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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAKOYA ALEXIS DARBY,

APPELLANT

APPELLATE CASE NO. 2022-001127

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1.

Did the trial judge abuse his discretion by denying Appellant's motion for a mistrial when the assistant solicitor asserted during her closing argument that defense counsel was going to deceive the jury with "smoke and mirrors" since this improper comment unfairly prejudiced Appellant and violated her due process rights to a fair trial?

2.

Did the trial judge abuse his discretion by denying Appellant's motion for a mistrial when the forensic pathologist testified that he received additional information two weeks prior to trial, specifically "of an alleged asphyxia type event," which would have changed his findings concerning the cause of death, when this evidence was never provided to the defense, and where Appellant was unfairly prejudiced by the pathologist's inadmissible testimony since it eviscerated her defense that there was no evidence of manual strangulation in the medical records?

STATEMENT OF THE CASE

A Richland County grand jury indicted Appellant on April 12, 2022 for homicide by child abuse. R. * (Indictments). A pretrial hearing was held on July 28, 2022 before the Honorable Robert E. Hood. Tr. 1. Appellant's case was called to trial on August 1, 2022 before Judge Hood, and a jury. Tr. 1. Assistant Solicitors Anna Browder and Melanie Darko represented the state. Tr. 1. Tivis Sutherland represented Appellant. Tr. 1. On August 4, 2022, the jury found Appellant guilty as indicted. Tr. 430, ll. 12-19. Post-trial motions and sentencing occurred on August 10, 2022. Tr. 1. Judge Hood sentenced Appellant to forty years imprisonment. Tr. 44, ll. 13-16.

This appeal follows.

STANDARD OF REVIEW

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (quoting State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009)) (internal quotation marks omitted).

ARGUMENT

1.

The trial judge abused his discretion by denying Appellant's motion for a mistrial when the assistant solicitor asserted during her closing argument that defense counsel was going to deceive the jury with "smoke and mirrors" since this improper comment unfairly prejudiced Appellant and violated her due process rights to a fair trial.

Relevant Facts

During the state's closing argument, the assistant solicitor asserted:

> Now you heard the judge say that I get to talk to you now. Mr. Sutherland [defense counsel] gets to talk to you after that, and I don't get to talk to you again. So, I want to address some things that Mr. Sutherland might say. I don't know what Mr. Sutherland is going to say. Your guess is as good as mine, but some of the things, ladies and gentlemen – before I get into that, you know, **the defense wants to say *we want to put smoke and mirrors up* by the government. The government's bad. Defense is good.**

Tr. 367, ll. 10-20.

Defense counsel immediately objected arguing the solicitor's comment regarding "defense attorneys do smoke and mirrors" constituted a due process violation. Counsel cited to Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (2019) in support of his objection. Tr. 367, ll. 19-23. In response, the trial judge instructed the jury, "All right, ladies and gentlemen, you'll disregard that statement by Ms. Browder [the assistant solicitor]." Tr. 367, ll. 24-25. The solicitor then continued her argument.

At his first opportunity, which was after the state concluded its closing argument, the defense made its closing argument, and the judge charged the jury, defense counsel moved for a mistrial. He argued the solicitor's comment was "an egregious offense" pursuant to Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (2019) and accused the defense of dishonesty. Tr. 412, l. 23

– 413, l. 4. The trial judge found the comment did not relate to dishonesty and denied the motion for a mistrial. He said he did not think the improper comment "rose to that level." Tr. 413, ll. 5-10. The judge asserted, "I told them [the jurors] from the beginning that the statements [of counsel] are not evidence, and I cautioned them to disregard that statement, and she [the assistant solicitor] quickly moved on from it." Tr. 413, ll. 11-13.

The jury then began its deliberations. After the jury found Appellant guilty, defense counsel requested ten days to file any post-trial motions. Tr. 435, ll. 2-23. The judge granted the request and stated he would hear post-trial motions the following week immediately before sentencing Appellant. Tr. 435, l. 2 – 439, l. 15.

The day before the hearing, defense counsel filed a memorandum in support of motion for a new trial. R. * (Memorandum). In his memorandum, counsel argued Appellant should be granted a new trial due to the assistant solicitor's improper comment during her closing argument which constituted a due process violation. R. * (Memorandum at 1-2). He asserted, "The solicitor contrasted the state's role with that of defense counsel by characterizing counsel as attempting to deceive the jury with 'smoke and mirrors.'" R. * (Memorandum at 1). Again citing Fortune v. State, 428 S.C. 545, 551-52, 837 S.E.2d 37, 41 (2019), defense counsel argued our Supreme Court has unequivocally held "that such comments by a prosecutor are 'universally condemned' and 'absolutely inexcusable.'" R. * (Memorandum at 2). Because of this due process violation, counsel concluded Appellant should be granted a new trial. R. * (Memorandum at 2).

During Appellant's sentencing proceeding in which post-trial motions were heard, defense counsel renewed his motion. He explained that during her closing argument, the assistant solicitor compared the state to the defense attorney and stated, "I don't know what he's

going to do. He's going to come up here with smoke and mirrors.'" Tr. 4, ll. 14-19. The judge recalled that after this comment, defense counsel objected, and the judge sustained the objection. Tr. 4, ll. 20-24. Counsel agreed with this recollection and asserted that our Supreme Court has "come down very hard on that type of comment by the solicitor's office." Tr. 4, l. 25 – 5, l.15. He argued that the "comment that I was going to deceive the jury with smoke and mirrors was a violation of due process" and entitled Appellant to a new trial. Tr. 6, 17-22.

The assistant solicitor argued the comment was not improper, but even if it was improper, the judge gave a curative instruction and she immediately moved on with her argument. She concluded that a mistrial should not be granted. Tr. 13, l. 3 – 14, l. 3.

The judge ultimately denied the motion for a new trial. He agreed that the solicitor's comment was improper, which is why he sustained defense counsel's objection. However, he found that it did not rise "to the level of a due process violation to the extent that Ms. Darby [Appellant] was denied a fair trial." Tr. 17, ll. 14-17. He emphasized, as he did when he denied the motion for a mistrial during trial, that he told the jurors to disregard the statement and instructed them that the opening statements and closing arguments of counsel are not evidence. Tr. 16, ll. 8-15.

Discussion

The trial judge abused his discretion by denying Appellant's motion for a mistrial when the assistant solicitor asserted during her closing argument that defense counsel was going to deceive the jury with "smoke and mirrors" since this improper comment unfairly prejudiced Appellant and violated her due process rights to a fair trial.

"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) (citing State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009)). "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." Id. (quoting State v. White, 371 S.C. 439, 447-48, 639 S.E.2d 160, 164 (Ct. App. 2006)) (internal quotation marks omitted). "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." Id. at 586, 698 S.E.2d at 865-66 (quoting White, 371 S.C. at 447, 639 S.E.2d 160, 164) (internal quotation marks omitted).

"The Due Process Clauses in both the Fifth and Fourteenth Amendments provide that no person may be deprived of liberty 'without due process of law.'" Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019) (citing U.S. Const. amend. V; U.S. Const. amend. XIV, § 1). "To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial." Id. (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986) ("The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'")).

In Fortune, the prosecutor claimed during his closing argument, "'My job is to present the truth,' and said, 'if you look in the ... Code of Laws ... [, I] have to say what the truth is.' 'On the other hand,' the prosecutor told the jury, 'the defense attorneys' jobs are to manipulate the truth. Their job is to shroud the truth. Their job is [to] confuse jurors. Their job is to do whatever they have to—without regard for the truth.' The prosecutor explained that if he—the prosecutor—believes 'somebody else did the crime,' then he must 'dismiss it.' 'And [if] I know the person

has done something that I think the facts show they're guilty of, then I can't [dismiss] it. I have to go forward with it.'" Fortune, 428 S.C. at 547, 837 S.E.2d at 38.

Our Supreme Court held these comments were "blatantly improper" and violated Fortune's rights under the Due Process Clause. Id. at 547, 837 S.E.2d at 38. The Court determined the assistant solicitor improperly characterized the role of defense counsel and asserted that "Courts have universally condemned this type of statement by a prosecutor." Id. at 555, 837 S.E.2d at 42. Moreover, the Supreme Court held the solicitor's improper remarks unfairly prejudiced Fortune as to deprive him of a fair trial. The Court emphasized that "arguments of this kind can rarely be harmless." Id. at 559, 837 S.E.2d at 45 (quoting State v. Thomas, 287 S.C. 411, 413, 339 S.E.2d 129, 129 (1986)) (internal quotation marks omitted). Consequently, the Court granted Fortune a new trial. Id. at 561, 837 S.E.2d at 46.

In this case, the trial judge correctly found the assistant solicitor's comment was improper. The comment suggested to the jury that defense counsel was trying to fabricate a defense or mislead or deceive the jury in a dishonest manner. See State v. Parker, 391 S.C. 606, 614 n.3, 707 S.E.2d 799, 803 n.3 (2011) ("It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense or to otherwise denigrate defense counsel."). The trial judge was correct to sustain the objection and give the jury a curative instruction.

However, the curative instruction did little to cure the unfair prejudice Appellant suffered due to the solicitor's misconduct. The trial judge never told the jury that the solicitor's remark was improper nor corrected the solicitor's misstatement concerning the role of defense counsel. The judge merely told the jury to "disregard that statement by Ms. Browder." See Tr. 367, ll. 24-25. This "curative" instruction was not sufficient.

Respectfully, this Court should grant Appellant a new trial because the solicitor's improper closing argument requires it. Appellant's due process rights to a fair trial were violated by the solicitor's blatantly improper remark that defense counsel sought to deceive the jurors with "smoke and mirrors." Consequently, the trial judge abused his discretion by denying Appellant's motion for a mistrial and subsequent motion for a new trial.

2.

The trial judge abused his discretion by denying Appellant's motion for a mistrial when the forensic pathologist testified that he received additional information two weeks prior to trial, specifically "of an alleged asphyxia type event," which would have changed his findings concerning the cause of death, when this evidence was never provided to the defense, and where Appellant was unfairly prejudiced by the pathologist's inadmissible testimony since it eviscerated her defense that there was no evidence of manual strangulation in the medical records.

Relevant Facts

Dr. Kyle Shaw was the forensic pathologist who conducted the autopsy on Minor. Dr. Shaw originally opined that the cause of death was "complications of remote head trauma." The following exchange took place between the assistant solicitor and Dr. Shaw during direct examination:

> Q: And again, based on your autopsy examination, what was the cause of death?
>
> A: So, again **based on my examination and the information I had available to me at the time, cause of death was complications of remote blunt head trauma**.
>
> Q: And did you receive any information subsequent to your report?
>
> A: Yes. **Only in the last two weeks I was informed** –
>
> Mr. Sutherland: I'm sorry, Your Honor. May we approach?
>
> The Court: Sure.
>
> (Off the Record Bench Conference)
>
> Q: And **based on your receiving this information, would it change your report in any way**?

A: Essentially **yes**. So, it depends on the, on the, on the details of that information. Basically **if there was an additional incident that, that was reasonably supported, then yes, I would, I would have added that as a factor in the cause of death**.

Q: And what is that? **What was that factor that you looked at**?

A: So, **I was informed of an alleged asphyxia type event**.

Q: What does asphyxia mean?

A: Right. So, getting into, into that a little bit more, asphyxia basically is a, is a catchall or broad term - -

Mr. Sutherland: I'm sorry again, Your Honor. May we approach?

The Court: Yes.

After the off the record bench conference, the trial judge excused the jury from the courtroom. Tr. 282, l. 16 – 283, l. 24. Once the jury left the courtroom, defense counsel complained that the state "added information two weeks ago that's not been provided to me to get some testimony that there was a potential asphyxia when there was no such finding in the original report." Tr. 284, ll. 3-7. The assistant solicitor conceded defense counsel was never informed that Dr. Shaw was given additional information concerning the case two weeks prior and that such information would have changed the pathologist's findings. Tr. 284, l. 8 – 285, l. 15. Because the evidence was not properly and timely given to the defense before trial, the judge correctly excluded any mention of findings related to asphyxia. However, the judge ruled that any findings contained in Dr. Shaw's report which was given to the defense was admissible. Tr. 285, l. 16 – 286, l. 17. Defense counsel then moved for a mistrial. He argued that "the defense is that there's no evidence of manual strangulation, and the word asphyxia has been presented to this jury." Tr. 286, ll. 21-24. The trial judge immediately denied the motion for a mistrial, but agreed to give a curative instruction. He found the error had not "reached the level of manifest necessity." Tr. 287, ll. 5-6.

When the jury returned to the courtroom, the judge instructed, "Now, ladies and gentlemen, what Dr. Shaw just relayed about any information he received in the past two weeks and asphyxia, okay, that portion of his testimony you are to disregard. You are not to consider it in your jury deliberations at the end. And I told you in the beginning, some[times] witnesses say things that they shouldn't, and so I will tell you to disregard that testimony. You don't have to erase it from your memory, right? Okay, the standard is not erase it from your memory. The standard is when it comes time for you to deliberate, you can't consider what he just said about receiving information two weeks ago on asphyxia in your process of going through the evidence. You just can't consider that as, as part of a factor, okay?" Tr. 287, l. 19 – 288, l. 7.

After the state rested, defense counsel renewed the motion for a mistrial, which the judge summarily denied. Tr. 338, ll. 7-23. In the memorandum in support of motion for a new trial filed several days after trial, defense counsel asserted Appellant should be granted a new trial based on the improper testimony by the pathologist. R. * (Memorandum at 2). Counsel maintained that the defense was "predicated on the absence of any indicia or symptoms of manual strangulation in the medical records." R. * (Memorandum at 2). He argued, "For Dr. Shaw to opine on the spot (preposterously so), that the cause of death was now asphyxia entirely contradicted the defense; from opening to cross examination of every witness the defense was establishing that there was no evidence of manual strangulation in the medical records." Counsel further asserted that he had no notice that additional information was given to Dr. Shaw, what that additional information consisted of, nor of Dr. Shaw's change in opinion. R. * (Memorandum at 2). Lastly, counsel maintained that Appellant was prejudiced by Dr. Shaw's testimony, notwithstanding the curative instruction, and should be granted a new trial as a result. R. * (Memorandum at 2-3).

During Appellant's sentencing hearing in which post-trial motions were heard, defense counsel continued to argue that "secret information" was given to Dr. Shaw shortly before trial, which caused Dr. Shaw to change his opinion on the cause of Minor's death from complications of remote blunt force trauma to asphyxia without any notice to the defense. Tr. 8, l. 4 – 9, l. 12. He asserted that this testimony "destroy[ed] the entire defense" and his argument to the jury that there was no evidence of manual strangulation in the medical records "just collapsed by that one line from that one witness." Tr. 9, ll. 13-23. Counsel concluded Appellant should be granted a new trial as the inadmissible testimony was unfairly prejudicial. Tr. 11, ll. 4-12.

The judge denied the motion for a new trial finding that Dr. Shaw's testimony did not rise "to the level of manifest necessity, which is the standard for a mistrial. Nor does it rise to the level of a motion for a new trial." Tr. 17, l. 18 – 18, l. 1.

Discussion

The trial judge abused his discretion by denying Appellant's motion for a mistrial when the forensic pathologist testified that he received additional information two weeks prior to trial, specifically "of an alleged asphyxia type event," which would have changed his findings concerning the cause of death, when this evidence was never provided to the defense. Appellant was unfairly prejudiced by the pathologist's inadmissible testimony since it eviscerated her defense that there was no evidence of manual strangulation in the medical records.

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999) (citing State v. Crim, 327 S.C. 254, 489 S.E.2d 478 (1997)). "The power of the court to declare a mistrial should be used with the greatest caution and for plain and obvious causes." Id. (citing State v. Crim, 327 S.C. 254, 489 S.E.2d 478 (1997)). "A mistrial should not be ordered in every case where incompetent

evidence is received." Id. An instruction to disregard objectionable evidence is usually deemed to cure the error in its admission *unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced*. Id. at 89-90, 512 S.E.2d at 801 (emphasis added).

The trial judge correctly ruled that any testimony from Dr. Shaw concerning additional information he was provided two weeks before trial and how that additional information may have changed his opinion concerning the cause of Minor's death was not admissible because it had not been timely turned over to the defense. See Brady v. Maryland, 373 U.S. 83 (1963) and Rule 5, SCRCrimP. However, the judge abused his discretion by denying Appellant's motion for a mistrial and her subsequent motion for a new trial. While the judge gave the jury a curative instruction to disregard Dr. Shaw's testimony concerning information he received two weeks before trial and any mention of asphyxia, this instruction was insufficient to cure the error and the resulting unfair prejudice to Appellant.

Appellant's defense was that she falsely confessed to placing her hands around Minor's neck, which was supported by the medical records since none of the records mentioned any evidence of manual strangulation. Instead, the medical records supported the finding that Minor's death was caused by blunt force trauma to the head. The state never alleged Appellant inflicted blunt force trauma upon Minor. Rather, the evidence established that these injuries were caused by Appellant's then boyfriend, Jarrell Weston, who admitted to striking and throwing Minor. Consequently, despite the judge's curative instruction, Appellant was undoubtedly prejudiced by Dr. Shaw's inadmissible testimony.

Respectfully, this Court should hold the trial judge abused his discretion by denying Appellant's motion for a mistrial and subsequent motion for a new trial, reverse Appellant's conviction and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse her conviction and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of July, 2023.