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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KIERIN MARCELLUS DENNIS,

APPELLANT.

APPELLATE CASE NO. 2019-001486

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

1.

The state had no counter response to binding legal precedent, which holds the rulings of the trial judge in proceedings which end in a mistrial represent no binding adjudication upon the parties, and it leaves the parties as though no trial had taken place.

Appellant had a pre-trial immunity hearing before Judge Russo. Judge Russo denied appellant immunity. Appellant's subsequent trial before Judge Russo ended in a mistrial.

In State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct.App. 1999), this Court remanded for a new *in camera* hearing. This Court agreed with Smith that the trial judge erred by refusing to allow Smith to present new evidence that the confidential informant's identification of him was tainted. Smith correctly argued that the informant's identification testimony during the first trial was nugatory because of the mistrial and the trial judge therefore should have held a new hearing.

A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court. When the trial of this case was thus terminated, the status of the litigation and of the parties became the same as though no trial had taken place." Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965), *citing* Keels v. Powell, 213 S.C. 570, 50 S.E.2d 704(1948).

In State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009), a death penalty case, the trial court granted the defendant's pre-trial motion for a change of venue. However, after granting that motion for a change of venue, the first trial ended in a mistrial.

When the case was called for a re-trial, the state took the position that the mistrial resulted in the case going back to "ground zero," and that its consent before the prior trial for a jury from Marion County being transported to Clarendon County for trial was no longer binding.

The Supreme Court agreed, noting that "a mistrial is the equivalent of no trial and leaves the cause pending in the circuit court," *citing* State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct.App.1999). "The case having resulted in a mistrial; it was a nullity and therefore began anew when called again for trial." State v. Woods, 382 S.C. 153, 157-58, 676 S.E.2d 128, 130-31 (2009).

Despite this precedent, the state asserts, "No case law, statute, or regulation exists that would have entitled the appellant to a new [immunity] hearing [after the mistrial]." Brief of Respondent at 10, 17. It then claimed that having a second pre-trial hearing on this legal issue after a mistrial "would create mass chaos in the courts of general session." Brief of Respondent at 18. Despite this prediction of calamity, the state admits it cannot point to another case where a mistrial occurred after there was an immunity hearing. Brief of Respondent at 10-11, n. 4.

The second trial judge, Judge Hood, relied on evidence from the nullity mistrial immunity hearing, and he also did not observe the demeanor of the witnesses at that hearing. The judge also limited evidence at his immunity hearing to that testimony he determined to be "after-discovered evidence" following the mistrial. Both were errors of law, and unfortunate. The only way to now remedy these errors of law is to grant Appellant Dennis a new immunity hearing unencumbered by the remnants of the nullity mistrial.

2.

While the state admits "both judges listed conflicting evidence as a reason for denying immunity," it ignores the fact that the court acceded to the solicitor's position that conflicting evidence made self-defense a "quintessential jury question," now making the assertion on appeal that both judges denied immunity because "he did not meet his burden by a preponderance of the evidence."

Appellant does not need to repeat his argument made in his brief that the judge found conflicting evidence as a reason to deny appellant immunity. The solicitor successfully urged that the conflicting evidence created a quintessential jury question. R. 2079, ll. 11-21.

In Judge Hood's order, he cited conflicting and inconsistent testimony and ruled, "the direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. *Therefore*, immunity does not apply because the defendant has not proven beyond a preponderance of evidence standard of self-defense." Order of Judge Hood at 6-7; R. 2920-2921.

There was evidence that as appellant and his friends were walking through the front lobby to the parking lot after the basketball game that numerous Dutch Fork students made their way to the lobby and began taunting and harassing the Lexington students. During the ensuing chaos, appellant became separated from his friends. A student from Dutch Fork followed appellant to his car. The school resource officer pulled a taser and ordered the students to leave. All the students scattered, and appellant got into his car and left. R. 246, l. 5 – 247, l. 23. *Appellant never said a word to any of the Dutch Fork students in the parking lot.* R. 247, l. 24 – 248, l. 6. As seen in the brief of appellant, and infra, this was *consistent* with appellant's behavior at the Cook Out where he avoided conflict, advised his friends to dodge conflict by

leaving, and did not take the bait at least twice from Dutch Fork student Michael James when James was seeking a confrontation.

The state points to a claim by Dutch Fork student Deshon Chatman, who maintained that appellant said, "Meet us at the Cook-Out, we've got something for you." Chatman said he did not know what was going on in the parking lot at that point, "[a]nd I had to go pick my mom up, so I had to go straight home." R. 361, l. 6 – 362, l. 24.

Detective Brent Carter said there was a "lot of jawing back and forth between a lot of different people [in the parking lot after the basketball game]." However, Carter admitted his recommendation to the solicitor to not grant appellant immunity from prosecution, and to instead charge him [seemingly with murder] was influenced by the claim of Dutch Fork student Deshon Chatman and Dutch Fork graduate Waldon Roberson (who also was not at the Cook Out) that appellant made this earlier statement in the parking lot. R. 2007, l. 13 – 2008, l. 3.

Judge Hood unfortunately did not have the benefit of our Supreme Court's opinion in State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019), where the Court held, "[J]ust because conflicting evidence as to an immunity issue exists, does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." While it is unfortunate Judge Hood did not have the benefit of State v. Cervantes-Pavon, this record reveals the solicitor successfully argued that the presence of inconsistent evidence made this a "quintessential jury question."

The court's denial of immunity was impermissibly and irrevocably tainted by its ruling that "the direct contradiction between witnesses creates an issue for a jury to decide, not the trial court." R. 2920. A new immunity hearing untainted by this error of law is the proper remedy.

3.& 4.

Appellant did not have a duty to retreat. He had the right to stand his ground because the Cook Out was "a place he had a right to be."

The state asserts that the first immunity judge, Judge Russo, properly ruled that appellant "had a duty to retreat before meeting force with force." Brief of Respondent at 27. The state also maintained that the second immunity judge, Judge Hood, properly found that appellant had not proven he was without fault in bringing on the difficulty, and that he had a duty to retreat as a result, but failed to retreat. Brief of Respondent at 27. Both judges were respectfully incorrect in their legal analysis.

Appellant had every right to be at the Cook Out restaurant that evening. The Cook-Out was a Lexington High hangout, not a Dutch Fork venue, and appellant was a one year removed alumnus of Lexington High.

Further, although appellant had no duty to retreat since he was acting lawfully in a place he had a right to be, pursuant to S.C. Code §16-11-440 (C), appellant's actions while at the Cook Out restaurant showed he was avoiding confrontation, not seeking it. The state cherry picked the testimony in an attempt to create a narrative that "[t]he appellant challenged them to meet up at the local Cook-Out later to settle things as a police officer ordered everyone to leave the parking lot." Brief of Respondent at 5.

However, no objective reading of what occurred at the Cook Out supports the state's wishful, cherry picked narrative. When appellant was approached by Dutch Fork student Michael James, who objectively seemed to be looking for trouble, appellant told James: "We just came here to eat." R. 251, ll. 11-21. When James later asked appellant, "Are you still salty?" Appellant responded, "The game was thirty – thirty, thirty-five minutes ago, y'all won,

congratulations." R. 254, ll. 13-22. Appellant also told his friends that they needed to leave before they even got the food they had ordered, and the group began walking to their respective cars. R. 254, l. 22 – 255, l. 8.

Objective witness Beth Bettini described at the second immunity hearing before Judge Hood what she saw at about this time at the Cook Out. Thirty to forty teenagers in the parking lot were "screaming, hollering, cussing, acting crazy." R. 1771, ll. 1-9. She saw a light-colored SUV come to a complete stop in the driveway because there were students blocking the road. They surrounded the SUV and started yelling at appellant, the driver. They were calling him names and threatening him. R. 1771, ll. 10-19. They were yelling, "Fuck you. We'll kick your ass." R. 1772, l. 22 – 1773, l. 1. She saw a student throw a drink at the car. R. 1771, ll. 10-19.

Appellant responded, "Y'all leave me the fuck alone or get the fuck away from me." R. 1773, ll. 3-6. She told the dispatcher that appellant *"looked scared to death"* and she thought the other students were going to hurt him. R. 1771, ll. 22-25; r. 1773, ll. 12-19; r. 1774, ll. 8-15. (emphasis added). She explained *that appellant could not leave because there were students in front of his car*. He would have had to hit them to leave. R. 1776, ll. 5-7.

The legislature enacted 16-11-440(C), the stand your ground provision, which provides "a person who is not engaged in unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in §16-1-60."

Appellant had every right to go to the Lexington county Cook-Out hangout after the basketball game. The state on appeal essentially takes issue with the wisdom of the stand your

ground provision enacted by our General Assembly by arguing that appellant had a duty to stay away from the Cook Out restaurant, even though it was "a place where he had a right to be." Appellant was not obligated to run home and hide after the game because the emotions of the partisan fans had run high during and right after the game. Any reasonable reading of appellant's actions at the Cook Out restaurant showed that, even though he did not have a duty to avoid confrontation because he had a right to "stand his ground," appellant sought to avoid confrontation.

The state's Monday morning quarterbacking given its apparent dislike of the stand your ground law is respectfully of the worst kind. Regardless, it cannot overcome the intent of the legislature that "no person . . . should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

Appellant was also entitled to the legislature's presumption set forth in S.C. Code § 16-11-440(A) that he had a reasonable fear of imminent peril of death or great bodily harm while a hostile person was invading his occupied vehicle. Further, since appellant had a right to be at the Cook Out restaurant, he had no duty to retreat, and he had a right to stand his ground and meet force with force, pursuant to S.C. Code § 16-11-440(C), even though the evidence showed appellant tried to avoid confrontation.

Appellant is entitled to a new immunity hearing, untainted and unencumbered by the legal errors enumerated in his briefs.

5.

The staged aerial photograph of the incident location was not admissible because it did not corroborate witness testimony or show the jury the circumstances of the crime but instead depicted a misleading image of the area which was not representative of the actual events as perceived and experienced by the witnesses who were present at the time of the incident.

Respondent argues that the trial judge did not err in allowing the state to introduce the staged aerial photograph of the incident location because the photograph oriented the jury to where the incident occurred, helped to trace the movements of appellant, and showed the width of the road. Brief of Respondent at 27-28. Respondent maintains that the trial judge did not abuse his discretion in allowing the photograph because it was relevant and more probative than prejudicial. Brief of Respondent at 28.

In support of its argument, respondent cited to Nelson v. Charleston & W.C. Ry. Co., 231 S.C. 351, 98 S.E.2d 798 (1957), State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986) and State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). None of these cases have any applicability to appellant's situation, and they are therefore irrelevant.

In each of these cases, Nelson, Todd, and Jones, the disputed photographs were photographs that showed the *actual condition* of something pertinent to the case at the time of the disputed incidents. The photograph that was introduced in Nelson was used to show the actual condition of the railroad track at the time of the incident. The photographs in Todd and Jones showed the victim's actual injuries that had been caused by the defendants.

In Nelson v. Charleston & W.C. Ry. Co., 231 S.C. 351, 354-55, 98 S.E.2d 798, 799 (1957), the Railway Company appealed a verdict for the plaintiff in a wrongful death case arising out of a collision between a freight train and an automobile. The Railway Company argued on

appeal that the trial judge erred by "permitting [the plaintiff] to prove abandonment of the spur track involved." Id. at 357, 98 S.E.2d at 800. The Supreme Court in Nelson stated that the Railway Company "misapprehended" the plaintiff's position because the plaintiff did not argue that the track had been abandoned but rather that the track was only used seldomly. The Court thus held that a photograph introduced by the plaintiff which showed the condition of the track at the time of the collision was admissible to show that the track was "very infrequently used." Id. at 357-58, 98 S.E.2d at 800.

In State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986), the appellant argued that the trial judge erred in allowing the state to introduce a photograph which showed the actual location of the victim's gunshot wound. Specifically, the appellant argued that the photograph was unnecessary because the location of the wound was not in dispute. The appellant further argued that the photograph was inflammatory because it showed the victim's upper right chest area including her breast and the appellant was also on trial for criminal sexual conduct. Id. at 213, 349 S.E.2d at 340. The Supreme Court held that the photograph was properly admitted into evidence because it corroborated the pathologist's testimony regarding the location of the wound and that the appellant was not prejudiced by its admission because there was testimony that the victim's clothing had been removed by medical personnel in order to render medical aid. Id. at 214, 349 S.E.2d at 340.

Finally, the state relies on State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), in which the Supreme Court held that four color photographs showing the victims' bodies "in substantially the same condition in which [they] were left by the defendant" and which "demonstrate[d] the circumstances of crime and the character of the defendant" were admissible in the *sentencing phase of a death penalty trial*. Id. at 579, 541 S.E.2d at 822. In reaching this conclusion, the

Court relied on State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998), which held that color photographs at the *sentencing phase of a death penalty trial* are admissible "so long as they demonstrate the circumstances of the crime and the character of the defendant, or they depict the victim's body in substantially the same condition in which the defendant left it." Id. at 46-47, 501 S.E.2d at 120-21. It is elementary that the penalty phase of a capital trial is about the defendant's character and the circumstances of the crime. "[T]he sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and characteristics of the individual defendant." State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984).

The aerial photograph in this case was not used to show the condition of the road at the time of the incident, but it was rather a staged manipulation of the scene which was used to mislead the jury as to the character of the road. Contrary to respondent's assertion, the photograph did not show whether appellant was blocked in at the Cook Out or not. This staged photograph bore zero resemblance to what appellant was faced with on the night of the incident, and he did not have the luxury of viewing the area from a bird's-eye-view before making his decisions. As defense counsel argued at trial, the witnesses did not see the scene from overhead, and they did not make their decisions based on what things looked like from an aerial view because the witnesses could only see what was in front of them. Supp. R. 9, ll. 1-23.

The trial judge erred in allowing the staged aerial photograph into evidence which gave the jury the false and misleading impression that the road was *three lanes wide* even though it was in fact only *a two-lane road.* Instead of showing the actual condition of a pertinent fact, as was the case in Nelson, Todd, and Jones, here, law enforcement had deliberately manipulated the scene to show the road in a manipulated and false condition favorable to the state. Furthermore,

the photograph was not an accurate portrayal of the incident location as it was perceived by appellant and the witnesses. In sum, the aerial photograph was confusing, misleading, and unduly prejudicial. Appellant's convictions should be reversed given this misleading evidence on a critical matter at issue for the jury.

6.

The model car door created by the state's investigator did not help the jury determine whether the decedent reached his hand into appellant's vehicle or whether the decedent was stabbed inside or outside the vehicle because the model was substantially different from appellant's actual vehicle and the demonstrative use of the model was highly misleading and resulted in an inaccurate representation of the incident.

Respondent argues that the trial judge did not err in allowing the state to use a model car door of a Ford Explorer created by the state's investigator because the model was substantially similar to appellant's actual vehicle and "it would help the [jury] understand and visualize where appellant was standing and whether he could have stabbed the [decedent] outside or inside the vehicle." Brief of Respondent at 42. Respondent contends that the model was relevant to the question of whether the decedent reached his hand into appellant's vehicle. Brief of Respondent at 42.

Respondent relies on Holmes v. Black River Elec. Co-op., Inc., 274 S.C. 252, 262 S.E.2d 875 (1980). Holmes has no relevance to the current dispute. In Holmes, the plaintiff was injured after suffering from an electrical shock while he was fishing on the Santee Cooper Lake near low hanging power lines. Id. at 255, 262 S.E.2d at 876-77. As a result of the horrific electrical shock, the plaintiff had to have his left hand and part of his arm amputated. Id. The defendant electric company argued that the trial judge erred in allowing into evidence photographs of the plaintiff's amputated arm because "they may have aroused the sympathy of the jury" and were "hideous, grotesque, and grossly unfair." Id. at 258, 262 S.E.2d at 878. The Supreme Court held that the photographs were admissible because they showed the extent of the plaintiff's injuries.

The Court also noted that the parties agreed that the photographs accurately showed the plaintiff's injuries. Id.

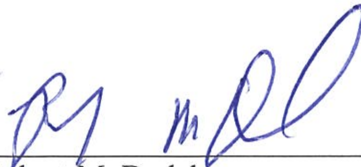
Again, Holmes has no application to the legal issue in this case. The photographs in Holmes were not demonstrative exhibits but rather photographs of the *actual injuries* sustained by the plaintiff. Not only was the model car door used in appellant's trial not his actual car door, it was not even similar, let alone substantially similar. The model was not used to show the actual events that occurred on the night of the incident but was instead used by the solicitor to give a dramatic reenactment. In fact, two of the state's witnesses used the misleading demonstrative of the model car door to physically reenact the incident in front of the jury. R. 2558, l. 10 – 2559, l. 14. This included at least one of the witnesses physically sitting in the car seat of the model and pretending to be appellant while reenacting what appellant supposedly did on the night of the incident. R. 2580, l. 11 – 2582, l. 14.

Respondent acknowledged that demonstrative evidence is subjected to broader discretionary exclusion because of its use as an illustrative tool as opposed to real evidence in the case. Brief of Respondent at 40. However, respondent failed to recognize the principles laid out by the Supreme Court in Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), which dealt with a videotaped animation of a car accident. In Cantrell, the Supreme Court warned how a computer animation could be highly misleading to a jury and that a party's staged reproduction of their version of facts in controversy carries with it a particularly great danger that "the jury may confuse art with reality." Id. at 383-384, 529 S.E.2d at 536. The Court further warned that a misleading recreation of the disputed incident has "the potential to create lasting impressions that unduly override other testimony or evidence." Id.

Contrary to respondent's assertion, the model car door in this case was not substantially similar to appellant's car because the model was based on only a single measurement and the solicitor's investigator admitted that there were numerous other critical measurements that he did not take of appellant's car before constructing the model. R. 2353, l. 14 – 2354, l. 7; r. 2361, ll. 3-21; r. 2402, ll. 4-17; r. 2403, ll. 11-16. Because the model created by the state was inaccurate, the use of the model by the witnesses was necessarily misleading and confusing. Furthermore, the model did not corroborate the witnesses' testimony but instead was used as a prop by the witnesses to conduct a theatrical performance of the incident. Both of the witnesses who acted out the event were biased as they were both friends of the decedent. The trial judge erred in allowing the state to use the inaccurate model car door for witness reenactments of the incident, and appellant's conviction should be reversed because the model was critically misleading to the jury.

CONCLUSION

For the reasons argued in appellant's brief, and in this reply brief, this Court should reverse appellant's conviction and remand this case to the Lexington County Court of General Sessions for a new immunity hearing.



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This 5 day of October, 2021.

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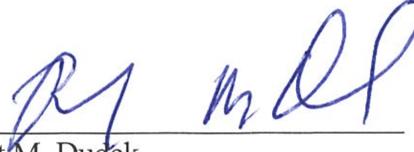
CERTIFICATE OF COUNSEL

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

October 5, 2021.



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