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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 2016-UP-034 (S.C. Ct. App. filed Jan. 20, 2016)
2012-GS-10-05449 & 05452

THE STATE,

RESPONDENT,

V.

TYREL R. COLLINS,

PETITIONER

APPELLATE CASE NO. 2016-000877

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tyrel Rashone Collins, Appellant.

Appellate Case No. 2014-000216

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-034
Submitted December 1, 2015 – Filed January 20, 2016

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

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Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, and Senior
Assistant Attorney General Melody Jane Brown, all of
Columbia; and Solicitor Scarlett Anne Wilson, of
Charleston, for Respondent.

JAN 20 2016
SECRET OF
APPELLATE DEFENSE

PER CURIAM: Tyrel Rashone Collins appeals his conviction for murder and possession of a firearm during the commission of a violent crime, arguing (1) the trial court erred in limiting the introduction of evidence of the victim's reputation for violence in the community because the evidence was necessary to Collins's presentation of a complete defense and because the prosecutor opened the door to such evidence during his opening statement and (2) Collins's second trial was barred by double jeopardy because the grant of a mistrial during his opening statement at the first trial was not dictated by manifest necessity or the ends of public justice. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in limiting the introduction of evidence of the victim's reputation for violence in the community: *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001) ("The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion."); Rule 402, SCRE ("Evidence which is not relevant is not admissible."); *State v. Cope*, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) ("[E]vidence of third-party guilt that only tends to raise a conjectural inference that [a] third party, rather than the defendant, committed the crime should be excluded.").
2. As to whether Collins's second trial was barred by double jeopardy because a mistrial was improvidently granted in the first trial: *State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005) ("Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial."); *State v. Baum*, 355 S.C. 209, 214, 584 S.E.2d 419, 422 (Ct. App. 2003) ("Generally, jeopardy attaches when the jury is sworn and impaneled, unless the defendant consents to the jury's discharge before it reaches a verdict or legal necessity mandates the jury's discharge."); *State v. Cooper*, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999) ("The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless an abuse of discretion amounting to an error of law occurs."); *Arizona v. Washington*, 434 U.S. 497, 511 (1978) ("[T]he overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.").

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

AFFIRMED.

SHORT, THOMAS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TYREL R. COLLINS,

APPELLANT

APPELLATE CASE # 2014-000216

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

Opinion No. 2016-UP-034

PETITION FOR REHEARING

On January 20, 2016, this Court affirmed Appellant’s convictions and sentences in an unpublished opinion. State v. Collins, 2016-UP-034 (S.C. Ct. App. filed Jan. 20, 2016). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing of the two issues presented in his case based on the significant points overlooked and/or misapprehended by this Court in arriving at its conclusions and holdings.

Improper Exclusion of Defense Evidence

On appeal, Appellant raised an issue concerning the trial judge’s improper exclusion of relevant evidence necessary to his ability to present a complete defense even after the prosecutor opened the door. In ruling on this issue, this Court cited State v. Saltz, 346 S.C. 114, 127, 551

S.E.2d 240, 247 (2001) for the proposition that a trial judge has broad discretion on issues of relevancy and the decisions of a trial judge will be reversed “only if there is a clear abuse of discretion.” Additionally, this Court cited Rule 402, SCRE for the general proposition that only relevant evidence is admissible. Finally, this Court cited State v. Cope, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) concerning evidence of third-party guilt. Specifically, this Court quoted “[E]vidence of third-party guilty that only tends to raise a conjectural inference that [a] third party, rather than the defendant, committed the crime should be excluded.” Thus, this Court determined the proffered evidence was not relevant and raised a conjectural inference that a third party committed the crime, and as such, should be excluded. Appellant respectfully disagrees with both points and asks this Court to rehear the matter.

Solicitor's opening statement

On September 9, 2013, the solicitor delivered his opening statement to the jury in Appellant's first trial before the Honorable J.C. Nicholson, Jr. During his opening, the solicitor discussed the history of the area where the alleged murder occurred. He explained he wanted to give the jury “some perspective on what we face in this particular community.” R. 15, lines 20-21. The solicitor promised the jury a “flavor of the East Side” during the trial: “In all of our Charleston neighborhoods, this was perhaps one of the most lawless. This has the highest incidence of illiteracy, highest unemployment rate, fewest college degrees.... And the problem with lawlessness is that it breeds lawlessness.” R. 18, lines 16-22. He claimed “[t]he East Side became a tough place, tough place to raise a family, tough place to do business, tough place to do police work.” R. 18, lines 4-6.

Due to what the solicitor described as the “lawlessness” of the East Side, the jurors would hear “substantially less” evidence in this case than in others. In the East Side, “[t]here's a

cultural bias against working with the police for any reason. There's genuine fear in the streets for cooperating with the police for any reason." This fear and cultural bias "shape[d]" how the solicitor had "to tell this story to [the jury], how the evidence [he got] to present and what the witnesses [said]." R. 18, line 23 – R. 19, line 8.

According to the solicitor, on the East Side, "[i]t's real ... and it's palpable." Here, "people don't tell their stories and people count on people not telling their stories and not explaining things and not seeing what they saw. This was a lawless area." R. 19, lines 9-14. He provoked the jurors with images of Wild Bill and warned against allowing lawlessness: "[W]e can't allow lawlessness. We can't allow our streets to be this way." R. 19, lines 15-22.

The solicitor went to great pains to tell the jury that the state did not have to prove motive in the case. Although the solicitor had an idea of motive, he was not required to prove "the why." He warned the jury that this may not be satisfactory to the jurors, but the state was not required to prove motive. R. 20, line 19 – R. 21, line 6.¹

Defense's opening statement

Defense counsel began his opening statement: "Good morning. The solicitor talked about the East Side. This is the East Side, the common area. And Solomon Chisolm was legendary in this area as a killer." R. 22, lines 19-22. The solicitor immediately objected, and the judge excused the jury to consider the arguments. R. 22, line 23 – R. 23, line 17. The solicitor argued the mistrial motion was "because he's now rung a bell that we can't unring." He further argued it was "designed to be improper," "designed to come out before an objection [could] be made," "designed to be heard so it can't be unheard." Thus, he argued, "there's no

¹ The solicitor's opening statement in the second trial was almost identical to his opening during the first trial. R. 71, line 19 – R. 79, line 14.

curative instruction that fixes it.” R. 24, lines 4-13; see also R. 24, line 25 – R. 25, line 1. He noted that the deceased was never convicted of any homicide, but agreed that was not the same as not being a killer. The solicitor was incensed that defense counsel had made the remark when he had “no burden to prove anything, no obligation to prove anything.” He accused defense counsel of “drop[ping] a bomb,” “slinging mud and trying to prejudice” the jury. R. 102, lines 14-24. The prosecutor *admitted* the evidence of the deceased’s violent history would be admissible during the trial, but he took umbrage with defense counsel mentioning it during his opening statement. R. 27, line 19 – R. 28, line 1.

Judge Nicholson determined that telling the jury that “he’s a legendary killer is totally improper.” R. 25, lines 6-10. When Judge Nicholson inquired how the opening related to the deceased’s reputation for violence, defense counsel explained that his remarks went directly to the deceased’s reputation in the community for having killed a dozen people. R. 25, line 11 – R. 26, line 8. According to defense counsel, the “point” was that due to his reputation as a legendary killer, “[a]ny number of people could have wanted to kill him.” R. 26, lines 12-15; R. 29, line 17 – R. 30, line 4. Further, defense counsel explained the evidence responded directly to the solicitor’s opening statement about motive. R. 26, lines 16-19; R. 33, line 24 – R. 34, line 3. Defense counsel noted a recent newspaper article chronicling the “legend” surrounding the deceased due to his history of violent crimes, including three murder charges in less than four months. R. 27, lines 7-18.

Judge Nicholson found defense counsel’s statement was “very clearly improper in opening statement”; however, he noted “[i]t would have been perfectly proper in closing arguments.” R. 30, line 22 – R. 31, line 10. Judge Nicholson also determined that defense counsel could prove the deceased’s reputation in the community throughout the course of the

trial; however, where he had “a problem” was “in making that argument in opening statements.” R. 31, line 24 – R. 32, line 1. According to the judge, defense could had “to offer some foundation before [he could] just stand up there and say, hey, he’s a legendary killer.” He then analogized the situation to “ask[ing] some woman is she a prostitute if you don’t have any basis know that she’s a prostitute.” Thereafter, Judge Nicholson granted the state’s motion for a mistrial. R. 35, lines 3-11.²

Second trial – motion to bar evidence

The solicitor called Appellant to trial four months later before the Honorable Roger M. Young, Sr., and a jury. R. 36. At the second trial, the solicitor moved to bar evidence of the deceased’s reputation – the very evidence he previously admitted would be admissible during the course of the trial and the very evidence Judge Nicholson suggested would be admissible. R. 38, line 23 – R. 39, line 4. Defense counsel argued evidence of the deceased’s reputation was relevant because “[h]e was the most notorious person in that area in a long time,” including being “accused of three different murders” and “rumored to have killed anywhere from eight to a dozen people.” R. 39, lines 10-17. Further, defense counsel noted he wanted to use the evidence to show “there could have been any number of people who would have wanted to kill Solomon Chisolm, because of the enemies that he made and the reputation.” R. 40, lines 4-7. The judge refused to permit the introduction of evidence on this basis stating that defense would have to “present a little bit more evidence” than that. R. 40, lines 8-12.

According to defense counsel, four days before the deceased’s death, Appellant had been a passenger in a car on the interstate when the driver was shot and killed. The deceased was the only suspect though he was never charged. R. 41, lines 3-10. Based upon this event, Appellant

² The judge’s erroneous decision to grant the mistrial will be discussed in greater detail infra.

was the primary suspect when the deceased was shot. The police and others believed the death of the driver gave Appellant a motive to kill the deceased. Defense counsel wanted to use this evidence to attack the investigation. R. 41, line 11 – R. 42, line 16.

Judge Young ruled that defense counsel could not present the evidence:

I wouldn't at this point see any relevance to a defense that you've indicated to me that you have. If anything, it supplies motive for your client. And if it's kind of a backhanded reputation of victim evidence, well, again, I don't see where that's relevant since you're not putting up self-defense. And it really doesn't seem to accomplish the point at all.

R. 43, lines 9-16.

Complete defense - Relevance

The evidence of the deceased's reputation was necessary for a full and fair presentation of Appellant's defense. The prosecution's evidence against Appellant was very weak. Essentially, the entire prosecution case rested on the testimony of Raymond Clement, who gave multiple inconsistent statements.³ No physical evidence tied Appellant to the crime. The deceased's reputation in the community, particularly, his reputation for violence in the community, was essential to Appellant's defense that someone other than Appellant shot the deceased. Appellant did not shoot the deceased; therefore, he could not rely upon self-defense or defense of others. Further, he was unable to argue the crime was something less than murder due to his defense that he was not the shooter. Thus, his defense was that someone else committed the crime and relied upon the weak case of the prosecution to make this clear. However, the jury was left with only the testimony of

³ However, Clement had been an informant for local and federal law enforcement officers for several years. His information had resulted in the arrests and convictions of "a lot of people." R. 167, lines 11 – 24; R. 169, line 10 – R. 170, line 11. At the time of the trial, Clement had a pending charge, reckless homicide, with the Ninth Circuit Solicitor's Office. R. 167, lines 1 – 3; R. 170, lines 12 – 19.

Clement that Appellant was the shooter and no other plausible theory of who may have shot the deceased.

Pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, a defendant has the right to present a complete defense – “through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.” State v. Gillian, 360 S.C. 433, 449–450, 602 S.E.2d 62, 71 (Ct.App.2004); see also State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986). “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

Certainly, the right to present a defense is constrained by the Rules of Evidence. However, those constraints do not prohibit the introduction of the proffered evidence in this case; rather, the Rules of Evidence compel admission of the evidence. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. Further, “[a]ll relevant evidence is admissible” unless prohibited by constitutional or statutory provisions or another rule. Rule 402, SCRE. Character evidence, even of the accused, is admissible when offered by an accused or by the prosecution to rebut the same. Rule 404(a)(1), SCRE. Additionally, evidence of a pertinent trait of character the alleged victim of the crime is admissible. Rule 404(a)(2), SCRE.

Appellant's defense was not a third-party guilt case dressed in different clothing. Appellant's defense was not “a conjectural inference that [a] third party ... committed the crime.”

Rather, Appellant's defense was that a crime had occurred as evidence by the deceased's body, but that Appellant had not caused the death. In essence, Appellant defended against the charge by presenting the only defense he could – "some other dude did it."

Opening the door - Relevance

In State v. Stroman, 281 S.C. 508, 512-513, 316 S.E.2d 395, 398-399 (1984), the Court found a defendant had opened the door to his previous participation in two armed robberies because he had questioned an accomplice regarding prior housebreakings. The Court held "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." Id. at 513, 316 S.E.2d at 399 (quoting State v. Albert, 277 S.E.2d 439 (N.C. 1981)); see also Vaughn v. State, 362 S.C. 163, 171, 607 S.E.2d 72, 76 (2004).

The evidence of the deceased's reputation was a fair rebuttal to the prosecution's opening statement. Although the history of the area and the crime rate of the area were completely unnecessary for the prosecution to explain in opening, the prosecutor chose to do so at both trials. As a result of this choice, the prosecutor opened the door to evidence about the deceased's reputation in the community, particularly, his reputation for violence. The prosecutor told the jury that the area was "lawless" and the reason for his weak case was because people did not want to cooperate with the police, fearing retaliation. These statements invited defense counsel's reply that the area was lawless and that the deceased was part of that lawlessness.

Based upon the clear invitation by the prosecutor during his opening statement and the constitutional right to present a complete defense using relevant evidence, Judge Young erred in excluding the evidence of the deceased's reputation, particularly for violence, in the community.

This evidence was relevant and essential to Appellant's defense that someone else shot the deceased as it showed many people in the community had a motive to harm the deceased. The evidence also responded to the opening statement of the prosecutor and his theme of "lawlessness" used throughout the trial.

Double Jeopardy

On appeal, Appellant asserted that his second trial before Judge Young was barred by double jeopardy because Judge Nicholson granted a mistrial that was not dictated by manifest necessity or the ends of justice after consideration of all the facts and circumstances. In affirming Appellant's convictions and sentencing as to this issue, this Court cited several cases concerning general propositions of law governing double jeopardy. Principally, this Court relied upon deference to the trial judge's decision. Appellant respectfully requests this Court rehear the matter in light of the facts in the record demonstrate the judge improvidently granted the mistrial.

Both the United States Constitution and the South Carolina Constitution protect individuals from being twice placed in jeopardy by the state. "No person shall be... Subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V.⁴ "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty." S.C. Const. Art. 1, § 12. "It is a rule of general recognition that one is in jeopardy when a legal jury is sworn and impaneled to try him, upon a valid indictment, in a competent Court, unless the jury before reaching a verdict be discharged with the prisoner's consent, or upon some ground of legal necessity or the verdict, if rendered be set aside according to law." Ex Parte Prince, 185 S.C. 150, 159, 193 S.E. 429, 433 (1937); see also State v. Baum, 355 S.C. 209, 214, 485 S.E.2d 419,

⁴ The Fifth Amendment is made applicable to the states through the Fourteenth Amendment's Due Process clause. Benton v. Maryland, 395 U.S. 784 (1969).

421 (2003). The theory of former jeopardy protects an individual from multiple prosecutions for the same offense after an improvidently granted a mistrial. State v. Kirby, 269 S.C. 25, 27 – 28, 236 S.E.2d 33, 34 (1977).

Double jeopardy bars a subsequent trial where a mistrial is granted over the defendant's objection unless the mistrial was required due to a manifest necessity based upon a consideration of all the circumstances. Kirby, 269 S.C. at 28, 236 S.E.2d at 34. "The pivotal issue determinative of the constitutional prohibition against double jeopardy is thus the existence of 'manifest necessity' for the mistrial." Id.

The constitutional prohibition against double jeopardy prevents a retrial following a mistrial only if there were manifest necessity for the mistrial. Id., at 29, 236 S.E.2d at 34. The test is "whether the mistrial was dictated by manifest necessity or the ends of public justice," which is defined as "the public's interest in a fair trial designated to end in just judgment." Id. at 29, 236 S.E.2d at 35; see also, Illinois v. Somerville, 410 U.S. 458 (1973); Wade v. Hunter, 336 U.S. 684 (1949); State v. Kelsey, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998); State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983); State v. Garris, 394 S.C. 336, 345, 714 S.E.2d 888, 893 (Ct. App. 2011); State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct. App. 2006).

"The power of the court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." Kirby, 269 S.C. at 29, 236 S.E.2d at 34; see also State v. Prince, 279 S.C. 30, 310 S.E.2d 471 (1983). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). "[M]anifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion

leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.” United States v. Jorn, 400 U.S. 470, 485 (1971).

In determining whether to grant a mistrial motion, the trial judge should consider the following factors: “the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony in the case.” State v. Creech, 314 S.C. 76, 82, 441 S.E.2d 635, 638 (Ct. App. 1994)(citing State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988)).

An examination of South Carolina’s double jeopardy jurisprudence demonstrates that the mistrial order during Appellant’s first trial was not dictated by manifest necessity or the ends of public justice. Manifest necessity and the ends of public justice require a powerful showing, which simply did not exist at Appellant’s first trial.

The South Carolina Supreme Court found manifest necessity was established where the solicitor prosecuting the case died during the trial and the assistant solicitor had not been present for any of the trial and was totally unprepared to prosecute the remainder of the case. Kirby, 269 S.C. at 29, 236 S.E.2d at 35. In Baum, 355 S.C. at 214, 485 S.E.2d at 421, the Court affirmed a mistrial grant where the deceased’s body was found during the trial because the public’s interest in a fair adjudication was implicated by the discovery of the body, which was an extremely important piece of evidence with as much potential to exonerate as to inculcate the accused and finding.

In State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000), this Court held that the double jeopardy clause barred the defendant’s prosecution after an improvidently granted mistrial. After the jury was sworn, the prosecution moved for a continuance based on the absence of a material witness. Id. at 456, 539 S.E.2d at 718. The judge denied the continuance

motion but granted the State's alternate motion for a mistrial. Id. When the case was called to trial again, the defendant moved to dismiss based on double jeopardy. Id. This Court held the mistrial was not dictated by necessity or by the ends of public justice based upon the absence of a material witness. Id. at 459, 539 S.E.2d at 720.

In Prince, 279 S.C. at 33, 310 S.E.2d at 472-473, a unanimous South Carolina Supreme Court found the granting of a mistrial where the jury asked to hear testimony was improper. The jury had been deliberating for less than six hours, a portion of which had been used for an evening meal, and the court had invested two days in the trial. Id. After noting "[t]he 'manifest necessity' rule is easy to state but sometimes difficult to apply" and that "[i]n borderline cases, it is the inclination of the appellate courts to sustain the judge in the exercise of his discretion," the Court held that record failed to reveal facts to justify declaring a mistrial over the defendant's objection. Id. at 33, 310 S.E.2d at 473.

Further, South Carolina's jurisprudence requires consideration of alternatives to the granting of a mistrial, such as giving a curative instruction. "If the trial [court] sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-912 (1996). A curative instruction is generally deemed to cure any error. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989). State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005); State v. McEachern, 399 S.C. 125, 147, 731 S.E.2d 604, 615 (Ct. App. 2012); State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996).

This Court's decision in State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012) is instructive with regard to factors to consider when a party moves for a mistrial. Manning was

charged with felony DUI and drug possession, and at the beginning of jury selection, the trial judge read both indictments to the prospective jurors. After jury selection, Manning moved to sever the charges, and the judge granted the motion. Thereafter, Manning moved for a mistrial because the jurors were aware of both charges. The trial judge denied the motion. *Id.* at 268-269, 734 S.E.2d at 320. Although this Court found Manning waived this issue on appeal, this Court addressed the merits and found the “single reference to the schedule three drug charge contained in the indictments read at the beginning of trial [did] not constitute sufficient prejudice to justify a mistrial.” *Id.* at 270, 734 S.E.2d at 320 (emphasis added). The fact that the jury heard only a single reference to the other charge was foundational to this Court’s decision.

In *State v. Thompson*, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003), a police officer, testifying on behalf of the prosecution, informed the jury that Thompson had warrants pending against him. Thompson moved for a mistrial based upon the prejudicial and improper testimony. *Id.* at 560, 575 S.E.2d at 82. This Court held the officer’s “single reference to warrants that existed against Thompson did not constitute sufficient prejudice to justify a mistrial.” *Id.* at 561, 575 S.E.2d at 82 (emphasis added). The officer’s statement did not convey that the warrants concerned unrelated charges or other bad acts. In light of the jury hearing evidence that the police were looking for Thompson in connection with the offense for which he was on trial, “it would be reasonable to assume the jury inferred that the warrants related to the charged offenses.” *Id.* at 561-562, 575 S.E.2d at 82-83. As in *Manning, supra*, the single reference was of singular importance in arriving at the ultimate conclusion.

In *State v. Rogers*, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004), the judge learned that a newspaper containing an article about the trial was in the jury room. The judge questioned the jurors regarding their having read, seen, or heard about the article. Six jurors responded

affirmatively. Only one juror admitted to having read the article. She remembered details in a paragraph following one reference to the defendant's prior record. As a result, this juror was excused by the trial judge. This Court held the trial judge's actions were proper and a mistrial was not warranted where the other five jurors had very limited exposure to the article and testified the article had not caused them to form any opinions. *Id.* at 184-185, 603 S.E.2d at 913-914.


Retrial - Motion to bar prosecution

When the state called the case for a second trial on January 6, 2014 before Judge Young, Appellant moved to bar his prosecution based on double jeopardy. R. 37, line 1. Defense counsel noted the solicitor's opening statement discussed the high crime rate in the East Side during the first trial. R. 52, lines 20-23. Further, defense counsel argued the mistrial was "improperly granted and not dictated by manifest necessity." He explained that a "curative instruction could have been given" and that nothing he said was evidence. R. 53, lines 2-8; R. 58, lines 3-12. The solicitor repeated his argument that the "bell could not have been on wrong. Those things could not have been unsaid." R. 56, lines 5-11; R. 57, lines 8-9 ("I don't think you could have put that genie back in the bottle"). According to the solicitor, "a mistrial was the easiest, cleanest way of cauterizing and removing that particular stain from that trial." R. 56, lines 12-15.

Judge young found that Judge Nicholson, who granted the mistrial, "acted within his sound discretion to grant a mistrial." He determined "there was clearly a misunderstanding of what [defense counsel] could and couldn't say." After noting that "it was brought about by the defense, and not by the prosecution," the trial judge held the granting of the mistrial did not bar the subsequent prosecution of Appellant. R. 58, lines 18 - 24.

Appellant's argument regarding the erroneous mistrial grant is two-fold. First, the evidence was admissible. Therefore, the granting of a mistrial was erroneous because there was no error in defense counsel using his opening statement to foreshadow what the evidence would be. Second, even if this Court were to determine that the evidence was not admissible, the mistrial was not dictated by manifest necessity or the ends of public justice. What defense counsel said to the jury was not evidence and was merely a roadmap of where the case would go. Defense counsel made a single reference to the deceased's reputation. Thus, it was unlikely that the single reference had prejudiced the jury. Certainly, a curative instruction to disregard the statement would have cured any error created by defense counsel's opening statement.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

This 4th day of February, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,


. V.

TYREL R. COLLINS,

APPELLANT

CERTIFICATE OF SERVICE

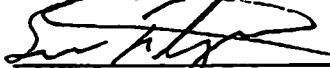
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Tyrel R. Collins #338147, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 4th day of February, 2016.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 4th day
of February, 2016,

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

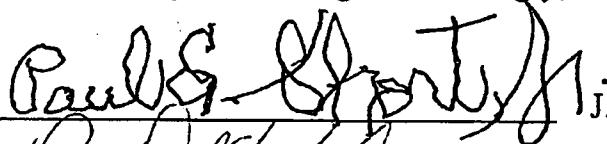
v.

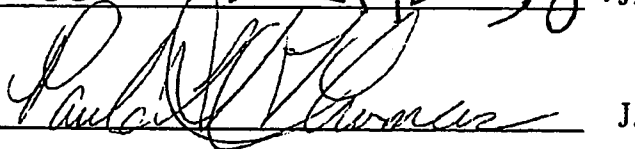
Tyrel Rashone Collins, Appellant.

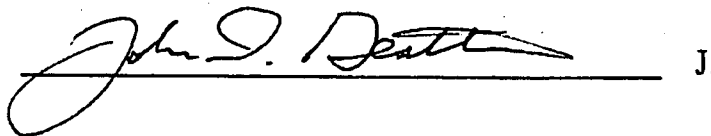
Appellate Case No. 2014-000216

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Donald J. Zelenka, Esquire
Melody Jane Brown, Esquire
Scarlett Anne Wilson, Esquire
John W. McIntosh, Esquire

FILED

March 24, 2016