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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Saluda County

Honorable Kristi F. Curtis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AKEEM JERMILE HICKMAN,

APPELLANT

APPELLATE CASE NO. 2023-001917

ANDERS BRIEF OF APPELLANT

JESSICA M. SAXON
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a mistrial where the State elicited testimony about Appellant's involvement in prior uncharged drug sales where Appellant was on trial for constructive possession of narcotics found in a home pursuant to a search warrant?

STATEMENT OF THE CASE

In March 2022, Appellant was indicted by a Sumter County grand jury for one count of trafficking heroin (twenty-eight grams or more), possession with intent to distribute marijuana, trafficking methamphetamine (ten to twenty-eight grams), possession of a Schedule IV controlled substance, possession of a weapon during the commission of a violent crime, and possession of stolen pistol. R.___(Indictment). The State, represented by Ernest A. Finney, III, and Bronwyn McElveen, called the case to trial on December 4, 2023, before the Honorable Kristi F. Curtis and a jury. Appellant was represented by S. Elaine Cooke. R. 1. After a two-day trial Appellant was found guilty as indicted.[1] R. 264, ll.6-24. Judge Curtis sentenced Appellant to concurrent terms of imprisonment for twenty-five years on each trafficking charge, three years on the possession with intent to distribute charge, one year on the possession charge, three years on the stolen pistol charge, and five years on the possession of a weapon during the commission of a violent crime charge. R. 269, l. 21-R. 270, l. 12; R. 275-286.

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1 The amount of the trafficking heroin charge was reduced from over twenty-eight grams to four to fourteen grams during the trial. R. 210, ll. 12-15. Based on Appellant's prior record, the trafficking charges and the possession charge were considered second, third, or subsequent offense for the purposes of sentencing. R. 267, l. 20-R. 269, l. 12.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Cook, 440 S.C. 308, 316, 891 S.E.2d 35, 39 (Ct. App. 2023) *quoting* State v. Martucci, 380 S.C. 232, 246, 669 S.E.2d 598, 605 (Ct. App. 2008). "The decision to grant or deny a mistrial is within the sound discretion of the trial court." Id. *quoting* State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010). "The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id.

ARGUMENT

The trial court erred in refusing to grant a mistrial where the State elicited testimony about Appellant's involvement in prior undercover, uncharged drug sales in a constructive possession case based on a search warrant.

Relevant Facts

On May 6, 2020, narcotics officers with the Sumter County Sheriff's Office obtained a search warrant for 150 Jerry Street in Sumter County. The search warrant was based on a controlled buy made officers made from Shaquanna Spencer on May 5, 2020. R. 37, ll. 13-24. The affidavit of the search warrant read as follows:

> Sumter County Sheriff's Office Narcotics Unit received information of primary suspect, Akeem Hickman, selling illegal narcotics from 150 Jerry Street, Sumter S.C. The Sumter County Sheriff's Office Narcotics Unit corroborated the information through a confidential informant who made multiple controlled purchases from Hickman at the address stated above. Voluntary statements have been given to law enforcement stating that the subjects giving the statements had purchased heroin from this residence. Controlled purchases were also made from a black female that has been identified as Shaquanna Spencer. Each controlled purchase was audio and video recorded. Hickman and Spencer were seen on video selling illegal narcotics from this location. The drug analysis from multiple controlled purchases revealed that Fentanyl had been purchased during the control purchases. During surveillance, several vehicles had been seen coming and leaving after only short periods of time being at the residence. Based on my experience, vehicles coming and leaving after short periods of time is indicative of illegal narcotic activity. The last controlled purchase occurring within the past 72 hours. A confidential informant purchased a quantity of heroin from inside the residence. Due to the totality of these circumstances, I believe there may be a large amount of illegal narcotics and firearms in the residence.

R. 34, l. 23-R. 36, l. 2. The search warrant was executed the following day.

Officers located various narcotics and firearms in the home. R. 71, l. 3-R. 72, l. 4. Spencer was in the home when officers executed the search warrant and was taken into custody. R. 262, ll. 15-17. Appellant was not in the home at the time the search warrant was executed. Officer Jason Tassone testified that a white Ford F150 was "slow rolling" down Jerry Street

while the search warrant was being executed but it would not stop when he flagged the truck down. He stated the occupants were Appellant and his brother, Scottie Hickson. The Ford was found abandoned nearby a short time later. R. 145, l. 7-R. 147, l. 11; R. 262, ll. 15-17. Appellant, Hickson, and Spencer were ultimately charged with the various illegal items found in and around the home. R. 87, ll. 2-9.

Prior to the start of trial, Counsel Cooke moved *in limine* to prohibit the State from admitting or referencing any prior drug sales allegedly made by Appellant. Counsel Cooke argued that the prior sales were uncharged bad acts that were not admissible because the State's entire case was built on the theory of constructive possession based on what was found during the execution of the search warrant. She maintained that such evidence was Lyle evidence, was prejudicial and should be excluded under Rule 403, SCRE. She also argued that because the trafficking statute was based on a presumptive weight, the State was not required to prove any form of actual distribution. R. 38, l. 13-R. 39, l. 7; R. 40, l. 12-R. 42, l. 6; R. 44,

The State argued that Appellant's charges insinuated some prior distribution and that the prior sales were the basis of the search warrant, thus they were admissible to explain why the home was investigated. The State further argued that the trafficking statute was not solely based on weight and the State was allowed to prove the trafficking through the prior distributions. The State intended to ask officers if controlled purchases were made from the home, without unduly emphasizing the prior purchases, and to confirm that Appellant was a person of interest in the controlled buys. R. 39, l. 15-R. 40, l. 11; R. 42, l. 11-R. 43, l. 24; R. 45, ll. 22-25.

The trial court ruled that the State was entitled to show, within a very narrow timeframe, the specific events leading up to the search warrant. The trial court clarified that the State could only reference activities within the days before the search warrant to lay the foundation for the

search warrant. Further, the trial court ruled that the State could refer to the fact that prior sales were made at the home but could not name Appellant as the person who made the sales. Ultimately, the trial court limited the prior sale testimony to events occurring on May 5 and afterwards, but nothing prior to that day. R. 46, l. 4-7; R. 49, ll. 14-18; R. 55, ll. 15-24.

During the testimony of Investigator Symeon Graham the following exchange occurred:

Q. And he had previously been known to be at that scene?

A. Yes.

Q. And law enforcement knew that he had been at that scene previous to that day?

A. Correct.

MS. COOKE: Object to leading.

THE COURT: That's sustained.

Q. How did you know that he had been at that scene before?

A. Through surveillance and through video of -- from the controls -- delivery or controlled purchases that were done previous to obtain [sic] the search warrant.

MS. COOKE: Objection, Your Honor. I have a motion outside the presence of the jury.

R. 78, ll. 8-21 (emphasis added). Counsel Cooke moved for a mistrial arguing the State's witness had connected Appellant directly to prior controlled purchases made at the residence in violation of the trial court's earlier ruling. The trial court determined that a curative instruction telling the jury to disregard the testimony would be sufficient. Counsel Cooke stated that she "would not be opposed to" a curative instruction. R. 79, l. 1-R. 84, l. 24. The trial court instructed the jury,

> Okay. Ladies and gentlemen, I just want to give you a brief instruction and clarification that you understand that this defendant is only on trial for the events of May 7th and for the items seized from the home on May 7th and nothing else.

> Nothing prior to that is anything that can come before you or be part of your deliberations.

R. 85, ll. 2-8. Counsel Cooke did not object to the curative instruction as presented to the jury and did not renew her motion for a mistrial.

Argument

"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. White, 371 S.C. 439, 443–44, 639 S.E.2d 160, 162 (Ct. App. 2006) *citing* State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct.App.1999). "Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case." Id. *citing* State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." Id. *quoting* State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Id. *quoting* Patterson, 337 S.C. at 227, 522 S.E.2d at 851.

Our Supreme Court has explained that "the proper general rule is this: 'The American cases hold generally that there must be a manifest necessity for the discharge of the jury and leave the Courts to determine in their discretion whether under all the circumstances of each case such necessity exists.'" State v. Bilton, 156 S.C. 324, 342, 153 S.E. 269, 276 (1930) (emphasis removed). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Kelsey, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998). Therefore, "[t]he trial judge should

first exhaust other methods to cure possible prejudice before aborting a trial." White 371 S.C. at 444, 639 S.E.2d at 162 (cleaned up).

"Generally, a curative instruction is deemed to have cured any alleged error." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129-130 (Ct.App.2005). "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." Id. Accordingly,

> Great care should be exercised in the "delicate, difficult and important matter" of instructing the jury to disregard incompetent evidence. The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations. A mere general remark excluding the evidence does not cure the error.

White 371 S.C. at 446, 639 S.E.2d at 163 *quoting* State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (internal citations omitted). "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." Patterson, 337 S.C. at 226, 522 S.E.2d at 850; see also State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (no issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial).

While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced. White, 371 S.C. at 446–47, 639 S.E.2d t 164 at *citing* State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). "Error is not, however, always rendered harmless by instructions to the jury to disregard

improperly admitted evidence or to give it only a limited effect. **The test is one of prejudice.**" 75A Am. Jur. 2d Trial § 1032 (emphasis added) (footnotes omitted).

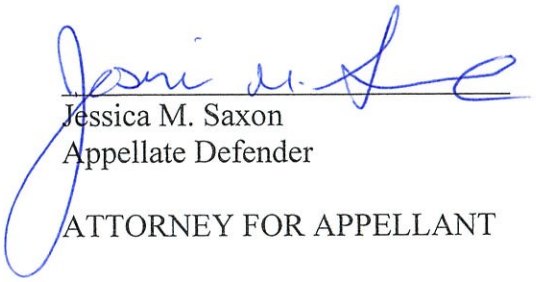
Appellant was not charged with the prior controlled purchases. He was only on trial for the constructive possession of the narcotics and guns found during the execution of the search warrant. Any evidence relating to the prior controlled purchases was immaterial and irrelevant. The testimony that was elicited from Investigator Graham not only violated the trial court's ruling on the matter but was highly prejudicial to Appellant. Further, the unspecific nature of the instruction did not cure the prejudice in this case. Under the facts and circumstances of this case, the trial court abused its discretion when it failed to grant the motion for a mistrial.

Appellant was not at the residence when the search warrant was executed. His connection to the home based on the evidence introduced at trial was tenuous. The State elicited improper testimony about Appellant being involved in prior drug sales to try to place him at the scene. The intended effect of such testimony was to paint Appellant as a bad actor. The testimony was a blatant attempt to backdoor in bad character evidence that the trial court had ruled was not admissible. The State chose not to prosecute Appellant for the controlled purchases he purportedly made yet wanted to use the prior purchases as proof of Appellant's guilt for trafficking and distribution. Such evidence was classic bad character evidence.

Once the jury had heard the objected to testimony, the proverbial cat could not be put back in the bag. Instructing the jury that Appellant was only on trial for the events of May 7 did not clearly inform the jury that it was not to consider the prior alleged controlled purchases from the home. The jury heard that Appellant had previously sold drugs from the home and was not told to specifically disregard that testimony. The error in admitting the evidence was not cured by the broad and generalized curative instruction given in this matter.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests that this Court find the trial court erred in denying the motion for a mistrial.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of October, 2024.

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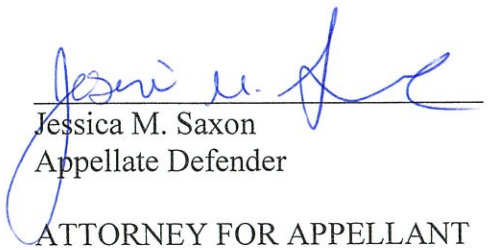
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Akeem Jermile Hickman states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Kristi F. Curtis, which was held on Dec. 4-5, 2023, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, she asks the Court to relieve her as counsel for Akeem Jermile Hickman.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment: 2020-GS-43-0725 (Six count indictment)
(2) Sentencing Sheets dated December 5, 2023
(3) Trial Transcript before the Honorable Kristi F. Curtis dated December 4-5, 2023

I certify that this designation contains no matter which is irrelevant to this appeal.

Jessica M. Saxon
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(803) 734-1330

ATTORNEY FOR APPELLANT

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

Jessica M. Saxon
Appellate Defender

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APPELLATE CASE NO. 2023-001917

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Akeem Jermile Hickman, #344497, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this This 31st day of October, 2024.

Jessica M. Saxon
Appellate Defender

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ATTORNEY FOR APPELLANT

Leverett, Scott

From: Leverett, Scott
Sent: Thursday, October 31, 2024 3:12 PM
To: SC - FARTHING MARK
Cc: SC - COLLINS CAROLINE; Saxon, Jessica
Subject: 2023-001917 - State v. Akeem J. Hickman - Anders Brief of Appellant
Attachments: 2023-001917 - State v. Akeem J. Hickman - Anders Brief of Appellant.pdf; 2023-001917 - State v. Akeem J. Hickman - Record on Appeal.pdf

Dear Mr. Farthing,

Attached please find a copy of the Anders Brief of Appellant and Record on Appeal in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Jessica Saxon
Appellate Defense