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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2021-001232

THE STATE, Respondent,

v.

CALVIN EUGENE WHITENER, Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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III. The trial judge did not abuse his discretion in denying Appellant's motion for a mistrial.

STATEMENT OF THE CASE

On February 13, 2015, a Newberry County Grand Jury indicted Appellant for trafficking cocaine, 28 grams or more, but less than 100 grams, first offense. On November 13, 2017, Appellant proceeded to trial in absentia before the Honorable Frank R. Addy, Jr. Ricky Harris, Esquire represented the Appellant. The jury found Appellant guilty as indicted. The trial court sealed Appellant's sentence due to his absence at trial. On October 20, 2021, Appellant appeared before the trial court to impose the sealed sentence. The trial court sentenced Appellant to twenty-five years imprisonment. This appeal follows.

STATEMENT OF FACTS

On September 3, 2014, Deputy Michael Claytor of the Newberry County Sherriff's Department was conducting a radar operation when he clocked a white Nissan Altima speeding 80 mph in a 55 mph zone at approximately 1:00 am. (Tr. 115). Claytor conducted a traffic stop of the vehicle. (Tr. 115). There were four occupants in the vehicle: (1) Jacques Mincey, the driver; (2) Walker Camp, front seat passenger; (3) Bobby Gregory, back driver's side passenger; and (4) Calvin Whitener- passenger side back seat (Appellant). (Tr. 115-121).

Mincey notified Claytor that they were on their way home from a funeral in Atlanta and the vehicle was a rental as Claytor approached the vehicle, (Tr. 116-117). Mincey also informed Claytor that he did not have a valid license and provided him with his South Carolina ID card. (Tr. 116). After confirming that Mincey was driving with a suspended license, Claytor asked Mincey to step out of the car where Claytor then arrested Mincey for driving under suspension. (Tr. 118). Mincey was then patted down to make sure he did not have any weapons or contraband on his person. (Tr. 118).Claytor asked the remaining passengers for their identification. (Tr. 117). In checking the passengers' identification, Claytor learned that Camp, the front passenger, had an active warrant for an unknown offense. (Tr. 118).

Claytor had Camp step out of the vehicle and while doing so, Claytor observed a set of digital scales in the pocket of Camp's Cargo shorts. (Tr. 119). Claytor testified at trial that in his experience this type of scale is used to weigh drugs. (Tr. 120). Claytor testified that Mincey and Camp each had a very nervous demeanor. (Tr. 120). Claytor then asked the remaining two passengers to step out of the vehicle to conduct a Terry[1] frisk on them for weapons to be sure they didn't have anything on them that was going to harm the deputy or anyone else. (Tr. 121-122).

[1]Terry v. Ohio, 392 U.S. 1(1968).

When Gregory and Appellant stepped out of the car they were not placed in handcuffs. (Tr. 123). Claytor conducted a pat down search of Gregory and found nothing on his person. (Tr. 123). Claytor then conducted a pat down search of Appellant. (Tr. 124). While conducting the search on Appellant, Claytor felt a large ball at Appellant's inner thigh. (Tr. 124). Claytor testified that it appeared to be a ball of a powdery substance. (Tr. 124). Claytor asked Appellant what it was to which Appellant responded "it's a bag of powder." (Tr. 125). Claytor removed the bag of powder and continued his search finding $790 in Appellant's left pocket. (Tr. 125). Appellant was then place into detention. (Tr. 125).

Believing the powder to be illegal drugs, Claytor called narcotics investigator Michael Stribble to the scene (Tr. 126). Stribble performed a presumptive test on the substance and weight of the bag. (Tr. 126-127, 172- 175). The presumptive test was positive for cocaine and weighed enough for trafficking amounts. (Tr. 175). Appellant was then arrested for trafficking cocaine. (Tr. 127, 175).

At trial, defense counsel moved to suppress all evidence against Appellant as the result of an unlawful search and seizure. (Tr. 25-28). Defense counsel asserted three grounds: (1) there was no reasonable articulable suspicion to extend the traffic stop to the point where Appellant needed to be removed from the car and searched; (2) there was no reasonable articulable suspicion that lead a reasonable police officer to believe Appellant was armed and dangerous and should be frisked for weapons under Terry; (3) Appellant was detained to the extent that Miranda was required before police could question Appellant about the nature of the object in his pants. (Tr. 25-28). The trial court ruled that based on the totality of the circumstances the drugs were admissible and not in violation of either Miranda or Terry or any other applicable search and seizure law. (Tr. 77-80).

STANDARD OF REVIEW

Issues 1 and 2

"In criminal cases, the Appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E. 2d 216, 220 (2006). "On appeals from a motion to suppress based on fourth amendment grounds, this court applies a deferential standard of review and will reverse if there is clear error." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). "This deference does not bar this court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." Id. "If there is any evidence to support the trial judge's decision, this court will affirm." State v. Spears, 429 S.C. 422, 433 839 S.E.2d 450, 455 (2020) (citing State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided case differently." State v. Pichardo, 367 S.C. 84, 95, 623 S.E.2d 840, 846 (2005) (citing Easley v. Cromartie, 532 U.S. 234, 121 S. Ct. 1452, 149 L.Ed.2d. 430 (2001).

Issue 3

"The decision to grant or deny a motion for a mistrial is a matter within a trial court's discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). Whether a mistrial is necessary is decided on a case by case basis. "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." State v. Rowlands, 343 S.C. 454, 457-458, 539 S.E.2d 717, 719 (Ct. App. 2000) (citations omitted). "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled

to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 445, 460 (Ct. App. 2005). "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983).

ARGUMENT

I.

The trial judge properly denied Appellant's motion to suppress the drugs found inside Appellant's pants because the officer had reasonable suspicion to conduct a pat down search.

Appellant argues that the trial judge erred by denying a motion to suppress evidence found in Appellant's pants during a traffic stop because the officer did not have reasonable suspicion that Appellant was armed and dangerous prior to conducting the pat down search. Appellant's argument lacks merit because the officer had reasonable suspicion to conduct a pat down search of Appellant.

Appellant was charged with trafficking cocaine found after police performed a traffic stop. The United States Constitution protects people from unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained." U.S. CONST. amend. IV. The State of South Carolina also provides people with protections against unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained." S.C. CONST. art. I, § 10.

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the

meaning of the Fourth Amendment." State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App 2005). "Thus an automobile stop is 'subject to the constitutional imperative that it not be unreasonable under the circumstances.'" Id. (citing Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996)). "Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se." Id. "The police may also stop and briefly detain a vehicle if they have reasonable suspicion that the occupants are involved in criminal activity." Id. Here, there is no contest that Deputy Claytor observed a vehicle, in which Appellant was a passenger, speeding on a rural road at 1:00 a.m. (Tr. 115).

"Once a motor vehicle is detained lawfully for a traffic violation, the police may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures." State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 708 (Ct. App. 2002). "In carrying out the stop an officer 'may request a driver's license and vehicle registration, run a computer check, and issue a citation.'" Id. (citing United States v. Sullivan, 136 F.3d 126, 131 (4th Cir. 1998)). Deputy Claytor approached the vehicle to inform the driver of the purpose of the stop, obtain driver's license, registration and insurance. (Tr. 115-116).

"Accordingly, we hold that in connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others. U.S. v. Sakyi, 160 F.3d 164, 169 (4th Cir. Ct. App. 1998). Our Supreme "Court has recognized that because of the 'indisputable nexus between drugs and guns,' where an officer has reasonable suspicion that drugs are present in a vehicle lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk of both the driver and

the passenger in the absence of other factors alleviating the officer's safety concerns." State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006). "The appellate court, however, does not review the trial court's determination de novo, but applies a deferential standard of review, and will reverse only if there is clear error in its ruling. This court will affirm if there is any evidence to support the decision, regardless of the basis of the trial court's ruling." State v. Butler, 353 S.C. 383, 393, 577 S.E.2d 498, 503 (2003).

The search of Appellant's pants was proper. In ruling that the drugs found in Appellant's pants was admissible, the trial judge looked at the totality of the circumstances and very thoroughly pointed to evidence to support his ruling. "The officer's observations while conducting the traffic stop may create reasonable suspicion to justify further search or seizure." State v. Provet, 405 S.C. 101, 109, 747 S.E.2d 453, 457 (2013). Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable search and seizures. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007) (citing State v. Freiburger, 366 S.C. 125, 620 S.E.2d 787 (2005)). However, a warrantless search will withstand constitutional scrutiny where the search falls within one of the several well-recognized exceptions. The Court explained:

> This is not a situation where you have a mere traffic stop, the driver gets ticketed and then stops. Under the totality of the circumstances and the facts of this particular case, what we have is a stop taking place at 1:00 o'clock in the morning; driver is under suspension; one of the passenger's has an outstanding warrant. The stop takes place on a very rural road in which the Court is very familiar of that stretch of roadways, extremely uninhabited, it is very bucolic. First it is strange that a person without a driver's license would be able to rent a car. The statement having been at a funeral, when the driver and the occupants are not in, what one would consider, minimally appropriate funeral attire. That certainly would cause to peak the officer's interest. And then, of course, the person, the individuals he speaks to, one is actually engaged in violation of the law, driving without a license, driving with a suspended license; the other one has an outstanding warrant for him out of North Carolina. Additionally the behavior of the occupants was clearly suspicious, being on a deserted roadway the officer

> was justifiably concerned for his own safety. Many, many cases will [c]ite the proposition that typically guns and drugs go hand in hand and in this case when the driver's side backseat passenger was arrested he had scales in his cargo pants that were readily apparent, in plain view of the officer. Based on his training and experience as well as his experience with digital scales, simply go hand in hand with drugs. When you couple that with the fact that the officer is with only a trainee and I am sure the trainee was capable of his own right but obviously who is still in training. The officer is initially by himself at 1:00 o'clock in the morning, the individuals in the car behaving suspiciously, glancing out. The individual in question, Mr. Whitener, not really making eye contact with the officer. Clearly there was good reason, good cause for the officer to make an initial pat down of the occupants, to make sure that no one had weapons at that time of the night.

(Tr. 78-79). In conclusion, the trial judge's finding was legally correct and is supported by evidence. Therefore, the ruling should be affirmed.

II.

The trial court properly denied Appellant's motion to suppress his statement made to police during the pat down of Appellant because he was not in custody and therefore Miranda was not required.

Appellant argues that the trial court erred in refusing to suppress Appellant's statement to the officer immediately after the pat down search because a reasonable person would have believed he was in custody, and the officer's question was reasonably likely to evoke an incriminating response. This argument lacks merit because Appellant's statements were non-custodial and made during a routine pat down.

Miranda warnings are designed to protect several constitutional rights of an accused, most importantly, the privilege against self-incrimination. State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988). In order to assure that an accused's right to remain silent is not compromised during custodial interrogation, the United States Supreme Court ruled that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444 (1966). "A

statement, whether exculpatory or inculpatory, obtained as a result of custodial interrogation is inadmissible unless the person was advised of and voluntarily waived his rights under Miranda . . . ." State v. Kennedy, 325 S.C. 295, 302, 479 S.E.2d 838, 842 (Ct. App. 1996) aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998).

The special procedural safeguards outlined in Miranda are not required if a suspect is simply taken into custody, but only if a suspect in custody is subjected to interrogation. Id. at 303, 479 S.E.2d at 842 (Ct. App. 1996), aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998). The interrogation requirement of Miranda is met by express questioning or its functional equivalent, and includes words or actions the police should know are reasonably likely to elicit incriminating responses from a criminal suspect. Rhode Island v. Innis, 446 U.S. 291 (1980); State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989); Kennedy, 333 S.C. at 426, 510 S.E.2d at 714. Voluntary statements not made in response to custodial interrogation do not require Miranda warnings. Arizona v. Mauro, 481 U.S. 520 (1987). Miranda warnings are inapplicable to voluntary statements not the product of interrogation. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989). In Howard, the court stated:

> In formulating a definition of interrogation, the [Innis] Court pointed out that "the concern of the Court in Miranda was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." The Court noted that interrogation must reflect a measure of compulsion above and beyond that inherent in custody itself.

296 S.C. at 488, 374 S.E.2d at 288 (emphasis added).

Notably, courts have repeatedly found that the questioning of a motorist during a routine traffic stop is not considered "custodial interrogation" for the purposes of Miranda. In Berkemer v. McCarty, 468 U.S. 420 (1984), the United States Supreme Court held that a traffic stop,

although considered a "seizure" pursuant to the Fourth Amendment, was not a situation considered unduly coercive which required the issuing of Miranda warnings to a seized person for two primary reasons: (1) detention of a motorist during a traffic stop is "presumptively temporary and brief" and a motorist expects that he or she will most likely be allowed to continue on his or her way, a situation drastically different from an interrogation at a police station which is presumptively long and will continue until the individual provides interrogators with the information they seek; and (2) circumstances associated with a typical traffic stop are not such that the motorist feels he or she is "completely at the mercy of the police" because the public location of such detainment, which allows for the presence of witnesses and passing motorists "reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse." Id. at 437–39.

Due to these two important factors, the Berkemer court found routine traffic stops to be analogous to Terry stops which allow officers to investigate individuals and circumstances which "provoke suspicion" by asking a detained individual a "moderate number of questions" to determine identity and obtain information proving or dispelling an officer's suspicions. Notably, a detainee is only arrested in such situations if his or her answers provide an officer with probable cause to initiate the arrest. Id. at 439. A police officer may order both the driver and passenger out of the vehicle pursuant to a valid automobile stop without violating the Fourth Amendment prohibition against unreasonable seizures. State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006). The United States Supreme Court held in Terry v. Ohio that a police officer must have reasonable suspicion that a person is armed and dangerous before conducting a pat down or frisk of that person. Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968); see also

Pennsylvania v. Mimms, 434 U.S. 106, 111-112, 98 S.Ct. 330 (1977) (extended the Terry doctrine to frisks pursuant to valid automobile stops for traffic violations).

In State v. Smith, an officer pulled Smith over for speeding. State v. Smith, 329 S.C. 550, 495 S.E.2d 798 (1998). The officer noticed the driver was acting "a little bit edgy, looking around et cetera." Id. at 554. The officer asked Smith to step out of the car and walk to the rear of the vehicle where he conducted a pat down for weapons. Id. The officer felt a bulge in Smith's jacket and testified that it was obvious it was a baggy of some type. Id. The officer asked Smith "What's this your reefer?" to which Smith replied "Yeah, man, that's my reefer." Id. Our Court of Appeals held that based on all of the facts taken together there was reasonable suspicion to conduct a pat down of Smith. Id. at 557. The Court further held that the officer's brief questioning did not exceed the permissible bounds of a Terry search and cited to State v. Scott, holding that an officer did not conduct an improper search in violation of the Fourth Amendment by asking defendant the nature of the object in his pocket after officer patted down object and determined that it was not a weapon. Id. (citing State v. Scott, 518 N.W.2d 347 (Iowa 1994)).

Similar to Smith, there was a lawful traffic stop and reasonable suspicion to conduct a pat down search of the driver and passengers for weapons. Appellant was not in handcuffs at the time of the pat down. He was not subject to a custodial interrogation because it was a pat down for weapons and therefore Miranda was not required.

III.

The trial judge did not abuse his discretion in denying Appellant's motion for a mistrial.

Appellant contends the trial court erred in denying Appellant's motion for a mistrial because the prosecutor's comments during opening statement were unduly prejudicial and improperly shifted the burden of proof. Appellant's argument lacks merit because the statements

made by the Solicitor were not improper, and even if they were, the trial judge removed any prejudicial effect the statements may have made by giving a curative instruction.

"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997). "The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "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).

"Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." State v. White, 371 S.C. 439, 447-448, 639 S.E.2d 160, 164 (Ct. App. 2006). "The granting of a motion for mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009).

Appellant argues that the Solicitor made multiple statements in his opening that shifted the State's burden. Appellant specifically references the statement "[this trial] is not very efficient, is it, because you- it is your third day coming in here now. It is inconvenient for you, so it is not very efficient trying a case in front of a jury." (Tr. 101-102). Appellant further references the statement "in other countries they are not afforded these rights. Issues of guilt, governmental

officials make that determination in other countries. The Philippines for instance. They have judicial-some are executions" as well as "it seems kind of silly, maybe, [to] decide on something so straightforward." (Tr. 102-105). Appellant argues that it is the cumulative effect of several comments that creates the prejudice and improperly shifts the burden. Appellant asked to approach the bench and the following curative instruction was given after the State's opening statement. (Tr. 105-107).

> Additionally, I understand that at all points and times the State has the burden of proving the Defendant's guilt beyond a reasonable doubt. And under all circumstances individual desires of jury trials under the laws of our states, they are certainly entitled to a jury trial regardless of the nature of the case, regardless of the nature of the evidence. Every one, every citizen of this county is entitled to that right. To the extent that the Solicitor's opening statement could be interpreted by you as any sort of indication that the state has a lessor burden in this particular case, please don't accept his comments in that way and disregard that portion of the statement that may have alluded has a lessor burden of some kind. Again, the State has the burden of proving the Defendant's guilt beyond a reasonable doubt at all points in time. And as I will instruct you at the conclusion of the trial, the proof is always with the State, it is always with the State of South Carolina and obviously the Defendant is never required to prove himself innocent. The burden is always with the State to prove his guilt beyond a reasonable doubt.

(Tr. 106).

At the end of the trial the trial judge made it clear on the record that Appellant properly and timely objected to the State's opening statement and requested a mistrial. (Tr. 200). The trial judge further articulated that Appellant was protected with that objection and would be allowed to formally place his motion for a mistrial on the record. (Tr. 200-201). In ruling on the motion the trial judge stated,

> The comment that the Solicitor made, I consider that more of a, more of a passing comment along the lines of our evidence in this case is very, very strong as opposed to suggesting we need a lessor burden of proof is required, what is required. To the extent that the statement could infer, or that one could infer from the statement, this is not proof beyond a reasonable doubt kind of case or to the extent that the comments on the necessity of the trial, I think there might, that my instructions to the jury emphasized the State's burden that everyone has a right to a jury trial. But the, as to who has the burden, I think that was sufficient to cure

> assuming for the moment that the – was inappropriate in the first place. Again, I take it as being more of a statement of, hey, the drugs were found in the guy's groin. That is a pretty strong case for possession that is how I took his comment.

(Tr. 202-203).

The statements made by the Solicitor in the opening statement were not prejudicial nor did they shift the burden. The Solicitor simply acknowledged that being a juror was likely an inconvenience to the jury as it takes more time and it takes away from their everyday lives. The solicitor's other comment of it seems kind of silly to decide on something so straightforward does not shift the burden to say that the Defendant has to prove himself innocent, it simply shows the confidence the State has in their case and the strength of their evidence.

Even if the statements were prejudicial and shifted the burden the proper remedy would not be granting a mistrial. In State v. Bell, the Solicitor said in his opening statement "Reasonable doubt is not just any fanciful doubt. It is a very substantial, it's a substantial doubt." State v. Bell, 305 S.C. 11, 16, 406 S.E.2d 165, 169 (1991). The South Carolina Supreme Court held that the judge's charge cured any error in the Solicitor's statement of the law. Id. "Generally a curative instruction is deemed to have cured any alleged error." State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006). "As the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review." State v. Smith, 411 S.C. 161,169, 767 S.E.2d 212, 216 (Ct. App. 2014).

Here, the trial judge made the curative instruction right after the State's opening statements where the alleged improper statements were made. There was no objection to the sufficiency of the curative instruction made at the time by Appellant, therefore it is unpreserved for appellate review. (Tr. 107). Even if Appellant had made the objection and the issue was

preserved for appellate review, the curative instruction was sufficient and cured any potential prejudice that occurred. During the curative instruction the trial judge stated **five** times that the burden was on the State to prove Appellant's guilt. Further, after the curative instruction was given, counsel for Appellant then gave his opening statement, where he spoke in depth about the presumption of innocence that Appellant had and the burden that the State had to overcome. During the State's Closing argument, counsel for Appellant objected claiming that the Solicitor was arguing that the defense had some burden of proof. (Tr. 215). The trial judge again stated in front of the jury that "I will instruct the jury on the question of burden of proof. Obviously I have already done that. The burden is always on the State on each and every element." (Tr. 215-216). Immediately following that statement by the trial judge the Solicitor continued with his closing argument stating "the burden of proof is on us, okay." (Tr. 216). Further in his closing argument the Solicitor states "Mr. Daniel in his opening, he talked about our burden of proof. Okay. It is the highest in the world and we relish that because they do have a presumption of innocence and they wear it like a robe, the Judge is going to tell you that." (Tr. 217). Counsel for Appellant then went through the State's burden thoroughly in his closing argument. (Tr. 220-233). Finally, the Judge stated again the State's burden as well as Appellant's presumption of innocence in his jury charge before deliberations. (Tr. 234-236). The Solicitor's comments in his opening statement did not shift the burden of proof nor were they improper, but even if they had improperly shifted the burden, the trial judge's curative instruction as well as the sheer amount of times the State's burden was mentioned, was the proper remedy. Therefore the trial judge properly denied Appellant's motion for a mistrial.

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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September 7, 2022

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2021-001232

THE STATE, Respondent,

v.

CALVIN EUGENE WHITENER, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on counsel of record for the Appellant by electronic mail to the addresses listed for each counsel in AIS, and followed by depositing one copy of the same in the United States mail, postage prepaid, addressed to:

Dayne Phillips, Esquire
Jael Gilreath, Esquire
Price Benowitz LLP
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I further certify that all parties required by Rule to be served have been served.
This 7th day of September, 2022.

Anne Mueller

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Subject:	The State v. Calvin Eugene Whitener, 2021-001232
Date:	Wednesday, September 7, 2022 10:17:00 AM
Attachments:	image001.png WHITENER Calvin - 2021-001232 - Initial Brief Of Respondent and Designation Of Matter (03093895xD2C78).PDF

Good morning Mr. Phillips and Mr.Gilreath.
Attached to this email is the State's Initial Brief Of Respondent and Designation Of Matter in the above criminal appeal. We will be filing our brief with the Court electronically later this morning.
If you don't mind, please confirm your receipt of this email and brief by return email.
I thank you for your cooperation.
Sincerely,
Anne Mueller, Legal Assistant to Assistant Attorney General Ambree M. Muller

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