STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

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THE STATE,

Respondent,

vs.

RICKEY MAZIQUE,

Appellant.

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**INITIAL BRIEF OF RESPONDENT**

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defendant is entitled to a fair trial, not a perfect one. But even a perfect trial would not prevent the inevitable result of Appellant's conviction.

## STATEMENT OF THE CASE

Appellant Mazique was indicted for armed robbery by the Horry County Grand Jury. A pre-trial hearing was held on November 8, 2012, before the Honorable Edward B. Cottingham. A jury trial was held November 15-16, 2012, also before Judge Cottingham. Mazique was initially represented by Melinda A. Knowles, Esquire, at the pre-trial hearing and by Knowles and James C. Galmore, Esquire, at the start of trial. On the day of the trial and prior to the selection of the jury, Mazique was allowed to represent himself. A jury found Mazique guilty as charged, and he was sentenced to twenty-five years imprisonment.

## STATEMENT OF FACTS

Appellant Ricky Mazique robbed a Kangaroo convenience store that he regularly visited, wearing a wig, which did not stop the store clerk, Branton, from recognizing Mazique.

Officer Brian Scales was dispatched to Kangaroo in response to a triggered panic alarm. On the way to the store, he passed a suspicious vehicle caught on the patrol car video tape. Upon arriving at the Kangaroo store, he confirmed a robbery occurred and the robber departed in a vehicle. Tr. pp. 75-76. The robber is seen in the store's surveillance video stuffing cigarettes into a garbage bag. Tr. p. 88. Officer Scales testified that Branton indicated the robber was in his fifties with either long hair or a wig. Branton indicated she recognized the robber but did not know his name. Tr. pp. 101-103.

Officer Scales' investigation led to Mazique's residence. Mazique's girlfriend consented to a search of the residence. In a closet was a trash bag full of cartons of cigarettes. A box of ammunition was hidden inside the air vent above the kitchen counter. Officer Scales also seized a jacket similar to the jacket the perpetrator wore in the store surveillance video. Tr. p. 92.

Officer James Chatfield was with Officer Scales when Mazique's residence was searched. Officer Chatfield confirmed that Mazique's girlfriend consented to the search and testified they seized sixty cartons of cigarettes from the residence and found ammunition in the vent. Tr. pp. 154-155.

Officer Chatfield met with Mazique at the police station. Mazique gave a statement in which he acknowledged frequenting the store. Tr. p. 178. Mazique admitted

robbing the Kangaroo store. He admitted using a gun, which he threw away. He indicated he hid ammunition over the sink at his house. Tr. pp. 183-186.

During cross-examination, Mazique asked Officer Chatfield how he became a suspect. Officer Chatfield answered: "Well Ms. Branton over there picked you out in a photo lineup. I interviewed you and you said that you threw your gun over a 701, that you robbed the Kangaroo with, you said you didn't remember what jacket. . . ." Tr. p. 202, lines 6-13.

Tonia Branton testified she was working at Kangaroo when Mazique entered the store at 2:40 a.m. Branton testified Mazique bought lottery tickets at the store and he sometimes spent hours there. So even though Mazique was wearing a wig, Branton recognized him. Mazique entered the strore with his usual greeting for Branton, asking, "Honey, how are you?" Mazique went in the bathroom and came back, pointing a gun at Branton and demanding money and cigarettes. Mazique left in a vehicle. Branton subsequently was able to pick Mazique out of a photographic lineup. Tr. pp. 233-237. Mazique elicited testimony from Branton describing how ineffective his wig disguise proved to be: "Yes, when you were in that store with a gun at me I [knew] it was you." Tr. p. 241, lines 9-10.

After the State rested, Mazique recalled both officers and elicited their testimony, resulting in Mazique losing last closing argument. Despite warnings from the trial court, Mazique persisted in opening the door to the fact that he was a suspect in multiple robberies. Tr. p. 286.

## ARGUMENT

### I.

**The trial court conducted a proper inquiry into the basis for the Appellant's motion to have new counsel appointed which seemed based on Appellant's misguided view of the law, and the refusal to appoint substitute counsel was not error.**

Mazique complains he should have been allowed substitute counsel. The trial court did not abuse its discretion by denying Mazique's motion for substitute counsel over a disagreement in trial strategy between Mazique and counsel.

At the pre-trial hearing, after notice of Mazique's motion to relieve Knowles as counsel, the trial court asked Mazique his reasons for wanting new counsel. November 8, 2012 transcript (Pre-trial Tr.) p. 4, lines 13-14. Mazique demonstrated his thorough misunderstanding of the law.

The first reason Mazique gave was that Knowles waived his right to a preliminary hearing. Pre-trial Tr. p. 4, lines 21-23. However, the trial court explained Mazique was not entitled to a preliminary hearing because the Grand Jury already found probable cause to issue a true bill. Pre-trial Tr. p. 5, lines 12-14.

Mazique next claimed Knowles possessed favorable exculpatory evidence. Pre-trial Tr. p. 6, lines 8-9. Mazique complained Knowles did not make a motion to obtain the actual device used to record Mazique's statement. In response, the trial court explained Mazique is not entitled to the actual recording device. Pre-trial Tr. p. 8, lines 3-4. The trial court further explained the recording's authenticity would be questioned at trial. Pre-trial Tr. p. 8, lines 21-23.

The final reason Mazique provided involved the validity of the search warrant. Pre-trial Tr. p. 14, lines 19-25. In response, the trial court stated the validity of the search warrant would be addressed at trial outside the presence of the jury. Pre-trial Tr. p. 15, lines 1-11.

Therefore, the trial court properly indulged Mazique's reasons for wanting substitute counsel, but ultimately resolved them.

After providing his initial reasons for wanting a substitute counsel, Mazique argued he could not move forward with Knowles as his attorney because he did not trust her. Pre-trial Tr. p. 16, lines 14-18. "[A]t least after the trial has begun, a mere disagreement between a defendant and his counsel as to a matter of trial tactics is not sufficient cause, in itself, to require the trial court to replace or to offer to replace court appointed counsel with another attorney at that time." State v. Jones, 270 S.C. 587, 243 S.E.2d 461, 462 (1978). Therefore, a trial judge has discretion to decline appointment of substitute counsel for a defendant who no longer desires assistance of his court-appointed counsel. See also State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001) (finding the trial court did not err in denying defendant's motion to relieve counsel even though defendant alleged counsel was not representing his interests, was not fully prepared for the case, and the defendant claimed he was not comfortable going to court with counsel as his lawyer). A reviewing court will not interfere with the trial court's decision regarding a request for substitute counsel absence an abuse of discretion. State v. Marshall, 273 S.C. 552, 257 S.E.2d 740 (1979).

Mazique's argument that his motion was timely made does not outweigh the reasons for requesting substitute counsel. In Jones, the Supreme Court noted, "when the disagreement with counsel is merely concerning trial tactics, certainly no greater justification would exist for the replacement of counsel after trial has begun than would exist before that time." Id. at 588, 243 S.E.2d. at 462. Thus, even if Mazique's motion was timely made, the reasons given to justify it were not sufficient.

The record fails to show that appointed counsel was incapable of protecting Mazique's rights and ensuring he received a fair trial. The Supreme Court noted in a pre-Strickland case:

> The quality of the service rendered by counsel meets all requirements of due process when counsel is a member in good standing of the Bar, gives his client his complete loyalty, serves him in good faith to the best of his ability, and, his service is of such character as to preserve the essential integrity of the proceedings as a trial in a court of justice. He is not required to be infallible, nor to do the impossible, since the defendant is entitled to a fair trial and not a perfect one or a perfect result.

State v. Lewis, 255 S.C. 466, 471, 179 S.E.2d 616, 618 (1971). The record reflects no reason to believe appointed counsel could not meet such expectations, and therefore, the trial court did not err in denying the motion for substitute counsel.

Instead, the trial court made clear Mazique had the benefit of diligent and effective appointed counsel. After Mazique claimed to be dissatisfied with his counsel because he thought Knowles breached his trust, the trial court countered that Mazique had an excellent, experienced lawyer. Pre-trial Tr. p. 17, lines 6-14. The trial court sagely explained Mazique needed a good legal mind for representation, and Knowles would provide him with such. Mazique's motion was made on his unshakable, erroneous views of the law. Mazique's performance as his own counsel proved the trial court's advice should have been taken. The trial court did not abuse its discretion.

## II.

**Appellant's self-representation motion was not (1) clear and unequivocal, and (2) knowing, intelligently and voluntarily made; instead it was unintelligently, ambiguously, and disruptively made. The trial court did not err in postponing a ruling until the day of trial.**

The Trial court did not err in denying Mazique's request to proceed pro se at the pre-trial hearing because the motion was never clearly made and seemed motivated by improper considerations. Even Mazique questioned his own ability to represent himself. The Trial court did not abuse its discretion by keeping Knowles as Mazique's counsel during the pre-trial hearing.

A defendant may waive his right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806 (1975); State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010). "The request to proceed pro se must be clearly asserted by the defendant prior to trial." Winkler (quoting Farretta).

"Because an exercise of the right of self-representation necessarily entails a waiver of the right to counsel – a defendant obviously cannot enjoy both rights at trial – the exercise of the right of self-representation must be evaluated by using many of the same criteria that are applied to determine whether a defendant has waived the right to counsel." United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). Under Frazier-El, in order for a defendant to conduct his own defense, the court must be certain that the defendant's choice is (1) clear and unequivocal, (2) knowingly, intelligently, and voluntarily made, and (3) is timely. Id.

Mazique did not satisfy these requirements. At the pre-trial hearing, when initially asked about his self-representation motion, Mazique responded "I'm not qualified to go pro se; I just want another attorney." Pre-trial Tr. p. 4, lines 4-5. Mazique later repeated that he did not want

Knowles as his attorney because of a breach of trust between them. Pre-trial Tr. p. 16, lines 14-18.

After being presented with the option to proceed pro se, Mazique repeated he did not want Knowles as his attorney and added "if you compel me to [be] my own lawyer, I'll be my own lawyer. I don't want her representing me." Pre-trial Tr. p. 18, lines 6-16. Therefore, Mazique was not voluntarily moving for self-representation if he felt "compelled" to do it.

Mazique continued to be unclear about his desire for self-representation:

> Court: I strongly urge you to let Ms. Knowles represent you. You're not – you don't have the education, in my experience, to represent you in an armed robbery charge. But our Supreme Court has said if a Defendant insists on proceeding pro se, you've got that right. I urge you for your own protection to let Ms. Knowles represent you.
>
> Mazique: And for the record, Your Honor, I'm not insisting that I represent myself but I'm – I'm also bringing it to the Court's attention the ineffectiveness of my lawyer and you can't establish and this Court can't establish that my attorney, she's filed frivolous motions –

Pre-trial Tr. p. 19, lines 10-20. After the trial court decided Knowles would defend Mazique "until he states that he wants to represent himself," Mazique repeated the following:

> She's not representing me. She's not representing me. She's not my attorney. I don't have no trust in her, Your Honor, and I'm explaining to the Court as plainly as I can, the trust has been breached.

Pre-trial Tr. p. 22, lines 12-19.

The trial court reiterated his ruling that Knowles would continue to represent Mazique, but stated the following:

> If on the morning of the trial, he tells me under oath before this Court Reporter, that he wants to represent himself, I'm gonna let him do that. Otherwise, you're gonna represent him.

Pre-trial Tr. p. 22, lines 21-24. Several times after the trial court's decision to keep Knowles as Mazique's counsel, Mazique made additional, unclear outbursts about proceeding pro se:

> Well, I'll represent myself, I don't want you representing me. I'll represent myself; if she's not representing me.
>
> ...
>
> I represent myself **but I'm forced** to do it. I'm gonna represent myself. I don't want this lawyer.
>
> ...
>
> **If I have to** represent myself, I will. I'm prepared to.

Pre-trial Tr. pp. 34-35 (emphasis added). As indicated in the record from the pre-trial hearing, Mazique's motion was neither clear and unequivocal, nor was it knowingly, intelligently, and voluntarily made. Mazique indicated he would represent himself because he was "forced" to and admitted previously he was not qualified to represent himself. This was just a continuation of his fit over not getting his way on his motion for substitute counsel.

"The requirement that the assertion be clear and unequivocal 'is necessary to protect against an inadvertent waiver of the right to counsel by a defendant's occasional musings,' and it also 'prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation.'" United States v. Bush, 404 F.3d 263, 271 (4th Cir. 2005) (quoting Frazier-El, 204 F.3d at 558-59). "This protection against an inadvertent waiver of the right to counsel is especially important because representation by counsel does not merely tend to ensure justice for the individual criminal defendant, it marks the process as fair and legitimate, sustaining public confidence in the system and in the rule of law." Frazier-El, at 559 (citation and internal quotation marks omitted). "The requirement that a request for self-representation be clear and unequivocal also prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation." Id.

"In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation." Id.

"At bottom, the Faretta right to self-representation is not absolute, and the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." Id. (citation and internal quotation marks omitted).

Finally, the record indicates that the trial court did not abuse its discretion by provisionally retaining Knowles as Mazique's counsel. A request for self-representation must "generally must be asserted before meaningful trial proceedings have begun." United States v. Hilton, 701 F.3d 959, 965 (4th Cir. 2012). Thereafter, a defendant's request for self-representation is a matter submitted to the sound discretion of the trial court. Id.

"[I]nvocation [of the right to self-representation] does not set into motion rigid, mechanical procedures that must be followed to the letter to avoid an error. The invocation of the right and whether the proper procedures were followed must be evaluated in the context of a given case." Swan v. Commonwealth, 384 S.W.3d 77, 94-95 (Ky. 2012). "[W]hile the right is a structural right, it must still be applied in the real world, which sometimes requires a practical approach, not an absolute and unbending one." Id. at 95.

"Even if a request is unequivocal, timely, voluntary, knowing, and intelligent, a court may defer ruling if the court is reasonably unprepared to immediately respond to the request." State v. Madsen, 229 P.3d 714, 717 (Wash. 2010). "The trial court was within the bounds of proper discretion to delay ruling on the matter until it could properly prepare to rule on the issue." Id. at 718. "[A] court's discretionary decision to defer ruling on a motion to proceed pro

se should be upheld if the deferral was based on tenable grounds and tenable reasons." Id. at 722.

The trial court explained the following to Mazique:

> This lawyer is going to represent you, prepare your case over the weekend, be ready for trial.... If on the morning of trial – I just want you to have her preparation for the next week, in fairness to you. If on the morning of trial, after examination, you tell me that you want to represent yourself, I'm gonna give you that opportunity. But in fairness to you, I want her to at least prepare for trial and turn over her trial material to you. I'm trying to help you if you'll let me.

Pre-trial Tr. p. 55, lines 9-15. The trial court further explained why it denied Mazique's self-representation motion, while also addressing the untimeliness of the motion:

> To grant [Mazique] his request on the eve of trial would simply mean that everybody in the detention center would want the same thing for the rest of the year. It's obvious to me that he's using this only as a reason to avoid trial and I'm not going to permit it.

Pre-trial Tr. p. 59, lines 5-9.

Since Mazique's self-representation motion was not clear and unequivocal, it was not knowing, intelligent, and voluntary, and because a trial judge has sound discretion in granting requests, the trial court did not err in denying Mazique's motion for self-representation at the pre-trial hearing.

## III.

**Appellant failed to object to Solicitor's comments in the opening and closing statements, which precludes appellate review of the issue, and the comments were not prejudicial and were invited by Appellant's inflammatory arguments.**

Mazique complains about isolated portions of the prosecution's closing argument. However, Mazique did not make a single objection during the closing argument. Accordingly, the issue should not be reviewed by this Court.

It is apodictic that a contemporaneous objection is required to preserve an issue for review. State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995). "The proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon." Id. In the instant case, there was no objection; accordingly this Court should refrain from reviewing the issue. State v. Varvil, 338 S.C. 335, 339, 526 S.E.2d 248, 251 (Ct. App. 2000) (finding the failure to object to comments made during argument precludes appellate review of the issue); Abba Equip., Inc. v. Thomason, 335 S.C. 477, 486, 517 S.E.2d 235, 240 (Ct. App. 1999) ("An appellate court may not address an issue that is not preserved"). Mazique relies on Toyota of Florence v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994) to avoid the rules of error preservation. However, that case involved racial stereotyping in a demonstrative exhibit. The Solicitor's comments, to the extent they may be considered improper, simply do not compare to the outrageous racial slur present in Toyota.

Mazique complains about the Solicitor's comment: "It is my duty to prosecute the person I believe who committed the crime. If I thought Rickey Mazique did not commit this crime I would not be standing in front of you today." Tr. p. 345, lines 7-11. However, the full context puts this isolated passage in a different light:

> **Mr. Mazique told you it is my duty to seek justice** and that's what I do in this case. It's the police's duty to arrest who they think is the person who committed the crime. It's my duty to prosecute the person I believe who committed the crime. It's also my duty not to prosecute someone who I think is innocent. If I thought Ricky Mazique did not commit this crime I would not be standing in front of you today.

Tr. p. 344, lines 4-11 (emphasis added). The first sentence of the quoted passage above reveals the prosecutor's motive was to reply to an argument Mazique made about the prosecutor's duties. The prosecutor's argument was a reply to the following argument Mazique made to the jury:

> The State has multiple, multiple obligations, he has an obligation not just to prosecute but to see that justice is done not only to represent the State but the accused as well. That is the Solicitor's obligation. He was obligated to investigate before charging. He knew that crime didn't happen on the 29th and for over a year they led me to believe that that crime happened on the 29th until I saw the video played, now that the video the cat is out of the bag now. I don't know nothing about it but he knew, he had this evidence prior to submitting it to ya'll. He saw it; he did his investigation and he stood here and told ya'll that this crime happened on the 29th.

Tr. p. 334, line 23 – p. 335, line 9.

In the instant case, the prosecutor's remarks about his duty to Mazique is an entirely proper invited response to the argument Mazique made during his closing statement, which implied that the prosecution was ignoring its duty to see justice done to Mazique and implied that the prosecution was misleading the jury and Mazique. See State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) (finding no denial of due process rights because the solicitor's comment was in response to an argument appellant made during his closing statement); Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004) (noting conduct that would otherwise be improper

may be excused under the "invited reply" doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense).

Mazique also complains the prosecutor argued facts not in the record when he discussed the value of the stolen cartons of cigarettes; however, the facts were insignificant to the case. The value of stolen property is not an element of the crime or vital to the evidence in this case.

Mazique further complains the prosecutor should not have told the jury he never heard Reeves complain she did not consent to the search before. However, the question of whether the consent to search was valid was for the trial court to determine, not the jury, and therefore, the prosecutor's comments on the matter were not prejudicial to the extent such comments were improper. It also is arguably responsive to Mazique's arguments claiming prosecutorial abuse.

"[An appellate court] must review the argument in the context of the entire record." Patterson, at 17, 482 S.E.2d at 766. "Moreover, [t]he appellant has the burden of showing that any alleged error in argument deprived him of a fair trial. 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." Id. In the instant case, the value of the stolen cigarettes or Reeve's consent to search were not relevant to the jury's determination of guilt. Therefore, to the extent the prosecution discussed facts outside the record, the argument did not amount to a violation of due process and did not result in Mazique receiving an unfair trial. Appellate courts should be "careful and critical" in finding allegedly improper statements of counsel to be reversible error, and "[e]very case must necessarily depend upon its own particular circumstances." State v. Gilstrap, 205 S.C. 412, 415, 32 S.E.2d 163, 164 (1944).

Mazique further complains the prosecution should not have expressed confidence that the jury would be as firmly convinced of Mazique's guilt as the prosecution was. However, the

prosecution may argue to the jury or ask that a certain verdict be returned. State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("[T]he prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence . . . . and he may ask for a conviction, or assert the jury's duty to convict."). To the extent the prosecution exceeded this allowance, Mazique was not prejudiced, as the trial court instructed the jury they were the "sole and only finders of facts" and the "sole and only judges of credibility of all the witnesses." Tr. p. 321, lines 19-21. The trial court reminded the jury of its fact finding role two more times. Tr. p. 322, line 14 – p. 323, line 2; Tr. p. 323, lines 22-25. Jurors are presumed to follow the trial court's instructions. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975).

Accordingly, Mazique failed to preserve any issue regarding closing arguments. Further, no error occurred and any improper argument would be harmless beyond a reasonable doubt in light of the trial court's clear instructions and the overwhelming evidence of guilt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

## IV.

**Portions of Appellant's police interview were prejudicial to Appellant, so the trial court properly exercised its discretion by denying Appellant's request to require the State to offer the entire audio recording; and any conceivable error was harmless beyond a reasonable doubt.**

Mazique complains the trial court erred in not allowing him to play an audio recording of one of his statements to law enforcement. Mazique argues he was entitled to play the audio recording pursuant to Rule 106, SCRE. Mazique was able to play the audio recording when he presented his case, admitting the recording as Defendant's exhibit #1. Mazique complains that because he was not allowed to play the recording to the jury during his cross-examination of the law enforcement officer, he was prejudiced because he lost the right to last closing argument. Mazique's argument fails because he failed to show the rule of completeness should have applied to the admitted exhibit and because he presented testimony from two different witnesses and would have lost last closing argument anyway.

Under Rule 106, SCRE:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 106 is a procedural rule that governs the timing of the completion of evidence and is designed to affect the order of proof. State v. Taylor, 333 S.C. 159, 170-71, 508 S.E.2d 870, 876 (1998). There is no requirement that the writings or recordings be contemporaneous or responsive to one another. State v. Tennant, 394 S.C. 5, 14, 714 S.E.2d 297, 302 (2011). The Supreme Court explained in Tennant that "[t]he standard here is 'fairness,' not responsiveness." Id. Tennant quotes, with approval, the Fed.R.Evid. 106 advisory committee's note as follows:

"The [corresponding federal] rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial."

In the instant case, Mazique failed to explain, either to the trial court, or this Court, why Defense Exhibit #1 should have, in fairness, been considered contemporaneously with State's Exhibit #23. Mazique seems to make the fundamental mistake that the rule of completeness applies automatically or in some ministerial fashion without regard to the substance of the writing or writings (or in this case recordings) involved. See Tennant (finding the trial court did not abuse its discretion in denying appellant's request to admit a purported suicide note disclaiming responsibility for the crime: "while relevant, [it] was not so inextricably connected to the letter introduced by the State that its omission was patently unfair.").

Instead, the trial court properly denied Mazique's motion for the State to play the police interview ultimately admitted as Defense Exhibit #1, which contained comments about prior offenses. The contents of the interview contained information that did not appear to be inextricably connected to State's Exhibit #23. Further, the motion was not made until several questions into cross-examination, and therefore, Mazique failed to seek its admission contemporaneously with the publication of Exhibit #23, as the rule requires.

"The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Kirton, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008) (citing State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). In the instant case, the trial court did not abuse its discretion in denying Mazique's motion to publish the portion of the interview ultimately admitted as Defense Exhibit

#1. The trial court ultimately allowed Mazique to play the portions he desired to the jury, so Mazique got his way in the end. Tr. pp. 269-271.

Indeed, what Mazique fails to mention is that the trial court was trying to help Mazique by keeping prejudicial portions of that interview from being published to the jury. At the pre-trial hearing during the Jackson v. Denno hearing, the trial court used its discretion to redact all parts of the police interviews that were prejudicial to Mazique, and Mazique's counsel made no objection. Pre-trial Tr. p. 42, lines 4-14. The audio-recorded statements consisted of three interviews with Mazique. The second interview, which contained discussion of Mazique's prior drug offenses and probation, was marked as Court's exhibit for identification, but was redacted and not used in the State's case in chief. Pre-trial Tr. pp. 40-41.

The trial court found the evidence could be used if referenced on cross-examination from Mazique's testimony. Pre-trial Tr. pp. 41-42. Midway through trial, in the State's case-in-chief, the trial court explained to Mazique the reason for redacting the second interview as follows:

> I did not let the State play that second [interview] simply because it may contain things that you said that were prejudicial against your interest, to protect your rights I would not let the State play it. If you think there's something helpful to you when your time comes we'll play it and I'll call [Officer Chatfield] back and let you cross examine him but I'm not going to do it at this time.

Tr. p. 219, lines 17-23.

It is obvious the trial court was seeking to preserve the integrity of the proceedings and save Mazique from the worst effects of his hapless self-representation by avoiding admission of evidence so clearly prejudicial to Mazique. This effort to preserve the decorum of the proceedings was not error. See Rule 403, SCRE; State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) (finding the conduct of a criminal trial is left largely to the sound discretion of the trial judge).

Mazique contends he was prejudiced because he lost last argument. To the extent this is even a valid argument for prejudice from the exclusion of evidence later admitted at trial, Mazique was not prejudiced because he chose to recall both police officers as his witnesses. Mazique lost last argument by presenting testimony regardless of the publication of Defense Exhibit #1 to the jury. Mazique chose to recall Officer Chatfield to examine him not only on the content of the interview, but on other topics as well. For instance, Mazique questioned Officer Chatfield on the ability to manipulate or edit interviews recorded at the police station. Tr. p. 275-278. Mazique also questioned Officer Chatfield about his decision to clear Reeves of any potential charges and about when Officer Chatfield sought an arrest warrant from the magistrate. Tr. pp. 281-282. Mazique wanted the jury to know why Officer Chatfield came back the next day to obtain a statement from Mazique when he already had an arrest warrant. (The answer was related to the fact that Mazique was a suspect in at least three other robberies). Tr. pp. 284-286. Further, Mazique, as a matter of strategy, recalled Officer Scales to inquire about the surveillance recording at the store and how Officer Scales compiled his report. Tr. pp. 302-305. The strategy is far less than apparent when Mazique entered a duplicate copy of the surveillance video as Defense Exhibit #2. Tr. pp. 295-296. Accordingly, the other evidence Mazique presented would result in loss of last argument, regardless of the exhibits. State v. Pinkard, 365 S.C. 541, 617 S.E.2d 397 (Ct. App. 2005) (defendant's display of tattoo constituted presentation of evidence resulting in losing entitlement to last closing argument).

Further, any error is harmless in light of the overwhelming evidence of guilt. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). "Harmless

error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)).

## V.

**Appellant was not entitled to the police officer's notes under Rule 5, and no evidence in the record indicates the notes contained evidence favorable to the Appellant. Further, any conceivable error is harmless beyond a reasonable doubt considering Appellant confessed, the stolen goods were found in his home, and the wig he wore was an insufficient disguise since the store clerk recognized Appellant right away as a regular customer who often loitered around the store.**

Mazique complains the trial court should have required the prosecution to turn over Officer Chatfield's handwritten notes from his interview with Mazique. Of course, the interviews were audio recorded and represent a more accurate representation of the interview than whatever content found in Officer Chatfield's notes.[1] However, any notes were not made part of the record at trial, and so the issue should not be reviewed. Further, the prosecution was not required to turn over any of Officer Chatfield's handwritten notes.[2]

Under Rule 5 (a)(2), SCRCrimP, discovery or inspection is not authorized for "reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case . . . " In State v. Bryant, 304 S.C. 488, 405 S.E.2d 423 (Ct. App. 1991) *rev'd on other grounds by* State v. Bryant, 307 S.C. 458, 415 S.E.2d 806 (1992), this Court rejected the appellant's contention that the trial court erred in not requiring a police officer's notes be turned over to the defense under Rule 5, noting the officer's notes "are clearly internal prosecution documents and, therefore, not covered by Rule 5." Id. at 490, 405 S.E.2d at 424.

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[1] See State v. Kerr, 330 S.C. 132, 149, 498 S.E.2d 212, 221 (Ct. App. 1998) (finding trial court in a DUI case did not abuse its discretion concerning the prosecution's failure to disclose photographs depicting damage to the vehicle after the wreck because the appellant already confessed to the collision).

[2] Actually, it is unclear whether or not there are handwritten notes. When asked if he took his own personal notes, Officer Chatfield responded: "Did I take my own personal notes, everything that I have is in the case file." Tr. p. 200, lines 20-23.

Further, the record below is inadequate to review this allegation. The burden is on appellant to provide a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). A violation of Rule 5, SCRE is not reversible unless prejudice is shown. State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). In the instant case, the notes were not made part of the record on appeal, so this Court will be unable to review for prejudice. Mitchell (finding review of possible trial court error, in relation to a written statement discovered after jury deliberations began, foreclosed where the statement was not made part of the record).

Additionally, since the notes are not part of the record, nothing in the record indicates that the notes were material to the guilt or punishment of Mazique. The prosecution's withholding of evidence favorable to the excused may result in the denial of due process if the evidence is material to the guilt or punishment of the accused. Brady v. Maryland, 373 U.S. 83 (1963). To establish that a new trial is warranted, the defendant must show the evidence: (1) was favorable to the accused, (2) was in possession of or known to the prosecution, (3) was suppressed by the prosecution, and (4) was material to the guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Mazique cannot succeed on a Brady claim because these elements were not met.

Mazique argued he did not receive the notes in discovery, to which the State replied that Mazique was not entitled to written notes of an officer's thoughts and feelings. Tr. p. 201, lines 9-15. Mazique continued with the examination, without making a Rule 5 motion for disclosure of the notes and without claiming that the notes might have some exculpatory value. His acquiescence waives any further argument. Mitchell, supra (finding that although defendant told the trial court he wanted the prosecution's criminal file on a witness with pending criminal

charges, he failed to make any further objections on the limitations on defendant's cross-examination of the witness concerning the charges or make any further objections about not receiving the file, so the issue was not preserved). At no point did Mazique refer to Rule 5 or Brady. "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001).

Mazique recalled Officer Chatfield to the stand during his case, and the trial court asked Officer Chatfield to provide Mazique with a synopsis that Officer Chatfield prepared. Tr. pp. 190-191. It is unclear whether this synopsis constitutes the notes referred to earlier in trial. However, Mazique requested Officer Chatfield publish the following portion of the synopsis: "Mazique stated the bullets in apartment were his, stated he threw the firearm near 501 but would not confess to robbing the store." Tr. p. 292, lines 7-11. Officer Chatfield subsequently noted he was investigating Mazique for a "multitude of cases" in explaining the discrepancy from the audio taped interviews. Tr. p. 292, lines 14-18. Given that recordings of the interviews were submitted into evidence, the jury could determine whether or not Mazique confessed. Mazique failed to show the notes contained, or were even likely to contain, evidence favorable to him. Further, Mazique fails to show any such evidence was material such that it was reasonably likely to have changed the outcome of the trial. Gibson at 524, 514 S.E.2d at 325. Accordingly, the trial court did not err and Mazique failed to demonstrate prejudice from any supposed error.

## VI.

**The trial court used its discretion to limit Appellant's dilatory examination of witnesses, which veered into repetitive and irrelevant matter. Further, Appellant was not entitled to a court-provided transcript of the pre-trial hearing and failed to explain to the trial court why the transcript was needed.**

Mazique complains about the limitations at various times placed on his cross-examination of Officers Chatfiled and Scales. However, Mazique was dilatory, struggled with proper evidentiary procedure, sought to delve into irrelevant matter, and was often repetitive in his examination. The trial court's limitations fell within its discretion as the trial court struggled with the awesome challenge of maintaining the integrity of proceedings during Mazique's unfocused and hapless cross-examination.

The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 534 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240, 244 (2001). "Trial judges retain wide latitude . . . to impose reasonable limits on cross-examination including questions regarding matters that are only marginally relevant." State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300, 314 (2001) (citations omitted).

Most of the trial court's limitation of Mazique's cross examination of Officer Chatfield was due to Mazique's dilatory conduct. Mazique asked questions that were already asked and

answered, so the trial court properly limited Mazique's examination so as to not waste anymore of the jury's time. Tr. pp. 231-233. The trial court necessarily warned Mazique as follows:

> I've already told you, you are now beginning to waste the jury's time. It's 6:00. You've examined this witness at length and detail on a lot of things that really are not relevant. You are pro se; you're representing yourself. I'm leaning over backwards to help you; I'm not going to let you waste this jury's time any further. Now conclude your examination.

Tr. p. 229, lines 13-20.

For instance, Mazique complains he should have been allowed to cross-examine Officer Chatfield further on a blue mesh bag. The prosecution objected out of concern that he was passing documents around to the witness and asking questions about them without identifying them. Mazique failed to lay sufficient foundation for the documents that he was passing around. Mazique never asked Officer Chatfield to identify the documents and failed to lay down a sufficient foundation if he was seeking to elicit a prior inconsistent statement. See Rule 612, SCRE; Rule 613, SCRE. Mazique simply was not following proper evidentiary procedure and the trial court did not abuse its discretion in limiting Mazique's unfocused inquiry.

The evidentiary value concerning the blue bag was already exhausted by the time Mazique was required to move on from that topic. Mazique established that a blue mesh bag was found in his closet. Officer Chatfield agreed there was a blue bag but was mistaken in his recollection as to whether the blue bag was seized. Tr. pp. 226-230. Mazique made this point for its minimal evidentiary worth, and no further examination was needed. See Rule 403, SCRE.

Given that Mazique confessed to the robbery, he was readily identified by the victim who knew him from his frequent visits to Kangaroo, and stolen cartons of cigarettes were recovered from his residence, Mazique cannot demonstrate prejudice from the limitation on further inquiry in light of the overwhelming evidence and the minimal impact the existence of the blue mesh bag

might have on his case. State v. Liverman, 386 S.C. 223, 233-34, 687 S.E.2d 70, 75 (Ct. App. 2009) (noting reversal of a circuit court's ruling on the admission or exclusion of evidence requires prejudice to the defendant).

Mazique also complains he should have been allowed to replay the interview recording during his cross-examination of Officer Scales. The trial court would not allow it, as it had already been played for the jury. Mazique was not prohibited from asking questions about the video though, and the trial court advised the jury that it would be available for them to view during deliberations. Tr. p. 216. Likewise, the trial court did not err in denying Mazique's request to play a duplicate copy of the surveillance video already submitted into evidence. The trial court did allow Mazique to enter the duplicate copy as Defense Exhibit #2. Tr. p. 296. Mazique has shown no distinction between the two tapes – Mazique was yet again being dilatory. Under Rule 403, SCRE, relevant evidence may be excluded based on "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court did not err in this regard, as the evidence fit the bill for exclusion under Rule 403.

Mazique further complains Officer Chatfield was not allowed to answer the following question: "Now if [Reeves] wasn't truthful and being honest would she allege that she felt threatened, or would she let ya'll into - - -." Tr. p. 231, lines 11-13. The question constituted an attempt to improperly pit witnesses. "It is improper to cross-examine in a way that requires a witness to attack another witness's credibility." State v. Benning, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999). So that limitation was proper.

Mazique, whose lengthy and unconstructive cross-examination approached the evening hours, had his examination mercifully ended by the trial court when he attempted to ask additional questions about Officer Chatfield's interactions with Branton. Tr. pp. 231-232.

Mazique had already examined Officer Chatield about his interaction with Branton. Tr. p. 207. Mazique failed to explain why further examination was necessary. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." State v. Mitchell, 330 S.C. 189, 196, 498 S.E.2d 642, 646 (1998) (quoting State v. Smith, 315 S.C. 547, 551-52, 446 S.E.2d 411, 414 (1994)). Further, since he later recalled Officer Chatfield, Mazique had the opportunity for further examination on any matter he had not yet covered.

**The Trial court did not err in declining to order the pre-trial transcript for Appellant since Appellant failed to show a particularized need and the issue is abandoned on appeal since no authority was cited by Appellant.**

Mazique argues the trial court erred in not accommodating his request for the pretrial transcript, which includes the Jackson v. Denno hearing. Mazique fails to cite any authority in his brief supporting his claim of right or entitlement to the pre-trial hearing transcript. State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was conclusory and abandoned on appeal).

At trial, Mazique failed to explain why he needed the transcript and how it would help him cross-examine law enforcement. The trial court simply did not abuse its discretion. The conduct of a criminal trial is left largely to the sound discretion of the trial judge. State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) (citing State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981)). A trial court abuses its power of discretion when it

commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). Since Mazique failed to explain his need for the transcript, the trial court did not abuse its discretion.

Officer Chatfield's testimony during the pre-trial hearing was substantially the same as his trial testimony concerning the interviews. In State v. South, 285 S.C. 529, 536, 331 S.E.2d 775, 779 (1985), the Supreme Court ruled that when the State failed to produce a tape recorded statement in addition to a written statement, the error was harmless beyond a reasonable doubt since appellant received the "substantial equivalent" in the written statement. In the instant case, the trial court observed, "I don't believe a jury of your family could have found you not guilty under all of these circumstances." Tr. p. 353, lines 8-9. The evidence was simply overwhelming. Any conceivable error in the present case is harmless beyond a reasonable doubt. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

VII.

**The trial court did not err in not allowing Appellant to ask the victim about whether she had ever been arrested, and Appellant's claim that he should have been allowed to cross-examine Appellant about any pending charges is not preserved for review.**

Mazique complains on appeal that he should have been allowed to ask if Branton had pending charges at the time of trial. Mazique never asked Branton this question. Instead, he asked Branton if she had ever been arrested. The trial court told Mazique not to ask that question and Mazique never provided any explanation for why he should be allowed to ask if Branton **had ever** been arrested. Tr. p, 242. Mazique never indicated he was trying to determine if Branton had pending charges and never advised the trial court if in fact, he had reason to believe Branton had pending charges.

The burden is on appellant to provide a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Failure to make an offer of proof precludes consideration of an issue on appeal. State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984). The record is limited to that matter placed before the trial court. SCACR Rule 210(c). If Branton had pending charges, Mazique needed to bring that to the trial court's attention if this Court were to speculate and entertain the proposition that Mazique was attempting to elicit such testimony.

The reviewing court may not consider alleged error in excluding testimony unless the record shows fairly what the rejected testimony would have been. State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979). Failure to raise an argument against exclusion of testimony and to proffer witness's testimony, had it been allowed, means the issue is not preserved for review. State v. Simmons, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004).

Quite simply, the argument advanced now on appeal was not raised and ruled on below and therefore is not preserved for review. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005). Accordingly, this Court should not review this issue.

Further, the trial court did not err in not allowing Mazique to ask Branton if she **had ever been** arrested. "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). Thus a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) .

Even assuming (1) the issue was preserved, (2) Mazique actually intended to inquire about pending charges, and (3) Branton had a relevant answer to this question, any error would be harmless beyond a reasonable doubt. Mazique is no master of disguise, he hoarded the stolen goods at his house, and confessed. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

VIII.

**There is no error, much less cumulative error, and any preserved errors are harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. A defendant is entitled to a fair trial, not a perfect one. But even a perfect trial would not prevent the inevitable result of Appellant's conviction.**

The Trial court made reasonable efforts to help Mazique as he lumbered haplessly through his trial. Several of the arguments Mazique has advanced are not preserved for review. Certainly, the alleged but meritless structural errors asserted in issues I and II have no bearing on the actual jury trial. Indeed, Mazique would have been better off with the competent and experienced attorney appointed for his case. Mazique engaged in a dilatory and unfocused approach to his case, engaged in needless and repetitive questioning, and successfully opened the door to his other charged conduct. He prejudiced his own case far more than the trial court or the prosecution could have. Of course, the evidence of his guilt was truly overwhelming.

Further, the record reflects the trial court exercised its discretion soundly at each instance. However, the cumulative effect of any errors this Court might find fails to undermine the fact that Mazique did receive a fair trial. This case does not warrant reversal on cumulative error. "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted).

## CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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