

9
STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Alison Renee Lee, Circuit Court Judge

ORIGINAL

THE STATE,

RESPONDENT,

V.

AUSTON BREAZEAL

APPELLANT

APPELLATE CASE NO 2016-001780

ANDERS BRIEF OF APPELLANT

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JUN 23 2017

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Appellant's motion for mistrial when the prosecution questioned him about whether he had attended counseling?

STATEMENT OF THE CASE

On June 6, 2016, the Lexington County Grand Jury returned an amended indictment against Appellant Auston Lee Breazeal for criminal sexual conduct with a minor in the first degree. R. 281.

On August 22-23, 2016, Breazeal appeared for trial before the Honorable Alison Renee Lee and a jury. Breazeal was represented by Robert Theodore Williams, Sr., and the state was represented by assistant attorney generals Kinli Bare Abee and David Fernandez. R. 1.

The jury found Breazeal guilty as indicted. R. 271. Judge Lee sentenced Breazeal to the mandatory minimum of twenty-five years incarceration. R. 278.

This appeal follows.

ARGUMENT

The trial court erred in denying Appellant's motion for mistrial when the prosecution questioned him about whether he had attended counseling.

Relevant Facts

The indictment against Appellant Breazeal related to an incident alleged to have occurred when he was sixteen years old against his then four year old cousin, the Minor Child. During an interview of the Minor Child conducted at the Dickerson Children's Advocacy Center, she claimed that Breazeal made her put her mouth on his "pee thing." R. 126, l. 2 – 128, l. 5; State's Ex. 1 (on file with this Court). The Minor Child repeated this allegation at trial but provided little detail other than that it happened at her grandmother's house while other family members were in the home, including her own parents. R. 112, l. 16 – 113, l. 24. Breazeal testified in his own defense. He admitted that the Minor Child had barged in on him in the bathroom once and seen his penis, but denied allegations that he had ever intentionally exposed himself to her or touched her or had her touch him in a sexual manner. R. 190, l. 6 – 194, l. 15; R. 196, l. 5 – 199, l. 16; R. 205, l. 18 – 212, l. 25.

Through the Minor Child's father, Matthew Trey Marsh, the prosecution admitted evidence of what they alleged was a prior bad act by Breazeal toward the Minor Child. *See* R. 37, l. 7 – 42, l. 18. Marsh is also Breazeal's uncle, as he Breazeal's mother are siblings. R. 88, ll. 4-23. Marsh said that one evening in May 2014, he picked Breazeal up while his sister attended an evening class. Marsh, the Minor Child, and Breazeal were all at Marsh's house when Marsh went to use the master bathroom. When he came out, his sister had arrived and was discussing "what had just gone on" with the Minor Child and Breazeal. Marsh did not testify regarding the specifics of what was alleged to have occurred while he was in the bathroom, but

said that it was “sexual in nature.” R. 91, l. 23 – 95, l. 5. After further discussions with the Minor Child, his wife, and his sister, Marsh said that they decided that Breazeal and the Minor Child “should no longer have the opportunity to be left alone with one another.” R. 95, l. 6 – 96, l. 4. They also “agreed that he should seek counseling.” R. 96, ll. 6-7. Marsh said that they did not report the incident to law enforcement because Marsh was “confused about the exact nature of what happened.” R. 96, ll. 8-13. Notably, the Minor Child was never questioned regarding this incident. *See* R. 104, l. 1 – 114, l. 8.

On cross-examination, the prosecutor questioned Breazeal about the incident described by Marsh. Breazeal explained that he did not shut the door completely when he went to use the bathroom and that the Minor Child burst in on him while he was urinating. He pulled his pants up as quickly as he could, but she saw his penis. He said that when they walked into the living room, his mother had arrived and the Minor Child was jumping around saying that she saw his “finger hiney.” R. 196, l. 5 – 199, l. 13. The prosecutor asked Breazeal about whether there were any changes in his life following that incident, initially eluding to any change in his schooling. Breazeal agreed that he stopped being homeschooled and attended a military school from November 2014 until February 2015. R. 199, l. 14 – 200, l. 11. She then asked: “And after this did you go to counseling?” R. 200, l. 12. Breazeal responded: “I did. I actually -- Not after military. Yeah. It was after military school. I went to --.” R. 200, ll. 13-14. Defense counsel objected and asked to take up a matter of law outside the presence of the jury. R. 200, ll. 15-17.

Counsel then made a motion for mistrial, arguing that the prosecutor’s question regarding counseling was aimed at improperly implying that Breazeal acknowledged some sort of sexual misconduct and need for counseling for a sexual problem. R. 200, l. 25 – 202, l. 10. The

prosecutor responded that she questioned Marsh about the “other sort of parameters” that were set after the incident that occurred at his home. She argued:

This is the same line of questioning that I was just asking the defendant about a conversation between his mother and Minor Child and as a result of that things changed in his life. He then was in military school at that point in time and then also sought counseling. It's not a conviction, Your Honor. It's counseling. This was appropriate *Lyle* testimony to bring in this situation and to talk about it and the fact that the defendant sought counseling is just a fact in the case, Your Honor. That this happened and then he went and had counseling after that as a result of the conversation between his mother and the victim's mother, Your Honor. Although, I mean, I hear what Mr. Williams is saying but it's not suggesting an inappropriate result in this case. It's just flat out a fact in this case that after this first scenario, they tried to limit contact. He went to military school and he sought counseling.

R. 202, l. 12 – 203, l. 9. The prosecutor averred that she did not intend to ask any specific questions regarding the nature or duration of Breazeal’s counseling. R. 203, ll. 10-19. Defense counsel responded by analogizing such questioning as similar to eliciting evidence that a defendant refused to give a statement to a police officer. Such evidence would be similar aimed at implying guilt. He argued that “[c]ounseling by necessity indicated that someone had a problem.” R. 203, l. 21 – 204, l. 3.

The trial judge denied the motion for mistrial but agreed that the question as it was phrased was “misleading under the circumstances.” Even so, she found that the testimony was “part and parcel of what was testified to by Mr. Marsh and I think it goes to those particular issues and so it’s relevant.” She further ruled: “I understand what you assert as a characterization of the counseling, but I think the question needs to be phrased differently than the way it is currently phrased.” R. 204, ll. 4-25. When the jury returned, there was no instruction given to them to disregard the question and answer previously given. *See* R. 205, ll. 1-21.

Discussion

The trial judge erred in denying the motion for mistrial where the evidence that Breazeal attended counseling following the filing of a police report related to the instant allegation was not admissible. “The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law.” *State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010). “A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial.” *Id.* “Unfair prejudice means an undue tendency to suggest decision on an improper basis.” *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009).

Rule 407, SCRE, precludes the admission of subsequent remedial measures to prove “negligence or culpable conduct in connection with the event.” Here, the prosecution admitted evidence not only that Marsh and Breazeal’s mother thought that Breazeal needed to seek counseling, R. 96, ll. 6-7; but also that Breazeal actually participated in such counseling following the end of his military school attendance in February 2017. R. 200, ll. 12-14. Notably February 2017 was also when the police investigation began related to the indicted offense. R. 66, ll. 5-8. While the prosecution alleged that Breazeal’s counseling was merely “a fact in this case,” not every “fact” related to a case is admissible before a jury. R. 202, l. 12 – 203, l. 9; *see generally* Rule 401 – 412, SCRE.

Just as defense counsel argued, the implication of such testimony in this case was that Breazeal’s attendance at counseling was evidence that he acknowledged some sexual problem or wrongdoing. Contrary to the trial judge’s ruling, when or whether the defendant attended any type of counseling is not relevant to the determination of whether Breazeal committed the

alleged offense against the Minor Child. *See* Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”). Further, the question asked of Breazeal regarding whether he actually attended counseling was distinct from the testimony elicited from Marsh that he believed that Breazeal should attend counseling. *Compare* R. 96, ll. 6-7, *with* R. 200, ll. 12-14. Thus, defense counsel had not waived any objection to the prosecutor’s question to Breazeal due to his failure to object to Marsh’s testimony.

Ultimately, though the trial judge recognized that the prosecutor’s question was misleading, she did nothing to cure the improper question and testimony already elicited. Thus, the jury was free to consider it as evidence in their deliberations, prejudicing Breazeal. The jury could not help but wonder why Breazeal, who vehemently denied any sexual misconduct, would have submitted himself to any sort of counseling. Thus, the judge’s refusal to grant a mistrial in this case constitutes an abuse of discretion amounting to an error of law and requires reversal.

CONCLUSION

Based on the foregoing, Appellant Auston Lee Breazeal respectfully requests that this Court reverse his conviction and remand his case for a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of June, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Auston Breazeal states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Alison Renee Lee, which was held on August 22-23, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Auston Breazeal.

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Respectfully Submitted,



Laura R. Baer

Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of June, 2017.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Transcript of trial held August 22-23, 2016 (entirety);
- (2) True-billed indictment, amended June 6, 2016; and
- (3) State's Exhibit 1 (child interview).

I certify that this designation contains no matter which is irrelevant to this appeal.

June 23, 2017

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

June 23, 2017.

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

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