STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case Tracking No. 2017-001406

The State, Respondent,

vs.

Antwuan Levon Nelson, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in denying Appellant's motion for a continuance or a mistrial when his counsel did not act with any diligence in seeking to ensure his witness would be available for trial.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Michael Rogers, the victim, was shot and killed by Appellant at Broadway Station, a condo or apartment complex in Myrtle Beach. Kristen Bloomer, who lived with the victim and had a child with the victim, was in the apartment when all the difficulty between the victim and Appellant began. (T.368; 372; R.275; 279). The victim arrived home with Appellant and the two seemed fine. Shortly thereafter, their voices became hostile with Appellant demanding the victim buy drugs from him. (T.374-375; R.281-282). Appellant then punched the victim and the two started scuffling throughout the kitchen. (T.376; R.283). After fighting for some time, the victim told Bloomer to get his gun. Instead, she opened the front door and Appellant took off. (T.378; R.285). Bloomer and the victim stayed in their apartment while Bloomer tried to calm him down. (T.380; R.287).

The victim and Bloomer leave the apartment and head downstairs. When they get downstairs, the victim is still upset and is yelling for Appellant to come out and fight like a man. (T.382-383; R.289-290). Bloomer realized it was time to pick up their daughter so she got the victim to go with her back to their apartment so they could then go and pick up their daughter. Before heading back, the victim took his shotgun out of the bed of his truck. Bloomer was unsure if he had it when he headed down or not. (T.380; 385; R.287; 292). After several minutes Bloomer and the victim head to the parking lot. The victim decided not to go pick up their daughter, so he headed back to their apartment. (T.387; R.294).

When the victim headed back to their apartment, Bloomer saw Appellant emerge from one of the buildings. He crouched down, looked around, and headed for the trunk of his car. Appellant closed the trunk and stood up with a black rifle in his hand. (T.387; R.294). He

approached Bloomer and told her to call the victim and tell him to bring Appellant's stuff. She walked off and back toward her apartment. (T.388; R.295).

As she was walking off, she saw the victim emerge behind a doorway. The victim had his shotgun in his hands. Bloomer heard shots as she made it through a breezeway that lead around the apartments. She heard several shots, three to four overall, and when it stopped rushed to the victim's side. (T.391-392; 395; R.298-299; 302). She did not know whether the victim had ever fired his shotgun, but she did not remove any shells or see anyone disturbing the scene around the victim. (T.394-395; R.301-302). Appellant approached while taking apart his rifle and Bloomer told him to get away. Appellant then headed toward the trunk of his car. (T.393; R.300).

Officer Mackin arrived at Broadway Station around four in the afternoon to find numerous people telling him someone had been shot and Appellant was the shooter. (T.116; R.23). Appellant, wearing a black jacket, was leaning up against a red older car, possibly a Crown Victoria, with an AR-15 rifle beside him. (T.117-118; 122-124; R.24-25; 29-31). Officer Mackin and his partner were told there was a man shot down the alley leading to the back of the complex, so his partner went to tend to the victim. Officer Mackin testified 40 people[1] were around making threats, yelling, and threatening Appellant. (T.119; 124; R.26; 31).

Officer Owens testified he approached Appellant with Officer Mackin. Appellant was wearing black with red trim, with a black jacket. (T.146; 147; R.53; 54). After Appellant was in custody, Officer Owens left to assist the victim. He found the victim middle ways in the alley.

[1] Appellant seems to make a point of saying the State failed to call the 40 witnesses, but there is nothing in the record to indicate what any of the witnesses knew or that their testimony would be any different from that presented by others at trial. See State v. Richardson, 253 S.C. 468, 473–74, 171 S.E.2d 717, 719 (1969) (noting "the State is not required to place upon the stand every witness who has knowledge of material facts connected with the crime charged or whose name is endorsed upon the indictment"); see also, State v. Charping, 333 S.C. 124, 129, 508 S.E.2d 851, 854 (1998) ("[A]n adverse inference from the unexplained failure of a party to call an available witness is generally held not warranted where the material facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses.").

(T.147; R.54). He arrived at the victim and immediately realized it was bad because the victim was shot in the neck and Officer Owens knew from his time in combat that it was a fatal blow. He tried to press a towel to the wound and perform CPR until EMS arrived. (T.145; R.52). In the area around the victim, Officer Owens testified he saw two shotgun shells, but both were unfired. (T.149-150; R.56-57). He saw no spent shotgun shells. The two unfired shells were 12 gauge, No. 8 birdshot. (T.154; R.61).

James Garrett, a former supervisor with the Myrtle Beach Police Department, arrived at the scene after Appellant was already in handcuffs. He told Officer Mackin to place Appellant in his vehicle and he would take him to the station. Mr. Garrett did not ask Appellant any questions, but Appellant volunteered: "I shot him because he was going to shoot me." (T.180-182; R.87-89).

Michelle Cantey lived in the same condo complex as the victim and near where the victim was shot. (T.184; R.91). She heard several gunshots and then a reverberation like a mini earthquake. (T.190; R.97). She testified the day of the shooting a bullet entered her condo and embedded in the drawer of her end table. (T.185-186; 192; R.92-93; 99). She indicated she saw an individual wearing black with red trim trying to scale a fence after she heard several gunshots. He appeared to throw something and then run toward the red Crown Victoria. (190-192; R.97-99).

Officer Harlow, along with his K-9 officer Roscoe, searched the area along the fence. They located a ball of saran wrap with a green leafy substance as well as a white powder that looked like cocaine. (T.206; R.113). He also found several spent shells near the area where Appellant was located.

Michelle McSpadden, was a former crime scene officer with the Myrtle Beach Police Department. She indicated three fired shells were located that came from the AR-15 rifle fired by Appellant. She indicated the rifle had 16 unfired rounds in the magazine located beside the rifle on the ground. (T.242-245; R.149-152). She also stated there were two unfired shotgun shells found near where the victim had been shot. She explained the shotgun itself had no shells, fired or unfired, in it when it was collected. (T.248-249; R.155-156). Ms. McSpadden also performed gunshot residue tests on Appellant. (T.259; R.166). A similar test was performed by another officer on the victim. (T.299; R.206). She indicated officers found no evidence of birdshot or other shotgun pellets. She also testified they found no spent shells or the wadding that would have been ejected when the shell was spent. (T.264-265; R.171-172). According to McSpadden: "We spent quite a bit of time at that scene there, and I feel confident we would have seen evidence of a shotgun blast had it been there." (T.277; R.184).

Jennifer Nates, an agent with SLED's Trace Evidence Section, explained gunshot residue tests and the results of the tests performed on Appellant and the victim. (T.357-358; R.264-265). She located gunshot residue on the hands of Appellant. (T.360-361; R.267-268). However, she found no gunshot residue on the hands of the victim. (T.361; R.268).

According to Dr. Proctor, the pathologist, the bullet that killed the victim entered the neck. It caused extensive damage to the carotid artery and the jugular vein. (T.290-292; R.197-199). The jacket of the bullet and the projectile separated in the victim's body, with the projectile exiting and the jacket remaining lodged in the body. (T.290; R.197). The victim died from a gunshot from at least two feet away which struck the victim's neck and caused extensive visceral damage and hemorrhage. (T.293; R.200). With every beat of the victim's heart, "blood would just spew" until he was dead. (T.293; R.200).

STANDARD OF REVIEW

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)).

"[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). 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." State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (citations omitted). This Court "favors the exercise of a **wise discretion of the circuit judge** in determining the merits of such motion in each individual case." State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 309 (1976) (emphasis added) (quoting State v. Singleton, 167 S.C. 543, 166 S.E. 725 (1932)). "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983).

ARGUMENT

I. The trial court did not err in denying Appellant's motion for a continuance or a mistrial when his counsel did not act with any diligence in seeking to ensure his witness would be available for trial.

Appellant contends the trial court erred in denying his motions for a continuance or mistrial when Ms. Brockington, one of Appellant's witnesses, was not available at trial. Appellant knew Ms. Brockington's testimony prior to trial beginning and took no steps to secure that testimony at trial. Appellant did not subpoena the witness until after trial began and after she was already in Georgetown Memorial Hospital. As a result, Appellant did not utilize due diligence to obtain her testimony and cannot now complain regarding her failure to be present at trial.

In the instant case, Appellant was arrested in January 2014. Ms. Brockington, who is married to Appellant's cousin, gave a statement on January 27, 2014. Appellant's case was called to trial on May 30, 2017, for the week of June 12, 2017. See Records for Antwuan L. Nelson, Horry County Fifteenth Judicial Circuit Public Index, https://www.horrycounty.org/Online-Services/Public-Index (last visited July 18, 2018). Appellant's counsel admitted not having his witness under subpoena prior to trial because she was going to be present voluntarily. (T.435; 437; R.342; 344). He also acknowledged knowing she was not present on Monday, June 12, and it was not until Tuesday, June 13 that he had her subpoenaed.[2] (T.437; 441; R. 342; 348). At the time Appellant finally subpoenaed Ms. Brockington, she was already in the hospital. (Court's Exhibit 2, Affidavit; R.484).

[2] Interestingly, the affidavit provided to the Court indicates the subpoena was served on Ms. Brockington June 12, 2018, at the hospital even though, according to the Work/School Excuse provided by Tidelands Georgetown Memorial Hospital, Ms. Brockington was not admitted until June 13. Counsel's statement that she was served on Tuesday would correspond with June 13. (Court's Exhibit 2, Affidavit and Work/School Excuse; R.484).

On June 14, 2017, the State rested and Appellant acknowledged two of his witnesses were not present, one of which was Ms. Brockington. Appellant admitted he had not complied with Rule 7, because he had not prepared an affidavit for the court. (T.431-432; R.338-339). Appellant then asked the trial court to recess early for the day, at approximately 3:15 pm, which the court granted. (T.432; 434; R.339; 341).

On June 15, 2017, the fourth day of trial, Appellant provided an Affidavit, Ms. Brockington's statement, and a Work/School Excuse from Georgetown Memorial Hospital, then asked the trial court to declare a mistrial. The Affidavit indicates Ms. Brockington was served with the subpoena while already in the hospital, though counsel misplaced the proof of service so he did not attach either the subpoena or the proof of service. The Affidavit indicates Ms. Brockington was expected testify consistent with her statement given to police, which was provided to the trial court. The statement, by the wife of Appellant's cousin, merely indicates the victim approached her door looking for Appellant while holding a shotgun. She then heard shots fired and indicated the victim fired first and Appellant returned fire. She admitted she could not see the victim from where she was located in her apartment, but could only hear the shots fired. She indicated she heard four total shots. Finally, the attached Work/School Excuse indicated Ms. Brockington was admitted on June 13, 2017—the second day of trial—and would not be released until cleared by a doctor. (Court's Exhibit 2; R.496).

The trial court noted: "This is the fourth day. Not only do you have notice of this case going, this is essentially the fourth day of trial of this case." (T.437; R.344). The trial court denied the motion for a mistrial and indicated he would not continue the case. He found the subpoena was not issued until after trial started even though counsel had notice of both Ms. Brockington's statement and the fact trial was going forward. (T.441; R.348). The court also

found the majority of the testimony Ms. Brockington would provide was already in the record, and so the continuance or mistrial was not necessary to add cumulative testimony. (T.441-442; R.348-349).

Rule 7 of the Criminal Rules of Procedure states:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and **has made use of due diligence to procure the testimony of the witness** or of such other circumstances as will satisfy the court that his motion is not intended for delay.
>
> (1) When a subpoena has been issued, the original shall be produced with proof of service or the reason why not served endorsed thereon or attached thereto; or if lost the same proof shall be offered with additional proof of the loss of the original subpoena.
>
> (2) A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to and the grounds for such belief.

Rule 7(b), SCRCrimP (emphasis added). A continuance is not automatically given because a witness is unavailable. The court has discretion to determine whether due diligence was used to try and secure the witness's testimony. In the instant case, the trial court clearly found due diligence was not used by Appellant's counsel because he did not seek the continuance prior to trial and, instead, waited until the fourth day of trial.

This Court has made it abundantly clear: "It is paramount that the party asking for the continuance **show 'due diligence' was used** in trying to procure the absent witness." State v. Colden, 372 S.C. 428, 439, 641 S.E.2d 912, 918-19 (Ct. App. 2007) (emphasis added). This Court has also explained the primary requirements for obtaining a continuance based on an

absent witness—even one that is unexpectedly absent: "The party asking for the continuance **must show due diligence was used** in trying to procure the testimony of an absent witness as well as set forth what the party believes the absent witness will testify to and the grounds for that belief." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005) (emphasis added).

Appellant relies on two primary cases, State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002), and State v. Williamson, 115 S.C. 315, 105 S.E.697 (1921). The two cases are clearly distinguishable from the instant case.

In McMillian, the Court found a continuance should have been granted in order for the defendant to obtain a transcript from the first trial which would be used to impeach the witnesses against him. Appellant fails to explain the key aspects resulting in the reversal in McMillian. First, the Court articulated: "**At the outset of the second trial**, McMillian moved for a continuance in order to obtain portions of the transcript of his Jan. 5-6 trial, which resulted in a hung jury and a mistrial." McMillian, 349 S.C. at 21, 561 S.E.2d at 604 (emphasis added). The Court makes it clear the motion for a continuance was made "at the outset" of trial and not on the third or fourth day of trial after the State had rested its case. Additionally, the Court noted limited time transpired between the first and second tapes so no transcript had been created, backup tapes were not available to be used at trial, and McMillian had a clear need for the transcript to properly present a defense because the credibility of the witness was essential, so the Court found "[u]nder the **limited circumstances** of this case" the reversal was warranted. Id. at 24, 561 S.E.2d at 605.

In describing Williamson, Appellant omits two important considerations from the Court's opinion finding the continuance should have been granted. First, the Court specifically found:

"Ordinarily a person tried for a capital felony **has a right** to have his wife present at the trial, and the wife has the right to be present." Williamson, 115 S.C. 315, 105 S.E. 697, 697 (emphasis added). The most significant factor is that the trial court required the defendant to proceed to trial knowing about his wife's absence, the reason for that absence, and her necessity to testify as to the circumstances of the case prior to trial. Williamson's counsel did not wait until she was to be testifying to determine her inability to testify. Counsel in Williamson used due diligence, whereas counsel in the instant case failed to use any diligence.

Because Appellant cannot demonstrate the trial court erred in failing to grant a continuance,[3] this Court should certainly find he was not entitled to a mistrial. He waited until the fourth day of trial, after the State had presented its entire case, to seek to end the trial based on his own counsel's failure to secure a witness's testimony prior to trial commencing. He should not be able to see the entire State's case and, based on his own conduct, get a second opportunity to prepare for and counter the evidence presented. He has not demonstrated the need for the extreme remedy of a mistrial.[4] See e.g., State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the **greatest caution**

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[3] Additionally, as the trial court found much of the statement and likely testimony from Ms. Brockington would have been entirely cumulative to other testimony already in the record. As a result, the continuance and motion for a mistrial would have been properly denied on this ground. See State v. Morris, 376 S.C. 189, 209, 656 S.E.2d 359, 370 (2008) ("Furthermore, in light of the evidence introduced at trial, any testimony from unavailable witnesses or other unavailable evidence would likely have been cumulative."); United States v. Valenzuela–Bernal, 458 U.S. 858, 867 (1982) (noting "the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses").

[4] Appellant has failed to demonstrate prejudice from the failure to present Ms. Brockington's testimony. As noted, much of the testimony was cumulative. Other testimony merely supported the mutual combat charge presented by the trial court and not self-defense. Her statement clearly indicates Appellant armed himself instead of retreating from the scene. See e.g., State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007) (finding no self-defense charge warranted when defendant approached victim with loaded gun at his side and stating: "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense."); State v. Graham, 260 S.C. 449, 452, 196 S.E.2d 495, 496 (1973) (finding mutual combat supported by evidence when "[t]here was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point.").

under **urgent circumstances**, and for very **plain and obvious causes**." (emphasis added)); State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) ("The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way.").

Accordingly, as a result of counsel's complete lack of due diligence in seeking to secure the testimony of Ms. Brockington, the trial court properly denied his motion for a continuance or mistrial. Appellant should not be able to hear the entirety of the State's case and either obtain a continuance or mistrial based on a witness he should have known would be unavailable before trial started. Appellant's counsel failed to exercise the "paramount" responsibility prior to seeking a continuance; the party asking for the continuance must "show 'due diligence' was used in trying to procure the absent witness." Colden, 372 S.C. at 439, 641 S.E.2d at 918-19. As a result, this Court should affirm the trial court's decision and affirm Appellant's convictions and sentences.

CONCLUSION

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

Respectfully submitted,

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September 7, 2018

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Final Brief of Respondent on Appellant by delivering copies of the same addressed to David Alexander, Esquire, South Carolina 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 7th day of September, 2018.

Anne Mueller

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