STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS HAROLD SAILORS, JR.

APPELLANT

APPELLATE CASE NO. 2019-000391

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by ruling the solicitor could argue in closing that the jury should consider evidence of a second Walmart forgery charge, of which the court had already directed a verdict of acquittal on for Appellant, when the jury considered Appellant's guilt on the remaining Park Sterling Bank forgery charge, since it invited a verdict on an improper basis where Appellant had been acquitted of the other forgery charge?

STATEMENT OF THE CASE

During the April 2018 term the Union County Grand Jury indicted Appellant on two counts of forgery. R. 136.

On February 26-27, 2019, Appellant proceeded to trial before the Honorable William McKinnon. R. 1. Jennifer Williams represented Appellant. Id. Meghan Gilmer represented the state. Id.

At the conclusion of the trial, Judge McKinnon granted directed verdict on one of the two forgery charges, the "Walmart charge." R. 67, ll. 6 – 20. Appellant was found guilty of the other forgery charge, the "Park Sterling Bank charge." R. 128, ll. 10 – 13. Appellant was sentenced to four years' imprisonment for forgery. R. 135, ll. 7 – 12.

This appeal follows.

STANDARD OF REVIEW

"The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." Id. "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record." Id. at 324, 468 S.E.2d at 625. "The appellate has the burden of proving she did not receive a fair trial because of the alleged improper argument." Id. at 324, 468 S.E.2d at 625.

ARGUMENT

The court erred by ruling the solicitor could argue in closing that the jury should consider evidence of a second Walmart forgery charge, of which the court had already directed a verdict of acquittal on for Appellant, when the jury considered Appellant's guilt on the remaining Park Sterling Bank forgery charge, since it invited a verdict on an improper basis where Appellant had been acquitted of the other forgery charge.

Relevant Facts

On October 16, 2017, Appellant attempted to cash a check for $117.00 at Park Sterling Bank. R. 8, l. 21 – 9, l. 15. The check was written by Brenda Keith, the complaining witness. R. 9, ll. 19 – 24. Keith, an elderly woman, claimed that she had not written the check to Appellant. R. 12, ll. 2 – 3; R. 28, l. 12 – 29, l. 10. The state alleged that Appellant forged that check and attempted to cash it. R. 19, ll. 12 – 20.

Appellant testified in his own defense and explained that he found the check sitting in his mailbox that morning. R. 73, ll. 18 – 25. Appellant did not know why the check was in his mailbox, but it was written to him, so he presumed he earned it. Id.

The state also alleged that Appellant tried to cash the same check earlier on the same day at a nearby Walmart. R. 46, l. 25 – 49, l. 12. Appellant was seen on a surveillance camera inside the Walmart; however, no evidence was presented that Appellant ever tried to cash the alleged forged check at Walmart that day. R. 65, l. 26 – 66, l. 20. Therefore, Judge McKinnon properly granted a directed verdict as to the Walmart forgery charge. R. 67, ll. 6 – 20.

After the successful directed verdict motion, the solicitor moved to be allowed to refer to the evidence from the Walmart charge at closing. R. 67, l. 21 – 68, l. 8. Defense counsel objected because using the evidence from the Walmart charge, to which directed verdict had been granted,

would improperly bolster the Park Sterling Bank charge. R. 68, ll. 15 – 23. The court overruled defense counsel's objection and allowed the solicitor to refer to the Walmart charge during closing arguments. R. 68, l. 24 – 69, l. 9. The court stated it would instruct the jury that "the only determination you have to make is [the Park Sterling Bank] count." R. 70, ll. 4 – 9. However, it is hard to see how that instruction would "cure" unfair prejudice to Appellant because the Park Sterling Bank charge was all that Appellant was still on trial for anyway. Moreover, the charge did not address the problem because it did not instruct the jury that the evidence from the already acquitted Walmart charge was not to be used in their deliberations on the still pending Park Sterling Bank charge.

Furthermore, the solicitor's repeated references to the Walmart charge during her closing arguments destroyed any possibility of the court's instruction "curing" the unfair prejudice to Appellant. R. 109, ll. 14 – 23; R. 111, ll. 6 – 25; R. 112, ll. 19 – 23; R. 114, ll. 6 – 16; R. 117, ll. 2 – 14. The solicitor stated that "we know [Appellant] acted criminally [at Park Sterling Bank] because among other things, Walmart wouldn't cash the check." R. 114, ll. 6 – 16. The solicitor argued that Appellant was forced to admit it was him on the surveillance camera at Walmart, "even though he didn't want to," and repeatedly referred to the video itself as though Appellant's presence at Walmart was a prior bad act. R. 112, ll. 19 – 23; R. 109, ll. 14 – 23; R. 117, ll. 2 – 14. The solicitor also specifically told the jury to use the evidence from the Walmart charge as evidence of Appellant's guilt while they are in deliberations for the Park Sterling Bank charge. R. 111, ll. 6 – 25.

The numerous improper comments by the solicitor were aimed at recharacterizing Appellant's prior acts at Walmart as prior bad acts to use as propensity evidence to convict Appellant on the Park Sterling Bank charge. Her command to the jury to take into account the

Walmart charge evidence when deliberating for the Park Sterling Bank charge obliterated any mitigating effect the court's instruction could have had on the unfair prejudice to Appellant from those improper comments. R. 111, ll. 6 – 25; R. 114, ll. 6 – 16.

Discussion

The court erroneously allowed the state to use Appellant's actions at Walmart, of which he was already acquitted by way of the directed verdict ruling, to support a conviction on the Park Sterling Bank forgery charge. See State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); see also Galloway v. U.S., 319 U.S. 372 (1943) (holding that a directed verdict serves the same purpose as the demurrer to the evidence). That error prejudiced Appellant because the wrongful comments by the solicitor at closing regarding the Walmart charge invited the jury to impermissibly convict Appellant on the Park Sterling Bank forgery charge by using evidence of prior acts not in the record, and the court's purported "curative" instruction did not cure the unfair prejudice resulting from the error. See State v. Fortune, Op. No. 27932 (S.C. Sup. Ct. filed Dec. 4, 2019) (Shearhouse Adv. Sh. No. 46 at 19 – 20) (holding that the judge's "curative" instruction did not "cure" the solicitor's improper closing remarks).

Since the court granted directed verdict as to the Walmart charge, the evidence presented regarding that charge should have been treated as though it was never entered into the trial. Evans v. Michigan, 568 U.S. 313 (2013) (holding that a midtrial directed verdict was an acquittal for double jeopardy purposes); See U.S. v. Martin Linen Supply Co., 420 U.S. 564, 571 (1997) (a directed verdict is an acquittal if the ruling of the judge "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.") see also People v. Stout, 108 Ill.App.3d 96 (1982) (holding that the legal effect of granting a motion for directed verdict is an acquittal.) see also Hood v. Bayless, 207 N.C. 82 (1934) (the legal effect of a

directed verdict is the same as that of a nonsuit or dismissal.) The granting of a directed verdict is an "equivalent procedure based on a finding of innocence." See Evans, supra. Consequently, the solicitor using the Walmart charge in her closing arguments was improper because the state may not rely on matters not in evidence during closing argument. State v. Gaines, 271 S.C. 65, 244 S.E.2d 539 (1978). See State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997); see also State v. Homewood, 241 S.C. 231 (1962) ("An argument that discusses facts not in evidence is improper.")

Here, during her closing arguments the solicitor turned the Walmart charge, a prior act for which Appellant was granted directed verdict, into a prior *bad* act, then she used it as propensity evidence to secure a conviction on the present charges. R. 109, ll. 14 – 23; R. 111, ll. 6 – 25; R. 112, ll. 19 – 23; R. 114, ll. 6 – 16; R. 117, ll. 2 – 14. The prejudice resulting from those improper comments cannot be overstated since the Walmart charge, forgery, *was the same charge for which he was still on trial*. Id.; State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 ("When, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried the danger of prejudice is enhanced.")

In State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997) the South Carolina Supreme Court held that the solicitor's comments on evidence not in the record during closing arguments that alleged Huggins made an inculpatory statement that she, "was going to kill [the decedent] one day," to her brother was improper and warranted reversal of Huggins' convictions for voluntary manslaughter and criminal conspiracy. Id. at 107 – 108, 481 S.E.2d at 116. When Huggins testified in her own defense, the state asked her if she made that inculpatory statement to her brother and she denied it. Id. During closing arguments, the solicitor referred to the statement that Huggins allegedly told her brother. Id. at 107, 481 S.E.2d at 116.

The Court determined that the state asking Huggins about the inculpatory statement, "did not amount to putting [the statement] into evidence." Id. at 107, 481 S.E.2d at 116. The Court held that, "the reference to Appellant's … plan and offering money for someone to kill [the decedent], when there was no evidence in the record that she had done so, was highly prejudicial *in light of the fact that she was on trial for [the decedent's] murder* (and for conspiring to commit his murder)." Id. at 108, 481 S.E.2d at 116. (emphasis added) Therefore, the trial court erred when it denied the motion for mistrial on that basis. Id. at 108, 481 S.E.2d at 117.

In State v. Gaines, 271 S.C. 65, 244 S.E.2d 539 (1978) Gaines was convicted of receiving stolen goods. During closing arguments, the state made referred to statements that were not introduced into evidence. Id. at 66, 244 S.E.2d at 540. The South Carolina Supreme Court explained that the solicitor's comments were clearly erroneous and that a "solicitor cannot rely, in his closing argument, on statements not in evidence." Id. Accordingly, Gaines' conviction was reversed. Id.

In State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) Gore was convicted of voluntary manslaughter and arson. Id. at 119, 322 S.E.2d at 12. The state's theory of the case was that Gore set the fire to kill Coffey, the decedent, because she was going to end their relationship. Id. The state cross-examined Gore about a fire at a prior girlfriend's, Miriam Hooper, trailer while Gore lived there. Id. at 119 – 120, 322 S.E.2d at 12 – 13. There was no evidence presented during trial about the fire at Hooper's trailer and Gore was never charged or convicted for that fire.

The South Carolina Supreme Court explained, "Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts. Furthermore, where bad acts did not result in a conviction, guilty plea, indictment, or arrest of the appellant, this Court has limited the State's use of the evidence."

Gore, at 120 – 121, 322 S.E.2d at 13. (citing State v. Smith, 279 S.C. 440, 308 S.E.2d 794 (1983). (Appellant's lover improperly related instance of the appellant's unconvicted sexual battery upon her in his trial for murder of another woman); State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). (In trial for criminal sexual conduct with the prosecutrix, the court erred in receiving testimony from the appellant's wife regarding his prior unconvicted acts of sexual misconduct on her); State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977). (Allegations that the appellant poisoned her first husband not admissible because the evidence was not clear and convincing); State v. Drew, 316 S.E.2d 367 (S.C.1984). (Cross-examination and reply testimony regarding unconvicted act of burning a combine not proper in criminal conspiracy trial for burning a business.) The Court held that the solicitor's questioning in Gore was "*gravely prejudicial* and was, accordingly, reversible error," especially in light of the fact that the alleged prior bad act was "strikingly similar" to the charges for which he was still on trial. Id. at 120 – 121, 322 S.E.2d at 12 – 13. (emphasis added)

In Cole v. State, 356 So.2d 1307 (1978), the District Court of Appeals in Florida reversed Cole's conviction because the solicitor cross-examined him about committing a sex crime with a fourteen-year-old girl for which a motion of acquittal had previously been granted. Id. at 1308 – 1309. At trial the state argued that the evidence of the acquitted charge was admissible to show "criminal intent and a common modus operandi." Id. at 1309.

The Court of Appeals held that the admission of Cole's prior acquitted offense into evidence would be improper, even if it showed criminal intent or a common modus operandi, because "the state must prove that the accused perpetrated the acts sought to be introduced under the rule." Id. The Court also held that the improper cross-examination by the state must have prejudiced Cole because the state referred to an acquitted offense, *which by its nature is not a*

prior bad act, as if Cole had committed that offense to show that Cole had a propensity to commit the present charges. Id. This was exactly what the state did in the present case. R. 109, ll. 14 – 23; R. 111, ll. 6 – 25; R. 112, ll. 19 – 23; R. 114, ll. 6 – 16; R. 117, ll. 2 – 14.

In Fleurimond v. State, 10 So.3d 1140 (2009) Fleurimond was convicted of two counts of trafficking in cocaine and two counts of possession of cocaine. Prior to trial, defense counsel made a motion to prohibit the state from introducing evidence concerning prior drug activity at the house where Fleurimond was arrested. Id. at 1142. The trial court granted the motion. Id.

However, later in the trial a state's witness, Detective Belfort, stated that the arresting officers were at the house because they knew narcotics were sold there. Id. Defense counsel moved for a mistrial because the state had introduced evidence of the prior drug activity at the house. Id. The state argued that the testimony was proper because it showed why the police officers were at the house. Id. at 1143. The lower court denied the motion for a mistrial. Id.

During closing arguments, the state told the jury that Fleurimond was flushing drugs down the toilet when the arresting officers found him. Id. at 1145. Defense counsel objected to that comment because there was no evidence presented to support it. Id. The lower court sustained the objection and instructed the jury that "no such testimony had been presented at trial." Id. Fleurimond was found guilty as indicted. Id.

The Florida District Court of Appeals determined that the Detective Belfort's testimony was not admissible to explain why the detectives were at the house because the officer went into the details of the accusatory information. Id. at 1147. The Court held that the lower court abused its discretion when it did not declare a mistrial for the improper answers elicited by the prosecutor coupled with the wrongful closing argument and that the jury instruction did not cure the error. Id. at 1147 – 1148.

In Wilson v. State, 294 So.2d 327 (1974), Wilson appealed a perjury conviction where the solicitor made pointed and repeated improper references to the related earlier murder charge that resulted in acquittal. In 1972, Wilson was indicted for the alleged murder of her husband. Id. at 328. She testified in her own defense and was found not guilty. Id. Six months later she was charged with perjury from her testimony at her murder trial and was found guilty. Id.

The Supreme Court of Florida held that the solicitor's direct and repeated references to Wilson's prior murder trial, where the solicitor accused her of being guilty of that already acquitted crime, prejudiced Wilson's case. Id. at 329 – 330. The Court determined that "the total flavor of the trial sub judice amounted to a virtual retrial, under the guise of perjury," and because of that "[Wilson] was *completely prejudiced*." Id. (emphasis added)

In the present case, the Walmart charge had already been acquitted via directed verdict. R. 67, ll. 6 – 20. Accordingly, the lower court allowing the solicitor to use evidence from Appellant's innocuous conduct at Walmart during closing arguments for the Park Sterling bank charge was improper. R. 68, l. 24 – 99, l. 9; Gore, at 120 – 121, 322 S.E.2d at 13; Gaines, at 66, 244 S.E.2d at 540; Cole, at 1309.

The solicitor's repeated references to the Walmart charge during closing arguments unfairly prejudiced Appellant because the solicitor presented the acquitted charge to the jury as if Appellant had been convicted of that charge. R. 109, ll. 14 – 23; R. 111, ll. 6 – 25; R. 112, ll. 19 – 23; R. 114, ll. 6 – 16; R. 117, ll. 2 – 14; Cole, at 1309. Since Appellant was acquitted on the Walmart charge, it was improper for the solicitor to use details surrounding that incident because Appellant's actions were not "bad" in the prior bad act context. See Gore, supra; see also Smith, supra; see also Rivers, supra; see also Drew, supra; see also Conyers, supra. The state's

references to the already acquitted Walmart charge amounted to an attempt to retry Appellant for that crime. R. 111, ll. 6 – 25; Wilson, at 329 – 330.

The court's jury instruction did nothing to cure the error in Appellant's case. R. 96, l. 14 – 109, l. 19. The court instructed the jury they are only to deliberate on the Park Sterling Bank forgery charge. Id. The court also charged the jury to not to take into account evidence stricken from the record, but never informed the jury that the evidence from the Walmart charge was not in the record after the directed verdict was granted. R. 98, ll. 4 – 12; R. 100, ll. 10 – 12; R. 101, ll. 17 – 20; see Galloway, supra. The solicitor's comments about the Walmart charge during closing manipulated the jury into believing that the Walmart charge evidence was not stricken from the record.

The risk of unfair prejudice to Appellant was not that the jury would still reach a verdict on the Walmart forgery charge, which is what the curative instruction explained. The risk of unfair prejudice to Appellant was that the jury would use evidence from the already acquitted Walmart charge to convict Appellant of the Park Sterling Bank charge. See State v. Fortune, Op. No. 27932 (S.C. Sup. Ct. filed Dec. 4, 2019) (Shearhouse Adv. Sh. No. 46 at 19 – 20) (holding that the trial court's curative instruction that explained the jury's role as, "the finders of the truth," did not cure the improper comments by the solicitor where he claimed for himself the responsibility to decide truth because the unfair prejudice to Fortune was created when the solicitor misrepresented his own role, not a misrepresentation of the jury's role.) Accordingly, the court's jury instruction was inadequate to cure the unfair prejudice to Appellant because it did not address the error in this case. Specifically, the instruction did not explain that the evidence from the acquitted Walmart forgery charge was not to be considered for the Park Sterling Bank forgery charge that Appellant still faced.

Furthermore, the solicitor directly referenced the surveillance video from Walmart as evidence of Appellant's guilt for the Park Sterling bank charge. R. 114, ll. 6 – 16. The solicitor also told the jury to take the evidence from the Walmart charge into account when deliberating on the Park Sterling Bank charge. R. 111, ll. 6 – 25. Those two comments together completely undermined any minimal effect the court's purported "curative" instruction may have had.

Accordingly, Appellant's conviction for forgery should be reversed and he should be granted a new trial because the state unfairly prejudiced Appellant when it used his conduct at Walmart, of which he was acquitted, as a "prior bad act," to convict Appellant on the same charges at Park Sterling Bank. R. 109, ll. 14 – 23; R. 111, ll. 6 – 25; R. 112, ll. 19 – 23; R. 114, ll. 6 – 16; R. 117, ll. 2 – 14; see State v. Lyle, 125 S.C. 406, 118 S.E. 803; see also Huggins, at 108, 481 S.E.2d at 116.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate his conviction and remand his case to the Union County Court of General sessions for a new trial.

s/ Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,

s/ Victor R. Seeger

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This 5th day of May, 2020.