STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK EMIL DAY,

APPELLANT

APPELLATE CASE NO 2018-001918

ANDERS BRIEF OF APPELLANT

TAYLOR D GILLIAM
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying a motion for a mistrial, where a prospective juror indicated she went to church with one of the State's four witnesses, where the entire jury pool heard the comment, where such a remark bolstered the credibility of the witness, and where the trial judge's curative instruction expanded upon the original comment by suggesting that the witness was a good guy because he went to church?

STATEMENT OF THE CASE

Appellant was indicted on two counts of unlawful taking of a weapon from a law enforcement officer as well as two counts of assaulting a police officer while resisting arrest by a Charleston County grand jury on July 25, 2016. R. 198. He proceeded to trial on October 17, 2018 before the Honorable Roger M. Young. R. 1. Lorelle Proctor and Stephen Bowden represented Appellant, and David DuTremble and Richard Waring appeared on behalf of the state. R. 1. The jury found Appellant not guilty on the two unlawful taking of a weapon from a law enforcement officer charges and guilty on the two assaulting a police officer while resisting arrest charges. R. 190, ll. 2 – 8. Judge Young sentenced Appellant to five years' incarceration suspended upon the service of three years, with two years of probation, concurrent. R. 196, ll. 12 – 16.

This brief follows.

STANDARD OF REVIEW

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.' " State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (quoting Gilliam v. Foster, 75 F.3d 881, 895 (4th Cir.1996)).

ARGUMENT

The trial court erred in denying a motion for a mistrial, where a prospective juror indicated she went to church with one of the State's four witnesses, where the entire jury pool heard the comment, where such a remark bolstered the credibility of the witness, and where the trial judge's curative instruction expanded upon the original comment by suggesting that the witness was a good guy because he went to church.

Relevant facts

On July 25, 2016, North Charleston police officers arrived at a Target store after an employee made allegations of shoplifting. R. 82, l. 23 – R. 85, l. 25. Law enforcement officers attempted to detain Appellant and another man at the exit of the store. Id. Christopher Talbott, one of the officers, testified that "[a]s we approached [Appellant] and told him to put his hands up against the wall, he initially turned, put his hands up against the wall. Then we went to handcuff and he immediately started to pull away and just swing his arms at us, and somehow we ended up on the ground." R. 103, ll. 5 – 11. Appellant explained that when he put his hands on the wall, it triggered shoulder pain from a previous injury. R. 195, ll. 6 – 16. Appellant, who had recently separated his shoulder, was in intense pain when Talbott grabbed his arm Id. He tried to explain to officers that his arm could not bend to the position to which it was being pulled. Id. In response, he was told to "[q]uit resisting," and the police officers escalated the situation from there. Id. Talbott classified this as resisting and later claimed he was being assaulted. R. 103, ll. 12 – 22.

Talbott requested that another officer, James Stewart, use his Taser on Appellant, but it had no effect. R. 103, l. 23 – R. 104, l. 21. Appellant was supposedly kicking during the struggle and allegedly kicked the Taser out of Stewart's hand. Id. According to Talbott,

Appellant rolled over, pulled the Taser wires out, and ran out the door. Id. Appellant ran approximately 200 yards before colliding with a police car. R. 107, l. 25 – R. 108, l. 17.

During jury selection, the trial judge inquired as to whether any prospective juror was "related by blood or marriage of acquainted with" Talbott, a North Charleston police officer, in any way. R. 25, l. 3 – R. 26, l. 9. A prospective juror, in earshot of the entire jury pool, indicated that Talbott "goes to [her] church." Id. When questioned by the judge, the prospective juror indicated she could still be fair and impartial. Id. Talbott was the third witness called by the state and had by far the lengthiest testimony, as he was one of the officers who interacted with and eventually arrested Appellant. R. 97, l. 11 – R. 108, l. 23.

Counsel for Appellant sought to strike for cause this prospective juror because she "stood up and [said] she goes to church with … the main officer in this case." R. 34, l. 18 – R. 36, l. 3. Furthermore, counsel remarked that the prospective juror "probably tainted the whole jury panel [by suggesting] that he's a big Christian." Id. After the trial court notes that the prospective juror maintained that she could be fair and impartial, counsel expanded upon the initial request for a strike and moved for a mistrial:

> Well, our problem is that she basically said that she goes to church with him, so it sounds like he's a good, solid, Christian guy. It's whether they believe him or our guy … and we want to put on the record that we think the whole panel is tainted.

R. 35, ll. 17 – 23. The trial judge denied the motion for a mistrial. R. 36, ll. 1 – 3. Following jury selection, the trial judge revisited the matter:

> That one juror who - - you excused her, but you said she stood up and vouched, basically, for the one officer.
>
> What I propose is when [the jury comes] back I'll say, look, one of the people in the jury panel indicated that she knew a guy and went to church and made comments which might speak favorably to his character, and if anybody thinks that they couldn't put that aside and are influenced by that in any way, let me know and see where we go from there. Okay?

R. 47, ll. 7 – 16. When the jury was brought back into the courtroom, the trial judge did just that and offering the following instruction to the jury:

> Back when I was asking you a bunch of questions a few minutes ago, one lady, in response to asking if you knew any of the police officers or witnesses involved, stood up and said she went to church with one of the officers and basically vouched for his character by saying he's a good guy and went to church.
>
> It's unfortunate when somebody says something like that because I don't want it to influence you, but I need to know if a comment like that did influence you. I know you've heard it. I can't make you unhear it, but is there anybody that doesn't feel like they could put that aside and basically - - you're the judge of credibility. We don't let people come in and say what they think about other witnesses and whether or not they're truthful or untruthful.
>
> In other words, I'm asking, do you think you could put that aside, having heard that, and base your judgment on the evidence that you hear in this courtroom and the testimony of the witnesses as you hear them? You judge their credibility, not what other people may have said about some witness' credibility. Does anybody think they couldn't do that? Okay. Thank you.

R. 49, l. 14 – R. 50, l. 14. None of the jurors admitted that the remark influenced their opinions of credibility. The motion for a mistrial was again denied, "based on the juror's response, or nonresponse." R. 52, ll. 2 – 6. As noted above, Appellant was acquitted on the two unlawful taking of a weapon from a law enforcement officer charges and found guilty on two assaulting a police officer while resisting arrest charges. R. 190, ll. 2 – 8.

Discussion

> Appellant was indicted for assaulting a police officer while resisting arrest:
>
> It is unlawful for a person to knowingly and wilfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not. A person who violates the provisions of this subsection is guilty of a felony and, upon conviction, must be fined not less than one thousand dollars nor more than ten thousand dollars or imprisoned not more than ten years, or both.

S.C. Code Ann. § 16-9-320(B).

Another one of the officers who arrived at the Target, Amber Rossillo, did not see any "blows make contact with Officers Talbott and Stewart." R. 87, ll. 13 – 24. All she saw was a "struggle on the ground." Id. On cross-examination, she straightforwardly admitted that she did not see an assault. R. 95, ll. 2 – 15. Thus, the testimony and credibility of the remaining witnesses, Talbott included, was of great importance.

The prospective juror's remark bolstered the credibility of Talbott, and the trial judge complicated the matter with the attempted curative instruction. All the prospective juror said is that Talbott goes to her church. R. 26, ll. 1 – 9. The trial judge, however, magnified the bolstering by suggesting that the juror "vouches for his character by saying **he's a good guy** and went to church." R. 49, ll. 14 – 20 (emphasis added).

"In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). It is impermissible for a prosecutor to vouch for or bolster the testimony of government witnesses in arguments to the jury. United States v. Lewis, 10 F.3d 1086, 1089 (4th Cir.1993). Vouching occurs when a prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury. Id. A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999).

While the comment did not come from the prosecution, it still had the same effect. Inadmissible evidence, namely Talbott's church attendance, was made aware to the entire jury pool. Talbott's credibility was thus elevated; his character was likely similarly established as trustworthy and probably similar to that of the jury. The comment was not remedied by the trial court's instruction, either.

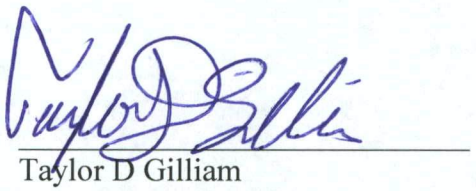
First uttered by just the prospective juror, the single comment vouched for and bolstered Talbott's credibility prior to opening statements. Additionally, the trial judge's expansion of the initial remark likely unfairly prejudiced Appellant's right to a fair trial. By suggesting that church attendance is tantamount to being "a good guy," the trial court added its own weight behind the original statement. Therefore, the trial court validated the suggestion Talbott's church involvement constituted good character. The curative instruction offered to the jury could not have been effective, and the motion for a mistrial should have been granted.

Much like how a solicitor cannot vouch for the credibility of a witness because doing so "places the government's prestige behind a witness," the trial court should not express any opinions regarding a witness' truthfulness or character. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). A jury must make its own assessment on the credibility of witnesses. In Gilchrist v. State, this Court noted that religiously-tinged language was problematic and "certainly enhanced the impropriety" of the objectionable language in that case. 350 S.C. 221, 227-8, 565 S.E.2d 281, 285 (2002).

Appellant's right to a fair trial was denied when the mistrial motion was denied. The jury selected for his case heard the comment which vouched for the credibility of Talbott, and the entire pool was therefore tainted. Anything Talbott testified to was going to be believed. Accordingly, the trial court erred in denying the motion for a mistrial.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions based upon the trial court's error in failing to grant a mistrial following the improper bolstering of one of the State's witnesses.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of August, 2019.

STATE OF SOUTH CAROLINA

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Honorable Roger M. Young, Circuit Court Judge

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark Emil Day states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Roger M. Young, which was held on October 17 - 18, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Mark Emil Day.

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

This 27th day of August, 2019.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment;
(2) Entire trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 27, 2019

Taylor D Gilliam
Appellate Defender

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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 27, 2019.

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ATTORNEY FOR APPELLANT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Mark Emil Day, 378042, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 27th day of August, 2019.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of August, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.