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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Perry H. Gravely, Circuit Court Judge

ORIGINAL

Appellate Case No. 2017-001844

THE STATE, ...RESPONDENT,

v.

DAVID SCOTT BAGWELL, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial judge properly denied trial counsel's motion for a mistrial because the trial judge did not make prejudicial comments to the jury regarding the facts of the case, and any purported error was remedied by the instructions he provided to the jurors before the presentation of evidence and prior to deliberations.
- II. The trial judge properly allowed the State to enter the victim's recorded forensic interview into evidence because it possessed particularized guarantees of trustworthiness required by S.C. Code Ann. section 17-23-175(B).

STATEMENT OF THE CASE

On February 10, 2015, the Pickens County Grand Jury indicted Appellant for first-degree criminal sexual conduct (CSC) with a minor. On August 28–30, 2017 Appellant proceeded to a jury trial before the Honorable Perry H. Gravely. John DeJong, Esquire, represented Appellant; Assistant Solicitor Christopher Jones, Esquire, represented the State. The jury found Appellant guilty as charged. The trial judge sentenced Appellant to thirty years' incarceration.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STANDARD OF REVIEW

“In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous.” State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). “The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. “An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.” Id.

ARGUMENT

I.

The trial judge properly denied trial counsel's motion for a mistrial because the trial judge did not make prejudicial comments to the jury regarding the facts of the case, and any purported error was remedied by the instructions he provided to the jurors before the presentation of evidence and prior to deliberations.

Appellant argues the trial judge committed reversible error in denying trial counsel's motion for a mistrial because the trial judge's comments regarding Appellant's indictment prejudiced the jury pool by implying Appellant was guilty of the charged crime. The State disagrees with this allegation of error. Not only were the trial judge's comments entirely proper, but his opening and closing instructions to the jurors remedied any alleged error because he explained the jurors, and not the judge, were to determine Appellant's guilt based on the evidence presented at trial.

Statement of Facts

During jury selection, the trial judge informed the jury pool:

I'm going to read you just very brief facts (sic) from the indictment. I always make sure to say before I ever mention an indictment that an indictment does not mean that a person is guilty.

In fact, [Appellant] has pled ["Not Guilty"] in this matter.

This is merely the formal paper that brings the charges before the court.

This is a matter that happened in Pickens County on August 28th, 2013 -- I'm sorry, between the dates of August 28th, 2013 and October 30th, 2013, regarding a sexual battery on a minor.

So I'm going to ask you very specific questions about this -- I guess that we need to put them under oath for this particular case.

(R.p.5, line 24–R.p.6, line 16).

Following these remarks, the jury panel was sworn and the parties elected the jury. After the jury panel was seated, neither party objected to the selection process and the jury was excused for the day. (R.p.6, line 18–R.p.25, line 5).

After a break and an off-the-record, in-chambers meeting between the parties trial counsel moved for a mistrial, claiming the trial judge's opening remarks about giving "a brief statement of the facts" of the case was improper because no evidence had been presented at that time and the indictment contained only allegations. Trial counsel further argued that a curative instruction could not fix the error because "[t]he bell ha[d] been rung" and it was impossible to "unring that bell." He claimed the trial judge did not read the indictment, but merely performed a "kind of [] pick-and-choose" of the information within it. (R.p.25, line 7–R.p.27, line 7).

The trial judge noted he informed the jurors the indictment contained mere allegations and that it was their duty to determine Appellant's guilt. Further, he claimed a curative instruction would clear-up any alleged confusion. Accordingly, the trial judge denied the motion. (R.p.27, lines 8–19).

During his preliminary instructions to the jury, the trial judge explained:

The defendant comes to this case with a presumption of innocence, which is completely appropriate because he has pled not guilty to these charges.

This puts the burden of proof on the State. They must prove to you each element of the charge beyond a reasonable doubt.

... Again, I just remind you that the burden is on the State to prove [its] case beyond a reasonable doubt.

Your role as jurors is to pay very close attention to all the evidence that is presented. Evidence will be in basically two forms, it will

be by way of witnesses that you will hear on the witness stand and also evidence that comes in via documents or statements, written or video statements. There are various kinds of exhibits or evidence that you will have before you.

You are only to consider evidence that is presented in this courtroom, which has properly admitted as evidence. . . . When you begin deliberating on the evidence in this case, after the law has been presented, you are only to consider that evidence which has been presented in this courtroom. That is very, very important.

Now, we have different roles in this trial. You are the sole judge of the facts. If there is anything that I've said throughout this trial, it -- the law does not allow me to have an opinion as to the facts or state any facts in the case. Anything up to this point [are] merely allegations. We had a reference to an indictment. An indictment has been presented to the court and the defendant has pled not guilty to those allegations and, therefore, the burden is on the State to prove each and every element of the charge beyond a reasonable doubt.

If I make any statement or make any inference that would cause you to think that I may have an opinion on the facts, or state anything that you think I presented as a fact, please disregard that. That is not -- it's your place to determine what the facts are.

Anything referenced in the indictment, again those are merely allegations. An indictment is also something that you're not to consider in any way when you begin deliberations because the indictment is merely the paper that brings -- just like an arrest warrant -- the charges. An indictment merely brings a case before this court and is not to be considered evidence in any way.

(R.p.51, line 5–R.p.55, line 1).

On the second day of trial, trial counsel renewed his motion for a mistrial. Trial counsel conceded the trial judge told the jurors the indictment contained “mere[] allegations” and that he did not read the indictment. The trial judge again denied the motion, noting no error occurred and the subsequent instructions to the jury remedied any potential error. (R.p.105, lines 3–23).

At the conclusion of the case, the trial judge instructed the jury:

First of all, the indictments charge the defendant with [CSC] with a minor in the first degree. I remind you that the fact that the defendant was arrested and charged in this case is not evidence. It cannot be considered by you as evidence of his guilt, no[r] does it create any presumption of any inference of his guilt.

Indictments, the documents that you have heard referenced, are simple formal written documents to bring a matter to court. That is the only thing that it is to be used for.

The defendant has pled not guilty to this indictment, and that plea puts the burden on the State to prove the defendant guilty, prove him guilty beyond a reasonable doubt.

I charge that it is an important rule of law that a defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed innocent of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you, the jury, of his guilt beyond a reasonable doubt.

You are to consider only the competent evidence which came from this witness stand, the documents introduced into evidence and any stipulation. If there was any testimony or questions stricken from the record during this trial, then you must not consider that in your deliberations. You are to only consider the testimony which has been presented here from this witness stand and which has been ruled on as being admissible.

In every case tried before a jury, you are the sole judge of the facts. That is a very important part of this. As a judge, I cannot intimate, I can't state, I can't comment, I can't have an opinion about the facts in a case. If anything that I did or that I said in any way made you think that I have an opinion on the facts or if I stated something that appeared to be an opinion on the facts, please disregard that. It is your duty to determine what the facts of this particular case are. The law does not allow me to have an opinion on the facts.

This is a matter solely for you. As jurors, it is your duty to determine the effect, the value and the weight of all the evidence presented during the trial.

(R.p.351, line 8–R.p.355, line 18).

Standard of Review

The purpose of a jury instruction is “to enlighten the jury and to aid it in arriving at a correct verdict.” State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) (*quoting State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003)). A jury charge that is substantially correct and covers the law does not require reversal. Mattison at 478, 697 S.E.2d at 583. “Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error.” State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

“A curative instruction is generally deemed to have cured any alleged error.” State v. Dial, 405 S.C. 247, 258, 746 S.E.2d 495, 500 (Ct. App. 2013). “If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured.” State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996).

Analysis

Here, the disputed instructions given by the trial judge were proper. The trial judge explained the purpose of the indictment is to bring the charges against a defendant before a court and that the existence of an indictment does not mean that a person is guilty, emphasizing Appellant pled “not guilty” to his charge. Further, due to trial counsel’s objection, the trial judge further explained any information contained in the indictment is merely an allegation and not evidence; Appellant was presumed innocent and it was the State’s burden to prove his guilt beyond a reasonable doubt. The trial judge further emphasized these instructions in his jury charge immediately before deliberations and explained the jurors should ignore any statements

he may have made which may have given the impression he had an opinion as to Appellant's guilt. When considered as a whole, the trial judge's various instructions clearly communicated the indictment was not evidence of Appellant's guilt and that the State was required to prove his guilt using the evidence presented during its case-in-chief. See Mattison at 478, 697 S.E.2d at 583.

Additionally, even if the trial judge's comments about the indictment were improper, his subsequent instructions to the jury cured any alleged error. As noted above, the trial judge clearly explained to the jurors that they were not to consider indictment as evidence of Appellant's guilt. Therefore, absent any showing to the contrary, any error that may have occurred is deemed to be cured. See George, 323 S.C. at 510, 476 S.E.2d at 912.

Accordingly, because the trial judge's instructions correctly explained the law and the State's burden of proof, Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly allowed the State to enter the victim's recorded forensic interview into evidence because it possessed particularized guarantees of trustworthiness required by S.C. Code Ann. section 17-23-175(B).

Appellant argues the trial judge erred in admitting the video of the recorded forensic interview with Victim because "it did not possess particularized guarantees of trustworthiness" as required by S.C. Code Ann. section 17-23-175(B). The State disagrees with this allegation of error. Initially, the State notes this issue is not preserved for appellate review because trial counsel failed to object to any specific statements made in the recording. On the merits, Victim's interview was performed by a trained professional and was a detailed, coherent account of the repeated abuse perpetrated by Appellant. Further, the information gathered was not elicited by the interviewer's "leading" questions, but by Victim's original description of the abuse. Finally, the interviewer's restatements of Victim's descriptions were not bolstering remarks, but pointed questions used to gather important information during the interview.

Statement of Facts

Prior to trial, trial counsel moved to exclude the video recording of Victim's forensic interview. He complained the interviewer's questions were leading and also constituted improper bolstering because the interviewer often repeated the Victim's statements back to her in the form of a question. The State disagreed with trial counsel's argument, noting the interviewer was trained to repeat the Victim's answers to ensure she understood what the Victim was alleging and that all the information in the "leading" questions came directly from explanations already provided by Victim. The trial judge withheld ruling on the video until after he could watch the recording and the State had the opportunity to proffer the interview. (R.p.29, line 10-R.p.33, line 18).

By the second day of trial, the trial judge had reviewed the video recording of the interview. Further, the solicitor proffered the testimony of Ms. Pam Darby, the social worker who interviewed Victim. She testified she was a licensed master social worker who performed interviews with children whom alleged abuse. She claimed she had performed "well over fifty" forensic interviews during her career, and was trained to use these interviews for "neutral fact-finding" purposes by using "nonsuggestive, appropriate" and "nonleading" questions. Further, repeating what an interviewee says is important for three reasons: (1) it ensures the interviewer correctly heard the child; (2) it gives the interviewee the opportunity to self-correct; and (3) to continue the conversation about specific information referenced earlier but was not fully explained at that time. Further, Ms. Darby emphasized that children instructed that they have the ability to say they do not know the answer to a question. (R.p.93, line 24–R.p.94, line 5; R.p.137, line 24–R.p.150, line 23).

At the beginning of the interview, Ms. Darby made it clear that Victim was to provide information throughout, but that if Victim did not understand a question or did not know an answer that was perfectly but Victim should make such known to her. Throughout the interview, Ms. Darby often repeated the information provided by Victim, but used nearly identical language to Victim when repeating the info and left all of her questions open-ended so that Victim, and Victim alone, provided new information used for subsequent questions. Notably, Victim, not Ms. Darby, first stated: (1) Appellant touched Victim's breasts, buttocks, and vagina; (2) Appellant assaulted her on multiple occasions; (3) Appellant tied-up Victim to restrain her movement; (4) He instructed her not to tell anyone about the assaults; (5) he cut off her clothes; (6) Appellant lured her to his room for the first assault by saying she had misbehaved, but all subsequent assaults started with him using his superior size to throw her into his room; (7) he

touched her with his hands and mouth; (8) Appellant would cease the assaults after Victim would struggle against her restraints, almost free herself, and urinate on him; and (9) Appellant would rub his penis during the assaults and ejaculate. Further, Victim used dolls to demonstrate how Appellant attacked her. (State's Exhibit 2).

Following the proffer, the State moved to introduce the video into evidence, noting the interview was performed by a trained professional and noting the interviewer did use leading questions to obtain the relevant information. Ms. Darby only repeated the information stated by Victim to ensure she understood what Victim was saying and to make sure they covered all relevant topics. (R.p.151, line 1–R.p.152, line 15).

In response, trial counsel claimed he did not have a problem with Ms. Darby repeating Victim's answers, but complained Ms. Darby should not have repeated answers that occurred several minutes prior in an effort to direct the interview to certain topics and argued such actions were "leading" Victim and was also "internal bolstering" because it "subtly convey[ed]" that Ms. Darby believed her. (R.p.152, line 16–R.p.153, line 24).

After reviewing the video and Ms. Darby's testimony, and considering the parties' arguments, he found the video recording was admissible and satisfied the requirements of S.C. Code Ann. section 17-23-175(B). Specifically, he noted the challenged questions were not used for the purposes of leading Victim or bolstering her testimony and that overall the video was free of leading questions. (R.p.153, line 25–R.p.154, line 21).

Later, Ms. Darby testified she interviewed Victim, and the State submitted the video recording through her testimony. Trial counsel renewed his objection to the video. (R.p.163, line 1–R.p.166, line 5).

Further, Victim's trial testimony echoed the statements she made to Ms. Darby during the interview. (R.p.109, line 7–R.p.136, line 23).

Issue Preservation

Initially, the State notes this issue was not properly preserved for appeal. It is “the responsibility of trial counsel to preserve issues for appellate review.” Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750, 759 (1997). To adequately preserve an issue for appeal, the objection should be sufficiently specific to bring the exact error to the trial court's attention. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005).

Here, while Appellant objected generally to the video's admissibility on the grounds that the video itself was suggestive in nature and included leading questions, Appellant never objected to any specific questions that were purportedly leading. Therefore, Appellant's general objection to the interview is not sufficiently specific to bring the exact error to the trial court's attention and this issue is not preserved for review. See id.

Standard of Review

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (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, 79, 606 S.E.2d 215, 218–19 (Ct. App. 2004). 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).

In determining whether the statement possesses the particularized guarantees of trustworthiness under S.C. Code Ann. § 17–23–175(B), the trial judge must make certain

findings also identified by statute. S.C. Code Ann. § 17-23-175(B), grants the trial judge broad discretion. In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, **but is not limited to**, the following factors:

- (1) whether the statement was elicited by leading questions;
- (2) whether the interviewer has been trained in conducting investigative interviews of children;
- (3) whether the statement represents a detailed account of the alleged offense;
- (4) whether the statement has internal coherence; and
- (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. Code Ann. § 17-23-175(B) (Supp. 2010). Notably, a “leading question” is one which suggests the answer to the person being interrogated. Black’s Law Dictionary (10th ed. 2014).

“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. Taylor, 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), *rev’d in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009)). Generally, bolstering is prohibited to prevent a witness from testifying whether another witness is credible, which is exclusively within the province of the jury. Id.

Analysis

Even if the issue were properly preserved for appeal, the trial court correctly determined that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness. The State notes Appellant did not, nor does he currently, challenge four of the five factors listed for evaluating the trustworthiness of a

statement. Ms. Darby was a trained professional who had performed over fifty forensic interviews at the time of trial. She noted, through her sworn testimony, that she was trained to repeat questions to ensure that she correctly heard victims and to give them an opportunity to self-correct. Further, Victim provided a coherent, consistent, and detailed account of the abuse perpetrated by Appellant. Accordingly, four of the five factors commonly used to determine trustworthiness, all unchallenged, weigh in favor of the video's admission. See S.C. Code Ann. § 17-23-175(B); State v. Fairey, 374 S.C. 92, 106, 646 S.E.2d 445, 452 (Ct. App. 2007) (stating an unchallenged ruling, right or wrong, is the law of the case).

Regardless, Ms. Darby did not ask leading questions in her interview of Victim. Her questions were designed to allow Victim to provide the details of the assaults and never mentioned information which was not previously provided by Victim. Ms. Darby did repeat statements made by Victim but, like she explained during her proffered testimony, she did so to allow Victim a chance to correct any misunderstandings she had about the information and to give Victim the chance to fully explain situations Victim mentioned during the interview. Victim, not Ms. Darby, first-discussed the assaults and important details related to them, including the parts of her body touched, Appellant's use of rope to restrain her, his demand that Victim not tell anyone about the abuse, and that the abuse occurred while Victim's mother was away from home. These details, along with the others she provided, originated from her own statements and were entirely consistent with her trial testimony. Accordingly, Ms. Darby's statements did not "lead" victim and the trial judge did not err in admitting the recording of the forensic interview. See McLeod, 362 S.C. at 79, 606 S.E.2d at 218-19; Black's Law Dictionary (10th ed. 2014, "leading question").

Further, the video did not improperly bolster Victim's testimony. Ms. Darby was not qualified as an expert witness and she never stated, whether during her testimony or in the recording, whether she believed Victim's story. By definition, the video evidence did not improperly bolster Victim's testimony. See Taylor, 404 S.C. at 514–15, 745 S.E.2d at 128.

The video possessed the “particularized guarantees of trustworthiness” as required by S.C. Code Ann. section 17-23-175(B) and did not improperly bolster Victim's testimony.

Accordingly, the trial judge did not abuse his discretion in its admission.

CONCLUSION

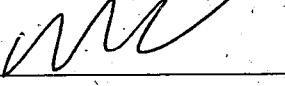
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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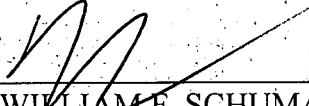
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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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