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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2022-001305

THE STATE,

Respondent,

v.

SHEENA ALSTON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The Trial Judge properly denied Appellant's continuance motion and tried Appellant in absentia.

II. The Trial Judge properly denied Appellant's motion for a mistrial.

STATEMENT OF THE CASE

Sheena Alston (Appellant) was indicted by a Charleston County Grand Jury in May 2019 for first degree burglary. Appellant proceeded to a jury trial before the Honorable Robert J. Bonds on August 1-2, 2022. James Kristian Falk, Esq. represented Appellant at trial. The jury found Appellant guilty as charged. Judge Bonds subsequently sentenced Appellant to sixteen years with credit for time served, but not for time spent on monitored house arrest. This appeal follows.

STATEMENT OF FACTS

In the early morning of September 14, 2018, officers from the North Charleston Police Department responded to a 911 call regarding a burglary in progress near the caller's residence in a nearby trailer park. (Tr. 90—Tr. 91). Police arrived at the scene at 4:30 am to a single-story brick duplex apartment in North Charleston. (Tr. 149). While approaching the residence on foot, police observed what appeared to be flashlights coming from inside. (Tr. 92, ll. 8-11; Tr. 93, ll. 17-24). As the officers got closer, the front door slammed shut, and police responded by announcing themselves while taking up positions around the duplex. (Tr. 92). As more officers arrived, a perimeter was established around the apartment in order to prevent exit and entry. (Tr. 94—Tr. 95; Tr. 148). After a lack of response to verbal commands, police entered the apartment and found nobody inside. (Tr. 95—Tr. 96).

Upon entry, they found an open back window and an air conditioning unit on the ground outside next to the window. (Tr. 96; Tr. 150—Tr. 151). Soila Avila, the resident of the burglarized residence, would later testify that when she returned after the burglary, she found clothes "scattered everywhere" around the bedroom the back window was connected to. (Tr. 117—Tr. 118). Ms. Avila and her family had previously evacuated the duplex in order to avoid the approach of Hurricane Florence and had not left the bedroom in the described state of disarray. (Tr. 118).

Outside the home, along with the detached air conditioner, officers found a cell phone on the ground in a purple and pink case. (Tr. 151; Tr. 164, ln. 24—Tr. 165, ln. 4). Eric Zipfel would later testify that the phone belonged to Appellant, and forensic technician Sam Riedel testified that the phone number was the same number identified by Zipfel as Appellant's number. (Tr. 194—Tr. 198; Tr. 219—Tr. 226). Additionally, while on scene, officers contacted the

complainant who stated that somebody was leaving the duplex through the back as officers approached the residence. (Tr. 97). In his police report, Officer Owens stated that one of the possible suspects was female with long hair. (Tr. 109).

After securing the scene with no suspects arrested, officers noticed a man sitting in a running car in front of the house. Realizing that he was likely a suspect, officers detained the man who was later identified as Zipfel. (Tr. 97, ln. 18—Tr. 98, ln. 5; Tr. 155). On scene, Zipfel stated that he was an Uber driver waiting for work outside the residence and that when officers arrived, a "woman took off." (Tr. 191). Back at the detective bureau after being arrested, Zipfel admitted that he had driven Appellant to the residence in search of gas money so that Zipfel could leave town after an argument between the two. (Tr. 183, ln. 22—Tr. 185, ln 6). He stated that it was roughly 4:30 am when they pulled up to the Victim's residence. (Tr. 186, ll. 19-25). Zipfel further stated that once there, he took the air conditioning unit out of the back window and returned to his car parked out front while Appellant entered the house. (Tr. 185, ln. 9—Tr. 188, ln. 16). While waiting in the car, Zipfel could see Appellant open the front door while using her phone as a flashlight, at which point Officer Owens arrived and Appellant slammed the front door shut in response. (Tr. 188—Tr. 189).

A few days later, after Appellant was listed as a prime suspect, officers were tipped off by a Spinx gas station employee about Appellant's whereabouts and followed her to her apartment. (Tr. 123—Tr. 125; Tr. 143—Tr. 144; Tr. 156—Tr. 158). After retrieving an arrest warrant, officers entered the apartment and found Appellant hiding in a cabinet under the kitchen sink. (Tr. 161—Tr. 163).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. "The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." McMillian, 349 S.C. at 21, 561 S.E.2d at 604 (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)); see also Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006) ("The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant.")

"[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). Whether a mistrial is manifestly necessary is a fact specific inquiry. "It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (citations omitted). This Court "favors the exercise of a **wise discretion of the circuit judge** in determining the merits of such motion in each individual case." State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 309 (1976) (emphasis added) (quoting State v. Singleton, 167 S.C. 543, 166 S.E. 725 (1932)). "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 court properly denied Appellant's continuance motion and tried Appellant in absentia.

Appellant argues that the trial court reversibly erred by denying the continuance motion and by trying Appellant in absentia because her absence was not due to a willing, voluntary choice, but was due to an ongoing series of medical emergencies. Specifically, Appellant argues that she was not able to attend due to multiple visits to the emergency room stemming from a moped accident that occurred the day before trial.

"It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence." State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010) (citing State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007); State v. Goode, 299 S.C. 479, 481, 385 S.E.2d 844, 845 (1989)). "A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence." Ravenell, 387 S.C. at 455, 692 S.E.2d at 557–58. "The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend." Id. at 456, 692 S.E.2d at 558.

Appellant cites to State v. James as similar to this present case. (App. Br. P. 11-12). In State v. James, the jury was sent to the jury room for deliberations and during their deliberations, the defendant was taken from the courtroom to the jail. State v. James, 116 S.C. 243, 107 S.E. 907 (1921). The defendant was not present in the courtroom when the jury returned to ask a question and then was sent back to their jury room to continue deliberations. Id. The court

granted a new trial stating finding that the defendant in this case was not absent voluntarily, at his request, and of his own volition. Id. This case differs greatly for numerous reasons.

Here, Appellant concedes that she received notice of the right to be present and was warned that she would be tried in her absence should she fail to attend; however she argues that her absence was not involuntary and therefore the continuance motion should have been granted. (App. Br. p. 12, Tr. 140-141, 171). The determination of whether a criminal defendant waived his right to be present at trial is in the discretion of the judge. "An abuse of discretion occurs when the trial court's ruling is based upon an error of law...based upon factual conclusions, the ruling is without evidentiary support; or when the trial court is vested with discretion, but the ruling reveals no discretion was exercised." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006).

"The trial court's denial of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." Id. "Continuances may be granted by a presiding judge during a term of court at which he presides...upon a showing of good and sufficient legal cause." Rule 7, SCRCrimP. "To require a trial judge to grant a continuance anytime a defendant intentionally absents himself from trial of which he has notice would subvert the rule and case law specifically allowing a trial in absentia under the proper circumstances, i.e., when the defendant has notice of his right to be present and has been warned that the trial could proceed in his absence upon his failure to appear." State v. Ravenell, 387 S.C. 449, 458, 692 S.E.2d 554, 559 (Ct. App. 2010). In State v. Wright, our South Carolina Supreme Court held that the trial courts denial of defense counsel's request for continuance, based on counsel's recent contact with defendant and belief that defendant could be

located, was not an abuse of discretion; defendant was aware of the term of court and knew he would be tried in absentia if he failed to appear. State v. Wright, 304 S.C. 529, 405 S.E.2d 825 (1991).

"Continuances may be granted by a presiding judge during a term of court at which he presides...upon a showing of good and sufficient legal cause." Rule 7, SCRCrimP. Appellant requested a continuance based on a health condition. Our Supreme Court has held that there was no abuse of discretion in refusing to continue the cases because of a defendant's physical condition. State v. Lee, 58 S.C. 335, 36 S.E.2d 706; State v. Francis, 152 S.C. 17, 149 S.E. 348 (1929); State v. Rickenbacker, 138 S.C. 24, 135 S.E. 651; State v. Whitener, 228 S.C. 244, 89 S.E.2d 701 (1955); State v. Young, 243 S.C. 187, 133 S.E.2d 210 (1963); State v. Queen, 264 S.C. 515, 216 S.E.2d 182 (1975).

In State v. Lee, the defendant moved for a continuance and produced a doctor's certificate that his nervous system was disturbed and that he was in bad physical condition, but the Court held his appearance and manner did not indicate any trouble or physical weakness and the motion was denied. Lee, 58 S.C. at 351, 36 S.E. at 712 (1900). In Francis, the Court held that a refusal of continuance on the ground of defendant's disabled physical condition due to a broken thigh, was not an abuse of discretion. Francis, 152 S.C. at 24-25, 149 S.E. at 351. Appellant cites to United States v. Brown, in outlining the factors that the trial judge may consider while ruling on a motion for continuance stating that there is no requirement for an affidavit by a treating physician to be produced. Brown, 821 F.2d 986 (4th Cir. 1987). Brown also held that "for a denial of a continuance to constitute an abuse of discretion, the medical repercussions must be serious and out of the ordinary; the impending trial must pose a substantial danger to a defendant's life or health." Id at 988. In order to show that the medical repercussions

would be serious and out of the ordinary, as well as posing a substantial danger to the defendant's life or health, an affidavit from the treating physician stating so would be extremely helpful to show the court that this would be the result. Without an affidavit the trial judge must use his discretion based on what was provided.

In this case, Appellant's Counsel (Counsel) informed the Court on the first day of trial that Appellant was not present because she was in the emergency room because of a moped accident that occurred the night before trial was set to begin. (Tr. 47). On August 1, 2022, this case was called to trial after having been previously delayed in May earlier that year. (Tr. 1; Tr. 57). After *voir dire* was concluded, Counsel informed the Court that Appellant went to Roper's Emergency Room that morning after reportedly giving way on her ankle and that they were "taking X-rays right now." Allegedly, Appellant was in the emergency room that morning after already being in the emergency room the night before as a result of a moped accident. (Tr. 47—Tr. 48). Counsel for Appellant explained to the court "it's my understanding it not a break, and the bike, you know, she's on a motor bike of some kind, she's having to stop short of hitting a car, and she placed—the bike falls on her, she's trying to stop. That's how it was explained to me."[1] (Tr. 49). The only evidence of the initial hospital visit on the night before trial that was provided to the Court was Counsel stating "She advised me that they were giving her Tylenol 3. She sent me a picture of a medicine bottle, which is blurry, but I'm taking her word it was a prescription for the Tylenol 3 for the pain. And I also have, not a great picture, but somewhat of a piece of paper showing that she was in the emergency room last night."[2] (Tr. 55). The State emphasized that at the moment, there was no concrete evidence of Appellant's claims, and the

[1] The accident was not investigated by law enforcement. No report was filed. No EMS or law enforcement were called or present on scene and Appellant was not transported to the hospital by EMS. (Tr. 51, 62-63)

[2] Neither of these were made exhibits.

Court highlighted a need for some "objective findings" of serious injury before being "inclined to continue this case." (Tr. 48—Tr. 49). Additionally, the State informed the Court that the translator needed for one of their witnesses would only be available [that day] and that the interpreter services in the State were limited. (Tr. 50). To facilitate Counsel's need to find more concrete evidence regarding Appellant's absence, the Court allowed a brief recess. (Tr. 52).

When court resumed, Counsel presented the following items which were later entered into evidence as Court's Exhibits 1, 2, 3, and 4, respectively: a photo of a hospital wrist wrap dated 8/1/22 and an ankle wrapped in a compression bandage, a picture of an Estimated Patient Financial Obligation Summary dated the same, a picture of the charges associated, and another photo combining the contents of the previous two exhibits. (Tr. 52—53; Court's Exhibit 1-4).

The State responded against the continuance by noting the non-severity of Appellant's injuries and that transportation for Appellant to court could be arranged. (Tr. 54).[3] After hearing both arguments for and against a formal motion for continuance, the Court denied Counsel's motion on the following grounds: (1) the case was four years old at that point and had already been delayed for trial once earlier that year, (2) the evidence regarding Appellant's absence was limited and did not suggest a life-threatening or neurological injury that would actually affect Appellant's ability to attend trial that afternoon,[4] and (3) granting a continuance would seriously hamper the State's ability to call one of its own witnesses due to a lack of interpreter services. (Tr. 58—Tr. 61). After the jury was sworn in, the Court gave the following instruction regarding Appellant's absence:

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[3] The Court stated multiple times that transport for Appellant could be arranged by the Court at Counsel's request. (Tr. 61—Tr. 62).
[4] The Court emphasized the lack of evidence surrounding the initial moped "accident" as a factor leading to his ruling. (Tr. 62—Tr. 63).

> Now, ladies and gentlemen, I will tell you this right now that [Appellant] is not in the courtroom today. She may be in the courtroom later today, she may be in the courtroom tomorrow, but what I'm telling you right now is this: You took an oath and I'm instructing you, per your oath and your duty, ladies and gentlemen, you are not to consider why she is or isn't in the courtroom. You are to draw no inference from the fact that she isn't in this courtroom. You are not to consider that, the fact that she is not in this courtroom.
>
> Ladies and gentlemen, you are the judges of the facts. That's what you are here to judge. You're to draw no inferences at all by the nature of her not being here today.

(Tr. 69, ll. 3-15).

When court resumed the following morning, Appellant was again absent, and the Court made the following statement:

> I said yesterday that, in the event that the defendant was not here this morning at the commencement of the case, that I would go ahead and sign a bench warrant for her arrest. And so, Solicitor, I understand that you will provide that for me and its's my understanding ***that she, in fact, has had and received notice about being here this week and that her case was Number 1 up for trial that [sic] she needed to be here.***[5]

(Tr. 140-141) (emphasis added). Following more testimony, the court adjourned for lunch and when they resumed, Counsel began relaying new information to the Court about Appellant's absence. (Tr. 204—Tr. 205). According to a phone call from Appellant, Counsel informed the Court that "[. . .] she's been in the hospital since 6:00 o'clock this morning." (Tr. 205). He continued, "Well, she told me she had a reaction to the medicine and that her face is all swollen up and her eyes are closed." (Tr. 206). Evidence regarding this hospital visit was introduced as Court's Exhibit 9.[6] In response to this new information, the Court stated:

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[5] This notice of trial was later made Court's exhibit 6. (Tr. 171).

[6] It is worth noting that this document refers to a dental abscess with facial cellulitis, bacterial conjunctivitis, and dental cavity with a follow up plan to see primary dentist within 3-5 days. There is no mention to an allergic reaction to the Tylenol 3 prescribed on the Sunday night visit or any reference to either of the previous two visits.

> Well, I understand that, but, you know, you've got nothing else to show me. And it is my understanding – and now she's not available because of what she's related as an adverse reaction to some medication that was prescribed? Perhaps the Tylenol 3 that was prescribed Sunday night.
>
> [. . .] I'm going to stand on my ruling. I just think there's some gamesmanship going on here and I'm not going to continue this case or slow down the – or keep this jury waiting, I don't think it's fair to them.

(Tr. 207).

Unlike James, the trial judge in this case was presented with very limited information regarding the involuntariness of Appellant's absence. If anything, the evidence that was presented to the trial judge proved that **none** of the "injuries" or visits to the emergency room **were serious** and Appellant could have been present in the court room. There was nothing from a doctor or a nurse indicating that she couldn't come and participate in her trial. Appellant was allegedly walking on her ankle the morning of trial when it gave way. She could have attended trial in a wheelchair or on crutches as this was an injury that did not affect her sitting in a chair and being present for her trial. She was allegedly prescribed the Tylenol 3 the night before trial in the hospital for her injuries and we can assume that based off that prescription it would have helped with her pain during trial. Further, the trial judge noted in his ruling during the post-trial motions that "I was informed Monday afternoon that I believe—I think early afternoon—that Mr. Falk's client was on the way to the courthouse, I believe that was the information that he relayed to the Court, that was probably the information that he received. We were here close to 5:00 o'clock and never saw his client she was not here." (Tr. 309). Even assuming the hospital visits themselves were involuntary, despite the absence of any evidence to establish that, her absence after she was discharged on Monday afternoon shows that her absence was in fact voluntary.

Regarding Appellant's absence on the second day of trial, again there is lack of proof that shows that Appellant could not be in attendance and the evidence that was provided makes no reference to either of the prior visits to the emergency room nor does it indicate any injuries regarding Appellant's ankle or a reference to a reaction to the medicine prescribed to her due to those injuries. Further, at the sentencing hearing Appellant did not provide any additional information as to the involuntariness of her absence. (Sentencing Hearing Transcript pgs. 1-7). Appellant's absence was completely voluntary and was a ruse in an attempt for the trial not to go forward. Despite the voluntariness of her absence during the jury charge the Court reemphasized to the jury that Appellant's absence was not to be considered during their deliberations:

> Now, ladies and gentlemen, in this case, under the laws of this state a defendant may be tried even if the defendant does not attend the trial, ***but the fact that the defendant is not present may not be considered against the defendant in any manner whatsoever. I further instruct you that the defendant's failure to appear may not be construed as an admission of guilt.*** Finally, ladies and gentlemen I will instruct you that the fact that the defendant did not testify could not be used against her and not to be considered by you or discussed during your deliberations.

Therefore, Appellant was not prejudiced by her motion to continue being denied and being tried in her absence. The trial judge reviewed everything that he was presented with in deciding on whether to grant Appellant's motion to continue or to try the case in absentia, and the trial judge did not abuse his discretion in denying the motion to continue and proceeding with trial in absentia.

II. The Trial Judge properly denied Appellant's motion for a mistrial.

Appellant contends that the trial court erred by denying Appellant's motion for mistrial after sustaining Counsel's objection during the State's closing argument for what amounted to burden shifting by the prosecutor. Specifically, Appellant argues that the trial judge's curative

instruction was not sufficient because it did not tell the jury to disregard the State's comment or to not consider them for any purpose during deliberations. Appellant's argument lacks merit because the trial judge removed any prejudicial effect the statement may have had 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." Harris, at 117, 674 S.E.2d 532, 537.

During the State's closing argument, the State made the statement "I submit to you that all of this could have been cleared up if she was allowed to be in that house, and the officers rolled up, that she could tell the officers, Hey, I know this person. I'm allowed to be here." (Tr. 252). Trial Counsel objected immediately, and a bench conference was had resulting in the

objection being sustained. (Tr. 252). Before the State could continue his closing argument the Court addressed the jury stating "[. . .] the State has the burden of proof. The defendant doesn't have to prove anything. And it's not proper [. . .] for the State to make the argument that the defendant was under the duty or owed some duty to respond or answer questions." (Tr. 252-253).

Appellant did not object to or challenge the sufficiency of the trial judge's instruction to the jury at that time. Prior to the trial judge presenting the jury charge, when the judge was asking about the additions to the jury charge that was previously discussed, there was no objection or request to add to the jury charge anything regarding the statement made during the State's closing argument. (Tr. 271-272). During the jury charge, the judge stated again "The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden ladies and gentlemen, relies on direct evidence, circumstantial evidence or some combination of the two. Again, ladies and gentlemen, the State has the burden of proving the defendant guilty beyond a reasonable doubt." (Tr. 276). The judge further stated the State's burden when stating each element of the crime. (Tr. 280-282). At the end of the jury charge, Appellant had no objections nor additions to the jury charge. (Tr. 285). Finally, Appellant did not have anything to add or object to when the court asked "I'm informed that we have a verdict, so anything before we bring the jury in from the defense?" (Tr. 295).

The objection to the statement should not have been sustained because the comment was not improper, but addressed Appellant at the scene when she slammed the door shut in officers' faces. The State can properly point this out to impeach a defendant's credibility. "The State may point out a defendant's silence prior to arrest, or his silence after arrest but prior to the giving of Miranda warnings, to impeach the defendant's testimony at trial. Due process is not violated because 'such silence is probative and does not rest on any implied assurance by law

enforcement authorities that it will carry no penalty'" State v. McIntosh, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004) (citing Brecht v. Abrahamson, 507 U.S. 619, 628, 113 S. Ct. 1710, 1716 (1993). Her slamming the door and escaping out of a back window instead of telling officers why she was there was pre-arrest and pre-Miranda, and therefore her silence was admissible to impeach her credibility.

Even if the statement in the State's closing argument was improper or prejudicial, Appellant made no effort to request further instruction to the jury. "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).

Appellant made a motion for mistrial after the verdict based on the statement made by the State in his closing argument. (Tr. 302-303). The State argued that "I was simply referring to the evidence as far as the officer interaction. I understand where Mr. Falk is coming from, but that was not the intent of the State. And, again, we feel that the jury instruction was enough to remedy any error there may have been." (Tr. 304). In making his ruling the trial judge stated;

> **I just don't think there's any doubt that the jury was aware that, number one, I said that your client has no burden at all, that the State has the burden of proving guilt beyond a reasonable doubt...I called him down in front of the jury to make a point... What I'm trying to do is just make sure they realize that that us something that's not for their consideration. And I just thing that cured any—cured any improper argument on the part of the State in this matter.**

(Tr. 304-305). Appellant had ample opportunities to ask the Court for additional instruction regarding the statement made in closing argument. Further, the trial judge's curative instruction

was sufficient and 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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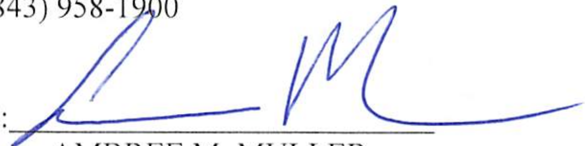

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