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JAN 30 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MACK WASHINGTON, JR.

APPELLANT

APPELLATE CASE NO. 2014-000667

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in denying defense counsel's motion for a mistrial where the assistant solicitor said in closing argument that Appellant had "a pattern of manipulating young people," "a pattern of violence," and "a pattern of robbing old folks," where there was no evidence to support these highly prejudicial assertions?

STATEMENT OF THE CASE

On August 23, 2012, a Colleton County Grand Jury indicted Appellant for armed robbery and kidnapping. R. 500. On August 22, 2013, Appellant was indicted for a second count of armed robbery and kidnapping, and one count of possession of a weapon during a violent crime. R. 500. All five indictments refer to a single incident.

The matter proceeded to a jury trial on March 17, 2014, before the Honorable Perry M. Buckner, III. R. 1. After a four-day trial, Appellant was found guilty of all five charges. R. 532 – 533. Judge Buckner sentenced Appellant to thirty-five years imprisonment. R. 546 – 547. Everett W. Bennett and Laurie Sanders represented Appellant. R. 1. Tameaka Legette and Carra Henderson represented the State. R. 1.

Appellant appealed his convictions and sentence. This brief follows.

ARGUMENT

The trial judge erred in denying defense counsel's motion for a mistrial where the assistant solicitor said in closing argument that Appellant had "a pattern of manipulating young people," "a pattern of violence" and "a pattern of robbing old folks," where there was no evidence to support these highly prejudicial assertions.

Relevant Facts

Joan Klem testified that on January 7, 2012, she and her husband, Frank, were driving from Michigan to their winter home in Florida. R. 218, lines 2 – 24. They stopped in Walterboro, South Carolina, and checked into the Rice Planters Inn. R. 220, lines 2 – 11.

After checking in at the front desk, she took her dog for a walk while her husband moved the car. R. 220, lines 14 – 18. When the Klems reached their hotel room, "two men were at the door." R. 220, line 18 – 19. One man grabbed her at her waist and held a knife near her. R. 220, lines 23 – 24. The other man demanded her purse and car keys. R. 220, line 25 – R. 221, line 2.

After taking the purse, wallet, and car keys from the room, the two men "took off running and immediately got in the car and left." R. 223, lines 13 – 14. Frank Klem ran to the hotel's main office and called the police. R. 223, lines 20 – 22.

Tyneshia Young testified that she and Appellant were "close friends." R. 288, lines 21 – 24. Appellant had a key to her Druid Hills apartment, C-7, in Walterboro and would "hang out" there almost every other day. R. 289, lines 18 – 24. Young claimed that on the night of January 8, 2012 Appellant came over to her apartment. She heard a knock at the door and asked Appellant who was there. R. 294, lines 1 – 2. He said "[n]obody." After

hearing another knock on the door, she looked out of the peephole and saw the police outside. R. 294, lines 2 – 4.

According to Young, Appellant pushed her into the bathroom to prevent her from opening the front door. R. 294, lines 5 – 10. Appellant then took two guns out of her closet and put them underneath her bed. R. 294, lines 15 – 16. He also grabbed Young's phone and carried it into the bathroom. R. 294, lines 9 – 10. While Young was in the bathroom, she called her mother, who lived in the building next door and had seen the police outside. R. 294, lines 1 – 9. Young's mother walked over to her apartment and put Lieutenant Jason Chapman on the phone to speak to Young. R. 295, lines 3 – 10.

After speaking with her mother and Lt. Chapman, Young opened the door and allowed the police to come inside and take the guns. R. 297, lines 10 – 11. The police identified the two guns as belonging to the Klems. R. 323, lines 9 – 11. Young ultimately gave a statement that Appellant and his co-defendant, Tyheem Lewis, brought the guns to her apartment. R. 335, line 24 – R. 336, line 2.

Young stated that the next day, she started having trouble with her toilet. R. 298, lines 21 – 23. She called the maintenance man to come unclog it. R. 298, line 24 – R. 299, line 3. When he unclogged the toilet, he found an ID card that was "an older white woman." R. 299, lines 1 – 3. After the toilet continued to get clogged, the maintenance man took it apart and found credit cards that had been flushed down. R. 299, lines 3 – 6. Young claimed Appellant flushed the credit cards down the toilet because it started clogging up after Appellant had been in the bathroom. R. 300, lines 8 – 15. Joan and Frank Klem's names were on the credit cards. R. 280, lines 5 – 12.

Lt. Jason Chapman investigated the case. R. 313, lines 16 – 18. On January 8, 2012, he received a call from a confidential informant. The informant told him that two guns that were taken during the armed robbery at the Rice Planters Inn may be located inside Druid Hills apartment C-7. R. 314, lines 3 – 8. Lt. Chapman read the police report from the robbery and saw that the Klems told police two guns were stolen. R. 314, lines 8 – 15. Lt. Chapman called his informant back to confirm that the guns stolen were rifles. R. 314, lines 16 – 22. He then called for backup and drove to Druid Hills apartments.

After speaking to Tyneshia Young, Lt. Chapman and other officers went into apartment C-7 and recovered the two guns. R. 323, lines 6 – 9.

On January 10, 2012, Lt. Chapman received information that property that possibly belonged to the Klems was located at Cuckhold's Landing in Walterboro County. R. 323, lines 12 – 16. He and other officers drove to the landing and found closed suitcases and personal papers strewn all over the ground. R. 323, lines 17 – 25. They found mail with the Klem's name on it. R. 323, lines 24 – 25. The Klems identified the two guns, suitcases and personal papers as theirs. R. 334, lines 17 – 23.

On January 30, 2012, Lt. Chapman received information that Appellant was driving a white Chevrolet Impala, like the one stolen from the Klems, in the Turkey Hill area of Walterboro. R. 327, lines 1 – 5. Lt. Chapman was also told that Appellant had sold it to two people and remnants of the car were left behind a house at 703 Turkey Hill Road in Green Pond, South Carolina. R. 328, lines 17 – 22. Police located the vehicle and, after finding the secondary vehicle identification number, were able to confirm that it belonged to the Klems. R. 333, line 19 – R. 334, line 4.

Based on the statement from Tyneshia Young that Tyheem Lewis and Appellant brought the guns to her apartment, Lt. Chapman interviewed Lewis. R. 335, line 20 – R. 336, line 21. Lewis admitted to robbing the Klems and was charged with armed robbery, kidnapping, and possession of a weapon during a violent crime. R. 338, lines 1 – 12.

Based on Lewis' confession, as well as the other evidence discovered during the investigation, Lt. Chapman charged Appellant with armed robbery, kidnapping, and possession of a weapon during a violent crime. R. 338, lines 7 – 12. Lewis pled guilty to strong arm robbery and was sentenced under the Youthful Offender Act¹ for a term not to exceed six years. R. 375, line 17 – R. 376, line 2.

Lewis testified against Appellant at trial, claiming Appellant was the mastermind of the robbery and the one holding the knife on Joan Klem. R. 360, line 11 – R. 361, line 23. According to Lewis, they found the guns inside the trunk of the car. R. 372, lines 2 – 3. After throwing away the clothes that were in the car, he and Appellant dropped the guns off at Young's apartment. R. 373, lines 2 – 9. Then, they drove to "the village" to park the car until the next day. R. 373, lines 19 – 21.

Appellant chose to put the State to its burden and did not offer a defense.

Closing Argument

During closing argument, the assistant solicitor argued that the State proved all of the elements of armed robbery and kidnapping. R. 479 – 496. She emphasized to the jury that "there is no reasonable doubt" in the case. R. 496, line 3. She stated that Appellant

“...has a pattern of manipulating young people and luring them and intimidating them. He has a pattern of violence,

¹ S.C. Code Ann. §§ 24-19-10 to -160 (1976).

throwing Tyneshia Young to the floor and intimidating and manipulating her into lying for him. He has a pattern of robbing old folks, holding them up.”

R. 496, lines 6 – 11.

Motion for a Mistrial

At the end of the State’s closing, defense counsel moved for a mistrial.² R. 497, line 19. He argued that the closing argument “was improper” and that the assistant solicitor told the jury that Appellant “had a pattern of robbing old people.” R. 497, lines 19 – 23. He explained that since Appellant’s prior record was not published to the jury, the assistant solicitor saying that Appellant had a pattern of robbing old people “implies that he had a prior record for doing that or prior charges.” R. 498, lines 1 – 2. Such an implication, explained defense counsel, “certainly is prejudicial.” R. 498, line 5.

The assistant solicitor argued that the standard for a mistrial is manifest necessity and her words in closing “would not rise to the level of manifest necessity.” R. 498, lines 13 – 16. She explained that her use of the word “pattern” was due to the fact that both Klems were elderly and both were robbed. R. 499, lines 1 – 3.

The trial judge agreed with the assistant solicitor that one “could consider a pattern to be more than one incident.” R. 499, lines 10 – 11. He denied defense counsel’s motion for a mistrial. He offered to give the jury a curative instruction to disregard the term “pattern.” R. 499, lines 5 – 19. However, counsel did not want to call attention to the word and did not want a curative instruction. R. 499, lines 20 – 21; lines 24 – 25.

² Defense counsel did not object when the assistant solicitor made these prejudicial assertions in her closing. Consequently, this Court may find this issue is more properly one for post-conviction relief than direct appeal.

Discussion

The solicitor's closing argument must "stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Here, there was no evidence to support the solicitor's assertions that Appellant had "a pattern of manipulating young people," "a pattern of violence," and "a pattern of robbing old folks." Appellant did not take the stand and his prior criminal record was not published to the jury. Therefore, the trial judge erred in denying defense counsel's motion for a mistrial.

A trial judge should grant a mistrial only when absolutely necessary. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000); State v. Elgin, 398 S.C. 39, 45, 726 S.E.2d 231, 234 (Ct. App. 2012); State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002). A defendant moving for a mistrial must show both error and prejudice resulting from the error. Harris, 340 S.C. at 63, 530 S.E.2d at 628; Simmons, 352 S.C. at 354, 573 S.E.2d at 862. Such an error must be so grievous that its prejudicial effect cannot be removed in any other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct. App. 2009).

Therefore, "the less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Whether a mistrial is warranted by manifest necessity is a fact-specific inquiry. State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000).


Here, the trial judge erred in failing to grant defense counsel's motion for a mistrial. The assistant solicitor's assertions that Appellant had "a pattern of manipulating young people," "a pattern of violence," and "a pattern of robbing old folks" implied that he had committed such acts in the past. As soon as the jury heard the word "pattern" used three times by the assistant solicitor, Appellant was prejudiced. Any curative instruction given by the judge would have been futile. See State v. White, 371 S.C. 439, 446, 639 S.E.2d 160, 164 (Ct. App. 2006).

While there were claims of Appellant's involvement made by his co-defendant, Lewis, and items belonging to the Klems found in Young's apartment, there was no overwhelming evidence that Appellant committed the robbery. Therefore, the jury hearing that Appellant had a "pattern" encouraged a verdict on the improper basis that Appellant had previously committed crimes of armed robbery and kidnapping and, thus, committed the crimes for which he was on trial.

CONCLUSION

For the grounds argued, Appellant Mack Washington respectfully requests this Court to reverse his convictions and sentence and remand to the lower court for a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of January, 2015.

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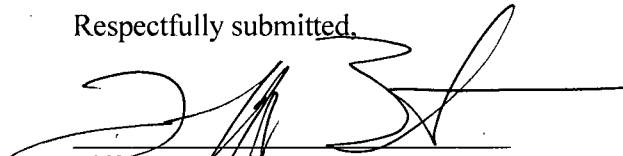
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mack Washington Jr. states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Perry M. Buckner, which was held on March 17-20, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Mack Washington, Jr.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of January, 2015.

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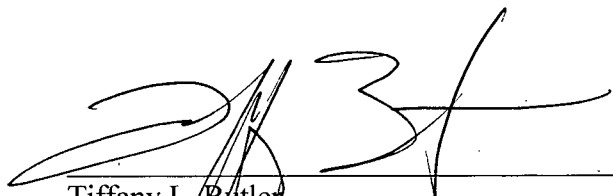
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire transcript

I certify that this designation contains no matter which is irrelevant to this appeal.

January 30th, 2015



Tiffany L. Butler
Appellate Defender

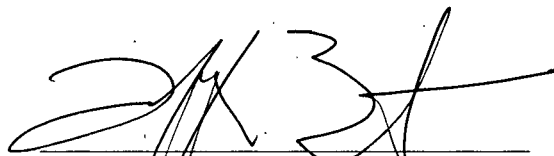
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 30, 2015



Tiffany L. Butler
Appellate Defender

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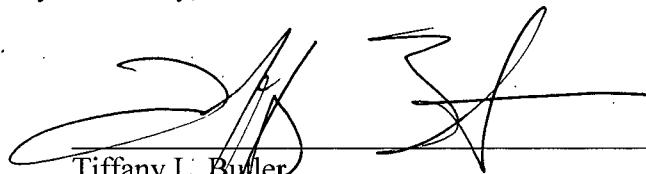
MACK WASHINGTON,

APPELLANT

APPELLATE CASE NO. 2014-000667

CERTIFICATE OF SERVICE

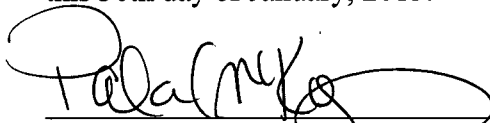
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Mack Washington, Jr., #314550 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of January, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of January, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022