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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BARRY EUGENE LAFAVOR,

APPELLANT

APPELLATE CASE NO. 2013-000568

FINAL BRIEF OF APPELLANT
FILED UNDER SEAL

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by denying Appellant's motion for a continuance to allow sufficient time for defense counsel to properly investigate Department of Social Services (DSS) records involving the minor complainants and their family?

2.

Whether the court erred by refusing to grant a mistrial where the solicitor argued in closing that the jury should convict Appellant out of anger towards the minor complainants' parents for allowing Appellant to be around the children, and if the jury was not angry, it should acquit Appellant since this highly improper argument violated Appellant's right to due process?

STATEMENT OF THE CASE

An Aiken County Grand Jury indicted Appellant at the April 4, 2013 term of General Sessions for second degree criminal sexual conduct with a minor, criminal solicitation of a minor, and three counts of third degree criminal sexual conduct with a minor. R. 269-278. His case was called to trial on June 24, 2013 before the Honorable Michael G. Nettles, and a jury. R. 17. Assistant Solicitors Ashley Agnew and Samuel B. Grimes, Jr. represented the state, and Michael D. Routzong represented Appellant. R. 17.

On June 26, 2013, the jury acquitted Appellant of criminal solicitation of a minor, second degree criminal sexual conduct with a minor, and one count of third degree criminal sexual conduct with a minor, but found him guilty of the remaining two counts of third degree criminal sexual conduct with a minor. R. 253, l. 7 – 254, l. 4. Judge Nettles sentenced Appellant to two concurrent sentences of fifteen years imprisonment suspended upon the service of ten years imprisonment and five years probation. Appellant was also ordered to register as a sex offender, undergo sex offender counseling upon his release from incarceration, and be subject to lifetime GPS monitoring pursuant to S.C. Code Ann. § 23-3-540. R. 258, l. 10 – 259, l. 3.

This appeal follows.

STATEMENT OF THE FACTS

Minor 1, who was between the ages of eleven and twelve at the time of these allegations, and Minor 2, who was between the ages of ten and eleven, lived in a mobile home with their mother, Allison Whittle, their mother's partner, Susan Lukowiak, their younger brother and sister, and occasionally a few other individuals. See R. 34, ll. 22-25; R. 59, ll. 17-18; R. 78, ll. 17-20; R. 79, ll. 15-21. Both Whittle and Lukowiak were disabled and did not work. R. 198, ll. 5-8.

Sometime before the spring of 2011, their family home was destroyed by a fire and replaced by a new mobile home on the same property. R. 80, ll. 1-11. After the fire, Appellant's cousin, Marie Scott, who was friends with the family, asked Appellant to help the family due to their unfortunate circumstances. Appellant testified that he reluctantly agreed and bought each family member new clothing and other needed supplies. R. 182, l. 17 – 183, l. 11. He eventually moved in with the family to help pay the bills, maintain the home, and take care of the four children. R. 183, ll. 12-21.

Investigator Kim Sievers of the Aiken County Sheriff's Office testified that she first became involved in this case when she was asked to respond to Greendale Elementary School in reference to "accusations of some sexual abuse" involving Minor 1 and Minor 2's younger brother. As a result of these accusations, Sievers interviewed all four children in the family, including Minor 1 and Minor 2. Of the four children, Minor 1 was the only child who "disclosed sexual abuse." R. 140, l. 8 – 141, l. 5. After Minor 1 disclosed on May 1, 2012, Sievers referred the children to the Child Advocacy Center for a forensic interview and told their mother, Allison Whittle, that the children were to have no contact with Appellant until the allegations could be investigated. R. 142, ll. 5-13.

All four children were interviewed at the Child Advocacy Center on May 11, 2012 and all four, including Minor 1, denied any form of sexual abuse. "Due to no disclosure at that point," Sievers closed the case. R. 142, l. 20 – 143, l. 5. However, the investigation was reopened on June 20, 2012 when Sievers received a telephone call from Minor 1's counselor at Aiken Barnwell Mental Health, Sherry Pattillo, who indicated Minor 1 was again alleging sexual abuse. R. 144, ll. 2-9. That same day, Sievers spoke to both the children's mother, Allison Whittle, and Appellant and told them that the investigation had been reopened and that Appellant was to have no contact with the children until the allegations could be investigated. R. 144, ll. 13-20.

Minor 1, Minor 2, and their younger sister were again seen at the Child Advocacy Center on July 30, 2012 for a second forensic interview. R. 145, ll. 15-24. While Minor 1 disclosed sexual abuse, Minor 2 again denied she had ever been improperly touched. R. 148, ll. 23-25. Despite Minor 1's disclosure during this second forensic interview in July, Sievers took no action. It was not until October 15, 2012, when Sievers learned Appellant had allegedly sent Minor 2 flowers at her school that Sievers decided to obtain warrants for Appellant's arrest regarding the allegations made by Minor 1. Appellant was ultimately arrested on October 16, 2012. R. 146, l. 11 – 147, l. 13.

On November 14, 2012, Minor 2 was again seen at the Child Advocacy Center. During this third forensic interview, despite denying on *three* prior occasions that she had ever been improperly touched, Minor 2 "disclosed sexual abuse." R. 147, l. 19 – 148, l. 5. As a result, Sievers obtained additional warrants for Appellant. R. 149, ll. 6-8.

Minor 1 testified that Appellant "bad touched" her on her "private area" with his hand approximately five times while she was in the sixth grade. She claimed this happened

in the back bedroom of their mobile home and in the living room while everyone else was sleeping. R. 39, l. 12 – 41, l. 10. Minor 1 further alleged that Appellant touched her with his hand underneath both her "night clothes" and her "panties" and would "sometimes" go "on the inside" of her private area with his hand. R. 41, l. 11 – 42, l. 3. While she denied that Appellant had ever asked or made her touch him anywhere, she claimed Appellant asked her to "[m]ake love to him." R. 43, ll. 13-23.

Minor 2 similarly claimed Appellant "bad touched" her on her "private area" with his hand when she was in the fourth grade. She alleged this happened in one of the beds in the living room at her house during the night while everyone else was sleeping. R. 65, l. 4 – 67, l. 4. Minor 2 testified Appellant touched her in her private area about "three or four times," each time on top of her shorts and panties. She denied that he ever touched her underneath her clothing. R. 67, l. 11 – 68, l. 17. Minor 2 claimed she told her mother about the alleged touching, but her mother did "nothing" about it. R. 69, ll. 3-11.

Susan Lukowiak, Allison Whittle's partner, testified that even after these allegations surfaced, she and Whittle continued to allow Appellant to live in the family home and have contact with the children "because [they] needed help with the bills." R. 91, l. 22 – 92, l. 5. Lukowiak also admitted that when Minor 1 first claimed Appellant had touched her she told Investigator Sievers that Minor 1 was lying because she wanted Appellant "kicked out of the house." R. 91, ll. 1-8; R. 97, l. 14 – 12.

Appellant denied ever improperly touching Minor 1 or Minor 2. R. 190, l. 18 – 191, l. 8. He testified that he helped support the children and had bought Minor 1, Minor 2, and their younger sister a cell phone, but that Minor 1 was upset because she did not like the telephone Appellant had bought her and wanted an "open face phone." When Appellant

refused to buy Minor 1 another telephone, Minor 1 told him, "[I]f [he] did not buy her an open face telephone that she was going to tell somebody that [he] touched her." It was shortly after Minor 1 made this threat that she claimed Appellant had improperly touched her. R. 186, l. 5 – 187, l. 11.

There was no physical evidence of sexual abuse presented to the jury. Therefore, the case depended solely on the credibility of Minor 1, Minor 2, and Appellant. After three hours of deliberation, the jury ultimately acquitted Appellant of criminal solicitation of a minor, second degree CSC with a minor, and one count of third degree CSC with a minor, but found him guilty of the remaining two counts of third degree CSC with a minor. R. 253, l. 7 – 254, l. 4.

ARGUMENT

1.

The court erred by denying Appellant's motion for a continuance to allow sufficient time for defense counsel to properly investigate Department of Social Services (DSS) records involving the minor complainants and their family.

Motion for Continuance

In March 2013, Appellant's trial counsel subpoenaed the DSS records pertaining to Minor 1 and Minor 2. About a week later, a representative of DSS moved to quash the subpoena in Family Court. R. 2, ll. 8-11. On May 21, 2013, a hearing was held before the Honorable Doyet A. Early, III in the Court of General Sessions on the motion to quash. R. 1. Assistant Solicitor Ashley Agnew represented the state at this hearing, and Amanda F. Whittle was present on behalf of DSS. R. 1. At the conclusion of the hearing, Judge Early ordered all the DSS records pertaining to Minor 1, Minor 2, and their family be delivered to him to review *in camera* and determine whether the records were relevant or material to Appellant's defense. R. 8, ll. 14-25; R. 11, l. 25 – 12, l. 25; R. 21, ll. 3-6.

At noon on Thursday, June 20, 2013, less than four days before Appellant's trial began on Monday, June 24, 2013, Judge Early released a copy of the records to Appellant's counsel and the assistant solicitor.[1] R. 21, ll. 6-13.

At the beginning of the trial, Appellant moved for a continuance to allow defense counsel adequate time to investigate the contents of the records and possibly hire an expert witness. Defense counsel stated that he subpoenaed the records in March to allow him

[1] It is unclear from the record whether Judge Early released all of the records or only the documents the court found to be relevant or material.

sufficient time to review the records and conduct a proper investigation. He maintained that four days was not enough time for him to properly review the records, which included about five hundred pages of documents, and determine which documents, if any, were relevant and material to the defense. R. 21, l. 8 – 22, l. 6. Counsel also stressed that there were clearly pages missing from the records and that he had been unable to obtain these missing pages. R. 21, l. 24 – 22, l. 1; R. 24, ll. 13-14.

Judge Nettles ultimately denied Appellant's motion for a continuance, but agreed to make the DSS records part of the record for purposes of appellate review. R. 24, ll. 15-20. The records were marked as Court's Exhibit No. 2 and held under seal. When ruling, the court stressed that defense counsel had an opportunity to review the records, and presumably relied on the assistant solicitor's assertion that it only took her a few hours to read all of the records. R. 22, ll. 7-8; R. 23, l. 24 – 24, l. 11.

Defense counsel renewed his motion for a continuance during the course of the trial. Counsel again argued that a continuance was needed to allow counsel the opportunity to "fully investigate the DSS records." Counsel maintained that four days was an inadequate amount of time to properly review the records and hire an expert witness. R. 162, ll. 10-25. Counsel presumably wanted an expert to explain to the jury the behavioral characteristics of children who have been sexually abused and the significance of prior allegations of sexual abuse made by the same child.[2] Judge Nettles ultimately denied the motion "pursuant to reasons stated previously." R. 163, ll. 18-19.

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[2] The DSS records reveal that Minor 1 made prior allegations of sexual abuse against Gerald Carlisle, Jr., who is the father of Minor 1 and Minor 2's younger brother. <u>See</u> Court's Exhibit No. 2.

After the verdict, Appellant moved for a new trial based on the court's failure to grant a continuance to allow counsel an adequate "opportunity to fully examine the DSS records." Counsel again emphasized that four days, which included a weekend, was an insufficient amount of time to allow him to retain an expert or possibly subpoena an employee of DSS to testify during Appellant's case in chief.

Counsel sought an expert to testify about the significance of prior accusations of sexual abuse and how prior sexual trauma may affect a child's behavior. Specifically, counsel argued, "Your Honor, the issue would have been what an expert could have told us [about] the effect the prior abuse, clearly that happened before Mr. Lafavor [Appellant] had any contact with these children, the effects on Minor 1 that might have motivated her to, frankly, tell untruths in court." He also argued, "[T]he failure to grant a continuance hampered our ability to fully build the defense and to fully be prepared."

The Court again denied the motion without giving any further reasoning. R. 261, l. 1 – 268, l. 11.

Evidence Contained in the DSS Records

A review of the DSS records shows that Gerald Carlisle, Jr., the father of Minor 1 and Minor 2's younger brother and a longtime boyfriend of their mother Allison Whittle, was charged with seven counts of first degree criminal sexual conduct with a minor and seven counts of lewd act upon a child in November 2007. As a condition of his bond for these charges, Carlisle was ordered to have no contact with Minor 1, Minor 2, and their

younger sister. [3] The Department of Social Services opened an investigation during the summer of 2008 after the agency received a complaint that Carlisle was having contact with the children in violation of the conditions of his bond. See Court's Exhibit No. 2.

Moreover, the records show that Minor 1 accused Carlisle of sexually abusing her in July 2005. The records contain an intake form from DSS dated July 10, 2005 that states, "Reportedly, six yr. old [Minor 1] stated that her pee pee hurts and that her mom['s] boyfriend took her ([Minor 1]) to the bedroom with her ([Minor 1)] pants down . . ."[4] This intake form further states that the mother, Allison Whittle, took Minor 1, Minor 2, and their younger sister to the emergency room when Minor 1 made the accusation against Carlise, but when Whittle "found out how detailed the examination would be," she left the hospital with the girls before any examination could be completed.[5] See Court's Exhibit No. 2.

This intake form is corroborated by an incident report from the Aiken County Sheriff's Office also dated July 10, 2005. The incident report states, "Victim [Minor 1] and Mother [Allison Whittle] had made allegations of fondling, touching, and digital insertion of Victim [Minor 1] by listed Subj. [Gerald Carlise]." The report further states, "Victim had been brought to Aiken E.R. by Victim's Mother" but "Mother depart[ed] E.R. with Victim prior to DSS and ACSO arrival." See Court's Exhibit No. 2. A supplemental incident

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[3] Carlisle was convicted by a jury of four counts of lewd act upon a child and two counts of first degree criminal sexual conduct with a minor. This Court affirmed his convictions and sentence. State v. Carlisle, 2013-UP-213 (S.C. Ct. App. filed May 22, 2013). Upon information and belief, these convictions pertained to an unrelated complainant and did not involve Minor 1 or Minor 2.

[4] A portion of this narrative is cut off on the edge of the page due to how it was copied. See Court's Exhibit No. 2.

[5] Allison Whittle is almost exclusively referred to as Allison Mikell throughout the DSS records.

report dated July 11, 2005 states, "Mother stated that she believed Victim had been lying about incident in order to get attention." See Court's Exhibit No. 2.

Moreover, the DSS records show a pattern of physical neglect. Primarily, the children often did not have clean, weather and size appropriate clothing and shoes, and the family home was often dirty and unsanitary. The children, especially Minor 1, also had behavioral problems, suffered from ADHD, and acted out in school. Additionally, there were numerous reported incidents of domestic violence between the mother, Allison Whittle, and her longtime boyfriend, Carlisle. See Court's Exhibit No. 2.

Evidence Presented to Jury of Prior Allegations of Sexual Abuse

The court permitted defense counsel to briefly explore the prior allegations Minor 1 had made against Gerald Carlise, Jr. before the jury. This evidence was presented during the cross-examination of several witnesses, including Susan Lukowiak, Investigator Kim Sievers, and Sherry Pattillo.

During the cross-examination of Lukowiak, the following exchange took place between defense counsel and the witness:

> Q: You're aware of the allegation that Gerald Carlyle molested [Minor 1]?
>
> A: No, he did not. And her mother will tell you that herself.

R. 97, ll. 10-13.

During the cross-examination of Sherry Pattillo, who was Minor 1's therapist at Aiken Barnwell Mental Health, the following exchange took place between defense counsel and the witness:

> Q: You were aware that there were prior allegations that she [Minor 1] made against other people other than Mr. Lafavor [Appellant]?

A: I believe I'd heard something about that. I can't really recall much about that because that was before I had seen her [Minor 1].

R. 137, ll. 15-19.

Lastly, during the cross-examination of Investigator Sievers, the following exchange took place between defense counsel and the witness:

Q: And you were aware that Marie Scott, there was an allegation that Marie Scott had molested [Minor 1]?

A: Yes. I don't have any details on that, but, yes that statement was made.

Q: [Minor 1] made that statement, didn't she?

A: I don't know.

Q: And you're aware that the father of [J.C], who was living in the house, Gerald Carlyle, were you aware that there was an allegation that [Minor 1] made against him?

A: No. I know there was an investigation involving Gerald Carlyle and that he was arrested on a case in reference to sexual, but I don't remember.

Q: He was in the house at the time, was he married to - -

A: I have no idea.

Q: But they were all living together, Gerald Carlyle, [Minor 1] - -

A: I don't know the answer to that.

Q: You're aware that Gerald Carlyle is now still in prison on a criminal sexual conduct?

A: I don't know that. I did hear that mentioned earlier, but I don't know.

Q: Are you aware that [Minor 1] said that her pee-pee hurt and her Mom's boyfriend took [Minor 1] to the bedroom with her and her pants were down. Her two sisters were in the house at the same time. Were you aware of any of those allegations?

A: I don't recall any of that.

R. 167, l. 2 – 168, l. 3.

Discussion

The court erred by denying Appellant's motion for a continuance to allow adequate time for defense counsel to properly investigate the DSS records involving Minor 1, Minor 2, and their family, and retain an expert witness to address and explain evidence contained in the records. Specifically, defense counsel sought an expert to help explain to the jury the impact prior allegations of sexual abuse may have on a complainant, including behavioral changes and knowledge of sexual activities.

"The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (citing State v. Smith, 387 S.C. 619, 622, 693 S.E.2d 415, 417 (Ct.App.2010)). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." Meggett, 398 S.C. at 523, 728 S.E.2d at 496 (quoting State v. Geer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010)) (internal quotation marks omitted).

In State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989), our Supreme Court restated the two primary factors considered when determining whether a motion for continuance is proper: (1) whether there was a showing of *any* other evidence on behalf of the defendant that *could* have been produced; and (2) whether *any* other points on his behalf *could* have been raised had more time been granted for the purpose of preparing the case for trial. Id. (quoting State v. Squires, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966)). Therefore, if the defendant shows that any other evidence or points could have

been produced or raised on his behalf if he had more time to prepare his case for trial, then a motion for continuance should be granted.

Appellant has met both prongs of this analysis. If defense counsel had been given sufficient time to investigate and review the DSS records, counsel could have more fully explored the allegations Minor 1 had previously made against Gerald Carlisle, Jr. and presented this evidence to the jury to show a possible source of Minor 1's knowledge of sexual activities and what happens when one makes allegations of sexual abuse. See State v. Grovenstein, 340 S.C. 210, 219, 530 S.E.2d 406, 411 (Ct. App. 2000) ("evidence of a child victim's prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim's ability to testify about alleged sexual conduct.").

Moreover, counsel could have also retained an expert witness to discuss the effects of prior sexual abuse on a complainant if he had been given a sufficient opportunity. An expert could have explained to the jury how prior sexual abuse can affect a child's behavior. An expert could have also explained how simply making an allegation of sexual abuse against another, even if unfounded, can affect a child. See State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("The trial judge's refusal to determine Smith's qualification as a 'child abuse assessment' expert was patent error. Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims.); see also State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); see also State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); see also State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015).

As the trial court itself recognized, "[A]t some point in time there's going to be an adverse inference on how emotionally disturbed these young children [Minor 1 and Minor 2] seem to be, and it very well could be that it's not as a result of this defendant's [Appellant's] activity, but having been abused by some other lady and some other man. And it could be that they - - it shows the power of what happens when you make an allegation of sexual misconduct. It empowers the child and it happens quite often, if you're ever involved in family court which I doubt you are. That happens, you know, quite often, where children learn when you bring up bad touching they are the ones who end up being empowered." R. 155, l. 17 – 156, l. 5.

An expert witness that could explain the behavioral characteristics of sexually abused children, along with the various points raised by Judge Nettles himself, likely would have changed the outcome of Appellant's trial. The jury acquitted Appellant of numerous offenses indicating it already questioned the credibility of the complainants and, as mentioned above, there was no physical evidence of sexual abuse in this case. The sole factor was the credibility of Minor 1 and Minor 2.

Therefore, the trial court abused its discretion by failing to grant Appellant's motion for a continuance. Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

2.

The court erred by refusing to grant a mistrial where the solicitor argued in closing that the jury should convict Appellant out of anger towards the minor complainants' parents for allowing Appellant to be around the children, and if the jury was not angry, it should acquit Appellant since this highly improper argument violated Appellant's right to due process.

Motion for a Mistrial

Near the conclusion of her closing argument, the solicitor told the jury:

> Mr. Routzong [defense counsel] is right. When the investigation first started, Momma [Allison Whittle] and Momma Sue [Susan Lukowiak] got up, they didn't protect their children. They protected their cash cow. That's what was important to them. And that's why they said those girls were lying because they couldn't have him [Appellant] get in trouble because the money flow would stop.
>
> You heard when Minor 1 got up here, you heard about the fight. Mr. Routzong brought it up himself. She said, Momma, I told you I had been messed with and you didn't believe me.
>
> Y'all watched Minor 2 up there. I asked her, I said Minor 2, did you ever tell anybody about Barry [Appellant] bad touching you? She said, I told my mom. Okay. What happened when you told your mom. She got quiet. I had to ask her two times, and finally her answer about what happened when she told her momma, nothing. Nothing happened. She did nothing.
>
> Members of the jury, they let this man [Appellant] have full control over their kids and - - they had a stranger living in the house, taking these kids places in the car, being alone with them and they didn't care so long as he was paying the bills. **If that makes you mad, it should. No parent does that, but the reason it makes you mad that those parents did nothing when their little girl said that he was touching them is because you know those little girls were telling the truth. If it doesn't make you mad that that's what happened to Minor 1 and Minor 2, if that doesn't make you mad, then you should have no problem sending that man home today to move right back into that house with Minor 1 and Minor 2. That shouldn't bother you one bit, but if it makes you mad that those girls were abandoned, that those girls - -**

R. 232, l. 9 – 233, l. 12 (emphasis added).

Defense counsel immediately objected to this improper argument by the solicitor and the court sustained the objection. R. 233, ll. 13-17. After the solicitor finished her argument and the jury was excused from the courtroom, defense counsel moved for a mistrial based on the inflammatory and prejudicial nature of the solicitor's remarks. He argued, "We believe, Your Honor, that closing argument to the jury was inflammatory, inflammatory personalized in an effort to inflame the jury's passions with anger toward the mother to convict the defendant. Your Honor, we believe it's improper and at this time we would ask for the Court to rule and grant a mistrial." R. 234, ll. 8-14.

In response, Judge Nettles stated he had sustained the objection and agreed that the prosecutor's argument was improper. However, without giving any reasoning, he refused to grant a mistrial. R. 234, ll. 23-25.

At the next opportunity, defense counsel requested the court give the jury a curative instruction based on the solicitor's improper argument. He stated, "We would ask the Court to consider instructing the jury that they cannot make - - decide the verdict based on any opinion or prejudice or any kind of inflammatory emotion that they might have regarding any alleged action in the past by the parents. In other words, just instruct them that they have to go by the evidence, not based on whether or not they should be angry with the parents or Mr. Lafavor [Appellant]. Just based on the evidence, Your Honor." R. 236, ll. 3-17.

The court agreed to provide the jury with a curative instruction and the state did not object. When the jury returned to the courtroom, Judge Nettles instructed them, "First of all, the defense made an objection in the closing argument and I sustained that objection and I

want to give a curative charge in that regard. Ladies and gentlemen of the jury, your deliberation should focus on the evidence or the lack of evidence. Your decision should not be affected by prejudice or appeals to passion or anger. It's about the evidence or the lack thereof." R. 238, ll. 10-17.

After the jury returned its verdict, Appellant moved for a new trial. Part of his motion for a new trial was based on the inflammatory remarks made by the solicitor in her closing argument. Defense counsel argued, "Your Honor, we believe the inflammatory remarks by the state said in front of the jury, there is no curative instruction sufficient. I know the Court did give a curative instruction, but the remarks made by the state inflamed the prejudices and the passions of the jury by specifically telling the jury that they should be mad at the accusers' mom and step-mom in a case involving very young children. And by doing that that could only excite the passions of the jury and extinguish any kind of rational view of the indignation, Your Honor." R. 259, ll. 10-22.

The court again indicated that it thought the solicitor's argument was improper, but that it did not think it "tainted the proceedings in any way, shape, or form." The judge said, "I think the jury took a considerable amount of time. The record will reflect how long it was that they deliberated. They took a tremendous amount of time and it was apparent from their deliberations they just didn't go in and act in a very passionate and prejudice way. They found your client not guilty on a number of offenses, some of the more serious of the offenses, which would be an indication - - of course, we don't know what transpired in the jury room, but it would be an indication that they were motivated by the evidence or the lack thereof. They rendered a verdict that speaks the truth. So your motion with regard to

improper argument, motion for the renewal of a mistrial, request for a new trial is denied." R. 260, ll. 9-25.

Discussion

The court erred by refusing to grant a mistrial following the inflammatory and prejudicial remarks made by the solicitor in her closing argument, specifically that the jury should convict Appellant based on its anger with Minor 1 and Minor 2's parents, who allowed Appellant to live in their home and have contact with the children even after these allegations surfaced, and if the jury was not angry, it should acquit Appellant. This highly improper argument violated Appellant's right to due process.

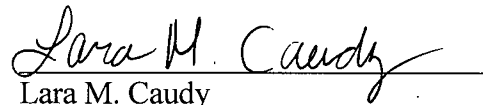
"A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (citing State v. Linder, 276 S.C. 304, 312-313, 278 S.E.2d 335, 339-340 (1981)).

The solicitor's improper argument was clearly "calculated to arouse the jurors' passions [and] prejudices." The argument invited the jury to convict Appellant, even if the evidence did not prove his guilt beyond a reasonable doubt, based on its anger with Minor 1 and Minor 2's parents for their handling of the allegations. Specifically, the parents continued to allow Appellant to live in the family home and have contact with Minor 1 and Minor 2 for months after the children disclosed. The solicitor's argument, which was found improper by the trial judge, likely led the jury to convict Appellant on an improper basis, and thus this Court, respectfully, should grant Appellant a new trial. See R. 234, ll. 23-24.

CONCLUSION

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

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of May, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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Lara M. Caudy

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330