STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2014-001803

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CALVERT MYERS,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the court abused its discretion by allowing Investigator Carwell to give opinion testimony regarding his interpretation of what was occurring on videotape of the incident at the bar, since his opinions that the decedent and his girlfriend were only attempting to enjoy their evening, that appellant became the aggressor, while the decedent acted innocently were highly prejudicial particularly where self-defense and voluntary manslaughter were jury issues?

2. Whether the court abused its discretion in denying a mistrial, especially when it found the investigator's highly prejudicial opinions about what was allegedly occurring on the videotape at critical times were not at all apparent, and the state made maximum use of the inadmissible unsupported opinions?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial court abused its discretion in admitting Investigator Carwell's testimony regarding the security video footage when the testimony was admissible and any error in admitting the testimony was harmless?

2. Whether the trial court abused its discretion in denying Appellant's motion for a mistrial when the objection to a question that included a gesture that was not clearly part of the record was sustained, a proper curative instruction was given, and a mistrial was not warranted?

STATEMENT OF THE CASE

On August 12-14, 2014, Appellant Calvert Myers ("Appellant") was tried by a jury for the murder of Cornelius Green. Appellant was tried in the Richland County Court of General Sessions before the Honorable Clifton Newman, Circuit Court Judge. Robert Mills represented Appellant. The State was represented by Assistant Solicitors Meghan Walker and John Steadman, both of the Fifth Judicial Circuit Solicitor's Office.

On August 14, 2014, Appellant was convicted of one count of murder. (Tr. 523). He was sentenced to thirty-seven years confinement for the murder conviction. (Tr. 542). Before this Court is Appellant's direct appeal of his conviction. Appellant requests this Court reverse his conviction and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm his conviction.

STATEMENT OF FACTS

On December 29, 2012, Appellant Calvert Myers ("Appellant") shot the victim, Cornelius Green, six times. Those shots included one to the upper left shoulder, one to the back of the victim's left lower arm, one on the side of the victim's chest near his armpit, one to his chest, one to left upper thigh, and one graze wound. (Tr. 208-13). The forensic pathologist indicated that one bullet that entered in the victim's upper left shoulder fractured the victim's scapula, fractured two ribs near his back, perforated his left lower lung, diaphragm, hit the small bowel three times, and perforated part of the aorta and the inferior vena cava in the victim's abdomen. (Tr. 215-16). While all of the other gunshots would have contributed to the victim's bleeding, this particular shot was the fatal wound. (Tr. 218). The cause of death was determined to be multiple gunshot wounds. (Tr. 220).

First Confrontation between Appellant and his grand niece

Sherry Myers ("Sherry"), Appellant's grand-niece, was dating the victim at the time of the shooting. (Tr. 158). Sherry testified that she and the victim arrived at Toney's Lounge around 11 p.m. (Tr. 159). Appellant was already at the bar when they arrived. (Tr. 159). Sherry also noted that she and Appellant have a bad relationship. (Tr. 159-60). At approximately 1:10 a.m., Appellant approached Sherry and called her "a no good bitch." (Tr. 161, ll 19-21).

Toney Lowman ("Lowman"), the owner of Toney's Lounge, knew Appellant and the victim. (Tr. 124-25). Lowman, who was initially outside the bar, indicated that shortly after he went inside, he saw Appellant in Sherry's face.

(Tr. 126). Lowman testified Appellant "was calling her the baddest names a man could call a young lady." (Tr. 127, ll 23-24).

James Myers ("James"), Appellant's nephew, testified that he and Appellant stopped at Toney's Lounge after selling food that day. (Tr. 282-84, 295-96). James thought they arrived at the bar around 11:30 p.m. (Tr. 284, 297). James also saw Sherry and the victim arrive at the bar. (Tr. 286). James noted that he spoke with the victim (they were friends), and he talked with Sherry. (Tr. 286).

Marvin Moore, a friend of the victim and someone who knew Appellant, was also at Toney's Lounge on the night/early morning of the shooting. (Tr. 415). He noted that Appellant was at the bar when Moore arrived. (Tr. 416). The victim was also there with Sherry. (Tr. 416). Moore saw Appellant and Sherry arguing at the bar. (Tr. 416). Moore noted that the victim was at the bar keeping to himself while the argument was happening. (Tr. 416).

Sherry testified she did not respond to Appellant, and Appellant continued calling her names. (Tr. 161-62). Sherry told Appellant to go away and leave her alone, but Appellant continued calling her names. (Tr. 162). Sherry indicated that Appellant put his hands on her, and that's when Lowman intervened. (Tr. 162-63, 182-83). Lowman intervened, and Sherry attempted to hit Appellant over Lowman. (Tr. 128, 147-48). Sherry noted that Appellant and the victim did not exchange words during this confrontation. (Tr. 164). Lowman noted that at that point in time, the victim came over and got Sherry to sit back down. (Tr. 128).

Lowman also noted the victim was attempting to calm everyone down. (Tr. 128-29).

Lowman testified that he was able to get Appellant outside, and he talked with Appellant and calmed him down. (Tr. 129). James and Lowman had taken Appellant outside because he was trying to get to Sherry, and he was using nasty language in the process. (Tr. 287-88). Sherry also testified Appellant was taken out of the bar, but Appellant came back inside. (See Tr. 164, 185). Lowman also told Appellant that he would not be able to go back inside the bar. (Tr. 129). James testified that at some point, he and Lowman took Appellant outside, and Lowman and Appellant stayed out there for a minute.[1] (Tr. 286, 287, 298).

Appellant Returns Inside the Bar a Second Time

Lowman noted that Appellant told him he was going to let go of all of the foolishness, and he promised that everything was going to be all right. (Tr. 130). James indicated Appellant wanted to go back inside and get a drink, but James was ready to go at that point because he felt trouble was going to happen if they did not leave. (Tr. 288). However, James had to wait on Appellant because Appellant was his ride. (Tr. 288). Lowman took Appellant back inside the bar and arranged for him to get a drink. (Tr. 130). Sherry and the victim were sitting at the bar at that time. (Tr. 130-31). James testified that Appellant and Lowman went back inside the bar, but James stayed outside. (Tr. 289).

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[1] James testified that before the altercation between Appellant and Sherry, Appellant had had four or five drinks, and James did not believe he was intoxicated. (Tr. 297).

Lowman testified that shortly after re-entering the bar, Appellant went back to the bar and got into a second argument with Sherry. (Tr. 131). Lowman stated the victim was just sitting at the bar at this point. (Tr. 132). After this encounter, Lowman told his sister, a bartender, to call the police for Appellant. (Tr. 132).

Appellant Returns Inside the Bar a Third Time

When Appellant returned to the inside, he had an interaction with the victim. (Tr. 164, 186). Sherry did not know what Appellant said to the victim, but the victim walked out of the bar shortly afterwards. (Tr. 164). Appellant followed. (Tr. 164). Lowman also saw the victim got up and went outside, and Appellant followed. (Tr. 133).

The Confrontation Outside

Initially, Appellant and the victim did not have an issue outside. The victim, Appellant, and Lowman were involved in a conversation. (Tr. 133-34). Sherry also went outside after retrieving her jacket. (Tr. 165, 187). Sherry noted that when she first exited the bar, she observed Appellant, the victim, and a third person talking. (Tr. 165).

However, once Appellant saw Sherry, he started calling her names again. (Tr. 134, 165). At that point, the victim hit Appellant. (Tr. 165, 187, see Tr. 177). Sherry testified this occurred after Appellant had hit her. (Tr. 187). Sherry indicated the victim hit Appellant hard enough to knock him on the ground. (Tr. 177, 187). Lowman stated Sherry hit Appellant, and Appellant turned around and hit Sherry on the back. (Tr. 134). In response, the victim hit Appellant. (Tr. 134,

149). When James (who had gone around to another door to order food) returned to the front, he saw Appellant on the ground and the victim getting off the ground. (Tr. 289, 300, 303). Appellant was not bleeding at that time. (Tr. 290).

After hitting Appellant, the victim and Sherry walked off. (Tr. 134, 149). Lowman noted that Appellant was not bleeding at that time, and he saw no bruises, scratches or scrapes on him. (Tr. 135). The victim headed towards his truck. (Tr. 166, 188). Sherry had his keys. (Tr. 166).

The Shooting

James saw Appellant pulling out a gun as he was getting up. (Tr. 290). The victim was right beside him. (Tr. 290). James told the victim Appellant has a gun. (Tr. 290). When the victim looked and saw Appellant pulling out the gun, he ran towards his truck. (Tr. 290, 303). James noted that he did not know Appellant had a gun before then. (Tr. 291). James testified that Appellant started shooting, and he shot the victim in the back or something. (Tr. 291, see Tr. 301). According to James, the victim was running, and trying to dodge bullets. (Tr. 291).

Sherry testified someone must have yelled out about Appellant having a gun because the victim attempted to hide shortly thereafter. (Tr. 166, 188-89). Sherry noted that the security video reflected everyone was running at that time because someone had said Appellant had a gun. (Tr. 166). Sherry did not see Appellant immediately, but she did notice him running and she saw the flash from

the gun. (Tr. 167). Sherry did not know how many shots were fired, but she remembered the victim saying Appellant had shot him.[2] (Tr. 167, 190).

Lowman indicated that a crowd had come outside the bar before the shooting. Shortly thereafter, he saw people were backing away. (Tr. 135-36, 153). Lowman heard someone say Appellant had a gun, and everyone started backing up. (Tr. 136). Lowman watched Appellant walk between two vehicles, and he saw that he was fumbling around with something. (Tr. 137). Lowman then saw the gun in Appellant's hand. (Tr. 137). "As soon as I saw the gun, he shot. I know whether he shot at Neil, in the air--." (Tr. 137, l 25 – 138, l 1). Lowman was not sure if the victim was shot then because the victim was still standing. (Tr. 138). Lowman could not see anything for ten to twenty seconds. (Tr. 138).

After Appellant shot the victim, the victim tackled Appellant and started beating him. Sherry indicated that the victim had somehow gotten behind Appellant, pushed him down, got on top of Appellant, and was beating him. (Tr. 167, 189-90). Sherry noted that after hitting Appellant two or three times, the victim just dropped and lay flat on top of Appellant. (Tr. 167). Sherry indicated that she saw blood on Appellant after the shooting. (Tr. 172). Lowman testified that when he was next able to observe what was going on, he saw the victim on top of Appellant, and he saw a hole in the victim's arm. (Tr. 138, 153, 154, 155). Someone kicked the gun away from Appellant. (Tr. 139). Lowman noted that it

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[2] Sherry did admit during cross-examination that in her statement to law enforcement, she indicated that she heard three shots. (Tr. 189). She also indicated that she did not know the victim was shot in the back; she only saw the hole in his arm. (Tr. 189).

was at this point that Appellant was bloody. (Tr. 139). After the shots were fired, James and another man went over to Appellant and the victim, and they took the victim off top of Appellant. (Tr. 291). They then put the victim on his back. (Tr. 291).

Moore thought Sherry and the victim had left, but shortly thereafter, Lowman came back inside and said Appellant had "shot that boy." (Tr. 419, l 15, see Tr. 423). Moore went outside and saw the victim on the ground. (Tr. 419, 423). Appellant was next to him, crawling. (Tr. 419, 423). James saw that both Appellant and the victim were bleeding. (Tr. 292). James asked the victim if he was alright, but the victim did not respond and the victim was not breathing.[3] (Tr. 292). James indicated that one of his cousins called 911. (Tr. 292). Sherry also testified she called 911. (Tr. 172).

[3] In his statement to law enforcement, James had indicated that his uncle had gotten loud with Sherry. (Tr. 305). James and Lowman took Appellant outside. (Tr. 305). Appellant bothered Lowman about going back in for another drink, and Lowman eventually relented. (Tr. 305). Then, Appellant went back in for a beer, and while inside, he started cussing at the victim. (Tr. 305). Appellant was taken out of the club again. (Tr. 305). James was inside ordering food when he heard something was going on. He went outside and saw Appellant and the victim on the ground fighting. (Tr. 305). The victim was on top of Appellant at that time. (Tr. 305). The victim stopped, got up, and went towards Sherry. (Tr. 305). That's when Appellant went for his gun. (Tr. 305). The victim tried to get back to his truck, but Sherry had his keys. (Tr. 305). That was when Appellant started shooting at him. (Tr. 305). James heard the victim say "he done shot me" real loud. (Tr. 305). The victim then came up behind Appellant, got him to the ground, and they fought for about five minutes. (Tr. 305). Next thing James knew, the victim dropped down and was laying on top of Appellant. James stated Appellant was taken out of the club three times. (Tr. 306).

Law Enforcement Arrives

Deputy Kristen Ellis of the Richland County Sheriff's Department testified that on the early morning of the shooting, she responded to the 911 call at Toney's Lounge. (Tr. 88-91). When she arrived, the victim was breathing shallowly, but he was unconscious. (Tr. 93). Ellis also noted Appellant's face was completely bloody. (Tr. 93).

Deputy Robert Furgal also arrived at the Toney's Lounge in response to the 911 call. (Tr. 100-01). He noted that it was raining, wet, and dark when he and Ellis arrived at the scene. (Tr. 101). Furgal retrieved the handgun found on scene. (Tr. 102). He noted that there were no rounds remaining in the magazine. (Tr. 102). After securing the weapon, Furgal assisted with crowd control. (Tr. 104). Furgal testified that the victim was unconscious, and Appellant was conscious. (Tr. 104). Furgal assisted the paramedics in performing CPR on the victim. (Tr. 104). He noted that both the victim and Appellant were loaded into separate ambulances. (Tr. 105). Furgal followed both ambulances to the hospital. (Tr. 105). Once at the hospital, he stayed with Appellant, collected his clothing, and instructed hospital personnel to put paper bags over Appellant's hands to preserve any gunshot residue. (Tr. 106). Furgal testified that he turned over the evidence he collected to Investigator Woods when she arrived at the hospital. (Tr. 106).

A High Point 9mm Luger caliber pistol registered to Appellant's wife was recovered from the scene. (Tr. 102, 312, 380). The seven cartridge casings that were recovered from the scene were all fired by the gun. (Tr. 317, 324). Law

enforcement was unable to say anything conclusive about the relationship between the gun and the two fired bullets recovered from the victim's body. (Tr. 318-19).

Appellant Gave a Statement

John Carwell, the lead investigator on the case, testified about Appellant's statement. In the statement, Appellant discussed cooking and selling food on the morning and afternoon of the shooting. (Tr. 373). On the way home, Appellant stopped at Toney's Lounge with his nephew, James. (Tr. 374). Appellant indicated he was not intoxicated, and he did not drink during the day when he was working. (Tr. 374). Appellant did not remember having a conversation with Sherry. (Tr. 374). Appellant did note that he and Sherry had an up-and-down relationship, and he believed it was because of her changing moods. (Tr. 374-75). Appellant also did not have any problems with the victim, who Appellant had known since the victim was a little boy. (Tr. 375-76). Appellant's gun was one he received from his wife; he indicated he kept it in the car because people see him taking money for the food he sells. (Tr. 376).

Appellant indicated in his statement that he did not remember shooting the handgun in the parking lot, getting assaulted, or arguing with anyone on the night of the shooting. (Tr. 377, 378). He also indicated that he had an open-faced crown knocked out, a pearl knocked out, two more teeth besides them, and two teeth knocked out. He also suffered a fractured jaw and a fractured skull. (Tr. 378). His mouth was wired for a week, and he had a trachea cut in his throat. (Tr. 378). He also suffered a bullet hole in his right foot. (Tr. 378).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TESTIMONY FROM INVESTIGATOR CARWELL, THE LEAD INVESTIGATOR IN THE CASE, REGARDING THE CONTENTS OF SECURITY CAMERA FOOTAGE PRESENTED AT TRIAL. PART OF APPELLANT'S ARGUMENT IS NOT PRESERVED FOR APPELLATE REVIEW; THE TESTIMONY APPELLANT ASSERTS WAS IMPROPER OPINION TESTIMONY WAS PROPERLY ADMITTED AT TRIAL, AND ANY ERROR BY THE TRIAL COURT DID NOT PREJUDICE APPELLANT.

What Occurred at Trial

At issue is Investigator John Carwell's testimony during the presentation of the video from the security cameras from Toney's Lounge. During his direct testimony, Carwell testified about what he considered to be important on the video. (Tr. 348-49).

> A. This is one o'clock in the morning and 30 seconds. You can see this is Sherry Myers here. This is the victim, Cornelius Green. They're having a fine time. Everybody is fine at this point –
>
> MR. MILLS: Your Honor, I would object to his opinion about what's going on. It can speak for itself. He's giving an opinion testimony.

(Tr. 349, ll 3-9). In response to the objection, the State noted that Carwell was asked about what parts of the video were significant to him in terms of deciding how to charge in this case, and Carwell was indicating that Myers had interjected himself into the victim's evening when they were otherwise having a good time. (Tr. 349). The trial court requested that the State restate the question. After questioning continued, Carwell was asked if the demeanor of the victim and Sherry Myers was significant to him in the video.

He responded, "[y]es, it was fine. Everything was calm at this time." (Tr., 350, l 11). Appellant objected, raising the same objection and also asserting the

testimony would be hearsay. (Tr. 350). The trial court overruled the objection. (Tr. 350). Carwell continued to testify about what he observed in the video. Carwell indicated that later in the video, Lowman comes into the bar. (Tr. 350). Carwell identified Lowman on the video, and he noted Appellant was on the video two minutes later. (Tr. 350). Carwell further testified that on the video, Appellant was watching Sherry. (Tr. 350).

Carwell then identified James Myers on the video. (Tr. 351). Carwell noted that at 1:10 on the video, Appellant approached Sherry, and it appears that he is saying something. (Tr. 351). Carwell testified that at 1:12:31, Lowman intervened and attempted to separate Appellant and Sherry. (Tr. 351). Carwell continued to identify individuals involved in the incident in the video as he narrated what was occurring on the video. (Tr. 352). Carwell noted that it was significant to him that he did not see the victim engage with Appellant after Sherry hit Appellant on the video. (Tr. 352). Carwell testified that at 1:16, Appellant re-entered, and Lowman bought him a drink. (Tr. 352). Carwell further testified that Appellant went right next to Sherry. (Tr. 352). Carwell noted that the victim remained seated. (Tr. 352). Carwell testified that at 1:20 on the video, Appellant could be observed entering the bar with a tall gentleman. (Tr. 352). Carwell was unable to identify the tall gentleman. (Tr. 353). At 1:27 on the video, Carwell noted that Lowman was visible, Appellant just walked back up from the back of the bar, and the victim is speaking with Marvin Moore. (Tr. 353).

Carwell then explained the scene using the security video. (Tr. 353-54). He noted there were blind spots where actions that occurred that night could not

be captured by the cameras. (Tr. 354). Carwell then went on to testify that at 1:29, on the video, Sherry was coming from the back of the bar to leave at the front door. (Tr. 354). He noted that it was at this point in time the final argument occurred. Carwell then identified Appellant on the video in camera one. (Tr. 354).

> A. Yeah, this is the area (indicating). This is Calvert Myers right here. He leans on the back of that car. This is Mr. Green, the victim, as he's walking to his car, right here (indicating), between these two cars right here. Calvert Myers is still here leaning up against this car (indicating).
>
> Q. This is the victim?
>
> A. The victim comes to hide behind here, Calvert Myers is right here (indicating). He goes in between that truck, that's Toney Lowman's truck. Green is hiding behind this Explore here.
>
> MR. MILLS: Your Honor, I object to the characterization. He can explain what's going on, but not - -
>
> THE COURT: The objection is sustained.

(Tr. 354, l 21 – 355, l 10). After the objection was sustained, there was some discussion between counsel as to what was improper from the testimony. Appellant noted Carwell could testify as to who was on the video, but he could not discuss their actions or mental state. (Tr. 355).

Carwell testified that at that point in the video, the victim was walking back to his vehicle, and Appellant was walking between two cars. (Tr. 355). "He's going to come back up here and you're going to see him kneeling down." (Tr. 355, ll 19-21). Carwell then noted that this part of the video was significant to him because it was his understanding that it was when Appellant was going for his gun. (Tr. 355). Appellant objected on hearsay grounds. (Tr. 355-56).

Appellant also noted that the response by Carwell was not responsive to the question asked, but the answer was based on hearsay. (Tr. 356). The trial court agreed the answer was not responsive to the question. (Tr. 356). The following exchange then followed:

> BY MS. WALKER:
>
> Q. Once you saw -- use the word crouching, the Defendant crouching behind the vehicle and doing this motion, was that significant to you?
>
> MR. MILLS: Objection, Your Honor, that has not been testified to, what she just –
>
> THE COURT: The objection is sustained.
>
> MR. MILLS: Thank you, Your Honor. Your Honor, I may have a motion at this time, Your Honor.

(Tr. 356, ll 15-23).

Standard of Review

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion." State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

"Rule 701 of the South Carolina Rules of Evidence explains when lay witness testimony is admissible." State v. Mitchell, 399 S.C. 410, 416, 731 S.E.2d 889, 893 (Ct. App. 2012).

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." State v. Fripp, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting Rule 704, SCRE).

Discussion

A. Much of Appellant's argument is not preserved for appellate review. Appellant's objections to Carwell's testimony as improper opinion testimony were limited to, at most, three responses given during his direct testimony.

Appellant contends that much of Carwell's testimony presented during the presentation of the security video was improper opinion testimony. Much of this argument is not preserved for appellate review. At trial. Appellant objected to Carwell's testimony as being improper opinion testimony at most, three times. The first was after Carwell indicated that early in the video, everyone was "They're having a fine time. Everybody is fine at this point. (Tr. 349). The second objection was Carwell's statement slightly later that at a particular point in the video, "everything was calm." (Tr. 350). Appellant arguably made a similar objection when he objected to the characterization of the victim's actions as

hiding from Appellant later in the video. (Tr. 354). At no point did Appellant object to the questions or testimony regarding what Carwell believed was significant in the video. Further, as discussed more below in response to the argument regarding the mistrial motion, Appellant's objection to the question that led to the motion for a mistrial was not based upon alleged improper opinion. Thus, to the extent Appellant asserts Carwell's testimony was improper opinion testimony outside of the three occasions when Appellant objected, Respondent submits his argument is not preserved for appellate review. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating an objection should be sufficiently specific to bring the exact error to the trial court's attention); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct.App.2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal)

B. Carwell's testimony was not improperly admitted.

Appellant contends the testimony from Investigator Carwell regarding the security camera video was improper opinion testimony. Respondent submits that to the extent Carwell's testimony was opinion testimony, it was properly admitted under Rule 701, SCRE.

Appellant's argument is primarily based upon case law that is not applicable or analogous to the circumstances presented in his case. First,

Appellant's reliance upon State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011), is misplaced. In Commander, the Supreme Court held,

> an expert in forensic pathology's opinion testimony as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence.

Commander, 396 S.C. at 269, 721 S.E.2d at 421. At issue was whether some expert medical testimony improperly invades the province of the jury.

Appellant's case is not congruous with the circumstances presented in Commander. First, Carwell was not tendered or qualified as an expert. Second, Carwell's testimony that was at issue at trial was not improper opinion testimony. The statements at issue are that in the early part of the security video, it appeared everything was calm; and in the later part of the video, it appeared the victim was hiding from Appellant by crouching behind a car. These comments by Carwell did not invade the province of the jury. They did not speak to the ultimate issue before the jury, whether Appellant was guilty of murder.

Carwell's testimony regarding the video was also helpful to the jury in determining facts or issues in the case. Almost all of Carwell's testimony regarding the security video consisted of identifying the eyewitnesses who testified at trial in the video. As noted by Appellant, there are portions of the video that are difficult to follow. Carwell's testimony in identifying eyewitnesses in the video and tracking some of the actions in the video would only assist the jury in utilizing the security video as evidence. In light of the fact Carwell was familiar with the eyewitnesses through his investigation, his testimony regarding

the identity of those witnesses in the video was properly admitted. See Fripp, 396 S.C. at 439, 721 S.E.2d at 467; see also Mitchell, 399 S.C. at 417-20, 731 S.E.2d at 893-95.

C. Any error in admitting the testimony was harmless.

If the trial court erred in admitting the brief snippets of Carwell's opinion into evidence, the error was harmless. There was overwhelming evidence of Appellant's guilt presented at trial absent Carwell's statement.

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

In Appellant's case, it must first be noted that the brief snippets of Carwell's opinion that was admitted was minimal. Second, the characterizations made by Carwell were cumulative to the testimony of eyewitnesses who testified at trial. For instance, Sherry testified that prior to the initial confrontation between Appellant and Sherry, she and the victim were sitting at the bar having a drink. (Tr. 159). She also noted that before Appellant initially approached her, she was talking with her daughter's cousin. (Tr. 161). Furthermore, Moore indicated that everything in the bar was calm until Appellant and Sherry got into an argument.

(See Tr. 416, 421). Also, several witnesses indicated that after the victim was made aware Appellant had a gun, he was attempting to hide behind cars to avoid being shot by Appellant. Sherry noted that the video reflected the victim was hiding behind a truck after someone yelled Appellant had a gun. (Tr. 166, 188). James also testified he saw the victim "running, like, hiding trying to dodge bullets." (Tr. 291, ll 19-20).

Third, there was overwhelming evidence of Appellant's guilt. "'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. There was overwhelming evidence that Appellant was guilty of the murder of Cornelius Green. First, there was overwhelming evidence that Appellant shot and killed Green. Lowman testified that Green, the victim, knocked Appellant down after Appellant made physical contact with Sherry. (Tr. 134, 149). Several witnesses indicated that after Green knocked Appellant down, he walked away and headed towards his vehicle. (Tr. 134, 149, 165-66, 188, 289-90, 300, 305). Those witnesses indicated that when Appellant got off the ground, he started pulling his gun out and started to shoot at the victim. (Tr. 136, 150, 166-67, 189, 290-91, 303, 305). When Appellant shot the victim, the victim was attempting to avoid being shot. (Tr. 166, 188, 291, 305). Several witnesses also noted the victim seemingly identified Appellant as the one who shot him. (See Tr. 138, 167, 305). While the initial fight between the victim and Appellant outside was not captured by the security camera, the testimony regarding the victim's attempt to run away and avoid getting shot by Appellant is

corroborated by the security camera video. (State's Exhibits 4, camera 3, 1:32:08-1:33:00).

There was also substantial evidence that the shooting was done with malice. All of the eyewitnesses indicated that prior to the brief confrontation outside, they had not seen any confrontation between Appellant and the victim that night. (See Tr. 128, 140, 173, 293, 417). Sherry and Lowman both indicated Appellant initiated the confrontation outside by cursing and harassing Sherry, and by making physical contact with Sherry. Further, Appellant shot the victim using a pistol. Malice can be inferred from the use of a deadly weapon. See State v. Belcher, 385 S.C. 597, 612, n. 9, 685 S.E.2d 802, 810 n. 9 (2009). The testimony presented at by the eyewitnesses all indicated that Appellant and the victim were not actively engaged in a physical confrontation when the shots were fired. All indicated that the final confrontation that led to Appellant's injuries occurred after he shot the victim. (Tr. 134-35, 138-39, 167, 190, 291-92, 301, 305). Altogether, any error by the trial court in allowing the testimony from Carwell to which Appellant objected was improper opinion testimony in Appellant's trial was harmless. This claim for relief should therefore be denied and dismissed. Appellant's conviction should be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MISTRIAL. THE ARGUMENT PRESENTED ON APPEAL IS NOT PRESERVED FOR APPELLATE REVIEW. THE OBJECTION TO THE QUESTION WAS PROPERLY SUSTAINED, A PROPER CURATIVE INSTRUCTION WAS GIVEN, AND A MISTRIAL WAS NOT WARRANTED.

What Occurred at Trial

As the questioning of Investigator Carwell continued, the following exchange occurred:

> BY MS. WALKER:
> Q. Once you saw -- use the word crouching, the Defendant crouching behind the vehicle and doing this motion, was that significant to you?
>
> MR. MILLS: Objection, Your Honor, that has not been testified to, what she just –
>
> THE COURT: The objection is sustained.
>
> MR. MILLS: Thank you, Your Honor. Your Honor, I may have a motion at this time, Your Honor.

(Tr. 356, ll 15-23).

After the jury left the courtroom, Appellant further explained the basis for his objection.

> Your Honor, there's been no testimony about anybody doing like this and pointing (indicating). I think the characterization by the solicitor of that is a -- is a comment that is, basically, leading the witness and, also, commenting on what could be seen on the video. There's been no testimony of that.

(Tr. 457, ll 5-10). After the trial court acknowledged that Appellant had objected and the objection was sustained, Appellant moved for a mistrial. "And I would move for a mistrial. It is prejudicial for her to be showing actions that are -- that would be up to the jury to determine whether that's occurred. There's been no

testimony to that effect at this point." (Tr. 357, ll 12-16). In response, the State argued that it had attempted to rephrase the question after the prior objection. (Tr. 357). Further, the State contended that it was appropriate to ask the investigator about what parts of the investigation were significant to him and what assisted in his decision making process regarding how to charge Appellant. (Tr. 357-58).

The trial court then asked the solicitor about the time mark on the video that reflected the gesture that was used during the question. (Tr. 358). During the argument about what could be seen in the video, the solicitor stated,

> Your Honor, the witness was describing -- this is the Defendant. The witness was describing him walking around. He leans on the car at this point in time. And, Your Honor, it's going to cut to a different camera angle. And he's still leaning on the car. It cuts to this camera angle. And he's saying this is all significant to him because he has a situation in which he's determining what to charge and who to charge. He has the victim here, I guess, couching behind the vehicle at this point figuring out which way the Defendant is going. And the Defendant comes up around here, goes back behind the car at this point, which he was leaning. Toney Lowman testified he saw him go out and get the gun. He goes down and does that and comes back up, Your Honor.

(Tr. 358, l 24 – 359, l 12). During further discussion, Appellant and the solicitor disagreed regarding whether it could be seen that Appellant pulled out a gun. (Tr. 360). The trial court ultimately determined that the question was improper because the gesture demonstrated in asking the question was not clearly demonstrated by the video.

> But whatever you said the Defendant did in your question, I cannot see him doing that. I don't see where he did that from my vantage point here on that video.
>
> . . .

> And if there's some uncertainty, it's not clearly demonstrated, then it's an improper question. Improper in the sense that you would be testifying about the witness, number one. And as relates to the witness's ability to say what occurred, it has to be clearly demonstrated on the video.

(Tr. 360, ll 14-7, 19-24). The trial court noted that the inference being made by the State could be argued to the jury during closing, but it could not be included in questioning. (Tr. 361). The trial court further noted that it sustained the objection, and it believed that was sufficient. The trial court also denied the motion for a mistrial. (Tr. 361).

When the jury returned to the courtroom, the trial court stated,

> All right. Thank you. The objection is sustained. The jury is to disregard the last question. Ladies and gentlemen, questions asked by counsel -- questions are not evidence. You are not to consider any questions asked as being evidence.

(Tr. 362, ll 14-8).

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct.App.1999). Appellate courts have favored the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "A mistrial should only be granted in cases of manifest necessity and with

the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851; see also State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.").

"[A] mistrial should not be ordered in every case in which incompetent evidence is improperly admitted." State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct.App.2006) (citing State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999) and Patterson, 337 S.C. at 227, 522 S.E.2d at 851). "[T]he trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (internal citation omitted).

Discussion

A. The trial court did not abuse its discretion in denying the motion for a mistrial. A proper curative instruction was given, and a mistrial was not warranted.

The trial court did not err in denying Appellant's request for a mistrial. First, any prejudice created by the question asked by the solicitor was resolved by the trial court's curative instruction. It is well known "[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Goldsmith, 301 S.C. 463, 467, 392 S.E.2d 787, 789 (1990) (quoting State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct.App.2005)); see State v. Dawkins, 297

S.C. 386, 377 S.E.2d 298 (1989); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. Harris, 382 S.C. 107, 119, 674 S.E.2d 532, 538-39 (Ct.App.2009). Here, the trial court strongly instructed the jury to disregard the previous question. Further, the jury was instructed that questions by the attorneys were not evidence. Under South Carolina law, jurors are presumed to follow the trial judge's instructions. State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct.App.2001), affirmed as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) quoting Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions."). In light of the curative instructions that were given by the trial court, Respondent submits the trial court did not abuse its discretion in denying the motion for a mistrial.

B. The argument raised by Appellant on appeal is not preserved for appellate review.

Appellant's argument that the trial court should have granted the motion for a mistrial because the investigator provided improper opinion testimony was not raised to the trial court. As reflected by the transcript, trial counsel's objection that led to the motion for a mistrial was not based upon a belief that the question asked was requesting improper opinion. Instead, the basis for the objection was that the gesture made in asking the question did not reflect testimony or evidence that was in the record. Thus, the question was based on a lack of proper foundation. Since the basis for the mistrial motion below differs from the argument raised on appeal, the argument is not preserved for appellate review. See Johnson, 363 S.C. at 58, 609 S.E.2d at 523 (stating an objection should be

sufficiently specific to bring the exact error to the trial court's attention); Adams, 354 S.C. at 380, 580 S.E.2d at 795; see Perez, 334 S.C. at 565-66, 514 S.E.2d at 755 (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also Tucker, 319 S.C. at 428, 462 S.E.2d at 265 (party cannot argue one ground below and then another on appeal).[4]

C. The denial of the mistrial motion should be affirmed because the alleged error in the question was harmless.

Respondent submits that the denial of the mistrial motion should be affirmed because the error in how the question was asked was ultimately harmless. Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Adams, 354 S.C. at 380-81, 580 S.E.2d at 795; see also State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct.App.2006) (error is harmless when it could not have reasonably affected the result of the trial). An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant. State v. Lee-Grigg, 374 S.C. 388, 414-15, 649 S.E.2d 41. 55 (Ct.App.2007). No definite rule of law governs finding an error harmless; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Lee-Grigg, supra; see also State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) (in determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict).

---

[4] Respondent would also note that Appellant may have waived the argument raised at trial in not objecting to the curative instruction given by the trial court, or specifically reserving the motion for a mistrial in light of the curative instruction. See Patterson, 337 S.C. at 226, 522 S.E.2d at 851.

As already noted in Argument I, there was overwhelming evidence that tended to prove the Appellant's guilt, which was wholly independent of the question regarding the gesture made by Appellant. As such, Respondent submits that Appellant is unable to prove prejudice, and that as a result, any error is harmless. Thus, the trial court did not abuse its discretion in denying the motion for a mistrial. Therefore, Respondent submits that this claim should be denied, and that this Court should affirm the findings of the lower court.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm his conviction for the murder of Cornelius Green.

Respectfully submitted,

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December 30, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Trial Court Case No. 2013-GS-40-01493
Appellate Case No. 2014-001803

THE STATE,

Respondent,

vs.

CALVERT MYERS,

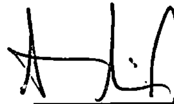
Appellant.

PROOF OF SERVICE

I, Alphonso Simon, Jr., of counsel for the Respondent, certify that I have served two (2) copies of the within Initial Brief of Respondent and Designation of Matter via U.S. mail to his attorney of record, Robert Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201-3332.

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

This 30th day of December, 2015.



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RECEIVED
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SC Court of Appeals

December 30, 2015

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

Re: *The State v. Calvert Myers*
Appeal from Richland County
Appellate Case No. 2014-001803

Dear Ms. Kitchings:

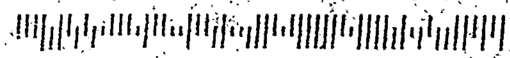
Enclosed for filing in your office is the original Initial Brief of Respondent, Designation of Matter and Certificate of Service in the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.,
Assistant Attorney General

AS/dmd
Enclosures
cc: Robert Dudek, Esq. (w/two copies of encls.)



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