STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEROY CLIFTON GIBBS,

APPELLANT

APPELLATE CASE NO. 2013-0001297

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Did the court err by denying Appellant's pretrial request to waive his right to counsel and represent himself without conducting the proper inquiry pursuant to Faretta v. California, 422 U.S. 806 (1975), in violation of Appellant's federal and state constitutional rights?

2.

Did the court err by admitting evidence that Appellant allegedly distributed crack cocaine on three prior occasions at the residence where Appellant was arrested and where the state alleged Appellant lived, since Appellant's testimony that he did not live at the residence did not "open the door" to such evidence being admitted and since evidence of the alleged prior distributions was unduly prejudicial and denied Appellant a fair trial?

3.

Did the court err by denying Appellant's motion for a mistrial after the court admitted evidence that Appellant allegedly distributed crack cocaine on three prior occasions at the residence where Appellant was arrested and where the state alleged Appellant lived, since the evidence was unduly prejudicial and denied Appellant a fair trial?

STATEMENT OF THE CASE

A Sumter County Grand Jury indicted Appellant at the July 21, 2011 term of General Sessions for trafficking cocaine base, manufacturing cocaine base, and possession with intent to distribute cocaine. R. *. His case was called to trial on June 3, 2013 before the Honorable William Jeffrey Young, and a jury. Assistant Solicitors John Meadors and Tyler Brown appeared on behalf of the prosecution and Charles T. Brooks, III represented Appellant. Tr. 1.

At the conclusion of the trial on June 5, 2013, the jury found Appellant guilty. Tr. 245, l. 15 – 246, l. 6. Judge Young sentenced Appellant to ten years imprisonment for trafficking cocaine base, fifteen years concurrent for manufacturing cocaine base, and fifteen years concurrent for possession with intent to distribute cocaine. Tr. 259, ll. 3-25.

This appeal follows.

ARGUMENT

1.

The court erred by denying Appellant's pretrial request to waive his right to counsel and represent himself without conducting the proper inquiry pursuant to *Faretta v. California*, 422 U.S. 806 (1975), in violation of Appellant's federal and state constitutional rights.

Relevant Facts

Appellant moved pretrial, and before the jury was sworn, to relieve his court appointed counsel and represent himself. See Tr. 12, l. 17 – 13, l. 3. After a very brief discussion in which the court failed to follow the requirements as set out in Faretta, the court denied Appellant's motion to relieve his counsel and refused to allow Appellant to represent himself. The following colloquy took place on the record:

> Mr. Brooks: Judge, the first thing is I think my client wants to be addressed. He is asking for this matter to be continued, for me to be relieved as counsel, and he again to be appointed new counsel in this case. I think he probably wants to be heard on that.
>
> The Court: All right. Mr. Gibbs, you may stand. Yes, sir?
>
> The Defendant: Yes. I would like to ask the Court to be added as co-counsel to assist counsel - -
>
> The Court: You can't do that. You're not an attorney. I can't let you be co-counsel.
>
> The Defendant: Or I can - - or - - well, I feel that in this matter that my client is not going to represent me - -
>
> The Court: Your client? You mean your lawyer?
>
> The Defendant: My attorney is not going to represent me to the fullest - -

The Court: Okay.

The Defendant: - - because of the fact that - -

The Court: Well, I mean I think he [Attorney Brooks] tried to get off last week.[1]

The Defendant: Yes, ma'am. Yes, sir.

The Court: Judge James didn't let him. So are you asking that he be relieved now?

The Defendant: Yes.

The Court: So you don't want him on this case?

The Defendant: No, sir.

The Court: And you want me to appoint you a new lawyer?

The Defendant: Yes, sir.

The Court: If you - - if you want nothing to do with Mr. Brooks, then I can relieve Mr. Brooks, but the case will go on and you'll represent yourself.

The Defendant: Okay.

The Court: So you want to represent yourself?

The Defendant: Yes, sir.

The Court: Mr. Brooks, I'm not going to allow him to do that. We're at this stage. I'm going to leave you on. You all have been through this long enough. I'm - - I'm going to deny the request and Mr. Brooks will stay on the case. All right, thank you.

Tr. 7, l. 6 – 8, l. 19.

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[1] The fact that trial counsel previously moved to be relieved as counsel is irrelevant to this appeal as the issue is whether the trial court engaged in the proper colloquy with Appellant regarding his constitutional right to waive his right to counsel and represent himself.

Despite the fact that Appellant unequivocally stated he did not want trial counsel to represent him and wished to represent himself, the case proceeded to trial with Charles Brooks representing Appellant.

Discussion

"A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, ___ S.C. ___, 753 S.E.2d 545, 550 (2014) (citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." Id. (citing State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010)).

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." Id. (citing State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998)). "Recognizing that it may be to the defendant's detriment to be allowed to proceed pro se, his knowing, intelligent and voluntary decision 'must be honored out of that respect for the individual which is the lifeblood of the law.'" Id. (citing Faretta, 422 U.S. at 834).

Here, the trial court did not follow the requirements as set forth in Faretta since it failed to determine whether Appellant made a "knowing and intelligent waiver of his right to counsel." See Reed, 332 S.C. at 41, 503 S.Ed.2d at 750. Furthermore, the court also failed to inform Appellant of the dangers and disadvantages of self-representation. Instead, the court summarily rejected Appellant's request to relieve his counsel without conducting **any** Faretta colloquy and arbitrarily denied Appellant's motion to represent himself. This was error.

In State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999), the defendant moved pretrial to relieve his counsel and proceed *pro se*. Our Supreme Court reversed Fuller's conviction for murder after finding "the trial court failed to conduct an adequate hearing to fully assess the purpose behind the defendant's request or to determine what effect granting the request would have had on the proceedings."

Since the trial court failed to make the proper inquiries under Faretta and did not honor Appellant's desire to waive his right to counsel, this case should be reversed and remanded for a new trial.

2.

The court erred by admitting evidence that Appellant allegedly distributed crack cocaine on three prior occasions at the residence where Appellant was arrested and where the state alleged Appellant lived, since Appellant's testimony that he did not live at the residence did not "open the door" to such evidence being admitted and since evidence of the alleged prior distributions was unduly prejudicial and denied Appellant a fair trial.

Relevant Facts

On December 23, 2008, law enforcement officers with the Sumter County Sheriff's Office and various SLED agents responded to a residence in Sumter to serve Appellant with arrest warrants. Tr. 29, l. 19 – 30, l. 9. Investigator Wayne Dubose of the Sumter County Sheriff's Office testified that he approached the front door of the residence, knocked, and announced "sheriff's office." After a "couple of minutes," Kimberly Gibbs, Appellant's wife, answered the door. Dubose informed Mrs. Gibbs that they were looking for Appellant and had arrest warrants for him. Dubosed testified, "I could see [Appellant] back behind her in the hallway area between the bedroom and the living room. He was standing there in his boxers." Tr. 32, l. 1 – 33, l. 2. Dubose immediately placed Appellant under arrest and moved him into the living room area where he was seated on the couch. Tr. 33, ll. 20-23.

Dubose testified that Appellant "asked about getting a pair of pants" and indicated that his pants were on the floor of the bedroom. Dubose said he went into the bedroom, found the pants, and "went ahead and searched the pants to make sure there was no weapons in them before [he] gave them to him." Dubose claimed he found $1,355 in the

pocket of Appellant's pants. Tr. 33, l. 23 – 34, l. 7. He also claimed that he "noticed the odor of marijuana in the residence." Tr. 35, l. 21-25.

According to Dubose, he then read Appellant his Miranda[2] rights and "asked for consent or permission to bring a drug dog in the residence." Appellant allegedly told Dubose that "he didn't live there." Dubose then asked Mrs. Gibbs "if we could bring a dog in the residence and she said, yeah, no problem." Tr. 38, ll. 9-15. Mrs. Gibbs also signed a written consent to search form giving the officers permission to search the entire residence. Tr. 39, ll. 10-23; Tr. 40, l. 2-8. Dubose explained that since Appellant denied living at the residence, they went ahead and transported him to the local detention center before conducting the search. Tr. 38, l. 15 – 39, l. 11.

Law enforcement then searched the residence. Tr. 40, ll. 9-10. Inside a kitchen cabinet above the microwave officers allegedly found a plastic bag with a "quantity of white power substance," baking soda, a measuring bowl, Pyrex dishes, four razor blades, a fork, and additional baggies. Tr. 42, l. 22 – 44, l. 3; Tr. 45, l. 22. The measuring bowl had a residue inside that field tested positive for cocaine. Tr. 48, ll. 7-25. The officers also discovered a residue on the "turntable" or "glass plate inside the microwave" that field tested positive for cocaine. Tr. 50, l. 10 – 51, l. 3. Additionally, in the master bedroom where Dubose "retrieved the pants from" was a "small marijuana blunt in the ashtray." Tr. 57, ll. 5-8.

As law enforcement was "fixing to leave out the residence," Dubose testified that he decided to search Mrs. Gibbs' purse which was on the kitchen table where both Dubose and Mrs. Gibbs were sitting. At the top of the purse was a bag of baby wipes.

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[2] Miranda v. Arizona, 384 U.S. 436 (1966)

Dubose claimed that inside the bag of baby wipes he found bags of marijuana and "what was believed to be crack cocaine and cocaine." Tr. 54, l. 2 – 55, l. 17. Dubose said that he immediately asked Mrs. Gibbs about the drugs and "she was shocked." She denied the drugs belonged to her. Tr. 55, ll. 18-24.

Dubose explained that on December 24, 2008, which was the next day, he went to the detention center to serve Appellant with new warrants based on the evidence discovered in the residence. Tr. 66, l. 24 – 67, l. 5. After advising Appellant of his Miranda rights, Dubose said that he confronted Appellant with a statement that he had allegedly made the day before when he was being transported to jail. Appellant had allegedly said, "Selling drugs is a lifestyle for [me]." When Dubose asked him about it, Appellant allegedly responded that "he had to support his family." Dubose claimed Appellant also said that "none of the items was his because he did not live at the residence. He said it must have been his wife's - - or no. He said that his wife must have had someone else there because it wasn't his and it had to be hers." Tr. 69, l. 19 – 72, l. 3.

Lieutenant Dale Horton of the Sumter County Sheriff's Office testified that he helped transport Appellant to the detention center on December 23, 2008 after he was arrested. Horton explained that he rode in the front passenger seat, Lieutenant Chris Moore drove the patrol car, and Appellant was in the back seat. Tr. 83, l. 10 – 84, l. 8. According to Horton, during the approximately fifteen minute drive, Appellant "was steadily talking" and "rambling" even though neither he nor Moore were asking Appellant any questions. Horton claimed that Appellant allegedly said "selling drugs was a lifestyle to him." Horton said that both he and Moore "looked at each other saying

I can't believe he just said that." Tr. 85, ll. 1-20. They later reported the statement to Investigator Dubose. Tr. 86, l. 12 – 87, l. 2.

Mitchell Hansen, who worked as a drug analyst at the Sumter County Sheriff's Office from 2006 until 2011, was qualified as an expert in drug identification. He testified that there were three separate items of evidence submitted in this case that he identified as benzocaine or benzocaine and caffeine mixes. He explained that benzocaine and caffeine are both "cutting agents" that individuals add to drugs to increase the volume of the substance. The total weight of the benzocaine and caffeine submitted was 12.25 grams. Hansen also testified that only one item submitted testified positive for cocaine. The total weight of cocaine was 3.35 grams. Hansen further testified that three separate items of evidence submitted tested positive for crack cocaine. The total weight of crack cocaine from these three items was 14.03 grams. Tr. 112, l. 21 – 120, l. 9.

Additionally, Hansen testified that crack cocaine is made from mixing cocaine and baking soda using water and heat. He explained that sometimes manufacturers will use a microwave to "cook" crack cocaine or "heating rounds" "depend[ing] on what they have." Tr. 120, l. 22 – 122, l. 3.

Kimberly Gibbs, Appellant's wife, was the next to testify. She explained that she met Appellant through her sister in 2004 and that the two got married in 2006. Tr. 127, ll. 4-23. When they got married, she was in the Navy and was living and working in Texas. Appellant lived with her in Texas and then shortly thereafter moved with her to San Diego. Tr. 127, l. 24 – 128, l. 17. Mrs. Gibbs testified that the couple moved back to Sumter in June 2007 after having a child earlier that year. Tr. 128, l. 18 – 129, l. 8. When they moved back, they lived with her mother at first and then Appellant's father until they

finally moved into the residence where Appellant was arrested in April 2008. Tr. 129, l. 9 – 130, l. 3. Mrs. Gibbs explained that she signed the lease, but the occupants listed on the lease were her, Appellant, and their son. Tr. 133, l. 20 – 134, l. 24. She claimed that she and Appellant shared the master bedroom, that a second bedroom belonged to their son, and that a third bedroom was used as a computer room. Tr. 135, l. 21 – 136, l. 5.

Mrs. Gibbs admitted to giving verbal and written consent for law enforcement to search her home the day that Appellant was arrested. Tr. 137, l. 22 – 138, l. 22. She was present when the police found what they believed to be drugs in the house. She also acknowledged that she gave the officers permission to search her purse and that they found more drugs inside her purse. However, Mrs. Gibbs denied that the drugs were hers or that she put them in her purse. She claimed the officer told her that Appellant must have put the drugs in her purse. Tr. 139, l. 11 – 141, l. 15. Mrs. Gibbs also denied having any knowledge that Appellant kept drugs in the house or that she had ever seen Appellant cook crack cocaine in the house. She testified that she "was at work so [she] couldn't tell you [Appellant's] activities." Tr. 143, l. 13 – 147, l. 4; Tr. 147, l. 23 – 148, l. 3. Mrs. Gibbs testified that the only people who had access to the house were her, Appellant, and their son. She denied that she had another man living with her. Tr. 147, ll. 5-22.

After Mrs. Gibbs testified, the state rested. The judge engaged in a routine colloquy with Appellant regarding his right to testify and then gave Appellant an opportunity to speak further with defense counsel about his decision. Tr. 162, l. 15 – 165, l. 16. After speaking with defense counsel, Appellant informed the court he would testify. Tr. 165, l. 19 – 166, l. 1. Before bringing the jury in, defense counsel put the following on the record:

> Judge, I just wanted to put on the record I've advised my client against testifying and the reason is, Judge, is because if we end up getting into whether or not he was a resident there, it's my possession, particularly in light of the motion *in limine* that I presented prior to us taking testimony, that that would open the door for the state to start talking about all these other drug buys that they made at this residence involving my client.[3]
>
> At the present time, the jury doesn't know that he has drug charges from buys or alleged buys, and if he takes the stand on the drug evidence to talk about whether he's a resident or not to basically say he's not a resident, then that would allow Mr. Meadors and Mr. Brown to talk about, yeah, he is a resident there. We showed up as the police on this day, this day, and this day, and this is what happened, and that's what scares me in regards to my client, but right now, nobody knows that he has any other drug charges pending except for, obviously the people in the courtroom. None of the jury knows that and that's why we put that motion on the Court before we started and that's, you know, our position. I'm just adamant about it. I think that is suicide for my client, but I wanted to put that on the record.

Tr. 166, l. 7 – 167, l. 3.

Appellant then testified that the drugs found in the residence and in Kimberly. Gibbs' purse did not belong to him. He denied putting drugs in her purse or in the kitchen or in the microwave. Appellant also denied "blurt[ing] out selling drugs is a lifestyle to me" while being taken to jail by Lieutenant Horton. He testified that the only thing he said to Investigator Dubose when Dubose came to see him at the detention

[3] Pretrial, defense counsel expressed his concern about the possibility of opening the door to the state introducing evidence of Appellant's other pending charges related to allegations that Appellant sold crack cocaine to a confidential informant on several occasions at the residence where Appellant was ultimately arrested. The court stated if Appellant took the stand and asserted that he did not live at the residence then that would open the door and the state "can ask him anything they want to about it." The court, however, was cautious about giving an advisory opinion and stated that he could not make a ruling before the issue was properly before him. See Supp. Tr. 44, l. 17 – 48, l. 7.

center the next day "was that I had no knowledge of any drugs that was found at the residence." Tr. 168, l. 3 – 169, l. 23.

On cross-examination, Appellant testified that in December 2008, he was unemployed and cared for his son during the day. He watched his son either at the residence where he was arrested because that is where his son lived or at his own residence where he was living with his mother. Tr. 171, ll. 3-17. Appellant explained that he no longer lived at the residence with his wife because the couple had "altercations." He testified that "eighty-five percent of the time" he "would be staying at [his] mom's." Appellant said the residence "was basically her house because she paid the bills there. She just added my name back in April to the lease because at that time we was married." Appellant further testified that "there was plenty of time that, you know, she would have friends and, you know, people that she dealt with at that - - at the residence." Tr. 173, l. 1 – 174, l. 1.

After Appellant denied living at the residence with his wife in December 2008, the solicitor informed the court that it had a matter of law and a bench conference was held off the record. Before the testimony resumed, defense counsel said, "You Honor, while he's doing that, I note my objection for the record." The court responded, "Yes, sir. You're protected." Tr. 175, ll. 2-13.

The following colloquy then took place between the solicitor and Appellant:

> Q: And I assume the answer is the same you said for December would be true of October and November that you weren't living there most of the time; correct?
>
> A: Yes, sir.
>
> Q: Was that a yes?

A: Yes, sir.

Q: Specifically, please, sir, on or about October 28th of 2008 at [the residence where Appellant was arrested], did you or did you not distribute a quantity of crack cocaine to an individual at approximately 1:29 on October 29th of 2008 - -

A: No, sir,

Q: - - at this address?"

A: No, sir.

Q: And specifically on November 24th of 2008 at approximately 12:28 pm, did you or did you not distribute a quantity of crack cocaine to an individual from this same residence at [redacted address] that you were living?

A: No, sir.

Q: And on December 1st, 2008, when you were saying you weren't staying there eighty-five percent of the time; right?

A: Yes, sir.

Q: Did you distribute a quantity of crack cocaine at approximately 4:43 pm to an individual at your residence in exchange for money?

A: No, sir.

Tr. 175, l. 14 – 176, l. 13.

Appellant again stated that he had no knowledge of the drugs found inside the residence. He testified, "I was arrested and sent to the jail. I didn't know about any drugs until the next day." Tr. 180, ll. 2-8. Appellant also repeatedly stated that he had "no knowledge" regarding whether the drugs belonged to his wife or not. Tr. 187, ll. 21-23; Tr. 187, ll. 21-23.

After Appellant's testimony, defense counsel put his objection on the record. He stated, "I'll put my objection and motion for a mistrial on the record in light of we don't feel that that was opening the door to allow the state to go into prior incidents - - incidents and allegations about drugs that are totally separate from the incident that is on trial. We feel that the state should not have been allowed to do that and ask - - we're asking the court to grant a mistrial in this matter." Tr. 189, ll. 4-11. The court responded, "I don't think there's any question in my mind that he opened the door and allowed those questions." Tr. 189, ll. 22-24. The court thus denied the motion for a mistrial.

The state then called Investigator Dubose to testify in reply. Tr. 190, ll. 17-20. Defense counsel again noted his objection for the record. Tr. 191, ll. 10-11. Dubose testified in detail about an alleged undercover purchase that took place on October 29, 2008 at the residence where Appellant was arrested. He explained that a confidential informant was given sixty dollars of "documented funds." According to Dubose, the informant called Appellant at 1:24 pm, arranged to purchase crack cocaine, and then drove to the residence where Appellant was arrested and allegedly purchased a quantity of crack cocaine from Appellant in exchange for the sixty dollars. Tr. 191, l. 13 – 194, l. 1. Dubose also testified about a second alleged undercover purchase that took place on November 24, 2008 at approximately 12:28 pm in which the same confidential informant was given one hundred dollars in documented funds, arranged to purchase crack cocaine from Appellant, drove to the residence where Appellant was arrested, and allegedly purchased a quantity of crack cocaine from Appellant in exchange for the one hundred dollars. Tr. 194, l. 2 – 195, l. 14.

Lastly, Dubose testified about a third alleged undercover purchase. This incident took place on December 1, 2008 at approximately 4:43 pm. Dubose explained that he gave the confidential informant one hundred forty dollars and the informant called Appellant to arrange to purchase crack cocaine. The informant then allegedly drove to the residence where Appellant was arrested and purchased a quantity of crack cocaine from Appellant in exchange for the one hundred forty dollars. Tr. 195, l. 15 – 196, l. 18. Dubose claimed that each of the alleged undercover purchases took place at a different time during the day and that Appellant was at the residence each time. Tr. 196, ll. 14-24.

After Investigator Dubose's testimony in reply, defense counsel renewed his motion for a mistrial arguing, "It's our position that this reply testimony or rebuttal testimony was extremely prejudicial." The court responded, "I agree with you on that." Defense counsel further argued, "It is a plethora of hearsay. Not a whole lot of proof to it and we would just ask the court in defense of my client that we renew our position. We don't believe this opened the door and that obviously we feel that this is hearsay and it's extremely prejudicial, and obviously we'd ask the court to declare a mistrial in this matter." Tr. 200, l. 20 – 201, l. 4. The state admitted that the testimony was prejudicial, but argued that it was probative and that Appellant "opened the door when he said that he didn't live there eighty-five percent of the time." Tr. 201, ll. 7-15. The court ultimately denied Appellant's motion for a mistrial. Tr. 201, ll. 16-17.

After the guilty verdicts were announced, defense counsel again renewed the motion for a mistrial, which was subsequently denied by the judge. Tr. 249, l. 17 – 250, l. 25.

Discussion

The state's questioning of Appellant about distributions that allegedly took place in the months prior to Appellant's arrest at the residence where the state alleged Appellant lived and the later testimony of Investigator Dubose that a confidential informant allegedly purchased crack cocaine from Appellant at this residence was extremely prejudicial and denied Appellant a fair trial especially since Appellant was on trial for various drug offenses. Additionally, Appellant did not open the door to his pending distribution charges being admitted by denying he lived at the residence.

Rule 403, SCRE states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." The evidence that Appellant allegedly distributed crack cocaine at this residence on three prior occasions was not probative to prove Appellant lived at the residence. If anything, the evidence was probative to prove Appellant was at the residence on these various occasions. However, Appellant had already testified that he was often at the home during the day watching his son while his wife was at work. See Tr. 171, ll. 3-17. Because the testimony was not probative to prove Appellant lived at the residence, Appellant did not open the door to the evidence being admitted by denying that he lived at the home.

Furthermore, any probative value was substantially outweighed by the danger of unfair prejudice. See Boyd v. U.S., 142 U.S. 450, 458, (1892) (proof of earlier robberies "only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value").

Thus, the trial court erred in allowing the state to question Appellant about the alleged distributions and permitting Investigator Dubose to testify about the alleged undercover purchases in rebuttal. Based on this error, Appellant's convictions should be reversed and this case remanded to the Sumter County Court of General Sessions for a new trial.

3.

The court erred in denying Appellant's motion for a mistrial after the court admitted evidence that Appellant allegedly distributed crack cocaine on three prior occasions at the residence where Appellant was arrested and where the state alleged Appellant lived, since the evidence was unduly prejudicial and denied Appellant a fair trial.

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, 639 S.E.2d 160, 162 (SC App. 2006) (citing State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997) and State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999)). In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the mistrial was 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).

Specifically, the trial court is to consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. See State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

After considering these factors, it is evident that the court should have granted Appellant's motion for a mistrial. Both the trial judge and the state conceded at trial that the

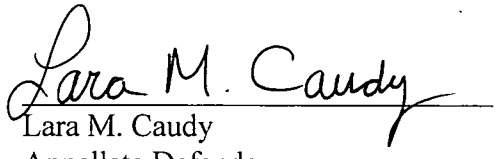
testimony was extremely prejudicial. See Tr. 200, ll. 21-23; see also Tr. 201, ll. 7-8. It was offered in an attempt to prove Appellant lived at the residence, but it was merely probative that Appellant was at the residence on those specific occasions. Additionally, Appellant was being tried for various drug offenses, specifically trafficking crack cocaine, manufacturing crack cocaine, and possessing with intent to distribute cocaine, and the evidence erroneously admitted was that Appellant allegedly distributed crack cocaine to a confidential informant at the residence on three occasions. See State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) (When "the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."). Furthermore, before admitting the evidence, Appellant had already testified that during this time period he took care of his son at the residence during the day while his wife was at work. Therefore, the jury had already heard evidence that Appellant was often at the residence during the day.

Therefore, the court abused its discretion in denying Appellant's motion for a mistrial. Consequently, Appellant's convictions should be reversed and this case remanded to the Sumter County Court of General Sessions for a new trial.

CONCLUSION

By reason of the foregoing arguments, Appellant's convictions should be reversed and this case remanded to the Sumter County Court of General Sessions for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of March, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEROY CLIFTON GIBBS,

APPELLANT

APPELLATE CASE NO. 2013-0001297

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True–billed indictments;
(2) Cover page of trial transcript dated June 3, 2013 (Supp. Tr.);
(3) Supp. Tr. 44-48;
(4) Cover page of trial transcript dated June 4-5, 2013;
(5) Tr. 7-8; Tr. 12-13; Tr. 21-92; Tr. 107-159; Tr. 162-201; Tr. 203-246; Tr. 249-250; Tr. 259.

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

March 10th, 2014

Lara M. Caudy

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEROY CLIFTON GIBBS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of March, 2014.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
~~this~~ 10th day of March, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.