STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2013-000425

THE STATE, ...RESPONDENT

v.

PHILLIP MONROE .....APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General
S.C. Bar No. 1871

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

P.O. Box 1880
Bluffton, South Carolina 29910

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Respondent's Statement of Issue on Appeal 1

Statement of the Case 2

Respondent's Statement of Facts 3

Argument:

Appellant may not properly present on appeal an issue respecting the trial court's denial of his mistrial motion when Appellant failed to preserve the issue at trial by refusing the trial court's offer of curative instructions and failing to move to strike the testimony; nevertheless, the trial court did not abuse its discretion in denying the motion for mistrial when the reference to polygraph was not connected to Appellant, the results were not discussed and no negative inference was created 7

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Arizona v. Washington, 434 U.S. 497 (1978) 9

Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) 10

Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996). 7

Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006) 10

In interest of Robert R, 340 S.C. 242, 531 S.E.2d 301 (Ct. App. 2000) 9

State v. Bantan, 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010) 7, 8

State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000) 9

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) 9

State v. Edwards, 373 S.C. 230, 644 S.E.2d 66 (2007) 8

State v. Jackson, 364 S.C. 329, 613 S.E.2d 374 (2005) 10

State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999) 9

State v. McGuire, 272 S.C. 547, 253 S.E.2d 103 (1979) 11

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001) 9

State v. Pressley, 290 S.C. 251, 349 S.E.2d 403 (1986) 9

State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983) 8

State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000) 9

State v. Watts, 321 S.C. 158, 467 S.E.2d 272 ..... 7, 8, 11

State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996) 9

Rules

403, SCRE 9

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

May Appellant properly present on appeal an issue respecting the trial court's denial of his mistrial motion when Appellant failed to preserve the issue at trial by refusing the trial court's offer of curative instructions and failing to move to strike the testimony; nevertheless, the trial court did not abuse its discretion in denying the motion for mistrial when the reference to polygraph was not connected to Appellant, the results were not discussed and no negative inference was created.

STATEMENT OF THE CASE

Appellant was indicted at the September, 2012 term of the grand jury for Jasper County for trafficking in cocaine, ten grams or more but less than twenty-eight grams, and possession with intent to distribute Clonazepam, a Schedule IV drug. He was represented by Robert Hughes, Esquire. On February 11, 2013, Appellant proceeded to trial by jury pursuant to which Appellant was found guilty of trafficking in cocaine and the lesser included offense of possession of Clonazepam. He was sentenced by the Honorable Perry M. Buckner to twenty-seven years imprisonment. Appellant timely filed a notice of appeal and subsequently submitted a Brief. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF FACTS

On April 10, 2012, Officer Richard Long of the Ridgeland Police Department initiated a traffic stop of a tan Honda that was driving erratically. R. pp. 75-77; 92. Immediately after Officer Long pulled the Honda over, both the driver and passenger seemed to be in an excited state and tried to open doors as they pulled the vehicle to the side of the road. R. p. 77. Appellant was the driver of that vehicle. R. p. 78. The passenger got out of the vehicle, threw his hands up, and backed away. R. pp. 93; 98. Officer Long's partner, Corporal Smith, informed Long that he found a purple Crown Royal bag on the ground next to the vehicle that had either fallen out of the car or was next to the car during the traffic stop. R. p. 78. Both occupants were detained. R. pp. 80; 93. The Crown Royal bag contained several types of narcotics, pills, and then a powdery white substance that later tested positive for cocaine. The pills were determined to be clonazepam. R. pp. 80; 94; 159; 161. After waiving his rights, Appellant made a statement that evening stating that the drugs found in the vehicle were not his. R. p. 81.

The co-defendant in the case, Courtney Baniel, testified that once they saw blue lights behind them, Appellant grabbed the Crown Royal bag and tossed it onto Baniel's lap and stated "Take these charges from me." R. pp. 108-109. When Baniel got out of the car, the Crown Royal bag fell off his lap and onto the ground. R. p. 108. Baniel refused to take responsibility for the drugs, prompting Appellant to state "Boy, don't play with me, I'll kill Sally and your kids." R. p. 108. Sally is Baniel's girlfriend. R. p. 102. This threat caused Baniel to remain silent the evening of the arrest as to who the drugs belonged to. R. p. 111. A few days later, Baniel told police that the drugs were actually Appellant's and that he did not originally reveal this information due to a threat by Appellant. R. pp. 110-111.

An investigator for the Ridgeland Police Department, Lieutenant Daniel Litchfield, interviewed Appellant on April 12th and April 16th. R. pp. 126-127. Immediately prior to the April 12th interview, Appellant waived his Miranda rights and agreed to speak with Lieutenant Litchfield. R. p. 128. In the interview Appellant maintained that the drugs belonged to Courtney Baniel and were not his. R. pp. 128; 150. Appellant contacted investigators and asked for another interview which was conducted on April 16th. R. p. 128. Appellant again waived his Miranda rights for the second interview. R. p. 129. In the second interview Appellant stated that the drugs belonged to both himself and Baniel. R. p. 129. Lieutenant Litchfield also was present for another interview on April 30th with Master Sergeant Brian Baird. R. pp. 134-135. At that interview, Appellant told Master Sergeant Baird that the drugs all belonged to him and that Courtney Baniel had nothing to do with the drugs. R. pp. 135; 144-45; 151.

During Lieutenant Litchfield's testimony, the following colloquies took place:

> Q: Mr. Litchfield, did you observe any other interviews of the defendant?
> A:Yes, ma'am
> Q: And when was that?
> A: I believe on April 30th, following a polygraph.
> Mr. Hughes: Your honor I believe we have a matter of law that needs to be taken up.
> The Court: Counsel approach.
> OFF-THE-RECORD BENCH CONFERENCE
> The Court: Motion by defense counsel is respectfully denied.

R. p. 134. On cross-examination of Litchfield, the following occurred:

> Q: Okay, but you had the ability to make a recording, but you did not do so.
> A: No, sir. Now, if you'd like me to elaborate, I will.
> Q: Sure, go ahead.
> A: Typically, when we use another agency's equipment or facilities, we try to use their, also, their rules as far as that goes. It was on a closed circuit T.V., if you're referring to the polygraph. And at that time, I—
> The Court: Just a moment, Bob. One second. Yes, ma'am.
> Ms. Henderson: Sidebar, your Honor.

The Court: Counsel approach.

OFF-THE-RECORD BENCH CONFERENCE (with Litchfield joining the discussion).

R. p. 139. Lt. Litchfield continued with his explanation that he is not familiar with Beaufort County equipment and their ability to record with video. R. p. 140.

At the conclusion of the State's case, the Court explained for the record what occurred during the bench conferences. R. p. 166. In the first instance where the polygraph was mentioned, the trial judge offered to give the jury a curative instruction in which he would tell the jury there was no evidence of a polygraph in the case nor did Lieutenant Litchfield ever state that the defendant took a polygraph. R. p. 166. The trial judge additionally offered to give any curative instruction the defense requested. R. p. 166. Appellant refused the offers for curative instruction and moved for a mistrial, which was denied. R. p. 166. The trial judge explained that the mistrial was denied because he did not believe that the questions intended to elicit a response concerning a polygraph. R. p. 167.

After Lieutenant Litchfield mentioned the polygraph a second time during cross-examination and the judge again offered a curative instruction, which was refused by Appellant. R. p. 167. Appellant again moved for mistrial, which was denied. R. p. 167. The polygraph examination at issue pertained to an unrelated murder investigation, for which the Appellant was not charged nor will he face charges. R. pp. 167 - 68. The Solicitor instructed the witness before his testimony not to mention the polygraph or the murder investigation. R.p. 167. At the conclusion of all the evidence the defense renewed its motion for a mistrial, which was denied. R. pp. 185-186.

The defense counsel moved for a directed verdict. R. p. 170. The judge granted the motion respecting possession with intent to distribute but submitted the lesser included offense of possession of a Schedule IV drug to the jury. The judge denied the motion respecting the trafficking charge. R. p. 181. Appellant also renewed the motion for mistrial which was again denied. R. p.181 The jury subsequently found the defendant guilty of possession of Clonazepam, a Schedule IV drug, and trafficking in more than 10 grams, but less than 28 grams of cocaine. R. p. 223.

ARGUMENT

Appellant may not properly present on appeal an issue respecting the trial court's denial of his mistrial motion when Appellant failed to preserve the issue at trial by refusing the trial court's offer of curative instructions and failing to move to strike the testimony; nevertheless, the trial court did not abuse its discretion in denying the motion for mistrial when the reference to polygraph was not connected to Appellant, the results were not discussed and no negative inference was created.

Appellant argues the Court's denial of a mistrial was erroneous as the mention of the word "polygraph" was improper and unduly prejudicial to Appellant. The State disagrees and submits Appellant's argument is without merit. First, the State submits that this issue was not preserved for appellate review and, therefore, is not properly before this Court. Second, and assuming arguendo, the issue may be considered on appeal, the trial court did not abuse its discretion in denying the motion for mistrial when the brief use of the word "polygraph" was not connected to Appellant, the results were not discussed, and no negative inference was created.

As set forth in the Respondent's Statement of Facts herein, the record before this Court clearly reveals that Appellant twice refused the trial court's offers to provide generous curative instructions when the witness mentioned the word "polygraph." The refusal to take advantage of a curative instruction operates as a waiver of the party's right to complain of error. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 Ct.App. 1996); Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 11, 466 S.E.2d 727, 732 (1996). The facts of this case are similar to State v. Bantan, 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010). In Bantan, a witness mentioned drugs and a shotgun unrelated to

Bantan's robbery charge. Id. at 418. Bantan moved for a mistrial, which was denied by the trial court. Id. The court instead offered a curative instruction, which was refused by Bantan. Id. On appeal, this Court found that the issue was not preserved for appellate review. Id. This Court stated "By rejecting the trial court's offer to give a curative instruction, Bantan waived any challenge to the offending testimony on appeal." Id. Similarly, in the present case, Appellant twice refused the trial court's offer to provide curative instructions as outlined by the trial court or as Appellant might suggest. This refusal of the curative instructions operates as a waiver of Appellant's right to challenge the offending testimony on appeal and precludes consideration of the issue on appeal. Appellant is not entitled to relief on appeal when his own conduct contributed to the alleged error. Id. Appellant also failed to move to strike the testimony which also precludes appellate review. State v. Watts, 321 S.C. at 158, 467 S.E.2d at 272.

Even if this issue were preserved for review, the trial judge did not err in denying the motion for mistrial. "The granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (2007). "The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. A curative instruction to disregard testimony is generally deemed to have cured any error. Id. The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is "whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Manifest

necessity is not a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Arizona v. Washington, 434 U.S. 497, 505-506 (1978). The word "necessity" is not to be interpreted literally. Rather, there need only be a "high degree" of necessity in order to conclude that a mistrial is appropriate under the circumstances. Id. at 506. A trial judge's decision to grant or deny a mistrial will not be reversed on appeal absent an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). The term "abuse of discretion" has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support. State v. Corey D., 339 S.C. 107, 118, 529 S.E.2d 20 (2000).

Prior to the adoption of the South Carolina Rules of Evidence, our appellate courts repeatedly held that polygraph examination results are generally inadmissible because of questions concerning the reliability of polygraph results. In interest of Robert R, 340 S.C. 242, 246-48, 531 S.E.2d 301,304 (Ct. App. 2000), citing, State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999); State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996); State v. Pressley, 290 S.C. 251, 349 S.E.2d 403 (1986). However, after the adoption of the South Carolina Rules of Evidence, "admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors." Id., citing State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); see also State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001).

The record in this case supports the trial judge's conclusion that there was not manifest necessity to terminate the proceeding. The trial judge stated that he did not believe the question by the Solicitor elicited a response concerning a polygraph. R. p.

167. Both statements made by Lieutenant Litchfield were vague and did not concern a polygraph in the case at hand, nor did Litchfield discuss the results of a polygraph or say why a polygraph was administered. It was clear Appellant was taken to a law enforcement agency in another county and that any polygraph was unrelated to the charges for which Appellant was on trial. The mere mention of polygraph was not directly tied to Appellant, the results were not discussed, and no reasonable inference was created that the results were adverse to Appellant. See Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006); Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001). In fact, the second time polygraph was mentioned was on Appellant's cross-examination and in response to Appellant's persistent inquiry about recording capabilities of Beaufort County facilities. Appellant cannot complain about that which he invited. Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006).

Contrary to Appellant's argument for the first time on appeal, there was no inference created that Appellant confessed to the crime after submitting to a polygraph examination. State v. Jackson, 364 S.C. 329, 613 S.E.2d 374 (2005). Instead, the evidence reflects that Appellant provided a series of statements, the first two of which were given prior to the unrelated polygraph. Appellant admitted his guilt in the second statement given on April 16th and before the polygraph. The only new information provided in the final statement given on the date of the polygraph was Appellant's concession that his co-defendant was not involved. There is no reasonable possibility the jury would have concluded that Appellant confessed to the crime because of the polygraph.

The references to polygraph were innocent enough that they did not prejudice the defendant to the point where there was manifest necessity to terminate the proceeding. If the error is not manifest, a curative instruction could eliminate any conceivable prejudice. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996). Defense counsel could have cleared up any prejudice from the testimony via a curative instruction. The judge offered curative instructions on two occasions, and both times the defense attorney refused the instruction and let Lieutenant Litchfield's testimony stand without a curative instruction to prevent the jury from making assumptions. The Court in State v. McGuire, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979) referred to potential prejudice from polygraph evidence in stating "If such is brought out in the testimony, the trial judge should be meticulous to see that no improper inference is created." The trial judge sought to ensure that no improper inference was created by the testimony via a curative instruction. The curative instruction would have explained to the jury that there was no evidence of a polygraph and that Lieutenant Litchfield never stated that Appellant took a polygraph. This would have limited any potential prejudice from Litchfield's statements.

The State also submits that Appellant's arguments are without merit as the record contains overwhelming evidence of Appellant's guilt. A Crown Royal bag filled with drugs was found outside of Appellant's vehicle during a traffic stop. R. p. 78. Appellant's co-defendant, Courtney Baniel, stated at trial that upon the initiation of the traffic stop, Appellant tossed the Crown Royal bag full of drugs onto his lap, and the drugs then fell off his lap as he exited the vehicle. R. pp. 108-109. Appellant also confessed that the drugs belonged to him and that he threw the drugs into Courtney Baniel's lap. R. p. 135. At the sentencing hearing, Appellant stated "I was addicted to selling drugs at the time.

And when I came down this time, I had ended up getting hooked on drugs." R. p. 238. Appellant went on to state, "And I used to cook drugs for a lot of different guys right here in Jasper to support my drug habit. And that's what I was doing with those drugs. That's why I had to be honest with the detective and tell the detectives." R. p. 239. These facts, all taken together, provide overwhelming evidence of Appellant's guilt.

The issue Appellant presents is without merit. The convictions must be affirmed.

CONCLUSION

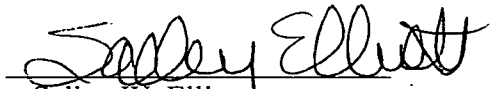
For all of the foregoing reasons, the State respectfully requests that the judgment, convictions, and sentences of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: 
Salley W. Elliott
S.C. Bar No: 1871

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina

January 2, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2013-000425

THE STATE, ...RESPONDENT

v.

PHILLIP MONROE .....APPELLANT.

DESIGNATION OF MATTER

In addition to the matter designated by Appellant, Respondent proposes the following matter to be included in the Record on Appeal:

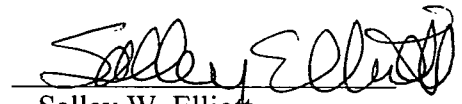
(1) Trial Transcript pages 238-239

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: 
Salley W. Elliott
S.C. Bar No. 1871

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina

January 2, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2013-000425

THE STATE, ...RESPONDENT

v.

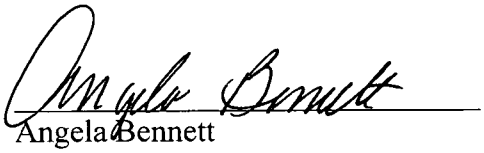
PHILLIP MONROE .....APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated January 2, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Lara M. Caudy, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 2nd, day of January, 2014.



Angela Bennett
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727