STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2015-001436

The State, Respondent,

vs.

NAKIA KARREIM JOHNSON, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Kershaw County Grand Jury returned true-billed indictments against Appellant for criminal sexual conduct (CSC) with a minor in the first degree, CSC with a minor in the second degree, and committing a lewd act on a child. (Indictments; R. 526-529). Appellant proceeded to trial from June 22-26, 2015, in front of the Honorable Doyet A. Early, III. The jury found Appellant not guilty of CSC with a minor in the first degree, guilty of CSC with a minor in the second degree, and guilty of committing a lewd act on a child. (T.634-635; R. 513-514). Judge Early sentenced Appellant to twenty years for CSC with a minor second degree and fifteen years for committing a lewd act; the sentences are concurrent. (T.642; R. 521).

ARGUMENT

I. The trial court did not err in denying Appellant's motion for a mistrial because the expert's testimony did not constitute impermissible bolstering.

Appellant contends the trial court erred in admitting testimony by the State's expert witness regarding the reaction of family members of victims of child sexual abuse. The testimony by the expert did not constitute impermissible bolstering. The trial court properly denied the motion for a mistrial.

A trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

In addition, the admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

Qualification of a witness as an expert and the subsequent admission of that witness's testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499 (2013). "For an expert to comment on the veracity of a [victim's] accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This Court recently stated:

> "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013). Any time an expert testifies or provides evidence which supports the underlying charge levied by the victim, or corroborates other evidence; it does not result in improper or impermissible bolstering or

vouching. It is only when the testimony invades the province of the jury and makes a comment on the credibility or veracity of a witness that the testimony becomes improper.

> Exposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse can provide jurors with possible alternative explanations for complainant actions and statements that are, to average laypeople, "superficially bizarre," "seemingly unusual," "seemingly inconsistent," or normally attributable to "inaccuracy or prevarication." Thus informed, the jury will be better able to perform its fact finding duty.

Wheat v. State, 527 A.2d 269, 273 (Del. 1987). This is the same kind of testimony provided by the State's expert to explain the "seemingly unusual" fact that others did not recognize the fact the child was being abused until accidentally overhearing a phone conversation. The testimony did not indicate the mom or child was telling the truth, instead it merely explained a phenomenon that occurs that may be outside the understanding of the average juror.

Additionally, this case is clearly distinguishable from State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). In Anderson, the expert witness also served as the forensic interviewer and met with the child. The expert was well aware of the child's testimony and statements regarding how the abuse occurred and the ramifications of the abuse through the interview with the child. When the expert testified regarding typically admissible behaviors of a child sexual abuse victim, the testimony of tailored to meet the statements and interview of the child victim. As a result, the Court found her testimony vouched for the minor when she testified only to those characteristics which she observed in the minor. Id. at 219, 776 S.E.2d at 79.

The State followed the "better practice" outlined in Anderson during this case and called a separate "independent" expert to testify regarding behavioral characteristics and family dynamics. See id. at 218, 776 S.E.2d at 79. The expert did not track the testimony of the child because of having been privy to the experiences and statements of the child. Instead, the expert

testified to a portion of the family dynamic which was also seen in the instant case. Her testimony complied completely with the requirements and admonishments of Anderson.

Finally, the testimony was in direct response to questions of the victim's mother which opened the door to the testimony. "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); see also, State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) (same).

In the following colloquy, Appellant's counsel clearly tried to infer that the story was not true because no one had noticed anything prior to the phone conversation overheard:

> Q. I just want to establish, Nakia [Appellant] was a good stepfather to [victim]?
> A. Yes, he was.
> Q. Okay. And he was a good provider and good person to you?
> A. Yes, he was.
> Q. Okay. And up until the time you got this phone call, you had no indications of anything like this?
> A. No, I hadn't.

(T.256; R. 135). The colloquy continued to try and paint Appellant as supportive of the victim and her family. (T.257; R. 136). As a result, Appellant opened the door to the State's expert's testimony regarding whether the mother would have any indications something was occurring between Appellant and the victim.

Accordingly, because the testimony was properly admitted, was not impermissible bolstering, and was in direct response to questions asked by Appellant's counsel, the trial court did not err in denying Appellant's motion for a mistrial.

II. The trial court did not err in denying Appellant's motion for a mistrial because the comment by the forensic interviewer did not warrant the extreme consequence of a mistrial.

Appellant maintains the trial court erred in failing to grant his motion for a mistrial after the forensic interviewer commented on the fact the child was told to tell the truth during the interview. Even if error, the single comment in the midst of a longer statement regarding the interview was harmless, or at most minimally prejudiced Appellant, and certainly did not warrant the extreme remedy of a mistrial.

A trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)). "The granting of a motion for a mistrial

is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way." State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011).

The incident in question did not inject such prejudice into the proceeding as to warrant the extreme measure of a mistrial. The prosecutor asked: "How did you begin the interview?" The forensic interviewer responded:

> I interviewed by introducing myself, and very briefly in the beginning, we talk about just general topics. We check and see if they're aware that this is being recorded. We provide a couple of semi-instructions just about how to respond if they don't know something so that they're not trying to provide information to us just to try to provide us information or to guess.
>
> So we encourage them to -- if they don't know something, to say they don't know; if they don't understand, to say I don't understand and not to guess. We also ask in the beginning if will they tell the truth during the interview process.

(T.353; R. 232). It was at that point that Appellant's counsel indicated he had a motion and made his motion for a mistrial. The concept of the child being asked to tell the truth was never mentioned again during the trial.

While the comment was arguably improper under State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) and State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), the trial court correctly concluded the prejudice to Appellant by the comment was minimal and did not warrant a mistrial. The trial court analyzed the comment in light of the Supreme Court's holding in Kromah. (T.355-356; R. 234-235). The court concluded: "And I think the context in which he has testified about the truthful statement would not taint it so as to make it inadmissible." (T.357; R. 236). The court further indicated:

> Well, the question was asked: Tell us generally how you conduct the interview. And he started off by telling us a number of things, including encouraging her to tell the truth, is basically what he

> said. I don't find that to be more prejudicial than probative, so I'm going to allow him to continue on with his testimony.

(T.358; R. 237). As the trial court specifically concluded, the prejudice of the comment did not rise to the level necessitating a mistrial.

Further, this is not a case that relies entirely on the credibility of the child victim as the only evidence of the ongoing sexual abuse. The victim's mother indicated she and Appellant talked by phone several times after he left the house with the victim. (T.239-240; R. 118-119). At one point, the victim's mother received a telephone call from Appellant. When she answered she said hello and could hear Appellant talking but he couldn't hear the victim's mother. (T.240; R. 119). She testified she heard Appellant tell the child victim "you know I want to nut in you, but I can't." She then heard him say "you know why?" The child victim's response was "I'll get pregnant." Appellant then asked the child victim if she missed him and asked her how she wanted to do it; does she want to get on top or does she want him to get on top. The child victim indicated she wanted Appellant on top. (T.240; R.119). The testimony clearly provides additional evidence beyond just the testimony of the child victim and corroborates the child victim's story regarding one incident of the abuse. (T.182-186; R. 61-65).

Additionally, the single innocuous comment was unlikely to sway the jury or impact the jury's verdict in this case. State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."). In the particular instance, the child victim was duly sworn in front of the jury. This oath requires the telling of the truth. See Rule 603, SCRE ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness'

mind with the duty to do so."). The child's testimony at trial was not significantly different from the information provided in the forensic interview. (State's Exhibit 3). As a result, the jury could not have been swayed by the innocuous statement that she was asked to tell the truth. The trial court did not abuse its discretion in denying the motion for a mistrial because any prejudice resulting from the comment by the forensic interviewer did not rise to the grievous level necessitating the extreme measure of a mistrial.

III. This Court should not grant a new trial based on cumulative error.

Appellant contends this Court should grant a new trial based on the cumulative error doctrine based on the alleged prejudice resulting from the first two issues he raised. He never moved for a new trial on the basis of the cumulative error doctrine so the issue is not preserved for review on appeal. Further, there was not cumulative error in this case and any prejudice resulting from the testimony of the two witnesses was not such that this Court should use the cumulative error doctrine as a means of circumventing the preservation or waiver rules.

First, Appellant never raised the cumulative error doctrine to the trial court. He never raised it during trial or even in a post-trial motion after trial, and as a result, the issue is not preserved for review on appeal. See State v. Beekman, 405 S.C. 225, 236, 746 S.E.2d 483, 489 (Ct. App. 2013) (finding cumulative error doctrine must be raised to and ruled upon by the trial court in order to be addressed on appeal). Appellant seems to be asking this court to completely ignore longstanding preservation and waiver rules, and instead address this issue as plain error. South Carolina has rejected the plain error doctrine and this Court should not entertain it under the guise of the cumulative error doctrine. See e.g., State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.").

Next as discussed above, there is no error in the admission of the testimony of the State's expert witness. No prejudice resulted from the properly admitted testimony. Therefore, it could not have contributed to a level of cumulative error necessitating a new trial. Additionally, the prejudice resulting from the single comment regarding the child being asked to tell the truth

during the interview with the forensic interviewer did not create any substantial prejudice to Appellant. As a result, even if some possible prejudice existed from the expert witness' testimony, the combined effect with the comment by the forensic interviewer does not warrant this Court ignoring the preservation requirements and finding the case should be reversed and remanded for a new trial.

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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September 23, 2016

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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