STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

John C. Hayes, III, Circuit Court Judge

THE STATE, RESPONDENT,

V.

DEMETRICE R. JAMES, APPELLANT

APPELLATE CASE NO. 2014-002125

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err by refusing to declare a mistrial where the foreman of the jury expressly and unequivocally admitted on the record that he and members of the jury had begun discussing the testimony that had been presented, since the State had not rested its case-in-chief, Appellant had not presented his defense, and the trial judge had not charged the jury on the law, which deprived Appellant of his constitutional right to a fair trial?

II. Did the trial judge err by allowing the State to call Investigator James Boland as a rebuttal witness to prove that Appellant changed his statements to police after being confronted by officers with newly discovered evidence where Appellant testified on his own behalf, the State thoroughly cross-examined Appellant regarding his statements to police, and no new evidence was revealed during Appellant's testimony?

STATEMENT OF THE CASE

On February 13, 2013, the Richland County Grand Jury indicted Appellant for murder, two counts of attempted murder, attempted armed robbery, first degree burglary, and murder. R. 738 On September 29, 2014, Appellant's case proceeded to a jury trial before the Honorable John C. Hayes, III. R.1. Nicole Simpson and Meghan Walker represented the State. Anastasia Walker and Tracy Pinnock represented Appellant. R. 1.

After week-long jury trial, the jury found Appellant guilty of both counts of attempted murder, attempted armed robbery, and first degree burglary. R. 726. The jury was deadlocked on the murder charge. R. 726. Judge Hayes declared a mistrial on the murder charge. R. 726.

Judge Hayes sentenced Appellant to thirty years' imprisonment for both counts of attempted murder and the first degree burglary to run concurrently. R. 735, lines 18 – 20. Appellant was also sentenced to twenty years' imprisonment for the attempted armed robbery which was to run concurrently to the attempted murders and burglary. R. 735, lines 21 – 23.

Appellant appealed his convictions and sentences. This brief follows.

STATEMENT OF FACTS

According to the State, on January 25, 2013, Appellant, Maurice Roberts, Deshawn McClary, and Vincent Nelson invaded the home at 4016 Williamsburg Drive in Richland County. R. 157, line 14 – 159, line 17. The four defendants allegedly planned to steal studio recording equipment to use for their rap group. R. 160, lines 20 – 25.

According to Troy Scott, he and his brother, Trenton Scott, his mother, stepfather, Josh Williams, Brandon Jones, and Cari Pearson were all at the Williamsburg Drive residence on the night of January 25, 2013. Vincent Nelson, Jr. arrived at the home around 11:00 p.m. that night, unexpectedly, and joined Williams, Jones, and Trenton Scott downstairs in the sports room. R. 379, line 18 – R. 380, line 13. Minutes after Nelson arrived, he convinced Jones to go outside to smoke. Williams followed behind them. R. 380, lines 15 – 17. Scott and his brother, Trenton, remained inside the house. R. 380, lines 18 – 20.

Scott stated that he was upstairs in his bedroom with Cari Pearson when he heard a glass break downstairs. R. 381, lines 3 – 6. As he walked downstairs into the sports room, he saw his brother, Trenton Scott rolling on the floor and fighting an unknown person, whom he later identified as Maurice Roberts. R. 382, lines 1 – 5. Scott claimed that a person, whom he later identified as Appellant, entered the house.

During the struggle inside the house, Scott's brother, Trenton, was shot in his arm. R. 387, lines 1 – 20. After his brother was shot and Scott successfully pushed the two intruders out of the house, he heard five gunshots outside. R. 388, lines 6 – 8. He walked outside to find his friend Brandon Jones lying on the ground and asking for help. R. 389,

lines 17 – 24. Jones died at the hospital from five gunshot wounds to his body. R. 437, lines 9 – 14.

That same night, officers with the Richland County Sheriff's Department interviewed Troy Scott and Cari Pearson who both gave accounts of what happened at the house. R. 447, line 7 – R. 448, line 23. After obtaining statements from Scott and Pearson, officers developed Vincent Nelson, Jr. as a suspect in the home invasion. R. 449, line 1 – 9. Nelson was subsequently located and arrested at Hammond Village, Apartment 15 – 3, in Richland County. R. 477, lines 5 – 22. Maurice Roberts was also arrested at the apartment. R. 477, lines 23 – 25. After interviewing Nelson and Roberts, officers developed Deshawn McClary and Appellant as suspects in the home invasion. R. 478, lines 9 – R. 485, line 23.

Appellant was also identified by Troy Scott in a photographic line-up as one of the two intruders who came inside his home and fought Scott and his brother. R. 392– 393. However, Scott admitted that he did not know Appellant. R. 377, lines 23 – 24. Appellant was arrested and charged with murder, two counts of attempted murder, attempted armed robbery, and first degree burglary. R. 482, lines 5 – 21. There was no forensic evidence which tied Appellant to the crimes.

ARGUMENT

I. The trial judge erred by refusing to declare a mistrial where the foreman of the jury expressly and unequivocally admitted on the record that he and members of the jury had begun discussing the testimony that had been presented, since the State had not rested its case-in-chief, Appellant had not presented his defense, and the trial judge had not charged the jury on the law, which deprived Appellant of his constitutional right to a fair trial.

Relevant Facts

Prior to opening statements, the trial judge instructed the jury:

> "While you're on the jury, do not discuss the case among yourself or try to make up your mind until I instruct you to jointly deliberate and return a unanimous verdict. Prior to that time, you don't have all of the tools you need to make a fair and reasoned decision. Do not discuss the case. Do not try to make up your own mind until I tell you to jointly deliberate and return a unanimous verdict."

R. 153, lines 16 – 24.

During the State's case-in-chief, a bailiff and the court coordinator informed the trial judge that they "both heard some conversations through the door" which "alerted [them] that there was some discussion regarding, if not the case, at least a witness." R. 395, line 23 – R. 396, line 3. The judge decided to bring each individual juror out of the jury room to "query them about whether or not they could still be fair and impartial." R. 396, lines 7 – 10.

Prior to the trial judge's query, defense counsel moved for a mistrial. R. 397, lines 19 – 20. Counsel argued:

> "I do feel that any sort of jury deliberation prior to - - especially where we are in this case, that we haven't finished the prosecution's side of the case, that that violates my client's rights to a fair trial, his right to due process. I don't believe that any - - whatever the juror's response would be that a curative instruction would be sufficient in order to cure

> this matter so that my client could have a fair trial from here on out."

R. 397, line 23 – R. 398, line 5.

The judge declined to rule on defense counsel's motion for a mistrial. The judge stated:

> "I don't believe at this time that there's a manifest necessity to grant a mistrial, but I will take it under consideration."

R. 399, lines 22 – 24.

The bailiff informed the judge that the jurors "were discussing the two prisoners that came in." R. 400, lines 11 – 12. However, the bailiff "couldn't hear the rest of the discussion." R. 400, lines 15 – 17.

The trial judge then called the foreman of the jury to the courtroom. The judge inquired:

> "It's been reported to me that some of the staff that's been working with the jury overheard some of the jurors discussing the case yesterday. Particularly, they were discussing, it appears, something about some witnesses. Did any discussions in the jury room take place regarding this case?"

R. 401, line 24 – R. 402, line 4.

The foreman responded:

> **"We're discussing the testimony that we've heard so far."**

R. 402, lines 5 – 6. (emphasis added)

After the foreman admitted that the jury had prematurely begun discussing Appellant's case, the judge asked the foreman whether the prior discussion could affect his ability to be fair and impartial to Appellant. The foreman stated that he thinks he can be impartial. R. 402, lines 19 – 20. The judge then asked the remaining jurors and the alternate

juror whether the prior discussions about Appellant's case that had taken place in the jury room will affect their ability to be fair and impartial to Appellant. R. 404 – 416.

After the judge concluded his query, defense counsel again moved the court for a mistrial. R. 416, line 22 – R. 417, line 21. Counsel argued:

> "Your Honor, I think there are serious concerns with this jury's ability to follow instructions. They have already blatantly disregarded the order of the Court to not discuss this case and not deliberate. They have already been discussing this case without being instructed on the law.
> The foreman came forward and said they have been discussing, as we can assume, all the testimony that they've heard thus far. We are now on the fourth day of trial. I understand testimony only started on Tuesday, so we can assume that what's been going on to this point has already been a two-day conversation.
> Your Honor, that bell has already been rung. I don't think that the jury has the ability to forget that conversation and move on from here. I think that they have already violated the order of the Court and their oath. I have serious concerns with them being able to follow further orders from this Court, especially following instructions on the law at the end of this trial, and I think that it further violates my client's right to a fair trial and his due process rights. I have serious concerns about this jury's ability to follow instructions and to give my client a fair trial."

R. 416, line 23 – R. 417, line 20. The trial judge, again, denied defense counsel's motion for a mistrial and found that "there's not any manifest necessity." R. 418, lines 23 – 24. In addition to moving for a mistrial, counsel requested that the trial judge "further inquire exactly what the discussions were." R. 422, lines 8 – 10. The solicitor also expressed concern that the jury prematurely discussed the case. R. 420, lines 7 – 17. The solicitor contended:

> "So with their failure to comply with Your Honor's ruling regarding not prematurely discussing the case, I'm not sure we can believe that they haven't done any outside research at this point, if they have just disregarded all of Your Honor's

> rulings regarding what they are or are not allowed to do before they receive the case . . ."

R. 420, lines 7 – 17. The solicitor requested:

> "I would like to see what they say about whether or not they've done any independent research into this case or discussed this case with people outside of the jury."

R. 421, lines 16 – 19.

However, the judge assumed that the jury discussed everything and denied counsel's request. R. 422, lines 6 – 12. The judge summoned the jury back into the courtroom and informed them:

> "I'm just going to remind you what I've told each of you individually and I told you at the first of the trial: That there will be no further discussions of the case until I instruct you to jointly deliberate and return a unanimous verdict. And I instruct you know to disabuse your mind of all of the discussions you've had to this point."

R. 423, line 20 – R. 424, line 1.

At the close of the State's case, counsel renewed her mistrial motion. Counsel contended:

> "I don't believe we can get a fair trial at this point. I think the jury has violated the oath that they took when you swore them in on Monday or Tuesday. They started discussing the case before you instructed them on the law. I don't think it's too far to assume that they have formed opinions based on this."

R. 508, lines 16 – 18. Counsel continued:

> "However, based on the disregard of their previous order not to do that, I don't think it can be entrusted to them to follow any more of Your Honor's orders. They have shown us very clearly that they are not going to follow instructions. So I do think Mr. James is being denied a fair trial, and his due process rights are being violated because he cannot get a fair trial at this point."

R. 509, lines 1 – 7. The trial judge, again, denied counsel's mistrial motion. R. 509, lines 13 – 14.

Discussion

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a fair trial by an impartial jury. U.S. Const. amend. VI; U.S. Const. amend. XIV. Accordingly, premature deliberations may affect the fundamental fairness of a jury trial. State v. Aldret, 333 S.C. 307, 313, 509 S.E.2d 811, 814 (1999).

The South Carolina Supreme Court succinctly explained:

> "The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation."

State v. McGuire, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979).

Therefore, a "jury should not being discussing the case, nor deciding the issues, until all the evidence has been introduced, the arguments of counsel complete, and the applicable law charged." Gallman v. State, 307 S.C. 273, 276, 414 S.E.2d 780, 782 (1992); State v. Joyner, 289 S.C. 436, 346 S.E.2d 711 (1986).

In State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999), the defendant was convicted of driving under the influence. Following the guilty verdict, defense counsel moved for a new trial. Id. at 310, 509 S.E.2d at 812. Counsel contended that "the jury had engaged in premature deliberations" and submitted an affidavit from an alternate juror in support of his motion. Id. However, the trial judge refused to consider the alternate juror's affidavit and denied counsel's motion for a new trial. Id. The Court of Appeals found that

the trial judge erred in refusing to consider the affidavit, reversed the defendant's conviction, and remanded for a new trial. Id.

The Supreme Court, however, found "no error in the trial court's refusal to conduct further inquiry." Id. at 312, 509 S.E.2d at 813. The Court based its holding on the fact that the record was devoid of any evidence that defense counsel alerted the judge to "the jury's allegedly premature deliberations." The Court wrote:

> "Had such a request been timely made, the court could have *voir dired* the jury prior to its verdict to determine if, in fact, there has been premature deliberations, and whether Aldret had been prejudiced thereby."

Id.

In cases where an allegation of premature deliberations arises during trial, the Court set forth that:

> "[T]he trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. If requested by the moving party, the court may *voir dire* the jurors and if, practicable, 'tailor a cautionary instruction to correct the ascertained damage.'"

Id. at 315, 509 S.E.2d at 815 (citing U.S. v. Resko, 3 F.3d 684, 695 (3rd. Cir. 1993)).

A trial judge should grant a mistrial only when absolutely necessary. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ; State v. Elgin, 398 S.C. 39, 45, 726 S.E.2d 231, 234 (Ct. App. 2012); State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002). A defendant moving for a mistrial must show both error and prejudice resulting from the error. Harris, 340 S.C. at 63, 530 S.E.2d at 628; Simmons, 352 S.C. at 354, 573 S.E.2d at 862. Such an error must be so grievous that its prejudicial effect cannot be removed in any other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct. App. 2009).

"[T]he less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Whether a mistrial is warranted by manifest necessity is a fact – specific inquiry. State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000).

Here, the trial judge erred by refusing to declare a mistrial. The bailiff overheard the jurors discussing the "prisoners" who had just testified against Appellant, Jwaun Duckett and Vincent Nelson. The foreman of the jury openly stated that the jury had already begun discussing the testimony that had been presented. Unlike in Aldret, the misconduct of the jury was discovered and made known to the trial judge mid-trial and well before the State closed its case-in-chief.

In addition to the trial judge having clear evidence of improper and premature jury deliberations, **both** defense counsel and the solicitor requested further inquiry of the jury. Counsel and the solicitor were **both** concerned that the jurors completely disregarded the judge's instruction to not discuss the case until they were permitted. Both parties wanted to know what the jurors discussed, whether any of the jurors discussed the case with anyone outside the court, or whether any of the jurors conducted independent research about Appellant's case. Despite the fact that **both parties** wanted to know the extent of the jury's improper and premature deliberations, the trial judge refused any further inquiry of the jury.

Because the jurors had already begun discussing the evidence presented by the State before the State rested its case and before Appellant presented his defense, the jurors could not consider **all** of the evidence. Although the judge did warn the jury not to discuss the case any further, it is certain that at least one juror formed an opinion as to Appellant's

culpability at that point in the trial. Consequently, Appellant was deprived of his constitutional right to be tried by a **fair and impartial** jury.

II. The trial judge erred by allowing the State to call Investigator James Boland as a rebuttal witness to prove that Appellant changed his statements to police after being confronted by officers with newly discovered evidence where Appellant testified on his own behalf, the State thoroughly cross-examined Appellant regarding his statements to police, and no new evidence was revealed during Appellant's testimony.

Relevant Facts

Appellant chose to offer a defense and testified on his own behalf. On direct examination, when asked by defense counsel, Appellant admitted that his first statement to the police was not "exactly what happened." R. 543, lines 16 – 25. During cross-examination, Appellant admitted to the solicitor:

> "I think the first statement is the one that's not accurate. The second statement is accurate."

R. 584, lines 20 – 24.

The solicitor asked Appellant:

> "And did you actually—like I said, you talked to police and gave them a total of three written statements."

R. 600, lines 16 – 17.

Appellant responded:

> "I think it was two, and the other one was an add-on to the second one."

R. 600, lines 18 – 19.

At the end of Appellant's testimony, defense counsel informed the trial judge that the State intended to call Investigator James Boland to introduce statements taken by law enforcement from Appellant when he was arrested. R. 606, lines 14 – 18. Defense counsel contended that the "purpose of the reply witness is to address new information that was

brought up during the defense case in chief." R. 606, lines 18 – 20. Counsel explained that Appellant had already been cross-examined on the details of his statements to police and the solicitor had "an opportunity to introduce the statements in their case in chief." R. 606, lines 22 – 24. Counsel argued that it would not be proper "to call the investigator back up on the stand just to introduce Mr. James' statement on the record." R. 607, lines 4 – 6.

The solicitor argued that the investigator's testimony is essential to proving the State's case. Specifically, she argued:

> "[W]hat's been elicited, too, is that he just was cooperative with law enforcement. He gave these statements just essentially supplementing on another and that's how it came about when, in fact, he only gave these statements after being confronted with more information, confronted with more information, and his versions change. And we do want to introduce the actual physical statements through Investigator Boland as well as the circumstances surrounding those statements since Mr. James denied them."

R. 608, lines 5 – 14.

Defense counsel responded:

> "[I]if the purpose of the witness is to try to impeach him, I think it's an improper impeachment because he was confronted with the fact that he gave multiple statements. He was asked about it on direct and cross, and he acknowledged that, yes, he did that . . . he has not denied doing anything. He admitted to all of it."

R. 608, lines 18 – 21. Counsel further explained that "[t]he information was elicited through both direct and cross . . . it's not new information." R. 609, lines 1 – 2.

The solicitor responded to counsel's argument by stating:

> "[T]he new information here is really how the versions of the statements came about because based on his testimony, he was just cooperating with law enforcement and I just want to tell the truth or sort of the truth or half the truth, and he did deny making certain statements to law enforcement."

R. 609, lines 16 – 21.

The trial judge allowed Investigator Boland to testify as a rebuttal witness. During the investigator's testimony, the solicitor introduced each of Appellant's three written statements into evidence. R. 616, line 1 – R. 628, line 23.

Discussion

When a party introduces evidence about a particular matter, the opposing party is entitled to introduce evidence to explain or rebut the evidence presented. State v. McEachern, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012); State v. Garris, 394 S.C. 336, 714 S.E.2d 888 (Ct. App. 2011). However, "[r]eply testimony should be limited to rebuttal of matters raised in defense, rather than to complete the [state's] case in chief." State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781 (Ct. App. 2010) (citing State v. Farrow, 332, S.C. 190, 504 S.E.2d 131 (1998)).

The admission and exclusion of evidence is within the discretion of the trial judge. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). Unless there has been an abuse of discretion, the trial judge's decision whether to admit or exclude evidence will not be disturbed on appeal. State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015). An abuse of discretion occurs when the trial judge's ruling is "based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012); State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

Here, the trial judge abused his discretion by allowing Investigator Boland to testify as a reply. Appellant provided no new information during his testimony. When examined on direct, he admitted to defense counsel that he was not truthful in his first statement to the police. On cross-examination, he also acknowledged the inconsistencies in his verbal and

three written statements to officers. Appellant never denied originally denying his involvement to police. The record is devoid of such evidence.

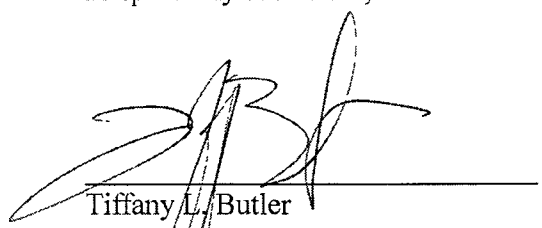
Further, the solicitor chose not to introduce Appellant's statements to police in the State's case-in-chief. By allowing the investigator to testify and the solicitor to admit Appellant's statements into evidence through the investigator, the trial judge essentially let the solicitor continue and complete its case in chief. See Huckabee, supra. During Appellant's testimony, the solicitor had already thoroughly cross-examined Appellant on each statement, including the inconsistencies. Yet, the solicitor was able to introduce the actual written statements through the investigator, which she argued in closing. R. 677, line 24 – R. 687, line 18.

Because there is no evidentiary basis for determining that Investigator Boland's was a proper reply witness, the trial judge manifestly abused his discretion by allowing the investigator to testify.

Conclusion

For the reasons argued above, Appellant Demetrice R. James respectfully requests this Court to reverse his convictions and sentence and remand to the lower court for a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of March, 2016.

CERTIFICATE OF COUNSEL

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

March 9, 2016

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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 Henry Gunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of March, 2016.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of March, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.