STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2013-000356

THE STATE,

Respondent,

vs.

CAROLYN H. POE,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

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

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

Post Office Drawer 3368
Aiken, SC 29802
(803) 642-1557

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT 10

The trial judge did not abuse his discretion regarding the scope of the solicitor's cross-examination of Appellant because defense counsel opened the door to the objected-to questioning by directly pitting Appellant against the State's witnesses during his direct examination of her. However, even assuming that the door was not opened and that the objected-to questioning constituted improper witness pitting, any error resulting from that questioning was entirely harmless in light of the evidence and testimony presented during trial conclusively establishing Appellant's guilt coupled with the facts that Appellant pitted herself against the State's witnesses during her own testimony, that Appellant personally impeached her own credibility by testifying untruthfully, and that the jury's attention was properly called to the absence of any motive or reason for the State's witnesses to testify untruthfully against Appellant. 10

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998). 11, 12, 13, 16

Calderon v. California, 525 U.S. 141 (1998). 17

State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1986). 17

State v. Avant, 85 S.C. 570, 575, 67 S.E. 908 (1910). 11

State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999). 13

State v. Benning, 338 S.C. 59, 524 S.E.2d 852 (Ct. App. 1999). 11

State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012). 14

State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978). 14

State v. Bonneau, 276 S.C. 122, 276 S.E.2d 300 (1981). 17

State v. Bryant, 316 S.C. 216, 447 S.E.2d 852 (1994). 11

State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005). 14

State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). 11

State v. Hariott, 210 S.C. 290, 42 S.E.2d 385 (1947). 12

State v. Kennedy, 143 S.C. 318, 141 S.E. 559 (1928). 13

State v. King, 367 S.C. 131, 623 S.E.2d 865 (Ct. App. 2005). 11

State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983). 16

State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011). 15

State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995). 16

State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007). 13

State v. Sapps, 295 S.C. 484, 369 S.E.2d 145 (1988). 11

State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956). 11, 12

State v. Thompson, 304 S.C. 85, 403 S.E.2d 139 (Ct. App. 1991). 12

State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004). 17

State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010). 17

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). 11

State v. Wingo, 304 S.C. 173, 403 S.E.2d 322 (Ct. App. 1991). 12

State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995). 13

Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). 12, 16

Town of Hartsville v. Munger, 93 S.C. 527, 77 S.E. 219 (1913). 15

United States v. Hastings, 461 U.S. 499 (1983). 13

STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse his discretion regarding the scope of the solicitor's cross-examination of Appellant because defense counsel opened the door to the objected-to questioning by directly pitting Appellant against the State's witnesses during his direct examination of her. However, even assuming that the door was not opened and that the objected-to questioning constituted improper witness pitting, any error resulting from that questioning was entirely harmless in light of the evidence and testimony presented during trial conclusively establishing Appellant's guilt coupled with the facts that Appellant pitted herself against the State's witnesses during her own testimony, that Appellant personally impeached her own credibility by testifying untruthfully, and that the jury's attention was properly called to the absence of any motive or reason for the State's witnesses to testify untruthfully against Appellant.

STATEMENT OF THE CASE

On May 23, 2012, Appellant Carolyn H. Poe was arrested after she was seen shoplifting items from a store and unsuccessfully attempted to flee with those items. In January of 2013, the Aiken County grand jury indicted Appellant for one count of shoplifting in violation of S.C. Code Ann. § 16-13-110 and S.C. Code Ann. § 16-1-57. On February 12, 2013, a jury trial was commenced in the Aiken County court of general sessions with the Honorable J. Derham Cole, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a ten-year term of imprisonment suspended to a three-year term of imprisonment, a $100 fine, and a three-year term of probation. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On May 23, 2012, Timothy Lawrence, an asset protection and theft detection specialist employed by Walmart, was patrolling a Walmart store located in North Augusta, South Carolina, when he observed Appellant Carolyn H. Poe and Appellant's seventeen-year-old granddaughter, Quejayteavonna H., in the electronics department of the store concealing D.V.D.s in their shopping cart underneath stuffed animals that had been placed at the top of the cart. (R. pp. 10-12; p. 39). Believing their actions to be suspicious, Lawrence decided to monitor the women and watched as they left the electronics department and moved to the fabric and crafts department several aisles away.[1] (R. pp. 11-12). As Lawrence continued to look on, the women removed the D.V.D.s from their cart, took the discs out of the D.V.D. cases, put the empty cases back onto a shelf, and concealed the discs in the pockets of Appellant's shorts. (R. pp. 12-13). Appellant and her granddaughter then pushed their cart to the lawn and garden department, went to a register, purchased the stuffed animals in their cart, passed the last point of sale before the exit, and left the store without paying for the D.V.D.s concealed in Appellant's pockets. (R. p. 14; p. 28).

After observing Appellant and her granddaughter leave the store with the concealed merchandise, Lawrence approached the women outside of the store, identified himself to them, and informed them that he wanted to speak with them about stolen merchandise. (R. p. 14; p. 29). In response, Appellant stated that she "didn't know what the fuck [Lawrence] was talking about," began quickly walking away, and told her granddaughter to get their truck. (R. p. 15). Appellant's granddaughter then ran to a red

[1] Although cameras were placed throughout the inside and outside of the store, there were no cameras located in the fabric and crafts department of the North Augusta Walmart. (R. p. 21; pp. 31-32).

truck, rapidly pulled the vehicle out of a parking space, drove towards the exit of the store's parking lot, and stopped to let Appellant inside before driving away. (R. pp. 15-16; State's Ex. # 1 (D.V.D.)). As Appellant and her granddaughter sped off, Lawrence notified the North Augusta Public Safety Department of the crime in progress, described Appellant and her granddaughter's truck to law enforcement, and continued to watch Appellant and her granddaughter to ensure that Appellant did not try to discard any evidence of the crime. (R. p. 15-17; p. 30).

Seconds later, Appellant and her granddaughter's truck was stopped by law enforcement officers directly after it exited the store's parking lot.[2] (R. p. 17; pp. 37-38). Corporal Joshua Priester of the North Augusta Public Safety Department then quickly responded to the scene of the automobile stop and detained Appellant and her granddaughter, who were inside the truck. (R. pp. 36-38). Moments later, Lawrence arrived on the scene and advised the officer of what had transpired. (R. p. 17; p. 38). Corporal Priester then looked into the truck, found stuffed animals and eight D.V.D. discs without cases in the rear passenger area of the vehicle, and showed the items to Lawrence. (R. p. 18; p. 33; pp. 40-41). Lawrence quickly identified them as the ones taken from the store, and Appellant and her granddaughter were arrested for shoplifting. (R. p. 18; p. 41). Thereafter, Lawrence looked in the arts and craft department of the store, found eight empty D.V.D. cases matching the discs found in Appellant and her granddaughter's truck, and determined that the merchandise was valued at $109 in total.[3] (R. p. 19; p. 21; pp. 32-33). Subsequently, Appellant was indicted for shoplifting as a

[2] Appellant and her granddaughter's red truck matched the description and license tag number of the vehicle identified by Lawrence as being involved in the theft of the Walmart merchandise. (R. pp. 37-38).

[3] The D.V.D.s stolen by Appellant and her granddaughter were Mission Impossible, Don't Be a Menace to Society, Breaking Dawn, Happy Feet, Joyful Noise, Underworld, Alvin and the Chipmunks, and Immortal. (R. pp. 20-21).

third or subsequent property crime, and she proceeded to trial. (R. p. 4; p. 6; pp. 115-116).

During trial, Lawrence testified about his observations during the incident, recounted that he personally saw Appellant shoplift the merchandise from the store before fleeing, and identified Appellant in court as one of the women involved in the incident. (R. pp. 11-20). Additionally, during Lawrence's testimony, a video recording of the portions of the incident that were able to be recorded was admitted into evidence and played for the jury. (R. pp. 23-24; pp. 31-32; State's Ex. # 1). Thereafter, following Lawrence's testimony, Corporal Priester testified about the automobile stop of Appellant and her granddaughter's truck and the discovery of the stolen merchandise inside of the vehicle. (R. pp. 37-41).

Subsequently, the State rested its case, and Appellant elected to testify in her own defense. (R. p. 44; p. 49). During her testimony, Appellant claimed that she withdrew $200 from the bank and went to the North Augusta Walmart with her granddaughter with the intention of buying a bag of charcoal and a phone. (R. pp. 49-50; p. 56). Upon arriving at the store, Appellant asserted that she picked up some clothes for her granddaughter, tried unsuccessfully to find a phone, picked up some D.V.D.s, got a fan and some fabric, went to the lawn and garden department to get a bag of charcoal, found that there were no bags left, asked an employee to check and see if there were any more bags available, and continued to shop while she waited for a response. (R. pp. 50-52). Appellant claimed that she then got a hose, switched the fan in her cart for a different one, decided not to get the clothes and D.V.D.s, put them back after an argument with her granddaughter, and returned to the lawn and garden department. (R. pp. 50-52). Once there, Appellant asserted that she found out that there were no more bags of charcoal so

she continued to shop and got some pillow pets for her other granddaughter.[4] (R. p. 52). After that, Appellant claimed that she saw an acquaintance working at a cash register, left her number with the acquaintance so that she could be contacted if the store received more bags of charcoal, purchased only the pillow pets, and left the remainder of the merchandise she had selected in her shopping cart. (R. pp. 52-53). Appellant asserted that she then talked with her acquaintance for ten more minutes, left the store with her granddaughter, looked at a gazebo outside, and talked with a woman at the door for several more minutes. (R. p. 53). Once she finished speaking with the woman, Appellant claimed that she and her granddaughter continued walking towards their vehicle before they were confronted by Lawrence, who allegedly had a camcorder, and a woman who asked to search her. (R. pp. 53-54). Appellant stated that she then became angry, cussed at the woman, and refused to allow herself to be searched. (R. p. 54). After that, Appellant asserted that the woman asked her if she had any D.V.D.s and she responded to the woman that they would be visible in her tight clothing if she did. (R. p. 54). Appellant then claimed that she became scared because she saw several more people, gave her granddaughter her keys, told her to get their truck, and ran to the truck along with her granddaughter. (R. p. 54). After that, Appellant asserted that she pulled out a phone to call home, dropped it as her granddaughter drove them away from the store, pulled out two more phones, dropped those as well when her granddaughter almost drove into another vehicle, and got out a fourth phone. (R. pp. 54-56). When she got out the fourth phone, Appellant indicated that she realized that her granddaughter had stopped and that they were surrounded by police. (R. p. 56). Appellant claimed that an officer

[4] Later during her testimony, Appellant explained that pillow pets were stuffed animals that could be used as pillows. (R. pp. 69-70).

then opened her door and tried to take her fourth phone and she responded by hiding it in the front console of the truck. (R. p. 56). She further denied stealing anything from Walmart, asserted that she goes to shop and not to shoplift when she goes to a store, claimed that the D.V.D.s found in the truck belonged to her son and were there to entertain his children, and stated that a D.V.D. player and jewelry were missing from the truck when it was returned to her.[5] (R. pp. 56-59). Then, at the conclusion of her testimony on direct examination, the following exchange occurred:

> **[Defense Counsel]**: Mrs. Poe, the State says – actually, Walmart says you left that store with DVDs in your pocket and you didn't pay for it. What do you have to say about that?
>
> **[Appellant]**: I did not steal nothing from Walmart and I did not steal no DVDs from Walmart and they did not find DVDs in my car that came from no Walmart.

(R. p. 59).

Thereafter, on cross-examination, Appellant admitted that she had previously been convicted of shoplifting on two earlier occasions while claiming that she was guilty of one of the offenses and not guilty of the other. (R. p. 67). When asked if she could explain how the specific eight discs missing from the store were the same discs found in her truck, Appellant admitted that she could not while claiming that there were more than eight D.V.D.s found in her truck. (R. p. 70). Then, the following exchange occurred:

> **[Solicitor]**: Mrs. Poe, do you know of any reason why Mr. Lawrence would want to frame you for eight DVDs?
>
> **[Defense Counsel]**: Objection, Your Honor. How could she possibly know why Mr. Lawrence would be interested in lying in this case?
>
> **[Trial Judge]**: Overruled.

---

[5] Appellant indicated that her son's children were two years old, four years old, seven years old, and ten years old. (R. p. 58).

[Appellant]: I don't know why he want to frame me, but I know he did sit here and lie.

[Solicitor]: Okay. And why would Mr. Priester – Officer Priester make up a story that he –

[Defense Counsel]: Objection, Your Honor. He is pitting the witnesses.

[Trial Judge]: Well, he is just asking if they would have a reason to. He's asking her if she knows of any reason that they might have. That's an appropriate question. Overruled.

[Solicitor]: Any reason why Officer Priester would say that he saw teddy bears and eight DVDs matching the ones stolen from Walmart in the back of your truck? Does he have a reason to say that.

[Appellant]: I don't know why he would say that. I guess he is trying to make a name for hisself.

(R. pp. 71-72). As the solicitor's cross-examination of Appellant continued, the solicitor asked Appellant if she reported the alleged theft of items from her truck after her arrest, and Appellant indicated that she did not because she was scared, upset, and crying. (R. p. 72). The solicitor then asked how the discs from the store ended up in Appellant's vehicle, and Appellant claimed that the discs found in her vehicle belonged to her son. (R. pp. 72-73). Finally, the solicitor asked Appellant if she was telling the jury that Lawrence and Corporal Priester were making up the allegations, and Appellant asserted that "[t]hey had to make it up." (R. p. 73). Following that question and response, defense counsel objected, and the trial judge sustained the objection after finding the question to be witness pitting. (R. p. 73).

Subsequently, the defense rested its case, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law.[6] (R. p.

[6] During his closing argument, the solicitor asked the jurors to consider the witnesses' motivations for testifying when they were assessing the credibility of the witnesses during their deliberations, stating: "I ask you to weigh the credibility that [defense counsel] is talking about of the witnesses. Who has something to lose here? Who has a motive? What reason does Mr. Lawrence have to make this up? He

74; pp. 77-101). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 106). Following the verdict, the trial judge sentenced Appellant to a ten-year term of imprisonment suspended to a three-year term of imprisonment, a $100 fine, and a three-year term of probation. (R. p. 112).

---

was just doing his job. What is the motive behind that? Officer Priester. What motive does he have? What reason does he have to make up this story about finding these DVDs in the car?" (R. pp. 84-85).

ARGUMENT

The trial judge did not abuse his discretion regarding the scope of the solicitor's cross-examination of Appellant because defense counsel opened the door to the objected-to questioning by directly pitting Appellant against the State's witnesses during his direct examination of her. However, even assuming that the door was not opened and that the objected-to questioning constituted improper witness pitting, any error resulting from that questioning was entirely harmless in light of the evidence and testimony presented during trial conclusively establishing Appellant's guilt coupled with the facts that Appellant pitted herself against the State's witnesses during her own testimony, that Appellant personally impeached her own credibility by testifying untruthfully, and that the jury's attention was properly called to the absence of any motive or reason for the State's witnesses to testify untruthfully against Appellant.

Appellant contends that the trial judge erred in permitting the solicitor to allegedly improperly pit Appellant against the State's witnesses. Appellant further maintains that the alleged witness pitting was unfairly prejudicial to her and constituted "a measured attempt to negatively portray [her] as dissident and unscrupulous[.]" (App. Br. p. 8). Initially, the trial judge did not abuse his discretion in regard to the scope of the solicitor's cross-examination of Appellant and did not err in overruling defense counsel's objections to the solicitor's questions. That is true because, even if the solicitor's questioning constituted witness pitting, defense counsel opened the door to the objected-to questions by pitting Appellant against the State's witnesses during his direct examination of her. However, even if the door was not opened and the objected-to questioning constituted improper witness pitting, any error resulting from that questioning did not result in any unfair prejudice to Appellant and was entirely harmless in light of the evidence and testimony presented during trial conclusively establishing Appellant's guilt coupled with the facts that Appellant pitted herself against the State's witnesses during her own testimony, that Appellant personally impeached her own credibility by testifying untruthfully, and that the jury's attention was properly called to

the absence of any motive or reason for the State's witnesses to testify untruthfully against Appellant. Appellant's conviction should be affirmed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). However, errors of law that are not prejudicial do not warrant reversal. State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). For that reason, "[t]he burden is upon the appellant to satisfy [the appellate] court that there has been **prejudicial** error." State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) (emphasis added).

ANALYSIS

During a trial, the scope of cross-examination is a matter falling within the discretion of the trial judge. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-248 (2000); see State v. Avant, 85 S.C. 570, 575, 67 S.E. 908, 910 (1910) ("The conduct of the case in respect to cross-examination must be left, in large measure, to the sound judgment of the presiding Judge[.]"). However, a trial judge should not permit a solicitor or defense counsel to cross-examine a witness in such a matter as to force that witness to attack the veracity of another witness. State v. Bryant, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994); see State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-146 (1988) ("It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness."); State v. Benning, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999) ("It is improper to cross-examine in a way that requires a witness to attack another witness's credibility."). Such "argumentative questioning" constitutes improper witness pitting. Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998).

Importantly though, improper witness pitting "constitutes reversible error only if the accused is unfairly prejudiced" as a result of the pitting. Id. "If it appears from the record that the conviction is clearly correct on the merits, that the accused had a fair trial, and that no other verdict could reasonably have been returned on the evidence, [an appellate court] is disposed to regard the [witness pitting] error as harmless." Thrift v. State, 302 S.C. 535, 538, 397 S.E.2d 523, 525 (1990); see also Smith, 230 S.C. at 168, 94 S.E.2d at 887 ("The burden is upon the appellant to satisfy [the appellate] court that there has been prejudicial error."). Even in cases where witness pitting occurs, "[i]t is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947).

In the case sub judice, aside from asking a question to which an objection was sustained, the solicitor did not directly ask Appellant to comment on the credibility of any of the other witnesses during trial.[7] See Burgess, 329 S.C. at 91, 495 S.E.2d at 447 ("No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness."). However, the solicitor did ask Appellant if she was aware of any reason for either Lawrence or Corporal Priester to make up the allegations against her, which indirectly led to Appellant commenting on the credibility

[7] To the extent that Appellant is complaining about the question and answer to which defense counsel's witness pitting objection was sustained by the trial judge, that issue was not preserved for appellate review because the objection was sustained and defense counsel did not ask the trial judge to strike Appellant's response to the question. See State v. Wingo, 304 S.C. 173, 177-178, 403 S.E.2d 322, 325 (Ct. App. 1991) (instructing that any error in the admission of improper testimony is not properly preserved for appellate review if an objection to the testimony is sustained and there is no motion made to strike that testimony); see also State v. Thompson, 304 S.C. 85, 87, 403 S.E.2d 139, 140 (Ct. App. 1991) ("[T]he trial judge sustained defense counsel's objections to the testimony of which [Thompson] complains. No motion to strike, no request for instruction that the jury disregard the testimony, nor a motion for a new trial based on the admission of the testimony was made at trial. Appellant has failed to preserve this issue. He obtained the only relief he sought and this court, therefore, has no issue to decide.").

of those witnesses. Importantly though, the solicitor only questioned Appellant in that regard **after** defense counsel opened the door to such an inquiry by first asking Appellant what her direct response was to what "Walmart" said she did. See State v. Kennedy, 143 S.C. 318, 321-322, 141 S.E. 559, 560 (1928) (finding that previously inadmissible testimony elicited during redirect examination was properly admitted in response to questioning of the same witness along similar lines during cross-examination by the appellant). Accordingly, because the solicitor was merely asking questions of Appellant directly related to a topic discussed during her own testimony, the trial judge did not err in permitting that questioning to occur. See State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) ("[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially."); see also State v. Rice, 375 S.C. 302, 329, 652 S.E.2d 409, 422 (Ct. App. 2007) ("[A]n appellant cannot complain of prejudice resulting from the admission of evidence to which she opened the door.").

However, even if the door was not opened and the challenged questions constituted improper witness pitting, any error stemming from that questioning did not result in any unfair prejudice to Appellant under the specific facts and circumstances of her case. See Burgess, 329 S.C. at 91, 495 S.E.2d at 447 ("[I]mproper pitting constitutes reversible error **only** if the accused if **unfairly prejudiced**." (emphasis added)); see also State v. Wyatt, 317 S.C. 370, 372, 453 S.E.2d 890, 891 (1995) ("While we agree there was error, appellant cannot show sufficient prejudice from it to warrant reversal."). As a result, any error that occurred was entirely harmless and did not warrant the reversal of Appellant's conviction. See United States v. Hastings, 461 U.S. 499, 509 (1983) ("[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing

court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]").

Turning to the particular facts and circumstances of Appellant's case, Appellant's own actions greatly diminished any prejudice that could have resulted from the allegedly improper witness pitting **before** the solicitor even asked the objected-to questions. Regarding those actions, Appellant impeached her own credibility by lying to the jury when she claimed that she only goes to shop when she goes to the store, which opened the door for the solicitor to soundly refute her claim by questioning her about her prior shoplifting convictions. Cf. State v. Black, 400 S.C. 10, 29, 732 S.E.2d 880, 891 (2012) ("[W]e note, in considering the overall strength of the State's case, that Petitioner's *own* credibility was seriously impeached at trial as well by testimony that he had a criminal record that included two prior offenses for CSC with a minor." (italics in original)). Furthermore, as previously noted, defense counsel stated to Appellant on direct examination that "Walmart [said she] left that store with DVDs in [her] pocket and [she] didn't pay for [them]" and asked her what her response to that accusation was. (R. p. 59). Thus, prior to any witness pitting that occurred on cross-examination, defense counsel directly pitted Appellant against the State's witnesses, and Appellant responded by indicating that the allegations against her were untruthful. See State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."); see also State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). Accordingly, through her own testimony, Appellant damaged her own credibility and directly pitted herself against the State's witnesses.

Additionally, notwithstanding Appellant's own witness pitting and own damaging testimony adversely reflecting on her credibility, the other evidence presented during trial conclusively established Appellant's guilt. Regarding that evidence, the surveillance footage from the store, which was played for the jury, showed Appellant and her granddaughter filling their shopping cart with D.V.D.s that they did not subsequently purchase and then showed them taking extreme actions to flee from the store after being confronted about the stolen property. See Town of Hartsville v. Munger, 93 S.C. 527, 529, 77 S.E. 219, 219 (1913) ("False and conflicting statements and attempts to run away have always been regarded as some evidence of guilty knowledge and intent."); see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011) ("[A]ny guilty act or conduct on the part of the accused is admissible as some evidence of consciousness of guilt."). Moreover, testimony was presented establishing that eight D.V.D.s were discovered in Appellant's truck after she was apprehended by the officers and that eight empty cases matching those same D.V.D.s were discovered in the store after Appellant was arrested, and Appellant specifically informed the jury that she had no explanation for how that could have occurred.[8] (R. p. 70).

Finally, notwithstanding Appellant's personally-damaging testimony and the substantial evidence of Appellant's guilt presented during trial, the jury's attention was properly called during the closing arguments to the complete lack of any evidence of a motive or reason for Lawrence and Corporal Priester to fabricate their testimony against Appellant. Specifically, the solicitor asked the jurors to consider what reasons either Lawrence or Corporal Priester would have had to testify untruthfully when they were

[8] Specifically, on cross-examination, the solicitor noted to Appellant that it was an amazing coincidence that the empty cases to the eight D.V.D.s found in Appellant's truck were found in the store and asked Appellant how she could explain that. (R. p. 70). Appellant responded: "I can't explain that, but I know the DVDs that they took out of my truck was not the DVDs that came out of Walmart." (R. p. 70).

assessing the credibility of the witnesses. See State v. Raffaldt, 318 S.C. 110, 115, 456 S.E.2d 390, 393 (1995) ("The solicitor has the right to give his version of the testimony and to comment on the weight to be given to the testimony of the defense witnesses. Therefore, although the State cannot 'pit' witnesses during questioning, it may comment on the credibility of the witnesses in argument." (citation omitted)). As a result, any potential prejudicial impact that could have resulted from the challenged questioning was eliminated in much the same way that prejudice resulting from the introduction of inadmissible evidence is eliminated by the introduction of cumulative evidence. Cf. State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence.").

In conclusion, the trial judge committed no error in regard to the scope of the solicitor's cross-examination because defense counsel opened the door to the challenged portions of the solicitor's questioning. However, even if the questioning constituted improper witness pitting, the two objected-to questions asked of Appellant by the solicitor could not have had any impact on the outcome of Appellant's case in light of the evidence and testimony presented during trial conclusively establishing Appellant's guilt coupled with the facts that Appellant personally pitted herself against the State's witnesses on her own accord, that Appellant's untruthful testimony greatly diminished her own credibility, and that the jury's attention was properly called to the absence of any articulable reason for the State's witnesses to lie during Appellant's trial. See Burgess, 329 S.C. at 91, 495 S.E.2d at 447 ("In light of the evidence presented, this error does not undermine confidence in the outcome of this case."); see also Thrift, 302 S.C. at 538, 397 S.E.2d at 525 ("If it appears from the record that the conviction is clearly correct on the

merits, that the accused had a fair trial, and that no other verdict could reasonably have been returned on the evidence, [an appellate court] is disposed to regard the error [in permitting witness pitting to occur] as harmless."); cf. State v. Arther, 290 S.C. 291, 296-297, 350 S.E.2d 187, 190 (1986) (holding that a solicitor's references to Arther's silence were harmless beyond a reasonable doubt after reviewing the entire record and concluding that the challenged comments were "miniscule in the record"). Accordingly, any error that resulted from the solicitor's questioning of Appellant was entirely harmless and did not deprive Appellant of a fair trial. See State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("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."); see also Calderon v. California, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." (citations omitted)); see, e.g., State v. Bonneau, 276 S.C. 122, 126, 276 S.E.2d 300, 302 (1981) ("The defendant was entitled to a fair trial, but not necessarily one satisfactory to him. This he has had."); State v. Weaver, 361 S.C. 73, 89, 602 S.E.2d 786, 794 (Ct. App. 2004) ("[A] criminal defendant is entitled to a fair trial, not a perfect one."). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

BY: 
Mark R. Farthing

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

ATTORNEYS FOR RESPONDENT

May 21, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2013-000356

THE STATE,

Respondent,

vs.

CAROLYN H. POE,

Appellant.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

BY: _____
Mark R. Farthing

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

ATTORNEYS FOR RESPONDENT

May 21, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2013-000356

THE STATE,

Respondent,

vs.

CAROLYN H. POE,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Benjamin John Tripp, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 21st day of May, 2014.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

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