ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Roger M. Young, Circuit Court Judge

Appellate Case No: 2011-191471

THE STATE,

Respondent,

v.

TRISTAN CHEEK A/K/A TRISTAIN CHEEK,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for peeping tom. (R. pp.51-52) On April 18, 2011, Appellant proceeded to trial before a jury. Andrew Grimes, Esquire, and Alicia Penn, Esquire, represented Appellant, and Assistant Solicitors Elizabeth Gordon and Marian Askins represented the State. The jury found Appellant guilty as charged, and the Honorable Roger M. Young sentenced Appellant to three years' imprisonment. (R. pp.44, 50.)

On April 29, 2011, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On July 27, 2008, at 10:51 p.m., Officer Ben Ballenger of the Mount Pleasant Police Department responded to a report of a prowler. (R. p.3 lines 4-25; R. p.4 lines 1-4, 25; R. p.5 line 1.) Officer Ballenger received a description of the suspect and saw someone who fit the description when he arrived on the scene. (R. p.5 lines 5-11; R. p.6 lines 11-13.) After Officer Ballenger briefly made contact with the suspect, the suspect ran from the scene and police were unable to capture him that night. (R. p.7 lines 17-25; R. p.8 lines 1-19.; R. p.9 lines 15-17.) The witnesses who reported the incident led police to the truck the suspect arrived in, and police were able to trace it to Appellant. (R. p.9 lines 22-25; R. p.10 lines 1-6.) Several days later, police arrested Appellant and charged him with peeping pursuant to S.C. Code Ann. § 16-17-470 (A). (R. p.11 lines 2-6; R. pp.51-52)

After the State presented its case, Appellant testified in his own defense. (R. p.12-43.) During cross-examination, in an effort to challenge Appellant's credibility, the State questioned Appellant regarding past incidents involving stealing credit cards out of cars. (R. p.35 lines 2-8.) As part of the exchange, the State asked Appellant, "And you ran that time too when the police tried to arrest you?" (R. p.35 lines 9-10.) Appellant answered, "That's correct." (R. p.35 line 11.) Appellant did not object to this line of questioning. At the end of its cross-examination, the following exchange took place:

[The State]: When's the last time you worked?

[Appellant]: Last time I worked was in December.

[The State]: December of 2010?

[Appellant]: Yes.

[The State]: When you were running from the police?

[Defense Counsel]: Objection. May we approach?

(R. p.39 lines 20-25.)

At that point, the trial court excused the jury and Appellant moved for a mistrial, arguing the State deliberately asked about running from the law to inflame the jury and show that Appellant is someone who runs from police. (R. p.40 lines 2-15.) The State pointed out Appellant already testified he ran from police the last time he was arrested. (R. p.40 lines 19-21.) Further, the State withdrew the question. (R. p.42 line 5.) The trial court denied Appellant's motion for a mistrial and offered to give the jury a curative instruction to disregard the last question. (R. p.42 lines 9-11.) Appellant argued a curative instruction would be insufficient to cure the question unless the trial court told the jury the question was deliberately improper. (R. p.42 lines 12-21.) The trial court determined it would not comment on whether the question was deliberate and gave the following curative instruction to the jury:

> The Court: All right. Folks, when we left out of here, the solicitor had asked a 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. p.42 lines 22-23; R. p.43 lines 5-11.) Appellant made no objection to the sufficiency of the curative instruction and did not move for a mistrial.

Ultimately, the jury found Appellant guilty as charged, and the trial court sentenced him to three years' imprisonment. (R. pp.44, 50.) During sentencing, Appellant argued he should not have to register as a sex offender because there was no underlying evidence of sexual misconduct in his peeping tom charge. (R. p.48 lines 19-24; R. p.49 lines 1-5.) Appellant specifically argued, "It [sic] should be a law or

something where a judge could make a finding where if 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 . . . ." (R. p.48 lines 24-25; R. p.49 lines 1-3.) The trial court did not address this argument, but the sentencing sheet reflects that Appellant is required to register as a sex offender. (R. pp.51-52)

ARGUMENTS

I.

Appellant's argument that the trial court erred in denying his motion for a mistrial and that the trial court's curative instruction failed to cure the prejudice is not preserved for review, but even if preserved, the trial court properly denied the motion.

Appellant contends the trial court abused its discretion in failing to grant a mistrial after the State improperly placed Appellant's character at issue by asking about Appellant running from police in December 2010. Specifically, Appellant argues the State's question violated Rule 404, SCRE. However, the trial court gave a curative instruction after Appellant objected. Because Appellant did not object to the sufficiency of the curative instruction or move for a mistrial after the trial court gave the jury a curative instruction, this issue is not preserved for review. Moreover, the granting of a mistrial requires manifest necessity and is an extreme measure that ought to be granted with the greatest caution. Appellant failed to show manifest necessity and even if the issue were preserved, the trial court acted within its discretion in denying the motion.

The fact that a trial court gives a curative charge indicates it must have sustained the evidentiary objection. State v. Wilson, 389 S.C. 579, 584, 698 S.E.2d 862, 865 (Ct. App. 2010). "If the trial [court] sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996). "No issue is preserved for appellate review if the objecting party accepts the [court]'s ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial." Id. at 510, 476 S.E.2d at 912.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Wilson, 389 S.C. at 585, 698 S.E.2d at 865 (citation and internal quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." Id. at 585-86, 698 S.E.2d at 865. "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." Id. at 586, 698 S.E.2d at 865 (citation and internal quotation marks omitted). "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." Id. at 586, 698 S.E.2d at 865-66 (citation and internal quotation marks omitted). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005).

The trial court is in the best position to ascertain the potential prejudicial effect of any offending testimony and the Supreme Court favors the exercise of wide discretion of the circuit court in ruling on a motion for mistrial in each individual case. State v. Jones, 325 S.C. 310, 324, 479 S.E.2d 517, 524 (Ct. App. 1996).

Appellant initially objected when the State asked him about fleeing from the police in December 2010. Appellant moved for a mistrial and the trial court denied the motion. Next, the trial court gave a curative instruction to the jury telling them to disregard the improper question and any answer they may have heard. Appellant did not object to the sufficiency of the curative instruction or renew his motion for a mistrial. Thus, the issue is not preserved for review by this Court. See George, 323 S.C. at 510,

476 S.E.2d at 912 ("No issue is preserved for appellate review if the objecting party accepts the [court]'s ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.").

Additionally, Appellant's argument on appeal that the State's question improperly placed Appellant's character at issue in violation of Rule 404(b), SCRE, is also not preserved. At trial, Appellant argued the question regarding running from the police in 2010 would inflame the jury and show Appellant was someone who runs away from the police. However, the argument that the question violated Rule 404(b), SCRE, was not articulated with any specificity. See State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) (finding an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); see also State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Appellant's argument also fails on the merits. In State v. Council, 335 S.C. 1, 11, 515 S.E.2d 508, 513 (1999), the defendant argued he was entitled to a mistrial based on the introduction of testimony concerning a prior fingerprint card. An officer testified he took prints from the defendant after his arrest and compared those to prints in the SLED records. Id. at 11-12, 515 S.E.2d at 513. The defendant moved for a mistrial, contending the testimony implied he had a prior record by indicating he had been previously fingerprinted. Id. at 12, 515 S.E.2d at 513. The trial judge refused to grant a mistrial and declined to issue a curative instruction in order to avoid drawing the jury's attention to the issue. Id. The South Carolina Supreme Court affirmed the denial of the motion for mistrial, finding the reference was too vague to be prejudicial and it was questionable

whether the jury understood the implications of the testimony. Id. at 13, 515 S.E.2d at 514.

In State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003), the defendant moved for a mistrial after an officer testified that he knew the defendant had warrants at the time officers approached his home. The defendant asserted that this testimony was improper evidence of prior bad acts, but the trial judge denied the motion for a mistrial. Id. This Court affirmed, finding the reference to prior criminal acts was too vague and not sufficiently prejudicial to justify a mistrial. Id. at 561, 575 S.E.2d at 82. In affirming the trial court's decision to deny the motion for a mistrial, this Court determined that, based on testimony the jury had already heard, "it would be reasonable to assume the jury inferred that the warrants related to the charged offense." Id. This Court held: "[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes." Id.

In both Council and Thompson, our appellate courts have affirmed the denial of mistrials based on the vagueness of references to a defendant's prior bad conduct or criminal record. Other cases also support these holdings. See George, 323 S.C. at 510-511, 476 S.E.2d at 912 (testimony that "merely suggested" a possible prior bad act was not prejudicial); State v. Singleton, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), ("extremely vague" references possibly suggesting another crime were harmless); State v. Robinson, 238 S.C. 140, 150-151, 119 S.E.2d 671, 676 (1961), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding testimony by a witness that the defendant told him he was on the way to the probation office did not

create an inference that the defendant had been convicted of another crime); State v. Creech, 314 S.C. 76, 82, 441 S.E.2d 635, 638 (Ct. App. 1994) (inadvertent reference to calling the defendant's probation officer did not warrant a mistrial).

In the case sub judice, Appellant's objection was based on the State's reference to his running from police in December 2010, when Appellant asserts he had possibly been charged with resisting arrest. However, the State did not reference that charge and did not question him about any other charges at that point. Furthermore, Appellant had already testified he ran from police after he stole credit cards out of people's cars, and Appellant did not object to the earlier testimony. Because the State did not introduce any other charges, it is reasonable to assume the jury would infer that the running from police incident related to the stolen credit card charges to which Appellant had already testified without objection. See Thompson, 352 S.C. at 561, 575 S.E.2d at 82. Thus, the State's question could not have caused any prejudice that was not already presented by its first question regarding flight. In any case, any additional prejudice was cured by the curative instruction. See George, 323 S.C. at 510, 476 S.E.2d at 911-12 (stating a curative instruction to disregard testimony deems any error to be cured).

In summary, such a vague reference to Appellant's flight from police that may have implied other criminal charges was not sufficient to justify a mistrial because there was no attempt by the State to introduce evidence of other crimes. See Thompson, 352 S.C. at 561, 575 S.E.2d at 82. Accordingly, the trial court did not abuse its discretion in denying Appellant's motion for a mistrial.

II.

The trial court did not violate Appellant's substantive due process rights by requiring him to register as a sex offender after being convicted of S.C. Code Ann. § 16-17-470, which is an enumerated offense requiring mandatory registration under S.C. Code Ann. § 23-3-430 without requiring the court to first make specific findings regarding the sexual nature of the offense, because the registry is non-punitive and no liberty interest is implicated.

Appellant argues being required to register as a sex offender violates his substantive due process rights because there is no sexual element to the peeping statute under which he was convicted. Additionally, Appellant argues no evidence was presented that he committed an act of sexual misconduct or was seeking sexual gratification. However, no finding of sexual misconduct was necessary to require Appellant to register as a sex offender as mandated by the peeping statute. Because the registry is non-punitive and no liberty interest is implicated, Appellant's rights were not violated.

Appellant argues the statute requiring persons convicted of peeping to register as sex offenders infringes fundamental liberty and constitutionally protected property rights. However, the Supreme Court has determined the sex offender registry does not violate substantive due process and therefore "cannot constitute a deprivation of a constitutionally protected liberty interest." Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 325 (2003). Additionally, Appellant complains of the sex offender residency restrictions, claiming they demonstrate the punitive nature of the registry. S.C. Code Ann. §§ 23-3-465, -535 (2007 & Supp. 2011). However, the complained of residency restrictions do nothing more than enhance the registry's recognized non-punitive goal of protecting the public. In regard to residence, the restrictions only limit sex offenders

from residing in campus student housing at a public institution of higher learning (§ 23-3-465) and from residing within one thousand feet of certain proscribed areas (§ 23-3-535).

The South Carolina Code provides:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.
>
> The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400 (2007 & Supp. 2011). Thus, the registry and any amendments thereto are not meant to punish, but are intended for investigative, statistical, and public safety purposes. Indeed, the South Carolina Supreme Court has examined the statutory intent as stated by the General Assembly and held, "[I]t is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (emphasis added). This lack of punishment led to the Court's subsequent holding that the sex offender registry, regardless of the length of time one must be listed, is non-punitive and therefore no liberty interest is implicated. Hendrix, 353 S.C. at 552, 579 S.E.2d at 325.

"The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (citation and internal quotation marks omitted). "Where the statute's language is plain

and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id. at 587, 713 S.E.2d at 622-23 (citation and internal quotation marks omitted).

The South Carolina Legislature has determined that certain offenses mandate registration as a sex offender.

> Any person . . . who in this State has been convicted of . . . an offense described below . . . shall be required to register pursuant to the provisions of this article . . . . For purposes of this article, a person who has been convicted of . . . any of the following offenses shall be referred to as an offender: . . . (12) peeping, voyeurism, or aggravated voyeurism (Section 16-17-470) . . . .

S.C. Code Ann. § 23-3-430(A), (C) (2007 &Supp. 2011). Other offenses require the trial court to make a specific finding on the record before the convicted person must register as a sex offender or allow the person not to register if the court makes specific findings. For indecent exposure, the convicted person is required to register "if the court makes a specific finding on the record that based on the circumstances of the case the convicted person should register as a sex offender." S.C. Code Ann. § 23-3-430 (C) (14) (2007 &Supp. 2011) (emphasis added). For kidnapping and trafficking in persons, the convicted person is required to register "except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal

sexual offense."[1] S.C. Code Ann. § 23-3-430 (C) (15), (17) (2007 & Supp. 2011) (emphasis added).

Here, the Legislature was clear. The subsection regarding peeping has no language allowing the trial court discretion as to whether the convicted person must register as a sex offender. The above subsections demonstrate the Legislature's ability to treat certain offenses differently to allow for judicial discretion in situations where mandatory registry is not required. Discretion in those three areas is specifically carved out by the Legislature. If the Legislature wanted to require the trial court to determine whether the crime was of a sexual nature before requiring a person convicted of peeping to register as a sex offender, it would have added language similar to the above noted subsections. See Byrd v. Irmo High Sch., 321 S.C. 426, 433-34, 468 S.E.2d 861, 865 (1996) (finding when one provision does not include a right that is included in a related provision, legislative intent is that a right will not be implied where it does not exist). Thus, it is clear the Legislature intended the peeping offense to require mandatory sex offender registry with no room for judicial discretion.

In State v. Harris, the Supreme Court of South Carolina stated, "The crime of 'Peeping Tom' involves peering into private places and breaches a duty one owes his neighbors. It is inherently immoral." 293 S.C. 75, 76, 358 S.E.2d 713, 714 (1987). The Harris court held that "Peeping Tom" was a crime of moral turpitude, which is "'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man . . . .'" (Id.; quoting State v. Yates, 280 S.C. 29, 37, 310

[1] Appellant's reliance on Hazel v. State, 377 S.C. 60, 659 S.E.2d 137 (2008), is misplaced. Hazel involved kidnapping, which allows judicial discretion within the statute to determine whether a convicted person must register as a sex offender.

S.E.2d 805, 810 (1982)). An inherent sexual nature exists in the traditional definitions of peeping tom. See Black's Law Dictionary 1167 (9th ed. 2009) ("Peeping Tom. A person who spies on another (as through a window), usu[ally] for sexual pleasure[.]"); see also Merriam-Webster's Online Dictionary, "peeping tom" (last visited October 23, 2012) http://www.merriam-webster.com/dictionary/peeping%20tom (defining peeping tom as a pruriently prying person) and Merriam-Webster's Online Dictionary, "prurient" (last visited October 23, 2012) http://www.merriam-webster.com/dictionary/prurient (defining prurient as "marked by or arousing an immoderate or unwholesome interest or desire; *especially* **:** marked by, arousing, or appealing to sexual desire"). Due to the underlying sexual nature of the very definition of peeping tom, the Legislature did not need to require the trial court to make a specific finding as to whether the crime was of a sexual nature. In this way, the crime of peeping tom can be distinguished from those of indecent exposure, kidnapping, and trafficking persons, which may or may not be committed with an underlying sexual purpose.

Furthermore, requiring Appellant to register with the sex offender registry furthers the remedial purpose behind the registry, which is not to punish individuals but rather to protect the public from offenders who may re-offend and assist law enforcement in solving sex crimes. State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Because section 23-3-430 is a remedial statute, not penal, this Court must interpret the statute liberally. Trammell v. Victor Mfg. Co., 102 S.C. 483, 483, 86 S.E. 1057, 1058 (1915).

In summary, section 23-3-430 requires individuals who are convicted of peeping to register with the sex offender registry without requiring the court to first make findings as to the underlying sexual nature of the crime, and the registry does not implicate a

fundamental liberty interest. Therefore, Appellant's substantive due process rights were not violated, and this Court should affirm the trial court.

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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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 10th day of December, 2012.

Angela Bennett

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