STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Fairfield County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID ALLEN TINDAL, JR.

APPELLANT

APPELLATE CASE NO. 2018-001213

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by refusing to grant a mistrial when Lieutenant Sparks claimed the confidential informant "came to us because Mr. Tindal [Appellant] had got her sister back on methamphetamine" when this testimony was (1) inadmissible pursuant to Rule 404(b), SCRE, and Rule 403, SCRE, since it indicated Appellant had previously distributed methamphetamine, and (2) extremely prejudicial to Appellant who was being tried for distribution of methamphetamine, and where the judge's instruction to "disregard that last response" was insufficient to cure the prejudice to Appellant?

STATEMENT OF THE CASE

A Fairfield County grand jury indicted Appellant on April 17, 2018 for distribution of methamphetamine. R. *. His case was called to trial on May 31, 2018 before the Honorable Thomas A. Russo, and a jury. Tr. 1. Assistant Solicitor Riley Maxwell represented the state, and William Frick represented Appellant. Tr. 1. Appellant was tried in his absence after he did not appear for trial. See Tr. 34, l. 1 – 36, l. 12.

The jury found Appellant guilty as indicted. Tr. 137, ll. 8-18. Judge Russo sealed the sentence. Tr. 143, ll. 1-6. On June 25, 2018, the sealed sentence was opened by the Honorable Brian M. Gibbons. Tr. 1. Appellant was sentenced to twenty years imprisonment for distribution of methamphetamine, second offense. Tr. 3, l. 16 – 4, l. 1. Judge Gibbons refused to reconsider the sentence. Tr. 8, ll. 3-15.

This appeal follows.

STANDARD OF REVIEW

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010) (citing State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct.App.2009)). "The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id.

STATEMENT OF FACTS

On December 20, 2017, Kristin Levister contacted the Fairfield County Sheriff's Office (FCSO) and claimed she could purchase methamphetamine from Appellant. Tr. 62, ll. 1-13; Tr. 70, ll. 1-19. Levister met with narcotic investigators at a "predetermined location" where she was searched and wired with audio and video equipment. Tr. 58, ll. 1-22; Tr. 70, l. 20 – 71, l. 24. The investigators also searched Levister's vehicle. Tr. 58, ll. 12-22. She was given sixty dollars in documented funds in which to purchase the drugs. Tr. 72, ll. 5-6; Tr. 74, ll. 5-10. She then drove to 565 Oak Street, which she claimed was Appellant's residence. Tr. 59, ll. 6-22; Tr. 72, ll. 7-11.

Levister testified that when she arrived at Appellant's house, she walked inside. There were several people there, including Appellant. She "asked for a gram" and Appellant had her walk to his bedroom. Levister claimed Appellant "kept his stuff in the [bedroom] closet." He opened the closet door, reached down, and got out methamphetamine, a digital scale, and baggies. Levister testified that Appellant weighed out a gram, she gave him sixty dollars, and he gave her a baggie of methamphetamine. She then told Appellant she "was in a rush" and "had to go." Levister claimed she drove straight back to "the storage facility" where she met with the officers and turned over the substance she had allegedly purchased from Appellant. Tr. 72, l. 7 – 74, l. 4. She was paid forty dollars for her service. Tr. 57, ll. 18-25; Tr. 79, ll. 12-18.

The substance Levister tuned over to the narcotics investigators tested positive for methamphetamine with a weight of 0.25 grams, significantly less than the gram Levister claimed she purchased from Appellant for sixty dollars. Tr. 101, 1. 13 – 103, l. 17; See Tr. 73, l. 14 – 74, l. 7. The audio and video footage of the controlled buy was published to the jury during trial. Tr. 75, ll. 5-11.

ARGUMENT

The trial judge abused his discretion by refusing to grant a mistrial when Lieutenant Sparks claimed the confidential informant "came to us because Mr. Tindal [Appellant] had got her sister back on methamphetamine" when this testimony was (1) inadmissible pursuant to Rule 404(b), SCRE, and Rule 403, SCRE, since it indicated Appellant had previously distributed methamphetamine, and (2) extremely prejudicial to Appellant who was being tried for distribution of methamphetamine, and where the judge's instruction to "disregard that last response" was insufficient to cure the prejudice to Appellant.

How the Issue was Presented Below

Lieutenant Ross Sparks of the Fairfield County Sheriff's Office was the first witness for the state. He testified that the narcotics division conducted a controlled buy on December 20, 2017. Kristin Levister was the confidential informant. She contacted law enforcement on that date and claimed she could purchase methamphetamine from Appellant. During Lieutenant Sparks' direct examination, the following exchange took place between the assistant solicitor and Sparks:

> Q: And in this case, what's the reason why Ms. Levister became . . . the confidential informant in this case?
>
> A: She came to us because *Mr. Tindal [Appellant] had got her sister back on methamphetamine*.

Tr. 54, ll. 2-8 (emphasis added).

Defense counsel immediately objected and asked to be heard outside the presence of the jury. Tr. 54, ll. 9-12. After the judge excused the jury from the courtroom, defense counsel moved for a mistrial. He argued Lieutenant Sparks' response was inadmissible pursuant to Rule 404(b), SCRE and Rule 403, SCRE because it was evidence of prior bad acts. Tr. 54, l. 19 – 55,

l. 1. He asserted a curative instruction would not cure the unfair prejudice to Appellant because the "bell" cannot be "unrung." Tr. 54, ll. 24-25; Tr. 56, ll. 11-15.

The solicitor maintained he did not intend to elicit testimony concerning Kristin Levister's "motivation for working with law enforcement." However, he argued the judge could simply strike the last response and instruct the jury to disregard Lieutenant Sparks' answer. Tr. 55, ll. 2-13. He asserted, "Your Honor, while it could be prejudicial to Mr. Tindal [Appellant], *he's charged with selling methamphetamine. All Mr. Sparks said is maybe on another occasion, he [Appellant] sold methamphetamine to somebody else.* I just don't see based on what he's charged with the jury giving that too much weight where we'd have to declare a mistrial. I think [the] jury can ignore that and go forward with the evidence they're going to hear in regards to this case of him distributing methamphetamine." Tr. 56, ll. 2-10 (emphasis added).

The trial judge ultimately denied the motion for a mistrial but sustained the objection to the testimony. He maintained he would strike the last response and instruct the jury to disregard it. Tr. 56, ll. 18-22. After the judge ruled, defense counsel made clear that he did not believe striking the testimony and giving a curative instruction was sufficient to cure the error and resulting prejudice to Appellant. Tr. 57, ll. 2-4.

When the jury returned to the courtroom, the judge stated, "All right. I'm going to sustain the objection to that last response. Ladies and gentlemen, I'm striking that last response from the record. You're to disregard that response and we'll pick up with the direct examination." Tr. 57, ll. 10-15.

Discussion

"A mistrial should be declared only when absolutely necessary." State v. Culbreath, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008) (citing State v. Council, 335 S.C. 1, 13, 515

S.E.2d 508, 514 (1999)). "In order to receive a mistrial, a defendant must show error and resulting prejudice." Id. "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." Id. (citing State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct. App. 2006)). "A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Wiley, 387 S.C. 490, 498, 692 S.E.2d 560, 564 (Ct. App. 2010) (citing State v. Harris, 382 S.C. 107, 119, 674 S.E.2d 532, 538 (Ct. App. 2009)). "The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations. A mere general remark excluding the evidence does not cure the error." State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (citing 75 Am.Jur.2d, *Trial*, Section 748).

In State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), Council moved for a mistrial after a law enforcement officer testified that he retrieved a fingerprint card with the name Council on it from the records division at the South Carolina Law Enforcement Division (SLED) and compared the impressions from this card with latent fingerprints found on the interior and exterior of the decedent's car. Id. at 11-12, 515 S.E.2d at 513. Council argued this testimony was a clear reference to Council's prior criminal record and that a curative instruction would not "get the jury to forget" Council had a prior record. Id. at 12, 515 S.E.2d at 513. Our Supreme Court held it was "questionable whether the jury even understood the implication of [the officer's] statement" and emphasized that the "Court has held similar references to a defendant's past conduct were too vague to be prejudicial." Id. at 13, 515 S.E.2d at 514. Because the state never attempted to introduce Council's prior criminal record during the guilt phase of the trial, the Court concluded the vague reference was not prejudicial and the trial judge did not abuse his discretion by refusing to grant a mistrial. Id.

In this case, Lieutenant Sparks' testimony could only be interpreted to mean Appellant had previously distributed methamphetamine to Kristin Levister's sister and this was Levister's motivation for working as a confidential informant on that date. The solicitor even admitted during trial that Sparks' testimony could easily be interpreted to mean on another occasion, Appellant had sold methamphetamine to somebody else. See Tr. 56, ll. 2-5. This testimony was inadmissible pursuant to Rule 404(b), SCRE because it was evidence of prior bad acts. It was also inadmissible pursuant to Rule 403, SCRE because it was not relevant and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Appellant was being tried for distribution of methamphetamine and Lieutenant Sparks' testimony unmistakably informed the jury that on *at least* one occasion Appellant had previously distributed methamphetamine to Levister's sister.

While the trial judge properly sustained the objection recognizing that this testimony was inadmissible, the judge abused his discretion by refusing to grant a mistrial since the error in the admission of this evidence and the resulting prejudice to Appellant could not be cured. As defense counsel argued below, the "bell" could not be "unrung." See Tr. 54, ll. 23-25. Unlike the solicitor argued at trial, the offense for which Appellant was being tried increased the prejudice to Appellant. See State v. Colf, 337 S.C. 622, 628, 525 S.E.2d 246, 249 (2000) ([E]vidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions.")

Moreover, the trial judge's curative instruction was insufficient because while he told the jury to "disregard that response," he never instructed the jury "not to consider it for any purpose during deliberations." See State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) ("The

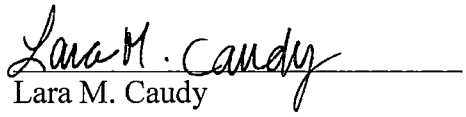
jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations. A mere general remark excluding the evidence does not cure the error.").

Because the trial judge abused his discretion by refusing to grant a mistrial, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of March, 2019.

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THE STATE,

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V.

DAVID ALLEN TINDAL, JR.

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served upon David Allen Tindal, #376943, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 20th day of March, 2019.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of March, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.