STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM DEREK BENNON,

APPELLANT

APPELLATE CASE NO. 2019-001358

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by twice refusing to declare a mistrial, where the accusing daughter testified appellant was "in and out of jail" during her childhood and that she allegedly did not tell anyone about appellant molesting her because they may not have understand appellant was in jail for the "things" he did to her as a child, since defense counsel correctly argued this bad character testimony so prejudiced appellant that a curative instruction could not fix the damage?

STATEMENT OF THE CASE

Appellant was indicted at the July 2019 term of the Lexington County Grand Jury for two counts of criminal sexual conduct with a minor in the first degree. R. 515-518. Appellant's case was called to trial on August 5, 2019 before the Honorable Frank Addy, and a jury. Theo Williams represented appellant. Suzanne Mayes and Marie Sazehn were the prosecutors. R. 1.

On August 8, 2019, the jury found appellant guilty on both counts. R. 483, ll. 10-21. Judge Addy sentenced appellant to twenty-one years' imprisonment. R. 496, l. 23 – 497, l. 4.

This appeal follows.

STANDARD OF REVIEW

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "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." Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

ARGUMENT

The court erred by twice refusing to declare a mistrial, where the accusing daughter testified appellant was "in and out of jail" during her childhood and that she allegedly did not tell anyone about appellant molesting her because they may not have understand appellant was in jail for the "things" he did to her as a child, since defense counsel correctly argued this bad character testimony so prejudiced appellant that a curative instruction could not fix the damage.

Relevant facts

J.K. was the alleged victim in this case. She was twenty-five years old at the time of trial. R. 41, ll. 10-24. Appellant was her father. R. 42, ll. 12-14. She was living with her husband and three children in Richland county at the time of appellant's trial. R. 42, ll. 1-8.

A pre-trial hearing was held on the admissibility of her "other bad acts" Lyle[1] testimony. This testimony involved appellant allegedly molesting her and her younger sister throughout their childhood. The state relied on the "similarities" analysis in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), which was overruled in the intervening case of State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020) for the admission of this evidence. R. 90, l. 3 – 96, l. 17. Once the trial judge ruled this testimony was admissible, J.K.'s testimony was repeated in the presence of the jury almost verbatim.

J.K. testified that she resided in the same home with appellant, her father, until she was in the fifth grade. R. 42, ll. 15-20. She recalled living at River Oaks Apartments, a house on Ashborn Road, St. Andrews Pointe, and on Huffield Road in Chapin during that time. The family moved often in Richland and Lexington Counties. R. 42, l. 15 – 47, l. 21.

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[1] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). This issue was preserved for appellate review.

J.K. alleged in each of these locations that appellant molested her by having anal sex with her, and on at least one occasion oral sex. She also said appellant touched her improperly at other times. R. 47, l. 14 – 49, l. 7. Appellant separated from her mother when she was in fifth grade. R. 51, ll. 18-20.

J.K. was dating her "current husband" when she told him about the alleged molestation. J.K. was fifteen years old at the time. R. 53, ll. 7-24. She also claimed she told her mother about the molestation, but that her mother did not do anything. It was unclear if her mother simply did not believe her or chose to ignore the accusation. R. 53, l. 22 – 54, l. 1.

J.K. testified in 2014, while she was attending the University of South Carolina, while caring for three young children, and working twenty-five to thirty-five hours a week at Rush's, that she went to the Sexual Trauma Services Center. She told the therapist there that appellant molested her aa a child. R. 54, l. 7 – 56, l. 24. She stopped going to therapy in November of that same year "[t]o focus more on school." R. 57, ll. 3-7. Defense counsel would later have J.K. admit she did not attend all of her scheduled sessions before she stopped going altogether.

J.K.'s younger sister had moved to New York in the meantime, and J.K. said she made a decision with her younger sister that both of them would tell law enforcement about the molestation they allegedly suffered as children. This was on August 5, 2018. J.K.'s younger sister "confided in me" on that day she had been molested. R. 57, l. 11 – 60, l. 10.

Investigator Kelly Mountzouros with the Irmo Police Department was assigned to the investigation. R. 60, l. 5 – 61, l. 2. The investigator decided to place a "pretext phone call" from J.K. to appellant to see if he would make an inculpatory statement. The phone call would be recorded to use against appellant. R. 62, l. 6 – 63, l. 7. The judge ruled that this "other bad acts evidence" -- outside of the two indictments for criminal sexual conduct with a minor in the first

degree from November 12, 1998 until November 11, 2000, when J.K. was five to seven years old, and from November 12, 2002 until November 11, 2004, when J.K. was nine to eleven years old -- was admissible over objection.

Jury in

When this pretext phone call was subsequently played for the jury, the jury was allowed to use a transcript of the phone call as a demonstrative exhibit, Court's Exhibit #1, over objection. R. 500. (Court's Exhibit #1). During this phone call, J.K. told appellant her younger sister had now alleged that appellant also raped her anally when the younger sister was seven years old in Chapin. Appellant's reply -- in the transcript and on the audiotape on file with this Court -- as unintelligible. See R. 506. (Transcript of phone call at 7).[2]

J.K testified during the trial that she was now twenty-five years old. R. 143, ll. 3-23. She recalled living with her younger sister, appellant, and her mother while she was growing up in Richland and Lexington Counties. R. 144, ll. 1-19.

J.K. testified that her mother worked jobs outside of the home while she was growing up, and she was therefore alone with appellant at times. When asked about the stability of appellant's work scale, J.K. answered, "I recall him being in and out of jobs, sometimes in and out of jail." R. 145, ll. 1-22. Defense counsel immediately objected, and the jury was removed from the courtroom. R. 145, l. 23 – 146, l. 5.

Mistrial motion

Defense counsel told the judge that this was still the beginning of the trial, and the jury now knew that appellant had been in and out of jail. There was not anything the judge could do "to fix the damage now." Defense counsel requested a mistrial. R. 146, ll. 8-22.

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[2] State's Exhibit #8, the tape recording of this call, is on file with this Court.

The solicitor surprisingly only argued that the mistrial matter was something "within the court's discretion" given the jail testimony. R. 146, l. 24 – 147, l. 13. The judge stated he thought the answer on appellant being in and out of jail was unintentionally solicited by the solicitor. The judge ruled that he was not going to grant a mistrial, and said he would give a curative instruction, despite defense counsel's position that there was nothing the court could do could "fix the damage now." The judge said the curative instruction would be subject to the defense motion for a mistrial. R. 148, l. 9 – 149, l. 3.

The judge then told the jurors:

> All right. The jury is back and seated.
>
> Ladies and gentlemen of the jury, a moment ago a question was asked of this witness and the witness made a statement referencing her father being in jail at some point when she was extremely young. Understand that the State did not intend to elicit that response and, more importantly, ladies and gentlemen, that response is not relevant to any issue in this case. Okay?
>
> As you can all imagine, and as I've personally experienced, maybe there are things we have done in our youth that we often regret; mistakes, so to speak. And, perhaps, may of us have spent a night in jail or something like that. It is irrelevant to any issue involved in this case, totally irrelevant, and should not have been elicited from this witness.
>
> So I'm instructing you that you're to expunge that statement that was made by the witness from your memory. You're to give it no consideration whatsoever, just completely wipe it away. It's not relevant to any issue in this case and should not have been introduced. So, please, completely and totally ignore it.
>
> Solicitor, if you'll continue, please.

R. 149, l. 8 – 150, l. 7.

Testimony resumes

J.K. then testified that appellant, her father, was left alone with her on more than one occasion, and that he had had oral and anal sex with her during some of those times. R. 150, l. 9 – 164, l. 19.

When J.K. was asked, like her sister T.B., why she did not tell anyone about the molestation or rape, she responded: that "I felt like I was carrying this burden of abuse by myself." She wondered if she told, "Would my siblings who didn't live inside the home who were kids, would they understand why Daddy's in jail because [J.K.] said he's doing things to her?" Defense counsel immediately objected, and the jury was sent out of the courtroom. R. 165, l. 1 – 166, l. 5.

Second mistrial motion

Defense counsel again moved for a mistrial, noting: "I believe the dots are now connected . . . Now she has said he's in jail—or **people would believe that he is in jail because he's doing these things to me**, these sexual events to me." Defense counsel, based on this second jail testimony injection into the trial, again asked the judge to declare a mistrial. R. 166, ll. 7-18. (emphasis added).

The solicitor offered that the witness's response was "a very valid response," and reasoned J.K. did not want to punish appellant or see him punished because of the effect it would have on her siblings. The judge responded that the solicitor's "recitation of the testimony may differ from what I remember the response being." Defense counsel reminded the judge this was the second time the jurors heard that appellant had been in jail when his children were young. R. 166, l. 7 – 169, l. 5.

The judge again ruled he was not going to declare a mistrial, but he added: "The State's case is on horribly thin ice We're only an hour into the trial in earnest and we've already had a couple of references" to appellant being in jail. R. 168, l. 8 – 172, l. 2.

Testimony again resumes

J.K. testified that her mother usually worked "an 8:00-to-5:00-type job. So when we got out of school, she was at work." R. 150, l. 9 – 151, l. 24. J.K. said appellant began molesting her, and she described the alleged oral and anal sex. R. 152, l. 1 – 164, l. 19.

J.K. said she told her sister about the molestation before her sister left for New York. J.K. was a "stay-at-home mom" after graduating from the University of South Carolina at that time. Her husband would later testify she was deeply troubled and had attempted suicide more than once. R. 174, l. 3 – 179, l. 22.

As stated, the recording of the phone call between J.K. and appellant was played for the jury. R. 188, l. 11 – 191, l. 4. When confronted about the anal sex allegation, appellant's response was unintelligible. See transcript of phone call at 7. R. 506; State's exhibit 8 on file with this Court.

On cross-examination, J.K. admitted the alleged sex acts appellant made her engage in were not always the same, and they did not happen at the same place or same time over the years. R. 194, ll. 3-23. J.K. said she told her mother about the molestation when she was seven or eight years old. She maintained that her mother did nothing, and J.K. said she became "suicidal" at an early age. R. 217, l. 8 – 220, l. 25.

J.K.'s sister, T.B., was twenty-three years old at the time of appellant's trial. J.K. was "two years older than me." R. 224, ll. 10-24.

T.B. recalled the five different locations the family lived while she was growing up. R. 225, ll. 6-9. T.B. told her cousin Gabrielle about the alleged molestation when she was eighteen years old. R. 230, l. 18 – 231, l. 24. T.B. related that when she learned her older sister was going to the police, "I told her it happened to me, too." R. 233, l. 16 – 237, l. 4. T.B. acknowledged that she never told anyone about the alleged abuse until her older sister decided to go to law enforcement. R. 243, l. 2 – 245, l. 3.

J.K.'s husband, Devin-Paul Kelley, testified that J.K.'s behavior became very erratic and that she attempted suicide. R. 260, l. 15 – 263, l. 8. Kelley remembered two or three serious suicide attempts in 2013 or 2014. R. 263, ll. 9-20. Kelley admitted knowing J.K. was concerned about him being with their own daughter but she never accused him of doing anything improper. R. 274, ll. 3-23.

Heather Smith of the ARC had a degree in psychology from the University of South Carolina. She also had a master's degree in "Rehabilitation Counseling." R. 292, l. 10 – 293, l. 3. Smith testified and claimed that seventy to eighty percent of children who are molested do not disclose until they become adults. R. 301, ll. 6-10.

When challenged about the source of this information or claim, Smith said: "I don't have the actual citation of the percentage. I can get that, though. I can find that." Smith claimed that the 70-80% statistic came from more than one study, although she could not point to any study to support her claim. R. 312, l. 9 – 313, l. 17.

Appellant testifies

Appellant took the stand in his own defense and denied molesting either daughter. R. 407, ll. 15-19. Appellant said he heard on the phone call from J.K. that he was being accused of molesting her and having anal sex with her. R. 420, l. 22 – 423, l. 23. Appellant said he was

stunned to hear the allegations of molestation and rape on the phone. Appellant maintained he never had sex with either daughter. R. 424, ll. 3-15.

Discussion

In a criminal case, the state cannot attack the character of the defendant unless the defendant first places his character at issue. Mitchell v. State, 298 S.C. 186, 188, 379 S.E.2d 123, 125 (1989); State v. McElveen, 280 S.C. 325, 313 S.E.2d 298 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983); State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966). Evidence of prior acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). Evidence a defendant is a person of bad character due to his bad acts can result in the jury reaching a guilty verdict based upon a legally spurious presumption of guilt. State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980).

In the present case, the alleged victim twice testified about appellant going to jail. She first told the jurors that appellant was in and out of jail while she was a child. This clearly portrayed to the jury that appellant was a person of bad character.

Later, the alleged victim testified that she did not disclose the abuse because she feared others would talk about her being the reason appellant was in jail due to his molestation of her. This second mention of appellant going to jail while J.K. was a child only made a bad situation much worse.

The decision to grant or deny a mistrial rests within the sound discretion of the trial judge. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999). Here, the repeated assertions that appellant had been incarcerated while the

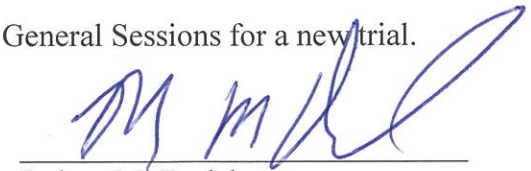
alleged victim was a child, and that she feared she would be blamed for the fact of appellant's incarceration, were extraordinarily prejudicial.

Defense counsel correctly argued that a curative instruction could not undo the damage that had already been done by the repeated references to appellant going to jail. The judge, based upon the highly unusual circumstances of this case, abused his discretion in denying the motion for a mistrial.

Criminal sexual conduct with a minor cases are very difficult cases for the defense based upon the accusation alone. Respectfully, no fair-minded person can or should deny that assertion. The repeated declarations from the alleged victim in this case that appellant was in and out of jail while she was a child, and that she feared being blamed for appellant's repeated incarceration impermissibly made appellant out to be a person of bad character. Mitchell v. State, 298 S.C. 186, 188, 379 S.E.2d 123, 125 (1989). Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of August, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,4

RESPONDENT,

V.

WILLIAM DEREK BENNON,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for William Derek Bennon states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Frank R. Addy, which was held on August 5 - 8, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for William Derek Bennon.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 21st day of August, 2020.

STATE OF SOUTH CAROLINA

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Aug 21 2020
SC Court of Appeals

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THE STATE,

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APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s);
(2) Entire transcript of trial held August 5-8, 2019
(3) Court's Exhibit #1 (Transcript of Phone Call)
(4) State's Exhibit #8 (CD – Phone Call)

I certify that this designation contains no matter which is irrelevant to this appeal.

August 21, 2020

Robert M. Dudek
Chief Appellate Defender

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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

August 21, 2020.

Robert M. Dudek
Chief Appellate Defender

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ATTORNEY FOR APPELLANT

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 21st day of August, 2020; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on William Derek Bennon, 381024, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 21st day of August, 2020.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT