STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

CLARENCE PUCKETT, III,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Puckett was indicted by the Union County Grand Jury for trafficking 28-100 grams of cocaine and possession with intent to distribute crack cocaine. The first trial apparently ended in mistrial. The second trial occurred November 13-15, 2012.

Although an instruction became necessary under Allen v. United States, 164 U.S. 492 (1896), the jury found Puckett guilty of trafficking cocaine and not guilty of the crack cocaine charge.[1]

The Honorable John C. Hayes, III, sentenced Puckett to ten years' imprisonment for trafficking cocaine.

1 The evidence at trial was that the cocaine was found in the bathroom toilet that Puckett was hunched over when police found him. The crack cocaine was found in the living room where Travis Anderson, a visitor, was found. See Respondent's Statement of Facts, infra.

STATEMENT OF FACTS

Lieutenant John Sherfield set up surveillance of Puckett's trailer. Lieutenant Sherfield observed Travis Anderson arrive at the trailer at this time. Meanwhile, Sergeant Jimmy Johnson obtained a search warrant. ROA. pp. 12-14.

Four officers executed the search warrant. The back door was padlocked and the front door opened to the outside, making entry difficult. Lieutenant Sherfield testified he could hear someone running inside while they attempted to open the door. ROA. pp. 15-16. The door finally came open and Travis Anderson was found inside the living room. Lieutenant Sherfield heard the toilet flushing and the bathroom door was locked, so Lieutenant Sherfield knocked a hole through the wall of the bathroom. ROA. p. 17. Lieutenant Sherfield observed Puckett through the hole; Puckett was leaning over the toilet. Sergeant Johnson was able to open the bathroom door and led Puckett out of the bathroom. Sergeant Johnson recovered an open bag of powder cocaine from the bathroom. ROA. p. 18. Also, fourteen grams of marijuana were recovered from the basket next to the commode. Both Puckett and Anderson were arrested. ROA. p. 19. Anderson's case was still pending at the time of trial. ROA. p. 24.

Law enforcement found $1,177 in cash in Puckett's pocket. ROA. p. 20. Puckett admitted at the scene that he flushed some of the drugs, although he could not say how much. He also told officers there were scales in the kitchen cabinet. Law enforcement recovered black digital scales with white powder residue, which Sherfield believed was cocaine, on the lid. ROA. p. 21. Puckett admitted to selling drugs because he fell on hard times and lost his job. ROA. p. 22. Two more baggies, later determined to be crack

cocaine, were found on the couch and floor in the living room.[2] ROA. pp. 22-23. Sherfield testified that Travis Anderson was searched, as was his car. Anderson only had $1.31. Anderson also had marijuana and prescription medication (Xanax) in his car, along with his own set of digital scales. ROA. p. 23; pp. 66-67.

Puckett was interviewed the next day at the Union County jail. He again admitted selling drugs because he lost his job. He indicated he knew three other people who were selling drugs and said he might want to help, but he wanted to think it over. ROA. pp. 24-25. Puckett indicated he could attain up to a quarter kilo (9 oz.) of cocaine. ROA. p. 25.

Sergeant Jimmy Johnson testified he heard movement inside the trailer when he knocked on the door to execute the search warrant. Sergeant Johnson kicked and pulled on the door until it suddenly opened. ROA. pp. 89-91. When Sergeant Johnson heard flushing, he attempted to open the bathroom door but it was locked. After he busted the door open, he found Puckett crouched down at the toilet and also found a bag of cocaine in the toilet and marijuana in the bathroom trash can. ROA. pp. 92-94; pp. 107-108. Puckett told Sherfield that all the drugs in the trailer were his and not Anderson's. ROA. p. 95. Sergeant Johnson confirmed twenty grams of marijuana, forty Xanax pills, and a set of digital scales were found in Anderson's car. ROA. p. 111.

Deputy Dee Haney confirmed that Puckett told law enforcement that the drugs were his and Anderson knew nothing about them. ROA. p. 119.

The bag from the bathroom contained 55.95 grams of cocaine and the two bags

2 The two baggies found in the living room constituted the contraband for the charge of possession with intent to distribute crack cocaine, for which Puckett was acquitted.

from the living room contained 4.22 grams of crack cocaine.

Puckett admitted the marijuana was his but denied the crack cocaine or cocaine were his. He explained he does not do cocaine, marijuana was his thing. ROA. p. 197. He denied the scales were his. ROA. p. 198. He claimed he received a $20 pack of marijuana from Anderson. ROA. p. 198. Puckett claimed he did not attempt to flush the toilet and he did not bring any cocaine into the bathroom. He denied ever telling law enforcement at the trailer or the jail that the cocaine was his. He also denied ever telling law enforcement he could buy cocaine from anyone. ROA. p. 214.

ARGUMENT

I.

The trial court did not err in denying the motion for mistrial and the issue is not preserved where Appellant did not contemporaneously make this motion, but waited for four more witnesses to testify.

Puckett argues that the trial court erred in denying his motion for mistrial for testimony elicited by his trial attorney. Puckett's argument asserts two misconceptions: (1) the trial court based its ruling on the desire not to try the charges a third time; and (2) the testifying law enforcement officer was not prompted by defense counsel. In fact, the trial court simply did not find the error significant enough to grant a mistrial and defense counsel prompted law enforcement's answer – it was imprecise questioning that led to the answer. Further, the motion for mistrial was not contemporaneous and accordingly, the issue should not be reviewed by this Court.

Defense counsel questioned Sergeant Johnson as follows:

> 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---
>
> Mr. Delaney: Your Honor.

Court: Just – Go on to your next question.

ROA. p. 99, lines 5-16 (emphasis added). Contrary to Puckett's contention, defense counsel kept leading Sergeant Johnson toward an explanation of what information Sergeant Johnson attained, as it was less than clear what testimony defense counsel was seeking. Defense counsel did not move to strike the testimony or move for a mistrial at that time, but gingerly started back down the same path again:

> Q: Again, my question to you is, and if you – just wait.
>
> A: Okay.
>
> Q: Listen to what my question is. You received information; is that right?
>
> A: Right.
>
> Q: From Officer Sherfield?
>
> A: Correct.
>
> Q: Okay. And your job at that point was to take that information to somebody to get a warrant; is that right, search warrant?
>
> A: Correct.

ROA. p. 99, line 20 – p. 100, line 11. So it appears defense counsel was taking an elongated line of questioning to simply elicit testimony that it was Sergeant Johnson's job to go to the magistrate for a search warrant, which he simply could have elicited by asking Sergeant Johnson: "Was it your job to go to the magistrate to obtain a search warrant?"

Defense counsel waited until much later to make his mistrial motion. Four more State's witnesses testified before defense counsel made his motion for mistrial. ROA. p.

150. The trial court needed the reporter to replay the testimony. ROA. pp. 150-151.

The trial court made the following detailed ruling:

> That was not necessary and it was not responsive to – it was not 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 [these] 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.

ROA. p. 152, lines 5-25.

Puckett ignores the first five sentences of the trial court's ruling to claim the reason his motion was denied was solely based on not wanting to try the case a third time. However, looking at the totality of the trial court's ruling, the basis of the ruling was simply that the testimony was not so prejudicial as to create a manifest necessity to grant the mistrial motion. Indeed, it is implicit that the trial court viewed the prejudice from the testimony as so slight that a curative instruction would only "highlight" the objectionable testimony. Even if the trial court was not going to require the curative instruction, counsel could have sought one and most likely would have had his request granted. Instead,

counsel obviously did not want to highlight the testimony either, a clear indication that the testimony was not so prejudicial as to affect the fairness of the trial.

"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." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted). "The 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).

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. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." Id. The trial court did not abuse its discretion, as the oblique reference was not sufficiently prejudicial as to require a curative instruction, much less a mistrial.

Further, the issue is not preserved for review, as the motion came too late. A contemporaneous objection is required to properly preserve an error for appellate review. State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (objection to testimony was broadly made and well after initial, allegedly prejudicial, testimony); State v. Curtis,

356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) (finding the objection untimely where counsel did not object after several pages of testimony). An issue is not preserved for review unless a contemporaneous objection is made to and ruled upon by the trial court. State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

On point is State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012). In Heller, counsel contemporaneously objected to reference during direct examination to his client being on parole. The trial court sustained the objection and gave a curative instruction when counsel moved to strike. However, counsel waited until the witness finished direct examination and the court took a fifteen-minute break to make a motion for mistrial. This Court found the issue was not preserved for review as the motion for mistrial was not contemporaneously made. Id., 399 S.C. at 173-74; 731 S.E.2d at 321.

In the instant case, defense counsel did not specifically object, the trial court did not specifically rule, and defense counsel did not move to strike the testimony. But even ignoring those matters, defense counsel undeniably failed to make a contemporaneous motion for mistrial as in Heller. This issue should not be reviewed.

II.

The trial court did not err in not allowing Appellant's self-serving testimony from his first trial into evidence where it was not admissible under the rules of evidence as a prior consistent statement and where Appellant failed to offer argument for its admission; and given the unrelentingly incredible testimony from Appellant and that he was caught red-handed with an open bag of cocaine while hunched over his flushing toilet, any error is harmless beyond a reasonable doubt.

Evidence was overwhelming if Puckett did not testify – he was caught red-handed, hunched over a flushing toilet with an open bag of cocaine. Yet Puckett managed to make his case even worse with his testimony. Puckett assured the jury that he did not do cocaine, marijuana was his thing. ROA. p. 197. Puckett testified as follows about his prior trial:

> Q: All right. Now, CJ, I want to talk to you about at a prior court proceeding you said that right before you went into the bathroom Travis handed you cocaine and told you to flush.
>
> A: Yes, sir.
>
> Q: Okay. And you said that at a prior court proceeding am I right?[3]
>
> A: Yes, sir, I did.
>
> Q: Is that what happened?
>
> A: No, sir. Actually it was misunderstood but I misunderstood it myself. Saying it myself I apologized

3 On direct examination at his first trial, Puckett testified: "Right before I run into the bathroom Mr. Anderson handed me the cocaine and threatened me to run in the bathroom and flush it . . . ." Mistrial ROA. p. 321, lines 20-22. After the State's hearsay objection was sustained, Puckett continued unprompted: "Okay. At the time I took the drugs, run into the bathroom, I flushed the drugs down in the toilet because I did not have the drugs, so I took the drugs that was told to me to flush, flush them, try to flush them. My intention was to flush them, but as I say, the bag of marijuana was still floating on top of the water." Mistrial ROA. p. 322, lines 4-10.

> now. What had happened is he had tried to hand me the cocaine, the little bag of whatever he had but I couldn't take it and I refused to take it first but I also had my hands full ---
>
> Q: Okay.
>
> A: --- so there's no way that I could have taken it.
>
> Q: All right. Now did you also testify under oath at this same court proceeding numerous times that Travis did not give you anything when he was leaving the bathroom?
>
> A: Yes, sir.

ROA. p. 205, line 23 – p. 264, line 18.

Naturally, Puckett was cross-examined about his prior testimony that Anderson handed Puckett the cocaine to flush. Puckett then sought on redirect examination to admit his prior testimony claiming he did not take the cocaine from Puckett. Puckett was at a loss to explain a rule or theory of admission of the hearsay. The trial court considered whether it was admissible as a prior consistent statement and sustained the State's objection. ROA. pp. 248-249. Counsel never offered to explain how the testimony qualified as a prior consistent statement.

Under Rule 801(d)(1), SCRE, a declarant's statement is admissible if the declarant testifies at trial and is subject to cross-examination concerning the statement where the statement is "(B) 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". (Emphasis added).

In the instant case, the State did not allege recent fabrication and further, the statement did not arise before the motive to fabricate arose. Instead, Puckett claimed he took the cocaine from Anderson on direct examination, **then** he claimed he never took any cocaine from Anderson when subjected to cross-examination. In State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003), our state supreme court noted that "a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all." Id., 354 S.C. at 621, 582 S.E.2d at 430 (internal quotation marks and citation omitted).

Examining its prior opinion in State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001), the Supreme Court in Foster noted that merely questioning a witness about a prior inconsistent statement is insufficient to admit a prior consistent statement under Rule 801(d)(1)(B). Id., 354 S.C. at 622, 582 S.E.2d at 430. The Court found that the prior statement by a State's witness was inadmissible because there was no express or implied charge against the witness of recent fabrication or improper influence or motive. Id.

Puckett mistakenly claims that "the solicitor accused Puckett of now making up this story" and references ROA. p. 217, lines 13-16. See Br. of App. p. 18. That portion of the testimony follows:

> Q: Okay. And on that day you testified under oath that before you ran into the bathroom Mr. Anderson handed you cocaine and told you to flush it?
>
> A: Yes, sir.

ROA. p. 217, lines 13-16. As shown above, the prosecutor was merely impeaching Puckett with his prior inconsistent statement. As in Foster, this line of questioning does

not amount to an express or implied charge of recent fabrication.

The issue is not preserved for review. Puckett never articulated a basis for admission of the statement at trial. Only the trial court identified Rule 801 as a possible basis for admission. "[T]he trial court's mentioning the issue does not preserve it for appeal." State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) *reversed on other grounds by* State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Mere observations by the trial court do not enlarge the grounds upon which the motion is made. Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951). Indeed, Puckett never claimed at trial that the prosecution made an allegation of recent fabrication and he did not present any other argument that the proposed statement met the criteria for admission.

Even if preserved for review, any error is utterly harmless. First, Puckett was allowed to explain on direct examination that he had testified at one point in the first trial that he never received cocaine from Anderson. ROA. p. 206, lines 15-18. Therefore, the proposed redirect examination testimony would have been cumulative to the direct examination testimony and its exclusion was harmless. State v. Beckham, 334 S.C. 302, 320, 513 S.E.2d 606, 615 (1999) (finding any error in admission of excluded evidence harmless where it would be cumulative to impeachment evidence that was admitted).

Second, any error is harmless beyond a reasonable doubt due to the overwhelming evidence of guilt. The fact that Puckett was found crouched over the toilet, which was flushing, with an open bag of cocaine, in his locked bathroom, is powerful evidence of guilt. Then he admitted the drugs were his to law enforcement upon arrest. Later, he confirmed this admission in an interview at the county jail. Finally, the prior testimony

recanting his admission that he took the cocaine from Anderson to flush down the toilet would not begin to undue Puckett's credibility issues. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

CONCLUSION

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

Respectfully submitted,

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February 27, 2014

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Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Norma Bigbee, 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 27th day of February, 2014.

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