STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLARENCE PUCKETT, III,

APPELLANT

APPELLATE CASE NO. 2012-213517

FINAL BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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II. The Trial Court erred in refusing to allow Appellant to introduce his prior consistent statement made in his first trial pursuant to Rule 801(d)(1)(B), SCRE where (1) Appellant testified at the trial and was subject to cross-examination; (2) the State accused Appellant of fabricating a new story at the second trial about whether Travis Anderson gave him the cocaine before Appellant entered the bathroom; (3) Appellant's statement at the first trial that he sought to have admitted was consistent with his testimony on direct at the second trial; and (4) the statement at his first trial that he sought to have admitted was made before the alleged recent fabrication.

STATEMENT OF THE CASE

On October 8, 2009, Appellant Clarence Puckett, III was indicted by the Union County Grand Jury for (1) one count of trafficking in cocaine in an amount being more than twenty-eight (28) grams but less than a hundred (100) grams in violation of S.C. CODE ANN. § 44-53-370. R.340. Puckett was subsequently indicted in 2010 for possession of crack cocaine with the intent to distribute. R. 5, ll. 6-8.

Puckett was tried before the Honorable John C. Hayes, III and a jury on November 13-15, 2012. R. 1. Puckett was represented by Erik Delaney, and the State was represented by Deputy Solicitor John C. Anthony. Id.

After informing the court that it could not reach a unanimous decision on either charge, the Trial Court gave an Allen[1] charge, after which the jury returned with a verdict of (1) guilty on the indictment for trafficking cocaine; and (2) not guilty on the indictment for possession of crack cocaine with the intent to distribute. R. 306, l. 10 – 309, l. 4. The Trial Court sentenced Puckett to ten years for trafficking cocaine. R. 313, ll. 18-19.

Puckett timely filed and served his Notice of Appeal on November 12, 2012.

[1] Allen v. United States, 164 U.S. 492 (1896).

STATEMENT OF FACTS

Lieutenant John Sherfield had been employed by the Union County Sherriff's Office for approximately twenty-three years and had worked as a lieutenant in the Narcotic's Investigation Division for a little over twelve years. R. 12, ll. 14-22. At trial, he testified that on August 21, 2009, he had set up surveillance at Puckett's residence. R. 12, l. 23 – 72, l. 1; R.13, ll. 21-22. Lieutenant Sherfield claimed he had received information that there would be narcotics at Puckett's residence and asked Sergeant Jimmy Johnson to obtain a search warrant. R. 14, ll. 2-6.

While waiting on the search warrant, Lieutenant Sherfield continued surveillance on Puckett's residence and observed an individual named Travis Anderson arrive at Puckett's residence, drive up in the driveway, get out of his car, and go inside Puckett's home. R. 14, ll. 11-18. Lieutenant Sherfield was familiar with Travis Anderson prior to August 21, 2009. R. 51, ll. 4-6.

Around 5:30 in the evening, Sergeant Jimmy Johnson contacted Lieutenant Sherfield advising that he had obtained the search warrant. R. 14, l. 25 – 15, l. 3. Lieutenant Sherfield, Sergeant Jimmy Johnson, Deputy Dee Haney, and Deputy Scott Coffer met, went to Puckett's residence, and executed the search warrant. R. 15, ll. 5-14.

Sergeant Johnson want to the front door, Lieutenant Sherfield and Deputy Dee Haney went to the rear of Puckett's home, and Deputy Coffer went to the corner on the far side to watch any windows. R. 15, ll. 15-20.

Lieutenant Sherfield said he found the back door padlocked, so he went back around to the front where Sergeant Johnson was trying to gain entry into the home. R. 15, l. 23 – 16, l. 5. After Sergeant Johnson kicked at the door, it finally opened. R. 16, ll. 7-14.

Lieutenant Sherfield claimed that while waiting for the front door to open, he could hear somebody running through the home. R. 16, ll. 15-18.

When the front door opened, Sergeant Johnson went inside and Lieutenant Sherfield followed. Lieutenant Sherfield said he found Travis Anderson standing in the living room right inside the front door. Anderson was standing beside the couch, and Lieutenant Sherfield told Anderson to lay down on the floor and put his hands behind his back. R. 16, l. 23 – 17, l. 2. At that point, Lieutenant Sherfield and Sergeant Johnson then began to try to find who they thought was running down the hall. Lieutenant Sherfield testified that he could hear the toilet being flushed in the bathroom, so they went to the bathroom door where the door was locked and Sergeant Johnson was having a hard time getting in the door. R. 17, ll. 2-7.

Lieutenant Sherfield went into the kitchen which adjoined the bathroom, moved the microwave out of the way, and started kicking a hole through the wall to get into the bathroom. He said he kicked a big hole in the wall. Sergeant Johnson was able to get the door open and went into the bathroom. According to Lieutenant Sherfield, Puckett saw Lieutenant Sherfield coming through the wall. Puckett allegedly began screaming, "don't hurt me, I give up" and threw his hands up in the air. R. 17, l. 10 – 18, l. 2.

Lieutenant Sherfield alleged that through the wall he could see Puckett leaning over the toilet. He then went around and walked through the door of the bathroom. When he walked into the bathroom, he saw Sergeant Johnson had hold of Puckett and was leading Puckett out of the bathroom. Lieutenant Sherfield said they recovered a plastic bag with a white powder substances believed to be cocaine from the rim of the commode. The bag had apparently been torn open. Sergeant Johnson had actually been the one to take the bag out

of the rim of the toilet and placed it on the top of the toilet tank. Lieutenant Sherfield collected this evidence. R. 18, ll. 3-22. This bag was later determined to contain approximately 55 grams of cocaine. R. 136, l. 22 – 137, l. 18.

Lieutenant Sherfield said he also collected a small plastic bag containing approximately fourteen grams or a half an ounce of marijuana out of the wastebasket next to the commode. R. 19, ll. 6-9.

Sergeant Johnson took Puckett into an area between the kitchen and the living room. Deputy Haney had handcuffed Anderson and he was lying on his stomach on the living room floor. R. 19, ll. 10-17.

Lieutenant Sherfield testified that he advised both that they were under arrest and gave them *Miranda* warnings. R. 19, ll. 22-23. Lieutenant Sherfield claimed that as soon as he advised them of their rights, Puckett said that Anderson did not know anything about the drugs. R. 20, ll. 19-21. The incident report prepared by Lieutenant Sherfield never mentioned any statements allegedly made by Puckett at his residence. R. 74, l. 24 – 75, l. 2. Lieutenant Sherfield also claimed that Puckett made some statements at the residence that he had flushed some of the cocaine down the toilet but would not elaborate on the amount, but these alleged statements were not included in either the incident report or General Sessions Report prepared by Lieutenant Sherfield. R. 76, l. 15 – 77, l. 1. There were also absolutely no written or recorded statements by Puckett in this case. R. 79, l. 3- 80, l. 18.

Lieutenant Sherfield searched Puckett and found a little over a thousand dollars in his pocket. R. 20, ll. 22-25. He also claimed that while searching Puckett, Puckett told him that there were some scales in the kitchen. Lieutenant Sherfield said he found the scales in a cabinet. R. 21, ll. 1-14.

Lieutenant Sherfield testified that they also found two more bags of drugs in the living room where Anderson was found, one bag on the floor and one on the couch next to the couch cushion. R. 22, l. 21 – 23, l. 5; R. 57, l. 14 – 58, l. 16. It was subsequently determined that these two bags contained approximately four grams of crack cocaine. R. 58, ll. 17-21; 139, l. 25 – 140, l. 21.

In Anderson's car, they found approximately an ounce or twenty-eight (28) grams of marijuana and prescription drugs. R. 23, ll. 20-24; 65, ll. 10-17. The prescription drugs consisted of forty Xanax pills for which Anderson did not have a valid prescription. R. 66, ll. 9-15. A set of scales was also found in Anderson's car. R. 67, ll. 3-5. Puckett and Anderson were both transported to jail. R. 24, ll. 2-4.

Lieutenant Sherfield never requested the bags of drugs to be analyzed for fingerprints. R. 72, ll. 12-22. The scales were also never sent to SLED to be tested for fingerprints. R. 72, l. 23 – 73, l. 6.

Sergeant Jimmy Johnson and Deputy Dee Haney also testified at trial with similar testimony. R. 88, l. 21 – 123, l. 5. Deputy Haney, however, testified that she did not hear Puckett say anything about flushing any drugs down the toilet. R. 120, ll. 16-22.

Puckett also testified at trial in his defense. R. 186, l. 16 – 250, l. 21. He testified that in August 2009 he was living in a single wide mobile home that he purchased for fifteen hundred dollars. R. 188, ll. 3-21. At the time he was working odd jobs such as working on race cars, building decks and porches, and the like. R. 191, l. 10 – 192, l. 11. He did not have a checking or savings account at the time and kept the money he made on his person. R. 192, ll. 15-20.

Puckett testified that he had been acquaintances with Travis Anderson for approximately eighteen to twenty years. R. 195, ll. 12-25. On August 21, 2009, Puckett knew that Anderson was coming over to his house. The two were scheduled to go to a drag strip together that night. R. 197, ll. 19-24.

Puckett testified that before Anderson arrived at his residence, there was no cocaine, crack cocaine, marijuana, Xanax, or scales at his house. R. 198, ll. 6-18. Puckett testified that when Anderson came inside, he did hand Puckett the scales Anderson brought in with some marijuana on top. Anderson then told Puckett he would be right back because he needed to put his cigarettes in his car. Anderson walked outside and then returned back to the home. R. 199, ll. 2-10.

Puckett testified that he did not receive any cocaine or crack cocaine from Anderson. R. 199, l. 25 – 258, l. 3. He had no knowledge that Anderson had any of these things in his possession when he came to Puckett's home. R. 200, ll. 8-11.

Puckett said he began to roll up a blunt at the kitchen bar and shortly thereafter heard a loud banging at the door. R. 200, l. 14 – 202, l. 15. Anderson jumped up and yelled to Puckett that the police were there. R. 202, ll. 18-20. Anderson was running down by Puckett in the trailer, freaking out and fumbling with something in his pockets. R. 203, ll. 3-11. Puckett at that point raked the marijuana into his hand. R. 203, ll. 12-18.

Puckett headed towards the bathroom and he bumped into Anderson heading out of the bathroom. R. 204, ll. 12-23. He testified that Anderson tried to hand him a little bag, but Puckett's hands were full. R. 205, ll. 1 – 17. Puckett could not take the bag that Anderson handed him. R. 206, ll. 7-14.

In the bathroom, Puckett said the took the marijuana seeds and stems and threw them towards the toilet and as he did that he heard a big bang behind and turned around and saw a fist coming through the sheet rock. R. 208, ll. 1-6. When he threw the marijuana, he was looking at them busting the hole in the wall and so he did not see where the marijuana landed. Puckett said he did not try to flush the toilet and did not see anything in the toilet. While he admitted to bringing the marijuana into the bathroom, he was adamant that he did not bring any cocaine into the bathroom. R. 208, ll. 8-24.

Puckett testified that he also saw a gun pointed at him through the hole in the wall and so he just threw his hands up, opened the door real quick and said I give up. R. 211, ll. 7-12.

Puckett also testified that he had no knowledge of the crack cocaine found in his living room and none of it was his. R. 211, ll. 13-23.

After he was arrested and read his *Miranda* rights, Puckett testified that he did tell the officers that the marijuana was his. He claimed the marijuana and took full responsibility for it because he had purchased it from Anderson for twenty dollars. R. 212, ll. 5-24. He never made any statements to the officers claiming the cocaine, crack cocaine, or the scales. R. 213, ll. 1-5. The only thing Puckett acknowledged that belonged to him in the house was the twenty dollar bag of marijuana he had just purchased from Anderson. R. 215, ll. 23-25.

Puckett was ultimately charged with trafficking cocaine and possession of crack cocaine with intent to distribute. The jury found him guilty of trafficking cocaine and not guilty of the possession of crack cocaine with intent to distribute. R. 308, l. 24 – 309, l. 4.

ARGUMENT

I. The Trial Court erred in refusing to grant a mistrial where the police officer testified about a confidential informant witnessing Appellant selling drugs where such evidence constituted improper evidence of prior bad acts and where the Trial Court's only basis for denying Appellant's motion for a mistrial was because the Trial Court did not want the case to be tried for a third time.

During the trial, Puckett's attorney cross-examined Sergeant Jimmy Johnson, one of the officers that executed the search warrant at Puckett's home the night of August 21, 2009. Sergeant Johnson had worked for the Union County Sheriff's Office for fifteen years and had been an investigator with the narcotics division for almost four years and was working in that capacity on August 21, 2009. R. 88, l. 21 – 89, l. 8; 97, ll. 5-9. During Sergeant Johnson's cross-examination, Puckett's attorney had the following exchange with Sergeant Johnson where Sergeant Johnson revealed without prompting from Puckett's attorney that Puckett had been selling drugs before:

> Q: And I want to go to the point where you, before you get to the residence you received a call, say that it was information and you were going to use that information to go get a search warrant, is that right?
>
> A: Yes. Lieutenant Sherfield gave me a call, advised me that one of our confidential informants - - -
>
> Q: Right.
>
> A: - - - that we had used had been to Mr. Puckett's location - - -
>
> Q: Right.
>
> A: - - - and witnessed him sell - - -

R. 99, ll. 5-16.

Puckett's attorney moved for a mistrial:

> When Sergeant Johnson was testifying earlier there was a mention made of my client being observed by a confidential informant selling an amount or selling something, selling cocaine. I do not feel that the question I asked the officer should have elicited that response. The officer testified he had fifteen years experience. I'm sure he's testified in numerous trials like this, should the solicitor informs him,

> you know, that obviously he knows better than to go into that. That's something that's prejudicial to the jury. I'd like to bring that to the court's attention. What would be the remedy? I ask the court to consider a mistrial in the case. It's prejudicial. I don't know what the remedy would be as far as an instruction to the jury that could take back what ultimately was said.

R. 105, ll. 6-20.

The Trial Court agreed that the remark should not have been made and decided not to give any curative instruction. The Trial Court further decided to not grant a mistrial because the case had already been tried one time and he did not want to have to have the case tried for a third time:

> That was not necessary and it was not responsive to – It was not a necessary to respond to the question. It was gratuitous information and it of course was hearsay and hearsay on hearsay basically. I'm not going to grant a mistrial. I do not find that there is any manifest necessity to grant a mistrial although this kind of interjections disturb me particularly Officer Johnson having been around for a long time and we shouldn't have to get into these situations. I will give a curative instruction if requested by the defense. Well, I'm not going to give a curative instruction, I think that would highlight it and I'm not going to put the burden on the defense to have to ask for a curative instruction so I deny the motion for a mistrial and I'm not going to give any kind of curative instruction. But I am going to request the solicitor to have some similar or some sort of training with the officers who appear as the solicitor's witnesses and try to make sure they understand where they can go with their testimony and where they can't go with their testimony. *We've already tried this case one time, don't want to have to try it a third time based on some extraneous interjection by a State's witness.*

R. 152, ll. 5-26 (emphasis added).

For determining whether a mistrial should have been granted, 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, Sergeant Johnson's nonresponsive remark that a confidential informant had witnessed Puckett selling drugs improperly placed Puckett's character at issue in violation of Rule 404(b), SCRE. Evidence that a defendant has committed other unrelated crimes or bad acts is inadmissible to prove the defendant's propensity to commit the crime with which he is charged. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). This is so because under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts. State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984).

It is only in exceptional cases that another crime or bad act is relevant to an issue other than the accused's character. Such exceptions to the general rule which permit the admission of evidence of other crimes or bad acts are applicable only where the prior bad act directly supports some substantial element of the State's case or is relevant to establish a material fact or element of the crime charged. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

In State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994), this Court held that the trial court improperly admitted testimony from an informant about previous drug purchases from the defendant in a case where the defendant was charged with distribution of crack cocaine. The court held that the informant's testimony did not fit the Lyle exception for a common scheme or plan and that "[b]y introducing the prior bad acts, the State was not trying to prove a common scheme but to convince the jury that because [the defendant] sold crack cocaine in the

past, he was selling crack cocaine on this occasion. This is precisely the type of inference that Lyle prohibits." Campbell, 317 S.C. at 451, 454 S.E.2d at 901.

The Campbell court further remarked that "[w]hen the prior bad acts are strikingly similar to the one for which the appellant is tried, the danger of prejudice is enhanced." Id. at 451-52, 454 S.E.2d at 901 (internal citations omitted).

Subsequently, in State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996), this Court held in another distribution of crack cocaine case that evidence of a drug transaction involving the defendant and a cooperating government witness four days before the transaction giving rise to the charge against the defendant was not admissible for any proper purpose. In so holding, this Court observed "[i]n the prosecution of one crime, proof of another direct substantive crime is never admissible unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue." Id. at 467, 476 S.E.2d at 917.

Here, there is no question that Sergeant Johnson's testimony was not proper. The Trial Court agreed and stated that this type of interjection into a trial by an experienced officer "disturb[ed]" him. The Trial Court further admonished the solicitor to make sure officers who appeared as witnesses understood where they could and could not go with their testimony. R. 152, ll. 9-24. The Trial Court also decided that the remark could not be cured with any sort of curative instruction. R. 152, ll. 14-19. In the end, however, the Trial Court ruled that it would not grant Puckett's motion for a mistrial because "[w]e've already tried this case one time, don't want to have to try it a third time based on some extraneous interjection by a State's witness." R. 152, ll. 24-26.

While the trial court does have discretion to grant or deny a mistrial which will not be overturned on appeal absent an abuse of discretion and while the grant of a mistrial is a "serious and extreme measure which should only be taken when the prejudice can be removed no other way," Puckett maintains that the Trial Court here did abuse its discretion in not granting his motion for mistrial. Edwards, 373 S.C. at 236, 644 S.E.2d at 69.

The Trial Court had already determined that Sergeant Johnson's remark was improper and the prejudice could not be removed by a curative instruction. R. 152, ll. 5-19. The only reason, however, that the Trial Court denied the mistrial was because the court did not want the case tried for a third time. R. 152, ll. 24-26. Puckett submits that this is not a sufficient reason to deny his motion for a mistrial where he was denied a fair trial by the improper injection by Sergeant Johnson that Puckett was selling drugs in a case where Puckett was being tried for trafficking cocaine.

The refusal of the Trial Court to grant a mistrial was not harmless error. Puckett's credibility was essential for a jury's determination of whether the cocaine found in the toilet belonged to him or Travis Anderson. "Error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense." State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

Moreover, the evidence against Puckett was obviously not overwhelming as there was a first trial which resulted in a hung jury and the jury in this case at first could not reach a unanimous decision on either charge against Puckett. R. 306, ll. 10-13. Therefore, it cannot be said that Sergeant Johnson's interjection into the trial that a confidential informant witnessed Puckett selling drugs was harmless error beyond a reasonable doubt and did not factor at all into

the jury's decision. Therefore, the Trial Court erred in refusing to grant Puckett's motion for a mistrial.

II. The Trial Court erred refusing to allow Appellant to introduce his prior consistent statement made in his first trial pursuant to Rule 801(d)(1)(B), SCRE where (1) Appellant testified at the trial and was subject to cross-examination; (2) the State accused Appellant of fabricating a new story at the second trial about whether Travis Anderson gave him the cocaine before Appellant entered the bathroom; (3) Appellant's statement at the first trial that he sought to have admitted was consistent with his testimony on direct at the second trial; and (4) the statement at his first trial that he sought to have admitted was made before the alleged recent fabrication.

In his testimony on direct examination, Puckett testified that Anderson did not give Puckett any cocaine to flush into the toilet before Puckett entered the bathroom and that Puckett absolutely did not possess any of the cocaine found in the house. R. 204, l. 24 – 208, l. 24; 211, l. 24 – 212, l. 1.

On cross-examination, the solicitor accused Puckett of now making up this story because at his first trial he apparently testified that before he went into the bathroom, Anderson handed him the cocaine and told him to flush it. R. 217, ll. 13-16. Puckett tried to explain that he made a mistake on his part in saying that in the first trial because he was so nervous. R. 217, l. 18 – 218, 10.

On re-direct examination, Puckett's attorney tried to bring out Puckett's statements in his first trial that he did not flush the cocaine for Anderson or possess any of the cocaine to show that his testimony on direct examination in the second trial was consistent with his testimony in his first trial despite the solicitor's accusations that Puckett was now making up this new story. R. 244, l. 13 – 249, l. 15. Specifically, Puckett's attorney wanted the following testimony from the first trial admitted:

> Q: Okay. And when [Anderson] came out of the bathroom is when you say he handed you the cocaine?
>
> A: No, sir.

. . .

Q: Okay. And then as you are walking in the bathroom, he's walking out of the bathroom?

A: Yes, sir.

Q: Okay.

A: Coincided. We kind of bumped each other just a little bit to run in and out of the bathroom.

Q: And, and it's at that point that he gave you the cocaine as he was walking out of the bathroom?

A: He did not never ever give me cocaine, sir. I answered that awhile ago for you.

Q: Oh, you never got it?

A: No, sir.

Q: You never got the cocaine?

A: No, sir.

First Trial R. 333, ll. 8-10; 334, ll. 9-22.

The solicitor argued that there was no exception to the hearsay rule that allowed this testimony to come in. Puckett's attorney argued that he was using the exception under Rule 801(d)(1)(B), SCRE for the admissibility of prior consistent statements. R. 189, l. 24 – 191, l. 14. The Trial Court sustained the solicitor's objection and did not allow Puckett's attorney to question him about this testimony from his first trial. Id.

Under Rule 801(d)(1)(B), prior consistent statements are not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

Id.

"In order for a prior consistent statement to be admissible pursuant to Rule 801(d)(1)(B), the following elements must be present:

> (1) The declarant must testify and be subject to cross-examination,
>
> (2) The opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive,
>
> (3) The statement must be consistent with the declarant's testimony, and
>
> (4) The statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive."

State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010).

Here, Puckett's testimony from his first trial should have been admissible as a prior consistent statement under Rule 801(d)(1)(B). First, Puckett testified at the trial and was subject to cross-examination. Second, the State accused Puckett of fabricating a new story at the second trial about whether Anderson gave him the cocaine before Puckett entered the bathroom. Third, Puckett's statement at the first trial that he sought to have admitted was consistent with his testimony on direct at the second trial. Fourth, the statement at his first trial that he sought to have admitted was made before the alleged recent fabrication. Thus, all of the elements of Rule 801(d)(1)(B) were satisfied, and the Trial Court committed error by not allowing into evidence Puckett's statements at the first trial on re-direct examination.

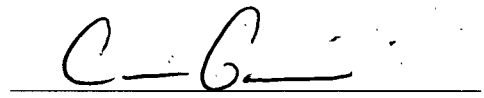
This error, like the Trial Court's error in refusing to grant a mistrial, was not harmless. Again, Puckett's credibility was essential for a jury's determination of whether the cocaine found in the toilet belonged to him or Travis Anderson. "Error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense." State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

Moreover, the evidence against Puckett was obviously not overwhelming as there was a first trial which resulted in a hung jury and the jury in this case at first could not reach a unanimous decision on either charge against Puckett. R. 306, ll. 10-13. Therefore, the Trial Court erred in refusing to allow Puckett to admit into evidence on re-direct his statements made in his first trial about whether Anderson gave him the cocaine to flush and whether the cocaine belonged to him.

CONCLUSION

For the reasons set forth herein, Appellant Clarence Puckett, III respectfully requests that his conviction be reversed and the case be remanded for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of Februray, 2014.

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."

February 25th, 2014

Carmen V. Ganjehsani
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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FEB 25 2014

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of February, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of February, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.