STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
FEB 06 2015
SC Court of Appeals

Appeal from Fairfield County
R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEREKEE JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-000920

INITIAL BRIEF OF APPELLANT

R. MORRISON M. PAYNE

PO Box 315
Walterboro, SC 29488
(843)549-1060

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 3

ARGUMENT

I. BECAUSE A JUROR SAW APPELLANT IN SHACKLES, THE COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR A MISTRIAL 5

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Estelle v. Williams, 425 U.S. 501 (1976) 5

Irvin v. Dowd, 366 U.S. 717 (1961) 5

State v. Baum, 355 S.C. 209, 584 S.E.2d 419 (Ct. App. 2003) 5

State v. Cameron, 311 S.C. 204, 428 S.E.2d 10 (Ct.App.1993) 5

U.S. v. Pina, 844 F.2d 1 (1st Cir. 1988) 6

U.S. v. Waldon, 206 F.3d 597 (6th Cir. 1999) 5

OTHER AUTHORITIES

S.C. Const. art I, §§ 3 & 14 5

STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN FAILING TO GRANT DEFENDANT A MISTRIAL AFTER A JUROR SAW HIM IN SHACKLES?

STATEMENT OF THE CASE

Appellant Derekee Johnson was indicted for the murder of Bobby "Clyde" McCloud in May 2012. He also was indicted for possession of a firearm during the commission of a violent crime and possession of a firearm by a person convicted of a violent crime. The matter was tried by a jury from April 14 to April 21, 2014 and Johnson was convicted. He was sentenced to life without possibility of parole. Appellant served his notice of appeal on April 23, 2014 and filed on April 28, 2014.

STATEMENT OF FACTS

Appellant Derekee Johnson was tried under indictments for murder, possession of a firearm during the commission of a violent crime and possession of a firearm by a person convicted of a violent crime. (Tr. p. 5, ll. 5-10) Although witness accounts varied, the basic facts were that Johnson had a run-in with Carl McDaniel, a close friend of the victim and a purported member of the Cripps, several days before the victim (McCloud) was killed. (Tr. p. 783, ll. 3-25, p. 784, ll. 1-25) Johnson was worried that there may be a retaliation because of McDaniel's alleged gang affiliation. (Tr. p. 785, ll. 3-10) On the day of McCloud's death, Johnson and McCloud ended up in the backyard at the same house. (Tr. p. 787, ll. 20-23) There was some exchange of words to the effect that McDaniel wanted to talk to Johnson and Johnson took those words as a threat. (Tr. p. 790, ll. 1-25, p. 791, ll. 1-7) The parties then left separately. Later that day, Johnson went to the home of Rick James and told James

that McCloud was talking about shooting him. Johnson stated that he was going to try to talk to McCloud but when he stepped outside of James' home he saw another acquaintance, Taz Bouknight. (Tr. p. 793, ll. 2-7, 25, p. 794, l. 1) While he was talking to Bouknight, he saw McCloud behind a nearby abandoned house with a gun. Johnson went back inside James' house to ask for a ride out of the area. Johnson and James then exited the house and went to James' car. When Johnson tried the car door, it was locked. At that time, McCloud came from behind the abandoned house and threatened Johnson. (Tr. p. 795, ll. 7-25, p. 796, ll. 1-22) As Johnson and McCloud were exchanging words, McCloud pulled a gun from his back pocket, cocked it and pointed it at Johnson. Johnson then pulled a gun and began to fire. At the same time, Johnson heard shots coming from behind McCloud and recognized the shooter as another alleged gang member, Quinton Adams. He stated that Adams was firing at him and that McCloud was caught in the crossfire and killed. (Tr. p. 797, ll. 24-25, p. 799, ll. 1-25, p. 800, ll. 1-25, p. 801, ll. 1-11)

Approximately four days into the trial, Appellant's counsel advised the trial court that a juror saw Appellant Johnson with his hands and feet in shackles coming up the stairs into the courtroom. (Tr. p. 730, ll. 18-23) Johnson asked the court to declare a mistrial, which the court denied. (Tr. p. 733, ll. 6-10) Johnson advised the court that he did not wish to have a curative instruction on the grounds that he did not want to make the whole jury panel aware that defendant was restrained if only one juror saw defendant in this manner. (Tr. p. 730, ll. 23-25; p. 731, l. 1; p. 733, ll. 11-21)

ARGUMENT

I. BECAUSE A JUROR SAW APPELLANT IN SHACKLES, THE COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR A MISTRIAL.

The grounds for a mistrial exist upon a showing of manifest necessity. State v. Baum, 355 S.C. 209, 214, 584 S.E.2d 419 (Ct. App. 2003)(*citing* State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983)). "Manifest necessity" must be determined in light of the particular problem the trial judge faces. Baum at 214 (*citing* Arizona v. Washington, 434 U.S. 497, 505-06 (1978)). Furthermore, the term "necessity" is not to be taken literally but requires only a "high degree" of necessity for the trial court to conclude that under the circumstances presented a mistrial is appropriate. Id. Whether a mistrial is required depends upon the particular facts of a case. Id. at 215 (*citing* State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 718 (Ct. App. 2000)).

A defendant is guaranteed a fair trial by "impartial and indifferent jurors" under the Sixth and Fourteenth Amendments to the United States Constitution. Estelle v. Williams, 425 U.S. 501 (1976); Irvin v. Dowd, 366 U.S. 717 (1961); *see also* S.C. Const. art I, §§ 3 & 14. In order to protect these rights, the jury's verdict must be rendered free from any outside influences. State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.App.1993).

Although a defendant who seeks a mistrial when a juror or jurors have seen him handcuffed and in shackles outside the courtroom must show actual prejudice, such a determination requires a hearing or at least questioning of the jurors as to whether seeing the defendant in this manner destroys the presumption of innocence and affects the juror's ability to decide the case on the evidence. *See, e.g.*, U.S. v. Waldon, 206 F.3d 597

(6th Cir. 1999), in which the jury foreman saw the defendant in shackles being placed into a police car just before the verdict was to be read. The foreman was with another juror at the time. The trial court questioned the foreman and the other juror, separately, asking such questions as whether seeing the defendant in restraints affected their decision in any way. It was only after this questioning that the court found that a mistrial would not be appropriate. *See also*, U.S. v. Pina, 844 F.2d 1 (1st Cir. 1988), in which three jurors who saw the defendant in shackles were questioned individually by the court. Each juror stated to the court that they were able to remain unbiased after the encounter and the court directed that they were not to discuss the matter with the other jurors.

Appellant advised the trial court that a juror had seen him coming up the stairs while shackled at the hands and feet and he moved the court to declare a mistrial. (Tr. p. 730, ll. 18-23) Without a hearing on the motion or questioning the juror, the court denied the motion but offered to give a curative instruction. (Tr. p. 733, ll. 6-10) Not wanting to taint the jurors who had not seen him shackled, Johnson declined the court's offer of a curative instruction. (Tr. p. 730, ll. 23-25; p. 731, l. 1; p. 733, ll. 11-21) The court's denial of Appellant's motion for a mistrial under these circumstances denied him a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons stated, this Court should reverse Appellant's conviction.

Respectfully submitted,

R. MORRISON M. PAYNE

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 6th day of February, 2015.