STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions

Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-001841

THE STATE,

Respondent,

v.

KENNETH JORDAN BELL,

Appellant.

FINAL BRIEF OF RESPONDENT

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The trial court correctly allowed testimony to be presented that one of the victims owed a debt to the codefendant; however, the trial court properly limited the testimony so that details of a previous drug transaction, the reason for the debt, were not disclosed.

STATEMENT OF THE CASE

A Horry County Grand Jury indicted Appellant for first-degree burglary, armed robbery, kidnapping, possession of a weapon during the commission of a violent crime, and criminal conspiracy. (R.381-390) On August 12, 2013, Appellant proceeded to a trial before the Honorable Roger L. Couch and a jury. Gregory M. McCollum, Esquire, represented Appellant, and Assistant Solicitor Nancy R. Livesay represented the State. The jury found Appellant guilty on all charges, and Judge Couch sentenced him to concurrent sentences of fifteen years' imprisonment for first-degree burglary, ten years' imprisonment for armed robbery, ten years' imprisonment for kidnapping, five years' imprisonment for the weapon charge, and five years' imprisonment for criminal conspiracy. (R. 356-357, 372.)

On August 21, 2013, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On February 2, 2013, Paul DeGruccio and Tanner Clark were in their apartment when two masked men burst through the door—one with a gun and one with a tire iron. (R. 33, lines 8-16; R. 34, line 18-R. 35, line 16; R. 75, lines 7-12.) A friend, Erik Meijer, was also there playing video games in the living room, and another roommate, Scott McDonald, was asleep in his room. (R. 38, lines 15-22.) Clark called 911 from his locked bedroom and stayed on the phone with the operator until he saw the police arrive and arrest the men in the parking lot. (R. 35, lines 4-5; R. 36, lines 3-10.) Appellant and Chris Bell (Chris) were the two men arrested on the scene. (R. 181, line 1-R. 182, line 17.)

Appellant proceeded to trial on charges of first-degree burglary, armed robbery, kidnapping, possession of a weapon during the commission of a violent crime, and criminal conspiracy. (R.381-390.) Pretrial, the State made a motion in limine to keep out details of a prior marijuana deal between DeGruccio and Chris and subsequent debt owed by DeGruccio, arguing it was not relevant, that even if it was relevant it was unfairly prejudicial, and that there was no relationship between DeGruccio and Appellant. (R. 12, line 3-R. 13, line 1.) Defense counsel argued the drug transaction and resulting debt should be admitted for a full and complete confrontation, to show bias, and as part of the *res gestae* of the crime. (R. 15, lines 2-22.) The trial court acknowledged Appellant has the right to confront and present any defense. (R. 17, lines 21-23.) In weighing the prejudicial effect versus the probative value, the trial court asked defense counsel if there was any reason the collection of the debt had to be characterized as a drug deal. (R. 18, line 10-R. 19, line 3.) When defense counsel argued the testimony would go to the intent of the burglary and armed robbery, the trial court asked, "Again though, if he intends to

collect a debt, if that's the intent, why do we care what it was for?" (R. 19, lines 11-16.)

This exchange followed:

> [Appellant]: I think there's some difference if it was, it was lawful debt or an unlawful debt.
>
> The Court: Well, if it was an unlawful debt, nobody has a right to collect it and then it goes against your defense. Am I right or wrong?
>
> [Appellant]: If it were--if it were derived--it's my -- Your Honor, I understand you have the ability to rule on this. It's the Defense position that that is a relevant part of the crime charged. That's what was really going on. That's what happened. Therefore, it's relevant. We would submit that it's not unduly prejudicial to the State's case to prove the truth of what happened in the case as part of the reasoning of the case and the res gestae and the true facts of the case, Your Honor. That's the Defense'[s] position.
>
> The Court: All right. I'm gonna, I'm gonna rule in your favor to the extent that I'm going to limit them from characterizing the debt as stemming from any type of illegal activity or drug, drug transaction. I will not prevent them, however, from testifying to the fact that the purpose, their intent at the time they went over there was to collect a debt that goes to an element of the crime and I find that that would be admissible if they did go there for the purpose of collecting a debt, not to commit any type of robbery. So I'll allow that to come in, but I find that characterizing it as a debt stemming from a drug transaction, the prejudicial effect of that would outweigh the probative value of that information so I'm excluding it to that extent.
>
> [The State]: Your Honor, my only concern with that is that once we allow them to go into a debt, my fear is that it is definitely insinuating that he has the right to go in and collect that debt, which that's not a defense. I don't believe you can break into somebody's house and burglarize them and that is essentially---
>
> The Court: No, but burglary--burglary is entering a home with the intent to commit a crime therein. Now, if at the time they entered the home they did not have the intent to commit a crime, that's an element of the offense--you've got to prove that when they went in, they had the intent to

> commit a crime therein. So I'm gonna let them put in what their intent was when they went in the place. If they, if they testify, I don't know what evidence they're gonna present, but I'm not gonna exclude it because that goes to one of the elements of the crime. I mean, if I go into someone's home for the purpose of drinking lemonade and then later on I commit a crime, that may not be a burglary when I entered without the intent to commit a crime. That's my ruling.

(R. 19, line 17-R. 21, line 13.)

The State called Tanner Clark to testify regarding his 911 call on the day of the incident. (R. 32, line 15-R. 34, line 9.) While in his bedroom, he heard a commotion in the living room, poked his head out, saw two men coming into the apartment—one with a gun, shut and locked his bedroom door, and called 911. (R. 35, lines 1-16; R. 39, lines 9-13.) Before closing the door, he saw the man with the gun put it up to his roommate's head and tell him to sit down. (R. 40, lines 16-21.) Clark then heard the men take DeGruccio back to his room and begin arguing. (R. 35, lines 23-25.) He heard one man refer to the other as "Kenny." (R. 41, lines 21-24; R. 42, lines 6-15.) At one point, he heard DeGruccio say something like, "Why are you doing this?" (R. 42, lines 18-24.) He testified he did not hang up with the 911 operator until he saw police arrive and apprehend the two men. (R. 36, lines 3-10.) He testified he did not feel like he was free to leave after he saw the men and the gun. (R. 41, lines 11-13; R. 68, lines 5-7; 21-25.) On cross-examination, Clark admitted he now knows DeGruccio owed Chris money at the time of the incident. (R. 63, lines 9-14.)

Paul DeGruccio testified next regarding the events of February 2, 2013. (R. 69, line 13-R. 70, line 13.) He explained he woke up to a phone call from a woman named Jasmine, who was supposed to come over to his apartment. (R. 70, lines 14-17; R. 71, lines 10-17; R. 72, lines 2-6.) According to DeGruccio, Jasmine texted him when she

arrived and asked him to crack the door. (R. 73, lines 13-17.) He cracked the door and was looking out the window into the parking lot when the door burst open and two masked men entered—one holding a tire iron and one with a gun. (R. 73, lines 17-22; R. 75, lines 7-12.) When DeGruccio heard the voice of the man with the tire iron, he recognized it as that of Chris Bell and said Chris's name, at which time the intruder removed his mask. (R. 76, lines 10-14.) DeGruccio testified Appellant pointed the gun at him several times and he did not feel free to leave. (R. 77, lines 3-9.) Chris then took DeGruccio to his room and told DeGruccio he was going to give Chris whatever he had. (R. 77, lines 20-24.) Appellant stayed in the living room with his gun on Erik Meijer. (R. 77, line 25-R. 78, line 2.) DeGruccio stated:

> After me and Chris went into my room, he was kind of rummaging through my stuff throwing my things everywhere and I kind of was a little upset about the situation, kind of our past and everything, I was like talking to him, you know. I had owed him money for something and the situation, what--I was basically, we had talked a couple of months back about this and ---

(R. 78, lines 5-11.)

On cross-examination, DeGruccio testified he owed Chris approximately $800. (R. 100, lines 3-7.) Defense counsel elicited that the debt came from one transaction. (R. 100, lines 8-11.) Immediately following that testimony, defense counsel asked about DeGruccio's felony conviction. (R. 700, lines 12-14.) The State objected to this line of questioning, arguing the trial judge had already ruled the drug transaction between Chris and DeGruccio would not be admitted. (R. 101, lines 1-17.) Defense counsel argued possession with intent to distribute (PWID) is a crime of dishonesty, but the trial judge disagreed and analyzed the testimony under Rule 609(a)(1), SCRE. (R. 107, line 9-R. 109, line 3.) The State then argued there was no probative value to questioning

DeGruccio about his felony except to slander him. (R. 109, lines 11-23.) The trial judge ruled in favor of Appellant, finding the probative value did not outweigh the prejudicial effect. He allowed Appellant to ask about the felony but not to connect it to a transaction between Chris and DeGruccio. (R. 110, lines 10-15.) The judge instructed Appellant he could ask about the conviction but if DeGruccio admitted it, the inquiry would end without the introduction of any extrinsic evidence. (R. 112, lines 20-24.) Further, the trial judge reiterated his ruling that the fact the debt arose out of the drug transaction was not relevant. (R. 113, lines 1-7.) The trial judge specifically ruled that Appellant could ask DeGruccio if he had a felony conviction for PWID marijuana, and the State argued it would be unduly prejudicial because there would be an assumption that there was a transaction between DeGruccio and Chris, stating:

> I, I think my concern is, I'm just—once we get into the fact that he has a PWID marijuana charge, the assumption is gonna be the transaction obviously because it's gonna come in that he has—and I think in some circumstance, it would be probative but, when I think you look at the fact that we're talking about a transaction that has led to an armed robbery and burglary first, I think it's very quick for them to jump to this transaction obviously had drugs involved.

(R. 115, lines 11-19.) The trial court then allowed Appellant to make a proffer regarding the details of the conviction, during which DeGruccio admitted the drugs taken during his arrest for PWID were the drugs he got from Chris and were the reason he owed Chris money. (R. 117, line 1-R. 119, line 8.)

Following the proffer, defense counsel argued the jury should be allowed to hear the details of the prior transaction because it was part of the *res gestae*, showed motive and intent, and was relevant. (R. 121, line 13-R. 122, line 2.) The trial court reminded Appellant it already overruled the State's objection and ruled in Appellant's favor on

allowing the conviction in, but it did not change its ruling as to the details of the drug transaction and how it was the reason for the debt owed. (R. 122, line 25-R. 123, line 23; R. 124, lines 18-20.) Cross-examination then continued, and Appellant elicited from DeGruccio that he had been convicted of a felony and that it was PWID marijuana. (R. 124, line 25-R. 125, line 7.) Immediately after eliciting that testimony, Appellant asked DeGruccio about knowing Chris and recognizing his voice under the mask, specifically asking, "And the reason you knew it was Chris is because when he was referring to money that you owed him, you knew that made you know who it was, right?" (R. 125, lines 8-25.)

Officer Natalie Boyd of the Horry County Police Department testified regarding her response to the 911 call reporting two masked men in an apartment on February 2, 2013. (R. 175, line 14-R. 178, line 3.) As she arrived on the scene, she saw two subjects—who matched the description she had received of two men in black hoodies and jeans—cross the parking lot and start to get into a red vehicle. (R. 178, line 20-R. 179, line 16; R. 180, lines 3-6.) She ordered the subjects to the ground and placed them in handcuffs. (R. 182, line 3; R. 183, lines 5-8.) She testified one of the subjects was Appellant. (R. 184, line 21-R. 185, line 1.) During Officer Boyd's testimony, the State introduced the video she captured on her in-car camera. (R. 189, line 5-R. 190, line 14.) The trial judge admitted it and it was played for the jury. (R. 191, lines 15-21.) Officer Boyd testified she collected a .45 automatic round from Appellant's pocket. (R. 194, lines 14-20.) The gun was found on the back floorboard of the vehicle the men were getting into when captured. (R. 164, lines 5-13.)

Next, Officer Timothy Cast testified about the evidence collected on the scene. (R. 212, line 12-R. 213, line 19.) He testified there were five rounds in the gun—four in

the clip and one in the chamber. (R. 221, lines 5-11.) He explained that because there was a round in the chamber, the gun was ready to shoot without being racked. (R. 223, lines 1-18.)

When the trial judge charged the jurors, he first explained each of the charges and then told them in regard to the verdict form:

> Now each question that I give you must be decided by you unanimously. Each and every verdict you reach must be agreed upon by all of you before it is the verdict of the Jury. So again, no juror has any greater say in the outcome of the case than any other juror. All of you must agree upon the verdicts before they become the verdict of the jury in this case.

(R. 309, line 19-R. 316, line 8.) (emphasis added.) He again stated to the jury:

> Now, as to each indictment to the case, there's a separate question and each question will be for example, as to armed robbery or burglary in the first degree, there are two choices under each question and again, it requires a unanimous finding by the Jury, one way or the other, either guilty or not guilty. . . . Once the verdict has been reached unanimously on that particular issue by the Jury, you'll either put an X or a check in the blank beside the appropriate verdict and then move on to the next question to be answered.

(R. 317, line 22-R. 318, line 7.) (emphasis added.) After the jury began deliberations, it sent a question to the trial court asking, "What happens if there is one charge that the Jury cannot agree on?"[1] (R. 345, lines 1-2.) The trial court read the question to the attorneys and stated, "It appears to the Court that as to that charge an Allen Charge would now be appropriate." (R. 345, lines 2-3.) Both parties agreed. (R. 345, lines 3-6.) However, after the trial judge determined reviewing the evidence in the form of watching the video

[1] The jury asked a second question at the same time: "Can we see the video again, the part from when the police arrived at the complex on and is there any way to slow the video?" (R. 345, lines 22-24.)

again would assist the jury in continuing deliberations, he did not give an Allen charge. (R. 346, lines 2-6.) Later, the jury asked, "What happens if we deadlock on one charge?" (R. 352, lines 7-10.) At that point, the trial judge gave the jury an Allen charge during which he reminded it "a verdict in any of the charges must be unanimous." (R. 352, lines 14-15.) (emphasis added.) He further instructed, "If you do not agree on a verdict in this case, on one of the charges in that case, it would be my duty to declare what is referred to as a mistrial." (R. 353, lines 14-16.) (emphasis added.) After the trial judge gave the Allen charge, Appellant asked him, "If the Jury reaches verdicts, whether they be guilty or not guilty, on all those indictments with the exception of the one they seem to be referring to, could the Defendant be tried again?" (R. 354, lines 16-19.) The following exchange followed:

> The Court: I haven't gone there and that's not really before me to decide.
>
> [Appellant]: Well, it just comes to mind in terms of the Allen Charge because--and I understand the Allen Charge is well-grounded as the appropriate response, but I just raise that.
>
> The Court: I haven't researched it. I would think since each indictment stands on its own and charges [a] separate and distinct offense with different elements, I would not think that double jeopardy would apply if the Jury deadlocked and mistrial was declared. But I would research that; I don't know.
>
> [Appellant]: So, that's all I'm raising.
>
> The Court: All right. It would seem to me--now, if you have some law as to that, I'll be glad to take a look at it.
>
> [Appellant]: Well, it just occurred to me.
>
> The Court: Again, I would think that since each indictment, and we charged them at the beginning of the

> charge, that they should decide each indictment separately and distinct from the decision that they make in every other indictment. That was the charge they were given at the beginning of their deliberations. So, they are to weigh each offense separately and the fact that they find someone guilty on one charge should not influence their decision in deciding the other charges.
>
> [Appellant]: Maybe it's more of a practical consideration.
>
> The Court: So, it would seem to me that since each one alleges separate and distinct offenses with different elements, then I think they each stand alone; that's the way I understand it.
>
> [Appellant]: All right. Okay.

(R. 354, line 20-R. 356, line 2.) (emphasis added.) He did not ask the trial judge to clarify the jury instruction or propose an alternate instruction.

Ultimately, the jury found Appellant guilty of all charges, and the trial court sentenced him to concurrent sentences of fifteen years' imprisonment for first-degree burglary, ten years' imprisonment for armed robbery, ten years' imprisonment for kidnapping, five years' imprisonment for the weapon charge, and five years' imprisonment for criminal conspiracy. (R. 356-357, 372.)

ARGUMENT

I.

Appellant's argument is not preserved, but even if preserved, the trial court properly delivered the current and correct law in its Allen charge to the jury when the jury asked what would happen if it was deadlocked on one charge.

Appellant argues the trial court erred in instructing the jury that if it failed to reach a verdict on one of the charges, a mistrial would be declared, the case would be retried, and the parties would "go through this whole process again."[2] Specifically, he argues the trial court erred by not clarifying that the jury's failure to reach a verdict on any one indictment would not necessitate a new trial of all indictments. Initially, the State submits this issue is not preserved for review because Appellant did not object to the giving of the Allen charge, nor did he object to the sufficiency of the charge or ask the trial judge to clarify that only the charge it was deadlocked on would be retried rather than all the charges. Even if the court finds it is preserved, the trial court charged the current and correct law of South Carolina, which is all that is required. State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005).

Error in jury instructions is not preserved for review if the defendant fails to object. See Rule 20(b), SCRCrimP (stating failure to object to the giving or failure to give a jury instruction shall constitute waiver of the objection); State v. Whipple, 324 S.C. 43, 52, 476 S.E.2d 683, 688 (1996) (noting the failure to object to a charge as given,

[2] It is worth noting the Allen charge the trial judge gave came directly from the current version of the Criminal Charges Bench Book, which the judicial department updates each year and distributes to judges and that is now published on the S.C. Judicial Department's website. http://www.judicial.state.sc.us/juryCharges/GS%20InstructionsJune2013.pdf.

or to request an additional charge when given an opportunity to do so, constitutes a waiver of the right to complain on appeal).

In State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996), the appellant objected after the trial judge had given one Allen charge and the State had asked for a second one based on the jury's question asking whether the six guilty verdicts would stand if it could not reach a unanimous decision on the other two. The trial court gave the second Allen charge, stating, "If you do not reach a verdict on the two counts, it would be a mistrial. The whole case would have to be tried over." Id. at 98, 470 S.E.2d at 108. The appellant did not object to the substance of the instruction. Id. On appeal, Pauling argued the trial judge incorrectly instructed the jury a failure to reach a verdict on two counts would necessitate a new trial on the entire case. Id. at 100, 470 S.E.2d at 109. The supreme court stated, "Failure to reach a verdict on any count in the indictment would necessitate a new trial of the entire case to arrive at a verdict *on that particular count*[,]" acknowledging the instruction could be confusing. Id. But, because the appellant did not contemporaneously object to the substance of the charge, ask for clarification, or propose an alternate instruction, he denied the trial judge the opportunity to cure any alleged error and, thus, he was barred from raising the issue for the first time on appeal. Id.

In Pauling v. State, 350 S.C. 278, 284, 565 S.E.2d 769, 772 (2002), the supreme court found "counsel's failure to object to the trial judge's response to the jury's question concerning the result if it failed to reach a verdict on the murder charges was deficient." In that case, the trial judge's response to the jury's question was: "[Y]ou gave me a question. If you do not reach a verdict on the two counts, it would be a mistrial. The whole case would have to be tried over." The statement that the whole case would have to be tried over is not part of the standard Allen charge. Here, when the trial judge

responded to the jury's question, he began: "Now, ladies and gentlemen, you've stated to me that you've been unable to reach a verdict as to one of the charges in this case and as I instructed you earlier, a verdict in any of the charges must be unanimous." He then gave the standard Allen charge, which both attorneys had previously agreed to and defense counsel did not object to. Unlike Pauling, the trial judge here never stated "the whole case would have to be tried over." Rather, he merely stated the standard Allen charge language: "[I]t just means that at some future time either I or some other judge will try this case with some other jury sitting where you now sit. . . . and we will go through this whole process again." However, even if this Court determines the trial judge's statement during the Allen charge was confusing or erroneous, the issue is not preserved because defense counsel did not object to the charge, ask for clarification, or propose an alternate instruction.

Here, Appellant did not object to the substance of the jury instruction after the trial court gave the jury an Allen charge in response to its question about being deadlocked on one indictment. Appellant simply asked the trial judge, "If the Jury reaches verdicts, whether they be guilty or not guilty, on all those indictments with the exception of the one they seem to be referring to, could the Defendant be tried again?" (R. 354, lines 16-19.) The trial judge and Appellant then engaged in a discussion of double jeopardy and whether Appellant could be tried again. At no time did Appellant object to the Allen charge; indeed, he had already stated he had no objection to it when the jury first asked its question, and he also stated, "I understand the Allen Charge is well-grounded as the appropriate response . . . ." (R. 345, lines 3-6; R. 354, lines 23-25.) Additionally, Appellant did not make any specific objection regarding how the trial judge instructed the jury, nor did he request that the trial judge clarify any part of the instruction

to the jury or propose an alternate instruction. By not objecting to the charge specifically, Appellant waived his right to complain on appeal. See Pauling, 322 S.C. at 100, 470 S.E.2d at 109. Accordingly, this issue is not preserved for appellate review.

Appellant's argument also fails on the merits. "Generally, the trial judge is required to charge only the current and correct law of South Carolina." Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865. "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. The trial court gave the jury a charge that reflected the current and correct law in South Carolina, based on the language of Allen v. United States, 164 U.S. 492, 17 (1896). Unlike in State v. Pauling, the trial judge did not confuse the jury by telling them the whole case would have to be tried again. He adhered to the accepted Allen charge and emphasized to the jury numerous times that each verdict was separate. Thus, the trial judge properly instructed the jury and should be affirmed.

II.

The trial court correctly allowed testimony to be presented that one of the victims owed a debt to the codefendant; however, the trial court properly limited the testimony so that details of a previous drug transaction, the reason for the debt, were not disclosed.

Appellant argues the trial court erred in excluding evidence that one of the victims previously engaged in a drug deal with Appellant's codefendant, which resulted in the victim owing the codefendant money. Specifically, he argues the evidence should have been admitted to show (1) the *res gestae* of the crime, (2) Appellant's intent in going to the victim's apartment, and (3) bias on the part of the victim that Appellant should have been allowed to confront him about. Additionally, he argues the probative value of the evidence was not substantially outweighed by the prejudicial effect, especially because the trial court allowed the jury to hear the victim had a drug conviction. However, the trial court correctly limited the testimony to allow the victim to testify regarding a debt owed to the codefendant without offering unnecessarily prejudicial testimony regarding the reason for the debt, which was the prior drug transaction with the codefendant.

"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. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012). 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. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision made on an improper basis, such as an emotional one. State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." State v. Collins, 409 S.C. 524, ___, 763 S.E.2d 22, 28 (2014) (citations and internal quotation marks omitted).

In its ruling on the State's pretrial motion to exclude evidence that Paul DeGruccio was convicted of PWID marijuana and that the debt he owed to Appellant's codefendant was the result of a drug transaction between the two, the trial court recognized Appellant's right to confront and to present any potential defenses. Consequently, the trial judge allowed evidence of the debt to come in to support Appellant's defense that Appellant and his codefendant only went to the apartment to collect a debt. However, he limited the testimony such that the source of the debt, the prior drug deal, would not come in. Specifically, the trial judge found the prejudicial

effect of characterizing the debt as stemming from a drug deal outweighed the probative value.

Appellant argues the trial court incorrectly conducted the balancing test under Rule 403, SCRE, because it did not use the phrases "substantially outweighed" or "unfair prejudice." However, upon review of several appellate cases from South Carolina, these magic words do not seem to be necessary. For example, in State v. Grovenstein, 340 S.C. 210, 219, 530 S.E.2d 406, 411 (Ct. App. 2000), in discussing Rule 403, SCRE, this Court found, "Although relevant, the admission of this type of evidence is still subject to a determination of whether the prejudicial effect of the evidence outweighs its probative value." This Court then quoted the rule. Similarly, in Collins, 409 S.C. at ___, 763 S.E.2d at 28, in determining this Court should not have invaded the trial court's discretion in admitting photographs, the supreme court stated, "The evidence was highly probative, corroborative, and material in establishing the element of the offenses charged; its probative value outweighed its potential prejudice . . . ." (emphasis added). The Court then pointed out in a footnote that it disagreed with this Court that the trial court did not conduct its own Rule 403, SCRE, analysis. See also State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013) ("[E]vidence should be excluded when its probative value is outweighed by its prejudicial effect."). As is clear from these cases, a Rule 403 balancing test need not include specific language from the rule in order to meet the requirements, as long as the record shows the trial court thoroughly considered the arguments of counsel and weighed the prejudicial effect against the probative value of the evidence. See Collins, 409 S.C. at ___ n.4, 763 S.E.2d at 28 n.4. Indeed, a finding that evidence should be excluded pursuant to Rule 403, SCRE, due to its prejudicial effect necessarily entails a

conclusion that "the probative value was substantially outweighed by the danger of unfair prejudice."

Later, during DeGruccio's testimony, Appellant argued again that the trial court should allow testimony that the debt was related to a previous drug deal between DeGruccio and the codefendant. The argument was presented in combination with Appellant's argument that DeGruccio's conviction for PWID marijuana should be admitted for impeachment under Rule 609, SCRE. During Appellant's cross-examination of DeGruccio, he asked if DeGruccio had a felony conviction, and the State objected. The trial court excused the jury and held a discussion as to whether the conviction could come in. After Appellant unsuccessfully argued PWID was a crime of dishonesty and should come in under subsection (a)(2), the trial court considered it under subsection (a)(1) and conducted a balancing test, finding the probative value did not outweigh its prejudicial effect. The only new ruling that took place at this point in the trial was in Appellant's favor: the trial court's allowing DeGruccio's conviction for PWID marijuana to come in. The fact the trial court did not allow any reference to the debt stemming from the drug deal connected to that charge was simply the continuation of a ruling the court had already made pretrial. And, as explained above, the trial court's ruling that the probative value of the source of the debt did not outweigh the prejudicial effect was proper under Rule 403, SCRE.

Appellant's specific arguments for why the evidence of DeGruccio's owing a drug debt to his codefendant should have been admitted are that it would have shown: (1) the *res gestae* of the crime, (2) Appellant's intent in going to the victim's apartment, and (3) bias on the part of the victim that Appellant should have been allowed to confront him about.

Res Gestae

"The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Under *res gestae*, evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' [and is thus] part of the res gestae of the crime charged."

Id. at 512-13, 514 S.E.2d at 582-83 (citations omitted) (emphasis added). While evidence that the codefendants went to the apartment for the purpose of collecting a debt is certainly part of the *res gestae* of the crime, the source of the debt—a prior drug transaction—was not necessary to a full presentation of the case.

Appellant cites State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), and State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996), to support his argument that the drug transaction was part of the *res gestae*. However, both cases emphasize the contemporaneity requirement, which is not met here. In Adams, the supreme court found the evidence of drug use immediately prior to the robbery was properly admitted as part of the *res gestae*, emphasizing "the *temporal* proximity of the cocaine use to the robbery and murder is so close that one cannot deny that the cocaine use was so much a part of the 'environment' of the crime that omitting the evidence of it would unnecessarily

fragmentize the State's case." 322 S.C. at 122, 470 S.E.2d at 371. Similarly, in Williams, the supreme court found evidence of a drug transaction immediately prior to the shooting was necessary to explain the circumstances of the crime, again emphasizing the evidence should be admitted when it is "so linked together in point of time and circumstances . . . that one cannot be fully shown without proving the other." 321 S.C. at 462, 469 S.E.2d at 53 (quoting State v. Hough, 319 S.C. 104, 109, 459 S.E.2d 863, 866 (Ct. App. 1995) (emphasis added)). Here, the PWID charge that led to the debt owed occurred over a year before this incident. (R. 119, lines 3-12.) Thus, the temporal requirement is not met, and the trial court correctly found it was not part of the *res gestae* of the crime.

Intent

As the trial judge pointed out, the probative value of the evidence was to show that a debt was owed to explain the intent behind going to DeGruccio's apartment. The nature of the debt, that it stemmed from a drug deal, was not relevant. If the intent upon entering the apartment was to collect a debt, the trial judge commented, "[W]hy do we care what it was for?" (R. 19, lines 15-16.) The reason for wanting evidence of intent to come in is to offer a defense to the crime of burglary because an element of that crime is intent to commit a crime when entering the dwelling. As the trial court explained:

> [T]he issue here and the Jury knows that there was an alleged debt. The Jury's been made aware that there was a controversy over whether money was owed. Whether that debt arose as a matter of an honest legal transaction, they bought and sold a car, traded other property, which is entirely legal or whether it was for an illegal substance. I'm not sure it justifies the allegations of what happened in this case. I don't see how that bears on this.

(R. 123, lines 9-17.)

Because the trial court allowed testimony that the intent to enter the apartment was to collect a debt, there was no prejudice to Appellant that the reason behind the debt was not introduced. Furthermore, Appellant was certainly able to lead the jury to infer that the debt was drug-related when the following line of questioning took place:

> [Appellant]: Okay. Now you had indicated that, that you owed Christopher Bell some money, right?
>
> DeGruccio: Yes.
>
> [Appellant]: And you indicated that you had neither the, I think the money or the means with which to repay him, correct?
>
> DeGruccio: Yes, sir.
>
> [Appellant]: Was it a substantial amount of money that you owed him?
>
> DeGruccio: It was under a thousand dollars.
>
> [Appellant]: Under a thousand. And do you know how much it was; was it an exact amount?
>
> DeGruccio: Maybe like $800; I'm not exactly sure.
>
> [Appellant]: <u>And this money that you owed him, did that debt come about say from one transaction or was it an accumulation of that debt?</u>
>
> DeGruccio: <u>It was [] one transaction.</u>
>
> [Appellant]: <u>Okay. Now correct me if I'm wrong, but right now, you have a felony conviction, right?</u>
>
> DeGruccio: <u>Yes, I have a conviction.</u>

(R. 99, line 22-R. 100, line 14.) (emphasis added.) When cross-examination continued, the following exchange took place:

[Appellant]: And that felony that you were convicted of is possessing marijuana with intent to distribute it or sell it, right?

DeGruccio: Yes.

[Appellant]: Okay. Thank you. Now, when Christopher Bell--Christopher Bell, you, you admit knowing him, correct?

DeGruccio: Yes.

[Appellant]: And in fact, your testimony is that when Christopher Bell was in your apartment, that you recognized him, right?

DeGruccio: Yes, I recognized his voice.

[Appellant]: And he was standing in your apartment and he was wearing a mask, right?

DeGruccio: Yes.

[Appellant]: And when you said something like, Chris? Is that the way you said it?

DeGruccio: Similar to that, yes.

[Appellant]: You said, Chris? Right? And he said--he took his mask off, right?

DeGruccio: Yes.

[Appellant]: And the reason you knew it was Chris is because when he was referring to money that you owed him, you knew that made you know who it was, right?

(R. 125, lines 5-25.) (emphasis added.)

Bias

When cross-examining a witness in regard to the potential for bias, considerable latitude must be allowed. State v. Gillian, 360 S.C. 433, 450, 602 S.E.2d 62, 71. Any fact may be elicited which tends to show interest, bias, or partiality of the witness. State

v. Brewington, 297 S.C. 97, 101, 226 S.E.2d 249, 250 (1976). Limitations placed on a defendant's ability to cross-examine a witness constitute a Confrontation Clause violation when the defendant is prohibited from engaging in "**otherwise appropriate cross-examination**" designed to show a prototypical form of bias from which jurors could draw inferences relating to the reliability of the witness. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (emphasis added). "The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." Gillian, 360 S.C. at 450, 602 S.E.2d at 71.

However, although a defendant is entitled to an opportunity for meaningful cross-examination, the scope of that cross-examination still rests in the trial judge's sound discretion. State v. Whitner, 380 S.C. 513, 519, 670 S.E.2d 655, 659 (Ct. App. 2008). A defendant's right to confront the witnesses against him does not deprive the trial judge of his usual discretion in limiting the scope of cross-examination. State v. Turner, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007). Trial judges may impose reasonable limitations on cross-examination designed to show bias "based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness's safety, or interrogation that is repetitive or only marginally relevant." State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 814 (Ct. App. 1996). The limitation of cross-examination constitutes reversible error only if the defendant establishes unfair prejudice resulted from the limitation. State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

Here, Appellant was not prevented from questioning DeGruccio about his past drug conviction. The only limitation the trial court placed on Appellant was he could not connect the conviction to the debt DeGruccio owed the codefendant. Appellant was still

able to explore the debt, including the fact that it was the reason Appellant went to the apartment—to assist his brother in collecting the debt—thus supporting his defense that his intent to enter the apartment was not a crime and did not meet that element of first-degree burglary. He also elicited from DeGruccio that he had been convicted of PWID marijuana. Further, Appellant was also able to elicit testimony that the debt arose from one "transaction" between DeGruccio and the codefendant. Because Appellant was able to connect, through his skillful use of cross-examination, the testimony that (1) DeGruccio owed the codefendant money, (2) he had a felony conviction for PWID marijuana, and (3) the debt was the result of "one transaction," ample evidence was presented to allow the jury to infer the debt could have been connected to the drug transaction.

Appellant fails to articulate how the evidence he seeks to introduce shows bias, interest, or partiality. He argues the evidence was admissible to show whether DeGruccio's account of the events was accurate because DeGruccio "had a motivation to be less than truthful at trial to protect himself from his own involvement in drug activity." (App. Br. 25.) The State fails to see how this can possibly meet the threshold requirement. DeGruccio had already admitted his own involvement in drug activity by testifying he had a conviction for PWID marijuana. Therefore, there was no motivation to hide his involvement in drugs. Additionally, testimony was presented by Clark and Meijer, who were both in the apartment at the time of the crime. They corroborated DeGruccio's account of the events, and Clark even went so far as to relay what was happening to the 911 operator as it happened, including what he could overhear from DeGruccio's room. Moreover, no unfair prejudice can be established from the limitation the trial judge imposed. Indeed, Appellant does not argue any unfair prejudice resulted.

See Brown, 303 S.C. at 171, 399 S.E.2d at 594 (finding the limitation of cross-examination constitutes reversible error only if the defendant establishes unfair prejudice resulted from the limitation).

In State v. Gracely, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012), our supreme court acknowledged "[a] violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis."

> Whether such an error is harmless in a particular case depends upon a host of factors . . . . The factors include [1] the importance of the witness's testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross[-]examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case.

Id. (quoting Van Arsdall, 475 U.S. at 684 (emphasis added in Gracely)).

Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 663 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "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). When overwhelming evidence of guilt has been established, any trial error may be harmless. State v. Gathers, 295 S.C. 476, 480-81, 369 S.E.2d 140, 143 (1988).

Here, overwhelming evidence of guilt was established. Not only were there were other eyewitnesses to the crime, the suspects were arrested right there at the

scene. There is no confusion over who did it or whether they arrested the right people because they were seen coming from the apartment and had the stolen items, tire iron, and gun in the vehicle they had just gotten into when apprehended. Indeed, DeGruccio's testimony was not even necessary to prosecute the crime. Therefore, even if Appellant had been able to show DeGruccio had some sort of bias by connecting his debt to his PWID charge and had completely discredited his testimony, the evidence would still have been sufficient to convict Appellant of all the charges. Likewise, any error in the trial court's limitation was harmless beyond a reasonable doubt.

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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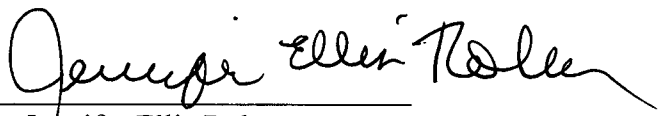
BY: 
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January 15, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-001841

THE STATE,

Respondent,

v.

KENNETH JORDAN BELL,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, 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:

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served. This 15th day of January, 2015.

Angela Bennett

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RE: State v. Kenneth Jordan Bell
Appellate Case No. 2013-001841

Dear Ms. Baer:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original & 14 copies enclosed)
Victim Services

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