Third District Court of Appeal

State of Florida

Opinion filed July 29, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-2530 & 3D18-2534
Lower Tribunal Nos. 11-26154 & 16-5055

Anthony Ward,
Appellant,

vs.

The State of Florida,
Appellee.

Appeals from the Circuit Court for Miami-Dade County, Marisa Tinkler Mendez, Judge.

Carlos J. Martinez, Public Defender, and Shannon Hemmendinger, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Michael W. Mervine and David Llanes, Assistant Attorneys General, for appellee.

Before EMAS, C.J., and FERNANDEZ and SCALES, JJ.

SCALES, J.

We consolidate the appeals in appellate case numbers 3D18-2530 and 3D18-2534 for purposes of this opinion.

3D18-2530

In appellate case number 3D18-2530, Anthony Ward appeals the revocation of his probation in lower tribunal case number F11-26154 for committing new offenses in lower tribunal case number F16-5055, claiming only that the trial court failed to reduce its oral pronouncements to a written order during Ward's probation revocation hearing. The State properly and commendably concedes this was error. See Mitchell v. State, 238 So. 3d 386, 386-87 (Fla. 3d DCA 2018).[1] We therefore remand lower case number F11-26154 to the trial court for entry of a written probation revocation order. Ward need not be present for entry of the written order. Id. at 387.

3D18-2534

[1] Citing to Daniels v. State, 118 So. 3d 996 (Fla. 1st DCA 2013), the State suggests that Ward must raise this issue via a post-conviction motion. We disagree. Unlike Daniels and the cases cited therein – where the written orders failed to conform to the lower courts' oral pronouncements – the trial court in this case never entered any written order of revocation. When, as here, the trial court has failed to enter any written order of revocation, this Court has, on plenary appeal, consistently granted relief in the form of a remand with directions for the trial court to enter a written order of revocation. See Mitchell, 238 So. 3d at 386-87.

In appellate case number 3D18-2534, Ward appeals his convictions and sentences in lower tribunal case number F16-5055 for second degree murder with a firearm, attempted second degree murder with a firearm, and possession of a firearm by a convicted felon. Ward argues only that the trial court abused its discretion in denying his motion for a mistrial after one of the State's fact witnesses violated the court's pre-trial ruling. The trial court's pre-trial ruling directed that witnesses not refer to the firearm seen in Ward's possession prior to the shootings as an AK-47 assault rifle. We affirm because the trial court did not abuse its discretion in denying Ward's motion for mistrial.

I. RELEVANT FACTS

On March 6, 2016, minutes after James White fought with Ward during a party at the home of Myrtle White, James White was shot multiple times, and killed, with a .40 caliber handgun and a nine-millimeter handgun. Ebony Herron, who was both present at the party and shot at by the same assailant, identified Ward as the shooter. In February 2018, the State charged Ward by amended information with: (i) second degree murder with a firearm, for the shooting death of James White; (ii) attempted second degree murder with a firearm, for shooting at Ebony Herron; and (iii) possession of a firearm by a convicted felon.

Prior to trial, the defense filed a motion in limine to preclude any testimony that Ward had possessed an AK-47 assault rifle at the party because, while "the

Defendant [was] alleged to have momentarily possessed an AK-47 while at this house party[,] . . . [t]he gun was never used" and "was not the weapon used to kill James White." Determining that Ward's purported possession of the weapon was inextricably intertwined with the evidence regarding the subsequent shootings, the trial court ruled that the State's fact witnesses could describe the firearm they saw in Ward's possession during the party; however, the fact witnesses could not use the term "AK-47" both because the witnesses did not know firearms well enough to identify the weapon, and because the term "evokes more emotion in people just when they hear that phrase."

At trial, the State called four fact witnesses – Myrtle White, Jami Herron, Movia Nicholas and Ebony Herron – who all testified that after James White and Ward fought at the house party, Ward brandished a weapon and then left in a car with another individual.

Myrtle White was the State's first witness. Myrtle testified that upon hearing the altercation between James White (her son) and Ward, she asked Ward to leave the party and walked away. Myrtle testified that she then heard her granddaughter, Ebony Herron, scream,[2] "Somebody come and get him. Come and . . . he's got a – has a full power KKK47 [sic]." The trial court sustained defense counsel's

[2] The prosecutor laid the foundation for introducing Ebony Herron's out-of-court statement under the excited utterance exception to the hearsay rule.

immediate objection and instructed the jury to "disregard the last statement by the witness." Indicating that she did not get a good look at what Ward was holding at the time, Myrtle testified that Ward had a "weapon." Myrtle White then explained that a few minutes after Ward left the scene, she heard gunshots outside her home. When Myrtle looked outside her kitchen window into the backyard, she saw a person wearing the same style of pants Ward had worn to the party. Myrtle witnessed the individual jump onto a gated fence and then she heard several more gunshots.

When Myrtle White's testimony concluded, the defense moved for a mistrial because she had referred to a "KKK47" in violation of the trial court's pre-trial ruling. Satisfied that the prosecutor had instructed its witnesses not to refer to the firearm as an AK-47, and that its curative instruction was sufficient, the trial court denied the mistrial motion. The trial court, however, warned the State that if any other witness used the term AK-47 it would grant a mistrial. Defense counsel declined the trial court's invitation to give a further curative instruction "because it would just highlight it."

The other fact witnesses' testimony with respect to the firearm seen in Ward's possession at the party was minimal. Jami Herron described the weapon as a "big gun" that took "both" hands to hold. Movia Nicholas stated that Ward had a "gun," giving no further description. Ebony Herron testified that Ward had a "gun" that was "brown, black, medium, not too big, not too small."

Ebony Herron further testified that, about four minutes after Ward left the house party, Ward returned to the home with a gun and began shooting at her and James White, her father. James White ran towards the backyard of the home and Ebony ran in a different direction.

The jury convicted Ward as charged, and the trial court sentenced Ward to fifty years in prison.[3] Ward timely appealed his convictions.

II. ANALYSIS[4]

Ward's sole point on appeal is that the trial court erred in denying his mistrial motion because Myrtle White's recitation of her granddaughter's excited utterance – i.e., her reference to a "KKK47" – violated the trial court's pre-trial order, and so prejudicially sullied the trial as to warrant a mistrial. We disagree.

The trial court should not grant a motion for mistrial merely because an error is prejudicial. See Talley v. State, 260 So. 3d 562, 568 (Fla. 3d DCA 2019). Rather, the lower court should grant a mistrial only when "an error is so prejudicial as to vitiate the entire trial, which is another way of saying that the motion should be

[3] Specifically, the trial court sentenced Ward as follows: fifty years in prison with a twenty-five year minimum mandatory for the second degree murder with a firearm of James White; twenty-five years in prison with a twenty-year minimum mandatory for the attempted second degree murder with a firearm of Ebony Herron; and fifteen years in prison with a three-year minimum mandatory for possession of a firearm by a convicted felon. The court ordered the sentences to run concurrently.

[4] We review a trial court's denial of a motion for mistrial for an abuse of discretion. Gosciminski v. State, 132 So. 3d 678, 695 (Fla. 2013).

granted only when necessary to ensure the defendant a fair trial." Jennings v. State, 124 So. 3d 257, 265 (Fla. 3d DCA 2013). In order to grant a mistrial based on impermissible trial testimony from a witness, the witness's "comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Gosciminski v. State, 132 So. 3d 678, 696 (Fla. 2013) (quoting Salazar v. State, 991 So. 2d 364, 372 (Fla. 2008) (quoting Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994)).

The denial of a motion for mistrial is not error where an inadvertent remark is isolated and does not become the focus of the trial. Cole v. State, 701 So. 2d 845, 853 (Fla. 1997). This is particularly true where an appropriate curative instruction is given. See Clark v. State, 881 So. 2d 724, 727 n.2 (Fla. 1st DCA 2004) ("[O]ne isolated comment does not entitle a defendant to a mistrial, especially when an appropriate curative instruction is given by a trial judge."); see also Gudinas v. State, 693 So. 2d 953, 964 (Fla. 1997) (determining the trial judge did not err in denying a motion for mistrial based on impermissible witness testimony where the witness made "an isolated comment which the judge dealt with swiftly and decisively by issuing a curative instruction").

Here, Myrtle White's impermissible testimony came in response to the prosecutor's question asking Myrtle what she had heard her granddaughter, Ebony Herron, scream out soon after the fight between James White and Ward had ended. Rather than rephrase what she had heard, Myrtle impermissibly – albeit understandably – testified precisely as to what her granddaughter said: "Somebody come and get him. Come and . . . he's got a – has a full power KKK47 [sic]." Myrtle's failure to rephrase Ebony Herron's excited utterance from "KKK47" to "gun" was clearly inadvertent.

The "KKK47" reference was also isolated and did not become the focus of the trial. Myrtle gave no actual description of what she saw in Ward's possession at the party, saying only that Ward had a "weapon." The other three fact witnesses testified only that Ward has possessed a "gun" that was either "big" enough to hold with "both" hands or "medium, not too big not too small."

Because the "KKK47" reference was inadvertent, isolated and did not become the focus of the trial, and because an adequate curative instruction was given, we conclude that the impermissible comment was not so prejudicial as to vitiate the entire trial; therefore, the trial court did not abuse its discretion in denying the motion for mistrial. See Jackson v. State, 25 So. 3d 518, 528-29 (Fla. 2009) (finding the trial court did not abuse its discretion in denying a motion for mistrial "after a witness impermissibly testified that Jackson carried a 'little pistol'" because "the

brief mention of possessing a gun was not so prejudicial as to vitiate the entire trial"); James v. State, 741 So. 2d 546, 549 (Fla. 4th DCA 1999) (finding the trial court did not abuse its discretion in denying a motion for mistrial where "the opinion from the witness appears to have been a surprise response to a question from the prosecutor, the trial court immediately sustained the objection, gave two extensive curative instructions (one of which was composed by defense counsel), and the matter was not mentioned again").

III. CONCLUSION

In appellate case number 3D18-2530, we remand for the trial court, in lower tribunal case number F11-26154, to enter a written probation revocation order consistent with the court's oral pronouncements during the probation revocation hearing. Ward need not be present for entry of the written order. In appellate case number 3D18-2534, we conclude the trial court, in lower tribunal case number F16-5055, did not abuse its discretion in denying Ward's motion for a mistrial.

Affirmed in part; remanded, in part, with directions.