STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2021-000608

THE STATE, Respondent,

v.

ANTERIUS BRAESHUN SMITH, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in denying Appellant's motion for a mistrial when Appellant did not preserve the issue for appeal because Appellant accepted the trial judge's ruling on the contested testimony and then requested a mistrial the following day or a curative instruction in the alternative? And even if preserved, did the trial judge's curative instruction cure any possible error? And finally, was Appellant prejudiced by Phaedra Hall's testimony when it was cumulative to other evidence presented at trial, including testimony elicited by Appellant?

STATEMENT OF THE CASE

In September 2017, the Cherokee County Grand Jury indicted Appellant for one count of attempted murder and one count of possession of a weapon during the commission of a violent crime. On May 19-21, 2021, a jury trial was held in the Cherokee County Court of General Sessions with the Honorable J. Mark Hayes, II, presiding. Appellant was represented by Steven Epps, Esq. The State was represented by Assistant Solicitors Adrienne Barry and Hope Coleman-Hicks of the Seventh Circuit Solicitor's Office. At the end of Appellant's case-in-chief, the trial judge granted a directed verdict as to the attempted murder charge but instructed the jury on the lesser-included offense of assault and battery of a high and aggravated nature. At the conclusion of trial, the jury convicted Appellant of both counts. The trial judge sentenced Appellant to twenty years' imprisonment suspended upon service of seven years' incarceration with the balance suspended to five years' probation for ABHAN. Appellant was sentenced to five years' imprisonment for possession of a weapon during the commission of a violent crime to run concurrently to Appellant's ABHAN sentence. Appellant timely filed a notice of appeal and an initial brief.

STATEMENT OF FACTS

On March 28, 2017, Tyler Vassey (Victim) was helping his father move from one residence to another. (R. 74-75). During the move, Victim's father gave Victim a turkey cooker. (R. 75). Victim arranged to sell the cooker to a woman named, Tisa (R. 75). Tisa was the sister of one of Victim's close friends, Tony Smith. (R. 75). Victim enlisted the help of a friend named Brittany Whisnant to drive him to Tisa's house in the City of Gaffney. (R. 75-76). When Victim and Whisnant arrived at Tisa's residence, Victim got out of the passenger's seat and attempted to take the turkey cooker inside the house. (R. 78). Before he could deliver the turkey cooker, Victim was confronted by Appellant[1]. According to Victim, Appellant pointed a gun at Victim and told him to get back into the car and leave. (R. 78-79). Before Victim could get back into the car, Appellant shot him through his right collar bone. (R. 79-80). The gun shot caused Victim to fall to the ground. Appellant then stood over Victim and told him to get back into the car a second time. (R. 80). Victim crawled into the passenger seat of the car and Whisnant drove him to the hospital. (R. 80, 82). Victim spent four days in the hospital. (R. 84).

After Victim was released from the hospital, Appellant approached Victim and offered to pay his medical bills if Victim would tell law enforcement that Appellant was not involved in the shooting. (R. 83-84). Appellant paid Victim $50.00 and recorded Victim reading a statement that Appellant prepared. (R. 84). Detective Brian Blanton of the Gaffney Police Department was assigned to investigate the shooting. Blanton was initially unable to learn the identity of the shooter after speaking with witnesses on the scene the night of the shooting. (R. 27). After speaking with Whisnant and Victim, Blanton learned that the shooter was a shorter black male

[1] Victim initially did not know Appellant's name but recognized his face from having attended the same high school and middle school. (R. 74, 86).

with shoulder length dreadlocks. (R. 28-29). Sometime later, Blanton was contacted by Phaedra Hall regarding the identity of the shooter. (R. 29). Hall showed Blanton the Facebook profile of Appellant. (R. 29). Because the image of Appellant on his Facebook profile matched the description given by Victim and Whisnant, Blanton asked SLED to create a six person photo lineup that included a photo of Appellant. (R. 30). On April 19, Blanton showed the photo lineup to Victim. (R. 31). Victim selected Appellant out of the lineup. (R. 32-33). Blanton showed the same lineup to Whisnant who also picked Appellant's photo out of the lineup. (R. 34-35).

At trial, Phaedra Hall testified she witnessed Victim and Appellant exchanging words outside of the car Victim arrived in. (R. 173). Phaedra testified she heard Appellant tell Victim to get back into the car. (R. 173). Hall then heard a gunshot and saw Appellant "just standing there with a gun." (R. 175, line 10). Phaedra acknowledged she initially denied knowing who the shooter was because she was scared. (R. 176). However, in the days after the shooting, Phaedra eventually told law enforcement that Appellant was the shooter. (R. 177). Similarly, Phaedra Hall's daughter, Kaitlin Hall, testified she witnessed Victim and Appellant arguing and heard a gunshot, but did not see the shooter. (R. 202). At the conclusion of trial, Appellant was convicted of the lesser-included offense of ABHAN and possession of a weapon during the commission of a violent crime.

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 Appellant initially accepted the trial judge's ruling on the contested testimony and waited until the next day to ask for a mistrial or a curative instruction in the alternative. Even if preserved, the trial judge's curative instruction cured any possible error. Finally, Appellant was not prejudiced by Phaedra Hall's testimony because it was cumulative to other evidence presented at trial, including testimony elicited by Appellant.

Appellant argues the trial judge erred in denying Appellant's motion for a mistrial after Phaedra Hall testified Appellant came to her mother's house after the shooting. Appellant argues Phaedra's testimony was inadmissible hearsay that bolstered the State's case and characterized Appellant "as a scary individual who would stoop to the low of threatening a witnesses' mother." (Initial Brief of Appellant 10). Appellant's argument fails for three reasons. As an initial matter, Appellant did not preserve this issue for appeal because he initially accepted the trial judge's ruling on Phaedra's testimony. It was not until the following day that Appellant moved for a mistrial, and in doing so, Appellant asked for a curative instruction in the event his mistrial motion was denied. (R. 196-97, 236-37). Furthermore, when the trial judge gave the curative instruction, Appellant did not object to the sufficiency of the instruction. (R. 243-44). Because Appellant's motion was not timely, Appellant asked for a curative instruction, and Appellant did not object to the curative instruction given, this issue was not preserved for appeal. Even if preserved, the trial judge's curative instruction cured any possible error. Finally, Appellant was not prejudiced by Phaedra's testimony because it was cumulative to other testimony, including testimony elicited by Appellant. Appellant's convictions and sentences should be affirmed.

Error Preservation

"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). "Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial." State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981).

Here, the following exchange took place during the State's redirect examination of Phaedra Hall:

> Ms. Barry: And you have repeatedly testified today that you are scared?
>
> Phaedra Hall: Yes, ma'am.
>
> Ms. Barry: So are you afraid of things that [Appellant's] family might do to you if you say [Appellant's] name?
>
> Phaedra Hall: Yes, ma'am.
>
> Ms. Barry: And you said that you heard [Appellant] came to your mama's. Who told you that?
>
> Mr. Epps: Objection, Your Honor.

The Court: lawyers want to approach?

(WHEREUPON, a bench conference was held out of the hearing of the jury at this time.)
Ms. Barry: Ms. Phaedra, who told you that [Appellant] had been to your mom's?

Phaedra Hall: My daughter and her baby daddy was driving by---

Ms. Barry: Okay. Thank you. That's all I needed to know. I just needed to know the name. So, you were afraid of [Appellant's] family then?

Phaedra Hall: Yes, ma'am.

Ms. Barry: Any you're afraid of [Appellant's] family now?

Phaedra Hall: Yes, ma'am.

Ms. Barry: but you're testifying today despite all that, correct?

Phaedra Hall: Yes, ma'am.

(R. 196, lines 14-25- R. 197, lines 1-13). After Phaedra's testimony, the State called two more witnesses before resting their case. (R. 198-222). The following day after making a motion for a directed verdict, Appellant moved for a mistrial or a curative instruction if his request for a mistrial was denied. (R. 236-37). The trial judge denied Appellant's motion for a mistrial and articulated a proposed curative instruction. (R. 241-44). Appellant did not object to the proposed curative instruction or the curative instruction given to the jury. (R. 241-44). Appellant failed to preserve this issue for appeal in three separate ways. First, Appellant accepted the trial judge's ruling on Phaedra's testimony and did not contemporaneously ask for a mistrial. Second, Appellant explicitly asked for a curative instruction in the event a mistrial was not granted. Finally, Appellant did not object to the sufficiency of the curative instruction either time he was given an opportunity to do so. Therefore, 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).

After denying Appellant's mistrial motion, the trial judge provided the following curative instruction:

> The Court: I need to start by giving you an instruction. Yesterday you heard statements from a witness or witnesses concerning threats that may have been made outside of Court. I am going to instruct you at this time, ladies and gentlemen, that you must disregard any statements that you may have heard about threats or potential threats that may have been made outside of this Court. You are instructed that you must disregard those statements, and you must not give those statements any consideration in the deliberations that you will conduct as part of this trial.

(R. 243, lines 14-23). As Appellant acknowledges in his brief, a curative instruction is generally deemed to have cured any alleged error. (Initial Brief of Appellant 10). Here, the trial judge's instruction clearly told jurors to disregard any testimony about threats made outside of court. 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, such error was harmless because Phaedra's testimony was cumulative to other testimony that was not objected to by Appellant and even elicited by Appellant. For example, in his cross examination of Detective Blanton, Appellant asked Blanton why Phaedra's name was not listed in a police report. Blanton replied "...I know, by speaking with Phaedra that day, that she lives right across the street from where the shooting incident occurred, and she said she was scared that, if her name was mentioned, retaliation or she feared for her life." (R. 53, lines 8-12). Furthermore, during his

cross examination of Phaedra, Appellant specifically asked Phaedra what she was afraid of in the following exchange:

> Mr. Epps: ...Okay. Are you scared?
>
> Phaedra Hall: Yes, sir, a little bit.
>
> Mr. Epps: Of?
>
> Phaedra Hall: A lot of reasons. A lot of reasons.
>
> Mr. Epps: Okay. Like?
>
> Phaedra Hall: Like, for instance, my mom left her house a while ago—
>
> Mr. Epps: Okay.
>
> Phaedra Hall: cause she's scared too.
>
> Mr. Epps: Okay. Well, you've had how many birthdays since that, that faithful birthday?
>
> Phaedra Hall: A lot.
>
> Mr. Epps: I have yet to see anything where you have requested charges be brought for harassment or anything else like that related to this case. Are you aware of any?
>
> Phaedra Hall: No, sir, not until here recently.
>
> Mr. Epps: not until here recently. So, there's a pending case right now?
>
> Phaedra Hall: what do you mean?
>
> Mr. Epps: I mean so—you know what I'm talking about?
>
> Phaedra Hall: No. They—about two weeks ago I was told that he came to my mom's house.

(R. 182, lines 12-25 – R. 183, lines 1-9). During the aforementioned exchange, Appellant specifically asked Phaedra about what she was scared of and why. Appellant also elicited

information about the same event—Appellant coming to Phaedra Hall's mother's home—that he would later object to (R. 196-97).

Appellant cannot complain about testimony on appeal that he solicited on cross examination. See State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("A party 'cannot complain of an error which his own conduct has induced.'"(quoting State v. Worthy, 239 S.C. 449, 465, 123 S.E.2d 835 (1962)). Not only was Phaedra's testimony cumulative to other testimony that was elicited by Appellant, but the testimony itself is anodyne and harmless. Appellant asserts that Phaedra testified that Appellant threatened her family. (Initial Brief of Appellant 4). Although Phaedra testified she was afraid of what Appellant's family might do to her if she said Appellant's name, that question was not objected to by Appellant. Appellant only objected to the follow-up question: "And you said that you heard [Appellant] came to your mama's. Who told you that?" After a bench conference on Appellant's objection, Phaedra merely testified that her daughter and her baby's father were the ones who told her about Appellant coming to her Mother's house. (R. 197). This innocuous testimony can hardly be said to prejudice Appellant and certainly does not rise to the level of prejudice that would warrant a mistrial. The jury was convinced of Appellant's guilt from multiple eyewitness identifications of Appellant being the shooter or Appellant being seen with a gun immediately after the shooting. A single question regarding who told Phaedra that Appellant came to her mother's house had no bearing on the jury's verdict and was harmless error if it was error at all. 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,

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June 22, 2022

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
The Honorable J. Mark Hayes, Circuit Court Judge

Appellate Case No. 2021-000608

THE STATE, Respondent,

v.

ANTERIUS BRAESHUN SMITH, Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed June 22, 2022, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 22nd day of June, 2022.

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
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STATE OF SOUTH CAROLINA
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The Honorable J. Mark Hayes, Circuit Court Judge

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Final Brief of Respondent on Appellant by emailing his counsel of record, Sarah E. Shipe, at her primary email address as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served. This twenty-second day of June, 2022.

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Caroline Collins

From: Caroline Collins
Sent: Wednesday, June 22, 2022 8:45 AM
To: sshipe@sccid.sc.gov
Cc: William Blitch; Stock, Chris
Subject: The State v. Anterius Braeshun Smith (2021-000608)
Attachments: SMITH Anterius - Final Brief of Respondent - 2021-000608 (03018746xD2C78).PDF

Good Morning Ms. Shipe,

Attached please find a copy of the Final Brief of Respondent in The State v. Anterius Braeshun Smith (2021-000608). This brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

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