STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

GERALD JARROD ANCRUM,

APPELLANT

APPELLATE CASE NO 2017-001335

Appeal from Charleston County

Honorable William P. Keesley, Circuit Court Judge

Opinion No. 2019-UP-075

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing on this Court's holding that the trial judge did not err in denying a mistrial motion when prior bad acts testimony surfaced in the case as this Court may have overlooked the fact that the admission of the same into evidence constituted error of law and resulting prejudice, both of which met the requirements for the grant of a mistrial. In support of this motion, counsel would submit the following points.

(1.) Appellant Gerald Jarrod Ancrum was tried by jury on two indicted charges of distribution of crack cocaine and distribution of heroin during the May 2017 term of the

Charleston County General Sessions Court before Judge William Paul Keesley. Appellant was convicted on the heroin distribution offense only[1] and received a sentence of imprisonment for a period of fifteen years. Melissa Gay represented appellant at trial, and Assistant Solicitors Stephanie B. Linder and Whitt Sowards appeared on behalf of the state. Appellant appealed his conviction and sentence.

(2.) On appeal, appellant raised the following issue:

> The trial judge erred in failing to declare a mistrial when the state elicited prior bad acts testimony form the confidential informant that drug purchases from appellant were made previously because this resulted in the admission of prejudicial and improper evidence in the case.

(3.) This Court held as follows:

> We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. White*, 371 S.C. 439, 443, 639 S.E.2d 160, 162 (Ct. App. 2006) ("The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law."); *State v. Howard*, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988) ("Among the factors to be considered in ordering a mistrial are the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony in the case."); *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009) ("A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial."); *id.* ("The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way."); Rule 404(b), SCRE ("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."); *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005) ("Generally a curative instruction is deemed to have cured any alleged error."); *State v. Smith,* 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) ("An instruction to disregard incompetent evidence is usually deemed to have cured the error unless on the facts of the particular case it is probable that, notwithstanding the instruction, the accused was prejudiced.").
>
> **AFFIRMED.**

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[1] The trial judge declared a mistrial on the crack cocaine offense charged due to a hung jury on the same. R. 266, l. 2 – p. 270, l. 18.

(4.) This Court overlooked the fact that to the contrary, the trial judge in fact abused his discretion in denying the motion for a mistrial and that such abuse constituted an error of law and that there was resulting prejudice, all of which established that the mistrial was warranted in this case. See State v. Harris, 382 S.C. 107, 647 S.E.2d 532 (Ct. App. 2009).

(5.) This case involved a controlled buy heroin and crack cocaine set up by Charleston police. Confidential informant Tessa Morris testified that she met appellant at Dunkin Donuts in Charleston on February 5, 2015, and purchased crack cocaine and heroin from him (appellant) at that time. R. 55, l. 20 – R. 64, l.9. Appellant did not testify at trial and did not present any witnesses on his behalf.

Prior to trial, the following colloquy occurred regarding the issue of prior bad acts:

> Defense Counsel: And, then we have prior bad acts, which we've had some discussion on prior to this and a prior conviction which we also had some discussion on.
>
> Solicitor: [A]s far as the prior bad acts...we don't intend to go into anything on the defendant ... until he testifies and opens the door.
> R. 2, l. 19 – Tr. 6, l. 1.
>
> The Court: Okay. There's no intent to go into any prior bad acts. There's no intent to go into any convictions unless the defendant takes the stand. The prior bad acts would only come in if the defendant in some way opened the door to that.
> R. 6, l. 6-12.

On cross examination of informant Morris, defense counsel asked Morris if she had a sexual relationship with appellant in the past. R. 70, lines 1-16. At the close of this cross examination, the solicitor moved outside of the jury's presence to question Morris about her "relationship" with appellant as the door was opened in order to show that her relationship with appellant was based on prior drug sales transactions only. R. 74, l. 21 – R. 75, l. 14; R. 76, l. 19 – R. 77, l. 3. Defense counsel argued that the sex inquiry had nothing to do with prior drug sales,

but rather a credibility matter in effect to verify how she knew appellant. R. 75, l. 16 – R. 76, l. 17. The trial judge ruled as follows:

> You (solicitor) can ask about how long she had known him...but I am not going to let you get into drug transactions. R. 77, l. 4-6.

On redirect, the following testimony was elicited from Morris by the solicitor:

> Q: How long overall had you known the defendant; a week, a month, a year?
>
> A: I've known him for several years.
>
> Q: You were not in a sexual relationship with him
>
> A: No we were never.
>
> Q: But you knew him for several years
>
> A: From purchasing drugs
>
> Q: And in fact, you knew him through your boyfriend
>
> A: Correct. R. 79, l. 21 – R. 80, l. 12.

Trial counsel objected to the "for purchasing drugs" comment in violation of the Judge's instruction to "keep the testimony away from prior bad acts," and the pre-trial admonition to avoid prior bad acts testimony also, and moved for a mistrial based on the error. R. 80, l. 13-17; R. 86, l. 5 – R. 87, l. 10.

The solicitor requested a curative instruction to resolve the issue. R. 80, l. 19 - R. 81, l. 2. The defense argued that this was "highly prejudicial" and could not be corrected by a curative instruction. R. 81, l. 3-7; R. 82, l. 23 – R. 83, l. 10; R. 86, l. 8 – R. 86, l. 11; R. 92, l. 17 – R. 93, l. 13. The defense in effect reminded the court that this issue was addressed during pretrial deliberations. Indeed, prior to trial, the defense moved to exclude any prior bad acts evidence (presumably drug related) at trial. R. 6, lines 6-12.

The trial judge ruled that a curative instruction would suffice because the state's witnesses testified that Morris identified targets for police to pursue, which meant these people were therefore certainly involved in prior drug transactions. R. 83, l. 11 – R. 84, l. 12; R. 101, l. 1 – R. 107, l. 8. The trial judge denied the mistrial motion. R. 92, l. 12-16. The trial judge's curative instruction follows:

> Now, the instruction is this, ladies and gentleman. The law does not allow evidence of other crimes, wrongs or acts to be admitted to prove the character of an accused in order to show action in conformity with that character. In other words, if an accused was involved in a prior wrongful or bad act, that cannot be used as evidence that he committed either/or both of the crimes for which he is now on trial. You must disregard the statement that this witness made that in any way implied or suggested that she knew this defendant from other activities involving drugs. That portion of her testimony is stricken from your consideration. It must not be used in any way whatsoever against the defendant. R. 88, l. 22 – R. 89, l.9.

Clearly, the information that appellant apparently had a history of drug selling to the informant (and presumably others) constituted prejudicial prior bad acts testimony that obviously portrayed appellant as a habitual drug seller who was predisposed to commit the drug distribution acts for which he was on trial.

(6.) Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. State v. Stearns, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). Moreover, evidence of prior bad acts is inadmissible to suggest that the accused has the propensity to commit the crime charged. State v. Peake, 302 SC 378, 396 S.E. 2d 362 (1990). State v. Smith 309 SC 409, 419 S.E. 2d 816 (1992). Prior bad acts evidence is not admissible to show that the accused in a bad person. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Also, even if prior crimes are

considered under the Lyle[2] exceptions; nonetheless, the value of the priors must outweigh the prejudicial value, i.e., the prior crimes cannot be used to show that the accused is a bad person. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008).

Additionally, there is heightened prejudice in admitting prior crimes that are similar to the one for which the accused is on trial. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000); State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (2007); State v. Gore, 283 S.C. 118, 322 S.E.2d 13 (1984); State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980). Admitting priors similar to the crime for which the defendant is on trial would constitute evidence that is more prejudicial than probative because this suggests that the defendant had the propensity to commit the crime charged against him. State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992).

Compare the Court's reversal in State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (2005), where the court found error where the prior bad act of the defendant's sale of crack cocaine to an undercover operative on several prior occasions in the past was not relevant to the charge of trafficking for which the defendant was on trial. See also the reversal in State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994), where the court held that the state's introduction of evidence of the defendant's prior cocaine sales was an attempt to demonstrate that because he had done so in the past, then he was guilty on the charge of distribution of crack cocaine for which he was being tried. In State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (1996), the Court reversed and held that testimony concerning a prior sale of crack cocaine to a certain person by the defendant on January 14, 1994, was not necessary to establish the defendant's guilt regarding the January 18, 1994 sale of crack cocaine that was made to the same person. In State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (1992), the court reversed and held that since the defendant was being tried for distribution of crack

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2 Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

cocaine, evidence that the defendant made prior drug sales from the same location was held to have been more prejudicial than probative. In State v. Garner, 304 S.C. 220, 403 S.E.2d 63 (1991), the Court held that the defendant, who was convicted of trafficking in cocaine, was prejudiced by the admissions of portions of a taped conversation between him and another regarding negotiations for a future a sale of kilo of cocaine.

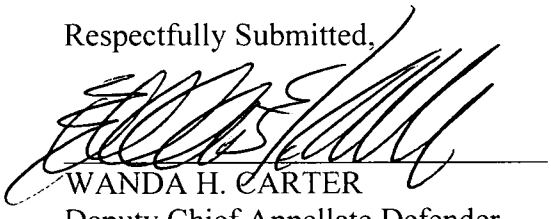
Also, a defendant's character cannot be attacked unless the defendant first places his character in issue. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Also, evidence of a person's character trait cannot be admitted for the purpose of proving action in conformity therewith on a particular occasion. See State v. Holden, 382 S.C. 278, 676 S.E.2d 690 (2009), citing to State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998); State v. Brown, 344 S.C 70, 543 S.E.2d 552 (2001). In Brown, the defendant was convicted of murder and the court held it was error to admit the defendant's wife's testimony that she knew that her husband became violent when he became angry because this "indicated appellant's general prosperity to become violent" and the likelihood that he would commit such a crime as murder. Character evidence can only be admitted if it can reasonably lead to an inference of guilt by a chain of logic that does not include an inference implicating the bad character of the defendant. State v. Nelson, supra. The danger of prejudice is enhanced when the prior crimes or bad acts are similar to the crime for which the defendant is on trial. State v. Gore, 283 S.C. 118, 322 S.E.2d 13 (1984); State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980).

Clearly, the prior bad act drug testimony in this case portrayed appellant as a confirmed drug dealer who was probably guilty of the drug charges for which he was on trial; and clearly, there was no question that the prejudicial value of this prior bad act testimony outweighed any probative value.

(7.) This Court overlooked the fact that to the contrary, the trial judge in fact abused his discretion in denying the motion for a mistrial and that such abuse constituted an error of law and resulting prejudice, all of which established that the mistrial was warranted in this case. See State v. Harris, 382 S.C. 107, 647 S.E.2d 532 (Ct. App. 2009).

WHEREFORE, based on the foregoing points, counsel for appellant would request a rehearing on the issue raised above in this Court's holding on appeal.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

This 28th day of February, 2019.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Scott Matthews, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Gerald Jarrod Ancrum, #267401, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of February, 2019.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 28th day of February, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.