STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Beaufort County
Hon. Carmen T. Mullen, Circuit Court Judge
Appellate Case Tracking No. 2014-001017

The State, Respondent,

v.

Eric Wright, Petitioner.

Opinion No. 2014-UP-091 (S.C. Ct. App. filed March 5, 2014)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals properly relied on the law of South Carolina to find the trial judge, who according to Petitioner was the most aggrieved party by the introduction of the allegedly improper evidence, did not err in denying Petitioner's motion for a mistrial.

II. The Court of Appeals properly affirmed the trial court's denial of Petitioner's Batson motion finding no pretext in the solicitor's explanation of her use of a peremptory strike.

STATEMENT OF THE CASE

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

ARGUMENT

I. The Court of Appeals properly relied on the law of South Carolina to find the trial judge, who according to Petitioner was the most aggrieved party by the introduction of the allegedly improper evidence, did not err in denying Petitioner's motion for a mistrial.

The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion for a mistrial. First, as Petitioner admits, the Court of Appeals properly relied on "black-letter principle" to affirm the trial court's denial of a motion for mistrial because the trial court issued a thorough and effective curative instruction and because Petitioner failed to demonstrate how he was prejudiced. He contends this Court should go behind the trial judge's discretion and reverse the denial of a mistrial because of the solicitor's "flagrant and deliberate violation of the trial judge's *in limine* ruling," when in reality, the trial judge was in the best position to use her discretion in deciding whether a curative instruction was sufficient or whether the drastic remedy of a mistrial was necessary. Further, the testimony was not inadmissible and, as a result, Appellant could not have been prejudiced by the jury hearing it. Finally, the testimony was merely cumulative to other un-objected to testimony in the record.

Prior to any testimony, Appellant's trial counsel sought to prohibit testimony from possible witnesses to the shooting that they heard the shooter called Bo, Appellant's nickname. (T.91-92; R. 61-62). The trial court stated:

> If they can ID him at the scene, and I don't know where these people were, then they can ID him through his photograph, they can ID him and say this is him. I would agree that <u>if they don't know his name is Bo and they can't look at him and say, that's Bo</u>, by their acknowledgement, they can't say it.

(T.92-93; R. 62-63) (emphasis added). The trial court's ruling only requires witnesses testify from personal knowledge, which is always the requirement. See e.g., Rule 602, SCRE. She did not rule that a witness testifying they know someone by their nickname instead of their real name was impermissible.

During her testimony, Alexus Green, a witness to the shooting, testified "I don't know his real name, but I know they call him Bo." Counsel objected and the trial court sustained the objection and issued a curative instruction. (T.158; R. 91). Counsel later moved for a mistrial. (T.158; 166-167; R. 91; 99-100).

Initially, whether the admission of the testimony was error or not, the trial court sustained Appellant's objection to the testimony and immediately issued a curative instruction for the jury. As the Court of Appeals properly noted, 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).

Also, the Court of Appeals properly applied the law of South Carolina finding: "At any rate, the trial court's explicit instruction to the jury to strike the question and strike Alexus' answer cured any possible error, and the prejudicial effect would have been minimal such that a mistrial would not have been warranted." "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. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) (noting a curative instruction to disregard the testimony is usually deemed to cure any alleged error); 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).

The trial court's ruling on Appellant's hearsay objection and the trial court's subsequent curative instruction provided:

> Your objection is sustained. Ma'am you can only say what you do know, what you know by your own independent knowledge. Ladies and Gentlemen, that last question you are to strike and also her answer wasn't appropriate. She can only testify as to what she knows.

(T.158; R. 91). The curative instruction more than sufficiently cured any possible prejudice from the testimony, even if it was hearsay. The trial court specifically instructed the jury Green's answer was not appropriate, and it was struck from the record. The jury is expected to follow the instructions given to it, and in this case the jury was to strike the question and answer.

Further, Petitioner maintains the solicitor's actions were such an affront to the trial court a mistrial is required. However, the trial court was in the perfect position to make such a ruling, and determined a mistrial was not necessary because there was no prejudice to Petitioner. As a result, this Court has stated 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). Additionally, even if the basis articulated by Petitioner is considered: "The granting of a mistrial for improper conduct of the prosecutor is largely discretionary with the trial court." State v. Craig, 267 S.C. 262, 266, 227 S.E.2d 306, 308 (1976). "This Court favors the exercise of the wide discretion of the circuit judge in determining the merits of such motion in each individual case." State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988); see also, Craig, 267 S.C. at 269, 227 S.E.2d at 309 ("This Court 'favors the exercise of a wise discretion of the circuit judge in determining the merits of such motion in each individual case.")(quoting State v. Singleton, 167 S.C. 543, 166 S.E. 725 (1932)).

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." State v. Patterson, 337 S.C. 215, 226, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) (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)).

Alexus Green's testimony in this case did not create the kind of prejudice sufficient to warrant a mistrial. Any prejudice was adequately removed by the curative

instruction. Further, as the Court of Appeals properly found the testimony was cumulative to Green's own testimony just prior to the objected to testimony. She specifically testified:

> They was - - I don't know what they were arguing over, but then we saw Bo got out the car, and pointed a gun, was like, "what you said", you know. He pointed the gun at Troy and shot twice.

(R.81) (emphasis added). This testimony by Green was admitted without any objection.[1] The testimony conveyed nearly identical information to the testimony surrounding the mistrial. She indicated the male in the vehicle, whom she referred to as Bo, got out of the car and shot twice at the victim. As a result, the denial of the mistrial is without error in light of the lack of prejudice from the allegedly improper testimony.

Additionally, her testimony, however, indicated there was only one male riding in the vehicle and it was the male in the vehicle who shot the victim. (T.163; R. 96). Her testimony indicated Petitioner was that male, when she identified him during the following colloquy:

> Q. And who else did you observe in the car?
> A. It was another young lady and - - **and him**, the man.

(R.87). The only logical reading of this testimony indicates she identified the defendant as the man observed in the car. Also, the male was later identified by multiple people as Appellant. (T.206; 318-320; R. 139; 215-217).

Further, any prejudice was minimal, at most, given the testimony by other witnesses identifying Appellant as the shooter. Troy Jinks, the victim, testified Appellant

[1] Petitioner admits the testimony was admitted without objection, but tries to excuse this by arguing counsel used a valid trial strategy to not object to the testimony, thereby not calling attention to it. As discussed, this testimony was more damaging than her later testimony merely identifying the shooter's nickname as Bo and certainly eliminated any prejudice from the allegedly improper testimony.

was the shooter, and he identified him by his name Eric as well as his nickname Bo. (T.215; R. 148). In court, Jinks identified Appellant as the person who shot him. (T.215; R. 148). He testified numerous times that he was certain of the identity of the shooter and had identified the shooter to law enforcement. (T.221; 229; 249; R. 154;162; 182). The victim testified he identified Appellant in a photo-lineup thereby heightening the reliability of his identification. (T.222; R. 155). Also, he indicated through his testimony Appellant was the only male in the vehicle along with three females, thereby supporting Green's testimony the male was the shooter. (T.209; 213; R. 142; 146). Additionally, Octavia Scott, one of the individuals riding in the vehicle with Appellant at the time of the shooting identified Appellant as the shooter and testified regarding his name and nickname. (T.315-316; R. 212-213). She identified Appellant in court as the shooter. (T.315; R. 212).

As a result, any prejudice resulting from the admission of the testimony was minor in light of the other witnesses identifying Appellant and supporting Green's testimony the male riding in the vehicle was the one who shot Jinks. The trial court, therefore, did not err in denying the motion for a mistrial even if the testimony was improper hearsay.

As an additional sustaining ground which was properly noted by the Court of Appeals, the State submits the testimony was not improper and the objection should not have been sustained by the trial court. Green's testimony was "I don't know his real name, but I know they call him Bo." Petitioner attempts to parse this statement to create hearsay when none actually exists. First, he indicates her statement "I don't know his real name" admits she does not know Petitioner. A clear reading indicates she only does

not know her real name, but says nothing about whether she knows him as a person. Her prior testimony specifically indicating Bo got out of the vehicle and shot the victim and directly referencing "him" as the man in the car seem to indicate she did have knowledge of Petitioner.

Next, Petitioner argues Green's statement "but I know they call him Bo" indicates she heard another unknown person say his nickname was Bo. In reality, a proper reading of the testimony in light of her remaining testimony seems to indicate it is just another way of saying she did not know Appellant's real name but knew him by his nickname, Bo. She was not testifying that the people on scene called him Bo, she was merely testifying that he is in general called Bo, meaning his nickname is Bo. As a result, it is not impermissible hearsay. See Rule 801(c), SCRE ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.).

A similar situation was addressed by the Supreme Court of Rhode Island in which two individuals testified to the nickname used by the defendant. The Supreme Court found:

> However, a multitude of courts have held that evidence about a person's nickname, in this context, does not constitute hearsay because the use of such a name does not rise to the level of an assertion. See United States v. Allen, 960 F.2d 1055, 1059 (C.A.D.C.1992) ("One virtually always learns a name—even one's own—by being told what it is. . . . Nevertheless, evidence as to names is commonly regarded as either not hearsay because it is not introduced to prove the truth of the matter asserted, . . . or so imbued with reliability because of the name's common usage as to make any objection frivolous."); United States v. Weeks, 919 F.2d 248, 251 (5th Cir.1990) (holding that a prison warden's testimony that guards and inmates used a nickname to refer to the defendant was merely a report of

> "non-assertive oral conduct and was therefore not hearsay"); Commonwealth v. Gabbidon, 398 Mass. 1, 494 N.E.2d 1317, 1320 (1986) (determining that witness's testimony about observing others call the defendant several nicknames did not constitute hearsay because it "was not admitted for the truth of any fact asserted outside of court"). We are persuaded by the logic of these holdings and concur with it.

State v. Johnson, 13 A.3d 1064 (R.I. 2011) (emphasis added).

The statement is admitted merely to explain the name by which she knows Appellant, no different than any witness testifying about someone's name or nickname. Accordingly, the denial of the mistrial was proper because the testimony was not inadmissible and should have been allowed to be considered by the jury. Therefore, the Court should find the Court of Appeals did not err in affirming the trial court's denial of the motion for a mistrial and should deny the Petition for Writ of Certiorari on this issue.

II. The Court of Appeals properly affirmed the trial court's denial of Petitioner's Batson motion finding no pretext in the solicitor's explanation of her use of a peremptory strike.

The Court of Appeals correctly found the State presented a gender-neutral explanation and Appellant was unable to demonstrate the reason was mere pretext. The State's reason demonstrated a legitimate difference between those individuals struck and the individual Petitioner alleges was similarly situated.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5 6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. On review, this Court is limited to determining whether the trial court abused its discretion. State v. Edwards, 384 S.C. 504, 682 S.E.2d 820, 822 (2009).

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court, through the Equal Protection clause, forbade the use of peremptory challenges to strike jurors because of their race. See, State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999). In J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994), the United States Supreme Court extended the protection by finding it unconstitutional to strike a juror on the basis of gender. J.E.B., 511 U.S. at 130-131.

In State v. Evins, this Court reiterated the procedure the trial court is to follow for a Batson[2] hearing:

> After a party objects to a jury strike, the proponent of the strike must offer a facially [gender] neutral explanation. Once the proponent states a reason that is [gender] neutral,

[2] While the Batson opinion referred only to strikes based on race, the term will be used throughout this Petition as it commonly is to also refer to strikes based on gender.

> the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another [gender] were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike.

State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007) (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); Haigler, 334 S.C. 623, 515 S.E.2d 88).

As this Court explained:

> In deciding whether the opponent of a strike has carried the burden of persuasion, a court must undertake a sensitive inquiry into the circumstantial and direct evidence of intent. A strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. Whether a party's proffered reason for exercising a peremptory strike is discriminatory must be determined by examining the totality of the facts and circumstances in the record.
>
> . . . .
>
> The trial court's findings regarding purposeful discrimination are accorded great deference and will be set aside on appeal only if clearly erroneous.

Haigler, 334 S.C. at 629-630, 515 S.E.2d at 91.

At trial, the State used its peremptory strikes to strike 2 females and 3 males. Appellant challenged the strikes of the males as discriminatory. The trial court held a hearing and the solicitor indicated she struck the males because they all had a criminal record when their background check was run. Appellant then indicated the first alternate, a female, had a notation on her background check and argued the State's reasoning was mere pretext.

Based on a totality of the circumstances, the trial court properly determined the State's use of its peremptory strikes was not discriminatory against men. A review of the

exhibits demonstrates those individuals struck have listed criminal histories, including destruction of property and cocaine abuse. (Court's Exhibits 2 and 3; R.453-455). The reports run on these individuals indicate the charges as well as the disposition of the charges.

On the other hand, the alternate's report which Appellant sought to use to show the strikes were mere pretext does not have listed criminal history. Instead, her report merely indicates: "The criminal history record is maintained and available from the following: California" (Court Exhibit 1; R. 450-451). There is no listing of a specific history, nor does the notation indicate any particular charges exist or the disposition of those charges. The charges could have been juvenile records which could not be accessed, or charges which have been expunged or for which a pardon has been received and could not be considered.

The trial court's determination that there is a distinction between the jurors struck and the first alternate was correct based on the totality of the circumstances. As the court found: "the printing of the Rap sheet showing actual specific charges is a difference." (T.57; R. 58). The Court of Appeals properly affirmed this finding by holding:

> Because the rap sheet on Juror 119 included no charges or disposition of charges, the solicitor interpreted it as including nothing to show an arrest, and the juror therefore having no record. Thus, the State provided a meaningful distinction between female Juror 119 and male Jurors 173 and 46.

Further, the overall use of strikes by the State, using two to strike females and three to strike males indicates it was not using its strikes discriminatorily. Finally, out of eight total males called to sit in the jury, the State struck three, Appellant struck two, and three were seated in the jury. (T.28-39; R. 29-40). As a result, the final composition

when compared to the number called and struck by each party reflects the strikes were not made in an intentionally discriminatory manner. Accordingly, the Court of Appeals properly affirmed the trial court's finding no Batson violation occurred and Appellant received a fair trial by his peers. This Court, therefore, should deny the Petition for Writ of Certiorari as to this issue.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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August 11, 2014

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served. This 11th day of August, 2014.

Sally Ellison

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