ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRISTAN CHEEK,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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II. Did S.C. Code Ann. § 23-3-430(C)(12) (2008) violate Appellant's substantive due process rights by requiring Appellant to register as a sex offender when there is no sexual element contained in S.C. Code Ann. § 16-17-470(A) (2008) and there was no evidence presented that Appellant committed an act of sexual misconduct or was seeking sexual gratification?

STATEMENT OF THE CASE

On November 3, 2008, Appellant Tristan Cheek was indicted by the Charleston County Grand Jury for "peeping" (Peeping Tom).[1] R. 51 – 52.

On April 18, 2011, Appellant proceeded to trial before the Honorable Roger M. Young, Sr., and a jury. R. 1. Appellant was represented by Andrew Grimes and Alicia Penn, and the State was represented by Assistant Solicitors Elizabeth Gordon and Marian Askins. R. 1.

On April 19, 2011, the jury found Appellant guilty as charged. R. 44, l. 7 – 47, l. 11. Judge Young sentenced Appellant to three years imprisonment. R. 50, ll. 5-11.

This appeal follows.

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[1] *See* S.C. Code Ann. § 16-17-470(A) (2008) ("It is unlawful for a person to be an eavesdropper or a peeping tom on or about the premises of another or to go upon the premises of another for the purpose of becoming an eavesdropper or a peeping tom. The term "peeping tom", as used in this section, is defined as a person who peeps through windows, doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon and any other conduct of a similar nature, that tends to invade the privacy of others. The term "peeping tom" also includes any person who employs the use of video or audio equipment for the purposes set forth in this section. A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than three years, or both.").

STATEMENT OF FACTS

Relevant Facts

The State sought to "prove that [on July 27, 2008,] the [Appellant], one, went upon the premises of another and, two, that he either peeped through windows, doors or other like places, either to invade the privacy of another or by doing something that would tend to invade the privacy of another." R. 2, ll. 14-19. Appellant was indicted for this charge on November 3, 2008. R. 51 – 52.

After the close of the State's case, Appellant testified as the sole witness for the defense. R. 12, l. 1 – 43, l. 20. The following occurred during the State's cross-examination of Appellant:

SOLICITOR: When's the last time you worked?

APPELLANT: [The] Last time I worked was in December.

SOLICITOR: December of 2010?

APPELLANT: Yes.

SOLICITOR: *When you were running from the police?*

DEFENSE COUNSEL: Objection. May we approach? We have a matter of law.

R. 39, ll. 20-25 (emphasis added).

Outside the presence of the jury, defense counsel moved for a mistrial "based on the solicitor's last question about [Appellant] running from the law." R. 40, ll. 7-9. Defense counsel further argued:

> [Appellant] had been charged I think with resisting arrest in, I believe, 2010. He was kind of on the run. *There's been no evidence in this case so far that he was running from the law in 2010* or doing anything - - [the State] interjected that on purpose to inflame the jury and just to show that he's someone who's running away from police.

R. 40, ll. 7-15 (emphasis added).

The State maintained, "[Appellant] ha[d] already previously stated that he had ran from the police and that he ran from the police the last time he was arrested." R. 40, ll. 19-21. The trial court subsequently noted, "Well, I guess I'm trying to figure out at what point do we usually allow evidence of crimes other than the one that [defendants are] put on trial for to be entered into evidence, especially when they occurred subsequent to the case in point." R. 41, ll. 17-21. The trial court ultimately denied defense counsel's motion for a mistrial and stated, "I will instruct the jury that they're to disregard the last statement." R. 42, ll. 9-11.

Defense counsel argued, "*We don't think there is a curative instruction to cure her comment.*" R. 42, ll. 12-14 (emphasis added). Defense counsel further argued that the trial court's curative instruction should indicate that the State's question was deliberately improper. R. 42, ll. 15-21. The trial court stated, "Well, I'm not going to comment on whether or not it was deliberate. I will just tell them that it was an improper question and that they are to disregard the question and the answer." R. 42, ll. 22-25.

When the jury returned to the courtroom, the trial court gave the following curative instruction:

> Folks, when we left out of here, the solicitor had asked a (sic) deemed to be improper question and you also began to hear a bit of an answer. I'm going to instruct you to disregard the last question that the solicitor asked as well as the answer, and I don't want you to consider it in any way either now or during your deliberations.

R. 43, ll. 5-11.

Sentencing

During sentencing, defense counsel argued:

> As to the sex offender registry issue, ... [Appellant] shouldn't have to register because this is arbitrary and capricious to have a peeping Tom register. *There's no underlying evidence of sexual misconduct.* It should be a law or something where a judge could make a finding where it was not sexually related then he shouldn't have to register. And without that, *I think it violates his right to due process and fundamental fairness*, and we'd ask that he not have to register as a sex offender and if the Court denied that I just to clear that for any appeal.

R. 48, l. 19 – 49, l. 5 (emphasis added). The sentencing sheet indicates that Appellant is required to register as a sex offender. R. 53.

ARGUMENT

I. The trial court erred by refusing to grant a mistrial because the State improperly placed Appellant's character at issue by asking Appellant about his flight from law enforcement in a separate crime and the trial court's curative instruction failed to cure the prejudice to Appellant.

The South Carolina Supreme Court has stated that "[t]he less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Specifically, the trial court is to consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." *State v. Craig*, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. See *State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

In this case, the State improperly placed Appellant's character at issue in violation of Rule 404(b), SCRE, by asking Appellant about his flight from law enforcement in a separate crime. R. 39, ll. 20-25; *See Craig*, 267 S.C. at 269, 227 S.E.2d at 310. This is because none of the Rule 404(b) exceptions were applicable to the State's impermissible question. *See State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) (providing the exceptions to Rule 404(b)). Notably, Appellant did not offer evidence of a pertinent trait of character. Therefore the State's improper question also violated the rule forbidding the State to introduce evidence of Appellant's character or traits prior to the defense raising the issue. *See* Rule 404 (a)(1).

Furthermore, while an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced. *See State v. Simpson,* 325 S.C. 37, 479 S.E.2d 57 (1996); *see also* 75B Am.Jur.2d *Trial* § 1284 (1992) ("Error is not always rendered harmless by instructions to the jury to disregard it or to give it only a limited effect. The test is one of prejudice.") (footnotes omitted). Thus, to warrant reversal, "the errors must adversely affect [the defendant's] right to a fair trial." *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999).

Here, the trial court's curative instruction did not sufficiently remove the prejudice because the prejudice was enhanced by the State's impermissible question under Rules 404 (a)(1) and 404(b), SCRE. *See State v. Wilson,* 274 S.C. 635, 637-38, 266 S.E.2d 426, 427 (1980) (noting "[t]he inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. . . . Further, the danger of prejudice is enhanced when, as here, there has been no trial and conviction for the [alleged previous criminal activity]. The subsequent acts remain accusations. The manifest prejudice of this evidence is obvious."). Thus, the trial court's curative instruction failed to cure the prejudice to Appellant.

Accordingly, the Appellant failed to receive a fair trial because the trial court erred by refusing to grant a mistrial. *See Simpson,* 325 S.C. 37, 479 S.E.2d 57; *see also Johnson,* 334 S.C. at 93, 512 S.E.2d at 803.

II. S.C. Code Ann. § 23-3-430(C)(12) (2008) violated Appellant's substantive due process rights by requiring Appellant to register as a sex offender when there is no sexual element contained in S.C. Code Ann. § 16-17-470(A) (2008) and there was no evidence presented that Appellant committed an act of sexual misconduct or was seeking sexual gratification.

In this case, Appellant was required to register as a sex offender pursuant to S.C. Code Ann. § 23-3-430(C)(12) (2008) because he was convicted as a "peeping tom" under S.C. Code Ann. § 16-17-470(A) (2008). R. 44, l. 7 – 47, l. 11; R. 51 – 53. Notably, there is no sexual element contained in § 16-17-470(A),[2] and there was no evidence presented that Appellant committed an act of sexual misconduct or was seeking sexual gratification. Since our Supreme Court's decisions in *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002), *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003), and *In re Ronnie A.*, 355 S.C. 407, 585 S.E. 2d 311 (2003), South Carolina's Sex Offender Registry has become punitive in nature.[3] Accordingly, § 23-3-430(C)(12) violated Appellant's substantive due process rights under the Fourteenth Amendment to the United States Constitution. R. 48, l. 19 –

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[2] (finding "[i]t is unlawful for a person to be an eavesdropper or a peeping tom on or about the premises of another or to go upon the premises of another for the purpose of becoming an eavesdropper or a peeping tom. The term "peeping tom", as used in this section, is defined as a person who peeps through windows, doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon and any other conduct of a similar nature, that tends to invade the privacy of others. The term "peeping tom" also includes any person who employs the use of video or audio equipment for the purposes set forth in this section. A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than three years, or both.").

[3] Evidence of the statute's punitive nature: (1) 2005 Act 94 § 2 (S.C. Code Ann. § 23-3-465) (restricting residency by prohibiting sex offenders "from living in campus student housing at a public institution of higher learning supported in whole or in part by the State."); and (2) 2008 Act 333 § 1 (S.C. Code Ann. § 23-3-535) (prohibiting sex offenders convicted of certain offenses from residing "within one thousand feet" of a school or park) (§ 23-3-535(E)(1) (declaring residency restrictions to be "penalties.").

49, l. 5.

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV. The United States Supreme Court has held that substantive due process protects citizens against arbitrary or capricious action by the government regardless of the procedures used to carry out that action. *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). The substantive component of this right prohibits the state from arbitrarily or capriciously depriving a person of life, liberty, or property regardless of whether or not the way in which the government carries out this deprivation is, itself, ostensibly fair. *Id.*, 351 S.C. at 140, 568 S.E.2d at 347. Therefore, substantive due process "allows a court to examine the constitutionality of the underlying statute as opposed to merely the process by which it is applied to each individual." *Id.*

The first step in a substantive due process analysis is to determine what level of scrutiny should be applied. *See id.* The level of scrutiny to apply is determined by the nature of the rights infringed by the statute. A statute that infringes a fundamental right must satisfy strict scrutiny. *Id.* at 140-41. Strict scrutiny requires a statute to be narrowly tailored to achieve a compelling state interest. *Id.* If a fundamental right is not implicated, then the rational basis test is applied. *Id.* Under the rational basis test, a statute must be "reasonably designed to accomplish its purpose." *Id.* (internal quotation omitted).

Here, substantive due process requires § 23-3-430(C)(12) be narrowly tailored to achieve a compelling state interest because it infringes fundamental liberty and constitutionally protected property rights. Although protecting the public from sex

offenders who pose a high risk of re-offending is a compelling state interest, protecting the public from citizens whose convictions do not involve sexual misconduct or sexual gratification is not a compelling state interest. *Compare State v. Dykes*, 398 S.C. 351, 728 S.E.2d 455 (2012), rehearing granted (July 12, 2012) (finding a statutory provision that mandates lifetime satellite monitoring of certain child sex offenders without judicial review related to an assessment of an individual's risk of reoffending violates the Due Process Clause) *with Walls*, 348 S.C. 26, 558 S.E.2d 524 (noting the language of § 23-3-400 makes clear that the General Assembly intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes).

Furthermore, § 23-3-430(C)(12) is not narrowly tailored to achieve its declared purpose because there is no sexual element contained in § 16-17-470(A), and there was no evidence presented that Appellant committed an act of sexual misconduct or was seeking sexual gratification. *Cf. Hazel v. State*, 377 S.C. 60, 659 S.E.2d 137 (2008) ("As a result, we approve the procedure utilized by the Court of Common Pleas and find that court has the power to make the determination that a prior kidnapping offense did not involve sexual misconduct such that the one convicted is required to register as a sex offender.").

Our Supreme Court addressed a valid application of § 23-3-430 in *Hazel*, 377 S.C. 60, 659 S.E.2d 137. After serving twenty-two years for kidnapping, Hazel was required to register as a sex offender in 2002 under § 23-3-430(C)(15) (2007) (requiring any person convicted of kidnapping a person eighteen years of age or older must register as a sex offender unless a finding is made on the record that the kidnapping did not include a criminal sexual offense or attempted criminal sexual offense).

The *Hazel* Court discussed how the sex offender statute had evolved since its enactment as it applied to kidnapping:

> Section 23-3-430 has been through many changes since its enactment in 1994. In the beginning, the statute provided that a person convicted of kidnapping shall be referred to as a sex offender. § 23-3-430(8) (Supp.1995). The statute was amended in 1996 and kidnapping was deleted from the listing of offenses that require one to register as a sex offender. § 23-3-430(C) (Supp.1996). In 1998, the statute was again amended and kidnapping was re-added as one of the enumerated offenses. An exception was added to state that if the court makes a finding on the record that the offense did not include a criminal sexual offense, then a defendant convicted of kidnapping would not be required to register as a sex offender. § 23-3-430(C)(15) (Supp.1998). The statute was again amended in 1999. This amendment rewrote the kidnapping subsection to state that a person convicted of kidnapping a person eighteen years of age or older would be required to register as a sex offender. The exception was again included and stated that no registration would be required if the court made a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense. § 23-3-430(C)(15) (Supp.1999).

Id. at 63-64, 659 S.E.2d at 139.

The Supreme Court found:

> Section 23-3-430 had no effect on respondent until he was released from prison and was required to register as a sex offender. Applying the law as it read on the date of respondent's release best fulfills the legislature's intent because respondent is not at risk of re-offending where his crime did not have involve a sexual element. . . . The 1999 amendment states that a person convicted of kidnapping a person eighteen years of age or older would be required to register as a sex offender, with the exception that no registration would be required if the court made a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense. In the instant case, no such finding was made on the record because the amendment did not exist at that time. The record is clear, however, that no sexual misconduct was

> involved in this kidnapping. Accordingly, the Court of Common Pleas properly found that respondent should not be required to register as a sex offender.

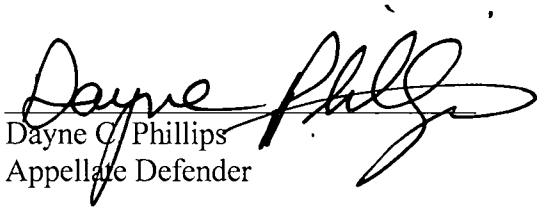
Id. at 64-65, 659 S.E.2d at 139-40.

Protecting the public from citizens whose convictions do not involve sexual misconduct or sexual gratification is not a compelling state interest; therefore, § 23-3-430(C)(12) is not narrowly tailored to achieve its declared purpose because there is no sexual element contained in § 16-17-470(A), and there was no evidence presented that Appellant committed an act of sexual misconduct or was seeking sexual gratification. Accordingly, § 23-3-430(C)(12) violated Appellant's substantive due process rights by requiring Appellant to register as a sex offender. *See* U.S. Const. amend. XIV; *see also Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347.

CONCLUSION

For the foregoing reasons, Appellant Tristan Cheek requests that this Court reverse his convictions and remand this case to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of December, 2012.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 27, 2012

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of December, 2012.

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of December, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.