STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Kershaw County
Hon. Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2018-001355

The State, Petitioner/Respondent,

v.

Nakia Johnson, Respondent/Petitioner.

Opinion No. 2018–UP–109 (S.C. Ct. App. filed March 14, 2018)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on April 10, 2018. The Petition for Rehearing was denied by Order filed June 21, 2018.

STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals erred in conflating the analysis related to the grant of a mistrial with analysis related to exclusion of evidence and finding Johnson's conviction for second degree criminal sexual conduct with a minor should be reversed.

STATEMENT OF THE CASE

Procedural History

The Kershaw County Grand Jury returned true-billed indictments against Johnson for criminal sexual conduct (CSC) with a minor in the first degree, CSC with a minor in the second degree, and committing a lewd act on a child. (Indictments; App. 526-529). Johnson proceeded to trial from June 22-26, 2015, in front of the Honorable Doyet A. Early, III. The jury found Johnson not guilty of CSC with a minor in the first degree, guilty of CSC with a minor in the second degree, and guilty of committing a lewd act on a child. (T.634-635; App. 513-514). Judge Early sentenced Johnson to twenty years for CSC with a minor second degree and fifteen years for committing a lewd act; the sentences are concurrent. (T.642; App. 521).

Johnson filed a Notice of Appeal. After briefing and oral argument, the Court of Appeals affirmed Johnson's conviction for lewd act, but reversed Johnson's conviction for CSC in the second degree. See State v. Johnson, Op. No. 2018–UP–109 (S.C. Ct. App. filed March 14, 2018). Both parties filed a Petition for Rehearing. The Court of Appeals denied both by Order filed June 21, 2018. This Petition for Certiorari by the State follows.

STANDARD OF REVIEW

"[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." State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). 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).

ARGUMENT

I. The Court of Appeals erred in conflating the analysis related to the grant of a mistrial with analysis related to exclusion of evidence and finding Johnson's conviction for second degree criminal sexual conduct with a minor should be reversed.

The Court of Appeals erred in reversing Johnson's conviction for second degree CSC with a minor because the single comment by the forensic interviewer did not warrant the extreme remedy of a mistrial. The Court of Appeals erred by applying exclusion of evidence analysis in its opinion when the only question before it was whether a mistrial was warranted. The Court of Appeals improperly reversed the CSC with a minor charge while properly affirmed the lewd act charge.

Factual Background

In direct examination of the forensic interviewer, the prosecutor asked: "How did you begin the interview?" The forensic interviewer responded:

> I interviewed by introducing myself, and very briefly in the beginning, we talk about just general topics. We check and see if they're aware that this is being recorded. We provide a couple of semi-instructions just about how to respond if they don't know something so that they're not trying to provide information to us just to try to provide us information or to guess.
>
> So we encourage them to -- if they don't know something, to say they don't know; if they don't understand, to say I don't understand and not to guess. We also ask in the beginning if will they tell the truth during the interview process.

(T.353-354; App. 232-233). It was at that point that Johnson's counsel indicated he had a motion and made his motion for a mistrial. The concept of the child being asked to tell the truth was never mentioned again during the trial.

The trial court analyzed the comment in light of the Supreme Court's holding in Kromah. (T.355-356; App. 234-235). The court concluded: "And I think the context in which he has

testified about the truthful statement would not taint it so as to make it inadmissible." (T.357; App. 236). The court further indicated:

> Well, the question was asked: Tell us generally how you conduct the interview. And he started off by telling us a number of things, including encouraging her to tell the truth, is basically what he said. I don't find that to be more prejudicial than probative, so I'm going to allow him to continue on with his testimony.

(T.358; App. 237). As the trial court specifically concluded, the prejudice of the comment did not rise to the level necessitating a mistrial.[1]

Analysis

Initially, it should be noted Johnson 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; App.533; 535; 548) (emphasis added). As a result, the **sole** issue that should have been considered by the Court of Appeals 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, Johnson 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."

[1] The trial court did not even find the prejudice outweighed the probative value. He certainly did not consider the single, isolated comment sufficiently prejudicial to warrant a mistrial.

(Br. App. 15; App.549)(emphasis added). As a result, Johnson clearly limited consideration of any error to whether or not the trial court properly denied his request for a **mistrial**. The Court of Appeals should have similarly limited its consideration and analysis.

"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, Johnson 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, were not properly raised before the Court of Appeals and should not have formed the basis for the 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). Therefore, this Court should grant the Petition for Writ of Certiorari because the Court of Appeals applied incorrect analysis and failed to solely consider whether the trial court erred in failing to grant a mistrial. Once the issue is viewed through the standard of review applicable to a mistrial motion, the Court should find the trial court did not abuse its discretion in denying the extreme measure.

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 courts 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. "The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way." State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011).

The Court of Appeals erred in finding a mistrial was necessary as it related to any offense. The Court of Appeals' 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." (App.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. (App.237). The Court of Appeals failed to give the trial court proper deference in determining the court abused its discretion in denying the mistrial as it related to the second degree CSC with a minor charge.

Further, 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 the Court of Appeals 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 Johnson. The phone conversation the child victim's mother overheard also corroborated the criminal sexual conduct with a minor charge. The mother overheard Johnson:

> 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.

(App.119). The nature of this phone conversation, which clearly included a discussion of Johnson committing CSC with a minor, provides significant corroboration of the fact Johnson 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 Johnson leaving lend credibility to the lewd act charge. This was not just purely a credibility case in light of the context and content of the conversation overheard by the child's mother. 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, the Court of Appeals overlooked the highly significant fact that Johnson 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. Johnson never requested a curative instruction. Accordingly, this Court should find a mistrial was not manifestly necessary in light of the alternative remedies available to Johnson but never requested of the trial court.

Finally, the single innocuous comment was unlikely to sway the jury or impact the jury's verdict in this case. State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."). In the particular instance, the child victim was duly sworn in front of the jury. This oath requires the telling of the truth. See Rule 603, SCRE ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."). The child's testimony at trial was not significantly different from the information provided in the forensic interview. (State's Exhibit 3). As a result, the jury could not have been swayed by the innocuous statement that she was asked to tell the truth.

This Court should find the Court of Appeals erred in reversing Johnson's conviction for second degree CSC with a minor. This Court should find the extreme measure of a mistrial was not necessary in order to remedy the single, isolated, innocuous statement by the forensic interviewer and the trial court did not abuse its wide discretion in denying the motion. As a result, this Court should grant the State's Petition for Writ of Certiorari, find the analysis used by the Court of Appeals was not appropriate in light of the single question raised on appeal regarding the denial of a motion for mistrial, find a mistrial was not warranted, and reinstate Johnson's conviction and sentence for second degree CSC with a minor.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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July 26, 2018

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S.C. SUPREME COURT

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Petition For Writ of Certiorari to the Court of Appeals and Appendix by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr.
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I further certify that all parties required by Rule to be served have been served.
This 26th day of July, 2018.

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