STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2015-001585

THE STATE, ...RESPONDENT,

v.

STERLING MAYBIN, ...APPELLANT.

AMENDED FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The trial court properly refused to grant a mistrial based on the admission of evidence linking Appellant to other crimes that had been committed in the area because Appellant invited any allegedly erroneous testimony.

STATEMENT OF THE CASE

Appellant was indicted at the August term of the grand jury for Newberry County for third-degree burglary (2015-GS-36-0121) and petit larceny (2015-GS-36-0122). Appellant proceeded to trial by jury and was convicted as charged. He was sentenced by the Honorable Frank R. Addy, Jr. to an aggregate ten years' imprisonment. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Sam Glenn arrived at his home and observed a man just outside the storage shed of his neighbor, Walter Cromer. (R. 4.) The man appeared to be "fiddling" with something near the storage room door. (R. 6.) Believing the man to be Cromer, Glenn spoke to him. (R. 4.) However when the man turned, Glenn realized he was not Cromer and returned to his own house to call the police. (R.6–7.) When the police arrived, the man fled from Cromer's backyard, and Glenn saw him pass by on a green bicycle. (R. 8.) Glenn recognized the man, but did not know his name; he thought he looked like Thierry Maybin's brother.[1] (R.9,16–17.)

Officers followed the suspect on foot briefly but gave up chase when he fled into the woods. (R.26–27, R.76.) The police were able to recover the bicycle. (R. 77.) The perpetrator was eventually identified as Appellant, who was arrested and charged with third-degree burglary and petit larceny. (R.117.)

At trial, Officer Harold Malloy, who had been one of the first to respond, testified that upon arrival he was directed by Glenn to the back of the house. (R.22.) Officer Malloy described how he walked around back and saw Appellant speed by on his bicycle. (R.23.) Although Officer Malloy did not immediately recognize Appellant, he knew he had seen him before and eventually realized the identity of Appellant. (R.23.)

On cross-examination, Appellant questioned Officer Malloy about the report written for the incident. (R.37–38.) Appellant asked that he read a portion of it aloud to the jury, which Officer Malloy did:

> Officer Malloy: The suspect was located, was not located but a possible identity was provided due to Cromer sees [sic] Sterling Maybin in the area recently, referred to case numbers 2014-11160

[1] Appellant's brother is Thierry Maybin.

> and 2014-11161 which were two prior property crimes in that same area, on that same street.
>
> Defense Counsel: But the report indicates that Mr. Cromer said he had seen Sterling Maybin on his property two days beforehand?
>
> Officer Malloy: That was from a prior report, yes sir. The reason why we had so many officers--
>
> Defense Counsel: Your Honor,--
>
> The Court: He can explain his answer, go ahead.
>
> Officer Malloy: The reason why we had so many officers to respond to this is, this is the third incident that we had of theft on that street in the last, in that two-day span, three-day span.
>
> Defense Counsel: And, Your Honor, that is not in relation to any kind of question I have asked.
>
> Officer Malloy: That was the verification of the case numbers that I read.

(R.38.) Defense Counsel subsequently asked whether Appellant had been arrested for the previous crimes and Officer Malloy answered in the negative. (R.39.) On redirect the State asked whether the "reports on file prior to [this incident]" involved Appellant. (R.39.) Officer Malloy responded Appellant was involved in the files and that fact aided in the police identifying him in the current case. (R.39.) Appellant objected, contending the State could not introduce any testimony identifying Appellant as a suspect in other crimes because it would be impermissible prior bad acts evidence. (R.40.) Outside the presence of the jury, the State proffered the testimony it sought to elicit. (R.41–44.) Appellant subsequently moved for a mistrial, arguing the jury heard testimony that he was a suspect in two other cases and there was no way it could now disregard that information. (R.48.) The trial court considered the motion overnight and the next morning denied it. (R.59.) In doing so, it noted Appellant asked "this officer to read those two sentences in the incident report about the other two cases" after which

the witness was allowed to explain his answer. (R.58.) The trial court concluded that the Appellant had "to some extent . . . possibly opened the door" to the testimony. (R.59.) It further noted the officer testified Appellant had not been arrested for those crimes, which led the State to ask whether Appellant was involved in the other cases. (R.58–59.) However, it prohibited further testimony on the subject. (R.59.) The trial court noted, however, that nothing would prohibit the State from questioning Cromer as to how he identified Appellant because he had seen him two days prior. (R.59.)

Cromer testified he had received a call on the day of the incident that his utility building had been broken into. (R.79.) Two days before that, Cromer had come home and seen a bicycle in his front yard—the same bicycle later recovered by officers pursuing Appellant. (R.86.) He looked in his backyard and saw Appellant, who he grew up with. (R.87.) When Cromer spoke to him, Appellant got on his bike and rode away. (R.88.) After the occasion giving rise to this charge, Cromer informed an officer he thought the perpetrator was Appellant and gave her that name as a suspect. (R.89.)

The State rested and Appellant moved for directed verdict, which was denied. (R.118–121.) The jury found Appellant guilty as charged and the court sentenced him to ten years' imprisonment on both charges, to run concurrently. (R.174.)

ARGUMENT

The trial court properly refused to grant a mistrial based on the admission of evidence linking Appellant to other crimes that had been committed in the area because Appellant invited any allegedly erroneous comments.

Appellant contends the trial court erred in failing to grant a mistrial based on testimony of the investigating officer during cross-examination, which indicated Appellant was implicated in the other crimes. However, even assuming arguendo the evidence was inadmissible, a review of the testimony reveals Appellant's questioning invited this disclosure. Moreover, any prejudice was negligible because the officer confirmed Appellant was not arrested for those crimes.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011). "It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. McEachern*, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008).

Without directing the argument to any particular testimony, Appellant complains that the "jury heard inadmissible evidence that Appellant's identity as the suspect in the alleged burglary was based on reports of the two prior thefts in the neighborhood." (Appellant's Br.8.) However, this inference was the substance of the report Appellant had Officer Malloy read aloud to the jury: "The suspect was located, was not located but a possible identity was provided due to Cromer sees [sic] Sterling Maybin in the area recently, referred to case numbers 2014-11160 and 2014-11161 which were two prior property crimes in that same area, on that same street." (R.38.)

The language from the report elicited by Appellant itself indicates Cromer had seen Maybin earlier and referenced the reports of two other property crimes in the area. Furthermore, it was defense counsel who elaborated on the subject by asking whether Appellant had been arrested. The trial court did not abuse its discretion in allowing the State to consequently question Officer Malloy on redirect about whether the prior reports "involve[]" Appellant.[2] Indeed, this evidence essentially mirrored the substance of the report Appellant had Officer Malloy read aloud to the jury. Appellant is precluded from claiming error based on the admission of testimony he himself invited. *State v. Curtis*, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) ("A party cannot complain of an error which his own conduct created."); *State v. Logan*, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal."). There was no basis for a mistrial where Appellant prompted the discourse he now complains of and the trial court therefore properly denied his motion for mistrial.

Further, any error in admission is harmless in light of the other evidence in the record. Glenn testified he recognized Appellant when he encountered him in Cromer's yard—he simply did not know his name. Officer Malloy also stated that when Appellant rode by him as he fled the scene of the crime he recognized him and eventually realized who he was. Additionally, Cromer testified to having seen Maybin in his yard previously that week with the same bicycle as the one discarded by the perpetrator during police pursuit. Moreover, any prejudice was vitiated by Officer Malloy's clarification that Appellant was never arrested for those crimes. Accordingly, the mention of Appellant's involvement in two prior crimes could not have affected the verdict and therefore any error was harmless. *See State v. Mitchell*, 286 S.C. 572, 573, 336

[2] The State never elicited testimony from Officer Malloy specifically indicating Appellant was a suspect in the two prior crimes.

S.E.2d 150, 151 (1985) ("No definite rule of law governs this finding; 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.") (internal quotations omitted).

CONCLUSION

Based on the foregoing, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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