

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2012-213734

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES LAMONT MOORE,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not abuse its discretion in admitting certain statements in the video of the drug buy where the challenged statements did not specifically refer to any prior bad acts of Appellant and the statements were far too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b), SCRE, or to prejudice Appellant to such an extent that a new trial is required.**

- II. Appellant's mistrial issue is not preserved for appellate review where Appellant objected to the challenged testimony but then failed to make a contemporaneous objection to the sufficiency of the curative instruction and only later, after other evidence was presented, made a motion for mistrial; but, in any event, the extreme remedy of a mistrial was not warranted under the circumstances of Appellant's case.**

- III. Appellant's contention on appeal that he was improperly tried in his absence is not preserved for appellate review and is without merit in any event where the record establishes that Appellant received the appropriate notice and warnings.**

STATEMENT OF THE CASE

Appellant was indicted in Charleston County in November of 2009 for distribution of crack cocaine. On October 17-18, 2012, Appellant was tried in his absence before the Honorable Kristi L. Harrington and a jury. The jury found Appellant guilty as indicted, and Judge Harrington sealed the sentence. On November 16, 2012, Appellant appeared before Judge Harrington and a sentence of seventeen years was imposed. Judge Harrington denied Appellant's motion to reconsider following a hearing on December 13, 2012. A timely notice of appeal was served and filed.

ARGUMENT

Background

Appellant was indicted in November 2009 in Charleston County for distribution of cocaine base in relation to a drug transaction that occurred on July 16, 2009. (See Indictment). The case was called for trial on Wednesday, October 17, 2012. At the outset of trial, it was apparent that Appellant was not present, and the trial judge inquired about Appellant's location. (R. p. 5). Defense counsel stated that Appellant was out on bond and noted that he had been present that Monday, the first day of the term of court. (R. p. 5-7). Counsel indicated that he had been unable to reach Appellant on his cell phone Monday and Tuesday, but was able to leave a voice mail message that morning instructing Appellant to be at the courthouse at 1:00 pm for his trial. (R. p. 5-6). Counsel also indicated that Appellant's bondsman had been unable to locate Appellant at the place where Appellant supposedly worked. (R. p. 6). Counsel indicated he would prefer that the court issue a bench warrant for Appellant rather than going forward with the trial in Appellant's absence. (R. p. 7-8). The court issued a bench warrant at that time and continued the case until later in the day. (R. p. 10).

Later that afternoon, Appellant was still not present. (R. p. 10-11). When the judge asked defense counsel about Appellant's intentions, defense counsel stated "I don't believe he's coming." (R. p. 10, lines 19-21). Counsel then stated that he had informed Appellant that he would be "locked up" if he did not show up for court and that "possibly the trial might continue as well." (R. p. 10, line 25 – p. 11, line 3). Counsel further elaborated that "I don't think he's coming from the conversation I had with him." (R. p. 11, lines 3-4). He explained that he had a conversation with Appellant over the break

wherein Appellant claimed to be in Mount Pleasant looking for a ride but stated he was on his way to court. (R. p. 11, lines 4-9). Appellant also told counsel that Appellant said he was on his way and would be there in fifteen minutes. (R. p. 11, lines 9-11). Subsequent to that, Appellant again told counsel over the phone that he was still looking for a ride. (R. p. 11, lines 14-15). Counsel reiterated that “I don’t believe that he’s coming. I honestly don’t.” (R. p. 11, lines 15-16). Counsel again urged the judge to not go forward with the case. (R. p. 11, lines 18-20). The judge noted counsel’s objection but stated that, at a minimum, the pre-trial hearings were going forward. (R. p. 11-12). The judge also noted that she was hoping the bench warrant would be effectuated some time that day and that the trial could proceed with Appellant present the following day. (R. p. 12, lines 15-17).

Thereafter, pre-trial motions were heard. One of the defense’s motions was to redact portions of the drug buy video. (See R. p. 17-22). Defense counsel argued that statements in the video referring to a location where people were “hollering” at the confidential informant were improper comments on Appellant’s character because the statements implied that Appellant was “always out there trying to sell drugs.”¹ (R. p. 18-20). The solicitor responded by pointing out that the statements regarding people “hollering” pertained to multiple people at a particular location and that the statements did not implicate Appellant’s character. (R. p. 22; p. 26-27; p. 38-39). Defense counsel then acknowledged that “it’s not outright stated that [Appellant is] trying to sell – always out there trying to sell drugs” but asserted it was implied that Appellant was yelling or “hollering” trying to sell drugs. (R. p. 23, lines 6-20). Counsel also argued that Rule

¹ Defense counsel also argued that certain statements in the video were inadmissible prior consistent statements that would improperly bolster the confidential informant’s testimony. (R. p. 20-21). This specific issue is not being raised on appeal.

403, SCRE, precluded the evidence because there was a danger that the jury would “misinterpret” the “hollering” statements and this would unfairly prejudice Appellant. (R. p. 39-40).

After watching the drug buy video (R. p. 25), the judge stated that she did not know of any drug-related reference that could be inferred from the use of the word “hollering” and stated that she had never heard the word connected with drug use or drug selling. (R. p. 35, lines 20-22). She indicated that she “hollered” at neighbors or passersby when she worked out in her yard. (R. p. 36, lines 15-18). The judge stated that, based upon her review of the video, there was nothing that indicated to her that the “hollering” statements implied that the persons who “hollered” were soliciting drug transactions. (See R. p. 4-8). The judge then ruled as follows:

I have never heard that expression in any other drug case that I either prosecuted or have presided over during the last few years on the bench. And based upon that I do not, in doing – and I’m glad you brought up Rule 403. I do not find that there’s any undue prejudice. That [hollering was related to drug transactions] was not my assumption[] even knowing that that’s what you were challenging. And so I deny your motion that it’s improper character evidence because I do not think that it’s a comment on anyone’s character, let alone your client. (R. p. 40, lines 9-18).²

After more pre-trial issues were discussed, the case was recessed until the next day. (See R. p. 41-58). The next day, upon prompting from the judge, defense counsel announced that Appellant was still not present. (R. p. 58). The solicitor then argued that this was a “quintessential TIA” and that Appellant willfully failed to show up for trial. (R. p. 58, lines 9-21). The trial judge stated she was noting defense counsel’s objection that he “did not wish to go forward” but that the trial was going to commence in

² In a subsequent ruling, the judge appeared to address defense counsel’s second argument regarding improper prior consistent statements and found that statements made by the confidential informant in the video constituted present sense impressions. (See (R. p. 40, line 19 – p. 41, line 3). *See infra* at footnote 5.

Appellant's absence because the case had been on the trial docket, Appellant had been informed of this, and Appellant had been in court on Monday of that week and was aware that his case was "second up" for trial. (R. p. 58, line 22 – p. 59, line 1).

Following jury selection, State called four witnesses, and the testimony and evidence presented established the following facts. A black male was captured on video engaging in a drug transaction with the confidential informant. (See State's Exhibit # 3 at 9:09-11:40). The confidential informant, who had been used in hundreds of successful operations over the years and who had been thoroughly searched before and after this particular drug transaction, described the appearance of the black male to officers, including the fact that the black male was wearing a blue cast on his right arm. (See State's Exhibit # 3; R. p. 112-13; p. 128-29; p. 132; p. 175-77). One of the detectives, who had known Appellant for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Appellant as the black male wearing the cast. (R. p. 117; p. 154-55). Two other officers then obtained Appellant's driver's license photograph, compared it to the drug dealer's face in the video, and concluded that Appellant was the drug dealer. (R. p. 118, lines 10-16; p. 187, line 20 – p. 188, line 4). Appellant's counsel stipulated at trial that the confidential informant turned over crack cocaine to police following the drug transaction. (R. p. 159, lines 2-21; p. 205-206).

During cross-examination, defense counsel extensively questioned the confidential informant regarding an affidavit he signed relating to a previous case involving different defendant wherein the confidential informant indicated that he lied on the witness stand about the defendant selling him drugs. (R. p. 141-45). On re-direct, the solicitor asked

the confidential informant to explain the circumstances surrounding his signing of this affidavit. (R. p. 145-50). In a lengthy response, the confidential informant explained that he signed the affidavit because his life was threatened by the defendant's family and that the statements in the affidavit were written by someone else and were not true. (R. p. 147-50). In concluding his explanation, he stated as follows:

Yeah, I did the wrong thing when I signed that paper but [the previous defendant] know[s] he guilty, and his lawyer know[s] he guilty. Just like the guy who supposed to be on trial here, he guilty -- (R. p. 150, lines 7-10).

The solicitor cut him off at that point, and the confidential informant stated "[t]hat's all I got to say." (R. p. 150, lines 11-12).

Defense counsel objected and asked for a curative instruction. (R. p. 150, lines 13-14). The judge sustained the objection and ordered the jurors to strike the comment from their notes and instructed the foreperson to ensure that the comment was not considered "in any way" during deliberations. (R. p. 150, lines 15-20). Later in trial, defense counsel made a motion for mistrial, stating that he did not believe the curative instruction was "enough to cure any prejudice caused to [Appellant]." (R. p. 161, lines 15-21). The State asserted that the curative instruction given by the judge was sufficient, and the judge denied the mistrial motion but stated that over the break she would review her curative instruction to make sure it was appropriate and would give a further instruction in her charge to the jury if she felt the need to do so. (R. p. 161-62).

After the State rested its case, the defense elected to present no witnesses. (R. p. 192, lines 19-22). Following closing arguments and the final jury charge, the jury returned a guilty verdict after twenty-five minutes of deliberations. (R. p. 223-24). Based on his prior record and the fact that this was Appellant's third or subsequent drug

offense, the trial judge sentenced Appellant to seventeen years. (R. p. 225-26; Sentencing Hearing Transcript, p. 6-7).

I. The trial court did not abuse its discretion in admitting certain statements in the video of the drug buy where the challenged statements did not specifically refer to any prior bad acts of Appellant and the statements were far too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b), SCRE, or to prejudice Appellant to such an extent that a new trial is required.

Appellant argues that the trial court abused its discretion by admitting the unredacted video of the drug buy which contained statements constituting prior bad act evidence that improperly weighed on his character. On appeal, Appellant complains about (1) statements regarding “hollering,” and (2) a statement indicating Appellant was the one who “caused all the problems.”

A. Statements Regarding “Hollering”

Appellant first contends that statements contained in the video of the drug buy indicating that he was “always hollering” at the confidential informant violated Rule 404(b), SCRE, because it implied that Appellant committed prior bad acts, i.e., that he always solicited the confidential informant to buy drugs from him. (Brief of Appellant, p. 4-7). Appellant relies on German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) in support of his argument. In German, the defendant was tried for possession with intent to distribute crack cocaine. German, 325 S.C. at 26, 478 S.E.2d at 688. During opening argument, the solicitor stated that one of the officers involved in the defendant’s arrest had received several tips that the defendant was distributing or selling crack cocaine. Id. On appeal of the post-conviction relief judge’s denial of relief, our Supreme Court held that trial counsel was ineffective for failing to object to the solicitor’s remarks because the statements specifically referred to the defendant and were objectionable as improper

comments on the defendant's character. *Id.* at 27-28, 478 S.E.2d at 688-89. Appellant also points to *State v. Bostick*, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992), a similar case where an officer testified that the police had "intelligence" that the defendant "had been selling crack cocaine from the store." *Bostick*, 307 S.C. at 227, 414 S.E.2d at 176. This Court held that the officer's testimony was improper evidence of prior bad acts and was clearly prejudicial to the defendant, particularly where his defense to the charge for which he was on trial was that the confidential informant had confused him with someone else. *Id.* at 226-30, 414 S.E.2d at 176-77.

In Appellant's case, unlike in *German* and *Bostick*, the statements in the video of the drug buy regarding "hollering" did not refer to any prior bad acts of Appellant. The American Heritage Dictionary defines "holler" as "to yell or shout; cry out; call." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 628 (1980). Similarly, Webster's Dictionary defines "holler" as "to shout or yell." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 2nd COLLEGE EDITION 669 (1976). Urban Dictionary defines "holler" as "to scream or yell."³ See *Holler*, Urban Dictionary (May 14, 2014), <http://www.urbandictionary.com/define.php?term=holler>. Urban Dictionary also defines "holla" as "(1) [a] word used to acknowledge the presence of a fellow companion; (2) For a man to express interest in a particularly impressive female specimen; (3) To contact via telephone." See *Holla*, Urban Dictionary (May 14, 2014), <http://www.urbandictionary.com/define.php?term=holla>.⁴

³ The Urban Dictionary definition of "holler" also includes the following: "[I]n the south east mountains of the [U]nited [S]tates this word is used instead of hollow."

⁴ As this Court recently noted, "Time Magazine rated Urban Dictionary as one of its "50 Best Websites" in 2008 . . . and described it as follows: 'To stay hip, visit Urban Dictionary, which has millions of user-

None of the common definitions of the word “holler” or “holla” include any references to drug solicitation or drug sales, nor does Appellant point to any authority suggesting the word has taken on such a meaning in any setting or context. Moreover, the video itself did not establish that “holler” or “holla” meant anything more than simply making verbalizations, yelling, or making contact with someone. (See State’s Exhibit 3). In fact, as Appellant acknowledges on page 5 of his brief, in one part of the video, the confidential informant substituted the word “yelling” for “holler.” (See State’s Exhibit 3 at 9:56-10:00). Further, many of the “hollering” statements in the video were not connected with Appellant because they referred to more than one person at a location or to an unidentified person. (See R. p. 22, lines 18-23; p. 26, lines 13-17 & lines 22-23; see State’s Exhibit # 3). Contrary to defense counsel’s argument below (see Brief of Appellant, p. 5), there was no evidence before the jury indicating that the police targeted that particular location, or Appellant specifically, due to any so-called “hollering;” instead, the video makes clear that the term was used merely to help officers explain to the confidential informant the location of the drug buy and, later in the video, to describe the persons being discussed. (See State’s Exhibit # 3). There is no reason to believe the jury would attach a nefarious meaning to the word “holler” as used in the video. In sum, the complained-of statements regarding “hollering” did not refer to any prior bad acts of Appellant and consequently did not violate Rule 404(b), SCRE, or Rule 403, SCRE.

Even assuming the statements regarding “hollering” might be construed as having some type of negative connotation, the references were simply too vague and ambiguous

submitted words and definitions. Visitors can vote on the best entries....” Anita Hamilton, *Urban Dictionary—50 Best Websites 2008*, Time (Jun. 17, 2008), http://www.time.com/time/specials/2007/article/0,28804,1809858_1809955_1811527,00.html.” *State v. Price*, 400 S.C. 110, 111, 732 S.E.2d 652, 652 n1 (Ct. App. 2012).

to constitute impermissible prior bad act evidence under Rule 404(b) or to prejudice Appellant to such an extent as to constitute reversible error. Again, the word “holler” was never directly linked to drug transactions. Further, the State never offered any substantive evidence regarding any prior drug transactions involving Appellant. Accordingly, even assuming some type of error occurred, such error was not sufficiently prejudicial to warrant reversal of Appellant’s conviction.⁵ See State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (recognizing appellant's possible drug dealing was merely suggested and no testimony was presented concerning such behavior); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (noting that references to defendant's prior crimes in arresting officer's testimony were extremely vague); State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 (1961) (“We do not think that the testimony referred to creates the prejudicial inference asserted by the appellant,” in case where defendant asserted that a vague reference to his going to the probation office suggested he was convicted of a prior crime); State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) (a vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes); State v. Wiley, 387 S.C. 490, 495-97, 692 S.E.2d 560, 563-64 (Ct. App. 2010) (concluding that the prosecutor’s comment regarding the defendant’s warrant was merely a vague reference to his prior criminal record that

⁵ To the extent the judge may have ruled that statements describing past events were admissible as “present sense impressions,” the State agrees with Appellant that this was error. (See Brief of Appellant, p. 8-10). (See R. p. 40, line 19 – p. 41, line 3). However, the ruling regarding present sense impressions appears to address defense counsel’s *second* argument at trial - which has not been raised on appeal - regarding improper prior consistent statements, rather than his argument regarding improper character evidence with respect to the “hollering” statements. (See R. p. 20, line 14 – p. 21, line 23; p. 40-41). See *supra* at footnote 2. Accordingly, any error in the ruling regarding present sense impressions is inconsequential and harmless.

was not sufficiently prejudicial to warrant a mistrial; further, even if the jury inferred that the defendant committed another crime, the defendant was not prejudiced because the State never attempted to prove he was convicted of some other crime); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). (determining law enforcement agent's isolated testimony regarding fingerprint cards was not so prejudicial to defendant as to warrant mistrial because it was questionable whether jury drew connection between fingerprint card and defendant's prior criminal activity); see also State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) (“A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in ‘exceptional circumstances.’ We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.”) (citations omitted).

Statement Regarding “Causing All the Problems”

Appellant also contends that the statement in the video indicating that the man with the cast on was the one who “caused all the problems” improperly weighed on Appellant’s character and “called into question Appellant’s unspecified bad acts.” (Brief of Appellant, p. 7). This issue is not preserved for appellate review because trial counsel never made mention of this particular statement to the trial judge and, consequently,

never argued that this statement raised an issue of prior bad acts. (See R. p. 17-41; p. 131, lines 8-14). See State v. Holland, 385 S.C. 159, 172, 682 S.E.2d 898, 905 (Ct. App. 2009) (“[The appellant] did not raise this specific ground before the trial court. Therefore, this specific argument is not preserved for this Court’s review.”); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”); State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party may not assert one ground at trial and argue another ground on appeal).

In any event, even assuming the issue was somehow preserved, the trial judge did not commit reversible error by admitting the challenged statement. Initially, the statement - made by an unknown officer over the police radio and barely audible in the background noise of the video - is not clearly making reference to Appellant at that point in the video. (See State’s Exhibit # 3 at 6:05-6:16). It is doubtful the jury would have later connected the incidental comment to Appellant. Furthermore, even if the jurors were to connect the statement with Appellant, the comment did not suggest Appellant committed prior drug transactions, or that he had a propensity to do so, because of the utter vagueness of the comment. Cf. Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000) (noting that prior bad acts involving the *same or similar acts for which the defendant is on trial* are highly prejudicial). In that vein, as discussed above in the context of the “hollering” statements, the comment regarding “causing all the trouble” was simply too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b) or to prejudice Appellant to such an extent as to constitute reversible error, particularly where the State never introduced any evidence about Appellant causing any trouble at some other time. See cases cited *supra*, p. 12-13; see also State v. Brown,

344 S.C. 70, 76-77, 543 S.E.2d 552, 555-56 (2001) (whatever negative connotation appellant's gambling may have had, its impact was minimal and it did not imply any propensity on his part to commit the crime with which he was charged; thus any error in its admission was harmless beyond a reasonable doubt); State v. Haselden, 353 S.C. 190, 195-96, 577 S.E.2d 445, 448 (2003) (testimony regarding the defendant's habits, which resulted in his not spending much time with his wife and son, was simply not bad character evidence because it was not evidence showing he had a tendency toward committing the crime for which he was on trial).

Overwhelming Evidence of Guilt

In any event, there was overwhelming evidence of Appellant's guilt such that any error in admission of the challenged statements in the video was harmless beyond a reasonable doubt. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. Haselden, 353 S.C. at 196, 577 S.E.2d at 448; see State v. Wiley, 387 S.C. at 497, 692 S.E.2d at 564 ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). "When guilt has been conclusively proven by competent evidence such

that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.” State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Thus, when overwhelming evidence of guilt has been presented, trial error will be harmless. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) (“[I]n view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt.”).

In this case, a black male was captured on video engaging in a drug transaction with the confidential informant. (See State's Exhibit # 3 at 9:09-11:40). Appellant's counsel stipulated at trial that the confidential informant turned over crack cocaine to police following the drug transaction. (R. p. 159, lines 2-21; p. 205-206). The confidential informant, who had been used in hundreds of successful operations over the years and who had been thoroughly searched before and after this drug transaction, described the appearance of the black male to officers, including the fact that the black male was wearing a blue cast on his right arm. (See State's Exhibit # 3; R. p. 112-13; p. 128-29; p. 132; p. 175-77). One of the detectives, who had known Appellant for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Appellant as the black male wearing the cast. (R. p. 117; p. 154-55). Two other officers then obtained Appellant's driver's license photograph, compared it to the drug dealer's face in the video, and concluded that Appellant was the drug dealer. (R. p. 118, lines 10-16; p. 187, line 20 – p. 188, line 4). Finally, it is worth noting that the jury deliberated only twenty-five minutes before reaching its guilty verdict. (R. p. 223-24).

The evidence described above constituted overwhelming evidence of Appellant's guilt. Therefore, any error with respect to the admission of the challenged statements in the video was harmless beyond a reasonable doubt. See State v. Bailey, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Appellant's conviction and sentence should be affirmed.

II. Appellant's mistrial issue is not preserved for appellate review where Appellant objected to the challenged testimony but then failed to make a contemporaneous objection to the sufficiency of the curative instruction and only later, after other evidence was presented, made a motion for mistrial; but, in any event, the extreme remedy of a mistrial was not warranted under the circumstances of Appellant's case.

Issue Preservation

Appellant now argues that the trial judge should have granted a mistrial after the confidential informant remarked that Appellant was guilty. This issue is not preserved for appellate review because trial counsel failed to **contemporaneously** make a motion for mistrial following the objected-to comment. In State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012), one of the State's witnesses unexpectedly made a comment about the defendant's parole leave. Heller at 173, 731 S.E.2d at 321. Defense counsel immediately objected and moved to strike. Id. The trial judge sustained the objection and instructed the jury to disregard the comment. Id. After the State completed its direct examination of the witness, the judge took a fifteen-minute break. Id. At that point defense counsel, apparently having reflected further on the matter, made a motion for a mistrial based upon the parole leave comment, arguing that the State's witnesses were not

supposed to bring up the defendant's parole and that the curative instruction was an insufficient remedy. Id. The trial court denied the motion, noting the witness's comment was spontaneous and nonresponsive to the question. Id.

On appeal, the defendant argued that the mention of him being on parole clearly showed he had a prior record and that such evidence constituted reversible error warranting a mistrial where the court's curative instruction was insufficient to cure the error. Id. This Court held that the issue was not preserved for appellate review, finding that, at the time the defendant objected to the testimony, the defendant received the relief he requested - a curative instruction telling the jury to disregard the comment - and his later motion for mistrial did not qualify as a "contemporaneous" motion for mistrial as is required by our error preservation case law. Id. at 174, 731 S.E.2d at 321-22.

The scenario in Appellant's case is essentially identical to the scenario described in Heller, although the issue preservation problem is even more egregious in Appellant's case. Here, defense counsel objected to the unexpected and unsolicited "he guilty" comment made on re-direct examination of the confidential informant and requested a curative instruction. (See R. p. 147, line 4 – p. 150, line 14). The judge sustained the objection and ordered the jurors to strike the comment from their notes and instructed the foreperson to ensure that the comment was not considered "in any way" during deliberations. (R. p. 150, lines 15-20). Defense counsel did not at that time object to the sufficiency of the curative instruction or request a mistrial. Subsequently, the confidential informant provided further testimony on re-direct and then completed his testimony. (R. p. 150-51). Thereafter, another witness was called to the stand and he was examined by the solicitor and cross-examined by the defense attorney. (R. p. 152-

58). The solicitor then read into the record a stipulation regarding the crack cocaine. (R. p. 159). Following the stipulation, the judge recessed for lunch, and, after excusing the jury, inquired about the remaining witnesses from the State and the defense. (R. p. 160-61). Only at that point – well after the conclusion of the testimony of the confidential informant – did defense counsel make his motion for mistrial, stating that he did not believe the curative instruction was “enough to cure any prejudice caused to [Appellant].” (R. p. 161, lines 15-21). As in Heller, defense counsel’s belated motion for mistrial did not qualify as a **contemporaneous** objection to the sufficiency of the curative charge or motion for mistrial. Heller at 174, 731 S.E.2d at 321; see also State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (“No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.”). Therefore, the mistrial issue raised on appeal is not preserved for appellate review.

Discussion Regarding the Merits

“The granting of a motion for 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. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); see State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) (“The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public’s interest in a fair trial designated to end in just judgment.”). In order to receive a mistrial, a party must show both error and resulting prejudice. See State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455,

460 (Ct. App. 2005). A mistrial should not be granted unless absolutely necessary, and instead, all other methods to cure any possible prejudice should be exhausted before granting the motion. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Critically, a curative instruction to disregard the testimony is generally deemed to cure any potential prejudice from improper testimony. State v. Ferguson, 376 S.C. 615, 619, 658 S.E.2d 101, 103 (2008). The grant or denial of a mistrial lies within the sound discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion or an error of law. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000).

Even assuming the issue had been properly preserved for review, the trial judge did not abuse her discretion by denying a mistrial in this case. As stated above, a curative instruction to disregard the testimony is generally deemed to cure any possible prejudice. Here, the trial judge issued a prompt and concise curative instruction to disregard the testimony, and, later in the final jury charge, she reminded the jurors that it was their duty to disregard any testimony that was ordered stricken from the record. (R. p. 212, line 24 – p. 213, line 1). Significantly, jurors are presumed to follow a judge’s instructions to them. See, e.g., State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow curative instructions given to them by the judge). Appellant has failed to provide a satisfactory explanation, either at trial on appeal, as to why the curative instruction was insufficient to cure any possible prejudice.

Furthermore, any possible prejudice from the “he guilty” comment was slight considering that the comment was basically cumulative to other, un-objected-to testimony from the confidential informant. See, e.g., State v. Price, 368 S.C. 494, 499-

500, 629 S.E.2d 363, 366 (2006) (any error in admission of evidence that is merely cumulative to other un-objected-to evidence is harmless). For example, the confidential informant had already testified during cross-examination that Appellant “ain’t here right now because he lying.” (R. p. 144, lines 20-22). In that vein, the thrust of the confidential informant’s testimony was that Appellant sold the confidential informant crack cocaine, i.e., that Appellant was guilty of the crime for which he was on trial. (See R. p. 125-52). Even assuming the confidential informant’s testimony was in fact improper,⁶ it would have hardly been shocking to the jury in this case that the confidential informant believed Appellant was guilty in light of his testimony that established Appellant’s guilt. Finally, although defense counsel did not himself elicit the “he guilty” comment, the comment was made as part of the confidential informant’s explanation of how he had been coerced into signing an affidavit recanting his trial testimony in a previous case - an issue about which defense counsel *extensively* cross-examined him before the comment was made on re-direct. (See R. p. 141-50). See State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) (a defendant on appeal cannot take advantage of an error to which he contributed at trial); see also State v. Bell, 293 S.C. 391, 402, 360 S.E.2d 706, 712 (1987).

In sum, considering that the degree of possible prejudice from the objected-to comment was slight in light of the other testimony in the record, and that any prejudice was undoubtedly cured by the instructions given by the trial judge, the extreme remedy of a mistrial was not warranted under the circumstances of this case. Therefore, the trial judge did not abuse her discretion by denying Appellant’s motion. See State v. Harris,

⁶ Notably, Appellant cites no authority supporting the proposition that the confidential informant’s testimony was actually improper. (See Brief of Appellant, p. 13-14).

340 S.C. at 63, 530 S.E.2d at 627-28 (the grant or denial of a mistrial lies within the sound discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion). Appellant's conviction and sentence should be affirmed.

III. Appellant's contention on appeal that he was improperly tried in his absence is not preserved for appellate review and is without merit in any event where the record establishes that Appellant received the appropriate notice and warnings.

Although the Sixth Amendment guarantees a defendant's right to be present at trial, it is well established that this right may be waived. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007); City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 688 (Ct. App. 2006). Rule 16, SCRCrimP, provides that a defendant may waive his right to be present, and may be tried in his absence, upon the court's finding that the defendant received notice of his right to be present and that he was warned the trial would proceed in his absence if he failed to appear. State v. Fairey, at 99-100, 646 S.E.2d at 448. Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 100, 646 S.E.2d at 448. Also, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449. "The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice." Ellis, 267 S.C. at 261, 227 S.E.2d at 306.

A trial judge must determine that the defendant voluntarily waived his right to be present in order to try the case *in absentia*. Aiken v. Koontz at 547, 629 S.E.2d at 689.

However, “[i]n order to claim the protection afforded by the rule of law that a criminal defendant may be tried in his absence only upon a trial court’s finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in his absence if he failed to attend, **a defendant or his attorney must object at the first opportunity to do so, and failure to so object constitutes waiver of the issue on appeal.**” State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010) (citing State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987)) (emphasis added).

Appellant now argues on appeal that he was improperly tried in his absence because the record does not indicate he was specifically warned that trial would proceed in his absence. (Brief of Appellant, p. 17). This issue is not preserved for appellate review and is without merit. Although trial counsel urged the trial judge to continue the case so that Appellant could be present for trial, he conceded over and over again that Appellant had proper notice of trial.⁷ (See R. p. 7, lines 5-9; p. 8, line 22 – p. 9, line 1; p. 11, lines 2-20; p. 58-59; Sentencing Hearing Transcript, p. 5, line 21 – p. 6, line 3; Motion to Reconsider Hearing Transcript, p. 9-10). He agreed Appellant knew his case was number two on the trial docket and had appeared on Monday of that week prepared to pick a jury, and he specifically stated that he explained to Appellant that if he did not appear the trial could continue in his absence. (R. p. 5-10; p. 10, line 25 – p. 11, line 3). Most notably, trial counsel candidly indicated to the judge that, after speaking with

⁷ Obviously, as an officer of the court, trial counsel was bound to truthfully answer the trial judge’s questions regarding the notice Appellant received for trial. See Rule 3.3, RPC, Rule 407, SCACR (“Candor Toward the Tribunal”).

Appellant on the telephone, he honestly believed Appellant had chosen not to come to trial.⁸ (See R. p. 10, line 19 – p. 11, line 16; see also p. 228, lines 12-17).⁹

Accordingly, any issues regarding the sufficiency of the notice and/or warnings provided to Appellant, and regarding the sufficiency of the trial judge's findings, were waived, are not preserved for review, and are without merit in any event because the record is clear, based on trial counsel's admissions, that Appellant voluntarily elected not to appear for trial after having received proper notice and being warned the trial could continue in his absence. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Dickman, 341 S.C. 293, 295 534 S.E.2d 268, 269 (2000) (a party may not assert one ground at trial and argue another ground on appeal); State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (an issue conceded in the trial court cannot be argued on appeal); State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010) (this Court found it arguable that the defendant did not properly preserve an objection to his trial *in absentia* where, although counsel moved for a continuance until such time as he could locate his client, counsel never specifically objected to a trial *in absentia* and never asserted to the trial judge that his client did not receive the requisite notice of his right to be present or a warning that the trial would proceed in his absence if he failed to attend); State v. Castineira, 341 S.C. 619, 623, 535 S.E.2d 449, 451 (Ct. App. 2000) (trial in absentia issue was without merit where "counsel stipulated that [the defendant] had received the proper notice").

⁸ The trial judge subsequently made findings that Appellant had chosen not to show up for his trial. (R. p. 58, line 22 – p. 59, line 7; Sentencing Hearing Transcript, p. 6, lines 20-21; Motion to Reconsider Hearing Transcript, p. 10, lines 9-10 & lines 14-15).

⁹ After the verdict, counsel told the trial judge that he believed Appellant did not attend the trial because he was afraid. (R. p. 228, lines 12-14).

Furthermore, it is undisputed that Appellant was out on bond, and his signed bail form included a provision stating as follows: “I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence.” See Appellant’s Bail Form, filed with the Charleston County Clerk of Court on 8/14/09).¹⁰ The signed bail form also required Appellant to appear for the general sessions term of court beginning on October 9, 2009, and, if his case was not disposed of during that term, to “appear and remain throughout each succeeding term of court until final disposition is made of his case.” See Appellant’s Bail Form, filed with the Charleston County Clerk of Court on 8/14/09). Appellant’s bail form leaves no doubt that Appellant had proper notice to appear at trial and that he was warned that trial would proceed in his absence. See, e.g., Fairey, 374 S.C. at 101, 646 S.E.2d at 449 (“A bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice.”).

In light of the representations of the solicitor and Appellant’s defense counsel regarding Appellant’s awareness of when his trial was set to begin, Appellant’s appearance at the courthouse at the beginning of the week, and Appellant’s act of signing the acknowledgement on the bail form before he was released on bond, it is clear Appellant was fully aware of his right to be present for his trial, the scheduled date and time of his trial, and the consequences of his failure to appear for trial. Accordingly, the

¹⁰ The bail form was not directly referenced by the parties or the judge during Appellant’s trial. However, the bail form was properly before the trial court because it was filed with the Charleston County Clerk of Court well before Appellant’s trial, thus making it a part of the clerk’s file in Appellant’s case. See Rule 210(c), SCACR (“The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal.”); see also South Carolina Dep’t of Soc. Servs. v. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) (“These documents were filed with the family court; therefore, they were part of the record.”).

trial judge did not abuse her discretion in denying Appellant's continuance request and proceeding with the trial in Appellant's absence. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) ("The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion.").

In any event, a court's decision to try a defendant in his absence is subject to a harmless error analysis. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). In that vein, "[a]lthough the right to be present is a substantial one, **no presumption of prejudice arises from a defendant's exclusion.**" State v. Whaley 290 S.C. 463, 465, 351 S.E.2d 340, 341 (1986) (emphasis added). Here, the jury was instructed that the fact that Appellant was not present for trial was not to be considered as evidence against him (R. p. 218, lines 10-15), and jurors are presumed to follow instructions given by a trial judge. See, e.g., State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow instructions given to them by the judge). More importantly, Appellant did not identify below, and has not identified on appeal, any prejudice whatsoever resulting from his absence from trial. Furthermore, as discussed above, there was overwhelming evidence of Appellant's guilt and his presence at trial could not possibly have altered the outcome.¹¹ See, e.g., State v. McLeod, 362 S.C. 73, 82, 606 S.E.2d 215, 220 (Ct. App. 2004) ("[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached."); State v. Sims, 387 S.C. 557, 566-67, 694 S.E.2d 9, 14-15 (2010) (trial error is harmless where there is overwhelming evidence of the defendant's guilt). Therefore, even if the trial judge

¹¹ In fact, his presence at trial would have only harmed him because it would have allowed the jurors to match up his face with the face of the drug dealer in the video of the controlled buy. (See State's Exhibit # 3 at 9:22-9:30).

somehow erred by trying Appellant in his absence, any error was harmless beyond a reasonable doubt. Appellant's conviction and sentence should be affirmed.

CONCLUSION

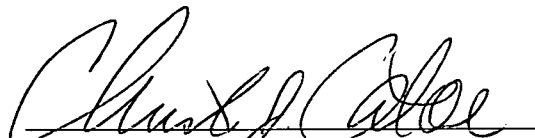
Based on the foregoing, the State requests that this Court affirm Appellant's conviction and sentence for distribution of crack cocaine.

Respectfully submitted,

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SCARLETT A. WILSON
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ATTORNEYS FOR RESPONDENT

May 16, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2012-213734

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES LAMONT MOORE,

APPELLANT.

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MAY 16 2014

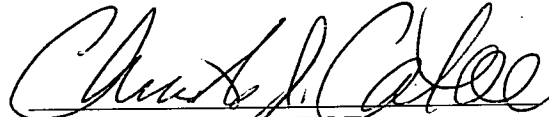
SC Court of Appeals

**RESPONDENT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

The Respondent submits that the following should be included in the Record on Appeal:

- (1) Trial transcript, p. 5-41; p. 58-61; p. 99-192; p. 196-232.
- (2) Sentencing Hearing Transcript, p. 1-7;
- (3) Motion to Reconsider Hearing Transcript, p. 4-11;
- (4) State's Exhibit # 3, Video of Drug Buy;¹
- (5) Certified copies of Appellant's Bail Form, filed 8/14/09, and additional surety form filed 7/30/12; and
- (6) Indictment.

The undersigned hereby certifies this Designation contains no matter that is irrelevant to this appeal.



CHRISTINA J. CATOE

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May 16, 2014

¹ The State submits that since no "unofficial transcript" of State's Exhibit # 3 was presented to the trial judge or the jury, it would not be appropriate to include the same in the record on appeal.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2012-213734

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

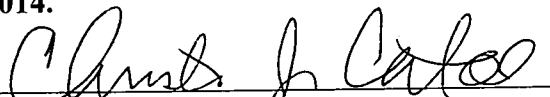
v.

JAMES LAMONT MOORE,

APPELLANT.


AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Initial Brief of Respondent** and **Designation of Matter** in the above-referenced case has been served upon **Brandon S. Smith**, Nelson, Mullins, Riley & Scarborough, LLP, Post Office Box 11070, Columbia, SC 29211-1070, and **Robert M. Dudek**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **16th** day of **May, 2014**.


CHRISTINA J. CATOE
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SWORN to before me this 16th day of May, 2014.


Notary Public for South Carolina.
My Commission Expires: 3-21-2018

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SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

May 16, 2014

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. James Lamont Moore
Appellate Case No. 2012-213734

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent**, along with the **Designation of Matter and Affidavit of Service**, in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina J. Catoe
Assistant Attorney General
SC Bar No. 73562

cc: Brandon S. Smith, Esquire
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