STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Thomas W. Cooper, Circuit Court Judge

Appellate Case No. 2023-001288

THE STATE, Respondent,

v.

STEVEN DANIEL BROWN, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On October 12, 2020, a Lexington County Grand Jury indicted Appellant, Steven Brown for trafficking methamphetamine, 400 grams or more. On August 7-10, 2023, Appellant proceeded to trial before the Honorable Thomas W. Cooper. Robert "Theo" Williams, Esquire and Jason Yonge, Esquire represented Appellant. The jury found Appellant guilty as indicted. The trial court sentenced Appellant to twenty-five years' imprisonment. This appeal follows.

STATEMENT OF FACTS

John Gietz, an investigator with the Lexington County Sheriff's Department, opened an investigation on Appellant after receiving multiple tips that Appellant was trafficking methamphetamine from Georgia to South Carolina. (R. 180). Gietz explained that he looked up Appellant's vehicles in the DMV database and found a white F-350. (R. 180). Gietz then placed the license plate into DEASIL[1]. (R. 182).

On June 29, 2020, Gietz received a hit for Appellant's license plate at approximately eight in the morning on I-20 going westbound just on the other side of Augusta, Georgia. (R. 184). Gietz notified the team that had been investigating Appellant and reached out to the South Carolina Highway Patrol to get in contact with their interdiction team to conduct a whisper stop[2]. (R. 187). Officers were placed along I-20 on the eastbound side where Appellant would be returning. (R. 187-188).

Trooper Gregory Shropshire from South Carolina Highway Patrol was positioned on mile marker 39 when he witnessed Appellant commit two traffic violations: following too closely and failure to maintain lane. (R. 232-235). Shropshire conducted a traffic stop and identified the driver as Appellant. (R. 236). Shropshire testified that he had prior knowledge there was a possibility of illegal narcotics trafficking going on, but that he needed to develop reasonable suspicion before he could search the vehicle. (R. 237). Shropshire testified that during the stop, he observed Appellant with extremely nervous behavior, he had inconsistencies in his

[1] DEASIL is a license plate reader system run by the DEA that will track and monitor license plates as they pass a reader.

[2] A whisper stop is where officers pretend the traffic stop is a normal stop when in reality they are given information about who a person is, where they are coming from, and what they are allegedly supposed to have inside their vehicle. (R. 182, 227).

statements, and was evasive with answers. (R. 237-245). Shropshire testified that he then had reasonable suspicion and asked Appellant for consent to search his vehicle. (R. 246).

When Appellant refused consent, Jacob Atwood, a K-9 officer with the South Carolina Highway Patrol, then deployed the K-9 officer to do a sniff test on the outskirts of the vehicle and he ultimately indicated that there were drugs in the vehicle. (R. 283). Once the dog gave a positive indication that there were drugs in the vehicle, it was searched and approximately 3,200 grams of methamphetamine was found in the rear passenger compartment. (R. 197, 249).

STANDARD OF REVIEW

Issue 1

"In criminal cases, the Appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E. 2d 216, 220 (2006). "Historically, we have repeatedly noted that appellate courts review and appeal from a motion to suppress based on a violation of the Fourth Amendment under the deferential "any evidence" standard." State v. Frasier, 437 S.C. 625, 632, 879 S.E.2d 762, 765 (2022). "Pursuant to this standard, our appellate courts 'will not reverse a trial court's finding of fact simply because it would have decided the case differently.'" Id. "Appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for evidentiary support, but the ultimate legal conclusion...is a question of law subject to de novo review." Id. at 633-634, 879 S.E.2d at 766.

Issue 2

"The decision to grant or deny a motion for a mistrial is a matter within a trial court's discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). Whether a mistrial is necessary is decided on a case by case basis. "It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." State v. Rowlands, 343 S.C. 454, 457-458, 539 S.E.2d 717, 719 (Ct. App. 2000) (citations omitted). "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 445, 460 (Ct. App. 2005). "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is

as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983).

Issue 3

"A trial judge has considerable latitude in ruling on admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." State v. Howard, 396 S.C. 173, 177, 720 S.E.2d 511, 514 (Ct. App. 2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). "To warrant the reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

Issue 4

"The granting or refusal of a motion for a new trial is within the discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). "Where a discretionary order is based on factual conclusions, it will not be disturbed unless without evidentiary support." Id. at 166-167, 303 S.E.2d at 858.

ARGUMENT

I.

The trial judge properly denied Appellant's motion to suppress the drugs evidence found because the stop was not unlawfully extended, and the officer had probable cause to search the vehicle.

Appellant argues that the trial judge erred by refusing to suppress the drug evidence. Specifically, Appellant maintains the continued detention of Appellant allegedly exceeded the scope of the traffic stop and the officer did not have reasonable suspicion of illegal activity. Appellant's argument lacks merit because the stop was not unlawfully extended, and the officer had probable cause to conduct a search of Appellant's vehicle without his consent.

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

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

meaning of the Fourth Amendment." State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App 2005). "Thus an automobile stop is 'subject to the constitutional imperative that it not be unreasonable under the circumstances.'" Id. (citing Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996)). "Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se." Id. "The police may also stop and briefly detain a vehicle if they have reasonable suspicion that the occupants are involved in criminal activity." Id. Here, there is no contest that Appellant committed two traffic violations and therefore Appellant's vehicle was lawfully detained. (R. 235).

"Once a motor vehicle is detained lawfully for a traffic violation, the police may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures." State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 708 (Ct. App. 2002). "In carrying out the stop an officer 'may request a driver's license and vehicle registration, run a computer check, and issue a citation.'" Id. (citing United States v. Sullivan, 136 F.3d 126, 131 (4th Cir. 1998)). Officer Shropshire approached the vehicle, gave Appellant the reason for the stop and asked for his information. (R. 236).

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

the passenger in the absence of other factors alleviating the officer's safety concerns." State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006).

In Kansas v. Glover[3], the United States Supreme Court held that facts known to the deputy at the time he stopped a vehicle gave rise to reasonable suspicion that the defendant was driving with a revoked license in violation of Kansas law. Further, our Supreme Court has held an investigative detention is constitutional if supported by a reasonable and articulable suspicion that the person is engaged in criminal activity and the required reasonable suspicion can arise from an anonymous tip provided that the totality of the circumstances justifies acting on the tip. State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013). In Provet, our Supreme Court held that an officer may not lawfully extend the duration of a traffic stop to engage in off topic questioning so long as those inquiries do not measurably extend the duration of the stop and that ten minutes was a reasonable length of time for the initial traffic stop and the off topic questions did not measurably extend the stop. State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013). "The officer's observations while conducting the traffic stop may create reasonable suspicion to justify further search or seizure." Provet at 109, 747 S.E.2d at 457.

Here, Shropshire had knowledge prior to the stop that there was a possibility of trafficking illegal narcotics. (R. 237). Appellant was asked to step out of the vehicle since this was an interdiction stop and Shropshire was trying to rapidly assess the situation. (R. 238). Shropshire testified that Appellant seemed "extremely nervous" and was very inconsistent in statements of where he had been and what he was doing. (R. 239-242). He also testified that when asking him questions unrelated to the stop such as his vehicle or riding motorcycles he answered quickly and confidently, but anything relating to the stop or drugs he was very evasive

[3] Kansas v. Glover, 589 U.S. 376, 140 S.Ct. 183 (2020).

in his answers. (R. 243-245). The entire traffic stop lasted approximately 10-12 minutes and Shropshire testified that he had based off the prior knowledge and the interaction with Appellant he had developed reasonable suspicion. (R. 246-247).

Therefore, the stop was properly extended and the probable cause-based search of Appellant's vehicle that followed the drug detection dog's alert was proper. In ruling that the drugs found in Appellant's vehicle were admissible, the trial judge looked at the totality of the circumstances noting the prior knowledge that Shropshire had along with Appellant's inconsistencies in his statement as well as his demeanor and actions. (R. 123-126). In conclusion, the trial judge's finding was legally correct and is supported by evidence. Therefore, the ruling should be affirmed.

II.
The trial court properly denied Appellant's motion for a mistrial.

Appellant argues that the trial court erred by refusing to grant a mistrial for a couple of reasons. First, Appellant argues that a mistrial should have been granted when the State's first witness referenced inadmissible propensity evidence. Second, Appellant argues that a mistrial should have been granted when the State presented inadmissible drug evidence to the jury. Finally, Appellant argues that a mistrial should have been granted because the trial court excused a juror for writing "guilty" on their notepad during the second day of trial. Appellant's arguments lack merit.

"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, 382 S.C. at 117, 674 S.E.2d at 537.

Inadmissible Propensity evidence

John Gietz with the Lexington County Sheriff's Office began to testify about his involvement in Appellant's case. He testified that he had opened an investigation into narcotics on Appellant that began in approximately 2018. (R. 173). The Solicitor asked Gietz if he had received any tips in reference to the defendant. (R. 174). Gietz responded with "Yes, ma'am I did. We received multiple tips from several sources that he was trafficking narcotics." (R. 174). The trial judge immediately interrupted Gietz and Trial Counsel requested that he make a motion outside the presence of the jury. (R. 174). Trial counsel ultimately made a motion for a mistrial "because what has just happened is that we now have heard that the defendant—that they were investigating whether or not the defendant is involved in more than the one case that we're dealing with right now. So there is a – they're bringing up the fact that he is guilty of other offenses for which he's not being tried for." (R. 175). The Court stated that all the State really needed was that Appellant was being investigated and that there were tips that led Gietz to believe he was going to be on the road trafficking drugs. (R. 176). The trial judge noted the motion for a mistrial and denied it and gave the following curative instruction:

> Ladies and gentlemen, I told you a little earlier I'm the judge of the law, and that's my job, is trying to keep the – the law properly applied and sometimes I have to take steps as the trial—as the traffic court I supposed, when it comes to that in deciding things that are admissible and are not admissible.
>
> You are to disregard any testimony offered by the investigator that goes beyond the scope of this case when it comes to the investigation of the defendant

> in this particular case. There's a – he's on trial for one offense and it's included in the indictment. You're to disregard any testimony regarding the scope of this investigation beyond that particular event.

(R. 178-179). There was no objection to the sufficiency of the curative instruction and is therefore not preserved for appellate review. However, even if preserved the trial court did not err in denying the motion for a mistrial.

Appellant argues that a mistrial should have been granted because this was inadmissible propensity evidence, however the statement made by Gietz would not rise to evidence of bad acts. In State v. Thompson, this court held that a police officer's single reference to warrants that existed against the defendant did not constitute sufficient prejudice to justify a mistrial. State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003). "[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes." Thompson at 561, 575 S.E.2d at 82; See State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (determining law enforcement agent's isolated testimony that he compared defendant's fingerprints with fingerprint card agency had on record was not so prejudicial to defendant as to warrant mistrial because it was questionable whether the jury drew a connection between a fingerprint card and defendant's prior criminal activity). Further in State v. Robinson, the court emphasized that even if the testimony created the inference in the jury's mind that the accused had committed another crime, the state never attempted to prove the accused had been convicted of some other crime.

In this case, Gietz does not even reference any other criminal activity. He states "we received multiple tips from several sources that he was trafficking narcotics." (R. 174). He doesn't reference different time periods or different drugs and therefore while one may infer

those multiple tips means multiple drugs or offenses, on its face the statement means that they received multiple tips regarding this specific charge of trafficking methamphetamine.

Further, the trial judge gave a curative instruction immediately after and trial counsel did not object to the sufficiency of the curative instruction. "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). This statement is not sufficient to justify a mistrial and therefore the trial judge did not err in denying the motion for a mistrial.

A. Inadmissible Drug Evidence

Appellant argues that the trial court erred in refusing to grant a mistrial when the State presented inadmissible drug evidence to the jury. Because of the quantity of methamphetamine found in Appellant's vehicle, Gietz packaged the seized evidence in a box, sealed it and initialed anywhere he could find a gap. (R. 198). The box was marked as State's Exhibit 7 and shown to Gietz for identification purposes only. (R. 198). He testified that State's Exhibit 7 was the box he submitted with his signature and date it was submitted. (R. 198-199). The dates on the box were June 29, 2020, and another when the box was opened for trial. (R. 199).

Margaret Walker, an expert in chemical analysis testified at trial. Walker testified that she received State's Exhibit 7 from evidence custodian, Candy Kyzer. (R. 394). Walker testified that she checked all of the seals Gietz taped shut on State's Exhibit 7, confirmed his initials and the date and made sure the box was not opened. (R. 396-398). She concluded that the box did not "appear to be tampered with at all." (R. 396-397). She testified that she opened the box and did

testing on the contents. (R. 399). As Walker was about to testify to what was in the box trial counsel requested a motion outside the presence of the jury and the following conversation took place:

> **Trial Counsel**: Judge, obviously we had a motion dealing with the search of the vehicle, which your Honor has already ruled on. I don't know what's inside that box other than there is a box and there may, indeed, be evidence which was secured from the truck inside that, as well as obviously there's gonna be some sort of testimony in regards to what the analysis of those items are.
> **The Court**: Right.
> **Trial Counsel**: So, Your Honor, at this time I want to make sure that the record revealed that we renewed our motions in regards to the search—
> **The Court**: Right.
> **Trial Counsel**: --so that it would continue to—and I don't know if I did—I did it this early time because I don't know what's in that box and if she's seeking to introduce something that's in that box, I didn't want to—the reason I sent the jury out was as I talked about the search, which Your Honor's already ruled on.
> **The Court**: All right.
> **The State**: Judge, the whole box is already in evidence.
> **The Court**: I'm sorry?
> **The State**: The whole box is already in evidence. It's just the drugs.
> **The Court**: Right. The—the video shows that there were three plastic smaller boxes that were stacked up. Is that what is in this box?
> **The State**: Yes, Your Honor.
> **The Court**: Anything else?
> **The State**: No. They don't package evidence that way. They keep—
> **The Court**: Ma'am?
> **The State**: They keep everything separate. They wouldn't put everything in one box with suspected narcotics. They don't do that.
> **The Court**: I'm just trying to figure out is there anything in this box that was not seized at the scene on the videotape?
> **The State**: There are bags added that she added herself that she will testify to—
> **The Court**: Surely.
> **The State**: —but that's it.
> **The Court**: All right. Mr. Williams, does that address your concern or is there something else that we need to—
> **Trial Counsel**: No, sir. I just wanted to make sure that I was protected in terms of the introduction of any evidence dealing with the search by continuing the objection before these items get placed into evidence in the trial itself.

(R. 408-410). Walker then proceeded to testify what was in the box stating that there was item 1.1, three plastic containers containing a crystal substance, and item 1.2, a Ziploc bag containing a crystal substance. (R. 411). She testified to the process of measuring and testing the substance ultimately testifying that item 1.1 contained 2,917 grams of methamphetamine. (R. 411-416). Walker was then asked about item 1.2 and she testified that it was a Ziploc bag containing 5.22 grams of methamphetamine. (R. 418-422). No objection was made at that time.

On cross examination trial counsel was going through the evidence that Walker discussed and when he got to 1.2 trial counsel stated he had a matter to take up outside the presence of the jury. (R. 427). The trial judge then questioned Walker about the items to get clarification:

> **The Court**: My understanding was that the 1.1 item is the three plastic containers, right?
> **The Witness**: Yes, sir.
> **The Court**: And then you took each of those three plastic containers and gave them a sub number, 1.1, 1 in parentheses, 2 in parentheses and 3 in parentheses?
> **The Witness**: Yes, sir.
> **The Court**: So is it my understanding then that accounts for the—the drugs that are in the three plastic containers?
> **The Witness**: For Item 1.1, yes.
> **The Court**: That's right. Item 1.1 is the three plastic containers?
> **The Witness**: Yes, sir.
> **The Court**: And the drugs that are in them?
> **The Witness**: Yes.
> **The Court**: And 1.1(1) and 1.1(2) and 1.1(3) is the individualized contents of each of those three containers?
> **The Witness**: Yes, sir.
> **The Court**: All right. So what then is 1.2 with the 5.22 grams?
> **The Witness**: That is the Ziploc bag containing plastic container containing plastic corner bag containing crystal substance.
> **The Court**: Okay. Not the three bags that are in the 1.1? something different?
> **The Witness**: Yes, sir.

(R. 428-429). The trial judge then sent the jury to the jury room and trial counsel moved for a mistrial based on evidence that was shown to the jury that was not found in Appellant's vehicle. (R. 432).

The State argued that the remedy was not a mistrial, but a suppression of item 1.2. (R. 433). The Court's response was that that item 7 was just for identification purposes and had not been moved into evidence and that the appropriate remedy would be to not allow the item 1.2 into evidence because it doesn't disturb the validity of the other evidence in the three plastic containers. (R. 433-434). Trial Counsel argued that because the jury heard all the testimony about item 1.2 that it should be a mistrial. (R. 434-437). In denying the motion for mistrial the trial judge stated:

> The motion has been made for a mistrial. I'll tell you what we all know in this courtroom about the law in that regard. Our Court has held that the granting of a mistrial is an extreme measure that should be taken only when an incident is so grievous that the prejudicial impact can be removed no other way. That's State versus Tisdale, 338 South Carolina 607.
>
> A mistrial should not be granted unless absolutely necessary. Defendant must show error and resulting prejudice. State versus Council, C-O-U-N-C-I-L, 335 South Carolina 1. And, of course, it's the judge's discretion which controls.
>
> What we're talking about in this case is improperly admitted evidence or improperly proffered evidence sought to be admitted. It is not in evidence yet. State's 7 has been offered for identification and has not been introduced into evidence—has not been admitted into evidence I should say.
>
> I am struggling with two separate events. First of all, there's the testimony early on by Inspector Gietz about the fact that the defendant was under investigation and had been under for some other—for some time. There was a reference for more than in this event, which we have dealt with earlier.
>
> Our caselaw creates a bar that it is extremely difficult to meet in order to get a mistrial and I and other trial judges are compelled by the law as it has been handed to us to try to avoid a mistrial if we possibly can and still- and still ensure a fair trial.
>
> The prior reference of other drug activity has been addressed in other cases, State versus Council again, in which there was some reference to the defendant's prior criminal record, but the State didn't make any attempt to introduce any other evidence of any other crimes in that regard. A single reference to warrants or other charges against the defendant has been held insufficient to grant a mistrial. That's State versus Harris, 340 South Carolina 59.

The more troublesome case that we're confronted with right now is that evidence, that improperly offered evidence in this regard, and I need not repeat again which both sides have alluded to during the argument. Here is evidence that by agreement was not going to be offered in this particular case. Here is evidence that insofar as the arrest is concerned and the circumstances surrounding the arrest, and all of the motions that we took care of in regard to that, was not even mentioned. The photographs on the roadside, the nature of the stop, the nature of the dog search, all of those things, the photographs, the videos that were taken, talked about three plastic containers full of methamphetamine. That's all that Investigator Gietz talked about. That's all that the troopers talked about. That's all there was.

And then in the course of Ms. Walker's testimony, who was not present obviously for the other and didn't know the background, all she knew is what she had been asked to analyze, and she did and here it is, and she went into great detail that I don't need to belabor any further and having – and having completed her report. And very specifically. Even I understood it. The 1.1 and the 1.1(1), (2) and (3), I understood that. And then there comes in this 1.2. I was trying to figure out what that was. I hadn't heard about that. Mr. Williams knew about it or he thought he knew about it. He thought he knew what they were talking about and he tried to keep it out. He insisted that he wanted the chain to be completed. He wanted to know what was in the box. He knew exactly what—what it could have been. He fought to keep it out. I would have thought at that time if I were on the other side and realized now wait a minute, we weren't supposed to be trying this case on anything but the—but the three plastic containers, but the prosecution forges ahead right through the stop sign, right through the speed bumps and everything else, right onto this 1.2 Ziploc bag containing crystal, weighed separate, tested, 5.22 grams. I was trying to figure out how that factored into the weight that had been given of the three plastic bags and I – I didn't know because I didn't know what it was until we get to the flower pot or whatever it was that says this is—this is something else and that of course, immediately gave rise to the mistrial.

Now—now I'm confronted with what is obviously overreaching and not accidental. Not to say that it was intentional from the standpoint of luring somebody into a trap in this regard, but to say for some reason, and I don't understand why, the agreement not to bring this very item into evidence was forgotten, and what do I do with it?

Candidly, folks, I wanted to declare a mistrial. I still want to declare a mistrial, but a trial judge doesn't get to do whatever he wants to do just because he wants to do it. I'm bound by the law and our courts have told me in cases even more severe than this that a mistrial should not be granted.

State v. Howard at 269 South Carolina 481.

Mr. Howard was on trial for the crime of murder and his co-defendant said during the course of the trial that Howard had committed another murder and the statement was made twice and the Supreme Court said that did not warrant a mistrial when the judge admonished the jury to disregard anything about that and so any error in failing to grant a mistrial in that case was harmless error. Of

> course, as the trial judge I don't like to commit any error, even a harmless error, but that requires the State to review the—I mean, the Supreme Court to review the entire record to find out.
>
> A mistrial should not be ordered in every case where incompetent evidence is received and later stricken out. An instruction to disregard objectionable evidence usually cures any error in its admission. The defendant has to show both error and resulting prejudice. State versus Johnson, 334 South Carolina 78.
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> State versus Moses, 390 South Carolina 502, when in the course of a trial incompetent statements of witnesses are brought in either from accident or when they might reasonable though erroneously be thought by counsel to be competent, the only remedy that the Court can afford is to grant a motion to strike and instruct the jury to disregard the testimony. The injury resulting from a jury having heard incompetent testimony is regrettable, but the trial cannot be stopped because of such accidents and mistakes likely to occur.
>
> That's the law that I'm confronted with in the face of my gut reaction to grant a mistrial in this case. I don't get to rule on the basis of what my—pardon my French—gut reaction happens to be. I'm bound by the law.
>
> And, Ms. Oppenheimer and Mr. Smith, you-all are the beneficiaries of the law in this regard, and you should be. The State should be. Whoever the law benefits under the law I suppose it should be because that's the way the law is intended to be, and so the motion to grant a mistrial is respectfully, yet regrettably, denied.

(R. 437-442). Further, item 1.2 was suppressed, and a curative instruction was given to the jury again with no objection to the sufficiency of the instruction by trial counsel. (R. 442-448).

The introduction of item 1.2 was harmless and therefore the trial judge did not err in denying Appellant's motion for a mistrial regarding the inadmissible drug evidence. As the trial judge mentioned in his thorough ruling, the jury hearing about item 1.2 was not sufficient to constitute a mistrial. In hearing about item 1.2 they simply heard that it weighed 5.2 grams and contained methamphetamine. There were no details about where it was found, so while there may be an inference that it had to do with a separate case, it could also have been inferred that it was found on Appellant's person after he was arrested or in another place in the vehicle. Also, they heard about the 5.2 grams after having seen and heard about the almost 3,000 grams that had been found in Appellant's vehicle. The State had greatly surpassed the 400 gram threshold

that they needed with what was found in the car and the jury was going to convict Appellant regardless of the 5.2 grams. Further, the trial judge gave a curative instruction immediately after. "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). This inadmissible drug evidence was not sufficient for the trial judge to grant a mistrial and therefore the trial judge properly denied Appellant's motion for a mistrial.

B. Jury Note

On day 2 of trial, it was made known to the trial judge that a juror had written "guilty" on their notepad along with other doodles and the notepad was found in the jury room. (R. 305). The trial judge called each juror individually and inquired whether they had any connection with the note, seen the note, or heard any discussions regarding the note. (R. 305-359, 600-601). Juror 226 admitted to writing the note and even though he stated that he did not discuss the note or his opinion with any other juror he was excused from the remainder of the trial. (R. 325-328). Jurors 165, 53, and 20 stated that they saw the note but did not hear any discussions regarding the note. (R. 305-359). They further stated that the note did not impact them at all and that they could remain fair and impartial in the case. (R. 305-359). In the trial judge's ruling he stated:

> I renew my earlier rulings and discussions at some point in time during this voir dire and find that even if this rises to the level of misconduct, and I will accept for the purposes of argument that it does, that it – that it is discussion for those purposes, that under these circumstances the fact that we've inquired of all of the other jurors and whatever the discussion was they were not impacted by it. He will not be present from this point on in the trial to share these opinions with anyone else and so I think that we've done—certainly we've done all that we can do under these circumstances, but I think it's more than just—it's not like it's just

close enough for government work. It is thorough enough in my view to satisfy the process itself and to assure that the process goes forward untainted given the affirmations of each these jurors.

The question always, of course, is not whether even a prospective juror has reached an opinion himself in the trial of the case, the question is whether or not that juror could set aside an opinion previously held by that juror and decide the case based on the evidence itself and not on that preconceived opinion.

So we go a step beyond that and we don't have preconceived opinions or ideas among any of the jurors at this point, so I think that the process, although not perfect, granted, Mr. Williams, I think it's as close to perfect as we can have any process to assure a fair and impartial juror in the trial of the case. I respectfully note your—your exceptions in that regard.

(R. 365-366). This did not rise to the level of juror misconduct and surely wasn't sufficient enough to warrant a mistrial; therefore the trial judge did not err in denying Appellant's motion for a mistrial.

III.

The trial court did not err in finding the State provided a sufficient chain of custody to admit a box containing drug evidence as State's Exhibit 7.

Appellant argues that the trial judge erred in finding the State provided a sufficient chain of custody to admit a box containing drug evidence. Specifically, Appellant argues that State's Exhibit 7 passed through the hands of three people in this case: Investigator Gietz; evidence custodian Candy Kyzer; and chemist Margaret Walker, and the chain of custody was insufficient because Kyzer did not testify. (Initial Brief of Appellant pg. 31). Appellant argues that this is particularly concerning because no witness testified at trial about how item 1.2 ended up inside State's Exhibit 7. (Initial Brief of Appellant pg. 31). However, Appellant's chain of custody argument, does not deal with item 1.2. During Margaret Walker's testimony, Appellant made an objection when the State attempted to move State's Exhibit 7, the box containing the drugs, into evidence. (R. 399-400). Trial Counsel argued that a witness could testify as to when and where Gietz placed the box in evidence and how it got to Walker. (R. 400). He further argued that there

has been no testimony to trace the box from the date and time the box was allegedly found on the road until it was placed into evidence and how it was maintained. (R. 400-401).

"'To warrant reversal based on the admission or exclusion of evidence, the [A]ppellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof.'" State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)). A party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. State v. Sweet, 374 S.C. 1, 647 S.E.2d 202 (2007). "Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture." Id. at 6, 647 S.E.2d 202, 205 (2007). Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill motive. State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004).

"Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." State v. Pulley, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018) (Citing State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)). "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "[W]e have never held the chain of custody rule requires every person associated with the procedure be available to testify or identified personally, depending on the facts of the case."

South Carolina Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 629, 614 S.E.2d 642, 646 (2005). Cochran further held that the chain of custody was sufficient even though the courier who transported the samples from the collection site to the testing facility was never identified, where the samples arrived at the facility sealed and intact. Id.

"It is unnecessary.... [t]hat the police account for 'every hand-to-hand- transfer' of the item; it is sufficient if the evidence demonstrates a reasonable assurance of the condition of the item remains the same from the time it was obtained until its introduction at trial." State v. Hatcher, 392 S.C.86, 95, 708 S.E.2d 750, 754 (2011). "To expect the [prosecuting authority] to produce every possible individual who may have had fleeting contact with the evidence would cause unnecessary logistical problems concerning chain of custody." Id. (citing to Commonwealth v. Herman, 288 Pa. Super. 219, 431 A.2d 1016, 1019 (1981) (holding the absence of testimony from a crime lab custodian who merely logged in the seized marijuana was not fatal to the chain of custody where the officers who seized the drugs and the chemist who tested them did testify at trial)). "[I]f they identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill motive." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007). Furthermore, "where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001).

At trial, Appellant argues that because Kyzer did not testify that the chain of custody wasn't sufficient. Investigator Gietz testified that he packaged the seized evidence in a box, sealed it and initialed anywhere he could find a gap. (R. 198). He then testified that he submitted

it to the Lexington County evidence center so that they could conduct testing. (R. 198-199). Walker then testified that she collected the evidence from the evidence room where only she and the evidence custodian Candy Kyzer have access. (R. 394). She then testified that the seal was intact, and the evidence did not appear to be tampered with. (R. 396-400). Based on that testimony, every individual who handled the methamphetamine was identified and a full chain of custody was established as far as practicable. See State v. Trapp, 420 S.C. 217, 231, 801 S.E.2d 742, 749 (Ct. App. 2017). This is sufficient to show that Gietz sealed the evidence, and it was not tampered with until Walker opened up to test the contents.

In Appellant's brief, Appellant attempts to now argue that the addition of item 1.2 in the evidence box constituted proof of tampering. In Trial Counsel's argument of the mistrial for item 1.2, Trial counsel references a search warrant that allowed officers to go into Appellant's house and seize other items. (R. 432). The State further explains that after Appellant's arrest, a search warrant was granted for Appellant's home and that is where item 1.2 came from, and they packaged the evidence together because the case was originally going to be tried together and it would have been difficult to keep a chain of custody without packaging them together. (R. 432-433). This explains that item 1.2 was placed in the box before it was sealed by Gietz and disproves that the box was tampered with and therefore still admissible. See Carter, 344 S.C. at 425, 544 S.E.2d at 835 (rejecting a challenge to a chain of custody based on the fact a saliva sample sealed inside an evidence kit with blood samples was inexplicably missing when the kit was unsealed at the laboratory because the evidence related to the missing saliva sample "simply contradict[ed] the State's evidence negating tampering, thereby created a factual issue" for the jury to resolve but did not render the blood samples inadmissible). See also State v. Pope, 410 S.C. 214, 228-229, 763 S.E.2d 814, 822 (Ct. App. 2014) (concluding a complete chain of

custody was established for the drugs based on the testimony presented even though the chain of custody affidavit prepared by one of the officers in the chain contained inaccurate information concerning where the drugs were seized from and who actually seized them). Even though Kyzer did not testify, she was identified as being in the chain and there was testimony that there was no tampering and the evidence remained sealed. Therefore, the trial judge did not abuse his discretion in admitting evidence because a sufficient chain of custody was established.

IV.

The trial Court did not err by refusing to grant a new trial.

Appellant argues that the trial court erred by refusing to grant a new trial where the cumulative effect of the unfair prejudice created by all the errors that occurred during the trial deprived Appellant of his right to a fair trial. This argument lacks merit because as shown in his ruling above on whether or not to grant a mistrial in the case the trial judge viewed all of the issues cumulatively before making his ruling.

"A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 722 (Ct. App. 1996). Therefore, the trial judge did not abuse his discretion in not granting Appellant a new trial.

CONCLUSION

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

Respectfully submitted,

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September 18, 2024

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Thomas W. Cooper, Circuit Court Judge

Appellate Case No. 2023-001288

THE STATE, Respondent,

v.

STEVEN DANIEL BROWN, Appellant.

PROOF OF SERVICE

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

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I further certify that all parties required by Rule to be served have been served.
This 18th day of September, 2024.

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From: Grace Sommer
Sent: Wednesday, September 18, 2024 4:32 PM
To: Dayne Phillips; Jason Yonge; twilliams@wsblegal.com
Cc: Ambree Muller
Subject: The State v. Steven Daniel Brown (2023-001288)
Attachments: BROWN Steven - FBOR.pdf

Good Afternoon Mr. Phillips, Mr. Yonge, Mr. Williams,

Attached please find the Final Brief of Respondent in The State v. Steven Daniel Brown (2023-001288). This Brief will be filed today with the Court of Appeals via the AIS OneDrive System.

If you would, please confirm receipt of this email.

Thank you!

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