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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2020-001425

THE STATE, Respondent,

v.

MARKESE CHRISTOPHER WILSON, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SAMUEL R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

205 East Main Street
Lexington, SC 29072
(803)-785-8352

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUE ON APPEAL

Did the trial judge properly refuse to declare a mistrial when Appellant did not preserve the issue for appeal because he expressly consented to the trial judge's curative instruction? And even if preserved, did the trial judge's curative instruction cure any possible error? Finally, was Appellant prejudiced by a single reference to Appellant's incarceration when the evidence presented against Appellant at trial was overwhelming?

STATEMENT OF THE CASE

In February 2020, the Lexington County Grand Jury indicted Appellant for one count of first degree burglary, one count of armed robbery, one count of kidnapping, one count of possession of a weapon during the commission of a violent crime, one count of safecracking, and one count of first degree assault and battery. On October 12-16, 2020, a jury trial was held in the Lexington County Court of General Sessions with the Honorable Eugene C. Griffith presiding. Appellant was represented by Robert T. Williams, Esq. The State was represented by Assistant Solicitors Margaret Boykin and Dale Scott of the Eighth[1] Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of every offense except for first degree assault and battery. The jury could not reach a verdict on first degree assault and battery and a mistrial was declared. (R. 596-97). The trial judge sentenced Appellant to thirty years' imprisonment for first degree burglary, armed robbery, kidnapping and safecracking. Each of those sentences were to run concurrently with each other. Appellant was sentenced to five years' imprisonment for possession of a weapon during the commission of a violent crime. That sentence was to run consecutively to the thirty year sentences. Therefore, Appellant was sentenced to an aggregate total of thirty-five years' imprisonment. Appellant timely filed a notice of appeal and an initial brief.

[1] The Eighth Circuit Solicitor's Office was assisting the Eleventh Circuit Solicitor's Office because Victim was closely related to an employee of the Eleventh Circuit Solicitor's Office.

STATEMENT OF FACTS

In the early evening hours of January 21, 2019, deputies with the Lexington County Sheriff's Department arrived at a residence in the Quail Valley neighborhood to investigate a reported home invasion. (R. 31-32). After nightfall[2], Kathy Samellas[3] (Victim) reported that two black male individuals with guns entered her home and demanded to know where her safe was. (R. 33, 38). The two assailants were wearing all black clothes with black and white masks and white gloves. (R. 48, 88). The two men struck Victim in the head with a gun and threatened to kill her if she did not comply with their demands. (R. 48, 89). When law enforcement arrived, Victim's safe was cracked open and mostly empty. (R. 37-38). Prior to the burglary, Victim had approximately $100,000 in cash and $35,000 worth of jewelry in the safe. (R. 85-86). Victim was examined by EMS personnel but ultimately sustained only a minor injury to the back of her head. (R. 49). Victim's backdoor was forcefully opened by the assailants. (R. 57-58).

On April 25, 2019, law enforcement obtained the cell phone of Andre McFadden after he and Shyrod Wannamaker were arrested in West Columbia for an attempted armed robbery. (R. 111, 120). Sergeant Anthony Creech obtained a search warrant for McFadden's phone and then extracted data from the cell phone via Cellebrite physical analyzer software. (R. 111). Creech located a video on McFadden's phone taken on January 21, 2019, which appeared to show McFadden and two other black males standing around a table with a large quantity of cash on top. One individual in the video was bragging about completing a "hundred grand lick[4]." (R. 123-24, State's Exhibit #54). A screen shot from the video was entered into evidence. (R. 131, State's Exhibit #47). Creech also located multiple photographs on the phone of three black males

[2] Victim called 911 at 6:51 PM. (R. 157).
[3] Victim passed away shortly before Appellant's trial. (R. 15).
[4] McFadden and Wannamaker identified that McFadden said "one hundred band lick" in the video and that it referred to robbing someone for $100,000. (R. 228, 318, 349).

holding large amounts of cash. (R. 124-25, State's Exhibit #37 and #38). The data on the phone revealed the photographs were taken at 8:16 PM on January 21st. (R. 125, State's Exhibit #37 and #38). Creech identified the individuals in the photo as Appellant, Wannamaker, and McFadden[5]. An additional photo of Appellant holding a large quantity of cash was found on the phone. (R. 344, State's Exhibit #36). Creech's data analysis revealed the photo was taken at 7:33 PM on January 21, 2019. (R. 126, State's Exhibit #36). A photo from a FaceTime chat between Appellant and McFadden was also located on the phone and determined to originate at 10:48 PM on January 21, 2019. (R. 127-28, 345, State's Exhibit #33). Finally, text messages between McFadden, Wannamaker, Appellant, and Maurice White[6] were located on McFadden's phone. (R. 622-29).

After downloading the contents of McFadden's phone, law enforcement arrested McFadden and Wannamaker. Wannamaker and McFadden each spoke to law enforcement as well as McFadden's girlfriend, Brittany Whitmore. (R. 175-76, 314). After speaking with the aforementioned individuals, law enforcement obtained arrest warrants for Appellant. (R. 177). Appellant was arrested in December 2019 at his grandparent's house in Calhoun County. (R. 499-500).

Both Wannamaker and McFadden testified against Appellant at trial. According to Wannamaker, McFadden and Appellant picked him up at his mother's house in Irmo on January 21, 2019 in McFadden's grey colored Infiniti Q3. (R. 203). The trio drove to a nearby Target parking lot. (R. 203). Each of the three men was armed with a handgun. (R. 206-07).

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[5] At trial, McFadden identified the three individuals in State's Exhibit #37 and #38. The person on the left was Appellant, the person in the middle was McFadden, and the person on the right was Wannamaker. (R. 341, 343-44).

[6] Maurice White was not charged with any offenses related to this incident.

Wannamaker testified McFadden[7] told them about a nearby house with a large amount of money inside. (R. 204-05). According to Wannamaker, the original plan was for McFadden and Appellant to enter Victim's home. However, the plan changed when a passerby pulled behind the three men's vehicle. As a result, McFadden stayed behind the wheel while Wannamaker and Appellant exited the vehicle and proceeded to Victim's home. (R. 207-10).

Wannamaker and Appellant jumped over the fence in Victim's backyard and saw Victim through a window. (R. 210-11). The two men were not expecting anyone to be home, and Wannamaker suggested they abandon their plan. However, Appellant insisted on going forward (R. 211-12). Wannamaker testified Appellant kicked in the back door and demanded to know where the safe was located. (R. 212). Victim declined to tell Appellant where the safe was so Appellant began to search for it. (R. 214-15). Appellant found the safe and forced Victim to obtain a key to unlock the safe. (R. 215). After Victim opened the safe, Appellant dumped its contents into a pillowcase. After taking the contents of the safe, the two men took Victim's house phone and cell phone and smashed them to prevent her from calling the police. (R. 218-19). While Wannamaker and Appellant were inside Victim's home, McFadden circled the neighborhood in his car. (R. 336). McFadden received a call from Wannamaker requesting to be picked up. (R. 336-37). McFadden witnessed Appellant running with a pillowcase along with Wannamaker. (R. 337-38). Appellant got in the backseat of the car while Wannamaker sat in the passenger seat. (R. 337-38).

The three men drove from Irmo to McFadden's residence at 80 Sweetshrub Lane in St. Matthews. (R. 220, 338). When they arrived at McFadden's trailer, McFadden witnessed Appellant go to his car and retrieve his phone. (R. 339). As soon as the three men entered

[7] McFadden heard about the money from an individual known only as D.K. D.K. heard of the money from a maid that cleaned Victim's home. (R. 204-05).

McFadden's home, Appellant dumped a large quantity of cash out of the pillowcase onto a table. (R. 221-22). Wannamaker and McFadden later referred to this moment in a series of text messages on February 20, 2019. (R. 226-27, 628). Wannamaker texted McFadden the following message "All dat shit falling out dat bag when Kese[8] flip it was a movie." (R. 628). On January 23rd, Appellant sent a text message to Wannamaker and McFadden that said "Shut feel good to know y'all got it sutnmd. Wit me.*"(sic)(R. 625). Wannamaker understood Appellant's text message as a reference to stealing Victim's money. (R. 237). After Wannamaker and McFadden attempted to rob another woman in April 2019, Wannamaker texted McFadden the following message: "lol just push her out the damn way grab the pocket book shit me and kese did the other old lady wrong we don't care money come first." (R. 629). Wannamaker testified he was referring to him and Appellant robbing Victim. (R. 260-61, 364-65).

Law enforcement obtained phone records and GPS data for each defendants' phone, as well as Brittany Whitmore. According to GPS data, appellant's phone stayed in St. Matthews during the hours of the robbery. (R. 174). At approximately 6:15 PM, Appellant and Whitmore's phones were using cell phone towers in St. Matthews while Wannamaker and McFadden were using cell phone towers in the Harbison area of Irmo. (R. 463). By 7:30 PM, McFadden and Wannamaker's phones had returned to St. Matthews. (R. 463-64). From 5:11 PM to 7:41 PM, Appellant's phone remained in the same location in St. Matthews. (R. 467). Law enforcement summarized the GPS information in a cell phone plot animation. (State's Exhibit #53 and #62). At the conclusion of trial, Appellant was convicted of every count except first degree assault and battery.

[8] Wannamaker testified the name "Kese" referred to Appellant. (R. 227)

STANDARD OF REVIEW

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id.

ARGUMENT

The trial judge did not err in denying Appellant's motion for a mistrial when Appellant did not preserve the issue for appeal because he expressly consented to the trial judge's curative instruction. Even if preserved, the trial judge's curative instruction cured any possible error. Finally, Appellant was not prejudiced by a single reference to Appellant's incarceration because of the overwhelming evidence submitted against Appellant at trial.

Appellant contends the trial judge erred by refusing to grant a mistrial when Shyrod Wannamaker, Appellant's codefendant, made an unsolicited comment that Appellant was in jail in April 2019. Appellant argues the State elicited Wannamaker's comment and that Wannamaker's remark was improper character evidence. Furthermore, Appellant argues the State failed to present competent evidence of Appellant's guilt. Appellant's argument fails for three reasons. First and foremost, Appellant has not preserved this issue for appeal. Although Appellant requested the trial judge declare a mistrial, Appellant did not object to the trial judge's proposed curative instruction. (R. 240-41, 247). Not only did Appellant fail to object to the curative instruction, but he expressly consented to it. (R. 247). Furthermore, Appellant waived any objection to the substance of Wannamaker's statement when he explicitly consented to a text message from Andre McFadden being admitted into evidence that said "[Appellant] n jail."(sic) (R. 231, 627). Even if this issue is preserved for appeal, Wannamaker's statement was entirely unsolicited and any prejudice that Appellant suffered from the statement was cured by the trial judge's curative instruction. Finally, even if the prejudice was not cured by the curative instruction, any error was entirely harmless in light of the overwhelming evidence presented against Appellant at trial.

Error Preservation

As an initial matter, this issue is not preserved for appellate review because Appellant expressly consented to the admission of evidence which indicated Appellant was incarcerated

and because Appellant failed to object to the trial judge's proposed curative instruction. In fact, Appellant expressly consented to the curative instruction. Therefore, this issue is not properly before this Court.

"A litigant cannot concede an issue at trial and then raise it on appeal." CFRE LLC v. Greenville County Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011). When a party consents to evidence being admitted, that party waives any issues as to the admissibility of that evidence on appeal. State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007). "No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-912 (1996). "Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

Here, the State offered a series of text messages taken from McFadden's phone into evidence. One of the text messages sent from McFadden on January 24th read: "Kese n jail." (R. 627). When the State moved to admit the text messages through Wannamaker, Appellant responded "No objection, Your Honor." (R. 231, line 17). Shortly thereafter the State asked Wannamaker about an attempted armed robbery[9] in April 2019. Appellant moved for a mistrial when Wannamaker noted that Appellant did not participate in the subsequent armed robbery because he was in jail. (R. 240). The trial judge proposed a curative instruction to remedy any potential prejudice to Appellant. (R. 246-47). After the trial judge read his proposed curative

[9] Appellant previously told the trial judge that he wanted the jury to hear about the subsequent armed robbery. (R. 115-16).

instruction, Appellant responded by saying: "Okay." (R. 247, line 3). Appellant not only failed to object to the curative instruction, but he expressly consented to it. Therefore, Appellant did not preserve this issue for appeal for two reasons. First, counsel for Appellant expressly consented to the admission of a text message that said Appellant was in jail. Second, Appellant did not object to the trial judge's proposed curative instruction, but rather consented to it. Accordingly, this issue is not properly before this Court.

Curative Instruction

"A curative instruction is generally deemed to have cured any alleged error." State v. Dial, 405 S.C. 247, 258, 746 S.E.2d 495, 500 (Ct. App. 2013). "If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." George, 323 S.C. at 510, 476 S.E.2d at 911-912. "A curative instruction to disregard incompetent evidence and not consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005).

Here, the following exchange took place between the solicitor and Wannamaker during direct-examination:

> Mr. Scott: Do you remember in April, three months after this when you and McFadden get busted by the West Columbia police?
>
> Shyrod Wannamaker: Correct.
>
> Mr. Scott: You-all tried to stick up another lady?
>
> Shyrod Wannamaker: Yes, sir.
>
> Mr. Scott: He wasn't – [Appellant] wasn't involved in that, was he?
>
> Shyrod Wannamaker: No, sir. He was in jail.

(R. 240, lines 8-14). Appellant objected to Wannamaker's response and moved for a mistrial outside the presence of the jury. (R. 240-41). On appeal, Appellant argues the solicitor elicited improper evidence of Appellant's character. On the contrary, far from eliciting evidence of Appellant's incarceration, the solicitor was attempting to establish that Appellant was not involved with the subsequent attempted armed robbery. Appellant previously expressed a desire for the jury to hear about the subsequent attempted armed robbery; therefore, the solicitor was merely addressing an inevitable forthcoming issue in a way that actually benefitted Appellant. (R. 115-16). Wannamaker answered the solicitor's question but added the unsolicited detail that Appellant was incarcerated in April 2019.

Following Wannamaker's unsolicited remark, the trial judge denied Appellant's motion for a mistrial and proposed a curative instruction to which Appellant did not object. (R. 246-47). When the jury returned, the trial judge provided the following curative instruction:

> The Court: Now just 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.

(R. 251, lines 6-19). The trial judge's thorough curative instruction clearly informed the jury that they were to disregard Wannamaker's answer and not consider it in their deliberations. Therefore, the curative instruction cured any potential error.

Lack of Prejudice and Harmless Error

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." Thompson, 352 S.C. at 560, 575 S.E.2d at 82. "The court's decision will not be overturned on

appeal absent an abuse of discretion amounting to an error of law." Id. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. Id. "A mistrial should not be granted unless absolutely necessary." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Id. In order to receive a mistrial, the defendant must show error and resulting prejudice. Id.

"Whether an error is harmless depends on the circumstances of the particular case." State v. Mitchell, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). "Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules. State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015). "Rather, appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case." Id. "[O]ur jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." State v. Tapp, 398 S.C. 376, 389-390, 728 S.E.2d 468, 475 (2012). "Error is harmless when it could not reasonably have affected the result of the trial." State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990).

Even if the curative instruction did not cure any possible error, the trial judge did not err in refusing to declare a mistrial because Appellant was not prejudiced by Wannamaker's statement in light of the overwhelming evidence presented against Appellant. On appeal, Appellant asserts the State did not present competent evidence of Appellant's guilt. (Initial Brief of Appellant 9-10). On the contrary, the State produced overwhelming evidence of Appellant's guilt. Both of Appellant's co-defendants testified Appellant participated in the planning and

execution of the robbery. (R. 204-06, 330-31). Wannamaker provided eyewitness testimony regarding what occurred inside Victim's house. Among other things, Wannamaker testified that Appellant: kicked in Victim's backdoor, found Victim's safe, forced Victim to open the safe, dumped the contents of the safe into a pillowcase, and assisted in taking and smashing Victim's phones. (R. 212-19). Furthermore, the State produced photographic evidence of Appellant celebrating with large quantities of cash along with McFadden and Wannamaker in the hours immediately after the robbery. (State's Exhibits #33, #36, #37, #38). The State also produced text messages from McFadden and Wannamaker that corroborated their testimony at trial. (R. 622-29). Although Appellant asserts that cell phone data indicating Appellant's phone remained in St. Matthews during the hours of the robbery exculpates Appellant, the data merely corroborates McFadden's testimony that Appellant left his cell phone in St. Matthews and did not take it with him to Irmo. (R. 339, State's Exhibits #53, #62). The jury rendered guilty verdicts against Appellant because of the aforementioned evidence; not because of a single reference to Appellant being incarcerated in April 2019. Appellant was not prejudiced by Wannamaker's statement and any error was harmless beyond a reasonable doubt. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

SAMUEL R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

205 East Main Street
Lexington, SC 29072
(803)-785-8352

BY: Scott Matthews
SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

SAMUEL R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

205 East Main Street
Lexington, SC 29072
(803)-785-8352

BY: Scott Matthews

Scott Matthews
Bar # 101464

Office of the Attorney General
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(803) 734-3727

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