STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Saluda County
Honorable Eugene C. Griffith, Circuit Court Judge
Appellate Case Tracking No. 2017-000500

The State, Respondent,

vs.

Antonio Kenyardo Posey, Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court gave Appellant's requested curative instruction and Appellant never asserted it was insufficient to remedy any error. Further, the comments by the solicitor in closing argument did not render the trial fundamentally unfair.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

The child victim, twelve years old at the time of trial, previously lived with her mom, sister, and Appellant who was her stepfather. (T.90; R.___). The child victim indicated Appellant started by kissing her, next he began touching her, then he put his mouth on her vagina, and finally it escalated to him vaginally raping the child victim. (T.95-97; R.___). The sexual abuse would occur while her mother was outside smoking, taking a bath, or otherwise not in the same area as the child victim and Appellant. (T.98; 100-101; R.___). The child victim did not disclose the abuse because Appellant was the only father she had known and she was scared what would happen. Appellant told her he would go to jail and she did not want her younger sister to grow up without a father. (T.97-98; R.___).

On one occasion, the child victim was helping her sister with her homework and Appellant entered the room. He put his hand on his step-daughter's vagina under her clothing and her younger sister saw him. When her sister asked Appellant what he was doing, he said he was tickling the child victim. (T.101-102; 105; R.___). On another occasion, the child victim and her sister were lying in bed watching television. Appellant entered the room and got in bed behind his step-daughter and tried to put his hands down her pants. She kept scooting away from him until her sister said she was about to be knocked off the bed and Appellant left the room. (T.106; R.___).

On the night before the child victim finally disclosed the ongoing abuse, Appellant entered her room after using the restroom. He turned her over, put his finger inside his step-daughter's vagina, and then put his mouth on her vagina. (T.109-110; R.___). Appellant then vaginally raped his step-daughter and then put his mouth on the child victim's vagina and performed oral sex on her again. (T.110; R.___). The child victim was wearing shorts and

underwear, but Appellant made his step-daughter pull them to the side while he digitally penetrated her, performed oral sex on her, and vaginally raped her. (T.110-111; R.___). When the child victim heard her mother draining the bath water out of the bathtub, Appellant stopped, wiped off his penis, wiped off his step-daughter's vagina, and left her room. (T.111; 113; R.___).

The child victim was in gifted and talented program as well as Beta Club at her school. (T.89; R.___). She had always tried to keep good grades because she wanted to become an anesthesiologist. (T.116; R.___). The child victim started acting out at school in an attempt to get attention and because she was frustrated with the abuse by Appellant. (T.116-117; R.___). In science class, she wrote on her homework assignment that she did not care and got in trouble for it. When she and her younger sister got picked up by her mom, her mom asked the child victim about the homework. The child victim indicated she did not want to talk about it, but when pushed by her mom, she finally disclosed the abuse by writing it on a notecard. (T.117-119; R.___). On the notecards, she told her mother she was raped by her step-father and that "he would lick [her] private and he slid his private in [hers]." (T.132; State's Exhibit 26; R.___).

Ultimately, the child victim was taken to the hospital, where they collected her underwear and performed a rape kit swabbing her mouth, breasts, and vagina. (T.123; 180-189; R.___). Photos were taken during the examination of the child victim in an effort to locate any physical evidence of the abuse. Upon review of the examination and photographs, Kate Chappell, a pediatric nurse practitioner and professor at the University of South Carolina, indicated the exam for the child victim was normal. However, she explained 92% of the time the physical exam is normal and would not discredit the possibility of sexual abuse occurring. (T.227-228; R.___).

The child victim's younger sister indicated she saw some behavior between Appellant and her sister that made her concerned. She indicated she was sitting at the kitchen table with

her sister and Appellant. She saw Appellant "digging" in her sister's pants. (T.253-254; R.___). Appellant told the younger sister that he was just rubbing the child victim's stomach, but the younger sister saw the child victim's pants unbuttoned and Appellant's hand "moving around." (T.254; R.___). On another occasion, the younger sister went to bed with the child victim. Appellant came in the room and got under the covers. According to the younger sister, Appellant then "started humping [the child victim]." (T.256; R.___). She said Appellant was moving next to her sister moving back and forth. When the younger sister sat up, Appellant told her to lie back down, so she did. (T.256-257; R.___).

Courtney Thompson, a forensic serologist in the DNA case work department of the South Carolina Law Enforcement Division (SLED), received four items for DNA testing. She tested two swabs and two pairs of underwear for the presence of biological fluid. (T.444-445; R.___). On both pairs of underwear, saliva was found and the item was sent for further DNA testing. (T.447; 449; R.___). Additionally, the vaginal swab from the child victim tested positive for saliva and was sent for further DNA testing. (T.451; R.___).

Paul Meeh, a forensic scientist with SLED, testified regarding his findings of DNA. On the one pair of underwear, he was able to develop a male DNA profile. The profile matched Appellant.[1] (T.477; R.___). He testified he received and even better match to Appellant from DNA developed from the vaginal swab of the child victim. (T.478; R.___). Finally, there was also a match to Appellant's DNA found in the other pair of underwear worn by the child victim on the night he last sexually abused her. (T.481; R.___). Paul Meeh testified it was highly significant to find Appellant's DNA on the vaginal swabs because it would not be expected to be found based on any normal daily interactions. (T.479; R.___). He further explained that they

[1] The profile could also have matched one of Appellant's paternal relatives; however, there is no allegation by Appellant or the State that any other member of Appellant's family was involved.

generally do not obtain any DNA samples. He stated "I would think that there would have to be extensive contact with the vaginal canal to generate this profile personally." (T.483; R.___). He testified to a reasonable degree of medical certainty that bodily fluid from Appellant was deposited into the vaginal opening of the child victim. He indicated it could have been saliva or it could have been through sex. (T.483; R.___). He explained "it's consistent with extensive contact." (T.484; R.___).

The jury, after deliberating about 50 minutes, found Appellant guilty of first degree criminal sexual conduct with a minor. (T.631; R.___). The trial court sentenced Appellant to 40 years in prison. (T.640; R.___).

STANDARD OF REVIEW

"A trial court is vested with broad discretion in dealing with the range and propriety of a closing argument. An appellate court will not disturb a trial court's ruling regarding a closing argument unless the trial court commits an abuse of discretion." State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009) (internal citation omitted). "In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016)(citing Vaughn v. State, 362 S.C. 163, 169-170, 607 S.E.2d 72, 75 (2004); Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974) (internal quotations omitted)). In order for a solicitor's remarks to rise to the level of reversible error, it is not enough for the remarks to be "undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotations omitted). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (quoting Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

ARGUMENT

I. The trial court gave Appellant's requested curative instruction and Appellant never asserted it was insufficient to remedy any error. Further, the comments by the solicitor in closing argument did not render the trial fundamentally unfair.

Appellant contends the trial court erred in failing to grant a curative instruction or mistrial after his objection to comments made by the solicitor in reply argument. The trial court, however, issued a curative instruction so Appellant received the relief he requested. He acquiesced in the curative instruction offered by the trial court and, after given as part of the court's jury instructions, he failed to object to its sufficiency to cure any error. In addition, the comments by the solicitor, while maybe rhetorical flourishes, were not sufficient to render the Appellant's trial fundamentally unfair.

Initially, Appellant received the exact relief he requested from the trial court.[2] After objecting to the solicitor's comments during reply argument, counsel stated: "With regards to the reply and argument when the Solicitor started talking about the community and involvement, I feel like that's something that I have got to at least ask for a **mistrial or a curative instruction.**" (T.613; R.___) (emphasis added). The trial court responded:

> I generally give in my very end, you can see it in the instructions, as to I instruct the jury they have got, you know, no friends to reward, no enemies to punish. If they're active in the community and state, their verdict has got to be just either for the State or the defense so **I think that would be an appropriate way to fix this without drawing attention to it.**

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[2] It is questionable whether the issue is properly preserved because the request for a mistrial or curative instruction was not contemporaneous with the comments by the solicitor. Instead, Appellant objected, the trial court told the solicitor to move on and the solicitor rephrased her comments. After the solicitor concluded her argument, and the court took a short break, Appellant returned to make his motion for a curative instruction or mistrial. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (finding to preserve an issue for review there must be a contemporaneous objection).

(T.613-614; R.___) (emphasis added). In response, Appellant's counsel acknowledged his acceptance of the curative instruction: "All right, sir." The trial court clearly offered a curative instruction, as requested by Appellant's counsel, and it was accepted by Appellant. As a result, Appellant clearly received the relief he requested and acquiesced in the trial court's determination of how to "fix [any errors] without drawing attention to it." See State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997) (an issue is not preserved for review if the objecting party accepts judge's ruling on a particular matter and does not contemporaneously make an additional objection indicating his dissatisfaction); State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (holding that where the defendant received the relief requested from the trial court, there is no issue for the appellate court to decide); State v. McEachern, 399 S.C. 125, 146, 731 S.E.2d 604, 614-15 (Ct. App. 2012) (where defendant received the relief she sought she could not be heard to complain on appeal).

Also, after the trial court issued his instructions to the jury, which contained the curative instruction agreed to by Appellant's counsel,[3] he asked: "Any exceptions to the charging either side?" Appellant's counsel responded: "None from the defense, Your Honor." (T.628; R.___). His response again reaffirms his acceptance of the trial court's means of curing any alleged error in the solicitor's reply argument. As a result, there is no issue for this Court to consider regarding Appellant's request for and receipt of the curative instruction.

Even if this Court considers the merits of the arguments, the trial court did not abuse its discretion in only giving a curative instruction. First, "[g]enerally, a curative instruction is

[3] The trial court stated: "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. . . . 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." (T.625; R.___).

deemed to have cured any alleged error." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996). The curative instruction in this case, along with the remainder of the court's instructions regarding burden of proof and reasonable doubt, was sufficient to remind the jury of their duty to consider the evidence and not make a decision based on passion or prejudice.

Further, the rhetorical flourish by the solicitor was not sufficient to render the trial fundamentally unfair and warrant a reversal of Appellant's conviction and sentence. The South Carolina Supreme Court, in State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965), recognized the trial judge is allowed a wide discretion in dealing with the range and propriety of argument of the solicitor to the jury, and ordinarily his rulings on such matters will not be disturbed. "The closing argument of a prosecutor need not be confined to such detached exposition as would be appropriate in a lecture . . . because to shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice." United States v. Isaacs, 493 F.2d 1124, 1164 (7th Cir. 1974) (citations and internal quotations omitted). However, in presenting arguments to the jury, a solicitor must avoid appeals to the personal biases of the jurors and must not attempt to arouse the passions or prejudices of the jurors. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). The solicitor is generally permitted to use her opportunities to speak directly to the jurors to appeal to them to do their full duty in enforcing the law, urge them to return the verdict desired by the prosecution, employ any legitimate means of impressing upon them their responsibilities, and "dwell on the evil results of crime[.]" State v. Durden, 264 S.C.

86, 92, 212 S.E.2d 587, 590 (1975) (citation and internal quotations omitted). Even obviously improper comments do not require reversal unless they so infected the trial with unfairness as to be a denial of due process. See Darden v. Wainwright, 477 U.S. 168, 181 (1986) (finding universally condemned remarks about how the prosecutor wished the defendant had been shot with a shotgun in the face and stating the defendant should not be allowed out of his cell without being on a leash, among other commentary, was insufficient to violate the defendant's due process rights).

The solicitor in this case spent the majority of her closing and reply reviewing the evidence for the jurors and explaining the significance of the evidence. Even the comments objected to by Appellant were in part in response to comments made by Appellant's counsel. In his closing he stated: "[It's better to let . . .a hundred guilty people go free than to incarcerate one innocent person. So you think of that. Make sure whatever your verdict is you've got a peace of mind going home that you can live with." (T.607; R.___). The solicitor sought to remind the jury of the seriousness of the charges and the role they play. The solicitor sought to ensure the jury did not take the case lightly and argued against jury nullification, especially in light of the nature of the crime. She concluded her reply by specifically reminding the jurors: "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." (T.612; R.___). The two comments with which Appellant takes issue were certainly not enough to sway the jury one way or the other, much less render the trial fundamentally unfair.

Additionally, the solicitor's comment that "a crime of this nature would shock the conscious of any community" is a truthful statement, which in no way shifts the burden onto Appellant or alters the jurors' responsibility to find their verdict beyond a reasonable doubt. The

comment is merely recognition of the seriousness of the crime which was before them for consideration. This seriousness has been recognized by the United States Supreme Court: "The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002); see also, United States v. Gayle, 996 F. Supp. 2d 42, 51 (D. Conn. 2014) ("Sexual abuse against a minor constitutes a crime of moral turpitude because of its inherently vile and depraved nature."). The fact it is a heinous crime should be universally accepted. Nothing in this statement by the solicitor sought to influence the jury's verdict. Instead it acted as a reminder of the seriousness of their charge, especially when connected to her next statement that the jury should render a guilty verdict beyond a reasonable doubt based on the evidence presented to them.

Even if the comments were improper, as the South Carolina Supreme Court has stated:

> [A] momentary lapse of good taste will rarely constitute prejudicial error nor does robust language inject an arbitrary factor into a trial. The latitude allowed counsel in argument may depend upon the issues involved and the nature of the trial. A trial judge is in a better position to rule upon the propriety of the argument than is this Court from a cold printed record.

State v. Chaffee, 285 S.C. 21, 29, 328 S.E.2d 464, 468–69 (1984) (quoting State v. Plath, 281 S.C. 1, 17, 313 S.E.2d 619, 628 (1984) (the Court explained "appellants complain of rhetorical flourishes engaged in by the Solicitor in his summation, especially his expressed hope that the jurors would have the 'guts to do your job.' An inelegant turn of phrase or momentary lapse of good taste will rarely constitute prejudicial error, nor does robust language necessarily inject an arbitrary factor into a trial such as this one.")).

As in Chaffee, this Court should defer to the discretion of the trial court who specifically found: "I don't believe she overstepped the bounds of trying to create an emotional bond with the jurors on the verdict which I think is what you are suggesting." (T.613; R.___). Additionally, the

trial court believed its jury instructions would cure any possible harm from the solicitor's statements. This Court should find the trial court did not abuse its discretion as it was in the best position to determine whether the trial was rendered unfair by the solicitor's comments.

Finally, in light of the overwhelming evidence presented in this case, the comments could not reasonably have affected the jury's verdict. "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries, 351 S.C. at 373, 570 S.E.2d at 166 (citing Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998)). When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, the Court will not set aside a conviction for insubstantial errors not affecting the result. State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984). The South Carolina Supreme Court has held improper comments do not require reversal when there was such overwhelming evidence of Appellant's guilt, no prejudice could possibly have resulted. See State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 268 (1996).

In the instant case, when the comments are reviewed in the context of the entire record, any impropriety in their admission was entirely harmless and did not rise to the level necessitating a mistrial. First, the Court instructed the jury numerous times of the State's burden to establish guilt beyond a reasonable doubt and regarding Appellant's presumed innocence. The

Court explained the jurors' role was to consider the evidence before it and not to reward or punish either party.

Importantly, this case was not one pitting the credibility of the child victim against the adult perpetrator. Two significant instances described by the child victim were corroborated by the child victim's younger sister, Appellant's own daughter. The younger sister testified consistent with the child victim's testimony that Appellant put his hand down the child victim's pants while the three were at the kitchen table while the younger sister did homework. The younger sister also corroborated the incident when the child victim indicated Appellant got into the bed with the two of them and tried to assault the child victim.

Most significantly, the jury had DNA evidence corroborating the child victim's testimony regarding the last time Appellant assaulted his step-daughter before she reported it to her mother. She indicated Appellant twice put his mouth to her vagina to perform oral sex on her. Testimony indicated the girl's underwear worn that night and the day she reported both contained traces of saliva and in that saliva was DNA matching Appellant. Additional testimony indicated the vaginal swab taken during the child victim's also contained saliva with a DNA match to Appellant and the SLED forensic scientist indicated there was no reason for it to be there except for extensive contact between Appellant and his step-daughter's vagina.

Even if the issue is properly before this Court for consideration and in light of the complete record, any possible impropriety in the comments that was not cured by the trial court's instructions was entirely harmless and did not so infect the trial with unfairness as to require reversal of the jury's decision. Accordingly, this Court should affirm Appellant's conviction and sentence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 14, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Saluda County
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The State, Respondent,

vs.

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PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 14th day of August, 2018.

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August 14, 2018

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RE: State v. Antonio Kenyardo Posey
Appellate Case Tracking No. 2017-000500

Dear Mr. Dudek:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

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

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division