STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFREY S. EVANS,

PETITIONER

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred in affirming the trial court's denial of petitioner's motion for a mistrial after two prosecution witnesses referred to petitioner as the robber which was outside the scope of evidence because no witness had identified petitioner as the robber?

STATEMENT

On August 28, 2007, the Anderson County Grand Jury indicted Jeffrey Scott Evans on the charges of armed robbery (AR) and possession of a knife during the commission of a violent crime. On August 4-5, 2008, Evans proceeded to trial before the Honorable Alexander S. Macaulay and a jury. The jury returned verdicts of guilty as indicted. Judge Macaulay sentenced Evans to life without the possibility of parole (LWOP) as required by S.C. Code Section 17-25-45. Evans had prior convictions for burglary and armed robbery. ROA. 49, ll. 12 – 25; ROA. 50, ll. 1 – 24. Evans' attorney filed a notice of appeal. The Court of Appeals affirmed the trial court's rulings in State v. Evans, Op. No. 2010-UP-464 (filed October 25, 2010). App. 1 – 2. Appellate counsel filed petition for rehearing on November 9, 2010. The Court of Appeals issued an Order on November 19, 2010 denying the petition for rehearing. App. 18. A petition for a writ of certiorari to the Court of Appeals was filed September 23, 2010. The Supreme Court granted the petition for writ of certiorari on December 1, 2011. This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in affirming the trial court's denial of petitioner's motion for a mistrial after two prosecution witnesses referred to petitioner as the robber which was outside the scope of evidence because no witness had identified petitioner as the robber.

On May 24, 2007, Paula Ayers was working at the Goodwill Store on South Main Street in Anderson as the cashier. Several customers were still in the store as it was near closing time. As she was checking out a customer, a man whom she could not identify put a knife to her side and demanded the money from the cash register. The man then ran from the store with the money. ROA. 14, ll. 7 – 23; ROA. 15, ll. 4 – 25; ROA. 16, ll. 1 – 25; ROA. 17, ll. 1 – 25; ROA. 22, ll. 16 – 25; ROA. 23, ll. 1 – 18.

Kevin Matheson, investigator for the Sheriff's Department, was assigned to this case. He obtained information through other investigators that the robber's name was "Scott" and that he was at the Sunrise Motel. He also had a partial tag number for the car the robber was driving from a witness. As result of the investigation and looking at the surveillance video from the store, he focused on Jeffrey Scott Evans. ROA. 33, ll. 4 – 18; ROA. 34, ll. 1 – 25; ROA. 35, ll. 1 – 25; ROA. 36, ll. 1 – 25; ROA. 37, ll. 1 – 25; ROA. 38, ll. 1 – 20.

Evans was arrested at the home where he was staying. ROA. 39, ll. 9 – 25; ROA. 40, ll. When he was questioned by Investigator Matheson, Evans gave a statement admitting the robbery. ROA. 41, ll. 14 – 25; ROA. 42, ll. 1 – 25; ROA. 43, ll. 1 – 25; ROA. 44, ll. 1 – 25. During the pretrial hearing, Evans testified that he only gave a statement because Investigator Matheson told him that the most time he would probably get would be ten years. Evans said he had been up six days smoking crack and ice at the time of the statement. ROA. 1, ll. 1 – 25; ROA. 2, ll. 1 – 25; ROA. 3, ll. 1 – 25.

When Paula Ayers testified, she said in response to the state's questions:

> **Q.** Okay. And so the register, in fact, came open?
>
> **A.** Yes, it did.
>
> **Q.** All right. So then what was the next thing you remember happening?
>
> **A.** Okay. I was fixing to give the lady her change, and the defendant.

ROA. 18, ll. 2 – 7.

At that point, defense counsel immediately objected and asked to consider an issue outside the presence of the jury. ROA. 18, ll. 7 – 25. Counsel argued to the court that he had been informed by the state that none of the witnesses could identify Evans as the robber. Based on that, counsel did not request a hearing to determine if the identification was reliable. He argued that the witness had just identified Evans as the robber by stating that the "defendant" had robbed the cash register. ROA. 19, ll. 1 – 6.

The state responded that the witness, Ms. Ayers, had not been able to identify Evans as the robber and could not pick him out of a photo line-up. That was the reason there was no hearing. She could give a description. ROA. 19, ll. 7 – 15.

The judge instructed the state to rehabilitate the witness since the witness was not able to identify but would leave it the solicitor as to how to do it. The judge said he would give a curative instruction if he felt it was necessary. ROA. 19, ll. 19 – 25; ROA. 20, ll. 1 – 14. The solicitor told the judge that none of the witnesses from the Goodwill Store could identify Evans as the robber. ROA. 20, ll. 10 – 23. The judge told the state to make it clear in the testimony that the witness could not identify the robber. He again said he might have to issue a curative instruction. ROA. 20, ll. 24- 25; ROA. 21, ll. 1 – 1 – 7.

Defense counsel then made a motion for a mistrial because he believed that the identification might have an effect on the jury. He explained that the state said in their opening statement that no witness could identify Evans as the robber and then the very first State's witness identified him. Counsel asked for a new trial. The judge denied his motion for the time because the judge said it would depend on if the state "put the testimony in the proper perspective." ROA. 21, ll. 9 – 25.

The state was able to get Paula Ayers to testify that she was not able to pick out from a photo line-up "or otherwise" the person who committed this crime. ROA. 22, ll. 8 – 14.

The second witness, Pat French, was working at the Goodwill Store at the time of the incident. When she testified, she said:

> **Q.** So when you got to Register one, what happened if anything?
>
> **A.** I was gonna talk to the cashier and help her, and I looked up and I seen the defendant running out.

Supp. ROA. 3, ll. 1 – 25; Supp. ROA. 4, ll. 1 – 17.

Defense counsel again objected and moved for a mistrial again. The court instructed the state to take a break and talk with future witnesses to say "they saw someone." He instructed her to tell them what they could testify to and what they could not testify to. The judge denied defense counsel's motion for a mistrial. However, the judge stated that he was taking it under advisement "because as each of the testimony begins, it becomes compounded" and "at some point the pounds will have greater weight then deserving". Supp. ROA. 4, ll. 18 – 25; Supp. ROA. 5, ll. 1 – 25; Supp. ROA. 6, ll. 1 – 24.

The judge warned the state that if the problem continued, he would have to consider whether the prejudice could be overcome by cross-examination. He said that court would proceed subject to

defense counsel's prior motions and his rulings. Supp. ROA. 7, ll. 3 – 18. The judge did not give a curative instruction to the jury either time the motion for a mistrial was made. ROA. 22, ll. 1 – 25: Supp. ROA. 7, ll. 1 – 25; ROA. 25, ll. 1 – 25.

The other two witnesses, Barbara Cooley and Suzanne Shirley, testified that a "gentleman" took money from the cash register and Ms. Shirley said "somebody" did it. Both stated they could not pick out the robber from a photo line-up. ROA. 26, ll. 1 – 25; ROA. 27, ll. 18 – 25; ROA. 28, ll. 1 – 25; ROA. 29, ll. 1 – 8; ROA. 30, ll. 4 – 25; ROA. 31, ll. 1 – 25; ROA. 32, ll. 15.

The decision to grant or deny a motion for 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. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct.App. 1999); State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455(Ct. App. 2005). The granting of the motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011); State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359 (2005); State v. Patterson, 337 S.C. 251, 522 S.E.2d 845 (Ct. App.1999); State v. Edwards, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007).

When an objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks. State v. Primus, 341 S.C. 592, 535 S.E.2d 152 (Ct.App.2000) citing State v. Harry, 321 S.C. 273, 468 S.E.2d 76 (Ct.App.1996).

In order to receive a mistrial, a defendant must show error and resulting prejudice. State v. Garris, 394 S.C. 336, 714 S.E.2d 888 (Ct. App. 2011); State v. Culbreath, *supra.*

In State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), the Supreme Court reversed the trial court and remanded the case because the trial court should have issued a curative instruction where the solicitor referred to the defendant's failure to call witnesses. The Supreme Court ruled this was necessary although the solicitor made only one reference to defendant's failure to call witnesses.

In Evans' case, the state allowed two witnesses to say the "defendant" committed the robbery which they did not know was so. The trial court should have granted a mistrial or at least issued a curative instruction after the second witness gave inadmissible testimony. The trial court did not do either.

The trial court certainly should have granted the mistrial after the second witness identified Evans as the robber by saying the "defendant". The judge did not give a curative instruction although he admitted the testimony was prejudicial. He used the term "compounded with each testimony" and was considering granting the mistrial motion as indicated by the fact he said he was taking it under advisement. Supp. ROA. 6, ll. 3 – 5.

The Court of Appeals held that whether to grant a mistrial was a matter within the trial court's discretion, would not be disturbed on appeal absent an abuse of discretion relying on State v. Culbreath, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008). App.2. The Court of Appeals' treatment was "summary" and without any analysis.

The Court of Appeals misapprehended the issue as Evans was prejudiced because the testimony of two primary eyewitnesses stated "the defendant" was the robber, when they did not know whether this was so. The judge commented on that when he said he would have to consider if the prejudice could be overcome by cross-examination. Supp. ROA. 7, ll. 3 – 10.

The state should have instructed the future witnesses on what they could testify to or not immediately after the first witness made the error of referring to Evans as the robber. The judge made it clear to her at that point that it was not admissible testimony.

The prejudice was sufficient to require the court to grant a mistrial and select a new jury. There was a reasonable probability that the idea that Evans was the robber was in the minds of the jurors when the first two eyewitnesses identified him by saying the defendant did it. The judge believed the statements were prejudicial when he admitted they were. Supp. ROA. 6, ll. 3 – 5.

In State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010), the Supreme Court held that the denial of a mistrial motion following improper testimony by a state's witness was a matter resting in the trial court's sound discretion, and would be overturned on appeal only where there is an abuse of discretion amounting to an error of law. The Supreme Court reversed this case where the investigator's testimony in this murder prosecution, that he arrested the defendant based in part on a conversation with the co-defendant, which told the jury that he co-defendant's unredacted confession named the defendant as a participant, violated the hearsay rule.

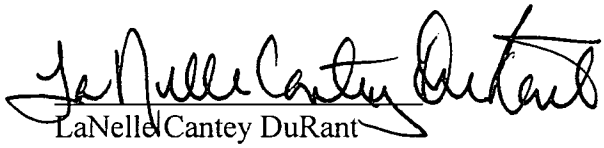
In State v. Garris, *supra,* the Court of Appeals held that South Carolina courts favor the trial court's exercise of wide discretion in determining the merits of a motion for a mistrial in each individual case; this, the appellate court will intervene and grant a new trial only in cases when an abuse of discretion results in prejudice tot eh defendant.

Evans suffered irreparable prejudice when the trial judge did not grant a mistrial and did not give a curative instruction. The first two eyewitnesses basically testified that the "defendant" did the robbery. No one had identified Evans as the robber. Justice requires a new trial for Evans.

CONCLUSION

Based on the above reasons, the convictions and sentences of the trial court should be reversed and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of April, 2012

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CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on David Spencer, Esquire, and Jeffrey Evans, this 4th day of April, 2012.

Kathrine D. Hudgins for
LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of April , 2012.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: December 4, 2017.