STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
The Honorable Courtney Clyburn-Pope, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DAE' KWON-JAHEEM SIMMONS,

APPELLANT.

Appellate Case No. 2021-000802

FINAL BRIEF OF RESPONDENT

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I. Whether the court erred by allowing the solicitor to include in his impeachment of defense witness Reginald Young for his accessory before the fact of murder adjudication that the solicitor asserted at Young's family court guilty plea that Young was "egging" appellant on to shoot the decedent, or that Young had admitted "egging" appellant on, since this was improper impeachment, it was unduly prejudicial to appellant, and it should be excluded under Rule 403, SCRE?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Did the trial court abuse its discretion in permitting the State to impeach codefendant Young concerning his guilty plea to accessory before the fact to attempted murder of Victim?

STATEMENT OF THE CASE

Appellant was charged with murder and possession of a weapon during the commission of a violent crime (2019-GS-02-02112; 02-02113). (R. p. 253). A two-day jury trial was held before the Honorable Courtney Clyburn-Pope, on April 13-14 and July 13, 2021.[1] Appellant was represented at trial by defense counsel Barry L. Thompson, Esq. and William Thomas McKellar, Esq. The State was represented by Assistant Solicitors Cassie Weathersbee Hall, Esq. and Samuel Brian Grimes, Esq. (R. p. 1). At the conclusion of the trial, the jury found Appellant guilty on both charges. (R. p. 253). Judge Clyburn-Pope sentenced Appellant to thirty-eight (38) years imprisonment for murder, and a concurrent five (5) years for the weapon charge. (R. p. 257).

This appeal now follows.

STATEMENT OF FACTS

Larry Swearingen (hereinafter "Victim"), his wife Jessica, and his daughter S.S., were walking home after visiting family in the nearby Pruitt Nursing Home. (R. p. 11-12). They walked by the "Off Da Chain" seafood restaurant and headed to the corner of Laurens Street and Columbia Avenue. Walking in the opposite direction were Appellant, codefendant Reginald Young (hereinafter "Mr. Young"), and two young women. Jessica Swearingen testified that as she and her family passed by the group, one of the young men bumped into their daughter. This prompted Victim to turn and confront them. (R. p. 14-16). The argument ended, Victim proceeded to catch up to his wife and daughter, and Jessica testified that at no time did she see her husband remove the pistol he had tucked into the small of his back. Moments later, she heard three gunshots and saw her husband fall to the ground with a bullet wound to the head. (R. p. 17-19). Jessica attempted

[1] Sentencing was delayed so that defense counsel could provide a presentence report to the court. (R. p. 254).

to render aid to her husband by putting pressure on the wound.[2] When police arrived she informed them of her husband's gun, which was underneath his body and tightly tucked into his pants. (R. p. 20; p. 22).

Law enforcement and emergency services personnel responded quickly to the scene. First to arrive was Sergeant Busbee who was on the scene within one minute of the emergency being radioed out to patrol. (R. p. 84-85). Sergeant Busbee testified to Jessica's efforts to put pressure on the wound, to her being clearly upset, to the fact that she told him about her husband's firearm, and that Victim's gun was indeed tucked into the waistband in the small of his back with the Victim's shirt over the gun. (R. p. 85-87). He testified that Victim's eyes were open, but he was unresponsive and lifeless. He further testified that he could not detect a heartbeat at that time. (R. p. 85-86).

Officer Breeden was next to arrive. She testified that Jessica's hands were covered in blood from having aided her husband. (R. p. 91-93). She testified that she made the effort to remove Victim's firearm from his waistband, and that doing so proved difficult. She explained that Victim was laying on top of the gun in his waistband, and that she had to tug on Victim's shirt to get it out of the way to access the gun. She then passed the gun off to Lieutenant Faulkner. (R. p. 95-96). There was no blood on the gun. (R. p. 123). EMS arrived soon after, a weak pulse was found by electric monitor and Victim was rushed to the hospital.

Victim was on life support for four days while his organ donor status was honored, and then pronounced brain dead and taken off life support. The pathologist, Dr. Rose, testified that the cause of death was perforation of the spine by gunshot. Dr. Rose testified that the bullet struck

[2] Victim's daughter, S.S., had run some distance from the scene and was ushered to safety by Millie Cummings, a bystander who had witnessed the crime and pulled over her vehicle to help the family. (R. p. 52-53).

Victim in the back of the neck on the right side, and proceeded forward and left, striking his vertebrae, and exiting out Victim's cheek. The result of such a wound was that the spinal nerves controlling Victim's breathing and heartbeat were incapacitated. Evidence from the wound was consistent with a gunshot from distance. (R. p. 103-108).

The security camera footage from the "Off Da Chain" seafood restaurant caught both the confrontation and subsequent shooting on camera. Appellant can be clearly seen in a blue t-shirt and Mr. Young in a white sleeveless shirt. The surveillance video depicts: 1) Mr. Young arguing with Victim, 2) Appellant standing off to the side while the argument took place, 3) Appellant, Mr. Young, and the girls walking away after the argument up to the walkway of the restaurant, 4) Appellant looking back toward Victim multiple times after walking away, 5) Appellant carrying a pistol in his right hand, 6) Appellant stepping over the chain railing to get a clear angle to shoot, 7) Appellant attempting to fire a round, 8) Appellant turning and smiling at Mr. Young, 9) Appellant clearing the jammed ammunition, and then 10) Appellant shooting three times. (State's Exhibit 3, 4, and 5). Forensics recovered one unfired bullet, and three casings. Analysis of the spent casings demonstrated that they were all fired by the same firearm. (R. p. 115-118; p. 122).

Keith Dill testified that he was driving down the road and witnessed one of the young men of the group fire four times. He saw that Appellant was firing toward a family of three up the road. Mr. Dill testified that after the first two shots the man began to turn and face the shooter, then grabbed his neck and fell back onto the ground. (R. p. 37; p. 44). Similarly, witness Millie Cummings was stopped at the stop sign and saw her niece, Chemondria, walking with another girl and two young men. The young man dressed in a blue shirt she knew to be "Dae" and identified Appellant as "Dae". (R. p. 51; p. 55). She witnessed Dae (later referred to as "Dae Dae") and Victim arguing, after which Victim turned and walked away. (R. p. 48-49). She testified in more

detail moments later that the group had originally been heading toward Hahn Village, but "then they turned – the two guys turned around. And just like I said, they was changing words with Larry, and they was exchanging words. Then I looked, I seen gunfire fire." [3] (R. p. 50). Ms. Cummings testified that Victim and his family had walked to the corner of Columbia Avenue and Laurens Street, she then testified "I seen Dae Dae shoot" while Victim and his family had their backs to Appellant. (R. p. 50, line 6 through p. 51, line 1). She identified Appellant as the man in blue from the surveillance video, saw Victim get shot, and did not see Victim with a gun. (R. p. 51-52; p. 55). Detective Dobbs testified as to his investigation, and how he further developed Appellant as a suspect. (R. p. 80-83). At trial, the issue of the identity of the shooter was not contested by Appellant, his defense relied upon arguing that the shooting was in the heat of passion, therefore constituting voluntary manslaughter. (R. p. 5-6).

HOW THE ISSUE WAS PRESENTED AT TRIAL

After the close of the State's case-in-chief, and following the denial of a directed verdict motion, Appellant preemptively moved the court to limit the cross-examination of Appellant's sole witness, Reginald Young, as it pertained to his previously entered guilty plea to attempted murder in family court. Appellant initially argued that the State should not be permitted to make any reference to Mr. Young's guilty plea as it was not relevant, and otherwise substantially more prejudicial than probative under Rule 403. (R. p. 147-148). In response, the State argued that, predictively, any testimony from Mr. Young would be to establish either a self-defense claim or a voluntary manslaughter defense, and since his attempted murder plea was incongruent with either

[3] On cross-examination, redirect, and re-cross Ms. Cummings was questioned as to whether she saw Victim push one of the young men. Though her testimony is not entirely clear, it appears as though she testified that she did not see any pushing at the time of the crime, but was able to see a push on the multiple replays of surveillance footage. (R. p. 59-61).

of those theories of the case, the topic of cross-examination would be infinitely relevant, could not possibly be more prejudicial that probative, and would go directly to the credibility of the witness. (R. p. 148-149). The State further articulated that while it is not common for there to be a completed plea in advance and then have the pleading codefendant come and testify on behalf of the defense, the defense was calling this witness and it was not the burden of the State to prevent such a scenario. In any case, it would be a "ridiculous notion" to suggest that one codefendant can plead guilty and then give favorable testimony to their fellow codefendant in contrast to that plea, while the motive and credibility of such testimony is shielded from cross-examination. (R. p. 149-150). Lastly, the State noted that the testimony presented by Mr. Young might also create an impermissible "transferred" theory of voluntary manslaughter, as the Victim was primarily in an argument with Mr. Young, not Appellant.[4] (R. p. 151-152).

The trial court postponed giving a ruling on the motion so as to provide counsel with an opportunity to provide caselaw on the issue. (R. p. 153). When court was reconvened the following day Appellant conceded that in general such cross-examination is permissible for the purpose of impeaching the witness's credibility, but not the guilt of the defendant, and consequently Appellant relied upon the remaining argument that the evidence is simply substantially more prejudicial than probative. (R. p. 154-155). Appellant summarized the distinction as follows: "you can offer this testimony to try to say hey, you pled guilty to attempted murder and doesn't that prove that you're lying about things today. But they can't offer it to say hey, you pled guilty to attempted murder, and doesn't that mean that Dae'Kwon is also guilty of murder somehow. There's a difference –".

[4] There is evidence from witnesses that Appellant was also "exchanging words", but the bump of Victim's child S.S. testified to by Jessica, appears from the video to be the actions of Mr. Young. The video also shows that the face-to-face portion of the confrontation is between Victim and Mr. Young, with Appellant off to the side. (State's Exhibit 3).

(R. p. 155). Appellant cited to *State v. Moore* for that premise, reiterated his argument under Rule 403, and requested a limiting instruction.[5] (R. p. 155-156); *State v. Moore,* 337 S.C. 104, 108, 522 S.E.2d 354, 357 (Ct. App. 1999).

The State ultimately agreed with Appellant's contention that the contemplated cross-examination of Mr. Young's guilty plea could not serve as substantive evidence of Appellant's guilt and had no objection to a limiting instruction to that end. The State then reiterated the concern that Mr. Young's testimony would be inconsistent with his guilty plea given under oath that he was an "accessory before the fact to attempted murder, which includes the intent to kill" and that impeachment of Young's testimony on that issue is relevant and permissible. Appellant understood the State's argument and ended with a stated expectation that Mr. Young would not be giving inconsistent statements. (R. p. 159).

The trial court ruled that he would permit the State to question Mr. Young as to his guilty plea and the adjudication thereof, and would give a limiting instruction that the jury cannot consider such as evidence of guilt of the defendant, only as evidence of the witness's credibility. The trial court also requested that Appellant draft the limiting instruction that would be given to the jury in this matter. (R. p. 159-160).

On direct examination, Mr. Young took the stand and testified to his actions during the disputed crime. He testified that as he and his group walked past Victim and his family, Victim made unkind and aggressive comments to him. According to Mr. Young, Victim asked: "Why you looking at my fucking wife?" He responded by stating: "You talking to me? You can't be talking to me because I'm not looking at your wife." Following the exchange, Appellant testified that

[5] At this juncture, the trial court also referenced the language of the notes under Rule 609, and the holding in *State v. Mallory,* 270 S.C. 519, 242 S.E.2d 693 (1978) as support that juvenile convictions can be used for purposes of impeachment of the witness.

Victim pulled out his gun and told him to "[g]et your black ghetto ass on." (R. p. 176, line 15 through p. 177, line 25). Mr. Young testified that he responded by putting up his hands to indicate he did not want any problems and did not talk trash with Victim. *According to Mr. Young, as his group moved on he continued to say that he did not want any problems, and did so even as his group reached the front of the Off Da Chain seafood restaurant.* Mr. Young testified that he felt scared and unsafe by the exchange, but not excited. (R. p. 178, lines 1-17; p. 174; p. 175).

Mr. Young testified that his exchange with Victim was loud enough that Appellant "probably heard it". He was asked on direct what Appellant had to say about the incident, and the record indicates only: "(inaudible)". (R. p. 174, lines 11-13). Mr. Young did not offer any further testimony as to Appellant's mood or behavior regarding the incident. Appellant then preemptively questioned Mr. Young on the fact that he pled guilty in family court as to his involvement in this crime. (R. p. 179-181).

On cross-examination, Mr. Young testified to his group's intentions for that day and then testified to the video as portions were played in court. (R. p. 181-186). Mr. Young testified that he was standing right next to Appellant when Appellant fired the gun. (R. p. 186, lines 17-19). He then testified that his juvenile case was heard by the family court, that he pled guilty to accessory before the fact to attempted murder, and that he had an attorney advising him on his case. *He was then asked that as part of his guilty plea proceedings the Solicitor informed the judge as to the facts of what took place during the crime. Mr. Young confirmed that the Solicitor did so, but that the solicitor only told the judge "my part in it."* (R. p. 188, lines 22-24). The Solicitor then asked if Mr. Young's part included an effort to "egg on" Appellant to shoot. Mr. Young denied ever agreeing to such a characterization of his behavior during his family court plea. (R. p. 188, line 25 through 189, line 4). In the face of the denial, the solicitor offered Mr. Young the transcript to

review, which was followed by an objection and bench conference. Questioning on the matter continued and confirmed that the Solicitor's recitation of facts for the plea included Mr. Young's behavior of egging on Appellant, and saying "do it, do it." (R. p. 189, lines 3-12). Mr. Young's testimony then reverted to claims that he does not remember agreeing to those facts, obfuscation as to the nature of the question, but ultimately agreeing that the Solicitor's reference is indeed in the transcript of his plea. (R. p. 189, line 13 through p. 191, line 6). He then again denied ever saying such during the crime. (R. p. 191, lines 5-7). Mr. Young confirmed that he was sworn in and under oath for his plea and was truthful with the court in answering questions. (R. p. 191, lines 8-13).

At closing, the solicitor used the cross-examination to argue to the jury that Mr. Young testified for no other reason than to help his buddy. The solicitor explained that Mr. Young testified on direct that he was scared by the incident, but that at his plea he was egging on Appellant, saying do it, do it. When he was under oath for his plea Mr. Young had no objection to this description of his actions, but "[t]oday, it's a different story." (R. p. 216; p. 219; p. 224, lines 10-20). No objection was raised during closing argument.[6] The trial court gave the limiting instruction offered by Appellant, and stated as follows to the jury:

> Ladies and gentlemen, you've heard the testimony of a codefendant who was adjudicated delinquent of accessory before the fact to attempted murder for the events leading to the death of Larry Swearingen. The codefendant's adjudication of delinquency may be considered by you only on the matter of assessing the codefendant's credibility. Under no circumstances may it be considered by you as evidence of Dae'Kwon Simmons' guilt or innocence.

[6] Appellant raises in his discussion additional objections by defense counsel to the solicitor's questioning of Mr. Young as to their meeting prior to trial, and Mr. Young's level of cooperation during that meeting (it appears the meeting may have been conducted virtually). (Initial Brief of Appellant, p. 10-11). This portion of the State's cross examination has not been raised as a basis for appeal and has no connection to Appellant's issue on appeal alleging improper admission of the guilty plea during cross.

The trial court finished its remaining charges, the jury deliberated, and found Appellant guilty of both indicted offenses. (R. p. 252-254).

STANDARD OF REVIEW

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Rule 611(b), SCRE. An appellate court "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." Rule 403, SCRE. "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *State v. Hawes*, 423 S.C. 118, 129, 813 S.E.2d 513, 519 (Ct. App. 2018) *Id.* "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Taylor*, 404 S.C. 506, 511, 745 S.E.2d 124, 126 (Ct. App. 2013).

ARGUMENT

I. The trial court did not abuse its discretion in permitting the State to impeach codefendant Young concerning his guilty plea to accessory before the fact to attempted murder of Victim.

The trial court did not commit an abuse of discretion in permitting the State to cross examine Mr. Young on his guilty plea for accessory before the fact to attempted murder. First and foremost, Appellant received the benefit of an error of law *in his favor*, as the law of South Carolina

does permit testimony of a prior inconsistent statement to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination. Nevertheless, as the issue was argued and ruled upon during trial, the law permits cross-examination on matters that address the impeachment of a witness's credibility, even pre-existing guilty pleas of juvenile codefendants, and the guilty plea was used exclusively for that purpose by the State. As the content of his guilty plea directly contradicted his sworn testimony offered to the jury, the trial court was correct to permit the State to impeach Mr. Young on his behavior during the crime as attested to during his guilty plea hearing. Moreover, the cross-examination conducted by the State addressed solely Mr. Young's actions that day in relationship to the crime. It in no way impacted the elements of voluntary manslaughter that Appellant otherwise failed to prove via cross-examination and his case-in-chief. The convictions and sentences of the circuit court should be affirmed.

Our Supreme Court in *State v. Copeland* considered the argument that "the trial court erred in failing to instruct the jury that a police officer's testimony concerning a witness's statement prior to trial which is inconsistent with that witness's statement made at trial, is to be considered solely for impeachment purposes." *State v. Copeland*, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982), holding modified on other grounds by *Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022). The Court found the argument lacking and held that it is proper to "allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross-examination", agreeing with the reasoning of the Georgia Supreme Court that being under 'oath is not as strong a guaranty of truth as it once may have been" and in judging the truth of prior inconsistent statement "the jury has the opportunity to observe the declarant as he may repudiate or vary his former statement. . .". *Id.*, (citing *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717, 721 (1982)). This distinction between *Copeland* and the tact taken during trial arises

because the guilty plea was not referenced solely as Mr. Young's admission of guilt, but contained attestations that constitute prior inconsistent statements to his trial testimony. Appellant received the benefit of an error of law that unnecessarily restrained the utility of the State's cross-examination and any prejudice Appellant now claims on appeal cannot be substantiated under the law. As such, there is no legal basis for Appellant's argument, the guilty plea and associated facts thereto were admissible without limitation or distinction in this case.

However, the matter was addressed by both the parties and the court with the commonly held distinction of other jurisdictions that a codefendant's guilty plea is admissible only for purposes of impeachment. The law dictates that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Rule 611(b), SCRE. Rule 609(d) adds that "[e]vidence of a juvenile adjudication is admissible under this rule if conviction of the crime would be admissible to attack the credibility of an adult." Rule 609(d), SCRE. Our courts have held that "[a] trial judge may impose reasonable limits on cross-examination based upon concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant." *State v. Jenkins*, 322 S.C. 360, 474 S.E.2d 812, 814 (Ct. App. 1996). However, a co-defendant's guilty plea may be admitted for purposes of impeachment of the witness. See *State v. Moore*, 337 S.C. 104, 108, 522 S.E.2d 354, 357 (Ct. App. 1999); See *State v. Mallory*, 270 S.C. 519, 522, 242 S.E.2d 693, 694 (1978); Trial Handbook for South Carolina Lawyers, § 25:18. Guilty plea of co-defendant (5th ed.). Appellant's argument for inadmissibility on the basis of irrelevance was counter to this law and was quickly demonstrated as baseless; Appellant even conceded as much at trial when defense counsel agreed that the guilty plea could be admitted for impeachment. (R. p. 155). Any underlying argument to the contrary would therefore be unpreserved for appeal.

This left Appellant with only his argument for limiting cross examination under Rule 403, and that argument likewise failed. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." Rule 403, SCRE. Demonstrating a lack of credibility to the defense's only witness, so as to draw doubt upon his narrative of the confrontation, the alleged actions of Victim, and the portrayal of his own behaviors was probative, essential, and not at all "unfairly" prejudicial as it does not demonstrate any improper basis for a verdict against Appellant. *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct.App.1998)("Unfair prejudice means an undue tendency to suggest a decision on an improper basis."). Notwithstanding the prior inconsistent statement distinction reached by our Supreme Court in *Copeland*, there is general agreement across jurisdictions that evidence of a codefendant's guilty plea is inadmissible as substantive evidence of guilt of the defendant, but admissible to impeach the witness's trial testimony. The Rhode Island Supreme Court stated it best:

> This court recognizes the "well-established principle of law that use of a coconspirator's guilty plea or conviction as substantive proof of a defendant's complicity is not admissible in evidence." *State v. Parente*, 460 A.2d 430, 434 (R.I.1983). ***However, such evidence is admissible and not unduly prejudicial when introduced to impeach the credibility of a previously convicted defendant testifying in a codefendant's trial.*** *Id.* Recognizing that evidence of a codefendant's guilt is amenable to misuse, this court in *Parente* noted that a trial justice has the utmost responsibility to instruct the jury on the limited evidentiary use of a guilty plea or conviction.

State v. Braxter, 568 A.2d 311, 316 (R.I. 1990)(emphasis added); *State v. McDonald*, 117 Ariz. 159, 161, 571 P.2d 656, 658 (1977) ("Such evidence may be introduced where it tends to impeach the witness' trial testimony, *United States v. King*, 505 F.2d 602 (5th Cir. 1974), for the reason that the defense may not leave misleading impressions. . .".); *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, 199, 228 P.3d 909, 935 (Ct. App. 2010), as amended (May 4, 2010)("A co-defendant's

guilty plea is admissible to impeach the credibility of a witness and prevent a defendant from misleading the jury."); *People v. Brunner*, 797 P.2d 788, 789 (Colo. App. 1990); *Allen v. State*, 878 A.2d 447, 451 (Del. 2005). The trial court in this matter followed this formula precisely in finding the cross-examination relevant and admissible under Rule 403 to impeach the testimony of Mr. Young, in permitting the State to continue cross-examination after an otherwise unclarified bench-conference objection, and in giving the jury a limiting instruction as to the nature of the evidence.

As was explicitly predicted by the solicitor during trial, Mr. Young's testimony on direct examination was contradictive of the facts he attested to during in sworn guilty plea, and Appellant's prior preemptive motion to exclude the guilty plea from cross-examination was a blatant attempt by Appellant to shield his only witness from impeachment and preserve a veneer of credibility to the testimony Mr. Young offered to the jury. On direct examination, Mr. Young testified that the confrontation in question only took place between himself and Victim; importantly, it did not include Appellant. In further support of this fact within the record, Mr. Young testified on direct that Appellant only "probably heard" the exchange between Mr. Young and Victim. (R. p. 178). And, while still on direct, Mr. Young was asked what Appellant's response was to the encounter and Mr. Young's only answer was transcribed as "inaudible" with no further questioning or clarification. (R. p. 174, lines 11-13). *Lastly, in response to the alleged fact that Victim pulled out his gun, and used racially charged language, Mr. Young was adamant that his response was to simply put his arms up and repeatedly indicate that he did not want any trouble with Victim.* He even testified that his behavior in this regard continued once he reached the Off Da Chain restaurant. Contrary to defense counsel's assurances (R. p. 159), and contrary to Appellant's argument on appeal (Initial Brief of Appellant, p. 10), Mr. Young's testimony at trial

constituted an inconsistent statement to that for which he attested in his guilty plea, and impeachment on the matter was immensely probative.

Mr. Young told the jury that he maintained a "I don't want any problems" mentality throughout the encounter, and supposedly uttered those precise words to Victim after moving on from Victim and reaching the location where the shooting was commenced. However, he attested to facts at his guilty plea hearing that he explicitly egged on Appellant to shoot at Victim. Mr. Young's attestation to "egging on" Appellant is an affirmation that Mr. Young, personally, did "want problems" with Victim and this behavior carried the requisite intent for the charge he accepted at his plea. The contradictory nature of these statements was shown to the jury to demonstrate that Mr. Young's testimony could not be trusted as credible, and that he harbored bias and an motive to testify in a manner that would assist his codefendant friend at trial. That is precisely and exclusively how the evidence was used by the Solicitor at trial, and it was precisely the predicted concern that the solicitor anticipated before Mr. Young ever took the stand.

Appellant's argument loses credence by failing to even acknowledge the comparison of these two conflicting descriptions of Mr. Young's actions. Appellant sidesteps the obvious incongruence and argues that the cross-examination regarding "egging on" of Appellant constituted substantive evidence of Appellant's guilt as it pertained to his defense of voluntary manslaughter. However, Appellant's argument as to "why" the evidence was substantive is based not on facts, evidence, or testimony, but purely on a presumption as to how Mr. Young's actions "could" have impacted Appellant prior to the shooting. Appellant's argument rests on the presumption that Mr. Young's "egging on" Appellant suggests to the jury that Appellant did not possess the prerequisite heat of passion for his alleged defense, or that Mr. Young's actions constituted "evidence of reflection prior to appellant shooting the decedent". (Initial Brief of

Appellant, p. 12). These arguments do not represent the intended use or the actual use of the guilty plea during cross, and it demonstrates why a limiting instruction is given to ensure the jury does not independently utilize evidence in an improper way. *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S. Ct. 1702, 1707, 95 L. Ed. 2d 176 (1987)(noting "the almost invariable assumption of the law that jurors follow their instructions. . ."); *Foye v. State*, 335 S.C. 586, 593, 518 S.E.2d 265, 296 n. 1 (1999) (A jury is presumed to follow the instructions given by the court.); *State v. Young*, 420 S.C. 608, 623, 803 S.E.2d 888, 896 (Ct. App. 2017) (quoting *State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) ("Limiting instruction are deemed to cure error unless 'it is probable that, notwithstanding the instruction, the accused was prejudiced.'"); See *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (A curative instruction is deemed to have cured alleged error).

While the trial record would certainly support the absence of a heat of passion in this case, critically, Mr. Young's actions bear no weight upon the subject. Moreover, as Appellant conceded the issue of identity at the outset of trial, Mr. Young's guilty plea cannot even be said to have prejudiced him as being a participant in the crime. Appellant's argument presupposes the manner in which Appellant was impacted by his friend's actions, despite a complete lack of record evidence to support the conclusion. "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Pittman*, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007). The State's cross-examination did not address in any way some portion of Mr. Young's guilty plea that would have demonstrated Appellant's state of mind, and the "egging on" attestation speaks only to the actions of Mr. Young, *not to the impact of those actions on Appellant.* Mr. Young could have been egging on Appellant while Appellant was already experiencing a heat of passion leading to his gunshots, and likewise he could have been

egging on Appellant in the total absence of a heat of passion necessary for voluntary manslaughter. Yet again, and particularly damaging to Appellant's argument, Mr. Young's egging on of Appellant could also be argued to have contributed to or created a heat of passion at the time of the shooting. All three arguments are entirely speculative, and the State's cross-examination does not lend weight to any particular inference. (See R. p. 181-199). Mr. Young's actions fail to shed any light on Appellant's mindset or how Appellant received Mr. Young's urging. Mr. Young's guilty plea was used only to impeach the testimony of Mr. Young's actions that day; he even testified that his guilty plea addressed only "[his] part" in the crime.[7] Appellant relies upon the presupposition that Mr. Young's egging suggests evidence of reflection because without it, there is no foundation for the argument.

The State remained within the confines of the court's ruling by limiting its reference to the guilty plea as evidence of impeachment, such that Mr. Young's attestations for his guilty plea contradicted his testimony offered at Appellant's trial. In consideration of the facts and circumstances of the State's cross-examination, the trial court was well within its discretion to deny Appellant's preemptive motion to limit cross-examination, and to permit the State's cross-examination to continue following the unspecified objection and bench-conference. As such the conviction should be affirmed.

However, even if the "egging on" cross-examination were to be construed as substantive

[7] Appellant references *State v. Joseph*, 328 S.C. 352, 358, 491 S.E.2d 275, 278 (Ct. App. 1997), *State v. Gregg*, 230 S.C. 222, 225, 95 S.E.2d 255, 257 (1956), and *State v. Corn*, 215 S.C. 166, 54 S.E.2d 559 (1949) to suggest that the admissibility of the guilty plea for impeachment is limited strictly to the existence of the plea, and not any attestations to facts made by Mr. Young. None of those cases are applicable here. They each address circumstances where the basis for impeachment is a crime or moral turpitude that the jury can consider in choosing whether to believe the witness is worthy of trust in general. Here the guilty plea was needed to impeach the witness, as he was in the process of giving untrustworthy and contradictive testimony.

evidence of Appellant's guilt – a proposition for which there is no record support – the issue is rendered harmless error. "Most errors that occur during trial, including those that violate a defendant's constitutional rights, are trial errors that are subject to harmless error analysis." *State v. Jenkins*, 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015). "Whether an error in the admission of evidence is harmless generally depends upon its materiality in relation to the case as a whole." *State v. Brown*, 344 S.C. 70, 75, 543 S.E.2d 552, 554–55 (2001) (citing *State v. Reeves*, 301 S.C. 191, 391 S.E.2d 241 (1990). To warrant reversal based on wrongly admitted evidence, the complaining party must prove resulting prejudice; a showing of prejudice requires that there be a reasonable probability that the wrongly admitted evidence influenced the jury's verdict. *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

In arguendo, to the extent any error was made by the trial court, it is harmless on two bases. First, as requested and without objection from the State, the trial court gave Appellant's limiting instruction to the jury. Any concern for the jury utilizing the evidence in an improper way would be prevented by such, and Appellant's argument cannot rely solely upon the premise that the jury would explicitly disregard the instructions of the trial court. (*Supra*). Second, Appellant's successes toward establishing a factual basis for voluntary manslaughter in this case were practically nonexistent. Appellant 1) provided absolutely no testimony as to his own state of mind during the confrontation; 2) Mr. Young's *direct examination* regarding Appellant's reaction was "inaudible"; 3) the confrontation relied upon as legal provocation was between Mr. Young and the Victim, and not Appellant; 4) the video evidence shows an ended confrontation, an opportunity for cooling of passions, Appellant and his friends casually moving on from Victim, and a delayed and clearly contemplated shooting; 5) Appellant appeared to be smiling just before committing the murder; 6) there was considerable evidence that Victim's gun had never been removed during the

confrontation given the difficulty in removing it by police, the video evidence provided no clear indication that Victim pointed or even brandished his weapon, and corroborative eye-witnesses did not see Victim with a gun at the time of the confrontation. Appellant's conviction comes as a result of the severe lack of evidence and testimony needed to support his defense, not because a presumptive misuse of evidence by the jury that was otherwise properly admitted under the law. Any error in regard to the use of the guilty plea during the State's cross-examination would be harmless, and Appellant's convictions should be affirmed.

CONCLUSION

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

(Signature block on following page)

Respectfully submitted,

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May 16, 2023

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SC Court of Appeals

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Appeal from Aiken County
The Honorable Courtney Clyburn-Pope, Circuit Court Judge

STATE OF SOUTH CAROLINA,

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v.

DAE' KWON-JAHEEM SIMMONS,

APPELLANT.

Appellate Case No. 2021-000802

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 16th day of May, 2023.

s/ W. Joseph Maye
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CERTIFICATE OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to W. Joseph Maye, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent and Certificate of Compliance has been forwarded to Appellant's counsel, Robert M. Dudek, Esq., via email today, May 16, 2023, and to his assistant at kwarren@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 16th day of May, 2023.

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