ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHEY LAMONT BOYD,

APPELLANT

Appellate Case No. 2012-209166

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in refusing to grant appellant's motion for a mistrial where the Clerk of Court improperly informed the jury panel that co-defendant Williams was charged with intimidation of a witness, where appellant had already moved for a severance on the basis that his guilt would be inferred on all of the same charges from the fact that he was on trial with Williams, where overwhelming evidence showed Williams was the shooter, since the jury would assume appellant also was involved in the witness intimidation which polluted the jury panel?

STATEMENT OF THE CASE

Appellant was indicted at the January 10, 2012 term of the Greenville County Grand Jury for the offenses of murder, kidnapping, burglary in the first degree, attempted armed robbery, conspiracy, and possession of a weapon during a violent crime. R. 526. Co-defendant Williams was indicted on all of the same charges with the addition of witness intimidation. His case, and that of co-defendant Williams was called to trial on February 13, 2012 before the Honorable Carmen T. Mullen, and a jury. The other three co-defendants were not tried with appellant and Williams and all three testified that Williams was the shooter. Everett P. "Bill" Godfrey, Jr. represented appellant Boyd. Larry H. Cooke represented co-defendant Williams. R. 1.

On February 16, 2012, the jury found appellant and co-defendant Williams guilty on each count. R. 518, l. 1 – 519, l. 14. Judge Mullen sentenced appellant to thirty years imprisonment for murder, thirty years imprisonment for kidnapping, thirty years imprisonment for burglary in the first degree, twenty years imprisonment for attempted armed robbery, twenty years imprisonment for conspiracy, and five years imprisonment for possession of a weapon during a violent crime. R. 525, ll. 5-23.

Judge Mullen sentenced co-defendant Williams to life imprisonment for murder and life imprisonment for burglary in the first degree, thirty years imprisonment for kidnapping, twenty years imprisonment for attempted armed robbery, five years imprisonment for conspiracy, and five years imprisonment possession of a weapon during a violent crime. R. 523, l. 18 – 524, l. 13.

This appeal follows.

ARGUMENT

The court erred in refusing to grant appellant's motion for a mistrial where the Clerk of Court improperly informed the jury panel that co-defendant Williams was charged with intimidation of a witness, where appellant had already moved for a severance on the basis that his guilt would be inferred on all of the same charges from the fact that he was on trial with Williams, where overwhelming evidence showed Williams was the shooter, since the jury would assume appellant also was involved in the witness intimidation which polluted the jury panel.

Relevant Facts

Defense Counsel Godfrey moved for a severance from his trial being with co-defendant Williams. Counsel noted that the co-defendant had made a statement indicating he was the shooter. Conversely, appellant had not made any statements to the police. Counsel argued it would be unduly prejudicial to be tried with co-defendant Williams where the evidence showed Williams was the shooter. Counsel acknowledged there were no Bruton v. United States, 391 U.S. 123 (1968) issues but he strongly maintained appellant would essentially be dragged down with Williams. R. 2, l. 7 – 6, l. 11. The judge denied the motion. R. 6, ll. 12-16.

After jury selection the trial judge asked the Clerk of Court, or an Assistant Clerk of Court to give the jury its oath as to the charges it would decide. The following then occurred:

> CLERK: The response to the oath is "I will."
>
> You shall well and try case 2011-GS-23-2010, State v. Lamar Dontray Williams, indicted for burglary first degree; 2011-GS-23-2011 for murder and possession of a weapon during the commission of a

violent crime; 2011-GS-23-2012 for attempted armed robbery; and 2011-GS-23-2013 for kidnapping; 2011-GS-23-2014 for conspiracy; and **2011-GS-23-2035 for intimidation or attempted intimidation of a witness or potential witness, and a true verdict render**, according to the law and the evidence, so help you God.

(WHEREUPON, all jurors said "I will.")

CLERK: Additionally - -

COURT: Hold on just a minute.

MR. COOKE: I think you know what I was going to say.

COURT: Yes, absolutely.

Ladies and gentlemen, just - - you can put your hands down. You are absolutely fine.

There was one charge that was read in there that is not a proper charge, and was not a charge. It was the intimidation of a witness. So you are to strike that and disregard it, ladies and gentlemen. That is not a charge.

CLERK: I'm sorry

COURT: That's all right.

And we'll go ahead. And you can go ahead and do it as to Mr. Boyd.

CLERK: Okay.

R. 7, l. 16 – 8, l. 17. (emphasis added).

The judge later acknowledged that defense counsel Godfrey made a motion at a bench conference that he needed to "renew for our court reporter." R. 23, ll. 6-8. Defense Counsel Godfrey then moved for a mistrial: "We all knew that the intimidation of a state's witness charge was not going to go forward." The judge interjected that that charge was only

against co-defendant Williams. Defense counsel responded: "And, unfortunately, the Clerk was not advised of that." Defense counsel Godfrey noted he already moved for a severance based on the unduly prejudicial effect of appellant being tried with co-defendant Williams and that the intimidation of a state's witness was now in the jury's mind, a curative instruction could not undo it, and the bell could not be un-rung. R. 23, l. 6 – 24, l. 22.

Defense counsel Cooke told the judge: "You did your best. But I agree with Bill . . . I'm like Bill, I don't believe you can unring that bell either. I think it's going to be in their minds throughout the trial. . . . I just think we need to take a precaution that we don't let this happen, that we don't let this jury take this case under consideration. I think they're prejudiced." The judge refused to grant a mistrial. R. 24, l. 6 – 27, l. 5.

Trial Evidence

The state's theory of the case was that the five co-defendants planned to burglarize the decedent's home because they knew that large quantities of drugs and money were stored there.

Shirlene Cruell was the mother of the decedent, Wallace Cruell, Jr. R. 28, l. 12 – 29, l. 16. The decedent was living nearby with this girlfriend and his two children on October 18, 2010. R. 30, l. 13 – 36, l. 12.

Cruell's husband left the house that October morning to go hunting in the woods near their home, and near the decedent's home. R. 36, l. 15 – 37, l. 3. Cruell took the children to school at seven thirty every school day. At about seven twenty-five on October 18, 2010 she saw her brother-in-law, Noah, coming towards her house with a "drop cord wrapped around his wrist, and he was struggling trying to get it off of him." R. 36, l. 6 – 38, l. 5.

Cruell said she asked Noah, who was said to be "slow," and who stuttered: "Why in the world are you out here in this cold. Because it was cold that morning. And all he could say was that Jay [the decedent] was shot. Jay shot." R. 38, ll. 1-11.

Cruell went running towards the back door of her son's house and she saw the back door was "torn off the hinges." She saw the decedent laying on the kitchen floor and she shook him "trying to wake him up and he wouldn't answer me." R. 38, l. 22 – 39, l. 15.

Noah Cruell testified that he heard his nephew's dog barking on the morning of October 18, 2010, and then "I heard something bust through the door." Noah remembered three men coming into the house and two of them tied him up with the drop cord. Noah "believed" they were all armed. R. 48, ll. 2-24.

Noah said the men asked him for money and they took him into the back bedroom. R. 49, ll. 2-22. During the burglary the decedent came back home. Noah heard "scuffling back there" in the back room where the decedent was located. R. 50, ll. 11-25. Noah then heard a "gun go off back there." He heard one gunshot. The man in the room with Noah then ran. Noah could not recognize any of the burglars because they had masks over their faces. R. 50, l. 20 – 52, l. 17.

Noah admitted he knew Jay, his decedent nephew, was involved in drugs. R. 52, l. 18 – 54, l. 4; R. 72, ll. 1-25. The decedent died as a result of a single gunshot wound to the chest. R. 107, l. 5 – 109, l. 9; R. 110, ll. 5-13.

Greenville County Sheriff's Investigator Chris Hammett testified he formulated a theory that this was a burglary interrupted by the decedent returning home. R. 122, ll. 7-15. There were no blatant fingerprints or blood other than the victim's found in the residence. No gunshot shells were recovered. As seen infra, there were no gun or gunshot shells

located. This was purely a case of co-defendants testifying for the state for significant sentencing favor. R. 144, l. 23 – 146, l. 22.

Hammett said that Noah Cruell was forthcoming about drugs being sold by the decedent. Noah showed him a rotten tree stump adjacent to a dog pen where a couple of pounds of cocaine were hidden. Hammett said this was just short of a kilo, and about fourteen thousand dollars in money were also located there. R. 155, l. 10 – 161, l. 20.

Although there was no forensic evidence, Scottie Butler, Jeffrey Dornberg, both white males, and Lamar Dontray Williams and Willie Taylor, both black males, were identified as suspects. R. 166, l. 5 – 182, l. 18. While appellant was a suspect, Butler was not able to pick appellant out of a lineup. R. 182, l. 19 – 183, l. 7.

The police had an abundance of telephone records but Hammett admitted that appellant's phone number was never implicated in the investigation. R. 207, ll. 7-16. Hammett testified that the decedent was a large drug dealer in marijuana. In addition, cocaine was also found on his property with a street value of $80,000 - $90,0000 dollars. R. 212, ll. 15-23.

Willie Taylor was charged with murder and he had his charges reduced to voluntary manslaughter with sentencing deferred until after his testimony during this trial. R. 242, l. 2 – 244, l. 2. This Court can take judicial notice of the fact that the South Carolina Department of Correction's inmate search website reveals Taylor is serving a twenty year sentence for manslaughter.

Taylor testified he had known appellant for only eight months to a year. Taylor said he went to the decedent's house with co-defendant Williams, appellant, Dornberg, and Scott

Butler. He believed Scott drove the car on that occasion. Taylor said they were going to rob the decedent because they knew he had money. R. 245, l. 2 – 251, l. 21.

Taylor testified the plan was to wait until everyone left the house and then to go into the house. Taylor said everyone had their faces covered when they approached the house and he said appellant, once inside with the others, was looking through the bedroom for items. R. 253, 6 – 258, l. 2. Taylor remembered seeing "the old dude" [Noah] was all tied. R. 257, l. 17 – 258, l. 3.

Taylor said they also tried to tie up the decedent, but that he fought them. When the decedent tried to get off of the ground he was shot one time by Williams. Taylor was unequivocal that co-defendant Williams was the only person that fired a shot. R. 259, l. 4 – 264, l. 5.

Scottie Butler also testified as a state's witness for sentencing consideration. This Court can take judicial notice Butler is serving a fifteen year sentence for accessory after the fact of murder in the South Carolina Department of Corrections. Scott testified that co-defendant Williams, appellant, Willie Taylor, and Jeff Dornberg were involved in the burglary with him. R. 287, ll. 11-19.

Butler said following the robbery Williams told him that he had shot the decedent and he that he knew that he had killed the decedent. R. 305, l. 1 – 306, l. 4.

Charles Jeffrey Dornberg pled to the crime of voluntary manslaughter prior to trial in consideration for his testimony. This Court can take judicial notice of the fact he is serving an eighteen year sentence in the Department of Corrections. R. 330, l. 4 – 331, l. 24.

Dornberg testified that he met appellant and Willie Taylor on the morning of the burglary. They did not commit the burglary on their first attempt the day before apparently

because people unexpectedly did not leave the house. Dornberg claimed that he did not have a gun during the burglary and planned robbery, but he said he saw co-defendant Williams, appellant, and Willie Taylor with revolvers. Dornberg recalled that Williams was trying to tie the decedent up, but the decedent was resisting. Dornberg testified that the decedent got up, tried to run and that co-defendant Williams shot him in the back. R. 337, l. 12 – 342, l. 18.

Appellant did not testify, and put the state to its burden of proof.

Discussion

A charge or indictment for witness tampering is a most serious charge because evidence of witness intimidation is probative of the defendant's consciousness of his guilt. Further, evidence of witness intimidation, *when linked to the defendant*, may be admitted to show his consciousness of guilt. See State v. Edwards, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009); State v. Walker, 366 S.C. 643, 655, 623 S.E.2d 122, 128 (Ct. App. 2005).

Defense Counsel Godfrey understood the extreme prejudice from the Clerk of Court informing the jury that co-defendant Williams had also been indicted for intimidating a witness as well as the other identical charges his client, appellant, faced. The court did correct the Clerk that that witness intimidation charge was not before **this jury this day**. However, Defense Counsel Godfrey correctly recognized that the jury in all likelihood thought that witness intimidation charge applied to appellant since the other indictments were identical. The judge had attempted to correct this grievous error before the charges against appellant were read to them. However, the jury would logically think

appellant was also implicated and involved in the witness intimidation charge since they heard identical charges otherwise read against him.

Defense counsel noted that he had moved for a severance -- arguing that trying him with co-defendant Williams -- when the overwhelming evidence showed Williams was the shooter - - where only one shot was fired - - was extremely prejudicial and the jury would make the impermissible spurious assumption that appellant and co-defendant Williams were connected at the hip in this crime.

The grievous error by the Clerk in informing the jury that a charge of witness intimidation was also before them occurred before the trial even began. This Court has held that determining whether a mistrial is manifestly necessary is a **fact specific inquiry**. State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000). A mistrial is proper only where it is dictated by "manifest necessity" or "the ends of justice." State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983) *citing* Illinois v. Somerville, 410 U.S. 458 (1973); Wade v. Hunter, 336 U.S. 684 (1949).

In State v. Barroso, 320 S.C. 1, 462 S.E.2d 862 (Ct. App. 1995), *rev'd on other grounds*, State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997), this Court dealt with the state offering testimony from a witness in a statewide grand jury drug conspiracy case where the wife of a state's witness found a note under her windshield which stated: "I know where you live." His wife also received a telephone call wherein she was told "testify and you die," and the caller then hung up.

The trial court sustained defense counsel's objections to this witness intimidation evidence. While holding it was not an abuse of discretion to deny the mistrial motion in that instance, this Court noted the extreme prejudice and unfairness to the defendant

when there is nothing to connect the alleged threat or intimidation to the particular defendant.

This Court noted that in Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994) the Supreme Court held "it would be a 'prostitution of justice' to permit evidence that someone attempted to influence a witness by fear or fright without evidence to connect the defendant with the tampering." The Court also wrote that in State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985), it stated the general rule was that "references to alleged threats or dangers to prosecuting witnesses are improper unless testimony is offered connecting the defendants with the threats."

The jury was informed by an official court official, a Clerk of the Court, that the jury had before it a charge of witness intimidation to decide. While "single references to improper evidence do not normally justify a mistrial" -- See State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003) -- this case is different and distinguishable because the jury learned at the beginning of the trial, *from a court official*, that it had to decide an issue of witness intimidation.

The testimony had not begun and the jury was already poisoned. Any juror would put himself or herself in the shoes of a prosecution witness who was being intimidated for the mere reason the witness had relevant evidence to convey to them. That is why this Court has referred to improper references to jury intimidation as a "prostitution of justice."

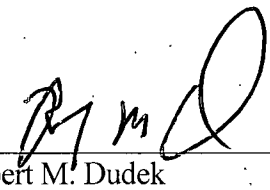
The judge should have declared a mistrial under the highly unusual facts of this case where a court official improperly instructed the jury that the case it had to render a

true verdict according to the law evidence including a charge of witness intimidation. The trial had not yet begun, and under the highly unusual facts of this case the court erred by not granting the motion for a mistrial.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed and his case remanded to the Greenville Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of October, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

October 15th, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of October, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of October, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023.