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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYREL R. COLLINS,

APPELLANT

APPELLATE CASE # 2014-000216

FINAL BRIEF OF APPELLANT

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II. Was Appellant's second trial barred by double jeopardy where the grant of the mistrial during defense counsel's opening statement at the first trial was not dictated by manifest necessity or the ends of public justice after consideration of all the facts and circumstances?

STATEMENT OF THE CASE

During its September 2012 term, a Charleston County grand jury indicted Appellant for murder (2012-GS-10-5449) and possession of a firearm during the commission of a violent crime (2012-GS-10-5452). R. 380; R. 383. On September 9, 2013, the state, represented by Stephanie B. Linder and Gregory Voigt, called the case for trial before the Honorable J.C. Nicholson, Jr. and a jury. Jason T. King and Luke J. Malloy, III represented Appellant. R. 1. During the course of opening statements, Judge Nicholson granted the state's motion for a mistrial. R. 35, line 11.

The state, represented by Stephanie B. Linder and Gregory Voigt, called the case for a second trial before the Honorable Roger M. Young, Sr. and a jury on January 6, 2014. Jason T. King and Luke J. Malloy, III, represented Appellant. R. 36. The jury found Appellant guilty as charged. R. 368, lines 11-16. Judge Young sentenced Appellant to life imprisonment without the possibility of parole for the murder conviction. R. 369, line 21; R. 382. Judge Young did not impose a sentence on the firearm charge because he had sentenced Appellant to life without parole on the murder charge. R. 369, lines 22-23; R. 382.

On January 16, 2014, Appellant moved Judge Young to reconsider his sentence. One basis of the motion was the absence of Appellant's family during the sentencing proceeding. Due to their absence, they were not able to speak on his behalf in mitigation of sentencing. The second basis for the motion was the negative publicity surrounding the trial due to the notorious reputation of the deceased and the arrest of Appellant's brother for intimidation of a witness during the trial. R. 375. The state responded on

January 17, 2014. R. 377. By an order filed on January 24, 2014, Judge Young denied the request for reconsideration. R. 379.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On October 27, 2011, Solomon Chisolm was shot on the East Side of Charleston. Chisolm and three others were playing cards on bleachers in the park. R. 144, line 7 – R. 145, line 24. Raymond Clement, one of the card players and Chisolm's brother, claimed Appellant shot Chisolm. R. 148, lines 15 – 21. Clement ran away after the shots were fired. R. 148, lines 22 – 24. Clement claimed the shooter, who was brown-skinned, tall, and slim, was wearing a black T-shirt, blue jeans, and a shirt over his head. R. 149, lines 14 – 19. Clement further claimed that he was shot in the leg during the incident. R. 149, lines 20 – 22.[1] Clement claimed that while running away, he saw Appellant, without anything covering his face, get into a car and ride away. R. 150, lines 3 – 16. Thereafter, Clement returned to the park and to the deceased's body. R. 150, lines 17 – 21.

Initially, Clement did not speak to the police, despite the presence of many officers at the park. R. 151, lines 1 – 15. The following day, Clement saw police at Appellant's mother's home. R. 153, lines 19 – 25. The police approached Clement and questioned him about the shooting. R. 154, lines 1 – 8. Still, Clement did not tell the police that Appellant was the shooter. According to Clement, "the East Side is known, you know, like you tell on somebody, you cooperate with the police, there's going to be harm for you and your family or whatever. So I didn't want to get involved at first." R. 154, lines 12 – 19.[2]

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[1] The initial officer on the scene, who interviewed Clement, did not notice any kind of wound to Clement's leg. R. 94, lines 4-9.

[2] However, Clement had been an informant for local and federal law enforcement officers for several years. His information had resulted in the arrests and convictions of "a lot of people." R. 167, lines 11 – 24; R. 169, line 10 – R. 170, line 11. At the time of the trial, Clement had a pending charge, reckless homicide, with the Ninth Circuit Solicitor's Office. R. 167, lines 1 – 3; R. 170, lines 12 – 19.

After Clement gave a statement to police claiming Appellant was the shooter, he recanted in a subsequent written statement. R. 160, line 1 – R. 161, line 14.

On September 9, 2013, the solicitor delivered his opening statement to the jury in Appellant's first trial. During his opening, the solicitor discussed the history of the area where the alleged murder occurred. He explained he wanted to give the jury "some perspective on what we face in this particular community." R. 15, lines 20-21. He began by discussing the plans of Henry Laurens, "a great South Carolina patriot," for the area in the 1760s. R. 15, lines 22-24. According to the solicitor, the area contained "the largest concentration of freed slaves in Charleston" after the Civil War. R. 16, lines 8-14. Thereafter, the area "became a working-class neighborhood." R. 16, lines 15-19. He then described the effects of "cruelty of Jim Crow, segregation, [and] hard economic times" on the East Side. R. 17, line 13 – R. 18, line 4. He claimed "[t]he East Side became a tough place, tough place to raise a family, tough place to do business, tough place to do police work." R. 18, lines 4-6.

The solicitor promised the jury a "flavor of the East Side" during the trial: "In all of our Charleston neighborhoods, this was perhaps one of the most lawless. This has the highest incidence of illiteracy, highest unemployment rate, fewest college degrees. ... And the problem with lawlessness is that it breeds lawlessness." R. 18, lines 16-22. Due to what the solicitor described as the "lawlessness" of the East Side, the jurors would hear "substantially less" evidence in this case than in others. In the East Side, "[t]here's a cultural bias against working with the police for any reason. There's genuine fear in the streets for cooperating with the police for any reason." This fear and cultural bias

"shape[d]" how the solicitor had "to tell this story to [the jury], how the evidence [he got] to present and what the witnesses [said]." R. 18, line 23 – R. 19, line 8.

According to the solicitor, on the East Side, "[i]t's real ... and it's palpable." Here, "people don't tell their stories and people count on people not telling their stories and not explaining things and not seeing what they saw. This was a lawless area." R. 19, lines 9-14. He provoked the jurors with images of Wild Bill and warned against allowing lawlessness: "[W]e can't allow lawlessness. We can't allow our streets to be this way." R. 19, lines 15-22.

The solicitor went to great pains to tell the jury that the state did not have to prove motive in the case. Although the solicitor had an idea of motive, he was not required to prove "the why." He warned the jury that this may not be satisfactory to the jurors, but the state was not required to prove motive. R. 20, line 19 – R. 21, line 6.[3]

Then, defense counsel began his opening statement: "Good morning. The solicitor talked about the East Side. This is the East Side, the common area. And Solomon Chisolm was legendary in this area as a killer." R. 22, lines 19-22. The solicitor immediately objected, and the judge excused the jury to consider the arguments. R. 22, line 23 – R. 23, line 17. The solicitor argued the mistrial motion was "because he's now rung a bell that we can't unring." He further argued it was "designed to be improper," "designed to come out before an objection [could] be made," "designed to be heard so it can't be unheard." Thus, he argued, "there's no curative instruction that fixes it." R. 24, lines 4-13; see also R. 24, line 25 – R. 25, line 1. He noted that the deceased

[3] The solicitor's opening statement in the second trial was almost identical to his opening during the first trial. R. 71, line 19 – R. 79, line 14.

was never convicted of any homicide, but agreed that was not the same as not being a killer. The solicitor was incensed that defense counsel had made the remark when he had "no burden to prove anything, no obligation to prove anything." He accused defense counsel of "drop[ping] a bomb," "slinging mud and trying to prejudice" the jury. Mistrial R. 102, lines 14-24. The prosecutor admitted the evidence of the deceased's violent history would be admissible during the trial, but he took umbrage with defense counsel mentioning it during his opening statement. R. 27, line 19 – R. 28, line 1.

The trial judge determined that telling the jury that "he's a legendary killer is totally improper." R. 25, lines 6-10. When the judge inquired how the opening related to the deceased's reputation for violence, defense counsel explained that his remarks went directly to the deceased's reputation in the community for having killed a dozen people. R. 25, line 11 – R. 26, line 8. According to defense counsel, the "point" was that due to his reputation as a legendary killer, "[a]ny number of people could have wanted to kill him." R. 26, lines 12-15; R. 29, line 17 – R. 30, line 4. Further, defense counsel explained the evidence responded directly to the solicitor's opening statement about motive. R. 26, lines 16-19; R. 33, line 24 – R. 34, line 3. Defense counsel noted a recent newspaper article chronicling the "legend" surrounding the deceased due to his history of violent crimes, including three murder charges in less than four months. R. 27, lines 7-18.

The judge found defense counsel's statement was "very clearly improper in opening statement"; however, he noted "[i]t would have been perfectly proper in closing arguments." R. 30, line 22 – R. 31, line 10. The judge also determined that defense counsel could prove the deceased's reputation in the community throughout the course of

the trial; however, where he had "a problem" was "in making that argument in opening statements." R. 31, line 24 – R. 32, line 1. According to the judge, defense could had "to offer some foundation before [he could] just stand up there and say, hey, he's a legendary killer." He then analogized the situation to "ask[ing] some woman is she a prostitute if you don't have any basis know that she's a prostitute." Thereafter, he granted the state's motion for a mistrial. R. 35, lines 3-11.

When the state called the case for a second trial on January 6, 2014, Appellant moved to bar his prosecution based on double jeopardy. R. 37, line 1. Defense counsel noted the solicitor's opening statement discussed the high crime rate in the East Side during the first trial. R. 52, lines 20-23. Further, defense counsel argued the mistrial was "improperly granted and not dictated by manifest necessity." He explained that a "curative instruction could have been given" and that nothing he said was evidence. R. 53, lines 2-8.

The solicitor argued that defense counsel failed to object to the granting of the mistrial motion. Additionally, he argued the defense acquiesced. R. 53, line 15 – R. 55, line 9. When questioned by the judge regarding the clear evidence in the record that defense counsel argued against the motion, the solicitor pontificated:

> I've done this from both sides. And I taught myself to protect the record. And objecting on the record, especially in mistrials, is how we get the ball rolling. It's how we keep the record intact for our client. It's not hard to do. It's not a magic formula. But there are magic words. And just – – like I said, the essence of that transcript argument is not an objection to the granting of the mistrial. Is an explanation as to why he shouldn't be held in contempt and why what he did was not a purposeful act, why he thought he could do it, despite the fact that he could not.

R. 55, line 19 – R. 56, line 4. The solicitor repeated his argument that the "bell could not have been on wrong. Those things could not have been unsaid." R. 56, lines 5 – 11; R.

57, lines 8 – 9 ("I don't think you could have put that genie back in the bottle"). According to the solicitor, "a mistrial was the easiest, cleanest way of cauterizing and removing that particular stain from that trial." R. 56, lines 12 – 15.

Defense counsel made clear that he argued against the mistrial motion and argued in favor of his presenting the relevant evidence to the jury. R. 57, lines 16 – 21. Additionally, defense counsel explained that a jury instruction to disregard his statement in opening would have cured any error. Further, defense counsel argued there existed no manifest necessity to order a mistrial. R. 58, lines 3 – 12.

The trial judge found it was "clear" that defense counsel argued against the motion and did not acquiesce to the grant of the mistrial. According to the trial judge, defense counsel was not required to "say the magic words 'I'll object.'" R. 58, lines 13 – 17. However the trial judge found that judge Nicholson "acted within his sound discretion to grant a mistrial." He determined "there was clearly a misunderstanding of what [defense counsel] could and couldn't say." After noting that "it was brought about by the defense, and not by the prosecution," the trial judge held the granting of the mistrial did not bar the subsequent prosecution of the appellant. R. 58, lines 18 – 24.

Additionally, the solicitor moved to bar evidence of the deceased's reputation. R. 38, line 23 – R. 39, line 4. Defense counsel argued evidence of the deceased's reputation was relevant because "[h]e was the most notorious person that area in a long time," including being "accused of three different murders" and "rumored to have killed anywhere from eight to a dozen people." R. 39, lines 10-17. Further, defense counsel noted he wanted to use the evidence to show "there could have been any number of people who would have wanted to kill Solomon Chisolm, because of the enemies that he

made and the reputation." R. 40, lines 4-7. The judge refused to permit the introduction of evidence on this basis stating that defense would have to "present a little bit more evidence" than that. R. 40, lines 8-12.

According to defense counsel, four days before the deceased's death, Appellant had been a passenger in a car on the interstate when the driver was shot and killed. The deceased was the only suspect though he was never charged. R. 41, lines 3-10. Based upon this event, Appellant was the primary suspect when the deceased was shot. The police and others believed the death of the driver gave Appellant a motive to kill the deceased. Defense counsel wanted to use this evidence to attack the investigation. R. 41, line 11 – R. 42, line 16.

The judge ruled that defense counsel could not present the evidence:

> I wouldn't at this point see any relevance to a defense that you've indicated to me that you have. If anything, it supplies motive for your client. And if it's kind of a backhanded reputation of victim evidence, well, again, I don't see where that's relevant since you're not putting up self-defense. And it really doesn't seem to accomplish the point at all.

R. 43, lines 9-16.

ARGUMENT

I. The trial judge erred in limiting the introduction of evidence of the deceased's reputation in the community where the evidence was necessary to Appellant's presentation of a complete defense and where the prosecutor opened the door to such evidence during his opening statement.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Gillian, 360 S.C. 433, 449–450, 602 S.E.2d 62, 71 (Ct.App.2004); accord State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986). The Due Process Clause of the Fourteenth Amendment ensures these rights are extended to criminal defendants in state courts. See U.S. Const. amend. XIV; Pointer v. Texas, 380 U.S. 400, 403–404 (1965) (holding the Sixth Amendment applicable to the states through the Fourteenth Amendment); Mizzell, 349 S.C. at 330, 563 S.E.2d at 317 ("The Sixth Amendment is applicable to the states through the Fourteenth Amendment."). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

Additionally, evidence, even character evidence, is admissible when offered by an accused or by the prosecution to rebut the same.

See Rule 404(a)(1), SCRE.[4] In State v. Major, 301 S.C. 181, 185, 391 S.E.2d 235, 238 (1990), the South Carolina Supreme Court explained "[w]hen the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct." The prosecution is restricted "to showing bad character only for the traits initially focused on by the accused." Id. When Major denied having ever used crack cocaine, the prosecutor was permitted to introduce evidence of a prior conviction for simple possession of cocaine. The Court found Major had made a "clear attempt ... to communicate to the jury that he [was] not the sort of individual who would become involved in the drug trade." Id. at 185-186, 391 S.E.2d at 238.

In State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984), the Court found a defendant had opened the door to his previous participation in two armed robberies because he had questioned an accomplice regarding prior housebreakings. The accomplice had been charged with the same crimes for which Stroman stood trial. However, the accomplice had entered guilty pleas and agreed to testify for the state. After Stroman questioned the accomplice about prior housebreakings, the prosecutor was permitted to question the accomplice about two robberies in which Stroman was an accomplice. Id. at 512-513, 316 S.E.2d at 398-399. The Court held "'[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation

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[4] A defendant "opened the door" to otherwise inadmissible character evidence when he offers evidence of his good character. For example, a defendant places his good character and general reputation in issue when he presented character witnesses. He also places a specific character trait in issue when he submitted evidence of his criminal past to establish his propensity for nonviolence. State v. Allen, 266 S.C. 468, 481-482, 224 S.E.2d 881, 886 (1976), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.'" Id. at 513, 316 S.E.2d at 399 (quoting State v. Albert, 277 S.E.2d 439 (N.C. 1981)).

In Vaughn v. State, 362 S.C. 163, 171, 607 S.E.2d 72, 76 (2004), the Court held a defendant was entitled to a new trial based upon the solicitor's improper closing argument where the defendant's attorney had opened the door to invited reply during the defense's closing argument. The defendant's attorney asked the jury to remember that only one officer testified on behalf of the prosecution concerning observing drugs despite the fact that another officer and civilians were present. Id. at 167, 607 S.E.2d at 74. The solicitor then informed the jury she did not present additional witnesses because she did not want to waste the jurors' time. She also stated that the rules of evidence did not permit the presentation of duplicative testimony. She told the jury that if any of the potential witnesses listed by the defendant's attorney would have testified differently than the testifying witness, then the defendant had the ability to subpoena those witnesses to testify. She also stated she did not call the other witnesses because they would have said "the very same thing" that the officer presented said. Id. at 168, 607 S.E.2d at 74.

The Court recognized that improper argument includes vouching for witnesses and initiating argument about the testimony of absent witnesses. Id. at 169, 607 S.E.2d at 75. Additionally, the Court recognized that the defendant "'opened the door' to some response from the solicitor" based on his closing argument concerning the absence of witnesses. Id. at 170, 607 S.E.2d at 75. The Court held that the solicitor's response was unfair and prejudicial in light of the lack of evidence of the defendant's guilt. Id. at 170, 607 S.E.2d at

75-76. Thus, the Court found trial counsel was ineffective for failing to object to the solicitor's closing argument. Id. at 171, 607 S.E.2d at 76.

The evidence of the deceased's reputation was necessary for a full and fair presentation of Appellant's defense. The prosecution's evidence against Appellant was very weak. Essentially, the entire prosecution case rested on the testimony of Clement, who gave multiple inconsistent statements. No physical evidence tied Appellant to the crime. The deceased's reputation in the community, particularly, his reputation for violence in the community, was essential to Appellant's defense that someone other than Appellant shot the deceased. Appellant did not shoot the deceased; therefore, he could not rely upon self-defense or defense of others. Further, he was unable to argue the crime was something less than murder due to his defense that he was not the shooter. Thus, his defense was that someone else committed the crime and relied upon the weak case of the prosecution to make this clear. However, the jury was left with only the testimony of Clement that Appellant was the shooter and no other plausible theory of who may have shot the deceased.

Additionally, the evidence of the deceased's reputation was a fair rebuttal to the prosecution's opening statement. Although the history of the area and the crime rate of the area were completely unnecessary for the prosecution to explain in opening, the prosecutor chose to do so at the first and second trials. As a result of this choice, the prosecutor opened the door to evidence about the deceased's reputation in the community, particularly, his reputation for violence. The prosecutor told the jury that the area was "lawless" and the reason for his weak case was because people did not want to cooperate with the police, fearing retaliation. These statements invited defense counsel's reply that the area was lawless and that the deceased was part of that lawlessness.

Based upon the clear invitation by the prosecutor during his opening statement and the constitutional right to present a complete defense, the trial judge erred in excluding the evidence of the deceased's reputation, particularly for violence, in the community. This evidence was essential to Appellant's defense that someone else shot the deceased as it showed many people in the community had a motive to harm the deceased. The evidence also responded to the opening statement of the prosecutor and his theme of "lawlessness" used throughout the trial.

II. Double jeopardy barred Appellant's second trial where the grant of the mistrial was not dictated by manifest necessity or the ends of public justice after consideration of all the facts and circumstances.

Both the United States Constitution and the South Carolina Constitution protect individuals from being twice placed in jeopardy by the state. "No person shall be... Subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V.[5] "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty." S.C. Const. Art. 1, § 12. "It is a rule of general recognition that one is in jeopardy when a legal jury is sworn and impaneled to try him, upon a valid indictment, in a competent Court, unless the jury before reaching a verdict be discharged with the prisoner's consent, or upon some ground of legal necessity or the verdict, if rendered be set aside according to law." Ex Parte Prince, 185 S.C. 150, 159, 193 S.E. 429, 433 (1937); see also State v. Baum, 355 S.C. 209, 214, 485 S.E.2d 419, 421 (2003). The theory of former jeopardy protects an individual from multiple prosecutions for the same offense after an improvidently granted a mistrial. State v. Kirby, 269 S.C. 25, 27 – 28, 236 S.E.2d 33, 34 (1977).

Double jeopardy bars a subsequent trial where a mistrial is granted over the defendant's objection unless the mistrial was required due to a manifest necessity based upon a consideration of all the circumstances. Kirby, 269 S.C. at 28, 236 S.E.2d at 34. "The pivotal issue determinative of the constitutional prohibition against double jeopardy is thus the existence of 'manifest necessity' for the mistrial." Id.

[5] The Fifth Amendment is made applicable to the states through the Fourteenth Amendment's Due Process clause. Benton v. Maryland, 395 U.S. 784 (1969).

The constitutional prohibition against double jeopardy prevents a retrial following a mistrial only if there were manifest necessity for the mistrial. Id., at 29, 236 S.E.2d at 34. The test is "whether the mistrial was dictated by manifest necessity or the ends of public justice," which is defined as "the public's interest in a fair trial designated to end in just judgment." Id. at 29, 236 S.E.2d at 35; see also, Illinois v. Somerville, 410 U.S. 458 (1973); Wade v. Hunter, 336 U.S. 684 (1949); State v. Kelsey, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998); State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983); State v. Garris, 394 S.C. 336, 345, 714 S.E.2d 888, 893 (Ct. App. 2011); State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct. App. 2006).

"The power of the court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." Kirby, 269 S.C. at 29, 236 S.E.2d at 34; see also State v. Prince, 279 S.C. 30, 310 S.E.2d 471 (1983). "The granting of a 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. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). "Manifest necessity stands as a command to trial judges not to foreclose the defendant's option to unscrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by continuation of the proceedings." United States v. Jorn, 400 U.S. 470, 485 (1971).

In determining whether to grant a mistrial motion, the trial judge should consider the following factors: "the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony in the case." State v. Creech,

314 S.C. 76, 82, 441 S.E.2d 635, 638 (Ct. App. 1994)(citing State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988)).

An examination of South Carolina's double jeopardy jurisprudence demonstrates that the mistrial order during Appellant's first trial was not dictated by manifest necessity or the ends of public justice. As demonstrated by the cases discussed infra, manifest necessity and the ends of public justice require a powerful showing, which simply did not exist at Appellant's first trial.

The South Carolina Supreme Court found manifest necessity was established where the solicitor prosecuting the case died during the trial and the assistant solicitor had not been present for any of the trial and was totally unprepared to prosecute the remainder of the case. Kirby, 269 S.C. at 29, 236 S.E.2d at 35. In Baum, 355 S.C. at 214, 485 S.E.2d at 421, the Court affirmed a mistrial grant where the deceased's body was found during the trial because the public's interest in a fair adjudication was implicated by the discovery of the body, which was an extremely important piece of evidence with as much potential to exonerate as to inculpate the accused and finding.

In State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000), this Court held that the double jeopardy clause barred the defendant's prosecution after an improvidently granted mistrial. After the jury was sworn, the prosecution moved for a continuance based on the absence of a material witness. Id. at 456, 539 S.E.2d at 718. The judge denied the continuance motion but granted the State's alternate motion for a mistrial. Id. When the case was called to trial again, the defendant moved to dismiss based on double jeopardy. Id. This Court held the mistrial was not dictated by necessity

or by the ends of public justice based upon the absence of a material witness. Id. at 459, 539 S.E.2d at 720.

In Prince, 279 S.C. at 33, 310 S.E.2d at 472-473, a unanimous South Carolina Supreme Court found the granting of a mistrial where the jury asked to hear testimony was improper. The jury had been deliberating for less than six hours, a portion of which had been used for an evening meal, and the court had invested two days in the trial. Id. After noting "[t]he 'manifest necessity' rule is easy to state but sometimes difficult to apply" and that "[i]n borderline cases, it is the inclination of the appellate courts to sustain the judge in the exercise of his discretion," the Court held that record failed to reveal facts to justify declaring a mistrial over the defendant's objection. Id. at 33, 310 S.E.2d at 473.

Further, South Carolina's jurisprudence requires consideration of alternatives to the granting of a mistrial, such as giving an curative instruction. "If the trial [court] sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-912 (1996). A curative instruction is generally deemed to cure any error. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989). State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005); State v. McEachern, 399 S.C. 125, 147, 731 S.E.2d 604, 615 (Ct. App. 2012); State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996).

This Court's decision in State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012) is instructive with regard to factors to consider when a party moves for a

mistrial. Manning was charged with felony DUI and drug possession, and at the beginning of jury selection, the trial judge read both indictments to the prospective jurors. After jury selection, Manning moved to sever the charges, and the judge granted the motion. Thereafter, Manning moved for a mistrial because the jurors were aware of both charges. The trial judge denied the motion. Id. at 268-269, 734 S.E.2d at 320. Although this Court found Manning waived this issue on appeal, this Court addressed the merits and found the "single reference to the schedule three drug charge contained in the indictments read at the beginning of trial [did] not constitute sufficient prejudice to justify a mistrial." Id. at 270, 734 S.E.2d at 320 (emphasis added). The fact that the jury heard only a single reference to the other charge was foundational to this Court's decision.

In State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003), a police officer, testifying on behalf of the prosecution, informed the jury that Thompson had warrants pending against him. Thompson moved for a mistrial based upon the prejudicial and improper testimony. Id. at 560, 575 S.E.2d at 82. This Court held the officer's "single reference to warrants that existed against Thompson did not constitute sufficient prejudice to justify a mistrial." Id. at 561, 575 S.E.2d at 82 (emphasis added). The officer's statement did not convey that the warrants concerned unrelated charges or other bad acts. In light of the jury hearing evidence that the police were looking for Thompson in connection with the offense for which he was on trial, "it would be reasonable to assume the jury inferred that the warrants related to the charged offenses." Id. at 561-562, 575 S.E.2d at 82-83. As in Manning, supra, the single reference was of singular importance in arriving at the ultimate conclusion.

In State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004), the judge learned that a newspaper containing an article about the trial was in the jury room. The judge questioned the jurors regarding their having read, seen, or heard about the article. Six jurors responded affirmatively. Only one juror admitted to having read the article. She remembered details in a paragraph following one reference to the defendant's prior record. As a result, this juror was excused by the trial judge. This Court held the trial judge's actions were proper and a mistrial was not warranted where the other five jurors had very limited exposure to the article and testified the article had not caused them to form any opinions. Id. at 184-185, 603 S.E.2d at 913-914.

Appellant's argument regarding the erroneous mistrial grant is two-fold. First, the evidence was admissible, see Issue I, supra. Therefore, the granting of a mistrial was erroneous because there was no error in defense counsel using his opening statement to foreshadow what the evidence would be. Second, even if this Court were to determine that the evidence was not admissible, the mistrial was not dictated by manifest necessity or the ends of public justice. What defense counsel said to the jury was not evidence and was merely a roadmap of where the case would go. Defense counsel made a single reference to the deceased's reputation. Thus, it was unlikely that the single reference had prejudiced the jury. Certainly, a curative instruction to disregard the statement would have cured any error created by defense counsel's opening statement.

CONCLUSION

As to Issue I, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. As to Issue II, Appellant respectfully requests this Court vacate his convictions and sentences because his second trial was barred by double jeopardy.

Respectfully submitted,

Susan B Hackett

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Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of May, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

May 26, 2015

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYREL R. COLLINS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of May, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of May, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.