

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APR 10 2018
SC 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 Johnson,

Appellant.

PETITION FOR REHEARING

On March 14, 2018, this Court affirmed in part and reversed and remanded in part Appellant's convictions and sentences for lewd act upon a minor and criminal sexual conduct with a minor in the second degree. This Court conflated cases and analysis related to the grant of a mistrial with cases and analysis related to exclusion of evidence. Additionally, this Court overlooked or misapprehended the relevant case law regarding when a mistrial is appropriate, and overlooked or misapprehended the relevant facts in this case which clearly establish insufficient prejudice to warrant the extreme remedy of a mistrial. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the single reference to the child telling the truth was insufficient to warrant a mistrial, and affirm Appellant's convictions and sentences.

Initially, it should be noted Appellant raised the following issue in his Brief of Appellant related to the testimony of the forensic interviewer:

Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony is prohibited by *State v. Kromah* and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

(Br. App. i, 1, 14). As a result, the sole issue to be considered by this Court is whether the trial judge erred in refusing to grant the extreme remedy of a mistrial based on the existence of manifest necessity. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Burris v. Propst Lumber & Logging, Inc., 396 S.C. 85, 94, 719 S.E.2d 695, 700 (Ct. App. 2011) (finding "specific issue is not preserved for appellate review because Employer did not specifically raise this point in its Statement of Issues on Appeal."). Additionally, Appellant specifically concluded his argument on this issue by indicating: "The trial court judge erred by not granting a mistrial, and this Court should order a new trial." (Br. App. 15). As a result, Appellant clearly limited consideration of any error to whether or not the trial court properly denied his request for a mistrial. This Court's analysis should be similarly limited.

"The appellants have the responsibility to identify errors on appeal, not the [c]ourt. . . . As Chief Judge Alex Sanders so aptly stated, 'appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' " Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (last alteration by court) (quoting State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991)). In this case, Appellant has not challenged any ruling of the trial court regarding the exclusion of testimony or the striking of testimony. He does not ask this court to find error in failing to exclude the testimony. He has solely raised an issue related to whether it was error to deny the serious consequence of a mistrial. Any other arguments, whether based on Rule 403, SCRE or other grounds are not

properly raised before this Court and should not have formed the basis for this Court's Opinion. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case); State v. Jones, 344 S.C. 48, 58–59, 543 S.E.2d 541, 546 (2001) (declining to address an issue on appeal because the supporting argument was “so conclusory that it has been abandoned”); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999) (issue is deemed abandoned on appeal if it is argued in a short, conclusory statement without supporting authority). As a result, this Court should reconsider its Opinion, omit any discussion of the exclusion of testimony, and rule solely on the basis of whether the trial court erred in denying the motion for a mistrial.

When the issue is properly reviewed solely through the lens of a mistrial motion, the appropriate standard is whether the trial court committed an abuse of discretion in failing to grant the serious and extreme measure of a mistrial. See State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) (“[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.”). Whether a mistrial is manifestly necessary is a fact specific inquiry. “It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.” State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (citations omitted). This Court ‘favors the exercise of a **wise discretion of the circuit judge** in determining the merits of such motion in each individual case. State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 309 (1976) (emphasis added) (quoting State v. Singleton, 167 S.C. 543, 166 S.E. 725 (1932)). “Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences ‘a feel of the case’ which oftentimes may not be detected from a cold printed record.” State v. Perry, 278 S.C. 490, 494,

299 S.E.2d 324, 326 (1983). This Court's opinion overlooks the substantial deference afforded the trial court in this state's long-standing case law.

The Courts of this state have also recognized that the grant of a mistrial is restricted to only the most serious situations in which there is no other means available to protect the rights of the defendant. "A mistrial should not be ordered in every case where incompetent evidence is received." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). "The grant of a motion for a mistrial is an **extreme measure** which should be taken only where an incident is **so grievous** that the prejudicial effect can be removed in no other way." Id. (citations omitted) (emphasis added). It is for this reason, the Courts have held that trial court's should be reluctant to grant a mistrial. "The power of a court to declare a mistrial ought to be used with the **greatest caution** under **urgent circumstances**, and for very **plain and obvious causes.**" State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) (emphasis added). In reviewing the need for a mistrial and exercising its "wise discretion" a trial court should consider "the character of the testimony, the circumstances under which offered, the nature of the case, other testimony in the case, and perhaps other matters, should be considered." Craig, 267 S.C. at 269, 227 S.E.2d at 309-10.

This Court's Opinion overlooks these clear tenants of case law in its review of the denial of the motion for a mistrial in this case. This Court's opinion indicates the trial court allowed incompetent testimony from the forensic interviewer, and sets forth a near *per se* rule that this should result in a mistrial. Instead, this Court should have determined whether the single, isolated statement which was merely a portion of a long explanation of procedure by the forensic interviewer qualified as a "grievous" incident resulting in "urgent circumstances" necessitating the ending of the trial. The trial court, which should be given extensive deference, clearly and

thoroughly explained the lack of prejudice and the minimal impact had by the testimony. The court specifically found the interviewer did not comment on the believability or credibility of the child. The court concluded: "I think the context in which he has testified about the truthful statement would not taint it so as to make it inadmissible." (R.236). After explaining the statement was made as part of a discussion regarding "a number of things" by the interviewer, the court found it was not sufficiently prejudicial. (R.237). These holdings were overlooked by this Court in ruling that "any mention of the word 'truth' during a forensic interview¹ or during a forensic interviewer's testimony" is sufficient to warrant a mistrial. State v. Johnson, Op. No. 2018-UP-109 (S.C. Ct. App. filed Mar. 14, 2018).

Further, this Court's discussion of the corroborative evidence provided by the child victim's mother provided additional evidence of the fact the single, isolated innocuous comment from the forensic interviewer did not warrant the extreme measure of a mistrial. As this Court noted, the testimony of the mother corroborated many of the facts of the child victim and provided evidence supporting the timing and occurrence of the lewd act committed by Appellant. However, this Court overlooked or misapprehended the significance of the phone conversation the child victim's mother overheard as it relates to corroborating the criminal sexual conduct with a minor charge. The mother overheard Appellant:

At first I couldn't make out what he was saying, but then I heard him say, you know I want to nut in you, but I can't. And I didn't hear anything . Then I heard him say, you know why? And she didn't say anything. He said, do you know why? And she said, because I'll get pregnant. And he asked her did she miss him. She didn't say anything. And he asked her how does she want to do it; does she want to get on top or does she want him to get on top. And I think she said, you on top.

¹ Additionally, it should be noted that neither Kromah nor Anderson have found it error to reference "truth" or show the interviewer asking the child to tell the truth during the playing of the actual forensic interview and the State asks this Court to correct its Opinion to reflect that the only impermissible mention is during the live testimony before the jury and not as part of the video recording.

(R.119). The nature of this phone conversation, which clearly included a discussion of Appellant committing CSC with a minor, provides significant corroboration of the fact Appellant and the child victim had a sexual relationship. The contents of the discussion lend credibility to the child's testimony regarding the CSC with a minor, just as the circumstances of the phone call and the child victim and Appellant leaving lend credibility to the lewd act charge. This Court should find the testimony of the forensic interviewer had minimal impact on the trial and the jury's decision in light of the detailed testimony by the child victim and the corroborative effect of the mother's testimony regarding the overheard conversation.

Additionally, this Court overlooks the highly significant fact that Appellant never requested a curative instruction from the trial court. A mistrial is only appropriate in a circumstance in which no other means may correct the error. In this case, had a curative instruction been requested, it could have cured any possible error in the testimony. Appellant never requested a curative instruction. Accordingly, this Court should find a mistrial was not manifestly necessary in light of the alternative remedies available to Appellant but never requested of the trial court.

As a result, this Court should reconsider its Opinion, find the only issue appropriate for consideration is whether the trial court erred in denying the motion for a mistrial and not any other issue related to the exclusion of evidence because that issue has not be properly raised to this Court, find the testimony did not warrant the extreme remedy of a mistrial, and affirm Appellant's convictions and sentences for both lewd act and CSC with a minor.²

² The State reiterates and includes by reference all arguments made in its Final Brief of Respondent.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court properly denied Appellant's motion for a mistrial, and affirm Appellant's convictions and sentences for both lewd act and CSC with a minor.

Respectfully submitted,

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Attorney General

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ATTORNEYS FOR RESPONDENT

April 10, 2018

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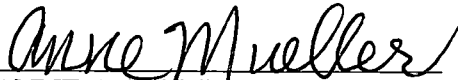
Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 10th day of April, 2018.


ANNE A. MUELLER
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ALAN WILSON
ATTORNEY GENERAL

April 10, 2018

VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Nakia Johnson,
Appellate Case No. 2015-001436

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SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: E. Charles Grose, Jr., Esquire (2 copies enclosed)
Victim's Services (enclosure)