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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
The Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2014-002414

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IN THE MATTER OF THE CARE AND TREATMENT OF
JOHNNY GARRETT,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Appellant's motion for a mistrial because the State's questions to the testifying expert about who would be in danger "if the jury releases him," did not dilute or shift the State's burden to prove beyond a reasonable doubt Appellant's mental abnormality and personality disorder remained such he was not safe to be at large.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On January 26, 2010, Appellant Johnny Ray Garrett was committed to the SC Department of Mental Health's Sexually Violent Predator Treatment Program (SVPTP) after a jury found beyond a reasonable doubt he had a mental abnormality or personality disorder that made him likely to commit future acts of sexual violence if not confined for long term control, care and treatment. Pursuant to statute, Appellant's mental status was reviewed in 2011, and the Department of Mental Health did not recommend his release from the SVPTP.

Appellant obtained an independent evaluation by Selman Watson, Ph.D, who opined Appellant's mental status had so changed he was safe to be at large. After a probable cause hearing, the circuit court granted Appellant's request for a release trial. (Order Granting Release Trial filed October 2, 2013; Record on Appeal [R.], pp. 259). The matter was called for a jury trial on October 6, 2014, before the Honorable Frank R. Addy, Jr., Circuit Court Judge.

The State presented testimony from Marie E. Gehle, Psy.D., who performed Appellant's annual review as part of her duties with the Department of Mental Health, and was qualified as an expert in psychology and forensic psychology. Dr. Gehle testified she had performed three annual reviews of Appellant's mental status since his commitment, including a 2012 review in which Appellant declined to participate. (Trial Transcript [TT], pp. 22-29; R., pp. 22-29).

As part of the annual review process, Dr. Gehle reviewed Appellant's legal records, treatment records and behavior notes from the SVPTP, and other tests and evaluations performed by other professionals, including a 2013 penile plethysmograph

(PPG). She also reviewed the underlying circumstances of Appellant's criminal history, including criminal conduct of a sexual nature for which he was not convicted, in order to substantiate his mental diagnoses and evaluate his risk to reoffend if released. (TT, pp. 30-51; R., pp. (30-51).

Dr. Gehle diagnosed Appellant with pedophilia (attracted to females, non-exclusive), personality disorder not otherwise specified, and polysubstance dependence. She testified he minimized his responsibility for his crimes in spite of his treatment, and had several behavior infractions at the SVPTP, including a March 2014 write-up for possessing sexually explicit materials, which are expressly prohibited there. (TT, pp. 51-62; R., pp. (51-62).

The State asked Dr. Gehle about Appellant's plans "if he's released by this jury." She testified, without objection, that he planned to live with family members and spend more time with his children and grandchildren, which was problematic in light of his pedophilia. (TT, pp. 62-63; R., pp. 62-63).

Dr. Gehle also testified about Appellant's risk factors for reoffending, which included his history of substance abuse, his difficulty with honesty, his pedophilia and personality disorder, his very poor boundaries, his history of non-sexual offenses, and his offending sexually while on probation. She opined to a reasonable degree of psychological certainty Appellant's pedophilia and personality disorder still affected his volitional and emotional capacity to control his behavior, which put him at risk to re-offend if released from the SVPTP, and he needed to remain confined for additional treatment. (TT, pp. 63-68; R., pp. 63-68).

The State then asked Dr. Gehle who would be at risk “if the jury releases [Appellant].” She testified, without objection, that prepubescent girls in his vicinity would be at risk. (TT, p. 68; R., p. 68).

After the State completed Dr. Gehle’s direct examination, Appellant moved for a mistrial on the grounds the references to the jury releasing him were burden shifting comments, making him show he should be released. The circuit court denied the motion, finding the questions did not shift the burden of proof because the jury would have two mutually exclusive options, and the probable and natural consequence of a verdict finding the State had not met its burden of proof “is in fact [Appellant] being released or discharged from the [SVPTP].” (TT, pp. 70-71; R., pp. 70-71).

Appellant presented testimony from Dr. Selman Watson, who was qualified as an expert in psychology, and opined Appellant had progressed in treatment such that he was safe to be at large. (TT, pp. 186-202; R., pp. 186-202). On cross-examination, however, Dr. Watson testified he diagnosed Appellant with pedophilia and anti-social personality disorder, and if released, Appellant needed to continue in outpatient sex offender treatment and be polygraphed every six months, neither of which he could be forced to do. (TT, pp. 203-213; R., pp. 203-213).

In closing arguments, both the State and Appellant acknowledged the State’s burden to prove its case beyond a reasonable doubt. (TT, pp. 223, 231, 237; R., pp. 223, 231, 237). The circuit court then repeatedly charged the jury the State had to prove beyond a reasonable doubt Appellant’s mental abnormality or personality disorder remained such that he was not safe to be at large, and properly defined beyond a reasonable doubt. (TT, pp. 244-248; R., pp. 244-248). The verdict form expressly

required to jury to answer the question “[h]as the [State] proven beyond a reasonable doubt that [Appellant’s] mental abnormality or personality disorder remains such that he’s not safe to be at large and if released is likely to commit acts of sexual violence.” (TT, p. 248-249; R., pp. 248-249).

The jury determined the State had proven its case beyond a reasonable doubt, and the circuit court ordered that he remain in confinement with the Department of Mental Health for long term control, care and treatment. (Order of Continued Commitment filed October 7, 2014; R., p. 261). The court subsequently denied Appellant’s motion for a new trial. (Motion for JNOV and a New Trial, dated October 17, 2014, Order Denying Motion for New Trial, filed October 31, 2014; R., pp. 262, 267). This appeal followed.

ARGUMENT

The circuit court properly denied Appellant's motion for a mistrial because the State's questions to the testifying expert about who would be in danger "if the jury releases him," did not dilute or shift the State's burden to prove beyond a reasonable doubt Appellant's mental abnormality and personality disorder remained such he was not safe to be at large.

Appellant contends the circuit court erred in denying his motion for a mistrial after the State asked Dr. Gehle where Appellant planned to live if the jury released him from the SVPTP, arguing the reference to "the jury" shifted the burden of proof from the State because it complicated the jury's decision process. This contention ignores the reality of the jury trial process.

A. Preservation

As a threshold matter, the mistrial issue is not preserved for appellate review. In order to preserve an issue for review, the party must make a contemporaneous objection, and cannot later bootstrap the issue with a mistrial motion. See State v. Tucker, 324 S.C. 155, 174-75, 478 S.E.2d 260, 270 (1996) (issue regarding purported improper testimony not preserved because the defendant did not make a contemporaneous objection, but waited until the close of direct testimony); State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34, 39 (Ct.App.1994) (failure to contemporaneously object to introduction of evidence "cannot later be bootstrapped by a motion for a mistrial.").

Appellant did not contemporaneously object when the State asked Dr. Gehle who would be at risk if the jury released him. Rather, he waited until Dr. Gehle's direct testimony was concluded, well after the question and her response, and then moved for a mistrial. If the question and response were improper, and as discussed below, the State

submits they were not improper, the circuit court could have addressed the issue immediately with a timely objection, and Appellant cannot bootstrap the issue with an untimely mistrial motion.

B. Merits

Even if preserved, Appellant's argument is meritless. The decision to grant or deny a mistrial is within the sound discretion of the trial judge, and the judge's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 682 S.E.2d 489, 492 (2009); State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77, 82 (Ct. App. 2003). "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. Thompson at 82 (*quoting State v. Kirby*, 269 S.C. 25, 236 S.E.2d 33, 34 [1977]). A mistrial should only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. *Id.* "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." *Id.* (*quoting State v. Prince*, 279 S.C. 30, 301 S.E.2d 471, 472 [1983]); *see also* State v. Goodwin, 384 S.C. 588, 683 S.E.2d 500 (2009) (same).

In this case, the State acknowledged in its opening statement the State had the burden of proving its case beyond a reasonable doubt, and stated Appellant was "petitioning you to let him out of this treatment center." (TT, p. 13; R., p. 13). In his opening statement, Appellant's counsel also stated the issue before the jury was whether

Appellant was “safe to be released,” and “ready to be released.” (TT, pp. 19-21; R., pp. 19-21). The burden of proof and whether Appellant was safe to be at large were also discussed by both parties during closing argument, with Appellant specifically recounting witness testimony about supporting Appellant “if the jury decides that he’s ready to be released.” (TT, pp. 221-237; R., pp. 221-237).

Finally, the circuit court instructed the jury the trial was “to determine whether [Appellant] should remain civilly committed” in the SVPTP and appropriately charged the State’s burden to prove its case beyond a reasonable doubt. The verdict form stated the question to be decided by the jury was: “Has the Respondent State of South Carolina proven beyond a reasonable doubt that [Appellant’s] mental abnormality or personality disorder remains such that he’s not safe to be at large and **if released** is likely to commit acts of sexual violence.” (TT, pp. 238-249; R., pp. 238-249) (emphasis added).

Thus, the jury was well aware the State had the burden of proof, which was beyond a reasonable doubt, and knew its verdict would determine whether Appellant remained in, or was released from, the SVPTP. Given the repeated references to the State’s burden of proof and Appellant’s release from confinement, Appellant simply cannot show any prejudice from the State’s question to Dr. Gehle about who would be at risk if Appellant was released, which did not shift the burden of proof in any way, and certainly did not warrant a mistrial. Accordingly, the circuit court properly denied Appellant’s mistrial motion.

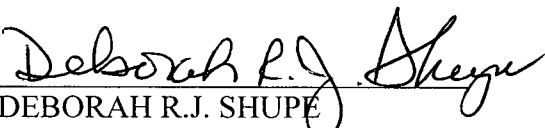
CONCLUSION

Based on the foregoing, Respondent submits the jury verdict should be affirmed.

Respectfully submitted,

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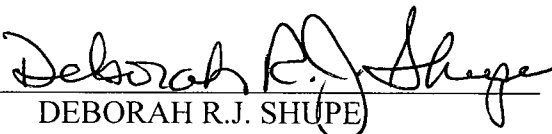
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent by depositing a copy in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 4th day of December, 2015.

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