

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

V.

TRAVIS ABE POLITE,

APPELLANT

APPELLATE CASE NO. 2015-000182

FINAL BRIEF OF APPELLANT

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RESPONDENT,
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STATEMENT OF ISSUE ON APPEAL

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?

STATEMENT OF THE CASE

On December 13, 2012, the Beaufort County grand jury indicted Appellant Travis Abe Polite¹ for the offenses of murder, armed robbery, and kidnapping. R. 352.

On January 20 – 22, 2015, Polite appeared before the Honorable Brooks P. Goldsmith and jury for a trial on the above offenses. Polite was represented by Chief Public Defender Gene G. Hood and assistant public defender Lauren Carroway. The State was represented by assistant solicitors Sean Thornton and Hunter Swanson. R. 1.

The jury found Polite guilty of the murder and armed robbery. Polite was found not guilty of kidnapping. R. 349, ll. 3-9. Judge Goldsmith sentenced Polite to concurrent terms of thirty-nine years for murder and twenty years for armed robbery. R. 351, ll. 18-23; R. 356.

This appeal follows.

¹ Appellant is also known as Abe Travis Polite. R. 259, ll. 24-25.

STATEMENT OF FACTS

Trial Testimony

On September 6, 2012, Quantize Greer and Jessica Power went to the Taylor's Mobile Home Park, where Greer intended to purchase one-half pound of marijuana from Brandon Singleton and Walter Tucker, also known by the street name "Oowee." Power put the parties in contact with one another. R. 49, l. 5 – 51, l. 14. Greer suffered a gunshot wound to the chest and died. R. 253, l. 19 – 255, l. 15. Evidence was presented that Power knew that the drug sale was a pretext to rob Greer. R. 161, l. 20 – 163, l. 25; State's Exhibit 43, audio of Appellant's second interview (on file with this Court). However, Power claimed to be a victim, innocent of any such nefarious involvement. R. 55, l. 22 – 56, l. 2; R. 84, l. 24 – 85, l. 4.

Antonio Brewer was the owner of the mobile home at which the incident took place. Though he initially denied any knowledge related to the incident, Brewer later admitted being present when Walter Tucker, Brandon Singleton, and two other unknown males used his mobile home to do "a lick." Brewer claimed that he was in the back room during the incident, until he heard gunshots and ran out of the back of the mobile home. R. 117, l. 15 – 132, l. 13; R. 149, l. 6 – 151, l. 20. It was not until October 10, 2012, after detectives had paid him several visits and admittedly told him he would not want to "catch a murder charge," that Brewer claimed that Polite, who he knew from "around town," was the shooter. R. 132, l. 14 – 138, l. 14; R. 218, l. 5 – 226, l. 9; R. 248, l. 13 – 249, l. 21. Notably, Brewer identified Singleton and Tucker on September 7, 2013, despite the fact that they were associated with the Black Mafia Family (BMF) and

actually threatened him. R. 145, ll. 4-19; R. 150, ll. 12-16; R. 152, l. 23 – 153, l. 7; R. 155, l. 13 – 161, l. 19; R. 171, ll. 5-25; R. 226, l. 12 – 227, l. 22; R. 229, l. 24 – 230, l. 16.

Jessica Power's version of events inculpated only two individuals, Tucker and an unknown black male whom she saw seated in the living room of the mobile home with his eyes closed. According to Power, when she and Greer pulled up to the mobile home Tucker was outside. Greer tried to negotiate a better price for the marijuana but ultimately counted out the amount requested and gave it to Power. Power claimed that when they went to enter the mobile home, Tucker slammed the door behind her, leaving Greer outside. She was then forced to the floor and made to relinquish the \$2,500 in cash that Greer had given her to carry in for him. Power claimed that Greer gave her the money because it was too much for him to put in his pocket.² She claimed that the man on the couch asked Tucker for a gun and went outside the trailer. Power then heard a gunshot, at which time Tucker went outside. She heard several more gunshots as she ran to the back of the mobile home to hide. She encountered Brewer and both of them ran out of the back of the mobile home. R. 46, l. 16 – 55, l. 21; R. 68, l. 2 – 95, l. 13. Power was unable to identify Polite as the man who was sitting in the chair during the incident. R. 85, l. 22 – 86, l. 1.

David Roche and Kalin Higgs also testified, but neither of them provided any information actually linking Polite to the incident. R. 34, l. 22 – 38, l. 18; R. 39, l. 13 - 46, l. 7. A gun found in the vicinity of the incident had the victim's DNA on it. R. 116, ll. 2-18; R. 200, l. 21 – 201, l. 7. Power confirmed that Greer had a gun in the console of

² The inventory from the autopsy revealed that Greer was wearing gray cargo shorts at the time of the incident. R. 210, ll. 3-11.

his vehicle. R. 78, ll. 18-22. DNA was also collected from an iced tea bottle inside of Brewer's mobile home and co-defendant Walter Tucker could not be excluded as a possible contributor. R. 176, ll. 9-12. There was no DNA or fingerprint evidence that connected Polite to the incident location. R. 177, l. 24 – 178, l. 3.

Polite was arrested and interviewed twice by members of the Sheriff's Department after he signed waivers of his Miranda rights. During the first interview, on October 19, 2015, Polite denied any knowledge of or involvement in the incident. R. 234, l. 21 – 235, l. 21. On October 23, 2015, at Polite's request, Sergeant Fraser and Sergeant Rice met with Polite at the detention center. Polite told them that he was concerned for the safety of his wife and children due to threats from Walter Tucker. He described Tucker as "a killer," "scary," "crazy," and "psycho." Tucker told Polite that he murdered two or three other people before and claimed that he was protected by the devil. Tucker was part of the Black Mafia Family, who was making sure that Singleton was collecting and turning over the correct money from his marijuana sales. Polite "babysat" the marijuana that was shipped to the area from Atlanta for Singleton to sell. R. 232, l. 22 – 238, l. 18; R. 240, l. 10 – 248, l. 3; State's Ex. 43, audio of Appellant's second interview (on file with this Court).

Though Tucker was "locked up," Polite said that Tucker could place a phone call and that someone else from the Black Mafia Family would harm his family, just as Tucker threatened in the past. One of the officers told Polite that he was "half-ass telling" them the story of what happened. The officer said he understood that Polite wanted his family safe, but that "there is nothing we can do with half of the information." He said: "you're trying to work out some kind of a deal for your family; we can't do that until we get all the information and present it to the prosecutor." The officer said that they were not going to

protect someone who had only lied to them so far. State's Ex. 43, audio of Appellant's second interview (on file with this Court).

Polite said that Tucker and Singleton picked him up earlier on the date of incident and they drove around, as they had done in the past. Tucker received several phone calls from Power. She asked Tucker if he had any marijuana and said "my man [is] waiting on you." They then went to Brewer's trailer, where Polite and Singleton remained in the car. Polite was in the back seat. Tucker drove. When they arrived, Tucker went inside the trailer. Once the other vehicle arrived, Power entered the trailer through the back door. Polite said that Power's screams were feigned so that her friend would not know that she was "in on it." Polite suspected that Power arranged the "set up" due to her prior sexual relationship with Tucker. After Tucker robbed Power inside of the trailer, he shot the victim on the way out. State's Ex. 43, audio of Appellant's second interview (on file with this Court).

The only people who went inside the trailer were Tucker, Power, and Brewer. Polite said Brewer had prior interactions with Tucker and was "in" on the robbery. The only reason Polite accompanied Tucker and Singleton to the mobile home park was out of fear of Tucker. Once Tucker said he thought he killed someone, Polite insisted that they let him out of the car. State's Ex. 43, audio of Appellant's second interview (on file with this Court).

Motion for Mistrial

During Sergeant Gobel's testimony regarding Brewer's identification of Polite, the following exchange occurred:

Solicitor: I'm going to hand you what's been marked for identification as State's Exhibit No. 3 and ask you if you can identify that for me?

Sergeant Gobel: This is a photo lineup identification of the defendant, Travis Polite, which was made by Mr. Brewer on the 10th of October at my office during the interview.

Solicitor: All right. Is that -- how many photographs are in there?

Sergeant Gobel: There's six different photographs. Five of the photographs are just random people who have the same type of hair, the same facial build, similarities to the defendant, but are not the defendant. And then one photograph is that of the defendant, Travis Polite.

Solicitor: And when you were doing this, and let's not talk in generalities, when you did this lineup, did you infer [sic] to Mr. Brewer that he should pick out a particular person or not?

Sergeant Gobel: No, sir. When -- during this interview, Mr. Brewer identified the defendant that he saw as the shooter in this case and he called him by the name, Travi. *He didn't use the name Travis Polite; he used Travi. We are familiar with that street name or nickname, as -- and we commonly know folks by their street names.*

R. 206, l. 17 – 207, l. 14 (emphasis added). Defense counsel objected and an off-the-record bench conference took place. The trial judge then sustained the objection and ordered the last statement of the witness stricken from the record. He ordered the jurors to disregard the last statement of the witness. R. 207, ll. 15-24.

Outside of the presence of the jury, defense counsel was allowed to place the reasoning for his objection and motion for mistrial on the record. Defense counsel argued that the curative instruction given by the court was insufficient and the police familiarity with Polite was already in the jurors' minds. R. 257, l. 21 – 259, l. 19. Though the trial judge did not state that the motion for mistrial was denied, his continuing on with the case was an implicit denial of the motion. Further, following the jury's verdict, defense counsel renewed the motion for mistrial and the court denied it. R. 350, ll. 9-22.

ARGUMENT

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.

The officer's testimony that he was "familiar" with Polite's "street name or nickname" of "Travi" was improper character evidence because Polite did not first put his character at issue. R. 206, l. 17 – 207, l. 14; 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. The officer's statement implied that Polite had a criminal record, or at the very least was under suspicion by the police outside of the present incident.

In Priest v. State, 282 S.W.2d 390 (Tex. Crim. App. 1955), the Texas Court of Criminal Appeals found that a curative instruction was insufficient to cure the prejudice where the victim twice referenced the defendant's criminal history. He said that police showed him a file of "known pickpockets" and "the police files" on the defendant. 282 S.W.2d at 390-91. The Priest court found that the trial court was correct in sustaining the objections and instructing the jury to disregard the answers, finding that "[s]uch inquiries were inadmissible as they inferred that appellant was a criminal generally and had committed other extraneous offenses." Id. at 391. The court found the questions and answers "highly inflammatory and prejudicial." Id. Thus, they went a step further and found that "[n]otwithstanding the court's rulings and instructions, the jury could not wholly disregard and keep such testimony out of mind." Id. Priest's conviction was accordingly reversed and his case remanded for a new trial. Id.

In Hicks v. State, 355 S.W.2d 189 (Tex. Crim. App. 1962), the Texas Court of Criminal Appeals relied on its decision in Priest. The Hicks court reversed the defendant's conviction for robbery by assault where the trial court failed to grant a mistrial after an officer testified that he was familiar with the defendant's mug shot. 355 S.W.2d at 189. There was additional evidence that the jury did not abide by the court's instruction to disregard the officer's answer. Id. at 190. The Hicks court found that the "jury consider[ed] the appellant's character when it had not been put in issue, giving consideration to a statement implying strongly that the appellant had been in previous trouble, when no evidence was introduced showing any previous acts of misconduct or law violation." Id.

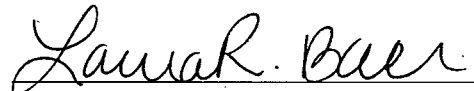
This Court found that "a vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 82 (Ct. App. 2003). However, the determination of the degree of prejudice must be made on case by case basis. In Thompson, the jury could have reasoned that the officer's reference to the defendant's warrants related to the charged conduct and not some other incident. 352 S.C. 552, 561, 575 S.E.2d 77, 82. In the present case, the officer's knowledge of Polite's street name was obviously prior to the charged incident because Polite was not even a suspect until Brewer mentioned him. See State v. Council, 335 S.C. 1, 13 n. 7, 515 S.E.2d 508, 514 n. 7 (1999) (distinguishing the fingerprint card referenced in Council from the mug shot admitted in State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986) because the date of the mug shot was one year prior to the trial, implying that Tate had a prior criminal record).

Here, the officer's testimony regarding law enforcement's familiarity with Polite's nickname implied that he either had a prior criminal record or was involved in some sort of unsavory activity that made him known to the police. Polite did not testify and did not present any witnesses to testify to his good character. Therefore, this attack on his character was improper. Further, Polite's defense was mere presence, which would clearly be impacted by an insinuation of his bad character. The instruction to the jury to disregard the testimony was not sufficient because the jurors could not reasonably put the comment out of their minds. It undoubtedly influenced their perception of all of the evidence presented. Though the trial judge ordered the statement "stricken" and instructed the jurors to "disregard the last statement," he failed to instruct the jury that the statement should not be considered for any purpose during deliberations. R. 207, ll. 20-23; see State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) ("Great care should be exercised in the 'delicate, difficult, and important matter' of instructing the jury to disregard incompetent evidence. The jury should be specifically instructed to disregard the evidence, **and not to consider it for any purpose during deliberations.**" (emphasis added)). The jury instructions given the following day were no more helpful given their remoteness in time. R. 313, ll. 10-16. Therefore, the motion for mistrial should have been granted.

CONCLUSION

Based on the foregoing, Appellant Travis Abe Polite respectfully requests that this court reverse his convictions and grant him a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "Laura R. Baer", written over a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of April, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

April 19th, 2016

Laura R. Baer

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Appellate Defender

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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 Sherrie Butterbaugh, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of April, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of April, 2016:



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.