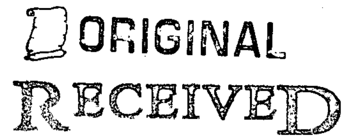
STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



APR 13 2018
SC Court of Appeals

Appeal from Saluda County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTONIO KENYARDO POSEY,

APPELLANT

APPELLATE CASE NO. 2017-000500

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the judge erred by ruling the solicitor's closing argument was not an improper reply argument, and therefore refused to grant the relief of a curative instruction or a mistrial where the solicitor told the jury, not in response to appellant's closing argument, that it had to decide "what crimes would and would not be tolerated," and that "a crime of this nature should shock the conscience of the community," since this appeal to passion and prejudice was fundamentally unfair to appellant who was on trial for a child sex crime, and it also put unfair and improper pressure on the jurors living in the small Saluda community to convict?

STATEMENT OF THE CASE

Appellant was indicted by the Saluda County Grand Jury for the offense of criminal sexual conduct in the first degree. His case was called to trial on February 13, 2017, before the Honorable Eugene C. Griffith, and a jury. David Scott, Nancy Jordan, and Richard Vieth represented appellant. Suzanne Mayes and Sutania Radlein were the assistant solicitors. Tr. 1.

On February 17, 2017, the jury found appellant guilty. Tr. 631, ll. 6-11. Judge Griffith sentenced appellant to forty years imprisonment. Tr. 640, ll. 13-21.

This appeal follows.

ARGUMENT

The judge erred by ruling the solicitor's closing argument was not an improper reply argument, and therefore refused to grant the relief of a curative instruction or a mistrial where the solicitor told the jury, not in response to appellant's closing argument, that it had to decide "what crimes would and would not be tolerated," and that "a crime of this nature should shock the conscience of the community," since this appeal to passion and prejudice was fundamental unfair to appellant who was on trial for a child sex crime, and it also put unfair and improper pressure on the jurors living in the small Saluda community to convict.

Relevant Facts

Appellant Antonio Posey had no prior criminal record. Tr. 637, ll. 3-7. Appellant became the minor girl's "stepfather" when he moved in with her mother when the minor was only three months old. The minor testified appellant began performing sex acts on her when she was seven or eight years old. She admitted that she made the accusation "about the same time that you learned that Antonio was not your biological dad." She also had gotten into trouble in school the day she made the accusations. Tr. 151, l. 23 – 152, l. 5.

The minor maintained that appellant began to have oral sex and sexual intercourse with her when she was almost eight years old. Tr. 93, l. 23 – 94, l. 2; Tr. 95, ll. 4-9. The minor claimed that appellant even had sex with her when her younger sister was in the same bed. Tr. 106, l. 15 – 108, l. 8.

The minor claimed that appellant had sex with her every night or every other night from the time she was eight years old until she was ten years old. Her mother was alleged to be taking a bath in the bathroom right outside the bedroom where she claimed appellant had sex with her, or she was "outside smoking." Tr. 153, ll. 2-22. The minor also maintained that appellant put

his hand down her pants at the kitchen table while her mother was in the same room washing the dishes. Tr. 147, l. 1 – 149, l. 18.

The minor testified that her parents would "split up for a little while" from time to time, and they would date other people. When they would reconcile, the minor said they "fought a lot." Tr. 158, l. 3 – 159, l. 19.

On December 2, 2014, the ten-year-old minor admitted she got in trouble in science class at school that day. She had a homework assignment that she did not complete, and she wrote on the paper "I don't know and I don't care." She also had been "written up" recently for "trashing" another girl's lunch. Tr. 117, l. 3 – 118, l. 7. She was in the fifth grade at the time at Hollywood Elementary School. Her misbehavior was reported to the principal, and to her mother.

When her mother picked her up from school that day, the minor told her mother she did not want to talk about her behavior at school, or talk about anything. Her mother asked her to "write it down" if something was bothering her. The minor then wrote down that she had "been raped," and she claimed "Daddy" was the rapist. Tr. 119, ll. 7-18.

Kelly Morse was the minor's fifth grade science teacher at Hollywood Elementary School. Morse remembered calling the minor's mother because of her misbehavior. Tr. 202, l. 15 – 203, l. 9. Morse recalled that the minor did not come back to school for several days or a week after the day she called her mother. Tr. 203, l. 7 – 205, l. 23.

Captain Toby Horne of the Saluda County Sheriff's Department testified that on December 2, 2014, the same day as the school misbehavior incident, he learned from the school resource officer that the minor and her mother were coming to the police station. The mother and the minor's aunt came into the lobby of the police station at about 4:30 that afternoon as Horne was getting ready to leave for the day. Tr. 374, l. 2 – 376, l. 5. Captain Horne took

possession of the index card upon which the minor had written that she had been raped by appellant. Tr. 375, l. 13 – 378, l. 13.

The Saluda Police Department obtained a search warrant for the home where the minor, her mother, appellant, and her younger sister lived. Tr. 378, l. 14 – 384, l. 16. Two of the items seized pursuant to the search warrant were two pairs of the minor's underwear.

Courtney Thompson, a SLED serologist, testified that saliva was found in the "crotch area" of two pairs of the minor's underwear. Tr. 447, l. 21 – 449, l. 21. Although the minor claimed appellant had sexual intercourse with her the night before when she was wearing the underwear: "I did not find the presence of semen anywhere." Tr. 454, ll. 18-24.

Paul Meeh was the SLED DNA analyst. He analyzed the two pairs of minor's underwear, and DNA samples were taken from appellant and the minor. Meeh testified that on the white underwear he had a "YSTR DNA profile from Antonio Posey," and that the possibility of "randomly selecting an unrelated male individual having a YSTR DNA profile matching that item was approximately one in 3300." Tr. 477, ll. 10-18.

On the other pair of the minor's underwear, Meeh said the "match" was "approximately one in 8600." Tr. 478, ll. 1-25.

The defense case

Appellant presented the testimony of former OB-GYN Wayne Burrows. Burrows had practiced medicine in South Carolina, Georgia, Ohio, and Illinois. Burrows was ultimately recognized as an expert in gynecology and obstetrics. Tr. 497, l. 21 – 504, l. 11.

Burrows examined the photographs from the minor's "rape kit" examination. He concluded: "[T]hose photographs suggest that the child has never been penetrated." Tr. 510, ll. 7-18; Tr. 511, ll. 20-24.

On cross-examination, Burrows said he disagreed with alleged research the solicitor claimed showed the overwhelming majority of children who had been raped still had "normal examinations" when a "rape kit" was done. Tr. 514, l. 9 – 517, l. 25. Burrows said his experience did not support alleged research which allegedly found that "eighty-six percent of confirmed child abuse cases result in normal evaluations." Tr. 517, ll. 21-25.

Appellant Antonio Posey took the stand in his own defense. He confirmed that the minor was three months old when he became her "stepfather." There was other evidence that appellant and the mother never formally married. Tr. 526, l. 10 – 530, l. 12. Appellant Posey said that he loved the minor and he also loved her little sister. Appellant denied that he ever had any sort of sexual activity with the minor. Tr. 528, l. 22 – 531, l. 10; Tr. 533, ll. 20-25.

As to the alleged rape the night before the child made her allegations of long standing sexual abuse, appellant testified that he had sex with the minor's mother, and that everything was normal that night. Tr. 543, l. 24 – 546, l. 9.

"Character for truthfulness"

Although the cross-examination of the minor in this case was normal cross-examination, and her character for truthfulness was not attacked, the judge allowed the solicitor, without objection, to call two witnesses to testify that the minor had a good reputation for truthfulness. This was purportedly done pursuant to Rule 608(a)(2), SCRE. The judge allowed the testimony, stating, "They're [the defense] offered the opportunity to call a witness in opposition to that if there is one."[1] Tr. 358, l. 10 – 359, l. 6. The judge also allowed, in advance of appellant's

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[1] Rule 608 (a)(2), SCRE, provides: "Evidence of truthful character is admissible **only after** the character of the witness for truthfulness **has been attacked by opinion or reputation evidence or otherwise**." (emphasis added). Although the defense here obviously maintained the rape allegations were untrue, the cross-examination of the minor did not attack the minor's character for truthfulness, nor was she otherwise attacked for untruthful character. The misuse of this rule

testimony, that appellant could also call a witness to vouch for his character for truthfulness if he chose to testify.

Tammy Shore, the principal at Hollywood Elementary School, then testified she remembered the minor getting into trouble in science class on the day after she claimed to have been sexually assaulted by appellant. Shore opined the minor's misbehavior was "very out of character for her." Tr. 363, l. 8 – 366, l. 12.

Nikita Robinson was the principal at Saluda Middle School. She testified the minor had a good reputation for truthfulness. Tr. 366, l. 21 – 368, l. 6. Denise Campbell-Gartrell was a teacher at Saluda Middle School. She also testified that the minor had "a good reputation" for truthfulness. Tr. 369, l. 13 – 370, l. 19.

In response, after appellant testified, his aunt, Natasha Jackson, testified that appellant had a good reputation for truthfulness and honesty and that she would believe him under oath. Tr. 562, l. 1 – 563, l. 14.

Following this mini "trial within a trial" about reputations for truthfulness of the minor and appellant, closing arguments were held. The solicitor would open in full, and would have the right of rebuttal. The judge noted "the Eleventh Circuit has already adopted the rule. They did it without batting an eye." Tr. 568, ll. 15-23.

Closing arguments

During the solicitor's closing argument, the defense objected to her assertion that there was a "full DNA match" of appellant on the minor's underwear. The judge responded, "She can

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of evidence, respectfully, appears the latest tactic to put before the jury inadmissible evidence that others believe the child is a truthful child, and therefore should be believed in this case since the State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) line of cases prohibit this vouching for the credibility of the child as impermissible bolstering. Appellant respectfully submits such "trials within a trial" on character for truthfulness, where not allowed by the terms of the rule as in this case, will be confusing to the jury.

argue that and you can argue the evidence. Everybody needs to confine their arguments to the presented evidence as previously noted." Tr. 580, l. 13 – 581, l. 11.

Defense counsel Rick Vieth had "the middle argument" on behalf of appellant. Vieth argued that the forensic interview "was almost a flippant interview. There was no sadness." Defense counsel noted there were "No tears. No crying. Nothing. Even in a part of that interview she looked down and says I like your shoes." The forensic interviews are on file for this Court's consideration. Tr. 595, ll. 13-25.

Defense counsel also reminded the jury that the minor alleged they "had sex every night and even the week before we had sex every night. . . ." Tr. 597, ll. 6-21. Counsel told the jury the defense did not have to prove motive but "[w]e know that both children said it's better when dad is not here. Things had moved on smoothly. It's in all the CAC tapes. Better when he's not here." Tr. 597, l. 22 – 598, l. 16. Defense counsel closed by asking the jury to use its common sense, and consider the "real facts of this case and come back with a verdict of not guilty." Tr. 609, ll. 3-7.

The solicitor then began her "rebuttal argument." The solicitor again argued "there is 100 percent proof that that DNA that is a match to Antonio Posey was on her vaginal swabs and in the crotch of both pairs of underwear." Tr. 611, ll. 21-25. The following occurred at the conclusion of the solicitor's "rebuttal" argument:

> You decide the evidence. That's your sworn oath and responsibility as jurors. **You decide what crime will and will not be tolerated.** I submit to you *a crime of this nature would shock the conscious of any community anywhere but in this state and in this county* --
>
> MR. VIETH: Your Honor, I object to that comment. They're giving the jury an area to think --
>
> THE COURT: I understand. Ms. Mayes --
>
> MS. MAYES: I'll rephrase it.

> THE COURT: -- move on.
>
> MS. MAYES: You decide this case based on the evidence before you and that evidence is proof beyond a reasonable doubt of criminal sexual conduct with a minor. Thank you.
>
> THE COURT: All right. Ms. Gallman, ladies and gentlemen of the jury, I'm gonna give y'all my instructions but let's take a brief break.

Tr. 612, ll. 1-17. (emphasis added).

Defense counsel then asked the judge for a curative instruction or to grant a mistrial. Defense counsel Vieth noted that the solicitor's objectionable remarks were "not responsive to anything I said and I just think it's very prejudicial in a small community like this." Defense counsel told the judge that the argument was meant to sway the jury that the community would "come down on us" if they did not find appellant guilty and "that's not what this trial is about." Tr. 613, ll. 6-15.

The judge ruled that he did not think the solicitor "overstepped the bounds of trying to create an emotional bond with the jurors on the verdict, which I think is what you're suggesting." The judge apparently reasoned that if there was any problem, his jury instruction that "you know, no friends to reward, no enemies to punish," would somehow, respectfully, take care of the confusion. Tr. 613, l. 6 – 614, l. 15.

The judge, in his charge, instructed the jury: "You and I are acting for this community and for this state. It is our responsibility, mine as the Judge and yours as the jury, to make certain that the trial is fair and you must be certain that a verdict is just." Tr. 625, ll. 1-5. The judge also instructed the jury "You have no enemies to punish. No friends to reward. Your responsibility is to make certain that this case and verdict is just. I'm confident y'all will do that." Tr. 625, ll. 1-22.

Discussion

Defense counsel correctly objected and argued that the solicitor's rebuttal argument was not proper rebuttal, where she argued the jury would decide "what crime will and will not be tolerated," and that "a crime of this nature would shock the conscience of any community anywhere but in this state and in this county --."

Defense counsel correctly objected that the solicitor's argument was that an appeal to how the rest of the community "in a small community like this" would show their displeasure with a jury verdict of not guilty. "The community is gonna come down on us, that's not what this trial is about." I think it's very improper. It was not responsive to anything I said and I just think its's very prejudicial in a small community like this." Tr. 613, ll. 6-15. This was an improper closing argument, and also improper rebuttal.

Defense counsel asked for a curative instruction or a mistrial. Tr. 613, ll. 6-15. The judge found that he did not think the solicitor "overstepped" the bounds of proper argument, and he refused to grant relief. Tr. 613, l. 16 – 614, l. 6. That was error. Moreover, the judge's assertion that his jury instruction on "no friends to reward or enemies to punish" would straighten out any confusion, or "fix it" without "drawing attention to it" was simply unavailing. Tr. 613, l. 16 – 614, l. 6.

In Lee v. State, 405 Md. 148, 950 A.2d 125 (Ct.App 2008), the Court found reversible error in the state's closing argument. In Lee, the prosecutor argued that while the defendant properly had rights that the residents in the area also had the right to be safe in their environment, and she asked the jury to teach the defendant a lesson. Following the objection, the judge responded, "Appeals to passion, prejudice, so forth and so on, are not proper appeals. It's an

argument, but your duty in this case is to decide the case based on the evidence, not the passion or prejudice. Is that clear? Continue." Lee v. State, 405 Md. at 158, 950 A.2d at 130-131.

Immediately after the judge's curative instruction, the state's attorney repeated her argument urging the jury not to allow "the law of the streets" to prevail, and to teach the defendant a lesson about settling a dispute with a gun. Defense counsel again objected. However, this time the court overruled the objection. The state's attorney then asked the jury to teach the defendant not to follow the laws "of the streets of Baltimore, but to follow the laws of the State of Maryland." Lee v. State, 405 Md. at 158-159, 950 A.2d at 130-131.

Lee was then found guilty of first degree assault, and various firearm counts, but acquitted of attempted first and second degree murder.

In finding reversible error, the Court in Lee v. State cited Lawson v. State, 389 Md. 570, 886 A.2d 876 (2005), where the prosecutor, during rebuttal argument, implied that the defendant in a sexual offense case was a child molester and a monster, which the Court of Appeals held was improper. It was designed to inflame the jurors' prejudices against a hated "class of individuals" -- child molesters.

It is no secret that child sex cases, as a class of cases -- such as this one -- are the most difficult cases for a defendant to get a fair trial. Sex offenders, and especially child sex offenders, are despised people, and limitations on placed on where they can live, and work, and the movements of some are monitored by the state with an electronic device.

Telling the jury here that it *would decide what crime will and will not be tolerated* was improper because it appealed to the passions of the jury to send a message as the "conscience of the community was shocked" by the nature of the crime appellant was accused of committing. It would send a message by convicting this appellant that the community would not tolerate

molesting or having sex with children. Conversely, to find the find appellant not guilty would send a signal that the community could look the other way when such incestuous behavior occurred. Others in the community "would come down on us" as a bad jury if they acquitted this accused child rapist. Tr. 613, ll. 6-15. "It is incumbent upon the people's representative to maintain an air of dignity and stay above the fray." Lawson v. State, 389 Md. at 598, 887 A.2d at 892, *quoting* Walker v. State, 121 Md. App. 364, 380-381, 709 A.2d 177, 185 (1998).

The Court in Lee v. State also noted that appeals to the jury's own interest, such as an appeal to convict a defendant in order to preserve the quality of their own communities were "wholly improper and presumptively prejudicial." Lee v. State, 405 Md. 148, 171, 950 A.2d 125, 138 (2008). In Lee v. State, the Court found reversible error even where the trial judge, as seen above, issued a curative instruction.

Here, the trial judge erroneously found the solicitor's argument was not even improper, and therefore no curative instruction or mistrial were necessary. Again, the solicitor here was urging the jurors to show that the nature of the crime shocked the conscience of **their community**, and to send a message that this particular crime -- child sex crime -- "will not be tolerated." Tr. 612, ll. 1-7. Appellant had a right for the jury to determine whether the state had proved his guilt beyond a reasonable doubt. Deciding whether a particular "class of crime" would be tolerated – rather than focusing solely on whether his guilt was proven beyond a reasonable doubt was fundamentally unfair to appellant.

After her wholly improper appeal to the jury's passion and prejudice as shown above, and the defense objection, the solicitor quickly added that: "You decide this case based on the evidence before you and that evidence is proof beyond a reasonable doubt of criminal sexual conduct with a minor." Tr. 612, ll. 1-14. That should be conclusive evidence the solicitor knew

her appeal to the passion and the prejudice of the jury was improper and unfair, and that she knew the difference between a proper and improper closing argument, and deliberately injected unfair considerations into the verdict considerations.

In State v. Beaty, Op. No. 27693 (filed December 29, 2006), the Supreme Court found the trial judge's preliminary remarks to the jury that the jury's role was to "search for the truth, determine 'true facts,' and render a 'just' verdict," were improper. The Supreme Court noted that in prior cases it had warned against the use of "seek the truth" language in regards to the state's burden of proof beyond a reasonable doubt because it ran the risk of unconstitutionally shifting the burden of proof to the defendant. See State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000).

If a criminal jury is deciding what the "true facts" are -- or "seeking the truth" -- it is deciding the case based upon a preponderance of the evidence civil standard, rather than a "proof beyond a reasonable doubt" constitutional criminal standard.

Similarly, when a jury is told to decide "what crime will and will not be tolerated" in the community, it is asked to render a verdict -- in this case -- of whether incestuous behavior will be tolerated in that particular community or whether the crime appellant was accused of committing shocked the conscience of the community. As defense counsel argued, putting that pressure on the jury was improper, and it is unfair to the defendant on trial, here appellant Antonio Posey. It also is very important that the solicitor waited until the end of her improper rebuttal argument to spring this improper appeal to passion and prejudice on the jury.

Finally, the argument was also improper, as defense counsel argued, because it was "not responsive" to the defense's closing argument. Tr. 613, ll. 3-15. The order of closing arguments

in this case was determined by the parties understanding of State v. Beaty, supra.[2] The solicitor opened in full, the defense had the middle argument, and the solicitor had a right of rebuttal.

Urging the jury to decide what kind of crime would be tolerated in Saluda County, and for it to show the nature of the crime appellant was accused of committing shocked the conscience of this community, was not only improper -- it was not in response to anything raised by the defense in its closing argument.

This Court, and the Supreme Court, have held that reply **testimony** is improper if it is not presented to rebut evidence adduced by the defendant. See State v. Farrow, 332 S.C. 190, 504 S.E.2d 131 (Ct. App. 1998); Daniel v. Tower Trucking Co., 205 S.C. 333, 32 S.E.2d 5 (1944). A rebuttal argument, as reply evidence, must be in response to new matters raised in the defense's closing argument. Moreover, this Court has repeatedly held that a solicitor's closing argument must be carefully tailored so that it does not appeal to the personal biases of the defendant, and it may not be calculated to arouse the jurors' passions or prejudices, and it must stay within the record and reasonable inferences. See State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981).

The trial judge respectfully erred in finding that the solicitor's rebuttal argument was not improper, and not an impermissible appeal to prejudice. The court did not give a curative instruction as the trial court did in Lee v. State, and it refused to grant a mistrial. The trial judge erred in his refusal to grant relief because the solicitor's argument was improper. See State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. Arnold, 366 S.C. 153, 221 S.E.2d 667 (1976).

The error was not harmless in this case because appellant's defense that the minor learned that appellant was not her biological father, and then began "acting out" and misbehaving. She

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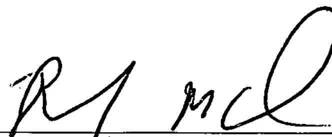
[2] Rehearing granted March 24, 2017.

accused appellant of sexual misconduct when she got in trouble in school. Such an accusation totally changes the dynamics of the situation – from a bad child to horribly abused child victim. The defense also presented its own expert on the child's physical examination, and it challenged the DNA saliva evidence as far from conclusive evidence. This was not an incredible defense, and the error in the wholly improper appeal to passion and prejudice should not be found harmless. Cf. State v. Gates, 269 S.C. 557, 561-562, 238 S.E.2d 680, 682 (1977).

In sum, the rebuttal argument respectfully was reversible error where the judge erred by ruling the argument was not improper, and he refused to grant the defense the requested relief. State v. Craig, supra.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Saluda County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of April, 2018.

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STATE OF SOUTH CAROLINA

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Appeal from Saluda County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

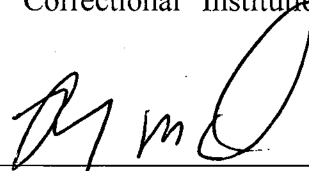
V.

ANTONIO KENYARDO POSEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned 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 a copy of the Initial Brief of Appellant and Designation of Matter have been served on Antonio Kenyardo Posey, #371503, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of April, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me this 13th day of April, 2018.

_______________ (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.