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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Diane Goodstein, Circuit Court Judge
Appeal Case No. 2013-002460

THE STATE

RESPONDENT,

V.

GERALD BERNARD HALTIWANGER, JR.,

APPELLANT

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6307

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, South Carolina 29202

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Was it unduly prejudicial under Rule 403, SCRE, for the trial court to admit in evidence the partial recording of the custodial interrogation of Appellant where the recording was recorded exclusively by the police and contained only those parts of Appellant's statement the police viewed as pertinent to their case and omitted portions that more fully explained Appellant's entire statement?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion in admitting Appellant's second statement to law enforcement into evidence when Appellant did not assert that it was inadmissible under Rule 403, SCRE, the statement was highly probative, the probative value was not substantially outweighed by unfair prejudice, and any error in admitting the statement into evidence was harmless?

STATEMENT OF THE CASE

On November 12-18, 2013, Appellant Gerald Bernard Haltiwanger Jr. ("Appellant") was tried by a jury for the murder of Jimmy Moti. Appellant was tried in the Richland County Court of General Sessions before the Honorable Diane Goodstein, Circuit Court Judge. Mark Sawyer, Alicia Dyar, and Pat Sharpe, all Assistant Public Defenders for the Fifth Judicial Circuit, represented Appellant. The State was represented by Assistant Solicitors Luck Campbell, Megan Walker, and Sandra Vriesinga of the Fifth Judicial Circuit Solicitor's Office.

On November 18, 2013, Appellant was convicted of murder. (Tr. 965). He was sentenced to life imprisonment for the murder conviction. (Tr. 988). Before this Court is Appellant's direct appeal of his conviction. Appellant requests this Court reverse his conviction and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm his conviction.

STATEMENT OF FACTS

On August 25, 2012, Appellant Gerald Bernard Haltiwanger, Jr., ("Appellant") shot and killed Jimmy Moti, a security officer at El Toro Bar and Grill in Columbia, SC. Moti was shot in the right back flank. (Tr. 487). The bullet went through his liver and the small bowel before exiting. (Tr. 487). It hit blood vessels in the liver, and Moti bled to death as a result. (Tr. 487).

Lamar Ray, who was working the front desk at El Toro on August 25, testified that Moti was working at the front door that evening. (Tr. 316-17). Moti was outside checking IDs and searching for weapons. (Tr. 318). Ray testified he remembered Moti did not let a guy in with a fake ID, and the guy started arguing with Moti. (Tr. 319). Ray recalled the guy attempted to pay Moti an extra $100, but Moti would not let him enter. (Tr. 319). An argument between Moti and the guy ensued. (Tr. 320). Ray testified that Moti started escorting the guy off the parking lot and the guy turned around. (Tr. 320). At that point, Moti started spraying mace. (Tr. 320-22).

Around that time, Ray saw other guys leave El Toro. (Tr. 323). He recalled that one with dreads swung on Moti from behind. (Tr. 323). Shortly thereafter, Moti pulled his gun on the guy, and the guy backed up and fell. (Tr. 323). At that point, they were at the edge of the El Toro parking lot near the gas station. (Tr. 324). Moti then got on his phone and called the police. (Tr. 324). Ray talked with Moti and told him they needed to head back to the building. (Tr. 324). Ray had noticed that some of the guys who had exited the club were going to their car, popping their hoods and trunks. (Tr. 324).

As Ray got to inside the front door at El Toro, he heard a girl yell out that someone was shooting. (Tr. 325). He also heard the gunshots as he was walking in. (Tr. 325). Ray turned around and saw a black Crown Victoria driving off. (Tr. 325). He also saw a white Crown Victoria around the same time. Ray testified that the gunshots came from the black car. (Tr. 325). Ray also testified that he saw the individual firing the shots. (Tr. 326). He noted it was someone who was in line to go in the club earlier, and he described the man as having gold teeth, dark skin, and shorter than Ray. (Tr. 326). Ray also identified Appellant in a photo lineup, and he testified that Appellant was the one who shot at Moti. (Tr. 329-31, 333). Ray also identified Appellant as the shooter in the courtroom. (Tr. 333). He noted that the guy who was attempting to use a fake ID was the one who did the shooting. (Tr. 346).

One of Appellant's girlfriends, Zondra Gilyard, testified that on the morning after the shooting, Appellant initially only indicated that he had gotten into an altercation at the club the night before. (Tr. 538). He later told Zondra that he had gotten into an incident with the bouncer at the club, that one thing led to another, and he just started shooting. (Tr. 538). Gilyard noted that Appellant did provide more details regarding the evening. Initially, there was an issue relating to an ID and Appellant could not get into the club. (Tr. 539). Appellant told Gilyard that he was walking away, and he was maced in the back of his shirt. (Tr. 539). Gilyard did confirm that she saw red spray on the back of Appellant's shirt, which was baby blue. (Tr. 539). Appellant also told Gilyard that his younger brother Jonathan tried to hit the bouncer, and that Jonathan did hit the

bouncer once. (Tr. 539-40). Appellant indicated that he and Jonathan approached the gas station. (Tr. 540). Eventually, they got into their respective cars, and at that point Appellant was upset and angry. (Tr. 540). Appellant indicated to Gilyard that he rolled down the window and just started shooting. (Tr. 540). He was angry because he believed had was maced for no reason. (Tr. 540).

Gilyard noted that she did not know what happened to the car until she was informed by law enforcement where the car was located. (Tr. 541). She also admitted that she found Appellant's gold teeth in a diaper bag. (Tr. 547-48, 557). She denied having any conversations with Appellant about getting rid of the teeth, a gun, and the car. (Tr. 548).

Marquita Mobley testified that she and her friend Kristina Nuttry attempted to go to El Toro that night. (Tr. 290). They did not go in because Nuttry was not allowed in because she did not have an ID with her. (Tr. 290). After they were unable to get into the club, the two eventually caught a ride with someone. (Tr. 292-93). The three ended up at the gas station that was immediately adjacent to El Toro. (Tr. 294). While the man from whom the two caught a ride was in the gas station, Mobley observed a commotion between the security officer at El Toro and some other guys. (Tr. 293). Mobley noted that Nuttry called Appellant to the vehicle while they were sitting there. (Tr. 294). She noted that Appellant indicated that someone got maced, and he warned Nuttry that they needed to get out of the way because he was going to shoot up the club. (Tr. 294).

Specifically, Mobley testified Appellant stated "that he about to let rounds go and we need to go." (Tr. 294, ll 24).

Mobley then went inside and retrieved the man who was giving them a ride. (Tr. 295). Mobley testified that she saw Appellant go to a car, get a gun, and start shooting out of the window. (Tr. 296). She identified Appellant in a photo lineup. (Tr. 297-98)

Kristina Nuttry testified that she and Mobley did attempt to go into El Toro, but could not get in because Nuttry did not have an ID. (Tr. 576-77). Shortly thereafter, a man offered them a ride home. (Tr. 577). The three initially went to the gas station that was next to El Toro. (Tr. 577-78). While the driver went inside, Nuttry observed some commotion in the El Toro parking lot. (Tr. 579). She called one of the two men causing the commotion over to the truck. She described him as wearing a baby blue t-shirt, jean shorts and sneakers, and he was no more than six feet tall. (Tr. 579). She also described the other male as having dreads, and she believed he was wearing a red shirt. (Tr. 579). Nuttry noted that she saw the two with the security officer earlier, and they were yelling at the security officer. (Tr. 579-81). Nuttry indicated the guy with the dreads had hit the security officer in the back of the head from behind, and the officer pulled his gun in response. (Tr. 581).

Nuttry testified that the guy she spoke with expressed that he was asked to be removed from the club and was not being allowed back in. (Tr. 582). He also told her that he was maced by the officer in the back of the head, and he expressed that he was upset about the whole situation. (Tr. 583). She also

noted that the guy indicated he was "going to light the place up." (Tr. 583, ll 19-20).

When Nuttry, Mobley, and the guy who offered them a ride left the gas station, Nuttry heard gunshots. (Tr. 584). She saw a black car and a white car in front of El Toro, and she could tell the shots were coming from one of the two cars. (Tr. 584-85, 592).

Law Enforcement investigation

Deputy Brunson, the first to arrive on the scene, testified that when he arrived, he received initial reports that three subjects were denied entry into the club because they were trying to use someone else's identification. (Tr. 228). After they could not gain access to the club, the victim attempted to escort them to their vehicle and advised them to leave the property. (Tr. 228). Brunson was also informed there was a physical altercation, and the victim was struck in the back of the head. (Tr. 228). Brunson also learned that shots were fired, and an older black Marquis vehicle was possibly involved in the shooting. (Tr. 228). Brunson also recovered the tactical vest the victim was wearing along with the items in the vest, which included a flashlight, a badge, a .40 caliber pistol, a magazine with eleven unfired .40 caliber cartridges, a baton, a knife, handcuffs and keys, a notepad and pens, gloves, a taser, and an identification card for Carlos Brown. (Tr. 229-30, 259, 266-72). Sergeant Lindler noted that when the

gun was recovered from the victim's vest, it was recovered from the holster.[1] (Tr. 638-39).

Investigators were able to obtain video from the gas station that was next to El Toro. (Tr. 374-75, 642-44). Based upon the video, law enforcement contacted a potential witness, and that potential witness led the investigators to Mobley and Nuttry. (Tr. 376-78, 654-55). The investigators also received a tip through Crimestoppers that Appellant may have been involved in the shooting. (Tr. 381; see Tr. 658). With that information, Appellant's photo was placed in a photo lineup. (Tr. 381-82, 658-59). Mobley identified Appellant in the photo lineup. (Tr. 660).

Appellant was arrested on August 29, 2012. (Tr. 383-84, 661-62). On that date, he gave a statement in which he denied any involvement in the shooting. (Tr. 388-92, 669-72; State's Exhibit 2). After Appellant was arrested, Gilyard turned over a set of gold teeth belonging to Appellant that were located in the bottom of a diaper bag. (Tr. 675).

On August 31, 2012, Appellant was interviewed a second time by Deputy Chief Wilson and Sgt. Lindler. During that interview, the investigators confronted Appellant with excerpts of statements from Appellant's brothers and with Gilyard's statement. (Tr. 609). During the discussion about Gilyard's statement, Appellant indicated he wanted to provide another statement. (Tr. 609).

Wilson and Lindler both testified that in his statement, Appellant indicated that he gave the security officer his brother's ID. (Tr. 611, 700). Appellant stated

[1] The paramedic who treated the victim at the scene also testified that the victim's gun was in its holster in the vest that night. (Tr. 843-44).

the man looked at the ID, told Appellant he was not the man in the ID, and told Appellant to get out of his face. (Tr. 611, 700-01). Appellant turned away, but continued to argue with the victim. (Tr. 611, 701). The victim followed Appellant as appellant was walking to his car. (Tr. 611, 701). The victim told Appellant to put his hands on the car, and Appellant refused. (Tr. 611, 701). The victim then pulled out his gun, and Appellant responded by putting his hands in the air and turning his back to the victim. (Tr. 611, 701). Appellant asserted the victim then pulled out pepper spray and sprayed Appellant in the back of the head. (Tr. 611, 701). One of Appellant's brothers then hit the victim in the head, and Appellant and his brother ended up in the gas station parking lot. (Tr. 611, 701). Appellant indicated that after he got in his car, he and his brother left out of the parking lot and Appellant started shooting. (Tr. 611, 701). He even acknowledged that he shot the door handle off of his car. (Tr. 611, 701).

In the statement, Appellant also told law enforcement that he wiped his car down with gas and that he sold the gun he used to a man from New York. (Tr. 612, 702). Appellant also indicated the gun was a .40 caliber handgun. (Tr. 612, 702). Appellant also stated that he threw the shell casings into the river. (Tr. 612, 702).

No gunshot residue was found on the victim's hands. (Tr. 529). Law enforcement found Appellant's car, an older model black Crown Victoria, under a car cover at another of Appellant's girlfriend's homes. (Tr. 559-62). A search of the car revealed an impact point on the passenger door. (Tr. 627). It appeared that a projectile entered the passenger side interior door and exited out of the

passenger side exterior door, perforating the door where the door handle would be. (Tr. 627). The passenger side door handle was missing. (Tr. 628).

Appellant's Testimony

Appellant testified that he was hanging out with his brothers on the day of the shooting. (Tr. 746-48). He noted that they decided to go out, and on the way, picked up his friend Cuz. (Tr. 748-50). He admitted that he did not have his ID with him when they got to El Toro, and he indicated that he grabbed his Carlos' ID from the car and attempted to use it to get into the club. (Tr. 753-54). Appellant testified that the victim would not let him in, and the victim got an aggressive tone after Appellant attempted to bribe the victim to get inside without an ID. (Tr. 754). Appellant then testified that he engaged in a verbal exchange with the victim, and during that exchange, the victim pulled his gun on Appellant. (Tr. 755-56). Appellant also asserted the victim cocked the pistol and put a bullet in the chamber. (Tr. 755-56).

Appellant indicated that after that happened, he turned around, put his hands in the air, and started to walk away. (Tr. 756). The victim then asked Appellant to put his hands on a car, but Appellant refused to comply. (Tr. 756-58). Appellant then indicated that the victim sprayed him with mace in the back of the head and shirt. (Tr. 758-59). Appellant confirmed that his brother Jonathan then hit the victim in the head. (Tr. 759-60). According to Appellant, the victim then dropped the gun, but he immediately picked it back up. (Tr. 760). Appellant and Jonathan then went to the gas station parking lot. (Tr. 760).

Appellant claimed the victim made threats during an exchange while they were at the gas station parking lot. (Tr. 762-63). He noted that someone from the club did walk the victim back towards the club. (Tr. 763-64). Appellant also confirmed that he spoke with the females that were in the truck at the gas station. (Tr. 765-66). Once he was able to get back in his car, Appellant got in. (Tr. 770-71). Appellant claimed that as he was attempting to pull away, he saw the victim jump from the porch and head towards Appellant's car with his gun drawn. (Tr. 771-72). Appellant indicated that he grabbed his pistol from between the bucket seats and started shooting at the victim in response to what he perceived to be the threat. (Tr. 772-73). He also noted that he realized later that he had shot the door handle off of his car. (Tr. 774).

Appellant agreed that the statement he gave on August 31, 2012 basically described what he told law enforcement. (Tr. 778). He indicated that the statement did not include what he said about the victim pulling out his gun before making Appellant, what Appellant told the women in the truck, that the victim never put his gun away, or that the victim was charging off of the porch and pointing his gun at Appellant's car immediately before the shooting. (Tr. 778). Appellant also contested what the last question and response in the statement. (Tr. 779).

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING APPELLANT'S AUGUST 31, 2012 STATEMENT INTO EVIDENCE. APPELLANT DID NOT ARGUE THE STATEMENT WAS INADMISSIBLE UNDER RULE 403, SCRE, THE STATEMENT WAS RELEVANT AND HIGHLY PROBATIVE, ITS PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY ANY UNFAIR PREJUDICE, AND ANY ERROR IN ADMITTING THE STATEMENT WAS HARMLESS.

Discussion at the Pre-Trial Hearing and at Trial

A Jackson v. Denno[2] hearing was held in this case on November 12, 2013. (Tr. 85). At issue was the admissibility of Appellant's statements to law enforcement given on August 29, 2012 and August 31, 2012. (See Tr. 95-115, 121-27, 128-30, 179-85). During the hearing, Sgt. Lindler testified that he and Investigator Jordan advised Appellant of his rights and spoke with him on the day he was arrested. (Tr. 95-6). Lindler noted that Appellant appeared coherent and did not appear to be under the influence of any drugs or alcohol. Lindler also indicated that they made no promises to Appellant, they did not threaten Appellant, and they did not coerce him in any way. (Tr. 96-7). Lindler further testified that they did not deprive him of any comforts. (Tr. 97). Once they were at headquarters, Appellant was advised of his rights again, and they went through the rights that were on the Advice of Rights form. (Tr. 97-100). Appellant signed the form and signed the waiver. (Tr. 100-01).

Again, Lindler testified that law enforcement made no promises to Appellant, did not threaten Appellant, and did not coerce him in any way. (Tr. 101-02). After that, Lindler explained the process by which law enforcement took

[2] Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

the August 29, 2012 statement. (Tr. 102-05). He noted that Appellant never invoked any of his rights during the conversation. (Tr. 105-06).

Lindler then testified about the statement Appellant provided on August 31, 2012. (Tr. 107-11). Lindler again confirmed Appellant was advised of his rights, and he signed the Advice of Rights form and waiver. (Tr. 107-08). Lindler testified that Appellant was not threatened, he was not deprived of any comforts, and he did not invoke any of his rights during that conversation. (Tr. 107-08). Lindler also explained the process of taking the statement from Appellant. (Tr. 108-110).

During cross-examination, Appellant asked questions relating to Appellant's ability to type his own statement, whether the statements could have been audio recorded or video recorded, and whether the statement on paper reflected the full conversation that was had between Appellant and the investigators. (Tr. 112-14).

Investigator Jordan also testified regarding the August 29, 2012 statement. Jordan indicated that Lindler read Appellant his Miranda rights, and Appellant acknowledged his rights and waived them. (Tr. 122-23). Jordan agreed Appellant never invoked his rights, and Appellant was neither threatened, nor promised anything, nor denied any creature comforts. (Tr. 123). He further explained how the statement was taken. (Tr. 124-25). In regards to the August 31, 2012 statement, Jordan testified that he did witness Lindler read Appellant his rights before questioning, and while Jordan was there, Appellant was not

promised anything, threatened, or denied any creature comforts. (Tr. 127). He also noted that Appellant appeared to voluntarily want to talk. (Tr. 127).

During cross-examination, Jordan noted that it was policy to not audio record or videotape statements. (Tr. 128). Jordan also indicated that items that were not included in the statement were not pertinent to the case. (Tr. 128).

Deputy Chief Wilson also testified about his involvement in obtaining the August 31, 2012 statement. Wilson indicated that he became involved after Jordan had to leave for a family situation. (Tr. 181). Wilson was aware that Appellant had been advised of his rights and had chosen to waive his rights. (Tr. 181). Wilson noted that during his involvement in the interrogation, Appellant did not invoke his rights, and no one threatened Appellant or promised Appellant anything. (Tr. 181). Appellant was not coerced in any way, and he appeared to be talking voluntarily. (Tr. 182). During cross-examination, Wilson acknowledged that the sheriff's department had a policy to not audio record or video record any statements. (Tr. 184).

In the argument regarding whether the statement was freely and voluntarily given, Appellant engaged in the following exchange with the trial court:

> Sorry, Your Honor, just briefly with the Denno hearing. Obviously, you heard me get into that and I just — I believe they said the proper words to get the Denno hearing in. Judge, you know, I just — I have a problem in 2013 that they're going to be able to enter in his statement into evidence saying that this is Bernard Haltiwanger's words, and I've got a cell phone in my pocket that were his words. I think that it's misleading to the jury to be able be — to say that you are going to rule that these are his words.
>
> THE COURT - And here's what's going to happen at some point. Don't know when, Mr. Sawyer, and it may be this case, but what's

> going to happen is that the jury because of the development of technology is going to walk that path with you, but again that does go to the weight rather than to the admissibility and it will happen one day. I have no question in my mind.
>
> MR. SAWYER - Judge, it can be the jurist to bring that to the Supreme Court for the first time
>
> THE COURT - Thank you so much for that opportunity. You know, I am such a stare decisis kind of girl. I would respectfully not walk down that path, but I do — I genuinely mean what I say. I do think that ultimately because of the development and technology, Mr. Sawyer, because it does go to the weight, at some point that's going to happen because juries are going to become suspect, but it doesn't go to the — again, it doesn't go to the admissibility; it goes to the weight, I think.
>
> MR. SAWYER - Thank you. Your Honor.

(Tr. 194, l 5 – Tr. 195, l 8).

Appellant renewed this objection when the first statement was introduced during trial and when the second statement was introduced at trial. (Tr. 389, ll 9-10; Tr. 609, l 13).

A. Appellant's argument is not preserved for appellate review.

Appellant contends the trial court erred in admitting Appellant's second statement without doing a proper analysis under Rule 403, SCRE, after Appellant requested such an analysis. (Initial Brief of Appellant at p. 7). Respondent submits such a request was not actually made to the trial court. Appellant did complain that the Richland County Sheriff's Department did not utilize the best means in documenting the interview and statement. However, Appellant did not assert the information in the statement was unfairly prejudicial or claim that pertinent information was deliberately omitted from the statement. Nor did Appellant inform the trial court of the nature of the information that might not have

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

B. Appellant's statement was properly admitted at trial. The statement was clearly relevant and highly probative, and the probative value was not substantially outweighed by any danger of unfair prejudice.

The trial court did not abuse its discretion when it admitted Appellant's August 31, 2012 statement into evidence. The statement was highly probative, and the probative value of the statement was not substantially outweighed by any unfair prejudice.

Standard of Review

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion."

State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

Evidence 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. Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears. State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 336-37, 665 S.E.2d 201, 206 (Ct. App. 2008). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001).

The trial court did not abuse its discretion in admitting Appellant's second statement into evidence. First, Appellant's statement was very probative. In the statement, Appellant essentially recants his first statement in which he claimed to have no involvement in the shooting at all. Appellant admits he gave the victim an ID that belonged to Appellant's brother. (Tr. 611, 700-01; State's 4, p. 1). Appellant further admits that he instigated the confrontation between him and the victim by "talking junk" and cursing at the victim. (Tr. 611, 701; State's 4, p. 1). Appellant noted that he was sprayed with pepper spray in the back of the head. (Tr. 611, 701; State's 4, p. 1). Appellant also acknowledged that his brother hit the victim in the head, and that the two ended up in the gas station parking lot. (Tr. 611, 701; State's 4, p. 1). Appellant admitted that he fired at the victim, and that he shot his own passenger side door handle off. (Tr. 611, 701; State's 4, p. 1).

In the statement, Appellant also indicated that he drove a black LTD, and noted that his brothers took the car to the country after the incident. (Tr. 612, 701; State's 4, p. 2). He admitted in the statement that he wiped the car down with gas. (Tr. 612, 702; State's 4, p. 2). Appellant also admitted that he sold his gun to a guy from New York, and he threw the shell casings from the shooting into a river. (Tr. 612, 702; State's 4, p. 3).

Appellant was charged with murder. "'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). Appellant's statement was relevant and material to showing all of the elements of murder. Appellant admits that he was involved in the killing of the

victim. His statement also reflected his involvement was intentional, and that he acted with malice. In all, Appellant admits that he is guilty of murdering the victim; corroborates the testimony of eyewitnesses and Gilyard regarding the actions that led to the shooting, the shooting, and the aftermath; and provided information explaining why law enforcement was unable to recover forensic evidence relating to the shooting. "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. Evidence is admissible to corroborate the testimony of a previous witness, and whether it in fact corroborates the witness' testimony is a question for the jury." State v. Stroman, 281 S.C. 508, 510, 316 S.E.2d 395, 397 (1984) (internal citations omitted).

Altogether, the statement was highly probative. Respondent would note that Appellant's contention that the statement was not probative because Appellant admitted he was the shooter in his opening statement is unfounded. First, opening statements are not evidence. See Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). Second, by making such a concession in opening statement, Appellant could not dictate how the State presented its case. Further, the admission during opening statement did not relieve the State of its burden of proving beyond a reasonable doubt that Appellant was involved in the shooting. See, e.g., State v. Cheatham, 349 S.C. 101, 110, 561 S.E.2d 618, 623 (Ct. App. 2002)(noting the State is not required to accept a defendant's stipulation of proof because the State still bears the burden of proving every element of a crime beyond a reasonable doubt. Third, Appellant's opening

statement and the other evidence presented at trial did not lessen the probative value of Appellant's statement to law enforcement.

The probative value of the statement was not substantially outweighed by any unfair prejudice. Appellant contends the trial court erred in admitting his second statement because it was unfairly prejudicial. Specifically, Appellant asserts the statement as presented was prejudicial because it was not a complete reflection of the interview between Appellant and law enforcement. Appellant's argument is flawed in several respects. First, nothing in the August 31, 2015 statement as entered into evidence is unfairly prejudicial. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009).

> Prejudice that is "unfair" is distinguished from the legitimate impact all evidence has on the outcome of a case. " 'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.' " State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)). " 'All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403].' " Id. (quoting United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989)); see also United States v. Mohr, 318 F.3d 613, 619–20 (4th Cir.2003) ("Rule 403 only requires suppression of evidence that results in unfair prejudice—prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion....").

State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014).

Appellant's statement was not unfairly prejudicial. The statement was found to be knowingly and voluntarily given. It does not contain information that would have unfairly influenced the passions or prejudices of the jury. The

statement does not appeal to emotion. It does not provoke an unfair basis for finding Appellant guilty in this case. Appellant's complaints regarding how the admission of the statement was prejudicial are all consistent with the type of prejudice that resolves from the probative value of the statement, not the type of unfair prejudice contemplated by Rule 403.

Furthermore, Respondent submits Appellant has not shown the statement was misleading or that it was missing pertinent information. In the argument during the Jackson v. Denno hearing, Appellant never presented any testimony or evidence indicating that pertinent information was not included in the statement. Importantly, Appellant never argued that the statement did not include facts regarding the victim's alleged actions that Appellant testified led him to shoot at the victim. The statement reflects that Appellant certified that he read or had the statement read to him, and that he gave the statement freely and voluntarily. Also, Appellant never elicited any evidence or testimony that would support Appellant's contention that the statement should have contained more information. During the cross-examination of Deputy Chief Wilson and Sgt. Lindler, Appellant never questioned either about the pertinent information that Appellant would later allege was not included in the statement.[3] (See Tr. 615-22,

[3] Respondent would further note that there was no evidence presented at trial to support his contention that the sheriff's department intentionally omitted any pertinent information from Appellant's statement. To the contrary, the testimony at trial reflected that the statement was recorded in accordance with long standing department policy, and Appellant was provided with ample opportunity to revise the statement at the interview if it did not comport with his responses to the questions. (Tr. 620-22). Furthermore, it should not be forgotten that the statement was freely and voluntarily given, and that it was signed by Appellant.

714-22). Ultimately, the trial court was correct in noting that Appellant's concern that the typed statement was not the best means by which the sheriff's department could have recorded Appellant's statement went to the weight of the evidence to be considered by the jury and not its admissibility. In light of the lack of unfair prejudice from the statement, and the high probative value of the statement, it was clearly admissible under Rule 403. The probative value of the statement was not substantially outweighed by any unfair prejudice. Thus, the trial court did not abuse its discretion in admitting the statement into evidence.

He did not have to sign the statement if he did not believe it accurately reflected what he told law enforcement that morning.

C. Appellant is not entitled to a new trial because any error by the trial court in admitting the August 31, 2012 statement was harmless.

Assuming *arguendo* this Court finds the August 31, 2012 statement was improperly admitted, any error by the trial court in admitting the statement was harmless. Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In this case, the State presented overwhelming evidence of Appellant's guilt. Ray, who was working the front desk at El Toro on the night of the shooting, identified Appellant in a photo lineup, and he testified that Appellant was the one who shot at Moti. (Tr. 329-31, 333). Ray also identified Appellant as the shooter in the courtroom. (Tr. 333). He noted that the guy who was attempting to use a fake ID was the one who did the shooting. (Tr. 346).

Both Mobley and Nuttry testified that Appellant warned them shortly before the shooting that he planned on shooting up the club. Mobley testified Appellant stated "that he about to let rounds go and we need to go." (Tr. 294, ll 24). Nuttry noted that the guy she was speaking with indicated he was "going to light the place up." (Tr. 583, ll 19-20). Mobley also identified Appellant in a photo lineup and in court. (Tr. 297-98).

Appellant's girlfriend, Gilyard, testified that Appellant admitted his involvement in the shooting. (Tr. 540). She stated that Appellant told her he rolled down the window and just started shooting. (Tr. 540).

Furthermore, evidence was presented that Appellant attempted to hide his involvement in the shooting. His car was found in the backyard of another girlfriend's house underneath a car cover. In phone calls Appellant made to Gilyard after his arrest, he requested that she take certain actions to get rid of some of the evidence. (Tr. 605, 607, 673-74).

The testimony and evidence presented clearly refuted any allegation that Appellant was acting in self-defense when he shot the victim.[4] The testimony of several witnesses indicated that Appellant was at fault in bringing on the difficulty in that he attempted enter the club without proper identification, and he instigated

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[4] Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

the confrontation between himself and the victim. Further, by all accounts, Appellant had other means of avoiding the danger. He simply could have driven away from the scene as requested by the victim in the beginning.

Also, the testimony and evidence outside of the statement that was presented at trial did not support a finding he was only guilty of voluntary manslaughter. Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). The evidence presented indicated that Appellant did not act in a sudden heat of passion as there was at least a few minutes between the initial confrontation with the victim and the shooting, and there was a sufficiently reasonable cooling period. State v. Hernandez, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct. App. 2010); State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001). Even considering Appellant's assertion that the victim pointed the gun at his car when they were leaving would not have warranted a finding Appellant was guilty of voluntary manslaughter. First, the statement was undermined by all of the other testimony and evidence which reflected Appellant's account was inaccurate. It was also undermined by the testimony that the victim's gun was holstered when first responders arrived on the scene. (Tr. 704, 843-44). In light of Appellant's testimony, the contention also would only have supported a self-defense claim, and not a voluntary manslaughter claim. See generally State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010); State v. Niles, No. 2012-213592, 2015 WL 1325887, at *4 (S.C. Mar. 25, 2015).

Altogether, any error made by the trial court in admitting the statement was harmless. Appellant's conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm his conviction in the murder of Jimmy Moti.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

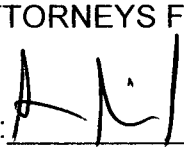
DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
Bar No. 74713

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, South Carolina 29202

ATTORNEYS FOR RESPONDENT

By: 
Alphonso Simon Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

April 22, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
The Honorable Diane Schafer Goodstein, Circuit Court Judge

General Sessions Case No. 2012-GS-40-05298
Appellate Case No. 2013-002460

THE STATE,

RESPONDENT,

vs.

GERALD BERNARD HALTIWANGER,

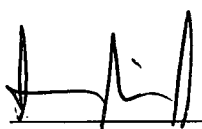
APPELLANT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Heather Vry Scalzo, Esq., 9 Graystone Road, Greenville, South Carolina 29615.

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

This 22nd day of April, 2015.



ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

April 22, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *State v. Gerald Bernard Haltiwanger, Jr.*
Appeal from Richland County
Appellate Case No. 2013-002460

Dear Ms. Kitchings:

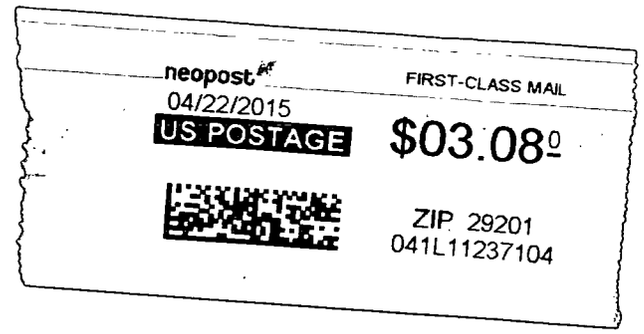
Enclosed for filing in your office is the original Initial Brief of Respondent, Designation of Matter and Certificate of Service in the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.,
Assistant Attorney General

AS/dmd
Enclosures
cc: Heather Vry Scalzo, Esq. (w/two copies of encls.)



Office of the Attorney General
State of South Carolina
Post Office Box 11549 – Columbia SC 29211-1549

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211