. Smalls, 364 S.C. 343, 346-347, 613 S.E.2d 754, 756 (2005).

A court ordinarily should not quash an indictment based on a challenge involving a truly minor irregularity in the functioning or processes of the grand jury. Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005) (no prejudice where the only info Defendant may not have obtained was of the list of potential suspects, to which he is not entitled). When a proper challenge to the sufficiency of an indictment has been raised, the court determines: (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce

upon conviction and the defendant to know what he is called upon to answer and be able to make a decision as to whether to plead guilty or stand trial; and (2) whether the defendant is apprised of the elements of the offense intended to be charged. State v. Tumbleston, 376 S.C. 90, 96-97, 654 S.E.2d 849, 852 (Ct. App. 2007). If an indictment satisfies the requisite conditions and, thus, is facially valid, the trial judge should deny the defendant's motion to quash. State v. Williams, 301 S.C. 369, 371, 392 S.E.2d 181, 182 (1990).

Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred. Id. at 129, 191 S.E.2d at 17. In such a case, however, the indictment must show the offense was committed prior to the finding of the indictment. State v. Gregory, 191 S.C. 212, 4 S.E.2d 1 (1939). Importantly, the specific date of a sexual assault is not an essential element. People v. King, 581 P.2d 739 (Colo. Ct. App. 1978) (the specific date of an offense is not a material allegation); State v. Allen, 622 S.W.2d 275 (Mo. Ct. App. 1981) (the specific date and time of an assault in a child sex case is not an essential element of an indictment); State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct. App. 2005) (holding an indictment alleging commission of second degree criminal conduct during periods of June 1 through July 20, 1995; July 1 through July 31, 1995; and August 1 through August 18, 1995, was sufficient as to time).

In determining whether an indictment is sufficient, courts consider the indictment with a practical eye in view of all the surrounding circumstances. Tumbleston, 376 S.C. 90, 654 S.E.2d 849. In Tumbleston, this Court approved the following indictment:

> Indictment 2005–GS–10–807: That [appellant] did in Charleston County on or between 2001 and June 2004 engage in sexual battery upon [B.J.], date of birth [DOB], to wit: fellatio. This is in violation of § 16–3–655 of the South Carolina Code of Laws (1976) as amended.
>
> Indictment 2005–GS–10–808: That [appellant] did in Charleston County on or between 2001 and June 2004 engage in sexual battery upon [B.J.], date of

birth [DOB], to wit: cunnilingus. This is in violation of § 16–3–655 of the South Carolina Code of Laws (1976) as amended.

Tumbleston, 376 S.C. 100-1, 654 S.E.2d 854-5.

The Tumbleston Court found the indictment clearly identified the elements of the offense charged, established the age of the victim, and stated a date range which ended before the grand jury indictment. Id.

Similarly, in Smith, our Supreme Court affirmed the use of two separate indictments for criminal sexual conduct which charged Smith for forcibly performing an act of sexual intercourse and shortly thereafter an act of fellatio. State v. Smith, 276 S.C. 484, 485, 280 S.E.2d 56, 56 (1981). The court noted that successive acts of rape are multiple crimes *and* are separately punishable. Id.

Here, the indictments explain the two distinct acts which occurred. The first indictment explains that the alleged unlawful act of "sexual intercourse occurring in the victim's bedroom in a residence on Bonner Road." Appellant testified in detail about this assault and significantly stated that Appellant penetrated her vagina with his penis. (Tr. p. 374-5). The second indictment explains the alleged unlawful act of "fellatio occurring at a residence on Bonner Road, with a minor[.]" Victim testified that Appellant forced her to perform oral sex after the sexual intercourse resulted in pain and on multiple other instances. (Tr. p. 378-9). These two successive acts are separately punishable and do not punish one crime twice. Cf. State v. Johnson, 314 S.C. 161, 166, 442 S.E.2d 191, 194 (Ct. App. 1994) ("An indictment is sufficient if ... the crime is so plainly stated that the nature of the offense charged may be easily understood.").

This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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