STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

The State, Respondent,

v.

TYREL RASHONE COLLINS Appellant.

Appellate Case No. 2014-000216

FINAL BRIEF OF RESPONDENT

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II. Was Appellant's second trial barred by double jeopardy where the grant of the mistrial during defense counsel's opening statement at the first trial was not dictated by manifest necessity or the ends of public justice after consideration of all the facts and circumstances?

(FBOA, p. 1).

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial judge abused his discretion in barring defense evidence attacking the character of the victim where the victim's character or actions were not at issue.

II.

Whether defense counsel's opening statement assertion that the victim "was legendary in this area as a killer," so infected the trial with unfairness that a mistrial was warranted pursuant to *Arizona v. Washington?*

RESPONDENT'S STATEMENT OF THE CASE

A Charleston County Grand Jury indicted appellant, Tyrel R. Collins, in September 2012 for the murder of Solomon Chisolm and for possession of a firearm during the commission of a violent crime. (R. pp. 380-381). The State originally called the charges for trial on September 9, 2013, before the Honorable J.C. Nicholson, Jr. However, Judge Nicholson declared a mistrial based on the defense's opening statement. The State called the charges for trial again on January 6, 2014, before the Honorable Roger M. Young, Sr. On January 9, 2014, the jury convicted as charged. (R. p. 368, lines 11-16). Judge Young then sentenced appellant to life imprisonment without the possibility of parole. (R. p. 369, lines 21-23). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

On October 27, 2011, a City of Charleston Police Officer heard five shots fired in a local park. (R. p. 83, line 9 – p. 84, line 3). As the officer approached, he saw Raymond Clement, crying and "in a state of panic" by the bleachers. (R. p. 85, line 2 – p. 86, line 22; p. 89, lines 6-10; p. 93, line 9- p. 94, line 1). Mr. Clement's brother, Solomon Chisolm, had been shot while playing cards on the bleachers, his playing cards still in his hand. (R. p. 145, lines 15 –24; p. 148, lines 15-21; p. 120, lines 4-5; p. 134, lines 12-16; p. 113, lines 24-25). Mr. Chisolm was shot five times – twice in the back, once in the neck, once in the forehead and once in the abdomen. (R. p. 219, lines 1-5). Five shells were found at or round the bleachers. All five were fired from one gun. (R. p. 230, lines 13-14).

Officer Quevas Gamble testified that he was on patrol in the area when he heard five gunshots in quick succession and immediately went toward the shots. He testified he heard shouts, saw children running, and "young juveniles hopping over the fences." (R. p. 83, line 23 – p. 84, line 10). He testified he also "saw some males running west out of the Mall Park area ... wearing hoodies ... running toward Columbus Street..." (R. p. 84, lines 19-21). He called in to advise that he saw the males running out of the area. (R. p. 84, lines 21-22). Officer Gamble testified he also "saw a black male ... standing next to a body... yelling, screaming, ... crying," and the man "wav[ed]" to the officer, "asking for help." (R. p. 84, lines 11-14). The body was across the bleachers. (R. p. 85, lines 12-15).

Officer Shaun Insley testified that he heard the report of shots fired, and that three black males were running toward Columbus. He testified he stopped three people in the area, Waukeem Madison, Dominique Montgomery, and Lavar Anderson. (R. p. 97, line 25

– p. 98, line 20). He testified he saw "playing cards on the sidewalk" close to Mr. Anderson's feet. (R. p. 98, lines 21-24).

Crime scene investigator Michael Sherman testified he was called out to the scene and arrived shortly after seven o'clock pm. (R. p. 105, lines 2-7). Investigator Sherman testified that five fired shell casings were recovered at the scene. (R. p. 114, lines 16-17; p. 118, lines 20-24). He also identified the fired projectiles which were recovered from autopsy. (R. p. 114, lines 17-18; p. 115, lines 2-10). Officer Sherman testified that he recovered evidence from a search of an A****** Street apartment. (R. p. 121, lines 16-22). He testified a black t-shirt was seized as a result of the search. (R. p. 124, lines 10-12). He also testified that fingerprints were lifted from the bleachers where the murder occurred that matched to Lavar Rashone Anderson, (R. p. 134, lines 4-5), and that fingerprints were also lifted from the cards that matched the victim, (R. p. 134, lines 12-16).

Raymond Clement testified that he had just finished playing basketball when the victim, Mr. Clement's half-brother, approached and asked if he wanted to play cards. (R. p. 145, lines 7-11). He testified that he and the victim, along with Lavar Anderson and Britney Anderson began to play cards on the bleachers. (R. p. 145, lines 17-24). Mr. Clement testified that "Tyrel Collins came and started shooting," at which point Mr. Clement ran. (R. p. 148, lines 15-24). He testified the shooter was wearing a black t-shirt, jeans, a shirt pulled up over his head, and was "[b]rown skin, tall, slim." (R. p. 149, lines 14-19). Mr. Clement was shot in his leg. (R. p. 149, line 22). Mr. Clement testified he saw appellant approach a white Crown Victoria automobile. Before he entered the vehicle, according to Mr. Clement, appellant "looked at [Mr. Clement] and shook his head like:

Yeah, I did that." (R. p. 150, lines 6-8). According to Mr. Clement, the shirt that had been over appellant's head was pulled down. He testified that appellant then drove away. (R. p. 150, lines 9-16). Mr. Clement testified he went back to the bleachers and found the victim. Officers were already approaching. (R. p. 150, lines 18-21). Mr. Clement testified he was hysterical, and feared getting involved: "I didn't want to talk, because I didn't want to be putting my family or nobody in danger by identifying no one, anything like that." (R. p. 151, lines 4-13). [1]

Though he did not originally want to be involved, Mr. Clement testified that he eventually spoke with police and identified appellant by a photo lineup. (R. p. 154, line 15 – p. 156, line 1). He testified he also advised officers that appellant had shot him in the leg. (R. p. 156, lines 2-10). Mr. Clement testified that appellant was a friend to the victim, and he had known appellant since 2006. Mr. Clement would see appellant at least several times a week. (R. p. 157, lines 11-22). Mr. Clement testified that he was contacted several times by several of appellant's family members and friends, including appellant's mother, Stacey Montgomery, and appellant's brother, Adrienne Collins. (R. p. 158, lines 5-16; p. 159, lines 1-17). Mr. Clement testified appellant directly contacted him on a three-way call facilitated by appellant's mother. (R. p. 159, lines 24-25). According to Mr. Clement, appellant wanted him to write a statement saying Mr. Clement did not actually see anything. Appellant's brother and mother picked Mr. Clements up one day and took him to the library to complete the statement, writing what appellant wanted written. (R. p. 160, line14 – p. 161, line 3). At trial, Mr. Clement identified several recorded calls from the jail.

[1] The jury did not hear, but the record reflects, that shots were fired into Mr. Clement's mother's home prior to the second trial, and two witnesses declined to testify after being called. The witnesses were held in contempt. (R. p. 213, lines 1-21; p. 205, line 18 – p. 208, line 2; p. 209, line 18 – p. 212, line 7).

R. p. 161, line 15 – p. 166, line 7). Mr. Clement recounted part of the phone call talking about the shooting. When he mentioned to appellant that he should not have done the shooting "like that," and complained that appellant also shot him, appellant stated, "that was foul, man, that was foul; whatever." (R. p. 164, lines 3-7).

Officer Jeremy Davidson testified that he saw appellant walk from the park, cross A****** Street toward Columbus Street at six twenty-seven p.m. (R. p. 200, lines 17-21). He was wearing a black t-shirt and jeans. (R. p. 201, lines 2-11).

A tool mark examiner with SLED, Agent Suzann Cromer, testified that all the cartridges recovered from the scene were fired by one weapon, and all the bullets from autopsy were fired by one weapon. (R. p. 232, lines 1-14). The cartridges and bullets were fired by a 9mm Macarov. (R. p. 233, lines 8-11). She could not say they were all fired by one weapon, though. (R. p. 233, lines 3-4).

Agent Ila Simmons, a SLED expert in trace evidence and gunshot residue, testified that the victim had particles on his hands that are "characteristic of gunshot residue," but they were not rounded particles that would constitute gunshot residue. (R. p. 248, line 16- p. 250, line 2). Agent Simmons testified that such material could be consistent with being shot in close proximity to the weapon. (R. p. 252, lines 19-24). The agent noted fewer particulars on the hands of Dominique Montgomery and Waukeen Madison, and none on Lavar Anderson's hands. (R. p. 253, line 3 – p. 255, line 11). Agent Simmons testified that the t-shirt similarly had particles consistent with gunshot residue, but did not reflect all three elements fused together in rounded particulars that could be identified as gunshot residue. (R. p. 257, lines 5-16; p. 258, line 21- p. 259, line 3).

Officer David Osborne testified he responded to the scene and conducted interviews, though many were not fruitful. He testified that he did, however, learn there were three people on the bleachers with the victim, that victim's vehicle was still at scene, and that his phone was in the vehicle. (R. p. 274, lines 4-23). As a result of his investigation, Officer Osborne was able to develop appellant as a suspect and applied for an arrest warrant. (R. p. 275, lines 4-18). After appellant was arrested, investigators sought a search warrant for an apartment on A***** Street. (R. p. 276, lines 19-24). They were to search for a "dark t-shirt," and weapons, ammunition, accessories, or "anything that might" aid in the investigation. (R. p. 277, lines 2-6). A black t-shirt was recovered. (R. p. 277, lines 7-11). Officers also found paperwork in the same room with appellant's name. (R. p. 290, line 13- p. 291, line 25). Officer Osborne recounted how Mr. Clement had positively identified appellant as the shooter from a photo array. (R. p. 277, lines 4-17). He further recounted how Mr. Clement had reported being shot himself, at which time the officer photographed the injury and secured the pants Mr. Clement wore when shot. (R. p. 280, lines 4-13).

Appellant offered a defense at trial. Domonique Montgomery, appellant's brother, testified that appellant did not actually live at the apartment on A****** Street; that he was present in the park but did not see the shooting; that Mr. Clement was not at the park the whole time; and, that the black t-shirt belonged to either him, or another brother, Tory, (though admittedly the brothers were approximately 5'5" while appellant was 6') and that it was taken from Tory's room. (R. p. 296, line 8 – p. 300, line 24; p. 304, lines 10-21). Britney Washington testified that she was playing cards with the victim at the time of the shooting; she could not see the man who shot the victim as the man wore a mask (which she

later described as a black t-shirt over the shooter's face); that Mr. Clement was not with them at the time of the shooting; and, that she did not see appellant at the park that day. (R. p. 319, line 3 – p. 320, line 15; p. 321, lines 5-16).

ARGUMENT

I.

The trial judge did not abuse his discretion in barring defense evidence attacking the character of the victim where the victim's character or actions were not at issue.

Relevant Facts:

A mistrial had been declared on September 9, 2013, after defense counsel egregiously described the victim as a killer, "legendary in this area...." (R. p. 22, line 19 – p. 35, line 11). In pre-trial motions on January 6, 2014, the State moved to determine relevancy of the victim's reputation in an attempt to prevent error again. (R. p. 38, line 23 – p. 39, line 4). In response, defense counsel admitted that he would not be pursuing self-defense, but argued character evidence regarding the victim was relevant because "it's not just [that] he was a bad guy. He was most notorious person in that area in a long time." (R. p. 39, lines 5-11). Defense counsel argued, though not convicted of murder, the victim "was rumored to have killed anywhere from eight to a dozen people." (R. p. 39, lines 16-17). Defense counsel likened the victim to "Billy the Kid," and argued "if someone had killed Billy the Kid, it seems to me that the jury ought to know...." (R. p. 39, lines 18-20). The judge noted that it is generally not allowed to argue that the victim "deserved to be killed," and evidence of a victim's character "only seems to be relevant in a self-defense argument...." (R. p. 39, line 21- p. 40, line 3). (See also R. p. 40, lines 13-19). He noted "we don't just get to go out and kill bad people." (R. p. 40, lines 2-3).

Defense counsel then argued the evidence could support other people had reason to kill him. (R. p. 40, lines 4-7; p. 42, lines 5-6). However, the judge found that would not constitute proper third party guilt evidence: "You've got to present a little bit more evidence than, yeah, there were a lot of people that might have had a motive ... You got to

actually be able to point to somebody, more or less." (R. p. 40, lines 8-12). In support of his position, defense counsel proffered that four days before the shooting, someone shot and killed the driver of a car. Appellant was a passenger in that car, and had to grab the steering wheel to prevent injury. No one was charged, but the police suspected the victim. (R. p. 41, lines 3-10).

Judge Young questioned how that would help the defense, then, after further argument about the incidents and motive, ruled and instructed as follows:

> ... I wouldn't at this point see any relevance to a defense that you've indicated to me that you have. If anything, it supplies motive for your client. And if it's kind of a backhanded reputation of victim evidence, well, again, I don't see where that's relevant since you're not putting up self-defense. And it really doesn't accomplish the point at all. So stay away from it certainly in opening statement.

(R. p. 43, lines 9-16).

On appeal, appellant argues that it was necessary to present the evidence for a "complete defense," and that the prosecutor opened the door for admissibility during his opening statement in which he referenced "the history of the area and the crime rate...." (FBOA, p. 15).

Discussion:

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011), *quoting State v. Douglas,* 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). An abuse of discretion is shown where the trial judge's ruling is based upon "an error of law or a factual conclusion that is without evidentiary support." *State v. Irick*, 344 S.C. 460, 464, 545

S.E.2d 282, 284 (2001). This record does not show an abuse of discretion. The trial judge reasonably found the proffered evidence was not relevant.

"Relevant evidence" is defined as "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." Rule 401, SCRE. Appellant's defense was that he was not the shooter. (See FBOA, p. 15). He argues the fact that the victim has a reputation for violence "was essential to [his] defense that someone else" shot the victim. (FBOA, p. 15). Appellant fails to show the victim's reputation was relevant to his defense.

Character evidence is prohibited unless it falls under strict exceptions provided by the Rules. Rule 404 (a), SCRE. Rule 404 (a)(2), SCRE, specifically outlines the exception for admissibility of character evidence for the victim:

> Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

Where proffered evidence "does not serve as a defense to any of the offenses charged .. nor ... excuse or mitigate" the actions at issue, the proffered evidence "is not probative of any issue material to reaching a verdict." *State v. Lyles*, 379 S.C. 328, 340, 665 S.E.2d 201, 207 (Ct. App. 2008), *cert. denied* (S.C. Sup. Ct. 2009). "The rule is well-settled that in homicide cases, the defendant is permitted to introduce testimony concerning previous difficulties with the decedent. The rationale for allowing such evidence is that it is relevant to the issue of the animus of the parties as it relates to the demeanor each party had reason to expect from the other when they met at the time of the fatal difficulty." *State v. Atchison*, 268 S.C. 588, 593-594, 235 S.E.2d 294, 296 (1977). Yet, as noted, defense

counsel admitted self-defense was not an issue in the case. (See R. p. 39, lines 5-7). Therefore, the trial judge properly found the exception of Rule 404(a)(2) was not applicable and evidence of the victim's character was not admissible.

Appellant first argues that the evidence was admissible "for a full and fair presentation of [his] defense." (FBOA, p. 15). However, defense counsel admitted that he did not have sufficient evidence of identity of another shooter to make a third-party guilt presentation. (R. p. 40, lines 20-21). "Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission." *Lyles*, 379 S.C. at 343, 665 S.E.2d at 209. A general argument that another must have committed the offense is not sufficient for a third-party guilt presentation. *State v. Cope*, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) ("...evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded") (*citing State v. Gregory*, 198 S.C. 98, 105, 16 S.E.2d 532, 534 (1941)). Thus, appellant has failed to show the evidence was admissible under his first argument.

As a second argument, appellant asserts the character evidence "was fair rebuttal to the prosecution's opening statement." (FBOA, p. 15). This argument is not preserved for appeal. At the mistrial motion, appellant argued that it was important to know that the victim "not just some innocent citizen sitting out there playing cards." (R. p. 25, lines 3-5). He did not argue "fair rebuttal." Further, in the motion to prevent the second trial, defense counsel stated only that the State had commented in opening "the East Side is a high-crime area," and defense counsel "told the jury that ... the victim in the crime, was legendary in

that area for being a killer." (R. p. 52, lines 18-25). In short, a "fair rebuttal" argument was not presented below as a basis to allow the opening statement. It is procedurally barred from review on appeal. *See, e.g., State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). At any rate, it is without merit.

"As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned." *State v. Bennett*, 369 S.C. 219, 231, 632 S.E.2d 281, 288 (2006). While a response may be invited, counsel making the response may not comment on something not supported by the evidence as this undermines the basic fairness of the trial. *See Vaughn v. State*, 362 S.C. 163, 170-171, 607 S.E.2d 72, 75-76 (2004). *See also United States v. Young,* 470 U.S. 1, 8, 105 S.Ct. 1038 (1985) ("It is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds."). Again, defense counsel's statement centered only on the victim's bad character, asserting he "was legendary in this area as a killer." (R. p. 22, lines 19-22; p. 26, lines 4-23). In discussion as to whether the mistrial was necessary, defense counsel referred to a newspaper article that suggested the victim was a criminal who had avoided prison. (R. p. 27, lines 7-18). The judge found that newspaper article was not admissible. (R. p. 32, lines 4-9). *See generally United States v. Baker*, 432 F.3d 1189, 1211-1212 (1th Cir. 2005) ("The Miami Herald articles are also inadmissible hearsay, as they are relevant primarily to establish the truth of their contents—the identity of the gunmen"); *United States v. Mathis*, 550 F.2d 180, 182 (4th Cir. 1976) ("A newspaper article connecting a witness to a robbery was inadmissible hearsay, even for purposes of

impeachment."). Appellant fails to show any proper character evidence that could be offered. See Rule 405, SCRE, Methods of Proving Character (evidence offered by opinion, but specific instances may be inquired into on cross-examination only if it "is an essential element of a charge, claim, or defense"). Even so, the State's comments did not "open the door" for defense counsel's comments or any subsequent testimony.

Counsel may open the door to otherwise inadmissible evidence by his opening comments. *State v. Dunlap*, 353 S.C. 539, 579 S.E.2d 318 (2003). As a first and basic point, the State's comments on the high crime *area* do not open the door to the victim's *character*. *See State v. Young*, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008) ("...Young's testimony that he hated to see a woman cry did not open the door for the admission of his prior CDV and CSC convictions. Reading Young's testimony in its proper context, Young was not offering evidence of a specific character trait towards women in general. Rather, the isolated statement used to justify admission of the prior CDV and CSC convictions was simply part of Young's narrative recounting his version of the events that occurred on the night in question."). *Compare State v. Dunlap*, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003) ("The opening statement created the impression that petitioner had no prior connection to the sale of narcotics. In reality, petitioner was not a mere drug user, but an individual who sought to 'elevate' his status to that of a drug dealer" thus "counsel opened the door to the introduction of evidence rebutting the contention that petitioner was merely an addict"). However, as noted above, appellant never proffered any evidence that could be admitted to prove character. Counsel's comments are not evidence, *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."); and, as noted above,

the newspaper article was inadmissible. "[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been." *State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct.App. 2006). To the extent the proffer was only counsel's comment and the newspaper article, there could be no acceptable character evidence to admit under an "opened the door" theory. However, the State's comments did not open a door, or invite a response, on victim's character simply by describing the high crime area. Further, the argument here is speculative in nature as the motion was made based on the prior comments before mistrial. At any rate, the comments were generally consistent describing the history of the high crime area. Again, that does not open the door to the victim's character as it does nothing to embrace or describe the victim's specific character or a possible legitimate defense to the crime.

In sum, the record fully and fairly supports the trial judge's ruling – the evidence was not relevant. Appellant's arguments to the contrary should be rejected.

II.

Defense counsel's opening statement asserting the victim "was legendary in this area as a killer," so infected the trial with unfairness that a mistrial was warranted pursuant to *Arizona v. Washington.*

Relevant Facts:

Defense counsel began his opening statement in the September 2013 trial as follows:

> Good morning. The solicitor talked about the East Side. This is the East Side, the common area. And Solomon Chisolm was legendary in this area as a killer.

(R. p. 22, lines 19-22).

The State immediately objected and Judge Nicolson excused the jury to discuss the objection on the record. (R. p. 22, line 23 – p. 23, line 17). The solicitor argued a curative instruction for such a significant and prejudicial error was inadequate:

> ... Solomon Chisolm was never convicted of any homicide. I know that's not the same as not being a killer, but he has not - - for someone who has no burden of prove anything, no obligation to prove anything, he can't just come right out and drop a bomb like that, something unsubstantiated that he doesn't have to substantiate. That's judge slinging mud and trying to prejudice this jury, and I think [it] has.

(R. p. 24, lines 17-24).

Defense counsel stated: "I believe it is relevant. He's not just some innocent citizen sitting out there playing cards." (R. p. 25, lines 3-5). Judge Nicholson noted the clear distinction between commenting on a reputation for violence and asserting someone was "a legendary killer." (R. p. 25, line 6 – p. 26, line 25). Judge Nicholson found the comment "totally improper." (R. p. 25, lines 8-9). After extensive discussion to determine if appellant had proper evidence to present, and a basis to present the evidence, Judge Nicholson found the assertion in opening was improper, and the assertion lacked foundation according to settle rules. (R. p. 25, line 17 – p. 35, line 10). Judge Nicholson granted the

mistrial motion, and ordered a contempt hearing be held the next day. (R. p. 35, lines 11-15).

On January 3, 2014, the defense filed a motion to dismiss the case asserting "the mistrial was improvidently granted and not dictated by manifest necessity. State v. Prince, 279 S.C. 30 (1983)." (R. p. 374).

In pre-trial, after the judge heard the State's motion to determine relevance of the victim's reputation, (see Issue 1, supra), the defense argued the motion to dismiss. Counsel noted that he had provided the transcript to the judge, and highlighted the portion that the State objected when defense counsel commented that the victim "was legendary in that area for being a killer." (R. p. 52, lines 19-25). Counsel argued the mistrial was "improperly granted and not dictated by manifest necessity." (R. p. 53, lines 2-3). He argued a curative instruction could have been given, and that his comments in opening were not evidence. (R. p. 53, lines 4-5). The judge found:

> ... I think Judge Nicholson ... acted within his sound discretion to grant the mistrial. And there was clearly a misunderstanding of what you could and couldn't say. And it was brought about by the defense, not by the prosecution.

(R. p. 58, lines 18-22).

Consequently, the judge found the prosecution was not barred and denied defense counsel's motion. (R. p. 58, lines 22-24).

Appellant argues the trial judge erred in denying the motion for two reasons. First, because evidence of the victim's character was admissible, the comment was permissible as it merely "foreshadow[ed] what the evidence would be." (FBOA, p. 22). Second, if the evidence was not admissible, then the single comment, which was not evidence, was not

enough to have severely "prejudiced the jury" such that manifest necessity was shown. (FBOA, p. 22).

Discussion:

"The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect citizens from being twice placed in jeopardy of life or liberty." *State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011). "Generally, jeopardy attaches when the jury is sworn and impaneled, unless the defendant consents to the jury's discharge before it reaches a verdict or legal necessity mandates the jury's discharge." *State v. Baum*, 355 S.C. 209, 214, 584 S.E.2d 419, 422 (Ct. App. 2003).

"The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is 'whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment.'" *Baum*, 355 S.C. at 214, 584 S.E.2d at 422 (*quoting State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983)). The Supreme Court of the United States has cautioned, "it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Arizona v. Washington*, 434 U.S. 497, 506, 98 S.Ct. 824 (1978).

The decision to grant a mistrial rests in the discretion of the trial judge. *State v. Thompson*, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). "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." *State v. Kirby*, 269 S.C. 25, 29, 236 S.E.2d 33, 34 (1977). However, the "decision to grant a mistrial will not be overturned absent an abuse of

discretion amounting to an error of law." *Baum*, 355 S.C. at 215, 584 S.E.2d at 422.

The United States Supreme Court decision in *Arizona v. Washington* is directly on point and is controlling. When reviewing facts remarkably similar to the situation at hand – an inappropriate comment by defense in opening statement where the facts of the comment could not be received into evidence – the Court found the trial judge did not abuse his discretion in finding manifest necessity and double jeopardy did not bar another trial free from the prejudice generated by the comment. The Court noted that Washington had been unable to show admissibility of the evidence of under state law; therefore, the Court would "start from the premise that defense counsel's comment was improper and may have affected the impartiality of the jury." 434 U.S. at 511. With a nod to the discretion of the trial judge in assessing juror bias matters, the Court note:

> We recognize that the extent of the possible bias cannot be measured, and that the District Court was quite correct in believing that some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.

Id.

The Court further reasoned:

> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel, or even remove him from the trial as he did in *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267. Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial

> procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his "duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop . . . professional misconduct." *Id.*, at 612, 96 S.Ct., at 1082.

Id at 512-513.

However, the discretion is not without limitations. The Court found that "reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." *Id* at 514. The Court noted in Washington's case that the trial judge "gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial" and, as such, were "persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding." *Id* at 515-516. Because "[n]either party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, 'the public's interest in fair trials designed to end in just judgements must prevail over the defendant's 'valued right' to have his trial concluded before the first jury impaneled." *Id* at 516.

In granting the mistrial in appellant's case, the record supports Judge Nicholson "acted responsibly and deliberately" looking at both sides, affording defense counsel every opportunity to argue that evidence could be admitted to show the victim was a known killer as he asserted in the opening statement. (R. p. 25, line 17 – p. 35, line 10). As a matter of law, appellant's argument on admissibility of character evidence failed as he offered no exception to the general rule that character evidence may not be used except where relevant to the charge or defense. *State v. Lyles, supra*. (See also Issue I, supra). Further, Judge

Nicholson noted the comment at issue was not simply reference to a reputation for violence; rather, it was the inflammatory assertion that the victim was a known killer. (R. p. 26, lines 24-25). While appellant argues a curative instruction would have been sufficient to address his single comment, he fails to consider the inflammatory nature of the comment. A comment that the victim was known to resort to violence may have been handled differently, but a comment that the victim was a known "legendary" killer is clearly improper and inflammatory. A comment that the victim was a known "legendary" killer when the jury just heard the area in question suffered from a high crime rate exponentially increased the danger of prejudice. (R. p. 24, lines 4-25). (See also R. p. 18, line 13 – p. 19, line 22). *Pleas v. State*, 495 S.E.2d 4, 5 - 6 (Ga. 1998) (finding no abuse of discretion where mistrial granted after defense counsel questioned witness whether witness "'knew [the victim] was a convicted killer'," concluding no other alternative sufficient as the information "so inflammatory").

In sum, the careful consideration of the comment, and the lack of any foundation or admissible evidence that would allow the defense to present character evidence, demonstrates the trial judge soundly exercised his discretion on facts well supported by the record. In addition to listening to counsel, the judge was also able to "listen[] to the tone of the argument as it was delivered and ... observe[] the apparent reaction of the jurors." *See Arizona v. Washington*, 434 U.S. at 514. Again, the record well supports the ruling. Consequently, the record shows no abuse of discretion and the second trial was not barred by double jeopardy. Appellant's argument to the contrary should be rejected.

CONCLUSION

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

Respectfully submitted,

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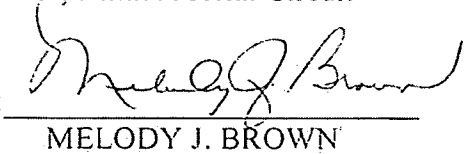
BY: 
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May 26, 2015.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

The State, Respondent,

v.

Tyrel R. Collins, Appellant.

Appellate Case No. 2014-000216

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Final Brief of Respondent* and *Certificate of Compliance* on Appellant by depositing two (2) copies in the United States mail, postage prepaid, to his attorney of record, addressed as follows:

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