STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN M. HOLDER

APPELLANT

APPELLANT CASE NO. 2015-001185

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to declare a mistrial after the solicitor asked, as the trial court called it, the "inappropriate question" that was "without foundation" of whether appellant was gay and "interested in young boys" in a sexual abuse case?

STATEMENT OF THE CASE

On May 12, 2015, a Pickens County grand jury indicted appellant for one count of third degree criminal sexual conduct with a minor and another count of second degree criminal sexual conduct with a minor. R. ___. On May 20, 2015, appellant was tried before the Honorable John C. Hayes, III, and a jury. Tr. 1. Samuel B. Tooker represented the State. Tr. 1. David D. Cantrell, Jr. represented appellant. Tr. 1. The jury convicted appellant. Tr. 352, ll. 11 – 19. Judge Hayes sentenced appellant to concurrent ten year terms of imprisonment. Tr. 358, ll. 21 – 25. This appeal follows.

ARGUMENT

The trial court erred in refusing to declare a mistrial after the solicitor asked, as the trial court called it, the "inappropriate question" that was "without foundation" of whether appellant was gay and "interested in young boys" in a sexual abuse case.

Factual Background

The State agreed that this sexual abuse case depended entirely upon credibility. Tr. 327, ll. 7 – 15. In his closing, the solicitor stated, "The issue in this case is whether or not you believe the victim when he says these things happened. That's why, in opening, I told you, credibility is paramount in any case, but particularly in this case." Tr. 327, ll. 7 – 15. Appellant Jonathan M. Holder ("Holder") testified in his own defense and denied the complainant's allegations of sexual abuse. Tr. 240, ll. 15 – 21. Tr. 257, ll. 10 – 20.

The complainant was a teenage boy who was a resident at an in-patient psychiatric facility in Pickens. Tr. 135, ll. 13 – 19. Tr. 136, ll. 17 – 21. The director of the facility stated that the juvenile residents "are diagnosed with ODD, bipolar, you name it. You have to be diagnosed with some sort of mental diagnosis." Tr. 141, ll. 8 – 12. He agreed that the juvenile residents had limited freedom. Tr. 141, ll. 19 – 21. Most of the residents wanted out of the facility. Tr. 142, ll. 1 – 5. Holder worked in the facility as a staff member responsible for watching the residents. Tr. 101, ll. 19 – 25.

Complainant described living in the facility as "like lockdown." Tr. 73, ll. 5 – 10. Complainant agreed that staff members were required to supervise the residents at all times for their safety. Tr. 91, ll. 14 – 17. Residents were accompanied by staff at all times when they moved around the facility. Tr. 126, ll. 20 – 22. Tr. 230, ll. 15 – 19. Staff members

were also required to keep different groups of residents separated from each other. Tr. 125, ll. 13 – 16.

The video surveillance system in the facility was "very extensive," but did not cover all areas. Tr. 105, ll. 12 – 20. Staff were told to "stay on-camera at all times . . . [t]o protect themselves and the patients." Tr. 108, l. 21 – 109, l. 1. The videos taken at the time of the alleged incident showed Holder and complainant entering off-camera areas while complainant was doing his chores in the laundry room and getting a book from the library. Tr. 111, l. 24 – 114, l. 12. Tr. 121, l. 4 – 123, l. 5. Holder was also off-camera with complainant in the nurse's station. Tr. 282, l. 6 – 283, l. 20. The nurse was gone from the station for "maybe a minute." Tr. 283, ll. 21 – 22. Holder agreed that staff members were instructed to stay "on-camera," but explained that if a resident's needs took him off-camera, he was allowed to follow. Tr. 231, l. 20 – 232, l. 14.

During these three instances, complainant alleged that Holder sexually abused him. Complainant said the first instance happened in the laundry room. Tr. 76, l. 21 – 77, l. 9. Complainant admitted that Holder had to be in the laundry room with him because Holder "had to make sure I was doing my job right, not trying to get contraband or whatever." Tr. 77, ll. 18 – 20. Tr. 91, ll. 11 – 17. Complainant admitted that it was not unusual for a staff member to be with him in the laundry room while he did his chores. Tr. 91, ll. 11 – 17. Holder testified that he was not allowed to leave complainant alone in the laundry room because of chemicals, electrical cords, and "suicide risk." Tr. 235, ll. 9 – 20. These rules applied to all of the residents, not just complainant. Tr. 235, ll. 21 – 23.

Complainant requested to do extra chores in the laundry room to earn "Avalons," the facility's in-house currency. Tr. 91, ll. 6 – 8. Tr. 137, l. 12 – 138, l. 11. Complainant stated

that he was in the laundry room with Holder when Holder made a comment about the size of his genitalia related to a box. Tr. 78, ll. 2 – 9. Holder showed complainant his penis and asked to see complainant's penis. Tr. 78, ll. 12 – 24. They touched each other for a "few minutes." Tr. 78, l. 25 – 79, l. 6. The total time in the laundry room was approximately thirty minutes, during which complainant continued folding clothes and working. Tr. 79, ll. 14 – 24. On the same day, in the nurse's station, complainant said that Holder "touched me, and asked me to put my mouth on him, and I moved away." Tr. 80, l. 19 – 81, l. 13.

On a different day, complainant "asked for a staff to come escort me to get a book." Tr. 81, ll. 8 - 19. Holder escorted complainant to the library where complainant said Holder "asked me to play with myself so that he could watch." Tr. 81, ll. 14 – 19. Holder stayed at the door keeping it cracked. Tr. 82, ll. 13 – 24. When the door shut, Holder performed oral sex on complainant until he ejaculated. Tr. 83, ll. 5 – 11. Complainant "grabbed a book and went back to my pod." Tr. 83, ll. 12 – 14.

The assistant director of the facility stated that the door to the library was "pretty heavy" and would close automatically unless someone held it open. Tr. 127, l. 24 – 129, l. 16. While policy was to keep the door open at all times and to be on camera at all times, the assistant director admitted that this policy "cannot be totally enforced." Tr. 128, l. 11 – 129, l. 16.

The first person complainant told about the alleged abuse was the facility's director, Kevin Sowell ("Sowell"). Tr. 83, ll. 21 – 22. Afterwards, complainant "ripped up the floors and the sink" because "[n]o one believed me." Tr. 84, ll. 1 – 7. A couple of months before making the allegations against Holder, complainant told his case worker "I know what I've got to do to get out of here." Tr. 139, l. 22 – 139, l. 17. Sowell testified that when

complainant told him when the abuse occurred, "Initially, he told me a couple of weeks prior. Then it switched to a couple of days prior of June 5, 2012." Tr. 140, ll. 18 – 21. Sowell said complainant's first report contained discrepancies in the times. Tr. 142, ll. 20 – 24.

When asked about complainant's reputation for truthfulness, Sowell testified that complainant "would lie and manipulate at times" and admitted he would lie in making statements about staff members. Tr. 144, ll. 5 – 24. Sowell described complainant as being untruthful. Tr. 145, ll. 5 – 8. Complainant had made up lies about other residents which had been contradicted by the video surveillance footage. Tr. 145, ll. 9 – 16. The facility's assistant director, Meghann Harvey ("Harvey"), tried to avoid defense counsel's questions about complainant's reputation for truthfulness, initially answering that complainant was "a handful." Tr. 132, ll. 5 – 12. On further cross-examination, Harvey admitted giving a statement to police that complainant was not truthful. Tr. 132, l. 13 – 134, l. 1.

Holder denied abusing complainant. Tr. 240, ll. 15 – 21. Tr. 257, ll. 10 – 20. Holder grew up in Pickens County. Tr.. 224, ll. 1 – 4. He was 33 years old at the time of trial. Tr. 224, ll. 5 – 6. He was married and had five children. Tr. 224, ll. 7 – 16. He began working at the facility in March 2011. Tr. 225, ll. 10 – 15. Each unit in the facility had approximately four staff members supervising 10-12 residents. Tr. 228, ll. 17 – 23. The residents were "under 24 hour watch" and staff members "had to do 15 minute checks of them." Tr. 229, ll. 14 – 18. The residents had "to be accompanied at all times" and the units were not allowed "to mingle together." Tr. 230, ll. 15 – 23.

Holder stated that complainant chose to earn extra "Avalons" by working in the laundry room. Tr. 233, l. 25 – 234, l. 17. Complainant was not allowed to be in the laundry

room by himself. Tr. 235, ll. 9 – 20. On the day of the alleged abuse, Holder showed complainant how to use the washer and dryer. Tr. 234, l. 22 – 236, l. 21. The laundry room was in an area where residents or staff could walk through at any given time. Tr. 240, l. 22 - 241, l. 3. Holder did not remember anything out of the ordinary occurring that night. Tr. 242, ll. 3 – 13.

Regarding the alleged incident in the library, Holder's supervisor asked him to take complainant to the library to get a book. Tr. 244, ll. 8 – 25. The door to the library was in the commons area for the entire facility where people congregated and routinely walked. Tr. 248, ll. 16 – 24. The door to the library was made of metal, heavy, and automatically closed. Tr. 249, l. 21 – 250, l. 2. Complainant looked through the books and magazines. Tr. 251, ll. 17 – 21. Holder was required to supervise complainant because of safety issues. Tr. 250, l. 17 – 251, l. 21. The video showed complainant in the library for approximately 18 minutes and the door opening and closing; Holder testified that he was holding the door during the video. Tr. 253, ll. 10 – 17. Holder denied abusing complainant in the library and took complainant back to his room after he got his books. Tr. 257, l. 10 – 259, l. 29.

The Motion for a Mistrial

After the solicitor finished a line of questioning that implied Holder had asked another staff member about complainant's whereabouts, the following occurred:

MR. TOOKER: And – one moment, Your Honor.

BY MR. TOOKER:

Q. So are you gay?

A. No.

Q. Are you interested in young boys?

A. No.

MR. CANTRELL: Your Honor, again, I object.

THE COURT: I sustain the objection.

MR. CANTRELL: There's no foundation.

THE COURT: I sustain the objection.

MR. TOOKER: Okay. All right.

MR. CANTRELL: Your Honor, could I be heard outside the presence—

Tr. 296, l. 21 – 297, l. 8 (emphasis added). Judge Hayes excused the jury. After the jury left the courtroom, Judge Hayes chastised the solicitor:

> THE COURT: All right. Before I hear from Mr. Cantrell, Mr. Tooker, I'm sure it's just a habit, but you don't have to comment after I ruled. Once I've ruled, that it.
>
> MR. TOOKER: Yes, sir.
>
> THE COURT: So you can't say, okay, or make – anyway, that's enough said. All right.
>
> MR. TOOKER: Yes, sir.

Tr. 297, ll. 11 – 19.

Defense counsel then moved for a mistrial. Tr. 297, l. 20 – 299, l. 5. Defense counsel argued the question was irrelevant and was asked "with no basis, no foundation whatsoever." Tr. 297, ll. 20 – 25. Defense counsel also argued that Holder had been prejudiced by the question:

> And, I guess, to be perfectly candid with Your Honor, we don't know the predisposition of members of the jury. If there is no foundation for such a statement or allegation, we don't know the effect it could have. It was unnecessary. I believe it's grounds for a mistrial.

Tr. 298, ll. 6 – 11. Defense counsel further argued that Holder could not get a fair trial, that there was no foundation for the question, it was prejudicial, "and I don't think it can be undone at this stage." Tr. 298, l. 12 – 299, l. 5.

The solicitor tried to explain his basis for asking the question:

> MR. TOOKER: On direct, Mr. Cantrell elicited from the defendant that he's married, that he does have several children. He's expecting another child. **Candidly, and this is just my personal theory in the case, but it seems to me like these things happened by virtue of some sort of repression.**
>
> **THE COURT: Some sort of what?**
>
> **MR. TOOKER: Repression. Repressed—if these things are true—and I'm not—**
>
> THE COURT: Well, you're not a psychiatrist or a psychologist.
>
> MR. TOOKER: No, I'm not.
>
> THE COURT: And have you had your theory [vetted] by someone who has expertise to tell you whether you are going down the right rabbit trail or not?
>
> **MR. TOOKER: Absolutely not, sir.** But I—again, ultimately, what we have got to do is make our case in close—

Tr. 299, ll. 7 – 24 (emphasis added). When asked by Judge Hayes for his good faith basis to ask the question "other than your theory of some kind of repression," the solicitor stated it was because of Holder's responses to defense counsel's standard background questions about whether he was married and had children. Tr. 300, ll. 3 – 21.

After this response by the solicitor, the trial judge ruled on the defense's motion for a mistrial:

> THE COURT: Well, I think-- I think it was an inappropriate question, quite candidly, **because there is nothing without foundation to throw that in. It is – it is just inappropriate.** I'm not going to go any further than that.

> However, I do not feel that it manifests a necessity to grant a mistrial. I'm going to ask the jury to disregard that. **If we – if we have another episode like that, then we will bring this 2 ½ day – or 2 day trial to a screeching halt.** And I think I have said enough on that, too. I tend to ramble. I think I have rambled enough. So I'm not going to grant it. I don't think it manifests the necessity to grant a mistrial.

Tr. 300, l. 22 – 301, l. 10 (emphasis added). Judge Hayes then stated that "even though the defense has not requested it, I want the record be clear that I'm doing this sua sponte, to give the correct – curative instructions and we'll proceed." Tr. 301, ll. 11 – 14. When the jury returned, Judge Hayes told them to disregard the question and the answer. Transcript 301, l. 18 – 302, l. 6.

Discussion

The trial court should have granted a mistrial because of the solicitor's irrelevant and inflammatory appeal to stereotypes about homosexuals. Homosexuals have a long history of being discriminated against, both in society and in the law. See Obergefell v. Hodges, 135 S.Ct. 2584, 2596 (2015). In Obergefell, the Court recognized that this prejudice would continue when it stated that "it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." Id. at 2607. Writing with a practical eye after the Obergefell decision, a practitioner in Wyoming advised that, "Discomfort with or prejudice against lesbians and gay men is a fact of life within almost any jury pool." John D. Rawls, Practical Effects of the Gay Marriage Opinion, 38 Wyo. Law. 52 (Oct. 2015).

Juror prejudice is especially present in child sexual assault cases. See Tisha R. A. Wiley, Bette L. Bottoms, Effects of Defendant Sexual Orientation on Jurors' Perceptions of Child Sexual Assault, 33 Law & Hum. Behav. 46 (Feb. 2009). In Professors Wiley and Bottoms' study, "Jurors made more pro-prosecution decisions in cases involving a gay

versus straight defendant, particularly when the victim was a boy." Id. at 46. The professors noted that "One stereotype about gay men generally is that they are oversexed, predatory child molesters who are drawn to boys in particular." Id. "Surveys reveal that people presume a link between homosexuality and pedophilia." Id. at 47. "[I]n one survey, 30% of registered voters endorsed a statement that 'typical' behavior for gay men included trying to 'take advantage sexually of boys and young men." Id. After their study, the professors reported that their "data suggest that compared to straight defendants, defendants perceived to be gay face unfair presumptions of guilt in child sexual abuse cases." Id. at 55.

As the trial judge recognized, the solicitor's question was irrelevant and "without foundation." Tr. 300, l. 22 – 301, l. 14. In a Missouri sexual assault case, the state introduced evidence the defendant was a homosexual. State v. Ellis, 820 S.W.2d 699, 701-02 (Mo. Ct. App. 1991). The court held, "The state attempts to justify the testimony regarding homosexuality and the earlier incident with Burks on the basis that it establishes a common plan and a general proclivity to commit the offense." Id. at 702. "To the extent this contention is based upon the proposition that homosexuality *per se* establishes a propensity to engage in sexual activities with children under the age of consent, we reject it out of hand." Id. "To allow its injection into the trial here was an attack on the character and reputation of the defendant which character and reputation he had not put into issue." Id.

In State v. Blomquist, 178 P.3d 42, 50 (Kan. Ct. App. 2008), the Kansas Court of Appeals reversed because of the prosecutor's "appeals to passion, prejudice, and fear." The court criticized the State's argument because it assumed "that a sexual desire for children is among those desires which define a homosexual orientation." Id. at 49. The court quoted

extensively from a video recording of the police's interrogation of the defendant during which the officer repeatedly asked the defendant if he was gay. Id. at 47. Just as the prosecutor's strategy of exploiting bias against gay people was rejected in Kansas, it should be rejected here.

Here, the solicitor intentionally tried to link homosexuality with pedophilia with the timing of his questions. Tr. 296, l. 21 – 297, l. 1. Immediately after asking Holder if he was gay he asked him if he was "interested in young boys." Tr. 296, l. 21 – 297, l. 1. The transcript indicates that the solicitor paused before asking his questions, demonstrating a deliberate strategy. Tr. 296, l. 21 – 297, l. 1. Furthermore, the solicitor's explanation for asking the question—his theory of "repression"—confirms that his strategy was to show that because Holder must be a "repressed" homosexual, it followed that he was more likely to molest children. Tr. 299, l. 7 – 300, l. 21. The solicitor's appeal to prejudice was also evident when he explained that he needed to rebut the notion that Holder was heterosexual and therefore could not have abused complainant. Tr. 300, ll. 11 – 21.

The trial judge correctly realized the irrelevance and highly prejudicial nature of the solicitor's questions, but erred in not granting a mistrial. See Rules 401, 403, SCRE. Whether the prosecution intentionally elicits inadmissible evidence is a factor the Court considers in determining whether to grant a mistrial. State v. Ferguson, 376 S.C. 615, 619, 658 S.E.2d 101, 103 (2008). In State v. Parker, 391 S.C. 606, 609, 707 S.E.2d 799, 800 (2011), the trial court granted a mistrial in part based on the solicitor's playing of an unredacted videotape containing graphic evidence. Id. The parties previously agreed to redact the videotape, but claiming "inadvertence," the solicitor played the unredacted

version for the jury. Id. In this case, the solicitor asked the inflammatory questions after a deliberate pause.

In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the defendant asked for a mistrial after the prosecutor elicited character evidence. The Court reversed and granted the defendant a new trial, stating that "the testimony elicited had the effect of placing the bad character of the defendant in issue when she herself had not placed her good character in issue." Id. at 60, 249 S.E.2d at 161.

As argued by defense counsel that the prejudicial effect could not be "undone," the trial judge's decision to give a "sua sponte" curative instruction was insufficient to cure the prejudice caused by the solicitor's deliberate insertion of the spectre that Holder might be a homosexual and therefore must be a child molester. An analogous case demonstrating that the prejudice could not be cured is State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998). In Nelson, evidence such as the defendant's membership in the "Punky Brewster" fan club was admitted by the State to show that he was a pedophile. Nelson at 4-5, 501 S.E.2d at 717-18. The Court held the evidence was "clearly inadmissible" as propensity evidence and reversed. Id. at 6-7, 501 S.E.2d at 718-19.

The rule against inadmissible propensity evidence about the defendant's character from Nelson applies to this case. The solicitor implanted in the jury's minds that Holder might be gay and therefore must also be attracted to young boys. Solicitors are bound by rules of fairness and they cannot ask questions or make arguments calculated to arouse a juror's passions or prejudice. Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

The solicitor again alluded to the theme of homosexuality in his closing argument when he claimed that complainant's version was believable because he admitted he ejaculated. Tr. 332, l. 11 – 333, l. 9. The solicitor argued that complainant was credible because if he had been making up the story, he would have spun the story to show he was not gay. Tr. 332, l. 11 – 333, l. 9. Speculating on what complainant might have said, he told the jury, "You're going to say, yeah, he tried to do these things to me. **I was like, whoa, Bro, I'm not into that.** That's not what I'm about. **That's not cool, right?**" Tr. 332, l. 11 – 333, l. 9 (emphasis added).

The State rushed this case to trial over appellant's request for a continuance because the solicitor had "significant concerns about my ability to ensure the appearance of the victim for another trial." Tr. 17, ll. 13 – 21. The solicitor did not believe complainant would appear even if served with a subpoena. Tr. 17, ll. 20 – 21. Both the director and the assistant director of the facility admitted that complainant had a reputation for being untruthful. Tr. 145, ll. 5 – 8. Tr. 132, l. 13 – 134, l. 1. The State also tried to call as a witness another resident from the facility who would claim that Holder abused him, but Judge Hayes found the boy's credibility lacking and would not allow him to testify. Tr. 198, l. 7 – 215, l. 11.

The State's injection of the notion that Holder might be gay and therefore was sexually attracted to young boys was irrelevant and highly prejudicial. The trial judge erred in not granting a mistrial. Holder could not receive a fair trial after the solicitor forced him

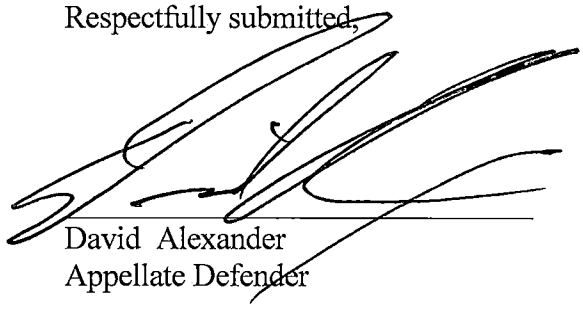
to deny he was gay and to deny he was sexually attracted to children.[1] This Court should reverse and remand Holder's case for a new trial.

[1] In assessing whether Holder's trial was fair, this Court can also note that he received the erroneous jury charge that "the testimony of the victim need not be corroborated." Tr. 348, ll. 3 – 6. The Supreme Court recently confirmed that giving this charge is an unconstitutional comment on the facts. State v. Stukes, Op. No. 27633, Shearouse Adv. Sheet No. 18 (May 4, 2016). As in Stukes, this charge was highly prejudicial in this case because both parties repeatedly emphasized that the entire case revolved around complainant's credibility.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and the case remanded for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of May, 2016.

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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 J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Jonathan Holder, #364105, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 6th day of May, 2016.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of May, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.