STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-001185

THE STATE,

Respondent,

v.

JONATHAN MATTHEW HOLDER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

The trial court did not abuse its discretion by declining to grant a mistrial under the circumstances of Appellant's case because the challenged portion of the assistant solicitor's cross-examination of Appellant did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole, and any prejudice that could have resulted from those remarks was eliminated through the issuance of a curative instruction to the jury.

STATEMENT OF THE CASE

During its June 2013 term, the Pickens County Grand Jury indicted Appellant Jonathan Matthew Holder for second-degree criminal sexual conduct with a minor and third-degree criminal sexual conduct with a minor following an investigation into allegations Appellant sexually assaulted a minor resident at an inpatient treatment center where he worked. On May 20, 2015, Appellant proceeded to a jury trial before the Honorable John C. Hayes, III. On May 21, 2015, the jury convicted Appellant of second-degree criminal sexual conduct with a minor and third-degree criminal sexual conduct with a minor. The trial court sentenced Appellant to concurrent sentences of ten years' imprisonment for each conviction. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

On October 13, 2011, Victim, a fifteen-year-old ward of the State,[1] was admitted to Hampton Psychiatric Residential Facility (hereinafter "Hampton"), an inpatient treatment center for minors with psychological, behavioral, and other mental health concerns, to address his on-going behavioral problems. (Tr. 60-62, 73, 98, 100, 132, 135, 137, 141-42). Hampton was designed to care for up to fifty-two boys at a time; the facility was operated by more than eighty employees called direct care staff. (Tr. 73-74, 100, 141). Direct care staff was responsible for resident care, including preventing the residents from harming themselves or others, assisting with their basic needs, and rewarding or punishing the residents. (Tr. 101-02, 136). Appellant was a direct care staff employee at Hampton while Victim resided there. (Tr. 76, 135-37, 225-27). Hampton provided the residents with bare essentials, but well-performing residents were able to do chores and other tasks to earn Avalons, an in-house currency residents could use to purchase special items. (Tr. 74-75, 137-38, 141).

Hampton was equipped with an extensive camera system throughout the facility, but there were several locations without cameras, including the library, the laundry room, and portions of the nurse's station. (Tr. 104-05, 108, 140). Direct care staff was advised to remain on-camera at all times and to avoid being off-camera with residents. (Tr. 108, 129, 231). Additionally, Hampton protocol required all doors to remain open. (Tr. 128). This policy was for the protection of both residents and direct care staff. (Tr. 108-09)

In late spring of 2012, Victim was progressing well in the Hampton's program and was able to do extra chores to earn Avalons. (Tr. 74, 132, 137, 290). One particular evening, Victim asked to do laundry to earn Avalons. (Tr. 234-35). Pursuant to Hampton's policy, a direct care

[1] Victim had been in the custody of the Department of Social Services since his parents' rights were terminated when he was twelve years old. (Tr. 98).

staff member was required to accompany him while he completed his chores and Appellant was tasked with assisting Victim in the laundry room, a small area not equipped with cameras. (Tr. 77, 108, 122, 140, 235-37). While in the laundry room with the door shut, Appellant made comments comparing the size of his genitalia to a box of laundry detergent. (Tr. 77-78). Appellant then showed Victim his penis and asked Victim to show him his penis. (Tr. 78). Appellant and Victim touched each other's genitals for a few minutes. (Tr. 78-79). The entire encounter lasted approximately thirty minutes. (Tr. 79).

Later that same evening, Appellant was monitoring Victim as he cleaned the nurse's station. (Tr. 80-81). While Victim was cleaning a back room out of camera view, Appellant touched Victim's genitals and asked Victim to put his mouth on Appellant's penis. (Tr. 80-81, 90-91). Victim declined and moved away from Appellant. (Tr.80-81). The encounter lasted approximately ten minutes and occurred when the on-duty nurse left the station. (Tr. 81, 91).

Another evening shortly thereafter, Victim requested to retrieve a book from the library and Appellant was asked to accompany Victim to the library. (Tr. 81, 244-45). Appellant, who had brought a large pizza into work that evening against Hampton policy, gave Victim a few slices of pizza to eat while on the way to the library. (Tr. 84-85, 246-47). It took Appellant and Victim a few minutes to walk to the library, a small room without any windows and one door that opened to a common area. (Tr. 81-82. 86-89, 245, 249-50). Once inside the library, Appellant left the door cracked and stood inside the library with Victim. (Tr. 81-82). Appellant instructed Victim to masturbate and Victim complied while Appellant watched. (Tr. 82-83). Appellant then shut the door completely and performed fellatio on Victim until he ejaculated. (Tr. 83). Following the assault, Victim grabbed a book and went back to his room. (Tr. 83).

After the abuse, Victim began acting out aggressively, including destroying property around the facility. (Tr. 83-84). A few days later, Victim disclosed the abuse to Kevin Sowell, the director of Hampton. (Tr. 83, 135, 138). Victim attributed the decline in his behavior to anger over the abuse and frustration over his perception that no one believed he was abused. (Tr. 83-84). Victim remained at Hampton for a few months following the abuse. (Tr. 84, 137).

Following Victim's disclosure, Sowell began an internal investigation into Victim's abuse allegations, which included looking at camera footage from the locations where Victim alleged Appellant had sexually abused him. (Tr. 138-40). The various cameras through Hampton showed Appellant and Victim alone and off-camera during the periods Victim alleged he was sexually abused by Appellant. (Tr. 63, 102-04, 108-12, 121-24, 138-40). The allegations were eventually reported to DSS, who informed the Pickens City Police Department. (Tr. 59-60). The case was assigned to Detective Samuel Byers, who interviewed Victim three times. (Tr. 59-61). Detective Byers also watched video footage from Hampton and reviewed a statement made by Appellant. (Tr. 61-63). Following his investigation, Detective Byers sought and obtained warrants for Appellant's arrest. (Tr. 63). Appellant was arrested and indicted for second-degree criminal sexual conduct with a minor and third-degree criminal sexual conduct with a minor.

Appellant proceeded to a jury trial on May 20, 2015. During its case-in-chief, the State presented testimony from Detective Byers, Victim, Sowell, Victim's DSS caseworker Johniece Wofford, and Hampton's Assistant Facility Director Meghann Harvey. The State also presented Shauna Galloway-Williams, who was admitted as an expert in the field of child abuse disclosure dynamics and who testified about delayed disclosure, risk factors for sexual abuse, and grooming of victims. (Tr. 147-94). Additionally, the State presented and published to the jury the video

footage from Hampton showing Appellant and Victim alone, often with the door shut, in the laundry room, nurse's station, and library. (Tr. 102-04, 108-12, 121-24, 138-40).

Appellant testified in his defense and denied abusing Victim. (Tr. 223-64, 268-96, 301-08). Appellant, who was thirty-three years old at the time of trial, testified he began working at Hampton as direct care staff in March of 2011. (Tr. 224-25). He testified he had worked in Victim's unit previously and was familiar with Victim. (Tr. 227, 232-33). He testified he would occasionally accompany Victim while he did chores to earn Avalons, something he also did with other residents. (Tr. 233-34). Appellant testified that although Hampton policy was to remain on-camera at all times with residents, it was impossible to stay within the view of a camera at all times and staff was allowed to go off-camera if necessary to care for or supervise a resident. (Tr. 231-32). Appellant testified he accompanied Victim one evening when Victim was doing laundry and he was unable to leave Victim alone at any point due to risks associated with the chore, including electrical and chemical risks. (Tr. 234-35). He testified nothing inappropriate occurred while he assisted Victim with the laundry. (Tr. 240).

Appellant testified he also took Victim to the library one evening to retrieve a book at the request of his supervisor. (Tr. 244-45). He testified he brought a pizza in to share with residents and fellow staff that evening, which he testified was a common practice despite formally being against Hampton policy, and he gave Victim pizza because Victim asked for some. (Tr. 246-48). He testified the library door was heavy and automatically shut if he did not hold it open. (Tr. 249-50). He testified he tried to hold the door open the entire time, but allowed it to shut briefly when he was helping Victim select a book or keeping him separated from other residents. (Tr. 254-56). Appellant insisted nothing inappropriate happened between himself and Victim in the

library. (Tr. 257). He similarly testified nothing inappropriate happened when he assisted Victim in cleaning the nurse's station. (Tr. 258-59).

During the cross-examination of Appellant, the following exchange occurred between the assistant solicitor and Appellant:

> Q. So are you gay?
>
> A. No.
>
> Q. Are you interested in young boys?
>
> A. No.

(Tr. 296-27). Defense counsel objected and the trial court sustained his objection. (Tr. 297). Defense counsel then asked to be heard outside the presence of the jury. (Tr. 297). Once the jury cleared the courtroom, defense counsel moved for a mistrial, arguing the line of questioning was irrelevant, without foundation, and prejudicial. (Tr. 297-98). The assistant solicitor responded the line of questioning was in reply to defense counsel's questioning about Appellant's marital status and number of children, which he theorized "revealed or developed that he is a heterosexual." (Tr. 299-300). He elaborated his theory of the case was that Appellant was a repressed homosexual. (Tr. 299-300).

After hearing from both parties, the trial court denied Appellant's motion for a mistrial. (Tr. 300-01). The trial court stated:

> 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 two and a half day—or two 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.
>
> I will give, even though the defense has not requested it, I want the record to be clear that I'm doing this *sua sponte*, to give the correct—curative instructions and we'll proceed.

(Tr. 300-01).

When the jury returned to the courtroom, the trial court issued the following instruction:

> Members of the jury panel, shortly before you went out, the—Mr. Tooker asked the witness whether or not he was gay. That was not an appropriate question. There is no evidence in this record to support that question. The question is not relevant—the question nor the answer.
>
> So please disregard the fact that the question was asked. Mr. Holder answered it no, so you can disregard that, too. But just disregard—that's not an issue in this case to any degree whatsoever. So disregard the fact that that question was asked. You may proceed.

(Tr. 301-02). The assistant solicitor finished his cross-examination without incident and defense counsel re-examined Appellant before resting his case.

ARGUMENT

The trial court did not abuse its discretion by declining to grant a mistrial under the circumstances of Appellant's case because the challenged portion of the assistant solicitor's cross-examination of Appellant did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole, and any prejudice that could have resulted from those remarks was eliminated through the issuance of a curative instruction to the jury.

Appellant contends the trial court erred by denying his motion for a mistrial following the assistant solicitor's line of questioning about his sexuality and interest in young boys. Specifically, Appellant complains the questions were irrelevant and highly prejudicial and avers the assistant solicitor deliberately intended to appeal to the stereotypical fallacy that homosexual males prey upon young boys, thereby irreparably tainting the jury. As a result, Appellant asserts the trial court's failure to grant defense counsel's mistrial motion and immediately abort the trial abridged his constitutional right to have his case decided by a fair and impartial jury.

Contrary to Appellant's contentions, Appellant's right to a trial by a fair and impartial jury was not adversely impacted by the assistant solicitor's line of questioning because the trial court promptly cured any possible prejudice to ensure the assistant solicitor's line of questioning did not impact the impartiality of the jury. Furthermore, the trial court determined the impartiality of the jury was not adversely impacted by the challenged line of questioning, and the court's determination in that regard was supported by the evidence presented during trial. Under those circumstances, the trial court did not abuse its broad discretion in refusing to grant the extreme measure of a mistrial in Appellant's case. Appellant's convictions should be affirmed.

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Significantly, a decision as to whether to grant or deny a motion for mistrial rests within the sound discretion of the trial court, and a trial court's ruling in regard to a mistrial motion will **not** be disturbed on appeal absent a prejudicial abuse of

discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000); see State v. Coaxum, 410 S.C. 320, 331, 764 S.E.2d 242, 247 (2014) ("[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion."); State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." (citations omitted)). Abuses of discretion occur where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see Harris, 340 S.C. at 63, 530 S.E.2d at 627 ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). That right guarantees to a defendant a trial by a panel of impartial, indifferent jurors. State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 633 (Ct. App. 2008). Importantly, it is the duty of the trial court to ensure a jury comprised solely of fair, impartial, and unbiased jurors ultimately decides a defendant's case. State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998). However, the "[g]ranting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." State v. Ferguson, 376 S.C. 615, 618–19, 658 S.E.2d 101, 103 (Ct. App. 2008) (citing State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct.App.2007)); see also State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009) ("The granting of a motion for a mistrial is an extreme measure that should only be taken

if an incident is so grievous that the prejudicial effect can be removed in no other way." (citations omitted)).

In the case at bar, Appellant was not entitled to a mistrial because the trial court's curative instruction sufficiently cured any error or potential prejudice. Immediately following the assistant solicitor's questions about Appellant's sexuality and interest in young boys, defense counsel objected, the trial court sustained the objection, and the jury was quickly removed from the courtroom. (Tr. 296-97). After the jury was removed, defense counsel moved for a mistrial, citing a lack of foundation and relevancy. (Tr. 297-300). Defense counsel also noted the "predisposition of the members of the jury" and the possible "effect" of the questioning was unknown and could potentially be prejudicial. (Tr. 298-99). After listening to the assistant solicitor's response,[2] the trial court admonished the assistant solicitor and cautioned him against asking any more questions without proper foundation. (Tr. 299-301). The trial court then denied defense counsel's motion for a mistrial based on a lack of manifest necessity. (Tr. 301). The trial court elected to *sua sponte* give a curative instruction. (Tr. 301). As soon as the jury returned to the courtroom, the trial court instructed the jury that the questions were irrelevant, inappropriate, and must be disregarded entirely. (Tr. 301-02).

"It is well known '[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.'" Harris, 382 S.C. at 119, 674 S.E.2d at 538 (quoting State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005)). In Harris, the assistant solicitor improperly asked a witness whether the defendant had ever hit her. Harris, 382 S.C. at 119, 674 S.E.2d at 538. Defense

[2] Appellant cites to the assistant solicitor's comments regarding his theory of the case—that Appellant was a repressed homosexual male—in support of his argument that he was irreparably prejudiced. However, these comments were made **outside** the jury's presence and this "theory" was never presented to the jury or mentioned in the State's closing argument.

counsel immediately objected and moved for a mistrial. Id. The trial court denied the mistrial motion but gave the jury the following curative instruction, "An objection was raised as to any hitting or spanking of the young man that was on the witness stand or the other children. I sustained the objection and I ask that you disregard the question that was raised by [the State]." Id. On appellate review, this Court determined "any alleged error was cured" by the trial court's curative instruction, noting the instruction "explained to the jury they were not allowed to consider the question in their deliberations" and specifically instructed the jury to disregard the question. Id.

The present case is analogous to Harris. In both cases, the trial court swiftly issued a curative instruction to the jury explicitly stating the line of questioning was improper and the jury must disregard it entirely. Therefore, any error in the present case was cured by the trial court's curative instruction. Appellant was not entitled to a mistrial and the trial court did not abuse its discretion in denying Appellant's mistrial motion.

Despite the trial court's curative instruction, Appellant maintains he was nonetheless entitled to a mistrial because the prejudicial effect could not be cured. In support of this argument, Appellant cites to State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998), a case where the South Carolina Supreme Court reversed and remanded Nelson's convictions for four counts of first-degree criminal sexual conduct with a minor and four counts of lewd act with a minor, finding that numerous children's toys, photographs, videos, and other evidence tending to depict Nelson as a pedophile were improperly admitted as character evidence. Id. at 6, 501 S.E.2d at 719.

Despite Appellant's attempts to draw parallels between the two cases, Appellant's case is readily distinguishable from Nelson. In Nelson, the trial was rife with evidence of Nelson's

infatuation with young brunette girls of similar appearance to the victim, including his membership in a "Punky Brewster" fan club. Id. at 4-5, 501 S.E.2d at 717-18. In the present case, the assistant solicitor asked two brief questions in succession, amounting to less than a minute of the two-day trial. Furthermore, there was no further mention of Appellant's sexuality during the rest of the trial including in the State's closing argument. Therefore, any potential prejudice was minimal and was cured by the trial court's curative instruction. Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment and conviction of the lower court.

Respectfully submitted,

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9/20, 2016

STATE OF SOUTH CAROLINA
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APPEAL FROM PICKENS COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-001185

THE STATE,

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JONATHAN MATTHEW HOLDER,

Appellant.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
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I further certify that all parties required by Rule to be served have been served.

This 20th day of Sept., 2016.

Megan Harrigan Jameson

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September 20, 2016

David Alexander, Esquire
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RE: State v. Jonathan Matthew Holder – Appellate Case No. 2015-001185

Dear Mr. Alexander:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Megan Harrigan Jameson
Assistant Attorney General
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MHJ/

Enclosures

cc: The Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services