STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERIC CHARLES PETERSON,

APPELLANT

APPELLATE CASE NO 2019-002097

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge erred in admitting testimony from Minor that she used to "play naked" with Appellant where such evidence constituted a prior bad act since no sexual abuse was alleged during that time and Appellant was not indicted for any offense related to him and Minor "playing naked?"

2.

Whether the trial judge erred in admitting four journal entries from a journal found on Appellant's night stand where the journal entries did not contain any inculpatory statements as to the allegations made by Minor but did contain written statements by Appellant that he was a bad person?

3.

Whether the trial judge erred in refusing to grant a mistrial where the assistant solicitor asked an investigator whether the letter written by Minor was placed into "a different victim's case file" and the witness answered in the affirmative after the judge had ruled pretrial that any testimony related to another pending case against Appellant was inadmissible?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County grand jury for four counts of criminal sexual conduct with a minor in the third degree. R. *. Appellant's trial was held before the Honorable Donald B. Hocker and a jury from December 9 – 12, 2019. Tr. 1. Appellant was represented by Brian Johnson. Tr. 1. The state was represented by Christine Sustakovitch. Tr. 1.

The jury found Appellant guilty as charged on each count. Tr. 422, l. 13 – 423, l. 4. The judge sentenced Appellant to fifteen years imprisonment on each count, all sentences to run concurrently. Tr. 434, ll. 17 – 21.

This appeal follows.

STANDARD OF REVIEW

Issues 1 and 2

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009).

Issue 3

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). "The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id.

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

STATEMENT OF FACTS

Appellant married Minor's mother in 2011 when Minor was nine years old. Tr. 145, ll. 15 – 20; tr. 265, l. 14 – 266, l. 2. Minor's biological father had never been a part of her life. She recalled that when Appellant married her mother, she was very excited because "[she] finally had the father figure [she] had always wanted." Tr. 146, ll. 7 – 18.

Minor lived with Appellant, her mother, and her siblings until Appellant and her mother separated around Easter of 2016 when Minor was fourteen years old. Tr. 147, l. 1 – 148, l. 5. After Appellant and Minor's mother separated, Minor wrote a letter claiming that she was abused by Appellant. Tr. 149, l. 1 – 151, l. 9. Minor recalled that she put the letter in a sealed envelope and gave it to her mother. Tr. 151, l. 15 – 152, l. 8.

Minor made four specific allegations against Appellant that she alleged occurred during the time she lived with Appellant. Appellant was indicted for each of these four incidents.

First, Minor claimed that on one occasion when she got out of the shower, Appellant asked her why she had taken so long. Minor claimed that she told Appellant she was having trouble grooming her pubic hair. Minor then claimed that Appellant told her to lie on her bed and then he shaved her pubic hair. Tr. 155, l. 1 – 157, l. 16; R. * (Indictment 1).

The second allegation Minor made was that Appellant gave her a full body massage. Minor testified that when she was thirteen, she asked Appellant to give her a back massage. Tr. 159, ll. 2 – 10. Minor claimed that Appellant said he would give her a full body massage instead. Tr. 159, ll. 11 – 19. Minor maintained that Appellant put his hands under her pants and underwear and massaged her "butt and everything." Tr. 160, ll. 13 – 20; R. * (Indictment 2).

The third allegation was that Minor claimed Appellant asked if Minor had ever given herself a breast exam. When Minor said that she had not, she claimed that Appellant began

touching her breasts. Tr. 163, ll. 1 – 25; R. * (Indictment 3). Finally, the fourth allegation made by Minor was that she and Appellant took a shower together and Appellant washed her body and she could "feel [Appellant's] penis on [her] back." Tr. 165, ll. 2 – 22; (Indictment 4).

Minor's mother, Pamela Peterson, testified that she separated from Appellant in 2016 because of marital problems. Tr. 267, l. 13 – 268, l. 16. Peterson recalled Minor giving her a letter that Minor had written. Tr. 271, ll. 1 – 4. Peterson took the letter to Investigator Perry with the Greenville County Sheriff's Office, who read it and made Peterson a copy. Tr. 271, l. 5 – 274, l. 24. Peterson had not looked at the letter until after Perry read it and she recalled the contents of the letter made her "very emotional." Tr. 275, ll. 3 – 13.

Minor's case was transferred from the Greenville County Sheriff's Office to the Greer Police Department because of jurisdictional concerns where Investigator Jason Bash was assigned to her case. Bash referred Minor to the Julie Valentine Center for a forensic interview which he watched through a camera system. Tr. 315, ll. 8 – 25; tr. 318, ll. 3 – 23. During this interview, Minor made allegations against Appellant and ultimately, Appellant was arrested as a result. Tr. 326, l. 17 – 328, l. 23.

ARGUMENT

1.

The trial judge erred in admitting testimony from Minor that she used to "play naked" with Appellant because such evidence constituted a prior bad act since no sexual abuse was alleged during that time and Appellant was not indicted for any offense related to him and Minor "playing naked."

Relevant Facts

Prior to Minor's testimony, the assistant solicitor informed the judge that she intended to have Minor testify that when she was ten years old, she and Appellant would "play naked." Tr. 136, ll. 7 – 13. The solicitor argued that this testimony should be admitted "under the continuing course of conduct under 404(b) to help give a total picture of how this abuse escalated." Tr. 136, ll. 18 – 25.

Defense counsel objected to the testimony arguing that it was irrelevant and unduly prejudicial. Tr. 137, ll. 11 – 22. The judge stated that he did not view the conduct as a prior bad act and found that "it just provides more of a foundation to what ultimately leads to the allegations." Tr. 138, ll. 10 – 15. The judge ruled that the testimony was admissible over defense counsel's objection. Tr. 138, ll. 18 – 25.

During the state's direct-examination of Minor, the assistant solicitor asked when was the first time that something happened between her and Appellant "that was not quite right." Tr. 153, ll. 8 – 10. Minor answered: "[I]t was around the age of 10 we had – it was never when my mom was home. And I don't know how it would happen to where we were completely naked, but we were just playing naked..." Tr. 153, ll. 11 – 14.

Defense counsel renewed his objection to this testimony and the judge again overruled it. Tr. 153, ll. 15 – 20. Minor continued:

> I don't remember how we would become naked, but we would like jump on the bed, play a game we'd call monster. If you ask me to describe it now, I can't. I can't describe the actual game. But we would just play naked. And at the time, I was a little uncomfortable, but I didn't know really any better. I wasn't really taught anything like that growing up.

Tr. 153, l. 21 – 154, l. 2.

Discussion

Rule 404(b) of the South Carolina Rules of Evidence provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." State v. Gillian, 360 S.C. 433, 443, 602 S.E.2d 62, 67 (Ct. App. 2004). Furthermore, in order to be admissible, "[t]he bad act must logically relate to the crime with which the defendant has been charged." Id.

If the prior bad act which the state seeks to introduce against the defendant is not the subject of a criminal conviction, then "evidence of the bad act must be clear and convincing." State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). Prior bad character evidence that is otherwise admissible under Rule 404(b) is still subject to the balancing test under Rule 403. Id. Under Rule 403 of the South Carolina Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

The trial court erred in admitting Minor's testimony that she and Appellant would "play naked" together. This testimony was a gratuitous attack on Appellant's character that served no other purpose other than to portray him as a sick and strange individual. None of the crimes Appellant was charged with had anything to do with Minor's allegations regarding their playing a game called "monster" while naked on the bed together. This testimony was extremely and unfairly prejudicial and was not probative of the crimes for which Appellant was on trial.

Furthermore, this testimony was not admissible as evidence of a common scheme or plan as suggested by the solicitor. "A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001). However, more than a general similarity must be shown. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003). There must be some connection between the two crimes for them to fall into the common scheme or plan exception. Id. "Where the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to overrule the prejudicial effect, it is admissible." State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999).

In State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020), the Supreme Court overruled State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) to the extent that Wallace had incorrectly held that for a prior crime to be admissible in a sex offense case pursuant to the common scheme or plan exception, "[a] close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility." Perry, 430 S.C. at 36-37, 842 S.E.2d at 660-61 quoting Wallace, 384 S.C. at 436, 683 S.E.2d at 279. The Perry Court held that "[t]he State must demonstrate to the trial court that there is in fact a scheme or plan common

to both crimes, and that evidence of the other crime serves some purpose other than using the defendant's character to show his propensity to commit the crime charged." Perry, 430 S.C. at 44, 842 S.E.2d at 665.

The Supreme Court in Perry ultimately found that the state had failed to show any legitimate purpose for the admission of testimony by the defendant's step-daughter that she had been sexually assaulted by the defendant more than twenty-years prior to the offenses for which he was on trial. Id. The state also failed to show there was substantial similarity between the offenses in Perry. Id. at 37-39, 842 S.E. 2d at 661-662.

Defense counsel correctly argued that the testimony about Minor and Appellant "playing naked" together was not substantially similar to what was alleged in the indictments. As counsel pointed out, the allegations of "playing naked" did not include any allegations of touching or sexual desire. Therefore, the prior uncharged acts did not fall within the common scheme or plan exception.

In State v. Tutton, 354 S.C. 319, 333-34, 580 S.E.2d 186, 194 (Ct. App. 2003), this Court held that evidence regarding a prior uncharged sexual assault by the defendant against one of the minor victims was not admissible under the common scheme or plan exception. The defendant in Tutton was accused of rubbing the private parts of two minors and digitally penetrating one of the minors on a single occasion. Id. at 323, 580 S.E.2d at 188. The state sought to introduce testimony from one of the minors that she had been sexually assaulted by the defendant several years prior to the allegations for which he was on trial. Id. at 324, 580 S.E.2d at 189.

The Tutton Court noted that there were significant differences between the prior sexual assault allegations and the offenses for which the defendant was currently on trial. Id. at 332, 580 S.E.2d at 193. The Court found the prior uncharged sexual assault was more egregious in

nature than what the defendant was on trial for which made its admission highly prejudicial. Id. Also, the defendant had allegedly threatened the minor during the prior uncharged assault but there were no such allegations made related to the charged offenses. Id. The Tutton Court also noted the significant time gap between the uncharged assault and the charged assaults in holding that they did not establish the defendant acted in a continuous course of conduct. Id. at 333, 580 S.E.2d at 193-94.

Here, the uncharged conduct was substantially *different* from the offenses that Appellant was on trial for. The only allegation regarding the uncharged conduct was that Appellant and Minor "played" together while naked. Minor did not explain in her testimony what she meant by the word "played" but there was no evidence that she meant it in a sexual way. There was also no allegation that Appellant touched her while they "played naked" together. Instead of showing a continuous course of conduct or common scheme or plan, this testimony was simply used to paint Appellant in a negative light and disparage his character. It should not have been admitted.

In State v. Nelson, 331 S.C. 1, 6-7, 501 S.E.2d 716, 719 (1998), the Supreme Court held that numerous items seized from the defendant's bedroom were inadmissible in his criminal sexual conduct with a minor trial. The items seized included children's toys, numerous photographs of children, and videos of children's television shows. Id. at 4-5, 501 S.E.2d at 717-18. The trial judge had allowed the evidence after the state's expert witness testified that it was characteristic of pedophiles to collect such items. Id. at 5, 501 S.E.2d at 718.

The Nelson Court found that these items were inadmissible character evidence because the only relevance was to paint the defendant as a pedophile. Id. at 6-7, 501 S.E.2d at 719. The Court further found that the admitted evidence would invite the jury to convict the defendant based on him acting in conformity with being a pedophile. Id. The Court stated: "We find the

State's argument this evidence was relevant to show motive or intent is merely a cleverly disguised way of asserting Petitioner committed the crimes because he has a propensity to commit sexual offenses." Id. at 12, 501 S.E.2d at 722.

As in Nelson, Minor's testimony that she and Appellant would get on the bed naked and play and game called "monster" was being used to show that Appellant had a propensity to commit sexual offenses. Even though there was no allegation that Appellant touched Minor while they were "playing naked," these allegations created a strong inference that Appellant was strange and a pervert. This testimony had nothing to do with the charged crimes against Appellant and had very little, if any, probative value. Because of the highly bizarre nature of the testimony, it was extremely prejudicial and should not have been admitted. Appellant's convictions should be reversed. See State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998); State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003).

2.

The trial judge erred in admitting four journal entries from a journal found on Appellant's nightstand because the journal entries did not contain any inculpatory statements as to the allegations made by Minor but did contain written statements by Appellant that he was a bad person.

Relevant Facts

The state sought to introduce four journal entries allegedly written by Appellant that were taken from a journal that Minor's mother found on Appellant's nightstand after they separated. Tr. 139, ll. 3 – 6. The solicitor summarized the journal entries to the judge telling him that they contained statements like "I'm scared," and "I will go back to jail." The solicitor said she would redact the word "back" from the entry referencing jail. Tr. 139, ll. 7 – 17.

The entries also contained statements where Appellant said he deserved to burn in hell. Tr. 140, ll. 1 – 4. The solicitor argued that the journal entries showed Appellant's state of mind after he and Minor's mother separated. Tr. 140, ll. 4 – 9.

Defense counsel objected arguing that the journal entries had no probative value because Appellant never made any reference to any of the allegations made against him by Minor. Tr. 140, ll. 13 – 24. The judge said he would make a ruling later after having an opportunity to review the letters. Tr. 141, l. 25 – 142, l. 1. After the judge read each of the four journal entries, he ruled that they were admissible. Tr. 217, ll. 11 – 20.

In response to defense counsel's objection to the journal entry which included a statement about him possibly going to jail, the judge stated:

> Certainly, *the solicitor is going to argue that his fear of going to jail was because of the allegations in this case, and you're going to argue that it could have been stated by the defendant for other reasons*. So I think it goes maybe towards the weight more so than

> admissibility, so I'm going to allow the State to have those into evidence...

Tr. 236, ll. 12 – 18 (emphasis added). The four journal entries were admitted through Minor's mother, Peterson, over defense counsel's renewed objection. Tr. 284, ll. 7 – 14; R. * (State's Exhibits 4, 5, 6 and 7). Peterson read all four of the journal entries in their entirety to the jury. Tr. 285, l. 7 – 288, l. 10.

Discussion

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE.

The trial judge erred in admitting the four journal entries from Appellant's journal because they were completely irrelevant to the charges against Appellant. The first journal entry was simply Appellant writing that he purchased the journal for the purpose of writing letters to Peterson, his ex-wife. R. * (State's Ex. 4). This journal entry did not mention Minor or anything related to Minor's allegations against Appellant. It had nothing to do with the charges against Appellant and it should not have been admitted.

The second journal entry included Appellant lamenting that he was a "horrible man, father and husband" and that he "deserve[d] nothing less than Hell and Hell's wrath from [Peterson] in eternity." R. * (State's Ex. 5). Again, this journal entry contained no references to Minor or the allegations she made against Appellant and it contained no references to any illegal conduct whatsoever. The jury could have been left only to speculate why Appellant was calling himself a horrible person and stating that he deserved to burn in hell. However, there is no

indication in the record that he wrote these things about Minor. This journal entry was irrelevant and did not make any fact of consequence more or less probable.

The third journal entry was primarily Appellant apologizing to Peterson for mistreating *her*. R. * (State's Ex. 6). Again, there is no mention of Minor or the allegations made against Appellant by Minor. Finally, the fourth journal entry consisted of Appellant writing that he was afraid of going to jail and that he hated himself. R. * (State's Ex. 7).

These four journal entries simply have no relation to the charges for which Appellant was on trial. There was no basis for their admission over defense counsel's objections because they did not contain any incriminating statements whatsoever, nor did they contain any inculpatory statements related to Minor's allegations. Therefore, the entries had no probative value.

In State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004), the Supreme Court held that it was error for the trial judge to admit an anger management questionnaire which was filled out by the defendant for an alcoholism program. The defendant in Myers was on trial for murdering his girlfriend. Id. at 42, 596 S.E.2d at 489. Police found the anger management questionnaire while searching the defendant's house. On the questionnaire, Myers had stated that he had gotten so angry at times to become physically violent, and that he had gotten angry enough to feel the urge to kill someone. Id. at 48, 596 S.E.2d at 492.

The Myers Court found that the prejudicial value of the anger management questionnaire substantially outweighed the probative value and should have been excluded. This case is similar to Myers because the journal entries written by Appellant portrayed him in a very negative light but was unrelated to the crimes he was accused of. Even if the journal entries had any probative value, the prejudicial effect was far greater.

In State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018), the Supreme Court considered the admissibility of the defendant's suicide attempt while in pretrial detention for numerous child sexual assault charges. Cartwright had argued that the evidence of his suicide attempt was not admissible because the state had failed to establish a nexus between the suicide attempt and the charged crimes. Id. at 90, 819 S.E.2d at 760. The Cartwright Court held that "evidence of attempted suicide may be admitted, provided that the State establishes a clear and unmistakable nexus linking the suicide attempt to a guilty conscience derivative of the offense for which the defendant is on trial." Id. at 91, 819 S.E.2d at 761.

The Court ultimately concluded that evidence of Cartwright's suicide attempt was admissible, in part, because he had told each of the victim's individually that if they told on him, he would commit suicide. Id. at 93, 819 S.E.2d at 762. While the case at bar does not involve a suicide attempt, Cartwright is still instructive on the matter. Appellant spoke of himself in very derogatory language in the journal entries, calling himself a horrible person and stating that he deserved to burn in hell. While not a suicide attempt, these statements can be interpreted to be a reflection of many different emotions that may be wholly unrelated to the charges against him. The state did not show *any* nexus between the journal entries and a guilty conscience derivative of the offenses Appellant was on trial for. Because of this lack of any nexus between the journal entries and Minor's allegations, the entries lacked any probative value.

Furthermore, the trial judge's suggestion to defense counsel that he could argue that Appellant was writing that he was afraid to go to jail for something unrelated to the allegations against Minor was just as bad as if he was writing that he was afraid of going to jail because of Minor's allegations as the solicitor argued. Defense counsel should not have to argue that Appellant feared going to jail *for some other uncharged crime* that he was not currently on trial

for. This would, of course, invite the jury to speculate as to all kinds of possible illegal acts committed by Appellant that were not before them during Appellant's trial. This would needlessly inject improper considerations before the jury and allow them to convict Appellant on irrelevant evidence.

Finally, this irrelevant evidence was extremely harmful to Appellant's case and its admission constituted reversible error. In the journal entries Appellant repeatedly degrades himself and refers to himself as horrible and that he deserves to burn in hell. Even though there is no evidence that these statements had anything to do with Minor's allegations, it is easy to see how a jury could be influenced to convict after hearing a defendant refer to himself in this manner. If the defendant believes himself to be a horrible person deserving of burning in hell for all eternity, then surely, he must deserve to be convicted. Therefore, the admission of this evidence against Appellant was not harmless beyond a reasonable doubt. Appellant's convictions should be reversed.

3.

The trial judge erred in refusing to grant a mistrial because the assistant solicitor asked an investigator whether the letter written by Minor was placed into "a different victim's case file" and the witness answered in the affirmative after the judge had ruled pretrial that any testimony related to another pending case against Appellant was inadmissible.

Relevant Facts

Prior to Appellant's trial, defense counsel informed the trial judge that Appellant had another pending charge regarding a different alleged victim. Counsel and the assistant solicitor agreed that any evidence regarding this other pending charge was inadmissible. The judge noted that the state had agreed not to introduce evidence of Appellant's other pending charge. Tr. 53, ll. 2 – 10. The assistant solicitor informed the judge that the letter Minor had written was inadvertently placed into the other alleged victim's case file which was an "honest mistake." Tr. 53, ll. 12 – 24.

Investigator Perry, with the Greenville County Sheriff's Office, testified that Minor's mother, Peterson, gave him a letter ostensibly written by Minor on July 20, 2016. Tr. 97, l. 10 – 98, l. 3. The assistant solicitor then asked Investigator Perry the following question: "[D]id you end up putting it into a different victim entirely – entirely a different victim's case file; is that correct?" Tr. 100, ll. 5 – 7. Perry responded: "I did." Tr. 100, l. 8.

Defense counsel objected and the jury was sent to the jury room. Tr. 100, l. 11 – 101, l. 8. Counsel then argued:

> Your Honor, my objection is that she asked him – she led him [to] you put this in a different victim's case file, and pursuant to what we discussed before trial, we were not going to reference a different charge with . . . the other alleged victim. That's a direct reflection to the other case. And I understand if it was asked you put this in a different case file, because that's what we discussed. .

> . . But a different victim's case file indicates that there's another victim.

Tr. 101, ll. 14 – 24. Defense counsel then moved for a mistrial. Tr. 102, ll. 21 – 22. The assistant solicitor claimed that she "was just trying to get out that it was in the wrong file and it was an accident." Tr. 104, ll. 11 – 17.

The trial judge denied counsel's motion for a mistrial and stated that when the jury returned to the courtroom he would strike the last question, tell the jury to disregard it, and have the solicitor re-ask the question without using the word "victim." Tr. 105, l. 20 – 106, l. 12. Defense counsel renewed his objection and request for a mistrial and stated that he did not believe that striking the question and re-asking it a different way would cure the prejudice. Tr. 106, ll. 15 – 20.

When the jury came back into court, the state moved to strike the last question and the judge told the jury to disregard it. Tr. 107, ll. 3 – 6. The solicitor then asked the following question: "[S]o that letter that we were talking about, was this letter put in the wrong case file totally unrelated to the case before the Court?" Tr. 107, ll. 8 – 11. Perry answered that it was. Tr. 107, l. 12.

Discussion

"The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." State v. Wilson, 389 S.C. 579, 585–86, 698 S.E.2d 862, 865 (Ct. App. 2010).

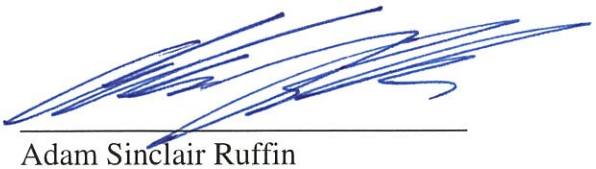
"Insubstantial errors that do not impact the result of a case do not warrant a mistrial when guilt is conclusively proven by competent evidence." State v. White, 371 S.C. 439, 447–48, 639 S.E.2d 160, 164 (Ct. App. 2006). "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." Harris, 382 S.C. at 117, 674 S.E.2d at 537.

The trial judge erred in refusing to grant counsel's motion for a mistrial. Striking the improper question only to re-ask it a slightly different way was wholly inadequate to remove the prejudice to Appellant. Appellant was on trial for sexually assaulting a minor which is a particularly unique type of case. See State v. Cross, 427 S.C. 465, 478, 832 S.E.2d 281, 288 (2019) (recognizing "the inherently prejudicial stigma a prior sex-related offense undoubtedly carries" in distinguishing criminal sexual conduct from burglary). Therefore, the jury hearing testimony which strongly suggested there was another case against Appellant by a different victim was extremely and undeniably prejudicial.

Defense counsel did nothing to open the door to the other pending charge against Appellant and it was totally improper for the solicitor to elicit this testimony. The solicitor specifically asked a leading question suggesting the answer was that the letter written by Minor had been placed into "another victim's case file." In doing so, the solicitor indirectly conveyed to the jury that there was another victim who had also been abused by Appellant. This extremely prejudicial testimony could not be cured in any way other than granting a mistrial. Therefore, Appellant's convictions should be reversed.

CONCLUSION

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



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of September, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Sep 25 2020
SC Court of Appeals

Appeal from Greenville County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERIC CHARLES PETERSON,

APPELLANT

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 Initial 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); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Eric Charles Peterson, #274354, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 25th day of September, 2020.

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT