

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County
The Honorable Edward B. Cottingham, Jr., Circuit Court Judge
Appeal Case No. 2012-213461

THE STATE

RESPONDENT,

V.

TYRONE J. KING,

APPELLANT

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

1. In this murder case involving the defense of accident, did the circuit court err in excluding some but not all references to Defendant-Appellant's prior charges of murder, kidnapping, and armed robbery?

2. Did the circuit court—which had admitted the bad-conduct references above on the belief that the State could not redact them—err in denying Mr. King's motion for new trial once it became clear that the State could redact precise portions of the videotaped interrogations?

3. Did the circuit court err in denying a mistrial after a witness referenced the Defendant-Appellant's charge for armed robbery only few transcript pages after the circuit court had told the solicitor in self-described "strong" terms that any questioning about the armed robbery would result in a mistrial?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court abused its discretion in not requiring the State to redact two comments made by Appellant during an interview with law enforcement under Rule 404(b), SCRE, when the argument raised on appeal was not preserved for appellate review, the admission of the two comments was harmless, the comment regarding a prior armed robbery was admissible under Rule 404(b), and the comment regarding an alleged murder and kidnapping charge was not evidence of a prior bad act?
2. Whether the trial court abused its discretion in denying Appellant's motion for a mistrial when a proper curative instruction was given, the argument raised on appeal in regards to the mistrial motion was not presented to the trial court, and Appellant failed to show that he was harmed by the denial of the motion for a mistrial?
3. Whether the trial court abused its discretion in denying Appellant's motion for a new trial

STATEMENT OF THE CASE

On September 10-13, 2012, Appellant Tyrone J. King ("King") was tried by a jury for the murder of James Galloway, assault and battery of a high and aggravated nature of Karen Galloway, pointing and presenting a firearm, and possession of a weapon during the commission of a violent crime. Appellant was tried in the Marlboro County Court of General Sessions before the Honorable Edward B. Cottingham, Circuit Court Judge. Tristan Shaffer, Esquire, and Assistant Public Defender Richard Jones, Esquire, represented Appellant. The State was represented by Deputy Solicitor Kernard Redmond, Esquire, and Assistant Solicitors Mia B. David, Esquire and Mary Thomas Johnson-Lee, Esquire, all of the Solicitor's Office for the Fourth Judicial Circuit.

On September 13, 2012, King was convicted of Murder, Third Degree Assault and Battery, Pointing and Presenting a Firearm, and Possession of a Weapon during the Commission of a Violent Crime. (Tr. 554). He was sentenced to life imprisonment for the murder conviction, thirty days suspended on time served for the assault and battery in the third degree conviction, five years confinement for the possession of a firearm during the commission of a violent crime conviction, and five years confinement for the pointing and presenting a firearm conviction. (Tr. 561). The latter two sentences are consecutive to the life sentence for the murder conviction and to each other. (Tr. 561-62). King subsequently filed a Motion for a New Trial. (Motion, R. pp. xxx-xxx). A hearing on the motion was heard on October 10, 2012. (Motion for New Trial Hearing Transcript). The trial court denied the motion on the record.

(Motion for New Trial Hearing Transcript pp. 16, 21-3, 24-6). Before this Court is Appellant's direct appeal of his convictions for Murder and Possession of a Firearm during the Commission of a Violent Crime, as well as an appeal of the denial of the motion for a new trial. King requests this Court reverse his convictions and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm his convictions.

STATEMENT OF FACTS

On the early morning of November 11, 2011, Appellant Tyrone King shot and killed the victim, James Galloway. King shot Mr. Galloway in the right side of his face. (See Tr. 366). The forensic pathologist testified that Mr. Galloway died as a result of a gunshot wound to the face. (Tr. 370).

King knocks on the victims' door early that morning

Karen Galloway, the murder victim's wife and the victim of the third degree assault and battery, testified that at around 2:30-2:45 on November 11, there was a knock at their door. (Tr. 158). Mrs. Galloway testified that her husband answered the door. (Tr. 158). Mr. Galloway came back to their bedroom and informed Mrs. Galloway that it was Appellant at the door. Mrs. Galloway testified that her husband put his shorts on, went back out the room. She then heard Mr. Galloway go back into the other room, "and he said, 'Naw, man, I don't have' . . ." (Tr. 158, 124). Mrs. Galloway then heard a pop. (Tr. 158).

Devonte M. testified that he heard someone come to the house on the early morning of November 11. (Tr. 177). He saw King that morning. (Tr. 177). Devonte testified that King asked for some beer or liquor. (Tr. 178). Then Devonte saw King shoot Mr. Galloway. (Tr. 179). Devonte indicated that King's gun was initially in his pants; King pulled the gun out and shot Mr. Galloway. (Tr. 179). After hearing the pop from the gun, Devonte jumped but did not run. (Tr. 180). Devonte later stated that he saw King point the gun at Mr. Galloway, but he did not remember see him fire the shot. (Tr. 188). Devonte noted that he

heard the shot, but he was not looking at Mr. Galloway when the shot was fired. (Tr. 188).

King charges into Mrs. Galloway's bedroom

Mrs. Galloway testified that after she heard the pop, she jumped out of her bed. (Tr. 158). By the time she was out of the bed, King started running into her bedroom with the gun in his right hand, pointing the gun in her face and asking her who was in the house with her. (Tr. 159, 160). Mrs. Galloway stated that King then hit her in the top of her head with the gun, and she sat down. (Tr. 159). Mrs. Galloway testified that King hit her with the handle of the gun, and the gun fired a bullet through the wall. (Tr. 160). After King hit her, he walked out of her bedroom and out towards the front room. (Tr. 161). She then got to her telephone and called 911. (Tr. 161). While on the phone, she walked into the living room and saw where Mr. Galloway was on the floor. (Tr. 161).

Reggie Cousar, the Galloways' first cousin who was living with them at the time, testified that on November 11, he was awoken when he heard Mrs. Galloway screaming his name.¹ (Tr. 169). When he walked around from his bedroom to the front room, he saw King pointing a gun to Mrs. Galloway's face. (Tr. 170, 174). Cousar saw King point the gun at her face.² (Tr. 170; see Tr. 174). Cousar indicated that he asked King what was going on, and King started talking about one of his did it. (Tr. 171). Then King turned and pointed the gun at Cousar in his chest. (Tr. 170). Cousar noted that he knew it was a gun from

¹Cousar had not heard the gunshot. (Tr. 172, 173).

²Cousar also noted that he knew King because King was from the neighborhood, and King hung around the house. (Tr. 172).

the way it felt on his chest, and from the fact that he saw it. (Tr. 170). Cousar then heard Mrs. Galloway on the phone talking about her husband being shot. (Tr. 171). When Cousar saw Mr. Galloway on the floor, he rushed to him, and King ran out the door. (Tr. 171).

Mrs. Galloway testified that King snatched the phone out of her hand and hung up the phone. (Tr. 162). When the 911 operator called back, King spoke with her. (Tr. 162). Mrs. Galloway recalled hearing King tell the 911 operator that his friend shot his neighbor. (Tr. 162). Mrs. Galloway asked King for the phone, and she recalled he said that he was not about to go to jail. (Tr. 162). Mrs. Galloway indicated that she asked him to just go outside and surrender, but King declined. (Tr. 162). After some further back and forth, King ran out the back door with the gun and phone in hand. (Tr. 162).

King runs away from the house

Mrs. Galloway testified that King ran out the back door. (Tr. 163). As he did so, she opened the front door and told the officers that King ran out the back door. (Tr. 163).

Deputy Shaw of the Marlboro County Sheriff's Office testified that as he walked towards the front porch of the residence, one of the people on the porch stated that the subject was running from the back door. (Tr. 192). Shaw indicated that he could hear someone running inside the residence. Shaw headed towards the back of the residence. (Tr. 192). As he got to the back corner, but before he could get to the back door, he saw the back door open and someone run out of it. (Tr. 192). Deputy Shaw engaged in a foot chase. (Tr.

192-93). He saw King slide up underneath a truck. Shaw testified that he started shouting to him to show Shaw his hands. Shaw noted that he could tell the subject had something in one of his hands. Eventually, King threw something towards the front of the truck and slid out from under the truck. (Tr. 193). The item was later identified as a telephone from the Galloways' residence. (Tr. 196). In securing King, Deputy Shaw found a bottle of alcohol, but no weapon on King. (Tr. 194).

Shaw noted that he saw no one else exit the Galloway residence. (Tr. 195).

Police investigation

Law enforcement recovered a telephone that was identified as belonging to the victims' house and a liquor bottle near the truck where King was apprehended. (Tr. 216). It was also noted that the liquor bottle was of the same type found in the victim's closet in the master bedroom. (Tr. 216). Law enforcement also found a bullet hole in the master bedroom, which led to the den and to the roof of the residence. (Tr. 216-17). A nine millimeter handgun with an extended clip was found in the wooded area behind King's residence. (Tr. 217). A projectile was also recovered from the living room of the victims' residence. (Tr. 218-19, 225, 231). Also, two cartridge casings were found, one in the living room and one in the master bedroom. (Tr. 235, 236).

Two statements were taken from King. In the first, he claimed that Aloysius McLaughlin was with him that night. (Tr. 288, State's Exhibit Five). He further claimed that they went to the Galloway house to purchase some alcohol,

and McLaughlin shot Mr. Galloway. (Tr. 288, State's Exhibit Five). King then noted that Mrs. Galloway came out of her bedroom hysterical, and he tried to calm her down. (Tr. 288, State's Exhibit Five). He noted that he swung the gun at her. (Tr. 288, State's Exhibit Five). King also claimed that Aloysius ran out the door with the gun, and King ran behind the residence. (Tr. 289).

In his second statement to law enforcement, King claimed that he had obtained the gun from a guy named Broom. (Tr. 330, State's Exhibit Four). King asserted that he was going to try to sell the gun, and he took it to Mr. Galloway's house to see if he wanted to buy it. (Tr. 330, State's Exhibit Four). King claimed that as he was attempting to take the clip out of the gun, it fired and struck Mr. Galloway. (Tr. 330, State's Exhibit Four). He also stated that he would not assert that Mrs. Galloway was lying if she said King struck her with the gun. (Tr. 331, State's Exhibit Four).

The forensic pathologist was able to determine that the shot that killed the victim was fired between six inches and four feet away from the entry wound in the victim's face. (Tr. 366-69).

Round lead particles were found in King's right palm. (Tr. 418, 422). The two cartridge casings recovered from the scene, along with the projectile recovered from the wall in the living room, were all fired from the gun found in King's back yard. (Tr. 440-44).

Mr. McLaughlin and his girlfriend at the time of the incident, Melissa Graham, both testified that they were not with King on the night before or the early morning of the shooting. (Tr. 300-03, 307-12).

ARGUMENT

- I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT REQUIRING THAT TWO COMMENTS MADE BY APPELLANT DURING HIS INTERVIEWS WITH LAW ENFORCEMENT BE REDACTED. THE ARGUMENT RAISED HERE WAS NOT RAISED AT TRIAL, AND IS THUS NOT PRESERVED FOR APPELLATE REVIEW; ANY ERROR IN ADMITTING THE TWO COMMENTS WERE HARMLESS; THE COMMENT ABOUT APPELLANT ROBBING MR. MCLAUGHLIN AT AN EARLIER TIME WAS ADMISSIBLE UNDER RULE 404(B), AND THE COMMENT ABOUT AN ALLEGED PRIOR MURDER/KIDNAPPING CHARGE DID NOT CONSTITUTE EVIDENCE OF A PRIOR BAD ACT.

Appellant contends the trial court erred in not requiring the State to redact two statements made by Appellant during his first interview with law enforcement. First, he contends the court erred in allowing the jury to hear a statement made King in which explains that he had robbed Aloysius McLaughlin and McLaughlin had signed a warrant on him in February of that year. Second, King contends the court erred in not requiring the State to redact a response by King in which he asserts that he had a prior murder and kidnapping charge on his record. This Court should affirm Appellant's convictions. The arguments raised are not preserved for appellate review. Further, any error the court may have made in not redacting these two statements were harmless as there was overwhelming evidence of guilt. The comment regarding the pending robbery charge was not improperly admitted. Finally, the statement regarding the alleged murder and kidnapping charge was not submitted as a prior bad act, and was not inadmissible under Rule 404(b).

Relevant Facts and Argument

Pre-trial discussion regarding the first statement

The first interrogation, State's Exhibit 5, was of an interview done with King on the morning of the shooting on November 11. After Investigator Feldner testified about the voluntariness of the statement, it was played in open court. While the first interview was playing, King made several objections through counsel. Initially, King requested that profanity that he used during the interview be redacted. (Tr. 84). Those requests were denied by the trial court, which indicated that it did not have the capability to do so. (Tr. 84). King further objected on relevancy grounds, to which the trial court again denied the request because it was the language King chose to use during the interview. (Tr. 84-5).

King objected to a discussion about his previous murder charge in the interview being mentioned:

MR. SHAFFER: At this point he's talking about his previous murder charge. It's 4:28 on the video. 4:28:58.

THE COURT: I want that redacted; that part. Can you do that without destroying the whole video?

MS. WHITE: We would have to fast forward it through that part.

THE COURT: Pardon me.

MS. WHITE: We will have to fast forward through it, your Honor.

THE COURT: Well, make sure you do it in the right place, but back up a little bit and then fast forward. I don't want to hear anything about that. To the extent possible get to where he talks about allegedly this incident. Go ahead. Let's see where we're going. Go ahead. You be sure that's redacted.

(Tr. 85, ll 9-23).

Next, King moved to redact a part of the interview where he admitted that he had shot a gun and that he carries a gun with him. (Tr. 86). Specifically, King contended those statements were not relevant, it was a prior bad act, and it was inadmissible under Rule 403. (Tr. 86). The trial court noted the objection for the record, but ultimately found the statement was admissible: "No, sir. There is evidence of the gun was used, and it was evidence as I understand it for the jury's consideration. It was his gun. He mentioned his gun. It's appropriate that it stays and will." (Tr. 86, ll 13-16).

King then moved to redact a discussion about a lawyer he had on a prior charge. (Tr. 86-7). After the trial court indicated that it was inclined to let that part of the interrogation into evidence, King noted that his objection was under Rule 404(b). (Tr. 87). The trial court then noted that it wanted anything that gets into significantly old charges redacted, as well as any reference to prior conduct. (Tr. 87).

King next objected to a portion of the interview where he was discussing charges he had pending from an incident in McColl. (Tr. 88). The trial court agreed that should be redacted. (Tr. 88). Next, King objected to a portion of the video where he discussed being stabbed during an alleged armed robbery. (Tr. 88). The trial court noted that they had discussed this particular segment in chambers, and indicated that it would not require that part of the interrogation be redacted. "I'm leaving that because the individual is coming in, and he's saying he was stabbed 20 times in self-defense. There is a witness coming in saying that's not true; isn't that true?" (Tr. 88, ll 20-3). The trial court further noted that it

was letting the information in based on the totality of the evidence that was there. (Tr. 89).

At that point, King contended "The objection I want to make are 401, 403 and 404(B) and the fact that it's a collateral issue that is not relevant to this case." (Tr. 89, ll 7-9). In response, the State argued, "we thought that this part was relevant because the defendant is saying in this case that he carried a gun because he was stabbed 20 times whereas we know that the guy that stabbed him said that he did so because the defendant was trying to rob him." (Tr. 89, ll 13-18). The trial court ruled that was why it was going to let the information into evidence. The trial court further explained that it was not going to allow Appellant to claim that he was stabbed twenty-two times without the truth coming out as to why he was stabbed. (Tr. 89).

King next objected to a reference of him carrying a gun for self-defense, contending that it was irrelevant. (Tr. 90). The trial court stated that it was going to allow that statement to be played. (Tr. 90).

King next moved to suppress a discussion in which he indicated that he was familiar with members of the Marlboro County Sheriff's Office and the Marlboro County Jail. (Tr. 91). He specifically moved to suppress those statements under Rule 404(b) and Rule 401. (Tr. 91). The trial court denied the motion. (Tr. 91).

King next objected to discussion about his pending charges relating to an incident in McColl. (Tr. 92). The trial court agreed and ordered that the statement made by King regarding how he was going to be charged for robbing a

drug dealer be redacted. (Tr. 92). King next objected to a statement he made about this being his life. That objection was overruled. (Tr. 92). Similarly, an objection to a statement King made about the police around 4:46:14 on the video was overruled. (Tr. 93). Also, the trial court denied an objection based on Rule 404(b) and Rule 403 to the inclusion of a statement where King referred to himself as a criminal. (Tr. 94).

After a brief discussion about whether everything before the second time King was Mirandized was admissible, King objected to another mention of the charges in McColl. (Tr. 95). The State responded by noting that the only reason it was mentioned was because King was saying that Aloysius McLaughlin was the one that murdered James Galloway. (Tr. 96). The investigator was confirming that he was talking about the same person. (Tr. 96). The trial court indicated that he was going to allow that statement to stay in the video. (Tr. 96). At that point, King noted that his objection was under Rules 404(b), 403, and 401. (Tr. 96). The trial court responded that it thought it was appropriate based on the totality of what King was saying. (Tr. 96).

Next, King requested that a statement at around 5:08:25 be redacted.

MR. SHAFFER: Your Honor, at approximately 4:08 – I mean 5:08:25 he said he already had murders on his record, and I move to redact that, 404(B).

THE COURT: What was the specific remark?

MR. SHAFFER: He said, "I've already got murders on my record."

MS. DAVID: Your Honor, he does not have a conviction for murder on his record.

MR. SHAFFER: And he's been charged with murder, Your Honor.

THE COURT: He said -- I'm going to leave it where it is. Go ahead.

(Tr. 96, ll 13-24).

King then objected to the inclusion of a discussion in which he talked about when he was stabbed. (Tr. 97). The trial court ordered that discussion be redacted. (Tr. 97).

Discussion regarding second statement pre-trial

After Investigator Seales testified about the voluntariness of the statement given by King on November 16, 2011, the video of that statement was shown in open court. (Tr. 99-109). King objected to a portion of the video as follows:

MR. SHAFFER: Objection.

THE COURT: What's your objection?

MR. SHAFFER: Just before this point which is 8:44:33 on the November 16th video it -- he begins to talk about he[sic] McColl charges. He asks, 'what about my McColl charges'. He's asking this investigator questions.

THE COURT: They didn't go any further into it that I recall.

MR. SHAFFER: They're about to, Your Honor.

THE COURT: Are they going into the McColl charge?

MS. DAVID: Yes, Your Honor. They're about to for the next four minutes.

THE COURT: Let's strike any mention of the McColl charge.

MR. SHAFFER: I believe that right there, actually, he will be -- the end of the tape will be a perfect time because he says, "I appreciate you being honest with me," and that's almost a natural end of the tape.

THE COURT: Does the McColl charge end the tape any way?

MS. DAVID: Yes, Your Honor. We do not oppose that. We discussed that in chambers.

THE COURT: End it right before he says, 'McColl'.

MS. DAVID: Yes, Your Honor.

THE COURT: Is that what you want?

MR. SHAFFER: Yes, Your Honor.

THE COURT: You're entitled to that.

MR. SHAFFER: Thank you, Your Honor.

THE COURT: Yeah, we discussed that in chambers. Make sure that that's the only change I note in the objection as to that video.

MR. SHAFFER: Yes, Your Honor, that's the only objection.

THE COURT: Okay. And I sustain that. All right.

(Tr. 109, l 17 – Tr. 110, l 23).

After the trial court ruled that both statements were freely and voluntarily given, and after some discussion regarding scheduling, the trial court requested that the parties meet to discuss the redactions. (Tr. 118).

Overnight, King sent an email outlining the video timestamps of the redactions to be made along with the timestamps of the redactions he requested, but which were not granted by the trial court. (Court's Exhibit 1, R. p. xxx). Specifically, King noted the following:

To be Redacted

Previous murder charge 4:28:52 - 4:29:04
Previous murder charge and Mccoll charge 4:32:20 - 4:34:04
Previous murder charge 4:40:44 -- 4:41 : 14
Mccoll charge 4:41:40 - 4:42:36
Stabbing 5:13:30-5:14:03

Not Granted but Objectioned[sic] to (This is not an exclusive list)

Mentions a lawyer on another charge 4:31 :40 (Rules 404b 403)
Prior Stabbing 4:34:04 - 4:34: 1 0 (Rule 401)
Statement[sic] "fuck the police" and " I am a criminal" 4:46:06 - 4:47:07 (Rules 404b and 403)
Aloyisious[sic] is same as previous charge 4:59:18 - 4:59:24 and 5:01:13 - 5:01:25
Prior stabbing 5:10:50 (401)
Prior Murder and Kidnapping Charge 5:08:09 - 5:08:10

Times where he said he shot a gun or carried a gun

4:30:05
4:36:11
4:44:31
5:06:48
5:10:55

(Court's Exhibit 1, R. p. xxx).

The next day, prior to the start of trial, the State moved into evidence the two videos as State's Exhibits Four and Five. (Tr. 121). King noted that pursuant to the redactions for the videotape and the previous objection, he had no further problems with the tapes being admitted. (Tr. 121-22). After that, the parties and the trial court went through a discussion of what was being redacted and what was not being redacted from the two videos.

MR. SHAFFER: And I had made two other objections for that were not ruled upon -- or that were ruled upon by the Court but were denied. Two that I can think of. I want to preserve - - -

THE COURT: What are they, please?

MR. SHAFFER: One was the mention of the prior stabbing, again.

THE COURT: No, they redacted that. Anything to prior stabbing.

MR. SHAFFER: Yes, Your Honor. There was another mention of that that was not redacted because the Court ruled not to redact.

THE COURT: Where was that and what line?

MR. SHAFFER: I think it was at 15:40:50 or approximately 15:40:50.

THE COURT: Can you tell me about that?

MS. DAVID: 15:40:50; that's the -- could the defense attorney be more specific. Tyra White, who has our times for the video, she said it's not on there.

THE COURT: It's not on there.

MS. DAVID: It is not on our -- the time that we have is 4:55:20 to be redacted.

MR. SHAFFER: Your Honor, there is another reference to the stabbing after the Miranda, and it's at 15:10:50. I believe the Court ruled not to redact it yesterday.

THE COURT: I ruled not to redact that one?

MR. SHAFFER: Yes, Your Honor.

THE COURT: Well, if I ruled on it that's fine.

MR. SHAFFER: Thank you, Your Honor. There is -- and there were a few other ones that you ruled not to redact. I would like to actually make this a Court's Exhibit. 15 This is an e-mail with just for clarification of some of the points I objected to.

(Tr. 123 | 18 – 124, | 16).

Further, King noted that he objected to a prior murder and kidnapping charge at 15:08. (Tr. 125). Initially, King noted that he believed the trial court had mentioned that the sheriff's office could not go through line by line and redact every reference to anything in the statement. (Tr. 125). The trial court noted that the equipment that the sheriff's office had was not the as sophisticated as it could be. (Tr. 125). In response, the solicitor noted that the trial court had ruled that the statement during the interview was admissible and not to be redacted. (Tr.

125). Both parties agreed that the trial court had ruled the statement did not need to be redacted. (Tr. 126).

After some discussion about the quality of the videos, King objected to the proposed approach regarding the testimony because they would be cumulative and a prior consistent statement. (Tr. 126-27). Further, counsel raised a due process and equal protection objection against the admission of the videos. Specifically, he contended that some of the reasons for not redacting certain parts were that the equipment in Marlboro County was not sufficient to do so. The trial court noted most of the video was not discernable. (Tr. 128).

After some discussion, both the State and King agreed that the equipment the Sheriff's Office had was current, and that it was not designed to allow for redacting and editing. (Tr. 128-29). King then noted that he believed other agencies could make those redactions. (Tr. 129). After further discussion, King requested that his objections to the statements in the video be made final so that he would not have to object to each one when the video was played for the jury. (Tr. 130). The trial court informed counsel that he was protected for the record. (Tr. 130).

State's Exhibit Five, the video of the November 11, 2011 statement, was played for the jury after Investigator Feidner testified. (Tr. 291). State's Exhibit Four, the video of the November 16, 2011 statement, was published to the jury after Investigator Seales' testimony. (Tr. 343).

Standard of Review

“In reviewing a trial court’s ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion.” State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

Evidence of other crimes is generally admissible when it is necessary to establish a material fact or element of the crime charged. State v. Byers, 277 S.C. 176, 178, 284 S.E.2d 360, 361 (1981); State v. Cheatham, 349 S.C. 101, 108, 561 S.E.2d 618, 622 (Ct. App. 2002).

Evidence of prior bad acts is admissible when it tends to establish (1) motive; (2) intent; (3) absence of mistake; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (5) the identity of the person charged with commission of the present crime.

State v. Sweat, 362 S.C. 117, 123, 606 S.E.2d 508, 511-12 (Ct. App. 2004) (citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); see Rule 404(b), S.C. R. EVID. “[T]he ‘bad act’ must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000). If the prior bad act evidence is

“logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime.” State v. Nix, 288 S.C. 492, 497, 343 S.E.2d 627, 630-631 (Ct. App. 1986)). “If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal.” Sweat, 362 S.C. at 128, 606 S.E.2d at 514.

Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.

State v. Fletcher, 379 S.C. 17, 23-24, 664 S.E.2d 480, 483 (2008)(internal citations omitted).

- 1. King's argument that the trial court failed to properly assess the admissibility of the alleged prior bad acts evidence is not preserved for appellate review. King never requested the trial court undertake a full analysis under Rule 404(b) that he complains was not done.**

Respondent submits that much of King's argument regarding the admission of certain comments King made during his first interview (State's Exhibit Five) is not preserved for appellate review. While King did make a general objection under Rule 404(b), SCRE, he did not specifically request that the trial court assess whether the State was proving those prior bad acts with clear and convincing evidence. King further did not request the trial court engage in an on the record prejudice analysis as required by Rule 403, SCRE. Thus, to the extent Petitioner contends that the trial court improperly admitted the evidence because it did not undertake the required analysis, his argument is not

preserved for appellate review. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating an objection should be sufficiently specific to bring the exact error to the trial court's attention); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal); see State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011) (concluding appellant did not preserve for review arguments that trial court conducted an improper analysis under Rule 403, SCRE, where the arguments were never presented to the trial judge).

Furthermore, if this Court finds the trial court erred in not conducting an on-the-record analysis of balance of the probative value against the prejudicial effect regarding the admission of the two comments by King, Respondent submits the appropriate remedy under state law at this time would be for a remand for such an analysis to be conducted. State v. Spears, 403 S.C. 247, 259, 742 S.E.2d 878, 884 (Ct. App. 2013) (remanding case for on-the-record analysis under Rule 403 when objection made pursuant to Rule 404(b), and no analysis was in the record from the initial trial).

2. Any error in allowing the statements into evidence was harmless; the comments had little to no bearing on the verdicts, and there was overwhelming evidence of guilt supporting the convictions.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176,

399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an 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. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

There was overwhelming evidence establishing King murdered Mr. Galloway absent the comments at issue. Three eyewitnesses identified King as being in the house with the firearm used in the shooting. Karen Galloway testified that she heard King argue with her husband before she heard the shot that killed him. Immediately afterwards, King ran into Karen Galloway's bedroom and pointed the firearm at her. Devonte, the Galloways' grandson, testified that he saw King point the gun at his grandfather immediately before the shooting occurred. Further, immediately after law enforcement arrived, King ran away from the scene. Flight from prosecution is admissible as guilt. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension). The weapon used in the shooting at the victims' house was found behind King's residence. (Tr. 229-30, 440-42). As to the murder charge, King admitted to being in the residence when the shooting occurred. He initially misled law enforcement about being the one who actually shot the victim. Instead, he accused Aloysius McLaughlin of being the one who shot the victim.

The State presented the testimony of Mr. McLaughlin and his girlfriend to disprove King's initial account that they were together on the night of the shooting. (Tr. 300-03, 307-12). Further, in his second statement, King later admitted that he was the one who shot Mr. Galloway. (State's Exhibit Four).

Malice could be inferred from several different facts. First, Mrs. Galloway's testimony regarding hearing the discussion between her husband and King prior to the shooting indicated some ill will on the part of King. (See Tr. 158). Second, Devonte's testimony that he saw King point the gun at Mr. Galloway indicated there was no accident. (Tr. 179). Malice could also have been inferred from the fact that King killed the victim with a firearm. See State v. Belcher, 385 S.C. 597, 612 n. 9, 685 S.E.2d 802, 810 n. 9 (2009)(noting that State can argue malice can be inferred from use of a deadly weapon even though jury may not be charged with inference of malice from use of deadly weapon).

Also, there was overwhelming evidence King was in possession of a firearm during the commission of the murder. Again, three eyewitnesses saw King with the gun in the victims' house that early morning. Devonte saw it in King's hand just prior to the shooting. (Tr. 179). Mrs. Galloway saw it right after the shooting was over when King attacked her. (Tr. 160). Mr. Cousar saw the gun when King pointed it at him shortly after he attacked Mrs. Galloway. (Tr. 170). King also admitted to having the gun in his possession during the shooting in his second statement to law enforcement. (State's Exhibit Four).

There is nothing in the record to support a finding that the two comments made by King that are at issue in this appeal played any role in his convictions. None of the facts relating to those alleged acts were presented by the State. Thus, there were no details for the jury to consider to see if King's acts in this case were similar to those in the other alleged acts. Further, the State did not reference the comments at any other point in time during the trial. The only other mention was made by Ms. Graham, and the trial court immediately instructed struck the comment by Ms. Graham from the record, and he later instructed the jury to not consider what she had said in regards to her prior encounter with King. (See Tr. 307-12). In all, there was overwhelming evidence of guilt. Thus, his convictions for the murder of Mr. Galloway and for possession of a firearm during the commission of a violent crime should be affirmed.³

3. The trial court did not err in not requiring the comments regarding the prior robbery of Aloysius McLaughlin from the interview video; it was admissible under Rule 404(b).

Appellant contends the trial court erred in not requiring the State to redact a statement made by King in which he admits that he had robbed McLaughlin at some point in time before the shooting.

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Rule 404(b), SCRE. “It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or

³ Respondent would note that King has waived his challenges to the convictions for pointing and presenting a firearm and for the assault and battery in the third degree. See IBOA at pp. 23, n. 7; 39, n. 13).

intent.” Rule 404(b), SCRE. “As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE.” State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013)(citing Clasby, 385 S.C. at 154, 682 S.E.2d at 895). “If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b).” Id.

This court has held if “an on-the-record Rule 403 analysis is required, [we] will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts.” State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct.App.2002). In King, this court determined the trial court's ruling was “a compressed Rule 403/404(b) analysis” with “some indicia of his consideration of whether admission of the testimony was fair to King (i.e., more probative than prejudicial).” Id. at 157, 561 S.E.2d at 647.

King's comment regarding the prior robbery was clearly relevant, especially given the context in which the comment was made. During the interview, King claimed that he was riding with McLaughlin that night, and that McLaughlin was with him when he went to the Galloway home. (State's Exhibit Four). He further indicated that he and McLaughlin went to the Galloway home to purchase some liquor. (State's Exhibit Four). King further alleged that McLaughlin was the one who shot Mr. Galloway. (Tr. 288, State's Exhibit Four). King further claimed in the interview that after McLaughlin shot the victim, he took the gun from McLaughlin, which would have been just prior to Mrs. Galloway

seeing King with the gun. (Tr. 288, State's Exhibit Four). In explaining who he is referring to, King states that McLaughlin was the guy he robbed and who had signed out a warrant on him. (State's Exhibit 4, at 5:01:12 – 5:01:26).

The comment was relevant as to the identity of the shooter in this case. In his first statement to law enforcement, King had indicated that McLaughlin was the one who shot the victim. The mention of his prior robbery of McLaughlin both undermined King's contention that the two would have been friends at the time of the shooting, and it further corroborated McLaughlin's later testimony that the two were not friends at the time of the shooting. "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. Evidence is admissible to corroborate the testimony of a previous witness, and whether it in fact corroborates the witness' testimony is a question for the jury." State v. Stroman, 281 S.C. 508, 510, 316 S.E.2d 395, 397 (1984) (internal citations omitted). Since the two were not friends at the time of the shooting, it was less likely that McLaughlin was at the scene when the shooting occurred, and it was unlikely he was the shooter.

Furthermore, Respondent submits it was shown by clear and convincing evidence. The comment by King that he had previously robbed Mr. McLaughlin was an unsolicited admission of guilt on King's part. The question asked by the investigator did not prompt King to make the admission.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, S.C. R. EVID. "Unfair prejudice means an undue tendency to suggest a decision on an improper

basis.” State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). “When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” State v. Lyles, 379 S.C. 328, 336-37, 665 S.E.2d 201, 206 (Ct. App. 2008). “A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in ‘exceptional circumstances.’” State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001).

The State submits the probative value of the admission of the comment by King that he had previously robbed Mr. McLaughlin was not substantially outweighed by any prejudice that may have resulted from the presentation of the comment. Again, the mention of the comment was very brief. The State did not emphasize the comment or the prior robbery throughout the rest of the trial. No details of the robbery were presented to the jury. In all, the mention of the robbery was not highly prejudicial to King. As already noted, it was probative to explaining why Mr. McLaughlin, who was treated as a person of interest early in the investigation, was not involved in the shooting. Thus, Respondent submits the trial court did not abuse its discretion in not requiring the State redact the comment from State’s Exhibit Five. As a result, King’s convictions should be affirmed.

4. The statement made by King regarding a prior murder and kidnapping charge did not constitute evidence of a prior bad act.

Contrary to King’s assertions, his comment regarding having a prior murder and kidnapping charge did not constitute evidence of a prior bad act.

The State never presented any testimony or evidence that King killed anyone prior to this murder. Nor did the State present any testimony or evidence that anyone was ever kidnapped by King prior to this incident. In fact, the State acknowledged during the argument regarding this comment that King had never been charged with murder or kidnapping before the incident involved in this case. (Tr. 96). King also never acknowledged in the two interviews that he ever killed anyone before he murdered Mr. Galloway, or that he had kidnapped anyone prior to the incident for which he was tried. King's comment that he had pending murder and kidnapping charges was not evidence that some prior bad act occurred. It was only evidence that he thought he was charged with a prior crime. As such, Respondent submits the comment does not fall under the purview of Rule 404(b) as it was not evidence of a prior bad act. As a result, King is not entitled to relief upon this claim. In light of the fact that Rule 404(b) does not apply to this comment, and in light of the fact that any error in admitting the comment was harmless, Respondent submits this claim should be denied, and King's convictions for the murder of Mr. Galloway and for possession of a weapon during the commission of a violent crime should be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING KING'S REQUEST FOR A MISTRIAL AFTER MELISSA GRAHAM MENTIONED KING HAD ROBBED HER AND ALOYSIUS MCLAUGHLIN PRIOR TO THE MURDER; THIS ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW AND WAS WAIVED BY KING AT TRIAL; KING RECEIVED AN ADEQUATE CURATIVE INSTRUCTION, AND KING FAILED TO SHOW A MISTRIAL WAS WARRANTED.

During King's trial, the State presented two witnesses, Aloysius McLaughlin and Melissa Graham, to discount earlier testimony that reflected that King had advised law enforcement that Aloysius McLaughlin was present in the Galloway home, and that McLaughlin was the one who shot the victim. Prior to McLaughlin's testimony, King objected to the any reference by McLaughlin to pending charges that King had. (Tr. 296). In response, the State noted that it did not intend to ask any questions about the pending charges; instead, it intended to ask McLaughlin if he was with King on the night of the shooting and if McLaughlin was friends with King. (Tr. 296). The trial court strongly warned the State to not go beyond those limited questions. (Tr. 296-97). The State further noted that McLaughlin "is not to mention that he would not have been with the defendant the night before because the defendant had robbed him two weeks prior." (Tr. 297, ll 4-7). The trial court further noted that if information about the prior robbery was made by the State, it would declare a mistrial. (Tr. 297). Based on those representations, King indicated that he would have no objection to the questions to be asked by the State. (Tr. 297).

Mr. McLaughlin testified that he was with his girlfriend and sister on the evening before the shooting. (Tr. 300-01). He further testified that he was not with King on the night of November 10 or on the morning of November 11). (Tr.

302). Finally, McLaughlin testified that he was not friends with King at that time. (Tr. 302).

Melissa Graham, McLaughlin's girlfriend, testified that she and McLaughlin were with his sister all day on November 10. (Tr. 307-08). She then indicated that after they left his sister's house, they went to McLaughlin's mother's house. (Tr. 308). After that, Graham noted that she and McLaughlin then went to the Sheriff's Office.

They came by to the house that morning about four o'clock and said they needed to talk to us about something that happened that night. So we looking like, 'Oh, Lord, What we done did now' you know what I'm saying. He's talking about he couldn't talk to us right then. He would talk to us when we get down there.

...
He said he would talk when we got down there. So when we got down there that's when he told us that he was dealing with a murder with Tyrone King. So we looking like how we going to help this man murder somebody he just robbed us ---

MR. SHAFFER: Objection, Your Honor.

THE COURT: Wait. Don't go. Rephrase your question.

MR. SHAFFER: Your Honor, I move to strike and ---

THE COURT: I'll strike that. Go ahead. Go ahead.

(Tr. 309, ll 4-9, 11-19). Graham then confirmed that she did not see King that night. (Tr. 309-10).

After the jury was excused for a moment, the trial court had the court reporter read back the transcript of what Graham stated. (Tr. 310). The trial court then stated that it would strike the statement regarding the robbery, and that it would tell the jury to not consider that. (Tr. 310).

When the jury returned, the trial court gave the following instruction:

The last utterance made by this witness as to this man is stricken from the record. Not a part of the record. You must not and may not consider that remark in any way whatsoever. It's totally irrelevant to any issue in this case. It's stricken, and is not to be considered. I'm referring to that last part, "This man, etc." Everybody understand that?

(Tr. 311, ll 3-9). Graham went on to confirm that she was not friends with King on November 10 and 11. (Tr. 311-12).

After cross examining Graham and after the jury was dismissed, King moved for a mistrial. Specifically, he contended "the instruction is insufficient to cure the fact that he had a previous armed robbery charge pending." (Tr. 313, ll 10-12). When asked for a proposed curative instruction, King contended that he did not believe any instruction would be sufficient. (Tr. 313). Ultimately, the trial court declined to grant the motion for a mistrial:

That this witness just blurted it out, and I told the jury to excuse it and to dismiss it and it's not relevant. There is no part in the record, and if you've got an addition instruction to them I'll be glad to do it. But that little statement blurted out by this witnesses is not sufficient to cause a mistrial in this case.

I'm not sure that the jury even heard it, but she said it. And I've instructed the jury, and I respectfully decline to mistrial on something that she said that was not asked for by the Solicitor.

(Tr. 314, ll 4-14).

After the trial court denied the motion, counsel attempted to clarify the motion by noting that the statement at issue was that King had previously robbed him. (Tr. 314). After the court reporter read into the record, King withdrew the motion.

MR. SHAFFER: Withdraw the second one. I think I can ---

THE COURT: Sir?

MR. SHAFFER: I'm going to withdraw. It's actually in the video, so I can withdraw.

THE COURT: You're going to withdraw the objection?

MR. SHAFFER: Yes, Your Honor. I'm going to withdraw the objection to the robbery because it was in the video. I believe it's already in evidence so I don't really have any grounds for a mistrial at this point. Thank you, Your Honor.

THE COURT: That's solves that problem. . .

(Tr. 314, l 25 – Tr. 315, l 10).

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct.App.1999). Appellate courts have favored the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851; see also State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.").

"[A] mistrial should not be ordered in every case in which incompetent evidence is improperly admitted." State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct.App.2006)(citing State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999) and Patterson, 337 S.C. at 227, 522 S.E.2d at 851). "[T]he trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (internal citation omitted).

Argument

- 1. The trial court did not abuse its discretion in denying the motion for a mistrial. A proper curative instruction was given, and a mistrial was not warranted.**

The trial court did not err in denying Appellant's request for a mistrial. First, any prejudice created by the comment made by Ms. Graham was resolved by the trial court's curative instruction. 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. Goldsmith, 301 S.C. 463, 467, 392 S.E.2d 787, 789 (1990) (quoting State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct.App.2005)); see State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. Harris, 382 S.C. 107, 119, 674 S.E.2d 532, 538-39 (Ct.App.2009). Here, the trial court strongly instructed the jury to disregard Ms. Graham's comment about King. Under South Carolina law, jurors are presumed to follow the trial judge's instructions. State v. Dunlap, 346 S.C. 312, 550 S.E.2d

889 (Ct.App.2001), affirmed as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) quoting Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 n. 1 (1999) (“A jury is presumed to [have followed the trial judge’s] instructions.”). In light of the curative instructions that were given by the trial court, Respondent submits the trial court did not abuse its discretion in denying the motion for a mistrial.

2. The argument raised by King on appeal is not preserved for appellate review. It was not raised to the trial court, and the general motion for a mistrial raised by King at trial was withdrawn.

King’s argument that the trial court failed to assess the proper factors in resolving to deny his motion for a mistrial is not preserved for appellate review. First, King never contended the trial court should have considered the factors outlined in State v. Thompson, 276 S.C. 616, 621 (1981) in deciding whether to grant or deny the motion. All King argued was that he did not believe that the curative instruction was sufficient to cure the harm created by the comment made by Ms. Graham. (Tr. 313-14). Since the argument King raises now was not presented to the trial court, it is not preserved for appellate review. See Johnson, 363 S.C. at 58, 609 S.E.2d at 523 (stating an objection should be sufficiently specific to bring the exact error to the trial court’s attention); Adams, 354 S.C. at 380, 580 S.E.2d at 795; see also Perez, 334 S.C. at 565-66, 514 S.E.2d at 755 (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); Tucker, 319 S.C. at 428, 462 S.E.2d at 265 (party cannot argue one ground below and then another on appeal).

Furthermore, King waived his argument for the mistrial motion by withdrawing the motion at trial. The record reflects that he clearly withdrew his motion, and the trial court accepted the withdrawal as a resolution to the argument. Thus, this claim is not preserved for appellate review, and it should therefore be dismissed.

3. The denial of the mistrial motion should be affirmed because the comment made by Ms. Graham was harmless.

Respondent submits that the denial of the mistrial motion should be affirmed because the admission of the comment made by Ms. Graham was ultimately harmless. Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Adams, 354 S.C. 361, 380-81, 580 S.E.2d 785, 795 (Ct. App. 2003); see also State v. Curry, 370 S.C. 674, 636 S.E.2d 649(Ct.App.2006)(error is harmless when it could not have reasonably affected the result of the trial). An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant. State v. Lee-Grigg, 374 S.C. 388, 414-15, 649 S.E.2d 41. 55 (Ct.App.2007). No definite rule of law governs finding an error harmless; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Lee-Grigg, supra; see also State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002)(in determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict).

As already noted in section two of Argument I, there was overwhelming evidence that tended to prove the King's guilt, which was wholly independent of any speculative knowledge of the prior robbery of Mr. McLaughlin and Ms.

Graham. As such, Respondent submits that Appellant is unable to prove prejudice, and that as a result, any error is harmless. Thus, the trial court did not abuse its discretion in denying the motion for a mistrial based upon Ms. Graham's comment. Therefore, Respondent submits that this claim should be denied, and that this Court should affirm the findings of the lower court.

III. THE TRIAL COURT DID NOT ERR IN DENYING KING'S MOTION FOR A NEW TRIAL.

As already noted, King was convicted and sentenced on September 13, 2012. (Tr. 553-55, 561-62). On September 24, 2012, King served and filed his motion for a new trial. (Motion, R. pp. xxx-xxx). In the Motion, King raised two arguments. First, he contended that one of the jurors failed to disclose information regarding her relationship with King's common law wife. Second, he contended the State was incorrect in its assertions that they would be unable to redact specific statements in the interrogation videos. Third, he contended that in the State's closing argument, the solicitor's argument regarding reasonable doubt was confusing and burden shifting.

In respect to the second argument, King asserted that the software for viewing the interrogation video would allow a user to redact portions of the video in one-second intervals. Thus, King argued the State's assertion that certain redactions could not be made was not true. King further noted that two statements in particular should have been redacted:

Investigator: Well, that's what I am saying. I mean if you didn't do it, I mean why didn't you just go out in the front yard, give the gun to the police and say hey, man, Aloysius just ran out the back door?

King: They didn't give me a god damn chance. Man she steady screaming . about my god damn I already got — I already got — I already got a murder kidnapping charge on my record. She didn't see shit - she was in a room.' Located at 5:08:08 - 5:08:27

Investigator: Who is that?

King: Aloysius, Same dude that I robbed, me and him got back on good terms.

Investigator: Aloysius

King: From McColl, that one - same dude that signed a warrant on me back in February. Me and him back on good terms." Located at 5:01:12 - 5:01:26

(Motion for New Trial, pp 3-4, R. pp. xxx-xxx).

A hearing on the motion was held before the Honorable Edward B. Cottingham, Circuit Court Judge on October 10, 2012. (Motion hearing transcript, R. pp. xxx-xxx). King was present and was represented by Tristan M. Shaffer, Esquire. Id. The State was represented by Deputy Solicitor Kernard E. Redmond and Assistant Solicitors Mary Johnson Lee and Mia B. David. Id.

At the hearing, in regards to the second issue, King argued that contrary to assertions made during discussions regarding the State's capability of redacting portions of the interview video, it was possible for redactions to the video to be made. (Motion hearing transcript 16-7, R. p. xxx-xxx). King specifically identified the references he made to the pending armed robbery charge as the language that should have been redacted. (Motion hearing transcript 17-8, R. pp. xxx-xxx).

In response to the motion, the State argued that in regards to the first statement, King made the reference to his armed robbery charge in the context of explaining that at one point, he was not on good terms with the person that King was alleging was in the house with him when the shooting occurred.⁴ (Motion hearing transcript 18-9, R. pp. xxx-xxx). The court noted that it also recalled the reference to the charge by King was made in that context. (Motion hearing transcript 19, R. pp. xxx-xxx).

⁴ This statement was actually the second listed in the Motion.

King further contended that his motion was essentially a renewal of the objection he made during the Jackson v. Denno hearing with extra evidence to support his contention that the program was capable of making the redactions. (Motion hearing transcript 20, R. pp. xxx).

In response, the trial court stated:

Well, I have two thoughts about it. First, I that late date in the trial of the case, it would've delayed the case to at least the following week to have that done because Sherriff's Office of Marlboro County don't have that capability. Secondly, it was his utterance, voluntarily made by him and he made the reference in the context of trying to blame somebody else for the shooting. You can -- have to agree to that.

(Motion hearing transcript 21, ll 1-8). The court asked for further argument on the other statement in the motion. During that discussion, the State contended that the statement was not the result of any question from the investigator, and the information was voluntarily offered by King. (Motion hearing transcript 22, R. p. xxx). King contended that it would still be inadmissible.

The trial court denied the motion in regards to the second issue.

Well, I want the record to reflect there were two videos and the first video, I didn't even -- there was continuous statements by him and I didn't even permit that to be played.

I conclude in this case that these were his utterances. The first utterance made by him was as he tried to blame a third party for the killing. The second utterance was made by him as an excuse as to why he hid the gun. And they were his utterances not provoked by any question of the State. I conclude that they were harmless in the context that he did it and I certainly would deny a new trial based on that bases.

Mr. Shaffer, as Defense counsel, based on what you had, you did the best job you could. But the evidence in this case as to his guilt was simply overwhelming. His own actions showed it. There was a young boy who saw him kill his granddaddy and then

the deceased wife came out when it was going on and he knocked her in the head with a 9 millimeter, all of which was uncontradicted. And there is nothing in these comments or that he made as an excuse, he made them trying to cover up his actions. So, I would deny that, too. And I want an order prepared as to those two issues but bringing up both of his utterances, do you understand?

MR. REDMOND: Yes, sir. Yes, sir, Your Honor.

THE COURT: Both of them were made by him and they were made by him as an excuse; one, as to why somebody else did it; and two as why he tried to hide the gun.

(Motion hearing transcript 22, l 15 – 23, l 15, R. p. xxx, l 15 – p. xxx, l 15).

In the Order Denying Defendant's Motion for a New Trial, the trial court ruled on this issue as follows:

On Wednesday, October 10th, 2012, the Court heard Defendant Tyrone King's Motion for a New Trial that was filed in the above-styled and numbered cause. Upon consideration of the motion, evidence on file, response, the record and arguments of counsel, the Court finds that the Motion for a New Trial is DENIED on the following grounds:

- Both parties were given an opportunity to redact the videos and/or agree to the redacted times when played before the court, following pre-trial motions on August 27th, 2012. The Court then ruled upon admissibility of the video statements on September 10th, before the trial began.

(Order Denying Defendant's Motion for a New Trial, R. p. xxx).

Standard of Review

"A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion." State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) (citing State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983)).

Here, the trial court did not abuse its discretion in denying the motion for a new trial. This motion was essentially a continuation of the argument of the admission of the two comments King made about alleged prior bad acts. As already discussed in above in Argument I, the trial court did not abuse its discretion in the admission of those comments.

To the extent King contends that the written order improperly denied the motion for a mistrial, Respondent submits that King's contention is without merit. First, the written Order simply states that the trial court denied the motion for a new trial on that issue. While the trial court does mention that the parties were given an opportunity to redact the videos and that it ruled upon the admissibility of the interviews on September 10, it does not provide any specific reasoning as to why the motion was denied. Respondent submits that the trial court's denial was not based upon the trial court's determination that it could not revisit issues already decided, as suggested by Appellant. To the contrary, the written Order reflects that the trial court had not been provided with a sufficient reason to overturn its prior ruling, which was proper as outlined in Argument I.

To the extent King asserts the ruling made by the trial court at the hearing was improper, Respondent disagrees. The trial court noted that the comments at issue were admitted in light of the context in which they were made, and that there was no question the comments were voluntarily made by Appellant. Further, the trial court also noted that admission of the two comments was harmless. Respondent submits that the trial court's determination that the two comments were harmless is supported by the record. Further, the trial court's

determination that they were admissible because of the context in which they were made is also supported by the record as outlined above in Argument I. Thus, Respondent submits the denial of the motion for a new trial was not the result of an abuse of discretion by the trial court. This claim should be denied, and King's convictions should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm his convictions in the murder of James Galloway, assault and battery of the third degree, pointing and presenting a firearm, and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

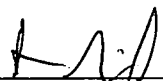
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May 19, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County
The Honorable Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2012-213461

THE STATE,

Respondent,

vs.

TYRONE J. KING,

Appellant.

PROOF OF SERVICE

I, Alphonso Simon, Jr., of counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant and Motion to File Initial Brief of Respondent Out of Time by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record, Howard W. Anderson, III, Esq., Law Office of Howard W. Anderson, III, LLC, P.O. Box 851, 402 Pendleton Rd., Ste. #3, Clemson, South Carolina 29633-0851; and to Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201-3332.

I further certify that all parties required by Rule to be served have been served.

This 19th day of May, 2014



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STATE OF SOUTH CAROLINA
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Appeal from Marlboro County
The Honorable Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2012-213461

THE STATE,

Respondent,

vs.

TYRONE J. KING,

Appellant.

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

Respondent proposes the following be included in the record on Appeal:

1. Trial Transcript pages 55-61; 66-82; 100-08; 120; 138-49; 157; 196-99; 210-37; 278-90; 294-95; 323-33; 344-45; 358-69; 411-19; 422; 436-43; 504-26; 528-47;
2. October 10, 2012 hearing transcript pages 1-2, 24-6.

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

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May 16, 2014.



ALAN WILSON
ATTORNEY GENERAL

19
May 16, 2014

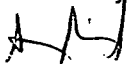
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: State v. Tyrone J. King
Appeal from Marlboro County
Appellate Case No. 2012-213461

Dear Ms. Kitchings:

Enclosed for filing in your office is the original Initial Brief of Respondent, Designation of Matter and Certificate of Service in the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,


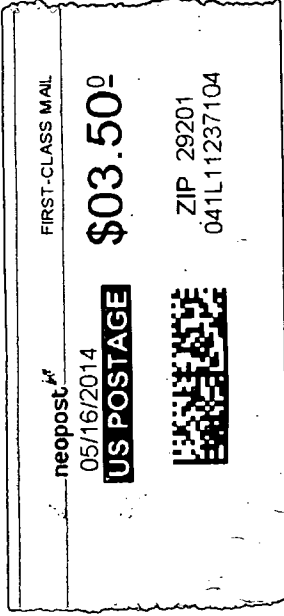
Alphonso Simon, Jr.,
Assistant Attorney General

AS/dmd

Enclosures

cc: Howard W. Anderson, III, Esq. (w/two copies of encls.)
Robert M. Dudek, Esq. (w/two copies of encls.)

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