ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2013-000381

THE STATE,

Respondent,

vs.

CHRISTOPHER ERIC RUSSELL,

Appellant.

FINAL BRIEF OF RESPONDENT

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II.

To the extent that Appellant is challenging the constitutionality of the search of the cell phone, the trial judge committed no error in denying Appellant's suppression motion because Appellant failed to establish that he had a legitimate expectation of privacy in the cell phone and, thus, did not have the capacity to challenge the constitutionality of the search. However, even if Appellant could properly challenge the constitutionality of the search, the trial judge correctly denied Appellant's suppression motion because the search warrant affidavit did not contain any false information.

III.

The trial judge did not abuse his discretion in denying Appellant's mistrial motion because the solicitor's comments during the State's closing argument regarding the alibi defense raised by Appellant were not improper and did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole.

STATEMENT OF THE CASE

In January of 2011, Appellant Christopher Eric Russell was arrested following an investigation into a home invasion and armed robbery that took place in December of 2010. In July of 2011, the Greenville County grand jury indicted Appellant for first-degree burglary, kidnapping, armed robbery, and conspiracy. Prior to trial, the solicitor served timely notice on Appellant indicating that the State would seek a sentence of life without parole upon conviction based on Appellant's prior convictions. On February 13, 2013, a jury trial was commenced in the Greenville County court of general sessions with the Honorable R. Lawton McIntosh, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for the first-degree burglary, kidnapping, and armed robbery convictions and a concurrent term of imprisonment of five years for the conspiracy conviction. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the evening of Saturday, December 18, 2010, Jeffrey Lyles ("Mr. Lyles") made a fire at his home and turned on some music after spending the day working at his brother's restaurant with his family. (R. pp. 57; pp. 59-62). Later that night, Mr. Lyles needed more firewood for the fire so he opened the back door and started to go get some. (R. pp. 62-63). When he did, two armed men wearing camouflage outfits and police masks burst through the door, threw him to the ground, kicked him in his side, tied his hands behind his back, and identified themselves as police officers. (R. pp. 62-64; p. 88). The skinnier of the two men then shoved a machine gun to Mr. Lyles' mouth, demanded to know where his money and safe were, and told him that they would kill him if he did not tell them. (R. p. 66). Thereafter, the men moved Mr. Lyles to a back bedroom, placed him on the floor, took $750 in cash from his wallet, stole his watch and cell phone, and began ransacking the home in an apparent attempt to locate the safe and money that they were seeking. (R. pp. 66-68; p. 72; p. 81; p. 216).

Around that time, Mr. Lyles' wife, Elaine Lyles ("Mrs. Lyles"), started to go get something to eat with her sixteen-year-old granddaughter, Danielle Durham, after they finished working at the restaurant together. (R. pp. 89-91; pp. 127-130). However, Mrs. Lyles was unable to get in touch with Mr. Lyles on his cell phone so the two drove to the Lyles' home to check on him instead. (R. p. 91; pp. 129-130). Once they arrived, they entered the home through the back door, and Mrs. Lyles started to walk down the hallway to the back bedroom in search of Mr. Lyles. (R. p. 91; pp. 93-94; pp. 134-135). As she did, the skinnier robber jumped out with his machine gun and forced her onto the floor. (R. pp. 93-94; p. 135). Durham, who had not been seen by the robbers, then quickly fled

from the residence and ran towards the home of one of the Lyles' neighbors to get help. (R. pp. 135-136).

Thereafter, the skinnier robber informed Mrs. Lyles that he was with the police, demanded that she tell him where the money and safe were, threatened to kill her husband if she did not do so, and stole $200 in cash from her belongings. (R. pp. 95-98). He and his accomplice then resumed ransacking the Lyles' home. (R. p. 98; p. 216). Meanwhile, Durham encountered Jimmy McDaniel, the son of the Lyles' next-door neighbors, and told him about the gunman that she had seen inside her grandparents' home. (R. pp. 136-138; pp. 141-145). In response, the two alerted the police of what was going on. (R. p. 137; p. 145).

Two minutes later, Deputy Bryan Leppard of the Greenville County Sheriff's Office arrived at the Lyles' residence with his blue lights and sirens activated. (R. p. 137; p. 145; pp. 154-156). Shortly after that, more officers arrived on the scene, and the robbers inside the residence noticed the officers' arrival and began to panic. (R. p. 99; p. 157; pp. 170-171). Fearing arrest, the larger robber, Antonias Williams, ran out the back door and discarded his pistol as he fled.[1] (R. pp. 157-159). However, the officers were waiting for him outside, and Deputy Leppard apprehended Williams with the assistance of a police dog. (R. pp. 158-159). Meanwhile, the skinnier robber, who was still inside the Lyles' house, took off his mask and turned his attention away from Mrs. Lyles, and she responded by quickly running out the back door. (R. pp. 100-101; pp. 171-172). When she did, the skinnier robber fled through the front door and escaped into a nearby wooded area while the officers' attentions were focused on Williams and Mrs. Lyles. (R. p. 139; pp. 147-149; pp. 172-173).

[1] A loaded .40-caliber pistol was subsequently located in the Lyles' backyard. (R. pp. 182-184).

Shortly thereafter, Deputy Leppard informed Williams of his rights and spoke with him about the incident. (R. p. 160). During their conversation, Williams admitted that he was in possession of Mr. Lyles' property and indicated that he and his accomplice were at the Lyles' house because they believed $200,000 was hidden inside. (R. p. 163; pp. 167-169). However, Williams declined to provide Deputy Leppard with the name of his accomplice. (R. p. 163; pp. 167-169). Subsequently, Investigator Dave Weiner of the Greenville County Sheriff's Office arrived on the scene and attempted to speak with Williams. (R. pp. 211-213). During their conversation, Williams advised the officer that the vehicle used in the crimes was parked just one street over from the Lyles' street. (R. p. 213). However, he again refused to name his accomplice. (R. pp. 213-214).

Using the information supplied by Williams, officers found a white Toyota van parked in the driveway of a vacant residence located one street away from the Lyles' street, and the van was secured and removed from the scene.[2] (R. pp. 175-177). Subsequently, a search warrant for the van was obtained, and Investigator Weiner participated in the search of the vehicle. (R. pp. 194-195). During the search, he found a cell phone next to the driver's seat, another cell phone plugged into the van's charger outlet, various police costume items, a stocking cap, and a pry bar, and the items were collected as evidence. (R. p. 217; pp. 219-222).

Thereafter, on January 5, 2011, Investigator Weiner again spoke with Williams about the incident and, once again, asked him to reveal his accomplice's identity. (R. p. 223). This time, Williams identified Appellant Christopher Eric Russell by name as his accomplice. (R. p. 224; p. 264; p. 303). Following that admission, Investigator Weiner

[2] The van belonged to Toyota of Greenville, a car dealership, and was a vehicle that was loaned to customers when their own vehicles were being serviced. (R. p. 223).

asked Williams about the cell phones found in the van, and Williams indicated that Appellant's cell phone was the one plugged into the charger outlet. (R. pp. 224-225). Based on Williams' admissions, Investigator Weiner obtained a subpoena for the records associated with Appellant's phone, a search warrant for the phone, and a warrant for Appellant's arrest.[3] (R. pp. 225-226; pp. 228-229).

Subsequently, on January 10, 2011, officers located Appellant and arrested him after he unsuccessfully attempted to flee from them on a bicycle. (R. pp. 165-167). Following his arrest, he was booked at the Greenville County Detention Center, identified his mother as his next of kin during the booking process, and provided her phone number. (R. p. 247). Officers then conducted a forensic examination of the cell phone that Williams identified as Appellant's phone, and the same phone number that Appellant had provided for his mother during the booking process was included in the phone's contacts list under "Momma." (R. pp. 232-233; p. 238; pp. 484-508). Thereafter, Appellant was indicted for first-degree burglary, kidnapping, armed robbery, and conspiracy, and he proceeded to trial. (R. p. 8; pp. 19-20; pp. 530-537).

At the outset of trial, defense counsel moved to suppress the evidence recovered from the search of the cell phone found in the van connected to the incident.[4] (R. p. 22). In support of that contention, defense counsel argued that the warrant affidavit did not comply with the warrant statute, did not contain sufficient information to establish probable cause, and violated Appellant's constitutional rights pursuant to the Fourth

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[3] Appellant's cell phone was a pre-paid phone, and no ownership information was available. (R. p. 225).

[4] Additionally, defense counsel moved to suppress the evidence discovered in the search of the van, arguing that it was questionable whether the search warrant affidavit established probable cause. (R. p. 22). Subsequently though, the trial judge questioned defense counsel about whether Appellant had standing to challenge the search of the van, and defense counsel responded by asserting that the main issue in the case was the search of the phone. (R. p. 24). The trial judge then denied her motion in regard to the search of the van. (R. pp. 24-25).

Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution. (R. p. 22). Following defense counsel's contentions, the solicitor informed the trial judge of the circumstances related to the search of the cell phone and asserted that Appellant did not have standing to challenge the search of the phone because it had been abandoned. (R. pp. 25-26). In response, defense counsel contended that the phone was not abandoned, that Appellant had standing based on the fact that the phone was being used as evidence against him, and that she had not been provided with any discovery regarding Williams' identification of Appellant as the cell phone's owner. (R. pp. 27-28).

After considering the arguments of counsel, the trial judge denied defense counsel's motion but asked the solicitor if he had complied with the discovery rules regarding Williams' identification of the cell phone's owner. (R. pp. 29-30). In response, the solicitor confirmed that he had provided defense counsel with all of the State's discoverable matter and noted that Williams' statements regarding the cell phone were not included in any reports or written statements but would be testified to during trial. (R. p. 30). Defense counsel then asserted:

> [I]f that statement is not reflected in discovery, that is making false representation to a Magistrate in order to get a search warrant. And then that's the problem. I would like to put that on the record as a problem with that search warrant is there's a statement in the officer's affidavit that says, Antonias Williams identified the phone as belonging [to Appellant]. And I don't see anything in any kind of incident report backing up that statement.

(R. pp. 30-31). Following defense counsel's new contention, the trial judge reaffirmed his denial of the suppression motion. (R. p. 31). However, he reserved ruling on defense counsel's claim regarding the inclusion of false information in the search warrant

affidavit and indicated an in camera hearing on the issue could be conducted when it came up during trial. (R. p. 31).

Thereafter, the trial judge presented opening instructions to the jury, and the solicitor and defense counsel made their opening statements. (R. pp. 35-43; pp. 45-56). During defense counsel's opening statement, she asserted to the jury that Appellant had an alibi for the time of the crimes and pointed out that Williams did not identify Appellant as his accomplice until over two weeks after his arrest. (R. p. 54).

Subsequently, during trial, the victims, witnesses, and law enforcements officers who responded to the incident testified about the details of Appellant's crimes and the ensuing investigation into them.[5] During Investigator Weiner's testimony, he confirmed that he spoke with Williams subsequent to his arrest and that Williams identified one of the cell phones recovered from the van connected to the incident as belonging to Appellant. (R. pp. 223-225). He further noted that the information about the cell phone was not included in Williams' written statement. (R. p. 227).

Following Investigator Weiner's testimony, Investigator Christopher Hammett of the Greenville County Sheriff's Office was called to the stand. (R. p. 230). During his testimony, he indicated that he extracted the data from Appellant's cell phone on February 8, 2013, and compiled a report of the extracted data. (R. pp. 231-234). Before that report was introduced, defense counsel objected and requested an in camera hearing on the matter. (R. p. 235). The jury was then excused from the courtroom, and defense counsel asked the trial judge to rule on her contention that the search warrant affidavit contained a material misrepresentation based on the fact that Williams' identification of

[5] During her testimony, Mrs. Lyles indicated that Appellant's skin tone, lips, and voice were consistent with the skin tone, lips, and voice of the skinnier robber. (R. pp. 123-124).

the owner of the cell phone was not included in his written statement. (R. pp. 235-236). In response, the trial judge stated:

> I'm going to overrule your objection as the officer clearly testified that that was told to him by [Williams]. I understand your argument that it did not find its way into a written report. I don't think that rises to the level of material misrepresentations referred to. So, I'm going to overrule your objection and find that it is admissible.

(R. p. 236). Thereafter, the jury returned to the courtroom, and the report was admitted into evidence. (R. p. 237). Investigator Hammett then confirmed that Appellant's cell phone contacts list included a specific phone number for an individual identified as "Momma." (R. p. 238).

Following Investigator Hammett's testimony, Captain Jinny Moran of the Greenville Department of Public Safety testified for the State. (R. p. 245). During her testimony, she indicated that Appellant provided the same phone number listed in his cell phone contacts list for "Momma" as the contact number for his mother. (R. pp. 245-247). Then, on cross-examination, defense counsel questioned Captain Moran about Appellant's aliases listed in the detention center's jail management system. (R. p. 252). Specifically, defense counsel asked her whether the nickname of "Poncho" was listed as one of Appellant's aliases, and she confirmed that it was not. (R. p. 253). However, she noted that only known aliases were entered into the system.[6] (R. p. 255).

Subsequently, Williams testified for the State, noted that he had pled guilty to armed robbery, kidnapping, and conspiracy based on his role in the incident, identified Appellant as his accomplice, and pointed him out in the courtroom.[7] (R. p. 260; pp. 264-265). Regarding the specifics of the incident, Williams stated that Appellant's brother

[6] Captain Moran also confirmed that it was common for individuals to have multiple aliases. (R. p. 256).

[7] After identifying Appellant as his accomplice, Williams stated that he called Appellant "Poncho." (R. p. 265).

came up with the idea of robbing the Lyles' home because their son supposedly had $200,000 hidden inside, Appellant brought the idea to him, they watched the home for approximately a month, and then they went there on the night of the incident with the intention of committing the robbery if the Lyles' son was home. (R. pp. 266-268). Upon arriving, Williams testified that they parked in front of a nearby abandoned home, left their cell phones in the van, put their gloves and masks on, and hid behind the Lyles' house for approximately an hour to an hour and a half.[8] (R. pp. 273-277). Then, when Mr. Lyles came out to get some firewood, Williams indicated that he and Appellant forced their way inside, restrained Mr. Lyles, stole some of his belongings, and searched the home for the money. (R. pp. 277-280). Subsequently, Williams testified that Mrs. Lyles entered the home, Appellant retrained her, they noticed that the police had arrived, he attempted to flee, and he was apprehended. (R. pp. 280-283). After he was arrested, Williams indicated that he did not reveal Appellant's identity as his accomplice for approximately two weeks. (R. p. 283; p. 307).

Following Williams' testimony, the State rested its case, and defense counsel offered the testimony of two alibi witnesses – Appellant's mother, Eleanor Russell, and Appellant's girlfriend or common-law wife, Ruby Willett.[9] (R. p. 328; p. 350). Both witnesses testified that Appellant was at Russell's house from approximately 7:00 p.m. to approximately 10:00 p.m. on the evening of December 18, 2010, watching a game with Willett, his brother, his daughter, and several of his cousins. (R. p. 329; p. 335-337; pp.

[8] During his testimony, Williams identified one of the cell phones recovered from the van as his own and the other as Appellant's. (R. pp. 275-276).

[9] In addition to the alibi witnesses, defense counsel offered the testimony of Anthony Lounds, who was incarcerated for armed robbery. (R. p. 315). Lounds testified that he was at the detention center at the same time as Williams and claimed that Williams asked him at some point in time between June of 2010 and July of 2011 what the police would do to Appellant if he told them that Appellant had been with him at the time of the crimes. (R. pp. 316; pp. 318-320).

351-353). Likewise, both witnesses indicated that they did not report Appellant's alleged alibi to the authorities following his arrest, but Willett stated that she told defense counsel about the alibi. (R. pp. 345-346; p. 358; p. 361). Additionally, Willett specifically claimed that she was testifying because she received a subpoena and "[i]t was the right thing to do."[10] (R. p. 350; p. 352). Furthermore, Willett asserted that her relationship with Appellant ended prior to his arrest, but she admitted that she visited Appellant in jail shortly after he was arrested and claimed to have done so on two or three occasions. (R. p. 351; pp. 355-356).

At the conclusion of Willett's testimony, the defense rested. (R. p. 366). The solicitor then indicated that he wished to present additional testimony to rebut Willett's claims about the number of times that she visited Appellant at the detention center following his arrest and to respond to the evidence elicited by defense counsel during trial suggesting that Appellant did not have the nickname "Poncho." (R. pp. 367-369). Regarding the testimony related to Appellant's nickname, the solicitor noted that he attempted to call a witness on that subject during his case-in-chief and brought the matter to the trial judge's attention at that time. (R. p. 370). The trial judge then confirmed that the solicitor brought the matter to his attention during the State's case-in-chief, noted that defense counsel raised an objection, and indicated that he informed the solicitor that he would have to introduce the testimony on reply due to the fact that the proposed witness was not on the witness list. (R. p. 370).

In response, the solicitor noted that the proposed witness was not on the witness list because the issue that the witness pertained to arose during cross-examination. (R.

[10] During her testimony, Willett admitted that she had previously been convicted in 2011 of giving false information to the police. (R. p. 362).

pp. 370-371). Furthermore, he noted that witness lists are not mandatory in South Carolina and not required by any criminal procedure rule. (R. p. 371). Following the solicitor's remarks, the trial judge indicated that he prohibited the solicitor from calling the witness when the solicitor attempted to do so based on his mistaken impression that a witness could not be called to testify during a party's case-in-chief unless he was on the party's witness list. (R. p. 374). Defense counsel then conceded that there was no rule regarding witness lists. (R. p. 374). However, defense counsel asserted that the solicitor should have anticipated the nickname issue because the "whole issue" in Appellant's case was allegedly whether Appellant "was this same person Poncho in all these telephone records." (R. pp. 374-375).

Following defense counsel's contentions, the trial judge inquired whether the nickname "Poncho" was ever referenced in the phone records that defense counsel had just mentioned. (R. pp. 376-377). Defense counsel admitted that it was not but argued "that's why I brought it up [–] because I anticipated when the records custodian was brought, that they were going to bring in his phone number and that's why this is the same in-take form and that's why I brought up the aliases." (R. p. 377). In response, the solicitor noted that the phone records were related to Appellant's cell phone so there would be no reason for Appellant's nickname to appear in those records. (R. p. 377). Thereafter, the following discussion occurred:

> **[Trial Judge]**: Well, let me stop you. I hear you[, solicitor]. [L]et me ask you this, do you want to risk dirtying up the record, based on a procedural posture in this case, by introducing evidence [t]hat was not responsive to the Defense? Regardless of my mistake or not?
>
> **[Solicitor]**: Your Honor, I really don't have a problem with it.
>
> **[Trial Judge]**: I do.

[**Solicitor**]: Okay.

[**Trial Judge**]: I mean, I certainly don't knowingly make mistakes up here but we're all human[]. I was under the impression that it had to be on the list, quite frankly. At the same time, [defense counsel], it is in some s[e]nse a matter of fairness. If I prevented him, I clearly did, because I was pretty unequivocal at the time bench, you're not going to do that when he tried to. I just . . .

[**Defense Counsel**]: Well, Judge, this trial is about fairness to the Defendant.

[**Trial Judge**]: Fairness to both State and the Defendant. One side doesn't have a priority over fairness.

(R. pp. 377-378).

Subsequently, the trial judge again noted that the solicitor attempted to call the witness at a proper time and was unequivocally prevented from doing so by him for an erroneous reason. (R. p. 380). As a result, the trial judge indicated that he would permit the solicitor to proffer the testimony of the proposed witness before he decided how to proceed on the matter. (R. pp. 380-381). The proposed witness, Master Deputy Allen Smith of the Greenville County Sheriff's Office, then testified during an in camera hearing and confirmed that he encountered Appellant three to four years prior to trial, that Appellant indicated that he was called "Poncho," and that Appellant refused to provide his real name. (R. pp. 382-384). He further noted that he was present throughout the trial and volunteered what he knew to the solicitor when the issue regarding Appellant's nickname came up.[11] (R. p. 384).

Following the proffered testimony, the trial judge ruled that the testimony was admissible and could be introduced. (R. p. 386). In response to the ruling, defense counsel asked for time to research if anyone else in the law enforcement records had the

[11] Master Deputy Smith was present in the courtroom during Appellant's trial because he was assigned to the courthouse and was in charge of courtroom security. (R. p. 382; p. 394).

nickname "Poncho," and the trial judge granted defense counsel's request.[12] (R. p. 386). Defense counsel then renewed her objection to the admission of the testimony on the grounds that it was inadmissible hearsay, its probative value was outweighed by its prejudicial effect, it was not proper rebuttal testimony, and it would deny Appellant a fair trial. (R. pp. 388-389). However, the trial judge overruled defense counsel's objection, found that the issue was raised by defense counsel through her cross-examination of the witnesses, and noted that his erroneous ruling was what prevented the testimony from being admitted during the State's case-in-chief.[13] (R. p. 389).

Subsequently, Master Deputy Smith testified before the jury about the circumstances of his meeting with Appellant three to four years earlier. (R. p. 394). Specifically, Master Deputy Smith stated that he was working while off-duty as a security coordinator at an apartment complex, he saw Appellant riding a bicycle there, he asked Appellant what his name was, and Appellant responded that it was "Poncho." (R. pp. 394-395). Additionally, Dana Lewis, the populations manager at the Greenville County Detention Center, testified about the information in the detention center's records regarding Willett's visits to Appellant. (R. pp. 396-397). Specifically, Lewis stated that Willett visited Appellant twenty-two times following his arrest in 2011, including two

[12] Later during trial, Investigator Weiner presented the results of the requested records check to defense counsel and the trial judge. (R. p. 391). According to the records, six individuals had the listed nickname of "Poncho" – three white males, one Hispanic male, and two black males. (R. p. 391). Because one of the black males had been born in 1947 and was last arrested in 1969, no photograph of that individual was available. (R. p. 391). However, a photograph of the other black male was available, and Master Deputy Smith confirmed that he had never seen that individual before after being shown the photograph. (R. p. 391).

[13] Additionally, defense counsel objected to the rebuttal testimony regarding Willett's visits to the jail on the basis that the admission of such testimony was improper due to the fact that Willett admitted she had visited the jail. (R. p. 389). However, the trial judge denied that objection after finding that the challenged testimony was proper evidence of bias. (R. pp. 389-390).

times in January, seven times in February, seven times in March, three times in April, two times in May, one time in June, and one time in August. (R. p. 398).

Thereafter, the State again rested its case, and defense counsel presented her closing argument to the jury. (R. p. 398; pp. 406-415). During her closing argument, defense counsel reminded the jury that Appellant had an alibi based on the testimony of Appellant's mother and Willett and argued that the State had failed to present enough evidence to overcome Appellant's alibi defense. (R. pp. 407-408; pp. 414-415). Additionally, defense counsel attacked the credibility of Williams' identification of Appellant as his accomplice due to the fact that Williams did not identify Appellant as his accomplice until two weeks after his arrest. (R. p. 408). Furthermore, defense counsel challenged the credibility of Master Deputy Smith's testimony regarding Appellant's nickname of "Poncho" due to the fact that it was allegedly not corroborated by any other witnesses during trial. (R. p. 412).

Subsequently, the solicitor presented his closing argument to the jury. (R. pp. 415-436). During his closing argument, the solicitor called the jury's attention to the fact that the witnesses who testified in Appellant's defense claimed to have vital information establishing Appellant's innocence and questioned why they would have waited for two years to come forward with that information even though Appellant was incarcerated during that time period. (R. pp. 419-420). Following those remarks, defense counsel objected and noted that she provided the State with notice of an alibi defense.[14] (R. p. 421). The solicitor then continued with his argument, indicating that the testimony presented during trial established that at least five people, including Appellant's daughter,

[14] Defense counsel served the alibi notice on the solicitor on October 25, 2012, which was approximately twenty months after Appellant was arrested. (R. p. 477).

brother, and cousin, were allegedly present with Appellant at the time of the crimes and that the expected response under those circumstances would be for them to go to the authorities and attempt to obtain Appellant's release from custody. (R. p. 421). Once again, defense counsel objected, asserting that Appellant had no duty to present any evidence. (R. p. 421). In response, the trial judge instructed the jury that the burden of proof rested upon the State and any insinuation to the contrary was incorrect. (R. pp. 421-422). The solicitor then argued:

> That's what they would have done. They would have gone down there and they would not [have] allowed this injustice to take place. And if that didn't work they would have gone to Channel Four News, gone to Greenville News and say, There's a horrible injustice that's been done. Because not only is an innocent man free [sic] but the real person who did this, the real criminal, the real dangerous person, is still out there on the streets. I argue to you that's what would have happened. Instead of that, it was an ambush. They wait until all this time goes by and then they let it out.

(R. p. 422). Following the solicitor's comments, defense counsel again objected, and the trial judge sent the jury out of the courtroom. (R. p. 422). Defense counsel then argued that the State had been provided with notice of Appellant's alibi defense in compliance with the applicable criminal procedure rule and objected to the solicitor referring to the alibi defense as an ambush. (R. p. 423). In response, the trial judge indicated that he would instruct the jury that the State had been provided with notice of Appellant's alibi. (R. p. 423). Defense counsel then moved for a mistrial, and the motion was denied. (R. p. 424). Thereafter, the jury returned to the courtroom, and the trial judge issued the following charge to the jury:

> [L]adies and gentlemen of the jury, attorneys are allowed wide latitude in their arguments. And I'll remind you of this, when you go back and begin your deliberations, if your memory of the testimony and evidence differs from what either on[e] of these attorneys tell you, then your memory will control, okay. With that being said, the Rules of Procedure in criminal

> court are if a Defendant wishes to assert an alibi defense, as was done in this case, that you have to give advance notice before trial to the State. And that was done.

(R. pp. 424-425). The solicitor then completed his closing argument without further objection from defense counsel. (R. pp. 425-436).

Following the closing arguments, the trial judge charged the jurors on the applicable law, including on their roles in determining the credibility of the witnesses, on the fact that Appellant's failure to testify could not be considered against him, on the defense of alibi, and on the burden of proof regarding the alibi defense. (R. pp. 437-462). Subsequently, the jury retired from the courtroom, and defense counsel renewed her mistrial motion along with her objections to the State's presentation of the additional testimony and to the challenged portions of the solicitor's closing argument. (R. p. 464). However, the trial judge once again denied those exceptions, and the jury began deliberating.[15] (R. p. 465).

Subsequently, at the conclusion of trial, the jury convicted Appellant as indicted. (R. pp. 468-469). Following the verdict, the trial judge sentenced Appellant to life without parole for first-degree burglary, kidnapping, and armed robbery and a concurrent term of imprisonment of five years for conspiracy. (R. pp. 474-475).

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[15] During the jury's deliberations, the jury foreman sent out a note asking if Master Deputy Smith was on the witness list and expressing concern that he seemed "like a last minute witness." (R. p. 465). Thereafter, the trial judge discussed the note with counsel and indicated that the standard way in which he typically responded to such questions was by advising the jurors that the requested information had not been presented during trial and that their determination had to be based solely on the evidence and testimony presented. (R. pp. 465-466). Defense counsel then indicated that she wished the trial judge would tell the jury that Master Deputy Smith was a last-minute witness, but she conceded that such a remark "might be commenting a little much on the question" and that the witness list was not evidence. (R. p. 466). Thereafter, the trial judge informed the jurors that their decision in the case had to be based on the testimony and evidence presented during trial while noting that the requested information was not in evidence. (R. pp. 466-467). The jury then resumed its deliberations, and no objections were raised to the trial judge's response to the jury note. (R. p. 467).

ARGUMENT

I.

The trial judge did not abuse his discretion in allowing the solicitor to introduce the testimony of a witness subsequent to the presentation of the defense's case when the solicitor attempted to introduce the testimony of the witness during the State's case-in-chief and was prevented from doing so by defense counsel objecting to the admission of the testimony and the trial judge precluding its admission on a basis that defense counsel subsequently conceded was legally incorrect.

Appellant contends that the trial judge prejudicially abused his discretion in permitting the solicitor to introduce the testimony of Master Deputy Smith, who testified about his knowledge of Appellant's nickname. In support of that contention, Appellant maintains that the trial judge abused his discretion in permitting the introduction of that testimony due to the fact that the testimony did not rebut the evidence presented in the defense's case. Contrary to Appellant's contentions, the trial judge did not abuse his discretion in allowing the solicitor to introduce the testimony of Master Deputy Smith after Appellant's case-in-chief had concluded because the testimony was only not admitted in the State's case-in-chief after Appellant objected to its admission and the trial judge excluded it on a basis that defense counsel subsequently conceded was legally incorrect. Because the trial judge had improperly excluded the testimony from being introduced in the State's case-in-chief, the trial judge committed no error in exercising his discretion to correct that earlier error by allowing the introduction of the improperly-excluded testimony upon discovering his error. As a result, no prejudicial abuse of discretion occurred in Appellant's case, and there were no grounds warranting a reversal of Appellant's convictions. Appellant's convictions should be affirmed.

The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bryant,

372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Pursuant to the trial judge's discretion regarding the manner in which a criminal trial is conducted, a trial judge has the discretion to control the time at which the testimony will be introduced, to reopen the evidentiary record, and to allow additional evidence or testimony to be presented. State v. Humphery, 276 S.C. 42, 43, 274 S.E.2d 918, 918 (1981); see State v. Clyburn, 16 S.C. 375, 378 (1882) ("The conduct of a case in the Circuit Court, so far as relates to the time when testimony may be introduced, must be left to the discretion of the Circuit judge, to be governed by the particular circumstances of each case."). Critically, "[a] trial is a search for the truth; concomitantly, liberality is the linchpin of the rule." State v. Wren, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996).

Likewise, decisions as to whether to admit or exclude evidence are generally left to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980). As a result, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of

discretion accompanied by probable prejudice."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.").

Notably, in State v. Thompson, 68 S.C. 133, 134-135, 46 S.E. 941, 942 (1904), Thompson was charged with murder after killing a man who "accomplished the ruin" of Thompson's daughter by promising to marry her. During trial, the solicitor attempted to introduce the testimony of a particular witness during his case-in-chief, Thompson objected, and the trial judge excluded the testimony. Id. at 135, 46 S.E. at 942. Subsequently, after Thompson had presented his case-in-chief, the solicitor again attempted to introduce the testimony of the previously-excluded witness, arguing that the basis upon which the testimony was excluded was incorrect. Id. At that point, defense counsel objected to the admission of the witness' testimony due to the fact that it was allegedly too late for it to be admitted and not on the basis upon which it had previously been excluded. Id. However, after realizing that his ruling excluding the testimony was erroneous, the trial judge reversed that ruling and allowed the solicitor to introduce the testimony despite the fact that the parties' cases-in-chief had already concluded. Id. Thereafter, Thompson was convicted and appealed, arguing that the admission of the witness' testimony was improper due to the fact that it was admitted after both the State and the defense had concluded their cases-in-chief. Id. On appeal, the Supreme Court affirmed Thompson's conviction. Id. at 137, 46 S.E. at 943. In affirming, the Supreme Court instructed:

> It is clear in our minds that the Circuit Judge made no error as here presented. Suppose the Circuit Judge had erred in refusing to allow one of the defendant's witnesses to be examined after the State had fully gone

> into its evidence in reply to the defense, and then for the first time the Court became conscious of his error, ought he not to have allowed defendant's witnesses to be examined? Clearly so. Courts are organized to dispense justice, and when such Courts find that *they* have made mistakes in refusing to admit competent testimony, they should at once admit such testimony. There are numerous decisions in our State sustaining such conclusions.

Id. at 136, 46 S.E. at 943 (italics in original).

In the case sub judice, the trial judge did not abuse his discretion in permitting the State to introduce the testimony of Master Deputy Smith after the defense rested its case because the solicitor – just like the solicitor in Thompson – was incorrectly precluded from presenting the testimony during his case-in-chief following an objection from defense counsel and an erroneous legal ruling from the trial judge. Critically, during the State's case-in-chief, the solicitor attempted to introduce the testimony of Master Deputy Smith at an appropriate time, and the trial judge prevented him from doing so after defense counsel raised an objection to the introduction of the testimony. The basis upon which the trial judge excluded the testimony at that time was that Master Deputy Smith was not originally on the State's witness list. However, as defense counsel later conceded to the trial judge, the fact that Master Deputy Smith's name was not on the State's witness list did **not** preclude him from testifying during trial. See State v. Nicholson, 366 S.C. 568, 579, 623 S.E.2d 100, 105 (Ct. App. 2005) ("The State . . . is not required to provide its witness list to a criminal defendant[.]"); see also Bryant, 372 S.C. at 315-316, 642 S.E.2d at 588 (recognizing that an issue conceded during trial cannot subsequently be argued on appeal). Because the trial judge's decision to prevent the solicitor from introducing Master Deputy Smith's testimony during the State's case-in-chief was legally incorrect, the trial judge properly corrected his earlier error by exercising his discretion and permitting the solicitor to introduce Master Deputy Smith's

testimony, which had only not been presented during the State's case-in-chief due to the trial judge's erroneous earlier ruling.[16] See Thompson, 68 S.C. at 136, 46 S.E. at 943 ("Courts are organized to dispense justice, and when such Courts find that *they* have made mistakes in refusing to admit competent testimony, **they should at once admit such testimony**." (italics in original and emphasis added)). Under those circumstances, the trial judge's decision was entirely proper and ensured that the trial was fair for all of the parties and that competent evidence relevant to the case was presented to the jury and not excluded merely as a result of the amount of time needed for the trial judge to discover his error in regard to it. See State v. Van Williams, 212 S.C. 110, 113, 46 S.E.2d 665, 667 (1948) (" 'The general rules for the introduction of testimony must necessarily be so often applied or relaxed according to circumstances apparent only to the Court engaged in conducting the trial, that a strict uniformity at all times is not to be expected and indeed, in some instances would prove injurious to the interests of justice. The Courts are agreed, accordingly, that the order of proof must be left to the sound discretion of the trial Court, and such Court will not be reversed unless it clearly appears that the Court has abused its discretion.' " (citations omitted)); see also Wren, 322 S.C. at 105, 470 S.E.2d at 112 ("A trial is a search for the truth; concomitantly, liberality is the linchpin of the rule.").

In arguing to the contrary, Appellant contends that the trial judge abused his discretion because Master Deputy Smith's testimony did not rebut any of the testimony presented by the defense witnesses. In support of that position, Appellant analogizes the

[16] Notably, since the trial judge's initial decision to exclude Master Deputy Smith's testimony was controlled by an error of law, that initial decision constituted an abuse of discretion. See McDonald, 343 S.C. at 325, 540 S.E.2d at 467 ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."). Thus, in essence, Appellant's argument against the admission of Master Deputy Smith's testimony is that the trial judge abused his discretion in correcting an earlier abuse of discretion.

circumstances of his case to the circumstances of State v. Farrow, 332 S.C. 190, 504 S.E.2d 131 (Ct. App. 1998). However, the circumstances in Farrow were markedly different from the circumstances of Appellant's case and do not support a conclusion that the trial judge abused his discretion in permitting the introduction of Master Deputy Smith's testimony. Specifically, in Farrow, the trial judge permitted the solicitor to introduce testimony that the solicitor had **not** attempted to introduce in his case-in-chief after Farrow concluded his case-in-chief based purely on written questions submitted by one of the jurors. Farrow, 332 S.C. at 132-133, 504 S.E.2d at 193-194. On appeal, this Court found that the introduction of the testimony was improper because it was not presented to rebut evidence introduced by Farrow. Id. at 133, 504 S.E.2d at 194. Conversely, in Appellant's case, the solicitor **did** attempt to introduce Master Deputy Smith's testimony during his case-in-chief and was only prevented from doing so due to an objection raised by defense counsel and an erroneous ruling from the trial judge. As a result, the circumstances of the cases are far different, and the trial judge in Appellant's case committed no error in permitting the introduction of the previously-excluded testimony after discovering that it had been excluded solely as a result of an error. See Thompson, 68 S.C. at 136, 46 S.E. at 943 (holding that a trial judge committed no error in permitting the introduction of previously-excluded evidence that was only excluded due to an error on the part of the trial judge despite the fact that the parties' cases-in-chief had concluded and instructing that trial judges should immediately admit improperly-excluded evidence when an error in regard to the exclusion of that evidence is discovered); see also Clyburn, 16 S.C. at 378 ("The conduct of a case in the Circuit Court, so far as relates to the time when testimony may be introduced, must be left to the

discretion of the Circuit judge, to be governed **by the particular circumstances of each case**." (emphasis added)).

Additionally, in seeking a reversal of his convictions, Appellant contends on appeal that the trial judge's ruling was prejudicial to him because Master Deputy Smith's testimony allegedly ambushed him, because the jury allegedly might have given undue weight to Master Deputy Smith's testimony due to the fact that he was a courtroom security officer, and because the trial judge did not poll the jurors to see if any of them knew of or were related to Master Deputy Smith.[17] However, as the trial judge did **not** err or abuse his discretion in allowing the solicitor to introduce Master Deputy Smith's testimony, a prejudice analysis is entirely unnecessary in regard to the admission of that evidence. See Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) ("It is well established that an appellant seeking reversal of a decision by the trial court **must show** both **error** and prejudice." (emphasis added)). Regardless though, the grounds identified by Appellant would not entitle him to a reversal of his convictions even assuming that a prejudice analysis was somehow necessary under the circumstances.

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[17] On appeal, Appellant also appears to suggest that Master Deputy Smith's testimony established Appellant's presence at the scene of the crimes and that his identity was required to be disclosed prior to trial as a result. See Rule 5(e)(2), SCRCrimP ("Within ten days after defendant serves his [alibi defense] notice, but in no event less than ten days before trial, or as the court may otherwise direct, the prosecution shall serve upon the defendant or his attorney the names and addresses of witnesses upon whom the State intends to rely to establish defendant's presence at the scene of the alleged crime."). Notwithstanding the fact that Appellant did not preserve such an argument by raising it to the trial judge, Master Deputy Smith did **not** testify that Appellant was present at the scene of the crimes. See In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."). Instead, he merely testified about his knowledge of Appellant's nickname while Appellant's presence at the scene of the crimes was established by the direct testimony of his accomplice, who identified Appellant by name as a participant in the crimes and identified him in-court as his accomplice. (R. pp. 264-265; pp. 382-385; pp. 394-395). Thus, to the extent that Appellant is asserting the solicitor was required by South Carolina's criminal procedure rules to disclose Master Deputy Smith's name before trial, that assertion is wholly without merit. However, assuming that Appellant's contentions in that regard were somehow valid, those contentions would conflict with Appellant's argument that Master Deputy Smith's testimony should not have been admitted because it did not rebut the testimony presented in Appellant's defense, which was primarily focused on Appellant's alleged alibi.

Initially, none of the prejudice grounds identified by Appellant on appeal was ever raised to or ruled upon by the trial judge, and, thus, those grounds cannot be raised for the first time on appeal. See State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal."); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). However, even if they were somehow preserved despite the fact that they were not raised during trial, they still would not have entitled Appellant to any appellate relief.

Regarding Appellant's contentions that the introduction of Master Deputy Smith's testimony was an improper ambush, the issue to which the officer testified was directly raised by defense counsel's questioning of the witnesses and, had it not been so raised, would have been largely irrelevant to the case since Appellant's accomplice identified Appellant not just by nickname but also directly by name subsequent to his arrest. Moreover, the trial judge had the solicitor proffer Master Deputy Smith's testimony prior to its introduction into evidence, and the trial judge allowed defense counsel to investigate the prevalence of the nickname "Poncho" upon request. Under those circumstances, the introduction of Master Deputy Smith's testimony did not ambush Appellant and resulted in no improper prejudice to him. Cf. State v. Duncan, 274 S.C. 379, 382, 264 S.E.2d 421, 423 (1980) ("The trial judge properly exercised his discretion in allowing Strength to testify. With or without the [unconstitutional local] rule

[requiring the disclosure of the names of the State's witnesses], the defendant was not prejudiced in this instance, since his counsel was aware of the nature of Strength's testimony and declined an opportunity to confer with the witness prior to his taking the witness stand.").

Regarding Appellant's contentions about the jurors' potential connections to or interactions with Master Deputy Smith, the trial judge was prevented from taking any steps to address Appellant's complaints or to question the jurors about any connection or contact with Master Deputy Smith that they might have had since Appellant never called those matters to the trial judge's attention. See State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."); State v. Burnett, 226 S.C. 421, 424, 85 S.E.2d 744, 746 (1954) ("A defendant may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial."); State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) ("The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just."); see also State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal."). As a result, Appellant cannot complain about the trial judge's failure to address those issues for the first time on appeal, and his unpreserved contentions cannot properly be addressed on appeal. See State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) ("Where an objection and the ground therefor is not stated in the record, there is no basis for appellate review."); see also State v. Hale,

284 S.C. 348, 355, 326 S.E.2d 418, 423 (Ct. App. 1985) ("Hale concedes that no exception was taken to the 'Allen' charge in the trial court. Having denied the trial judge an opportunity to cure any alleged error by failing to object to the charge, Hale cannot properly raise the issue for the first time on appeal."). Furthermore, nothing appearing in the record suggests that any of the jurors had a connection to Master Deputy Smith or that Master Deputy Smith had any direct interactions with any of the jurors in carrying out his role in providing courtroom security. Accordingly, Appellant suffered no improper prejudice from the introduction of Master Deputy Smith's testimony.

In conclusion, the trial judge committed no error in permitting the introduction of Master Deputy Smith's testimony regardless of the timing of when that testimony was introduced because the testimony was only prevented from being introduced in the State's case-in-chief due to an objection raised by defense counsel and a subsequent erroneous ruling from the trial judge. Under those circumstances, the trial judge's decision to admit that competent and relevant testimony could not be considered an abuse of the trial judge's broad discretion in regard to the conduct of the trial and merely ensued that the jury was presented with evidence that it should have been presented with during the State's case-in-chief. See Douglas, 369 S.C. at 429, 632 S.E.2d at 847-848 (recognizing that a trial judge's decision in regard to evidentiary matters will only be reversed for a manifest and prejudicial abuse of discretion). Appellant's convictions should be affirmed.

II.

To the extent that Appellant is challenging the constitutionality of the search of the cell phone, the trial judge committed no error in denying Appellant's suppression motion because Appellant failed to establish that he had a legitimate expectation of privacy in the cell phone and, thus, did not have the capacity to challenge the constitutionality of the search. However, even if Appellant could properly challenge the constitutionality of the search, the trial judge correctly denied Appellant's suppression motion because the search warrant affidavit did not contain any false information.

Appellant contends that the trial judge committed reversible error by refusing to grant his motion to suppress the evidence discovered in the search of one of the cell phones recovered during the investigation into the incident. In support of that contention, Appellant maintains that the trial judge erred in denying his suppression motion because the search warrant affidavit allegedly contained false information and because no evidentiary hearing was conducted in regard to that false information. Initially, to the extent that Appellant is challenging the constitutionality of the search of the cell phone, the trial judge committed no error in denying the suppression motion because Appellant did not have the capacity to challenge the constitutionality of the search in light of the fact that he failed to establish that he had a legitimate expectation of privacy in the cell phone. However, even assuming that Appellant had the capacity to challenge the constitutionality of the search, the trial judge nonetheless committed no error in denying Appellant's suppression motion because Appellant failed to make any showing at all during trial that the challenged statement in the search warrant affidavit was false. As a result, he was not entitled to an evidentiary hearing in regard to the truthfulness of the search warrant affidavit or to the suppression of the evidence discovered in the search of the cell phone. For those reasons, the trial judge properly denied Appellant's suppression motion. Appellant's convictions should be affirmed.

A. Appellant's Lack of Capacity to Challenge the Constitutionality of the Search

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Importantly though, the protections afforded by the Fourth Amendment are personal in nature and cannot be vicariously asserted. See Alderman v. United States, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."). As a result, a criminal defendant must first establish that his own personal Fourth Amendment rights were violated by an allegedly unreasonable search or seizure **before** a challenge to that search or seizure will be entertained. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987); see Rakas v. Illinois, 439 U.S. 128, 132, n. 1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.").

The critical factor as to whether an individual has the capacity to challenge the reasonableness of a particular search or seizure involves determining "whether the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place." Rakas, 439 U.S. at 143. A legitimate expectation of privacy is both subjective and objective in nature. State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004). In order to establish a legitimate expectation of privacy, an individual must show: (1) that the individual had a subjective expectation that the area searched would remain free from intrusion; and (2) that the individual's subjective expectation is one that society recognizes as reasonable. Id.; see Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990) (instructing that a subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable).

In the case sub judice, the cell phone that was ultimately searched was discovered abandoned in a loaned van being used by Appellant's accomplice. See State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) ("Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment."). Subsequently, during trial, Appellant did **not** assert that the searched phone belonged to him, that he had a subjective expectation of privacy in the contents of the phone, or that such a subjective expectation of privacy would be one that society recognizes as reasonable. Instead, in moving to suppress the evidence discovered in the search, Appellant merely asserted that he could challenge the constitutionality of the search solely because evidence discovered in the search was going to be used against him during his trial. See Rakas, 439 U.S. at 134 ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."); see also State v. Missouri, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999) (recognizing that the United States Supreme Court's decision in Franks v. Delaware, 438 U.S. 154 (1978), was based on the Fourth and Fourteenth Amendments of the United States Constitution). However, without establishing that he had a subjective expectation of privacy in the searched cell phone that society recognizes as reasonable, Appellant could not claim to have a legitimate expectation of privacy in the cell phone and, thus, could not assert that the search of the cell phone violated his own constitutional rights. See Missouri, 361 S.C. at 112, 603 S.E.2d at 596 ("A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable.").

Because Appellant wholly failed to establish during trial that he had a legitimate expectation of privacy in the searched cell phone, he lacked the capacity to challenge the constitutionality of the search of the cell phone and was not entitled to receive the benefits of the exclusionary rule even if the search was somehow unconstitutional. See United States v. Salvucci, 448 U.S. 83, 85 (1980) ("[D]efendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated."); see also Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) ("Petitioner, of course, bears the burden of proving not only that the search of Cox's purse was illegal, but also that he had a legitimate expectation of privacy in that purse."). Therefore, to the extent that Appellant is arguing that the search of the cell phone violated his constitutional rights, the trial judge committed no error in denying Appellant's suppression motion due to the fact that Appellant did not have the capacity to raise such a constitutional challenge. See Rakas, 439 U.S. at 130, n. 1 ("The proponent of a motion to suppress has the burden of establishing that **his own** Fourth Amendment rights were violated by the challenged search or seizure." (emphasis added)); see also McKnight, 291 S.C. at 114, 352 S.E.2d at 473 ("One who seeks to have evidence suppressed on this basis must establish that his *own* Fourth Amendment rights were violated." (italics in original)). Appellant's convictions should be affirmed.

B. Propriety of the Search Warrant and the Search of the Cell Phone

In order to obtain a search warrant in South Carolina, an affiant must present a sworn affidavit to a judge establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the

warrant."). Critically, those grounds must contain sufficient underlying facts upon which the judge can base a probable cause determination because a search warrant may only be issued upon a finding of probable cause. State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990); see Bellamy, 336 S.C. at 143, 519 S.E.2d at 349 ("A search warrant may issue only upon a finding of probable cause."); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be found"). If the affiant sufficiently establishes probable cause, the judge shall issue a search warrant. See S.C. Code Ann. §17-13-140 ("If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.").

However, under the Fourth and Fourteenth Amendment of the United States Constitution, a defendant has a right "to challenge misstatements in a search warrant affidavit" even after a search warrant is issued. State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000). In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court identified the process for raising such a challenge. Pursuant to the process identified in Franks, a defendant is constitutionally entitled to a hearing on the validity of a search warrant affidavit if "the defendant makes a **substantial** preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and "if the allegedly false statement is necessary to the finding of probable cause[.]" Id. at 155-156 (emphasis added). Importantly, that preliminary showing "must be more than conclusory" and "must be accompanied by an offer of proof." Id. at 171. Moreover, it

"must be supported by more than a mere desire to cross-examine." Id. In making the offer of proof, the defendant is required to "point out specifically the portion of the warrant affidavit that is claimed to be false[,]" to provide "a statement of supporting reasons[,]" and to either furnish "[a]ffidavits or sworn or otherwise reliable statements of witnesses" or "satisfactorily" explain why such materials were not provided. Id. Then, if those requirements are met, the defendant is entitled to a hearing where he must prove his allegations of falsity or a reckless disregard for the truth by a preponderance of the evidence. Id. at 156. Assuming that the allegations are proven during the hearing and the search warrant affidavit's remaining content is insufficient to establish probable cause, the trial judge should then void the search warrant and exclude the evidence discovered during the search "to the same extent as if probable cause was lacking on the face of the affidavit." Id.

In the case at bar, the trial judge committed no error in denying Appellant's suppression motion because Appellant failed to establish that the search warrant affidavit connected to the search of the cell phone contained any false information. Critically, during trial, Appellant alleged that the statement included in the search warrant affidavit regarding Appellant's accomplice's identification of the cell phone as Appellant's was false. However, Appellant did **not** offer any statements, affidavits, or other proof to establish that the challenged statement in the affidavit was, in fact, false. See id. at 171 ("They should point out specifically the portion of the warrant affidavit claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained."). Instead, Appellant simply asserted – and continues to assert on appeal – that the statement was false because it was not included in the

discovery materials provided to him prior to trial. Critically though, the fact that the statement, which was an oral statement made by Appellant's accomplice, was not memorialized in writing prior to the preparation of the search warrant affidavit or turned over to Appellant during the discovery process in no way established that the statement was false, and Appellant failed to identify **any** authority that would support such a conclusion. See Rule 5, SCRCrimP (containing no requirement that the State memorialize all oral statements in writing and turn them over to the defendant and certainly containing no declaration that all oral statements not disclosed during the discovery process are presumptively false); see also Franks, 438 U.S. at 171 ("There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant."). As a result, Appellant's unsupported allegation of a falsity in the search warrant affidavit did not constitute even a prima facie showing that the statement was false and was not sufficient to entitle him to an evidentiary hearing on the validity of the warrant or to establish by a preponderance of the evidence that the information in the affidavit was, in fact, false. See Franks, 438 U.S. at 171 ("To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine."). However, even assuming that Appellant's unsupported attack on the truthfulness of the information in the search warrant affidavit had somehow been sufficient to warrant an evidentiary hearing on the validity of the warrant, Sergeant Weiner unequivocally testified to Appellant's accomplice's identification of the cell phone during trial and noted that the identification led him to personally obtain the original search warrant for the cell phone's records. Accordingly, the unrebutted testimony presented during trial established that the information in the

search warrant affidavit was truthful, and the trial judge correctly determined that the search warrant affidavit did not contain any false information.

In arguing to the contrary on appeal, Appellant continues to assert that the statement in the search warrant affidavit was false because it was not contained in any of the discovery materials while also raising several new contentions. Specifically, Appellant now asserts – for the first time on appeal – that the trial judge erred in denying his suppression motion due to the facts that there was no testimony presented during trial regarding how the affiant, Investigator A.L. Bailey, acquired his knowledge of the information included in the affidavit and that no evidentiary hearing was conducted in regard to the alleged Franks violation. However, neither of those arguments was raised to the trial judge, and, thus, neither of those arguments was properly preserved for appellate review. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing that a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); see also Patterson, 324 S.C. at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial."); see, e.g., I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and **arguments**." (emphasis added)). However, even assuming that those arguments were somehow preserved for appellate review despite the fact that they were not raised to the trial judge, neither of those arguments established that the trial judge committed any error in Appellant's case or that the information included in the search warrant affidavit was false. First, regarding the source of the information included in the search warrant affidavit, the solicitor explained to the trial judge that two separate search warrants were

obtained for the cell phone in Appellant's case due to the fact that the officer who originally extracted the data from the phone was unavailable to testify during Appellant's trial, and defense counsel readily acknowledged that the affidavits used to obtain both of the search warrant were identical. (R. pp. 28-29). Thus, Investigator Bailey derived the information that he included in the search warrant affidavit used to obtain the second search warrant from Sergeant Weiner's statements in his sworn affidavit used to obtain the first warrant, which was entirely proper and in no way established that the information in either search warrant affidavit was false. See United States v. Ventresca, 380 U.S. 102, 111 (1965) ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."). Second, regarding the lack of an evidentiary hearing, Appellant – as previously stated – failed to make a substantial preliminary showing that false information was included in the search warrant affidavit. Moreover, Appellant also failed to ask the trial judge to conduct such a hearing during the course of trial. See Franks, 438 U.S. at 155-156 ("[W]here the defendant **makes a substantial preliminary showing** that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held **at the defendant's request**." (emphasis added)). Therefore, Appellant was not entitled to an evidentiary hearing on the Franks issue, and the trial judge committed no error in not conducting one.

In conclusion, Appellant wholly failed to establish that any information included in the search warrant affidavit was false. As a result, he was not entitled to an evidentiary hearing on the Franks issue and was not entitled to the suppression of the evidence

discovered during the search of the cell phone. Accordingly, the trial judge committed no error in denying Appellant's constitutional challenge to the validity of the search warrant, and his ruling was fully supported by the evidence and testimony presented during trial. See State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling."). Appellant's convictions should be affirmed.

III.

The trial judge did not abuse his discretion in denying Appellant's mistrial motion because the solicitor's comments during the State's closing argument regarding the alibi defense raised by Appellant were not improper and did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole.

Appellant contends that the trial judge erred in declining to grant his motion for a mistrial raised in response to comments made by the solicitor during the State's closing argument. In support of that contention, Appellant maintains that the solicitor's comments regarding Appellant's failure to call additional alibi witnesses and regarding the testifying witnesses' delay in revealing the alibi coupled with the solicitor's characterization of the alibi defense as an ambush were improper and rendered his trial fundamentally unfair. Contrary to Appellant's contentions, the trial judge committed no error in denying Appellant's mistrial motion because the solicitor's comments during the closing argument were entirely proper in light of the fact that Appellant chose to present an alibi defense. However, even assuming that the solicitor's comments were improper, those comments did not render Appellant's trial fundamentally unfair when considered in the context of the entire record. Accordingly, the trial judge did not abuse his discretion in declining to grant Appellant's mistrial motion. Appellant's convictions should be affirmed.

Closing arguments are a basic element of the adversarial fact-finding process in a criminal trial. Herring v. New York, 422 U.S. 853, 858 (1975). Such arguments serve "to sharpen and clarify the issues for resolution by the trier of fact in a criminal case" and provide both the prosecution and the defense with an opportunity to advocate for their respective positions, to argue for certain inferences to be drawn from the evidence and testimony presented, and to identify the weaknesses in their opponents' positions. Id. at

862. As a result, closing arguments are crucial towards achieving the ultimate objective of the adversarial system of justice in the United States, which is for the correct verdict to be reached in each case. Id.; see also Gardner v. Florida, 403 U.S. 349, 360 (1977) ("[T]he debate between adversaries is often essential to the truth-seeking function of trials[.]").

In presenting a closing argument to the jury, a solicitor – and any other party – must confine the argument to the evidence in the record and the inferences to be drawn from that evidence. State v. Tubbs, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). However, the solicitor is unquestionably permitted in a closing argument to state and discuss the State's version of the testimony, to comment on the weight to be given to such testimony, and to point out the matters that the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (" '[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.' " (citations omitted)). Importantly, the solicitor is also permitted to use a closing argument to call into question the credibility of the defenses that were identified or raised by the opposing side during trial. State v. Liberte, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct. App. 1999).

In considering the propriety of a closing argument, "[i]t is sometimes difficult to draw the line between proper and improper argument, but counsel's remarks must be confined within the record." State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961). "However, some latitude must necessarily be allowed and it must, to a large extent, be left to the wide discretion of the Circuit Judge." Id. As a result, trial judges

have broad discretion in regard to both the range and scope of closing arguments. State v. Raffaldt, 318 S.C. 110, 114-115, 456 S.E.2d 390, 393 (1995); see State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument.").

When a challenge is raised to the propriety of a closing argument, the burden rests upon the party raising the challenge to establish that the allegedly improper argument rendered the trial fundamentally unfair. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). On appeal, appellate courts will review the alleged impropriety in the context of the entire record and must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant's due process rights. State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003); see Patterson, 324 S.C. at 17, 482 S.E.2d at 766 ("The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."). In making that determination, " 'it is not enough that the [challenged] remarks were undesirable or even universally condemned.' " Darden v. Wainwright, 477 U.S. 168, 181 (1999) (citation omitted). Critically, absent a clear abuse of discretion, appellate courts will ordinarily not disturb the trial court's ruling in regard to a closing argument. Rudd, 355 S.C. at 548, 586 S.E.2d at 156; see State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000) ("Ordinarily, a trial court's rulings on closing arguments will not be disturbed.").

Notably, in State v. Bamberg, 270 S.C. 77, 81, 240 S.E.2d 639, 640 (1977), Bamberg and his co-defendant, Brown, were charged with murder and, during their trial, testified that they were at a club with friends at the time of the crime. However, in support of their alibi, they only presented the testimony of a few witnesses. Id. The

solicitor then commented during his closing argument on the fact that the defendants did not present many witnesses to support the alibi defense while also asserting to the jury that the defendants would not be found at church and, instead, "hung out" at the club identified in their alibi defense. Id. At the conclusion of trial, Bamberg and Brown were convicted, and they appealed, arguing that the trial judge erred in allowing the solicitor to comment on their failure to call more witnesses in regard to their alibi defense and in refusing to declare a mistrial when the solicitor made the comments regarding their absence from church and presence at the club. Id. On appeal, the Supreme Court affirmed their convictions. Id. at 82, 240 S.E.2d at 641. In affirming, the Supreme Court initially ruled that the trial judge's decision to allow the solicitor to comment on the defendants' failure to call alibi witnesses was proper, finding that the solicitor's comments were a valid argument to make to the jury and that the trial judge's charge to the jury on alibi defenses "corrected any possible misapprehension" that could have resulted from those comments. Id. at 81, 240 S.E.2d at 640. Furthermore, the Supreme Court held that the trial judge did not abuse his discretion in declining to grant a mistrial in response to the other remarks made by the solicitor under the circumstances of the case. Id. at 82, 240 S.E.2d at 641.

Just like the trial judge in Bamberg, the trial judge in Appellant's case committed no error in declining to grant a mistrial in response to the solicitor's comments during his closing argument because those comments were not improper. However, even if the solicitor's comments during the closing argument were improper, the trial judge nonetheless properly declined to undertake the extreme step of declaring a mistrial because the solicitor's comments did not render Appellant's trial fundamentally unfair when considered in the context of the entire record.

Looking to the challenged portions of the solicitor's closing argument, the solicitor used his closing argument to point out to the jurors that Appellant's alibi witnesses did not immediately disclose Appellant's alleged alibi to the authorities or the media after Appellant's arrest despite the fact that Appellant was incarcerated during that time period. Additionally, the solicitor noted in his closing argument that Appellant only presented the testimony of two alibi witnesses even though several other witnesses allegedly could have attested to the alibi. Furthermore, based on the amount of time that passed before the alibi defense was revealed, the solicitor characterized Appellant's alibi defense during his closing argument as an ambush.

Initially, the solicitor's comments regarding the alibi witnesses' failure to reveal the alleged alibi sooner and Appellant's failure to present additional witnesses to corroborate the alibi were entirely proper comments on the strength of Appellant's alibi defense. See State v. Shackleford, 228 S.C. 9, 11, 88 S.E.2d 778, 779 (1955) ("Where the evidence indicates that there are witnesses, seemingly accessible to the accused, or under his control, who are or should be cognizant of material and relevant facts competent to testify thereto, and whose testimony would presumably aid him or substantiate his story if it were true, it is not improper for the prosecuting attorney to comment upon his failure to produce them."); see, e.g., State v. Hammond, 270 S.C. 347, 356, 242 S.E.2d 411, 416 (1978) ("While **it is always proper for an attorney in argument to the jury to point out the failure of a party to call a witness**, we have concluded that such a charge has no proper place in the judge's statement of the law." (emphasis added)). Critically, Appellant chose to present an alibi defense, and, as a result, he opened up that defense to attack and challenge from the solicitor. See Liberte, 336 S.C. at 653, 521 S.E.2d at 746 ("Certainly, a prosecutor is entitled to call into

question the credibility of a defense."). Just as in Bamberg, the solicitor in Appellant's case properly identified to the jurors the different aspects of Appellant's alibi defense that reflected adversely on the strength and credibility of that defense.[18] See Bamberg, 270 S.C. at 81, 240 S.E.2d at 640 (holding that the solicitor's comments during closing argument regarding the defendants' failure to present more than a few alibi witnesses were proper due to the fact that the defendants presented evidence during trial to establish an alibi defense). Accordingly, as the solicitor's comments were a wholly proper attack on a defense raised by Appellant, the trial judge properly denied Appellant's motion for a mistrial based on those comments.[19] See State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way."); see also United States v. Jones, 471 F.3d 535, 543 (4th Cir.

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[18] Notably, the weaknesses in Appellant's alibi defense identified by the solicitor – the lack of further corroboration of the alibi testimony and the delays in the revelation of the details of the alibi – were the exact same kind of weaknesses that defense counsel alleged existed in the State's case during her closing argument to the jury. Specifically, defense counsel used her closing argument to call into question the credibility of Appellant's accomplice's testimony due to the fact that the accomplice did not implicate Appellant in the incident for approximately two weeks and to call into question the credibility of Master Deputy Smith's testimony because it was not corroborated by other witnesses. (R. p. 408; p. 412). Thus, even if the solicitor had not made the challenged remarks during his closing argument, defense counsel herself suggested to the jury that a lack of corroboration and a failure to reveal information at the earliest opportunity were legitimate reasons for the jurors to find the testimony of a witness not to be credible. 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 Darden, 477 U.S. at 179 ("The prosecutors' comments must be evaluated in light of the defense argument that preceded it[.]").

[19] On appeal, Appellant cites to State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), in support of his contention that the solicitor's comments on Appellant's failure to call additional alibi witnesses were improper. However, unlike Appellant, Primus did not call any alibi witnesses or testify on his own behalf. Primus, 349 S.C. at 584, 564 S.E.2d at 107-108. Based on the fact that Primus did not present any evidence in regard to an alibi defense, the Supreme Court in Primus found that the solicitor's comments on Primus' failure to call alibi witnesses were improper. Id. at 584, 564 S.E.2d at 108. Critically though, unlike the circumstances of Primus, Appellant **did** present alibi witnesses to establish his alibi defense. As a result, the solicitor was fully permitted to comment on Appellant's failure to call additional alibi witnesses, and his decision to do so was not improper. See Bamberg, 270 S.C. at 81, 240 S.E.2d at 640 (recognizing that the rule prohibiting the solicitor from commenting on a defendant's failure to present evidence is only applicable when the defendant presents no evidence at all and does not apply when a defendant presents testimony and witnesses on his own behalf).

2006) ("To view such general comments on the inadequacies of an opponent's case as improper is to strike at the heart of the adversary system. Adversaries are supposed to expose the weakness of each other's evidence, and the prosecution committed no error in doing just that.").

Furthermore, the solicitor's comments characterizing the alibi defense as an ambush were not improper and, instead, merely reflected the State's position on Appellant's defense in light of the fact that the State first received notice of Appellant's alleged alibi almost two years after Appellant was arrested for his crimes. See, e.g., Durden, 264 S.C. at 92, 212 S.E.2d at 590 (" '[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.' " (citations omitted)); State v. Pitts, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) ("The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such."). However, to the extent that the solicitor's "rhetorical flourishes" in describing the alibi defense could be considered improper, the trial judge did not abuse his discretion in denying Appellant's mistrial motion because the solicitor's comments neither warranted the extreme sanction of the abandonment of the trial nor rendered Appellant's trial fundamentally unfair. See State v. Plath, 281 S.C. 1, 17, 313 S.E.2d 619, 628 (1984) ("[A]ppellants complain of rhetorical flourishes engaged in by the Solicitor in his summation . . . . An inelegant turn of phrase or momentary lapse of good taste will rarely constitute prejudicial error, nor does robust language necessarily inject an arbitrary factor into a trial such as this one. Finding no prejudice here, we dismiss these claims of error as frivolous."). Critically, that is true because – notwithstanding the fact that the solicitor's "ambush" comment was minimal in the

context of the entire record – the trial judge quickly followed that comment with an instruction to the jury informing them that notice had to be provided to the State before an alibi defense could be raised and that such notice was, in fact, provided in Appellant's case. Cf. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("[T]he prosecutor's remark here, admittedly an ambiguous one, was but one moment in an extended trial and was followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process."). As a result, even if the solicitor's characterization of the alibi testimony as an ambush was improper, the harm that could have resulted from it – that the jurors believed the State had no advance notice in regard to Appellant's alibi defense – was dispelled. Cf. Bamberg, 270 S.C. at 81, 240 S.E.2d at 640 ("[T]he judge's charge that the State had the burden of showing the appellants were present and actually participated in the crime corrected any possible misapprehension on the part of the jury."). Accordingly, a mistrial was not warranted in light of the solicitor's comments. See State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) ("The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment."); see also State v. Greene, 255 S.C. 548, 558, 180 S.E.2d 178, 184 (1971) ("[The appellant] was not entitled to a perfect trial, only a fair one.").

In conclusion, the solicitor's comments during the State's closing argument were not improper and did not render Appellant's trial fundamentally unfair. Critically, the solicitor did **not** appeal to the personal biases of the jurors or make any statements that could reasonably be characterized as the type that would have aroused the passions and

prejudices of the jurors. See, e.g., Durden, 264 S.C. at 92, 212 S.E.2d at 590 ("Closing arguments have been held improper when they have appealed to personal bias, or when they have aroused passion and prejudice."). Instead, the solicitor's used his closing argument to focus the jury's attention on the weaknesses in Appellant's alibi defense, which is exactly what closing arguments are supposed to be used for in an adversarial system of justice. See Liberte, 336 S.C. at 653, 521 S.E.2d at 746 ("Certainly, a prosecutor is entitled to call into question the credibility of a defense."). Furthermore, even if the solicitor's comments were somehow improper, the trial judge's charge to the jury on alibi defenses and the State's burden of proof coupled with the trial judge's curative instruction regarding the fact that the State had actually received advanced notice of Appellant's alibi defense eliminated any prejudice that could have resulted from the solicitor's comments. See Darden, 477 U.S. at 181 ("[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " (citations omitted)). Accordingly, when the challenged comments are viewed in the context of the entire record, Appellant failed to meet his burden of establishing that the solicitor's comments deprived him of a fair trial, and the trial judge did not abuse his discretion in declining to grant a mistrial in response to those comments. See Durden, 264 S.C. at 93, 212 S.E.2d at 591 ("The burden of proving that the appellant did not receive a fair trial is upon the appellant himself."); see also State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) ("A mistrial should not be granted unless absolutely necessary. Instead, the trial

judge should exhaust other methods to cure possible prejudice before aborting a trial.").

Appellant's convictions should be affirmed.[20]

[20] At the conclusion of his appellate brief, Appellant contends that he is entitled to a new trial based on the cumulative effect of the errors alleged to have occurred during his trial even if none of the errors was individually sufficient to warrant such relief due to the fact that the alleged errors taken together supposedly deprived him of a fair trial. However, Appellant did **not** raise such a cumulative error argument to the trial judge and never asserted to the trial judge that the alleged errors taken together deprived him of his right to a fair trial. See Patterson, 324 S.C. at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial."); see also In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appellate review."). As a result, Appellant's appellate argument regarding cumulative error cannot properly be raised or considered for the first time on appeal. See West v. Morehead, 396 S.C. 1, 14, 720 S.E.2d 495, 502 (Ct. App. 2011) ("Appellants make arguments and cite authorities in their briefs that were not presented to the trial court. These arguments are not preserved."); see also State v. Senter, 396 S.C. 547, 555, 722 S.E.2d 233, 237 (Ct. App. 2011) ("Because Senter failed to raise this argument to the trial court, it is not preserved for our review."). However, even assuming that the issue had somehow been preserved for appellate review despite the fact that it was not raised to or ruled upon by the trial judge, none of the errors identified by Appellant was actually an error for the reasons previously articulated, and Appellant was afforded everything he was entitled to pursuant to his right to a fair trial. See State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) ("[A party raising an issue pursuant to the cumulative error doctrine] must demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial."); see also State v. Black, 400 S.C. 10, 29, 732 S.E.2d 880, 891 (2012) ("[A] defendant is entitled to a fair trial, not a perfect one."); State v. Kornahrens, 290 S.C. 281, 290, 350 S.E.2d 180, 186 (1986) ("[Kornahrens] asserts the trial judge should have granted a new trial because of the cumulative effect of the asserted trial errors. Since we have found no errors, this issue is without merit.")

CONCLUSION

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

Respectfully submitted,

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June 17, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2013-000381

THE STATE,

Respondent,

vs.

CHRISTOPHER ERIC RUSSELL,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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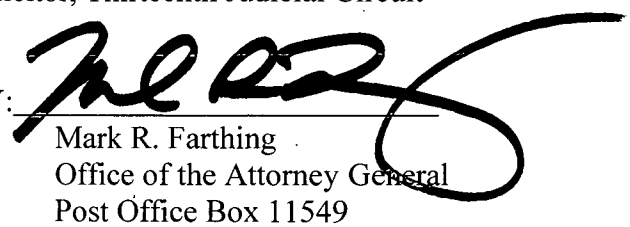
BY: 
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PROOF OF SERVICE

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:

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