STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRYL DOUGLAS BRADLEY, JR.

APPELLANT

APPELLATE CASE NO 2020-000524

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to declare a mistrial when the investigator testified that she knew it was Appellant the witness identified from a photo line-up because the investigator was familiar with Appellant, indicating that she knew Appellant from prior criminal acts?

2. Did the trial judge err in refusing to declare a mistrial after he instructed the jury that, "I have now charged you with the law in order to help guide you to a just result in this case."?

STATEMENT OF THE CASE

In June of 2017, the Beaufort County Grand Jury indicted Appellant, Darryl Douglas Bradley, for criminal sexual conduct first degree, burglary first degree, attempted armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime, indictments #2017-GS-70-633, 634, 642, 643, 644. (R. p. **, indictments). On February 18, 2020, Appellant proceeded to jury trial before the Honorable Perry M. Buckner. Trasi Campbell and Melissa Duque represented Appellant at trial. Hunter Swanson and Francine Norz prosecuted the case. The jury was unable to reach a verdict on the criminal sexual conduct, burglary and kidnapping charges and Judge Buckner declared a mistrial as to those charges, indictments #2017-GS-70-633, 634, and 643. (Tr. p. 374, lines 9-11; p. 376, line 17-22; p. 394, lines 15-16). The jury found Appellant guilty of attempted armed robbery and the weapon charge. Appellant filed a timely motion for new trial on February 24, 2020. (R. p. **, motion for new trial). Judge Buckner denied the motion for new trial in a written order signed March 17, 2020. A timely notice of intent to appeal was served on March 23, 2020. This appeal follows.

STANDARD OF REVIEW

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "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." Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

ARGUMENTS

1. **The trial judge erred in refusing to declare a mistrial when the investigator testified that she knew it was Appellant the witness identified from a photo line-up because the investigator was familiar with Appellant, indicating the she knew Appellant from prior criminal acts.**

The jury found Appellant guilty of the attempted armed robbery of Alfreda Thompson. Ms. Thompson lived with her parents and took care of her mother who suffers from dementia. (Tr. p. 141, lines 11-20). At trial Appellant testified that he had done yard work for Ms. Thompson's father, Wesley Smalls. (Tr. p. 274, lines 8-18). Appellant testified that about one week prior to the incident for which he was charged he was at the house doing yard work, the father, Mr. Smalls, left the house and Ms. Thompson invited him inside where the two had consensual sex. (Tr. p. 283, line 18 – p. 284, 285, lines 1-2). Appellant testified that on the day of the incident Ms. Thompson called him and told him he could come and pick up the money she owed him for sweeping off the drive through. (Tr. p. 278, lines 4-12). When Appellant arrived at the house Ms. Thompson invited him inside and made him two sandwiches. (Tr. p. 278, line 13 – p. 279, line 1). Appellant testified that after he finished eating Ms. Thompson suggested that they have sex but indicated that it would have to be quick and quiet because her father had just left to go to the store and her mother was sleeping. (Tr. p. 279, lines 2-9). Appellant testified that Ms. Thompson changed her mind about having sex after Appellant took his pants off and set his BB gun on the dresser. (Tr. p. 279, line 11 – p. 280, lines 1-6). Appellant admitted that he was frustrated that she changed her mind and demanded the money he was owed. (Tr. p. 280, line 7 – p. 281, lines 1-13). When Ms. Thompson told Appellant she was going to call the police, he left. (Tr. p. 281, lines 14-24).

Ms. Thompson identified Appellant from a photo line-up. (Tr. p. 152, line 9 – p. 153, lines 1-22). Investigator Jennifer Snider with the Beaufort County Sheriff's office showed the

photo line-up to Ms. Thompson. (Tr. p. 165, line 16 – p. 166, 167, lines 1-8). The following questioning took place on direct examination:

Q: Okay. Was she able to pick someone out?

A: Yes, she picked out number three and identified that as Mr. Bradley.

Q: Okay. Law Enforcement identified that as Mr. Bradley?

A: Yes. I was familiar with Mr. Bradley, so I knew that that was Mr. Bradley.

(Tr. p. 167, lines 9-15). Appellant immediately objected, an off the record discussion was held and the judge stated that he would place his ruling on the record at the appropriate time. (Tr. p. 167, lines 16-20).

Outside of the presence of the jury, Appellant moved for a mistrial based on the investigator's comment that she was familiar with Appellant. (Tr. p. 170, lines 8-16). Counsel for Appellant argued, "Your Honor, I would make a motion for a mistrial introducing the possibility, because this is a law enforcement officer, into the minds of the jurors that this law enforcement officer is somehow familiar with Mr. Bradley through her profession as a law enforcement officer, which would cast him in a light that is terribly unfavorable, prejudicial, can't be cured by some instruction to the jury, and we would move for a mistrial." (Tr. p. 170, lines 8-16). The judge denied the motion stating:

> Thank you. Ms. Campbell, I understand your motion, and your motion for mistrial is respectfully denied. The witness said, Ms. Snider, that she was familiar with him. She didn't say from her duties of law enforcement. Obviously she could have known him from all sorts of circumstances, other than that. I don't think that it gave grounds from that testimony for a mistrial.
>
> You promptly made an objection. It was not a statement solicited by the State in their question, it was volunteered. And I don't think it rises to the level of legal prejudice necessary to declare a mistrial in this case. Therefore, your motion is respectfully denied.

(Tr. p. 170, line 17 – p. 171, lines 1-5). The trial judge erred.

In State v. Washington, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1992), the South Carolina Supreme Court wrote:

> The granting of a mistrial is a matter within the sound discretion of the trial judge, and his decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Lake, 257 S.C. 407, 186 S.E.2d 256 (1972). We find that the witness' answer in each instance was responsive to counsel's queries. Appellant may not now be heard to complain of the admission of evidence elicited by his own counsel. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Goodwin, 250 S.C. 403, 158 S.E.2d 195 (1967). We affirm the ruling of the trial court on this issue.

In Washington, during questioning by defense counsel, the witness referred to a prior booking report of the defendant. In contrast in the present case, during questioning by the prosecutor, the investigator either volunteered that she was familiar with Appellant, as found by the trial judge (Tr. p. 169, lines 20-25), or the answer was solicited by the prosecutor when she asked, "Law enforcement identified that as Mr. Bradley?" (Tr. p. 167, lines 12-13).

The investigator's testimony that she was familiar with Appellant improperly implied to the jury that Appellant had been involved in prior criminal acts. This was improper in the same way it is improper to admit a mug shot of a defendant unless the State can make three specific showings. In State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004), the South Carolina Supreme Court wrote, "The introduction of a "mug-shot" of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication. State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986); State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980); State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977)." In the present case the State did not need the investigator's testimony that she was familiar with Appellant to properly introduce the photo

line-up. The testimony suggests that Appellant has a criminal record. While the State questioned Appellant about a petit larceny when he was thirteen, (Tr. p. 285, line 25 – p. 286, lines 1-15), the investigator's testimony that she was familiar with Appellant indicated a more serious prior record. Contrary to the trial judge's finding, it is unclear under what circumstances an investigator with the Beaufort County Sheriff's office would be familiar with Appellant.

In Traylor the Court found that admission of mug shots was error but found the error harmless because the mug shot was taken upon the arrest for the offense for which the defendant stood trial. The Court strongly admonished the State against the use of mugshots and wrote, "Further, we fervently caution trial court judges against utilization of mug shot photos unless absolutely necessary. Under the precise facts of this case, however, we find the suggestive procedure did not irreparably taint the victims' identifications, and admission of the mug shot photo was not prejudicial to Traylor." State v. Traylor, 360 S.C. 74, 85, 600 S.E.2d 523, 528 (2004). The error in the present case is not harmless and requires reversal.

A mug shot was not used in the identification process in the present case. Instead, an investigator testified that she was familiar with Appellant, indicating that Appellant had a prior criminal record, more than just a petit larceny when he was thirteen years old. For the same reasons that a mug shot of a defendant should not be admitted, an investigator should not be permitted to testify that she is familiar with the defendant. Both improperly imply that the defendant has a prior criminal record. The trial judge erred in allowing the investigator to testify that she was familiar with Appellant. Appellant was prejudiced by the improper testimony. The trial judge abused his discretion in refusing to grant a mistrial.

2. **The trial judge erred in refusing to declare a mistrial after he instructed the jury that, "I have now charged you with the law in order to help guide you to a just result in this case."**

At the close of the trial judge's charge he told the jury:

> Now, ladies and gentlemen, your verdict must be unanimous. That is, it must be the verdict of each and every one of you. All 12 of you must agree on a verdict. **I have now charged you on the law in order to guide you to a just result in this case.** I remind you that you are the judges of the facts in this case based on the evidence. And based on your determination of the facts in this case and the law as I have explained it to you, you are soon going to begin your deliberations.

(Tr. p. 355, line 22 – p. 356, lines 1-5)(emphasis added). Appellant objected citing State v. Beaty, 423 S.C. 26, 813 S.E.2d 502, (2018), and arguing that the language lessened the State's burden or proof. (Tr. p. 360, lines 14-22). The judge then ruled:

> At the end of my instruction I say, I charged you on the law in order to help guide you to a fair and just result. To use the term synonymously in the case. And then I tell them that you are the judges of the facts in this case. And based on your determination of the facts and the law as I have instructed you, you will soon begin your deliberations. That is what I charged, and you are correct that I said it that way. I do not think that that constitutes error, but your exception is noted for the record.

(Tr. p. 362, lines 10-19). Appellant then moved for a mistrial. (Tr. p. 362, lines 21-25). Appellant argued that no curative instruction could cure the error. (Tr. p. 363, line 7 – p. 364, lines 1-5). The trial judge denied the mistrial motion. (Tr. p. 364, lines 6-7). The trial judge erred in refusing to grant a mistrial.

In State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018), the South Carolina Supreme Court wrote:

> However, we agree with Appellant that a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes

> best serves its perception of justice. "We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt.

(n.#2 omitted) *cf.* State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict that is just and fair to all parties). In Beaty the Court found error in the Judge's preliminary comments to the jury that a trial is a search for the truth as well as comments about "find true facts" and a "true and "just verdict." The Court, however, found the error did not warrant reversal because the comments were made during preliminary statements to the jury rather than during the charge and were not linked to either the reasonable doubt or circumstantial evidence charge as discussed in State v. Aleksey, 343 S.C. 20, 26 538 S.E.2d 248, 251 (2000), with regard to the "seek the truth" language. In contrast, the challenge in the present case is not to "seek the truth language" and is not to a preliminary statement to the jury. The challenge in the present case is to the judge's instruction during the charge on the law that, "I have now charged you on the law in order to guide you to a just result in this case." (Tr. p. 355, lines 24-25). The instruction was not specifically in reference to reasonable doubt or circumstantial evidence but was at the end of the full charge and applied to all of the law given in the charge, including reasonable doubt and circumstantial evidecne. The instruction in the present case warrants and requires reversal.

In State v. Daniels, 401 S.C. 251, 257, 737 S.E.2d 473, 476 (2012), the judge instructed the jury, "Your verdict in this case is not to be based on sympathy, compassion, prejudice or some other emotion or other consideration that is not found in the evidence. This court is of the confirmed opinion that *whatever verdict you reach will represent truth and justice for all parties that are involved in this case.* (emphasis added)." The judge additionally instructed the jury, "You are not called to serve as jurors very often. And the proper performance of the duty

requires each of you to reach the hithe [sic] of freeing your mind of all improper influences. You and I are *acting for the community* and that is why we see to it that this *trial is fair and the verdict is just.*" Daniels, 401 S.C. at 257–58, 737 S.E.2d at 476.

In regard to the "fair and just" language" the Court wrote:

> Although the issue is not preserved, we instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the defendant and the State, and include the victim. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.
>
> Daniels, 401 S.C. at 256, 737 S.E.2d at 475.

In her concurring opinion former Chief Justice Toal wrote:

> As a final note, although no constitutional error occurred, the trial court's inappropriate statements in this case came close to jeopardizing the legitimacy of the trial. Judges and juries are critical actors in our judicial system. Jurors are sworn to declare the facts of the case as they are proved from the evidence placed before them. 50A C.J.S. *Juries* § 1 (2004). The very term "jury" connotes a deliberative body of persons. *Id.* A judge sits as a public officer, who presides over, conducts, and administers the law by virtue of the office, and does so cloaked in judicial authority. *Id.* Judges § 7 (2004). Judges and juries are not, as this trial judge put it, "in it together." While their functions may act as a complement to one another, it is erroneous to imply that they somehow work hand in hand, and any blurring of their roles serves as an unnecessary and improper distraction.
>
> Judicial instructions to the jury in a criminal case that "whatever verdict you reach will represent truth and justice for all parties," that "we must see to it that the trial is fair and the verdict is just" and that you and I are "in it together," may seem at first blush to be simply harmless phrases intended to put the jury at ease and portray the judge as a "regular guy." However, the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by state courts operating under the Supreme Court's guidance. It is inappropriate to jeopardize the constitutionality of a trial by instructing the jury in this way.
>
> It is critical that jurors understand the proper application of the reasonable doubt standard. That standard does not charge the jury with ensuring justice for all of

> the parties. Justice Pleicones correctly notes that this language could result in jurors substituting concepts of justice or fairness for the State's constitutional duty to prove guilt beyond a reasonable doubt. Thus, I join the Justice Pleicones's admonition to the trial court to restrict his jury instructions to matters of law, and refrain from issuing instructions which run the risk of depriving defendants of their right to a fair trial.

Daniels, 401 S.C. at 263–64, 737 S.E.2d at 479–80.

The trial judge erred in instructing the jury during the charge on the law that, "I have now charged you on the law in order to guide you to a just result in this case." The error is not harmless. The instruction deprived the Appellant of a fair trial by substituting a just result for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. The judge abused his discretion in refusing to grant a mistrial.

CONCLUSION

Based on the above arguments, this Court should reverse the convictions and sentences and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of January, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Jan 14 2021
SC Court of Appeals

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Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRYL DOUGLAS BRADLEY, JR.

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Darryl Douglas Bradley, #382519, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 14th day of January, 2021.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT