

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2013-000906

THE STATE,

Respondent,

vs.

MICHAEL ROSCOE,

Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

Appellant failed to object to the sufficiency of the curative instruction and abandoned his argument on appeal; therefore, Appellant's argument is not preserved for appellate review. Further, even if the victim's testimony was improper, the trial judge cured any alleged error by issuing a curative instruction to the jury. Regardless, even if the curative instruction was not sufficient, Appellant suffered no prejudice.

STATEMENT OF THE CASE

In April of 2013, a Lexington County Grand Jury indicted Appellant for second-degree criminal sexual conduct with a minor and promoting prostitution of a minor. On April 22, 2013, Appellant proceeded to trial before the Honorable Clifton Newman. Robert T. Williams represented Appellant at trial, and Assistant Solicitor Suzanne Mayes represented the State at trial. At the conclusion of the trial, the jury found Appellant guilty of both charges. Judge Newman sentenced Appellant to sixteen years of imprisonment for the second-degree criminal sexual conduct with a minor conviction and eight years of imprisonment for the promoting prostitution of a minor conviction.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

In 2006, Appellant paid to have sex with Oldest Victim, who was approximately sixteen years old at the time, and Youngest Victim, who was approximately fourteen years old at the time. (Tr. pp. 144-145; Tr. p. 150.)

Testimony of Oldest Victim

At trial, Oldest Victim testified that when she was thirteen years old, her mother ("Mother") would arrange for men to have sex with Oldest Victim in exchange for money. (Tr. p. 71.) Oldest Victim had sex with multiple men in exchange for money. (Tr. pp. 71-72.) In 2006, Appellant paid Oldest Victim to have sex with him on multiple occasions. (Tr. p. 72.) On multiple occasions, Oldest Victim performed oral sex on Appellant in exchange for money. (Tr. pp. 75-76.) However, Oldest Victim had to give the money to Mother. (Tr. p. 72.) Mother used the money to buy alcohol and drugs. (Tr. p. 76.) Eventually, Appellant began having sex with Youngest Victim because Oldest Victim refused to have sex with him. (Tr. p. 73.) According to Oldest Victim, Appellant wrote Mother a check for \$300 in exchange for Youngest Victim's virginity. (Tr. pp. 73-74.) Oldest Victim saw Appellant take Youngest Victim into Mother's bedroom. (Tr. pp. 74-75.)

During the State's direct examination of Oldest Victim, the following colloquy occurred:

Q. [Oldest Victim], 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.

[Defense Counsel]: Your Honor, I have a matter of law to take up with the Court outside the presence of the jury.

(Tr. pp. 64-65.)

Thereafter, Appellant moved for a mistrial. (Tr. p. 65.) Although Appellant did not have a problem with the State bringing out the fact that Mother was involved in soliciting Oldest Victim and Youngest Victim for prostitution, Appellant argued the following:

[T]hey can't bring out . . . 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 . . . who is being charged with the same crime.

(Tr. pp. 65-66.)

After hearing arguments from both sides, the trial judge denied Appellant's motion for a mistrial, struck the testimony, and issued 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 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.

(Tr. p. 70.)

After the trial judge issued the curative instruction to the jury, Appellant failed to object to the sufficiency of the curative instruction. (Tr. p. 70.)

Testimony of Jeremy Futch

At trial, Jeremy Futch testified for the State. (Tr. p. 121.) Futch testified that he paid Mother money in exchange for sex with Youngest Victim, who was fifteen years old at the time. (Tr. pp. 123-124.) On one occasion, Futch saw Appellant pick up Youngest Victim from Mother's house in order to "baby-sit." (Tr. p. 126.)

Testimony of Mother

Additionally, Mother testified for the State at trial. (Tr. p. 138.) Mother testified that she has been incarcerated for the past six years because she had criminal convictions for prostitution of a minor, which involved Oldest Victim and Youngest Victim. (Tr. pp. 138-139.) According to Mother, Appellant "had dealings with [her] daughters." (Tr. p. 141.) Appellant's "dealings" with Oldest Victim and Youngest Victim involved sexual favors. (Tr. p. 142.) Appellant paid to have sex with Oldest Victim and Youngest Victim. According to Mother, Appellant paid her \$300 in exchange for Youngest Victim's virginity. (Tr. pp. 143-145.) However, the bank would not cash the check Appellant wrote to Mother. (Tr. p. 143.)

During cross-examination of Mother, Appellant asked Mother about Futch. (Tr. p. 155.) Mother responded: "I went to jail because of Jeremy Futch." (Tr. p. 155.) In addition, Mother testified: "The one that [Oldest Victim] was seeing was Jeremy [Futch], and they're the ones that signed a statement to get me put in the penitentiary." (Tr. p. 156.)

Testimony of Detective Charles Robert Lint

According to Detective Lint, in January of 2007, Futch admitted that he paid money to receive oral sex from Youngest Victim. (Tr. pp. 170-171.) During the course of Detective Lint's investigation, six people were arrested for their involvement in the prostitution of Oldest Victim and Youngest Victim. (Tr. pp. 173-175.)

Testimony of Youngest Victim

At trial, Youngest Victim testified that Mother prostituted her and Oldest Victim out for money. (Tr. p. 177.) Appellant took Youngest Victim's virginity when she was approximately fourteen years old. (Tr. p. 178; Tr. p. 184.) On multiple occasions, Appellant paid Mother in order for him to have sex with Youngest Victim. (Tr. p. 181; Tr. p. 183.) Additionally, Youngest Victim testified that Futch also paid Mother for him to have sex with Youngest Victim. (Tr. p. 183.)

Testimony of Detective Samuel Gunter

According to Detective Gunter, in January of 2007, Futch admitted to paying Mother \$60 to have sex with Youngest Victim. (Tr. p. 196.) As a result of Futch's confession, the police learned that Appellant was also involved in the prostitution of Oldest Victim and Youngest Victim. (Tr. p. 196.) During Appellant's interview with Detective Gunter, Appellant admitted to receiving oral sex from Oldest Victim but claimed it occurred when Oldest Victim was seventeen years old. (Tr. p. 201.) Thereafter, Appellant told Detective Gunter that "all he ever did was pay \$40 to get a blow job from [Oldest Victim]." (Tr. p. 208; Tr. p. 222.)

ARGUMENT

I.

Appellant failed to object to the sufficiency of the curative instruction and abandoned his argument on appeal; therefore, Appellant's argument is not preserved for appellate review. Further, even if the victim's testimony was improper, the trial judge cured any alleged error by issuing a curative instruction to the jury. Regardless, even if the curative instruction was not sufficient, Appellant suffered no prejudice.

Appellant's argument on appeal fails for four primary reasons: First, Appellant did not object to the sufficiency of the trial judge's curative instruction or contemporaneously move for a mistrial after the trial judge issued the curative instruction. Therefore, Appellant failed to preserve the issue for appellate review. Second, Appellant failed to cite to any authority supporting his claim that Oldest Victim's testimony was improper. Thus, Appellant abandoned his argument on appeal. Third, even if Appellant preserved the issue, the trial judge cured any alleged error by issuing a curative instruction to the jury. Finally, regardless of any alleged error, Appellant suffered no prejudice from Oldest Victim's testimony regarding the fact Mother was in prison for promoting prostitution of minors.

Standard of Review

The grant or denial of a mistrial lies within the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed on appeal absent an abuse of discretion or an error of law. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000). A trial judge should not grant a mistrial unless absolutely necessary, and the trial judge should exhaust all other methods to cure any possible prejudice before granting a mistrial request. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999); see State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for

mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.”).

In determining whether to grant a mistrial, the trial judge should determine whether or not the mistrial is dictated by manifest necessity or the ends of public justice. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002); see State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) (“The less than lucid test is therefore declared to be 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.”). The burden is on the moving party to establish both error and prejudice. State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). Appellate courts in South Carolina favor the exercise of the wide discretion of the trial judge in determining the merits of a motion for mistrial. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

Analysis

A. Preservation

First, Appellant made neither an overt contemporaneous objection to the sufficiency of the curative instruction nor a renewed motion for a mistrial after the court gave the jury the curative instruction. Thus, the issue is not preserved for appellate review.

“If a trial court issues a curative instruction, a party must make a contemporaneous objection to the sufficiency of the curative instruction to preserve an alleged error for review.” State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010). Therefore, when a trial judge sustains an objecting party’s objection and issues a

curative instruction, the objecting party must thereafter make an additional objection to the sufficiency of the curative instruction or move for a mistrial in order to preserve the issue for appellate review. See State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (“No issue is preserved for appellate review if the objecting party accepts the judge’s ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.”); State v. McEachern, 399 S.C. 125, 146, 731 S.E.2d 604, 615 (Ct. App. 2012) (noting that the law assumes a curative instruction will remedy an error; therefore, failure to object to the sufficiency of that charge renders the issue waived and unpreserved for appellate review); State v. Ferguson, 376 S.C. 615, 620-621, 658 S.E.2d 101, 104 (Ct. App. 2008) (noting that the defendant failed to preserve the issue because “[he] made neither an overt contemporaneous objection as to the sufficiency of the curative instruction, nor a renewed motion for a mistrial after the court gave the jury the curative instruction.”); State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct. App. 1996) (holding no issue is preserved for appellate review if the complaining party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge).

In this case, Appellant objected to Oldest Victim’s testimony regarding the fact that Mother was in prison for promoting prostitution of minors, which was the same charge for which Appellant was on trial. (Tr. p. 65.) When the solicitor suggested that a curative instruction would cure any alleged error, defense counsel stated: “I’m not sure that a lobotomy can take that out, Your Honor.” (Tr. p. 69.) Thereafter, the trial judge stated he would issue a curative instruction instead of granting Appellant’s request for a mistrial because a mistrial was not absolutely necessary in this case. (Tr. p. 69.) When the

jury returned to the courtroom, the trial judge issued a curative instruction. (Tr. pp. 69-70.) Appellant neither objected to the sufficiency of the curative instruction nor contemporaneously moved for a mistrial. (Tr. p. 70.)

Accordingly, because Appellant failed to object to the sufficiency of the curative or move for a mistrial after the trial judge issued the curative instruction, the issue is not preserved for appellate review.

Second, Appellant abandoned his mistrial argument on appeal by failing to cite to any authority supporting his claim that Oldest Victim's testimony was improper. See State v. Hill, 394 S.C. 280, 296-297, 715 S.E.2d 368, 377-378 (Ct. App. 2011) (holding the issue was abandoned when appellate counsel merely recited the extensive testimony and arguments of trial counsel without adopting trial counsel's argument, and appellate counsel only made a two sentence conclusory argument with citation to only one case with no analysis whatsoever as to why the case applied); State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (holding that a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal), aff'd as modified, 337 S.C. 622, 525 S.E.2d 246 (2000).

Accordingly, Appellant abandoned his argument on appeal.

B. Merits

Third, regardless of preservation, the trial judge properly exercised his broad discretion in deciding to give a curative instruction instead of granting a mistrial.

“The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.” State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005).

Normally, the issuance of a curative instruction will cure an error. Brown, 389 S.C. at 95, 697 S.E.2d at 628 (“A curative instruction is usually deemed to cure an alleged error.”); State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) (“A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.”); see State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996) (holding a trial court should exhaust other available methods to cure prejudice before aborting a trial, and where the prejudicial effect is minimal, a mistrial need not be granted in every case where incompetent evidence is received and later stricken and a curative instruction is given).

In this case, the trial court cured any potential prejudice to Appellant when it issued 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 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.

(Tr. p. 70.)

Further, before the trial began, the trial court informed the jury that Appellant is presumed not guilty of the charges contained in the indictments, and he cannot be found guilty unless the State proves beyond a reasonable doubt that he is guilty of the charges. (Tr. p. 4.) In addition, before deliberations, the trial court once again instructed the jury regarding the presumption of innocence. (Tr. pp. 256-258.)

Notably, Appellant failed to cite to any authority supporting his claim that Oldest Victim's testimony was improper. However, even if the testimony was improper, the trial judge made it abundantly clear to the jury that Appellant was presumed innocent, and the jury could not convict Appellant just because someone else may have been convicted of a similar charge.

Moreover, Appellant's argument that Oldest Victim's testimony "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 . . ." is without merit. Not only is Appellant's argument speculative, it is factually inaccurate. Mother pled guilty to the charges against her; therefore, a jury did not hear any evidence whatsoever regarding Mother's case. (Tr. p. 22.) In addition, Mother testified that the reason she was in prison was because of Futch, not Appellant. (Tr. p. 155.) Contrary to Appellant's assertion, Oldest Victim's response to the State's questions merely informed the jury that Mother was in prison for the same **type** of charge for which Appellant was on trial.

Accordingly, the trial court's curative instruction cured any alleged error.

C. Harmless Error

Finally, even if the curative instruction did not cure the alleged error, Appellant suffered no prejudice from the challenged testimony because the testimony was merely cumulative to other testimony. Moreover, the State presented overwhelming evidence of Appellant's guilt.

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness

of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”). “When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.” State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Further, an error is harmless if the improper evidence is merely cumulative to other properly admitted evidence. See State v. Holder, 382 S.C. 278, 289, 676 S.E.2d 690, 696–97 (2009) (holding the erroneous admission of evidence is harmless beyond a reasonable doubt where it is minimal in the context of the entire record and cumulative to other testimony admitted without objection); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (the admission of improper evidence is deemed harmless if it is merely cumulative to other evidence).

In this case, Appellant suffered no prejudice from Oldest Victim’s testimony regarding the fact Mother was in prison for the same charge for which Appellant was on trial. At trial, Mother testified that she was in prison for promoting prostitution of a minor. (Tr. pp. 138-139.) Thus, Oldest Victim’s testimony was merely cumulative to Mother’s testimony. Further, any alleged prejudice from Oldest Victim’s testimony was eliminated when Mother informed the jury that the reason she was in prison was because of Futch, not Appellant. (Tr. p. 155.) Moreover, Futch admitted he paid Mother money in exchange for sex with Youngest Victim. (Tr. pp. 123-124.) Thus, Futch’s testimony

confirmed Mother's claim that the reason she was in prison was because of him, not Appellant.

In addition, the State presented overwhelming evidence of Appellant's guilt. Oldest Victim, Youngest Victim, and Mother all testified that Appellant paid to have sex with both Oldest Victim and Youngest Victim. Further, Appellant admitted to Detective Gunter that "all he ever did was pay \$40 to get a blow job from [Oldest Victim]." (Tr. p. 208; Tr. p. 222.)

Accordingly, even if the curative instruction did not cure the alleged error, Appellant suffered no prejudice from the challenged testimony.

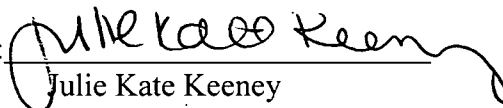
CONCLUSION

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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