STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2011-198488

THE STATE,

Respondent,

vs.

JIMMY WILSON, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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The trial judge did not commit reversible error in admitting the challenged testimony and any error in the admission of the testimony was harmless because the testimony consisted of only a single brief reference to Appellant's post-arrest silence, the testimony was not repeated or alluded to again at any point during trial, the testimony was not tied to Appellant's guilt or innocence in any way, the jury was not asked to draw any adverse or prejudicial inferences from the testimony, and the jury was specifically instructed it could not consider Appellant's silence in any manner during its deliberations.

STATEMENT OF THE CASE

In September of 2008, Appellant Jimmy Wilson, Jr. was arrested after fleeing from police on foot at the conclusion of a high-speed vehicle chase. In March of 2009, the Florence County grand jury indicted Appellant for third-offense possession of cocaine base. On March 10, 2010, a jury trial was commenced in the Florence County court of general sessions with the Honorable Thomas A. Russo, circuit court judge, presiding. Appellant did not appear for trial, and the trial proceeded in his absence. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge imposed a sentence, and the sentence was sealed due to Appellant's absence from trial. Subsequently, Appellant was apprehended. On August 25, 2011, Appellant appeared in the court of general sessions, and the trial judge announced Appellant's previously-sealed sentence, which was a term of imprisonment of ten years and a fine of $12,500. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

At approximately 4:00 p.m. on the afternoon of September 16, 2008, Sergeant John Calhoun, the supervisor of the narcotics unit of the Florence Police Department, was patrolling a high crime area in Florence, South Carolina, in an unmarked patrol car along with Corporal Robert Drulis, Officer Kendrick Spears, and Officer William Nida. (R. pp. 25-27; p. 38; p. 67; pp. 70-71; p. 107; p. 109). While patrolling the area, the officers encountered a blue and orange vehicle believed to be involved in drug sales headed in the opposite direction. (R. p. 27; p. 47; p. 71; p. 109). As Sergeant Calhoun drove towards the blue and orange vehicle, the driver of the vehicle quickly turned onto another street. (R. p. 27; p. 47; p. 71; p. 109). Sergeant Calhoun turned to follow, and, as he did so, the driver of the blue and orange vehicle rapidly accelerated, drove around another vehicle, passed a stop sign without stopping, and sped through an intersection. (R. pp. 27-28; pp. 47-48; p. 72; p. 110). Sergeant Calhoun then activated his patrol car's blue lights and sirens and attempted to stop the blue and orange vehicle. (R. p. 28; p. 48; p. 72; p. 111). However, the driver of the vehicle did not stop and continued to flee at a "very high" rate of speed until he reached the end of a dead-end street. (R. p. 29; pp. 48-49; pp. 73-74; p. 111). He then drove the vehicle off the road, and, as it came to a stop, he and the passenger both quickly exited the vehicle and began fleeing on foot. (R. p. 29; p. 42; p. 48; pp. 73-74; p. 111).

In response, Sergeant Calhoun secured the suspects' vehicle while the other officers chased after the passenger, who was carrying a dark-colored metal object and was closer to the officers than the driver, and commanded him to stop. (R. pp. 29-30; p. 41; pp. 48-49; pp. 52-53; p. 60; p. 74; pp. 111-112; p. 125). However, the passenger, Appellant Jimmy Wilson, Jr., ignored the officers' commands and fled through a nearby

wooded area, ran behind some houses, and jumped over several fences in an effort to evade the pursuing officers. (R. pp. 48-49; pp. 52-53; pp. 74-75; p. 113; p. 125). As Appellant fled, Officer Nida moved into position to cut off his escape. (R. p. 113). Appellant then jumped over a fence near the officer's location, continued to flee, and climbed over several more fences before he slipped on the muddy and wet ground. (R. p. 113; p. 115). After Appellant slipped, Officer Nida caught up to him, ordered him to stop, and deployed a taser on Appellant when he attempted to resume fleeing. (R. p. 115). Officer Nida then arrested Appellant, transported him back to the location of the blue and orange vehicle, and informed him of his rights. (R. p. 34; p. 57; p. 116; pp. 124-125). Following his arrest, Appellant did not make a statement. (R. p. 120; p. 125).

Thereafter, Corporal Drulis began walking back over the path of Appellant's flight. (R. p. 75). Next to one of the fences Appellant jumped over while fleeing from the officers, Corporal Drulis located a small plastic box sitting on top of the grass in plain view.[1] (R. pp. 75-76; p. 89). Despite the fact it had been raining and the ground was "extremely wet" and muddy, the plastic box was completely dry, and it contained five or six small pieces of what appeared to be crack cocaine. (R. p. 34; p. 49; p. 57; pp. 74-76; p. 105; p. 116; p. 126). Additionally, Corporal Drulis also discovered a vehicle radio a few feet away from the plastic box further along the path of Appellant's flight. (R. p. 57; p. 77; p. 91; p. 104). The radio, which was the object the officers observed in Appellant's hands at the beginning of the chase, was also dry on top and fit perfectly into the empty space for a radio in the blue and orange car. (R. p. 30; p. 35; p. 41; p. 56; p. 78). The plastic box and its contents were then secured by the officers, and subsequent testing

[1] The officers had not received any drug complaints related to the property upon which the plastic box was found, and the officers did not observe anyone else in that area at the time of the chase. (R. p. 80; p. 128).

revealed the substance inside of the box was 0.45 grams of crack cocaine. (R. pp. 117-118; pp. 143-144).

Subsequently, Appellant was indicted for possession of cocaine base, and his case was called for trial. (R. pp. 5-6; pp. 205-206). However, Appellant did not appear, and the trial proceeded in his absence. (R. p. 19). Once the trial began, the trial judge presented preliminary instructions to the jury and cautioned the jurors that they were required to follow his instructions on the law. (Supp. R. p. 2-7; R. p. 20). Following the preliminary instructions, the solicitor and defense counsel presented their opening statements to the jury, and neither made any reference whatsoever to Appellant's post-arrest silence. (R. pp. 20-24). Thereafter, each of the officers involved in the high-speed chase and the discovery of the crack cocaine testified about the details of their involvement in the incident. (R. pp. 26-27; pp. 46-47; pp. 70-71; p. 109).

During Officer Nida's testimony, the solicitor asked the officer what steps he undertook to try to determine the identity of the driver of the blue and orange vehicle, and defense counsel objected. (R. p. 119). Outside of the jurors' presence, the trial judge inquired into the matter, and Officer Nida indicated he intended to testify that Appellant would not speak with them after he was informed of his rights. (R. p. 120). In response, defense counsel objected to the admission of any testimony about the questioning of Appellant and argued no comment could be made about Appellant exercising his right to remain silent. (R. pp. 120-122). After considering the issue, the trial judge indicated he would permit the officer to testify to the following facts: "What did you do after you placed him under arrest, we read him his Miranda warnings, did he give you any statements, no." (R. pp. 122-123). Following the trial judge's suggestions, defense counsel indicated the trial judge's proposed method of eliciting the testimony was a

"better way" but asked that her objection be noted for the record. (R. p. 123). The trial judge then ruled Officer Nida would be limited to simply testifying that Appellant did not make a statement. (R. pp. 123-124). Following the ruling, the jury returned to the courtroom, and the questioning resumed as follows:

> **[Solicitor]**: Who arrested [Appellant]?
>
> **[Officer Nida]**: I did.
>
> **[Solicitor]**: Okay. And what did you do after arresting [Appellant]?
>
> **[Officer Nida]**: He was transported back and was Mirandized, read his rights.
>
> **[Solicitor]**: Okay. And did he make any statements?
>
> **[Officer Nida]**: No, ma'am.

(R. pp. 124-125).

Subsequently, after the State and the defense rested their cases, counsel for each side presented closing arguments to the jury. (R. pp. 153-169). During their arguments, neither the solicitor nor defense counsel made any reference whatsoever to Appellant's invocation of his right to remain silent following his arrest. (R. pp. 153-169). Following the closing arguments, the trial judge instructed the jury on the applicable law, including on the State's burden of proof and Appellant's presumption of innocence. (R. pp. 163-183). Furthermore, the trial judge emphasized to the jury that Appellant's silence, absence from trial, and failure to testify could not be considered during deliberations or held against Appellant in any way, instructing:

> [T]he fact that the defendant is not present may not be considered against the defendant in any manner whatsoever. I further instruct you and I emphasize that the fact that the defendant did not testify is not a factor to be considered by you in any way in your deliberations and in your consideration on the question of guilt or innocence of the defendant. It must not be considered by you in any manner whatsoever. A defendant

> has a constitutional right to remain silent. In the assertion of this right must not be considered by you in your deliberations. I repeat, under your oath you are to draw no conclusion whatsoever from the fact that the defendant in this case did not testify. The fact that this defendant did not testify should not even be discussed in the jury room.

(R. p. 178). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 188). Following the verdict, the trial judge imposed a sealed sentence of ten years and a $12,500 fine, and the sentence was subsequently unsealed after Appellant was eventually apprehended. (R. p. 196; p. 203).

ARGUMENT

The trial judge did not commit reversible error in admitting the challenged testimony and any error in the admission of the testimony was harmless because the testimony consisted of only a single brief reference to Appellant's post-arrest silence, the testimony was not repeated or alluded to again at any point during trial, the testimony was not tied to Appellant's guilt or innocence in any way, the jury was not asked to draw any adverse or prejudicial inferences from the testimony, and the jury was specifically instructed it could not consider Appellant's silence in any manner during its deliberations.

Appellant contends the trial judge erred in admitting Officer Nida's testimony establishing Appellant did not make a statement after he was arrested. Appellant maintains the admission of that testimony was reversible error because it constituted an impermissible comment on his decision to exercise of his right to remain silent. To the contrary, although evidence of Appellant's post-arrest silence was admitted during trial, the admission of the testimony was not prejudicial and did not require reversal because the testimony consisted of only a single brief reference to Appellant's post-arrest silence, the testimony was not repeated or alluded to again at any point during trial, the testimony was not tied to Appellant's guilt or innocence in any way, and the jury was not asked to draw any adverse or prejudicial inferences from the testimony. Furthermore, in addition to the isolated nature of the testimony coupled with the fact that the jury was never asked to draw an adverse inferences from it, the trial judge eliminated any potential for prejudicial that could have resulted from the admission of the testimony by specifically and directly instructing the jury that it could not consider Appellant's silence in any manner during its deliberations. Accordingly, when viewed in the context of the case as a whole, the trial judge's admission of the single reference to Appellant's post-arrest silence did not constitute reversible error, and any error in the admission of the testimony

was harmless and resulted in no prejudice to Appellant. Appellant's conviction should be affirmed.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). However, errors of law that are not prejudicial do not warrant reversal. State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "The burden is upon the appellant to satisfy [the appellate] court that there has been **prejudicial** error." State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) (emphasis added).

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. See U.S. Const. amend. V (prohibiting a criminal defendant from being "compelled in any criminal case to be a witness against himself[.]"); S.C. Const. art. I, § 12 ("[N]or shall any person be compelled in any criminal case to be a witness against himself."). Pursuant to that right, both comments by the prosecution on a defendant's silence and instructions by the trial judge indicating a defendant's silence constitutes evidence of guilt are prohibited. Griffin v. California, 380 U.S. 609, 615 (1965); see Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.").

"In particular, the State may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent[.]" Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000); see McFadden v. State, 342 S.C. 637, 640, 539

S.E.2d 391, 393 (2000) ("Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense."); State v. Weaver, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004) ("As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant's failure to testify at trial is constitutionally impermissible."). "The obvious purpose [of that prohibition] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions." Edmond, 341 S.C. at 346, 534 S.E.2d at 685; see Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) ("The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.").

However, the mere mention of a defendant's decision to exercise his right to remain silent during trial does not automatically constitute reversible error. See State v. Truesdale, 285 S.C. 13, 17, 328 S.E.2d 53, 56 (1984) ("When such a violation occurs, the question remains, however, whether it is cause for reversal or is harmless error beyond a reasonable doubt."), rev'd on other grounds by Truesdale v. Aiken, 480 U.S. 527 (1989). Instead, such testimony only requires reversal where its admission results in prejudice to the defendant. Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001); see State v. Johnson, 306 S.C. 119, 129, 410 S.E.2d 547, 553 (1991) (declining to reverse Johnson's conviction as a result of the introduction of testimony establishing Johnson invoked his right to counsel after determining the admission of that testimony was not prejudicial to Johnson's case). Significantly, the burden rests upon the defendant to establish the admission of the testimony deprived him of a fair trial. Gill, 346 S.C. at 221, 552 S.E.2d

at 33; see also Weaver, 361 S.C. at 89, 602 S.E.2d at 794 ("[A]lthough it is improper for the solicitor to indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.").

In determining whether the defendant was prejudiced by the admission of testimony concerning his post-arrest silence, any error resulting from the admission of that testimony will not result in reversal if a review of the entire record establishes the error was harmless beyond a reasonable doubt. State v. Arther, 290 S.C. 291, 296, 350 S.E.2d 187, 190 (1986); see United States v. Hastings, 461 U.S. 499, 509 (1983) ("[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]"). In reviewing the record to determine whether an error was harmless, the following factors should be considered: (1) whether the reference to defendant's right to remain silent was a single reference; (2) whether the reference was repeated or alluded to at another point during trial; (3) whether the prosecutor tied the defendant's exercise of his right directly to his exculpatory story; (4) whether the exculpatory story was totally implausible; and (5) whether the evidence of guilt was overwhelming. Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687; see Truesdale, 285 S.C. at 18-19, 328 S.E.2d at 56 (identifying the factors relied upon in the opinion of the Fifth Circuit Court of Appeals in Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), as relevant factors to be considered in determining if a Doyle violation is harmless). However, none of those factors is alone dispositive, and the specific circumstances of each case should be considered individually on a case-by-case basis to determine whether the error was harmless beyond a reasonable doubt. Truesdale, 285

S.C. at 19, 328 S.E.2d at 56; see Alderman v. Austin, 695 F.2d 124, 126, n. 7 (5th Cir. 1983) (instructing that the factors for determining whether a Doyle violation is harmless identified in Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), are not to be treated as rigid rules or applied strictly to all cases); see also United States v. Shaw, 701 F.2d 367, 382 (5th Cir. 1983) ("Subsequent cases have illustrated, however, that factual situations are not always amenable to description with the rigid Chapman types. Consequently, we have held Chapman inapplicable and the error to be harmless even though the defendant's story is 'not totally implausible,' but the evidence of guilt is 'substantial.' " (citations omitted)); see, e.g., State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding [of harmlessness]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.").

In the case sub judice, although testimony was introduced during trial establishing Appellant's did not make a statement following his arrest, the trial judge did not commit reversible in admitting the testimony. Instead, under the specific circumstances of Appellant's case, the single brief reference to Appellant's post-arrest silence could not have resulted in any prejudice to Appellant and, thus, was harmless.

Initially and significantly, Appellant's post-arrest silence was only referenced a single time during trial, and at no point was the testimony even repeated or alluded to again, including during the closing arguments to the jury. Cf. Arther, 290 S.C. at 296-297, 350 S.E.2d at 190 ("The comments purportedly concerning appellant's silence are miniscule in the record. . . . . Moreover, the solicitor did not allude to appellant's post-arrest silence in closing argument at the guilt phase. Our review of the entire record indicates that any Doyle violation could only be harmless beyond a reasonable doubt.").

As a result, the jury was only exposed to a single, isolated reference to Appellant's post-arrest silence and never heard the reference repeated again at any point during trial, which significantly minimized any potential for prejudice that could have resulted from the admission of the testimony.

Additionally and most importantly, the solicitor did not use or exploit the testimony regarding Appellant's post-arrest silence in any manner during trial. Critically, the solicitor never argued to the jury that Appellant's silence could be considered as evidence of his guilt, never suggested Appellant's silence was a fact that the jury should consider in its deliberations, and never tied Appellant's silence either directly or indirectly to any aspect of the case. See United States v. Francis, 82 F.3d 77, 79 (4th Cir. 1996) ("In stark contrast, the comments in this case in no way invited the jury to draw an 'inference of guilt' against the defendants."). Instead, the brief reference to Appellant's silence was introduced in a narrative, non-accusatory fashion as part of the arresting officer's description of the sequence of events leading up to and following Appellant's arrest. Cf. Alderman, 695 F.2d at 126 ("[The officer]'s statement was made during a narrative description of his interview with Alderman. It passed without any objection by the defense. It was not accusatory in nature and was obviously not used for any impermissible purpose such as impeachment. We recognize that in cases such as this, the record must be scrutinized with a skeptical eye for the purpose of discovering whether what would first appear to have been an innocent, narrative statement was actually a planned statement upon which the prosecutor based an argument of guilt. The record reveals no such misuse. Indeed, we can find no place during the trial where this testimony was ever referred to again by a witness, the prosecutor, or the judge. In this context, and in light of the substantial evidence against Alderman, we find the alleged

error to have been 'harmless beyond a reasonable doubt.' " (citations omitted)). Accordingly, since the jury was never asked to consider Appellant's silence in any fashion, the lone reference to Appellant's post-arrest silence could not have resulted in any prejudice to Appellant and could not have influenced the jury's verdict.[2] See State v. Gates, 269 S.C. 557, 561, 238 S.E.2d 680, 682 (1977) ("While it is true that silence on the part of an accused person may not be **used as an inference of guilt**, we are of the opinion that when the evidence introduced by the State is balanced against the brief references that appellant remained silent, it is apparent that such evidence did not contribute to the verdict in any way." (emphasis added and footnotes omitted)).

[2] Notably, the purpose behind the prohibition against comments on a defendant's post-arrest silence is to prevent that silence from being **used** against the defendant in establishing the defendant's guilt. See Lindgren v. Lane, 925 F.2d 198, 201 (7th Cir. 1991) ("[I]t is the use of an accused's silence against him at trial by way of specific inquiry or impeachment that forms the basis for a violation of the Fourteenth Amendment. At trial the prosecutor never called attention to the petitioner's silence. The defendant simply responded that he didn't 'wish to say any more' at the tail end of a compound answer to a question by the police officer. Consequently, no Doyle violation occurred. Petitioner has uncovered no case holding that a mere transcript witness' reference to defendant's silence breaches the Fourteenth Amendment, nor have we discovered any such authority. Since Lindgren's 'postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any reasonable inference,' no Doyle violation occurred." (citations omitted)). Consistent with that purpose, appellate courts in South Carolina have typically found reversible error where a defendant's post-arrest was exploited during trial while finding errors to be harmless where the defendant's silence was not exploited. Compare Arther, 290 S.C. at 269-297, 350 S.E.2d at 190 (holding the admission of several references to Arther's post-arrest silence was harmless where the references were not exploited); Truesdale, 285 S.C. at 19, 328 S.E.2d at 56 (finding the admission of testimony regarding Truesdale's silence was harmless where it was not exploited by the solicitor); and Gates, 269 S.C. at 561, 238 S.E.2d at 682 (finding the admission of testimony regarding Gates' failure to deny his crime after his arrest was harmless under the circumstances of Gates' case); with State v. McIntosh, 358 S.C. 432, 444, 595 S.E.2d 484, 490 (2004) (finding reversible error where "the solicitor's questions were intended to focus the jury's attention on [McIntosh]'s post-arrest silence as substantive evidence of his guilt, a prohibited tactic"); Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687 (finding the solicitor's use of Edmond's post-arrest silence and invocation of his rights during her closing argument constituted reversible error and was not harmless); State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (finding the admission of testimony regarding Smith's silence constituted reversible error where the testimony was used by the solicitor as substantive evidence of Smith's sanity to rebut an insanity defense); State v. Williams, 399 S.C. 281, 289, 731 S.E.2d 338, 342 (Ct. App. 2012) (holding the solicitor's use of Williams' post-arrest silence constituted reversible error where "the State attempted to show that if Williams acted in self-defense, he would have immediately explained this to the police"); and State v. Hill, 360 S.C. 13, 18, 598 S.E.2d 732, 734 (Ct. App. 2004) (finding reversible error where the solicitor elicited testimony regarding Hill's silence and directly tied it Hill's exculpatory story). Significantly, in Appellant's case, the solicitor did **not** use or exploit Appellant's silence in any way.

Also, in addition to the isolated nature of the testimony and the fact that it was not tied to Appellant's guilt in any way, the other evidence presented during trial constituted substantial evidence of Appellant's guilt. Specifically, the evidence and testimony presented during trial established Appellant immediately fled from officers at the conclusion of a high-speed vehicle chase, made substantial efforts to evade the officers by repeatedly jumping over fences, abandoned something he was carrying in his hand as he was fleeing, refused to comply with the pursuing officers' commands to stop, and only ceased his efforts to evade apprehension when an officer deployed a taser on him. Additionally, the plastic box containing the crack cocaine was discovered in plain view on the ground along the path of Appellant's flight in the yard of a residence never connected to any drug activity a few feet away from the radio Appellant was seen carrying and in an area where no one else other than Appellant had been observed. Furthermore, just like the radio, the plastic box was dry even though the ground was wet and muddy. Accordingly, when viewed in the context of Appellant's case as a whole, the admission of the isolated remark regarding Appellant's post-arrest silence resulted in no identifiable prejudice to Appellant and was harmless. See Arther, 290 S.C. at 296, 350 S.E.2d at 190 ("This violation, however, does not require reversal of a conviction if a review of the entire record establishes that any error was harmless beyond a reasonable doubt."); see also Shaw, 701 F.2d at 382 ("Subsequent cases have illustrated, however, that factual situations are not always amenable to description with the rigid Chapman types. Consequently, we have held Chapman inapplicable and the error to be harmless even though the defendant's story is 'not totally implausible,' but the evidence of guilt is 'substantial.' " (citations omitted)).

Furthermore, notwithstanding the isolated and harmless nature of the testimony concerning Appellant's post-arrest silence, any potential for prejudice that could have resulted from the introduction of the testimony was eliminated by the trial judge's instructions to the jury. Specifically, at the outset of trial, the trial judge instructed the jurors that they were required to follow his instructions on the law while emphasizing his instructions were "the only law [they] may consider" even if they disagreed with him. (Supp. R. p. 4). Then, during his instructions to the jury directly before deliberations began, the trial judge directly instructed the jurors that a criminal defendant has a constitutional right to remain silent and the assertion of that right "must not be considered by [them] in [their] deliberations." (R. p. 178). Thus, even though a single statement was presented during trial establishing Appellant remained silent following his arrest, the trial judge's instructions to the jurors specifically precluded them from considering Appellant's post-arrest silence in any manner during their deliberations, and nothing suggests the jury did not scrupulously adhere to the trial judge's instructions. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded those instructions, this Court declines to presume prejudice." (citations omitted)); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so."). Accordingly, in light of the trial judge's jury instructions, the admission of the challenged testimony could not have resulted in any prejudice to Appellant and could not have impacted the ultimate outcome of Appellant's case. See State v. Shuler, 353 S.C. 176, 187-188, 577 S.E.2d 438, 444 (2003) ("While the State may not comment on the

defendant's right to remain silent, an improper reference is subject to harmless error analysis. The trial court's instruction to the jury that it could not consider appellant's failure to testify in any way and could not use it against him cured any potential error."); see also Johnson v. State, 325 S.C. 182, 188, 480 S.E.2d 733, 735-736 (1997) ("[E]ven assuming arguendo the comment was improper, we find the trial court's instruction to the jury that it could not consider Johnson's failure to testify in any way and could not use it against him sufficient to cure any potential error."); see, e.g., Arther, 290 S.C. at 295, 350 S.E.2d at 189 ("The trial judge did charge the jury not to consider anything heard outside the courtroom. This charge was adequate under the circumstances to ensure the jury would render a verdict based upon the evidence presented.").

Although a brief reference was made to Appellant's post-arrest silence during trial, the admission of that testimony resulted in no prejudice to Appellant, and Appellant has failed to meet his burden of establishing any resulting prejudice. See State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947) ("It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him."); see also State v. Wyatt, 317 S.C. 370, 372, 453 S.E.2d 890, 891 (1995) ("While we agree there was error, appellant cannot show sufficient prejudice from it to warrant reversal."); see, e.g., Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) ("It is well established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice."). Critically, the isolated remark was never repeated or alluded to again at any point during Appellant's trial, and neither the solicitor nor defense counsel ever suggested to the jury that Appellant's post-arrest silence could be or should be considered as evidence of his guilt. Instead, the jury was specifically and unambiguously instructed

by the trial judge that it could not consider Appellant's silence in any manner. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."). Thus, as the jury was never asked to draw any adverse inferences from Appellant's post-arrest silence and was specifically instructed it could not consider Appellant's silence in any way whatsoever during its deliberations, the admission of the single statement regarding Appellant's post-arrest silence was not prejudicial to Appellant's case, and nothing supports a presumption of prejudice under the circumstances. See Calderon v. California, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." (citations omitted)). Accordingly, the trial judge did not commit reversible error in admitting the lone remark establishing Appellant did not make a statement after his arrest, and any error in the admission of the testimony was harmless under the circumstances of Appellant's case. See State v. Hale, 284 S.C. 348, 355, 326 S.E.2d 418, 422 (Ct. App. 1985) ("When the whole of the State's evidence is balanced against the brief reference to Hale's post-arrest silence, it is apparent the objectionable question did not contribute to the jury's verdict."). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 17, 2013

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Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 17, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2011-198488

THE STATE,

Respondent,

vs.

JIMMY WILSON, JR.,

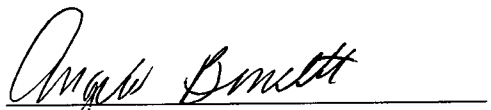
Appellant.

PROOF OF SERVICE

I, Angela S. Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Breen Richard Stevens, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 17th day of May, 2013.



ANGELA S. BENNETT
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727