STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRYAN JEFFREY ELLIS,

APPELLANT

APPELLATE CASE NO. 2017-001558

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying the defense's motion to redact part of Appellant's statement in which he admitted to Detective Rawl that he discussed masturbation with another minor child, prejudicing Appellant by injecting potential sexual misconduct with another child since Appellant was not charged with any offense regarding that child, particularly where the refusal to redact allowed the solicitor to argue in closing that Appellant was a sex offender who must be stopped?

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County Grand Jury on June 5, 2017, for criminal sexual conduct with a minor in the first degree and on July 10, 2017, for criminal sexual conduct with a minor in the third degree. R. 501 – 502; R. 504 – 505. His case was called to trial before the Honorable R. Knox McMahon and a jury, from July 10 through July 12, 2017. R. 1.

Suzanne Mayes and La'Jessica Stringfellow appeared on behalf of the state; David Mauldin represented Appellant. R. 1. The jury returned verdicts of guilty, and Judge McMahon sentenced Appellant to incarceration for life for criminal sexual conduct with a minor in the first degree, and incarceration for fifteen years for criminal sexual conduct with a minor in the third degree, with sentences to run consecutively. R. 476; R. 485.

This appeal follows.

ARGUMENT

The trial court erred in denying the defense's motion to redact part of Appellant's statement in which he admitted to Detective Rawl that he discussed masturbation with another minor child, prejudicing Appellant by injecting potential sexual misconduct with another child since Appellant was not charged with any offense regarding that child, particularly where the refusal to redact allowed the solicitor to argue in closing that Appellant was a sex offender who must be stopped.

Statement of facts

The state indicted Appellant for criminal sexual conduct with a minor in the first and third degree, alleging that Appellant fondled and engaged in oral sex with his seven-year-old stepdaughter (Child). R. 501 – 502; R. 504 – 505. Child disclosed the alleged abuse to her mother, Appellant's wife, who confronted Appellant and called 911. R. 243, l. 18 – 244, l. 8; R. 248, ll. 15-20.

Appellant was interrogated about the allegation by Detective Miles Rawl of the Lexington County Sheriff's Department. R. 48, ll. 3-6; R. 53, ll. 15-19. The interrogation was reduced to a written statement, in which Appellant admitted to touching the child's vagina, engaging in fellatio with her, and giving her a vibrating device. R. 487 – 493. Appellant wrote that he performed these acts with the child because she had a tendency to self-stimulate, and he believed he was teaching her about masturbation while pleasuring himself. R. 488 – 490. Child testified that Appellant touched her private part with his hand, put his mouth on her private part, put his private part in her mouth, and gave her a vibrating thing. R. 175, l. 2 – 176, l. 18; R. 181, ll. 4-25.

Appellant testified at trial, and admitted to improper behavior with Child. However, that admitted behavior did not amount to criminal sexual conduct with a minor. Appellant said he felt threatened by Rawl during the interrogation and that Rawl pushed him into "saying what he wanted me to say." R. 400, ll. 15-19; R. 402, ll. 20-24. The court denied the defense's motion to suppress Appellant's statement to Detective Rawl pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), *Missouri v. Seibert*, 542 U.S. 600 (2004), and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010), based on its contention that Appellant was not provided with *Miranda* warnings until after Rawl's interrogation yielded incriminating statements. R. 118, ll. 8-24; R. 119, l. 7 – 121, l. 19.

Appellant said he made up the portions of the statement in which he admitted to sexual acts and touching of Child in response to Rawl's interrogation. R. 402, l. 5 – 403, l. 25. Appellant testified that he did not have sexual contact or oral sex with Child. R. 386, ll. 4-6; R. 403, ll. 23-25.

Appellant admitted in his testimony that he had conversations with Child about masturbation and gave her a vibrating device. R. 385 ll. 6-21. Appellant said he was informed by his wife that the child had begun masturbating and he had conversations with Child to let her know "it's okay to play with yourself," but to "be a little more discreet about it." R. 385, ll. 6-13. Appellant acknowledged that he gave Child a "vibrating bean" to use for self-stimulation, but denied sexual contact or touching. R. 385, l. 19 – 386, l. 6.

Appellant's written statement to Rawl also included questions about whether Appellant had discussed masturbation with his minor step-son (Brother One) or minor son (Brother Two). R. 492 – 493. Appellant was not charged with any sexual offenses against Brother One or Brother Two.

Defense counsel moved the court redact this portion of the statement, arguing Rule 401, Rule 403, and Rule 404, SCRE. R. 126, l. 5 – 128, l. 10. Defense counsel moved to redact all of page six and the first two questions and answers on page seven of Appellant's statement. R. 127, l. 13 – 130, l. 12. Defense counsel moved to redact "[d]iscussions with [Brother One] about masturbation." R. 127, l. 16. Counsel argued: "that's a bad act. It's not relevant. The prejudice outweighs the probative value. He's on trial for alleged acts against [Child]." R. 128, ll. 8-10. Defense counsel said: "the first two questions and answers on the top of page 7 are a continuation of that line of questioning." R. 130, ll. 10-12. The contested question and answer read:

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

R. 493.

The state argued the inclusion of Brother One's name was incidental, and the statement was relevant because Appellant admitted talking to Child about masturbation without notifying his wife, and because Appellant said he discussed masturbation with Brother One but didn't act on any of those instructions to Brother One. R. 130, l. 18 – 131, l. 6; R. 127, l. 24 – 128, l. 6. Defense counsel argued the state had "five and a half other pages of the same topic they can work with" that did not reference a second child. R. 131, ll. 8-11. Counsel argued that "the prejudice is injecting potential sexual conduct even the inference of it," and "the prejudice outweighs the probative value." R. 131, ll. 11-14.

The court allowed the statement's admission with the name of Brother One obliterated; the defense objected to this form of redaction pursuant to *State v. Johnson*, 390 S.C. 600, 703

S.E.2d 217 (2010). R. 132, l. 13 – 134, l. 14. The court noted counsel's objection but allowed the question and answer to be redacted and admitted as follows:

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

R. 500. Counsel renewed his objections to the redactions after they were made, objected again when the statement was testified to by Rawl, and again when it was introduced into evidence. R. 221, ll. 22-24; R. 311, ll. 24-25; R. 321, ll. 7-8.

Prior to the statement's admission, Appellant's wife testified she had no knowledge that anything of a sexual nature had occurred between Child and Appellant. R. 242, ll. 5-11. Several other portions of Appellant's statement introduced in evidence contained admissions that Appellant believed he was teaching Child about masturbation, without referring to Brother One. R. 497 – 498.

The solicitor argued to the jury that Appellant was a sex offender who must be stopped, labeling Appellant as a "sex offender" seven times in her closing arguments. R. 436, l. 17 – 437, l. 19; R. 441, ll. 12-13; R. 456, l. 4. The solicitor declared: "This is a sex offender and there's no other way around it. Let this be the last time that he hurts a child in this way. Let this be the last time that he steals the innocence of a child." R. 446, ll. 15-20. The defense objected to this argument as improperly "appealing to passion and prejudice," and the court instructed members of the jury not to base their verdict on passion, prejudice, or bias. R. 446, l. 19 – 452, l. 1.

Nevertheless, the solicitor continued: "I submit to you this must be the last time. The correct verdict in this case --" R. 447, ll. 5-6. Defense counsel again objected, and the court again instructed the jury to base its verdict on the evidence. R. 447, ll. 5-11. The solicitor reacted by telling the jury: "you must return a verdict that speaks the truth," and then called Appellant a "manipulative sex offender" in her reply closing. R. 447, l. 14-15; R. 456, l. 4.

Discussion

Rule 404(a), SCRE prohibits the admission of character evidence generally, subject to certain exceptions. Rule 404(b), SCRE allows that while evidence of other bad acts is not admissible to prove the person acted in conformity with their character, it may be admissible to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

Defense counsel correctly objected to the introduction of this portion of the statement pursuant to Rule 403 when he argued "the prejudice outweighs the probative value." Rule 403, SCRE provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Probative value means the measure of the importance of the tendency to prove or disprove the outcome of a case. *State v. Gray*, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014).

"The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Even if prior bad act testimony is relevant, the trial court must apply Rule 403 and exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *State v. Perry*, 420 S.C. 643, 654, 803 S.E.2d 899, 905 (Ct. App. 2017), *reh'g denied* (Aug. 24, 2017).

Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one. *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146

(1991). A "trial court may properly redact dissimilar particulars of sexual conduct to avoid unfair prejudice to the defendant." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009). The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000).

Counsel objected to the manner of redaction as violating the principles laid out in *State v. Johnson,* 390 S.C. 600, 703 S.E.2d 217 (2010). In *Johnson*, the South Carolina Supreme Court addressed a redaction which allowed the jury to see that reference to another person had been blacked out with ink. *Id.* at 605, 703 S.E.2d at 219. There, the redactions were in a non-testifying codefendant's confession, with the name of the person who helped him commit the crimes obliterated. *Id.* The detective in the case testified this confession in part led to Johnson's arrest. *Id.* The Court found the redaction combined with the detective's testimony that the codefendant's confession caused him to arrest Johnson was constitutional error and resulted in prejudice. *Id.* at 607, 703 S.E.2d at 220.

Although *Johnson* involved a *Bruton* issue, the redaction here was of similar form. Brother One's name was removed in a way that made it clear reference to another person had been censored. The court's refusal to fully redact the question and answer allowed gratuitous uncharged sexual misconduct before the jury. Taken in context, the redaction effectively told the jury Appellant was "conversing" with more than one child about masturbation. Implying there was another victim of sexual abuse via the whited-out spaces before Child's name and after Appellant's answer unfairly prejudiced Appellant by injecting the inference a second child may have been sexually abused by Appellant.

The evidence was not important to prove the outcome of the case; it had minimal probative value as the state introduced other evidence Appellant admitted talking to Child about masturbation without his wife's awareness. Prior to the statement's admission, his wife testified to the jury she did not know anything of a sexual nature had occurred between Child and Appellant. Several other portions of Appellant's statement introduced in evidence contained admissions that Appellant believed he was teaching Child about masturbation, without containing an unfairly prejudicial reference to Brother One.

The solicitor fully exploited the erroneous admission of this evidence in closing argument by repeatedly calling Appellant a sex offender. A solicitor's closing argument must not be calculated to arouse the jurors' passions or prejudices. *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). In *Tappeiner v. State*, the defendant was accused of sexually assaulting her thirteen-year-old neighbor. *Tappeiner v. State*, 416 S.C. 239, 243, 785 S.E.2d 471, 473 (2016). In closing argument, the solicitor asserted that in making their decision, the jurors should consider whether they would let Tappeiner babysit their own children, grandchildren, nieces or nephews, concluding: "I think the answer to that is why you should find her guilty." *Id.* at 247, 785 S.E.2d at 475. In reversing and granting Tappeiner a new trial, the South Carolina Supreme Court reasoned that the "solicitor's remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives improperly appealed to the jurors' emotions, rather than the evidence in the record." *Id.* at 252, 785 S.E.2d at 478.

In *State v. Davis*, two rape cases were being tried in Beaufort the same term, the second being highly publicized and racially charged. *State v. Davis*, 239 S.C. 280, 282–83, 122 S.E.2d 633, 634–35 (1961). In closing on the first case, the solicitor made an emotional appeal to the jury, saying he had similar cases being tried that term and if they turned this defendant loose,

he'd turn the other defendants loose. *Id.* at 283, 122 S.E.2d at 635. Counsel objected and the judge remarked that the case would be tried from the evidence given from the witness stand and the law as given by the judge, and that no other case had anything to do with it. *Id.* at 284, 122 S.E.2d at 635. The South Carolina Supreme Court reversed, saying: "We gravely doubt that the evil influence upon the jury of the solicitor's statement before quoted was dispelled by so weak a protest and by such mild judicial action." *Id.*

Here, as in *Davis*, Appellant submits the judge's instructions that the jury base its verdict on the evidence rather than passion, prejudice or bias were insufficient to dispel the solicitor's infection of the trial with the idea that Appellant had sexually abused multiple children.

The trial court erred by failing to order the question and answer involving Brother One be entirely redacted, as any probative value was outweighed by unfair prejudice. Appellant was unfairly prejudiced because the statement implied to the jury that there was a second victim of sexual abuse, although Appellant was not charged with any sexual offenses against other children. The solicitor compounded the unfair prejudice in her closing argument by urging the jury to convict Appellant because he was a "sex offender" numerous times, and the jury should "let this be the last time he steals the innocence of a child." The solicitor fully exploited the faulty redaction of Brother One's name, conveying the impression that Appellant molested multiple children and should be convicted so this was "the last time he hurts a child in this way," rather than based on evidence properly before the jury.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Joanna K. Delany
Appellate Defender

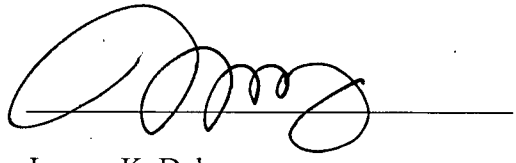
ATTORNEY FOR APPELLANT

This 5th day of June, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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 5, 2018



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