STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case Tracking No. 2012-213412

The State,

Respondent,

vs.

David Vice,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in allowing the jury to hear testimony of a prior bad act because the trial court sustained Appellant's objection to the testimony and issued a curative instruction. To the extent Appellant's argument could possibly be construed to contend the trial court erred in denying the motion for a mistrial, that issue is entirely without merit as any error was cured by the instruction.

II. Even if the trial court charged the jury using the language subsequently prohibited by State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), this issue is clearly not preserved for review on appeal, and any error is entirely harmless.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in allowing the jury to hear testimony of a prior bad act because the trial court sustained Appellant's objection to the testimony and issued a curative instruction. To the extent Appellant's argument could possibly be construed to contend the trial court erred in denying the motion for a mistrial, that issue is entirely without merit as any error was cured by the instruction.

Appellant contends the trial court erred in allowing the jury to hear testimony Appellant had previously "run from the law" because this was prior bad acts evidence that prejudiced Appellant's trial. The trial court sustained Appellant's objection to the testimony and struck it from consideration by the jury. As a result, the trial court did not allow the jury to hear the evidence and there is no error for which Appellant can complain. To the extent his argument could be a claim the trial court erred in denying his motion for a mistrial, this issue is entirely without merit because any error was deemed cured by the instruction and any prejudice to Appellant does not warrant the drastic remedy of a mistrial.

First, Appellant raises the following issue on appeal in his Brief: "The trial judge erred in allowing the jury to hear testimony that appellant had previously 'run from the law' because this was prior bad acts evidence that prejudiced appellant's trial." (Br. App. 3, Statement of Issues on Appeal). At trial, Officer Hayes stated: "Considering knowing that - - if who the suspect was and knowing he was known to run from law enforcement - - -". Appellant immediately objected to the testimony by the officer, and argued the admission was improper because it was evidence of prior bad acts. (T.80; R. p. 16). The trial court then sustained the objection and issued a curative instruction including striking

the testimony from the record. (T.86; R. p. 22). As a result, the trial court could not have erred in allowing the testimony in front of the jury when he specifically struck it from the record and instructed the jury to "disregard the entire question and response." (T.86; R. p. 22). As a result, there is no relief this Court can offer beyond that provided by the trial court. See e.g., State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) ("Inasmuch as the appellant obtained the only relief he sought, this court has no issue to decide."); see also State v. Thompson, 304 S.C. 85, 87, 403 S.E.2d 139, 140 (Ct. App. 1991) (Appellant obtained the only relief he sought and, therefore, the Court has no issue to decide).

To the extent his issue on appeal can be read to address the trial court's error lies in the denial of his motion for a mistrial, the issue is entirely without merit. A mistrial should not be ordered in every case when incompetent evidence is received and later stricken out. State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct.App.1996) (holding a trial court should exhaust other available methods to cure prejudice before aborting a trial, and where the prejudicial effect is minimal, a mistrial need not be granted in every case where incompetent evidence is received and later stricken and a curative instruction is given). "Generally, a curative instruction is deemed to have cured any alleged error." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); see also, State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (instruction to disregard inadmissible evidence is usually viewed as having cured the error in its admission); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (if trial judge sustains timely objection to testimony and gives jury curative instruction to

disregard testimony, error is deemed to be cured); State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("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.").

The curative instruction in the instant case sufficiently cured any possible prejudice from the testimony even if it were inadmissible as improper prior bad act testimony. The trial court instructed the jury Officer Hayes's answer was not appropriate, and it was struck from the record. (T.86; R. p 22). The jury is expected to follow the instructions given to it, and in this case the jury was to strike the question and answer. See Conner v. City of Forest Acres, 363 S.C. 460, 471, 611 S.E.2d 905, 910 (2005) (finding the case should be analyzed "in light of the presumption the jury followed the trial courts instructions to ignore any evidence" excluded by the court); Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999) (jury is presumed to follow instructions).

Further, a trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App.

2007). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

The testimony at trial, that the officer was seeking to block Appellant because he was known to run from law enforcement, is not such as would render the trial unfair. Any prejudice possibly created from the vague comment by the officer was not of the sort of urgent circumstances warranting the drastic measure of a mistrial. See State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (finding no prejudice resulted from the admission of testimony establishing that law enforcement already had Council's fingerprints on record at the time of his arrest for the charged offense); State v. Singleton, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985) (finding an arresting officer's vague references to prior crimes in the jury's presence did not warrant the granting of a mistrial), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Robinson, 238 S.C. 140, 150-151, 119 S.E.2d 671, 676 (1961) (finding testimony by a witness that Robinson told him that he was on the way to the "probition office" did not create an inference that Robinson had been convicted of another crime), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991);

State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."). As a result, the trial court did not err in denying Appellant's motion for a mistrial.

In addition, testimony similar to the testimony objected to by Appellant and sustained by the trial court was subsequently solicited by Appellant's own counsel. (T.108; R. p.44). Counsel did not object when the testimony came in as a result of his questioning. As a result, he cannot now complain of any error. See State v. Stanko, 402 S.C. 252, 270, 741 S.E.2d 708, 717 (2013) ("Appellant cannot now complain of an error which his own conduct induced.").

Finally, as an additional sustaining ground, if the testimony is to be analyzed as a prior bad act, the State asserts the testimony was properly admissible. Under Rule 404, SCRE and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The testimony would demonstrate an absence of mistake or accident in regards to Appellant's failure to stop and his decision to drive past Officer Hayes in an attempt to evade being stopped. Further, the testimony was not being offered as a prior bad act, but to explain the reason for the Officer's decision to block the road to try and stop Appellant. (T.80; 87-88; R. p. 16; pp. 23-24). Accordingly, the trial court could have found the testimony properly admissible.

Therefore, the trial court did not err in its handling of the testimony by Officer Hayes, and this Court should affirm the trial court's ruling.

II. Even if the trial court charged the jury using the language subsequently prohibited by State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), this issue is clearly not preserved for review on appeal and any error is entirely harmless.

Appellant maintains the trial court erred in charging the jury: "Actual knowledge of the presence of the marijuana is strong evidence of the defendant's intent to control its disposition or use." This issue is not preserved for review on appeal because Appellant never raised an objection to this portion of the charge. Further, even if preserved any error is entirely harmless as Appellant cannot demonstrate he was "merely present" when the drugs were found and was not prejudiced by the charge given.

Preservation

First, the issue is not properly preserved for review on appeal. The trial court charged the jury:

> Mere presence at the scene where the drugs were found is not enough to prove possession. Actual knowledge of the presence of the marijuana is strong evidence of the defendant's intent to control its disposition or use. The defendant's knowledge and possession may be inferred when a substance is found on the property under which the defendant - - found on the property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in this case and to be given the weight you decide it should have.

(T.227-228; R. pp. 107-108). After the court's charge to the jury, Appellant raised an objection. Specifically, he stated:

> I have an objection to where you mentioned - - you used the term inferred for property under which the defendant controls as far as possession. Your Honor, I just - - just for the record on appeal, I just object and say that's a comment on the facts, as well as comments about a verdict that speaks the truth.

(T.232; R. p. 112). At no time did Appellant object to the "strong evidence" language that was found improper in Cheeks. His objection was to another portion of the charge regarding the inference the jury can make from Appellant's control of the property. As a result, the issue is clearly not preserved for review on appeal. See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Prejudice

Even if the issue is preserved for review, Appellant cannot demonstrate how he was prejudiced by the charge given by the court and, therefore, is not entitled to a reversal of his conviction and sentence. "Errors, including erroneous jury instructions, are subject to harmless error analysis." State v. Belcher, 385 S.C. 597, 611-612, 685 S.E.2d 802, 809 (2009); see also, Cheeks, 401 S.C. at 329, 737 S.E.2d at 484 (conducting harmless error analysis to determine whether defendant prejudiced by improper jury charge); Lowry v. State, 376 S.C. 499, 510–11, 657 S.E.2d 760, 766 (2008) (same).

In the instant case, as in Cheeks, Appellant cannot demonstrate how he was prejudiced by the jury charge even in light of the fact the "strong evidence" language has been deemed improper. In Cheeks, the Supreme Court concluded:

> Appellant cannot show prejudice from the charge in this case, however, as there was no evidence that he was "merely present" at Markley's house when the search warrant was executed. Rather the evidence was that he was actively cooking crack cocaine when the warrant was served, and that he possessed the 650 grams of crack found on the kitchen counter. Further, in light of the overwhelming evidence of appellant's guilt, he cannot

> demonstrate prejudice warranting reversal from the adjective "strong" used in the charge.

Cheeks, 401 S.C. at 329, 737 S.E.2d at 484.

In the case *sub judice*, Appellant was seen disposing of the bag containing the narcotics. Specifically, Officer Hayes testified he saw face to face Appellant drive past him even after he turned on his blue lights to stop Appellant. (T.87-88; R .pp. 23-24). He testified as he chased Appellant, Officer Hayes observed Appellant throw a bag out of the vehicle. (T.90; R. p. 26). And when the bag was presented at trial, Officer Hayes identified it as "the bag David Vice [Appellant] threw out the window of his vehicle." (T.91; R. p.27). Further, Officer Hayes testified he did not see anyone in the passenger seat of the vehicle. (T.112; R. p. 48). Also, the State presented a copy of the video recording taken from Officer Hayes's in car camera. It clearly shows Appellant disposing of the bag. (T.97; R. p. 33; State's Exhibit 3). Finally, Sergeant Shearer, who retrieved the bag thrown, testified: "And I actually seen Mr. Vice [Appellant] holding a bag out the window that when he dropped, I retrieved." (T.155; R. p. 74).

The contents of the bag were determined to be 52.8 grams of cocaine. (T.146-148; R. pp. 69-71). Additionally, marijuana was found in the bag. (T.128; R. p. 61). The officers also located scales, a cell phone, and plastic bags during the search or the bag. (T.158-159; R. pp. 77-78). Finally, Appellant had over $3,400 taken off his person when he was finally stopped by police. (T.133-134; R. pp. 65-66).

Appellant was not merely present with the drugs; instead, he was the only one with control and possession of the drugs. Officers saw him throwing the bag out of the window, and Appellant's disposal of the bag was also documented by video. Officer Shearer immediately retrieved the bag, which was found to contain cocaine and

marijuana. Appellant could not have been prejudiced by the improper charge in light of the absence of any evidence he was "merely present" and the overwhelming evidence of his guilt.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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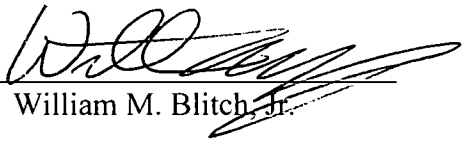
BY: 
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October 28, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case Tracking No. 2012-213412

The State,

Respondent,

vs.

David Vice,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211 (b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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October 28, 2013

STATE OF SOUTH CAROLINA

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Appeal from Williamsburg County
Honorable Clifton Newman, Circuit Court Judge
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The State,

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 28 day of October, 2013.

Sally Ellison

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October 28, 2013

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RE: State v. David Vice
Appellate Case Tracking No. 2012-213412

Dear Ms. Carter:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

WMB/erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and 9 copies enclosed)
Victim Services