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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable H. Steven DeBerry IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL L. MCNEIL,

APPELLANT

APPELLATE CASE NO. 2022-000093

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the trial court erred permitting complainant to remove her prosthetic eyeball in front of the jury because (1) any probative value in the provocative demonstration was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE and (2) the inflammatory display necessitated a mistrial?

2.

Whether the trial court erred in admitting two additional photographs of complainant's injuries where appellant was prejudiced by the needlessly cumulative admission of the photographs of complainant's injuries where a nearly identical photograph of her injuries was admitted through expert witness testimony, evidence of her injuries was presented through paramedic's testimony, and evidence of her injuries was presented through complainant's testimony?

STATEMENT OF THE CASE

On August 24, 2017, a Florence County grand jury indicted appellant for domestic violence of a high and aggravated nature (DVHAN) and attempted murder. R. 206-07. A pretrial hearing was held on November 7, 2017, before the Honorable William H. Seals, Jr. R. 1. On January 10, 2022, appellant's case was called to trial before the Honorable H. Steven DeBerry IV, and a jury. R. 2. Appellant was represented by Elizabeth Neyle and Emily Crayton. The state was represented by solicitor, Ed Clements and assistant solicitor, Susan McGill. R. 2.

On January 12, 2022, the jury found appellant guilty of domestic violence of a high and aggravated nature. R. 200, ll. 21-23. Judge Deberry sentenced petitioner to twenty years' imprisonment for DVHAN. R. 204, ll. 20-23.

This appeal follows.

ARGUMENT

1. The trial court erred permitting complainant to remove her prosthetic eyeball in front of the jury because (1) any probative value in the provocative demonstration was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE and (2) the inflammatory display necessitated a mistrial.

Standard of review

Rule 403, SCRE

The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson,* 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee,* 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *see also State v. Dial,* 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances."

Mistrial

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." *Id*. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Relevant facts

On the evening of December 8, 2016, Tanisia Cunningham drove to appellant's, her "on-

again, off-again" boyfriend, home. R. 27, l. 20; 141, l. 21-142, l. 6. Cunningham and appellant argued. R. 142, l. 11-143, l. 21. Cunningham sustained serious injuries to her face and her left eyeball from the impact of a beer bottle. R. 91, l. 9-92, l. 21; 139, ll. 4-15. Early the next morning appellant called 911. R. 35, ll. 2-7. Both Cunningham and appellant told emergency personnel and law enforcement that her injuries were self-inflicted in attempt to commit suicide.[1] R. 40, l. 23-41, l. 2; 43, ll. 10-22; 49, ll. 1-6; 52, ll. 14-19; 53, l. 17-14; 105, ll. 12-17; 146, ll. 2-14; state's exhibit 33, audio recording.[2]

Cunningham's version of events changed numerous times over the course of the day, and eventually she claimed that appellant struck her in the face with a beer bottle. R. 54, l. 8-55, l. 9; 60, ll. 16-24; 105, l. 21-106, l. 14. Law enforcement returned to appellant's home, he gave a voluntary statement, and he consented to the search of his home. In appellant's recorded statement to law enforcement, he maintained that Cunningham injured herself with a beer bottle and revealed that in his attempt to stop Cunningham his hand was injured. R. 56, ll. 19-24; 59, l. 14-60, l. 14.

At trial the state presented testimony from multiple witnesses regarding Cunningham's injuries. Paramedic, Thomas Mattis testified that when he arrived Cunningham had "several lacerations" above her left eye and on her forehead and "minor abrasions" on both hands. R. 41, l. 24-42, l. 13. Mattis wrote in his report that Cunningham told him her wounds were "self-inflicted." He also wrote that she told him she hurt herself at nine o'clock the previous evening and that she refused to call 911. R. 43, l. 10-44, l. 1. Officer Kevin Buxton testified that he

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1 The state presented conflicting testimony regarding how the 911 call initially came in. Public information officer, Levi James, testified that the call came in as a "sick person," call. R. 33. Officer Kevin Buxton testified that he responded to a "possible attempted suicide." R. 46.

2 State's exhibit 33, audio recording is on file with the Court.

arrived before paramedics and was told by appellant that Cunningham hit herself with a beer bottle. R. 48, l. 16-49, l. Buxton contended Cunningham was upset and did not say much at the home. Later in the day, Buxton interviewed Cunningham at the hospital, and he stated she gave "numerous different accounts" and changed her story several times.[3] R. 54, ll. 8-11. Cunningham asked to be put under an alias at the hospital and eventually told Buxton that appellant hit her in the face with a beer bottle during an argument. R. 54, ll. 14-15; 55, ll. 2-9.

Doctor Howard Farrell, the state's expert in facial trauma, treated Cunningham at the hospital. R. 90, ll. 9-16; 91, ll. 1-5. Doctor Farrell closed the lacerations on Cunningham's face. R. 92-93. Farrell noted that Cunningham had "complex" facial lacerations on her forehead, brow, and eyelid; and she had significant injury to her left eyeball. R. 91, ll. 11-24. He opined that Cunningham's injuries were "serious," and that while not likely to cause death the loss of her eyeball was a permanent loss of the function of a bodily member or organ. R. 92, ll. 19-21; 96, ll. 15-25. Farrell testified that Cunningham was transferred to the Medical University of South Carolina hospital to receive further treatment to her severe eyeball injury. R. 96, ll. 10-12.

Doctor George Magrath, the state's expert in ophthalmology, treated Cunningham's eyeball injury. R. 135, l. 21-136, l. 2; 136, ll. 9-22. Doctor Magrath diagnosed Cunningham with a "ruptured globe" and "eyelid lacerations." R. 136. Initially the goal of her treatment was to bring back vision to the damaged eyeball, but Magrath later determined there was nothing that could be done to restore vision to that eye. Later Cunningham reported that her eyeball was causing pain and she underwent surgery to remove her left eyeball and later she had a prosthetic eyeball surgically placed. R. 137-38. Magrath opined that Cunningham's injuries were "serious" and constituted the loss of function of a bodily member or organ where she not only

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3 Buxton testified that he utilized his body worn camera during the investigation but that the footage had been deleted. R. 58, ll. 2-19; 61, ll. 7-9.

lost her vision but the eyeball itself. R. 139, ll. 4-14.

Cunningham testified that she drove to appellant's house that evening. She said that they argued, and he accused her of infidelity. R. 141-142. Cunningham claimed she got in her car in an attempt to leave and appellant got in the car with her. R. 143, ll. 19-25. In the car appellant slapped her and grabbed her wig off her head. Cunningham stated that appellant took her mobile phone and smashed it on the ground. R. 144, ll. 1-25. Cunningham claimed appellant went to her door, removed her from the car, and struck her in the head with a beer bottle. R. 146, ll. 1-10. Cunningham testified after the fight appellant took her inside his home to lay down and she was treated by paramedics early the next morning. R. 146-47.

During Cunningham's testimony the solicitor asked her to step down from the witness box to show her "scarring" to the jury and she complied. R. 151, ll. 15-23. Following that the solicitor asked Cunningham if her prosthetic eyeball was "easily removable" and then requested she remove her prosthetic eyeball for the jury. R. 152, ll. 4-9. Defense counsel objected and the jury was sent out of the courtroom. Defense counsel argued that it was completely inappropriate and unduly prejudicial, having nothing to do with the offense. Counsel made a motion for a mistrial stating that the prejudice from this demonstration could not be cured. R. 152, l. 10-153, l. 1.

The solicitor asserted it was necessary for Cunningham to remove her prosthetic eyeball to prove the great bodily injury element of DVHAN. R. 153, ll. 2-7. The trial court ruled that the line of questioning and request of Cunningham was admissible and denied defense counsel's motion for mistrial. The court found that because great bodily injury is an element of DVHAN and because the jury would be instructed it could believe *or* disregard witness' testimony that the state's request that Cunningham remove her eyeball in front of the jury was "acceptable." R.

154, l. 4-55, l. 8.

Discussion

Rule 403 of the South Carolina Rules of Evidence provides that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. Evidence is unfairly prejudicial if it has an undue tendency to suggest decision on an improper basis, such as an emotional one. *State v. Martucci*, 380 S.C. 232, 669 S.E.2d 598 (S.C. App. 2008); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827, (S.C. 2001).

The trial court erred in permitting the removal of Cunningham's prosthetic eyeball during her testimony where there was no probative value in the display and it was substantially outweighed by the danger of unfair prejudice. The state offered ample evidence that Cunningham's injuries qualified as "great bodily injury," under the statute.[4] Two expert witnesses, Doctor Farrell and Doctor Magrath, opined about the severity of Cunningham's injuries. Doctor Farrell testified regarding the complex lacerations to Cunningham's face stating that if untreated she would have suffered "more scarring and disfigurement." He also agreed that the loss of her eyeball constituted the permanent loss of a function of a bodily member or organ. R. 96, ll. 15-25. Doctor Magrath testified that he "absolutely" considered Cunningham's injuries to be loss of function of a bodily member or organ and permanent disfigurement because she not only lost her vision in that eye, but she lost the eyeball itself. R. 139, ll. 4-15. Cunningham's testimony that she "lost her left eye" and that she had scarring corroborated the expert testimony. R. 151, ll. 6-14. Cunningham also displayed the scarring on her face and head to the jury right before the state asked her to remove her prosthetic eyeball. R. 151, ll. 15-24.

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4 "Great bodily injury" means bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ. S.C. Code Ann. § 16-25-10.

While it was necessary for the state to show evidence to prove the element of great bodily injury in cases of DVHAN, the seriousness of Cunningham's injuries were evident without the state's improper appeal to the emotions of the jury by requesting she remove her prosthetic eyeball during her testimony. *See generally Johnson v. State*, 433 S.C. 550, 559, 860 S.E.2d 696, 701 (Ct. App. 2021) (stating Rule 403, SCRE ". . . forbids 'unfair prejudice,' and its balancing test enables the trial court to temper the risk that evidence will exert such a pull on the jurors' emotions that it overwhelms their ability to rationally and impartially weigh the evidence and apply the law to the facts..").

Additionally, this case hinged on the jury's determination of whether appellant or Cunningham herself inflicted the injuries, notably the defense never contested that her injuries constituted great bodily injury as defined under the DVHAN statute. The jury was likely shocked by the inflammatory display, Cunningham removing her prosthetic eyeball, and the erroneous admission of this act at trial created "an undue tendency to suggest a decision on an improper basis." *See State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)). The trial court abused its discretion by allowing this demonstration where its only purpose was to create an emotional response in the jurors.

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. *Id*. "Insubstantial errors that do not impact the result of the 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) (emphasis added). "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 447, 639 S.E.2d at 164.

"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." *State v. Howard*, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). Refusal to grant a mistrial is not an abuse of discretion where there is other overwhelming evidence of guilt and the trial judge instructs the jury to disregard the testimony at issue. *State v. Howard*, 296 S.C. 481, 374 S.E.2d 284 (1988).

Here, the trial court's admission of this inflammatory display, where appellant's guilt was not conclusively proven by competent evidence, was error. *See White*, 371 S.C. at 447-48, 639 S.E.2d at 164. This was a case that turned on whether the jury believed Cunningham's final version of events or the one version that both parties initially gave to emergency personnel and that appellant never wavered from. The state used this shocking demonstration to distract the jury from the reality that they had a weak case. The only evidence that pointed to appellant's guilt was Cunningham's testimony which was much different than her prior statements to medical personnel and law enforcement.

Although, "[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct.App.2005). In this case no curative instruction was given where the trial court found the contested evidence, Cunningham removing her prosthetic eyeball during her testimony, more probative than prejudicial and therefore admissible. The trial court's error in denying appellant's motion for a mistrial after the jury was subjected to the inflammatory display, Cunningham's removal of her prosthetic eyeball, "adversely affect[ed] [appellant's] right to a fair trial, and this Court should reverse. *See White*, 371 S.C. at 448, 639 S.E.2d at 164 (2006).

2. The trial court erred in admitting two additional photographs of complainant's injuries where appellant was prejudiced by the needlessly cumulative admission of the photographs of complainant's injuries where a nearly identical photograph of her injuries was admitted through expert witness testimony, evidence of her injuries was presented through paramedic's testimony, and evidence of her injuries was presented through complainant's testimony.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher,* 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (*quoting State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

During pretrial motions defense counsel challenged admission of state's exhibits 18 and 21, photographs of Cunningham's face depicting her injuries. Defense counsel asserted that the state was seeking to introduce three extremely similar photographs of Cunningham's face and that the defense was not challenging state's exhibit 29, photograph that would be admitted during Doctor Farrell's testimony. However, counsel contended state's exhibits 18 and 21 were cumulative and prejudicial where they showed Cunningham's face from the same angle as state's exhibit 29.[5] R. 15, ll. 1-13; 16, ll. 7-14.

The court determined that the photographs showed Cunningham's facial injury from different distances and because there were only *two* additional photographs, if the state laid

5 State's exhibits 18, 21, and 29 are on file with this Court.

proper foundation, the photographs were not cumulative or prejudicial. R. 16, l. 17-, 17, l. 4.

During Doctor Howard's testimony he identified state's exhibit 29, photograph of Cunningham's face, and described it as showing the "closed lacerations." He testified that the photograph showed the way Cunningham looked after treatment. R. 94, ll. 1-24.

Officer Buxton was recalled and shown state's exhibit 18, photograph of Cunningham's face. He identified the photograph and stated that is the way Cunningham looked when he arrived at appellant's home. R. 85, 8-16. Defense counsel objected to the admission arguing there was a lack of foundation, and the court overruled the objection. R. 85, ll. 21-24. Buxton testified that the photograph showed "the severity of the injuries" Cunningham sustained as well as the amount of blood that was present at the scene. R. 86, ll14-18.

During Investigator Sheldon Shelley's testimony state's exhibit 21, photograph of Cunningham's face was admitted over defense counsel's objection. Shelley testified that it was a photograph of Cunningham taken on the day of her arrival to the hospital and that it showed significant injury to her face. R. 104

Discussion

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, SCRE.

The trial court erred by admitting state's 18 and 21, photographs of Cunningham's injuries where the probative value of these images was very low, and the images were a needless presentation of cumulative evidence.

In *State v. Stephens*, this Court held that the evidence of the photographic lineup of

Stephens was not needlessly cumulative where the state had already put up a witness who identified Stephens. 398 S.C. 314, 320-21, 728 S.E.2d 68, 72 (Ct. App. 2012). In *Stephens* the Court stated that "the *central theme* of Stephens's defense was discrediting the witness identification of Stephens in the second photographic lineup." *Id*. (emphasis added). The Court found that because Stephens's defense was so focused on attacking the witness' identification of Stephens it increased the probative value of the contested lineup and meant that it was not needlessly cumulative. *Id*.

As argued above the state presented a copious amount of evidence regarding Cunningham's injuries. Responding emergency personnel and law enforcement testified to the amount of blood that was present and the injuries Cunningham presented. Two expert witnesses and doctors testified extensively about Cunningham's terrible injuries. State's 29, photograph of Cunningham's face, was admitted during Doctor Farrell's testimony and he described the injuries in great detail. Most importantly Cunningham testified about the seriousness of her injuries and the loss of her eye and the jury bore witness to the permanent scarring on her body. It was not contested at trial that Cunningham's injures were tragic and severe. What was contested at trial was *who* inflicted the injuries. The admission of two very similar photographs, state's 18 and 21, was therefore needlessly cumulative to the state's enormous amount of evidence regarding the element of great bodily injury.

CONCLUSION

Based on the foregoing arguments, appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of July, 2023.

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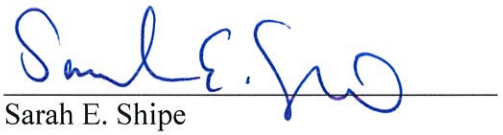
CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 13, 2023



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