STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2014-001528

THE STATE,

Respondent,

vs.

JAMES MCABEE,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. Appellant's argument that the trial court erred in allowing State's witnesses Belue and Habitzruther to testify regarding background information because it was "highly prejudicial" and "meant to garner sympathy" is not preserved for appellate review. However, even if this argument was preserved, the trial court did not abuse his broad discretion in permitting the questioned testimony, where the testimony was relevant and pertinent background information. Furthermore, any error was harmless and had no impact on Appellant's case.

STATEMENT OF THE CASE

Appellant was indicted during the August 2013 term of the Spartanburg County Grand Jury for carjacking and third-degree assault and battery. Appellant was represented by Charles William Snyder, III, Esquire. On July 7, 2014, Appellant appeared before the Honorable J. Derham Cole, where he pled guilty to third-degree assault and battery. Sentencing was deferred until the carjacking charge was resolved. Appellant proceeded to a jury trial on the carjacking indictment. The State was represented by Assistant Solicitors Russell D. Ghent and Lindsey Kate Robinette. On July 9, 2014, the jury convicted Appellant of carjacking. Judge Cole sentenced Appellant to thirty days imprisonment for third degree assault and battery and to fifteen years imprisonment suspended upon the service of ten years imprisonment followed by three years of probation. Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

At approximately 5 p.m. on June 5, 2013, Appellant entered the Lake Bowen Country Club, a bar in Inman, South Carolina near the intersection of Highways 9 and 292. (R pp. 19, 23-24, 113). Appellant, who was extremely intoxicated and aggressive, began badgering other patrons of the bar. (R. pp. 19-20, 115, 124, 126-27, Supp. R. 1-2). Due to his highly intoxicated state, the bartender declined to serve him and requested that he leave the premises. (R. p. 20). Appellant refused to leave the bar despite being asked to do so several times. (R. pp. 20-21). Numerous patrons tried to calm Appellant down without success. (R. pp. 20-21). Appellant finally left the bar at approximately 6 p.m. (R. pp. 21, 24).

Upon leaving the bar, Appellant got into his vehicle and tried to drive away. (R. pp. 21, 24, 115-16, 124-25, 128). He exited the bar parking lot, attempted to enter the roadway, but instead ran his car across the road and onto the embankment on the side of Highway 9, where it remained, partially suspended over a ditch. (R. pp. 21, 24, 115-16, 124-25, 128). Robert Kaminski, a fellow bar patron who had observed Petitioner's behavior earlier, went to check on Appellant two hours later and found him passed out in the front seat of his car. (R. pp. 21-22, 24-25).

Shortly thereafter, the bar received a call that Appellant was in the middle of the road trying to flag down vehicles. (R. pp. 22, 25). Several motorists driving in the area called 911 in response to Appellant's behavior. Michael Arledge and his wife Traci were driving on Highway 9 when they saw Appellant in the roadway. (R. p. 28). Michael noticed Appellant's wrecked car in the embankment and slowed down to see if Appellant needed assistance. (R. pp. 28, 43-44). As they slowed down, the Arledges noticed that Appellant was urinating in the median. (R. pp. 29, 42, 43-44). Appellant appeared to be

very intoxicated. (R. p. 29). Appellant then walked into the roadway, stepping in front of traffic and causing several drivers to swerve to avoid making contact with him. (R. pp. 28-29, 31-32, 44).

Concerned for the safety of Appellant and motorists, Michael called 911. (R. pp. 29, 31). The 911 operator asked for a more detailed description of Appellant, so Michael turned his car around and pulled into the Lake Bowen Country Club parking lot to get a better view of Appellant. (R. pp. 29-30). Still on the phone with the 911 operator, Michael saw several more cars swerve to avoid Appellant. (R. p. 31). As an SUV approached, Michael saw Appellant hit the driver's side of the vehicle with his hand, creating a loud thud. (R. pp. 32, 39). The SUV driver turned his vehicle around and approached Appellant. (R. pp. 32-33, 40). Michael then saw Appellant approach the SUV and the SUV began shaking side to side. (R. pp. 33-34, 40). Approximately five to ten seconds later, Michael heard a single gunshot, followed by Appellant's screams and cursing that he had been shot. (R. pp. 34, 40-41).

Michael told Traci to stay in the car and approached the SUV to render assistance. (R. p. 34). As Michael approached the passenger window of the SUV, the driver rolled down the window, informed him Appellant had tried to carjack him, and that he was on the phone with 911. (R. pp. 34-35, 41). Appellant approached the SUV and began to kick the vehicle and beat on its glass, trying to get to the driver. (R. p. 36). Michael advised the driver of the SUV to pull across the street to avoid any further altercation and the driver complied. (R. p. 36). Law enforcement arrived a short time later and took statements from the Alredges. (R. p. 37).

Kimberly Belue and her son Carter were also driving on Highway 9 near the intersection of 292 on June 5, 2013. (R. pp. 47-49). As she approached the intersection,

she saw Appellant in the roadway shouting. (R. pp. 49-50). She swerved her car to avoid him, then turned her vehicle around to see if he needed assistance. (R. pp. 51-52). She became increasingly concerned as other cars narrowly avoided hitting Appellant and called 911. (R. pp. 52-53). While on the phone with 911, she saw another car approaching Appellant followed by something hitting the car. (R. p. 53). She could not tell whether Appellant hit the car or the car hit Appellant. (R. p. 54). The vehicle swerved, followed by the driver regaining control and slowly approaching Appellant. (R. p. 56). The driver then rolled down his window and asked Appellant what he was doing. (R. pp. 55-56). Appellant then attempted to open the car door and then began reaching through the open driver's side window, placing his hands on the driver. (R. pp. 56-57). The driver appeared to be in disbelief and attempted to resist, repeatedly asking Appellant what he was doing. (R. pp. 56-57). Belue then saw a flash of light and heard a gunshot. (R. p. 57). Appellant stumbled backwards and began shouting at the driver. (R. p. 57). Appellant did not appear to be weakened by the gunshot and approached the car again, beating on the door and trying to gain entry. (R. pp. 58, 63, 71-72). Ms. Belue remained on 911 throughout the ordeal. (R. pp. 60, 62). She provided a statement regarding the incident when law enforcement arrived. (R. p. 65).

The victim of the attempted carjacking, John Habitzruther, was driving north on Highway 9 in his silver Nissan Pathfinder SUV on June 5, 2013. (R. p. 93). As he approached the intersection of Highways 9 and 292, Appellant appeared in the roadway in front of his vehicle. (R. pp. 93-94). He swerved to avoid hitting Appellant, but something made contact with the car. (R. pp. 93-94). He was unable to tell if Appellant had hit his car or if his car had hit Appellant. (R. p. 94). He turned around and stopped his vehicle near Appellant to see if he needed help. (R. p. 94). As he neared, Appellant

grabbed Habitzruther's left arm and began pulling violently in an attempt to remove him from the vehicle. (R. p. 94). Appellant was in a rage and continued to try to open the vehicle door and remove Habitzruther from the car. (R. pp. 95, 102). Due to Appellant's size and strength, the car began to shake back and forth and Habitzruther feared for his life. (R. p. 95).

Habitzruther, a concealed weapons permit holder, had his weapon in a side holster. (R. pp. 91, 103). Habitzruther pulled his firearm from his side holster and fired one shot. (R. pp. 95, 103, 108). Appellant stumbled backwards and began yelling obscenities at Habitzruther. (R. p. 95). Habitzruther immediately called 911. (R. p. 95). Appellant reapproached the vehicle agressively and Habitzruther moved his car to avoid any further altercation. (R. p. 96). He remained on the phone with 911 until law enforcement arrived. (R. p. 96).

When law enforcement arrived on the scene, Habitzruther told the officers that he had shot Appellant once and turned over his weapon. (R. pp. 76, 97). He gave a statement to law enforcement and cooperated fully with the investigation. (R. pp. 76-77, 79-80). In contrast, Appellant was uncooperative and noncompliant when law enforcement arrived. (R. pp. 81-84, 85, 86-87). He refused to follow officers' commands to get on the ground and kept yelling, even after officers drew their weapons. (R. pp. 81-84, 85, 86-87). He finally acquiesced when he saw an officer had a tazer. (R. p. 82).

Medical personnel also arrived on the scene. Spartanburg County EMS technician Meghan Wilson testified Appellant was uncooperative and difficult to treat, behavior which continued while he was transported to the hospital. (R. pp. 109-10). She testified that Appellant appeared to be extremely intoxicated, noting that he had slurred speech, was unsteady on his feet, was loudly yelling obscenities, had glassy eyes, and omitted a

strong odor of alcohol. (R. pp. 109, 111). Once at Spartanburg Regional Medical Center, Appellant blew his nose into a towel and threw the towel at a nurse, striking him. (R. p. 14).

Appellant was indicted for carjacking involving his attempt to take Habitzruther's vehicle and third-degree assault and battery for his attack of the Spartanburg Regional Medical Center nurse. Prior to the start of his trial, Appellant elected to plead guilty to third-degree assault and battery. Appellant then proceeded to trial on the carjacking indictment. The State presented Kaminiski, the Arledges, Belue, Habitzruther, several responding officers, and Wilson as witnesses.

Appellant took the stand in his defense and told a starkly different version of events. He testified that he arrived at the Lake Bowen Country Club completely sober, expecting to meet his friends for a bachelor party. (R. pp. 113-14). Upon learning that he had possibly arrived at the wrong location, Appellant testified that he ordered and drank at least ten shots of vodka and ten beers over a three and a half hour period instead of looking for his friends. (R. pp. 113-14). He testified that he was asked to leave the bar, but was unable to leave because he was heavily intoxicated. (R. pp. 114-15). He testified that he needed to use a phone to call a ride, but no one would let him use a phone. (R. pp. 114-15). Appellant testified he was badgering customers and was afraid the bar would call the police, so he attempted to drive away. (R. pp. 115, 124). He testified he crashed his car into an embankment, rendering it inoperable. (R. p. 116). He testified he then exited the vehicle and entered the roadway trying to flag down cars. (R. pp. 116-18). He testified he also urinated in the median. (R. p. 117-18).

Appellant testified he hit the side mirror of an SUV with his hand as is passed by, causing the driver to stop, turn his vehicle around, and approach him. (R. p. 118). He

testified that due to his heavily intoxicated state, he fell into the car, causing it to shake. (R. pp. 118-19). He testified he then used the door to push himself back into a standing position, also moving the car. (R. pp. 118-19). He testified he never tried to open the driver's door, but acknowledged that he made physical contact with the driver when he staggered into the car. (R. pp. 119-20). He testified he did attempt to grab the driver after he had been shot. (R. p. 119). He testified he also kicked the vehicle after the shooting. (R. p. 122). He testified he did not comply with officers' requests that he get on the ground following the shooting because he had an open wound and feared infection. (R. p. 123). Essentially, Appellant testified the entire situation was a large misunderstanding. (R. p. 124).

The jury convicted Appellant of carjacking. (R. p. 142). Judge Cole sentenced Appellant to thirty days imprisonment for third-degree assault and battery and to fifteen years imprisonment suspended to ten years imprisonment followed by three years' probation for carjacking.

ARGUMENT

I. Appellant's argument that the trial court erred in allowing State's witnesses Belue and Habitzruther to testify regarding background information because it was "highly prejudicial" and "meant to garner sympathy" is not preserved for appellate review. However, even if this argument was preserved, the trial court did not abuse his broad discretion in permitting the questioned testimony, where the testimony was relevant and pertinent background information. Furthermore, any error was harmless and had no impact on Appellant's case.

Appellant contends the trial court committed reversible error when it permitted, over defense counsel's objections, testimony from State's witnesses Belue and Habitzruther regarding past economic hardships that brought them to South Carolina and other background information. Specifically, Appellant objects to the following testimony from Belue: "(1) her ten year old son Carter was in the car with her, crying and begging her to leave; (2) her husband is deceased; (3) she relocated to South Carolina from Rhode Island five years prior; (4) her relocation was economically related and for a better life: and (5) she has no other children." (R. p. 60-61), (IBOA p. 7). Additionally, Appellant objects to the following testimony from Habitzruther: "(1) he used to own a construction company in Michigan; (2) his business was affected by the housing crisis, which left Detroit bankrupt; (3) he relocated for a better life and a construction job in the Cliffs community; (4) South Carolina appealed to him because of the basis of Christianity here and seemed like a peaceful place to live; (5) he and his family are strong believers in Jesus Christ; (6) his construction work at the Cliffs fell apart between 2008 and 2010; (7) he filed bankruptcy; (8) he has now moved to Wyoming to manage a drilling operation; and (9) he is making preparations to move his family from Spartanburg." (R. p. 89-90, p. 92-93), (IBOA p. 7-8).

At trial, defense counsel objected solely on relevance, which was overruled by the trial court. On appeal, Appellant now argues that this testimony was "irrelevant," "highly prejudicial," and "meant to garner sympathy in a very marginal prosecution." In support of this position, Appellant cites to the State's use of this testimony in its closing argument, to which Appellant failed to object during trial.

Contrary to Appellant's contentions, the trial court did not abuse its broad discretion in allowing Belue and Habitzruther to testify to the challenged information, as it was relevant and pertinent background information. Furthermore, assuming arguendo that the trial court erred in admitting the contested evidence, any error was harmless and had no impact on Appellant's case. Appellant's conviction should be affirmed.

A. Issue Preservation

As an initial matter, Appellant's argument that the questioned testimony is prejudicial is not preserved for this Court's review. In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and **arguments**." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) (emphasis added).

In the present case, Appellant contends on appeal the trial court erred in allowing the background testimony from Belue and Habitzruther because it was irrelevant, highly

prejudicial, and intentionally elicited to garner sympathy. Appellant further contends that the State "capitalized on this irrelevant evidence in [its] closing argument, which . . . encouraged the jury to reach their verdict on an improper ground." (IBOA p. 9). However, defense counsel only objected on relevancy grounds, never asserted that Appellant was prejudiced by this information, and failed to object to any portion of the State's closing argument. See State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) ("Where an objection and the ground therefor is not stated in the record, there is no basis for appellate review."). Instead, after unsuccessfully objecting to the testimony based on relevance, defense counsel failed to make any argument regarding prejudice and remained silent when this information was used in the State's closing argument. Therefore, defense counsel's argument during trial was based solely on relevance, not prejudice as Appellant is now raising on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but **it must be clear that the argument has been presented on that ground**." (emphasis added)).

Because defense counsel did not raise the issue Appellant is now raising on appeal to the trial court, Appellant's appellate issue cannot properly be considered or addressed for the first time on appeal. See State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). As a result, Appellant's challenge to the prejudice he suffered from the background testimony elicited from Belue and

Habitzruther was not properly preserved for appellate review and should be rejected on issue preservation grounds. See State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower court, the question cannot be raised for the first time on appeal."); cf. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (holding Benton's challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence).").

Furthermore, Appellant has waived his right to argue error in regards to the testimony regarding Habitzruther's religion, as Appellant questioned Habitzruther on the very topic during his cross-examination. (R. p. 100). A party can waive an objection to an issue by indicating to the trial court the party no longer has an objection to an issue the party previously objected to or by eliciting similar testimony to testimony to which the party previously raised an objection without reserving that earlier objection. See State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30, 30 (1972) ("During the course the trial certain testimony was admitted over the objection of [McKinney's] counsel. Thereafter, counsel for [McKinney] cross-examined the witness thereabout without reserving the objection previously made. The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured."). As Appellant cross-examined Habitzruther on the same subject that he had previously objected, his objection should be deemed waived.

Finally, as to Appellant's argument that the prosecutor's closing argument compounded the alleged prejudice, again there was no objection. Assuming argument

was improper, the issue was not raised before the trial judge, nor was the trial given opportunity to correct it through further instruction to the jury, had it been properly preserved for review. Appellant has gleaned less than twelve lines from almost twenty pages of argument to further bootstrap claims of prejudice, notably without once objecting to the argument.

Appellant's issue regarding prejudice is not preserved. Appellant's conviction should be affirmed.

B. Propriety of the Admission of the Challenged Testimony

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."). "An abuse of discretion occurs when the

conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

All relevant evidence is admissible, and only relevant evidence should be admitted during trial. Rule 402, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Evidence which could assist the jury in arriving at the truth of an issue is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. State v. Salley, 398 S.C. 160, 168, 727 S.E.2d 740, 745 (2012) (citing State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 101 (1999)).

However, even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (emphasis added); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Significantly though, unfair prejudice does **not** mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant. Id. It is only unfair prejudice that must be avoided. Id.

Significantly, a trial court "has considerable latitude in ruling on the admissibility of evidence" and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." McDonald, 343 S.C. at 325, 540 S.E.2d at 467. A trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008).

In the case at bar, the testimony elicited from Belue and Habitzruther was relevant and properly admitted. For both witnesses, the testimony regarding their previous residency, subsequent arrival in South Carolina, and the reasons for the relocations were relevant to show that neither witness had any previous connection to or relationship with Appellant, a lifelong resident of Spartanburg County. The testimony elicited from Belue regarding her son was extremely relevant and germane to the case, as he was in the car with her, can be heard on the 911 tapes played to the jury, and had an impact on her actions during the ordeal. Belue's testimony that her son was scared and begging her to leave provides explanation as to why she did not get closer to the scene or exit her vehicle to help, as Michael Arledge did. As to Habitzruther, his testimony regarding his religious affiliation, albeit non-responsive to the Assistant Solicitor's question, was relevant to show Habitzruther's motivation for stopping to help Appellant and that he bore no ill will towards him. His spontaneous reference to his religion was highlighted and mocked by defense counsel during his cross-examination of Habitzruther. (R. p. 100). The testimony regarding Habitzruther' s various career changes was also relevant to show why he obtained his concealed weapons permit and had a loaded weapon on the evening of the incident.

Appellant attempts to disregard the inherent relevance of the questioned testimony by arguing that it was elicited merely to garner sympathy in what he describes as a "very marginal prosecution." However, the testimony regarding previous financial and personal misfortunes of Belue and Habitzruther had a valid and relevant purpose. See Salley, 398 S.C. at 170, 727 S.E.2d at 745 ("Therefore, we believe this picture had a purpose independent of arousing sympathy, and was properly admitted."). The trial court did not abuse its discretion in admitting the challenged evidence.

Additionally, the evidence was also properly admitted as preliminary questions to introduce the witnesses to the court and jury. Courts have consistently held that such introductory questions are relevant and aid the finder of fact. See State v. Jamison, 365 S.W.3d 623 (Mo. Ct. App. 2012) (Preliminary questions directed toward aiding the jury in setting a proper estimate on the testimony of a witness may be properly asked and it is entirely proper, either by way of introduction or cross-examination, to identify a witness and to inquire into his residence, antecedents, social connections and occupation, particularly as they reflect his credibility either for good or bad.); State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358 (N.C. Ct. App. 1990) (Evidence of robbery victim's scholastic achievements which was presented by prosecution during preliminary questioning was not improper; evidence was offered as means of introducing victim to court and to jury and to assist in explaining victim's background, particularly in light of fact that defendant portrayed victim as aggressor.); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (N.C. Ct. App. 1988) (In prosecution of defendant for second-degree sexual offense involving his step-daughter, prosecutor's question regarding whether the victim was afraid to sleep in her own bed merely sought to establish background information, rather than elicit crucial testimony of elements of crime charged, and was not prejudicial.); State v. Sports, 41 N.C. App. 687, 255 S.E.2d 631 (N.C. Ct. App. 1979) (When a witness has been sworn and takes the stand, preliminary questions are properly put to him as to name, residence, knowledge of the case, et cetera, as the purpose of such questions is generally to introduce the witness to the court and the jury and to show why he is there testifying, and are thereby relevant). In the present case, the questions directed at Belue and Habitzruther were entirely appropriate background questions intended to introduce the court and jury with the witnesses and place their testimony in context. Yet

Appellant still claims that in giving the jurors a thumb-nail sketch of that history, the State sought to introduce evidence that did not meet the most fundamental evidentiary requirement, relevance, that which has "*any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.*" SCRE 401. Appellant's efforts are without merit. The trial court did not abuse its broad discretion in permitting such testimony.

C. Harmlessness of Any Error in the Admission of the Evidence

Assuming arguendo that the trial court abused its broad discretion in admitting the challenged testimony from Belue and Habitzruther, such error is harmless and had no impact on the jury's verdict.

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). "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 or when erroneously admitted evidence is merely cumulative to other properly admitted evidence, any trial error may 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."); State v. Blackburn, 271

S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.").

In Appellant's case, the challenged evidence on appeal was regarding background testimony from two State's witnesses. Appellant challenges this testimony based on relevance, arguing "[t]hese questions have nothing to do with any fact of consequence to the determination of the action because they have no bearing on whether or not McAbee attempted to take a vehicle from another by force and violence or intimidation while the person was operating or in the vehicle [under] S.C. Code Ann. § 16-3-1075." (IBOA p. 11). Based on Appellant's own protestations that such evidence is irrelevant, there is no logical way that such testimony could have had any bearing on the outcome of his case.

Furthermore, viewing the challenged testimony in relation to the other evidence of Appellant's guilt presented during trial, any error that possibly could have resulted by virtue of the introduction of evidence pertaining to the background of Belue and Habitzruther was entirely harmless. Numerous witnesses testified that Appellant attempted to open the vehicle door and remove the victim forcefully. Such evidence alone overwhelmingly and conclusively established Appellant's guilt for carjacking. Therefore, the challenged evidence was inconsequential when considered in relation to the other evidence presented during trial. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (erroneous admission of evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record); see also State v. Forney, 321 S.C. 353, 358, 468 S.E.2d 641, 644 (1996) ("Evidence of the expressed threat to kill Beth Ann is of minimal impact in the context of the properly admitted evidence of appellant's use of a deadly weapon during the North Carolina armed robbery. Accordingly, even if

evidence of the expressed threat was improper, its impact was minimal in the context of the entire record and any error is harmless beyond a reasonable doubt.").

In light of the inconsequential nature of the challenged evidence when viewed in relation to the other evidence presented during trial conclusively establishing Appellant's guilt, any error in the admission of challenged evidence was entirely harmless and had no impact on the ultimate outcome of Appellant's trial. See State v. Garner, 389 S.C. 61, 68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("An insubstantial error is harmless when guilt is proven by competent evidence such that no other rational decision could be reached or when the evidence is merely cumulative of other evidence."). Even assuming the trial court abused its discretion in admitting the challenged evidence, Appellant's conviction should not be reversed based on such an insignificant error. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, Respondent respectfully submits that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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July 15, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2014-001528

THE STATE,

Respondent,

vs.

JAMES MCABEE,

Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 15th day of July, 2015.

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