STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DECOTA CASTLE BROWN,

APPELLANT.

APPELLATE CASE NO. 2021-000744

INITIAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

STATEMENT OF FACTS 4

ARGUMENT

The trial judge erred by failing to grant a mistrial when the solicitor elicited improper bolstering testimony from the police chief regarding the chief's belief in the veracity of state's key witness against Appellant. 6

Relevant Facts 6
Discussion 8

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Briggs v. State, 421 S.C. 316, 06 S.E.2d 713 (2017) 10

Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998) 9

S.C. Dept. of Social Services v. Lisa C., 380 S.C. 406, 669 S.E.2d 647 (2008) 11

Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) 9

State v. Bilton, 156 S.C. 324, 153 S.E. 269 (1930) 8

State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) 10

State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) 10

State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013) 3, 8

State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) 11

State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) 3, 9, 11

State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999) 9

State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) 10

State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) 10

State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983) 8

State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000) 3

State v. Sapps, 295 S.C. 484, 369 S.E.2d 145 (1988) 9

State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) 9

State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005) 9

State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991) 10

State v. White, 371 S.C. 439, 639 S.E.2d 160 (Ct. App. 2006) 9

State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010) 3

State v. Wilson, 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010) 9

State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977) 9

Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018) 10

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by failing to grant a mistrial when the solicitor elicited improper bolstering testimony from the police chief regarding the chief's belief in the veracity of state's key witness against Appellant?

STATEMENT OF THE CASE

On July 22, 2019, an Oconee County grand jury indicted Appellant for murder, burglary in the first degree, and possession of a weapon during the commission of a violent crime. R. *(indictments). The state, represented by Jason Alderman and Blair Stoudemire, called the case to trial before the Honorable Perry Gravely and a jury on June 28, 2021, through July 1, 2021. Tr. 1-2. Kathleen Hodges represented Appellant. Tr. 2. The jury found Appellant guilty as charged. Tr. 682, ll. 11-23. Judge Gravely sentenced Appellant to fifty years for murder, fifteen years for burglary in the first degree, and five years for the weapon. Tr. 690, l. 19 – Tr. 691, l. 2; R. *(sentence sheets). He ordered the sentences to be served consecutively for a total of seventy years. Tr. 690, l. 22; Tr. 691, l. 2; R. *(sentence sheets).

On July 12, 2021, Appellant served his notice of appeal. This brief 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)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477-478, 716 S.E.2d 91, 93 (2011).

STATEMENT OF FACTS

Appellant was the biological nephew of Dee Anna Brown. Tr. 83, ll. 7; Tr. 221, ll. 12-15. She and her husband, Eric Brown, adopted Appellant and his siblings in 2001, when Appellant was three years old. Tr. 83, l. 7-13 - Tr. 84, l. 2; Tr. 221, ll. 12-20. Appellant's parents struggled with drug addiction, which required the removal of Appellant and his siblings from their custody. Tr. 83, ll. 7-13; Tr. 221, ll. 12-20. At some point, Dee Anna and Eric determined Appellant was no longer allowed to live with them. Tr. 222, ll. 9-11. In January 2019, Eric dropped Appellant off in the middle of the Mill Hill, where Appellant vaguely claimed he had a place to stay. Tr. 223, ll. 2-10. Eric last saw Appellant walking away from him across a parking lot. Tr. 223, ll. 12-13.

Dee Anna's mother, Geraldine Castle, lived in Walhalla on March 7, 2019, but she was staying overnight at Dee Anna's home because she had a doctor's appointment on March 8, 2019. Tr. 86, l. 23 - Tr. 87, l. 8. When Dee Anna left for work on March 7, Geraldine was the only one in the home. Tr. 88, ll. 11-13.

Around 6 p.m. on March 7, Dee Anna received a phone call from Geraldine's number, but the call disconnected almost immediately. Tr. 92, ll. 2-6. When Dee Anna finally reached Geraldine by phone, Geraldine sounded "groggy." Tr. 93, ll. 11-19. Worried, Dee Anna instructed her son, Kyle, to go to the house. Tr. 94, ll. 9-25. Dee Anna also called 911 and left work to go home as soon as she could. Tr. 94, ll. 5-8; Tr. 96, ll. 13-22. Later, Dee Anna learned Geraldine had been shot. Tr. 100, ll. 2-8; see also Tr. 227, ll. 1.

Hunter Hunnicut stayed in an area of the Mill Hill called the compound. Tr. 245, ll. 20. While living there, Hunnicut met Appellant. Tr. 247, ll. 14-16. People at the compound generally got high together. Tr. 249, ll. 13-14. Hunnicut later told the police that Appellant told

him of a place where they could steal guns, which they could then sell. Tr. 250, l. 23 - Tr. 251, l. 6. Beginning on March 6, the two got high and did not sleep. Tr. 252, l. 19 - Tr. 253, l. 10. Then, on March 7, the two went to a soup kitchen in Seneca for lunch. Tr. 254, ll. 13. Thereafter, Hunnicut and Appellant boarded a bus to get to the home of Dee Anna and Eric Brown. Tr. 254, ll. 24-25. Although the bus broke down, the two allegedly walked the rest of the way to the home. Tr. 255, ll. 8-11.

Hunnicut broke the glass of a basement window, which he used to access the interior of the house. Tr. 265, ll. 20. Hunnicut claimed he then unlocked the door so that Appellant could enter. Tr. 265, l. 20 - Tr. 266, l. 24. According to Hunnicut, he and Appellant saw Geraldine, Appellant's grandmother, sitting in a chair in the living room. Tr. 269, ll. 13-14. Hunnicut alleged that while he walked to a back bedroom, he heard gunfire and a woman screaming. Tr. 275, ll. 5-6. Thereafter, Hunnicut alleged, he and Appellant tried to get into a safe in a bedroom. Tr. 278, ll. 4-5. When Hunnicut re-entered the living room to tell the screaming Geraldine to be quiet, Hunnicut claimed that Appellant walked past him and shot Geraldine. Tr. 280, ll. 15-16. The two then ran out of the house without stealing anything. Tr. 282, l. 10 - Tr. 283, l. 5; see also Tr. 232, ll. 23-25.

Afterward, Hunnicut returned to the compound where he got high. Tr. 290, ll. 5; Tr. 293, ll. 16. The following day, Hunnicut contacted the police by phone. Tr. 299, ll. 22-23. Later, he met with police officers and provided multiple statements of what he claimed happened on March 7, 2019. Tr. 299, l. 22 - Tr. 306, l. 14. Initially, Hunnicut told the police that he *and* Appellant shot Geraldine. Tr. 303, ll. 16; Tr. 314, ll. 9. He later changed his story to place the blame on Appellant alone for the shooting. Tr. 306, ll. 12-14.

ARGUMENT

The trial judge erred by failing to grant a mistrial when the solicitor elicited improper bolstering testimony from the police chief regarding the chief's belief in the veracity of state's key witness against Appellant.

Relevant facts

At the time of Appellant's trial, Casey Bowling was the "chief police second" for the Seneca Police Department. Tr. 553, ll. 20-23. At the time of the shooting, he was the "captain over investigative division." Tr. 554, ll. 1-2. He responded to the scene of the shooting on March 7, 2019, where he was the highest-ranking officer. Tr. 554, ll. 12-14. The following morning, he learned that Hunter Hunnicut had information for the police regarding the shooting. Tr. 556, ll. 15-25. Bowling and Hunnicut spoke by phone that morning, and Hunter indicated "he wanted to come clean." Tr. 557, ll. 1-7. Bowling and Hunnicut had a special relationship. Bowling "was an actual SRO at Seneca Middle School at one time," and he met Hunnicut then. Tr. 558, ll. 17-23. Bowling knew that Hunnicut "came through a rough life" and "[d]idn't really have a stable home life at all." Tr. 559, ll. 23-25. He knew Hunnicut was "dabbing into the drug world." Tr. 559, ll. 1-2.

Initially, Hunnicut told Bowling that he and Appellant broke into the house to steal guns. Tr. 558, ll. 4-8. Hunnicut also told Bowling that he shot the deceased at least once. Tr. 561, ll. 23-25. In fact, Hunnicut informed the police that he took the gun from Appellant in order to shoot the deceased. Tr. 561, l. 25 – Tr. 562, l. 1. Less than a week later, Hunnicut changed his story. Tr. 560, ll. 22-25. During this time, Hunnicut was "very emotion about it" and "scared." Tr. 562, ll. 4-5. In his second statement, Hunnicut alleged Appellant had fired five shots. Tr. 562, ll. 6-7.

Additionally, Bowling claimed "[t]here was a huge difference in [Hunnicut]" between the first and second statements. Tr. 561, ll. 1-6. Bowling claimed that during the first statement, "he wasn't acting like the [Hunnicut] that I knew. He was falling asleep while we were talking to him. We were having to wake him up.... That was very unlike the Hunter that I knew." Tr. 561, ll. 1-13. However, Bowling informed the jurors, that Hunnicut "was back to his normal self" for the second interview. Tr. 561, ll. 14-15. Hunnicut was "very polite, very emotional." Tr. 561, ll. 14-16.

After noting the consistencies between Hunnicut's first and second statements, Bowling asserted there was an inconsistency between Hunnicut's first and second statements that was significant. Bowling explained that during Hunnicut's first statement, he held a sword to the deceased's throat and told her to shut up. Tr. 562, ll. 21-24. However, in his second statement, Hunnicut "didn't say anything about the sword," and Bowling found this "interesting" because the police "never found a sword." Tr. 562, l. 24 – Tr. 563, l. 2. This made Hunnicut's "second statement ... a lot more truthful than the first statement." Tr. 563, ll. 4-6. Furthermore, the Hunnicut's second statement mentioned "pipes," and the police "were able to corroborate exactly what [Hunnicut] said" about the pipes. Tr. 563, ll. 7-12. Then, Bowling claimed the police "were able to corroborate almost everything that [Hunnicut] said in that second statement to be true." Tr. 563, ll. 12-15.

Contemporaneously, defense counsel objected to Bowling's testimony as bolstering another witness. Tr. 563, ll. 16-17. The judge sustained the objection and informed the jurors that it had been stricken from their consideration. Tr. 563, ll. 18-23.

Undeterred, the solicitor asked Bowling, "[I]f I understand your testimony, that you tend to believe the second statement?" Tr. 564, ll. 23-25. Defense counsel promptly objected, and

the judge sustained the objection. Tr. 565, l. 1. Outside of the presence of the jury, defense counsel moved for a mistrial "based on the fact that the deputy solicitor has asked this witness and this witness has twice testified in a manner which bolsters the credibility of another witness, which is patently inadmissible." Tr. 565, ll. 13-19. Defense counsel argued Appellant's right to a fair and impartial trial was violated due to the solicitor's questioning and Bowling's answer invading the province of the jury on the subjection of the credibility of the witnesses. Tr. 565, ll. 19-22.

Seeking no argument from the solicitor, the trial judge ruled that had Bowling "answered the last question, that would have been absolute bolstering." Tr. 566, ll. 6-8. The judge ruled that asking whether the witness believed Hunnicut's testimony was "totally improper." Tr. 566, ll. 9-10. However, Bowling did not answer the question; therefore, there was no prejudice "in the fact the question was asked; it was unanswered." Tr. 566, ll. 10-12. The judge ruled the prior question and answer and the ones leading up to this penultimate question did not rise "to the level of creating a prejudice requiring a mistrial." Tr. 566, ll. 13-15.

Discussion

According to the South Carolina Supreme Court, "[t]he less than lucid test is ... declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). While a mistrial should be granted only when "absolutely necessary" and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident "is so grievous that the prejudicial effect can be removed in no other way." State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013). Another way of describing when a mistrial must be granted is when there is "manifest necessity." State v.

Bilton, 156 S.C. 324, 153 S.E. 269 (1930). This Court has held 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." State v. Wilson, 389 S.C. 579, 585-586, 698 S.E.2d 862, 865 (Ct. App. 2010). Thus, to warrant reversal, "the errors must adversely affect [the defendant's] right to a fair trial." State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999).

"Generally, a curative instruction is deemed to have cured any alleged error." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005). "While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced." State v. White, 371 S.C. 439, 446, 639 S.E.2d 160, 164 (Ct. App. 2006) (citing State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996)).

"It is axiomatic that the credibility of the testimony of the[] witnesses is for the jury." State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). The duty of determining the truthfulness of the testimony is "a matter exclusively for the jury." Id. Thus, witnesses may not comment on the veracity of other witnesses. Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding trial counsel provided deficient performance by failing to object to questioning that asked a witness to comment on the truthfulness or explain the testimony of another witness because such questioning is improper); see also State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-146 (1988) (holding that "[i]t is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness"); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (holding that it is improper "[f]or an expert to comment on the veracity of a child's accusations of sexual abuse"); Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010)

(holding a forensic interviewer's opinion testimony improperly bolstered a complaining witness's credibility); State v. McKerley, 397 S.C. 461, 463-467, 725 S.E.2d 139, 141-143 (Ct. App. 2012) (holding that a forensic interviewer's testimony about a compelling finding indicated belief in the complainant's truthfulness and was inadmissible).

In 1989, the South Carolina Supreme Court held that it was improper for the prosecution to ask an expert witness who had treated the alleged victim whether her symptoms were genuine. State v. Dawkins, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989). In the years following Dawkins, the appellate courts of South Carolina repeatedly have reminded trial judges and trial lawyers that witnesses, even expert witnesses, may not comment on the credibility of other witnesses. See e.g., State v. Whaley, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991) (holding expert eyewitness identification testimony is admissible, but warning that an expert may not "give his or her opinion of a particular witness' identification"). See also Thompson v. State, 423 S.C. 235, 243-245, 814 S.E.2d 487, 491-492 (2018) (holding a witness's testimony that the alleged victim's disclosures were "consistent with her own training and experience" was improper bolstering as it was used to enhance the credibility of the alleged victim); Briggs v. State, 421 S.C. 316, 325, 06 S.E.2d 713, 718 (2017) ("When the testimony directly conveys the witness's opinion that the victim is telling the truth, it is obviously improper bolstering."); State v. Chavis, 412 S.C. 101, 108-109, 771 S.E.2d 336, 340 (2015) (holding a witness's testimony that she recommended the alleged victim not be around Chavis for any reason improperly bolstered the testimony of the alleged victim because it could "only be interpreted as [the witness] believing Victim's claim that [Chavis] sexually abused her"); State v. Kromah, 401 S.C. 340, 359, 737 S.E.2d 490, 500 (2013) (finding error to allow a forensic interviewer to say a minor child gave a "compelling finding" of abuse because it was "the equivalent" of the witness

stating the minor child was "telling the truth"); State v. Jennings, 394 S.C. 473, 479-480, 716 S.E.2d 91, 94 (2011) (holding a forensic interviewer's reports that indicated the complaining witnesses provided a "compelling disclosure of abuse" improperly allowed the witness to comment on the veracity of the children because there was "no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful"); S.C. Dept. of Social Services v. Lisa C., 380 S.C. 406, 414, 669 S.E.2d 647, 651-652 (2008) ("For a psychologist to comment on the veracity of a child's accusations of sexual abuse is improper."); State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006) overruled on other grounds by 380 S.C. 499, 671 S.E.2d 606 (2009) (recognizing that improper bolstering testimony is inadmissible).

The state's case against Appellant hinged upon the credibility of Hunter Hunnicut. There was no physical evidence linking Appellant to the crime. Hunnicut claimed he had not received any deal for his testimony, but he pled guilty to a reduced charge of voluntary manslaughter prior to Appellant's trial and was awaiting sentencing. Tr. 317, ll. 14-17. The only physical evidence connecting anyone to the crime was Hunnicut's fingerprints inside the home. Tr. 175, ll. 11-18. Another print from a doorway where the shooter stood was identified as belonging to Burlin Dewayne Whitfield, and the state had no explanation for how his print was there. Tr. 175, ll. 18-21.

In his closing argument, the solicitor called Hunnicut "an absolute mess." Tr. 622, l. 7. Hunnicut "fumbled and mumbled through his testimony." Tr. 622, ll. 9-10. The solicitor promised the jury that he was "not going to sit here and look you in the eye and say that you should believe what Hunter Hunnicut says, because he said - - if he told you that he was going to come cut your grass, I wouldn't ask you to believe it because he said." Tr. 622, ll. 12-17. Yet,

the solicitor needed the jury to believe Hunnicut as he provided the only direct evidence against Appellant. Thus, it was no surprise that he used the distinguished police captain turned police chief Casey Bowling to bolster Hunnicut's testimony.

The trial judge erred by failing to grant a mistrial based upon the solicitor eliciting improper bolstering testimony from Bowling regarding Bowling's personal opinion of Hunnicut's veracity. The series of questions by the solicitor in which he built the platform upon which to ask the penultimate question of Bowling's opinion necessitated the granting of a mistrial. Although the judge surmised that because Bowling did not answer the penultimate question Appellant did not suffer any prejudice from the solicitor's improper question, the judge's ruling failed to account for the solicitor's series of questions that made the answer to the question obvious. In fact, the solicitor prefaced the penultimate question with "So, you're saying that - - if I understand your testimony, that you tend to believe the second statement," where Hunnicut placed the blame on Appellant alone for the shooting. See Tr. 564, ll. 23-25. The question made clear that the jury already knew the answer based on the prior questioning and answering: Bowling believed Hunnicut's testimony, which was consistent with his trial testimony. Here, the judge simply sustained the objection and stated it was not a proper question. See Tr. 565, ll. 2-3. He provided no curative instruction at all, and no curative instruction could have removed the taint created by the improper bolstering testimony elicited by the solicitor.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 5th day of May, 2022.

RECEIVED
May 05 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DECOTA CASTLE BROWN,

APPELLANT.

APPELLATE CASE NO. 2021-000744

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, 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 Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is mbrown@scag.gov, this 5th day of May, 2022.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT