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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTERIUS BRAESHUN SMITH,

APPELLANT

APPELLATE CASE NO. 2021-000608

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err in denying appellant's motion for mistrial where the court's instruction, that the jury should disregard Phaedra Hall's inadmissible hearsay testimony that appellant threatened her family, did not cure the error?

STATEMENT OF THE CASE

On September 21, 2017, appellant was indicted by a Cherokee County grand jury for attempted murder and possession of a weapon during the commission of a violent crime. R. 375. On May 18, 2021 pretrial motions were heard before the Honorable J. Mark Hayes. Appellant was tried May 19-21, 2021 before Judge Hayes and a jury. R. 1. Steven Epps represented appellant and Adrienne Barry, assistant solicitor, and Hope Hicks-Coleman, assistant solicitor, represented the state. R. 1.

The jury found appellant guilty of assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. R. 355. Judge Hayes sentenced appellant to concurrent terms of five years' imprisonment for possession of a weapon during the commission of a violent crime and twenty years, suspended to seven years' imprisonment followed by five years of supervision, for ABHAN. R. 372.

This appeal follows.

STANDARD OF REVIEW

A trial court'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 [court]." *Id.* at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

ARGUMENT

The trial court erred in denying appellant's motion for a mistrial where the court's instruction, that the jury should disregard Phaedra Hall's inadmissible hearsay testimony, that she was scared to speak law enforcement because appellant threatened her family, did not cure the error.

Relevant facts

On March 28, 2017, Tyler Vassey was shot outside the home of Tersandra (Tisa) Wood in Gaffney, South Carolina. There was no medical testimony presented at trial but Vassey testified he was shot "right above [his], [] right collar bone," and the bullet went through his body exiting his right shoulder. R. 80, l. 8-8, l. 20. Vassey said because of the injury his right arm was "significantly smaller" than his left arm but there is no additional evidence in the record that Vassey sustained any permanent physical impairment. R. 84, ll. 15-22.

At trial, Vassey testified that he knew appellant because they attended the same high school. R. 74, ll. 16-24. Additionally, Vassey was close friends with members of appellant's family. R. 83, ll. 7-14; 86, ll. 21-23; 101, ll. 8-25. On the day of the incident Vassey was helping his family pack up their house in preparation for a move. During that process he found a cooking item[1] that he planned to sell to an acquaintance. Vassey asked Britney Whisnant to drive him to the home of Tersandra (Tisa) Wood to drop off the item. R. 75, ll. 1-9. When they arrived at Tisa's Vassey got out of the car to unload the item and was approached by an individual that Vassey later claimed was appellant. Vassey testified appellant told him to leave, shot him, and continued to point a gun at him until he left with Whisnant to go to the hospital. R. 78-80. When

[1] It is unclear from the record exactly what the item was but from the description it appeared to be a propane turkey fryer kit that included stand and cooking pot.

police spoke to Vassey the same night he did not tell them that appellant shot him because, he claimed, that although he recognized appellant, he did not know his name. Vassey also testified that he was "in fear for his life." R. 86, ll. 1-22. Weeks later Vassey picked appellant out of a photographic lineup. R. 134, ll. 16-23. Vassey admitted he continued to socialize with appellant's family after the incident and even spent time at social gatherings where appellant was present. R. 101, l. 13-102, l. 21.

The state also called Britney Whisnant to testify. Whisnant drove Vassey to Tisa's home the day of the incident. R. 141. She testified that when they arrived Vassey got out of the car and was approached by a man. Whisnant recalled, that at the time she thought the two men were joking with one another, but it turned into an argument that resulted in Vassey being shot. Regarding the identity of the shooter, Whisnant first testified that she "caught a glimpse" of the shooter but then shortly after proclaimed that she looked right at the shooter. R. 142-45. Whisnant acknowledged that she was "high" on methamphetamine on the day of the incident but regardless was certain that the shooter was appellant. R. 161, l. 22-162, l. 2; 165, ll. 19-24. Whisnant identified appellant, as the person who shot Vassey, in the courtroom. R. 142, l. 22-143, l. 7.

Next the state called Phaedra Hall who lived beside Tisa, at the time of the incident, and claimed to have witnessed the shooting. Phaedra testified that she knew both Vassey and appellant. R. 169, ll. 16-25; 170, ll. 1-15. When Vassey arrived at Tisa's Phaedra testified that she greeted him and then as she was walking away overheard appellant and Vassey "having like some words." R. 173, ll. 10-23. Phaedra did not see appellant pull out a gun or see him shoot Vassey. She said heard a gunshot and then turned around and saw appellant "standing there with a gun." R. 175. Phaedra admitted she told police that night that she did not know how the shooter was, instead she told police that it was a black male with shoulder length dreads. She waited nearly a month before

telling police that appellant was the individual who shot Vassey that day because she was scared that she "might get shot or something." R. 176-77. During the prosecutor's redirect examination of Phaedra the following exchange occurred:

> Q: So are you afraid of things that [appellant's] family might do to you if you say [appellant's] name?
>
> A: Yes ma'am.
>
> Q: And you said that you heard [appellant] came to your mama's? Who told you that?
>
> Defense counsel: Objection, your honor.
>
> Court: Lawyers want to approach
>
> Whereupon a bench conference was held out of the hearing of the jury.
>
> Q: Ms. Phaedra who told you that [appellant] had been to your mom's?
>
> A: My daughter and her baby daddy was driving by - -
>
> Q: Okay, thank you. That's all I needed to know. I just needed to know the name. So you were afraid of [appellant's] family then?
>
> A: Yes ma'am.
>
> Q: And you're afraid of [appellant's] family now?
>
> A: Yes, ma'am.

R. 196, l. 17-197, l. 10.

Kaitlin Hall, Phaedra's daughter, testified next for the state. Kaitlin admitted that she had a charge pending and the prosecutor in appellant's case was the same as her case. Kaitlin testified that she had not been offered anything in exchange for her testimony in this case. R. 199. Kaitlin had attended the same high school as Vassey and appellant. R. 198-99. On the day of the incident Kaitlin was at her mother's house close by Tisa's house celebrating Phaedra's birthday. R. 199-

200. Kaitlin testified that she saw appellant at Tisa's that day and that he had been drinking. She claimed that she noticed that appellant had a gun in the waistband of his pants. R. 200-01. When Vassey arrived, Kaitlin saw appellant approach him and then she testified that there was "a little bit of chaos." She did not see appellant shoot Vassey. R. 202, ll. 3-25. Kaitlin admitted that she did not tell police that the shooter was appellant on the night of the incident but claimed it was because she was scared. R. 204, ll. 1-14.

After the state rested defense counsel made a motion for mistrial arguing that Phaedra Hall's hearsay testimony was "gravely [] prejudicial." Defense counsel contended that the hearsay testimony painted appellant as "big bad" scary man making threatening comments to someone's grandmother and that the jury would be affected by this characterization of appellant. R. 236, l. 19-237, l. 12.

The state agreed that testimony that appellant threatened Phaedra's family had come out during her testimony but argued that defense counsel should have cleared it up with Kaitlin during her testimony. The state also contended that the testimony was not prejudicial and asked that the motion be denied. R. 238, ll. 11-22

The court stated that during its off the record conversation with both parties the prosecutor indicated that it's next witness Kaitlin Hall was going to testify to the threat. However, Kaitlin did not give any testimony regarding appellant threatening her family. The court denied the motion for mistrial and chose to give a curative instruction to the jury regarding the hearsay testimony. R. 239, ll. 7-21; 241, ll. 17-25. The court instructed the jury as follows:

> Yesterday you heard statements from a witness or witnesses concerning threats that may have bene made outside of court. I am going to instruct you at this time, ladies and gentlemen, that you must disregard any statements that you may have heard about threats or potential threats that may have been made outside of this court. You are instructed that you must disregard those statements, and you

> must not give those statements any consideration in the deliberations that you will conduct as part of this trial.

R. 243, ll. 14-23.

The defense called multiple witnesses that testified that appellant was not at Tisa's residence the night of the incident, including Tisa Wood. Tisa testified that she was having people over to play cards that day and there were people in the house as well as the yard and the surrounding yards. R. 277, ll. 12-25. She maintained that appellant was not at her home that evening. R. 278, ll. 5-6. Tisa recalled Vassey arriving at her house to drop of the cooking item that she had agreed to buy earlier in the day. R. 278, ll. 7-20. She went outside and collected the cooking pot from Vassey and while she was walking back towards her house she heard a gunshot. Tisa indicated that the area she lived in at the time was dangerous and stated that when she heard the gunshot she dropped down and did not turn towards the gunshot she stated, "I never looked towards that road, but that's not my business." R. 280-81. Tisa contended that on that evening no one present at her home said that it was appellant who shot Vassey. She testified that it could not have been appellant that shot Vassey. R. 282, ll. 4-8.

Terry Wood, Tisa's brother and appellant's cousin, testified that he was at Tisa's on the day of the incident. He said that appellant was not at Tisa's that day. R. 263, ll. 1-13. Wood also testified that neither Phaedra nor Kaitlin Hall were at Tisa's the night of the shooting. R. 266, ll. 10-15. Wood did not see who shot Vassey. R. 269, 10-11. Appellant's former girlfriend, T'Andra Miller testified that the day of the incident before coming to Tisa's she had left appellant sleeping at her home and there was no way he could have been the shooter. R. 255-57.

Discussion

The trial court abused its discretion when it denied defense counsel's motion for a mistrial in this case where the curative instruction given did not cure the grave error of the jury having

heard inadmissible hearsay evidence that appellant threatened state's witness, Phaedra Hall's, family. *See State v. Young*, 420 S.C. 608, 803 S.E.2d 888 (Ct. App. 2017) ("Limiting instructions are deemed to cure error unless 'it is probable that, notwithstanding the instruction, the accused was prejudiced.'") (quoting *State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986).

The decision to grant or deny a motion for 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. *See State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). The Court favors 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, 374 S.E.2d 284 (1988). Among the factors to be considered in ordering a mistrial are the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony in the case. *Id.*

The state wove a thread throughout trial that its witnesses did not tell police what happened on the day of the incident because they feared appellant. The state used inadmissible hearsay that appellant threatened Phaedra Hall's mother to drive that point home to the jury. The court's cursory instruction that the jury should disregard that testimony could not have cured the prejudicial error in this case.

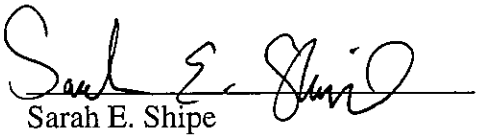
Witnesses for the defense, including Tisa at whose residence the shooting occurred, testified that appellant was not there the day of the shooting. In contrast, the state's witnesses implicated appellant in the incident. Vassey and Whisnant testified that appellant was the shooter. While Phaedra Hall admitted that she did not see appellant shoot Vassey she testified that she saw appellant standing over Vassey with a gun. Kaitlin Hall testified that she saw appellant with a gun in his waistband that day. One thing the state's witnesses all had in common was that they claimed they

feared appellant or feared some sort of retribution. A claim that was unlikely as even Vassey admitted that he had spent time with appellant after this incident.

Case law instructs that generally a curative instruction is deemed to have cured any alleged error. *See State v. Jones*, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996). However, this presumption was most famously doubted by Justice Jackson's disdainful assessment of "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, [which] all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted). In this case the court's instruction did not cure the error where the state used inadmissible hearsay to bolster its case and characterize appellant as a scary individual who would stoop to the low of threatening a witnesses' mother.

CONCLUSION

By reason of the foregoing argument, appellant requests this Court reverse his conviction and remand his case for a new trial.



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This 30th day of June, 2022.

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CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,

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This 30th day of June, 2022.

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