

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Florence County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

JUL 05 2018

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

FASHUN BURGESS,

APPELLANT

APPELLATE CASE NO 2017-002222

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a mistrial after appellant's character was put into issue when Investigator Chamberlain testified about an outstanding warrant against appellant?

STATEMENT OF THE CASE

Appellant was convicted of trafficking in heroin and possession of a weapon after a jury trial held before the Honorable Michael G. Nettles on October 9-11, 2017, in Florence County. Respective sentences of twenty-five (25) years and five (5) years were imposed. Daniel Jordan, Esq. was defense counsel. Angel Daniels, Esq. was the assistant solicitor.

This appeal follows.

STANDARD OF REVIEW

MISTRIAL

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). “Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.” Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)).

ARGUMENT

The trial court erred in refusing to grant a mistrial after appellant's character was put into issue when Investigator Chamberlain testified about an outstanding warrant against appellant.

During pre-trial defense counsel requested that there should be no testimony about a controlled buy that allegedly took place at appellant's hotel room prior to the execution of the search warrant at the room. Also, there should be no testimony about a prior distribution charge. (R. p. 51, line 1-12). The trial court stated that there should be no mention of a prior sell or any criminal record of the defendant or it will be stricken and there could be a mistrial. (R. p. 51, lines 13-23).

Well, if you tell someone they should not mention something, of course they have to mention it. That is what Investigator Chamberlain did. He testified that he explained to appellant that he obtained a lawful search warrant for his hotel room and that he was under arrest for an outstanding warrant. (R. p. 118, lines 20-23). Defense counsel moved for a mistrial. The trial court denied the motion. (R. p. 163, line 14-p. 165, line 8). That ruling was in error.

In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), the Court wrote:

In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue. State v. McElveen, 280 S.C. 325, 313 S.E.2d 298 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983); State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person.

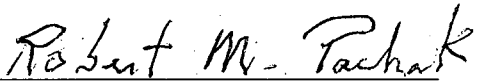
In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the Court noted: "Character evidence is so highly prejudicial that it is usually excluded under hard and fast rules." (citation omitted). In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), the Court elaborated on the subject:

[3] It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. *See, e.g., State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939). Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. *See, United States v. Johnson*, 610 F.2d 194 (4th Cir.1979); *State v. Byers*, 277 S.C. 176, 284 S.E.2d 360 (1981); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Even if evidence of other crimes is deemed relevant and admissible, the evidence may still be excluded if its probative value is substantially outweighed by the danger of undue prejudice or misleading the jury. *See, State v. Wilson*, 274 S.C. 635, 266 S.E.2d 426 (1980). Implicit in the rules of evidence which permit the introduction of prior bad acts or crimes into evidence is the prerequisite that they establish some element, i.e., intent or motive, of the crime charged. *See, e.g., State v. Lyle, supra; State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985); and *State v. Huggins*, 285 S.C. 361, 329 S.E.2d 759 (1985).

293 S.C. at 324-325, 360 S.E.2d at 319.

CONCLUSION

Appellant's conviction should be reversed.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of July, 2018.

STATE OF SOUTH CAROLINA

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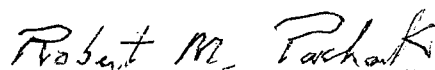
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Fashun Burgess states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Michael G. Nettles, which was held on October 11, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Fashun Burgess.

Respectfully Submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

This 5th day of July, 2018.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Transcript dated October 9-10, 2017
- (3) Transcript dated October 11, 2017

I certify that this designation contains no matter which is irrelevant to this appeal.

July 5, 2018

Robert M. Pachak

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Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

July 5, 2018.

Robert M. Pachak

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Fashun Burgess, 374174, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 5th day of July, 2018.

Robert M. Pachak

Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of July, 2018.

Mary M (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.