STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS ABE POLITE,

APPELLANT

APPELLATE CASE NO. 2015-000182

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The motion for mistrial is preserved for appellate review.

The Brief of Appellant raised the following issue:

> Whether the trial court erred in denying defense counsel's motion for mistrial where Sergeant Gobel testified that he was "familiar" with the defendant's "street name or nickname" of "Travi" and the trial court's order striking the testimony was insufficient to cure the prejudice from the admission of improper character evidence?

Brief of Appellant, p. 3. As argued in the Brief of Appellant, Sergeant Gobel's testimony implied that Appellant Polite had a criminal record, or at the very least was under suspicion by the police outside of the present incident. This attack on Polite's character was improper where he presented no testimony or witnesses to put his character at issue. Tr. 357, l. 18 – 358, l. 5 (Polite did not testify and did not present any evidence in his defense); see State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) ("In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue."); Rule 404, SCRE. A reasonable juror could not put Sergeant's Gobel's testimony out of its mind, such that the motion for mistrial should have been granted.

Respondent argues that this issue is not preserved for appellate review, alleging that defense counsel accepted the ruling, that a motion for mistrial was never made, and that to the extent one was made, it was not contemporaneous. Respondent's Brief, pp. 8-11. The objection to Sergeant Gobel's testimony was timely and an off-the-record bench conference immediately took place. Tr. 293, ll. 9-19. Defense counsel abided by the trial court's apparent ruling that he would strike the testimony, give a curative instruction, and allow defense counsel to put his motion for mistrial on the record at a later time when the jury was out of the courtroom:

MR. HOOD: **There was one other thing we were going to put on the record concerning the testimony of Detective Sergeant Gobel.** Do you remember when he made the comment about --.

THE COURT: **We were. Thank you.**

MR. HOOD: And –

THE COURT: We had a side bar.

MR. HOOD: That's correct. And you admonished the jury and ordered the court reporter to strike that portion of his testimony and for the jury, told the jury to disregard that. I sort of still object to that, because **I think that there is no curative instruction that can be given to a jury when the item is already before them. The cat is out of the bag and there's no way to successfully put it back in the bag to keep the jury from using that in their own minds as some type of evidence.** That's all I have to say about that.

THE COURT: Just for the record, why don't you refresh our memories as to the specific objection you had, the language, excuse me. It was a response, voluntary response, I think, on the part of the witness.

MR. HOOD: That's correct. He -- the question was asked by the State, and then during the course of the answer, there was a change, if I recall correctly, and he went off on this other tangent, if I remember correctly.

MR. THORNTON:

We were talking about the process of putting together and how many photos there were. And what you indicated, and I believe what he said -- obviously, the court reporter would have it verbatim -- but I believe what Detective Gobel said was he indicated Travi, and I think he said something to the effect of, and we are familiar with him. And then he said something about from being in the area about the time that Mr. Hood objected. And that's when we went to the side bar. I believe that is what he said. He said something to the effect that he was familiar with who Travi was.

MR. HOOD: That they were familiar with him.

MR. THORNTON: They were, yes, sir.

THE COURT: They were, right. And that was the reason we had the side bar.

MR. HOOD: Correct.

THE COURT: You objected to it.

MR. HOOD: You sustained it.

THE COURT: I sustained the objection and went further.

MR. HOOD: Correct.

Tr. 343, l. 21 – 345, l. 15 (emphasis added). Thus, the issue raised is preserved for appellate review.

Respondent argues that defense counsel "acknowledge[d] his acceptance of the judge's ruling sustaining his objection." Respondent's Brief, p. 11 (citing to page 345 of the trial transcript). Defense counsel's agreement with the trial judge that he "sustained the objection and went further" was not an agreement that the remedy provided was sufficient. Tr. 345, ll. 6-15. Because defense counsel's objection was sustained, there would have been no need to place anything further on the record unless defense counsel argued at the bench conference that the striking of the testimony and curative instruction were not sufficient and that the testimony warranted a mistrial.

Respondent alleges that defense counsel's statements were not a motion for mistrial. Respondent's Brief, pp. 9 and 11 (alleging that the only motion for mistrial was made following the jury instruction and did not relate to Sergeant Gobel's testimony). Defense counsel argued: "[T]here is no curative instruction that can be given to a jury when the item is already before them. The cat is out of the bag and there's no way to successfully put it

back in the bag to keep the jury from using that in their own minds as some type of evidence." Tr. 344, ll. 7-11. The only logical remedy when no curative instruction can be sufficient is a mistrial, which is what defense counsel was requesting in his argument.

Respondent further asserts that even if defense counsel's argument was a motion for mistrial, it was not contemporaneous to the striking of the testimony and curative instruction. Respondent's Brief, p. 11 ("Counsel did not make an additional objection to the sufficient of the curative charge and, despite appellant's contention, the record *clearly* shows counsel did not move for a mistrial at that time." (emphasis added)). The record reflects that immediately following defense counsel's objection an off-the-record bench conference took place. Tr. 293, ll. 9-19. When they came back on the record the trial judge said: "All right. I will sustain your objection, order the last statement of the witness stricken on the record. And, ladies and gentlemen, you are to disregard the last statement of the witness. You may proceed." Tr. 293, ll. 20-24. Following defense counsel's motion for directed verdict, when the jury was out of the courtroom, counsel said "There was one other thing we were going to put on the record concerning the testimony of Detective Sergeant Gobel. Do you remember when he made the comment about --." Tr. 343, ll. 21-24. The trial judge responded "We were. Thank you." Tr. 343, l. 25. Defense counsel then made his motion for mistrial and put the basis for his objection and motion on the record. Tr. 344, l. 1 – 345, l. 6.

It is reasonable to believe that in the interest of courtroom efficiency, rather than send the jury out of the courtroom mid-testimony, the trial judge allowed defense counsel to place his objection and motion on the record at a later time when the jury exited the courtroom. That opportunity arose after the State rested and defense counsel made his

motion for directed verdict.[1] It would have been improper for defense counsel to ignore the trial court's instructions and make a motion for mistrial on the record in front of the jury after the trial judge's curative instruction. See Rule 18(a), SCRCrimP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced."); State v. Liberte, 336 S.C. 648, 652 n. 1, 521 S.E.2d 744, 746 n. 1 (Ct. App. 1999) (finding counsel for defendant's actions "more than sufficient" to preserve motion for mistrial where trial court refused defendants' requests to excuse the jury and defendants sought mistrial at their first opportunity, when the court later excused the jury).

The present case is distinguishable from other cases where the motion for mistrial failed the contemporaneous objection requirement. In State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009), this Court found the motion for mistrial unpreserved because Simmons' attorney did not object to the officer's testimony until after the officer finished testifying. 384 S.C. at 171-72, 682 S.E.2d at 32-33. In the present case, the objection and bench conference took place when Sergeant Gobel gave the improper testimony. In State v. Heller, 399 S.C. 157, 172-73, 731 S.E.2d 312, 320-21 (Ct. App. 2012), this Court again found the motion for mistrial unpreserved. Though Heller's attorney objected and moved to strike at the time of the testimony regarding the defendant's parole, it was not until after the examination was finished that defense counsel asked to put a matter on the record and requested a mistrial. 399 S.C. 157, 172-73, 731 S.E.2d 312, 320-21. Heller also differs

[1] The only other time the jury left the courtroom between the objection and motion for mistrial was for a short break during the playing of the DVD of the interview with Polite, at which time the solicitor worked to improve the audio. Tr. 330, l. 5 – 331, l. 9.

from the present case in that it lacked the bench conference where the trial judge indicated that the motion for mistrial should be put on the record later.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). "[T]his is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function." Id. at 329–30, 730 S.E.2d at 285. Though our appellate courts should follow longstanding precedent and resolve an issue on preservation grounds when it "clearly is unpreserved," it is "good practice for [the appellate courts] to reach the merits of an issue when error preservation is doubtful." Id. at 330, 730 S.E.2d at 285. Here, the objection and motion for mistrial were properly made in compliance with the trial court's apparent instruction that defense counsel could put the matter on the record at a later time. Thus, this Court should rule on the merits of the issue raised.

II. The trial court's error in denying the motion for mistrial was not harmless.

Respondent argues that any error in the failure to deny the motion for mistrial was harmless. Contrary to Respondent's assertion, the evidence presented against Polite was not overwhelming. Further, the failure to grant a mistrial, where Sergeant Gobel's testimony could not be removed from the minds of the jurors in evaluating Polite's credibility, contributed to the conviction in this case.

"Before an error can be held harmless, a court must find the error harmless beyond a reasonable doubt." State v. Henson, 407 S.C. 154, 166, 754 S.E.2d 508, 515 (2014). "A harmless error analysis is contextual and specific to the circumstances of the case: 'No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.'" State v. Byers, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) (quoting State v. Reeves, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990)). Our Supreme Court recently noted in State v. Chavis:

> We disagree with the dissent that the "contributing to the verdict" standard and the "overwhelming evidence" standard are used interchangeably, and that one is less stringent than the other. In this case, where there is error in admitting certain testimony, we find that the error can be deemed harmless because there is other overwhelming evidence of guilt. However, we readily acknowledge that there are some errors, particularly errors of law, which cannot be rendered harmless by overwhelming evidence. *See, e.g., State v. Middleton,* 407 S.C. 312, 755 S.E.2d 432 (2014) (Pleicones J, dissenting) (noting that a failure to charge a lesser included cannot be rendered harmless by overwhelming evidence).

421 S.C. 101, 110 n. 7, 711 S.E.2d 336, 340 n. 7 (2015). Here, the issue was whether the trial court's curative instruction was sufficient to cure the prejudice from Sergeant Gobel's testimony.

Respondent's brief overstates the evidence against Polite, who was identified by only one witness, Antonio Brewer. Respondent's Brief, pp. 14-15. Brewer's identification of Polite came only after a month of badgering by police and their admitted threat to charge Brewer with murder if he did not give them a name for the shooter. Brewer knew Polite from "around town." Tr. 207, l. 14 – 213, l. 14; Tr. 304, l. 5 – 312, l. 9; Tr. 334, l.

13 – 335, l. 21. Respondent alleges that Polite gave an inculpatory statement to police wherein he "admitted to participating in the armed robbery." Respondent's Brief, p. 15. While Polite admitted that he was involved in the sale of marijuana with his co-defendants, he characterized himself as the "babysitter" of the "weed." He remained in the vehicle during the robbery and his defense at trial was mere presence. Tr. 410, ll. 8-13; State's Exhibit 43, audio of Appellant's second interview (on file with this Court). Notably, the only DNA evidence from the scene matched the victim and co-defendant, Walter Tucker. Tr. 191, ll. 2-18; Tr. 260, ll. 9-12; Tr. 261, l. 24 – 262, l. 3; Tr. 286, l. 21 – 287, l. 7. Thus, the jury here could have rationally concluded based on the evidence presented that Polite's statements to police were truthful – that he remained in the car during the robbery and murder and that he was not a part of the scheme to rob the victim. See State v. Brooks, 341 S.C. 57, 63, 533 S.E.2d 325, 328 (2000) ("Based upon the conflicting evidence introduced at trial, we cannot say that no other rational conclusion other than Brooks's guilt could be reached.").

Further, the perception in the juror's minds, that Polite either had a prior criminal record or was involved in some sort of unsavory activity that made him known to the police, contributed to the verdict. Polite's defense of mere presence, was undoubtedly impacted by an insinuation of his bad character. See State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987) ("Mere presence at the scene of a crime is insufficient to convict one as a principal on the theory of aiding and abetting.").

Therefore, there was not overwhelming evidence of guilt and the error contributed to the verdict such that the failure to grant a mistrial was not harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth herein and in Appellant's Brief, Appellant Travis Abe Polite requests this Court to reverse his convictions and grant him a new trial.

Respectfully submitted,

Laura R. Baer

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

This 2nd day of March, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant and Amended Designation of Matter to be Included in Record on Appeal in the above referenced case has been served upon Sherrie Butterbaugh, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Travis Abe Polite, #362894, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 2nd day of March, 2016.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 2nd day of March, 2016.

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