STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL ROSCOE,

APPELLANT

APPELLATE CASE NO. 2013-000906

INITIAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Appellant's motion for a mistrial where the complainant testified that her mother was "in prison for this trial" and "for the charges that [Appellant is] being accused of" since the testimony was improper and indicated to the jury that they should find Appellant guilty because another jury had already made a determination on the facts and found the mother guilty?

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant at the April 8, 2013 term of General Sessions for second degree criminal sexual conduct with a minor (CSC) and promoting prostitution of a minor. R. *. His case was called to trial on April 22, 2013 before the Honorable Clifton Newman, and a jury. Tr. 1. Robert T. Williams, Sr. represented Appellant and Suzanne Mayes was the assistant solicitor. Tr. 1.

At the conclusion of the trial on April 23, 2013, the jury found Appellant guilty. Tr. 274, ll. 2-13. Judge Newman sentenced Appellant to sixteen years imprisonment for second degree criminal sexual conduct with a minor and eight years imprisonment for promoting prostitution of a minor. The eight year sentence for promoting prostitution of a minor was ordered to be served concurrent to the sentence for the CSC conviction, but consecutive to a twelve year sentence Appellant is currently serving for a previous conviction as required by law.[1] Tr. 290, ll. 3-23.

This appeal follows.

[1] S.C. Code Section 16-15-415(C) requires, "Sentences imposed pursuant to this section must run consecutively with and must commence at the expiration of another sentence being served by the individual sentenced."

ARGUMENT

The trial court erred in denying Appellant's motion for a mistrial where the complainant testified that her mother was "in prison for this trial" and "for the charges that [Appellant is] being accused of" since the testimony was improper and indicated to the jury that they should find Appellant guilty because another jury had already made a determination on the facts and found the mother guilty.

Relevant Facts

Sarah Harsey, the first witness to testify, explained that in the beginning of 2006, she lived in a mobile home with her mother, Chana, her father, Wade, and her sisters, Skye and Rebecca. Skye was older than Sarah, and Rebecca, who went by Becky, was "a year or two younger" than Sarah. Tr. 60, l. 6 – 61, l. 15. She testified that sometime before her seventeenth birthday in May 2006 her father moved out and left the family. After her father moved out, the family was eventually forced to leave the residence because her mother could no longer pay the power bill due to her severe drug addiction. As a result, the family stayed in various motels in Lexington. Tr. 62, l. 24 – 64, l. 14. Sarah explained that Appellant is her father's cousin and she has "known him since [she] was in diapers as Uncle Roscoe." Her paternal grandfather and Appellant's father were brothers. Tr. 64, l. 15 – 65, l. 3.

After this testimony, the following colloquy took place on the record between the solicitor and Sarah:

> Q: Sarah, where is your mother at today?
>
> A: In prison for this trial.
>
> Q: When you say that, you mean for the charges - -

A: Yes, for the charges that he's being accused of.

Q: For?

A: Prostitution of minors.

Tr. 65, ll. 4-9

Defense counsel immediately informed the court that he had a matter a law to take up outside the presence of the jury. Once the jury was excused, defense counsel moved for a mistrial based on Sarah's testimony. He argued, "I think . . . they can bring out the fact that her mother, Chana, was involved in soliciting the children for prostitution. What they can't bring out is the fact that she is in prison for the same charges that my client is being tried for because that's an indication that some other jury has heard the same set of facts and made the determination of guilt of one of the two co-defendants, if you will, who is being charged with the same crime." Tr. 65, l. 10 – 66, l. 4.

While the solicitor acknowledged that Sarah "misspoke," she argued "that a curative instruction and striking of the testimony could redeem the problem." Defense counsel argued in response, "I'm not sure that a lobotomy can take that out, You Honor." Tr. 68, l. 14. – 69, l. 7.

The judge stated, "a mistrial should not be granted unless absolutely necessary and the judge should exhaust other methods to cure possible prejudice before aborting a trial." The judge thus denied the motion for a mistrial and decided to issue a curative instruction. Tr. 69, l. 14-23. The trial judge gave the following curative instruction to the jury:

> This defendant has pled not guilty to these charges, he's presumed to be not guilty of these charges. The fact that someone else may have been convicted of a charge has no bearing at all on whether this defendant is guilty of the charge. Before you can find this defendant is guilty of any charges, you must be convinced beyond a reasonable doubt

> of his guilt based on evidence presented in this court as it relates to the charge against this defendant, not based on someone else being convicted even if that person is charged with the same or similar offenses . . .Otherwise, in addition to all of that, you are to otherwise disregard the testimony of this witness in relation to why her mother is in prison.

Tr. 70, ll. 3-21.

Sarah then alleged that when she was between the ages of sixteen and seventeen years old her mother would arrange for her and her sister, Becky, to have sex with Appellant and others for money. Her mother "was the one who did all the dealing with the people." Tr. 72, ll. 4-7; Tr. 87, l. 3 – 88, l. 11. Sarah claimed that Appellant would pick her up at her house. She said, "I'd get in the car - - he'd hand me the money, I'd get in the car and we'd go, and when everything was done, he'd take me home." She testified, "We had sex in his living room on his couch and in his bed in his bedroom." Sarah also claimed that they had sex in Appellant's car and at Peachtree Rock Road Preserve, a local nature preserve. She alleged the interactions included both oral and vaginal sex. Tr. 75, l. 15 – 76, l. 10; Tr. 78, l. 14 – 81, l. 22.

Additionally, Sarah alleged that she heard Appellant and her mother talking in the family's living room one day. Appellant allegedly asked her mother "if he could take [her] sister's virginity" in exchange for a three hundred dollar check. Sarah claimed that when Becky arrived home, her mother took Becky into the mother's bedroom where Appellant was "waiting on her." Tr. 73, l. 24 – 75, l. 14.

Sarah testified that she eventually disclosed the alleged prostitution to a guidance counselor at Airport High School where she was a student. The guidance counselor informed the school resource officer (SRO) who in turned notified law enforcement. Tr. 77, l. 4 – 78, l. 1. Melissa Turner, the guidance counselor, later confirmed that she received

information from Sarah on October 11, 2006 in connection with prostitution and that she notified the SRO. Tr. 119, l. 4. – 121, l. 1.

Rebecca Harsey testified that "Momma prostituted out me and my sisters." She explained, "[Her mother] would either call Roscoe or Roscoe would call [her] mother." Rebecca alleged that Appellant "took [her] virginity" in her "mom's room on [her] dad's side of the bed." Tr. 177, l. 21 – 179, l. 3. She also claimed that Appellant would pick her up, drive her to his house, and then he "would either take me to the couch or his bedroom and tell me what he wanted" in exchange for money. Tr. 179, l. 20 – 180, l. 25. Additionally, Rebecca stated that she had sex with Appellant at a motel after the family moved out of their house because they could no longer pay the power bill. Tr. 179, ll. 12-19; Tr. 82, l. 14 – 183, l. 7. Rebecca was fourteen years old when this happened. Tr. 187, ll. 8-13; Tr. 192, ll. 23-24.

Rebecca explained that in October 2006, she was questioned by law enforcement at her high school about the alleged prostitution, but did not tell them what was going on because she was scared she would be put in foster care. However, she testified that in January 2007, after her mother was arrested, she told the police what happened. Tr. 184, l. 4 – 185, l. 25.

Chana, the mother, testified that she was convicted of promoting the prostitution of a minor after she prostituted her daughters, Sarah and Rebecca. Tr. 138, l. 23 – 139, l. 2. She explained, "Michael Roscoe is kin to [her] ex-husband, and he had dealings with [her] daughters." Chana claimed that Appellant would pay her to have oral and vaginal sex with her daughters. Tr. 141, l. 11 – 143, l. 13. She explained that Rebecca only got involved after Sarah "got to where she did not want to do it anymore." Tr. 146, ll. 1-10. Chana alleged

that Appellant had sex with her daughters at her house, at Appellant's house, and at various motels. Tr. 146, l. 23 – 147, l. 25. She explained that Rebecca's date of birth was November 19, 1991 and that Rebecca was fourteen in the fall of 2006 when this was occurring. Tr. 150, ll. 7-12.

Lieutenant Samuel Gunter of the Lexington County Sheriff's office testified that on January 26, 2007, he participated in the interview of Jeremy Futch, who was being investigated for an unrelated forgery. During this interview, Futch told Gunter that he had paid Chana Harsey sixty dollars to have sex with her fifteen-year-old daughter, Rebecca Harsey. Tr. 195, l. 18 – 196, l. 15; see also Tr. 170, l. 4 – 171, l. 9. Gunter explained that Chana Harsey was arrested that same day after he had interviewed Sarah Harsey. When Chana was arrested, Rebecca was present at the scene and taken into emergency protective custody. Rebecca Harsey also gave a statement to law enforcement. Both Sarah and Rebecca implicated Appellant in the alleged prostitution and he was subsequently arrested on January 28, 2007. Tr. 196, l. 16 – 199, l. 6.

Gunter further testified that he interviewed Appellant on February 1, 2007 and that Appellant provided a verbal statement. Appellant allegedly told Gunter that "the only thing he ever did was get a blow job from Sarah after she was seventeen-years-old." Gunter claimed Appellant also commented that "all he ever did was pay forty dollars to get a blow job from Sarah." Tr. 208, ll. 1-6. However, Appellant denied any involvement with Rebecca. Tr. Tr. 208, ll. 17-19.

At the end of all the testimony, Appellant renewed his motion for a mistrial. Tr. 224, ll. 24-25. In response, the solicitor argued "that any error would be harmless error because there has been plenty of admissible evidence on this same subject, further describing her

involvement, the involvement of Chana Harsey, both in the prostitution of her daughters in connection with Mr. Roscoe." Tr. 228, ll. 8-15.

The court ultimately held:

> With regard to the motion for a mistrial, the gist of the young lady's testimony was that her mother is in prison for the same thing that this defendant is on trial for. That's an accurate statement that has been reflected throughout the testimony in the trial, particularly, the testimony of the mother who said that that's why she is now in prison. So any error, although the testimony might have been premature, I don't believe it caused the jury to decide this defendant's guilt based on the witness' testimony as to why her mother was in jail.
>
> Further, the court gave instruction that the jury must decide this case as relates to the guilt or innocence of this defendant independently of guilt of anyone else. So any error in that testimony, that unobjected-to coming in would be harmless . . .

Tr. 229, ll. 2-21.

The court thus denied Appellant's motion for a mistrial. Tr. 229, ll. 22-23.

Discussion

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. White, 371 S.C. 439, 639 S.E.2d 160 (SC App. 2006) (citing State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997) and State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999)). In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Specifically, the trial court is to

consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. See State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

The trial court erred in denying Appellant's motion for a mistrial because Sarah's testimony that her mother was "in prison for this trial" and "for the charges that [Appellant is] being accused of" signaled to the jury that it should find Appellant guilty because another jury had already made a determination on the facts and found the mother guilty. This testimony, especially so early in the trial, tainted the jury and denied Appellant the right to a fair trial. See State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (provides in pertinent part that "the errors must adversely affect [the defendant's] right to a fair trial.").

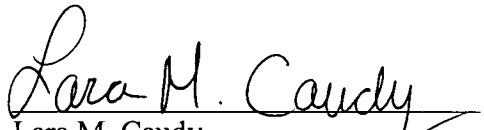
The trial court's curative instruction was insufficient to cure the error in admitting the improper testimony. 75B Am.Jur.2d Trial § 1284 (1992) (Error is not always rendered harmless by instructions to the jury to disregard it or to give it only a limited effect. The test is one of prejudice.") (footnotes omitted). The curative instruction was insufficient because it is probable, even with the curative instruction, the improper testimony affected the verdict thereby causing prejudice to Appellant. State v. Simpson, 325 S.C. 37, 479 S.E.2d. 57 (1996) (noting that while an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced.).

The error was not harmless because it was not proven "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993). Because the jury was influenced by this improper testimony and thus Appellant was unable to receive a fair trial, the trial court abused its discretion by refusing to grant a mistrial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court to reverse his convictions and remand this case to the Lexington County Court of General Sessions for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of February, 2014.