STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Fairfield County
Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case Tracking No. 2018-001213

The State, Respondent,

v.

David Allen Tindal, Jr., Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On April 17, 2018, the Fairfield County Grand Jury indicted Appellant, David Allen Tindal, Jr., on one count of distribution of methamphetamine. (Indictment; R. 105) The case was called for a jury trial on May 31, 2018, before the Honorable Thomas A. Russo, Circuit Court Judge, and a jury. (T. 1; R. 1) The Appellant was represented by Mr. William Frick, and Assistant Solicitor Riley Maxwell represented the State. (T. 1; R. 1) Appellant was tried in absentia when he failed to show up for trial as directed. (T. 34-36; R. 4-6)

Appellant was subsequently found guilty as indicted by the jury. (T. 137; R. 88) As a result of Appellant failing to appear for his trial, Judge Russo sealed the sentence. (T.143; R. 94) On June 25, 2018, Appellant appeared before the Honorable Brian M. Gibbons and Appellant's sentence was unsealed. (Sentencing T. 3; R. 97) Judge Gibbons delivered the sentence of Appellant from Judge Russo in the amount of 20 years. (Sentencing T. 3-4; R. 97-98) Appellant then motioned to have the sentence reconsidered by Judge Gibbons stating that the "sentence of [twenty] years is out of proportion" to Appellant's "limited record." (Sentencing T. 4; R. 98)

Having heard from both the State and defense, Judge Gibbons declined to readdress the sentence. (Sentencing T. 8; R. 102) Subsequently, Appellant was sentenced to twenty years imprisonment for distribution of methamphetamine, second offense. (Sentencing T. 8; R. 102)

STATEMENT OF FACTS

On December 20, 2017, deputies with Fairfield County Sheriff's Narcotics Division and confidential informant, Kristen Levister, convened at a pre-determined location to conduct a controlled buy of methamphetamine from Appellant. (T.58; R. 18) Deputies searched Levister's vehicle and person, and then the deputies wired Levister with audio and visual equipment to preserve the events of the controlled buy operation. (T. 58; R. 18) To effectuate the controlled buy, Levister received sixty dollars in recorded government funds. (T. 53; 72; 74; 82; R. 13; 28; 30; 38)

Once Levister was equipped and given money, she proceeded to Appellant's home to perform the controlled buy. (T. 59; 72; R. 19; 28) Levister arrived at Appellant's home and proceeded inside where Appellant and his girlfriend were arguing. (T. 72; R. 28) Levister "asked [Appellant] for a gram" and Appellant "got [her] to walk to his bedroom with him." (T. 72; R. 28) Levister explained Appellant "kept his stuff in his bedroom" and while inside Appellant's bedroom he proceeded to remove the methamphetamine from his closet, weighed it, and packaged one gram in a baggie for her and she left. (T.73; R. 29)

Immediately after she received the methamphetamine from Appellant, Levister drove back to the facility where the investigators were listening and waiting on her. (T. 73; R. 29) Law enforcement officials collected the drugs, audio, and visual equipment from her person, and turned the units off to conclude the controlled buy operation. (T. 74-75; State's Exhibit 1; R. 30-31) Levister was paid forty-dollars for completing the controlled buy. (T. 57; 79; R. 17: 35) Subsequently, the drugs bought from Appellant and delivered to deputies by Levister were identified by SLED drug analysis as methamphetamine. (T. 101; R. 57).

STANDARD OF REVIEW

"[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). 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) (citations omitted). This Court "favors the exercise of a wise discretion of the circuit judge in determining the merits of such motion in each individual case." State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 309 (1976) (quoting State v. Singleton, 167 S.C. 543, 166 S.E. 725 (1932)).

ARGUMENT

I. Did the trial judge abuse his broad discretion by denying Appellant's motion for a mistrial, when (1) Lieutenant Sparks' comment was a mere vague reference to Appellant's prior history, (2) the trial judge provided a sufficient curative instruction to the jury so as to cure any possible prejudice, and (3) any alleged error was harmless because of the overwhelming evidence of Appellant's guilt presented at trial?

Appellant contends the trial judge abused his discretion by refusing to declare a mistrial after Lieutenant Sparks made a vague reference to Appellant's prior drug history. Appellant asserts the vague reference was inadmissible pursuant to Rule 403, SCRE, and Rule 404(b), SCRE, and was overwhelmingly prejudicial to Appellant. Appellant's argument is without merit. It is evident from the record that the trial judge did not abuse his broad discretion in denying Appellant's motion for a mistrial because Lieutenant Sparks made a single vague reference to Appellant's prior drug dealing activity, which was insufficient to create the manifest necessity of a mistrial. Furthermore, after considering Appellant's objections and sustaining the objection to the testimony, the trial judge issued a curative instruction to the jury and struck the response from the record. Additionally, any error that may have occurred is harmless in light of the overwhelming evidence presented against Appellant at trial. Appellant's conviction and sentence should be affirmed.

In the case sub judice, the State called Lieutenant Sparks as its first witness. He testified his narcotics division conducted a controlled buy from Appellant with the cooperation of a confidential informant, Kristen Levister, on December 20, 2017. (T. 57-58; R. 17-18) Shortly after Lieutenant Sparks took the stand, the following exchange occurred:

> Solicitor: And in this case, what's the reason why Ms. Levister became or was the control -- excuse me, the confidential informant in this case?

> Sparks: She came to us because Mr. Tindal [Appellant] had got her sister back on methamphetamine.

(T. 54; R. 14) Whereupon Appellant objected and requested the matter be addressed outside the presence of the jury. (T. 54; R. 14)

Following the jury leaving the courtroom, Appellant argued Lieutenant Sparks' response was inadmissible pursuant to Rule 403, SCRE, and "at least" Rule 404(b) and moved for a mistrial. (T. 54-55; R. 14-15) After discussions, the trial judge sustained the objection to Lieutenant Sparks' testimony and overruled the motion for a mistrial. The court further struck the response and provided a curative instruction to the jury to disregard the statement. (T. 56; R. 16). The court instructed:

> 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.**

(T. 57; R. 17) (Emphasis added).

Initially, the curative instruction given cured any possible prejudice from the comment. Ordinarily, a trial judge's "curative instruction is deemed to have cured any alleged error." State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007), aff'd as modified, 383 S.C. 66, 678 S.E.2d 405 (2009); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); see also, State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (instruction to disregard inadmissible evidence is usually viewed to have cured the error in admission); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (if trial judge sustains timely objection to testimony and gives jury curative instruction to disregard the testimony, error is deemed to be cured). The jury is expected to follow the instructions given to it, and in this case, the jury was specifically told to disregard Lieutenant

Spark's response. See Conner v. City of Forest Acres, 363 S.C. 460, 471, 611 S.E.2d 905, 910 (2005) (finding the case should be analyzed "in light of the presumption the jury followed the trial [judge's] instructions to ignore any evidence" excluded by the court); Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999) (jury is presumed to follow the courts instructions).

Moreover, the decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion amounting to an error of law. State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). Certainly, a mistrial should be declared only when absolutely necessary, and defendant must show "error and resulting prejudice." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000); State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007); State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). In particular, "[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) (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989)); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes). Accordingly, "[t]he granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); see Edwards, 373 S.C. at 236, 644 S.E.2d at 69 (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)) (noting the

granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way.).

The prejudice created was minimal, especially in light of the fact it was a single vague reference at the beginning of trial and never mentioned again.[1] Any prejudice created by Lieutenant Sparks' vague reference to Appellant's prior history was certainly not so grievous that its effect could only be removed by the drastic measure of a mistrial. See State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (finding no prejudice resulted from the admission of testimony establishing that law enforcement already had Council's fingerprints on record at the time of his arrest for the charged offense); State v. Singleton, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985) (finding an arresting officer's vague references to prior crimes in the jury's presence did not warrant the granting of a mistrial), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Robinson, 238 S.C. 140, 150-151, 119 S.E.2d 671, 676 (1961) (finding testimony by a witness that Robinson told him that he was on the way to the "probation office" did not create an inference that Robinson had been convicted of another crime), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."). Further, the testimony presented after the judge's curative instruction also indicated Levister was paid for being an informant, which minimized the original comment by Lieutenant Sparks. Accordingly, the trial court did not abuse its wise and wide discretion in denying the extreme measure of a mistrial.

[1] The comment: "Mr. Tindal had got her sister back on methamphetamine" is a vague reference which does not clearly indicate Appellant was involved in selling or using methamphetamine. It is just as likely that he encouraged her to use it as it is that he sold it to her.

Finally, when viewing all of the evidence in the record, the single comment by Lieutenant Sparks was clearly not sufficiently prejudicial to warrant a mistrial. In addition to the testimony by law enforcement, the jury had the testimony by the informant who conducted the controlled buy. Additionally, the jury saw the video recorded during the controlled buy. It is highly unlikely the single, vague comment by Lieutenant Sparks altered their determination of guilt in this case. Accordingly, the trial court did not err in exercising its wide and wise discretion in denying the extreme measure of a mistrial given the minimal possible prejudice which was entirely cured through the trial court's curative instruction.

CONCLUSION

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

Respectfully submitted,

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October 16, 2019

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redact, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007) (requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 16th day of October, 2019.

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