To. S.C. Supreme Court
Daniel E. Shearouse, Clerk
PO Box 11330, Columbia, SC 29211

State v. Moore
Case # 2015-001054

June

RECEIVED
JUN 23 2015
S.C. SUPREME COURT

Dear Supreme Court:

Please find Enclosed my Proof of Service and Copy of my * Appendix for filing.

I thought Mr. Dudek, of the Appellant Defense was going to prepare it but I Don't want to miss any filings. The Court (This Court) said in a Letter to Me in May 22, or 23, 2015 to Submit an Appendix.

Please provide me with a filed Copy. I prepared it per the Rules.

Thank you,

James Moore

James Lamont Moore
McDougall C.I. #
1516 Old Gilliard Rd.
Ridgeville, SC 29472

Appellant, Pro se

State of South Carolina

In The Supreme Court

Appeal From Charleston County

Hon. Kristi L. Harrington

Judge and Jury

James Lamont Moore, petitioner,

v.

State of South Carolina, Respondant

Appellate Case Number: 2015-001054

Appendix

James Moore

James Lamont Moore

#_____, McDougall C.I.

1516 Old Gilliard Rd.

Ridgeville, SC 29472

Petitioner, pro se

STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: 2009-GS-10-8446
	)	
JAMES L. MOORE, JR.,	)	
	)	
Defendant.	)	

ORIGINAL

TRANSCRIPT OF PROCEEDINGS
SENTENCING HEARING
HEARD BEFORE JUDGE KRISTI LEA HARRINGTON
ON NOVEMBER 16, 2012

ROLAYNE M. VOLPE, CCR, RPR
Court Reporter for the State of South Carolina at Large
Post Office Box 342
Summerville, South Carolina 29484

A P P E A R A N C E S

For the Plaintiff:

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RANDELL STONEY
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O.T. Wallace Building
101 Meeting Street, Suite 400
Charleston, South Carolina 29401
(843) 958-1900

For the Defendant:

JASON T. KING
Ninth Circuit Public Defender's Office
O.T. Wallace Building
101 Meeting Street, Fifth Floor
Charleston, South Carolina 29401
(843) 958-1850

2009-GS-10-8446, State v James L. Moore, Jr.
Sentencing Hearing, November 16, 2012

INDEX

EXHIBITS

DESCRIPTION	PAGE

(No exhibits were offered or marked.)

Reported By:
Rolayne M. Volpe, CCR, RPR
Official Court Reporter for the State of Carolina

The above-styled cause came on for hearing on the 14th day of September, 2012, at 1:23 p.m., before Judge Roger Young, Judge at Large, presiding over the Circuit Court for the County of Charleston, when the following proceedings were had and entered of record, to wit:

PROCEEDINGS

SENTENCING HEARING

THE COURT: Mr. King, are you ready to proceed with sentencing?

MR. KING: Yes, your Honor. I'd ask that my -- just to be safe, I'm not sure if they were able to make it -- or the mother. I know she was upset when I talked to her on the phone about the sentencing, so -- but I'm ready to proceed as long as you are ready?

THE COURT: Ms. Linder, if you'll state your name for the record, the party you're representing, and the purpose of today's hearing.

MS. LINDER: Thank you, your Honor. May it please the Court. My name is Stephanie Linder, and I'm representing the Solicitor's Office. Randell Stoney is here in the courtroom with me. The purpose today is that we are here because there was a trial done the week of October the 15th on James Lamont Moore, Jr. At the conclusion of that trial, he was found guilty of the one

count that the State went forward on, and at that time, your Honor sentenced under seal, and we're here today for that sentence to be unsealed and sentence to be imposed in this case.

THE COURT: All right.

MS. LINDER: And I believe at that time, your Honor, I did hand up to the Court certified drug convictions. I'm happy to read his record into today's record if you would like, but the certified convictions were handed up at the time of trial.

THE COURT: All right. Thank you.

Mr. King, I'll be happy to hear from you.

MR. KING: Thank you, your Honor. I guess I'd go ahead and make the motion for a new trial again. I had done that before at the end of the trial, but we -- we'd ask you to reconsider that and consider giving him a new trial so he can be present for trial. Only thing that did -- did have an affect on the verdict with him not being present. If you would consider that, your Honor.

THE COURT: Your Motion for New Trial is denied. Mr. Moore was given sufficient notice to be here for his trial. Is that correct, Mr. King?

MR. KING: Yes, your Honor.

THE COURT: And if I recall correctly, he was

present Monday for jury selection, knew that his case was on the docket; isn't that correct?

MR. KING: Yes, your Honor.

THE COURT: All right.

Mr. Moore, please stand as I impose sentence.

Mr. Moore has been picked up on his bench warrant; is that correct?

MR. KING: Yes, your Honor. Mr. Moore wanted to speak regarding that same thing, your Honor, before sentencing is imposed.

THE COURT: Well, Mr. King, I have already imposed sentence, so, at the appropriate time, if you wish to make the appropriate motion for me to reconsider my sentence, but the procedural -- the proper procedural way to handle this is for me to impose sentence, and then for you to file any appropriate motions.

Mr. Moore, that's one of the benefits of you being at trial, when you're here, before I impose sentence, you would have had the opportunity to address the Court. Because you chose not to be present for your trial, I based the -- my sentence upon the testimony that was presented, as well as your prior record.

It's the Order of the Court on Indictment 2009-GS-10-8446, that you be committed to the State Department of Corrections for a term of 17 years. I'll

give you credit for the time that you have served.

Mr. Moore, you have the right to appeal this sentence. You have ten days -- or you or your attorney must do so within ten days. This is considered a serious offense.

Mr. King, did you explain to your client what this means?

MR. KING: I believe at some point during the representation I did, your Honor.

THE COURT: All right. Anything further from the Court here today, Mr. King?

MR. KING: No, your Honor.

THE COURT: All right.

MS. LINDER: Nothing from the State, your Honor.

THE COURT: All right. Good luck to you, Mr. Moore. Thank you.

(The hearing of this cause concluded at 9:26 a.m., on November 16, 2012.)

REPORTER'S CERTIFICATE

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF BERKELEY)

I, **ROLAYNE M. VOLPE**, Certified Court Reporter, CCR, and Registered Professional Reporter, RPR, do hereby certify that the transcript of the foregoing proceedings accurately reflects the events that occurred before me to the best of my ability at the time and place set out on the caption hereto, the witnesses having been duly cautioned and sworn, or affirmed, to tell the truth, the whole truth, and nothing but the truth.

I FURTHER CERTIFY that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken or to any attorney or counsel employed by the parties hereto, nor financially interested, directly or indirectly, in the outcome of this action.

CERTIFIED AND SIGNED on this 12th day of April, 2013.

ROLAYNE M. VOLPE, CCR, RPR
Certified Court Reporter and
Registered Professional Reporter
Commission Expires: 8/30/2021

ROLAYNE M. VOLPE NOTARY PUBLIC SOUTH CAROLINA

ORIGINAL

Reported By:
Rolayne M. Volpe, CCR, RPR
Official Court Reporter for the State of Carolina

SLB20090804745

WITNESSES

BRYANT GILMORE
Charleston City Police Department

AGENCY CASE NUMBER

0913284

ARREST WARRANT NUMBER

K342660

DATE OF ARREST

August 13, 2009

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury NOV 09 2009
Date:

VERDICT

Guilty

Mary A. Nabell 10-18-12
Foreperson of Petit Jury *Date:*

INDICT

DOCKET NO. 2009GS1008446

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

November Term 2009

09-4871-I

THE STATE

vs.

JAMES LAMONT MOORE
DOB: 1983-04-09
B/M

Indictment for

Distribution of Cocaine Base

10-10

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on November 9, 2009 the Grand Jurors of Charleston County present upon their oath:

Distribution of Cocaine Base

That in Charleston County, South Carolina, on or about July 16, 2009, the Defendant, JAMES LAMONT MOORE, did manufacture, distribute, dispense, deliver, purchase; or did aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase; or did possess with the intent to distribute, dispense or deliver a controlled substance or a controlled substance analogue, to wit: Cocaine Base; in violation of 44-53-375 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

STEPHANIE B. LINDER
ASSISTANT SOLICITOR

10

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston)
STATE VS.)
JAMES LAMONT MOORE)
AKA:)
Race: BLACK Sex: M Age: 29)
DOB: 04-09-1983 SS#:)
Address: 129-B CONGRESS STREET)
City,State,Zip: CHARLESTON, SC 294030000)
DL#: SID#: SC01331906)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

INDICTMENT/CASE#: 2009GS1008446
A/W#: K342660
Date of Offense: 7/16/2009
S.C. Code § : 44-53-0375 (B)
CDR Code #: 3039

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: PWID/Dist/Mfg Cocaine Base or Meth, 3rd offense
in violation of § 44-53-0375 (B) of the S.C. Code of Laws, bearing CDR Code # 3039
☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Stephanie Blunden 72656 _____ _____ _____
Lander, Stephanie B. SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is commited to the ☑ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 17 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$ 150.00
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 8.40
TOTAL		$ 288.40

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Dawn White
Court Reporter: R. Volpe
Presiding Judge Kristi Laurendine
Judge Code: 285
Sentence Date: 10/18/12

SCCA/217 (03/2011)

(15-30 years) Sentence Unsealed 11/16/12

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

Case No. 2012-213734

The State of South Carolina,..... Respondent,

v.

James Lamont Moore, ... Appellant.

INITIAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. **The trial court abused its discretion by denying Appellant counsel's motion *in limine* to redact statements in the State's video exhibit because the statements improperly weighed on Appellant's character and prior bad acts, and the probative value of the statements was substantially outweighed by the unfair prejudice caused to Appellant.**

II. **The trial court abused its discretion by denying Appellant's motion for mistrial after the State's witness blurted out, "he guilty," and the trial court's curative instruction could not, and did not, cure the prejudice caused to Appellant.**

III. **The trial court improperly allowed Appellant to be tried in absentia.**

STATEMENT OF THE CASE

Appellant was indicted by a grand jury for distribution of crack cocaine in the November 2009 Term of the Charleston County Court of General Sessions. (True Bill and Indictment). Appellant was tried in his absence on October 18, 2012 by the Honorable Kristi L. Harrington and a jury. Stephanie Linder and Randall Stoney represented the State of South Carolina ("The State"). Jason King represented Appellant. Appellant was found guilty as charged under S.C. Code Ann. § 44-53-375. (*See* Verdict Form). Judge Harrington sentenced Appellant to seventeen (17) years in prison. (*See* Sentence Sheet). On December 12, 2012, Judge Harrington denied Appellant's motion to reconsider the sentence. (Motion to Reconsider p. 10). This Appeal followed.

STANDARD OF REVIEW

"An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Cope*, 405 S.C. 317, 334-35, 748 S.E.2d 194, 203 (2013). The standard of review for whether the trial court properly admitted evidence a defendant's "prior bad acts" is an abuse of discretion standard. *State v. Mathis*, 359 S.C. 450, 462, 597 S.E.2d 872, 878 (Ct. App. 2004). The standard of review for the denial of a motion for mistrial is an abuse of discretion standard. *State v. Bantan*, 387 S.C. 412, 420, 692 S.E.2d 201, 205 (S.C. Ct. App. 2010).

ARGUMENT

I. The trial court abused its discretion by denying Appellant counsel's motion *in limine* to redact statements in the State's video exhibit because the statements improperly weighed on Appellant's character and prior bad acts, and the probative value of the statements was substantially outweighed by the unfair prejudice caused to Appellant.

The State presented a fifteen minute video, which captured the alleged drug buy as a trial exhibit. (Tr. p. 131; State's Exh. 3). The State played this video on three separate occasions, twice during the State's case in chief and once during Appellant's pre-trial motions. (*Id.* at 131, 181). The video contained a conversation between law enforcement and the confidential informant Joseph Ancrum ("Mr. Ancrum") en route to the location previously targeted by law enforcement. (*Id.* at 18). The conversation lasted approximately six minutes and a half minutes. (*See* State's Exhibit 3 0:00-6:30). Upon exiting the car, Mr. Ancrum began to narrate his experience to law enforcement. (*Id.* at 7:32-15:10).

Appellant's trial counsel moved *in limine* to redact portions of the video based on the fact that (1) the conversation constituted improper comments on Appellant's character and (2) that any probative value of the video recorded conversation was substantially outweighed by unfair prejudice to Appellant. (*Id.* at 17-23). The trial court denied Appellant's motion and did not

redact any of the statements in the video made by the officers or by Mr. Ancrum. (*Id.* at 40). Counsel for Appellant renewed his objection to the video during trial. (*Id.* at 131). Over the objection of Appellant's counsel, the trial court allowed the State to present the video for the jury both while Mr. Ancrum and Detective Jonathan Shealy were on the witness stand. (*Id.* at 131, 181).

A. The trial court's failure to redact the statements that Appellant was "always hollering" at Mr. Ancrum violated Rule 404 of the South Carolina Rules of Evidence.

Rule 404(b) of the South Carolina Rules of Evidence provides that, as a general rule, evidence of a defendant's "other crimes, wrongs, or acts" is not admissible to prove "the character of a person in order in order to show action in conformity therewith." Rule 404(b), SCRE. The trial court improperly allowed the following conversation regarding Appellant's prior bad acts:

> Officer: I'm going to drop you off at the same spot . . . you know that house right across from that gas station the boys always holler at you?
>
> Mr. Ancrum: Oh you want that one?
>
> Officer: Yep.
>
> Mr. Ancrum: If he out there.
>
> Officer: Yep. He be always out there . . . always hollering at you right there right across from that gas station.
>
> Mr. Ancrum: Yeah . . . Oh you talking about the one holler at me all the time when I go through there on the left-hand side?
>
> Officer: First intersection.
>
> Mr. Ancrum: Yeah, okay.

(State's Exh. 3 at 1:12-1:44).

During Appellant's motion *in limine*, the trial court posited whether "hollering" was more of a salutation than a solicitation of a drug purchase. (Tr. p. 36). The trial court reasoned, "I'm concerned because I like to work in my yard and when my neighbors walk by I holler at them, and so is that to assume that I'm – I mean, that's where I'm getting at." (*Id.*). The State argued, "I holler at my neighbors when they go by, have a baby, they walk by with a stroller. I holler at those people, some people holler at me." (*Id.* at 38).

Appellant's counsel correctly argued, albeit unsuccessfully, that in this context, the only logical implication was that "hollering" meant solicitation of a drug purchase. (*Id.* at 25-26). As Appellant's counsel noted:

> "If they are just out there saying, 'Hey, how you doing,' just yelling and being friendly, that wouldn't give the police a reason to make them investigate. It's the context of the whole video becomes clear what that means. Just taking the statement isolated [] hollering doesn't necessarily mean that but it becomes clear that's what that means when you watch the whole video and hear all the statements, and when you think about why would the police – why would the police send the informant to go – why are they even guarding him to go send the informant to him? Because they are out there selling drugs . . . [i]t's just not as innocent as they are out there hollering greetings, or . . . there would be no reason to try to buy drugs from someone who is just being friendly. That doesn't raise any suspicion at all.

(*Id.* at 36-37).

Other statements in the video confirm that Mr. Ancrum and law enforcement meant "solicitation of drug purchases" by use of the term "hollering." During Mr. Ancrum's narration of the drug buy, Mr. Ancrum stated, "[h]e getting ready to go up the street to go get the one with the blue cast on . . . [t]hat the same guy that be in the yard all the time, be yelling at me . . . [t]hat where he going." (State's Exh. 3 at 9:43-10:09). Later in the video, Mr. Ancrum states, "Yeah. Okay. I can thank you. I'll holler back" in the context of contacting the person again for drugs in the future. (*Id.* at 11:06-11:25).

The trial court abused its discretion because these statements improperly weigh on Appellant's character and call into question Appellant's prior bad acts. "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." *State v. Coleman*, 301 S.C. 57, 60 389 S.E.2d 659, 660 (1990). Moreover, "[t]he inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." *State v. Wilson*, 274 S.C. 635, 637, 266, S.E.2d 426, 427 (1980). In a criminal case, the State cannot attack the character of the defendant unless the defendant himself or herself first places his or her character in issue. *State v. Bostic*, 307 S.C. 226, 414 S.E.2d 175 (1992).

The Supreme Court offered guidance with respect to the admissibility of "prior bad acts" in *State v. Fletcher*, 379 S.C. 17, 664 S.E.2d 480 (2008) as follows:

> Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan,* 369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle,* 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must *logically* relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.; State v. Beck,* 342 S.C. 129, 135–36, 536 S.E.2d 679, 682-83 (2000).

Id. at 23-24, 664 S.E.2d at 483 (emphasis added) (holding that the defendant's alleged prior bad acts were inadmissible absent "clear and convincing evidence" that the defendant committed the prior bad acts.).

In this case, Mr. Ancrum's conversation with law enforcement that "the boys always holler at [Mr. Ancrum]" and "[he] be always out there . . . always hollering at [Mr. Ancrum]" in the context of a prospective drug buy, is a direct reference to Appellant's prior bad acts, namely that the Appellant "always" solicited Mr. Ancrum to purchase drugs. These statements, coupled

with Appellant's cocaine distribution charge, improperly suggest that Appellant acted in conformity with the asserted bad character and criminal propensity. Furthermore, the conversation between law enforcement and Mr. Ancrum occurred well before law enforcement dropped off Mr. Ancrum to walk to the targeted location. (*See* State's Exh. 3 at 1:12-1:44). By asserting that Appellant was "always" out there "hollering," the officers and Mr. Ancrum cast aspersions that Appellant had a prior history of soliciting drug purchases. These statements logically relate to the crime for which Appellant was charged. Therefore, the trial court improperly allowed the State to offer these statements to the jury.

B. The trial court abused its discretion by allowing the statements that Appellant was "the one that caused all the problems."

Several minutes into the video, before Mr. Ancrum exited law enforcement's vehicle, an occupant in the vehicle identified who he believed to be Appellant stating "one of those guys has a cast on . . . [t]hat's the one that caused all the problems." (State's Exh. 3 at 6:01-6:17). The State's main theory of the case was that Appellant wore a cast. In the State's closing argument, the assistant solicitor made the following comments:

> You can watch the video, I can watch the video, law enforcement can testify, Joseph testified. Who is the guy in the blue arm cast? *That's what it comes down to.* Who is the guy in the blue arm cast? You heard not one, not two but three officers tell you who the guy in the blue arm cast is. The guy in the blue arm cast is James Lamont Moore.

(Tr. p. 202) (emphasis added); (*see also id.* at 29, 117-18; 154-55, 183, 201). Similar to the statements regarding Appellant's criminal propensity to solicit drug sales, the statement that Appellant "caused all the problems" improperly weighed on Appellant's character and called into question Appellant's unspecified bad acts. The declarant never clarified what "problems" Appellant "caused." Rather, by admitting this statement, the trial court left the matter for the intrigue of the jury.

German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) is similar to this case. In *German*, two agents performing undercover drug operations received tips that Mr. German "was distributing or selling crack cocaine." 325 S.C. at 26, 478 S.E.2d at 688. The agents received identifiable information about Mr. German, specifically that "[h]e had a large cast on his arm. It was a very ornate cast." *Id.* The Supreme Court held that the statements were improper comments on Mr. German's character because the statements specifically referenced Mr. German. *German*, 325 S.C. at 27, 478 S.E.2d at 688. The court remanded the case for a new trial, finding that defense counsel's failure to object to the improper character statements prejudiced Mr. German. *German*, 325 S.C. at 28, 478 S.E.2d at 688. Moreover, the Court distinguished its holding in *German* from *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994). In *Brown*, the Court held that statements offered to prove why the police began surveillance did not amount to hearsay because the statements were not offered to prove the truth of the matter asserted. 317 S.C. at 63, 451 S.E.2d at 894. Namely, the statements in *Brown* referred to "drug activity in the apartment complex in which the defendant lived." *German*, 325 S.C. at 28, 478 S.E.2d at 688.

This identifying information, which the Court held improperly weighed on the defendant's character in *German*, is strikingly similar to the information Appellant's counsel moved to exclude. The statements attributed to Appellant as "that one" and "the one holler at me" and then later "one of those guys has a cast on . . . [t]hat's the one that caused all the problems" violates Rule 404.

C. The trial court failed to employ a "clear and convincing" standard to exclude character evidence presented in the video testimony and improperly relied on the present sense impression exception to hearsay.

As basis for denial of Appellant's motion to exclude improper statements in the State's video exhibit, the trial court stated as follows:

> I have observed the video and then both of you know that prior to taking the bench I did prosecute drug offenses, and based upon my review of the video there is nothing that causes me any concern that that's the automatic implication that I go to. I have never heard that expression in any other drug case that I either prosecuted or have presided over during the last few years on the bench. . . . And so I deny your motion that it's improper character evidence because I do not think that it's a comment on anyone's character, let alone [Appellant]. I do find that based upon my observation of the video and reading the rules that it is clearly a present sense impression . . .

(Tr. p. 40).

The trial court incorrectly applied the "clear and convincing" standard necessary for evidence of prior bad acts. Rather, the trial court's basis for admitting the entire video exhibit was that "nothing" caused the trial court "any concern" that the statements made by Mr. Ancrum and law enforcement gave the "automatic implication" that the State called Appellant's, or "anyone's," prior bad acts into question. (*Id.*). The record does not indicate whether the trial court considered any exception to Rule 404(b) in making its ruling. As set forth above, the video statements logically relate to the Appellant and to the crime for which Appellant was charged.

Furthermore, the trial court cited "present sense impression" exception to the rule on hearsay, SCRE Rule 803(1), as basis to admit the video in its entirety. Rule 803(1) provides that "a statement describing or explaining an event or condition" is admissible if "made while the declarant was perceiving the event or condition, or immediately thereafter." Rule 803(1), SCRE; *See also State v. Garcia*, 334 S.C. 71, 77, 512 S.E.2d 507, 510 (1999) (holding that the trial court erred in admitted testimony when "there was no indication of when Appellant had "kicked or threatened the deceased.").

In *Wilson v. Childs*, this Court affirmed the trial court's exclusion of testimony of statements made by a decedent just before his death as inadmissible hearsay. 315 S.C. 431, 434 S.E.2d 286, 292 (Ct. App. 1993). This Court reasoned that because the decedent made the

statement in reflection of a past event, the statement did not qualify as a present sense impression. *Wilson*, 315 S.C. at 439, 434 S.E.2d at 291-92.

In this case, the first six and a half minutes of the State's video exhibit consists of a conversation between Mr. Ancrum and law enforcement. (*See* State's Exh. 3 at 0:00-6:31). The statements in that conversation were not made while the declarants perceived an event, namely the purchase of drugs, but rather consisted of details in reflection of past events. The statements that Appellant, or his associates, "always holler[ed]" at Mr. Ancrum and that the person suspected to be the Appellant "ha[d] a cast on" and "caused all the problems" were not made while "perceiving the event or condition, or immediately thereafter." In addition, after completing the alleged transaction Mr. Ancrum stated to the officers, "I get it from the dude with the cast on." This statement occurred three and a half minutes after the event occurred and while Mr. Ancrum had reached a point of safety in law enforcement's vehicle. (*See* State's Exh. 3 14:30-14:40).

Based on the above, the trial court incorrectly extended the present sense impression exception to hearsay to statements reflecting on past events concerning Appellant's character.

D. The probative value of the statements, taken collectively, were substantially outweighed by the unfair prejudice caused to Appellant under Rule 403 of the South Carolina Rules of Evidence.

The statements made by law enforcement and Mr. Ancrum in the video compounded on one another and caused Appellant unfair prejudice under SCRE, Rule 403. As the Supreme Court summarized in *State v. Fletcher*:

> Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); *State v. Gillian,* 373 S.C. 601, 646 S.E.2d 872 (2007); *State v. Braxton,* 343 S.C. 629, 541 S.E.2d 833

> (2001). The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. *State v. Bell,* 302 S.C. 18, 393 S.E.2d 364, *cert. denied,* 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

379 S.C. at 23-24, 664 S.E.2d at 483. Moreover, "[u]nder our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal immoral acts." *State v. Gore*, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984). "When as here, a previous alleged bad act is strikingly similar to the one to which the defendant is being tried, the danger of prejudice is enhanced. *Gore*, 283 S.C. at 121, 322 S.E.2d at 13.

In *State v. Bostic*, an individual hired by the police to make drug buys testified that he had bought crack cocaine from the defendant at a variety store. 307 S.C. at 227, 414 S.E.2d at 176. A police officer providing testimony for the State blurted out that he had "intelligence" before the drug buy that the "'defendant had been selling crack cocaine from the store.'" *Id.* "His statement was not in response to any question." *Id.* The Supreme Court held that the probative value of the evidence in the case was "greatly diminished by its very nature because the police officer did not claim to have first hand knowledge that the defendant had previously sold crack cocaine." 307 S.C. at 229-30, 414 S.E.2d at 177. Instead, "he based his testimony to this effect on something he referred to, nebulously, as 'intelligence.'" *Id.* at 230, 414 S.E.2d at 177. The Court concluded that the "probative value of his testimony was substantially outweighed by its prejudice." *Id.*

In this case, the probative value of the statements captured in the video are substantially outweighed by the prejudice caused the defendant. The "intelligence" of law enforcement and Mr. Ancrum that Appellant was "always" out there "hollering" and that Appellant "ha[d] a cast on" and "caused all the problems" is equally nebulous and prejudicial. The trial court erred by

failing to exclude these statements because probative value of these statements were substantially outweighed by the unfair prejudice caused to Appellant.

II. The trial court abused its discretion by denying Appellant's motion for mistrial after the State's witness blurted out, "he guilty," and the trial court's curative instruction could not, and did not, cure the prejudice caused to Appellant.

A. The trial court erred in failing to grant Appellant's motion for mistrial.

"A motion for a mistrial is, by its very nature, both an allegation of error and an allegation of prejudice sufficient to warrant a mistrial." *State v. Wilson*, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). "A mistrial should only be granted when absolutely necessary, and movant must show both error and prejudice in order to be entitled to a mistrial" and "the determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *Wilson*, 389 S.C. at 585-86, 698 S.E.2d at 865-66. A party must make a contemporaneous objection for an alleged error to be the basis of a mistrial motion. *State v. Sosebee*, 284 S.C. 411, 413, 326 S.E.2d 654, 655 (1985).

In this case, during the State's redirect examination of Mr. Ancrum blurted "he guilty" in direct reference to Appellant. (Tr. p. 150). The State asked Mr. Ancrum about an affidavit that he signed in a previous case admitting to his dishonesty about statements he made about a criminal defendant at trial. (*Id.* at 145-50). Mr. Ancrum explained the circumstances surrounding the previous situation and took the opportunity to comment on Appellant's guilt:

> A: Yeah, I buy drugs from him, but I lied. Yeah, I did the wrong thing when I signed that paper but he know he guilty, and his lawyer know he guilt. Just like the guy who supposed to be on trial here, he guilty --
>
> Q: Joseph. Joseph.
>
> A: That's all I got to say.

(*Id.* at 150). Counsel for Appellant promptly objected to Mr. Ancrum's statements and asked the trial court for a curative instruction. (*Id.*). The trial court instructed the jury to "strike the last statement from your notes" and asked the foreperson not to consider Mr. Ancrum's statement in the jury's deliberations. (*Id.*). Upon a brief recess, Appellant's counsel moved for a mistrial:

> Based on the last statement by Mr. Ancrum on the stand I would make a motion for a mistrial. I know I requested a curative instruction but I don't believe that this is enough to cure any prejudice caused to Mr. Moore and would ask you to grant a mistrial.

(*Id.* at 161). The trial court denied the motion for mistrial. (*Id.* at 162). Appellant's counsel renewed the motion for mistrial following the trial. (*Id.* at 230).

The trial court abused its discretion by failing to grant the motion for mistrial based on the facts of this case and the circumstances surrounding Mr. Ancrum's unsolicited remarks that Appellant was "guilty." Mr. Ancrum cooperated with law enforcement "about over 20 years or longer." (Tr. p. 126). Law enforcement compensated Mr. Ancrum for his work. (*Id.* at 123, 129). At the time of this trial, Mr. Ancrum had made between one "hundred and two hundred" drug buys in his work with law enforcement. (*Id.* at 139). According to the Detective Charles Grill, Detective Grill had "worked with [Mr. Ancrum] a good bit" and that Mr. Ancrum "knows what he's supposed to do." (*Id.* at 122-23). Mr. Ancrum arrived "every time" at his assigned "pick up spot." (*Id.* at 177). Mr. Ancrum would "call [law enforcement] when instructed." (*Id.*). "In the past all the operations" that law enforcement "conducted with [Mr. Ancrum]" proved "successful." (*Id.*). With this background, coupled with the improper video statements, Mr. Ancrum's comments on the Appellant's guilt made an irreversible impact on the jury such that the trial court abused its discretion by failing to grant a mistrial.

B. The trial court's curative instruction was not sufficient to cure the prejudice suffered by the defendant.

In opposition to the motion for mistrial, the State argued that the trial court's curative instruction sufficiently prohibited any potential prejudice suffered by Mr. Moore. (Tr. p. 161-62). The court offered to "review the context and make sure that the curative instruction" sufficed and to examine whether "any further instruction" in the charge was necessary at a later time. (*Id.* at 162). However, nothing in the record indicates that the trial court specifically revisited Mr. Ancrum's indictment of Appellant other than to state in the charge to the jury "if there was any testimony that was ordered stricken from the record you must disregard that testimony." (*Id.* at 212-13).

An instruction to the jury to disregard objectionable evidence *usually* cures the error of admitting the evidence unless, on the facts of the particular case, it is probable prejudice exists notwithstanding such an instruction. *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985) (emphasis added). By use of the word "usually" this Court has recognized that this is the general rule and that this rule is not absolute. Mr. Ancrum blurted out "he guilty," the State intervened, yet he added "that's all I got to say." No instruction to the jury could repair the prejudicial damage caused to Appellant. These intentional statements could not be removed from the minds of the jury and the trial court's instruction to the jury could not, and did not, cure prejudice caused to Appellant.

III. The trial court improperly allowed Appellant to be tried in absentia.

Appellant's trial was originally scheduled for the November 2009 term of the Charleston County Court of General Sessions. (*See* True Bill and Indictment). The record does not provide specific guidance on the circumstances related to the continuance of the original trial date. However, Appellant appeared in court on Monday, October 15, 2012. (Tr. p. 5).

Appellant's trial did not go forward on Monday and the trial was continued to Wednesday October 17, 2012 at 2:30 p.m. (*Id.*). Appellant's counsel tried to reach Appellant, who at the time was on bond, by phone on Tuesday October 16, 2012 without success. (*Id.* at 6). Appellant's counsel previously informed Appellant that the trial would go forward either Monday October 15, 2012 or October 17, 2012. (*Id.* at 7). However, Appellant's counsel "had no luck" for "two days" in reaching Appellant but that Appellant "had shown up before . . . every time." (*Id.* at 8). The trial court "pass[ed] the case until 3:50[p.m.]" on October 17, broke for recess, and Appellant had not arrived when the trial court reconvened. (*Id.* at 10).

The trial court signed a bench warrant for Appellant's arrest. (*Id.*). Appellant's counsel expressed that Appellant "told [counsel] he was on his way" but that Appellant "was still looking for a ride [to court]." (*Id.* at 11). The trial court then heard pre-trial motions in Appellant's absence. (*Id.* at 12). Before breaking on Wednesday the trial court stated "regardless of what happens, be prepared to call the case at 9:30 a.m [Thursday, October 18, 2012]." (*Id.* at 55).

On Thursday, Appellant was not in court. (*Id.* at 58). The Charleston Police "put out a wanted flyer" for Appellant the previous evening but did not locate Appellant. (*Id.*). The trial court noted Appellant's objections not to proceed but elected to proceed in Appellant's absence because Appellant "knew that he was second up and close that we were going to have time to pick a jury this week for this case." (*Id.* at 58-59). Appellant's counsel agreed that Appellant knew he was second on the trial list but didn't think that Appellant "believed it was actually going to happen because of the history of the case and the fact it's been on the docket many times." (*Id.* at 61). Appellant's counsel agreed that "there was no indication that the case was not going to be called." (*Id.*)

After the jury was sworn, the State called three witnesses to testify, and then the trial entered a brief recess for lunch. (*Id.* at 163). When trial resumed, the trial court asked whether Appellant's counsel was able to reach Appellant to which Appellant's counsel replied, "I haven't heard anything . . . at this point any damage of him not being here has been done . . ." (*Id.*). The trial concluded without the presence of Appellant.

At Appellant's Sentencing Hearing, Appellant's counsel moved for "a new trial so [Appellant] can be present for trial." (Sentencing Hearing, p. 5). The trial court denied the motion for a new trial. (*Id.*). Appellant's counsel agreed that Appellant received proper notice. (*Id.*).

Appellant's counsel moved to reconsider Appellant's sentence. (Motion to Reconsider p. 4). Appellant's counsel explained that he had reached Appellant by phone on Wednesday, October 17, 2012. (*Id.* at 9). The trial court heard from Appellant regarding his absence from the trial and Appellant explained the following:

> I apologize for missing my trial, but, Your Honor, as you can see, I never missed a court date ever before. If I know I was supposed to be at trial, I would have been here. I didn't get no paperwork – saying that I'm supposed to be here. I didn't get no paperwork at my house or nothing, so I didn't know about the trial. I would have been here, Your Honor.

(*Id.* at 7). In addition, Appellant's fiancé stated that Appellant did not receive court papers reflecting the date and time of the trial. (*Id.* at 8).

In order for a criminal defendant to be tried in absentia, certain requirements must first be met. *State v. Truesdale,* 345 S.C. 542, 548 S.E.2d 896 (Ct.App. 2001). Rule 16, of the South Carolina Rules of Criminal Procedure provides:

> Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such

> person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

Rule 16, SCRCrimP.

A trial judge must determine whether a defendant voluntarily waived his right to be present at trial in order to try the case in absentia. *State v. Ritch,* 292 S.C. 75, 354 S.E.2d 909 (1987). Specifically, the trial judge must make findings of fact on the record that the defendant (1) received notice of his right to be present, and (2) was warned that the trial would proceed in his absence should he fail to attend. *State v. Jackson,* 288 S.C. 94, 96, 341 S.E.2d 375 (1986).

In this case, although the record indicates that Appellant appeared for trial on Monday, October 15, 2012, the record does not indicate whether Appellant was specifically warned that the trial would proceed other than to state that Appellant spoke with Appellant's counsel on Wednesday, October 17, 2012. Appellant should not be bound by this because the record does not fully address whether Appellant was actually warned before the trial proceeded.

As a result, this Court should reverse and remand this case for a new trial.

CONCLUSION

The trial court erred by allowing the State to introduce testimony captured by the State's video exhibit that improperly weighed on Appellant's character and caused Appellant to suffer unfair prejudice. The trial court erred by failing to grant a mistrial after the State's witness blurted out that Appellant was guilty. Appellant was improperly tried in absentia. For the foregoing reasons, Appellant requests that this Court reverse and remand for a new trial.

Respectfully submitted,

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Columbia, South Carolina

This 31st day of January, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2012-213734

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES LAMONT MOORE,

APPELLANT.

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not abuse its discretion in admitting certain statements in the video of the drug buy where the challenged statements did not specifically refer to any prior bad acts of Appellant and the statements were far too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b), SCRE, or to prejudice Appellant to such an extent that a new trial is required.

II. Appellant's mistrial issue is not preserved for appellate review where Appellant objected to the challenged testimony but then failed to make a contemporaneous objection to the sufficiency of the curative instruction and only later, after other evidence was presented, made a motion for mistrial; but, in any event, the extreme remedy of a mistrial was not warranted under the circumstances of Appellant's case.

III. Appellant's contention on appeal that he was improperly tried in his absence is not preserved for appellate review and is without merit in any event where the record establishes that Appellant received the appropriate notice and warnings.

STATEMENT OF THE CASE

Appellant was indicted in Charleston County in November of 2009 for distribution of crack cocaine. On October 17-18, 2012, Appellant was tried in his absence before the Honorable Kristi L. Harrington and a jury. The jury found Appellant guilty as indicted, and Judge Harrington sealed the sentence. On November 16, 2012, Appellant appeared before Judge Harrington and a sentence of seventeen years was imposed. Judge Harrington denied Appellant's motion to reconsider following a hearing on December 13, 2012. A timely notice of appeal was served and filed.

ARGUMENT

Background

Appellant was indicted in November 2009 in Charleston County for distribution of cocaine base in relation to a drug transaction that occurred on July 16, 2009. (See Indictment). The case was called for trial on Wednesday, October 17, 2012. At the outset of trial, it was apparent that Appellant was not present, and the trial judge inquired about Appellant's location. (R. p. 5). Defense counsel stated that Appellant was out on bond and noted that he had been present that Monday, the first day of the term of court. (R. p. 5-7). Counsel indicated that he had been unable to reach Appellant on his cell phone Monday and Tuesday, but was able to leave a voice mail message that morning instructing Appellant to be at the courthouse at 1:00 pm for his trial. (R. p. 5-6). Counsel also indicated that Appellant's bondsman had been unable to locate Appellant at the place where Appellant supposedly worked. (R. p. 6). Counsel indicated he would prefer that the court issue a bench warrant for Appellant rather than going forward with the trial in Appellant's absence. (R. p. 7-8). The court issued a bench warrant at that time and continued the case until later in the day. (R. p. 10).

Later that afternoon, Appellant was still not present. (R. p. 10-11). When the judge asked defense counsel about Appellant's intentions, defense counsel stated "I don't believe he's coming." (R. p. 10, lines 19-21). Counsel then stated that he had informed Appellant that he would be "locked up" if he did not show up for court and that "possibly the trial might continue as well." (R. p. 10, line 25 – p. 11, line 3). Counsel further elaborated that "I don't think he's coming from the conversation I had with him." (R. p. 11, lines 3-4). He explained that he had a conversation with Appellant over the break

wherein Appellant claimed to be in Mount Pleasant looking for a ride but stated he was on his way to court. (R. p. 11, lines 4-9). Appellant also told counsel that Appellant said he was on his way and would be there in fifteen minutes. (R. p. 11, lines 9-11). Subsequent to that, Appellant again told counsel over the phone that he was still looking for a ride. (R. p. 11, lines 14-15). Counsel reiterated that "I don't believe that he's coming. I honestly don't." (R. p. 11, lines 15-16). Counsel again urged the judge to not go forward with the case. (R. p. 11, lines 18-20). The judge noted counsel's objection but stated that, at a minimum, the pre-trial hearings were going forward. (R. p. 11-12). The judge also noted that she was hoping the bench warrant would be effectuated some time that day and that the trial could proceed with Appellant present the following day. (R. p. 12, lines 15-17).

Thereafter, pre-trial motions were heard. One of the defense's motions was to redact portions of the drug buy video. (See R. p. 17-22). Defense counsel argued that statements in the video referring to a location where people were "hollering" at the confidential informant were improper comments on Appellant's character because the statements implied that Appellant was "always out there trying to sell drugs."[1] (R. p. 18-20). The solicitor responded by pointing out that the statements regarding people "hollering" pertained to multiple people at a particular location and that the statements did not implicate Appellant's character. (R. p. 22; p. 26-27; p. 38-39). Defense counsel then acknowledged that "it's not outright stated that [Appellant is] trying to sell – always out there trying to sell drugs" but asserted it was implied that Appellant was yelling or "hollering" trying to sell drugs. (R. p. 23, lines 6-20). Counsel also argued that Rule

[1] Defense counsel also argued that certain statements in the video were inadmissible prior consistent statements that would improperly bolster the confidential informant's testimony. (R. p. 20-21). This specific issue is not being raised on appeal.

403, SCRE, precluded the evidence because there was a danger that the jury would "misinterpret" the "hollering" statements and this would unfairly prejudice Appellant. (R. p. 39-40).

After watching the drug buy video (R. p. 25), the judge stated that she did not know of any drug-related reference that could be inferred from the use of the word "hollering" and stated that she had never heard the word connected with drug use or drug selling. (R. p. 35, lines 20-22). She indicated that she "hollered" at neighbors or passersby when she worked out in her yard. (R. p. 36, lines 15-18). The judge stated that, based upon her review of the video, there was nothing that indicated to her that the "hollering" statements implied that the persons who "hollered" were soliciting drug transactions. (See R. p. 4-8). The judge then ruled as follows:

> I have never heard that expression in any other drug case that I either prosecuted or have presided over during the last few years on the bench. And based upon that I do not, in doing – and I'm glad you brought up Rule 403. I do not find that there's any undue prejudice. That [hollering was related to drug transactions] was not my assumption[] even knowing that that's what you were challenging. And so I deny your motion that it's improper character evidence because I do not think that it's a comment on anyone's character, let alone your client. (R. p. 40, lines 9-18).[2]

After more pre-trial issues were discussed, the case was recessed until the next day. (See R. p. 41-58). The next day, upon prompting from the judge, defense counsel announced that Appellant was still not present. (R. p. 58). The solicitor then argued that this was a "quintessential TIA" and that Appellant willfully failed to show up for trial. (R. p. 58, lines 9-21). The trial judge stated she was noting defense counsel's objection that he "did not wish to go forward" but that the trial was going to commence in

[2] In a subsequent ruling, the judge appeared to addresses defense counsel's second argument regarding improper prior consistent statements and found that statements made by the confidential informant in the video constituted present sense impressions. (See (R. p. 40, line 19 – p. 41, line 3). See *infra* at footnote 5.

Appellant's absence because the case had been on the trial docket, Appellant had been informed of this, and Appellant had been in court on Monday of that week and was aware that his case was "second up" for trial. (R. p. 58, line 22 – p. 59, line 1).

Following jury selection, State called four witnesses, and the testimony and evidence presented established the following facts. A black male was captured on video engaging in a drug transaction with the confidential informant. (See State's Exhibit # 3 at 9:09-11:40). The confidential informant, who had been used in hundreds of successful operations over the years and who had been thoroughly searched before and after this particular drug transaction, described the appearance of the black male to officers, including the fact that the black male was wearing a blue cast on his right arm. (See State's Exhibit # 3; R. p. 112-13; p. 128-29; p. 132; p. 175-77). One of the detectives, who had known Appellant for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Appellant as the black male wearing the cast. (R. p. 117; p. 154-55). Two other officers then obtained Appellant's driver's license photograph, compared it to the drug dealer's face in the video, and concluded that Appellant was the drug dealer. (R. p. 118, lines 10-16; p. 187, line 20 – p. 188, line 4). Appellant's counsel stipulated at trial that the confidential informant turned over crack cocaine to police following the drug transaction. (R. p. 159, lines 2-21; p. 205-206).

During cross-examination, defense counsel extensively questioned the confidential informant regarding an affidavit he signed relating to a previous case involving different defendant wherein the confidential informant indicated that he lied on the witness stand about the defendant selling him drugs. (R. p. 141-45). On re-direct, the solicitor asked

the confidential informant to explain the circumstances surrounding his signing of this affidavit. (R. p. 145-50). In a lengthy response, the confidential informant explained that he signed the affidavit because his life was threatened by the defendant's family and that the statements in the affidavit were written by someone else and were not true. (R. p. 147-50). In concluding his explanation, he stated as follows:

> Yeah, I did the wrong thing when I signed that paper but [the previous defendant] know[s] he guilty, and his lawyer know[s] he guilty. Just like the guy who supposed to be on trial here, he guilty -- (R. p. 150, lines 7-10).

The solicitor cut him off at that point, and the confidential informant stated "[t]hat's all I got to say." (R. p. 150, lines 11-12).

Defense counsel objected and asked for a curative instruction. (R. p. 150, lines 13-14). The judge sustained the objection and ordered the jurors to strike the comment from their notes and instructed the foreperson to ensure that the comment was not considered "in any way" during deliberations. (R. p. 150, lines 15-20). Later in trial, defense counsel made a motion for mistrial, stating that he did not believe the curative instruction was "enough to cure any prejudice caused to [Appellant]." (R. p. 161, lines 15-21). The State asserted that the curative instruction given by the judge was sufficient, and the judge denied the mistrial motion but stated that over the break she would review her curative instruction to make sure it was appropriate and would give a further instruction in her charge to the jury if she felt the need to do so. (R. p. 161-62).

After the State rested its case, the defense elected to present no witnesses. (R. p. 192, lines 19-22). Following closing arguments and the final jury charge, the jury returned a guilty verdict after twenty-five minutes of deliberations. (R. p. 223-24). Based on his prior record and the fact that this was Appellant's third or subsequent drug

offense, the trial judge sentenced Appellant to seventeen years. (R. p. 225-26; Sentencing Hearing Transcript, p. 6-7).

I. The trial court did not abuse its discretion in admitting certain statements in the video of the drug buy where the challenged statements did not specifically refer to any prior bad acts of Appellant and the statements were far too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b), SCRE, or to prejudice Appellant to such an extent that a new trial is required.

Appellant argues that the trial court abused its discretion by admitting the unredacted video of the drug buy which contained statements constituting prior bad act evidence that improperly weighed on his character. On appeal, Appellant complains about (1) statements regarding "hollering," and (2) a statement indicating Appellant was the one who "caused all the problems."

A. Statements Regarding "Hollering"

Appellant first contends that statements contained in the video of the drug buy indicating that he was "always hollering" at the confidential informant violated Rule 404(b), SCRE, because it implied that Appellant committed prior bad acts, i.e., that he always solicited the confidential informant to buy drugs from him. (Brief of Appellant, p. 4-7). Appellant relies on German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) in support of his argument. In German, the defendant was tried for possession with intent to distribute crack cocaine. German, 325 S.C. at 26, 478 S.E.2d at 688. During opening argument, the solicitor stated that one of the officers involved in the defendant's arrest had received several tips that the defendant was distributing or selling crack cocaine. Id. On appeal of the post-conviction relief judge's denial of relief, our Supreme Court held that trial counsel was ineffective for failing to object to the solicitor's remarks because the statements specifically referred to the defendant and were objectionable as improper

comments on the defendant's character. Id. at 27-28, 478 S.E.2d at 688-89. Appellant also points to State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992), a similar case where an officer testified that the police had "intelligence" that the defendant "had been selling crack cocaine from the store." Bostick, 307 S.C. at 227, 414 S.E.2d at 176. This Court held that the officer's testimony was improper evidence of prior bad acts and was clearly prejudicial to the defendant, particularly where his defense to the charge for which he was on trial was that the confidential informant had confused him with someone else. Id. at 226-30, 414 S.E.2d at 176-77.

In Appellant's case, unlike in German and Bostick, the statements in the video of the drug buy regarding "hollering" did not refer to any prior bad acts of Appellant. The American Heritage Dictionary defines "holler" as "to yell or shout; cry out; call." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 628 (1980). Similarly, Webster's Dictionary defines "holler" as "to shout or yell." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 2nd COLLEGE EDITION 669 (1976). Urban Dictionary defines "holler" as "to scream or yell."[3] *See Holler,* Urban Dictionary (May 14, 2014), http://www.urbandictionary.com/define.php?term=holler. Urban Dictionary also defines "holla" as "(1) [a] word used to acknowledge the presence of a fellow companion; (2) For a man to express interest in a particularly impressive female specimen; (3) To contact via telephone." *See Holla,* Urban Dictionary (May 14, 2014), http://www.urbandictionary.com/define.php?term=holla.[4]

[3] The Urban Dictionary definition of "holler" also includes the following: "[I]n the south east mountains of the [U]nited [S]tates this word is used instead of hollow."

[4] As this Court recently noted, "Time Magazine rated Urban Dictionary as one of its "50 Best Websites" in 2008 . . . and described it as follows: 'To stay hip, visit Urban Dictionary, which has millions of user-

None of the common definitions of the word "holler" or "holla" include any references to drug solicitation or drug sales, nor does Appellant point to any authority suggesting the word has taken on such a meaning in any setting or context. Moreover, the video itself did not establish that "holler" or "holla" meant anything more than simply making verbalizations, yelling, or making contact with someone. (See State's Exhibit 3). In fact, as Appellant acknowledges on page 5 of his brief, in one part of the video, the confidential informant substituted the word "yelling" for "holler." (See State's Exhibit 3 at 9:56-10:00). Further, many of the "hollering" statements in the video were not connected with Appellant because they referred to more than one person at a location or to an unidentified person. (See R. p. 22, lines 18-23; p. 26, lines 13-17 & lines 22-23; see State's Exhibit # 3). Contrary to defense counsel's argument below (see Brief of Appellant, p. 5), there was no evidence before the jury indicating that the police targeted that particular location, or Appellant specifically, due to any so-called "hollering;" instead, the video makes clear that the term was used merely to help officers explain to the confidential informant the location of the drug buy and, later in the video, to describe the persons being discussed. (See State's Exhibit # 3). There is no reason to believe the jury would attach a nefarious meaning to the word "holler" as used in the video. In sum, the complained-of statements regarding "hollering" did not refer to any prior bad acts of Appellant and consequently did not violate Rule 404(b), SCRE, or Rule 403, SCRE.

Even assuming the statements regarding "hollering" might be construed as having some type of negative connotation, the references were simply too vague and ambiguous

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submitted words and definitions. Visitors can vote on the best entries...." Anita Hamilton, *Urban Dictionary—50 Best Websites 2008,* Time (Jun. 17, 2008), http:// www. time. com/ time/ specials/ 2007/ article/ 0, 28804, 1809858_ 1809955_ 1811527, 00. html.'" State v. Price, 400 S.C. 110, 111, 732 S.E.2d 652, 652 n1 (Ct. App. 2012).

to constitute impermissible prior bad act evidence under Rule 404(b) or to prejudice Appellant to such an extent as to constitute reversible error. Again, the word "holler" was never directly linked to drug transactions. Further, the State never offered any substantive evidence regarding any prior drug transactions involving Appellant. Accordingly, even assuming some type of error occurred, such error was not sufficiently prejudicial to warrant reversal of Appellant's conviction.[5] See State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (recognizing appellant's possible drug dealing was merely suggested and no testimony was presented concerning such behavior); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (noting that references to defendant's prior crimes in arresting officer's testimony were extremely vague); State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 (1961) ("We do not think that the testimony referred to creates the prejudicial inference asserted by the appellant," in case where defendant asserted that a vague reference to his going to the probation office suggested he was convicted of a prior crime); State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) (a vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes); State v. Wiley, 387 S.C. 490, 495-97, 692 S.E.2d 560, 563-64 (Ct. App. 2010) (concluding that the prosecutor's comment regarding the defendant's warrant was merely a vague reference to his prior criminal record that

[5] To the extent the judge may have ruled that statements describing past events were admissible as "present sense impressions," the State agrees with Appellant that this was error. (See Brief of Appellant, p. 8-10). (See R. p. 40, line 19 – p. 41, line 3). However, the ruling regarding present sense impressions appears to address defense counsel's *second* argument at trial - which has not been raised on appeal - regarding improper prior consistent statements, rather than his argument regarding improper character evidence with respect to the "hollering" statements. (See R. p. 20, line 14 – p. 21, line 23; p. 40-41). See *supra* at footnote 2. Accordingly, any error in the ruling regarding present sense impressions is inconsequential and harmless.

was not sufficiently prejudicial to warrant a mistrial; further, even if the jury inferred that the defendant committed another crime, the defendant was not prejudiced because the State never attempted to prove he was convicted of some other crime); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (determining law enforcement agent's isolated testimony regarding fingerprint cards was not so prejudicial to defendant as to warrant mistrial because it was questionable whether jury drew connection between fingerprint card and defendant's prior criminal activity); see also State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) ("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. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.") (citations omitted).

Statement Regarding "Causing All the Problems"

Appellant also contends that the statement in the video indicating that the man with the cast on was the one who "caused all the problems" improperly weighed on Appellant's character and "called into question Appellant's unspecified bad acts." (Brief of Appellant, p. 7). This issue is not preserved for appellate review because trial counsel never made mention of this particular statement to the trial judge and, consequently,

never argued that this statement raised an issue of prior bad acts. (See R. p. 17-41; p. 131, lines 8-14). See State v. Holland, 385 S.C. 159, 172, 682 S.E.2d 898, 905 (Ct. App. 2009) ("[The appellant] did not raise this specific ground before the trial court. Therefore, this specific argument is not preserved for this Court's review."); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party may not assert one ground at trial and argue another ground on appeal).

In any event, even assuming the issue was somehow preserved, the trial judge did not commit reversible error by admitting the challenged statement. Initially, the statement - made by an unknown officer over the police radio and barely audible in the background noise of the video - is not clearly making reference to Appellant at that point in the video. (See State's Exhibit # 3 at 6:05-6:16). It is doubtful the jury would have later connected the incidental comment to Appellant. Furthermore, even if the jurors were to connect the statement with Appellant, the comment did not suggest Appellant committed prior drug transactions, or that he had a propensity to do so, because of the utter vagueness of the comment. Cf. Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000) (noting that prior bad acts involving the *same or similar acts for which the defendant is on trial* are highly prejudicial). In that vein, as discussed above in the context of the "hollering" statements, the comment regarding "causing all the trouble" was simply too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b) or to prejudice Appellant to such an extent as to constitute reversible error, particularly where the State never introduced any evidence about Appellant causing any trouble at some other time. See cases cited *supra*, p. 12-13; see also State v. Brown,

344 S.C. 70, 76-77, 543 S.E.2d 552, 555-56 (2001) (whatever negative connotation appellant's gambling may have had, its impact was minimal and it did not imply any propensity on his part to commit the crime with which he was charged; thus any error in its admission was harmless beyond a reasonable doubt); State v. Haselden, 353 S.C. 190, 195-96, 577 S.E.2d 445, 448 (2003) (testimony regarding the defendant's habits, which resulted in his not spending much time with his wife and son, was simply not bad character evidence because it was not evidence showing he had a tendency toward committing the crime for which he was on trial).

Overwhelming Evidence of Guilt

In any event, there was overwhelming evidence of Appellant's guilt such that any error in admission of the challenged statements in the video was harmless beyond a reasonable doubt. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 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. Haselden, 353 S.C. at 196, 577 S.E.2d at 448; see State v. Wiley, 387 S.C. at 497, 692 S.E.2d at 564 ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). "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). Thus, when overwhelming evidence of guilt has been presented, trial error will be harmless. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) ("[I]n view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt.").

In this case, a black male was captured on video engaging in a drug transaction with the confidential informant. (See State's Exhibit # 3 at 9:09-11:40). Appellant's counsel stipulated at trial that the confidential informant turned over crack cocaine to police following the drug transaction. (R. p. 159, lines 2-21; p. 205-206). The confidential informant, who had been used in hundreds of successful operations over the years and who had been thoroughly searched before and after this drug transaction, described the appearance of the black male to officers, including the fact that the black male was wearing a blue cast on his right arm. (See State's Exhibit # 3; R. p. 112-13; p. 128-29; p. 132; p. 175-77). One of the detectives, who had known Appellant for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Appellant as the black male wearing the cast. (R. p. 117; p. 154-55). Two other officers then obtained Appellant's driver's license photograph, compared it to the drug dealer's face in the video, and concluded that Appellant was the drug dealer. (R. p. 118, lines 10-16; p. 187, line 20 – p. 188, line 4). Finally, it is worth noting that the jury deliberated only twenty-five minutes before reaching its guilty verdict. (R. p. 223-24).

The evidence described above constituted overwhelming evidence of Appellant's guilt. Therefore, any error with respect to the admission of the challenged statements in the video was harmless beyond a reasonable doubt. See State v. Bailey, 298 S.C. at 5, 377 S.E.2d at 584 ("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."). Appellant's conviction and sentence should be affirmed.

II. Appellant's mistrial issue is not preserved for appellate review where Appellant objected to the challenged testimony but then failed to make a contemporaneous objection to the sufficiency of the curative instruction and only later, after other evidence was presented, made a motion for mistrial; but, in any event, the extreme remedy of a mistrial was not warranted under the circumstances of Appellant's case.

Issue Preservation

Appellant now argues that the trial judge should have granted a mistrial after the confidential informant remarked that Appellant was guilty. This issue is not preserved for appellate review because trial counsel failed to **contemporaneously** make a motion for mistrial following the objected-to comment. In State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012), one of the State's witnesses unexpectedly made a comment about the defendant's parole leave. Heller at 173, 731 S.E.2d at 321. Defense counsel immediately objected and moved to strike. Id. The trial judge sustained the objection and instructed the jury to disregard the comment. Id. After the State completed its direct examination of the witness, the judge took a fifteen-minute break. Id. At that point defense counsel, apparently having reflected further on the matter, made a motion for a mistrial based upon the parole leave comment, arguing that the State's witnesses were not

supposed to bring up the defendant's parole and that the curative instruction was an insufficient remedy. Id. The trial court denied the motion, noting the witness's comment was spontaneous and nonresponsive to the question. Id.

On appeal, the defendant argued that the mention of him being on parole clearly showed he had a prior record and that such evidence constituted reversible error warranting a mistrial where the court's curative instruction was insufficient to cure the error. Id. This Court held that the issue was not preserved for appellate review, finding that, at the time the defendant objected to the testimony, the defendant received the relief he requested - a curative instruction telling the jury to disregard the comment - and his later motion for mistrial did not qualify as a "contemporaneous" motion for mistrial as is required by our error preservation case law. Id. at 174, 731 S.E.2d at 321-22.

The scenario in Appellant's case is essentially identical to the scenario described in Heller, although the issue preservation problem is even more egregious in Appellant's case. Here, defense counsel objected to the unexpected and unsolicited "he guilty" comment made on re-direct examination of the confidential informant and requested a curative instruction. (See R. p. 147, line 4 – p. 150, line 14). The judge sustained the objection and ordered the jurors to strike the comment from their notes and instructed the foreperson to ensure that the comment was not considered "in any way" during deliberations. (R. p. 150, lines 15-20). Defense counsel did not at that time object to the sufficiency of the curative instruction or request a mistrial. Subsequently, the confidential informant provided further testimony on re-direct and then completed his testimony. (R. p. 150-51). Thereafter, another witness was called to the stand and he was examined by the solicitor and cross-examined by the defense attorney. (R. p. 152-

58). The solicitor then read into the record a stipulation regarding the crack cocaine. (R. p. 159). Following the stipulation, the judge recessed for lunch, and, after excusing the jury, inquired about the remaining witnesses from the State and the defense. (R. p. 160-61). Only at that point – well after the conclusion of the testimony of the confidential informant – did defense counsel make his motion for mistrial, stating that he did not believe the curative instruction was "enough to cure any prejudice caused to [Appellant]." (R. p. 161, lines 15-21). As in Heller, defense counsel's belated motion for mistrial did not qualify as a **contemporaneous** objection to the sufficiency of the curative charge or motion for mistrial. Heller at 174, 731 S.E.2d at 321; see also State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) ("No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial."). Therefore, the mistrial issue raised on appeal is not preserved for appellate review.

Discussion Regarding the Merits

"The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); see State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) ("The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment."). In order to receive a mistrial, a party must show both error and resulting prejudice. See State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455,

460 (Ct. App. 2005). A mistrial should not be granted unless absolutely necessary, and instead, all other methods to cure any possible prejudice should be exhausted before granting the motion. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Critically, a curative instruction to disregard the testimony is generally deemed to cure any potential prejudice from improper testimony. State v. Ferguson, 376 S.C. 615, 619, 658 S.E.2d 101, 103 (2008). The grant or denial of a mistrial lies within the sound discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion or an error of law. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000).

Even assuming the issue had been properly preserved for review, the trial judge did not abuse her discretion by denying a mistrial in this case. As stated above, a curative instruction to disregard the testimony is generally deemed to cure any possible prejudice. Here, the trial judge issued a prompt and concise curative instruction to disregard the testimony, and, later in the final jury charge, she reminded the jurors that it was their duty to disregard any testimony that was ordered stricken from the record. (R. p. 212, line 24 – p. 213, line 1). Significantly, jurors are presumed to follow a judge's instructions to them. See, e.g., State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow curative instructions given to them by the judge). Appellant has failed to provide a satisfactory explanation, either at trial on appeal, as to why the curative instruction was insufficient to cure any possible prejudice.

Furthermore, any possible prejudice from the "he guilty" comment was slight considering that the comment was basically cumulative to other, un-objected-to testimony from the confidential informant. See, e.g., State v. Price, 368 S.C. 494, 499-

500, 629 S.E.2d 363, 366 (2006) (any error in admission of evidence that is merely cumulative to other un-objected-to evidence is harmless). For example, the confidential informant had already testified during cross-examination that Appellant "ain't here right now because he lying." (R. p. 144, lines 20-22). In that vein, the thrust of the confidential informant's testimony was that Appellant sold the confidential informant crack cocaine, i.e., that Appellant was guilty of the crime for which he was on trial. (See R. p. 125-52). Even assuming the confidential informant's testimony was in fact improper,[6] it would have hardly been shocking to the jury in this case that the confidential informant believed Appellant was guilty in light of his testimony that established Appellant's guilt. Finally, although defense counsel did not himself elicit the "he guilty" comment, the comment was made as part of the confidential informant's explanation of how he had been coerced into signing an affidavit recanting his trial testimony in a previous case - an issue about which defense counsel *extensively* cross-examined him before the comment was made on re-direct. (See R. p. 141-50). See State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) (a defendant on appeal cannot take advantage of an error to which he contributed at trial); see also State v. Bell, 293 S.C. 391, 402, 360 S.E.2d 706, 712 (1987).

In sum, considering that the degree of possible prejudice from the objected-to comment was slight in light of the other testimony in the record, and that any prejudice was undoubtedly cured by the instructions given by the trial judge, the extreme remedy of a mistrial was not warranted under the circumstances of this case. Therefore, the trial judge did not abuse her discretion by denying Appellant's motion. See State v. Harris,

[6] Notably, Appellant cites no authority supporting the proposition that the confidential informant's testimony was actually improper. (See Brief of Appellant, p. 13-14).

340 S.C. at 63, 530 S.E.2d at 627-28 (the grant or denial of a mistrial lies within the sound discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion). Appellant's conviction and sentence should be affirmed.

III. Appellant's contention on appeal that he was improperly tried in his absence is not preserved for appellate review and is without merit in any event where the record establishes that Appellant received the appropriate notice and warnings.

Although the Sixth Amendment guarantees a defendant's right to be present at trial, it is well established that this right may be waived. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007); City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 688 (Ct. App. 2006). Rule 16, SCRCrimP, provides that a defendant may waive his right to be present, and may be tried in his absence, upon the court's finding that the defendant received notice of his right to be present and that he was warned the trial would proceed in his absence if he failed to appear. State v. Fairey, at 99-100, 646 S.E.2d at 448. Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 100, 646 S.E.2d at 448. Also, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449. "The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice." Ellis, 267 S.C. at 261, 227 S.E.2d at 306.

A trial judge must determine that the defendant voluntarily waived his right to be present in order to try the case *in absentia*. Aiken v. Koontz at 547, 629 S.E.2d at 689.

However, "[i]n order to claim the protection afforded by the rule of law that a criminal defendant may be tried in his absence only upon a trial court's finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in his absence if he failed to attend, **a defendant or his attorney must object at the first opportunity to do so, and failure to so object constitutes waiver of the issue on appeal.**" State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010) (citing State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987)) (emphasis added).

Appellant now argues on appeal that he was improperly tried in his absence because the record does not indicate he was specifically warned that trial would proceed in his absence. (Brief of Appellant, p. 17). This issue is not preserved for appellate review and is without merit. Although trial counsel urged the trial judge to continue the case so that Appellant could be present for trial, he conceded over and over again that Appellant had proper notice of trial.[7] (See R. p. 7, lines 5-9; p. 8, line 22 – p. 9, line 1; p. 11, lines 2-20; p. 58-59; Sentencing Hearing Transcript, p. 5, line 21 – p. 6, line 3; Motion to Reconsider Hearing Transcript, p. 9-10). He agreed Appellant knew his case was number two on the trial docket and had appeared on Monday of that week prepared to pick a jury, and he specifically stated that he explained to Appellant that if he did not appear the trial could continue in his absence. (R. p. 5-10; p. 10, line 25 – p. 11, line 3). Most notably, trial counsel candidly indicated to the judge that, after speaking with

[7] Obviously, as an officer of the court, trial counsel was bound to truthfully answer the trial judge's questions regarding the notice Appellant received for trial. See Rule 3.3, RPC, Rule 407, SCACR ("Candor Toward the Tribunal").

Appellant on the telephone, he honestly believed Appellant had chosen not to come to trial.[8] (See R. p. 10, line 19 – p. 11, line 16; see also p. 228, lines 12-17).[9]

Accordingly, any issues regarding the sufficiency of the notice and/or warnings provided to Appellant, and regarding the sufficiency of the trial judge's findings, were waived, are not preserved for review, and are without merit in any event because the record is clear, based on trial counsel's admissions, that Appellant voluntarily elected not to appear for trial after having received proper notice and being warned the trial could continue in his absence. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Dickman, 341 S.C. 293, 295 534 S.E.2d 268, 269 (2000) (a party may not assert one ground at trial and argue another ground on appeal); State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (an issue conceded in the trial court cannot be argued on appeal); State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010) (this Court found it arguable that the defendant did not properly preserve an objection to his trial *in absentia* where, although counsel moved for a continuance until such time as he could locate his client, counsel never specifically objected to a trial *in absentia* and never asserted to the trial judge that his client did not receive the requisite notice of his right to be present or a warning that the trial would proceed in his absence if he failed to attend); State v. Castineira, 341 S.C. 619, 623, 535 S.E.2d 449, 451 (Ct. App. 2000) (trial in absentia issue was without merit where "counsel stipulated that [the defendant] had received the proper notice").

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[8] The trial judge subsequently made findings that Appellant had chosen not to show up for his trial. (R. p. 58, line 22 – p. 59, line 7; Sentencing Hearing Transcript, p. 6, lines 20-21; Motion to Reconsider Hearing Transcript, p. 10, lines 9-10 & lines 14-15).

[9] After the verdict, counsel told the trial judge that he believed Appellant did not attend the trial because he was afraid. (R. p. 228, lines 12-14).

Furthermore, it is undisputed that Appellant was out on bond, and his signed bail form included a provision stating as follows: "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence." See Appellant's Bail Form, filed with the Charleston County Clerk of Court on 8/14/09).[10] The signed bail form also required Appellant to appear for the general sessions term of court beginning on October 9, 2009, and, if his case was not disposed of during that term, to "appear and remain throughout each succeeding term of court until final disposition is made of his case." See Appellant's Bail Form, filed with the Charleston County Clerk of Court on 8/14/09). Appellant's bail form leaves no doubt that Appellant had proper notice to appear at trial and that he was warned that trial would proceed in his absence. See, e.g., Fairey, 374 S.C. at 101, 646 S.E.2d at 449 ("A bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice.").

In light of the representations of the solicitor and Appellant's defense counsel regarding Appellant's awareness of when his trial was set to begin, Appellant's appearance at the courthouse at the beginning of the week, and Appellant's act of signing the acknowledgement on the bail form before he was released on bond, it is clear Appellant was fully aware of his right to be present for his trial, the scheduled date and time of his trial, and the consequences of his failure to appear for trial. Accordingly, the

[10] The bail form was not directly referenced by the parties or the judge during Appellant's trial. However, the bail form was properly before the trial court because it was filed with the Charleston County Clerk of Court well before Appellant's trial, thus making it a part of the clerk's file in Appellant's case. See Rule 210(c), SCACR ("The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal."); see also South Carolina Dep't of Soc. Servs. v. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) ("These documents were filed with the family court; therefore, they were part of the record.").

trial judge did not abuse her discretion in denying Appellant's continuance request and proceeding with the trial in Appellant's absence. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) ("The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion.").

In any event, a court's decision to try a defendant in his absence is subject to a harmless error analysis. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). In that vein, "[a]lthough the right to be present is a substantial one, **no presumption of prejudice arises from a defendant's exclusion.**" State v. Whaley 290 S.C. 463, 465, 351 S.E.2d 340, 341 (1986) (emphasis added). Here, the jury was instructed that the fact that Appellant was not present for trial was not to be considered as evidence against him (R. p. 218, lines 10-15), and jurors are presumed to follow instructions given by a trial judge. See, e.g., State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow instructions given to them by the judge). More importantly, Appellant did not identify below, and has not identified on appeal, any prejudice whatsoever resulting from his absence from trial. Furthermore, as discussed above, there was overwhelming evidence of Appellant's guilt and his presence at trial could not possibly have altered the outcome.[11] See, e.g., State v. McLeod, 362 S.C. 73, 82, 606 S.E.2d 215, 220 (Ct. App. 2004) ("[A]n 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. Sims, 387 S.C. 557, 566-67, 694 S.E.2d 9, 14-15 (2010) (trial error is harmless where there is overwhelming evidence of the defendant's guilt). Therefore, even if the trial judge

[11] In fact, his presence at trial would have only harmed him because it would have allowed the jurors to match up his face with the face of the drug dealer in the video of the controlled buy. (See State's Exhibit # 3 at 9:22-9:30).

somehow erred by trying Appellant in his absence, any error was harmless beyond a reasonable doubt. Appellant's conviction and sentence should be affirmed.

CONCLUSION

Based on the foregoing, the State requests that this Court affirm Appellant's conviction and sentence for distribution of crack cocaine.

Respectfully submitted,

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May 16, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Lamont Moore, Appellant.

Appellate Case No. 2012-213734

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2015-UP-098
Heard January 6, 2015 – Filed March 4, 2015

AFFIRMED

Brandon Scott Smith, of Nelson Mullins Riley & Scarborough, LLP, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan M. Wilson and Assistant Attorney General Christina Catoe Bigelow, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: James Lamont Moore appeals his conviction for distribution of crack cocaine, arguing the trial court erred in (1) denying his motion to redact statements in a video exhibit, (2) denying his motion for a mistrial, and (3) trying him in his absence. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in denying Moore's motion to redact statements in a video exhibit: Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009) (stating "[t]he trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion" in reviewing the admissibility of evidence under Rule 404(b)); Rule 403, SCRE (stating "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"); *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) (providing an appellate court reviews a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and is obligated to give great deference to the trial court's judgment); *id.* ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances."); *State v. Huggins*, 336 S.C. 200, 204, 519 S.E.2d 574, 576 (1999) ("Error without prejudice does not warrant reversal.").

2. As to whether the trial court erred in denying Moore's motion for a mistrial: *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured."); *id.* ("No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial."); *State v. Heller*, 399 S.C. 157, 174, 731 S.E.2d 312, 321 (Ct. App. 2012) (concluding a motion for a mistrial was not preserved for appellate review when the court sustained an objection and gave a curative instruction and Heller did not contemporaneously move for a mistrial but waited until after the State completed examination of the witness and the court took a fifteen minute recess).

3. As to whether the trial court erred by not making specific findings of fact on the record that Moore received notice of his right to be present and was warned the trial would proceed in his absence: Rule 16, SCRCrimP ("[A] person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court."); *State v. Williams*, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987) (finding error in complying with requirement to make specific findings is subject to a harmless error analysis); *Huggins*, 336 S.C. at 204, 519 S.E.2d at 576 ("Error without prejudice does not warrant reversal.").

AFFIRMED.

HUFF, SHORT, and KONDUROS, JJ., concur.

The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
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Re: The State v. James Lamont Moore
Appellate Case No. 2012-213734

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jonny Abbott Kitchings

CLERK

cc: The Honorable Kristi Lea Harrington

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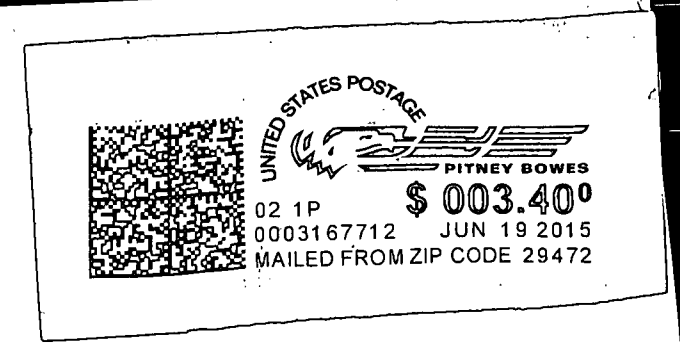

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