STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

COLE BROOKS GRAY,

APPELLANT

APPELLATE CASE NO. 2017-002265

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 23, 2017, an Anderson County Grand Jury indicted appellant for trafficking in methamphetamine, more than one hundred grams. R. p. *(indictments). On August 22, 2017, an Anderson County Grand Jury indicted appellant for receiving stolen goods and failure to stop for a blue light, second or subsequent offense. R. p. *(indictments).

Appellant was tried before the Honorable Alexander Macaulay and a jury, October 16 – 18, 2017. Tr. I, 1; Tr. II, 131; Tr. III, 287. R. Joseph Opperman represented appellant; David Wagner and Mary Holahan represented the state. Tr. I, 1. Petitioner was convicted of trafficking in methamphetamine more than one hundred grams, receiving stolen goods, and failure to stop for a blue light, second or subsequent offense. Tr. III, ll. 3-18.

The court sentenced appellant to a mandatory term of imprisonment for twenty-five years for trafficking, five years for failure to stop for a blue light, and three years for receiving stolen goods, with sentences to be served concurrently. R. p. *(sentence sheets).

This appeal follows.

STATEMENT OF FACTS

Appellant had a "very serious addiction problem." Tr. III, 376, l. 23. He told the court: "[T]hose actions that I took, I'm truly sorry for. And I know that it's a little bit late, but I'd like to apologize to you and everyone here today." Tr. III, 379, ll. 20-23. Appellant said he was ashamed of what he did while "under the influence of methamphetamines," and "the burden that [he] put on law enforcement." Tr. III, 378, l. 20 – 379, l. 1; Tr. III, 377, ll. 11-14.

On November 12, 2016, a police officer with the Anderson County Sheriff's traffic unit saw appellant "disregard [a] stop sign" and go into the wrong lane. Tr. I, 100, l. 20 – 101, l. 4; Tr. I, 102, ll. 20-23. He attempted to pull appellant over, but appellant kept driving. Tr. I, 103, ll. 2-5. What should have been a routine traffic stop turned into a lengthy police chase involving multiple officers that ended when appellant's tires were flattened and he threw a bag methamphetamine out the window. R. p. * (state's exhibits #1, #2, and #31). Appellant then put up his hands and was arrested without further incident. Tr. II, 184, l. 19 – 185, l. 7.

The entire event was captured on the dashboard cameras of two police officers, and the videos were admitted in evidence. The videos are state's exhibits #1 and #2 and are on file with this Court. Three police officers testified at trial about the details of the chase. Tr. I, 99, ll. 20-21; Tr. II, 150, ll. 22-23; Tr. II, 176, l. 15.

The solicitor told the trial court its intent "to offer into evidence a taped phone call from the Anderson County jail made by the defendant." Tr. II, 206, ll. 15-17. The recording is state's exhibit #4 and is on file with this Court. The phone call lasted over fifteen minutes and contained few statements that were relevant to the case, namely: 1) "I was just trying to get rid of that shit you know," and 2) "They say they found one hundred twenty grams. That's what they charged me with, trafficking one hundred to two hundred grams. That ain't good." State's exhibit #4.

The majority of the call is filled with profanity, racial epithets, and other offensive language: "fuck," "shit," "nigger," "queers." State's exhibit #4 (jail phone call recording). Appellant is heard recounting a fight with another inmate at the jail in which he had "bitten someone's face" leaving that person needing stitches in the face. State's exhibit #4. Appellant is also heard saying: "I need a fucking lawyer," and expressing familiarity with the jail's visitation policies and other inmates housed in the jail. State's exhibit #4. Appellant said that he was found to be in possession of another person's "food stamp card," and a police officer said: "Look at this piece of shit, he's got four hundred dollars and drugs and someone else's food stamp card." State's exhibit #4.

Defense counsel objected to the introduction of the recording in its unredacted form, arguing it violated Rule 403, SCRE. Tr. II, 216, ll. 14-17; Tr. II, 220, ll. 7-21. The defense moved that the state "pare down" the recording to the portions of the call the state believed were relevant to the elements of the charges. Tr. II, 216, ll. 20-24. "Those portions of the phone call which do go to the elements of the offense and do not violate the rule against hearsay, I have no reasonable objection against those portions. And if the State would like to identify those portions, I don't think I would have a reasonable objection to those." Tr. II, 217, ll. 13-18.

> **However, to play the phone call in its entirety in the environment of which my client is in jail speaking to someone, profane language is being used, discussion of hiring an attorney, suggesting that a crime has been committed, all of those things that don't go to the elements of the offense would be more prejudicial than probative.**

Tr. II, 217, ll. 19-25 (emphasis added).

Defense counsel objected to the portions of the recording that contained hearsay being entered into evidence. Tr. II, 216, ll. 14-17. Defense counsel argued the statements: "They say they found one-hundred twenty grams," and "Look at this piece of shit, he's got four hundred dollars and drugs and someone else's food stamp card" were hearsay because appellant was

merely repeating what someone else said. Tr. II, 210, ll. 8-19; Tr. II, 214, ll. 13-18. The trial court said it did not find the statements to be hearsay "because he made the statement, even though he was quoting somebody else that what he adopted it and then presented it." Tr. II, 212, ll. 10-13; Tr. II, 249, ll. 1-4. However, this was not an adopted admission.[1]

The court allowed the entire, unredacted recording of the fifteen-minute phone call into evidence, overruling defense counsel's objection. Tr. II, l. 22 – 221, l. 2; Tr. II, 251, ll. 18-22.

The state entered the recording through Lieutenant Gebing, who said he regularly accessed the jail telephone recording database. Tr. II, 245, ll. 3-13. The solicitor asked a question of Gebing that elicited testimony of prior bad acts by appellant.

> Q. Okay. The call that you pulled on the defendant, was it made two days after this incident?
>
> A. It was made November 14th. Yes, sir.
>
> Q. On the 14th on November of 2016?
>
> A. Yes, sir.
>
> Q. The first call being made from the jail?
>
> A. Not the first one from the jail. **The first one during that particular arrest, sir.**

Tr. II, 247, ll. 3-10 (emphasis added). Defense counsel immediately objected. Tr. II, 247, ll. 14-15. Defense counsel argued: "That answer introduced character evidence not permitted by the South Carolina Rules of Evidence into the record before the jury." Tr. II, 248, ll. 8-10.

The court found the statement admissible, saying it was cumulative: "Well in as much as the Court has ruled that the telephone call would come in, I think in that telephone call he refers

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[1] A party who has agreed with or concurred in an oral statement of another has adopted it. *State v. Knoten*, 347 S.C. 296, 312–13, 555 S.E.2d 391, 400 (2001).

to other incidents of his own incarceration . . ." Tr. II, 249, ll. 7-10. However, this statement was not cumulative—defense counsel had objected to the jail telephone call's admission. Defense counsel moved for a mistrial based on Gebing's statement, but the court said: "I deny your mistrial." Tr. II, 248, ll. 2-3; Tr. II, 250, ll. 5-6.

The defense did not put up a case. Tr. III, 265, ll. 3-7. The court told the jury: "The State will open on the law and the evidence, and then the defense will argue, and then the State will close." Tr. III, 293, ll. 17-19. The state gave its closing argument, and then the defense. Defense counsel asked the jury to convict appellant of a lesser-included offense, because there was no evidence appellant sold the drugs, delivered the drugs, or took them over the state line. Tr. III, 320, ll. 2-17.

After the defense finished its closing argument, the court allowed the solicitor to reply, giving the state final closing argument. Tr. III, 328, ll. 11-12. Defense counsel immediately objected and asked to approach the bench. Tr. III, 328, ll. 15-17. A bench conference was held, and it was later put on the record that defense counsel objected at the bench conference to the state being given the opportunity to respond, since the defense did not put up any evidence. Tr. III, 328, ll. 18-19. "Your Honor, we wish to object on the record that the State was given an opportunity to respond after the defense made its closing argument. It's our position that since the defense did not put up a case, the defense should have the right to close out with its arguments" Tr. III, 356, ll. 8-13.

The judge allowed the state to continue its reply argument. Tr. III, 328, ll. 18-20. In his reply, the solicitor argued: "we didn't say anything about him selling it . . . He knowingly possessed over 100 grams of methamphetamine. That's under the trafficking statute and that's why we're – we're here." Tr. III, 329, ll. 4-8.

Defense counsel moved for a mistrial due to the state being given final closing argument: "We do believe this may have caused some prejudice and at this time we request a mistrial." Tr. III, 356, ll. 13-15. The court responded that under its reading of *State v. Beaty*,[2] the defendant is always "the party with the middle argument," and denied counsel's motion for a mistrial. Tr. III, 356, l. 16 – 358, l. 11; Tr. III, 358, ll. 20-21.

2 *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018).

ARGUMENT

1.

The court erred where it allowed the solicitor a reply closing argument since appellant, the defendant, did not present evidence.

Standard of review

Appellant submits de novo review should be undertaken. The appellate courts of South Carolina review questions of law de novo. *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014). "We clarify that appellate courts review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 840 (2018). *Contra State v. Mouzon*, 326 S.C. 199, 485 S.E.2d 918 (1997). In *Mouzon*, the Court found the trial judge's error in denying the defendant, who presented no evidence, the right to final closing argument was not a structural error and was subject to harmless error analysis. *Id.* at 204, 485 S.E.2d at 921. Because *Mouzon* was decided before the South Carolina Supreme Court clarified that questions of law are reviewed de novo, appellant submits this purely legal error should be subject to de novo review.

Discussion

The right to last closing "argument to the jury is a substantial right, the denial of which is reversible error." *State v. Rodgers*, 269 S.C. 22, 24-25, 235 S.E.2d 808, 809 (1977). "In a criminal prosecution, where a defendant introduces no testimony, he is entitled to the final closing argument to the jury." *State v. Mouzon*, 326 S.C. 199, 203, 485 S.E.2d 918, 921 (1997).

The defendant in a criminal case has the right to reply closing argument when he does not introduce evidence. *State v. Garlington*, 90 S.C. 138, 72 S.E. 564, 566 (1911); *State v. Brisbane*,

2 S.C.L. 451, 454 (S.C. Const. App. 1802) (in all cases in which a criminal defendant calls no witnesses, he should have the privilege of concluding to the jury).

The trial court's interpretation of *Beaty* was error. *Beaty* held that when a defendant **does** introduce evidence, the state has the final closing argument, although the trial judge can restrict the state's reply argument to matters raised by the defense in closing to ensure that a defendant's due process rights are not violated. *State v. Beaty*, 423 S.C. 26, 42-46, 813 S.E.2d 502, 510-13 (2018). However, *Beaty* left intact the common law rule that a defendant who introduces no evidence has the right to last closing argument. "Pursuant to the common law rule pronounced in *Brisbane* and as clarified in *Garlington*, **in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument.**" *Id.* at 42, 813 S.E.2d at 510 (emphasis added).

After defense counsel gave what he correctly believed to be the last closing argument and argued the jury should only convict appellant of a lesser-included offense, the solicitor improperly replied by telling the jury that trafficking included "knowing possession." The trial court erred when it misapprehended *Beaty* and allowed the state a reply closing, because the defense did not put up any evidence.

2.

The court erred in refusing to declare a mistrial after it improperly allowed the state to have last closing argument.

Standard of review

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)).

Discussion

The right to last closing "argument to the jury is a substantial right, the denial of which is reversible error." *State v. Rodgers*, 269 S.C. 22, 24-25, 235 S.E.2d 808, 809 (1977). "In a criminal prosecution, where a defendant introduces no testimony, he is entitled to the final closing argument to the jury." *State v. Mouzon*, 326 S.C. 199, 203, 485 S.E.2d 918, 921 (1997).

The defendant in a criminal case has the right to reply closing argument when he does not introduce evidence. *State v. Garlington*, 90 S.C. 138, 72 S.E. 564, 566 (1911); *State v. Brisbane*, 2 S.C.L. 451, 454 (S.C. Const. App. 1802) (in all cases in which a criminal defendant calls no witnesses, he should have the privilege of concluding to the jury).

The court's interpretation of *State v. Beaty* was error. *Beaty* left intact the common law rule that a defendant who introduces no evidence has the right to last closing argument. "Pursuant to the common law rule pronounced in *Brisbane* and as clarified in *Garlington*, **in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument.**" *Id.* at 42, 813 S.E.2d at 510 (emphasis added).

After the defense gave what he correctly believed to be the last closing argument and argued the jury should only convict appellant of a lesser-included offense, the state was allowed to improperly reply, and told the jury that trafficking included "knowing possession." Defense counsel objected and moved for a mistrial. "Your Honor, we wish to object on the record that the State was given an opportunity to respond after the defense made its closing argument. It's our position that since the defense did not put up a case, the defense should have the right to close out with its arguments. We do believe this may have caused some prejudice and at this time we request a mistrial." Tr. III, 356, ll. 8-15.

Because the trial court erred in allowing the state to have last closing argument when the defense did not introduce any evidence, the court's failure to declare a mistrial was an abuse of discretion. *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018); *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

3.

The court erred when it admitted a recording of a jail phone call made by appellant where the phone call contained profanity, racial slurs, hearsay, and portrayed appellant as an habitual criminal, since the call's minimal probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE.

Standard of review

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson,* 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee,* 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). *State v. Dial,* 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) (trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances).

Discussion

The defense correctly requested the judge require the state to "pare down" the recording to the portions of the call the state believed were relevant to the elements of the charges.

In *State v. King,* 422 S.C. 47, 68-69, 810 S.E.2d 18, 29-30 (2017), the South Carolina Supreme Court found the trial judge abused his discretion when it admitted a jail call recording that was "riddled with profanity, racial slurs, and impermissible references to [the defendant's] prior bad acts."

Rule 403, SCRE provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation

of cumulative evidence." "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001).

The call is filled with profanity, racial epithets, and other offensive language: "fuck," "shit," "nigger," "queers." The jury heard appellant recount a fight with an inmate at the jail in which appellant had "bitten someone's face." It heard appellant saying: "I need a fucking lawyer," and expressing familiarity with the jail. The jury heard appellant say he was found with another person's "food stamp card," and a police officer said: "Look at this piece of shit, he's got four hundred dollars and drugs and someone else's food stamp card."

The call was over fifteen minutes long. While appellant's statement: "I had to get rid of that shit you know" was probative of his reason for failure to stop for a blue light, the limited probative value of the admitting the recording in toto was outweighed by the unfair prejudice to appellant. The state presented twenty-eight minutes of video footage from two cameras showing appellant fleeing from police. The video shows the bag of methamphetamine being thrown from the truck. Three police officers testified to the details of the chase. The foul language used in the call, and violent and criminal acts described therein that were unrelated to the case at hand had the impermissible tendency to suggest a decision on an improper basis.

Moreover, defense counsel correctly argued the statements: "They say they found one-hundred twenty grams," and "Look at this piece of shit, he's got four hundred dollars and drugs and someone else's food stamp card" were hearsay because appellant was merely repeating what someone else said.

Rule 801(c), SCRE provides: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

matter asserted." Rule 801(d)(2), SCRE provides in relevant part that a statement is not hearsay if the "statement is offered against a party and is . . . (B) a statement of which the party has manifested an adoption or belief in its truth . . ." The trial court's determination that appellant's statements were not hearsay because he had "adopted" them was error. Appellant's mere recitation of statements by others, without more, did not render them adopted.

The court abused its discretion when it allowed the entire, unredacted recording of the fifteen-minute phone call into evidence, since it was unfairly prejudicial and minimally probative. *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017); Rule 403, SCRE.

4.

The court erred when it allowed Lieutenant Gebing to testify that appellant had previously been arrested, since this was inadmissible bad character evidence.

Standard of review

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *State v. Saltz,* 346 S.C. 114, 120, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. *State v. McDonald,* 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. *State v. Mansfield,* 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000).

Discussion

Evidence of other crimes by the accused is not admissible to raise an inference of a defendant's guilt of the particular crime charged. The effect of such evidence "is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." *State v. Lyle,* 125 S.C. 406, 118 S.E. 803, 807 (1923). Rule 404(b), SCRE provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

If the court does not clearly perceive the logical relevancy between the extraneous criminal transaction and the crime charged, **the accused should be given the benefit of the**

doubt, and the evidence should be rejected. *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 327 (2000) (emphasis added).

In order to admit evidence of bad acts not resulting in conviction, the trial court must, as a threshold matter "determine whether the proffered evidence is relevant." *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence is admissible under the terms of Rule 404(b) to show, *inter alia,* the existence of a common scheme or plan. *Id.* If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403—where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. *State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007).

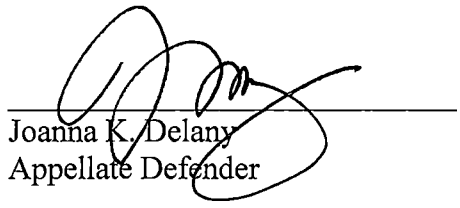
Lt. Gebing said this phone call was: "Not the first one from the jail. The first one during that particular arrest, sir." Tr. II, 247, ll. 9-10. There was no logical relevancy between Gebing's statement that appellant had been arrested previously and the case at hand. The jury heard bad character evidence about appellant that was impermissible because it had no probative value.

The court said it had previously ruled that the jail phone call referred to prior arrests of appellant and was admissible, so Gebing's testimony was cumulative to the jail call. Tr. II, 249, ll. 7-10. This was error—evidence is only cumulative if the party did not object to its admission the first time. Lieutenant Gebing's testimony was not cumulative since defense counsel had objected to the jail call's admission.

This statement was inadmissible bad character evidence with no logical relevancy to the case, which predisposed the jury "effectually to strip [appellant] of the presumption of innocence." *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923); Rule 404, SCRE.

CONCLUSION

Based on the foregoing arguments, appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



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This 10th day of August, 2018.