

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

Supreme Court Appellate Case No. 2018-001355
Court of Appeals Opinion No. 2018-UP-109

RECEIVED

NOV 26 2018

S.C. SUPREME COURT

The State of South Carolina, Respondent,

v.

Nakia Johnson,Petitioner.

BRIEF OF PETITIONER

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QUESTION PRESENTED

Did the Court of Appeals err by finding harmless error, regarding the third-degree criminal sexual conduct conviction, when David Kellin, a child advocacy center interviewer, testified he instructed the child to “tell the truth during the interview process,” when that testimony is prohibited by *State v. Anderson* and *State v. Kromah*, there was no physical evidence of sexual abuse, and the issues before the jurors turned solely on the credibility of the witnesses?

STATEMENT OF THE CASE

On October 14, 2011, the complaining child witness and her mother accused Nakia Johnson of child sexual abuse. The State arrested and indicted Mr. Johnson for first-degree criminal sexual conduct with a minor, second-degree criminal sexual conduct with a minor, and committing a lewd act on a minor child.¹ R. 526-29.²

From June 22-26, 2015, the State tried Mr. Johnson before the Honorable Doyet A. Early, III and a jury in Kershaw County. Nicole Simpson and Kathryn Cavanaugh represented the State. Virgin Johnson, Jr. (no relation) and Corey Williams represented Mr. Johnson. The jurors found Mr. Johnson not guilty of first-degree criminal sexual conduct with a minor but returned guilty verdicts for second-degree criminal sexual conduct with minor and lewd act. R. 513-14. Judge Early sentenced Mr. Johnson to twenty years imprisonment for second-degree criminal sexual conduct with a minor and

¹ Lewd act was previously found in S.C. Code Ann. § 16-15-140. Lew act is now third-degree criminal sexual conduct with a minor, codified at S.C. Code Ann. § 16-3-655(C).

² “R.” refers to the Record on Appeal. “A.” refers to the Appendix. The Record on Appeal is included in the Appendix. The page numbers for the Record on Appeal contained in the Appendix correspond to the pages numbers in the original Record on Appeal.

fifteen years imprisonment for lewd act. The sentences are concurrent. R. 521, lines 8-16; 524-25. Judge Early subsequently denied Mr. Johnson's motion for a new trial.

Mr. Johnson timely appealed to the Court of Appeals, raising the following three issues:

- I. Should the trial court judge have granted a mistrial when the State's expert witness, Dr. Allison Foster, testified that the "most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults] . . . [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?
- II. 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?
- III. Should [the Court of Appeals] grant a new trial based on the cumulative error doctrine?

A. 535.

On December 5, 2017, the Court of Appeals convened an oral argument. On March 14, 2018, the Court of Appeals issued a written opinion, *State v. Johnson*, Op. No. 2018-UP-109 (filed March 14, 2018), affirming Mr. Johnson's conviction for committing or attempting to commit a lewd act, reversing his conviction for second-degree criminal sexual conduct with a minor, and remanding the case for a new trial on the charge of second-degree criminal sexual conduct with a minor. A. 585-92. Regarding the first issue, the Court of Appeals did not find any error with Dr. Foster's testimony. A. 586-89. Regarding the second issue, the Court of Appeals held Mr.

Kellin’s “testimony 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) but reasoned:

Although we find the trial court erred in allowing Kellin to testify that he asked Victim if she would tell the truth in the forensic interview, we believe this error only requires reversal of Johnson’s conviction for second-degree CSC with a minor because only that conviction depended solely on the credibility of Victim. *See State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015) (“The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim.”). We affirm Johnson’s lewd act conviction because Mother’s testimony about overhearing Johnson and Victim’s conversation corroborated Victim’s testimony regarding the graveyard incident. Victim testified Johnson told her to get into the car to go to the store, and he left before Mother and the other children could come.

A. 589-91. Regarding the third issue, the Court of Appeals held Mr. Johnson did not establish cumulative error because the Court did not find error with the admission of Dr. Foster’s testimony. A. 591-92.

On March 29, 2018, Mr. Johnson petitioned for rehearing. A. 593-97. On April 10, 2018, the State petitioned for rehearing. A. 600-06. On June 21, 2018, the Court of Appeals denied the petitions for rehearing. A. 607.

On July 23, 2018, Mr. Johnson petitioned this Court for a writ of *certiorari* to review the opinion of the Court of appeals, raising the following three issues:

- I. Did the Court of Appeals err by finding harmless error, regarding the third-degree criminal sexual conduct conviction, when David Kellin, a child advocacy center interviewer, testified he instructed the child to “tell the truth during the interview process,” when that testimony is prohibited by *State v. Anderson* and *State v. Kromah*, there was no physical evidence of sexual abuse, and the issues before the jurors turned solely on the credibility of the witnesses?
- II. Did the Court of Appeals err when it failed to concluded the testimony by Dr. Allison Foster that the “most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults] . . . [questioning] how could I not have seen something was going on” when the State presented testimony of the child’s mother

and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

- III. Should this Court order a new trial for Nakia Johnson based on the cumulative error doctrine?

The State responded to Mr. Johnson's petition for writ of *certiorari* on August 20, 2018. Mr. Johnson replied on August 28, 2018.

On July 26, the State filed a cross-petition for a writ of *certiorari* raising the following issue:

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.

Mr. Johnson responded to the State's petition for a writ of *certiorari* on August 26, 2018.

By written order dated October 19, 2018, this Court granted Mr. Johnson's petition as to Question I, denied Mr. Johnson's petition as to Questions II and III, and denied the State's petition. This brief follows.

STATEMENT OF FACTS

Mr. Johnson, a Lee County Deputy Sheriff at the time, and Pamela Hall³ met in September 2001. At the time, both were married to other people, and Ms. Hall had a daughter from her prior relationship. The two married but later divorced. They had a son and two daughters together. After the divorce, Mr. Johnson provided financial support to

³ Ms. Hall has a 2002 conviction for fraudulent check and a 2009 conviction for financial identity fraud. For the 2009 charge, she served 18 months following a probation revocation. In 2010, Ms. Hall received inpatient treatment for alcohol and drug abuse. R. 130-33.

Ms. Hall and the children. Mr. Johnson and Ms. Hall continued to have a friendly and sometimes intimate relationship. Prior to and after the divorce, they argued about Mr. Johnson “cheating” with other women. Sometimes these arguments turned physical.⁴ R. 103-17.

At 6:36 p.m. on Tuesday, October 11, 2011, Pamela Hall reported to the Kershaw County Sheriff’s Office that her eleven-year-old daughter from her previous relationship (hereinafter “the child”) had been sexually assaulted. At 7:23 p.m., Deputy Sheriff Jerry Barnwell arrived at Ms. Hall’s residence and interviewed her, learning that she had pointed a gun at Mr. Johnson. He did not interview the child but notified the “on-call investigator” and victims’ advocate to meet Ms. Hall and the child at the hospital. R. 23-27.

According to Ms. Hall, Mr. Johnson came to pick up their youngest child. Before the children came home, they had sex. While Ms. Hall was helping their son with his homework, Mr. Johnson and the child left to go to the store. Ms. Hall called Mr. Johnson and asked him to pick up skins and beer from the store. Ms. Hall testified she got a call from Mr. Johnson’s phone and could hear him talking. At first, she couldn’t make out the conversation but claimed she heard him say, “[Y]ou know I want to nut in you, but I can’t.” Ms. Hall claimed Mr. Johnson asked, “[Y]ou know why?,” and the child responded, “[B]ecause I will get pregnant.” Ms. Hall also claimed she heard Mr. Johnson asking the child “does she want to do it; does she want to be on top or does she want him to get on top.” After the child allegedly said she wanted Mr. Johnson to be “on top,” Ms. Hall hung up the phone. Ms. Hall called back. Mr. Johnson answered. Ms. Hall told Mr.

⁴ The child testified she was aware of Mr. Johnson’s “cheating” with other women. R. 33, lines 12-15; 35, lines 4-8.

Johnson, “[Y]ou got ten seconds to have my baby back in the yard.” Ms. Hall claimed not to remember everything else she said. She went into the yard and waited. According to Ms. Hall, Mr. Johnson drove back fast. Ms. Hall told the child to get out of the car. Ms. Hall jumped into the car, grabbed Mr. Johnson’s gun, and argued with him. R. 117-20.

Still holding Mr. Johnson’s gun, Ms. Hall went to her mother’s house⁵ and talked to the child. When Ms. Hall asked her what happened, the child “kept saying nothing, nothing.” Ms. Hall pressed, and the child eventually claimed Mr. Johnson “was touching her breasts.” R. 120.

Ms. Hall took the child back outside and confronted Mr. Johnson, pointing his gun at him. Mr. Johnson denied he would “do something like that.” R. 121-22. Ms. Hall told the child “to go in the house.” She returned Mr. Johnson’s gun and “told him to get out of my yard because I was calling the police.” Ms. Hall called 911. After speaking with Deputy Barnwell, Ms. Hall took the child to the hospital. R. 125.

Later that night, the child was examined at the hospital and interviewed by the police. R. 67; 361. Temple Hart, a registered nurse, performed the examination. After getting general medical history from Ms. Hall, the child described the sexual assault from earlier in the day as involving touching and rubbing “on top of my clothes.” Other than some redness, which could have multiple causes, the examination was normal. R. 165-80; 183; 188. Ms. Hart collected evidence in a sexual assault kit for further analysis. R. 173, lines 21-24; 177, lines 10-18. Paul Meah of the South Carolina Law Enforcement Division testified as an expert in DNA analysis. Mr. Meah examined the sexual assault

⁵ Ms. Hall lived in a “single mobile home trailer, three bedrooms,” which is next to her mother’s house. R. 113.

kit, which contained a request from Ms. Hart to look for semen. Mr. Meah did not find any evidence of semen. R. 268-83.

At trial, the child testified about the allegations of sexual abuse.⁶ When they lived in Fairfax, South Carolina, the child claimed Mr. Johnson “discovered that I had hair on my privates.” She claimed Mr. Johnson would ask her to pull down her pants, and he would pull down his pants. She claimed Mr. Johnson would “rub” her arms and breasts, kiss her, and “put his private in my private.” She also claimed Mr. Johnson would ask her if she would tell, and the child said she would not. R. 36-38.

The child testified about abuse allegedly occurring when she lived on her grandmother’s property. She claimed she and Mr. Johnson would “go in the room” and Mr. Johnson “pull[ed] down his pants down” and told her “to suck it,” meaning his penis. While she did this, she claimed Mr. Johnson would “rub [her] hair or move [her] head back and forth.” She claimed “white stuff” would come out of his penis. Also at this location, the child claimed Mr. Johnson would “tell me to lay down and he’d kiss me. And he’d kiss my thighs and the he’ll put his penis in my private.” She further claimed Mr. Johnson would rub her bottom but would not put his penis inside. R. 38-40.

During the period of time when the child moved back to Fairfax, she claimed the abuse “just speeded up, just got worse than what it was.” She claimed Mr. Johnson would “would mess with me” and the abuse lasted “hour after hours.” Other than claiming it happened in the “back room, laundry room, and his room,” the child did not testify to any details of the abuse. R. 44-46.

⁶ At the time she testified at trial, the child was a 15-year-old high school sophomore. She lived with her father and stepmother following Ms. Hall’s probation revocation. R. 28-30.

The child claimed abuse occurred at her Aunt Missy's house in Cassatt, South Carolina while her aunt was at work and Ms. Hall was outside the house. She claimed Mr. Jonson would take her into the computer room, "pull down his clothes," and tell the child to pull down her clothes. The child claimed Mr. Johnson would have her sit on his lap. She claimed Mr. Johnson would talk for a while, start "kissing and rubbing" her, lick and kiss her breasts and stomach, and rub her butt. The child testified Mr. Jonson would sit in the computer chair, ask her to sit in his lap, and "put is penis in my vajayjay, and he'll just move up and down constantly." R. 46-51.

The child claimed the abuse occurred during a trip to Walt Disney World in Orlando, Florida. On the first night there, she "slept on one side of the bed and they slept on the other side." She "got closer to where he was." She claimed "he would take the cover up and down so I could see his penis that night." On the last day of the trip, the child claimed Mr. Johnson sent Ms. Hall and the other children to get the car. While they were gone, she claimed Mr. Johnson kept touching and rubbing her and tried to "[p]ut his penis in me," but she told him to stop because it hurt. R. 51-53.

The child testified about a trip to Myrtle Beach, South Carolina. She claimed Mr. Johnson touched her underwater and made her grab him underwater. When they returned from Myrtle Beach to a hotel in Bishopville, South Carolina, the child claimed Mr. Johnson sent Ms. Hall "to the store to get some soap and something else" and told her "brothers and sisters to go in the bathroom." She claimed Mr. Johnson told her "to lay back on the bed and take [her] pants off" and "put his penis in my vajayjay." R. 53-55.

The child testified about incidents allegedly occurring on various dirt roads near her Aunt Missy's house. She claimed Mr. Johnson would pull down her pants, take her

pants off, have her “get on top of him,” and have her “ride” him by “mov[ing] up and down.” She claimed this happened “multiple times” on multiple dirt roads but she could only identify a single dirt road for law enforcement. R. 55-58.

The child testified about the day Ms. Hall called the police. She and Mr. Johnson left to go to the store. Instead of going to the store, the child claimed Mr. Johnson took her to a graveyard, pulled down his pants, and told her to pull down her pants. She claimed, Mr. Johnson started touching me and he started feeling, but we never could have done nothing because of the fact that my mama was still on the line and he was just talking.” She further claimed, after Mr. Johnson got off the phone with Ms. Hall, the two went to the store and rushed home. R. 61-64.

On October 12, 2011, David Kellin, a social worker, interviewed the child at the Family Resource Center—a child advocacy center mandated by statute⁷—at the request of Investigator Rick Bailey. Because the child was sick, the interview was terminated early. The videotape of this interview was introduced at trial. R. 229-43; 251-52. On November 9, 2011, Laurie Caldwell of the Dickerson Center—also a child advocacy center—interviewed the child a second time. The videotape of this interview was not introduced into evidence because the child had turned twelve prior to the interview. R. 292-306.

Dr. Susan Luberoff, a medical doctor, testified as an expert “in the field of child sexual assault examinations.” She examined the child on October 14, 2011 at the Assessment & Resource Center (“ARC”)—also a child advocacy center. The

⁷ S.C. Code Ann. § 63-11-310.

examination was normal, and Dr. Luberoff couldn't offer an opinion whether sexual abuse "happened or whether it didn't" happen. R. 340-54.

A records custodian from AT&T testified that, on the afternoon of October 11, 2011, (1) Ms. Hall's phone called Mr. Johnson's phone for fifty seconds beginning at 5:41 p.m., (2) Mr. Johnson's phone called Ms. Hall's phone for two minutes, three seconds beginning at 5:54 p.m., and (3) Ms. Hall's phone called Mr. Johnson's phone for one minute, and twenty-three seconds to one minute, twenty-five seconds, beginning at 5:56 p.m. R. 191-205.

Investigator Dave Capps, of the Lee County Sheriff's Office, who is also responsible for "in house IT," retrieved the security video from Fountain Grocery Store showing that Mr. Johnson and the child were inside the store at 5:58 p.m. or 5:59 p.m. R. 253-61; 263-67. Investigator Rick Bailey of the Kershaw County Sheriff's Office acknowledged it would be impossible for Mr. Johnson to have been at the graveyard and the store at the same time. R. 395-97.

Investigator Rick Bailey of the Kershaw County Sheriff's Office contacted Mr. Johnson and requested he provide an interview. Mr. Johnson cooperated with the investigation. The interview, occurring on October 14-15, 2011, was videotaped and played to the jurors. R. 362-70; 373-74. During the interview, Mr. Johnson denied abusing the child. At the conclusion of the interview, Investigator Bailey arrested Mr. Johnson by serving arrest warrants that had already been obtained based solely on the statements of Ms. Hall and the child. R. 385-87.

ARGUMENT

Did the Court of Appeals err by finding harmless error, regarding the third-degree criminal sexual conduct conviction, when David Kellin, a child advocacy center interviewer, testified he instructed the child to “tell the truth during the interview process,” when that testimony is prohibited by *State v. Anderson* and *State v. Kromah*, there was no physical evidence of sexual abuse, and the issues before the jurors turned solely on the credibility of the witnesses?

The Court of Appeals “agree[d] with [Mr.] Johnson that the forensic interview’s testimony was improper under *Kromah* and *Anderson*” because Mr. “Kellin testified he begins forensic interviews by asking victims if they would tell the truth during the interview process” and the “trial court refused to strike this testimony or grant a mistrial.” The Court of Appeals then concluded, “Although we find the trial court erred in allowing Kellin to testify that he asked Victim if she would tell the truth in the forensic interview, we believe this error only requires reversal of Johnson’s conviction for second degree CSC with a minor because only that conviction depended solely on the credibility of Victim.” The Court of Appeals “affirm[ed] Johnson’s lewd act conviction because Mother’s testimony about overhearing Johnson and Victim’s conversation corroborated Victim’s testimony regarding the graveyard incident.” A. 589-90. As pointed out in Mr. Johnson’s petition for rehearing, A. 594-96, the Court of Appeals holding that the mother’s testimony was sufficient to corroborate the child’s testimony regarding the alleged assault at the graveyard erred for two reasons. Additionally, the Court of Appeals erred in its application of the harmless error analysis.

For its first error, the Court of Appeals overlooked Mr. Johnson presenting evidence of Ms. Hall’s motive to pressure or coach her child to make false allegations. An adult’s motive for making false allegations of sexual abuse is a recurring problem. *See, e.g., State v. Smith*, 383 S.C. 159, 679 S.E.2d 176 (2009) (trial judge did not abuse

his discretion or commit an error of law in granting defendant a new trial based on coaching by child's aunt during trial). That two witnesses sharing the same motive corroborated each other on one allegation in the case does not mean that credibility was not the central issue for the jurors to resolve. Following the Court of Appeals' analysis to the logical conclusion, the appellate courts could never reverse a conviction for third-degree criminal sexual conduct with a minor when the adult "coaching" the child provides testimony corroborating a portion of the child's testimony whose credibility is an issue in the case. There is no way an appellate court could conclude, beyond a reasonable doubt, that Ms. Hall's motive-based testimony is sufficient corroboration in the absence of any physical evidence corroborating the sexual assault allegations.

The second error involves the timeframe for the third-degree criminal sexual conduct allegations. The Court of Appeals correctly observed, "Mother's testimony, however, does not corroborate Victim's testimony about any other events" other than the graveyard allegations. A. 591. But, the Court of Appeals did not consider that the lewd act indictment alleged an over four-year timeframe during which the crime could have occurred. The child claimed Mr. Johnson sexually abused her on multiple dates at multiple locations. Accordingly, there is no way to know whether the jurors convicted Mr. Johnson of lewd act based on the graveyard allegation or one of the other allegations. In fact, the Court of Appeals correctly noted, "The State entered a surveillance video into evidence showing [Mr.] Johnson and Victim at the store that day." A. 590 (fn. 4). The opinion below, however, neglected to consider evidence in the record, including the time stamps on the surveillance video, showing Mr. Johnson and the child were at the store at the same time of the phone call that supposedly corroborated the graveyard allegations.

R. 191-205, 253-61, 263-67, 395-97. Thus, the jurors likely rejected these allegations and based the lewd act conviction on other allegations. Regardless, there is no way the Court of Appeals could conclude, beyond a reasonable doubt, that the jurors based the lewd act conviction on this testimony as opposed to other testimony.

In addition to making these errors, the Court of Appeals did not apply the correct standard of review. An appellate court must be able to conclude the error was “harmless beyond a reasonable doubt.” *State v. Mouzon*, 326 S.C. 199, 205, 485 S.E.2d 918, 921 (1997). “‘Harmless beyond a reasonable doubt’ means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt.” *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002). Although arising in the context of a post-conviction relief case, this Court’s recent opinion in *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) is instructive for when the State’s evidence is so strong that error does not result in prejudice. *Smalls* held, “[F]or the evidence to be overwhelming such that it categorically precludes a finding of prejudice..., the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland*⁸ standard of a reasonable probability. . . the factfinder would have had a reasonable doubt cannot possibly be met.” *Id.* 422 S.C. at 191, 810 S.E.2d at 845 (internal quotations omitted). In this case, the State did not present any evidence—such as DNA, a confession, or physical evidence—so conclusive that excludes the possibility that the jurors could have a reasonable doubt if the error was removed from the case.

⁸ *Strickland v. Washington*, 466 U.S. 668 (1984).

Because credibility of the witnesses was the central issue for the jurors to determine, the error was not harmless. *See Mouzon. Compare Kromah*, 401 S.C. at 362, 737 S.E.2d at 501 (“Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably have affected the result of the trial, so any error in its admission was harmless beyond a reasonable doubt.”) *with Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (finding “overwhelming” prejudice when the “case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied any improper conduct. There was no physical evidence of sexual abuse.”). *See also State v. Chavis*, 412 S.C. 101, 105, 771 S.E.2d 336, 338 (2015) (medical “exam also revealed Victim had chlamydia,” and “the State presented medical records that Appellant was taking medicine commonly used to treat chlamydia at this time.”).

This Court’s guidance is needed to clarify the proper application of the harmless error rule. Although this Court’s recent precedent in appeals of convictions for criminal sexual conduct with a minor focused on the presence or absence of physical evidence of sexual abuse, *e.g. Anderson, Kromah, and Jennings*, a proper harmless error analysis is much more in depth. *See e.g. Smalls*. Applying the proper standard of review, the appellate court must be able to say, beyond a reasonable doubt, that the error did not affect the outcome of the trial—something that cannot be said here.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals and remand this case for a new trial on all charges.

Respectfully Submitted,

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v.

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Certificate of Service

I certify that I have served Brief of Petitioner on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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