IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

Appeal from Richland County
Court of General Sessions

L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

Appellate Case No. 2013-001904

The State,

Respondent,

v.

Johnnie Walker Gaskins,

Petitioner.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

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The South Carolina Court of Appeals

The State, Respondent,
v.
Johnnie Gaskin, Appellant.

Appellate Case No. 2010-151386

The Honorable L. Casey Manning,
Richland County
Trial Court Case No. 2008GS4001631, 2008GS4001626,
2008GS4001629, 2008GS4001632, 2008GS4003947,
2008GS4001627

ORDER

Pursuant to Rule 210(f) of the South Carolina Appellate Court Rules, it is ordered that the Clerk of Court for Richland County release:

State's Exhibits # 22-46 (photographs)

to be transported to this Court by the South Carolina Attorney General's Office, for consideration in the above referenced matter.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

FILED
6-27-12

Columbia, South Carolina

cc:
Donald J. Zelenka
The Honorable Jeanette McBride
Tara Shurling

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Johnnie Gaskins, Appellant.

Appellate Case No. 2010-151386

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Unpublished Opinion No. 2013-UP-304
Heard January 8, 2013 – Filed July 3, 2013

AFFIRMED

Tara Dawn Shurling, of Law Offices of Tara Dawn Shurling, PA, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

PER CURIAM: Appellant, Johnnie Walker Gaskins, was tried for and convicted of two counts of murder, three counts of assault and battery with intent to kill (ABWIK), and one count of use of a firearm during the commission of a violent

crime in connection with a shooting spree at 360 Sports Bar & Grill. Gaskins appeals, asserting (1) the trial court erred in admitting crime scene photographs of blood splatter and pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury, (2) the trial court erred in denying Gaskins' motion for a mistrial based upon the admission of improper and highly prejudicial hearsay testimony in the form of a dying declaration and a statement from an anonymous telephone caller, and (3) Gaskins' right to due process was violated by the trial court's improper and heated response to defense counsel's objection. We affirm.

1. Gaskins first argues the trial court erred in admitting cumulative and gruesome crime scene photographs of blood splatters and blood pooling that were submitted solely for the purpose of inflaming the passions of the jury and were of negligible probative value. He contends, while some testimony regarding the location of victims or the extent of bloodshed may have been relevant in this case, the extent to which the photographic evidence was presented by the State was both cumulative and prejudicial to him.

A trial court has considerable latitude in ruling on the admissibility of evidence, and its ruling will not be disturbed on appeal absent a showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The relevance, materiality and admissibility of photographic evidence are matters within the sound discretion of the trial judge. *Id.* "A test to determine whether the trial court abused its discretion is whether the photographic evidence serves to corroborate the testimony of witnesses offered at trial." *State v. Jarrell*, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002). It is not an abuse of discretion to admit photographs which serve to corroborate testimony. *State v. Tucker*, 324 S.C. 155, 167, 478 S.E.2d 260, 266 (1996). However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

Here, the photographic evidence was probative inasmuch as it aided the jury by showing the actions of one of the victims during the shooting, as was corroborated by the expert through the photos. Additionally, a review of these photos reveals nothing more than a generic crime scene of blood, with no bodies present. We are

not convinced that, even if wrongly admitted, there was an undue tendency of the photographs to suggest a decision on an improper basis. Further, given the overwhelming evidence of Gaskins' guilt, we do not believe the photographs were of such a nature as to influence the jury's verdict. *See State v. Green*, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012) ("Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict."); *State v. Byers*, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) (quoting *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990) (alteration in original)) ("A harmless error analysis is contextual and specific to the circumstances of the case: 'No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.'"); *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); *State v. Baccus*, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, [the appellate court] will not set aside a conviction for insubstantial errors not affecting the result.").

2. Gaskins next contends the trial court erred in denying his motion for a mistrial following the admission of improper hearsay testimony from witness Porterfield concerning an alleged dying declaration that had not been previously disclosed to the defense, as well as testimony from Porterfield regarding an alleged statement made by an anonymous caller on Gaskins' mobile phone. Even if we were to assume the admission of this testimony by Porterfield was improper, we find no reversible error in the trial court's denial of Gaskins' motion for a mistrial based on the alleged improper testimony.

The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose 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). "The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). A mistrial should be granted only when absolutely necessary, and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

We find the trial court's explicit instruction cured any possible error and that the prejudicial effect was minimal, such that a mistrial would not have been warranted. *See Herring*, 387 S.C. at 216, 692 S.E.2d at 498 (noting a curative instruction to disregard the testimony is usually deemed to cure any alleged error); *State v. Moyd*, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996) (holding a trial court should exhaust other available methods to cure prejudice before aborting a trial, and where the prejudicial effect is minimal, a mistrial need not be granted in every case where incompetent evidence is received and later stricken and a curative instruction is given). Additionally, given the overwhelming evidence of Gaskins' guilt, we believe the testimony complained of by Gaskins could not reasonably have affected the result of the trial. *Baccus*, 367 S.C. at 55, 625 S.E.2d at 223 ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, [the appellate court] will not set aside a conviction for insubstantial errors not affecting the result.").

3. Gaskins lastly contends the trial judge erred in yelling at defense counsel and abruptly halting the proceedings after a series of defense objections, thereby violating the Appellant's right to due process of law. He contends a trial judge must be patient, dignified and courteous to lawyers, and must act with absolute impartiality in the performance of judicial duties. Gaskins argues his failure to object to the situation at the time should be excused, as the tone and tenor of the trial judge's comments made it clear any objection would be futile, especially where the judge's improper remark was an angry response to defense counsel's continuing objections. Gaskins maintains, though the judge's words were brief, the delivery of the remarks was harsh enough to have scared one of the jurors, and the judge himself felt the remarks were prejudicial enough to warrant him entering the jury room to make comments and then issue a formal instruction to the jurors in the courtroom on the matter. Gaskins asserts the trial judge's treatment of defense counsel diminished him in the eyes of the jury, and because the trial judge's reaction was prejudicially improper, he is entitled to a new trial.

We first note that trial counsel raised no objection and made no argument to the trial court asserting the trial judge had made remarks directed at trial counsel which diminished counsel in the eyes of the jury. Thus, the issue may not be properly preserved for review. *See State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (noting, in order to properly preserve an issue for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal). Gaskins contends, however, that such a failure may be excused because the tone and tenor of the judge indicated any objection would be futile.

See State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (holding, where the tone and tenor of the trial judge's remarks concerning defense counsel's gender and conduct were such that any objection would have been futile, defense counsel's failure to raise an objection did not amount to waiver of the issue of the propriety of the judge's comments concerning defense counsel).

We find no reversible error. A review of the record reveals the remarks made by the trial court in front of the jury during the exchange of questions and objections were directed at both the solicitor and defense counsel. While some were clearly directed at defense counsel, others were directed at both defense counsel and the solicitor, and yet another was directed at the solicitor alone. Accordingly, we do not believe the trial judge displayed partiality, bias or prejudice in the performance of his duties. Further, we do not believe his remarks undermined defense counsel's ability to effectively represent Gaskins. Thus, we find the remarks made by the trial judge, though maybe strong, were not directed as a whole at either side. Further, we find any prejudice from the fairly innocuous remarks was cured by the trial judge's instruction to the jury. Additionally, even assuming it was not necessary for trial counsel to raise an objection to the trial judge's comments to preserve the matter for review, we note that, not only did trial counsel fail to voice any concern, he apparently jokingly told the trial judge he should simply inform the jury that "it was theater." Such does not set the stage for the overly harsh treatment of trial counsel that Gaskins alleges on appeal. *See Graves v. State*, 309 S.C. 307, 312, 422 S.E.2d 125, 128 (1992) (holding, although the trial judge should have refrained from cautioning the witness regarding perjury in the presence of the jury, the trial judge's comments did not amount to prejudice which denied petitioner an impartial jury or violated his due process rights). *See also State v. Cooper*, 334 S.C. 540, 546-47, 514 S.E.2d 584, 587-88 (1999) (finding no prejudice from the trial judge's comments and rulings that were routine, noting none of the exchanges involved any improper, personal comment about defense counsel, nor tended to impugn counsel's credibility or diminish him in the eyes of the jury, many of the comments were innocuous or merely explanatory of the trial court's ruling, and some of the comments were made outside the presence of the jury, and therefore, could not affect the verdict).

For the foregoing reasons, Gaskins' convictions are

AFFIRMED.

HUFF, THOMAS and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appellate Case No. 2010-151386

The State,

Respondent,

v.

Johnnie Walker Gaskins,

Appellant.

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

PETITION FOR REHEARING

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NOW COMES the Appellant in the above-captioned action, acting by and through undersigned counsel, seeking rehearing on this Court's unpublished opinion in this matter. *State v. Johnnie Gaskins, Opinion No. 2013-UP-304 (S.C. Ct. App. Filed July 3, 2013).* Pursuant to *Rules 221(a) and 219, SCACR*, the Appellant petitions for rehearing on the ground that certain issues of material fact or law have either been overlooked or misapprehended by the Court in the opinion in question. In support of this position, the Appellant would show unto this Honorable Court the following:

Issue 1.

The Appellant would respectfully submit that the opinion of this Court either overlooks or misapprehends a significant factual question with regard to the lower court's error in admitting bloody crime scene photographs. Specifically, this Court's opinion indicates that the photographs in question were probative in that they showed, "the actions of one of the victims during the shooting" as corroborated by the State's expert through the photographs in question. This portion of the Court's decision overlooks or misapprehends two significant factors.

First, the shots fired in this case were made from the window of a car that had pulled up in front of the club where this incident took place. A witness from the security staff of the club testified to the fact that the shooter pulled up and fired multiple shots out of the window of the car before driving away. ROA at p. 94, ll.7-11. Witnesses described the shooter as firing shots from outside towards the front door. ROA at p. 43, l.18 – p. 44, l. 1. Thus, how the victims responded to the shots was not directly relevant to the operative question of who fired them. Although the photographs did not depict bodies, they were extremely bloody and gruesome. Where they had no probative value on the

operative issue before the jury for decision, their potential for appealing to the passions and emotions of the jury clearly outweighed any evidentiary value they had and therefore, the Appellant respectfully submits, they should have been excluded from evidence.

Secondly, the photographs in question were clearly cumulative to others introduced without objection from the Appellant. ROA at p. 87, ll.16 – 21. Assuming, *arguendo*, that the photographs of the interior of the club had any logical relevance to the issues before the lower court, other photographs admitted without objection addressed the issues demonstrated through this photographic evidence. Therefore, the inclusion in evidence of the particularly graphic photos introduced over the objection of the Appellant constituted reversible error where the evidence in question served no purpose except to inflame the passions as prejudices of the jury.

As argued by the Appellant in his Brief, ***"There can be no justice in a trial by jurors inflamed by passion..."*** *Groppi v. Wisconsin, 400 U.S. 505, 511 (1971) (footnote 12) (quoting Crocker v. Justices of Superior Court, 208 Mass. 162, 179, 94 N.E. 369, 377-378 (1911)).* The Appellant respectfully submits that by permitting the State to present unnecessary and cumulative photographic evidence of the bloodshed at the crime scene, the trial court impermissibly prejudiced the Appellant. The cumulative close-up photographs at issue served *no purpose* except to exacerbate the jury's reaction to the victim and eyewitness testimony.

For all the reasons set forth above, the Appellant respectfully requests that this Honorable Court grant rehearing on this issue.

Issue 2

The Appellant respectfully seeks rehearing on the question of whether the lower court erred in denying the Appellant's motion for a mistrial following improper hearsay testimony concerning an alleged dying declaration, that had not been previously disclosed to the defense, and an alleged statement made by an anonymous caller on Appellant's mobile phone, which arguably had also not been adequately disclosed to the defense prior to trial. The Appellant acknowledges that the grant of a mistrial is a severe remedy and that the judgments of the trial judge will seldom be disturbed in the exercise of his discretion concerning a Motion for a Mistrial. On the facts of this case however, the Appellant respectfully urges this Court to rehear this issue in the face of evidence that the testimony in question irreparably damaged the Appellant's ability to receive a fair trial and therefore, that the trial court abused its discretion in refusing to grant a mistrial in order to preserve the Appellant's rights to due process of law.

During his direct examination, the Club owner, Porterfield, set forth his limited acquaintance with the Appellant and described the circumstances of Appellant's departure from the Club on the evening in question. ROA at p. 172, l. 12-p. 173, l. 21. Porterfield testified that, after the shooting, he was communicating with one of the victims, John Adams, before he died. The State asked Porterfield; "What did he [Adams] say?" Porterfield replied, ***"He [Adams] was like the guy that we put out, shot me, was shooting."*** ROA at p. 177, ll. 20-22. At this moment, the Defense Counsel began to object and was interrupted by the judge, who identified the statement as an exception to the general rule on hearsay. Defense Counsel then asked to approach and a conversation was had, off the record, before direct examination continued. ROA at p. 177, l. 23-p. 178, l. 5. The statement was not repeated. As noted in the Brief of Appellant, at first blush, it might seem that the dying declaration was not prejudicial to the Appellant since

there was evidence that the Club had to deal with another unruly patron, Christopher Lyles, and the declaration could be argued to refer to either the Appellant or the other patron dealt with by security that night. A close review of the testimony, however, reveals that Lyles *had not been fully ejected from the Club*, when the shooting began. ROA at p. 126, l. 22-p. 128, l. 9. Therefore, the Appellant submits that this declaration was prejudicial to the Appellant, where he was the only patron the State claimed was actually ***"put out"*** of the Club.

Minutes later in the direct examination, Porterfield began speaking about the mobile phone, allegedly belonging to Appellant, which he found in the Club earlier that night. He said that the phone began to ring when the investigators arrived, and that he answered it. At that point in time, Defense Counsel objected and the following statements were made on the record:

> Mr. McCulloch: And, Your Honor, of course we're going to object to anything that would not be proper—
> The Court: What's your objection right now?
> Mr. McCulloch: My objection is to hearsay.
> The Court: It's anticipatory, is that correct?
> Mr. McCulloch: It is anticipatory, Your Honor.
> The Court: All right. Let's cross that river when we get to it. Right now, I'll note it but nothing has happened yet.
> Mr. Meadors: We're not offering this for the truth of the matter asserted—
> The Court: All right.
> Mr. Meadors: Oh.
> When you get a phone call, you answer it?
> [Witness]: Yeah, I got two phone—two phone calls from two ladies.
> [Mr. Meadors]: All right. What—who if anyone—what did the phone call say?
> [Witness]: Well, as soon as I answered the phone, I was trying to disguise my voice because it wasn't my phone. I didn't know who it was. I was like, hello. And they was like, ***Blackie (phonetic), was that you out there shooting?***
> I then, I was like, what, you know.
> [Mr. Meadors]: Did someone say the name Black?
> [Witness]: Yeah.

[Mr. Meadors]: Was it male or female?
Mr. McCulloch: Your Honor, may we approach?

ROA at p. 180, l. 16-p. 181, l. 17. (Emphasis added). Earlier in his testimony, Porterfield had stated that he knew the Appellant prior to the shooting and that the Appellant was known to him as ***"Black."*** ROA at p. 172, ll. 12-23. Thus, the testimony in dispute would clearly have been taken by the jury to imply that someone close enough to the Appellant to have his personal cell phone number believed him capable of this shooting.

The Appellant asks that his Honorable Court grant rehearing on this crucial issue where the jury in Appellant's case heard not one, but two, highly prejudicial statements that violated discovery provisions and constituted impermissible hearsay. Both statements go to the issue of the identification of the shooter, and both invited the jury to infer that the Appellant was that person.

The Appellant's central defense was that the State could not demonstrate, beyond a reasonable doubt, that he was the shooter. As noted in the Brief of Appellant, there were a number of questions regarding the identity of the shooter because the murder weapon was never recovered and the shooting, itself, occurred in the confusion following two, almost simultaneous, disruptions involving allegedly unruly patrons. Additionally, law enforcement had briefly examined, and excluded, another gun that matched the caliber of the murder weapon, and, coincidentally, belonged to two other patrons of that Club. The reason that these statements are so highly prejudicial, and so memorable to the jury, is that they suggest that one of the dying victims and an acquaintance of Appellant believed that the Appellant was the shooter. Given the evidence introduced in this case, the jury most certainly would have recognized the possibility that the security staff and Club employees were distracted when the shooting began, however the introduction of

these improper statements strengthened the likelihood that the jury would resolve any doubts they had concerning the identity of the shooter in favor of a finding of guilt based on inferences drawn from this witness's testimony. The Appellant would respectfully submit that, absent the objectionable testimony in question, the evidence against the Appellant was far from conclusive. Once heard, this testimony irreparably damaged the Appellant's ability to receive a fair trial. The Appellant respectfully submits that the nature of the testimony in issue was such that the prejudice to the Appellant could not be cured by instruction. For all the reasons set forth herein, the Appellant respectfully asks this Court to rehear his position that the lower court abused its discretion in denying the Appellant's Motion for a Mistrial. He asks that this Court reconsider his position that the introduction of the evidence in question now requires that he be granted a new trial.

Issue III

The Appellant also asks that this Court grant rehearing on his allegation that the trial judge's abrupt and improper response to an objection made by defense counsel violating the Appellant's right to due process of law. The Appellant would respectfully submit that the decision of this Honorable Court indicates that the Court may have misapprehended the record below on this important issue. This Court found that the remarks of the trial judge, on a whole, were not directed to either side.

The record below clearly demonstrates that just as defense counsel began to raise an objection, the judge yelled, ***"Stop. Go to the jury room, ladies and gentlemen. Don't talk about this case."*** ROA at p. 242, ll. 7-17. The harsh or angry tone of the judge's comment to the defense and abrupt instruction to the jury is apparent from the record, as

the judge felt it necessary to address the matter *in the jury room*, as well as on the record. After the Court returned from a brief recess, but before the jury returned, the judge said:

> Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels—high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad. ***Somebody said, well, you scared me.*** I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

ROA at p. 244, ll. 4-15. (Emphasis added)

The Appellant would respectfully submit that the tone of the Court's remarks is evidenced not only by the trial judge's decision to enter the jury room to address the incident, but also by his admission on the record that one of the jurors actually informed the judge that he had ***scared*** them. It is clear from the record that the outburst from the bench was prompted by the objection being made by defense counsel. The Appellant respectfully submits that the record therefore establishes that the initial remarks from the bench just before the recess, and the comments made to the jury *in the jury room*, were not addressed to both sides as is found by the decision issued in this case. The Appellant would submit that this Honorable Court may have misapprehended the record concerning the remarks of the trial court to this jury. The language referenced above documents what the trial judge told the parties he had said to the jury when he entered the jury room during the recess. When the jury returned to the courtroom, the Court instructed them as follows:

> ...And, members of the jury, I stuck my head in the door and sort of reminded y'all that this as [*sic*] an adversarial proceeding and both sides tend to get up on their high heels a little bit sometimes and it's my job to sort of control the

> civility in the courtroom. *If I yell, it's nothing personal. I'm not mad at anybody* but it's my job to sort of keep us on an even keel. And that's all the latest example was. It has nothing to do with the merits of the case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.

ROA at p. 245, ll. 2-15.

Thus, while the *curative charge* issued by the trial judge references both sides, the initial outburst itself, as well as the remarks the trial judge admitted making to the jury in the jury room, were obviously directed at defense counsel.

Likewise, the Appellant would respectfully submit that the decision in this case places undue significance on the responsive remarks of the defense counsel that the judge should just tell the jury, ***"it was theater."*** The Appellant would respectfully submit that where defense counsel had been spoken to in a manner which was likely to prejudice the Appellant by diminishing the jury's perception of his lawyer, defense counsel was forced to choose between making a new objection to an already angry judge's remarks, or to smooth ruffled feathers in an attempt to ensure that things would go more smoothly for the remainder of the trial. Defense counsel chose the latter, and the proceedings continued in a calmer manner. The Appellant would urge this Honorable Court to reconsider its finding that this comment, made by defense counsel in an effort to make the best out of a bad situation, evidences the fact that defense counsel was not dealt with in an overly harsh manner. The Appellant has submitted that the failure of defense counsel to make an objection relating to this incident should be excused where the tone and tenor of the trial judge's comments made it clear that any objection would have been futile. *State v. Pace, 316 S.C.71, 74, 447 S.E.2d 186,187 (1994).* He would now

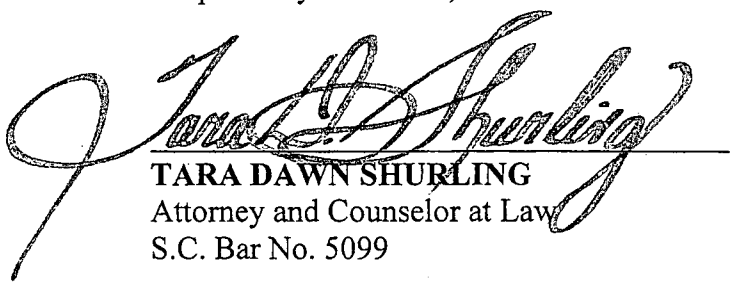
respectfully ask this Honorable Court to recognize that a responsive remark made by defense counsel in an effort to clear the air with the judge he still had to deal with for the remainder of his client's murder trial should not be viewed as conclusive evidence that the incident was not taken very seriously by defense counsel

The opinion of this Court states that the Appellant ***"contends that a trial judge must be patient, dignified and courteous to lawyers, and must act with absolute impartiality in the performance of judicial duties."*** With all due respect, the Appellant would ask this Court to recognize that it is the South Carolina Code of Judicial Conduct which sets that standard for judicial behavior. *Canon 3 of Rule 501, SCRAP.* Section B(4) of that Canon states that, ***"a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control."*** *Canons 3 of Rule 501, Section B(3), SCRAP.* Likewise, it is well established in precedents from our Supreme Court ***"that a trial judge must act with absolute impartiality in the performance of judicial duties."*** State v. Cooper, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999); State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). . The Appellant respectfully asks for this Court to grant rehearing on this important issue. Inasmuch as the judge's reaction was improper and the Appellant was prejudiced, the Appellant asks this Honorable Court to reconsider his prayer for a new trial.

CONCLUSION

WHEREFORE, having set forth his grounds above, the Appellant, Johnnie Walker Gaskins, asks that this Court rehear his direct appeal and grant him a new trial.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 18th day of July, 2013.

STATE OF SOUTH CAROLINA

In The Court of Appeals

The State, Respondent,

v.

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Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Appellant's Petition for Rehearing in the above-entitled case have been served upon opposing counsel, Donald J. Zelenka, Assistant Deputy Attorney General, P O Box 11549, Columbia, SC 29211, by depositing in the U.S. Mail, postage prepaid, postage prepaid, this 18th day of July, 2013.

Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 18th day of July, 2013.

Notary Public for South Carolina (L.S.)
My Commission Expires: 2/28/2023

The South Carolina Court of Appeals

The State, Respondent,

v.

Johnnie Gaskins, Appellant.

Appellate Case No. 2010-151386

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Hoff J.

Paul D. Thomas J.

John D. Geathers J.

Columbia, South Carolina

cc:
Donald J. Zelenka
Tara Dawn Shurling
L. Casey Manning

FILED
6 August 2013

IN THE STATE OF SOUTH CAROLINA
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Appellate Case No. 2013-001904

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Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appendix in the above matter has been served on opposing counsel this the 6th day of January, 2014, by mailing one (1) copy in a stamped envelope properly addressed to:

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SWORN TO BEFORE me this 6th day of January, 2014.

Sharon H. McCollister
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires Jan. 16, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

L. Casey Manning, Circuit Court Judge

Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

THE STATE,

RESPONDENT,

v.

JOHNNIE WALKER GASKINS,

APPELLANT.

FINAL BRIEF OF APPELLANT

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II.

Whether the lower court erred in denying the Appellant's motion for a mistrial, based on the admission of improper and highly prejudicial hearsay testimony, in the form of a dying declaration and a statement from an anonymous telephone caller?

III.

Whether the Appellant's right to due process of law was violated by the trial judge's improper and heated response to defense counsel's objection?

STATEMENT OF THE CASE

The Richland County Grand Jury indicted the Appellant for two counts of Murder (2008-GS-40-3948, 2008-GS-40-1626), three counts of Assault and Battery with Intent to Kill ("ABWIK") (2008-GS-40-1629, 2008-GS-40-1631, 2008-GS-40-1632), and one count of Possession of a Weapon during the commission of a violent crime (2008-GS-40-1627). On October 19, 2009, the Appellant proceeded to trial by jury where he was convicted of all charges. The Honorable L. Casey Manning, presiding circuit judge, sentenced the Appellant to two terms of life imprisonment on the Murder charges, to be served concurrently, and consecutive sentences of twenty years on each of the three ABWIK charges, and five years on the weapon charge.

Notice of Appeal was timely served and filed. This appeal follows.

STATEMENT OF THE FACTS

On February 5th, 2007, Club 360 located at 826 Bush River Road in Columbia, South Carolina was having a Super Bowl Party that began late in the afternoon and continued after midnight. ROA at p. 34, l. 21-p. 36, l. 11; p. 46, ll. 8-16; p. 89, ll. 8-11. Around 12:30 a.m., staff members of Club 360 claim that the Appellant was escorted out of the Club for unruly behavior. ROA at p. 41, ll. 20-24; p. 43, ll. 12-19; p. 90, l. 21-p. 91, l. 6. A friend of Appellant's, Sydney Williams, testified that he was present and spoke with the security staff to obtain the Appellant's release. ROA at p. 219, ll. 15-25; p. 92, ll. 13-24. Almost immediately after the Appellant was escorted out the door, another unruly patron, Christopher Lyles, was forcibly removed. ROA at p. 93, ll. 18-23; p. 126, l. 18-p. 127, l. 7; p. 208, l. 16-p. 209, l. 8.

At approximately 1:00 a.m. in the morning, while security staff members were standing around the entrance to the club, someone began firing a weapon towards the front door. ROA at p. 43, l. 18-p. 44, l. 1. One of the contract security staff, Lamont Davis, testified that the suspect had pulled around the front of the Club in a vehicle and had fired multiple shots out of the window before driving away. ROA at p. 94, ll. 7-25. Davis stated that he fired four shots at the retreating vehicle from his .38 caliber revolver. ROA at p. 98, ll. 7-11. When the shooting ended, one of the bar patrons, Shannavia Williams, was dead and a member of the security staff, John Adams, was mortally wounded. ROA at p. 45, ll. 1-14; p. 434, ll. 4-13; p. 439, l. 20-p. 440, l. 4. Two other members of the security staff, Lamont Davis and Quentin Harris, were wounded in the shooting and another Club patron, Deirdre Houston, was wounded from a gunshot to the face. ROA at p. 95, ll. 17-23; p. 157, ll. 20-25; p. 295, ll. 8-14. A mobile phone allegedly belonging to Appellant was found by the Club owner, Lindburgh Porterfield, inside the Club at some point prior to the shooting, and was turned over to the Richland County Sheriff's Department in the

ensuing investigation. ROA at p. 174, ll. 2-22; p. 180, l. 16-p. 181, l. 17; p. 172, ll. 12-23. A vehicle belonging to the mother of Appellant's girlfriend was searched in connection with the shooting. ROA at p. 525, l. 5-p. 527, l. 23. The murder weapon was never recovered, but a weapon matching the caliber of shell casings recovered from the scene, belonging to two Club patrons, was turned into the police and subsequently excluded as unrelated. ROA at p. 535, ll. 5-9; p. 466, ll. 3-10; p. 472, l. 5-p. 473, l. 3; p. 479, l. 23-p. 480, l. 1.

ARGUMENT

I. The lower court erred in admitting cumulative and gruesome crime scene photographs of blood splatters and blood pooling that were submitted solely for the purpose of inflaming the passions of the jury and were of negligible probative value.

A. Factual Background

During this trial, the State sought to introduce numerous photographs of the Club's interior showing blood in the form of smears and splatters and pooling. ROA at p. 83, ll. 5-12; Court's Exhibit # 5: State's Photo Exhibit List. The photographs appeared to be taken in groups with distance shots that established the position of each bloodstain and then close-up shots of the blood. ROA at p. 85, ll. 15-21. Some of the photographs contained numerical markers near the blood stains. The State argued that the photographs were going to corroborate the testimony of Investigator Richards, whose report on blood analysis had been provided to the defense. ROA at p. 83, ll. 5-12. The State asserted that the photographs displayed the location and movement of at least one victim, who could identify her own trail of blood in testimony. ROA at p. 83, l. 21-p. 84, l. 7. The Appellant objected to these photographs on the grounds that they were gruesome and prejudicial, as well as duplicative and lacking in probative value. ROA at p. 82, l. 5-p. 83, l. 2; p. 85, l. 15-p. 86, l. 5; p. 86, l. 19-p. 88, l. 3. The judge denied the motion to exclude and found that the probative value of demonstrating where and how the victims were shot outweighed the prejudicial consequences of the evidence's introduction. Specifically, the judge stated:

> I think it might be a close call but I do not believe the prejudice outweighs the probative value. Inasmuch as the jury already knows that two people were killed, three were shot, and at least at this point in time, I think I'll give the State an opportunity to connect the locations where the victims were shot, who was shot, where they were shot, that sort of thing. And at this point in time, Mr. McCulloch, it may be a close call but I think your objection is a little bit premature. If later on something evolves that I think

> prejudice does outweigh the probative value, I don't make that assessment at this time, I'll revisit it.

ROA at p. 88, ll. 14-25.

The Appellant renewed his objection to the introduction of the contested photographs during the testimony of Deirdre Houston, one of the shooting victims. ROA at p. 285, ll. 5-14. The judge had the witness briefly provide in-camera testimony regarding the photographs. Houston generally described her location in the bar when she was struck and her movement in the immediate aftermath of the shooting. ROA at p. 286, l. 11-p. 289, l. 4. In an attempt to spare the witness, the Appellant conceded that a proper foundation had been laid for the introduction of the photos, based on the victim's testimony. ROA at p. 287, l. 21-p. 288, l. 5. The Court denied the Appellant's renewed motion to exclude the photographs. ROA at p. 289, l. 8-p. 290, l. 12. Some of these contested photos were admitted into evidence during the testimony of Houston, the remaining photos were admitted during the testimony of Investigator Richards. ROA at pp. 289-290; pp. 345-347; State's Exhibits #22-46.

B. Discussion

The Appellant contends that while some testimony regarding the location of victims or the extent of bloodshed may have been relevant in this case, the extent to which the photographic evidence was presented by the State became both cumulative and prejudicial to the Appellant. Furthermore, the Appellant contends that the prejudicial impact of this evidence was augmented by the chilling testimony of victim Deirdre Houston. Houston testified that she was crawling along the floor after being shot in the face and identifies her own bloody path from the pool tables to the bathroom in several of the afore-mentioned photos. The close-up photos of blood smears were prejudicial in and of themselves, even without a victim identifying the pathway of

blood in the photos as originating from her own body. The extent of prejudice to the Appellant resulting from the judge's denial of the motion to exclude more than outweighed the minimal probative value of the cumulative photographs. Consequently, the Appellant argues that he is entitled to a new trial.

Evidence of the extent of a victim's injury is relevant in prosecutions for assault and battery with intent to kill and assault and battery of a high and aggravated nature. State v. Owens, 224 S.C. 533, 535, 80 S.E.2d 113, 114 (1954); see also State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976). Furthermore, all relevant evidence is admissible. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice. Rule 403, SCRE.

In State v. Franklin, our Supreme Court held that prejudicial photos of a crime scene and body, that would otherwise be inadmissible, were properly admitted where they demonstrated the aggravated circumstances that attended the crime; in that case, the defendant's brutal torture of the victim. State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995). The State v. Powers decision revisited Franklin and the Court clarified that aggravating circumstances are not necessary to admit gruesome and prejudicial photographs, as long as the evidence demonstrates the circumstance of the crime and the character of the defendant or else depicts the victim's body in the condition in which it was left. State v. Powers, 331 S.C. 37, 47, 501 S.E.2d 116, 121 (1998).

The Appellant agrees, as trial counsel did below, that *some* of the photographs introduced by the State regarding the locations of shooting victims were arguably relevant. ROA. at p. 87, ll. 16-21. However, once that evidence had been admitted, any further evidence detailing the extent of bloodshed became cumulative, rendering the probative value of the additional testimony

minimal. The Appellant would further assert that any probative value the photos had in demonstrating the circumstance of the crime or the defendant's character was very minimal, since the primary issue in this case was the identification of the shooter. The extent or manner of the injuries incurred and the movements of victim Houston were otherwise established through photographs taken from a distance of the Club's interior, testimony of the victims and the forensic pathologist and the cap of Deirdre Houston entered in evidence.[1] There was no clear item in dispute regarding either of these issues.

This highly inflammatory evidence was designed to inflame the jury and distract them from the operative question which *was not* how the victims were injured or even where they were located during and after the shooting. The true operative question was whether the State's theory of the shooting could establish, beyond a reasonable doubt, that Appellant was the shooter. These inflammatory photographs should therefore have been excluded from evidence in the State's case in chief. The defense team did not put forth any evidence to contradict the manner of victim's injuries or the victims' locations throughout the Club; the issues cited by the State in its defense of the photographs' relevancy. Had the defense done so in its case, the State could have possibly justified the introduction of additional photographic evidence on Reply.

"There can be no justice in a trial by jurors inflamed by passion..." Groppi v. Wisconsin, 400 U.S. 505, 511 (1971) (footnote 12) (quoting Crocker v. Justices of Superior Court, 208 Mass. 162, 179, 94 N.E. 369, 377-378 (1911)). By permitting the State to present unnecessarily cumulative photographic evidence of the bloodshed at the crime scene, the trial court impermissibly and undeniably prejudiced the Appellant. The cumulative close-up photographs served *no* purpose except to exacerbate the jury's reaction to the victim and

[1] The Appellant would note that the State introduced a cap worn by shooting victim Deirdre Houston, which was found with a bullet fragment attached to its fabric. ROA p. 296, ll. 9-16; p. 399, l. 1-p. 400, l. 8.

eyewitness testimony. There was no testimony suggesting that the contour of any of the blood evidence provided any forensic information of relevance in this case. If there had been, the State might have a stronger basis for their position that the jury for some reason needed a close-up view of the blood in some location(s). Accordingly, the Appellant is entitled to a new trial.

II. The lower court erred in denying the Appellant's motion for a mistrial following improper hearsay testimony concerning an alleged dying declaration, that had not been previously disclosed to the defense, and an alleged statement made by an anonymous caller on Appellant's mobile phone.

A. Factual Background

During his direct examination, the Club owner, Porterfield, set forth his limited acquaintance with the Appellant and described the circumstances of Appellant's departure from the Club on the evening in question. ROA at p. 172, l. 12-p. 173, l. 21. Porterfield testified that, after the shooting, he was communicating with one of the victims, John Adams, before he died. The State asked Porterfield, "What did he [Adams] say?" Porterfield replied, ***"He [Adams] was like the guy that we put out, shot me, was shooting."*** ROA at p. 177, ll. 20-22. At this moment, the Defense Counsel began to object and was interrupted by the judge, who identified the statement as an exception to the general rule on hearsay. Defense Counsel then asked to approach and a conversation was had, off the record, before direct examination continued. ROA at p. 177, l. 23-p. 178, l. 5. The statement was not repeated.

Minutes later in the direct examination, Porterfield began speaking about the mobile phone, allegedly belonging to Appellant, which he found in the Club earlier that night. He said that the phone began to ring when the investigators arrived, and that he answered it. At that point in time, Defense Counsel objected and the following statements were made on the record:

> Mr. Mcculloch: And, Your Honor, of course we're going to object to anything that would not be proper—
> The Court: What's your objection right now?
> Mr. Mcculloch: My objection is to hearsay.
> The Court: It's anticipatory, is that correct?
> Mr. Mcculloch: It is anticipatory, Your Honor.
> The Court: All right. Let's cross that river when we get to it. Right now, I'll note it but nothing has happened yet.
> Mr. Meadors: We're not offering this for the truth of the matter asserted—
> The Court: All right.
> Mr. Meadors: Oh.
> When you get a phone call, you answer it?
> [Witness]: Yeah, I got two phone—two phone calls from two ladies.
> [Mr. Meadors]: All right. What—who if anyone—what did the phone call say?
> [Witness]: Well, as soon as I answered the phone, I was trying to disguise my voice because it wasn't my phone. I didn't know who it was. I was like, hello. And they was like, *Blackie (phonetic), was that you out there shooting?* I then, I was like, what, you know.
> [Mr. Meadors]: Did someone say the name Black?
> [Witness]: Yeah.
> [Mr. Meadors]: Was it male or female?
> Mr. Mcculloch: Your Honor, may we approach?

ROA at p. 180, l. 16-p. 181, l. 17. Earlier in his testimony, Porterfield had stated that he knew the Appellant prior to the shooting and that the Appellant was known to him as "Black." ROA at p. 172, ll. 12-23.

When the bench conference began, the Appellant almost immediately moved for a mistrial on the ground that there were cumulative surprises in the evidence elicited by the State. In addition to an earlier in-camera identification of the suspect which had not been provided to the defense,[2] there was Porterfield's previously undisclosed testimony regarding a dying declaration and a speculative statement amounting to inadmissible hearsay from an anonymous caller. ROA at p. 182, l. 19- p. 183, l. 15; p. 187, l. 7- p. 188, l. 8. Appellant's defense counsel

[2] During an in-camera examination of intended State witness Roger Glover, Glover stated that he had identified the Appellant as the shooter on the night in question. Defense Counsel argued that this information was not contained in the material given to the defense, and the State did not ultimately call Glover as a witness. ROA at p. 61-81.

further argued that a failure on the part of the State to disclose this information had created numerous Brady[3] and Rule 5 violations.

The State responded that the first alleged violation, the witness identification, was not prejudicial as the witness had not testified in front of the jury. ROA at p. 184, l. 17-25. Regarding the second violation, the dying declaration, the State maintained that they had no prior knowledge of the conversation between Porterfield and Adams. ROA at p. 185, ll. 4-17. Addressing the final violation that was asserted by the Appellant, the State claimed that the speculative question[4] from the anonymous caller was described, somewhat poorly, in a discovery statement provided to the defense. ROA at p. 185, l. 21-p. 186, l. 5. This claim is dubious, from the record, as the State asserts that the actual language of the written statement was, "I kept receiving phone calls on the Verizon cell phone from women asking for Black, and he was at the place where you shooting at, 360." ROA at p. 185, l. 25-p. 186, l. 2. The State further asserted that this is essentially the same as the witness' testimony. In the argument for the mistrial, the Appellant pointed out the obvious inconsistency between the written statement and the witness testimony and reiterated that the testimony was in the form of inadmissible hearsay. ROA p. 187, l. 22-p. 188, l. 8.

The defense clearly stated that it was requesting a mistrial, and in the event that motion was denied, it sought a curative instruction to the jury. ROA at p. 188, ll. 4-8. The judge denied the mistrial motion and ultimately issued a curative statement requiring that the jury disregard the portion of Porterfield's testimony that referenced Adam's dying statement, as well as the testimony that referenced a statement from an anonymous caller on a cell phone. ROA at p. 189, ll. 12-16; p. 197, ll. 6-24.

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[3] Brady v. Maryland, 373 U.S. 83 (1963).

[4] "...Blackie (phonetic), was that you out there shooting?" ROA at p. 181, ll. 12-13.

The Appellant renewed his motion for a mistrial at the conclusion of the State's case, while he also noted that he respected the determination of the Court to strike the testimony and instruct the jurors. ROA at p. 556, l. 16-p. 557, l. 7. The Appellant renewed the motion for a mistrial again when the jury retired to begin deliberation, and his renewed motion was once again denied. ROA at p. 562, ll. 7-21.

B. Discussion

The decision to grant or deny a motion for a mistrial is a matter within the discretion of the trial judge. State v. Culbreath, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008). On appeal, the lower court's decision will not be disturbed absent an abuse of discretion. Id. It is only in cases where there is an abuse of discretion and resulting prejudice to the criminal defendant where this Court will reverse the lower court's decision to deny a mistrial motion. Id. A trial judge may not grant a mistrial, absent a manifest necessity or where it serves the ends of public justice. State v. Brown, 389 S.C. 84, 94, 697 S.E.2d 622, 627-28 (Ct. App. 2010). A defendant must demonstrate error and prejudice in order to justify a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless...it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced." State v. Simpson, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996).

"Hearsay" is defined as a statement, other than one made by the declarant while testifying at trial or the hearing, offered into evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Unless a hearsay statement falls within one of numerous exceptions, it is inadmissible. Rule 802, SCRE. A dying declaration is excluded from the general prohibition on hearsay where the declarant believed that death was imminent and the statement was addressing

the cause or circumstances of the death. Rule 804(b)(2), SCRE. In the instant case the defense had no notice that this dying declaration existed or that it might be introduced at trial, and due to the obvious discovery deficiency, the State did not seek to have the statement admitted under one of the hearsay exceptions. Under the sharing requirements imposed by Rule 5, South Carolina Rules of Criminal Procedure, the State had a duty to disclose evidence material to the preparation of a defense prior to the trial. Rule 5, SCRCrimP.

The speculative question from the anonymous caller was inadmissible hearsay in that it was uttered by someone other than the declarant, State witness Porterfield. The statement was also offered to prove the truth of the matter asserted, that someone questioned whether the Appellant was the shooter at that location. The statement was incredibly prejudicial in its implication that someone close to the Appellant, would know about the shooting almost as quickly as the authorities, and would have reason to believe that he was involved. The speculative phone call and the statement attributed to one of the deceased victims violated the hearsay rules and the defendant's right to confront adverse witnesses under the Confrontation Clause. U.S. Const. Amend. VI. Despite the fact that the jury was instructed to disregard the testimony in question, it would have been impossible for them to completely forget the damaging statements they had already heard. As is often said, "You cannot unring a bell."

In State v. Johnson, our Supreme Court held that the lower court erred in denying Johnson's mistrial motion where a redacted co-defendant's statement, taken in conjunction with the inference created by a witness' careless remark, erroneously implied that a co-defendant had implicated Johnson in the crime charged. State v. Johnson, 390 S.C. 600, 607, 703 S.E.2d 217, 220 (2010). The Court found that the inference violated Johnson's Confrontation Clause rights and the violation could not be remedied by an instruction limiting the jury's consideration of the

redacted terms in the co-defendant's statement. Id. The jury in Appellant's case heard not one, but two, highly prejudicial statements that violated discovery provisions and constituted impermissible hearsay. Both statements go to the issue of the identification of the shooter, and both infer that the Appellant was that person.

The Appellant's central defense, as summarized in his closing arguments, was that the State could not demonstrate, beyond a reasonable doubt, that he was the shooter. In this case, there were a number of questions regarding the identity of the shooter because the murder weapon was never recovered and the shooting, itself, occurred in the confusion following two, almost simultaneous, disruptions involving allegedly unruly patrons. Additionally, law enforcement had briefly examined, and excluded, another gun that matched the caliber of the murder weapon, and, coincidentally, belonged to two other patrons of that Club. The reason that these statements are so highly prejudicial and so memorable to the jury is that they suggest that one of the dying victims and an acquaintance of Appellant believed that the Appellant was the shooter.[5] The jury certainly recognized the possibility that the security staff and Club employees were distracted when the shooting began, but these improper statements strengthened the inferences being drawn from witness testimony indicating that the Appellant was the shooter. For these reasons, the Appellant is entitled to a new trial.

III. The trial judge erred in his abrupt and improper response to defense counsel's objection, thereby violating the Appellant's right to due process of law.

A. Factual Background

[5] At first blush, it might seem that the dying declaration was not prejudicial to the Appellant since there was evidence that the Club had to deal with another unruly patron, Christopher Lyles, and the declaration could be argued to refer to either the Appellant or the other patron dealt with by security that night. A close review of the testimony, however, reveals that Lyles *had not been fully ejected from the Club*, when the shooting began. ROA at p. 126, l. 22-p. 128, l. 9. Therefore, the declaration was prejudicial to the Appellant, who was the only patron the State claimed was actually "put out" of the Club.

During the redirect examination of State witness, Sydney Williams, the Appellant objected three times to leading or improper questions by the State. ROA at p. 240, l. 6-p. 241, l. 23. The Court finally instructed the State to, "Do it with the magic words so there won't be any longer any objections." He assured the State that they would have a chance to "amplify" the testimony later in the examination. ROA at p. 242, ll. 1-3. Almost immediately thereafter, the State interrupted its own witness when he was reading a requested portion of his statement. The Appellant began to object, and the judge yelled, "Stop. Go to the jury room, ladies and gentlemen. Don't talk about this case." ROA at p. 242, ll. 7-17. The harsh or angry tenor of the judge's comment to the defense and abrupt instruction to the jury is apparent from the record, as the judge felt it necessary to address the matter in the jury room, as well as on the record. After the Court returned from a brief recess, but before the jury returned, the judge said:

> Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels—high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad.
> *Somebody said, well, you scared me.* I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

ROA at p. 244, ll. 4-15. When the jury returned to the courtroom, the Court instructed them as follows:

> ...And, members of the jury, I stuck my head in the door and sort of reminded y'all that this as [*sic*] an adversarial proceeding and both sides tend to get up on their high heels a little bit sometimes and it's my job to sort of control the civility in the courtroom. *If I yell, it's nothing personal. I'm not mad at anybody* but it's my job to sort of keep us on an even keel.
> And that's all the latest example was. It has nothing to do with the merits of the case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I

> have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.

ROA at p. 245, ll. 2-15. With this statement, the redirect examination continued.

B. Discussion

"No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. In the language of the Supreme Court of the United States, "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217 (1982).

There is such importance attached to the appearance of impartiality from a trial judge, that the South Carolina Code of Judicial Conduct sets forth specific guidelines for judicial behavior. Canon 3 of Rule 501, SCRAP. Section B(4) of that Canon states that, "a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control." Canon 3 of Rule 501, SCRAP. "It is well settled that a trial judge must act with absolute impartiality in the performance of judicial duties." State v. Cooper, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999); See State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). As a general rule, there is no prejudice to a defendant, if hostile comments of a judge are made outside the presence of the jury. Cooper, 334 S.C. at 546, 514 S.E.2d at 587. In Cooper, the Supreme Court of South Carolina did not find reversible error in a trial judge's remarks that consisted of routine rulings against defense counsel. Id. None of the challenged communications in that case, however, involved personal or improper comments directed toward defense counsel, and they did not impugn defense counsel's credibility or "diminish him in the eyes of the jury." Id. at 546-47, 587-88.

In the current case, the Judge yelled at defense counsel, after a series of defense objections, and abruptly halted the proceedings. Defense counsel, understandably, did not object to the Judge's harsh remark in front of the jury or to the curative instruction that followed the recess. Case law suggests that a failure to object may be excused when the tone and tenor of the trial judge's comments make it clear that any objection would have been futile. Pace, 316 S.C. at 74, 447 S.E.2d at 187. This is especially true in the Appellant's case, where the Judge's improper remark was an angry response to Defense Counsel's continuing objections. In Pace, the Judge's comments were of a gentler, albeit inappropriate, nature and were not rebuking counsel for objecting. Id., at 73, 186-87.

The jury certainly understood that the anger behind the Judge's response was directed at Appellant's counsel, since his objection had prompted the abrupt interruption. While the Court's words were apparently brief, the delivery of the interrupting remarks was harsh enough to have "scared" one of the jurors. Even the judge, himself, felt that his remarks were prejudicial enough to warrant him entering the jury room to make off-the-record comments and subsequently to issue a formal instruction concerning the incident. At a minimum, the Court's treatment of defense counsel diminished his standing in the eyes of the jury. Although we do not have the benefit of a transcript of the judge's remarks to this jury in the jury room,[6] based on his own recollection of those comments on the record there is a great danger that the jury understood them to mean that the Court felt the need to bring defense counsel down a notch.

The Appellant notes that the Court's subsequent charge to the jury appears to have been intended to mitigate the Court's earlier focus on defense counsel. The unavoidable truth,

[6] The Appellant would point out that in the recent decision, Bailey v. State, the Supreme Court of South Carolina took the opportunity to "caution the bench" against off-the-record commentary to jury members. Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) (footnote 5). In Bailey, the record did not indicate if attorneys were present during the communication. In the instant case, the Judge's own comments indicate that the attorneys were not present when the Judge entered the jury room.

however, is that the jury was likely to take particular note of the remarks the Judge saw fit to enter the jury room to make after stopping this trial in the middle of a witness's testimony. The Court cut defense counsel off, and dismissed the jury abruptly without explanation. Not only was the Appellant prejudiced by the jury's diminished perception of defense counsel, but he was further prejudiced by the difficult dilemma that his counsel inevitably faced: whether to reinforce the previous objection and make a new objection to an angry judge's remark or to smooth ruffled feathers in an attempt to ensure that things would go more smoothly. Defense counsel chose the latter, and the proceedings continued in a calmer manner. Inasmuch as the judge's reaction was improper and the Appellant was prejudiced, the Appellant is entitled to a new trial.

CONCLUSION

The Appellant's conviction and sentence should be reversed, and this case should be remanded for a new trial.

Respectfully submitted,

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This 17th day of May, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

THE STATE,

Respondent,

V.

JOHNNIE WALKER GASKINS,

Appellant

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Whether the lower court erred in admitting crime scene photos of blood splatters and blood pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury?

II.

Whether the lower court erred in denying the Appellant's motion for a mistrial, based on the admission of improper and highly prejudicial hearsay testimony, in the form of a dying declaration and a statement from an anonymous telephone caller?

III.

Whether the Appellant's right to due process of law was violated by the trial judge's improper and heated response to defense counsel's objection?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Johnnie Gaskins, was indicted at the Court of General Sessions for Richland County at the July 18, 2008 term for two counts of murder, involving the February 5, 2007 deaths of John Adams (2008-GS-40-3948) and Shannavia Williams (2008-GS-40-1626). ROA 575-580. Gaskins was also indicted for three (3) separate counts of assault and battery with intent to kill concerning as victims Deirdre Houston (2008-GS-40-1632), Quinton Harris (2008-GS-40-1629) and Lamont Davis (2008-GS-40-1631). ROA 573-574. He was further charged with possession of a weapon during the commission of a violent crime. 2008-GS-40-1627. ROA 572-574.

On October 19, 2009, the Appellant entered a not guilty plea and the matters were tried before the Honorable L. Casey Manning, Presiding Judge. The Appellant was present and represented by Joseph M. McCulloch, Jr. and Kathy R. Schillaci of the Richland County Bar. The prosecution was handled by then Deputy Solicitor John P. Meadors and Assistant Solicitor Joanna A. McDuffie of the Fifth Circuit Solicitor's Office. The Appellant was convicted on October 27, 2009 on all six indictments. Tr. p. 1062, l. 1 - p. 1066, l. 5. Judge Manning sentenced the Appellant to two terms of life imprisonment for murder, concurrent, and an aggregate 65 years for the remaining charges of 20 years each consecutive on assault and battery with intent to kill, three separate counts, and 5 years consecutive on weapons charge, all consecutive to the life sentences. Tr. p. 1083, l. 6 - p. 1084, l. 4. ROA 565, 568, 571, 574, 577, 580.

The Appellant made a timely motion for a new trial. On January 26, 2010, Judge Manning denied the motion for a new trial and granted the Appellant's motion for preservation of

the evidence. ROA 589-590 (January 26, 2010 Order).

Counsel for the Appellant filed a timely notice of appeal which was served upon the Solicitor by mail on January 28, 2010. This briefing follows.

STATE'S VERSION OF THE FACTS

On February 5, 2007, Johnnie Gaskins was removed from the Super Bowl party at the Club 360 for unruly behavior. ROA 41, l. 20-24; p. 43, l. 12-19; p. 90, l. 21-p. 91, l. 6. According to bar manager Erin Hellman, Gaskins had demanded service: "give me a f—ing Hennessy (cognac). When he offered him a menu, he retorted again "give me a f—ing Hennessy bitch," and threw money at her. Gaskins then approached aggressively toward her behind the bar. ROA 38, 41. At that point security for the club came and took him out the front door of the club. ROA 41, Tr.p. 281. Hellman described Gaskins as being very sweaty and unsteady on his feet, with a difficult time in keeping his head up. ROA 42. She identified Gaskins in court (and in a photographic line-up) as the unruly person. Around 20 minutes later, she heard shots being fired. ROA 43-44.

Prior to the shooting, Shannavia Williams arrived at the Club 360 around midnight. After staying for a while, she decided to leave to go to another club with her friends. Before leaving, she sits her drink down, but spills it. ROA 281-282, Tr.p. 580-581. She leaves her friend, Deirdre Houston there and goes to get something to clean the drink. Two other friends, Shanna Williams and Shanelle Whack are in the back of the bar.

Quinton Harris and Lamont Davis with security had taken Gaskins outside and handcuffs him. Gaskins states that the security think they're gangsta, "I'll show them gangsta." ROA 254-255, Tr.p. 553-554. A friend of Gaskins, Sydney Williams approaches them and talks

them out of calling the police concerning Gaskins. ROA 92, l. 13-24; p. 219, l. 15-25. The handcuffs are removed and he is allowed to return to his car.

Gaskins is still angry as he walks back toward the car he came in - a Chevy Impala. Another security guard, Epsil Freeman remains concerned about Gaskins because he is still acting rowdy at the car. Palmer goes and talks to Gaskins and tells him to leave. ROA 256-257, 267-268. Subsequently, he is seen getting in the car by himself. ROA 224, Tr.p. 508, l. 5-10.

Harris and Davis return to inside the club to remove another patron, Christopher Lyles. ROA 93, 126 -127, 208-209;Tr.p. 355, l. 18-23; 408, l. 18-p. 409, l.7; p. 492, l. 16 - p. 493, l. 8. As they are doing that, Gaskins has returned to his car.

When Harris and Davis bring another rowdy patron Christopher Lyles outside. At that time, Gaskins has gotten in his Impala and drives to the front of Club 360 and opens fire. ROA 289. Harris while tussling with Lyles, looked up and saw Gaskins, who he had taken out, firing from the Impala. Independent witnesses identify Gaskins as either being the shooter or the person who went to the Impala where the shooting was coming from. ROA 94, 97 (victim Lamont Davis identifies Gaskins as the individual he saw shooting from the car); ROA 149 (victim Quinton Harris identifies Gaskins as the person he saw in the car with the gun); ROA 222, 247 (Sydney Williams identifies Gaskins as getting in the car which stopped in front of club when shooting started); ROA 272 (Epsil Palmer identifies Gaskins as person who entered vehicle and that he saw flashes coming from vehicle although it was too far at the time to see the actual shooter).

Security guard John Adams is hit and subsequently dies. ROA 434, Tr.p. 606-607, 790. Inside the bar, Deirdre Houston is shot while she was standing waiting for Shannavia Williams to return to clean up the spill. ROA 282-284. Shannavia Williams is returning to clean up the spill

and is shot in the head, resulting in her death. ROA 440. Security guard Lamont Davis is also shot. ROA 94-96; Tr.p. 356-358. Quintin Harris is also shot on his knuckle, but avoids other bullets in his direction. ROA 156-157; Tr.p. 438-439.

At that point the Chevy Impala with tinted windows leaves the scene. Calls are being made to 911. The acquaintance of Gaskins, Sydney Williams, is handcuffed by security because they believe he knows something about the shooter. ROA 230; Tr.p. 514.

The owner of the club, Lindburgh Porterfield recovers a cell phone in the parking lot. ROA 174; Tr.p. 458. This is later turned over to the Sheriff's Department. ROA 174, 180-181; Tr.p. 458, 464-465.

The Chevy Impala is ultimately found. ROA 421-424; Tr.p. 749-752. Inside the vehicle, the police locate documents with Gaskins name and gunshot residue and trace evidence linking Gaskins DNA to the vehicle. ROA 443-446, 492-493; Tr.p. 808-811, p. 889-895. In addition a shell casing is found inside the vehicle. Forensic testing of the shell casing in the Impala is linked to 40 caliber shell casings found in the club's parking lot as being fired from the same weapon. ROA 454-455, 459; Tr.p. 847-848, 852.

ARGUMENTS

I. The trial court did not abuse its discretion in the admission of a series of photographs from the crime scene which showed blood where they had probative value in a case where the photographs were not unduly prejudicial or inflammatory. Further, it appears at the time of the introduction of the "close-up" photographs the Appellant had abandoned the earlier objection.

During the trial, the prosecution introduced a series of crime scene photographs inside the Club 360 which also showed the various locations of blood at the crime scene. This evidence was used by law enforcement and a surviving victim, Deirdre Houston, to establish the location of the victim during and subsequent to the assault as she sought sanctuary from the assault. Although blood was present in the photographs, the challenged photographs do not show any bloody corpses or autopsy material, rather it shows the crime scene and specifically used by witnesses to help the jury to visualize the crime scene and understand the testimony of Ms. Houston. A review of the photographs suggest their relevance and although blood is present, a reasonable viewer would conclude that they are singularly or as a group not particularly gruesome or inflammatory. Judge Manning did not abuse his discretion in allowing the admission of the evidence.

Furthermore, the original objections to the crime scene photographs were limited to close-up photographs of blood as being duplicative of initially unobjected distance photographs. However, when the close-up photographs were introduced through Sgt. Richards, the Appellant's defense counsel abandoned the original objections and they were introduced specifically without objection. ROA 345; Tr.p. 662, l. 12-18. ["without objection]. **[Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46].** Therefore the issue presented in this argument was

abandoned at trial and is not preserved for this Court's review.

Standard of Review

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct.App. 2001); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct.App. 2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct.App. 2003).

All relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct.App. 2002); see also Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); In the Matter of the Care and Treatment of Corley, 353 S.C. 451, 577 S.E.2d 451 (2003) (evidence is relevant if it tends to establish or make more or less probable the matter in controversy).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Rule 401, SCRE. However, relevant evidence may be

excluded when its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Rule 403, SCRE. "Evidence is unfairly prejudicial in the context of Rule 403, if the evidence has an undue tendency to suggest a decision on an improper basis, such as an emotional one." S.C. Dep't of Soc. Servs. v. Lisa C., 380 S.C. 406, 417, 669 S.E.2d 647, 653 (Ct.App. 2008); State v. Spears, 393 S.C. 466, 479, 713 S.E.2d 324, 331 (Ct.App. 2011).

The determination of the admissibility of photographs is similarly a matter addressed to the sound discretion of the trial court. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980). Photographs are properly excluded if they are entirely without relevance or are not substantially necessary to show material facts or conditions. State v. Nathari, 303 S.C. 188, 268 S.E.2d 597 (S.C. App. 1990); State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940). If the photographs serve to corroborate testimony, it is not an abuse of discretion to admit them. State v. Crosby, 348 S.C. 387, 559 S.E.2d 352 (S.C. App. 2001), rev'd on other grounds, 355 S.C. 47, 584 S.E.2d 110 (2003); State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996); State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986).

However, photographs calculated to "arouse the sympathy or prejudice of the jury, should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Brazell, 325 S.C. 65, 78, 480 S.E.2f 64, 72 (1997). See *Annotation, Admissibility of Photographs of Corpse in Prosecution for homicide or civil action for causing death*, 73 A.L.R. 2d 769 (1960). Compare, State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (photographs of autopsy of victim with significant amount of blood and no material purpose was improperly admitted). In Patrick, the Court noted that the color photograph of the victim on the autopsy

table was extremely graphic and did not show the crime scene.

In State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995), the Court held properly admissible photographs and video of a crime scene which showed the victim's nude body lying in the living room floor with her face and body visibly swollen from the beating and other photographs showed blood smeared on the walls and floor. The Court found the photographs relevant to establish the crime scene.

In State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972), the Court found no error in the introduction of photographs of the crime scene where the photographs "served the purpose of helping the jury visualize the scene involved." Accord, State v. Stallings, 253 S.C. 451, 171 S.E.2d 588 (1969) (no error in admission of bloody clothing and photograph of rape victim's face). Also State v. Lynch, 375 S.C. 628, 634 S.E.2d 292 (S.C. App. 2007) (video of riot scene and negotiations showing bloody rag in defendant's cell not reversible where testimony was that Lynch had stabbed victim); State v. King, 222 S.C. 108, 71 S.E.2d 792 (1952) (admission of photo showing blood in room where assault occurred).

It has been stated that although presence of blood on a photograph of a victim is unpleasant, it is not, in and of itself, inflammatory so as to preclude admission of the photographs. Commonwealth v. Spell, 28 A.3d 1274 (Pa. 2011). The claim that the presence of blood is inflammatory, that result is not made out by the mere depiction of blood. "Murder evidence is not often agreeable, but sanguinity does not equal inadmissibility.

Relevancy, not necessity, is the test for admissibility of photographs into evidence. Welch v. State, 992 So.2d 206, 216 (Fla. 2008); State v. Jordan, 323 S.W.3d 1 (Tenn. 2010) (photograph of puddle of blood on floor and victim's arm was relevant and "not particularly

gruesome or inflammatory"); State v. Warledo, 285 Kan. 927, 190 P.3d 937 (2008)(blood splatter photographs relevant and admissible and gruesome nature of photograph not so extreme that it compels the conclusion that it was admitted solely to cause undue prejudice).

How the Issue Was Raised And Abandoned Below

The issue before this Court concerns the introduction of a series of photographs from the multiple victim crime scene at Club 360 which showed the location of blood. See Exhibits 22-43, 45-46. A review of the photographs reveal two categories of photographs. Some photographs were distant shots which revealed context to the specific location of the blood marked with identifying tags. Exhibit 22(I), 25 (J, K), 27 (K), 28 (K, L, M), 32 (N, O), 33 (N), 34 (N, O, P), 37 (P), 38 (Q), 39 (Q, R), 40 (R), 43 (S). The remainder of this group of photographs showed a close-up of the particular blood stain or splatter. Exhibit 23(I), 24 (J), 26 (K), 29 (L), 30 (M), 31 (stains depicted in 32), 35 (O), 36 (P), 41 (R), 42 (S), 45 (G), 46 (H). See also Court Exhibit #5, State's Photo Exhibit List (description of each photograph). ROA 581. It is with this second group of photographs that Appellant had his initial, but later abandoned objection.

During the trial, defense counsel McCulloch, while recognizing the liberal rule concerning the introduction of photographs within the Court's discretion, made an objection to the proposed photographs arguing that they were "duplicitous." Counsel McCulloch specifically stated that : "I do not object to them on the grounds that they show blood because this is obviously a case that involves blood.. . .But that fact is that these photographs duplicate each other and there is no point in that." ROA 81-82; Tr.p. 322-323. Counsel McCulloch also argued that the photos contained markers and close-ups and he questioned the relevance of showing

where the blood was.

The prosecution, through Assistant Solicitor McDuffie stated that markers in the photos were placed there by crime scene investigator Sgt.Stan Richards. She stated that he had provided a report detailing what each one of the markers represented in terms of a blood pattern analysis, such as whether it was transferred, pooled, drops, and smears which the defense has. ROA 83, l. 5-12. The prosecution stated that the photographs were not duplicative and had been narrowed down. She declared that there was a photograph of each marker from a shot to orient it in the club and then a close-up shot. She stated that the prosecution had tried very hard not to duplicate and had viewed tons of photos. She stated that the matters would be presented through Investigator Richards and through the victim who can orient herself in the club through the path she followed after being shot. ROA 83; Tr.p. 324, l. 13-25.

Deputy Solicitor Meadors stated that they considered showing the photographs without the cards, but thought that it was important to show the jury through victim Houston that this was the route she went using the blood. He stated that multiple sets were eliminated by use of these photographs which include the markers. ROA 84; Tr.p. 325.

The prosecution declared that these would be the only photos of blood in the interior that they intended to use. She stated that there are some bullet holes in the interior that would be used that show the floor in the distance. However, she stated that none of the other photographs will have blood as a focus of the photographs.

At that point counsel McCulloch asked the court to take it into consideration overnight where McCulloch stated that he would ever withdraw his motion or make it more specific, after he reviews Investigator Richards report. ROA 85; Tr.p. 326, l. 2-8. Judge Manning noted that it

was kind of hard to keep blood out of a situation where two people were killed and three are shot. ROA 85; Tr.p. 326, l. 17-19.

The next day, counsel McCulloch stated that he had provide the clerk with an itemization of his groupings of the proposed evidence as a close-up shot of blood splatters, blood skids, and blood residue and then he established a further back shot from the close-up showing where the bar is. He stated that he was aware that case law gives discretion to the court. He stated that his "only objection is that the photographs are duplicative and there's no real evidentiary value to a close-up shot of the blood." ROA 85; Tr.p. 328, l. 15-25. He stated that it would be apparent to the jury that this is a heinous crime with lots of injuries and deceased people. He stated that it would serve no real purpose in duplicating photographs with the close-up shots. ROA 86; Tr. p. 329, l. 4-5.

He restated that he had reviewed the photographs proffered by the prosecution the previous night. He stated that he had provided the state his rendition of the photographs.[1] Counsel opined that most of the photographs can be grouped in pairs. He stated that they showed a close-up of a blood splatter or a blood skid or just a close-up of blood. He then described that there was a photograph that showed an "establishing shot" taken at a distance that shows in the club where the bloodstain was. ROA 87; Tr.p. 330, l. 1-6. He stated that in its discretion, the court can allow evidence that has some relevance, but that it should not be duplicative or cumulative. He then stated that "our objection is simply that there was no real purpose in having the close-up of blood. ROA 87; Tr.p. 330, l. 7-14.

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[1]This listing was made Court Exhibit 5 and is included in this record. See Tr.p. 332, l. 11-17. See ROA p. 581.(Court Exhibit 5).

Counsel McCulloch continued that the relevant and pertinent value of the "establishing shots" to show blood on the pool table, but not showing a close up or a tile with blood on it is other than to inflame the jury and increase the sympathy level. ROA 87; Tr.p. 330, l. 15-21.

Judge Manning then declared:

> I don't know where the particular individuals that were shot or wounded, where it happened, how it happened, what location they were in. I think at least you look at the location of pools of blood, I would be like, for example somebody was shot against the wall you've got splattering and the bedroom or something like that will show where the victim was when they were wounded or shot.
>
> I think it might be a close call, but I do not believe the prejudice outweighs the probative value, Inasmuch as the jury already knows that two people were killed, three were shot, and at least at this point in time, I think I'll give the state the opportunity to connect the locations where the victims were shot, who was shot, where they were shot, that sort of thing.
>
> And at this point of time, Mr. McCulloch, it may be a close call but I think your objection is premature, If later something evolves that I think prejudice does outweigh the probative value, I don't make that assessment at this time, I'll revisit it. But for right now, I think it does have more probative value than prejudice to the defendant at this point in time.

ROA 88; Tr.p. 331, l.1-332, l. 2.

Testimony of Deirdre Houston.

Ms. Houston testified that on February 4, 2007 she went to the Club 360 where she met up with Shannavia Williams, Shanelle Whack, and Shawna Williams. ROA 279; Tr.p. 578. After playing pool for a while they got ready to leave to go to the Club Rockaway on Two Notch Road. ROA 281; Tr.p. 580. When she was waiting to get her jacket from Wolf (John Adams) before they left, Shawna walked away to get some napkins after a drink was spilled on a bannister. When Shawna walked off, Deirdre stated that she felt something hot hit her in side of her face and felt a ringing in her ear. She described touching ger face and seeing blood and then heard a

"boom" and she hit the floor and Shawna never made it back to her. ROA 282; Tr.p. 581, l. 4-23. Deirdre described that she got on the floor and crawled around with her head down, with a lot of blood in her eyes so she had difficulty seeing. She stated that she was crawling trying to get out of the way and felt some doors and trying to get to the pool tables when the shooting stopped. ROA 283; Tr.p. 582. She stated that she pulled herself up on the pool table and begged for someone to help her. At that point she described that the shooting started again and someone pulled her down and dragged her into the bathroom. She stated that she got a glimpse of herself in the mirror , but she could hear everything around her (including people screaming), but could not see or move. ROA 283; Tr.p. 582, l. 10-20. She stated that she hit the cold air with her eyes closed. She stated she woke up two days later in the hospital and learned that Shannavia was dead. ROA 283; Tr.p. 582, l. 21-25.

The In Camera Proceeding Related to the Photographs.

Subsequently, the trial court indicated that counsel McCulloch renewed the objection prior to the testimony of victim Deirdre Houston. ROA 285; Tr.p. 584. Judge Manning that he wanted the witness to do a dry run of her testimony outside of the jury's presence to see how she reacts when the witness identifies certain locations where she was and how she crawled to the bathroom. ROA 285; Tr.p. 584, l. 5-14. Counsel McCulloch stated that his interest was only whether she could authenticate the photographs, but not to punish her. ROA 285; Tr.p. 584, l. 16-19. Ms. Houston then in an in camera proceeding previewed her testimony identifying State Exhibit 15 as a diagram of Club 360, her testimony about feeling the sting of the bullet, crawling through the club to the bathroom and then identified State Exhibit 25. ROA 286-287; Tr.p. 595-586. At that point counsel McCulloch conceded that there was a proper foundation. ROA 287;

Tr.p. 586, l. 16-25. The witness confirmed and recognized State 32 as her blood, State Exhibit 38 as her blood, and State Exhibit 40 and State Exhibit 43 as relating to her testimony. ROA 288-89; Tr.p. 587-588. Allegedly over the earlier objection, the establishing photographs of State Exhibits 25 (photograph of pool table), 28 (photograph of K,L,M), 32 (photograph of pool tables and blood), 38 (distant photograph of Q), 39 (distant photograph of Q and R), 40 (distant photograph of R), and 43 (distant photograph of S in restroom) were admitted. ROA 289-90; Tr.p. 588-589. However, none of the so-called "close-up" photographs were introduced at this time or during the testimony of Ms. Houston which were the basis of the defense's original objections.

The Continued Testimony Before the Jury by Ms. Houston.

The prosecution then used the admitted "establishing" photographs to assist Ms. Houston in describing her path through the Club 360. ROA 291;Tr.p. 593. Referring to the photographs, she indicated where she was standing by the front door, where she crawled, where she touched the doors, the kitchen, her path toward the pool tables, and where she indicated where she was when she pulled herself up on the pool table after the shooting initially stopped. ROA 291; Tr.p. 593, l. 19-25. She indicated where she was then pulled back down and the entrance that took her back to the bathroom. ROA 292; Tr.p. 594. She then identified Exhibit 25 as the pool table where she was standing when she initially got hit. Exhibit 28 as the area where there were benches and booths and that she crawled "from here to here" using the exhibits. ROA 293;Tr.p. 595. As to Exhibit 32, she stated that it depicted farther along by the pool table that she pulled herself up and indicated that the blood was her blood. ROA 294;Tr.p. 596. Exhibit 38 was described by her as revealing her blood, showing an area near the bathroom. ROA 294; Tr.p. 596, l. 11-20. As to

Exhibit 39, she described it as the corner that you turn in the hallway before you get to the ladies restroom. ROA 294; Tr.p. 596, l. 17-20. As to Exhibit 40, it was described as the entrance inside the ladies restroom and Exhibit 43 was inside the ladies restroom in front of the mirror and sink, and identified the blood shown as her blood. ROA 294-295; Tr.p. 596, l. 17- p. 597, l. 4.

Houston next described that when she was hit, she first did not realize that she was hit until people started screaming that she was hit in the head, but that she was actually hit in the right ear. ROA 295; Tr.p. 597, l. 8-14. Houston confirmed that after she hit the cold air, she did not remember anything, thinking she was on a stretcher other than seeing blinking lights and hearing screaming. She stated as a result of the shooting that she is deaf in one ear and had nerve damage on the right side of her face. ROA 296; Tr.p. 598, l. 1-13. The toboggan hat that she was wearing that night was introduced into evidence without objection as State Exhibit 52. ROA 296; Tr.p. 598, l. 9-16. Houston stated that she did not know the Appellant, did not recall seeing him before and had no bad blood with him. ROA 297; Tr.p. 599, l. 5-10. The defense had no questions of the witness.

Testimony of Crime Scene Investigator Sgt. Stan Richards.

The photographic evidence was also used during the testimony of Sgt. Stanley Richards of the Richland County Sheriff's Department. He testified as an expert in crime scene to include blood pattern analysis, shooting reconstruction and footwear examination and comparison without objection. ROA 300-01, 305; Tr.p. 617-618, 622. He described being called to the Club 360 on February 5, 2007. ROA 306; Tr.p. 623. In the initial portion of his testimony, he described the Club 360 crime scene, including the location of impact points in the walls, trajectory patterns. He described his arrival at the scene and entry into the business where he

looked at a lot of possible blood , including stains on the floor to the left of the pool tables, all the way from the front to the back and that the stains on the floor were multi-directional. ROA 307; Tr.p. 624.

The Admission "Without Objection" of the Close-Up Photographs.

Later in his testimony, Sgt. Richards testified that on February 5, 2007, he looked at blood stains throughout the club. ROA 345; Tr.p. 662, l. 1-11. He referred to Exhibits 22 to 46 as photographs that related to his testimony. ROA 345; Tr.p. 662, l. 10-11. **These exhibits were re-introduced "without objection." [Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46]. ROA 345; Tr.p. 662, l. 12-18. ["without objection].**

The Use of the Photographs by Sgt. Richards to Describe The Scene

Sgt. Richards described to the jury that they were going to see a whole lot of smears. He stated that there were all kinds of directions in the stains and a lot of transfer stains. ROA 348; Tr.p. 665, l. 16-25. In State Exhibit 22, he pointed out the footwear pattern and the transfer of the blood from underneath the shoe. ROA 349; Tr.p. 666, l. 7-25. He pointed out this print was identified as "I." ROA 350; Tr.p. 667, L. 17.

Sgt. Richards next used Exhibit 24 and 25 to described the location of item "J." He described its location as coming through the entrance seeing the pool table with J and K running along the back side of the pool table. ROA 350; Tr.p. 667, l. 20-25. Exhibit 24 , ROA _, Exhibit 25, ROA _. He pointed out another entrance around the backside . He stated that item J showed the pooling of blood. Where there had been bloodletting at that point. He described the various directions of the smears in Exhibit 24 and also showing the imprint of a heel. ROA 351; Tr.p. 668, l. 3-20.

As to Exhibit 26, he described it as another picture of K showing the blood trail of a 90 degree drop to the floor and shows motion in a direction. ROA 352; Tr.p. 669, l. 1-6. ROA _ (State Exhibit 26).

State Exhibit 27 showed item K which reflects a better shot of the linear blood trail going in an indicated direction. He stated that it also showed swipes and blood smears coming in indicated directions. He described that the photo indicated a lot of blood, then lessening of the blood , and the feathering of the blood going in different indicated directions. He stated this showed that individuals or items that were being drug across in lateral motions on the floor going in both directions. ROA 352; Tr.p. 669, l. 8-19. State 28 was described as showing item L on the backside of the left side of the club coming around the center portion of the prior discuss of item K. He stated that you continue to see the smears on the floor , with a little bit of blood dripping and some stopping of motion at certain points where there is a little more blood, but directionality shown toward the bathroom. ROA 352-353; Tr.p. 669-670.

He stated that Exhibit 30 showed item M (which was indicated in the back of Exhibit 28 turning toward the wall near the pool tables). He stated that item M was a large quantity of blood pooling and suggested someone that was stationary for a period of time because secondary splatter is all around item M. ROA 353; Tr.p. 670, l. 17-25. Exhibit 30 also revealed a shoe impression. He stated that this photo was another general shot showing the directionality of where the blood was. ROA 353-354; Tr.p. 670-671, l. 4.

He stated that State 31 was a continuation of the backside of the area between the pool tables which showed another footwear impression though faded but showing its direction. ROA 354; Tr.p. 671, l. 11-15.

Sgt. Richards stated Exhibit 32 showed (in a distance) item N and reflected coming around the third section in the back area against the wall and between the pool tables, with the blood pooling, the stopping of motion at certain points and the dripping and smearing on the floor showing direction. He described the larger amounts of pooling as being caused by either someone in a different direction or the heart pumping harder and blood coming out and being in the spot longer. ROA 355; Tr.p. 672, l. 1-9. He pointed out in the third section footwear impressions coming the same way as going around the pool tables with the drops and swipes. ROA 355; Tr.p. 672, l. 10-19.

As to Exhibit 34, he stated it showed a larger overview of the same are going between the pool tables with item O marked on top of the (left) pool table and pooling on top of the pool table which indicates a wipe and blood dripping on top of the pool table. ROA 355- 56; Tr.p. 672-673. He stated that it suggests that someone stopped in the area for a period of time where there was bleeding and then blood pooling on the floor. ROA 356; Tr.p. 673, l. 1-11.

State Exhibit 35 was described by Sgt. Richards as being a closer view of item O on the top of the pool table which shows the drips and smaller drops which hit the top of the pool table . He stated that it had begun to dry by the time the photo was taken. ROA 356; Tr.p. 673.

He stated that Exhibit 36 showed item P was a bigger view of the drops from the pool table to the floor. ROA 357; Tr.p. 674, l. 3-8. State Exhibit 37 showed (more distant) of item P and the blood going around the backside of the second pool table back toward the entrance to the restroom areas. ROA 357; Tr.p. 674, l. 3-13.

Item Q was shown in State Exhibit 38 as it goes around the corner showing the blood drops , but not much pooling going towards the restroom area. ROA 357; Tr.p. 674, l. 14-21. Sgt.

Richards stated that State Exhibit 39 showed a better view of item Q around the corner going toward the restroom area, with a back and forth motion possibly opening the door 9and showing item R in the upper portion). ROA 357; Tr.p. 674, l. 23- p. 676, l. 2.

He described State Exhibit 40 as an overview of the back and forth motion, with footwear impressions smeared going toward an indicated direction, which showed a smear on the wall consistent with a person wiping their hand on the wall trying to find their way toward the restroom (showing a different view of item R). ROA 358; Tr.p. 675, l. 9-16.

As to state exhibit 41, he described it as a larger view (closer) view of what was found at the entrance to the restroom at the end of the blood letting smears (showing close - up of item R at the tile break). ROA 358; Tr.p. 675, l. 18-22. Concerning State Exhibit 42, he described it as showing item S (close-up) going into the restroom area. He then referred to State Exhibit 43 to explain the location of item S inside the restroom area where a lot of blood letting is shown and indicates through the use of the photograph the blood into blood, a lot of smearing , moving around directionality and blood drops . It shows a paper towel or cloth, that he suggests was someone trying to stop the bleeding. ROA 359; Tr.p. 676, l. 5-16.

At that point, Sgt. Richards returned to his seat and through the use of State Exhibit 15 sketched the pattern that he had described to the jury. ROA 359-360; Tr.p. 676, l. 17- p. 677, l. 2.

ANALYSIS

1. The Admissibility of the "Close-up" Photograph Issue Is Barred From Review because the Evidence Was Ultimately Entered Without Objection.

A review of the brief before this Court reveals a lack of specificity concerning what particular photographs the Appellant is presently seeking for this Court to review. The problem

with the Appellant's over broad assertion in this appeal most probably arises from the fact that the defense counsel's initial objection were not to the "establishing" (distant) photographs, but only the "close-up" photographs as being duplicative. ROA 87; Tr.p. 330. The particular photographs that these objections concerned were never identified by the defense with any specificity. However, when the actual "close-up" photographs were introduced in evidence during the testimony of Sgt. Richards, the defense declared the introduction was "without objection." [Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46]. ROA 345; Tr.p. 662, l. 12-18. ["without objection].[2] This issue as argued in this appeal is not preserved for this Court's review.

First, Judge Manning's pre-trial ruling on the close-up photographs was in a motion *in limine*. ROA 88; Tr.p. 331, l. 14-25. Generally, a motion *in limine* seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. See State v. Abraham, 395 S.C. 645, 720 S.E.2d 491, 494 (Ct. App. 2011) citing State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) ("[A] motion in limine seeks a pretrial evidentiary ruling to prevent the

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[2]The so-called "close-up" photographs are State Exhibit 24, 26, 29, 30, 31, 35, 36, 41, 42. The defense team distinguished the particular photographs in his groupings in Court Exhibit 5. ROA 581. In those grouping, he described "far shots" as Exhibits 23, 25, 37,38, 39, 40. He does not describe as either "close-up" or "far shot" the following: 27, 28, 32, 33, 34, 35, 38, 39, 43, 44, 45, 46, however a review of those photographs are consistent with the manner of the photographs described as "far shots" by having an area overview as opposed to a closer view of a marker. It would be apparent that these latter photographs would be included with his "far shot" designation as "establishing photographs" and were not subjects of his initial objection.

disclosure of potentially prejudicial matter to the jury. A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004) (making a motion *in limine* to exclude evidence at beginning of trial does not preserve issue for review because motion *in limine* is not a final determination; therefore, moving party must make contemporaneous objection when evidence introduced).

Second, when the so called "close-up" photographs were introduced at trial, the Appellant expressly stated that they had no objection to the introduction. See State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (holding a defendant who expressly consented to the admission of evidence at trial waived any right to raise the issue of admissibility on appeal). The issue was not preserved for this appeal. The Appellant abandoned the original objection during the trial when the defense allowed the admission of the "close-up" photographs without objection. ROA 345; Tr.p. 662.

2. The Admissions of the Crime Scene Photographs Were Relevant And the Prejudicial Effect Did Not Substantially Outweigh The Probative Value To Require Exclusion.

The Appellant does not specify any particular photographs that it is challenging in the appeal. To the contrary, his argument combines the mention with a series of photographs which the Appellant had no objection (ROA 87; Tr.p. 330) with photographs that he ultimately had no objection . ROA 345; Tr. p. 662. In the *Initial Brief of Appellant*, he simply makes a broad reference to State Exhibits 22-46 and the fact that they were introduced either through the testimony of victim Houston or Sgt. Richards. *Initial Brief of Appellant*, p. 9.

Assuming *arguendo* that the merits of the admission of certain unspecified exhibits can

be addressed, certain salient factors must be taken into account. First, the jury was aware that this was a horrific shooting involving two deaths and three other persons being wounded by shootings. Second, the crime scene photographs from inside the Club 360 (State Exhibits 22-43) were only a part of 150 exhibits introduced at that trial which included a plethora of other unchallenged exhibits which consisted of numerous photographs of bullet shells and holes in numerous locations at the Club 360, projectiles and cartridges from the scene, and autopsy photographs of two of the victims (which also entered without objection). See ROA 437-438; Tr.p. 793-794. Further, the breadth of the trial extended over a series of days from October 19 through October 27, 2009 and included 22 witnesses on behalf of the State.

As Judge Manning recognized at the hearing on the motion *in limine*, as well as defense counsel McCulloch, the existence of blood was a part of this crime and could not be divorced from the relevant evidence. At the outset, counsel McCulloch did not seek to exclude all photographs that showed the existence of blood at the crime scene, but only the "close-up" shots, suggesting the duplication was not necessary. However, as revealed in the testimony of surviving victim Houston, the photographs showed a probative purpose in corroborating her version of the shooting by substantially reflecting her location when shot and her path ultimately into the restroom to avoid further confrontation while the assault upon Club 360 continued. The testimony of Sgt. Richards gave meaning to the photographs by developing what the path of the smears actually showed enhancing the jury's understanding of victim Houston's blinded attempt at seeking sanctuary and safety.

While the photographs showed blood, in today's world of CSI and Law and Order shows and awareness, the photographs were not particularly gruesome and were relatively benign. This assessment is particularly evident where the surviving victim was present before the jury to

testify about the assault and the defense acknowledged that a series of photographs showing similar material was admissible. The Appellant, obviously recognizing that fact abandoned the objection prior to the admission of the close-up shots with Investigator Richards who presented the photographs in a matter of fact manner explaining how they supported and corroborated the victim's testimony about her path, stops, attempt to stand and return to the crawling during the continuing assaults.

In his brief on appeal, the Appellant concedes that evidence regarding the location of the victims and extent of the bloodshed was relevant, [*Initial Brief of Appellant*, p. 9, 10] but suggests claims that the close-up photographs were prejudicial, yet these photographs were not objected to when they were introduced. The Appellant suggests on appeal that the volume of the particular exhibits was cumulative and therefore prejudicial. However, Sgt. Richards used the photographs to educate the jury concerning how the manner of the stains corroborated victim Houston's testimony about her actions at the time of the assault.

Respondent submits that the evidence was not used to arose the sympathy or prejudice the jury. The Appellant acknowledged that some of the photographs showing the blood were relevant and probative. The use of the particular "close-up" photographs which allowed Sgt. Richards to describe the in better detail the direction of the victim than the distant photographs which also reveal blood, though in a manner cumulative, had additional probative value. A review of the photographs in light of the testimony - limited the prejudicial effect that Appellant suggests existed. Simply put, a viewing of the photographs in context with the testimony show that the close-up photographs are not unduly prejudicial or inflammatory.

The exception must be denied for these reasons.

II. Where the trial court instructed the jury to disregard evidence concerning an unexpected assertion in a dying declaration of one of the victims and an interrogative from a unknown caller to the Appellant's cell phone, the trial court did not abuse his discretion in denying the motion for a mistrial.

The cautious trial judge chose to use his discretion to exclude consideration by the jury of arguably admissible evidence concerning a dying declaration by victim John Adams and a question asked by an unidentified caller to the Appellant's cell phone asking whether Black was the shooter. In issuing a curative instruction, propounded by the defense counsel, to disregard the evidence, the trial judge properly applied the precedent of this Court. Assuming that the defense did not abandon its motion for mistrial when counsel declared he waived the objection (ROA 195; Tr.p. 479), the trial judge did not abuse his discretion in denying the mistrial motion where the incidents were not so grievous that prejudicial effect could not be removed in any other way.

STANDARD OF REVIEW

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion." State v. Spears, 393 S.C. 466, 485-486, 713 S.E.2d 324, 334 - 335 (Ct. App. 2011); State v. Kelly, 372 S.C. 167, 170, 641 S.E.2d 468, 470 (Ct.App. 2007). "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 455, 460 (Ct.App. 2005). See also State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (finding mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d

471, 472 (1983).

"Whether a mistrial is manifestly necessary is a fact specific inquiry." State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct.App.2000). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct.App.2009).

"An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless ... it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced." State v. Simpson, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996). "Error is harmless when it could not reasonably have affected the result of the trial." State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

HOW THE ISSUE WAS RAISED IN THE APPEAL

The Appellant asserts that a mistrial should have been declared based upon two occurrences during the testimony of Club 360 owner, Lindburgh Porterfield. However, upon review of the cited references, neither situation required a mistrial.

During the examination of Porterfield, he described the circumstances at his club at the Super Bowl party on February 4, 2007. ROA 169-173; Tr.p. 453-457. He stated that he had hired additional bouncers from Elite Security to assist with the particular party because they were able to carry weapons, unlike his own employees. ROA 171; Tr.p. 455. He stated it was their job to handle situations, which could include escorting someone to the door or handcuffing someone if they gave any problems. ROA 172; Tr.p. 456, l. 5-11.

Porterfield testified that he knew Johnnie Gaskins as "Black" at the time of the incident.

ROA 172; Tr.p. 456, l. 12-23. He stated that Black was at his club that day arriving early. He stated at some point, Gaskins was taken out of the club. ROA 173-174; Tr.p. 457-458. He stated that about 20 minutes after Gaskins was removed from the bar, Porterfield heard shots fired. He stated that he went to the front of his bar at the time where he saw the glass had been shot out of the front of his building and he saw bodies and people on the floor and trying to get out. ROA 176-177; Tr.p. 460-461. When he got to the front, he saw John Adams - one of his bouncers who he identified as Wolf - and told him that he would be all right because he was talking to him the whole time. ROA 177; Tr.p. 461, l. 10-12. He stated that Adams had been shot and that he was the first person the Porterfield had seen. The following occurred:

Q. What did he say?

A. He was like, the guy that we put out, shot me, was shooting.

Mr. McCulloch: Your Honor, I - - -

THE COURT: It's an exception to the hearsay - - go ahead.

Mr. McCulloch: May we approach? ..

ROA 177-178; Tr.p. 461, l. 20 - p. 462, l. 5. At that time, there was a bench conference. ROA 178; Tr.p. 462, l. 2-5. Porterfield continued to testify about wanting to drive victim Adams to the hospital, but he instead stayed and tried to calm people down.

Porterfield later testified about recovering a cell phone that he located on the floor of the club. ROA 174, l. 4- p. 175, l. 18, p. 180, l. 9-11. He stated that the cell phone started to ring and he answered it. ROA 180; Tr.p. 464, l. 12-13. The defense objected at that time asserting "hearsay." The prosecution responded that they were not offering the matter for the truth of the matter asserted. ROA 180-181; Tr.p. 464-465.

Porterfield then stated that he received two telephone calls from two ladies on the cell phone. He stated that he attempted to disguise his voice because it was not his phone and said:

A. . . "Hello. And they was like, Blackie, was that you out there shooting? I then , I was like you know.

Q. Did someone say the name Black?

A. Yeah.

Q. Was it male or female?

Mr. McCulloch : Your honor may we approach.

A. Female....

ROA 181; Tr.p. 465, l. 7-18. At that point another bench conference was held which led to an in camera discussion out of the jury's presence.

Defense counsel McCulloch made initially made a motion for a mistrial asserting cumulative surprises. The defense initially claimed that during the in camera testimony of Roger Glover, he testified to an identification of the Appellant that had not been provided in discovery where the defense had been advised that his identification was only of "a person in the bar ." See ROA 61-81; Tr.p. 295-315. [3]The defense also assented that they were surprised by the dying declaration testimony of Porterfield that had been provided. Lastly, the defense asserted that the

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[3]In the *in camera* proceedings, Glover testified that he had seen Gaskins in the bar area that night. ROA 66-67; Tr.p. 300-301. He then stated that he had seen him riding around that night. ROA 67. Then, he declared that he saw him in the car when the shooting was going on. ROA 70; Tr.p. 304. On cross-examination, Glover stated that he had told the police that night that he had seen the shooter, but that the police did not write it down in his statement or during the line-up. ROA 72, 77-78; Tr.p. 306, 311-312. Deputy Solicitor Meadors noted that although he had talked previously with Mr. Glover, at that hearing was the first time he had heard of the identification of the shooter. Tr.p. 319, l. 1-6. When the defense asserted that it was incompetent testimony, Judge Manning stated that it was a jury issue for weight and credibility. Tr.p. 320.

testimony from the cell phone caller though allegedly being only offered not for the truth had evidentiary value for the truth asserted. He disagreed that this information was provided in Porterfield's statement. He stated the motion for mistrial was because these were violations under Brady v. Maryland, 373 U.S. 83 (1963) and Rule 5 of the S.C. Rules of Criminal Procedure. ROA 183-184; Tr.p. 467-468.

In response, Deputy Solicitor Meadors stated that concerning Mr. Glover's in camera testimony that he was unaware as well and that he had not testified about the identification in front of the jury. As to the dying declaration by John Adams to Porterfield, the prosecutor stated that he had anticipated the testimony to instead be :"I'm dying, Dog, I'm dying" rather than the response made which was the first time that the prosecutor had heard it. ROA 185; Tr.p. 469, l. 4-19. Concerning the cell phone answer, Deputy Solicitor Meadors took issue concerning the matter stating that it was essentially disclosed in the discovery on page 3 of the statement where Porterfield had stated that he "kept receiving phone calls on the Verizon cell phone from women asking for Black and was he was at the place where you shooting at 360." ROA 185-186; Tr.p. 469, l. 21- p. 470, l. 5. See Court Exhibit 6, p. 2 (Statement of Lindburgh Porterfield, 02/05/2007 [actually page 3 in order of statement]). ROA 582-84. The state relied upon Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002)[4] to assert that information that a friend heard from rumor was not

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[4]In Rhodes, the Court held that the testimony admitted in this case about Thompson hearing petitioner was the shooter did not constitute hearsay:

> The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted. E.g., Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001). Here, it was repeatedly made clear during trial that the information Thompson had heard was "from the street," i.e., a "rumor." It was not offered to prove that petitioner had committed the crimes, but rather to explain Cook's identification of petitioner in the yearbook. This in turn led to petitioner's

offered for its truth, but to explain one victim's identification.

Counsel McCulloch responded: "my motion is for a mistrial or for an instruction and a redaction from the jury's memory that - - - Mr. Porterfield not be allowed to testify what people say on the phone, at least in this instance." The defense accepted that the prosecution did not know that the other evidence was going to come out. However, he asserted that the state had a duty of diligence to learn this information and make it available, asserting that Glover may have told police about his identification, suggesting a problematic pattern. The defense also disagreed that Porterfield's statement was close enough. He also contended that it did not fall within the realm of admissible hearsay. He then asked for a mistrial and if not granted , would ask for an instruction to disregard. ROA 188; Tr.p. 472, l. 4-8.

Judge Manning denied the motion for a mistrial, but agreed to tell the jury to disregard the challenged remarks. He stated that he did "not think anything had risen to the level of some sort of egregious constitutional deprivation against Mr. Gaskins." ROA 188-89; Tr.p. 472-473.

After a break, the Court noted that the cell phone statement about a female asking for Black was innocuous, but that he had told the defense he was giving the instruction anyway, over the State's objection. ROA 193; Tr.p. 477, l. 4-20. After a discussion on the proposed curative jury instructions, the Court noted that the objection was based upon Brady and Rule 5. However, the defense stated that the objection was based upon the cumulative failure of diligence and that he did not think it was admissible hearsay. At that point, the defense stated: "I respect your ruling

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> apprehension and the subsequent identification of him by both victims via the photographic line-up.

Rhodes v. State, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002).

as to a mistrial - - **I waive that objection** and I appreciate the instructions which I have prepared. .." ROA 195, l. 7-19; Tr.p. 479, l. 7-19. (emphasis added). [5]

When the jury returned, they were given the following curative instruction by Judge Manning:

> . . .I instruct you to disregard that portion of Mr. Porterfield's testimony that made reference to any statements that were attributable to Mr. Adams. Mr. Adams is the gentleman that was a victim and is now deceased.
>
> I further instruct you to further disregard the testimony of Mr. Porterfield that was made in reference to statements made by an unknown person and a telephone call received on the phone that's been admitted into evidence.
>
> Y'all understand what I just said?
>
> JURORS: (Affirmative response).
>
> And when I tell you to disregard it, what you must do is erase it from your mind and when you go back to the jury room finally at the end of this trial to deliberate, you cannot let these two things enter your discussions at all. It would be unfair for you to do so.

ROA 197; Tr.p. 481, l. 6-24. [6]

The record reflects that at the end of the State's case, the defense stated that it was renewing the previous motions including the motion for mistrial that was denied and that "I respect the determination of the Court to strike the testimony and to instruct them." ROA 556;

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[5] Respondent submits that Appellant abandoned his request for mistrial at this point. See State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (holding a defendant who expressly consented to the admission of evidence at trial waived any right to raise the issue of admissibility on appeal). The issue should be barred as not preserved. However, Respondent concedes that Appellant generally asserted a request for a mistrial at the close of the case. Tr.p. 957, 1050.

[6] These instructions were consistent with the proffered instructions prepared by defense counsel McCulloch. ROA 194; Tr.p. 478, l. 1-10. Court Exhibit 7. ROA 585 .

Tr.p. 957, l. 16-19. The motions were renewed generally at the conclusion and denied. ROA 562; Tr.p. 1050, l. 11-21.

ARGUMENT BEFORE THIS COURT

A. Dying Declaration Issue.

In the argument before this Court, the Appellant complains that it had no notice that the dying declaration existed or might be introduced at trial. He asserted that this was a discovery deficiency under Rule 5 and asserts that it should have been discovered by the State and revealed prior to trial under Rule 5. He claims that under Rule 5, the State had the duty to disclose evidence material to the preparation of the defense. *Initial Brief of Appellant*, p. 16, ¶ 1. However, a review Rule 5 imposes no requirement for disclosure of or creation of witness statements prior to trial, other than the statements of the defendant (not the victim). In pertinent part, Rule 5(a)(2)

> 2). Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case, or of statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon a sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.

Contrary to the claim of the defense, there was no requirement to create a document where one did not exist concerning the dying declaration made by John Adams to Porterfield. This is not a case of having the existence of a document not being turned over to the defense. There was no

document in existence. As the prosecution declared as to the dying declaration by John Adams to Porterfield, the prosecutor stated that he had anticipated the testimony to instead be :"I'm dying, Dog, I'm dying" rather than the response made which was the first time that the prosecutor had heard it. ROA 185; Tr.p. 469, l. 4-19. This was not a violation of Rule 5. This was not a case where there was a written document in the possession of the prosecution that revealed the existence of this part of the dying declaration by John Adams to Porterfield. If that had existed, the question before this Court may be different. Compare State v Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (former Criminal Practice Rule 8 was not violated, even though the defendant's counsel was not informed until the morning of jury selection of the state's tape of an interview with a witness which had been made within 48 hours of the shooting, where defense counsel was permitted to listen to the tape before the witness took the stand for direct examination, the trial judge allowed defense counsel to delay cross examination until the next day, and, thereafter, defense introduced the tape into evidence and played it for the jury, thus bringing to the jury's attention discrepancies between the witnesses' testimony and that appearing on the tape); State v South, 285 S.C. 529, 331 S.E.2d. 775 91985) (admission into evidence of the statement of a witness, despite the state's failure to produce a tape recording of the witness's statement in addition to the written statement, was harmless error beyond a reasonable doubt since the defendant received the substantial equivalent in the written statement).

However, plainly the unexpected statement made by John Adams to Porterfield was admissible as a dying declaration under South Carolina Rules of Evidence, Rule 804(b)(2). The state purported to have information revealed to the defense that Adams had indicated to Porterfield that he was dying and the statement clearly addressed the cause of his death. Tr.p.

469. Accord State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). In addition, the statement was likely also admissible as an excited utterance exception to the hearsay rule under SCRE Rule 803(2). McHoney .

Nevertheless, the resolution of the issue of the admissibility is moot because evidence was directed to be excluded by a cautious judge.[7]

B. The Cell Phone Caller.

The Appellant asserts in the appeal that the testimony by Porterfield that an unidentified female called the Appellant's cell phone which was answered by Porterfield and reported to him "Hello. And they was like, Blackie, was that you out there shooting?" The defense urged that it was a discovery violation, even though they had been in possession of Porterfield's statement that stated he "kept receiving phone calls on the Verizon cell phone from women asking for Black and was he was at the place where you shooting at 360." ROA 185-186; Tr.p. 469, l. 21- p. 470, l. 5. See Court Exhibit 6, p. 2 (Statement of Lindburgh Porterfield, 02/05/2007 [actually page 3 in order of statement]). ROA 584. Respondent submits that Rule 5 was satisfied by the disclosure of Court Exhibit 6 to the defense prior to the trial. The differences between the written statement and oral testimony would have been properly subject to cross-examination and impeachment concerning whatever inconsistencies he claims - but not necessarily exclusion.

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[7]Interestingly, the Appellant, in brief, asserts that the dying declaration may not be prejudicial to Appellant because another patron, Christopher Lyles was also ejected from the club and could have referred to Lyles or any other patron ejected that night. *Initial Brief of Appellant*, p. 17, n. 5. However, he notes that at the time of the shooting Lyles had not been fully ejected from the club when the shooting began. ROA 126-128; Tr.p. 408-410. However, in the defense closing, counsel McCulloch indicated that Lyles had been arrested later that night for drunk driving and had weapons on him and should have been placed in the line up but was never placed in one, never asked to submit to a gunshot residue test and only knew that the investigation did not pursue him. ROA 559-560; Tr.p. 1018-1019.

The Appellant also urges that this evidence was hearsay because it was going to the truth of the matter asserted - claiming that it was an assertion that Appellant was the shooter at Club 360. However, at the outset, the prosecution urged that it was not being introduced for the truth of the matter asserted. ROA 180; Tr.p. 464, l. 25-1. However, a close reading of the testimony shows the declarant telephone caller is asking a question on whether Black was the shooter - not a declarative statement that Black was the shooter.

Under SCRE 801, it is not an "assertion" by the declarant, but an "interrogative. A question is not a declarative statement of hearsay. Plainly, it could not go to the truth of the matter asserted because the question does not assert any matter, only seeks to elicit a response affirming or denying. See Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan & Frederic I. Lederer, *Courtroom Criminal Evidence* 1003 (3d ed. 1998) ("Because most assertive statements are declarative sentences, many trial judges use a rule of thumb that imperative, interrogative, and exclamatory sentences are not hearsay."; the authors would not follow this rule of thumb in all situations); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 Tex. L. Rev. 49, 71–73 (1982) (suggesting that this is at least a plausible, and perhaps the most plausible, interpretation of the word "assertion" in Rule 801(c)); United States v. Thomas, 453 F.3d 838, 844–45 (7th Cir. 2006) (defendant asked police officer who had just arrived on scene of shooting whether officer was responding to defendant's call; court found that question was not hearsay because it was not statement but a question, but excluding it was harmless error).

McCormick on Evidence addresses the issue of whether questions are hearsay:

n. 7. For example, many courts take the position that a question cannot be hearsay

because it is not an assertion. See, e.g., United States v. Oguns, 921 F.2d 442, 448 -49 (2d Cir.1990); United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir.1990); Bolen v. Paragon Plastics, Inc., 754 F.Supp. 221, 225 (D.Mass.1990). See also United States v. Bailey, 270 F.3d 83, 87 (1st Cir.2001) (holding telephone call which summoned recipient to rendezvous point but did not by content identify the recipient, was a direction and was not hearsay); United States v. Murphy, 193 F.3d 1, 5–6 (1st Cir.1999) (recognizing as nonhearsay instructions to use false warrant applications and to withhold information about seizures of cash because they were simply directions as to method of operation that were not statements of fact); United States v. Bellomo, 176 F.3d 580, 586 (2d Cir.1999) ("Statements offered as evidence of commands or threats or rules directed to the witness, rather than for the truth of the matter asserted therein, are not hearsay."). Frequently, questions should not be considered hearsay because the dangers of insincerity are sufficiently diminished when an assertion is not intended. See United States v. Long, 905 F.2d 1572, 1580 (D.C.Cir.1990); United States v. Jackson, 88 F.3d 845, 848 (10th Cir.1996); Kolb v. State, 930 P.2d 1238, 1245–46 (Wyo.1996). However, the result should not be automatic from the form of the words. Ex parte Hunt, 744 So.2d 851, 856–58 (Ala.1999) (reviewing split of authorities on whether questions are ever hearsay, deciding that a categorical answer cannot be given but instead the issue must be decided by nature of the question, facts sought to be proved, and circumstances, and concluding that the question at issue was not hearsay since it made no express or implied assertion); Powell v. State, 714 N.E.2d 624, 627 (Ind.1999) (concluding that while some questions are properly not considered hearsay because they contain no assertions of fact, others, including the one in the case, intend to assert a fact and are therefore considered hearsay); Lampitok v. State, 817 N.E.2d 630, 640 (Ind.App.2004) (reaching same conclusion as to commands); United States v. Summers, 414 F.3d 1287, 1299–1300 (10th Cir.2005) (concluding that defendant's statement to the police upon arrest, "[h]ow did you guys find us so fast?," was intended as an assertion and therefore hearsay).

McCormick on Evidence, (6th Ed. 2009), § 246, n. 7.

Nevertheless, the cautious trial judge entered an instruction excluding consideration of the evidence, thereby mooting this issue.

1. The Curative Instruction To Disregard the Particular Testimony Removes Any Reversible Error.

A mistrial is not required where the trial judge gave plain instructions to disregard the challenged testimony from Porterfield attributable to either victim Adams or the cell phone

caller. ROA 197; Tr.p. 481, l. 6-24. The curative instructions were fashioned by defense counsel.[8] It is well known "[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Harris, 382 S.C. 107, 119-120, 674 S.E.2d 532, 538 - 539 (Ct. App. 2009); State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct.App. 2005). In the present case, the trial court's curative instruction explained to the jury they were not allowed to consider the question by the cell phone caller or Mr. Adams statement to Porterfield in their deliberations. The trial court specifically instructed the jury to disregard the evidence. Thus, any alleged error was cured.

The Appellant argues that there was a residual effect because he feels that the Adams comment could only have referred to Appellant because another possibility of Christopher Lyles had not been ejected at the time. Porterfield had testified that he understood only two people had been "thrown out" that night. ROA 205; Tr.p. 489, l. 4-6. Lyles testified that he had been ejected from the bar that night. ROA 208-09; Tr.p. 492, l. 9- p. 493, l. 8. He recalled that his girlfriend took him his mother's house. ROA 209; Tr.p. 493. Lyles stated that he subsequently got into another vehicle and got stopped for DUI. ROA 210; Tr.p. 494, l. 17-24. He admitted that he had a gun in that car, but denied the gun was anywhere near the Club 360. ROA 211; Tr.p. 495, l. 1-25.

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[8] This Court may well find that this argument is not preserved for appellate review because Gaskins created the instructions and accepted the trial court's ruling and did not contemporaneously object to the sufficiency of the curative charge. ROA 195; Tr.p. 479. See State v. Parris, 387 S.C. 460, 464, 692 S.E.2d 207, 209 (Ct. App. 2010); State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct.App.1996) (holding a curative instruction is usually deemed to cure an alleged error; no issue is preserved for appellate review if the complaining party accepts the trial court's ruling and does not contemporaneously object to the sufficiency of the curative charge).

However, there was a series of independent witnesses who identified Gaskins as either being the shooter or the person who went to the Impala where the shooting was coming from. ROA 94, 97; Tr.p. 356, 359 (victim Lamont Davis identifies Gaskins as the individual he saw shooting from the car); ROA 149; Tr.p. 431 (victim Quinton Harris identifies Gaskins as the person he saw in the car with the gun); ROA 220, 247; Tr.p. 506, 531 (Sydney Williams identifies Gaskins as getting in the car which stopped in front of club when shooting started); ROA 272; Tr.p. 571 (Epsil Palmer identifies Gaskins as person who entered vehicle and that he saw flashes coming from vehicle although it was too far at the time to see the actual shooter). Thus, the excluded dying declaration would only have been cumulative to the evidence presented.

As noted above, a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Stanley, 365 at 33-34, 615 S.E.2d at 460. Under the facts presented, Appellant is unable to show prejudice in light of the fact the record of identifications by similarly situated witnesses other than victim John Adams.

The argument otherwise is without merit.

III. A new trial is not warranted where the trial judge gave a cautionary instruction to the jury after a series of exchanges between counsel for the prosecution and defense concerning the form of questions on re-direct required the Court to intervene to maintain civility between counsel in the courtroom. The Appellant's contention that defense counsel ability to represent the Appellant in the eyes of the jury was undermined in not supported by the record where both the state and defense were admonished to relax.

In his final argument, the Appellant contends that a mid-trial exchange between both counsel and the trial court during a re-direct examination of witness Sydney Williams about a prior statement requires a new trial. Although the trial judge addressed the tension arising between counsel on the exchange of questions and objections, the judicial comments did not undermine either counsel. Further, the trial judge's reasonable cautionary instruction given to the jury eliminated the concerns about any loss of credibility with the jury of counsel. The assertion must be denied.

HOW THE MATTER OCCURRED IN THE LOWER COURT

In the issue before the Court, the Appellant for the first time claims that the trial judge's actions allegedly toward defense counsel require a new trial. The jaundiced reading of the record ignores certain facts which defeat his claim. A review of the precise language, rather than characterizations is important to understand what occurred and what did not occur. As shown herein, the defense counsel never suggested that the response of the trial judge demanded a new trial or partiality against his client.

During the re-direct testimony of state witness Sydney Williams by Deputy Solicitor Meadors an issue arose concerning his earlier written statement and its variance from his trial testimony. ROA 238-240; Tr.p. 522-524. At one point the questioning became the subject of a

series of objections from defense counsel:

Q. Now, Mr. Williams, did you see a gun?

A. I ain't seen no gun that night, I didn't see the gun that night.

Q. Mr. McCulloch asked you about your statement. Did you put in your statement previously that - - -

MR. McCULLOCH: Objection, your Honor. That's not proper, that 's leading, did you put in your statement, whatever - -

Q. What if anything did you put in your statement?

MR. McCULLOCH: Classic leading - - -

THE COURT : **Stop, both of you, relax**. Back up a little bit. Dissect the question if you have to.

ROA 240; Tr.p. 524, l. 4-14. After having the witness review the statement, the following inquiry was

made:

Q. On February 5th, 2007, did you tell Investigator Isenhoward - - -

MR. McCULLOCH: Yes, your Honor again - - -

THE COURT: All right.

MR. McCULLOCH: Improper cross-examination - - -

THE COURT: All right. No run on arguments. Objection - - specifically what the objection is and I'll rule on it. But don't argue when you object. What did he say on such and such date.

MR. MEADORS: Under [Rule] 609, I thought that was the proper way to address it.

[ROA 242] THE COURT: Do it with the magic words so there won't be any longer any objections. Relax. I'll give you a chance to amplify later on. Continue.

Q. What if anything did you mention to Investigator Isenhoward about whether or not you saw the defendant with a gun, on page one?

A. On page one? I said, when he went - - he went back - -I mean, he went to his car, to a car beside his. He drives a blue car. He got in it. I started walking back toward the club - -

Q. No, no, no you skipped - - you skipped - -

MR. McCULLOCH : Your honor, let's let him read - - -

THE COURT: Stop. Go to the jury room ladies and gentlemen. Don't talk about this case. . . .

[Jury retires]
[OUT OF JURY'S PRESENCE]

THE COURT: **Both of you relax**. No run on objections. Objection, basis, that's the way to do it, Mr. McCulloch. Don't argue your objection - -

MR. McCULLOCH: All right.

THE COURT: **You relax**. Let me finish. Just specify what it is. I know this is all tedious for all of us. **Now lets's calm down a little bit and do it the right way**. Go ahead and place your objection on the [527] record.

MR. McCULLOCH: My objection was starting with the leading nature of the question. But now, asking him to look over his statement, then the Solicitor would like –to read to him the part of the statement he wants to say, oh yes, I remember that . That's not proper.

This is re-direct. It is outside the scope of proper re-direct, secondly.

Thirdly, under 613, this is a prior statement of the witness that he himself now wants to impeach him because his answers on the stand, in his questions, are different than what the Solicitor would like him to have testified with the statement.

THE COURT : All right. Anything further?

MR. McCULLOCH: That's it.

THE COURT: All right. I disagree. You can impeach with your own witness, I

think under the rules this day and time.

MR. MEADORS: [Rule]610.

THE COURT: It used to be the old rule but he can, for the sake of convenience, saving time, he can point , would you please read line 1 on page 2 of your statement or something.

Let's take a little break. **And y'all got to learn to be nice to each other, okay**. Let's take a break. It's tedious. I'll give you a chance to refresh yourselves. We'll come back and resume.

ROA 241-244; Tr.p. 525, l. 14- p. 528, l. 2.

During the recess, Judge Manning reported that he spoke with the jurors in the following manner to counsel:

THE COURT: Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels –high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad.

Somebody said, well, you scared me. I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

MR. McCULLOCH: Tell them it was theater.

THE COURT: Beg your pardon?

MR. McCULLOCH: Tell them it was theater – theater.

THE COURT: No, no no...

ROA 244; Tr.p. 528, l. 5- 19.

The jury then returned to the courtroom. Judge Manning then addressed his earlier comments:

THE COURT: ...I stuck my head in the door and sort of reminded y'all that this is an adversarial proceeding and both sides tend to get up on their

> high heels a little bit sometimes and it's my job to sort of control the civility in the courtroom. If I yell, it's nothing personal. I'm not mad at anybody but it's my job to sort of keep us at even keel.
>
> And that's all the latest example was. It has nothing to do with the merits of this case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.
>
> With that in mind, I will invite Mr. Meadors to continue...

ROA 245; Tr.p. 529, l. 2-20. The remainder of the examination was without similar problems by counsel.

A review of the record reveals no motion for mistrial as a result of the judge's comments by either the State or the defense.

ANALYSIS

The Appellant contends that the remarks of the judge during the examination were harsh and angry and directed at defense counsel. He now suggests the failure of the defense counsel to object to the comments made during the examination or the curative instruction given by the court does not prevent this Court from considering the issue on appeal because any objection would have been futile, relying upon State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). He contends that because this was an "angry response" by the trial judge to defense counsel McCulloch's continuing objections to the examination of the witness by the prosecution. He contends that these brief comments by Judge Manning diminished counsel's standing before the jury. Respondent submits that the comments although strong were not an reasonable reaction to defense counsel's objections.

The Appellant ignores that the comments were directed to the prosecution, as well as the defense. See ROA 240; Tr.p. 524, l. 13-14 (" **Stop, both of you, relax**. Back up a little bit.

Dissect the question if you have to"). Judge Manning was also directing comments toward Deputy Solicitor Meadors when he told him to "relax" and directed that he ask "what did he say back on such and such date" and to use magic words so that there won't be objections. ROA 241-242; Tr.p. 525-526. Plainly, he was also putting the problem at the feet of the prosecution in the manner he was asking questions. After the jury had retired, the judge also admonished for "both of you relax" and to "calm down." ROA 242; Tr.p. 526.

An alleged improper remark by a trial judge must be considered in context when determining whether it indicates sufficient bias or prejudice to require his or her disqualification. Shaw v. State, 276 S.C. 190, 277 S.E.2d 140 (1981). The Supreme Court has held a defendant is entitled to a mistrial where arguments by the trial judge indicate a lack of neutrality and cannot be cured by instruction, as where the defendant's testimony is referred to as "lies." State v. Kennedy, 272 S.C. 231, 250 S.E.2d 338 (1978). Likewise, any intimation by a judge, in the presence of the jury, that a particular witness has committed perjury is reversible error. Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992) (Supreme Court refused to apply the rule where a trial judge merely reminded a witness he was under oath and subject to perjury). The Appellant relies upon State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994). However, Pace, is readily distinguishable where the judge's references to defense counsel, in the presence of the jury, as a "pretty girl" and "nice girl" was error, and deprived the defendant of a fair trial and constituted reversible error. The Court stated in Pace that "[t]he trial judge must act with absolute impartiality in the performance of judicial duties. Canon 3 of Rule 501, SCACR. Reference by a trial judge to an attorney's age, gender, or competence are improper and constitute reversible error upon a showing of prejudice to the defendant."

The Code of Judicial Conduct, Rule 501, SCACR, sets forth the basic rules for the conduct and demeanor of judges. A judge should observe "high standards of conduct" in order to preserve the integrity and independence of, and public confidence in, the judiciary. Canons 1 and 2(A), Rule 501, SCACR. With respect to adjudicative responsibilities, a judge should:

(1) be faithful to the law and maintain professional competence in it;

(2) maintain order and decorum in judicial proceedings;

(3) be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others; and should require similar conduct of lawyers, court staff, court officials, and others subject to judicial direction and control;

(4) afford a full hearing to parties and their lawyers, and should avoid ex parte communications except as authorized by law;

(5) promptly dispose of the court's business; and

(6) abstain from public comment about any pending or impending court proceeding, and require similar abstention from court personnel subject to judicial direction and control.

Canon 3(B)(1) to (6), Rule 501, SCACR (emphasis added); see also Preamble to and Part 1 of Rule 502, SCACR ("Judicial Discipline and Standards").

A recent annotation, *Justification and Correction of Remarks or Acts of State Trial Judge Criticizing, Rebuking, or Punishing Defense Counsel in Criminal Case as Otherwise Requiring New Trial or Reversal*, 54 A.L.R.6th 429 (2010), addresses a plethora of situations where new trials were not required when judges commented about counsel. A reading o the numerous situations addressed in the article suggests that these matters are reviewed on a case by

case basis. Most importantly though, it is evident that the comments by the court to both counsel was the type of comment that would suggest impartiality on the judge's part nor diminish either counsel uniquely in the eyes of the jury.

A review of cases where the Supreme Court has addressed judicial comments show this situation was innocuous. In State v. Simmons, 267 S.C. 479, 229 S.E.2d 597 (1976), the Court found reversible error where the trial judge threatened defense counsel with a jail sentence, immediately after which counsel proceeded no further with the arguments. The Court concluded that the remarks tended to impugn the credibility of defense counsel. In State v. DeBerry, 250 S.C. 314, 157 S.E.2d 637 (1967), the Court concluded the trial judge's admonition to defense counsel to be brief and stop wasting court's time was not abuse of discretion nor prejudicial to the rights of defendant. Similarly in Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992), the Court found there is generally no prejudice when the trial court's hostile comments are made outside the jury's presence.

In State v. Cooper, 334 S.C. 540, 546-547, 514 S.E.2d 584, 587-588 (1999), the Court found no reversible error where the trial judge's comments and rulings were routine and none of the exchanges involved any improper, personal comment about defense counsel, nor did the comments tend to impugn counsel's credibility or diminish him in the eyes of the jury. The Court concluded Many of the comments were innocuous or merely explanatory of the trial court's ruling and were therefore permissible. See State v. Mishoe, 198 S.C. 215, 17 S.E.2d 142 (1941) (holding that remarks made by the judge in the course of a trial need not be confined in such narrow limits as to prevent him from stating his reasons for his rulings).

Importantly, the trial judge's cautionary instructions to the jury removed any impression

by the jurors that the trial judge was trying to diminish either counsel in the eyes of the jury. Judge Manning expressly imputed his own demeanor as an attempt to control civility in the courtroom. Although Appellant wants to suggest that the actions in front of the jury were one sided, the Appellant ignores that his comments were a two edge sword against both counsel getting a little frustrated during this brief portion in the middle of a lengthy trial. Although a juror reported that the juror was scared by the judge's action, it appears that the curative instruction dissipated the concern. It is also evident that both counsel subsequent to the brief admonishment toward both learned "to be nice to each other." A new trial is not warranted.

CONCLUSION

For all the foregoing reasons, the judgment of convictions must be affirmed.

Respectfully submitted,

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May 25, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

THE STATE,

Respondent,

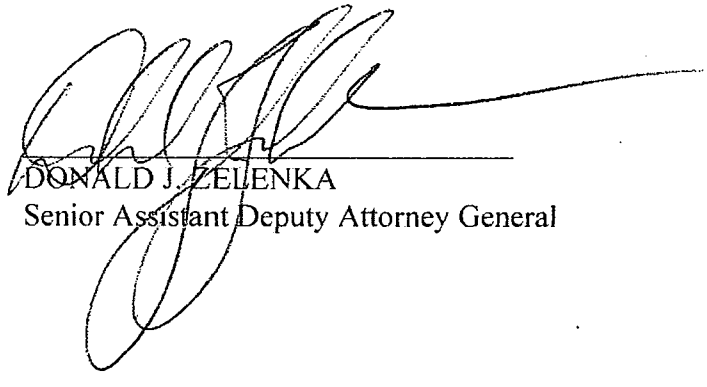
V.

JOHNNIE WALKER GASKINS,

Appellant

CERTIFICATE OF COMPLIANCE

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



DONALD J. ZELENKA
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May 25, 2012

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L. Casey Manning, Circuit Court Judge

THE STATE,

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Appellant

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Tara Dawn Shurling, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 25th day of May, 2012.

DONALD J. ZELENKA
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