STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARKESE CHRISTOPHER WILSON,

APPELLANT

APPELLATE CASE NO. 2020-001425

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred in denying appellant's motion for a mistrial where the state elicited improper character evidence testimony and failed to present competent evidence in order to conclusively prove appellant's guilt?

STATEMENT OF THE CASE

On February 10, 2020, appellant was indicted by a Lexington County grand jury for assault and battery, first degree, burglary, first degree, armed robbery, kidnapping, safecracking, and possession of a weapon during the commission of a violent crime. R.*. Appellant was tried October 12-16, 2020, before the Honorable Eugene C. Griffith, Jr., and a jury. Tr. 1. Robert Williams, Sr., and Benjamin Stitely represented appellant. Tr. 1. Christopher Scott, deputy solicitor, and Margaret Boykin, assistant solicitor represented the state. Tr. 1.

On October 15, 2020, Judge Griffith declared a mistrial as to the offense of assault and battery, first degree. Tr. 697, l. 13-698, l. 12. The jury found appellant guilty of burglary, first degree, armed robbery, kidnapping, safecracking, and possession of a weapon during the commission of a violent crime. Tr. 698. On October 16, 2020, Judge Griffith sentenced appellant to an aggregate term of thirty-five years' imprisonment. Tr. 722.

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).

ARGUMENT

The trial court reversibly erred in denying appellant's motion for a mistrial where the state elicited improper character evidence testimony and failed to present competent evidence in order to conclusively prove appellant's guilt.

Relevant facts

On January 21, 2019, two masked men wearing all black entered the home of Kathy Samellas, demanding that she tell them where her safe was. While one man held Samellas at gunpoint, the other searched the home for the safe. The men left Samellas' home taking with them the contents of the safe, one hundred thousand dollars and jewelry worth thirty-five thousand dollars, as well as Samellas' cell phone and one of the handsets to her landline. Tr. 149, ll. 1-11; 151, ll. 13-20. Samellas complained of a head injury, and EMS checked her out, but she did not receive any further medical treatment. Tr. 150, ll. 17-23.

In April, Andre McFadden, Shyrod Wannamaker, and Brittany Whitmore, McFadden's girlfriend, were arrested for attempting a different home invasion and robbery. McFadden's phone was seized, and law enforcement conducted a search of the contents of his phone. Tr. 221, ll. 12-25; 511, 9-25. Photographs and videos discovered on McFadden's cell phone from the evening of January 21, 2019, showed McFadden, Wannamaker, and appellant holding cash and discussing a "hundred band lick."[1] Tr. 328-29. McFadden and Wannamaker initially denied involvement in the home invasion of Kathy Samellas, but both later confessed to police and implicated appellant. Tr. 376, ll. 1-13; 467, l. 18-468, l. 16.

Wannamaker and McFadden were indicted for assault and battery, first degree, burglary, first degree, armed robbery, kidnapping, safecracking, and possession of a weapon during the

1 Wannamaker explained at trial that a "band" is a thousand dollars and a "lick" is a robbery. Tr. 329, ll. 12-17.

commission of a violent crime. Whitmore was initially charged with armed robbery and burglary first degree and later pled guilty to accessory after the fact to a felony.[2] Tr. 510, l. 3; 511, ll. 10-25.

At trial, Wannamaker testified that McFadden received information from an individual who worked in Samellas' home that there was a substantial amount of cash in the closet of one of Samellas' bedrooms. Tr. 305, l. 6-306, l. 5. Wannamaker said McFadden and appellant drove from McFadden's home in St. Matthews and picked him up at his mother's home in Columbia, not far from the Samellas residence. Tr. 303, ll. 2-24. McFadden drove them to Samellas' neighborhood where Wannamaker said that he and appellant were dropped off near Samellas' house. Tr. 310, l. 1-311, l. 7.

Wannamaker alleged appellant kicked in Samellas' door and began demanding she tell them where her safe was. Wannamaker claimed his involvement was limited to holding Samellas at gunpoint while appellant found the safe and emptied the contents into a pillowcase. Wannamaker said they left the house, he called McFadden to come and get them, and they proceeded to McFadden's trailer in St. Matthews. Tr. 313-20.

While at McFadden's trailer the three men counted and divided the money between themselves before going their separate ways. Tr. 365, ll. 9-22. Wannamaker also admitted they took photographs and videos with the stolen cash. Tr. 328-29.

During his testimony, Wannamaker was asked about the subsequent attempted robbery for which he was arrested. When asked if appellant was involved, Wannamaker responded, "[n]o sir, he was in jail." Tr. 341, ll. 8-14. Defense counsel objected, and the court sent the jury

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2 Whitmore claimed at trial that she did not know anything about the Samellas robbery until later and her involvement was limited to advising McFadden to exchange some of the older large bills for newer bills at the bank. Tr. 509, l. 7-510, l. 14.

out. Defense counsel moved for a mistrial, arguing the state elicited improper character evidence testimony. Tr. 341, ll. 15-25. Defense counsel asserted it was improper for the state to put appellant's character and credibility before the jury when appellant had not testified, and the defense had not opened the door to character evidence. Tr. 341, ll. 1-9.

The solicitor responded arguing defense counsel agreed to allow State's exhibit 59, a flash drive of the data recovered from McFadden's phone, which contained pictures and videos of appellant in jail, and a text conversation about appellant having been in jail. The solicitor averred the jury was entitled to view everything on the flash drive, and therefore, defense counsel could not complain about Wannamaker's testimony. However, the solicitor agreed not to go into any more detail regarding appellant's prior arrest. Tr. 346, ll. 4-5; 19-24.

The court did not declare a mistrial but agreed Wannamaker's testimony was "not appropriate." Tr. 344, ll. 15-16; 346, ll. 7-9; 347, l. 24. The court instructed Wannamaker not to mention appellant being in jail again. Tr. 348, ll. 7-8.

The court gave the jury the following curative instruction:

> [J]ust prior to the break, there were some questions asked of Mr. Wannamaker about an incident in April, you were involved in an incident in West Columbia and West Columbia police arrested you as a result of an attempted armed robbery or some incident over there, and there was a follow-up question about where was [appellant], his answer was unresponsive to the question asked by the solicitor, so I'm gonna ask you to disregard his unresponsive answer. And I'm not gonna repeat it because then you would go I wonder why he did that. So the answer was not responsive, not relevant to you-all's decision making which you all have to do, but Mr. Wannamaker will be back on the stand.

Tr. 352, ll. 6-19.

Before Wannamaker's testimony continued the following day, the defense made a motion requesting that the flash drive containing the entire contents of McFadden's cell phone not go

back to the jury and that only the exhibits published from the flash drive be accessible to the jury during its deliberation. Tr. 354-55. The solicitor agreed, stating the flash drive was only introduced to lay a foundation for certain exhibits. Tr. 355, ll. 16-19.

McFadden testified that on the day of the incident he and his girlfriend, Brittany Whitmore, drove from St. Matthews to Columbia to go to the mall and returned to St. Matthews by four o'clock. Tr. 422-24. McFadden claimed he and appellant drove back to Columbia to pick up Wannamaker around seven o'clock. Tr. 427-28. McFadden denied Whitmore had anything to do with either the Samellas robbery or the subsequent attempted robbery. Although he admitted Whitmore worked at Wells Fargo in Cayce and coincidentally both Samellas and the other woman he attempted to rob in April banked at Wells Fargo. Tr. 459, l. 11-460, l. 6; 492-95. Whitmore claimed she knew nothing about the Samellas robbery until later and her only involvement was advising McFadden to exchange the large bills from the stolen cash. Tr. 509-10; 5112, ll. 1-12.

The state introduced cell phone evidence that showed McFadden's and Whitmore's cell phones were using cell towers near Samellas' house in Lexington County earlier on the day of the incident. The evidence showed both of their phones used cell towers in St. Matthews later that afternoon and that McFadden's phone was again using cell towers near Samellas' residence during the time of the incident. Wannamaker's cell phone used towers close to Samellas' residence during the incident. The evidence also showed Wannamaker's phone using cell towers in St. Matthews later in the evening. Appellant's phone never traveled to Lexington County that day. His phone only used cell towers in St. Matthews and in Orangeburg, where he lived at the

time of the incident.[3] Tr. 554-69; state's exhibit 53 on file with the Court.

At the conclusion of trial, the court declared a mistrial as to assault and battery when the jury could not come to a unanimous decision after being given an *Allen*[4] charge. Tr. 693-94. The jury found appellant guilty of burglary, first degree, armed robbery, kidnapping, safecracking, and possession of a weapon during the commission of a violent crime. Tr. 697-98. The court sentenced appellant the following day to concurrent terms of thirty years' imprisonment for burglary, first degree, thirty years' imprisonment for armed robbery, thirty years' imprisonment for kidnapping, thirty years' imprisonment for safecracking, and a consecutive five years' imprisonment for possession of a weapon during the commission of a violent crime. Tr. 722.

Discussion

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct.App.2009) (internal citations omitted). A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial. *Id.* "**Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence.**" *State v. White*, 371 S.C. 439, 447–48, 639 S.E.2d 160, 164 (Ct. App. 2006) (emphasis added). "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each

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3 State's exhibit 53, cell phone plot animation, on file with the Court follows the location of four cell phones each denoted by a different color. Appellant's cell phone is brown. Whitemore's cellphone is yellow. McFadden's phone is teal. Wannamaker's phone is red.

4 *Allen v. United States*, 164 U.S. 492 (1896).

case." *Id.* at 447, 639 S.E.2d at 164.

In *State v. Harris*, the Court held that the state's eliciting improper character testimony from a witness did not warrant a mistrial where the state asked a defense witness whether Harris had ever hit him in Harris's trial on the charge of murder and assault and battery with intent to kill. *Harris*, 382 S.C. at 11, 674 S.E.2d at 538. In that case, the Court found that the court's instruction to the jury to disregard the question cured any alleged error. *Id.* at 119-20, 647 S.E.2d at 538.

While this case has one similarity to *Harris*, that the error was improper character testimony, it is distinguishable. As the Court noted, the witness in *Harris* never answered the question posed by the state. Here, Wannamaker blurted out that appellant was in jail at the time that he and McFadden were attempting to rob another woman mere months after the Samellas robbery. Additionally, Harris put up a defense, and the improper character evidence testimony was elicited from a defense witness. In this case, the improper character evidence was elicited from the state's own witness, and appellant did not testify or put up a defense.

In *State v. Wilson*, the Court held the trial court's error in admitting evidence of a prior incident of domestic violence between Wilson and the victim did not prejudice Wilson. 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010). In that case, the Court was unable to find any prejudice in the limited record before it. In this case, the record shows the state's case against appellant relied solely on the testimonies of Wannamaker and McFadden, who testified against appellant likely in an effort to receive some future benefit as neither had been tried at the time of appellant's trial.

Here, the admission of improper character evidence through the state's witness, where appellant's guilt was not conclusively proven by competent evidence, was error and was not

cured by the court's instruction to the jury. *See White*, 371 S.C. at 447-48, 639 S.E.2d at 164. In this case, the state's best evidence was the unreliable testimonies of Wannamaker and McFadden. There was no physical evidence found at the scene tying appellant to the scene, and significantly, cell phone evidence showed his phone was far from Lexington at the time when the incident occurred.

Appellant was prejudiced by the improper character evidence put before the jury. Though both Wannamaker and McFadden denied it at trial, it is coincidental that the targets of this incident and the April incident were both women who banked at Wells Fargo, where McFadden's girlfriend Brittany Whitmore worked. Tr. 199; 494. Wannamaker and McFadden admitted to police that they participated in the Samellas robbery, and the cell phone evidence corroborated their admissions of guilt. Appellant unfortunately made the ill-advised decision to celebrate with Wannamaker and McFadden when they returned from robbing Samellas, and then he also discussed their celebration in text messages in the days after the incident. The state produced no other evidence of appellant's guilt at trial. The trial court's error in denying appellant's motion for a mistrial after the jury learned that appellant was in jail was an error that "adversely affect[ed] [appellant's] right to a fair trial, and this Court should reverse. *See White*, 371 S.C. at 448, 639 S.E.2d at 164 (2006).

CONCLUSION

By reason of the foregoing argument, appellant requests this Court reverse his convictions and remand his case for a new trial.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of June, 2021.

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THE STATE,

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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), this 18th day of June, 2021; and on Markese Christopher Wilson, #384170, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 18th day of June, 2021.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT