STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2015-001408

The State, Respondent,

vs.

Rion McKissick Rutledge, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in denying Appellant's motion to sever his charges as they were interconnected and relied on the same evidence.

II. The trial court did not err in denying Appellant's motions for directed verdict.

III. The trial court did not err in failing to grant a mistrial where none was requested and Appellant specifically indicated he did not desire a mistrial.

IV. The Appellant was not deprived of a fair trial based on the State's closing argument. The issue is blatantly not preserved for review on appeal and was specifically allowed by the trial court without objection by Appellant.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Lucinda McKellar, an investigator with the South Carolina Attorney General's Office began an online undercover proactive investigation in which Investigator McKellar was using file sharing software to locate computers in South Carolina making child pornography available for download over file sharing networks. (T.52; 61-62; R.___). Investigator McKellar located files being offered for distribution from a source in South Carolina using several search terms which are typically associated with child pornography. (T.62-63; R.___). Investigator McKellar downloaded four different files of suspected child pornography from the computer in South Carolina. (T.64; State's Exhibit 1; R.___). She could verify all the downloads were from the same user because they all were associated with the same GUID, which is a unique number assigned to a specific computer and software combination. (T.66; R.___). Once the files were downloaded, Investigator McKellar viewed the files to verify their content and determined they were child pornography. (T.69-71; State's Exhibit 1; R.___).

After verifying the distribution of the child pornography, Investigator McKellar determined the location of the computer using the IP address.[1] The IP address was assigned to Comporium Communications. Using a 2703(d) order, Investigator McKellar obtained subscriber information for that IP address from Comporium and determined it was assigned to the Rutledge home in York County. (T.61; 72; R.___). Upon realizing

[1] An IP address is a numerical sequence that serves as an identifier for a device on the internet (usually a modem or router). It is a unique number consisting of 4 parts separated by dots–165.113.245.2 is an example of an IP address. The IP address is assigned to only one location. See http://techterms.com/definition/ipaddress (last visited April 5, 2016). (T75; R.___).

the address was in York County, Investigator McKellar contacted Investigator Chris Bomar with the York County Sheriff's Office.[2] (T.73-74; R.___).

Based on the information provided by Investigator McKellar, Investigator Bomar obtained a search warrant for the location provided by Comporium pursuant to the 2703(d) order. Investigator Bomar originally made contact with Appellant's wife and subsequently talked with Appellant. After having Appellant sign a waiver of rights form, Investigator Bomar asked Appellant questions about his computer and whether he used a file sharing program. Appellant indicated he did. He denied having anything illegal on his computer. (T.96-101; R.___). Investigator Bomar, and the other officer conducting the search warrant, seized several laptop computers, a desktop computer, a CD, a couple DVDs, and some memory cards. (T.102; R.___). Investigator Bomar conducted a forensic examination of the items taken from Appellant's residence. (T.103; R.___).

Two of the items taken from the residence included a laptop computer and a CD that were located in Appellant's office. (T.114; R.___). On the laptop, Investigator Bomar located Frostwire and Limewire, two file sharing programs. (T.115; R.___). In user created folders on the laptop, Investigator Bomar was able to find several video files, which were indicative of child pornography. (T.117-119; R.___). A total of three videos referencing "PTHC" (pre-teen hard core) as part of their file name were located on the laptop. (T.119-124; R.___). In addition, the CD contained a video also using "PTHC" in its title. (T.125; R.___). Further, during his investigation of the laptop, Investigator Bomar found files for Limewire and Frostwire containing the GUID which matched the

[2] At the time of the distribution and search warrant in this case, Chris Bomar was a Detective with the York County Sheriff's Office. At the time of trial, Chris Bomar was employed as a special investigator with the South Carolina Attorney General's Office. (T.89-90; R.___). He will be referred to as Investigator Bomar in this Brief to be consistent with the label used in the transcript.

GUID reported to Investigator McKellar during her download of the files of child pornography. (T.128; 131; R.___). Investigator Bomar indicated finding the same GUID on two computers would be like finding someone with the same DNA. (T.131; 150-151; R.___).

Investigator Bomar continued with his forensic investigation of the laptop. In a folder within the directory structure where the child pornography was located, Investigator Bomar found a Word document that was a letter written by Appellant on September 28, 2010, shortly before the images were downloaded by Investigator McKellar. (T.134-135; R.___). Additionally, Investigator Bomar was able to determine one of the child pornography files located on the laptop was last viewed on February 10, 2011. (T.144; R.___). Another was viewed January 27, 2011. (T.145; R.___). Investigator Bomar noted the folder in which the located child pornography files were found was not the default folder created by the file sharing programs; instead, it was a user created folder requiring someone to place the files into that folder. (T.172-173; R.___).

During his testimony, Appellant indicated he did not have possession of the laptop at the time the child pornography files were saved onto it. He alleged the laptop was in his brother's possession. (T.195-196; 198-199; 202; R.___). His brother was deceased at the time of trial. (T.197; R.___). Appellant also testified he was unable to get the computer operating once he received it from his brother. (T.202-203; R.___).

The State attempted to put forth reply testimony to specifically highlight evidence the laptop was in Appellant's possession during the time he alleged it was with his

brother and around the time of the downloaded files.[3] First, the State highlighted emails sent in early 2011 either from or to Appellant's accounts and accessed on that laptop. (T.259-261; R.___). Additionally, Appellant's daughter's Facebook page was accessed on December 22, 2010, well before Appellant indicated he received the laptop back from his brother. (T.261-262; R.___). Additionally, autofill entries were created in the Chrome browser on the laptop with Appellant's information and not his brothers in July 2010, clearly indicating the laptop was used by Appellant prior to the December 2010 downloads of child pornography. (T.262-263; R.___). In addition, the State presented clear evidence the computer was operational and files associated with Appellant's business were accessed by Appellant after the date he claims to have received the laptop back from his brother. (T.266-267; R.___). Most significantly, Appellant accessed Frostwire, the file sharing program, several hours prior to the execution of the search warrant by Investigator Bomar. (T.95; 267-268; R.___). This same information is included in State's Exhibit 4, which was moved into evidence and considered by the jury.

[3] The trial court ultimately ruled the State could not put in the reply testimony highlighting items in the forensic report which will be detailed below showing Appellant used the computer both before and after the time he allegedly gave it to his brother. (T.268; R.___). The State contends the trial court's ruling was in error and believes all the evidence and testimony should have been allowed.

ARGUMENT

I. The trial court did not err in denying Appellant's motion to sever his charges as they were interconnected and relied on the same evidence.

Appellant asserts the trial court erred in failing to sever the sexual exploitation of a minor in the third degree charges—the possession of child pornography charges—from the sexual exploitation of a minor in the second degree charges—the distribution or receipt of child pornography charges. The evidence proving both offenses is interconnected such that evidence regarding the distribution of child pornography charges would be necessary to prove the possession charges. Further, the distribution charges served as res gestae for the possession charges, and evidence related to either one of the charges would be properly admitted bad act evidence under Rule 404(b), SCRE to establish absence of accident or mistake during the trial of the other charges.

A motion for severance is addressed to the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) (internal citations omitted). Generally, when offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place, and character, the trial judge has the discretion to order the indictments tried together, but only so long as the defendant's substantive rights are not prejudiced. State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005); State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974). Criminal charges can be tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the

defendant has been prejudiced. State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). "Offenses are considered to be of the same general nature where they are interconnected." State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App.1996).

First, the charges are most definitely interconnected.The distribution by Appellant through the file sharing programs of Frostwire and Limewire to Investigator McKellar served as the basis for the search warrant of Appellant's residence. It was during the execution of the search warrant that the child pornography in Appellant's possession was located and constituted the crime of possession of child pornography. It would be impossible to establish the full context of the possession charges without explaining why the officers were conducting the investigation and the search warrant at Appellant's residence.

Second, much of the same evidence would be presented at separate trials and the same witnesses would be called at trials to establish the possession and distribution of child pornography. Both Investigators McKellar and Bomar would have to testify to their actions and set for most of the same testimony at separate trials. Even in a separate trial for the possession of child pornography charges, Investigator McKellar would have to explain why the investigation centered on Appellant's residence and would, therefore, have to testify regarding the downloads that constituted the distribution of the child pornography. Additionally, in a trial on the possession of child pornography charges Investigator Bomar obviously would have to testify to obtaining the search warrant, executing the search warrant, seizing the equipment, conducting a forensic examination, and finding the child pornography—all the same testimony required for the distribution of child pornography charge. While trial of the charges may necessitate some individual

evidence, much of the evidence produced at trial pertained to each of the separate charges. See State v. Caldwell, 378 S.C. 268, 278, 662 S.E.2d 474, 479 (Ct. App. 2008) (finding that, although the separate offenses must be proved by the same evidence, "the fact that some additional evidence from the individual victims may be necessary to prove the individual crimes is not fatal to the joinder of the charges").

Third, the evidence of the possession of child pornography would be admissible under Rule 404(b), SCRE(evidence of other crimes may be admissible when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan; or (5) the identity of the person charged with the present crime). The evidence Appellant was in possession of child pornography, including the child pornography not forming the basis of the distribution charge, serves to establish the absence of mistake or accident in the download and distribution of the child pornography. Most of the files in question involved "PTHC" or pre-teen hard core videos. This is a common search word for finding the child pornography files and the fact he had several in his possession makes it very unlikely he just happened to accidentally have the ones Investigator McKellar downloaded that had similar titles.

Additionally, the possession charges helped establish Appellant's intent to distribute the other files. The files Investigator McKellar downloaded would not have been located in the same folder as the files Appellant still possessed on his laptop. He knew how to move the files out of the shared folder he created for the file sharing programs and put them into another folder. As a result, his intent to distribute the child pornography on December 16 can be inferred from the fact he did not move the files

Investigator McKellar located out of his shared folder and into the same folder where the child pornography he possessed was located.

Fourth, as discussed above, all of the evidence of the possession of child pornography was obtained during a search for the evidence to establish the distribution of child pornography charges. As a result, the evidence of one crime is part of the res gestae of the other crime. Evidence of prior bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Fletcher, 363 S.C. 221, 246, 609 S.E.2d 572, 585 (Ct. App. 2005). "The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." Fletcher, 363 S.C. at 246, 609 S.E.2d at 585 (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004).

This evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... '[and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

State v. Adams, 322 S.C. at 122, 470 S.E.2d at 370 71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)).

The evidence of each crime is essential to provide a full presentation of the context in which the crimes occurred. Further, in order to provide a complete story, the same witnesses would testify at both trials to the same evidence. As a result, the testimony related to each separate charge would be admissible in the trial of the other charge, and as a result, Appellant cannot demonstrate how he was prejudiced by the trial of both charges.

Finally, the crimes at issue are certainly of the same general nature, involving child pornography and Appellant cannot demonstrate how he was prejudiced. Because the charges were so interconnected and the evidence of each crime was otherwise admissible at a trial on the other charge, Appellant was not prejudiced by having the evidence presented at one trial.

In addition, the trial court clearly explained the need for the jury to consider each charge separately in their deliberations. The trial court explained: "Each indictment charges a separate and distinct offense. You must decide each indictment separate on the evidence and the law applicable to that indictment, **uninfluenced by what you find on the others**." (T.315; R.___)(emphasis added).

The Court further explained:

> **But the point is that each stands or falls on its own merit, each charge.** The indictments I will not send in to you in the jury room. They charge, in the statutory language, that Mr. Rutledge did, on December 16th, 2010, commit the crime of sexual exploitation of a minor in the second degree, and there are three of those. And then, on March 2nd of 2011, it's alleged that he committed exploitation of a minor in the third degree, and there are

> four counts of that. **And again, each stands or falls on its own set of facts as you determine them to be.**

(T.315; R.___)(emphasis added). The trial court also articulated the State's burden on each and every element of the offenses for each crime. (T.315-319; 325; R.___). See State v. Harry, 321 S.C. 273, 279, 468 S.E.2d 76, 79–80 (Ct. App. 1996) (finding no substantive rights were jeopardized by the consolidation of charges when the trial court "went to great lengths to fully instruct the jury that the [S]tate had the burden of proving each element of each crime. The trial court did not abuse his discretion in denying Appellant's motion to sever the charges and require separate trials.

II. The trial court did not err in denying Appellant's motions for directed verdict. (Appellant's Issues B and C).

Appellant maintains the trial court erred in failing to grant a directed verdict as to all charges. He contends the State failed to present evidence he knew the contents of the files he distributed or the ones he possessed. He maintains he did not have possession of the laptop and his deceased brother downloaded the files. The State presented ample evidence to warrant sending the case to the jury.

"On appeal from the denial of a directed verdict, [the Appellate] Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). As the South Carolina Supreme Court recently reiterated: "[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016) (quoting State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955)).

"Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." Id. "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id.

Section 16-15-405 provides:

> An individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he:
>
> . . . .
>
> (2) distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.

S.C. Code Ann. § 16-15-405(A)(2) (Supp. 2010). Further section 16-15-410 provides: "(A) An individual commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity." S.C. Code Ann. § 16-15-410(A) (Supp. 2010).

The State presented evidence demonstrating Appellant knew the character of the files he was distributing and were downloaded by Investigator McKellar. Further, the State presented evidence demonstrating Appellant knew the character of the content of the files in his possession at the time Investigator Bomar executed the search warrant and seized the laptop. Finally, the State presented evidence indicating Appellant was in possession of the laptop at the time Investigator McKellar downloaded files from Appellant's computer and after; thereby indicating he was responsible for the child pornography being distributed and possessed.

Appellant argued to the jury he was not in possession of the laptop at the time the child pornography was distributed to Investigator McKellar and when child pornography was downloaded and later found in his possession. The State, however, presented evidence Appellant and members of his family used the laptop during the period of time in which he claimed the laptop was in the possession of his deceased brother. Further, the laptop and CD containing the child pornography, and from which the files were

distributed to Investigator McKellar, was recovered from the desk in Appellant's office at his residence. Finally, the distribution originated from Appellant's residence using Appellant's internet connection. In reviewing a directed verdict, the evidence in viewed in the light most favorable to the State and the evidence presented in the forensic report and other testimony clearly indicates he was in possession at the time of the distribution and download of the child pornography. (State's Exhibit 4). While Appellant could certainly argue to the jury he was not in possession of the laptop at the time of the distribution and possession of child pornography, the trial court correctly denied his motion for a directed verdict because the State presented ample evidence, especially when properly viewed in the light most favorable to the State, from which a reasonable juror could conclude the laptop remained in Appellant's possession.

Additionally, the State presented ample evidence, when the evidence is viewed in the light most favorable to the State, from which a reasonable juror could conclude Appellant knew the character or content of the material distributed and in his possession. First, and most significantly, the names of the files provide sufficient evidence on their own to establish the fact Appellant knew the content of the files.[4] Every file of child pornography either distributed to Investigator McKellar or charged for being in his possession at the time of the search warrant contained the term PTHC. PTHC is used for pre-teen hard core, thereby clearly indicating the contents of the files involved. As an example one of the files distributed to Investigator McKellar was entitled: "pictures from

[4] As the South Carolina Supreme Court concluded in construing the obscenity law's requirement of knowingly exhibiting the material: "One may be found to knowingly violate the statute when it appears that he shuts his eyes to avoid knowing what would otherwise be obvious." State v. Thompkins, 263 S.C. 472, 484, 211 S.E.2d 549, 554 (1975). The Court in construing a "knowing" *mens rea* in a securities fraud case, explained: "one cannot escape liability by "'shutting one's eyes to what would otherwise be obvious.'" State v. Sterling, 396 S.C. 599, 617, 723 S.E.2d 176, 186 (2012).

ranchi torpedo dloaded in 2009- pedo kdv kidzilla pthc toddlers 0yo 1yo 2yo 3yo 4yo 5yo 6yo 9yo tara babyj (174).jpg." The other two files had nearly identical names. Just a quick glance at the file name indicates it has pre-teen hard core material, as well as the fact the images related to pedophilia—hence the term "pedo" being used. It would be impossible for someone not to know the character of the content in this file from its name.

Further, the files found on his computer by Investigator Bomar contained similar names. Three of them included: "Pthc - 15Yo Shaved German Girl Steffi Moers Teaching 13Yo Boys - With Sound - 2004.mpg; PTHC Daddy's Girl Jessie 12Yo - (07-06) S F !!!New!!! 2007.mpg; Uncle's Lust For Young Blond 13Yo Niece Daniella-Pthc-Incest.avi." The final file had a bunch of Chinese characters but clearly included the term "pthc." Again, it would be impossible to not know the character of the files from the file names involved.

The State provided sufficient evidence from which a reasonable jury could determine Appellant retained possession of the laptop and was in possession of the laptop when child pornography files were distributed to Investigator McKellar and when they were downloaded to the computer and found by Investigator Bomar at the time of the forensic examination. Additionally, Appellant admitted using file sharing programs, thereby indicating he knew how to download the files and how to share the files with others. He manipulated the location where the files saved when downloaded and did not just accept all default locations, thereby indicating knowledge of what he was doing with the file sharing programs. The file names made clear the content of the files, most importantly, because every file contained PTHC which, again, stands for pre-teen hard

core. Finally, the laptop and CD containing child pornography were found in Appellant's residence and in his office in that residence.

Significantly, Counsel for Appellant even acknowledged: "whoever had the laptop was the person connecting and gathering the child pornography." (T.295; R.___). His arguments regarding the deceased brother being in possession of the computer were appropriate arguments for the jury; however, the jury obviously did not accept the arguments. On directed verdict, this Court takes the evidence and all reasonable inferences in the light most favorable to the State, not the defendant. When the evidence is viewed in the light most favorable to the State, a reasonable jury can certainly conclude Appellant was in possession of the laptop and used the laptop. A reasonable jury could conclude Appellant knew or should have known the content of all the files he possessed and which were distributed to Investigator McKellar. There is substantial circumstantial evidence from which a reasonable juror could find Appellant guilty of both distribution and possession of child pornography.

III. The trial court did not err in failing to grant a mistrial where none was requested and Appellant specifically indicated he did not desire a mistrial.

Appellant contends the trial court erred in failing to *sua sponte* grant a mistrial even though Appellant indicated he was not moving for a mistrial while requesting a curative instruction after excluded evidence was placed before the jury, and specifically indicated for strategic purposes he did not wish to have a mistrial declared after it was determined jurors were prematurely deliberating or discussing the case. The issue is blatantly not preserved and his arguments are merely an attempt to create a plain error rule in South Carolina which has been abandoned in all cases. Further, the instances did not warrant the extreme remedy of a mistrial.

First, the issue is not preserved for review on appeal. Appellant acknowledges the "unique" situation in this case regarding his request for a mistrial. The request was never made to the trial court. In the first instance, Appellant's counsel stated: "I've discussed this with Mr. Rutledge some. I think I may have grounds for a mistrial here. I'm not moving for a mistrial, but I do want it I do want that not shown to the jury. I think, maybe, some curative instruction would be appropriate, also." (T.140; R.___). In the second instance, counsel specifically stated:

> After discussion with my client, he's made the decision he does not want to ask for a mistrial, but I think we'd be entitled to it if we asked for it. He does not want to ask for that at this time, for a number of reasons I don't need to go into, that we've discussed but we would not request a mistrial at this time.

(T.276; R.___). After questioning the jury, the trial court asked Appellant: "After going through that exercise, does Mr. Rutledge still want to go forward, and waive any right to a mistrial?" Appellant responded: "Yes, sir."[5] (T.285; R.___).

In both instances, counsel told the trial court he did not want a mistrial. He cannot now claim it was error for the trial court not to grant him a mistrial. See State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."); State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct has induced."). Counsel never indicated the actions taken by the trial court were insufficient to cure any prejudice he experienced during the two instances: a curative instruction as requested by counsel in the first instance, and questioning of the jurors to determine if they could be fair and impartial in the second instance. As a result, he has not preserved any challenge for review on appeal and South Carolina does not recognize plain error. See e.g., State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.").

On the merits, the instances do not mandate the extreme remedy of a mistrial. A trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596

[5] The response was given by Appellant himself, and not counsel, so there cannot be any argument regarding counsel not following his express wishes.

S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "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 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

First, the improper admission of evidence is not a basis for a *per se* grant of mistrial. The curative instruction given by the trial court was deemed to have cured the prejudice and there is no indication it was insufficient. "Generally, a curative instruction is deemed to have cured any alleged error." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); see also, State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (instruction to disregard inadmissible evidence is usually viewed as having cured the error in its

admission); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (if trial judge sustains timely objection to testimony and gives jury curative instruction to disregard testimony, error is deemed to be cured); State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("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.").

Additionally, the evidence that was admitted by the trial court was not of such a nature that serious prejudice occurred to Appellant. The evidence consisted of file names and small thumbnails of other possible pornography, none of which formed the basis of charges against Appellant. The fact other items existed on his computer did not prejudice Appellant and, as an additional sustaining ground, should have been admissible pursuant to Rule 404(b), SCRE with significant probative value to demonstrate a lack of accident or mistake in Appellant's possession and distribution of child pornography.

The second instance involved premature deliberations or discussion by the jury. The trial court brought out the jurors and questioned them regarding their ability to continue to be fair and impartial. All jurors indicated they could remain fair and impartial and would consider Appellant's guilt or innocence based on the facts before them. (T.277-285; R.___). Accordingly, Appellant has not demonstrated how he was prejudiced by the premature discussions.

In the instant case, Appellant clearly did not believe there was such prejudice created in the two instances that it could not be cured through the curative instruction of the questioning of the jury. Had he believed the prejudice to his client, whether in isolation or in combination, was such that it denied him a fair trial, he would not have

told the court on both occasions a mistrial was not requested. See e.g., State v. Miokovich, 257 S.C. 225, 229, 185 S.E.2d 360, 362 (1971) ("We find nothing in this record to justify the conclusion that the trial judge should have been more alert than counsel for appellant and granted a mistrial, when such was not sought."); State v. Warren, 207 S.C. 126, 133, 35 S.E.2d 38, 41 (1945) (finding "we do not think it was the duty of the trial Judge 'to be more alert than counsel for appellant.'").

Accordingly, the trial court did not err in failing to grant a mistrial when counsel and Appellant specifically indicated a mistrial was not desired and when Appellant has failed to demonstrate the requisite prejudice to require the extreme remedy of a mistrial.

IV. The Appellant was not deprived of a fair trial based on the State's closing argument. The issue is blatantly not preserved for review on appeal and was specifically allowed by the trial court without objection by Appellant.

Appellant contends he was deprived of his right to a fair trial when the State explained evidence already before the jury. Appellant made no objection to the State's closing argument and presents no argument on appeal as to what error was made by the trial court. Further, the argument presented by the State in its closing argument was explicitly allowed by the trial court without objection by Appellant. Finally, and as an additional sustaining ground, it was error for the trial court to prevent the State from presenting the evidence Appellant contends improperly prejudiced his right to a fair trial in reply, and therefore, it was not error for the State to address the evidence which would have been explained in reply to the jury in its closing argument.

First, the issue is not preserved for review because Appellant never challenged the propriety of the State's closing argument or the State's inclusion of facts from the forensic examination in its closing argument. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."). Additionally, on appeal Appellant has not indicated any error made by the trial court or anything the trial court should have done that it was requested to do by Appellant. Accordingly, he has raised no issue for this Court to consider.

"A trial court is vested with broad discretion in dealing with the range and propriety of a closing argument." State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009). "An appellate court will not disturb a trial court's ruling regarding a

closing argument unless the trial court commits an abuse of discretion." Id.; State v. Tubbs, 333 S.C. 316, 322–21, 509 S.E.2d 815, 818 (1999) ("A new trial will not be granted unless the [solicitor's] comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

As the South Carolina Supreme Court explained:

> In State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975), we set forth the parameters of permissible prosecutorial argument. So long as the prosecutor stays within the record and its reasonable inferences, he may legitimately appeal to the jury to do their full duty. **A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony.** A review of the closing argument is based upon the standard of "whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."

State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990) (internal citations omitted and emphasis added), *overruled on other grounds by* State v. Evans, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006).

Next, the State was merely following the instructions of the trial court regarding its ability to refute Appellant's assertion he did not possess the laptop. After Appellant completed his case, the State sought to admit testimony in reply which demonstrated Appellant had control over the laptop during the period of time he alleged the laptop was with his brother. Appellant acknowledged the information was already in evidence. (T.258; R.___). After finding the evidence was already admitted, the trial court refused to allow the State to present the evidence finding:

> This could have been addressed in the case-in-chief, **and all the things you say it shows can certainly be argued to the jury**. I agree it does show all those things, at least to a layperson . And - I mean it's loaded up, appears the dates

> that do contradict, or appear to contradict, the testimony of the defendant, **and you can certainly call all that to the jury's attention**.

(T.269; R.___) (emphasis added). Appellant did not contest the trial court's allowance to the State to discuss the evidence or call the evidence to the jury's attention during closing argument.[6] As a result, the State's closing argument was not improper because it was exactly what was permitted by the trial court.

Further, the closing argument made by the State was entirely proper even without the express permission of the trial court. As the Supreme Court explained: "A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony." Caldwell, 300 S.C. at 504, 388 S.E.2d at 822. The prosecutor was merely stating his version of the evidence as found in the forensic report which Appellant acknowledged was already admitted before the jury. The State had every right to highlight the evidence, explain its relevance to the State's case, and comment on the jury's consideration of that evidence. The State's closing argument was entirely proper and did not deprive Appellant of a fair trial.

Finally, if the State was required to specifically address the evidence during trial before being able to comment in closing argument, then the trial court should have allowed the evidence to be presented during reply. The purpose of reply testimony is to refute or contradict testimony presented during the defense. See State v. South, 285 S.C. 529, 535, 331 S.E.2d 775, 779 (1985) ("Any arguably contradictory testimony is proper on reply"); State v. Stewart, 283 S.C. 104, 106, 320 S.E.2d 447, 449 (1984) ("The admission of testimony which is arguably contradictory of and in reply to earlier

[6] Counsel clearly expected the State to address the evidence in its closing argument because he addressed it and acknowledged the evidence from the forensic report. (T.297-298; R.___).

testimony does not constitute an abuse of discretion."); Daniel v. Tower Trucking Co., 205 S.C. 333, 32 S.E.2d 5 (1944) (Reply testimony should be limited to rebuttal of matters raised in defense; it should not be used to complete the plaintiff's case in chief). The testimony sought to be introduced by the State was clearly intended to contradict Appellant's assertion for the first time at trial that the laptop was in the possession of his brother who was deceased at the time of trial. The State could not anticipate this defense as the laptop was secured directly from Appellant's possession. The State had no reason to admit the testimony during its case in chief because the dominion and control of the laptop at the time child pornography was downloaded and distributed was not at issue. As a result, the trial court erred in refusing to allow the State to present its proffered testimony in reply. Once the testimony was entered in reply, it clearly would have been proper for the State to comment on the evidence in closing argument. Accordingly, Appellant cannot demonstrate how he was denied a fair trial when he received the windfall of the State being prohibited from admitting testimony in reply, and the State was merely making a proper closing argument based on facts admittedly before the jury.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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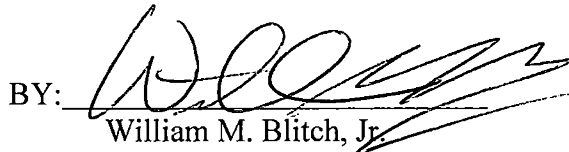

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