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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Richland County

The Honorable Jocelyn J. Newman, Circuit Court Judge

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THE STATE,

Respondent,

v.

JAMES TOATLEY,

Appellant.

Appellate Case No. 2023-001059

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# INITIAL BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***Cases:***

## APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by overruling Defendant's objection and refusing to grant a mistrial where, during its closing argument, the State was permitted to make an argument indirectly impugning Defendant's right to remain silent by urging jurors to consider "those who chose to speak to the police that night, ... who chose not to slip away in silence .... They went to the police. They gave statements."?

## RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether Appellant failed to preserve the issue that a mistrial was warranted based on his allegation that the State made a comment in its closing argument that offended his constitutional right to remain silent when he failed to contemporaneous object and move for a mistrial? Alternatively, if preserved, whether the trial court properly denied Appellant's motion for a mistrial when the comment in the State's closing argument did not explicitly reference Appellant nor was it a comment on Appellant's post-*Miranda* rights, or if error, whether the comprehensive and specific jury instructions cured any possibility of prejudice warranting relief, especially when the evidence against Appellant was overwhelming and included video evidence supporting the witnesses' testimony?

## STATEMENT OF THE CASE

On November 17, 2021, a Richland County grand jury indicted Appellant James Toatley for two counts of murder, (2021-GS-40-04737 and 04725); two counts of attempted murder, (2021-GS-40-4740 and 4739); and, one count of possession of a weapon during the commission of a violent crime, (2021-GS-40-04738). (*See* R. p. * (Indictments)).

On June 20-26, 2023, Appellant's case was called to trial before the Honorable Jocelyn J. Newman and a jury. (Tr. p. 2). Aimee J. Zmroczek Esq., represented Appellant and Assistant Solicitor Melanie Darko prosecuted the case for the Fifth Circuit Solicitor's Office. (Tr. p. 2). The jury found Appellant guilty of both counts of murder, one count of attempted murder, one count of the lesser included offense of assault and battery of high and aggravated nature (ABHAN), and possession of a weapon during the commission of violent crime. (Tr. p. 796, line 9 - p. 797, line 7).

Judge Newman sentenced Appellant to 38 years for the murder of Curtis Dinkins and 42 years for the murder of Corey Smith, to be served concurrently. As to the attempted murder of Pope Hope and ABHAN of Jamica Bethel, Judge Newman sentenced Appellant to two concurrent 10 year sentences to be served consecutively to the murder sentence. As to the weapons charge, Judge Newman sentenced Appellant to 5 years to be served consecutively to the murder, attempted murder and ABHAN sentences. (Tr. p. 822, *See also* R. p. * (Sentence Sheets)).

## RESPONDENT'S STATEMENT OF FACTS

In the early morning hours of December 19, 2020, Jamica Bethel and Curtis Dinkins pulled over in a parking lot after a night out due to a malfunction with their vehicle. (Tr. p. 284, lines 7-10). Curtis called his friend, Pope Hope, to pick them up. (Tr. p. 224, lines 17-23 and p. 284, lines 11-15). Pope arrived with his friend Corey Smith and the four went to Motor City Market, a convenience store also known as the Blue Store. (Tr. p. 226, lines p. 284, lines 11-15 and p. 285, lines 18-20).

Appellant, wearing all black, and his friend, wearing red shorts, were at the convenience store prior to Corey, Pope, Jamica and Curtis' arrival. (*See* State's Exhibit 10, Channel 1 at :22-6:00 – victims' arrival.). Appellant and the friend entered the store. (*See* State's Exhibit 10, Channel 1 at 2:10-2:15). According to some, the friend dropped the gun from his pocket inside the store, and Appellant picked up the gun and put it in his pocket. (Tr. p. 431, line 19 - p. 432, line 8; *See* Exhibit 14, Ch. 4 Clip 1 at :24 - :38 and Ch. 13 Clip 1 at :25 - :38). The store clerk told them that there were no guns allowed inside the store. (Tr. p. 431, line 25 - p. 432, line 1). Appellant and the friend bought something from the store clerk and left. (Tr. p. 432, line 9 - 433, line 25; *See* Exhibit 14, Ch. 4 Clip 1 at :38 -2:09).

When Corey, Pope, Jamica and Curtis arrived at the convenience store, Curtis went inside, and a few minutes later Pope also went inside. (Tr. p. 226, line 24 - p. 227, line 6 and p. 287, lines 8-14). Jamica and Corey remained in the vehicle. Appellant and the friend entered the store - for the second time that night - at the same time as Curtis and Pope, following them inside. (Tr. 68; 177, p. 227, lines 7-23; *See* State's Exhibit 10, Channel 1 at 7:23-7:36). Curtis was at the counter purchasing cigarettes and Pope was standing to his left, talking with him. (Tr. p. 228, lines 1-5; *See* Exhibit 14, Ch. 4 Clip 2 at :34 - :45) Appellant was standing behind Pope. (Tr. p. 228, lines 8-9,

and p. 434; *See* Exhibit 14, Ch. 4 Clip 2 at :45). Pope accidentally waved his hand back and grazed Appellant's hand, inadvertently knocking the bag of chips that were in his hand while they were in line. (Tr. p. 228, line 13 - p. 229, line 8; *See* Exhibit 14, Ch. 4 Clip 2 at :48 - :55). Pope and Curtis then left the store. (Tr. p. 229, lines 9-12; *See* Exhibit 14, Ch. 4 Clip 2 at :48 - :55). Though they were standing in line behind Pope and Curtis, Appellant nor his friend made another purchase in the store. (*See* Exhibit 14, Ch. 4 Clip 2 at :48 - :53 – end of clip). Appellant and his friend followed Pope and Curtis outside to confront Pope about the unintentional graze. (Tr. p. 229, line 13 - p. 230, line 435; *See* State's Exhibit 10, Channel 1 at 7:53 – confrontation begins).

Pope and Curtis tried to unsuccessfully calm Appellant and the friend down, and Pope having had enough of the argument and wanting to go home, got into the passenger seat of the vehicle they arrived in. (Tr. p. 230, lines 7-19 and p. 288, lines 5-22; *See* State's Exhibit 10, Channel 1 at 8:45). Appellant followed him and stood next to the car while Pope was inside the vehicle. (Tr. p. 230, lines 14-19; *See* State's Exhibit 10, Channel 1 at 8:45-9:13). Curtis remained outside the vehicle trying to diffuse the situation. (Tr. p. 230, lines 21-23; *See* State's Exhibit 10, Channel 1 at 8:45-10:04). Eventually, Curtis walked toward Appellant, who was standing at the rear passenger side of the vehicle, and seemingly diffused the situation by "dapping" Appellant, *i.e.* clasping hands as a sign of agreement. (Tr. p. 230, line 20 - p. 231, line 8 and p. 291, lines 18-22; *See* State's Exhibit 10, Channel 1 at 10:04).

Only moments later, Appellant pulls out a pistol from his waistband and fired multiple shots at the passenger side of the vehicle. (Tr. p. 231, lines 9-14; *See* State's 10, Channel 1 at 10:15). Aimed at Pope sitting in the front seat, those shots missed Pope and one of them hit Corey Smith who was in the driver seat of the vehicle. (Tr. p. 231, lines 17-25; *See* State's Exhibit 10, Channel 1 at 10:15). Appellant then turned and fired multiple additional shots at Curtis at close

range. (*See* State's Exhibit 10, Channel 1 at 10:15). Curtis died from those injuries. (Tr. p. 536, line 23 - p. 537, line 5).

While this is happening, Jamica runs from the vehicle trying to get away. (Tr. p. 231, lines 14-17 and p. 292, line 7-17; *See* State's Exhibit 10, Channel 1 at 10:20). Appellant walks around the rear of the vehicle to the rear driver side, points the gun inside the vehicle and fired additional more shots. (Tr. p. 293, lines 3-14; *See* State's Exhibit 10, Channel 1 at 10:20-10:30). Those two shots strike Corey in the neck, killing him. (Tr. p. 538, line 9 – p. 539, line 25). Jamica runs into the store and asked the store clerk to call 911, which he did. (Tr. p. 293, lines 15-23 and p. 435, line 21 – p. 436, line 7; *See* State's Exhibit 10, Channel 1 at 10:31). Pope tried to drive the vehicle away, was unable to do so, and jumped out of the car and ran down the road to try to get help at a nearby hotel. (Tr. p. 231, line 24 – p. 232, line 4 and p. 234, lines 1-12; *See* State's Exhibit 10, Channel 1 at 10:33). Appellant and his friend return to their vehicle, however they have trouble starting the vehicle, and eventually abandon it and leave on foot. (*See* State's Exhibit 10, Channel 1 at 10:34-13:38). Police arrive on scene within minutes of the 911 call. (*See* State's Exhibit 10, Channel 1 at 14:37).

## STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only." *State v. Robinson*, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019). The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624–25 (1996). An appellate court reviews the ruling under the abuse of discretion standard. *Id.* To establish an abuse of discretion, an appellant must demonstrate to the reviewing court that the trial judge erred as a matter of law and that he suffered prejudice as a result. *Id.* The appellate court will review the complained of comment "in context of the entire record." *Id.* "The appellant has the burden of proving she did not receive a fair trial because of the alleged improper argument" in alleging a mistrial was warranted. *Id*, at 324, 468 S.E.2d at 625.

## ARGUMENT

**Appellant failed to preserve the issue presented; however, if preserved, the trial court properly denied Appellant's motion for a mistrial when the comment in the State's closing did not explicitly reference Appellant nor was it a comment on Appellant's post-*Miranda* rights, or, if error, the comprehensive and specific instructions cured any possibility of prejudice warranting relief, especially when the evidence against Appellant was overwhelming and included video evidence supporting the witnesses' testimony.**

*Relevant Facts*

The shooting in this case occurred just outside a convenience store. When Investigator Vicki Rains arrived, she described the scene as follows:

> It was chaotic. There was multiple people on scene. There was CPDO, Columbia Police Department Officers on scene. There was bystanders, witnesses, victims. There was a deceased person in the front seat of the vehicle and two people that had been transported and a lot of people around.

(Tr. p. 340, lines 16-20). There had been two other people (Jamica Bethel and Pope Hope) in the car with the murder victims (Curtis Dinkins and Corey Smith). Jamica ran inside the convenience store to call 911 and Pope ran to a nearby hotel for help and later went to the hospital. Though scattered, many witnesses till aided in the investigation, including Jamica and Pope, bystander Andre Riley,[1] and the store clerk, Hesham Elghamrawi. (Tr. p. 345, line 13 - p. 347, line 24).

After she arrived and surveyed the scene and spoke to responding officers, Investigator Rains was advised that the convenience store had surveillance video available. (*See* State's Exhibit 10 and State's Exhibit 14). She entered the store and spoke to the clerk, Hesham Elghamrawi. (Tr. p. 341, lines 11-17). A woman came by to retrieve the suspect's vehicle when the investigator was viewing the video. (Tr. p. 343, lines 3 - p. 344, line 1). Investigator Rains recognized the name,

[1] Riley's vehicle can be seen on State's Exhibit 10, Channel 1 as the SUV in the back of the frame that is present throughout the incident.

Bria Ruffin, as a person that she knew. (Tr. p. 344, lines 2-14). Importantly, Investigator Rains knew that Bria's boyfriend was James Toatley, the Appellant. (Tr. p. 344, lines 15-18 and p. 345, lines 3-9). When reviewing the surveillance video, Investigator Raines also recognized Appellant as "the suspect wearing black with a gun." (Tr. p. 344, line 23- p. 345, line 2; *See* State's Exhibit 10, Channel 1). The video shows, and witnesses also noted, that another man was with Appellant. That man was wearing red shorts and a dark shirt and initially, according to the clerk, had the gun seen in the video. (Tr. p. 178, lines 18-19; p. 202, lines 12-20; p. 229, lines 17-21; and p. 441, line 18-441, line 5; *See* State's Exhibit 10, Channel 1). However, when that man dropped the gun inside the store, Appellant, the man in black on the video, picked up the gun. (Tr. p. 441, lines 2-7). Notably, there was some disagreement where the gun actually came from, but no disagreement that Appellant retrieved the gun from the floor. (Tr. p. 615, lines 12-24; *See* Exhibit 14, Ch. 4 Clip 1 at :24 - :38 and Ch. 13 Clip 1 at :25 - :38)). Appellant can be seen with a gun in his hand on the surveillance video outside of the store. (*See* State's Exhibit 10, Channel 1 at 4:26).

Investigator Rains testified that Captain Eisenhower also came onto the case after she spoke to Jamica. (Tr. p. 363, line 25 - p. 364, line 5). Captain Eisenhower testified that he was aware coming onto the case that Appellant had been developed as a suspect. (Tr. p. 580, lines 12-15). On review of the store video, he also developed a profile of physical attributes for the suspect, noting tattoos on his hands and face, and also noted a distinctive sweatshirt, black with details, a "full" skull cap indicated a lot of hair, and boots. (Tr. p. 584, line 23-586, line 12; *See* State's Exhibit 14, Ch. 6 Clip 1 at beginning of clip until :7 and Ch. 6 Clip 2 at :34 – end of clip). Captain Eisenhower further noted a specific gait in the way the suspect walked,

> He appeared to have a limp. I noticed he was -- he was favoring them -- one of his legs as he moved away from the store, you could notice it pretty -- pretty distinctively.

(Tr. p. 586, lines 18-20; *See* State's Exhibit 10, Channel 1 at 4:51 - 4:59). Eventually, investigators obtained an arrest warrant for Appellant based on the "the video, the witnesses, identifying them, everything being consistent with what the witnesses said." (Tr. p. 605, lines 5-6). As Captain Eisenhower further observed, "it was pretty clear information." (Tr. p. 605, lines 6-7). Captain Eisenhower also testified that he attempted to find the individual with "red shorts" who also appeared on the video; however, that person "was actively avoiding" the captain, and, since he was not a suspect for the crime, there was not cause for a warrant in the captain's view. (Tr. p. 616, lines 6-19).

In closing, the solicitor referenced the video evidence in this case but cautioned that the explanation comes through the surviving witnesses, such as "Pope Hope, Jamica Bethel, Andre Riley and Mr. Hesham…." (Tr. p. 759, lines 1-10). The solicitor also touched on the fact that credibility may be assessed based on a number of factors "acquire[d] through your movement in your ordinary lives." (Tr. p. 760, lines 17-19). The solicitor then continued:

> And that's what I want you to do. When considering those people that got on the stand, those who chose to speak to the police that night, those who chose not to slip away in silence. Because again, our lives begin to matter or begin to end the day that we become silent about the things that matter and they weren't. They went to the police. They gave statements.

(Tr. p. 760, lines 19-25).

At that point, defense counsel asserted, "Your Honor, a matter of law …. I'll just note…," after which the trial judge directed the solicitor to continue. (Tr. p. 761, lines 1-2). The solicitor concluded shortly after with defense counsel next presenting a closing that also underscored credibility and offered perceived inconsistencies. (Tr. p. 761, line 13 - p. 770, line 7). The solicitor then had last argument (given the defense presented a case) and addressed some of the questions defense counsel posed in closing specifically related to the details of the investigation and the

consistency of the testimony with the video. (Tr. p. 770, line 9 - p. 772, line 9). Thereafter, the trial judge immediately instructed on the law and verdict forms. (Tr. p. 772, line 10 - p. 789, line 6).

After the trial judge sent the jury to their jury room, she asked if there were any objections on the charging language. (Tr. p. 789, lines 10-11). The State had none. Defense counsel responded that she would "renew my previous objections," then advised she had "an inquiry separately from that objection" about a special jury regarding Ms. Bethel. (Tr. p. 789, lines 14-17). The trial judge and parties reviewed matters to go back to the jury room and the judge excused the alternates. (Tr. p. 789, line 25 - p. 791, line 6).

Only after all this passed did defense counsel return to the "matter of law that [she] marked contemporaneously" during the state's opening argument. (Tr. p. 791, lines 9-11). Defense counsel argued that the solicitor's reference to "witnesses that didn't just slip away, that did give statements," along with showing the video that reflected Appellant left the scene "[s]linking away," was an improper comment on the fact he had not given a statement and moved for a mistrial. (Tr. p. 791, lines 11-24). The trial judge called for a response from the solicitor who clarified that she had merely referenced the limp in Appellant's gait, as was referenced in testimony, and asserted that the defense had questioned Captain Eisenhower about following up on Burgess, the other individual in red shorts on the video, and

> I did focus in my closing on those witnesses that were willing to speak to the police and who came in this courtroom and testified. I don't think that -- and -- and I will say that Ms. Zmroczek's objection, I believe came after I said to the jury, you know, it's improper for you to make your decision based on sympathy or empathy. And then she made -- made that objection. I certainly don't think that -- I -- I – I'm quite – I'm surprised that it was construed as commenting on the -- the defendant's silence because it was really this testimony that was elicited in terms of Mr. Burgess and why that had not been followed up on. And no -- nothing further, Your Honor.

(Tr. p. 792, lines 7-19).

The trial judge denied the motion noting that she "did not, at the time, and still d[id] not see it as a burden shifting to the extent that that could be argued or construed," but if so construed, any error would have been cured by the jury instructions. (Tr. p. 792, line 20 – p. 793, line 5).

*Discussion*

Appellant Toatley now argues that the State improperly commented on his right to remain silent and the trial judge erred by not granting a mistrial. Appellant's argument is not properly preserved, but even it was, the argument fails in law and fact.

As a first matter, counsel failed to contemporaneously object and move to strike the argument or contemporaneously move for mistrial. This issue is not preserved as a failure to object bars appellate review of the issue. *State v. Myers*, 301 S.C. 251, 258, 391 S.E.2d 551, 555 (1990). *See also State v. Groome,* 274 S.C. 189, 192, 262 S.E.2d 31, 32 (1980) (concluding on a record that shows no objection to questions posed but a later motion for mistrial after completing of examination, that "Failure to contemporaneously object to the questions now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial."). Appellant essentially abandoned the objection and/or motion by failing to timely present the same to the trial judge for consideration of a specific curative instruction, if the trial judge deemed one was required. *State v. Heller,* 399 S.C. 157, 174, 731 S.E.2d 312, 321 (Ct. App. 2012) (finding mistrial issue procedurally barred even though defense counsel objected when counsel appeared to accept the curative instruction given and failed to timely move a mistrial); *State v. Smith*, 307 S.C. 376, 393, 415 S.E.2d 409, 419 (Ct. App. 1992) ("A mistrial motion is not a substitute for a timely and specific

objection during a witness's testimony.").[2] At any rate, there could be no legal error as there was no argument concerning the exercise of a constitutional right.

"The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974)). Arguments that mispresent evidence or impact "specific rights of the accused such as the right to counsel or the right to remain silent" may violate due process. *Darden,* 477 U.S. at 181-82.

"It is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right." *Edmond v. State*, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000). The protection against such comments is rooted in the impropriety of inferring guilt from the "exercise [of] rights guaranteed … by the state and federal constitutions." *State v. McIntosh*, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004) (quoting *Edmond,* 341 S.C. at 346, 534 S.E.2d at 685). Thus, to show error, it must be established that rights have attached – in the case of the right to remain silent, either that the *Miranda* warnings have been given and relied upon, or that the defendant has declined to take the stand. For instance, "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). Further, comments that indicated a failure to take the stand at trial or otherwise present evidence should be used against the defendant is a violation of due process. *See McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d

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[2] Relatedly, when the late argument was placed on the record, the trial judge understood the argument to be one of "burden shifting," and defense counsel did not state otherwise. (*See* Tr. 792-793). To the extent that counsel acquiesced in the judge's interpretation, then the issue presented is also barred as being on a different ground than that presented below. *State v. Shuler*, 353 S.C. 176, 187, 577 S.E.2d 438, 443 (2003) (citing *State v. Byram,* 326 S.C. 107, 485 S.E.2d 360 (1997) and noting "a party cannot argue one basis in support of motion at trial and another ground on appeal")).

391, 393 (2000) ("the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense."). Appellant can show neither here. Rather, here, if the comment could be tied to Appellant at all, the time period referenced was the hours immediately following the crime. There was no comment on post-*Miranda* silence nor any reference to the trial presentation. Moreover, the trial judge correctly found that in context there was no improper reference made.

The solicitor testified that the comment was most specifically in response to questions about Burgess, *i.e.,* the man in the shorts visible on the video and an individual who "actively avoided" being contacted by police. (*See* Tr. p. 616, lines 6-19). Given the evidence supports that response, the trial judge did not abuse her direction in finding no error. Even if error, however, the trial judge did not abuse her discretion in finding any such error was cured by her comprehensive instructions.

Further, the comments were in response to arguments made about Burgess compared to the remaining witnesses at the scene. To the extent the "error" was invited,[3] that certainly undermines a negative "effect on the trial as a whole." *Darden*, 477 U.S. at 182. Moreover, there was not a

[3] The error, presumably, would have to be that a reasonable juror would take the argument to be aimed at the defendant. Respondent maintains that would not be a reasonable assumption where the same jury heard defense counsel's questions and subsequent argument about not finding and questioning Burgess. (*See* Tr. p. 616, lines 6-23 and p. 765, lines 5-8). Moreover, the solicitor did reference Appellant separately and directly as having "le[ft] the scene for the last time" on the video "calmly." (Tr. p. 758, lines 19-25). That he left the scene with the urging of his companion that it was expected officers would soon arrive, (*See* Tr. p. 179, line 15 - p. 180, line 2), is more an inference of guilt from flight, not a comment on the right to remain silent. *See generally Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (in context of reasonable suspicion, "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."); *State v. Beckham*, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999) ("Evidence of flight has been held to constitute evidence of guilty knowledge and intent. The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities.").

misrepresentation of facts to undermine a fair trial, and the "the weight of the evidence against petitioner was heavy" and supported guilt such that it "reduced the likelihood that the jury's decision was influenced by the argument." *Id.* at 181-182. Appellant cannot show prejudice. For these same reasons, the argument would not survive a harmless error analysis.

"An error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained." *Arnold v. State*, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992). Harmless error analysis applies in reviewing of comments potentially showing a due process violation. *State v. Shuler,* 353 S.C. 176, 187, 577 S.E.2d 438, 444 (2003) (citing *Edmond v. State*, 341 S.C. 340, 534 S.E.2d 682 (2000)). Not only were the judge's instructions thorough, (Tr. p. 773, lines 5-8, jury determines facts; p. 774, line 19 - p. 775, line 12, presumption of innocence; p. 777, lines 4-5, "If the circumstances merely portray the defendant's behavior as suspicious, the proof has failed. The burden of proof rests with the State"; p. 777, line 12 - p. 778, line 22, credibility of the witnesses; p. 779, line 17 - p. 780, line 7, "fact that the defendant did not testify is not a factor to be considered… It must not be considered … defendant has the constitutional right to remain silent and the insertion [sic] of this right must not be considered by you … 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 … [t]he burden of proof … is on the State. The defendant is not required to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt."), the evidence was truly overwhelming with not only a video from the store but from testimony of surviving victims' and independent witness'. (*See* State's Exhibit 10, Jamica's testimony, Pope's testimony, Riley's testimony, and Elghamrawi's testimony).

Moreover, the comment at issue was not directed specifically to Appellant and the comment was short and isolated in view of the remaining argument. *Shuler*, at 188, 577 S.E.2d at 444 (considering argument in context, judge's instructions cured possibility of prejudice, and "lone remark" did not rise to the level of a due process violation). Error, if any, could only be harmless on this record.

## CONCLUSION

For the foregoing reasons, Respondent respectfully asks this Court to affirm Appellant's conviction and sentence.

Respectfully submitted,

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December 12, 2024

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