ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RALPHEAL ROBERTSON,

APPELLANT

APPELLATE CASE NO. 2014-001630

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to ask the potential jury members on voir dire as to potential juror bias in regard to allegations of child sexual abuse?

STATEMENT OF THE CASE

In April of 2014, the Aiken County Grand Jury indicted Robertson for two counts of criminal sexual conduct with a minor first degree and two counts of lewd act upon a child, indictments #2014-GS-02-382, 384, 385, 386. On July 15, 2014, Robertson proceeded to jury trial before the Honorable Eugene C. Griffith, Jr. The jury returned with verdicts of guilty as charged. Judge Griffith sentenced Robertson to two concurrent thirty (30) year sentences for criminal sexual conduct with a minor first degree, a fifteen (15) year concurrent sentence for one count of lewd act and a consecutive ten (10) year sentence for the other count of lewd act. A timely notice of intent to appeal was served on July 21, 2014. this appeal follows.

STATEMENT OF FACTS

Sometime before Christmas of 2010, the mother of the minor witness saw her daughter and another minor female touching each other inappropriately in the bathtub. (Tr. p. 77, lines 1-9; p. 78, lines 7-14). The mother questioned the minor about the touching. (Tr. p. 77, lines 10-11). At first the minor stated that she "learned it at school." (Tr. p. 81, lines 1-6). Then, according to the mother, the minor witness told her somebody had inappropriately touched her. (Tr. p. 77, lines 10-25). On re-direct examination the mother testified that the minor told her Appellant had touched her. (Tr. p. 102, lines 13-14). Appellant was the mother's live in boyfriend. The mother admitted that she did not call the police. (Tr. p. 78, lines 19-20).

Almost a year later, in November of 2011, Investigator Kimberly Sievers with the Aiken County Sheriff's Department began an investigation based on an incident report in regard to the minor witness. (Tr. p. 104, lines 13 – 25). The report was initially made by a deputy on the road, Jessica Roberts, who also happens to be the maternal aunt of the minor witness. (Tr. p. 105, lines 1-13; p. 112, lines 19-25; p. 136, lines 2-19). It appears that Deputy Roberts made the report based on something Marquez, her son and the minor witness's cousin, told her. (Tr. p. 67, lines 1-15; p. 137, lines 1-10).

The minor witness was interviewed at the Child Advocacy Center in Aiken. A video of the interview was introduced in evidence without objection. (Tr. pp. 126-127). Appellant testified at trial and denied touching the minor witness in any way. (Tr. p. 151, line 15 – p. 152, line 1; p. 155, lines 9-16).

ARGUMENT

The trial judge erred in refusing to ask the potential jury members on voir dire as to potential juror bias in regard to allegation of child sexual abuse.

Prior to jury selection Appellant specifically requested that the judge ask the jurors proposed defense voir dire question No. 2, "Does any member of the jury panel believe that anyone charged with crimes involving an allegation of sexual [sic] abusing a child is probably guilty?"(Tr. p. 13, lines 14-20; R. p. **, Court's Exhibit #1). The judge declined to ask the requested voir dire question but allowed Appellant to place his objection on the record after the jury was selected. (Tr. p. 13, lines 21-22). After jury selection Appellant objected to the judge refusing to ask proposed defense voir dire. (Tr. p. 32, lines 13 – 24). Counsel for Appellant argued, "People have prejudices about sexual crimes. I think that's demonstrated. They can have a prejudice towards – or a bias towards the fact that a child is saying that something happened. That's why I think this question is particularly important, Your Honor." (Tr. p. 32, lines 19-24) The judge again declined to ask the requested voir dire question. (Tr. p. 32, line 25 – p. 33, lines 1-24). The judge stated:

> I will further instruct them at the close that – consistent with the law that a child's accusation under a CSC need not be corroborated, but that they must consider all of the witnesses equally and not presume one – basically the duty of credibility, believability, and their evaluation of that in my instruction.
>
> So, respectfully, I understand your motion, I've ruled during the voir dire the way I did, and I'll consistently stick with that as denying that request to instruct number 2. I will do everything I can to address it within the instructions through this trial and at the – prior to the jury's deliberations.

(Tr. p. 33, lines 18-24). The requested voir dire was marked as Court's Exhibit #1. (Tr. p. 32, line 25 – p. 33, lines 1-3). The judge erred in refusing to ask the requested voir dire question as to potential juror bias in regard to child sexual abuse.

In United States v. Lancaster, 96 F.3d 734, 738 (4th Cir. 1996) the Fourth Circuit Court of Appeals wrote:

> Voir dire plays an essential role in guaranteeing a criminal defendant's Sixth Amendment right to an impartial jury. See Rosales–Lopez v. United States, 451 U.S. 182, 188, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) (plurality opinion); King v. Jones, 824 F.2d 324, 326 (4th Cir.1987). Voir dire "enabl[es] the court to select an impartial jury and assist[s] counsel in exercising peremptory challenges." Mu'Min v. Virginia, 500 U.S. 415, 431, 111 S.Ct. 1899, 1908, 114 L.Ed.2d 493 (1991); see also Rosales–Lopez, 451 U.S. at 188, 101 S.Ct. at 1634 (observing that voir dire is the means by which prospective jurors who are unwilling or unable to apply the law impartially may be disqualified from jury service); Scott v. Lawrence, 36 F.3d 871, 874 (9th Cir.1994) (noting that "[t]he principal purpose of voir dire is to probe each prospective juror's state of mind to enable the trial judge to determine actual bias and to allow counsel to assess suspected bias or prejudice").

S.C. Code §14-7-1020 provides:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

In State v. Cason, 317 S.C. 430, 432, 454 S.E.2d 888, 889-90 (1995), the South Carolina Supreme Court wrote:

> The requirements of section 14-7-1020 are mandatory. Robinson & Allen v. Howell, 66 S.C. 326, 44 S.E. 931 (1903). A specific voir dire question designed to reveal racial prejudices on the part of the juror is required only when there exists "special circumstance." See Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973). Absent special circumstances, the requirement of "bias or prejudice" is met through a general voir dire as to bias and prejudice. See State v. Gibbs, 267 S.C. 365, 228 S.E.2d 104 (1976).
>
> A special circumstance exists when race is an integral part of the case. See Id. A special circumstance of constitutional proportion does not exist, however, when the only racial fact in the case is that the defendant and

> victim are of different races. Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); State v. Gibbs, 267 S.C. 365, 228 S.E.2d 104 (1976). To rise to constitutional proportion, something beyond a difference in defendant's and victim's race is required. See *e.g.*, Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) (death penalty is special circumstance); Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) (special circumstance existed when defendant claimed police framed him because of his civil rights activities); Jordan v. Lippman, 763 F.2d 1265 (11th Cir.1985) (special circumstance existed when defendant accused of killing prison guard during race riot).

In State v. Vang, 353 S.C. 78, 89, 577 S.E.2d 225, 230 (Ct. App. 2003), the South Carolina Court of Appeals wrote:

> In the absence of special circumstances, the questions asked pursuant to the statute during general voir dire are sufficient to determine the existence of bias or prejudice. Id. at 432, 454 S.E.2d 888 454 S.E.2d at 889. The manner and scope of any additional voir dire questions are in the trial judge's discretion. State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997). "[A]s a general rule, the trial court is not required to ask all voir dire questions submitted by the attorneys." Wall v. Keels, 331 S.C. 310, 318, 501 S.E.2d 754, 757 (Ct.App.1998).

Both the Cason case and the Vang case involved the judge's refusal to ask juror's about racial bias. In both cases the court found that special circumstances did not exist to warrant the additional questioning of juror as to racial bias. The present case does not involve racial bias. Instead, in the present case special circumstances existed to warrant the judge asking about potential juror bias in regard to child sexual abuse. As noted by defense counsel, it was important to determine if jurors believed that children were more likely to tell the truth in regard to allegations of sexual abuse. The determination is particularly critical in a case like the present case where the State's evidence is based almost entirely on the testimony of the child. The general voir dire asked in the present case was not sufficient to determine potential bias of the jurors. The judge's failure to ask the requested voir constitutes an abuse of discretion.

During the general voir dire the judge asked if any of the jurors were related to attorneys involved in the case, asked if any juror were related to witnesses in the case, if any jury member knew anything about the case or was a member of several listed organizations. (Tr. pp. 7-9). The judge then stated:

> Any member of the jury panel – now, this is going to be a yes/no answer. I don't need any details, just kind of want to know your basic involvement with any type of situation such as this: Any member – and this is going to be – I'm not going to ask for an explanation. I'm going to ask, has it and would it affect your ability to be fair and impartial. This case involves accusations made by the state regarding sexual misconduct. It's going to contain material of that sort. So to that end, is any member of this jury panel, close personal friend, or member of your immediate family ever been a victim of a sexual crime or sexual assault? If so, please stand. And like I said, this is a yes or no.

(Tr. p. 10, lines 1-15). One juror stood and told the judge she hoped she could be fair. (Tr. p. 10, lines 19-25). The judge then asked about preconceived notions in regard to burden of proof, presumption of innocence and the ability to accept the law as instructed. (Tr. pp. 11-12). While the judge asked about victims of sexual abuse, he did not ask about bias in regard to child sexual abuse. A juror could potentially have a bias without having been a victim or associated with a victim. The general voir dire does not comply with the statute requiring the judge to ask jurors about bias.

In Crosby v. Se. Zayre, Inc., 274 S.C. 519, 521-22, 265 S.E.2d 517, 519 (1980), the South Carolina Supreme Court wrote:

> While it has been held that, generally, the conduct of voir dire examinations of jurors is within the discretion of the court, State v. Gibbs, 267 S.C. 365, 228 S.E.2d 104, we have also held that, under the quoted statute, the refusal to make any examination of prospective jurors to determine bias or prejudice on their part, when a timely request has been made, constitutes reversible error, State v. Brown, 240 S.C. 357, 126 S.E.2d 1. The request by appellant, that inquiry be made to determine the relationship of any juror to counsel in the case, concerned the possible interest, bias, or prejudice of the jurors arising not only from kinship but

> also from business connections with any of the attorneys. The refusal to make such inquiry, when requested, amounted in this case, in effect, to the refusal by the trial judge to follow the clear mandate of the above quoted provisions of Section 14-7-1020; and constitutes reversible error.

As in Crosby, in the present case the judge's refusal to ask the requested voir dire and failure to follow the mandate of S.C. Code §14-7-1020 in regard to potential bias constitutes reversible error.

In State v. Hatfield, 128 N.C. App. 294, 495 S.E.2d 163 (1998), rev. denied, 348 N.C. 75, 505 S.E.2d 881, cert. denied, 525 U.S. 887, 119 S.Ct. 202, 142 L.Ed.2d 165 (1998), the North Carolina Court of Appeals found that, based on North Carolina case law, the trial court committed error by refusing to allow *voir dire* of prospective jurors concerning the credibility of child witnesses on issues relating to sexual abuse. The North Carolina Court of Appeals wrote:

> In this case, asking a prospective juror whether he or she would think that children were more likely to tell the truth when they made allegations of sexual abuse was a proper inquiry into the jurors' sympathies. The question did not fish for an answer to a legal question before the judge had instructed on applicable legal principles. Furthermore, the question was not an attempt to establish a "rapport" with the prospective jurors, nor did it ask the prospective jurors what kind of verdict they would render under certain circumstances. Additionally, the question was not an argument—it did not incorporate assumed facts and was not a hypothetical. Rather, it simply informed the jurors that the State would offer a child's testimony and sought to ensure that their impartiality would not be swayed. The State did in fact rely to a great degree on the testimony of a sexually abused child. In sum, the question was allowable as a proper inquiry into the jurors' sympathies toward a molested child, and as such is indistinguishable from the question our Supreme Court found permissible in McKoy. Accordingly, we hold that the trial court erred by not allowing Hatfield to ask it.

128 N.C. App. at 297-98, 495 S.E.2d at 165.

The North Carolina Court of Appeals, however, found the error was not prejudicial. The error in the present case was not harmless in light of the insufficient general voir dire as discussed above.

The error was further complicated by the fact that the judge, without objection, charged the jury pursuant to S.C. Code §16-3-657 providing that the testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658. The judge charged the jury:

> Now, under South Carolina law, the testimony of the victim in a criminal sexual conduct with a minor need not corroborated in prosecutions or in committing lewd act of a minor prosecutions. The State is not required to prove precise time of the instances, as time is not a material element of criminal sexual conduct with a minor in the first degree or committing a lewd act upon a minor.

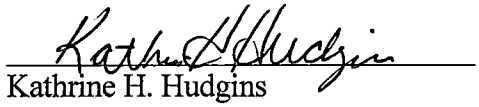
(Tr. p. 190, line 19 – p. 191, line 1).

S.C. Code §16-3-657 provides, "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." In State v. Rayfield, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006), the South Carolina Supreme Court wrote, "A trial judge is not required to charge § 16–3–657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law." While there was no objection to this charge, the cumulative effect of not being able to determine potential juror bias in regard to child sexual abuse combined with the no corroboration charge deprived Appellant of a fair trial.

CONCLUSION

Based on the above argument, Appellant's convictions should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 22th day of May, 2015.

STATE OF SOUTH CAROLINA

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APPELLATE CASE NO. 2014-001630

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ralpheal Robertson # 306718 at Perry Correctional Institution, this 22nd day of May, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of May, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.