STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2017-001335

THE STATE,

Respondent,

v.

GERALD JARROD ANCRUM,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. SCOTT MATTHEWS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843)-958-1900

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his broad discretion by declining to grant a mistrial in Appellant's case, where the confidential informant, Tessa Morris, only referred to Appellant's prior drug activity once, that reference that was unsolicited by the State, Appellant did not suffer any prejudice from this reference, and if Appellant was initially prejudiced in any way, the trial judge provided a thorough curative instruction that cured any such prejudice, and where any alleged error was harmless because of the overwhelming evidence of Appellant's guilt presented at trial?

STATEMENT OF THE CASE

In June of 2015, the Charleston County Grand Jury indicted Appellant for one count of distribution of heroin and one count of distribution of cocaine base. On May 23-24, 2017, a jury trial was held in the Charleston County Court of General Sessions with the Honorable William P. Keesley presiding. Appellant was represented by Melissa Gay, Esquire, of Melissa W. Gay, LLC. The Respondent (the State) was represented by Assistant Solicitors Stephanie B. Linder and Whitt Sowards of the Ninth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of one count of distribution of heroin. A mistrial was declared on the distribution of cocaine base count after the jury was unable to reach a verdict. Following the verdict, Appellant conceded that the heroin conviction was his third offense. The trial judge sentenced Appellant to a term of fifteen years' imprisonment. Appellant then timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On February 5, 2015, Special Agent Frank Preston of the Bureau of Alcohol, Tobacco, and Firearms set up a controlled purchase of drugs in coordination with agents of the Charleston County Sheriff's Office and the Charleston Police Department. (Tr. 87-89, 124). Appellant was the target of the controlled purchase operation. (Tr. 87). Preston utilized the services of a confidential informant, Tessa Morris, to complete the purchase of drugs from Appellant. (Tr. 88). Preston testified that informants are chosen to complete drug transactions because of their prior history of drug purchases with various targets. (Tr. 89-91). This line of questioning was not objected to by Appellant. (Tr. 89-91). In fact, on cross examination, Appellant asked Preston whether law enforcement had given Morris Appellant's name or whether Morris had come to law enforcement with Appellant's name based on who she had connections with in the drug trade. (Tr. 103, 105). Preston responded that Morris told law enforcement she could contact Appellant. (Tr. 103). Appellant even asked Morris on cross examination whether she had provided law enforcement with names "of people that you believed you could call to get drugs from?" (Tr. 136, lines 10-11). Morris responded in the affirmative. (Tr. 136).

Under Preston's supervision, Morris contacted Appellant using a particular phone number to set up the controlled purchase. (Tr. 93). The State later introduced a statement from Appellant acknowledging that the number called by Morris was his phone number. (Tr. 184). Morris arranged to meet with Appellant at a Dunkin Donuts store in the West Ashley area of Charleston County. (Tr. 88, 95, 126). Morris' phone call with Appellant was recorded and entered into evidence. (Tr. 94, State's Exhibit #1). Morris approached Appellant as he was sitting in a white BMW automobile in the parking lot of Dunkin Donuts. (Tr. 126, State's Exhibit #6).

Morris successfully purchased heroin[1] from Appellant. (Tr. 99-100, 126, State's Exhibit #6). At the instruction of law enforcement, Morris referred to Appellant by his first name, Gerald, during the transaction. (Tr. 126, State's Exhibit #6) Morris was paid $400 for her controlled buy with Appellant. (Tr. 92, 127). During his cross examination of Morris, Appellant asked her whether she had a prior sexual relationship with Appellant. Morris denied any sexual relationship with Appellant. (Tr. 137). The State argued to the trial judge that Appellant had opened the door to Morris testifying that she actually knew Appellant from buying drugs from him in the past. (Tr. 141-42). The trial judge denied the State's request, but ruled that the State could ask how long Morris had known Appellant. (Tr. 144). When the State asked Morris "But you knew him for several years?", Morris responded by saying she knew Appellant "from purchasing drugs." (Tr. 147, lines 4-5). Appellant then moved for a mistrial. The trial judge denied Appellant's motion and issued a curative instruction to the jury. (Tr. 155-56).

The State then called Investigator Marc Brown of the Charleston Police Department who observed the controlled purchase of drugs from Appellant. (Tr. 179). Brown testified that he observed Appellant arrive at Dunkin Donuts in a white BMW on February 5, and he arrested Appellant in the same BMW on February 19. (Tr. 179, 182). The State completed their case in chief by calling Ashley Earl of the Charleston Police Department to testify about her analysis of the drugs sold by Appellant. Earl testified that the items she analyzed tested positive for heroin and cocaine base. (Tr. 199). Appellant was convicted of the distribution of heroin charge. Appellant then timely filed his appeal.

[1] Morris also purchased cocaine base from Appellant, however a mistrial was declared on that count after the jury was unable to reach a verdict.

ARGUMENT

I.

The trial judge did not abuse his broad discretion by declining to grant a mistrial in Appellant's case where the confidential informant, Tessa Morris, only referred to Appellant's prior drug activity once, that lone reference was not solicited by the State, Appellant did not suffer any prejudice from this reference, and if Appellant was initially prejudiced in any way, the trial judge provided a thorough curative instruction that cured any such prejudice. Finally, any alleged error is harmless considering the overwhelming evidence of Appellant's guilt presented at trial.

Appellant contends that the trial judge abused his discretion by refusing to declare a mistrial after Morris made a single reference to Appellant's prior drug dealing activity. Appellant contends that the State elicited prior bad acts testimony from Morris and that testimony resulted in the admission of prejudicial and improper evidence against Appellant. However, this argument lacks merit. The trial judge did not abuse his discretion in failing to grant a mistrial because Morris only made a single reference to Appellant's prior drug dealing activity and that reference was not solicited by the State. Furthermore, multiple witnesses had already testified that Morris identified targets for law enforcement who she believed she could buy drugs from. This previous testimony was not objected to by Appellant, and the most reasonable conclusion a juror could make from this testimony was that Morris had bought drugs from Appellant before. After the single reference was made, the trial judge issued a curative instruction advising the jury not to consider any prior drug dealing activity by Appellant. Additionally, any error that may have occurred is harmless in light of the overwhelming evidence presented against Appellant at trial. Appellant's conviction and sentence should be affirmed.

A. Lack of prejudice to Appellant

The standard of review in this state for determining whether a trial judge should grant a mistrial is an abuse of discretion. State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). "The decision to grant or deny a mistrial is within the sound discretion of the trial judge." Id. "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. Id. "A mistrial should not be granted unless absolutely necessary." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Id. In order to receive a mistrial, the defendant must show error and resulting prejudice. Id.

In this case the solicitor asked a yes or no question of the confidential informant, Tessa Morris, regarding how long she had known the defendant. The relevant exchange between the solicitor and Morris is as follows:

> Assistant Solicitor Linder: ... and as part of that agreement, as part of briefing with them including with Special Agent Preston, you gave names and phone numbers of people who could be good targets for them?
>
> Morris: Right.
>
> Assistant Solicitor Linder: And one of the name and phone numbers you gave is the defendant, correct?
>
> Morris: Correct.
>
> Assistant Solicitor Linder: How long overall had you known the defendant; a week, a month, a year?
>
> Morris: I've known him for several years.
>
> Assistant Solicitor Linder: You've known him for several years before all of this happened?

Morris: Correct.

Assistant Solicitor Linder: And you were not in a sexual relationship with him?

Morris: No, we were never.

Assistant Solicitor Linder: But you knew him for several years?

Morris: From purchasing drugs.

Assistant Solicitor Linder: And, in fact, you knew him through your boyfriend?

Morris: Correct.

Ms. Gay: Your Honor, may we approach?

(Tr. 146-47, lines 13-8). The exchange depicted above clearly demonstrates that the State did not solicit the offending testimony from Morris. The State abided by the trial judge's ruling to not inquire about prior bad acts. Morris, of her own volition, responded to the State's question in a manner that violated the trial judge's ruling. The trial judge acknowledged that this was not an intentional act on behalf of the State when he remarked: "I don't find any prosecutorial misconduct. I find that the witness responded in a fashion that creates this problem. And the witness is not an attorney." (Tr. 154, lines 22-24).

Appellant suffered no prejudice from Morris' single mention of his prior drug activity, because similar testimony had already been offered by two witnesses and it was not objected to by Appellant. Not only had Morris already testified that she gave the names and phone numbers to law enforcement of people she could buy drugs from, but Preston testified that Morris was chosen because "the informant has had a history with the targets. They've been there before, done it before." (Tr. 89-90, lines 25-2, 146). This testimony was not objected to by Appellant thereby making Appellant's claim of prejudice difficult to substantiate. The trial judge remarked on this difficulty when making his ruling on Appellant's motion for mistrial:

> Well, I understand your position. But if the testimony has been offered several times now that she provided the targets. What other logical conclusion is there but that she is providing the target because he's involved in the drug trade in some way?

(Tr. 148, lines 8-12). Appellant acknowledged the trial judge's concerns saying: "I think that's a logical conclusion that the jury can make up on their own and discuss." (Tr. 148, lines 13-14). However, Appellant continued to emphasize that he was prejudiced because the prior bad act had been specifically excluded pre-trial. (Tr. 148). In further explaining his ruling, the trial judge would again emphasize that:

> The only reasonable conclusion that someone could draw from that is that she believed that those people were involved in drug transactions, and not just using drugs, but in providing drugs to other people. Otherwise, there's no basis for her to make that assertion. And so when I think about having a mistrial over this issue, it really seems to be overreaction.

(Tr. 151, lines 6-12). The trial judge accurately recognized that Appellant was not prejudiced by the single offending reference by Morris because Morris and Preston had already indirectly referred to why Appellant was a target. Any reasonable juror would have drawn the same conclusion from the testimony already presented.

The cases that Appellant cites in support of his position are clearly distinguishable from the facts in this case. State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (2005), State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994), and State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (1996) all featured nearly identical scenarios on appeal. In each case the defendant appealed a trial court's ruling that the State could ask about prior drug transactions under a common scheme or plan theory under Rule 404(B) SCRE. Here, the State argued that Appellant opened the door for the State to ask questions about Morris' prior drug history with Appellant based on Appellant's questions on cross examination. However, the trial judge denied the State's request and limited the scope of the State's questions to merely inquire how long Morris had known

Appellant. (Tr. 144). The State attempted to comply with that limitation by simply asking Morris: "But you knew him for several years?" (Tr. 147, line 4). Morris then violated the trial judge's restriction by responding: "From purchasing drugs."(Tr. 147, line 5).

The most relevant case Appellant cites is State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (1992). In Bostick, the defendant appealed his conviction for distribution of crack cocaine after a law enforcement witness "blurted out: 'We had intelligence prior to this that uhm, Angelo Bostick had been selling crack cocaine from the store.'" Bostick 307 S.C. at 227, 414 S.E.2d at 176. This statement was not in response to any question and like our current case, the offending testimony was not solicited by the State. Because the theory of the defense at trial was that the confidential informant had confused someone else with Bostick, this Court found that any suggestion from a law enforcement witness that the defendant had previously sold crack cocaine would improperly influence the jury. Bostick 307 S.C. at 228-229, 414 S.E.2d at 176. However, the current case before this Court differs from Bostick in several important ways.

In this case, unlike Bostick, two witnesses had already referred indirectly to the Appellant as a target of the controlled purchase because of Morris' prior drug transactions. Preston testified that Morris was chosen because of her prior history with the targets she gave law enforcement, and Morris testified that she had provided names of individuals that she knew she could get drugs from. (Tr. 89-90, 136). Therefore, a reasonable juror would have already been able to infer that Appellant had sold drugs to Morris on previous occasions. The additional testimony from Morris simply made the same inference and was not a stand-alone reference as in Bostick. Appellant also cited Bostick at trial, and in response the trial judge made the same distinction between Bostick and the current case:

> The Bostick case I think is distinguishable. In this instance, you have someone who, based on testimony thus far, had some prior relationship with the defendant, knew the defendant. It was unlike the Bostick case.

(Tr. 169-70, lines 23-1). Appellant's conviction and sentence should be affirmed.

B. Curative Instruction

Appellant contends that the single mention of Appellant's prior drug activity by Morris improperly prejudiced him. However, even if Appellant was prejudiced by Morris' reference to his prior drug activity, that prejudice was cured by the trial judge's curative instruction. "A curative instruction is generally deemed to have cured any alleged error." State v. Dial, 405 S.C. 247, 258, 746 S.E.2d 495, 500 (Ct. App. 2013). "If the trial judge 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, 912 (1996). In this case, the trial judge gave the following curative instruction:

> Now, the instruction is this, ladies and gentlemen. The law does not allow evidence of other crimes, wrongs or acts to be admitted to prove the character of an accused in order to show action in conformity with that character. In other words, if an accused was involved in a prior wrongful or bad act, that cannot be used as evidence that he committed either/or both of the crimes for which he is now on trial. You must disregard the statement that this witness made that in any way implied or suggested that she knew this defendant from other activities involving drugs. That portion of her testimony is stricken from your consideration. It must not be used in any way whatsoever against the defendant.

(Tr. 155-56, lines 23-9). The trial judge clearly explained to the jurors that they were not to consider allegations of Appellant's prior drug dealing activities in their deliberations. Therefore, absent any showing to the contrary, any error that may have occurred is deemed to be cured. Appellant's conviction and sentence should be affirmed.

C. Harmless Error

Appellant contends that the single mention of Morris having bought drugs from Appellant on a prior occasion improperly influenced the jury to decide his guilt based on

prejudice instead of the evidence presented at trial. However, considering the overwhelming evidence of Appellant's guilt, any error that resulted from the jury hearing about Appellant's prior history with Morris, that was not cured by the trial judge's curative instruction, was harmless.

"Whether an error is harmless depends on the circumstances of the particular case." Thompson, 352 S.C. at 562, 575 S.E.2d at 83. "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." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." Thompson, 352 S.C. at 562, 575 S.E.2d at 83. "Error is harmless when it could not reasonably have affected the result of the trial." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

The evidence presented against Appellant at trial was overwhelming. Law enforcement utilized a confidential informant to purchase drugs from Appellant. (Tr. 87-89, 124). To set up this transaction, Morris contacted Appellant at a phone number which Appellant later admitted was his. (Tr. 93, 184). Appellant's voice was recorded on a phone call with Morris setting up the drug buy. (Tr. 93, State's Exhibit #1). Preston and Morris both testified that Morris selected targets based on her recommendation of who she could buy drugs from. (Tr. 89-91, 136). Appellant was then clearly filmed participating in a hand to hand transaction with Morris inside his white BMW. (State's Exhibit #6). The film presented to the jury was of high quality and clearly shows Appellant's face, records Appellant's voice, and shows the hand to hand transaction. (State's Exhibit #6). Finally, Marc Brown testified that he arrested Appellant in the

same white BMW that he drove to the drug transaction on February 5, two weeks later on February 19th. (Tr. 179, 182).

When considering the record as a whole, the prejudice to Appellant of a single reference to a prior drug purchase with Morris pales in comparison to the evidence against Appellant. There was abundant evidence in the record for a reasonable jury to conclude Appellant was guilty. The jury was likely convinced of Appellant's guilt by a video clearly depicting Appellant selling drugs to Morris, rather than by a single reference to prior drug activity between Morris and Appellant. Therefore, any error resulting from Morris' reference to prior drug activity with Appellant is harmless. Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. SCOTT MATTHEWS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843)-958-1900

BY: Scott Matthews
J. SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 6, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2017-001335

THE STATE,

Respondent,

v.

GERALD JARROD ANCRUM,

Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This sixth day of March, 2018.

Sally Ellison

SALLY ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

March 6, 2018

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Gerald Jarrod Ancrum
Appellate Case No. 2017-001335

Dear Ms. Carter:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Scott Matthews

J. Scott Matthews
Assistant Attorney General
Bar # 101464

JSM/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services