STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions
The Honorable Perry M. Buckner, III, Circuit Court Judge

Appellate Case No. 2020-000524

THE STATE,

Respondent,

v.

DARRYL DOUGLAS BRADLEY, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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A mistrial should be declared only if "absolutely necessary" to achieve a fair trial. A police officer volunteered testimony that she was "familiar with" Bradley but did not indicate she knew Bradley in a law enforcement capacity, or that Bradley had a criminal record. Did the trial court abuse its discretion by refusing to declare a mistrial?

II.

An ambiguous jury instruction warrants reversal only when there is a reasonable probability that the jury applied the challenged instruction in a way that violates the constitution. The trial court's passing comment that he charged the law to "help [the jury] reach a just result" was made after repeated, thorough instructions correctly explaining the State's burden of proof beyond a reasonable doubt. Does the charge require reversal?

STATEMENT OF THE CASE

A Beaufort County grand jury indicted Darryl Bradley for first degree burglary, possession of a weapon during the commission of a violent crime, attempted armed robbery, kidnapping, and first degree criminal sexual conduct. Bradley proceeded to jury trial before the Honorable Perry M. Buckner, III, on February 18–20, 2020. He was convicted of attempted armed robbery and the weapon charge. The jury could not reach a verdict on the remaining charges and a mistrial was declared as to each of those indictments. He was sentenced to twenty years' incarceration on the attempted armed robbery charge and five years on the weapon charge, with the sentences to be served consecutively. This direct appeal follows.

FACTS

Alfreda Thompson lived at 10 Club Bridge Road on St. Helena Island near Beaufort. She lived there with her elderly parents so that she could help care for her mother, who had dementia. (R.94-95). At the time of trial, Thompson was 65 years old and suffering from Parkinson's disease. (R.p.95).

On April 18, 2017, Thompson was at home when Bradley showed up at her door offering to do lawn work. (R.p.96). When Thompson declined, Bradley pushed his way past the screen door into the home. He pointed a handgun at her head and "grabbed [her] and pulled [her] to the back of the house and raped [her]." (R.p.96).

Thompson explained that Bradley attempted to vaginally penetrate her but his penis didn't go "all the way in." (R.p.103). After assaulting Thompson, Bradley "dragged [Thompson] through the house again saying that he wanted money." (R.p.103). Bradley looked through her father's papers and drawers where he kept insulin. (R.p.104). Thompson told Bradley she did not have any money and Bradley "got frustrated and he ran through the door." (R.p.103). Thompson then called her sister, who lived nearby. (R.p.105).

Thompson's sister called 911 and gave Thompson a ride to the hospital. At the hospital, a rape kit was performed to collect biological evidence and assess Ms. Thompson's injuries. (R.p.80, 151). The nurse found Ms. Thompson had no "bleeding or bruising," or injuries of that nature. (R.p.156). Based on Thompson's statements, the nurse noted there had been "penile contact, anal attempted." (R.p.157). Thompson did not complain of pain or physical injury. (R.p.157).

Thompson gave police a description of the man who raped her. (R.p.105). Police interviewed neighbors, asking if they were familiar with a "younger black male in his 20s, thin build," who solicited employment for lawn services in the neighborhood. (R.p.139-40, 161). Darryl Bradley's name "kept coming up." (R.p.162). As a result of those interviews, police placed Bradley's photograph in a six-person lineup and showed the lineup to Thompson's father. (R.p.140). He identified Bradley as a person who had done lawn work for him in the past. (R.p.141, 128, 351). Police showed Thompson the same lineup and she identified Bradley as the person who raped her. (R.p.141, 107, 352-53). She also identified Bradley in court. (R.p.107-08).

Police collected the skirt and underwear Thompson was wearing when she was raped, along with other items from the scene. (R.p.88, 144). A SLED scientist tested the items, along with the rape kit. He found Bradley's DNA in a semen stain on Thompson's skirt. (R.p.208-11). He explained the match to Bradley "was 39 nonillion[1] times more likely than an unrelated individual." (R.p.211). He did not find male DNA in Thompson's vaginal or rectal swabs. (R.p.205-06). He concluded there may have been semen on the underwear, found the presence of male DNA, but did not recover enough DNA to make a profile. (R.p.208).

When police arrested Bradley at a house on St. Helena Island, he surrendered a black handgun from underneath the couch in the living room. (R.p.165, 349-50). Bradley requested counsel and did not give a statement to police.

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[1] A "nonillion" is equal to a number one followed by thirty zeroes. (R.p.214).

Police obtained a blood sample from Bradley to be used in their DNA analysis. (R.p.143). The State introduced a jail call Bradley made to his sister wherein he implicates himself in the robbery and burglary charges, but denies raping Ms. Thompson. (State's Exhibit #20; R.p.273).

Bradley testified in his defense. He admitted he did yard work for Thompson's father and claimed Thompson's father invited him in several times for food and drink. (R.p.227). Bradley claimed he "decided to go see Alfreda Thompson because she gave [him] a call and told [him] to come pick up the rest of the cash that she owe [him] for sweeping off her drive-through." (R.p.231). He testified he walked there and the door was open, but the screen door was closed. He claimed Thompson was excited to see him and invited him inside and gave him something to eat and drink while she checked on her mother. (R.p.231). He claimed Thompson then asked to have sex with him. He testified they also had sex on a previous occasion. (R.p.232). He admitted he had a gun with him, but claimed he brought it to protect himself in case Thompson's father caught them having sex. (R.p.232, 240). Bradley claimed Thompson led him to the back bedroom (her father's bedroom, not her own), where he set his gun down on the dresser. He testified he began "ejaculating" in order to get an erection. (R.p.232). He claims Thompson then changed her mind about having sex and told him to leave. He demanded money from her, but she refused. He then told her "in a demanding tone" to give him his money. (R.p.233). Thompson "started to pray" and begged him not to shoot her when he picked up his gun from the dresser. He admitted he looked through

her father's possessions for money. (R.p.234). He claimed Thompson threatened to call the police and he ran "all the way home." (R.p.234). Bradley then told a detailed story about having sex with Ms. Thompson on a prior occasion. (R.p.236-37). He explained he was not guilty of burglary because he had consent to enter the home. (R.p.246).

ARGUMENT

I. The trial court did not abuse its discretion by refusing to declare a mistrial based on a police officer's comment that she was "familiar with" Bradley.

Bradley argues the trial court erred by refusing to declare a mistrial based on a police officer's testimony that she was "familiar with" Bradley when she conducted the identification procedure with Thompson. He has not shown an abuse of discretion. The comment did not suggest Bradley had a criminal record and Bradley suffered no prejudice because the comment was too vague to be prejudicial when viewed in relation to the other evidence at trial. This Court should affirm.

A. 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. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010). The appellant has the burden of showing prejudice from the denial of a mistrial. Id. The Supreme Court has stated that it "favors the exercise of the wide discretion of the circuit judge in determining the merits of [a mistrial] motion in each individual case." State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

B. Discussion.

The trial court did not abuse its discretion by refusing to declare a mistrial. The officer's comment that she was "familiar with" Bradley did not suggest he had a criminal record, and any prejudicial effect from the officer's comment fell far short

of the "manifest necessity" required for mistrial. Under the applicable deferential standard of review, this Court should affirm.

The objection arose during the testimony of Jennifer Snider, the officer who conducted the identification procedure with Ms. Thompson. When the solicitor asked whether Thompson was able to "pick someone out" from the six-person photo lineup, Snider responded that Thompson "picked out number three and **identified that as Mr. Bradley**." (R.p.120). As discussed above, Ms. Thompson had already testified that she did not know Bradley and identified him anonymously from a six-person lineup. The solicitor attempted to clarify: "Okay. Law enforcement identified that as Mr. Bradley?" (R.p.120, lines 12–13). Snider failed to understand the question and responded, "I was familiar with Mr. Bradley, so I knew that was Mr. Bradley." (R.p.120, lines 14–15).

Bradley objected that Snider's comment was unfairly prejudicial and argued the prejudice could not be cured by a curative instruction. (R.p.120-23). In denying Bradley's motion for mistrial, the court explained that the officer said she was familiar with Bradley, but "didn't say from her duties of law enforcement. Obviously she could have known him from all sorts of circumstances, other than that." (R.p.123). The court also noted that the solicitor did not elicit the testimony, but that it was volunteered by the officer. (R.p.124). The court concluded: "I don't think that it rises to the level of legal prejudice necessary to declare a mistrial in this case." (R.p.124).

The trial court did not abuse its discretion by denying the motion for mistrial. 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. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203–04 (Ct. App. 2010). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Id.

There was no "manifest necessity" for a mistrial in this case. As the trial court noted, the officer's comment did not suggest she knew Bradley through prior crimes, or even in her capacity as a law enforcement officer. The court correctly observed she could have known him through "all sorts of circumstances." See State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (explaining trial court did not abuse its discretion in denying mistrial where an "inadvertent vague reference" to defendant's prior record was "too vague to be prejudicial"); State v. Wiley, 387 S.C. 490, 496, 692 S.E.2d 560, 563 (Ct. App. 2010) (affirming denial of mistrial and noting prosecutor's comment regarding an unrelated outstanding arrest warrant "was merely a vague reference to his prior criminal record that did not justify granting his motion for mistrial").

The comment did not suggest Bradley had a criminal record. Unlike cases involving fingerprint cards or mugshot pictures depicting the defendant in a state of

arrest or incarceration, the comment did not convey that Bradley had been arrested or served a prison sentence. Cf. State v. Lawson, 424 S.C. 51, 54, 817 S.E.2d 509, 510 (Ct. App. 2018) (explaining fingerprint evidence from state database showing defendant's fingerprints were collected in July 2003 at the "Department of Corrections, Kirkland Correctional Institute" improperly indicated he had previously served a prison sentence).

Any prejudice from the comment was minimal. See State v. Moultrie, 316 S.C. 547, 556, 451 S.E.2d 34, 40 (Ct. App. 1994) (affirming denial of mistrial based on officer's "casual statement that he knew Moultrie 'by sight and name'"); State v. Hurell, 424 S.C. 341, 358, 818 S.E.2d 21, 29 (Ct. App. 2018) (finding no abuse of discretion in denial of mistrial and no prejudice from "inadvertent" testimony that defendant "had been in prison as the result of a prior conviction"); State v. Manning, 400 S.C. 257, 270, 734 S.E.2d 314, 320 (Ct. App. 2012) (affirming denial of mistrial based on a "single reference" to a severed drug charge because there was not "sufficient prejudice").

Even if a juror could have inferred from the comment that Bradley had been in trouble with the law before, the State impeached Bradley during cross-examination with a prior conviction for petty larceny. (R.p.238-39). Any juror that assumed based on the officer's comment that Bradley had been convicted of a crime likely assumed it was this larceny. There is no basis for Bradley's argument that the officer's comment "indicated a more serious prior record." Brief of Appellant at 7.

Just as likely was an inference that the officer was "familiar with" Bradley through investigation of the charges for which he was being tried. See State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) (holding "single reference" that defendant had outstanding warrants when arrested "did not constitute sufficient prejudice to justify a mistrial" because "it would be reasonable to assume the jury inferred that the warrants related to the charged offenses"); State v. Robinson, 274 S.C. 198, 201, 262 S.E.2d 729, 730 (1980) (explaining the "jury could just have easily inferred that the [booking] photograph was the result of the investigation of the [charged offense]," as opposed to a prior crime).

The solicitor did not elicit the officer's comment, did not make any comments to highlight the remark, and did not attempt to show Bradley had prior convictions. See State v. Robinson, 238 S.C. 140, 151, 119 S.E.2d 671, 676 (1961) (finding no prejudice in witness's volunteered testimony that defendant was "on the way to the probation office" and noting the State "did not attempt to prove that the appellant had been convicted of some other crime"); State v. George, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996) (affirming denial of mistrial motion based on question whether defendant was "involved in the drug business" and noting "Appellant's possible drug dealing was merely suggested and no testimony was presented concerning such behavior"); State v. Martucci, 380 S.C. 232, 260, 669 S.E.2d 598, 613 (Ct. App. 2008) (affirming denial of mistrial and noting the "State did not attempt to introduce evidence of any prior convictions or otherwise highlight his character in this regard").

Finally, this court owes great deference to the trial court's finding that the comment was not sufficiently prejudicial to warrant a mistrial. The appellate court is "obligated to give *great deference* to the trial court's judgment" regarding the prejudicial effect of evidence. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (emphasis added). The Supreme Court favors "wide discretion of the circuit judge" in ruling on mistrial motions. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). This Court should show appropriate deference to the trial court in this case.

The officer's isolated comment that she was "familiar with" Bradley did not suggest he had a prior criminal record. Any prejudice was minimal and did not justify the "last resort" of a mistrial. Under the applicable deferential standard of review, this Court should affirm.

II. The trial court's jury instruction was a correct statement of law and Bradley was not prejudiced by the court's statement that he charged the law "in order to help guide [the jury] to a just result in this case."

Next, Bradley argues the trial court erred in his jury charge when he used the phrase "just result." The court's jury charge was a correct statement of law. The trial court's passing use of the phrase "just result" did not unconstitutionally reduce the State's burden of proof and did not reasonably affect the result of trial. This Court should affirm.

A. Standard of review.

A jury charge which is substantially correct and covers the law does not require reversal. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. Id.

B. Discussion.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970). Our Supreme Court has cautioned trial courts against including language in jury instructions that may

have the effect of lessening the State's burden of proof. The Court has discouraged instructions which urge the jury to "seek the truth," State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000), or "return to verdict that is 'just' or 'fair' to all parties." State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012). However, the Court has not reversed convictions in any of those cases.

In affirming each case cited in Bradley's brief, the Supreme Court has made clear that context matters. In Aleksey, the Court emphasized that the trial court's charge that the jury should "seek the truth" occurred during his instructions regarding witness credibility. It noted the charge was "prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof." State v. Aleksey, 343 S.C. 20, 29, 538 S.E.2d 248, 253 (2000). It concluded there was "not a reasonable likelihood the jury applied the judge's instructions to convict appellant on less than proof beyond a reasonable doubt." Id.

Likewise, in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), the Court considered a challenge to a trial judge's comments that a trial is "a search for the truth," that the jury took an oath to "reach a fair and just verdict," and to find the "true facts." The Court agreed that the 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." Beaty, 423 S.C. at 34, 813 S.E.2d at 506. However, as in Aleksey, the Court did not reverse. It explained: "our review of the entirety of the judge's opening comments

and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal." Beaty, 423 S.C. at 34, 813 S.E.2d at 506. Again, the Court emphasized that the comments "were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in Aleksey." Beaty, 423 S.C. at 34, 813 S.E.2d at 506. See also State v. Patterson, 425 S.C. 500, 511, 823 S.E.2d 217, 224 (Ct. App. 2019), reh'g denied (Feb. 21, 2019), cert. denied (June 28, 2019) (finding trial court's remarks that the jury should "search for the truth" did not warrant reversal); State v. Needs, 333 S.C. 134, 154, 508 S.E.2d 857, 867 (1998) (affirming conviction despite trial court's erroneous instruction for "jurors to seek a reasonable explanation other than the guilt of the accused" because other portions of the charge correctly emphasized the State's burden of proof beyond a reasonable doubt); State v. Pradubsri, 420 S.C. 629, 641, 803 S.E.2d 724, 730 (Ct. App. 2017) (affirming conviction despite use of phrase "search of the truth" during reasonable doubt instruction because "review of the record and the entire charge reveals no prejudice sufficient to warrant reversal"), .

As in the above-cited cases, the trial court in this case gave a full and correct instruction on the State's burden of proof beyond a reasonable doubt. The court instructed the jury that Bradley's plea of not guilty "puts the burden on the State of South Carolina to prove the Defendant guilty beyond a reasonable doubt." (R.p.281, lines 12–15). It continued:

> A person charged with committing a criminal offense in South Carolina is never required to prove himself or herself innocent. I charge you . . . that it is an important rule of law that the Defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be

> presumed to be innocent of the crime for which the indictment or indictments were issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.
>
> This presumption of innocence does not end when you begin your deliberations, but it accompanies the Defendant throughout the trial until you . . . reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. The presumption of innocence is not just a legal theory. It is a substantial right to which every Defendant is entitled unless you, the jury, are satisfied from the evidence of the Defendant's guilt beyond a reasonable doubt.

(R.p.281-82).

The court reiterated the State's burden of proof throughout its various instructions. For example, after instructing the jury about its role in determining the reliability of Thompson's identification, the court charged that the identification, like Bradley's guilt in general, must be proved by the State beyond a reasonable doubt. (R.p.290, lines 12–13; see also p.286, lines 15–22; p.289, lines 9–10). The court then repeated his reasonable doubt instruction yet again: "Once again, I instruct you that the burden of proof is on the State and it extends to every element of the charged crime." (R.p.291). When the court went on to define each of the charged offenses, it repeatedly instructed the jury that they must find the State met its burden of proof beyond a reasonable doubt for each element of each offense. (R.p.293-303). The court's "just result" comments were made in passing, after it concluded a thorough charge on the law and was explaining the verdict form to jurors with instructions for their deliberations. (R.p.308). Given the court's thorough and repetitive instruction on the State's burden of proof beyond a reasonable doubt, there is no chance the jury reached the opposite conclusion from

the single passing comment of which Bradley complains. See Aleksey, 343 S.C. at 29, 538 S.E.2d at 253.

Finally, the jury's verdict shows it gave Bradley the benefit of the doubt in this case and held the State firmly to its burden of proof. The jury convicted Bradley of attempted armed robbery, but was not able to reach a verdict on the CSC, kidnapping, and burglary charges, despite an extremely strong case for the State consisting of compelling DNA evidence and a strong witness identification. Surely, this jury did not reduce the State's burden of proof.

The State's evidence was overwhelming as to the armed robbery charge. Facing irrefutable evidence proving he was the person that raped Ms. Thompson, Bradley had no choice but to come up with a story that fit the evidence. It is possible that one or more jurors believed Bradley's ridiculous story claiming his rape of Thompson was consensual. On the other hand, one or more jurors may have refused to convict Bradley of the rape because Ms. Thompson testified his penis didn't go "all the way in." (R.p.103). Likewise, one or more jurors must have given Bradley the benefit of the doubt that his entry into the home was consensual, despite Thompson's testimony to the contrary. (R.p.96, 246). However, even the most skeptical juror was convinced of Bradley's guilt of attempted armed robbery. His guilt of that crime must have been truly overwhelming to compel this recalcitrant juror or jurors to convict. See State v. Reyes, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (explaining error is harmless where a "defendant's guilt has been conclusively proven ... such that no other rational conclusion can be reached").

The trial court's jury instructions correctly explained the law. There is no danger that the court's passing comment that it charged the law "in order to help guide [the jury] to a just verdict in this case" reduced the State's burden of proof, and it did not reasonably affect the result of trial. Like each previous court to consider a challenge of this nature, this Court should affirm.

CONCLUSION

For all the foregoing reasons, the State respectfully asks that this Court affirm Bradley's conviction and sentence.

Respectfully submitted,

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July 12, 2021

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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

The undersigned certifies that this Final Brief of Respondent 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."

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