

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAR 05 2015

Appeal from Lexington County
Thomas A. Russo, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BARRY GLENN MILLWOOD,

APPELLANT

APPELLATE CASE NO. 2014-001430

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Millwood's motion for a mistrial when the testifying Officer Harris referenced prior property crimes at the incident location, Dixiana Steel Plant, when the trial judge assured defense counsel pretrial that he would not allow any testimony about prior burglaries at the victim's Dixiana Plant and the state concurred?

STATEMENT OF THE CASE

On January 13, 2014, the Lexington County Grand Jury indicted Barry Glenn Millwood on the charges of burglary second degree and grand larceny. On June 23-24, 2014, Millwood proceed to trial before the Honorable Thomas R. Russo and a jury. Millwood was represented by Elizabeth C. Fullwood and Bennett E. Casto. The state was represented by Casey N. Rankin and Shannon A. Davis. R. 1. The jury returned a verdict of guilty on the burglary second degree and not guilty on the grand larceny. R. 249, ll. 6 – 21. Judge Russo sentenced Millwood to fifteen years under the B section of S.C. Code Section 16-11-0312 (B). R. 265, ll. 7 – 13. Millwood's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

Between January 26, 2013 and January 28, 2013, the Dixiana Steel Plant in Lexington County was burglarized. R. 109, ll. 11 – R. 110, ll. 19. Rhett Ingram, the owner and president, testified that he installed a security camera in January 2013 in one of the buildings called the saw house. The camera was disguised in a steel casing, and worked similar to a deer camera. It was not a video camera but took still pictures based on infrared motion. R. 130, ll. 17 – R. 133, ll. 25.

When he arrived at work on Monday, January 28, 2013, he learned that the plant had been broken into. Special stud guns for working with steel and welding leads (copper) were missing. He checked the security camera and allegedly saw Barry Millwood in the saw house. The picture had the time of 22:05 or 10:05 P.M. January 26, 2013. Before the jury, Ingram said he was familiar with Millwood from prior dealings with him. Ingram called law enforcement and gave them a DVD on which he had burned the pictures from the security camera. Ingram told the deputy that the person in the picture was Millwood. Later, the deputy brought a single picture of Millwood for Ingram to see just to confirm that it was the same Barry Millwood which it was. R. 135, ll. 1 – R. 142, ll. 23.

Deputy Rob Williams returned to his office after Ingram had identified Barry Millwood as the person in the picture from the security camera. Detective Williams went online to the DMV site and pulled the picture and record of Millwood. Detective Williams returned to see Ingram and showed him the DMV photo which Ingram verified it was the same person as the one in the security picture.

Detective Williams then obtained a warrant for the arrest of Millwood. R. 165, ll. 16 – R. 173, ll. 7.

Deputy Adam Clayton was on patrol in the Dixiana area and saw a blue truck parked in front of a residence that he knew. He thought this vehicle did not belong there so he ran the tag. The tag came back to Millwood and showed that he was wanted. Deputy Clayton asked the owner of the house if he could come in and get Millwood. Millwood was then arrested. R. 182, ll. 23- R. 184, ll. 23.

A pretrial hearing was held on the identification of Millwood which the judge determined was admissible. R. 60, ll. 1 – R. 81, ll. 16. During the hearing, Ingram testified that he had been dealing with Millwood for years because Millwood had been breaking into his business numerous times. He had never been convicted because he was not apprehended. This was the first time he had been caught. He knew it was Millwood because he had him on video as he had broken in several times. He saw Millwood on the news once for breaking into another steel company. Since then Ingram followed his mug shot on the internet. When Millwood was in jail, Ingram's company was fine. Once he was out, the burglaries started again. The breakins caused serious problems for his company as the items taken kept the employees from working until he could reorder. R. 63, ll. 9 – R. 72, ll. 10.

At the close of the hearing, defense counsel moved to suppress any reference to any prior burglary of any company by Millwood. Counsel emphasized that there should be no testimony that "he's been burglarizing my business for years." The solicitor stated that she had no intention of bringing in any prior testimony about

that. The judge assured defense counsel that he was not “going to allow that kind of testimony.” R. 81, ll. 18 – R. 85, ll. 22.

During the testimony of former Deputy Julian Harris, he said he visited Dixiana Steel and talked with the owner. R. 152, ll. 11 – R. 155, ll. 5. Ingram.

Harris’ testimony was:

He showed me several still film images that he had on a computer that he said were connected to surveillance cameras that he set around the property because he had issues with property crimes occurring there in the past.

R. 155, ll. 6-10.

Defense counsel immediately told the judge she had a matter of law. After the jury exited, counsel moved for a mistrial based on Deputy Harris’ reference to prior property crimes at Dixiana. Counsel argued that that would raise an inference for the jury that Millwood had engaged in past misconduct in connection with the Dixiana business. That reference combined with Ingram just saying that he had past dealings with Millwood along with Ingram’s body language, would put Millwood’s character into evidence. It would be more prejudicial than probative. Counsel argued that it just “blew everything out of the water that the judge had tried to put in place.” R. 155, ll. 11 – R. 157, ll. 10.

The solicitor argued that Millwood’s prior burglaries were going to come out anyway through the evidence the state would present to prove the elements of burglary second degree. R. 156, ll. 9 – R. 157, ll. 1.

The judge disagreed with defense counsel and denied the motion for a mistrial. He said that Ingram did not connect the prior activity to Millwood. R. 157, ll. 11 – R. 158, ll. 5.

During jury deliberations, the jury sent out several questions. One was how did the Defendant Millwood and the owner, Ingram, know each other. Another question was if

Millwood was found in possession of any of the stolen items. The judge responded that he could not comment on the facts so the jury would have to depend on their collective memory. R. 243, ll. 1 – R. 247, ll. 8.

The jury returned a verdict of guilty on the burglary but not guilty on the grand larceny charge. R. 249, ll. 7 – 21. Defense counsel moved for a new trial. R. 252, ll. 12 – R. 255, ll. 25.

ARGUMENT

The trial court erred in denying Appellant Millwood's motion for a mistrial when the testifying Officer Harris referenced prior property crimes at the incident location, Dixiana Steel Plant, when the trial judge assured defense counsel pretrial that he would not allow any testimony about prior burglaries at the victim's Dixiana Plant and the state concurred

Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Jenkins, 408 S.C. 560, 759 S.E.2d 759 (Ct. App. July 9, 2014); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); citing State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508, 514 (1999). In order to receive a mistrial, a defendant must show error and resulting prejudice. Id.

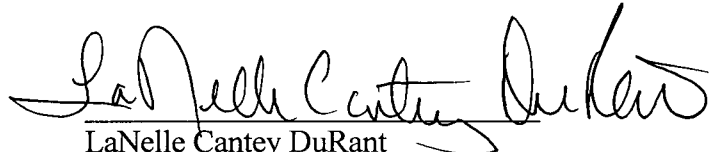
The party moving for a mistrial has the burden to show not only error, but resulting prejudice. State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

The trial judge erred in not granting the mistrial motion as Appellant Millwood was prejudiced by Deputy Harris' comment about prior property crimes at Dixiana Steel. The jury's question about how the owner, Ingram, and Millwood knew each other shows there was a strong reasonable probability that the jury made the inference that Ingram's prior "dealings" with Millwood were connected to the prior break-ins. That inference was only strengthened by the state's evidence of Millwood's two prior convictions for burglary. R. 194, ll. 10 – R. 198, ll. 22. There was a reasonable probability that the jury convicted Millwood on the prior crimes instead of on the evidence for the January 26, 2013 burglary.

CONCLUSION

Based on the above, Millwood's conviction and sentence should be reversed, and his case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2015.

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Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

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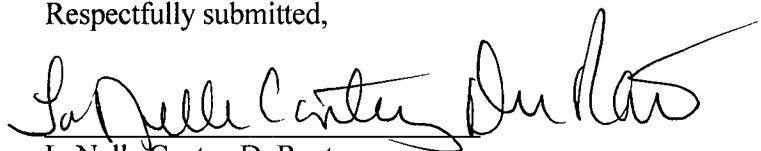
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Barry Millwood 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 Thomas A. Russo, which was held on June 24, 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 Barry Millwood.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2015.

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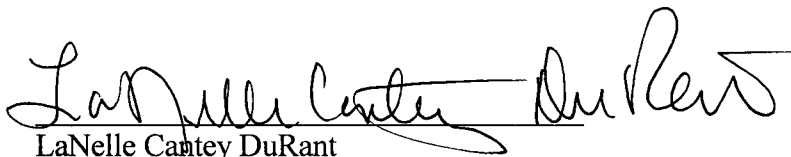
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Exhibits 18 and 19: Sentence sheets
- (3) Trial Transcript June 23-24, 2014

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

March 5th, 2015


LaNelle Cantey DuRant
Appellate Defender

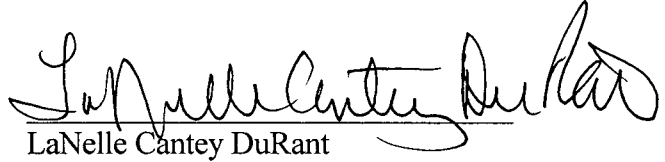
South Carolina Commission on Indigent Defense
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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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."

March 5th, 2015



LaNelle Cantey DuRant
Appellate Defender

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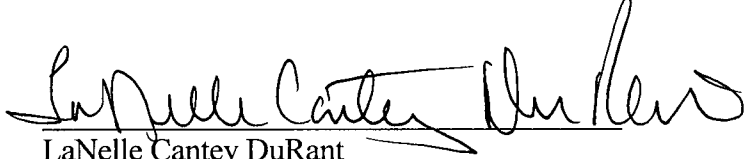
V.

BARRY GLENN MILLWOOD,

APPELLANT

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 Barry Millwood, #331077 at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 5th day of March, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of March, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.