RECEIVED

AUG 20 2018

S.C. SUPREME COURT

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)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

ATTORNEYS FOR PETITIONER/RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals did not err in affirming Johnson's conviction for lewd act because the trial court properly denied the extreme measure of a mistrial after the forensic interviewer's comment that he told the child to tell the truth.

II. The Court of Appeals did not err in finding the trial court properly denied Johnson's motion for a mistrial because the expert's testimony did not constitute impermissible bolstering.

III. The Court of Appeals properly refused to grant a new trial based on the cumulative error doctrine when it is not applicable and not preserved for review.

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. The State filed a Petition for Writ of Certiorari and then Johnson filed his Cross-Petition for Writ of Certiorari. This Return follows.

ARGUMENT

I. The Court of Appeals did not err in affirming Johnson's conviction for lewd act because the trial court properly denied the extreme measure of a mistrial after the forensic interviewer's comment that he told the child to tell the truth.

The Court of Appeals correctly affirmed Johnson's conviction for lewd act because the motion for a mistrial was properly denied. As discussed in the State's Petition for Writ of Certiorari, the Court of Appeals erred in its analysis by considering an issue beyond the question of whether a mistrial should have been granted. When the Court properly considers the only issue before it, whether the extreme measure of a mistrial was warranted by the single, isolated comment, the Court of Appeals did not err in affirming Johnson's conviction for lewd act.

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).

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]

[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.

Merits

Initially, it should be noted Johnson raised the following issue in his Final 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." (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 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).

While the comment was improper under State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) and State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), the trial court correctly concluded the prejudice to Johnson by the comment was minimal and did not warrant a mistrial. After examining the comment in light of this Court's holding in Kromah, 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).

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 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). This directly corroborated the child's testimony regarding the events of the incident of abuse which resulted in the lewd act charge.

Additionally, 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.

Finally, 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.

Based on the foregoing, this Court should deny Johnson's Petition for Writ of Certiorari as to Question I because the Court of Appeals did not err in finding a mistrial was not warranted as to the lewd act charge.

II. The Court of Appeals did not err in finding the trial court properly denied Johnson's motion for a mistrial because the expert's testimony did not constitute impermissible bolstering.

The Court of Appeals correctly found the State's expert's testimony did not impermissibly bolster the mother's testimony and properly concluded a the trial court did not err in denying Johnson's motion for a mistrial. The trial court properly admitted testimony by the State's expert witness regarding the reaction of family members of victims of child sexual abuse. As a result, this Court should deny the Petition for Writ of Certiorari as to Johnson's Question II.

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).

In addition, the admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). 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. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

Qualification of a witness as an expert and the subsequent admission of that witness's testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Merits

Significantly, the trial court instructed the jury to disregard the testimony by the State's expert. This curative instruction was sufficient to cure any possible error from her testimony and a mistrial was not warranted. "Generally, a curative instruction is 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); see also, State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (instruction to disregard inadmissible evidence is usually viewed as having cured the error in its admission); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (if trial judge sustains timely objection to testimony and gives jury curative instruction to disregard testimony, error is deemed to be cured); State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.").

The curative instruction was not even necessary because the testimony was not improper bolstering. "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499 (2013). "For an expert to comment on the veracity of a [victim's] accusations of sexual abuse is

improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). As the Court of Appeals has stated:

> "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013). Any time an expert testifies or provides evidence which supports the underlying charge levied by the victim, or corroborates other evidence; it does not result in improper or impermissible bolstering or vouching. It is only when the testimony invades the province of the jury and makes a comment on the credibility or veracity of a witness that the testimony becomes improper.

> Exposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse can provide jurors with possible alternative explanations for complainant actions and statements that are, to average laypeople, "superficially bizarre," "seemingly unusual," "seemingly inconsistent," or normally attributable to "inaccuracy or prevarication." Thus informed, the jury will be better able to perform its fact finding duty.

Wheat v. State, 527 A.2d 269, 273 (Del. 1987). This is the same kind of testimony provided by the State's expert to explain the "seemingly unusual" fact that others did not recognize the fact the child was being abused until accidentally overhearing a phone conversation. The testimony did not indicate the mother or child was telling the truth; instead, it merely explained a phenomenon that occurs that may be outside the understanding of the average juror.

Additionally, this case is clearly distinguishable from State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). In Anderson, the expert witness also served as the forensic interviewer and met with the child. The expert was well aware of the child's testimony and statements regarding how the abuse occurred and the ramifications of the abuse through the interview with the child. When the expert testified regarding typically admissible behaviors of a child sexual abuse victim, the testimony of tailored to meet the statements and interview of the child victim. As a result, the Court found her testimony vouched for the minor when she testified only to those characteristics which she observed in the minor. Id. at 219, 776 S.E.2d at 79.

The State followed the "better practice" outlined in Anderson during this case and called a separate "independent" expert to testify regarding behavioral characteristics and family dynamics. See id. at 218, 776 S.E.2d at 79. The expert did not track the testimony of the child because of having been privy to the experiences and statements of the child. Instead, the expert testified to a portion of the family dynamic which was also seen in the instant case. Her testimony complied completely with the requirements and admonishments of Anderson. The mere fact some of her testimony corroborated the mother's testimony does not mean it impermissibly bolstered the mother's testimony. See e.g., State v. Brown, 411 S.C. 332, 345, 768 S.E.2d 246, 253 (Ct. App. 2015), overruled on other grounds by State v. Jones, Op. No. 27822 (S.C.Sup. Ct. filed July 5, 2018).

Finally, the testimony was in direct response to questions of the victim's mother which opened the door to the testimony. "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered

initially." State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); see also, State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) (same).

In the following colloquy, Johnson's counsel clearly tried to infer that the story was not true because no one had noticed anything prior to the phone conversation overheard:

> Q. I just want to establish, Nakia [Johnson] was a good stepfather to [victim]?
> A. Yes, he was.
> Q. Okay. And he was a good provider and good person to you?
> A. Yes, he was.
> Q. Okay. And up until the time you got this phone call, you had no indications of anything like this?
> A. No, I hadn't.

(T.256; App. 135). The colloquy continued to try and paint Johnson as supportive of the victim and her family. (T.257; App. 136). As a result, Johnson opened the door to the State's expert's testimony regarding whether the mother would have any indications something was occurring between Johnson and the victim.

Accordingly, because the trial court gave a sufficient curative instruction to disregard the State's expert witness's testimony a mistrial was not required. Further, the testimony was properly admitted, was not impermissible bolstering, and was in direct response to questions asked by Johnson's counsel. As a result, the trial court did not err in denying Johnson's motion for a mistrial. Therefore, this Court should deny the Petition for Writ of Certiorari as to Question II.

III. The Court of Appeals properly refused to grant a new trial based on the cumulative error doctrine when it is not applicable and not preserved for review.

The Court of Appeals correctly found there was no merit to his cumulative error argument because there was no error. Further, the issue is not preserved for review on appeal. As a result, this Court should deny the Petition for Writ of Certiorari as to this issue.

First, Johnson never raised the cumulative error doctrine to the trial court. He never raised it during trial, or even in a post-trial motion after trial. As a result, the issue is not preserved for review on appeal. See State v. Beekman, 405 S.C. 225, 236, 746 S.E.2d 483, 489 (Ct. App. 2013) (finding cumulative error doctrine must be raised to and ruled upon by the trial court in order to be addressed on appeal). Johnson seems to be asking this court to completely ignore longstanding preservation rules, and instead address this issue as plain error. South Carolina has rejected the plain error doctrine, and this Court should not entertain it under the guise of the cumulative error doctrine. See e.g., State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured."). The trial court should have been given the opportunity to address the issue.

Next as discussed above, there is no error in the admission of the testimony of the State's expert witness, and any error was cured by the curative instruction. No prejudice resulted from the properly admitted testimony, and even if improper, the jury was specifically instructed to disregard the testimony. Therefore, it could not have contributed to a level of cumulative error necessitating a new trial. Additionally, the prejudice resulting from the single comment

regarding the child being asked to tell the truth during the interview with the forensic interviewer did not create any substantial prejudice to Johnson, especially in light of the corroborating testimony from the victim's mother. As a result, even if some possible prejudice existed from the expert witness' testimony, the combined effect with the comment by the forensic interviewer does not warrant this Court ignoring the preservation requirements and finding the case should be reversed and remanded for a new trial.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER/RESPONDENT

August 20, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
AUG 20 2018
S.C. 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.

PROOF OF SERVICE

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

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 20th day of August, 2018.

ANNE A. MUELLER
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727