`STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

TOBY KHAN ARMSTRONG,

APPELLANT

APPELLATE CASE NO. 2025-000718

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion by summarily denying appellant's motion for mistrial where the alleged victim's great aunt testified minor told her "he raped me" in violation of the rule against hearsay?

2. Did the trial court abuse its discretion by summarily denying appellant's motions for mistrial where (1) where the alleged victim testified the appellant told her that he would do to her what he did to her sister, and (2) where after repeated warnings the alleged victim's sister testified regarding appellant's having been previously incarcerated in violation of Rule 404(b), SCRE?

## STATEMENT OF THE CASE

On November 21, 2023, appellant was indicted for criminal sexual conduct (CSC) with a minor, first degree. Indictment. On April 7-9, 2025, appellant's case was called to trial before the Honorable Edward W. Miller and a jury. Tr. 1-310. Rachel Kepley represented appellant. Tr. 1. Christy Sustakovitch and John Gregory prosecuted the case for the state. Tr. 1.

At the conclusion of trial, the jury found appellant guilty as indicted. Tr. 304, ll. 1-12. Judge Miller sentenced appellant to thirty-five years' imprisonment. Tr. 309, ll. 7-15.

This appeal follows.

## STATEMENT OF FACTS

At trial the state alleged that in 2014, while appellant was living with minor's mother, appellant digitally penetrated minor and tried, unsuccessfully, to have intercourse with her. Tr. 38, l. 14—39, l. 9. The state's best and only evidence at trial was minor's testimony that this occurred. Tr. 67, ll. 22-24; 69, l. 16—73, l. 24. In addition, the state called minor's aunt, uncle, former boyfriend, and her sister, none of whom witnessed the alleged abuse, to corroborate minor's story. Tr. 44-56; 94-100; 124-145.

Appellant testified in his defense and denied sexual conduct with minor. Tr. 222, ll. 3-16. Appellant testified years after he was involved with minor's mother he had a child with minor's older sister. Tr. 227, l. 25—228, l. 3. He testified these allegations arose after he raised concerns with the Department of Social Services regarding the sister's care of their child. Tr. 229, l. 3—230, l. 9.

## STANDARD OF REVIEW

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

## ARGUMENTS

Appellant's short trial on a serious charge was plagued with multiple instances of inadmissible, prejudicial testimony. Each time, defense counsel timely objected to the inadmissible testimony and requested a mistrial. Each time the trial court summarily denied the request without any explanation on the record.

1. The trial court abused its discretion by summarily denying appellant's motion for mistrial where the alleged victim's great aunt testified minor told her "he raped me" in violation of the rule against hearsay.

**Inadmissible hearsay testimony**

Prior to the start of trial, defense counsel objected to any witness giving hearsay testimony pursuant to Rule 801(d)(1)(D), SCRE. Tr. 33, ll. 2-16. Angela Carter, minor's great aunt, was called by the state to testify about minor's disclosure of the alleged abuse. Tr. 44-56. Ms. Carter was asked about minor's demeanor when she disclosed what happened with appellant. Tr. 54, ll. 12-14. Ms. Carter responded, "[s]he screamed the loudest scream I've ever heard her scream and she said 'he raped me.'" Tr. 54, ll. 15-16. Defense counsel objected and the court sustained the objection. Tr. 54, ll. 17-18.

When the jury was out defense counsel moved for a mistrial arguing Ms. Carter's testimony that minor told her, "he raped me" was violative of Rule 801(d)(1), SCRE and the jury clearly heard the improper testimony. Tr. 92, l. 20—93, l. 1.

The trial court noted there had been a bench conference where counsel made argument and then denied the motion. The court cautioned the state, "to prepare your witnesses not to violate what we talked about at the beginning of trial." Tr. 93, ll. 7-13.

**Discussion**

Initially, the trial court correctly recognized this statement was inadmissible at the time it was offered. "The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." *State v. Jolly*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994). Here, the out-of-court statement was Ms. Carter's testimony that minor screamed, "he raped me." This statement was offered for the truth of the matter asserted, that appellant raped minor and was thus guilty as indicted.

In *State v. Parker*, 391 S.C. 606, 707 S.E.2d 799 (2011), a mistrial was granted in part due to the State's misconduct in using evidence previously agreed to be inadmissible. *Id.* at 609, 707 S.E.2d at 800. In that case, a videotape, which was originally redacted to remove graphic and prejudicial portions, was shown by the solicitor unredacted to the jury. *Id.* Defense counsel moved for a mistrial based on prosecutorial misconduct. *Id.* The trial court ultimately granted a mistrial based on the cumulative effect of prosecutorial misconduct in the case. *Id.* On appeal, The Supreme Court held that the state goaded the defense into moving for a mistrial and the double jeopardy clause barred defendant's retrial. *Id.* at 615, 707 S.E.2d at 803.

Like *Parker*, the state in this case failed to prepare this witness for trial and thus put before the jury hearsay evidence it knew was inadmissible. The prejudicial impact of Carter's hearsay testimony that minor screamed "he raped me," cannot be overstated. The only evidence before the jury in this case was testimony of minor and her family that this incident occurred ten years prior. There was no physical evidence. Necessarily the jury had to make a credibility determination in this case. Undoubtedly, Ms. Carter's emphatic and emotional testimony impacted the jury. Moreover, there was no explanation given for the denial of the mistrial nor was there any curative instruction given by the court.

2. The trial court abusee its discretion by summarily denying appellant's motions for mistrial where (1) where the alleged victim testified the appellant told her that he would do to her what he did to her sister, and (2) where after repeated warnings the alleged victim's sister testified regarding appellant's having been previously incarcerated in violation of Rule 404(b), SCRE.

**Inadmissible evidence of prior crimes or bad acts**

Minor was twenty-one at the time of trial and testified regarding an incident she alleged occurred when she was ten. Tr. 57-92. Minor testified appellant dated her mother and lived with her family for a time in a small trailer. Tr. 67, ll. 10-15; cite. Minor claimed that one night appellant rubbed her back and then asked her to come to the bedroom that he and her mother shared. She stated appellant removed her clothing and, "then he proceeded to tell me that he was going to do to me what he does to my sister." Tr. 70, l. 8—71, l. 24. Defense counsel immediately objected, and a bench conference was held off the record. Tr. 72, ll. 1-4. Minor went on to testify that appellant digitally penetrated her and then he tried, unsuccessfully, to have intercourse with her. Tr. 72, l. 20—73, l. 24; 74, ll. 3-21.

Contemporaneous with the motion for a mistrial based on inadmissible hearsay discussed above defense counsel moved for a mistrial based on minor's testimony arguing it was prohibited by Rule 404(b), SCRE. The court denied the motion for mistrial on both grounds and cautioned the state to have their witnesses prepared. Tr. 93, ll. 7-13.

Prior to the jury returning the state proffered minor's sister's testimony. Tr. 114-121. During the proffer the court warned sister multiple times not to say appellant had been in prison. Tr. 115, ll. 19-25; 121, ll. 1-3. On direct when asked why her mother and appellant split up sister

responded, "he went to jail." Tr. 129, ll. 23-24. Defense counsel objected, the court sustained the objection and an off the record bench conference was held. Tr. 129, l. 25—130, l. 5.

The court then instructed the jury as follows, "I just want to instruct you all to disregard the last statement made by this witness about the location of the defendant in this case. Okay? Just disregard it. Put it out of your minds." Tr. 130, ll. 7-10.

After sister's testimony was finished defense counsel requested to make a motion outside the presence of the jury. Tr. 145, ll. 9-11. Defense counsel objected to the curative instruction and moved for a mistrial based on sister's inadmissible and prejudicial testimony. Tr. 145, ll. 15-18. The court denied the motion without any explanation. Tr. 146, ll. 1-2.

**Discussion**

Generally, evidence of prior crimes or bad acts is not admissible to prove the crime for which the defendant is charged. *State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Such evidence can be admissible when it tends to show (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; or (5) the identity of the person charged with the commission of the crime on trial. *Id.*

The evidence of prior crimes or bad acts must be relevant to prove the alleged crime. *State v. Campbell*, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct.App.1994). When the prior bad acts are "strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced." *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). "[E]ven if [the] prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007). This balancing

process is reflected in Rule 403, SCRE.

The record is unclear in the first instance as to whether the trial court sustained the objection as to the inadmissible prior bad act testimony as there was an off the record bench conference held immediately after the objection. Regardless, it is clear minor's testimony that appellant said, "he was going to do to me what he does to my sister" at the time she claimed she was sexually assaulted by him was inadmissible bad act evidence.

This portion of minor's testimony was not relevant to proving that he committed any sexual act against her and because the act is the same as the one for which appellant was tried the prejudice was enhanced. The prejudice was even more enhanced in this particular case because appellant admittedly had a child with the sister years later.

The second objection to sister's testimony that appellant was incarcerated was clearly sustained by the court and a curative instruction was given.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct.App.2009) (internal citations omitted). A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial. *Id.* "**Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence**." *State v. White*, 371 S.C. 439, 447–48, 639 S.E.2d 160, 164 (Ct. App. 2006) (emphasis added). "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *Id.* at 447, 639 S.E.2d at 164.

In *State v. Harris*, the Court held that the state's eliciting improper character testimony

from a witness did not warrant a mistrial where the state asked a defense witness whether Harris had ever hit him in Harris's trial on the charge of murder and assault and battery with intent to kill. *Harris*, 382 S.C. at 11, 674 S.E.2d at 538. In that case, the Court found that the court's instruction to the jury to disregard the question cured any alleged error. *Id.* at 119-20, 647 S.E.2d at 538.

This case has one similarity to *Harris*, that there were instances of inadmissible bad act testimony. However, it is distinguishable. As the Court noted, the witness in *Harris* never answered the question posed by the state. Here, minor testified that appellant told her he would do to her what he did to her sister. Additionally, sister volunteered to the jury that appellant was previously incarcerated on unrelated criminal activity. Additionally, in *Harris* the improper character evidence testimony was elicited from a defense witness. In this case, the improper character evidence was elicited from state's witnesses both the alleged victim and her sister.

In *State v. Wilson*, the Court held the trial court's error in admitting evidence of a prior incident of domestic violence between Wilson and the victim did not prejudice Wilson. 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010). In that case, the Court was unable to find any prejudice in the limited record before it. Here, the state's case against appellant boiled down to credibility as there was only minor's version of events and appellant's version before the jury. The jury hearing that appellant was a criminal from sister and that he told minor that he was also abusing her sister at the time he allegedly abused minor was extremely prejudicial in this case.

The admission of improper character evidence through the state's witness, where appellant's guilt was not conclusively proven by competent evidence, was error and was not cured by the court's instruction to the jury. *See White*, 371 S.C. at 447-48, 639 S.E.2d at 164.

Appellant was prejudiced by the improper character evidence put before the jury. In this

case, the state's best evidence was the testimony of minor regarding an incident she claimed happened ten years prior. The degree of the prejudice could not be undone by the curative instruction. The trial court's error in denying appellant's motion for a mistrial after the jury learned that appellant was in jail was an error that "adversely affect[ed] [appellant's] right to a fair trial, and this Court should reverse. *See White*, 371 S.C. at 448, 639 S.E.2d at 164 (2006).

## CONCLUSION

By reason of the foregoing arguments, appellant respectfully requests this Court reverse his conviction and sentence, and remand his case to the Greenville County Court of General Sessions.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of March, 2026.