STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

THE STATE,

Respondent,

V.

JOHNNIE WALKER GASKINS,

Appellant

FINAL BRIEF OF RESPONDENT

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II.

Whether the lower court erred in denying the Appellant's motion for a mistrial, based on the admission of improper and highly prejudicial hearsay testimony, in the form of a dying declaration and a statement from an anonymous telephone caller?

III.

Whether the Appellant's right to due process of law was violated by the trial judge's improper and heated response to defense counsel's objection?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Johnnie Gaskins, was indicted at the Court of General Sessions for Richland County at the July 18, 2008 term for two counts of murder, involving the February 5, 2007 deaths of John Adams (2008-GS-40-3948) and Shannavia Williams (2008-GS-40-1626). ROA 575-580. Gaskins was also indicted for three (3) separate counts of assault and battery with intent to kill concerning as victims Deirdre Houston (2008-GS-40-1632), Quinton Harris (2008-GS-40-1629) and Lamont Davis (2008-GS-40-1631). ROA 573-574. He was further charged with possession of a weapon during the commission of a violent crime. 2008-GS-40-1627. ROA 572-574.

On October 19, 2009, the Appellant entered a not guilty plea and the matters were tried before the Honorable L. Casey Manning, Presiding Judge. The Appellant was present and represented by Joseph M. McCulloch, Jr. and Kathy R. Schillaci of the Richland County Bar. The prosecution was handled by then Deputy Solicitor John P. Meadors and Assistant Solicitor Joanna A. McDuffie of the Fifth Circuit Solicitor's Office. The Appellant was convicted on October 27, 2009 on all six indictments. Tr. p. 1062, l. 1 - p. 1066, l. 5. Judge Manning sentenced the Appellant to two terms of life imprisonment for murder, concurrent, and an aggregate 65 years for the remaining charges of 20 years each consecutive on assault and battery with intent to kill, three separate counts, and 5 years consecutive on weapons charge, all consecutive to the life sentences. Tr. p. 1083, l. 6 - p. 1084, l. 4. ROA 565, 568, 571, 574, 577, 580.

The Appellant made a timely motion for a new trial. On January 26, 2010, Judge Manning denied the motion for a new trial and granted the Appellant's motion for preservation of

the evidence. ROA 589-590 (January 26, 2010 Order).

Counsel for the Appellant filed a timely notice of appeal which was served upon the Solicitor by mail on January 28, 2010. This briefing follows.

STATE'S VERSION OF THE FACTS

On February 5, 2007, Johnnie Gaskins was removed from the Super Bowl party at the Club 360 for unruly behavior. ROA 41, l. 20-24; p. 43, l. 12-19; p. 90, l. 21-p. 91, l. 6. According to bar manager Erin Hellman, Gaskins had demanded service: "give me a f—ing Hennessy (cognac). When he offered him a menu, he retorted again "give me a f—ing Hennessy bitch," and threw money at her. Gaskins then approached aggressively toward her behind the bar. ROA 38, 41. At that point security for the club came and took him out the front door of the club. ROA 41, Tr.p. 281. Hellman described Gaskins as being very sweaty and unsteady on his feet, with a difficult time in keeping his head up. ROA 42. She identified Gaskins in court (and in a photographic line-up) as the unruly person. Around 20 minutes later, she heard shots being fired. ROA 43-44.

Prior to the shooting, Shannavia Williams arrived at the Club 360 around midnight. After staying for a while, she decided to leave to go to another club with her friends. Before leaving, she sits her drink down, but spills it. ROA 281-282, Tr.p. 580-581. She leaves her friend, Deirdre Houston there and goes to get something to clean the drink. Two other friends, Shanna Williams and Shanelle Whack are in the back of the bar.

Quinton Harris and Lamont Davis with security had taken Gaskins outside and handcuffs him. Gaskins states that the security think they're gangsta, "I'll show them gangsta." ROA 254-255, Tr.p. 553-554. A friend of Gaskins, Sydney Williams approaches them and talks

them out of calling the police concerning Gaskins. ROA 92, l. 13-24; p. 219, l. 15-25. The handcuffs are removed and he is allowed to return to his car.

Gaskins is still angry as he walks back toward the car he came in - a Chevy Impala. Another security guard, Epsil Freeman remains concerned about Gaskins because he is still acting rowdy at the car. Palmer goes and talks to Gaskins and tells him to leave. ROA 256-257, 267-268. Subsequently, he is seen getting in the car by himself. ROA 224, Tr.p. 508, l. 5-10.

Harris and Davis return to inside the club to remove another patron, Christopher Lyles. ROA 93, 126 -127, 208-209;Tr.p. 355, l. 18-23; 408, l. 18-p. 409, l.7; p. 492, l. 16 - p. 493, l. 8. As they are doing that, Gaskins has returned to his car.

When Harris and Davis bring another rowdy patron Christopher Lyles outside. At that time, Gaskins has gotten in his Impala and drives to the front of Club 360 and opens fire. ROA 289. Harris while tussling with Lyles, looked up and saw Gaskins, who he had taken out, firing from the Impala. Independent witnesses identify Gaskins as either being the shooter or the person who went to the Impala where the shooting was coming from. ROA 94, 97 (victim Lamont Davis identifies Gaskins as the individual he saw shooting from the car); ROA 149 (victim Quinton Harris identifies Gaskins as the person he saw in the car with the gun); ROA 222, 247 (Sydney Williams identifies Gaskins as getting in the car which stopped in front of club when shooting started); ROA 272 (Epsil Palmer identifies Gaskins as person who entered vehicle and that he saw flashes coming from vehicle although it was too far at the time to see the actual shooter).

Security guard John Adams is hit and subsequently dies. ROA 434, Tr.p. 606-607, 790. Inside the bar, Deirdre Houston is shot while she was standing waiting for Shannavia Williams to return to clean up the spill. ROA 282-284. Shannavia Williams is returning to clean up the spill

and is shot in the head, resulting in her death. ROA 440. Security guard Lamont Davis is also shot. ROA 94-96; Tr.p. 356-358. Quintin Harris is also shot on his knuckle, but avoids other bullets in his direction. ROA 156-157; Tr.p. 438-439.

At that point the Chevy Impala with tinted windows leaves the scene. Calls are being made to 911. The acquaintance of Gaskins, Sydney Williams, is handcuffed by security because they believe he knows something about the shooter. ROA 230; Tr.p. 514.

The owner of the club, Lindburgh Porterfield recovers a cell phone in the parking lot. ROA 174; Tr.p. 458. This is later turned over to the Sheriff's Department. ROA 174, 180-181; Tr.p. 458, 464-465.

The Chevy Impala is ultimately found. ROA 421-424; Tr.p. 749-752. Inside the vehicle, the police locate documents with Gaskins name and gunshot residue and trace evidence linking Gaskins DNA to the vehicle. ROA 443-446, 492-493; Tr.p. 808-811, p. 889-895. In addition a shell casing is found inside the vehicle. Forensic testing of the shell casing in the Impala is linked to 40 caliber shell casings found in the club's parking lot as being fired from the same weapon. ROA 454-455, 459; Tr.p. 847-848, 852.

ARGUMENTS

I. The trial court did not abuse its discretion in the admission of a series of photographs from the crime scene which showed blood where they had probative value in a case where the photographs were not unduly prejudicial or inflammatory. Further, it appears at the time of the introduction of the "close-up" photographs the Appellant had abandoned the earlier objection.

During the trial, the prosecution introduced a series of crime scene photographs inside the Club 360 which also showed the various locations of blood at the crime scene. This evidence was used by law enforcement and a surviving victim, Deirdre Houston, to establish the location of the victim during and subsequent to the assault as she sought sanctuary from the assault. Although blood was present in the photographs, the challenged photographs do not show any bloody corpses or autopsy material, rather it shows the crime scene and specifically used by witnesses to help the jury to visualize the crime scene and understand the testimony of Ms. Houston. A review of the photographs suggest their relevance and although blood is present, a reasonable viewer would conclude that they are singularly or as a group not particularly gruesome or inflammatory. Judge Manning did not abuse his discretion in allowing the admission of the evidence.

Furthermore, the original objections to the crime scene photographs were limited to close-up photographs of blood as being duplicative of initially unobjected distance photographs. However, when the close-up photographs were introduced through Sgt. Richards, the Appellant's defense counsel abandoned the original objections and they were introduced specifically without objection. ROA 345; Tr.p. 662, l. 12-18. ["without objection]. **[Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46].** Therefore the issue presented in this argument was

abandoned at trial and is not preserved for this Court's review.

Standard of Review

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct.App. 2001); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct.App. 2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct.App. 2003).

All relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct.App. 2002); see also Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); In the Matter of the Care and Treatment of Corley, 353 S.C. 451, 577 S.E.2d 451 (2003) (evidence is relevant if it tends to establish or make more or less probable the matter in controversy).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Rule 401, SCRE. However, relevant evidence may be

excluded when its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Rule 403, SCRE. "Evidence is unfairly prejudicial in the context of Rule 403, if the evidence has an undue tendency to suggest a decision on an improper basis, such as an emotional one." S.C. Dep't of Soc. Servs. v. Lisa C., 380 S.C. 406, 417, 669 S.E.2d 647, 653 (Ct.App. 2008); State v. Spears, 393 S.C. 466, 479, 713 S.E.2d 324, 331 (Ct.App. 2011).

The determination of the admissibility of photographs is similarly a matter addressed to the sound discretion of the trial court. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980). Photographs are properly excluded if they are entirely without relevance or are not substantially necessary to show material facts or conditions. State v. Nathari, 303 S.C. 188, 268 S.E.2d 597 (S.C. App. 1990); State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940). If the photographs serve to corroborate testimony, it is not an abuse of discretion to admit them. State v. Crosby, 348 S.C. 387, 559 S.E.2d 352 (S.C. App. 2001), rev'd on other grounds, 355 S.C. 47, 584 S.E.2d 110 (2003); State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996); State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986).

However, photographs calculated to "arouse the sympathy or prejudice of the jury, should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Brazell, 325 S.C. 65, 78, 480 S.E.2f 64, 72 (1997). See *Annotation, Admissibility of Photographs of Corpse in Prosecution for homicide or civil action for causing death*, 73 A.L.R. 2d 769 (1960). Compare, State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (photographs of autopsy of victim with significant amount of blood and no material purpose was improperly admitted). In Patrick, the Court noted that the color photograph of the victim on the autopsy

table was extremely graphic and did not show the crime scene.

In State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995), the Court held properly admissible photographs and video of a crime scene which showed the victim's nude body lying in the living room floor with her face and body visibly swollen from the beating and other photographs showed blood smeared on the walls and floor. The Court found the photographs relevant to establish the crime scene.

In State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972), the Court found no error in the introduction of photographs of the crime scene where the photographs "served the purpose of helping the jury visualize the scene involved." Accord, State v. Stallings, 253 S.C. 451, 171 S.E.2d 588 (1969) (no error in admission of bloody clothing and photograph of rape victim's face). Also State v. Lynch, 375 S.C. 628, 634 S.E.2d 292 (S.C. App. 2007) (video of riot scene and negotiations showing bloody rag in defendant's cell not reversible where testimony was that Lynch had stabbed victim); State v. King, 222 S.C. 108, 71 S.E.2d 792 (1952) (admission of photo showing blood in room where assault occurred).

It has been stated that although presence of blood on a photograph of a victim is unpleasant, it is not, in and of itself, inflammatory so as to preclude admission of the photographs. Commonwealth v. Spell, 28 A.3d 1274 (Pa. 2011). The claim that the presence of blood is inflammatory, that result is not made out by the mere depiction of blood. "Murder evidence is not often agreeable, but sanguinity does not equal inadmissibility.

Relevancy, not necessity, is the test for admissibility of photographs into evidence. Welch v. State, 992 So.2d 206, 216 (Fla. 2008); State v. Jordan, 323 S.W.3d 1 (Tenn. 2010) (photograph of puddle of blood on floor and victim's arm was relevant and "not particularly

gruesome or inflammatory"); State v. Warledo, 285 Kan. 927, 190 P.3d 937 (2008)(blood splatter photographs relevant and admissible and gruesome nature of photograph not so extreme that it compels the conclusion that it was admitted solely to cause undue prejudice).

How the Issue Was Raised And Abandoned Below

The issue before this Court concerns the introduction of a series of photographs from the multiple victim crime scene at Club 360 which showed the location of blood. See Exhibits 22-43, 45-46. A review of the photographs reveal two categories of photographs. Some photographs were distant shots which revealed context to the specific location of the blood marked with identifying tags. Exhibit 22(I), 25 (J, K), 27 (K), 28 (K, L, M), 32 (N, O), 33 (N), 34 (N, O, P), 37 (P), 38 (Q), 39 (Q, R), 40 (R), 43 (S). The remainder of this group of photographs showed a close-up of the particular blood stain or splatter. Exhibit 23(I), 24 (J), 26 (K), 29 (L), 30 (M), 31 (stains depicted in 32), 35 (O), 36 (P), 41 (R), 42 (S), 45 (G), 46 (H). See also Court Exhibit #5, State's Photo Exhibit List (description of each photograph). ROA 581. It is with this second group of photographs that Appellant had his initial, but later abandoned objection.

During the trial, defense counsel McCulloch, while recognizing the liberal rule concerning the introduction of photographs within the Court's discretion, made an objection to the proposed photographs arguing that they were "duplicitous." Counsel McCulloch specifically stated that : "I do not object to them on the grounds that they show blood because this is obviously a case that involves blood.. . .But that fact is that these photographs duplicate each other and there is no point in that." ROA 81-82; Tr.p. 322-323. Counsel McCulloch also argued that the photos contained markers and close-ups and he questioned the relevance of showing

where the blood was.

The prosecution, through Assistant Solicitor McDuffie stated that markers in the photos were placed there by crime scene investigator Sgt.Stan Richards. She stated that he had provided a report detailing what each one of the markers represented in terms of a blood pattern analysis, such as whether it was transferred, pooled, drops, and smears which the defense has. ROA 83, l. 5-12. The prosecution stated that the photographs were not duplicative and had been narrowed down. She declared that there was a photograph of each marker from a shot to orient it in the club and then a close-up shot. She stated that the prosecution had tried very hard not to duplicate and had viewed tons of photos. She stated that the matters would be presented through Investigator Richards and through the victim who can orient herself in the club through the path she followed after being shot. ROA 83; Tr.p. 324, l. 13-25.

Deputy Solicitor Meadors stated that they considered showing the photographs without the cards, but thought that it was important to show the jury through victim Houston that this was the route she went using the blood. He stated that multiple sets were eliminated by use of these photographs which include the markers. ROA 84; Tr.p. 325.

The prosecution declared that these would be the only photos of blood in the interior that they intended to use. She stated that there are some bullet holes in the interior that would be used that show the floor in the distance. However, she stated that none of the other photographs will have blood as a focus of the photographs.

At that point counsel McCulloch asked the court to take it into consideration overnight where McCulloch stated that he would ever withdraw his motion or make it more specific, after he reviews Investigator Richards report. ROA 85; Tr.p. 326, l. 2-8. Judge Manning noted that it

was kind of hard to keep blood out of a situation where two people were killed and three are shot. ROA 85; Tr.p. 326, l. 17-19.

The next day, counsel McCulloch stated that he had provide the clerk with an itemization of his groupings of the proposed evidence as a close-up shot of blood splatters, blood skids, and blood residue and then he established a further back shot from the close-up showing where the bar is. He stated that he was aware that case law gives discretion to the court. He stated that his "only objection is that the photographs are duplicative and there's no real evidentiary value to a close-up shot of the blood." ROA 85; Tr.p. 328, l. 15-25. He stated that it would be apparent to the jury that this is a heinous crime with lots of injuries and deceased people. He stated that it would serve no real purpose in duplicating photographs with the close-up shots. ROA 86; Tr. p. 329, l. 4-5.

He restated that he had reviewed the photographs proffered by the prosecution the previous night. He stated that he had provided the state his rendition of the photographs.[1] Counsel opined that most of the photographs can be grouped in pairs. He stated that they showed a close-up of a blood splatter or a blood skid or just a close-up of blood. He then described that there was a photograph that showed an "establishing shot" taken at a distance that shows in the club where the bloodstain was. ROA 87; Tr.p. 330, l. 1-6. He stated that in its discretion, the court can allow evidence that has some relevance, but that it should not be duplicative or cumulative. He then stated that "our objection is simply that there was no real purpose in having the close-up of blood. ROA 87; Tr.p. 330, l. 7-14.

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[1]This listing was made Court Exhibit 5 and is included in this record. See Tr.p. 332, l. 11-17. See ROA p. 581.(Court Exhibit 5).

Counsel McCulloch continued that the relevant and pertinent value of the "establishing shots" to show blood on the pool table, but not showing a close up or a tile with blood on it is other than to inflame the jury and increase the sympathy level. ROA 87; Tr.p. 330, l. 15-21.

Judge Manning then declared:

> I don't know where the particular individuals that were shot or wounded, where it happened, how it happened, what location they were in. I think at least you look at the location of pools of blood, I would be like, for example somebody was shot against the wall you've got splattering and the bedroom or something like that will show where the victim was when they were wounded or shot.
>
> I think it might be a close call, but I do not believe the prejudice outweighs the probative value, Inasmuch as the jury already knows that two people were killed, three were shot, and at least at this point in time, I think I'll give the state the opportunity to connect the locations where the victims were shot, who was shot, where they were shot, that sort of thing.
>
> And at this point of time, Mr. McCulloch, it may be a close call but I think your objection is premature, If later something evolves that I think prejudice does outweigh the probative value, I don't make that assessment at this time, I'll revisit it. But for right now, I think it does have more probative value than prejudice to the defendant at this point in time.

ROA 88; Tr.p. 331, l.1-332, l. 2.

Testimony of Deirdre Houston.

Ms. Houston testified that on February 4, 2007 she went to the Club 360 where she met up with Shannavia Williams, Shanelle Whack, and Shawna Williams. ROA 279; Tr.p. 578. After playing pool for a while they got ready to leave to go to the Club Rockaway on Two Notch Road. ROA 281; Tr.p. 580. When she was waiting to get her jacket from Wolf (John Adams) before they left, Shawna walked away to get some napkins after a drink was spilled on a bannister. When Shawna walked off, Deirdre stated that she felt something hot hit her in side of her face and felt a ringing in her ear. She described touching ger face and seeing blood and then heard a

"boom" and she hit the floor and Shawna never made it back to her. ROA 282; Tr.p. 581, l. 4-23. Deirdre described that she got on the floor and crawled around with her head down, with a lot of blood in her eyes so she had difficulty seeing. She stated that she was crawling trying to get out of the way and felt some doors and trying to get to the pool tables when the shooting stopped. ROA 283; Tr.p. 582. She stated that she pulled herself up on the pool table and begged for someone to help her. At that point she described that the shooting started again and someone pulled her down and dragged her into the bathroom. She stated that she got a glimpse of herself in the mirror , but she could hear everything around her (including people screaming), but could not see or move. ROA 283; Tr.p. 582, l. 10-20. She stated that she hit the cold air with her eyes closed. She stated she woke up two days later in the hospital and learned that Shannavia was dead. ROA 283; Tr.p. 582, l. 21-25.

The In Camera Proceeding Related to the Photographs.

Subsequently, the trial court indicated that counsel McCulloch renewed the objection prior to the testimony of victim Deirdre Houston. ROA 285; Tr.p. 584. Judge Manning that he wanted the witness to do a dry run of her testimony outside of the jury's presence to see how she reacts when the witness identifies certain locations where she was and how she crawled to the bathroom. ROA 285; Tr.p. 584, l. 5-14. Counsel McCulloch stated that his interest was only whether she could authenticate the photographs, but not to punish her. ROA 285; Tr.p. 584, l. 16-19. Ms. Houston then in an in camera proceeding previewed her testimony identifying State Exhibit 15 as a diagram of Club 360, her testimony about feeling the sting of the bullet, crawling through the club to the bathroom and then identified State Exhibit 25. ROA 286-287; Tr.p. 595-586. At that point counsel McCulloch conceded that there was a proper foundation. ROA 287;

Tr.p. 586, l. 16-25. The witness confirmed and recognized State 32 as her blood, State Exhibit 38 as her blood, and State Exhibit 40 and State Exhibit 43 as relating to her testimony. ROA 288-89; Tr.p. 587-588. Allegedly over the earlier objection, the establishing photographs of State Exhibits 25 (photograph of pool table), 28 (photograph of K,L,M), 32 (photograph of pool tables and blood), 38 (distant photograph of Q), 39 (distant photograph of Q and R), 40 (distant photograph of R), and 43 (distant photograph of S in restroom) were admitted. ROA 289-90; Tr.p. 588-589. However, none of the so-called "close-up" photographs were introduced at this time or during the testimony of Ms. Houston which were the basis of the defense's original objections.

The Continued Testimony Before the Jury by Ms. Houston.

The prosecution then used the admitted "establishing" photographs to assist Ms. Houston in describing her path through the Club 360. ROA 291;Tr.p. 593. Referring to the photographs, she indicated where she was standing by the front door, where she crawled, where she touched the doors, the kitchen, her path toward the pool tables, and where she indicated where she was when she pulled herself up on the pool table after the shooting initially stopped. ROA 291; Tr.p. 593, l. 19-25. She indicated where she was then pulled back down and the entrance that took her back to the bathroom. ROA 292; Tr.p. 594. She then identified Exhibit 25 as the pool table where she was standing when she initially got hit. Exhibit 28 as the area where there were benches and booths and that she crawled "from here to here" using the exhibits. ROA 293;Tr.p. 595. As to Exhibit 32, she stated that it depicted farther along by the pool table that she pulled herself up and indicated that the blood was her blood. ROA 294;Tr.p. 596. Exhibit 38 was described by her as revealing her blood, showing an area near the bathroom. ROA 294; Tr.p. 596, l. 11-20. As to

Exhibit 39, she described it as the corner that you turn in the hallway before you get to the ladies restroom. ROA 294; Tr.p. 596, l. 17-20. As to Exhibit 40, it was described as the entrance inside the ladies restroom and Exhibit 43 was inside the ladies restroom in front of the mirror and sink, and identified the blood shown as her blood. ROA 294-295; Tr.p. 596, l. 17- p. 597, l. 4.

Houston next described that when she was hit, she first did not realize that she was hit until people started screaming that she was hit in the head, but that she was actually hit in the right ear. ROA 295; Tr.p. 597, l. 8-14. Houston confirmed that after she hit the cold air, she did not remember anything, thinking she was on a stretcher other than seeing blinking lights and hearing screaming. She stated as a result of the shooting that she is deaf in one ear and had nerve damage on the right side of her face. ROA 296; Tr.p. 598, l. 1-13. The toboggan hat that she was wearing that night was introduced into evidence without objection as State Exhibit 52. ROA 296; Tr.p. 598, l. 9-16. Houston stated that she did not know the Appellant, did not recall seeing him before and had no bad blood with him. ROA 297; Tr.p. 599, l. 5-10. The defense had no questions of the witness.

Testimony of Crime Scene Investigator Sgt. Stan Richards.

The photographic evidence was also used during the testimony of Sgt. Stanley Richards of the Richland County Sheriff's Department. He testified as an expert in crime scene to include blood pattern analysis, shooting reconstruction and footwear examination and comparison without objection. ROA 300-01, 305; Tr.p. 617-618, 622. He described being called to the Club 360 on February 5, 2007. ROA 306; Tr.p. 623. In the initial portion of his testimony, he described the Club 360 crime scene, including the location of impact points in the walls, trajectory patterns. He described his arrival at the scene and entry into the business where he

looked at a lot of possible blood , including stains on the floor to the left of the pool tables, all the way from the front to the back and that the stains on the floor were multi-directional. ROA 307; Tr.p. 624.

The Admission "Without Objection" of the Close-Up Photographs.

Later in his testimony, Sgt. Richards testified that on February 5, 2007, he looked at blood stains throughout the club. ROA 345; Tr.p. 662, l. 1-11. He referred to Exhibits 22 to 46 as photographs that related to his testimony. ROA 345; Tr.p. 662, l. 10-11. **These exhibits were re-introduced "without objection." [Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46]. ROA 345; Tr.p. 662, l. 12-18. ["without objection].**

The Use of the Photographs by Sgt. Richards to Describe The Scene

Sgt. Richards described to the jury that they were going to see a whole lot of smears. He stated that there were all kinds of directions in the stains and a lot of transfer stains. ROA 348; Tr.p. 665, l. 16-25. In State Exhibit 22, he pointed out the footwear pattern and the transfer of the blood from underneath the shoe. ROA 349; Tr.p. 666, l. 7-25. He pointed out this print was identified as "I." ROA 350; Tr.p. 667, L. 17.

Sgt. Richards next used Exhibit 24 and 25 to described the location of item "J." He described its location as coming through the entrance seeing the pool table with J and K running along the back side of the pool table. ROA 350; Tr.p. 667, l. 20-25. Exhibit 24 , ROA _, Exhibit 25, ROA _. He pointed out another entrance around the backside . He stated that item J showed the pooling of blood. Where there had been bloodletting at that point. He described the various directions of the smears in Exhibit 24 and also showing the imprint of a heel. ROA 351; Tr.p. 668, l. 3-20.

As to Exhibit 26, he described it as another picture of K showing the blood trail of a 90 degree drop to the floor and shows motion in a direction. ROA 352; Tr.p. 669, l. 1-6. ROA _ (State Exhibit 26).

State Exhibit 27 showed item K which reflects a better shot of the linear blood trail going in an indicated direction. He stated that it also showed swipes and blood smears coming in indicated directions. He described that the photo indicated a lot of blood, then lessening of the blood , and the feathering of the blood going in different indicated directions. He stated this showed that individuals or items that were being drug across in lateral motions on the floor going in both directions. ROA 352; Tr.p. 669, l. 8-19. State 28 was described as showing item L on the backside of the left side of the club coming around the center portion of the prior discuss of item K. He stated that you continue to see the smears on the floor , with a little bit of blood dripping and some stopping of motion at certain points where there is a little more blood, but directionality shown toward the bathroom. ROA 352-353; Tr.p. 669-670.

He stated that Exhibit 30 showed item M (which was indicated in the back of Exhibit 28 turning toward the wall near the pool tables). He stated that item M was a large quantity of blood pooling and suggested someone that was stationary for a period of time because secondary splatter is all around item M. ROA 353; Tr.p. 670, l. 17-25. Exhibit 30 also revealed a shoe impression. He stated that this photo was another general shot showing the directionality of where the blood was. ROA 353-354; Tr.p. 670-671, l. 4.

He stated that State 31 was a continuation of the backside of the area between the pool tables which showed another footwear impression though faded but showing its direction. ROA 354; Tr.p. 671, l. 11-15.

Sgt. Richards stated Exhibit 32 showed (in a distance) item N and reflected coming around the third section in the back area against the wall and between the pool tables, with the blood pooling, the stopping of motion at certain points and the dripping and smearing on the floor showing direction. He described the larger amounts of pooling as being caused by either someone in a different direction or the heart pumping harder and blood coming out and being in the spot longer. ROA 355; Tr.p. 672, l. 1-9. He pointed out in the third section footwear impressions coming the same way as going around the pool tables with the drops and swipes. ROA 355; Tr.p. 672, l. 10-19.

As to Exhibit 34, he stated it showed a larger overview of the same are going between the pool tables with item O marked on top of the (left) pool table and pooling on top of the pool table which indicates a wipe and blood dripping on top of the pool table. ROA 355- 56; Tr.p. 672-673. He stated that it suggests that someone stopped in the area for a period of time where there was bleeding and then blood pooling on the floor. ROA 356; Tr.p. 673, l. 1-11.

State Exhibit 35 was described by Sgt. Richards as being a closer view of item O on the top of the pool table which shows the drips and smaller drops which hit the top of the pool table . He stated that it had begun to dry by the time the photo was taken. ROA 356; Tr.p. 673.

He stated that Exhibit 36 showed item P was a bigger view of the drops from the pool table to the floor. ROA 357; Tr.p. 674, l. 3-8. State Exhibit 37 showed (more distant) of item P and the blood going around the backside of the second pool table back toward the entrance to the restroom areas. ROA 357; Tr.p. 674, l. 3-13.

Item Q was shown in State Exhibit 38 as it goes around the corner showing the blood drops , but not much pooling going towards the restroom area. ROA 357; Tr.p. 674, l. 14-21. Sgt.

Richards stated that State Exhibit 39 showed a better view of item Q around the corner going toward the restroom area, with a back and forth motion possibly opening the door 9and showing item R in the upper portion). ROA 357; Tr.p. 674, l. 23- p. 676, l. 2.

He described State Exhibit 40 as an overview of the back and forth motion, with footwear impressions smeared going toward an indicated direction, which showed a smear on the wall consistent with a person wiping their hand on the wall trying to find their way toward the restroom (showing a different view of item R). ROA 358; Tr.p. 675, l. 9-16.

As to state exhibit 41, he described it as a larger view (closer) view of what was found at the entrance to the restroom at the end of the blood letting smears (showing close - up of item R at the tile break). ROA 358; Tr.p. 675, l. 18-22. Concerning State Exhibit 42, he described it as showing item S (close-up) going into the restroom area. He then referred to State Exhibit 43 to explain the location of item S inside the restroom area where a lot of blood letting is shown and indicates through the use of the photograph the blood into blood, a lot of smearing , moving around directionality and blood drops . It shows a paper towel or cloth, that he suggests was someone trying to stop the bleeding. ROA 359; Tr.p. 676, l. 5-16.

At that point, Sgt. Richards returned to his seat and through the use of State Exhibit 15 sketched the pattern that he had described to the jury. ROA 359-360; Tr.p. 676, l. 17- p. 677, l. 2.

ANALYSIS

1. The Admissibility of the "Close-up" Photograph Issue Is Barred From Review because the Evidence Was Ultimately Entered Without Objection.

A review of the brief before this Court reveals a lack of specificity concerning what particular photographs the Appellant is presently seeking for this Court to review. The problem

with the Appellant's over broad assertion in this appeal most probably arises from the fact that the defense counsel's initial objection were not to the "establishing" (distant) photographs, but only the "close-up" photographs as being duplicative. ROA 87; Tr.p. 330. The particular photographs that these objections concerned were never identified by the defense with any specificity. However, when the actual "close-up" photographs were introduced in evidence during the testimony of Sgt. Richards, the defense declared the introduction was "without objection." [Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46]. ROA 345; Tr.p. 662, l. 12-18. ["without objection].[2] This issue as argued in this appeal is not preserved for this Court's review.

First, Judge Manning's pre-trial ruling on the close-up photographs was in a motion *in limine*. ROA 88; Tr.p. 331, l. 14-25. Generally, a motion *in limine* seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. See State v. Abraham, 395 S.C. 645, 720 S.E.2d 491, 494 (Ct. App. 2011) citing State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) ("[A] motion in limine seeks a pretrial evidentiary ruling to prevent the

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[2]The so-called "close-up" photographs are State Exhibit 24, 26, 29, 30, 31, 35, 36, 41, 42. The defense team distinguished the particular photographs in his groupings in Court Exhibit 5. ROA 581. In those grouping, he described "far shots" as Exhibits 23, 25, 37,38, 39, 40. He does not describe as either "close-up" or "far shot" the following: 27, 28, 32, 33, 34, 35, 38, 39, 43, 44, 45, 46, however a review of those photographs are consistent with the manner of the photographs described as "far shots" by having an area overview as opposed to a closer view of a marker. It would be apparent that these latter photographs would be included with his "far shot" designation as "establishing photographs" and were not subjects of his initial objection.

disclosure of potentially prejudicial matter to the jury. A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004) (making a motion *in limine* to exclude evidence at beginning of trial does not preserve issue for review because motion *in limine* is not a final determination; therefore, moving party must make contemporaneous objection when evidence introduced).

Second, when the so called "close-up" photographs were introduced at trial, the Appellant expressly stated that they had no objection to the introduction. See State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (holding a defendant who expressly consented to the admission of evidence at trial waived any right to raise the issue of admissibility on appeal). The issue was not preserved for this appeal. The Appellant abandoned the original objection during the trial when the defense allowed the admission of the "close-up" photographs without objection. ROA 345; Tr.p. 662.

2. The Admissions of the Crime Scene Photographs Were Relevant And the Prejudicial Effect Did Not Substantially Outweigh The Probative Value To Require Exclusion.

The Appellant does not specify any particular photographs that it is challenging in the appeal. To the contrary, his argument combines the mention with a series of photographs which the Appellant had no objection (ROA 87; Tr.p. 330) with photographs that he ultimately had no objection . ROA 345; Tr. p. 662. In the *Initial Brief of Appellant*, he simply makes a broad reference to State Exhibits 22-46 and the fact that they were introduced either through the testimony of victim Houston or Sgt. Richards. *Initial Brief of Appellant*, p. 9.

Assuming *arguendo* that the merits of the admission of certain unspecified exhibits can

be addressed, certain salient factors must be taken into account. First, the jury was aware that this was a horrific shooting involving two deaths and three other persons being wounded by shootings. Second, the crime scene photographs from inside the Club 360 (State Exhibits 22-43) were only a part of 150 exhibits introduced at that trial which included a plethora of other unchallenged exhibits which consisted of numerous photographs of bullet shells and holes in numerous locations at the Club 360, projectiles and cartridges from the scene, and autopsy photographs of two of the victims (which also entered without objection). See ROA 437-438; Tr.p. 793-794. Further, the breadth of the trial extended over a series of days from October 19 through October 27, 2009 and included 22 witnesses on behalf of the State.

As Judge Manning recognized at the hearing on the motion *in limine*, as well as defense counsel McCulloch, the existence of blood was a part of this crime and could not be divorced from the relevant evidence. At the outset, counsel McCulloch did not seek to exclude all photographs that showed the existence of blood at the crime scene, but only the "close-up" shots, suggesting the duplication was not necessary. However, as revealed in the testimony of surviving victim Houston, the photographs showed a probative purpose in corroborating her version of the shooting by substantially reflecting her location when shot and her path ultimately into the restroom to avoid further confrontation while the assault upon Club 360 continued. The testimony of Sgt. Richards gave meaning to the photographs by developing what the path of the smears actually showed enhancing the jury's understanding of victim Houston's blinded attempt at seeking sanctuary and safety.

While the photographs showed blood, in today's world of CSI and Law and Order shows and awareness, the photographs were not particularly gruesome and were relatively benign. This assessment is particularly evident where the surviving victim was present before the jury to

testify about the assault and the defense acknowledged that a series of photographs showing similar material was admissible. The Appellant, obviously recognizing that fact abandoned the objection prior to the admission of the close-up shots with Investigator Richards who presented the photographs in a matter of fact manner explaining how they supported and corroborated the victim's testimony about her path, stops, attempt to stand and return to the crawling during the continuing assaults.

In his brief on appeal, the Appellant concedes that evidence regarding the location of the victims and extent of the bloodshed was relevant, [*Initial Brief of Appellant*, p. 9, 10] but suggests claims that the close-up photographs were prejudicial, yet these photographs were not objected to when they were introduced. The Appellant suggests on appeal that the volume of the particular exhibits was cumulative and therefore prejudicial. However, Sgt. Richards used the photographs to educate the jury concerning how the manner of the stains corroborated victim Houston's testimony about her actions at the time of the assault.

Respondent submits that the evidence was not used to arose the sympathy or prejudice the jury. The Appellant acknowledged that some of the photographs showing the blood were relevant and probative. The use of the particular "close-up" photographs which allowed Sgt. Richards to describe the in better detail the direction of the victim than the distant photographs which also reveal blood, though in a manner cumulative, had additional probative value. A review of the photographs in light of the testimony - limited the prejudicial effect that Appellant suggests existed. Simply put, a viewing of the photographs in context with the testimony show that the close-up photographs are not unduly prejudicial or inflammatory.

The exception must be denied for these reasons.

II. Where the trial court instructed the jury to disregard evidence concerning an unexpected assertion in a dying declaration of one of the victims and an interrogative from a unknown caller to the Appellant's cell phone, the trial court did not abuse his discretion in denying the motion for a mistrial.

The cautious trial judge chose to use his discretion to exclude consideration by the jury of arguably admissible evidence concerning a dying declaration by victim John Adams and a question asked by an unidentified caller to the Appellant's cell phone asking whether Black was the shooter. In issuing a curative instruction, propounded by the defense counsel, to disregard the evidence, the trial judge properly applied the precedent of this Court. Assuming that the defense did not abandon its motion for mistrial when counsel declared he waived the objection (ROA 195; Tr.p. 479), the trial judge did not abuse his discretion in denying the mistrial motion where the incidents were not so grievous that prejudicial effect could not be removed in any other way.

STANDARD OF REVIEW

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion." State v. Spears, 393 S.C. 466, 485-486, 713 S.E.2d 324, 334 - 335 (Ct. App. 2011); State v. Kelly, 372 S.C. 167, 170, 641 S.E.2d 468, 470 (Ct.App. 2007). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct.App. 2005). See also State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (finding mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d

471, 472 (1983).

"Whether a mistrial is manifestly necessary is a fact specific inquiry." State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct.App.2000). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct.App.2009).

"An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless ... it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced." State v. Simpson, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996). "Error is harmless when it could not reasonably have affected the result of the trial." State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

HOW THE ISSUE WAS RAISED IN THE APPEAL

The Appellant asserts that a mistrial should have been declared based upon two occurrences during the testimony of Club 360 owner, Lindburgh Porterfield. However, upon review of the cited references, neither situation required a mistrial.

During the examination of Porterfield, he described the circumstances at his club at the Super Bowl party on February 4, 2007. ROA 169-173; Tr.p. 453-457. He stated that he had hired additional bouncers from Elite Security to assist with the particular party because they were able to carry weapons, unlike his own employees. ROA 171; Tr.p. 455. He stated it was their job to handle situations, which could include escorting someone to the door or handcuffing someone if they gave any problems. ROA 172; Tr.p. 456, l. 5-11.

Porterfield testified that he knew Johnnie Gaskins as "Black" at the time of the incident.

ROA 172; Tr.p. 456, l. 12-23. He stated that Black was at his club that day arriving early. He stated at some point, Gaskins was taken out of the club. ROA 173-174; Tr.p. 457-458. He stated that about 20 minutes after Gaskins was removed from the bar, Porterfield heard shots fired. He stated that he went to the front of his bar at the time where he saw the glass had been shot out of the front of his building and he saw bodies and people on the floor and trying to get out. ROA 176-177; Tr.p. 460-461. When he got to the front, he saw John Adams - one of his bouncers who he identified as Wolf - and told him that he would be all right because he was talking to him the whole time. ROA 177; Tr.p. 461, l. 10-12. He stated that Adams had been shot and that he was the first person the Porterfield had seen. The following occurred:

Q. What did he say?

A. He was like, the guy that we put out, shot me, was shooting.

Mr. McCulloch: Your Honor, I - - -

THE COURT: It's an exception to the hearsay - - go ahead.

Mr. McCulloch: May we approach? ..

ROA 177-178; Tr.p. 461, l. 20 - p. 462, l. 5. At that time, there was a bench conference. ROA 178; Tr.p. 462, l. 2-5. Porterfield continued to testify about wanting to drive victim Adams to the hospital, but he instead stayed and tried to calm people down.

Porterfield later testified about recovering a cell phone that he located on the floor of the club. ROA 174, l. 4- p. 175, l. 18, p. 180, l. 9-11. He stated that the cell phone started to ring and he answered it. ROA 180; Tr.p. 464, l. 12-13. The defense objected at that time asserting "hearsay." The prosecution responded that they were not offering the matter for the truth of the matter asserted. ROA 180-181; Tr.p. 464-465.

Porterfield then stated that he received two telephone calls from two ladies on the cell phone. He stated that he attempted to disguise his voice because it was not his phone and said:

A. . . "Hello. And they was like, Blackie, was that you out there shooting? I then , I was like you know.

Q. Did someone say the name Black?

A. Yeah.

Q. Was it male or female?

Mr. McCulloch : Your honor may we approach.

A. Female....

ROA 181; Tr.p. 465, l. 7-18. At that point another bench conference was held which led to an in camera discussion out of the jury's presence.

Defense counsel McCulloch made initially made a motion for a mistrial asserting cumulative surprises. The defense initially claimed that during the in camera testimony of Roger Glover, he testified to an identification of the Appellant that had not been provided in discovery where the defense had been advised that his identification was only of "a person in the bar ." See ROA 61-81; Tr.p. 295-315. [3]The defense also assented that they were surprised by the dying declaration testimony of Porterfield that had been provided. Lastly, the defense asserted that the

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[3]In the *in camera* proceedings, Glover testified that he had seen Gaskins in the bar area that night. ROA 66-67; Tr.p. 300-301. He then stated that he had seen him riding around that night. ROA 67. Then, he declared that he saw him in the car when the shooting was going on. ROA 70; Tr.p. 304. On cross-examination, Glover stated that he had told the police that night that he had seen the shooter, but that the police did not write it down in his statement or during the line-up. ROA 72, 77-78; Tr.p. 306, 311-312. Deputy Solicitor Meadors noted that although he had talked previously with Mr. Glover, at that hearing was the first time he had heard of the identification of the shooter. Tr.p. 319, l. 1-6. When the defense asserted that it was incompetent testimony, Judge Manning stated that it was a jury issue for weight and credibility. Tr.p. 320.

testimony from the cell phone caller though allegedly being only offered not for the truth had evidentiary value for the truth asserted. He disagreed that this information was provided in Porterfield's statement. He stated the motion for mistrial was because these were violations under Brady v. Maryland, 373 U.S. 83 (1963) and Rule 5 of the S.C. Rules of Criminal Procedure. ROA 183-184; Tr.p. 467-468.

In response, Deputy Solicitor Meadors stated that concerning Mr. Glover's in camera testimony that he was unaware as well and that he had not testified about the identification in front of the jury. As to the dying declaration by John Adams to Porterfield, the prosecutor stated that he had anticipated the testimony to instead be :"I'm dying, Dog, I'm dying" rather than the response made which was the first time that the prosecutor had heard it. ROA 185; Tr.p. 469, l. 4-19. Concerning the cell phone answer, Deputy Solicitor Meadors took issue concerning the matter stating that it was essentially disclosed in the discovery on page 3 of the statement where Porterfield had stated that he "kept receiving phone calls on the Verizon cell phone from women asking for Black and was he was at the place where you shooting at 360." ROA 185-186; Tr.p. 469, l. 21- p. 470, l. 5. See Court Exhibit 6, p. 2 (Statement of Lindburgh Porterfield, 02/05/2007 [actually page 3 in order of statement]). ROA 582-84. The state relied upon Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002)[4] to assert that information that a friend heard from rumor was not

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[4]In Rhodes, the Court held that the testimony admitted in this case about Thompson hearing petitioner was the shooter did not constitute hearsay:

> The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted. E.g., Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001). Here, it was repeatedly made clear during trial that the information Thompson had heard was "from the street," i.e., a "rumor." It was not offered to prove that petitioner had committed the crimes, but rather to explain Cook's identification of petitioner in the yearbook. This in turn led to petitioner's

offered for its truth, but to explain one victim's identification.

Counsel McCulloch responded: "my motion is for a mistrial or for an instruction and a redaction from the jury's memory that - - - Mr. Porterfield not be allowed to testify what people say on the phone, at least in this instance." The defense accepted that the prosecution did not know that the other evidence was going to come out. However, he asserted that the state had a duty of diligence to learn this information and make it available, asserting that Glover may have told police about his identification, suggesting a problematic pattern. The defense also disagreed that Porterfield's statement was close enough. He also contended that it did not fall within the realm of admissible hearsay. He then asked for a mistrial and if not granted , would ask for an instruction to disregard. ROA 188; Tr.p. 472, l. 4-8.

Judge Manning denied the motion for a mistrial, but agreed to tell the jury to disregard the challenged remarks. He stated that he did "not think anything had risen to the level of some sort of egregious constitutional deprivation against Mr. Gaskins." ROA 188-89; Tr.p. 472-473.

After a break, the Court noted that the cell phone statement about a female asking for Black was innocuous, but that he had told the defense he was giving the instruction anyway, over the State's objection. ROA 193; Tr.p. 477, l. 4-20. After a discussion on the proposed curative jury instructions, the Court noted that the objection was based upon Brady and Rule 5. However, the defense stated that the objection was based upon the cumulative failure of diligence and that he did not think it was admissible hearsay. At that point, the defense stated: "I respect your ruling

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> apprehension and the subsequent identification of him by both victims via the photographic line-up.

Rhodes v. State, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002).

as to a mistrial - - **I waive that objection** and I appreciate the instructions which I have prepared. .." ROA 195, l. 7-19; Tr.p. 479, l. 7-19. (emphasis added). [5]

When the jury returned, they were given the following curative instruction by Judge Manning:

> . . .I instruct you to disregard that portion of Mr. Porterfield's testimony that made reference to any statements that were attributable to Mr. Adams. Mr. Adams is the gentleman that was a victim and is now deceased.
>
> I further instruct you to further disregard the testimony of Mr. Porterfield that was made in reference to statements made by an unknown person and a telephone call received on the phone that's been admitted into evidence.
>
> Y'all understand what I just said?
>
> JURORS: (Affirmative response).
>
> And when I tell you to disregard it, what you must do is erase it from your mind and when you go back to the jury room finally at the end of this trial to deliberate, you cannot let these two things enter your discussions at all. It would be unfair for you to do so.

ROA 197; Tr.p. 481, l. 6-24. [6]

The record reflects that at the end of the State's case, the defense stated that it was renewing the previous motions including the motion for mistrial that was denied and that "I respect the determination of the Court to strike the testimony and to instruct them." ROA 556;

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[5] Respondent submits that Appellant abandoned his request for mistrial at this point. See State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (holding a defendant who expressly consented to the admission of evidence at trial waived any right to raise the issue of admissibility on appeal). The issue should be barred as not preserved. However, Respondent concedes that Appellant generally asserted a request for a mistrial at the close of the case. Tr.p. 957, 1050.

[6]These instructions were consistent with the proffered instructions prepared by defense counsel McCulloch. ROA 194; Tr.p. 478, l. 1-10. Court Exhibit 7. ROA 585 .

Tr.p. 957, l. 16-19. The motions were renewed generally at the conclusion and denied. ROA 562; Tr.p. 1050, l. 11-21.

ARGUMENT BEFORE THIS COURT

A. Dying Declaration Issue.

In the argument before this Court, the Appellant complains that it had no notice that the dying declaration existed or might be introduced at trial. He asserted that this was a discovery deficiency under Rule 5 and asserts that it should have been discovered by the State and revealed prior to trial under Rule 5. He claims that under Rule 5, the State had the duty to disclose evidence material to the preparation of the defense. *Initial Brief of Appellant*, p. 16, ¶ 1. However, a review Rule 5 imposes no requirement for disclosure of or creation of witness statements prior to trial, other than the statements of the defendant (not the victim). In pertinent part, Rule 5(a)(2)

> 2). Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case, or of statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon a sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.

Contrary to the claim of the defense, there was no requirement to create a document where one did not exist concerning the dying declaration made by John Adams to Porterfield. This is not a case of having the existence of a document not being turned over to the defense. There was no

document in existence. As the prosecution declared as to the dying declaration by John Adams to Porterfield, the prosecutor stated that he had anticipated the testimony to instead be :"I'm dying, Dog, I'm dying" rather than the response made which was the first time that the prosecutor had heard it. ROA 185; Tr.p. 469, l. 4-19. This was not a violation of Rule 5. This was not a case where there was a written document in the possession of the prosecution that revealed the existence of this part of the dying declaration by John Adams to Porterfield. If that had existed, the question before this Court may be different. Compare State v Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (former Criminal Practice Rule 8 was not violated, even though the defendant's counsel was not informed until the morning of jury selection of the state's tape of an interview with a witness which had been made within 48 hours of the shooting, where defense counsel was permitted to listen to the tape before the witness took the stand for direct examination, the trial judge allowed defense counsel to delay cross examination until the next day, and, thereafter, defense introduced the tape into evidence and played it for the jury, thus bringing to the jury's attention discrepancies between the witnesses' testimony and that appearing on the tape); State v South, 285 S.C. 529, 331 S.E.2d. 775 91985) (admission into evidence of the statement of a witness, despite the state's failure to produce a tape recording of the witness's statement in addition to the written statement, was harmless error beyond a reasonable doubt since the defendant received the substantial equivalent in the written statement).

However, plainly the unexpected statement made by John Adams to Porterfield was admissible as a dying declaration under South Carolina Rules of Evidence, Rule 804(b)(2). The state purported to have information revealed to the defense that Adams had indicated to Porterfield that he was dying and the statement clearly addressed the cause of his death. Tr.p.

469. Accord State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). In addition, the statement was likely also admissible as an excited utterance exception to the hearsay rule under SCRE Rule 803(2). McHoney .

Nevertheless, the resolution of the issue of the admissibility is moot because evidence was directed to be excluded by a cautious judge.[7]

B. The Cell Phone Caller.

The Appellant asserts in the appeal that the testimony by Porterfield that an unidentified female called the Appellant's cell phone which was answered by Porterfield and reported to him "Hello. And they was like, Blackie, was that you out there shooting?" The defense urged that it was a discovery violation, even though they had been in possession of Porterfield's statement that stated he "kept receiving phone calls on the Verizon cell phone from women asking for Black and was he was at the place where you shooting at 360." ROA 185-186; Tr.p. 469, l. 21- p. 470, l. 5. See Court Exhibit 6, p. 2 (Statement of Lindburgh Porterfield, 02/05/2007 [actually page 3 in order of statement]). ROA 584. Respondent submits that Rule 5 was satisfied by the disclosure of Court Exhibit 6 to the defense prior to the trial. The differences between the written statement and oral testimony would have been properly subject to cross-examination and impeachment concerning whatever inconsistencies he claims - but not necessarily exclusion.

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[7]Interestingly, the Appellant, in brief, asserts that the dying declaration may not be prejudicial to Appellant because another patron, Christopher Lyles was also ejected from the club and could have referred to Lyles or any other patron ejected that night. *Initial Brief of Appellant*, p. 17, n. 5. However, he notes that at the time of the shooting Lyles had not been fully ejected from the club when the shooting began. ROA 126-128; Tr.p. 408-410. However, in the defense closing, counsel McCulloch indicated that Lyles had been arrested later that night for drunk driving and had weapons on him and should have been placed in the line up but was never placed in one, never asked to submit to a gunshot residue test and only knew that the investigation did not pursue him. ROA 559-560; Tr.p. 1018-1019.

The Appellant also urges that this evidence was hearsay because it was going to the truth of the matter asserted - claiming that it was an assertion that Appellant was the shooter at Club 360. However, at the outset, the prosecution urged that it was not being introduced for the truth of the matter asserted. ROA 180; Tr.p. 464, l. 25-1. However, a close reading of the testimony shows the declarant telephone caller is asking a question on whether Black was the shooter - not a declarative statement that Black was the shooter.

Under SCRE 801, it is not an "assertion" by the declarant, but an "interrogative. A question is not a declarative statement of hearsay. Plainly, it could not go to the truth of the matter asserted because the question does not assert any matter, only seeks to elicit a response affirming or denying. See Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan & Frederic I. Lederer, *Courtroom Criminal Evidence* 1003 (3d ed. 1998) ("Because most assertive statements are declarative sentences, many trial judges use a rule of thumb that imperative, interrogative, and exclamatory sentences are not hearsay."; the authors would not follow this rule of thumb in all situations); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 Tex. L. Rev. 49, 71–73 (1982) (suggesting that this is at least a plausible, and perhaps the most plausible, interpretation of the word "assertion" in Rule 801(c)); United States v. Thomas, 453 F.3d 838, 844–45 (7th Cir. 2006) (defendant asked police officer who had just arrived on scene of shooting whether officer was responding to defendant's call; court found that question was not hearsay because it was not statement but a question, but excluding it was harmless error).

McCormick on Evidence addresses the issue of whether questions are hearsay:

n. 7. For example, many courts take the position that a question cannot be hearsay

because it is not an assertion. See, e.g., United States v. Oguns, 921 F.2d 442, 448 -49 (2d Cir.1990); United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir.1990); Bolen v. Paragon Plastics, Inc., 754 F.Supp. 221, 225 (D.Mass.1990). See also United States v. Bailey, 270 F.3d 83, 87 (1st Cir.2001) (holding telephone call which summoned recipient to rendezvous point but did not by content identify the recipient, was a direction and was not hearsay); United States v. Murphy, 193 F.3d 1, 5–6 (1st Cir.1999) (recognizing as nonhearsay instructions to use false warrant applications and to withhold information about seizures of cash because they were simply directions as to method of operation that were not statements of fact); United States v. Bellomo, 176 F.3d 580, 586 (2d Cir.1999) ("Statements offered as evidence of commands or threats or rules directed to the witness, rather than for the truth of the matter asserted therein, are not hearsay."). Frequently, questions should not be considered hearsay because the dangers of insincerity are sufficiently diminished when an assertion is not intended. See United States v. Long, 905 F.2d 1572, 1580 (D.C.Cir.1990); United States v. Jackson, 88 F.3d 845, 848 (10th Cir.1996); Kolb v. State, 930 P.2d 1238, 1245–46 (Wyo.1996). However, the result should not be automatic from the form of the words. Ex parte Hunt, 744 So.2d 851, 856–58 (Ala.1999) (reviewing split of authorities on whether questions are ever hearsay, deciding that a categorical answer cannot be given but instead the issue must be decided by nature of the question, facts sought to be proved, and circumstances, and concluding that the question at issue was not hearsay since it made no express or implied assertion); Powell v. State, 714 N.E.2d 624, 627 (Ind.1999) (concluding that while some questions are properly not considered hearsay because they contain no assertions of fact, others, including the one in the case, intend to assert a fact and are therefore considered hearsay); Lampitok v. State, 817 N.E.2d 630, 640 (Ind.App.2004) (reaching same conclusion as to commands); United States v. Summers, 414 F.3d 1287, 1299–1300 (10th Cir.2005) (concluding that defendant's statement to the police upon arrest, "[h]ow did you guys find us so fast?," was intended as an assertion and therefore hearsay).

McCormick on Evidence, (6th Ed. 2009), § 246, n. 7.

Nevertheless, the cautious trial judge entered an instruction excluding consideration of the evidence, thereby mooting this issue.

1. The Curative Instruction To Disregard the Particular Testimony Removes Any Reversible Error.

A mistrial is not required where the trial judge gave plain instructions to disregard the challenged testimony from Porterfield attributable to either victim Adams or the cell phone

caller. ROA 197; Tr.p. 481, l. 6-24. The curative instructions were fashioned by defense counsel.[8] 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. Harris, 382 S.C. 107, 119-120, 674 S.E.2d 532, 538 - 539 (Ct. App. 2009); State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct.App. 2005). In the present case, the trial court's curative instruction explained to the jury they were not allowed to consider the question by the cell phone caller or Mr. Adams statement to Porterfield in their deliberations. The trial court specifically instructed the jury to disregard the evidence. Thus, any alleged error was cured.

The Appellant argues that there was a residual effect because he feels that the Adams comment could only have referred to Appellant because another possibility of Christopher Lyles had not been ejected at the time. Porterfield had testified that he understood only two people had been "thrown out" that night. ROA 205; Tr.p. 489, l. 4-6. Lyles testified that he had been ejected from the bar that night. ROA 208-09; Tr.p. 492, l. 9- p. 493, l. 8. He recalled that his girlfriend took him his mother's house. ROA 209; Tr.p. 493. Lyles stated that he subsequently got into another vehicle and got stopped for DUI. ROA 210; Tr.p. 494, l. 17-24. He admitted that he had a gun in that car, but denied the gun was anywhere near the Club 360. ROA 211; Tr.p. 495, l. 1-25.

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[8] This Court may well find that this argument is not preserved for appellate review because Gaskins created the instructions and accepted the trial court's ruling and did not contemporaneously object to the sufficiency of the curative charge. ROA 195; Tr.p. 479. See State v. Parris, 387 S.C. 460, 464, 692 S.E.2d 207, 209 (Ct. App. 2010); State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct.App.1996) (holding a curative instruction is usually deemed to cure an alleged error; no issue is preserved for appellate review if the complaining party accepts the trial court's ruling and does not contemporaneously object to the sufficiency of the curative charge).

However, there was a series of independent witnesses who identified Gaskins as either being the shooter or the person who went to the Impala where the shooting was coming from. ROA 94, 97; Tr.p. 356, 359 (victim Lamont Davis identifies Gaskins as the individual he saw shooting from the car); ROA 149; Tr.p. 431 (victim Quinton Harris identifies Gaskins as the person he saw in the car with the gun); ROA 220, 247; Tr.p. 506, 531 (Sydney Williams identifies Gaskins as getting in the car which stopped in front of club when shooting started); ROA 272; Tr.p. 571 (Epsil Palmer identifies Gaskins as person who entered vehicle and that he saw flashes coming from vehicle although it was too far at the time to see the actual shooter). Thus, the excluded dying declaration would only have been cumulative to the evidence presented.

As noted above, a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Stanley, 365 at 33-34, 615 S.E.2d at 460. Under the facts presented, Appellant is unable to show prejudice in light of the fact the record of identifications by similarly situated witnesses other than victim John Adams.

The argument otherwise is without merit.

III. A new trial is not warranted where the trial judge gave a cautionary instruction to the jury after a series of exchanges between counsel for the prosecution and defense concerning the form of questions on re-direct required the Court to intervene to maintain civility between counsel in the courtroom. The Appellant's contention that defense counsel ability to represent the Appellant in the eyes of the jury was undermined in not supported by the record where both the state and defense were admonished to relax.

In his final argument, the Appellant contends that a mid-trial exchange between both counsel and the trial court during a re-direct examination of witness Sydney Williams about a prior statement requires a new trial. Although the trial judge addressed the tension arising between counsel on the exchange of questions and objections, the judicial comments did not undermine either counsel. Further, the trial judge's reasonable cautionary instruction given to the jury eliminated the concerns about any loss of credibility with the jury of counsel. The assertion must be denied.

HOW THE MATTER OCCURRED IN THE LOWER COURT

In the issue before the Court, the Appellant for the first time claims that the trial judge's actions allegedly toward defense counsel require a new trial. The jaundiced reading of the record ignores certain facts which defeat his claim. A review of the precise language, rather than characterizations is important to understand what occurred and what did not occur. As shown herein, the defense counsel never suggested that the response of the trial judge demanded a new trial or partiality against his client.

During the re-direct testimony of state witness Sydney Williams by Deputy Solicitor Meadors an issue arose concerning his earlier written statement and its variance from his trial testimony. ROA 238-240; Tr.p. 522-524. At one point the questioning became the subject of a

series of objections from defense counsel:

Q. Now, Mr. Williams, did you see a gun?

A. I ain't seen no gun that night, I didn't see the gun that night.

Q. Mr. McCulloch asked you about your statement. Did you put in your statement previously that - - -

MR. McCULLOCH: Objection, your Honor. That's not proper, that 's leading, did you put in your statement, whatever - -

Q. What if anything did you put in your statement?

MR. McCULLOCH: Classic leading - - -

THE COURT : **Stop, both of you, relax**. Back up a little bit. Dissect the question if you have to.

ROA 240; Tr.p. 524, l. 4-14. After having the witness review the statement, the following inquiry was

made:

Q. On February 5th, 2007, did you tell Investigator Isenhoward - - -

MR. McCULLOCH: Yes, your Honor again - - -

THE COURT: All right.

MR. McCULLOCH: Improper cross-examination - - -

THE COURT: All right. No run on arguments. Objection - - specifically what the objection is and I'll rule on it. But don't argue when you object. What did he say on such and such date.

MR. MEADORS: Under [Rule] 609, I thought that was the proper way to address it.

[ROA 242] THE COURT: Do it with the magic words so there won't be any longer any objections. Relax. I'll give you a chance to amplify later on. Continue.

Q. What if anything did you mention to Investigator Isenhoward about whether or not you saw the defendant with a gun, on page one?

A. On page one? I said, when he went - - he went back - -I mean, he went to his car, to a car beside his. He drives a blue car. He got in it. I started walking back toward the club - -

Q. No, no, no you skipped - - you skipped - -

MR. McCULLOCH : Your honor, let's let him read - - -

THE COURT: Stop. Go to the jury room ladies and gentlemen. Don't talk about this case. . . .

[Jury retires]
[OUT OF JURY'S PRESENCE]

THE COURT: **Both of you relax**. No run on objections. Objection, basis, that's the way to do it, Mr. McCulloch. Don't argue your objection - -

MR. McCULLOCH: All right.

THE COURT: **You relax**. Let me finish. Just specify what it is. I know this is all tedious for all of us. **Now lets's calm down a little bit and do it the right way**. Go ahead and place your objection on the [527] record.

MR. McCULLOCH: My objection was starting with the leading nature of the question. But now, asking him to look over his statement, then the Solicitor would like –to read to him the part of the statement he wants to say, oh yes, I remember that . That's not proper.

This is re-direct. It is outside the scope of proper re-direct, secondly.

Thirdly, under 613, this is a prior statement of the witness that he himself now wants to impeach him because his answers on the stand, in his questions, are different than what the Solicitor would like him to have testified with the statement.

THE COURT : All right. Anything further?

MR. McCULLOCH: That's it.

THE COURT: All right. I disagree. You can impeach with your own witness, I

think under the rules this day and time.

MR. MEADORS: [Rule]610.

THE COURT: It used to be the old rule but he can, for the sake of convenience, saving time, he can point , would you please read line 1 on page 2 of your statement or something.

Let's take a little break. **And y'all got to learn to be nice to each other, okay**. Let's take a break. It's tedious. I'll give you a chance to refresh yourselves. We'll come back and resume.

ROA 241-244; Tr.p. 525, l. 14- p. 528, l. 2.

During the recess, Judge Manning reported that he spoke with the jurors in the following manner to counsel:

THE COURT: Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels –high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad.

Somebody said, well, you scared me. I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

MR. McCULLOCH: Tell them it was theater.

THE COURT: Beg your pardon?

MR. McCULLOCH: Tell them it was theater – theater.

THE COURT: No, no no...

ROA 244; Tr.p. 528, l. 5- 19.

The jury then returned to the courtroom. Judge Manning then addressed his earlier comments:

THE COURT: ...I stuck my head in the door and sort of reminded y'all that this is an adversarial proceeding and both sides tend to get up on their

> high heels a little bit sometimes and it's my job to sort of control the civility in the courtroom. If I yell, it's nothing personal. I'm not mad at anybody but it's my job to sort of keep us at even keel.
>
> And that's all the latest example was. It has nothing to do with the merits of this case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.
>
> With that in mind, I will invite Mr. Meadors to continue...

ROA 245; Tr.p. 529, l. 2-20. The remainder of the examination was without similar problems by counsel.

A review of the record reveals no motion for mistrial as a result of the judge's comments by either the State or the defense.

ANALYSIS

The Appellant contends that the remarks of the judge during the examination were harsh and angry and directed at defense counsel. He now suggests the failure of the defense counsel to object to the comments made during the examination or the curative instruction given by the court does not prevent this Court from considering the issue on appeal because any objection would have been futile, relying upon State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). He contends that because this was an "angry response" by the trial judge to defense counsel McCulloch's continuing objections to the examination of the witness by the prosecution. He contends that these brief comments by Judge Manning diminished counsel's standing before the jury. Respondent submits that the comments although strong were not an reasonable reaction to defense counsel's objections.

The Appellant ignores that the comments were directed to the prosecution, as well as the defense. See ROA 240; Tr.p. 524, l. 13-14 (" **Stop, both of you, relax**. Back up a little bit.

Dissect the question if you have to"). Judge Manning was also directing comments toward Deputy Solicitor Meadors when he told him to "relax" and directed that he ask "what did he say back on such and such date" and to use magic words so that there won't be objections. ROA 241-242; Tr.p. 525-526. Plainly, he was also putting the problem at the feet of the prosecution in the manner he was asking questions. After the jury had retired, the judge also admonished for "both of you relax" and to "calm down." ROA 242; Tr.p. 526.

An alleged improper remark by a trial judge must be considered in context when determining whether it indicates sufficient bias or prejudice to require his or her disqualification. Shaw v. State, 276 S.C. 190, 277 S.E.2d 140 (1981). The Supreme Court has held a defendant is entitled to a mistrial where arguments by the trial judge indicate a lack of neutrality and cannot be cured by instruction, as where the defendant's testimony is referred to as "lies." State v. Kennedy, 272 S.C. 231, 250 S.E.2d 338 (1978). Likewise, any intimation by a judge, in the presence of the jury, that a particular witness has committed perjury is reversible error. Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992) (Supreme Court refused to apply the rule where a trial judge merely reminded a witness he was under oath and subject to perjury). The Appellant relies upon State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994). However, Pace, is readily distinguishable where the judge's references to defense counsel, in the presence of the jury, as a "pretty girl" and "nice girl" was error, and deprived the defendant of a fair trial and constituted reversible error. The Court stated in Pace that "[t]he trial judge must act with absolute impartiality in the performance of judicial duties. Canon 3 of Rule 501, SCACR. Reference by a trial judge to an attorney's age, gender, or competence are improper and constitute reversible error upon a showing of prejudice to the defendant."

The Code of Judicial Conduct, Rule 501, SCACR, sets forth the basic rules for the conduct and demeanor of judges. A judge should observe "high standards of conduct" in order to preserve the integrity and independence of, and public confidence in, the judiciary. Canons 1 and 2(A), Rule 501, SCACR. With respect to adjudicative responsibilities, a judge should:

(1) be faithful to the law and maintain professional competence in it;

(2) maintain order and decorum in judicial proceedings;

(3) be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others; and should require similar conduct of lawyers, court staff, court officials, and others subject to judicial direction and control;

(4) afford a full hearing to parties and their lawyers, and should avoid ex parte communications except as authorized by law;

(5) promptly dispose of the court's business; and

(6) abstain from public comment about any pending or impending court proceeding, and require similar abstention from court personnel subject to judicial direction and control.

Canon 3(B)(1) to (6), Rule 501, SCACR (emphasis added); see also Preamble to and Part 1 of Rule 502, SCACR ("Judicial Discipline and Standards").

A recent annotation, *Justification and Correction of Remarks or Acts of State Trial Judge Criticizing, Rebuking, or Punishing Defense Counsel in Criminal Case as Otherwise Requiring New Trial or Reversal*, 54 A.L.R.6th 429 (2010), addresses a plethora of situations where new trials were not required when judges commented about counsel. A reading o the numerous situations addressed in the article suggests that these matters are reviewed on a case by

case basis. Most importantly though, it is evident that the comments by the court to both counsel was the type of comment that would suggest impartiality on the judge's part nor diminish either counsel uniquely in the eyes of the jury.

A review of cases where the Supreme Court has addressed judicial comments show this situation was innocuous. In State v. Simmons, 267 S.C. 479, 229 S.E.2d 597 (1976), the Court found reversible error where the trial judge threatened defense counsel with a jail sentence, immediately after which counsel proceeded no further with the arguments. The Court concluded that the remarks tended to impugn the credibility of defense counsel. In State v. DeBerry, 250 S.C. 314, 157 S.E.2d 637 (1967), the Court concluded the trial judge's admonition to defense counsel to be brief and stop wasting court's time was not abuse of discretion nor prejudicial to the rights of defendant. Similarly in Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992), the Court found there is generally no prejudice when the trial court's hostile comments are made outside the jury's presence.

In State v. Cooper, 334 S.C. 540, 546-547, 514 S.E.2d 584, 587-588 (1999), the Court found no reversible error where the trial judge's comments and rulings were routine and none of the exchanges involved any improper, personal comment about defense counsel, nor did the comments tend to impugn counsel's credibility or diminish him in the eyes of the jury. The Court concluded Many of the comments were innocuous or merely explanatory of the trial court's ruling and were therefore permissible. See State v. Mishoe, 198 S.C. 215, 17 S.E.2d 142 (1941) (holding that remarks made by the judge in the course of a trial need not be confined in such narrow limits as to prevent him from stating his reasons for his rulings).

Importantly, the trial judge's cautionary instructions to the jury removed any impression

by the jurors that the trial judge was trying to diminish either counsel in the eyes of the jury. Judge Manning expressly imputed his own demeanor as an attempt to control civility in the courtroom. Although Appellant wants to suggest that the actions in front of the jury were one sided, the Appellant ignores that his comments were a two edge sword against both counsel getting a little frustrated during this brief portion in the middle of a lengthy trial. Although a juror reported that the juror was scared by the judge's action, it appears that the curative instruction dissipated the concern. It is also evident that both counsel subsequent to the brief admonishment toward both learned "to be nice to each other." A new trial is not warranted.

CONCLUSION

For all the foregoing reasons, the judgment of convictions must be affirmed.

Respectfully submitted,

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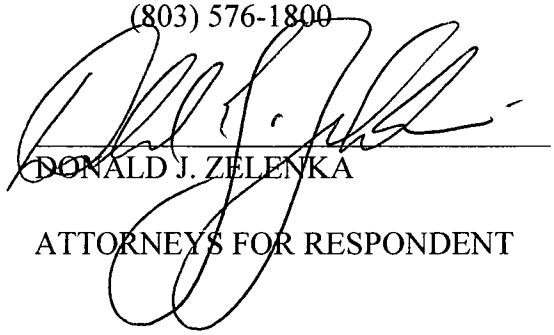
By: 
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ATTORNEYS FOR RESPONDENT

May 25, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

THE STATE,

Respondent,

V.

JOHNNIE WALKER GASKINS,

Appellant

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 entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

May 25, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

THE STATE,

Respondent,

V.

JOHNNIE WALKER GASKINS,

Appellant

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Tara Dawn Shurling, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 25th day of May, 2012.

DONALD J. ZELENKA
Senior Deputy Assistant Attorney General