RECEIVED
Aug 05 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FRANK L. MILLS,

APPELLANT

APPELLATE CASE NO. 2023-001273

INITIAL BRIEF OF APPELLANT

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred where it denied Appellant's mistrial motion, where State's witness Andrew Abercrombie testified that he knew Appellant because they had lived together at "Jump Start," which was "a prison program," since this was highly prejudicial testimony that could only be remedied by granting a mistrial?

II.

Whether the court erred in admitting mugshots of Appellant, where the cumulative photographs should have been excluded pursuant to Rule 403, SCRE, since their probative value was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

On July 12, 2021, a Spartanburg County Grand Jury indicted Appellant, Frank Mills, Jr., for armed robbery, possession of a knife during the commission of a violent crime, and three counts of kidnapping. R. *(indictments). Appellant was tried before the Honorable J. Mark Hayes, II, and a jury, from July 31 – August 2, 2023. Appellant was represented by Suzanne White. Spenser Smith and Blythe Walters prosecuted the case. Tr. 1.

The State sought life without parole sentences pursuant to S.C. Code Ann. § 17-25-45. Tr. 526, l. 19 – 528, l. 4. Appellant was convicted as indicted. Tr. 522, ll. 6-25. Appellant was sentenced to concurrent terms of life imprisonment without the possibility of parole for armed robbery and the three counts of kidnapping. The court did not impose a sentence for possession of a weapon during the commission of a violent crime. Tr. 531, l. 23 – 532, l. 21.

This appeal follows.

STANDARD OF REVIEW

The standard of review for both of the issues is abuse of discretion.

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). Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

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). "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.") (citation omitted).

STATEMENT OF FACTS

Shortly after 11:00 a.m. on September 2, 2019, a man walked into the Holiday Inn Express in Spartanburg and demanded money while holding a large kitchen knife. Three employees were working at the time: Rita Vaughan, Rachael Loan, and Crystal Cooper. Vaughan, who was the General Manager, gave the robber the hotel's cashbox and money from the safe. She estimated the total amount of money to be about $2,000. Loan estimated the robbery took about fifty seconds; Vaughan thought it took less than two minutes. The robber gestured at the women with the knife to sit down. The robber left and Vaughan called 911. Tr. 269, l. 7 – 278, l. 19; Tr. 296, l. 20 – 301, l. 23.

The employees did not recognize the robber, and he did not touch anything other than the items he took. Video surveillance equipment captured the robbery on film, although the robber's face was obscured by a baseball cap pulled low and his hand holding a knife near his face. The robber was a black man wearing a striped shirt. His baseball cap was black with a small white logo or design just above the bill. Tr. 329, ll. 13-16; State's Exhibit #1. The video surveillance footage was State's Exhibit #1, and is on file with this Court.

After the robbery, a guest at the hotel approached Loan and showed her a news article about a bank robbery in Union, in which the robber wielded a knife, and which had recently been solved by Appellant's arrest. The news article was dated September 11, 2019, included a photograph of Appellant, and stated he had "a lengthy rap sheet" which included three convictions for "armed robbery." The photograph was State's Exhibit #13, and the news article was Court's Exhibit #2, and they are both on file with this Court. The guest asked Loan if the suspect pictured in the news looked similar to the person who robbed her. Loan and Vaughan looked up the news article online and discussed their memories and the photograph, and they

determined Appellant looked like the man who robbed them. (The jury did not hear that Appellant's photograph was in the news for another armed robbery. It did not hear the contents of the news story; it only heard the women were shown Appellant's picture by a hotel guest.) Tr. 303, l. 14 – 305, l. 9; Tr. 280, l. 14 – 282, l. 14; Court's Exhibit #2; Tr. 191, ll. 2-5; Tr. 134, l. 12 – 136, l. 12; State's Exhibit #13.

Vaughan called Sherriff's Office and let Investigator John Guest know about the probable identification. Guest compared Appellant's DMV photograph to the video surveillance footage from the robbery and determined that it looked "pretty close." Guest did not do a photographic lineup with Vaughan or Loan. Guest stated his reason for not doing so was because a defense lawyer would just say the women picked out the person they saw in the news article instead of the person they saw during the robbery. Tr. 331, l. 19 – 333, l. 1; Tr. 345, ll. 6-25; Tr. 197, l. 20 – 201, l. 16.

After receiving the voicemail from Vaughan, law enforcement met with Appellant's then-wife, Joyce Rice, and showed her the video surveillance footage from the hotel. Rice claimed that when she saw the surveillance footage, she had no doubt it was Appellant. Rice alleged she recognized Appellant's shirt. According to Rice, Appellant was gone from 9:00 a.m. until 1:30 p.m. the day of the robbery, and he was wearing a black hat. Rice claimed Appellant came home that day and gave her $300. Rice further alleged Appellant told her, "[D]on't ask me no questions and I won't tell you no lie." Rice allowed law enforcement to search their home, and officers collected a black hat with a Russell Athletic logo on it. Law enforcement also collected a kitchen knife from Rice. Tr. 417, l. 9 – 424, l. 18; Tr. 334, l. 9 – 342, l. 23; Tr. 431, ll. 11-12.

Vaughan and Loan testified at trial and made in-court identifications of Appellant. Cooper did not testify at trial. Vaughan told law enforcement the robber had a "black stocking

cap over [his] face." However, Vaughan testified the robber had pitted skin, "like acne scars." Vaughan admitted her initial focus was on the knife. The other employee, Loan, claimed she remembered the robber's dark eyes. Tr. 283, l. 23 – 284, l. 5; Tr. 306, ll. 3-10; Tr. 285, l. 10 – 287, l. 9; Tr. 279, ll. 5-12; Tr. 289, ll. 10-16; Tr. 299, ll. 22-25.

Appellant put up testimony from Dr. Donna McQuiston, a Wofford professor who was qualified as an expert in eyewitness identification. McQuiston explained the concepts of weapon focus and stress and the negative effects of those things on memory. She explained "cross-race effect": many studies have shown "that people have a more difficult time recognizing and making an accurate identification of a person who is of a different race than their own. (In this case, the robber was black; Vaughan and Loan were white.) McQuiston testified that "memory is very fragile and can be contaminated very easily. And so, even talking with other people, we can fill in their information into our own memory and then later on its tough to discern whether information that we have actually came from something that we saw or we remember or did it come from another source?" Finally, McQuiston opined that an in-court identification was "not an actual identification," when, as here, it is obvious whom the defendant is—the only black man seated at the defense table. State's Exhibit #1; Tr. 441, l. 17 – 443, l. 6; Tr. 444, l. 23 – 446, l. 1; Tr. 448, l. 11 – 453, l. 13; Tr. 457, l. 19 – 458, l. 18.

When Investigator Guest testified, the State entered Appellant's mugshots over objection. The mugshots were State's Exhibits #7 – 9, and are on file with this Court. Guest testified the images were "booking photos" which showed that Appellant's face had acne or scarring. Defense counsel objected pursuant to Rule 403, SCRE, due to the unfair prejudice occasioned by the mugshots, and given that the jurors already had the media photograph of Appellant from which Loan and Vaughan identified him. (Vaughan testified she recognized Appellant from the

media photograph, and she mentioned that the media photograph showed his face had acne. Tr. 281, l. 10 – 282, l. 11.) The court overruled the objection, noting that the issue for the jury was identity. The court stated the images did not present a negative emotional reaction since the photographs were not obviously mugshots, because there was no prison uniform or guard in the pictures. However, as seen, Investigator Guest testified that the pictures were "booking photos." Tr. 343, l. 16 – 345, l. 5; Tr. 365, l. 14 – 366, l. 24.

In addition to the testimony by Vaughan, Loan, and Investigator Guest, the State put up two more witnesses—Andrew Abercrombie and Investigator Brian Dill. Dill had shown Abercrombie the video footage from the robbery, and according to Dill, Abercrombie identified the robber as Appellant. Abercrombie was Appellant's former roommate from prison, and he did not want to testify. His testimony was proffered, and the judge instructed him outside the presence of the jury not to go into the fact that he knew Appellant from prison. Tr. 413, ll. 12-18; Tr. 369, l. 24 – 385, l. 12; Tr. 385, l. 25 – 387, l. 22.

Nevertheless, during direct examination, the solicitor immediately elicited from Abercrombie that he knew Appellant from prison.

Q. All right. Do you know Frank Mills?

A. Yes, I do.

Q. How long have you known Frank Mills?

A. The 80's.

Q. All right. And at times since then, have you all lived together?

A. Not on the street, no. Not on the street, no.

Q. Okay. What about Jump Start?

A. Yeah, Jump Start we had, yeah.

Q. All right.

MS. WHITE: Objection, Your Honor.

THE WITNESS: It's a prison program.

MS. WHITE: Objection, Your Honor.

Tr. 390, ll. 6-18.

Defense counsel moved for a mistrial based on the fact that the testimony "essentially introduces information that Mr. Mills has been in prison." The prosecutor inaccurately responded, "I don't believe that the question that was asked required him to say Jump Start Ministries. It wasn't something that the State intentionally [elicited]." Tr. 395, l. 19 – 396, l. 15. However, as seen, it was the prosecutor who asked Abercrombie if the two men were roommates at "Jump Start."

Both the prosecutor and defense counsel stated they believed a curative instruction would call more attention to the problem, and the court did not give a curative instruction, but it denied the mistrial motion. The court stated the jurors probably did not know what "Jump Start" was, and if they did, perhaps they would think Appellant or Abercrombie was an instructor there rather than an inmate. Tr. 396, l. 15 – 398, l. 16.

Abercrombie testified that he did not recall identifying the robber on the footage as Appellant, but he also stated he told Investigator Dill: "it could be Frank and it could not be, you know? I definitely cannot say that that's him 100 percent." In contrast, Dill testified that he showed Abercrombie the footage and Abercrombie was "sure, a hundred percent sure that that was the defendant." Tr. 392, l. 3 – 393, l. 7; Tr. 394, ll. 6-9; Tr. 413, ll. 12-18.

Appellant was convicted as indicted, and he was sentenced to life imprisonment.

ARGUMENT

I.

The court erred where it denied Appellant's mistrial motion, where State's witness Andrew Abercrombie testified that he knew Appellant because they had lived together at "Jump Start," which was "a prison program," since this was highly prejudicial testimony that could only be remedied by granting a mistrial.

Whether a mistrial should be granted is "dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). While a mistrial should be granted only when "absolutely necessary" and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident "is so grievous that the prejudicial effect can be removed in no other way." *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013). A mistrial must be granted when there is "manifest necessity." *State v. Bilton*, 156 S.C. 324, 153 S.E. 269 (1930). This Court has held 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, 585-586, 698 S.E.2d 862, 865 (Ct. App. 2010). Whether the prosecution intentionally elicits inadmissible evidence is a factor the court considers in determining whether to grant a mistrial. *State v. Ferguson*, 376 S.C. 615, 619, 658 S.E.2d 101, 103 (Ct. App. 2008).

"[A]n instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced." *State v. Hale*, 284 S.C. 348, 354, 326 S.E.2d 418, 422 (Ct. App. 1985). "Because a trial court's curative instruction is considered to cure any error

regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient *or* move for a mistrial to preserve an issue for review." *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) (emphasis in original). "Generally, the consideration of whether there was any prejudice requires that a motion for mistrial be made after the trial judge attempts to cure the error." *State v. Craig*, 267 S.C. 262, 268, 227 S.E.2d 306, 309 (1976).

A defendant may not be convicted because the prosecution has improperly conveyed to the jury that he is a criminal. For example, the prosecution may not force a defendant to trial in prison clothes, or while shackled (absent a finding of necessity by the trial judge), and it may not introduce his prior record to show propensity. These types of actions undermine the presumption of innocence. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. "Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial." *State v. Perry*, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). Propensity evidence is "an improper basis upon which to determine guilt[.]" *State v. Nelson*, 331 S.C. 1, 7, 501 S.E.2d 716, 719 (1998). *See State v. Lawson*, 424 S.C. 51, 63, 817 S.E.2d 509, 515 (Ct. App. 2018) ("with limited evidence linking the defendant to the crime, the evidence suggesting Appellant had a prior criminal record was prejudicial because it could have influenced the jury's verdict"); *Deck v. Missouri*, 544 U.S. 622, 630 (2005) ("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (State may not compel an accused to stand trial

before a jury while dressed in identifiable prison clothes since the clothing may affect a juror's judgment and impair the presumption of innocence).

In *State v. Lawson*, 424 S.C. at 63, 817 S.E.2d at 515, this Court concluded the trial court abused its discretion by admitting testimony showing that the appellant's fingerprint card originated at Kirkland Correctional Institution prior to the crime for which he was on trial because "the reference indicated to the jury Appellant had a prior criminal record." In *State v. Tate*, 288 S.C. 104, 105, 341 S.E.2d 380, 381 (1986), the South Carolina Supreme Court held the defendant's mugshots "should not have been admitted into evidence because they implied he had a prior criminal record, and thereby improperly placed his character into evidence." *Cf. State v. Thompson* 352 S.C. 552, 575 S.E.2d 77 (2003) (officer's reference to defendant's warrants did not justify a mistrial where "it would be reasonable to assume the jury inferred that the warrants related to the charged offenses").

In this case, as in *Tate* and *Lawson*, Appellant's character was improperly assailed as the jury heard he was roommates with Abercrombie at "Jump Start," "a prison program." Abercrombie testified he and Appellant had never lived together "on the street." The solicitor then specifically asked Abercrombie if he and Appellant lived together at "Jump Start." Abercrombie stated they had, and then stated that "Jump Start" was "a prison program." This testimony was intentionally, and inexplicably, elicited by the prosecution, which weighed in favor of granting the mistrial.[1] *E.g.*, *Ferguson*, 376 S.C. at 619, 658 S.E.2d at 103 (whether prosecution intentionally elicits inadmissible evidence is a factor in determining whether to grant a mistrial). The testimony also implied Appellant had been in prison for decades, since

[1] The solicitor's intentional elicitation of this evidence was inexplicable since the prosecution and defense had earlier asked the judge to instruct Abercrombie not to testify that he knew Appellant from prison. Tr. 381, ll. 16-20; Tr. 235, l. 21 – 236, l. 22.

Abercrombie stated he had known Appellant since the 1980's. Although the trial judge found no prejudice because the jury could believe one of the men was an instructor at Jump Start, that is not so on these facts. Abercrombie said the men lived together at the prison program—inmates and instructors do not live together in prison.

The court did not offer to give a curative instruction. *Cf. State v. George*, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996) (judge's instruction to disregard statements suggesting defendant's involvement with drugs sufficiently cured any alleged error). The testimony was prejudicial as it undermined the presumption of innocence and fairness of the factfinding process. The evidence against Appellant was scant. This testimony could easily have influenced the jury's verdict, given the thin case against Appellant. A mistrial was necessary on these facts. *E.g.*, *State v. Dial*, 405 S.C. at 257, 746 S.E.2d at 500; *State v. Lawson*, 424 S.C. at 63, 817 S.E.2d at 515.

II.

The court erred in admitting mugshots of Appellant, where the cumulative photographs should have been excluded pursuant to Rule 403, SCRE, since their probative value was substantially outweighed by the danger of unfair prejudice.

"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. "Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one." *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). "The determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case." *State v. Holland*, 385 S.C. 159, 171, 682 S.E.2d 898, 904 (Ct. App. 2009) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)).

The probative value of the mugshots (State's Exhibits #7 – 9) was substantially outweighed by the danger of unfair prejudice. The jury already had a photograph of Appellant that showed he had acne scars—the picture from the news article (State's Exhibit #13). Defense counsel correctly argued the mugshots were cumulative to that photograph. They had no probative value given the other photograph already in evidence. However, they were unfairly prejudicial. As discussed in Issue I, above, a defendant may not be convicted because the prosecution has improperly conveyed to the jury that he committed the crime because he is a criminal. For example, the prosecution may not force a defendant to trial in prison clothes, or while shackled (absent a finding of necessity by the trial judge), and it may not introduce his prior record to show propensity. These type of actions undermine the presumption of innocence.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. "Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial." *State v. Perry*, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). Propensity evidence is "an improper basis upon which to determine guilt[.]" *State v. Nelson*, 331 S.C. 1, 7, 501 S.E.2d 716, 719 (1998). *See State v. Lawson*, 424 S.C. 51, 63, 817 S.E.2d 509, 515 (Ct. App. 2018) ("with limited evidence linking the defendant to the crime, the evidence suggesting Appellant had a prior criminal record was prejudicial because it could have influenced the jury's verdict"); *Deck v. Missouri*, 544 U.S. 622, 630 (2005) ("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (State may not compel an accused to stand trial before a jury while dressed in identifiable prison clothes since the clothing may affect a juror's judgment and impair the presumption of innocence). Putting in the mugshots was error, and it was unfairly prejudicial as it undermined the presumption of innocence and fairness of the factfinding process. Rule 403, SCRE; *e.g.*, *Deck v. Missouri*, 544 U.S. 630.

"The introduction of a 'mug-shot' of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication." *State v. Traylor*, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004) (citing *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986); *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980); *State v. Denson*, 269 S.C. 407, 237 S.E.2d 761

(1977)). "[T]he rationale for this holding is that such photos are prejudicial because they imply a defendant's prior bad acts." *State v. Traylor*, 360 S.C. at 85 n. 12, 600 S.E.2d at 528 n. 12 (citing *State v. Denson*, *supra*). "[W]e strongly admonish the state against utilization of such photos except in the rarest of cases[.]" *State v. Traylor*, 360 S.C. at 84, 600 S.E.2d at 528.

See Denson, 269 S.C. at 412–13, 237 S.E.2d at 764 (no error in admission of mugshots where there was a demonstrable need, they did not imply the defendant had a prior record, and the admission did not focus the jury's attention on the source of the pictures); *Tate*, 288 S.C. at 105–06, 341 S.E.2d at 381 (admission of mugshots required reversal where there was other competent evidence of identity, and where content of photographs would cause jury to infer defendant had a prior record); *State v. Ford*, 334 S.C. 444, 450, 513 S.E.2d 385, 388 (Ct. App. 1999) (photographic lineup containing defendant's mugshot was admissible where State had demonstrable need to introduce the evidence since the victim had mistakenly given police an incorrect first name of the suspect but picked him out of the lineup, and where the photographs were displayed "in such a way as to hide any indication of their origin").

In this case, the State did not have a demonstrable need to introduce the photographs since they had another photograph of Appellant's face. The photographs were introduced as "booking photos"—this told the jury that Appellant had been jailed and drew attention to the photographs' origin or implication. The admission of the mugshots was reversible error. *State v. Traylor*, 360 S.C. at 84, 600 S.E.2d at 528.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of August, 2024.