STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Charleston County
The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2019-000627

THE STATE, Respondent,

v.

GERALD JARROD ANCRUM, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843)-958-1900

ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in holding the trial judge correctly denied Petitioner's request for a mistrial where the confidential informant, Tessa Morris, only referred to Petitioner's prior drug activity once, where that reference was unsolicited by the State, and where Petitioner did not suffer any prejudice from this reference, and if Petitioner was initially prejudiced in any way, the trial judge provided a thorough curative instruction that cured any such prejudice, and where any alleged error was harmless because of the overwhelming evidence of Petitioner's guilt presented at trial?

STATEMENT OF THE CASE

Procedural History

In June of 2015, the Charleston County Grand Jury indicted Petitioner for one count of distribution of heroin and one count of distribution of cocaine base. On May 23-24, 2017, a jury trial was held in the Charleston County Court of General Sessions with the Honorable William P. Keesley presiding. Petitioner was represented by Melissa Gay, Esquire. The State was represented by Assistant Solicitors Stephanie B. Linder and Whitt Sowards of the Ninth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Petitioner of one count of distribution of heroin. A mistrial was declared on the distribution of cocaine base count after the jury was unable to reach a verdict. Following the verdict, Petitioner conceded that the heroin conviction was his third offense. The trial judge sentenced Petitioner to a term of fifteen years' imprisonment.

Petitioner appealed his conviction. On February 13, 2019, the Court of Appeals affirmed Petitioner's conviction. State v. Ancrum, 2019-UP-075 (S.C. Ct. App. filed February 13, 2019). On February 28, 2019, Petitioner filed a Petition for Rehearing with the Court of Appeals. The Court of Appeals denied the Petition for Rehearing on March 21, 2019. Petitioner filed a petition for writ of certiorari with this Court on April 15, 2019. This return now follows.

Factual Background

On February 5, 2015, Special Agent Frank Preston of the Bureau of Alcohol, Tobacco, and Firearms set up a controlled purchase of drugs in coordination with agents of the Charleston County Sheriff's Office and the Charleston Police Department. (R. 20-22, 57). Petitioner was the target of the controlled purchase operation. (R. 20). Preston utilized the services of a confidential informant, Tessa Morris, to complete the purchase of drugs from Petitioner. (R. 21). Preston

testified that informants are chosen to complete drug transactions because of their prior history of drug purchases with various targets. (R. 22-24). This line of questioning was not objected to by Petitioner. (R. 22-24). In fact, on cross examination, Petitioner asked Preston whether law enforcement had given Morris Petitioner's name or whether Morris had come to law enforcement with Petitioner's name based on who she had connections with in the drug trade. (R. 36, 38). Preston responded that Morris told law enforcement she could contact Petitioner. (R. 36). Petitioner even asked Morris on cross examination whether she had provided law enforcement with names "of people that you believed you could call to get drugs from?" (R. 69, lines 10-11). Morris responded in the affirmative. (R. 69).

Under Preston's supervision, Morris contacted Petitioner using a particular phone number to set up the controlled purchase. (R. 26). The State later introduced a statement from Petitioner acknowledging that the number called by Morris was his phone number. (R. 117). Morris arranged to meet with Petitioner at a Dunkin Donuts store in the West Ashley area of Charleston County. (R. 21, 28, 59). Morris' phone call with Petitioner was recorded and entered into evidence. (R. 27, State's Exhibit #1). Morris approached Petitioner as he was sitting in a white BMW automobile in the parking lot of Dunkin Donuts. (R. 59, State's Exhibit #6). Morris successfully purchased heroin[1] from Petitioner. (R. 32-33, 59, State's Exhibit #6). At the instruction of law enforcement, Morris referred to Petitioner by his first name, Gerald, during the transaction. (R. 59, State's Exhibit #6). Morris was paid $400 for her controlled buy with Petitioner. (R. 25, 60). During his cross examination of Morris, counsel for Petitioner asked her whether she had a prior sexual relationship with Petitioner. Morris denied any sexual relationship with Petitioner. (R. 70). The State argued to the trial judge that Petitioner had opened the door to

[1] Morris also purchased cocaine base from Petitioner, however a mistrial was declared on that count after the jury was unable to reach a verdict.

Morris testifying that she actually knew Petitioner from buying drugs from him in the past. (R. 74-75). The trial judge denied the State's request, but ruled that the State could ask how long Morris had known Petitioner. (R. 77). When the State asked Morris "But you knew [Petitioner] for several years?", Morris responded by saying she knew Petitioner "from purchasing drugs." (R. 80, lines 4-5). Petitioner then moved for a mistrial. The trial judge denied Petitioner's motion and issued a curative instruction to the jury. (R. 88-89).

The State then called Investigator Marc Brown of the Charleston Police Department who observed the controlled purchase of drugs from Petitioner. (R. 112). Brown testified that he observed Petitioner arrive at Dunkin Donuts in a white BMW on February 5, and he arrested Petitioner in the same BMW on February 19. (R. 112, 115). The State completed their case in chief by calling Ashley Earl of the Charleston Police Department to testify about her analysis of the drugs sold by Petitioner. Earl testified that the items she analyzed tested positive for heroin and cocaine base. (R. 132). Petitioner was convicted of distribution of heroin.

STANDARD OF REVIEW

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. Id. "A mistrial should not be granted unless absolutely necessary." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Id. In order to receive a mistrial, the defendant must show error and resulting prejudice. Id.

ARGUMENT

I.

The Court of Appeals correctly found the trial judge did not err in refusing to grant a mistrial in Petitioner's case where the confidential informant, Tessa Morris, only referred to Petitioner's prior drug activity once, that lone reference was not solicited by the State, Petitioner did not suffer any prejudice from this reference, and if Petitioner was initially prejudiced in any way, the trial judge provided a thorough curative instruction that cured any such prejudice. Finally, any alleged error is harmless considering the overwhelming evidence of Petitioner's guilt presented at trial.

Petitioner contends the Court of Appeals erred in affirming the trial judge's decision not to declare a mistrial after Morris made a single reference to Petitioner's prior drug dealing activity. Petitioner contends that the State elicited prior bad acts testimony from Morris and that testimony resulted in the admission of prejudicial and improper evidence against Petitioner. However, this argument lacks merit. The Court of Appeals correctly held the trial judge did not abuse his discretion in failing to grant a mistrial because Morris only made a single reference to Petitioner's prior drug dealing activity and that reference was not solicited by the State. Furthermore, multiple witnesses had already testified that Morris identified targets for law enforcement who she believed she could buy drugs from. This previous testimony was not objected to by Petitioner, and the most reasonable conclusion a juror could make from this testimony was that Morris had bought drugs from Petitioner before. After the single reference was made, the trial judge issued a curative instruction advising the jury not to consider any prior drug dealing activity by Petitioner. Additionally, any error that may have occurred is harmless in light of the overwhelming evidence presented against Petitioner at trial. Petitioner's petition for a Writ of Certiorari should be denied.

A. Lack of prejudice to Petitioner

The standard of review in this state for determining whether a trial judge should grant a mistrial is an abuse of discretion. State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). "The decision to grant or deny a mistrial is within the sound discretion of the trial judge." Id. "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. Id. "A mistrial should not be granted unless absolutely necessary." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Id. In order to receive a mistrial, the defendant must show error and resulting prejudice. Id.

In this case the solicitor asked a yes or no question of the confidential informant, Tessa Morris, regarding how long she had known the defendant. The relevant exchange between the solicitor and Morris is as follows:

> Assistant Solicitor Linder: ... and as part of that agreement, as part of briefing with them including with Special Agent Preston, you gave names and phone numbers of people who could be good targets for them?
>
> Morris: Right.
>
> Assistant Solicitor Linder: And one of the name and phone numbers you gave is [Petitioner], correct?
>
> Morris: Correct.
>
> Assistant Solicitor Linder: How long overall had you known [Petitioner]; a week, a month, a year?
>
> Morris: I've known him for several years.
>
> Assistant Solicitor Linder: You've known him for several years before all of this happened?

Morris: Correct.

Assistant Solicitor Linder: And you were not in a sexual relationship with him?

Morris: No, we were never.

Assistant Solicitor Linder: But you knew him for several years?

Morris: From purchasing drugs.

Assistant Solicitor Linder: And, in fact, you knew him through your boyfriend?

Morris: Correct.

Ms. Gay: Your Honor, may we approach?

(R. 79-80, lines 13-8). The exchange depicted above demonstrates the State did not solicit the offending testimony from Morris. The State abided by the trial judge's ruling to not inquire about prior bad acts. Morris, of her own volition, responded to the State's question in a manner that violated the trial judge's ruling. The trial judge acknowledged that this was not an intentional act on behalf of the State when he remarked: "I don't find any prosecutorial misconduct. I find that the witness responded in a fashion that creates this problem. And the witness is not an attorney." (R. 87, lines 22-24).

Petitioner suffered no prejudice from Morris' single mention of his prior drug activity, because similar testimony had already been offered by two witnesses and it was not objected to by Petitioner. Not only had Morris already testified that she gave the names and phone numbers to law enforcement of people she could buy drugs from, but Preston testified that Morris was chosen because "the informant has had a history with the targets. They've been there before, done it before." (R. 22-23, lines 25-2, 79). This testimony was not objected to by Petitioner thereby making Petitioner's claim of prejudice difficult to substantiate. The trial judge remarked on this difficulty when making his ruling on Petitioner's motion for mistrial:

> Well, I understand your position. But if the testimony has been offered several times now that she provided the targets. What other logical conclusion is there but that she is providing the target because he's involved in the drug trade in some way?

(R. 81, lines 8-12). Petitioner acknowledged the trial judge's concerns saying: "I think that's a logical conclusion that the jury can make up on their own and discuss." (R. 81, lines 13-14). However, Petitioner continued to emphasize that he was prejudiced because the prior bad act had been specifically excluded pre-trial. (R. 81). In further explaining his ruling, the trial judge would again emphasize that:

> The only reasonable conclusion that someone could draw from that is that she believed that those people were involved in drug transactions, and not just using drugs, but in providing drugs to other people. Otherwise, there's no basis for her to make that assertion. And so when I think about having a mistrial over this issue, it really seems to be overreaction.

(R. 84, lines 6-12). The trial judge accurately recognized that Petitioner was not prejudiced by the single offending reference by Morris because Morris and Preston had already indirectly referred to why Petitioner was a target. Any reasonable juror would have drawn the same conclusion from the testimony already presented.

The cases that Appellant cites in support of his position are distinguishable from the facts in this case. State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (2005), State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994), and State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (1996) all featured nearly identical scenarios on appeal. In each case the defendant appealed a trial court's ruling that the State could ask about prior drug transactions under a common scheme or plan theory under Rule 404(B) SCRE. Here, the State argued Petitioner opened the door for the State to ask questions about Morris' prior drug history with Petitioner based on Petitioner's questions on cross examination. However, the trial judge denied the State's request and limited the scope of the State's questions to merely inquire how long Morris had known Petitioner. (R.

77). The State attempted to comply with that limitation by simply asking Morris: "But you knew him for several years?" (R. 80, line 4). Morris then violated the trial judge's restriction by responding: "From purchasing drugs."(R. 80, line 5).

The most relevant case Petitioner cites is State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (1992). In Bostick, the defendant appealed his conviction for distribution of crack cocaine after a law enforcement witness "blurted out: 'We had intelligence prior to this that uhm, Angelo Bostick had been selling crack cocaine from the store.'" Bostick 307 S.C. at 227, 414 S.E.2d at 176. This statement was not in response to any question and like the current case, the offending testimony was not solicited by the State. Because Bostick's theory of the case at trial was that the confidential informant had confused someone else with Bostick, this Court found that any suggestion from a law enforcement witness that the defendant had previously sold crack cocaine would improperly influence the jury. Bostick 307 S.C. at 228-229, 414 S.E.2d at 176. However, the current case before this Court differs from Bostick in several important ways.

In this case, unlike Bostick, two witnesses had already referred indirectly to the Petitioner as a target of the controlled purchase because of Morris' prior drug transactions. Preston testified that Morris was chosen because of her prior history with the targets she gave law enforcement, and Morris testified that she had provided names of individuals that she knew she could get drugs from. (R. 22-23, 69). Therefore, a reasonable juror would have already been able to infer that Petitioner had sold drugs to Morris on previous occasions. The additional testimony from Morris simply made the same inference and was not a stand-alone reference as in Bostick. Appellant also cited Bostick at trial, and in response the trial judge made the same distinction between Bostick and the current case:

> The Bostick case I think is distinguishable. In this instance, you have someone who, based on testimony thus far, had some prior relationship with the defendant, knew the defendant. It was unlike the Bostick case.

(R. 102-03, lines 23-1).

B. Curative Instruction

Petitioner contends that the single mention of Petitioner's prior drug activity by Morris improperly prejudiced him. However, even if Petitioner was prejudiced by Morris' reference to his prior drug activity, that prejudice was cured by the trial judge's curative instruction. "A curative instruction is generally deemed to have cured any alleged error." State v. Dial, 405 S.C. 247, 258, 746 S.E.2d 495, 500 (Ct. App. 2013). "If the trial judge 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, 912 (1996). In this case, the trial judge gave the following curative instruction:

> Now, the instruction is this, ladies and gentlemen. 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. 88-89, lines 23-9). The trial judge clearly explained to the jurors that they were not to consider allegations of Petitioner's prior drug dealing activities in their deliberations. Therefore, absent any showing to the contrary, any error that may have occurred is deemed to be cured.

C. Harmless Error

Petitioner contends that the single mention of Morris having bought drugs from Petitioner on a prior occasion improperly influenced the jury to decide his guilt based on prejudice instead of the evidence presented at trial. However, considering the overwhelming evidence of

Petitioner's guilt, any error that resulted from the jury hearing about Petitioner's prior history with Morris that was not cured by the trial judge's curative instruction was harmless.

"Whether an error is harmless depends on the circumstances of the particular case." Thompson, 352 S.C. at 562, 575 S.E.2d at 83. "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." Thompson, 352 S.C. at 562, 575 S.E.2d at 83. "Error is harmless when it could not reasonably have affected the result of the trial." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

The evidence presented against Petitioner at trial was overwhelming. Law enforcement utilized a confidential informant to purchase drugs from Petitioner. (R. 20-22, 57). To set up this transaction, Morris contacted Petitioner at a phone number which Petitioner later admitted was his. (R. 26, 117). Petitioner's voice was recorded on a phone call with Morris setting up the drug buy. (R. 26, State's Exhibit #1). Preston and Morris both testified that Morris selected targets based on her recommendation of who she could buy drugs from. (R. 22-24, 69). Petitioner was clearly filmed participating in a hand to hand transaction with Morris inside his white BMW. (State's Exhibit #6). The film presented to the jury was of high quality and clearly shows Petitioner's face, records Petitioner's voice, and shows the hand to hand transaction. (State's Exhibit #6). Finally, Marc Brown testified that he arrested Petitioner in the same white BMW that he drove to the drug transaction on February 5, two weeks later on February 19th. (R. 112, 115).

When considering the record as a whole, the prejudice to Petitioner of a single reference to a prior drug purchase with Morris pales in comparison to the evidence against Petitioner. There was abundant evidence in the record for a reasonable jury to conclude Petitioner was guilty. The jury was likely convinced of Petitioner's guilt by a video clearly depicting Petitioner selling drugs to Morris, rather than by a single reference to prior drug activity between Morris and Petitioner. Therefore, any error that resulted from Morris' reference to prior drug activity with Petitioner was harmless.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843)-958-1900

BY: Scott Matthews
SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 13, 2019

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THE STATE, Respondent,

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This thirteenth day of May, 2019.

Sally Ellison

SALLY ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727