STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001558

THE STATE,

Respondent,

v.

BRYAN JEFFREY ELLIS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge sufficiently redacted the portion of Appellant's written confession which referenced his discussion of masturbation with a minor child other than Victim, where: (1) Appellant was not prejudiced by the redacted statement as it was consistent with Appellant's defense at trial and cumulative to evidence that Appellant introduced, (2) the trial judge provided a limiting instruction to the jury to not consider the redactions in their deliberations, and (3) any possible error by the trial judge was harmless because of the overwhelming evidence presented against Appellant at trial?

STATEMENT OF THE CASE

In June 2017, the Lexington County Grand Jury indicted Appellant for one count of criminal sexual conduct with a minor in the first degree and one count of criminal sexual conduct with a minor in the third degree. On July 10-12, 2017, a jury trial was held in the Lexington County Court of General Sessions with the Honorable R. Knox McMahon, presiding. Appellant was represented by David Mauldin, Esquire, of the Lexington County Public Defender's Office. The Respondent (the State) was represented by Assistant Solicitors Suzanne Mayes and La'Jessica Stringfellow of the Eleventh Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of both counts. Following the verdict, the trial judge sentenced Appellant to a life sentence for criminal sexual conduct with a minor in the first degree, and one consecutive term of fifteen years' imprisonment for criminal sexual conduct with a minor in the third degree. Appellant then timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

The victim (Victim) in this case was born in 2008. (R. 237). Appellant and victim's mother (Mother) began dating in 2009 when Victim was one and a half years old. (R. 237). Appellant is not Victim's biological father, but Appellant and Mother did share one biological child together (Brother Two). (R. 237). Victim had another brother (Brother One) who was also not biologically related to Appellant. (R. 237). Appellant and Mother were married in 2010 and then lived together with Mother's parents (Grandma and Grandpa) for approximately the next six years. (R. 238). In March 2015, Appellant and Mother purchased a mobile home approximately fifty yards away from Mother's parent's home. (R. 239).

On January 23, 2016, Victim disclosed to Grandma that she was sexually assaulted by Appellant. (R. 225). Victim disclosed the same information to Mother the following day, January 24, 2016, before Mother went to work. (R. 227). Mother called out of work and sent a text to Appellant asking him to come home. (R. 246). Appellant returned home at approximately 3:30 PM at which time Mother asked Appellant: "Did you make [Victim] lick your pee-pee?" (R. 247, lines 14-15). Appellant responded in the affirmative saying: "Yes. It's all true." (R. 247, line 15). Mother then went to her parent's home where she called 911 at approximately 3:56 PM. (R. 248). Grandpa and his brother (Mother's Uncle) went to Appellant's home to wait with Appellant until law enforcement arrived. (R. 251). Grandpa asked Appellant whether he sexually assaulted Victim. Appellant responded in the affirmative. (R. 280).

Sergeant Miles Rawl of the Lexington County Sheriff's Department arrived at Appellant's residence and spoke with Appellant inside Rawl's police vehicle. (R. 313). Rawl advised Appellant of his Miranda rights and Appellant voluntarily spoke with Rawl. (R. 316).

Appellant confessed verbally and in writing. (R. 318). One portion of Appellant's written confession reads as follows:

> I [Appellant] have changed my family by completing what should never have been done. It started mid to late November 2015. I had my daughter perform a hand job without ejaculation. Later in December, early January she had done the act again with flavored lubricant and an external vibrator in which she used on herself after seeing me use it on myself. I had asked if she would put her mouth on my penis and she did. I ejaculated on the floor and some in her mouth. Last was again using her mouth this past Thursday. I was going to put my mouth on her vagina but I became nauseated and did not proceed in doing so. I ejaculated in her mouth and on the floor.

(R. 326-27, lines 19-5, R. 494). At trial and in her forensic interview, Victim corroborated details of Appellant's confession, including details regarding Victim performing fellatio on Appellant, Appellant's subsequent ejaculation in Victim's mouth, and Victim's use of a vibrator on herself. (R. 174-77, 181, State's Exhibit #26).

Upon finishing his written confession, Appellant was arrested by Rawl. (R. 341). Law enforcement also seized Appellant's cell phone. Detective Michael Phipps performed an extraction of Appellant's phone that revealed a series of Google searches performed on the phone from the time Mother called 911 to the time Rawl arrived and began interviewing Appellant. Among the terms entered into the Google search engine on Appellant's phone during this time period were "help with addiction", "addiction", "beat addiction", and "beat sex addiction". (R. 373, line 19; R. 374, line 22, 24; R. 375, line 3).

While awaiting trial, Appellant wrote to Mother occasionally from the Lexington County Detention Center. (R. 252, State's Exhibit #20). In one such letter Appellant wrote to Mother: "I know I was wrong for what [Victim] and I did. That's why I confessed." (R. 421, State's Exhibit #20 p. 2). In the same letter, Appellant wrote "I know what [Victim] and I did was fucked up." (State's Exhibit #20, p. 1).

Prior to trial, Appellant challenged the admissibility of his written confession, and the trial judge held a hearing pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964). The trial judge found that Appellant's confession was freely and voluntarily given. (R. 121). However, Appellant moved to redact certain portions of the confession on the basis of the prejudice of such portions outweighing their probative value. The State and Appellant agreed on all redactions except one. Appellant took exception to the following question and answer regarding whether Mother knew Appellant had discussed masturbation with Victim and Brother One:

> Q: Did your wife know that you had these conversations with [Brother One] and [Victim]?
>
> A: No. I never thought to tell her I talked to them about it.

(R. 130-32, R. 493). The trial judge declined to redact the entire question and answer but instructed the State to redact any reference to Brother One. The State complied with the trial judge's ruling and made the appropriate redactions. The redacted exhibit that was entered into evidence read as follows:

> Q: Did your wife know that you had these conversations with [Victim]?
>
> A: No. I never thought to tell her.

(R. 130-32, R. 500). Prior to admitting the redacted copy of Appellant's confession into evidence, the trial judge gave the jury the following instruction:

> The State has introduced State's exhibit number 29. A copy instead of the original document which is Court's exhibit number 1 has been introduced because I have determined that portions of Court's exhibit number 1 is not admissible, therefore, I have ordered that to be redacted or removed from Court's exhibit number 1, therefore, it is now State's exhibit number 29. You will see some markings on there for items redacted or removed and the like. The fact that I have redacted portions of State's 29 or only allowed State's 29 into evidence should not be considered by you for any purpose whatsoever during your deliberations. I have

ruled that it is not proper that those portions which have been redacted would be a part of the record in this case.

(R. 321-22, lines 13-2). The State made no mention of Appellant's conversation with Brother One at trial. At the conclusion of trial, the jury found Appellant guilty of both counts.

ARGUMENT

I.

The trial judge sufficiently redacted the portion of Appellant's written confession which referenced his discussion of masturbation with a minor child other than Victim. Appellant was not prejudiced by the redacted statement as it was consistent with Appellant's defense at trial, and cumulative to evidence that Appellant introduced. Furthermore, the trial judge provided an appropriate limiting instruction which required the jury not to consider the redactions in their deliberations. Any error that may have been committed was harmless because of the overwhelming evidence presented against Appellant at trial.

Appellant contends the trial court erred by refusing to redact part of Appellant's confession in which he admitted discussing masturbation with Victim and another minor child. In support of this contention, Appellant contends that allowing the jury to see this portion of Appellant's confession prejudiced him because it raised the possibility in the minds of jurors that Appellant engaged in sexual misconduct with another minor child. This argument is without merit. The trial court properly redacted the portion of Appellant's confession that made reference to discussing masturbation with another minor child. Contrary to Appellant's argument, the jury only saw the portion of Appellant's confession in which he admitted discussing masturbation with Victim. Appellant was not prejudiced by the jury seeing this portion of his confession, because it was consistent with the defense Appellant presented at trial, namely that he only discussed masturbation with Victim and never committed a sexual battery with her. Furthermore, the portion of Appellant's confession he contends was admitted in error is cumulative to evidence Appellant introduced through his testimony at trail. Additionally, the trial judge provided an appropriate limiting instruction which required the jury not to consider any redactions in Appellant's confession during their deliberations. Even if we assume, for the sake of argument, that the trial court erred in admitted this portion of Appellant's confession, any

error is harmless because of the overwhelming evidence presented against Appellant at trial. Appellant's convictions and sentences should be affirmed.

Lack of Prejudice to Appellant and Cumulative Evidence

Appellant claims that he was prejudiced by the refusal of the trial court to redact a portion of his confession in which he admitted to discussing masturbation with Victim and Brother One. The redacted exhibit that was entered into evidence read as follows:

Q: Did your wife know that you had these conversations with [Victim]?

A: No. I never thought to tell her.

(R. 130-32, R. 500). Appellant contends the redacted statement above injected potential sexual misconduct with another child into the minds of jurors, and thus unfairly prejudiced him. Furthermore Appellant contends this statement "allowed" the Solicitor to argue that Appellant was a sex offender who must be stopped[1]. However, the redacted portion of Appellant's confession makes no reference to sexual conduct with another minor either directly or indirectly. Additionally, Appellant was not prejudiced by the admission of this portion of his confession because it was consistent with his theory of the case and the defense he presented at trial. Appellant's confession was also cumulative to evidence that Appellant introduced during his direct testimony.

The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and

[1] Appellant contends that the solicitor's reference to Appellant as a sex offender and the solicitor encouraging the jury to "let this be the last time he hurts a child in this way" somehow imply that Appellant has abused multiple children or is accused of doing so. (R.. 446). Neither of the solicitor's comments make any reference to Appellant abusing multiple children, but rather each comment is consistent with Appellant being accused of abusing a single child multiple times. To the extent Appellant suggests this commentary was not proper even in reference to the abuse for which Appellant was on trial, Appellant does not present that question to this Court on appeal. The sole claim of error Appellant makes on appeal is whether the trial judge erred in failing to redact a portion of his confession; not whether the solicitor's argument improperly appealed to the passions and prejudices of the jury. See Rule 208(b)(1)(B) SCACR.

probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). An "error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "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." Id. "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003).

"Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point." State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968). The introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008). When other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless. State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-555 (2001).

Here, the trial judge did not abuse his discretion in admitting a portion of Appellant's confession that referenced his discussion of masturbation with Victim. The trial judge correctly instructed the State to redact any reference to Brother One from Appellant's confession to avoid any suggestion that Appellant had also abused Brother One. When the redaction was complete, the jury only saw Appellant's statement that Mother was unaware he had conversations with Victim about masturbation. Appellant's claims of prejudice from this portion of his confession are difficult to substantiate. Appellant freely acknowledged on direct examination that he spoke about masturbation with Victim and even provided her with a vibrator. The relevant portion of Appellant's testimony is as follows:

> Uhm, [Mother] at the time, she notified me that [Victim] had been playing with herself; that [Mother] could smell it on [Victim's] hands and [Mother] didn't say anything else of it so I kind of took that as, hey, you deal with this and so over time I just kept asking, hey, [Victim] are you still doing this and she would say no, she's not and I would let her know that, you know, it's okay to play with yourself. It's just, you know, be a little more discreet about it. Wash your hands. Take baths. Just, you know, don't let anybody know that you are doing that, you know. Uhm, about, I would say about it was after Christmas, probably after Christmas before New Year's when I asked [Victim] again, Do you still do what mommy told you not to do? [Victim] said no again and that's when I brought her back into the master bathroom and did give her the shaky thing as she called it which now today she says I said it was a vibrating bean or something.

(R. 385, lines 6-21). Because Appellant voluntarily introduced this evidence in his case in chief, Appellant was not prejudiced by the alleged error because it is cumulative to his own testimony.

Appellant's concerns regarding the inference that he abused multiple children are unfounded. No reference is made directly or indirectly to another person in the redacted statement and neither the State nor the trial judge made such a reference at any point in trial. Appellant is merely assuming the worst possible interpretation of this portion of his confession by the jury, but has no evidentiary basis for such a claim. There is no indication from the record, either from statements made by the trial judge, statements made by the solicitor, or questions asked by the jury that the jury understood Appellant's statement to mean anything other than an admission that Mother didn't know anything about his conversations with Victim regarding masturbation. The question posed to Appellant clearly refers to "conversations" with Victim, not any sort of sexual activity. (R. 500). There is nothing from the context of the question that could lead a reasonable juror to conclude that Appellant had abused multiple children.

In support of his contention that the trial court erred in not redacting more of Appellant's confession, Appellant cites State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010). In Johnson, the South Carolina Supreme Court addressed the admissibility of a partially redacted statement in a non-testifying co-defendant's confession. Johnson is distinguishable from the current case

because the issue considered by the Supreme Court in Johnson was whether the co-defendant's statement violated Johnson's Confrontation Clause rights under Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620 (1968). The Supreme Court ultimately reasoned the co-defendant's redacted confession along with law enforcement's testimony about how they arrested Johnson "effectively told the jury that [co-defendant's] unredacted statement named [Johnson]." Johnson, 390 S.C. at 606, 703 S.E.2d at 220. Thus, the Supreme Court's ultimate concern was whether the redacted statement impermissibly implicated Johnson as being a participant in the crime. Here, no such concern exists.

Here, unlike in Johnson, there was only one defendant on trial and therefore the confession of a non-testifying co-defendant did not exist. Accordingly, any Bruton issue is inapplicable to Appellant's case. Appellant never claimed that someone else was responsible for the crime alleged, but rather claimed he merely discussed inappropriate topics with Victim but never committed a sexual battery against her. In fact, the statement, as admitted, was entirely consistent with the defense Appellant presented at trial: that he discussed masturbation with Victim and nothing more.

The remaining cases cited by Appellant, Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016) and State v. Davis, 239 S.C. 280, 122 S.E.2d 633 (1961) should also be unavailing to this Court. Both Tappeiner and Davis address whether the solicitor improperly appealed to the passions of the jury in closing argument. That question is not presented for consideration by this Court in Appellant's statement of issue on appeal. (Initial Brief of Appellant p. 1). See Rule 208(b)(1)(B) SCACR ("The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on

appeal."). When Appellant objected to remarks made in the solicitor's closing argument at trial, he received a curative instruction, and Appellant did not object to the sufficiency of that instruction. (R. 446-47). See State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured. No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial."). Appellant's convictions and sentences should affirmed.

Limiting Instruction

Appellant's claim of error is predicated on the assumption that jurors drew the nefarious conclusion that Appellant had molested more than one minor child due to the presence of a blank in the portion of Appellant's confession at issue in this case. However, the trial judge gave a limiting instruction to the jury that required them not to draw any conclusions from the redactions in Appellant's confession.

"A curative instruction is generally deemed to have cured any alleged error." State v. Dial, 405 S.C. 247, 258, 746 S.E.2d 495, 500 (Ct. App. 2013). "Limiting instructions are deemed to cure error unless 'it is probable that, notwithstanding the instruction, the accused was prejudiced.'" State v. Young 420 S.C. 608, 624, 803 S.E.2d 888, 897 (Ct. App. 2017) (Quoting State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986)). Jurors are presumed to follow the trial court's instructions. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975).

Here the trial judge provided a general limiting instruction prior to admitting the written portion of Appellant's confession. This instruction informed the jury that redactions "should not be considered by you for any purpose whatsoever during your deliberations." (R. 321, lines 23-

25). This limiting instruction applied to Appellant's entire seven-page written confession, including portions that Appellant requested to be redacted, and not just the statement at issue in this case. (R. 494-500). Absent any evidence to the contrary, the trial judges limiting instruction is deemed to cure any possible error. Here, Appellant has failed to show the limiting instruction was insufficient. Appellant's convictions and sentences should be affirmed.

Harmless Error

Even if this Court determines the trial court erred in admitting the portion of Appellant's confession at issue in its redacted form, any error was harmless in light of the overwhelming evidence presented against Appellant at trial.

"Whether an error is harmless depends on the circumstances of the particular case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." Thompson, 352 S.C. at 562, 575 S.E.2d at 83. "Error is harmless when it could not reasonably have affected the result of the trial." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

The evidence presented against Appellant at trial was overwhelming. Three witnesses testified that Appellant admitted he committed a sexual battery against Victim. Mother testified that she asked Appellant: "Did you make [Victim] lick your pee-pee?", to which Appellant responded: "Yes. It's all true." (R. 247, lines 14-15). Grandpa testified when he asked Appellant about whether Appellant sexually abused Victim, Appellant responded in the affirmative. (R.

280). Appellant confessed to Rawl in graphic detail the nature and extent of the sexual batteries he committed against Victim. Appellant then made incriminating statements in letters written to Mother including one in which Appellant wrote: "I know I was wrong for what [Victim] and I did. That's why I confessed." (R. 421, State's Exhibit #20). Finally, Phipps testified that Appellant made a number of Google searches on his phone after Mother called law enforcement including: "help with addiction", "addiction", "beat addiction", and "beat sex addiction". (R. 373, line 19; R. 374, line 22, 24; R. 375, line 3).

When considering the record as a whole, the prejudice to Appellant of a redacted statement in which Appellant admits Mother was unaware that he had conversations about masturbation with Victim pales in comparison to the evidence against Appellant. There was abundant evidence in the record for a reasonable jury to conclude Appellant was guilty. The State submits the jury was likely convinced of Appellant's guilt by Appellant's confessions of guilt to three separate witnesses, rather than by a single partially redacted statement from his seven page confession. Therefore, any error resulting from the trial judge's decision to allow the jury to see Appellant's redacted statement regarding discussing masturbation with Victim is harmless. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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May 24, 2018

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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