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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County
Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

vs.

TONY ORLANDO SINGLETON,

Appellant.

Appellate Case No. 2019-001391

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

Because the State was required to prove the victim was under the age of eleven when she was sexually assaulted and impregnated, and because the photograph is merely a headshot of the victim when she was ten years' old, the trial court did not abuse its discretion in admitting the photograph of the victim when she was ten years' old, the same age when she was sexually assaulted.

II.

The trial court did not abuse its discretion by denying Appellant's motion for mistrial after the child-victim cried during opening arguments because the child-victim's crying fell short of an outburst and she was gently led from the courtroom, and the child-victim maintained her composure through the remainder of the trial. The minor display of emotion did not affect the verdict as Appellant's guilt was proven by overwhelming evidence – he was the father of the unborn fetus.

III.

The trial court did not err in declining to instruct the jury on third party guilt because no evidence was presented that someone to the exclusion of Appellant committed the rape: the only evidence offered demonstrated that Victim was raped by three different individuals, including Appellant. The Appellant's requested jury instruction was an impermissible charge on the facts.

STATEMENT OF THE CASE

Appellant Singleton was indicted for criminal sexual conduct with a minor in the first degree (CSC-minor) (2016-GS-25-137). A jury found him guilty of CSC-minor following trial on August 5-7, 2019. The Honorable Carmen T. Mullen sentenced Singleton to life imprisonment.

STATEMENT OF FACTS

At the time of trial, Victim was thirteen years' old. Appellant was her stepfather. She testified she was raped by Appellant when she was ten years' old. Victim was interviewed by counselors when she was still ten years' old and the terminology she used at that age was Appellant stuck his "pee-pee in her boo." R. p. 58, lines 12-17. The intercourse occurred in her bedroom while she was watching television. R. p. 59.

During this interview, she told counselors that two other people **also** raped her: (1) her half-brother, Appellant's oldest son, who was twelve or thirteen years' old at the time, and (2) a boy about her age that lived in the neighborhood and was friends with Appellant's oldest son. R. p. 44; p. 59; pp. 62-63. The assault by Appellant's son happened in the house where they lived in Estill and occurred towards the end of December. R. pp. 63-64.

Victim explained she did not report the rape when it occurred because she was afraid it would break up Mother's relationship with Appellant. R. pp. 59-60. Thirteen year-old Victim identified a picture of herself when she was ten years' old – she is smiling, but it is just a headshot. R. p. 60; State's Exhibit 3. She testified at the time of the rape, she was in Fourth Grade, but now she was going into Eighth Grade at the time of trial. R. p. 61.

Appellant lived with Victim, Victim's mother, and Mother's five other children. Appellant

moved in and out several times, but already moved out for good by the time Victim's pregnancy was discovered. R. pp. 35-38. The pregnancy came to light in the spring-time while Victim was visiting her maternal grandmother (Grandmother). Grandmother was shocked to see Victim was pregnant. She called Victim's mother. R. pp. 31-32.

Mother never suspected anything until Grandmother called because for one thing, Victim never had her cycle before. R. p. 40. Mother and her parents took Victim to Florida to terminate the pregnancy. R. pp 41-42. Mother lost all her children for a few months until DSS determined she was not responsible for anything that happened and returned them. R. p. 42, lines 10-24.

Pamela Moore, a pediatric nurse examiner, testified Victim tested positive for her pregnancy test. Moore contacted DSS as required by the mandatory reporting laws. Victim was reluctant to admit to being sexually abused. She finally admitted "somebody touched her with it." Victim told Moore, "somebody who's my age touched me." R. pp. 52-53.

On April 14, 2016, Dr. Edward Warren performed an ultrasound on Victim and determined she was twenty-two weeks' pregnant, plus or minus thirteen days. R. p. 55. The nurse that terminated the pregnancy in April 2016 testified the age of the fetus was about twenty-four weeks' old with a probable conception date around the end of November 2015. R. pp. 65-66.

Lead Investigator Michael Thomas testified there were three suspects – Appellant and two juveniles. R. p. 71. He did not interview Victim himself. Both juveniles provided buccal swabs. He also took possession of the aborted fetus from the medical office in Florida and brought it to SLED. R. pp. 73-75.

DNA analyst Alysha Breland from SLED testified the DNA from the fetus established the

fetus was the offspring of Victim and Appellant. The same testing eliminated both juveniles as the father. R. p. 90. The DNA from the fetus and the known standards were compared at fifteen locations. R. p. 93. Defense counsel asked Breland about an alleged problem that is presented when a father and son are both candidates in a paternity test. Breland responded, "Since two of the suspects are father and son, all that tells me is that they are gonna have some degree of overlap between their two DNA profiles." R. p. 99, lines 1-7. Despite the expected overlap, Breland excluded Appellant's son because of two markers in the son's DNA sample. R. p. 99, lines 11 – p. 100, line 15. Breland explained, "[T]he number [for the two locations] that would have needed to be inherited from Malik to the fetus was not present." R. p. 100, lines 4-15.

Appellant testified in his own defense, denying he raped Victim. He also testified his son sometimes babysat the children. He claimed to have moved out prior to November. R. pp. 120-24. His mother testified Appellant moved out in October. R. pp. 112-14. The defense attempted to collaborate this further with Chief Mark Collins' testimony that he responded to a call in October and saw Appellant putting things in his trunk, but when Chief Collins arrived and spoke to both Mother and Appellant, they both said there was nothing wrong, so he did not take any action. He did not know if Appellant was moving out or not. R. pp. 107-110.

ARGUMENT

I.

Because the State was required to prove the victim was under the age of eleven when she was sexually assaulted and impregnated, and because the photograph is merely a headshot of the victim when she was ten years' old, the trial court did not abuse its discretion in admitting the photograph of the victim when she was ten years' old.

Prior to trial, defense counsel advised the trial court it had an objection to a photograph of Victim "at the age of ten when she became pregnant, and we are objecting to that on the Rules of Evidence, 401, 402, and then 403." R. p. 4, lines 9-13. Defense counsel did not explain why he felt a picture of Victim around the time of the crime was not relevant or how his client was prejudiced by the picture. The prosecutor noted it was simply a photograph of Victim when she was ten years' old. R. p. 4, lines 16-19. The trial court noted it was shown two pictures and the one introduced was more appropriate, and ruled on defense counsel's perfunctory and conclusory motion by indicating the trial court would allow the picture and found it was appropriate. R. p. 4, line 20 – p. 5, line 25. At trial, Victim identified the photograph as depicting herself when she was ten years' old. R. pp. 60-61.

Standard of review

"The relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999). The trial court does not abuse its discretion if the photographs serve to corroborate testimony. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997).

Because the State is required to prove Victim was under eleven years' old at the time of the crime and Victim was thirteen years' old at the time of trial, the photograph was probative to show Victim as she appeared at ten years' old, and it is not prejudicial.

Under S.C. Code § 16-3-655(A)(1), the prosecution was required to prove Victim was under the age of eleven at the time of the assault. The photograph – in tandem with Victim's testimony laying the foundation for the photograph – was probative for this purpose.

The apparent prejudice from the photographs is that the picture of Victim at ten years' old, in which she is smiling, inflamed the passion of the jury. In Commonwealth v. Degro, 733 N.E.2d 1024, 1032 (Mass. 2000), the defendant claimed testimony about the murder victim's home life and a photograph of the murder victim and his live-in girlfriend was improper. The court disagreed, holding, "The Commonwealth may tell the jury something of the person whose life has been lost in order to humanize the proceedings. . . . [A]nd a photograph may be admitted for this purpose." (citations and internal quotation marks omitted).

In Breeden v. State, 427 S.W.3d 5, 6 (Ark. 2013), the appellant argued photographs of the rape victim at ages ten, eleven, and twelve were erroneously admitted because they were not relevant. The Arkansas Supreme Court noted the pictures depicted the victim at the ages when the rapes were occurring and found the photographs were relevant because the state was required to prove the rapes occurred when the victim was less than fourteen years of age.

In People v. Khan, 88 A.D.3d 1014, 1014 (N.Y. App. Div. 2011), the appellate court found, "Contrary to the defendant's contention, the Supreme Court providently exercised its discretion in admitting into evidence two photographs depicting the victim at ages five and seven to illustrate the

victim's age when the sexual contact allegedly began and to corroborate testimony regarding the change in the victim's physical appearance. . . . The fact that there was other evidence available with respect to these matters did not require the exclusion of the photographs." (internal citations omitted).

In State v. Klein, 593 N.W.2d 325, 327 (N.D. 1999), the victim was six years' old when molested and twelve years' old at the time of trial. The North Dakota Supreme Court found the photograph of the victim when the victim was six years' old was not an abuse of discretion: "The photograph was relevant to show the jury what [the victim] looked like at the time of the offense, as opposed to what he looked like during his testimony at the trial." Id. "The photograph was much more illustrative than the statement that [the victim] was six years old at the time of the offense." Id.

In People v. Herrera, 272 P.3d 1158, 1163 (Colo. Ct. App. 2012), the defendant complained that photographs of the two victims taken at their first communion while they were praying were irrelevant and highly prejudicial. Rejecting the argument that the photographs were not relevant because they did not assist in establishing any necessary or disputed element of the crimes, the court opined, "[P]hotographs of a victim may have probative value even if they relate to an undisputed matter." Id. Instead, the court found, "[T]he prosecution was entitled to show what the victims looked like, even if their ages at the time of the alleged sexual assaults were undisputed, provided that the photographs were relevant and not unfairly prejudicial." Id. The court observed, "Courts in other jurisdictions have almost uniformly held that trial courts do not abuse their discretion in admitting photographs that depict victims of sexual assault when the alleged abuse began." Id.

In State v. Gann, 733 S.W.2d 113, 115 (Tenn. Ct. App. 1987), the Tennessee court found no

error in the admission of photographs of the three children at the time they reported abuse in 1984 to show their size and apparent age, and added, "Indeed, from the standpoint of prejudice, the photographs can be said to be innocuous." Id.

In the present case, Victim was thirteen years' old at the time of trial, but only ten years' old when impregnated. The photograph was relevant to show her age when the abuse occurred and it was certainly innocuous. The trial court did not abuse its discretion in allowing the photograph, a mere headshot of Victim, into evidence.

Further, Appellant was not prejudiced by the photograph. "To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice." State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

The jury did not reach its verdict based on the photograph. Instead it reached the verdict because Victim's testimony was corroborated by DNA evidence showing Appellant was the father of the fetus to the exclusion of the two boys who also raped Victim. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)).

II.

The trial court did not abuse its discretion by denying Appellant's motion for mistrial after the child-victim cried during opening arguments because the child-victim's crying fell short of an outburst and she was gently led from the courtroom, and the child-victim maintained her composure through the remainder of the trial. The minor display of emotion did not affect the verdict as Appellant's guilt was proven by overwhelming evidence – he was the father of the unborn fetus.

At the onset of trial, Victim cried some during Appellant's opening argument. She was gently led out by a victim's advocate. Even though the record fails to reflect that Victim suffered any further difficulties maintaining her composure, Appellant contends a mistrial should have been granted for the brief and isolated incident. Appellant hyperbolically claims at the end of his argument that "[w]hile some emotion is to be expected in these types of cases, Minor's conduct was extreme." Br. of App. p. 12. The trial court's perspective of the incident is markedly different, as the trial court did not view the isolated instance as an "outburst" and characterized it as "minimal." R. p. 174. The trial court did not abuse its discretion.

How the issue arose

Following opening statements by both attorneys, Appellant's counsel made a motion for a mistrial, claiming, "During my opening statement to the jury, if I'm correct, when I turned around, it appeared that [Victim] began to cry." R. p. 22, line 22 – p. 23, line 1. Defense counsel further claimed it "created a disturbance" and "was audible." Defense counsel noted Victim was escorted out of the courtroom to regain composure. R. p. 23, lines 5-22.

The trial court observed, "Obviously, it is an emotionally charged case, and I will say that she didn't do anything that maybe she wouldn't have occurred if she was on the stand testifying." R. p.

24, lines 7-10. The trial court cautioned the prosecution, the prosecution in response noted:

> I did have the conversation whether or not [Victim] wanted to be present in the courtroom, and I believe she has that right to decide that. I was not going to ban her from the courtroom, but she is a strong girl. She is doing really well now, and she's 13 years old. Should she feel like she cannot remain in the courtroom, April Winston will be sure to . . . make sure she's comfortable.

R. p. 25, lines 5-12. The trial court denied the motion but cautioned "we all need to tread lightly." R. p. 25, line 25 – p. 26, line 1. The record is devoid of any further emotional reactions by the thirteen year-old Victim.

At the conclusion of the trial, defense counsel moved for a new trial, and renewed the mistrial motion. The trial court denied the motion, noting for the record the following:

> [T]he victim began crying. However, I will say I will not characterize it in any way as an outburst. She just began crying, and she was not removed from the courtroom by me. The victim's advocate, in her wisdom, just gently took her and walked her out of the courtroom as she should, and did a good job doing it. So, that was just the way it was handled. So I don't think it was outwardly disruptive, and I know it's one of the things the Appellate courts look at it, you don't know if you weren't here exactly how it happened. So, I will say it was minimal.

R. p. 174, lines 1-15.

Standard of review

"A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). "The granting of a mistrial motion is an extreme measure to be taken only where an incident is so

grievous that its prejudicial effect can be removed in no other way." State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000).

"Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983). The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

The record reflects the trial court did not abuse its discretion in denying the mistrial.

"The decision whether to grant a mistrial because of a witness's outburst rests within the sound discretion of the trial judge and will not be reversed absent an abuse of discretion or manifest prejudice to the complaining party." State v. Anderson, 322 S.C. 89, 91-92, 470 S.E.2d 103, 105 (1996). In Anderson, during a murder trial, the victim's sister testified as to the identity of the defendant. She then addressed the defendant, saying, "Why Shawn? Why did you do it? . . . He didn't have to take her life." The jury was sent out of the courtroom, but Victim screamed and bawled for three to five minutes at the top of her voice. Defense counsel noted the jury room was adjacent to the area where this occurred, suggesting the jury would have been able to hear her. Id. at 90-91, 470 S.E.2d at 104. Appellant left these facts out when citing Anderson in his brief; but Appellant did note that the Supreme Court's observation that the sister's outburst had little effect on

the jury because it occurred at the beginning of trial and was "very limited in time and in scope." Id. at 93, 470 S.E.2d at 105. The Supreme Court found no error in the denial of the mistrial motion, opining, "Given that the trial judge was in the best position to assess the degree to which the jury may have been prejudiced by the [witness's] outburst, he did not abuse his discretion in denying [the appellant's] mistrial motion." Id. at 93, 407 S.E.2d at 105-06. In the instant case, the incident was limited in time and in scope, so Anderson compels affirmance in the instant case.

The issue in State v. Schaffer, 354 S.W.2d 829, 833 (Mo. 1962) involves, like the instant case, what the Missouri Supreme Court described as a challenge to a "discretionary ruling." The pertinent and wide ranging application to the instant case makes a block quote of the ruling useful to the analysis of the instant case:

> The charge is that the court should have declared a mistrial in each of several instances because of prosecutrix giving testimony while in a highly emotional state 'sobbing hysterically tearfully crying, and unable to testify without interrupting herself by her aforesaid sobbing and crying.' We find two instances where defendant moved for a mistrial, once on the ground that the prosecutrix was 'sniveling.' And another (one page later in the transcript) that she was 'crying and sniveling on the stand' and 'on the verge of hysteria.' In the first instance, the court commented and ruled, 'The witness is conducting herself very properly in the court's opinion, the objection is overruled.' In the second, the court stated that in its opinion the witness was not hysterical, but 'conducting herself here fairly well – she is conducting herself properly, while she is stumbling a little bit, but that is the way girls in rape cases do – they do it all the time. Your objection is overruled.' There is nothing in the record to indicate the situation was otherwise than as stated by the court, and no prejudice appears therefrom.

Id.

Likewise, in the instant case, the trial court did not abuse its discretion. As Appellant argues

in his brief, there is no doubt Victim was sexually abused because she was impregnated. Obviously, a jury would expect Victim to have some emotion about what happened to her. Of course, it was equally obvious that Appellant sexually abused Victim because of the DNA evidence and so defense counsel was prone to exaggeration in the vain attempt to preserve some possible error. Even defense counsel's exaggerated account of the event is countervailing to the necessity of a mistrial. However, because no evidence suggests the trial court's observations of the incident are inaccurate, the trial court clearly did not abuse its discretion.

In Commonwealth v. McCloughan, 421 A.2d 361, 363 (Pa. Super. Ct. 1980), the Pennsylvania Superior Court found no error in the denial of a mistrial motion when a minor victim of sexual abuse cried during her testimony. The trial court noted the crying episode was brief and the child was able to continue testifying without a recess. She continued to testify for the length of 41 pages of transcript without any further crying. The reviewing court concluded, "Since the crying episode was brief and since the trial court, which observed the episode, obviously felt that the jury had not been prejudiced by the brief incident we hold that the trial court did not abuse its discretion in refusing to declare a mistrial because of it." Id.

In the instant case, the trial court did not abuse its discretion because Victim's brief period of crying before she maintained her composure for the remainder of the trial did not warrant granting a mistrial. Further, any error was harmless beyond a reasonable doubt because Victim's credibility was corroborated by DNA evidence establishing Appellant as the father of the fetus. This trial was not a "whodunit" by any stretch of imagination. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

"Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)). The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)). Science irrefutably corroborated Victim's testimony that Appellant sexually assaulted her. Victim's limited and understandable episode of weeping did not prevent Appellant from receiving a fair trial. State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (noting the Constitution requires a criminal defendant to receive a fair trial, not a perfect one).

III.

The trial court did not err in declining to instruct the jury on third party guilt because no evidence was presented that someone to the exclusion of Appellant committed the rape: the only evidence offered demonstrated that Victim was raped by three different individuals, including Appellant. The Appellant's requested jury instruction was an impermissible charge on the facts.

Much like an adult may have more than one sexual partner, so may a child be sexually abused by more than one person. Despite this reality, Appellant claims to have been entitled to an instruction on third party guilt based on conjecture that his son might have impregnated Victim. However, the only evidence offered to the jury was that Appellant, Appellant's son, and a neighborhood boy, each raped Victim, which constitutes three separate crimes. Further, Appellant was not charged with impregnating Victim, but committing a sexual battery, specifically intercourse. The only evidence was the fetus matched Appellant's DNA and Appellant's son was excluded as the father of the fetus. However, even if someone else impregnated Victim, that does not constitute third party evidence of guilt because it does not exclude the possibility that Appellant raped Victim, even if he hypothetically did not impregnate Victim. Another glaring problems is that the requested instruction constitutes an impermissible instruction on the facts and the case law in South Carolina fails to suggest a defendant is entitled to an instruction on a stand-alone defense of third-party guilt.

Standard of Review/when there is a duty to provide requested instructions

An appellate court will not reverse the trial court's decision regarding a jury charge absent an abuse of discretion. State v. Mattision, 388 S.C. 469, 479, 697 S.E.2d 578, 583-84 (2010). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law

applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996).

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975).

While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Indeed, the purpose of the instructions is to enlighten the jury and to aid it in arriving at a correct verdict. Id.

Appellant did not present any evidence of third party guilt.

Evidence offered by a defendant of the commission of the crime by another person is limited to facts inconsistent with defendant's guilt. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). Evidence of another's guilt must raise a reasonable inference or presumption as to his own innocence, and evidence that only casts a bare suspicion on another is not admissible. State v. Gregory, 198 S.C. 98, 104-05, 16 S.E.2d 532, 534-35 (1941). A criminal defendant is not entitled to "indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty." Id.

In State v. Craig, 853 N.E.2d 621 (Ohio 2006), the Ohio Supreme Court upheld the trial court's exclusion of testimony "that another suspect might have raped and murdered" the victim. Specifically, that at the time of the victim's murder, the victim's uncle was under investigation for

raping victim. Id. at 635. However, the Ohio Supreme Court found no evidence linking the previous rape of the murder victim or the uncle with the current charges. Id. The court analyzed Holmes v. South Carolina, 547 U.S. 319 (2006) and noted the state's interest in promoting the rape shield law was not outweighed by speculative evidence of a prior rape not connected to the victim's murder. Id. at 636. Likewise, in the present case, no evidence links the son's prior rape of Victim to the pregnancy. The only evidence presented was Victim was raped by three people, including Appellant, and Appellant was the one who impregnated Victim.

In Bell v. State, 360 S.W.3d 98, 103 (Ark. 2010), the Arkansas Supreme Court observed:

> In cases involving rape of a minor, this court has uniformly and consistently excluded evidence of the minor's prior sexual activity because the only two issues to be determined are the fact of the occurrence of the prohibited activity and the age of the minor. . . . Generally, when consent is not an issue, the victim's prior sexual conduct with another person is entirely collateral.

(citations omitted). In the instant case, evidence that Victim was raped by two other people, even if close in time to the rape committed by Appellant, constituted extrinsic sexual activity, or rather victimization, that simply was not relevant to the charge for which Appellant was tried.

A situation somewhat inverse to the present case existed in State v. Talton, 497 A.2d 35 (Conn. 1985). In that case, the defendant was accused of forcing his way into the adult victim's residence and having intercourse with the victim against her will. She had a child nine and a half months later. At one point, she thought her attacker might be the father. However, she had intercourse with someone else three to seven days before the rape and the government never alleged the defendant was the father. Id. at 38. Nevertheless, the defendant moved for the trial judge to order the victim and her child to submit to a blood test, because the defendant argued the evidence

could be exculpatory. He also argued he should have been allowed to cross-examine the victim about the paternity of her child. The Connecticut Supreme Court found no error in excluding evidence of the pregnancy despite the claim such evidence would be exculpatory, holding:

> The issue in this case was whether this defendant sexually assaulted the complainant. The complainant's subsequent pregnancy was irrelevant as to whether a sexual assault had occurred. The areas the defendant sought to explore were plainly collateral in nature. Under the facts of this case, the pregnancy of complainant had no bearing upon the identity of the person who sexually assaulted her. The fact of the pregnancy did not prove or disprove that defendant committed the crime.

Id. at 40. The court further noted that the case before them was clearly distinguishable from the cases cited by the defendant in which the victim alleged the accused was the only person alleged to have had intercourse with the victim. Id.

In the instant case, as in Talton, the victim alleged she was sexually assaulted by three people. So Appellant was not the only person alleged to have had intercourse with the Victim. At best, if charitably accepting an issue of paternity for the fetus existed, that would have only been impeaching as to the State's evidence – it would fail to establish Appellant did not commit a sexual assault.

Case law predating the advent of modern DNA testing is instructive. In People v. Seeley, 75 N.Y.S.2d 833 (N.Y. County Ct. 1948), the defendant charged with rape sought a blood test for the pregnant victim. The court refused because the necessary element of the crime was an act of sexual intercourse, not pregnancy. The court observed sexual intercourse "as is well known, does not necessarily result in pregnancy. There is abundant precedent for the proposition that pregnancy or the birth of a child is no evidence to corroborate testimony that the defendant is the guilty party." Id. at 835. Obviously DNA testing has changed the ability to firmly establish a defendant's guilt when

the rape leads to pregnancy. However, the court observed something that has not changed, "Although there is no such substantial authority for the converse proposition, it is certainly logical and follows that pregnancy or the birth of a child could not acquit the defendant or substantiate his innocence of Rape in the Second Degree even if blood tests unequivocally showed that he could not be and was not the father." Id. at 836. DNA testing has not altered the reality that more than one person could rape a child, as in the instant case, regardless of whether one of the perpetrators impregnated the child. Victim testified as to three crimes, not one.

Evidence contrary to the State's DNA evidence – if indulging the argument that it existed – is impeaching, not evidence of third party guilt. In State v. Lawson, 267 S.E.2d 438, 439 (W.V. 1980), a witness testified the defendant thought the victim was pregnant by him and the victim testified she never engaged in sexual intercourse with anyone other than the defendant. The West Virginia Supreme Court noted:

> In our case the matter of the paternity of the child is not the central issue, but rather whether the defendant committed statutory rape . . . However, the paternity of the child is a relevant fact in this case because the victim testified that this was the only instance of sexual intercourse in which she had engaged. Thus, if the defendant had been able to establish by a blood test that he could not possibly have fathered the child, he would have effectively impeached the victim's testimony.

(Internal citation omitted).

In the present case, unlike the facts of Lawson, Victim's testimony established three separate crimes were committed by three different people, including by Appellant. The pregnancy standing alone fails to prove Appellant committed a crime. However, the additional element of the results of DNA testing is suffice to say, strong evidence he did commit a crime. But if DNA results showed

someone else was the father, that would not be exculpatory for Appellant, nor even impeaching since Victim did not claim Appellant was the only person she ever had intercourse with. As observed by the Arkansas Supreme Court in Bell, the tragic fact two other people also raped Victim is collateral to the issue of Appellant's own guilt and not evidence Appellant did not commit the crime for which Victim accused him of committing. Therefore, no evidence warranting a third party guilt charge was presented at trial, and the trial court did not err in declining to instruct the jury on third party guilt evidence.

The requested instruction is an impermissible comment on the facts and the trial court is not required to instruct the jury on third party guilt as a stand-alone defense.

Appellant requested the following jury instruction:

> The defendant contends that there is evidence before you indicating that someone other than he may have committed the crime, and that evidence raises a reasonable doubt with respect to the defendant's guilt.
>
> In this regard, I charge you that a defendant in a criminal case has the right to rely on any evidence produced at trial that has a rational tendency to raise a reasonable doubt with respect to his own guilt.
>
> I have previously charged you with regard to the State's burden of proof, which never shifts to the defendant. The defendant does not have to produce evidence that proves the guilt of another, but may rely on evidence that creates a reasonable doubt.
>
> In other words, there is no requirement that this evidence proves or even raises a strong probability that someone other than the defendant committed the crime.
>
> You must decide whether the State has proven the defendant's guilt beyond a reasonable doubt, not whether the other person or persons may have committed the crime.

Defendant's Exhibit #2 (Court's Exhibit).

Initially, the State notes there are no cases in South Carolina requiring the giving of a third-party guilt charge, especially not one similar to the one requested by Appellant.[1] Appellant's requested jury instruction essentially highlights the defendant's theory on his defense. It begins by stating: "The defendant contends that there is evidence before you indicating that someone other than he may have committed the crime or crimes, and that evidence raises a reasonable doubt with respect to the defendant's guilt." This statement is a comment on the facts because it is discussing the evidence as the defendant would have the jury believe it. It is also isolating one type of evidence and providing special instructions for that type of evidence, which our Supreme Court has indicated is not allowed in jury instructions. See State v. Stukes, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016).

In Stukes, the Supreme Court found the no-corroboration instruction for the testimony of sexual abuse victims isolated one type of evidence and set it apart from all others by indicating a victim's testimony need not be corroborated. The Supreme Court opined: "By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Id. In the instant case, the requested instruction likewise highlights a defendant's theory of the case and specifically invites the jury to give it special consideration which would be just as invalid as the jury instruction found in Stukes.

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[1] The Supreme Court observed, in an unpublished opinion, "[N]o case law in South Carolina . . . supports the proposition that a trial court must charge the jury on third-party guilt as a standalone defense." Teamer v. State, 2016-MO-013 (S.C. Supreme Court, filed April 13, 2016) 2016 WL 1458176.

The jury instruction also improperly holds that a defendant "has the right to rely on any evidence produced at trial that has a rational tendency to raise a reasonable doubt with respect to his own guilt." The "right to rely" language at a minimum has the likelihood to confuse the jury based on the trial court's explanation that they are the finders of fact and "it is your exclusive duty to decide all the issues of fact in this case. You must determine the effect, the value, and the weight of the evidence." R. p. 158, lines 11-13.

The jury instruction requested by Appellant then continues to address the weight and type of evidence presented and how a defendant should be allowed to rely on that evidence. This type of instruction, commenting on the weight to be assigned specific evidence or types of evidence is not allowed. See State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). In Cheeks, the jury charge indicated that actual knowledge of the possession of drugs is "strong evidence" of intent to control its disposition or use. The Supreme Court found the charge "improperly weighs the evidence . . . ." Id. at 328, 737 S.E.2d at 484.

The remainder of the jury charge requested by Appellant is just a re-wording of the burden of proof and the need for the State to prove its case beyond a reasonable doubt. The requested charge was fully covered by the trial court's instructions to the jury.

In State v. Simmons, 430 S.C. 1, 22, 841 S.E.2d 845, 856 (2020) (C.J. Beatty, dissenting), by a three to two vote, the Supreme Court reversed the appellant's conviction on an unrelated evidentiary issue, and therefore, the majority did not reach the appellant's claim that the trial court erred by failing to provide an instruction on third party guilt. However, the dissent, in an opinion written by Chief Justice Beatty, opined an instruction on third party guilt was not warranted based

on the evidence provided and further found the requested instruction would have been an impermissible statement on the facts. Likewise, the instruction requested in the instant case was not supported by evidence and is an unconstitutional statement on the facts.

Harmless error/no prejudice

Further, any error was harmless. Errors are considered to be harmless when the errors could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). The evidence established Appellant as the father of the fetus. The uncontroverted evidence excluded the other two perpetrators as the father of the fetus. "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)). The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)). This was hardly a whodunit, notwithstanding the desperate argument of defense counsel. Appellant committed criminal sexual conduct and any error is harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County
Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

vs.

TONY ORLANDO SINGLETON,

Appellant.

Appellate Case No. 2019-001391

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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