

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

MAR 30 2015

Appeal from Charleston County **SC Court of Appeals**
The Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2015-UP-098 (S.C. Ct. App. filed 3/4/15)
Appellate Case No. 2012-213734

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES LAMONT MOORE,

APPELLANT.

RETURN TO PETITION FOR REHEARING

On March 4, 2015, this Court affirmed Appellant's conviction for distribution of crack cocaine. Appellant submitted a Petition for Rehearing on March 19, 2015, arguing that this Court overlooked or misapprehended several points. To the contrary, this Court properly affirmed Appellant's conviction for the reasons discussed below.

I.

In his Petition for Rehearing, Appellant contends that this Court overlooked the cases of German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) and State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992), which he contends are "guiding precedent" applicable to his appeal. However, inasmuch as these cases are totally distinguishable from Appellant's case, it was unnecessary for this Court to discuss them in its opinion. his argument. In German, the defendant was tried for possession with intent to distribute

crack cocaine. German, 325 S.C. at 26, 478 S.E.2d at 688. During opening argument, the solicitor stated that one of the officers involved in the defendant's arrest had received several tips that the defendant was distributing or selling crack cocaine. Id. On appeal of the post-conviction relief judge's denial of relief, our Supreme Court held that trial counsel was ineffective for failing to object to the solicitor's remarks because the statements specifically referred to the defendant and were objectionable as improper comments on the defendant's character. Id. at 27-28, 478 S.E.2d at 688-89. In Bostick, an officer testified that the police had "intelligence" that the defendant "had been selling crack cocaine from the store." Bostick, 307 S.C. at 227, 414 S.E.2d at 176. This Court held that the officer's testimony was improper evidence of prior bad acts and was clearly prejudicial to the defendant, particularly where his defense to the charge for which he was on trial was that the confidential informant had confused him with someone else. Id. at 226-30, 414 S.E.2d at 176-77.

The statements in German and Bostick clearly and expressly referred to prior bad acts of the defendant – specifically, prior drug activity – and therefore the statements were improper. In contrast, in Appellant's case, the statements in the video of the drug transaction did not clearly or expressly refer to any prior bad acts or prior drug activity. The complained-of references in the video were simply too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b). Appellant was never directly linked to any prior drug transactions and the State never offered any substantive evidence regarding any prior drug activity involving Appellant. Accordingly, there was no reversible error. See State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (recognizing appellant's possible drug dealing was merely suggested and no testimony

was presented concerning such behavior); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (noting that references to defendant's prior crimes in arresting officer's testimony were extremely vague); State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 (1961) (“We do not think that the testimony referred to creates the prejudicial inference asserted by the appellant,” in case where defendant asserted that a vague reference to his going to the probation office suggested he was convicted of a prior crime); 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); State v. Wiley, 387 S.C. 490, 495-97, 692 S.E.2d 560, 563-64 (Ct. App. 2010) (concluding that the prosecutor’s comment regarding the defendant’s warrant was merely a vague reference to his prior criminal record that was not sufficiently prejudicial to warrant a mistrial; further, even if the jury inferred that the defendant committed another crime, the defendant was not prejudiced because the State never attempted to prove he was convicted of some other crime); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (determining law enforcement agent's isolated testimony regarding fingerprint cards was not so prejudicial to defendant as to warrant mistrial because it was questionable whether jury drew connection between fingerprint card and defendant's prior criminal activity); see also State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) (“A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in ‘exceptional circumstances.’ We review a trial court's decision regarding Rule 403 pursuant to the

abuse of discretion standard and are obligated to give great deference to the trial court's judgment. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” (citations omitted).

Since the complained-of statements in the video did not expressly refer to any prior bad acts of Appellant, this Court properly concluded that the admission of the video did not violate Rule 404(b), SCRE, or Rule 403, SCRE.¹ This Court also properly concluded that Appellant suffered no prejudice even assuming some type of error occurred. “When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.” State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Thus, when overwhelming evidence of guilt has been presented, trial error will be harmless. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988).

In this case, a black male was captured on video engaging in a drug transaction with the confidential informant. (See State’s Exhibit # 3, DVD, at 9:09-11:40). Appellant’s counsel stipulated at trial that the confidential informant turned over crack cocaine to police following the drug transaction. (R. p. 114, lines 2-21; p. 157-58). The confidential informant, who had been used in hundreds of successful operations over the

¹ In his Petition for Rehearing, Appellant complains repeatedly about the lead detective’s testimony “interpreting” portions of the video. (See Petition for Rehearing, p. 3-4). Note, however, that there was no objection to this testimony below. (See R. p. 139).

years and who had been thoroughly searched before and after this drug transaction, described the appearance of the black male to officers, including the fact that the black male was wearing a blue cast on his right arm. (See State's Exhibit # 3, DVD; R. p. 67-68; p. 83-84; p. 87; p. 130-32). One of the detectives, who had known Appellant for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Appellant as the black male wearing the cast. (R. p. 72; p. 109-10). Two other officers then obtained Appellant's driver's license photograph, compared it to the drug dealer's face in the video, and concluded that Appellant was the drug dealer. (R. p. 73, lines 10-16; p. 142, line 20 – p. 143, line 4).

The evidence described above constituted overwhelming evidence of Appellant's guilt. Therefore, any error with respect to the admission of the challenged statements in the video was harmless beyond a reasonable doubt. This Court properly affirmed Appellant's conviction and sentence for distribution of crack cocaine.

CONCLUSION

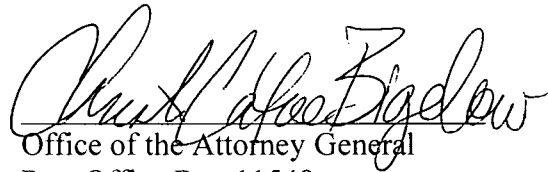
This Court did not misapprehend or overlook any issues of fact or law. Therefore, Appellant's Petition for Rehearing should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA CATOE BIGELOW
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit



Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

March 30, 2015

RECEIVED

MAR 30 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2015-UP-098 (S.C. Ct. App. filed 3/4/15)
Appellate Case No. 2012-213734

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES LAMONT MOORE,

APPELLANT.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of Respondent's **Return to Petition for Rehearing** in the above-referenced matter has been served upon **Brandon S. Smith**, Nelson, Mullins, Riley & Scarborough, LLP, Post Office Box 11070, Columbia, SC 29211-1070, and **Robert M. Dudek**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **30th** day of **March, 2015**.



CHRISTINA CATOE BIGELOW
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

March 30, 2015

VIA HAND-DELIVERY

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. James Lamont Moore
Appellate Case No. 2012-213734

Dear Ms. Kitchings:

Enclosed please find the State's **Return to Petition for Rehearing** in the above-referenced matter, along with **Proof of Service** of the same.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina Catoe Bigelow
Assistant Attorney General
S.C. Bar No. 73562

cc: Brandon S. Smith, Esquire
Nelson, Mullins, Riley & Scarborough LLP
Post Office Box 11070
Charleston, SC 29211-1070

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

RECEIVED
MAR 30 2015
SC Court of Appeals