STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable Clifton Newman, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Appellate Case No. 2017-001032 (Ct. App. Case No. 2014-001803)
Opinion No. 2017-UP-070 (S.C. Ct. App. Filed February 8, 2017)

THE STATE,

RESPONDENT,

V.

CALVERT MYERS,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549, Columbia, SC 29211-1549
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
Post Office Box 192, Columbia, South Carolina 29202
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by holding Investigator Carwell's opinion testimony regarding his interpretation of v^^hat was occurring on the videotape was admissible lay witness testimony, since his opinions about everything "being fine," and the decedent and his girlfriend only attempting to enjoy their evening was calculated to clearly convey his opinion that petitioner was the aggressor on the videotape while the decedent acted innocently, since this was highly prejudicial particularly where self-defense and voluntary manslaughter were jury issues?

2. Whether the Court of Appeals erred by holding it was not an abuse of discretion for the trial court to deny petitioner's mistrial motion especially when the trial court found the investigator's highly prejudicial opinions about what was allegedly occurring on the videotape at critical times were not at all apparent, and the state made maximum use of the inadmissible unsupported opinions?

RESPONDENT'S COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether certiorari should be granted when the Court of Appeals properly found the trial court did not abuse its discretion in admitting Investigator Carwell's testimony regarding the security video footage when the testimony was admissible and any error in admitting the testimony was harmless?

2. Whether certiorari should be granted when the Court of Appeals properly found the trial court did not abuse its discretion in denying Myers' motion for a mistrial when the objection to a question that included a gesture that was not clearly part of the record was sustained, a proper curative instruction was given, and a mistrial was not warranted?

STATEMENT OF THE CASE

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

On August 14, 2014, Myers was convicted of one count of murder. (R. p. 406). He was sentenced to thirty-seven years confinement for the murder conviction. (R. p. 415).

Myers timely filed a notice of appeal. After full briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming Myer's conviction. State v. Myers, Op. No. 2017-UP-070 (S.C.Ct.App. filed February 8, 2017). (App. pp. 1-3). Myers filed a Petition for Rehearing on February 23, 2017. (App. pp. 4-12). The Court of Appeals denied the petition on March 27, 2017. (App. p. 13). Myers now seeks review of the South Carolina Court of Appeals' opinion in this Court.

STATEMENT OF FACTS

On December 29, 2012, Petitioner Calvert Myers ("Myers") shot the victim, Cornelius Green, six times. Those shots included one to the upper left shoulder, one to the back of the victim's left lower arm, one on the side of the victim's chest near his armpit, one to his chest, one to left upper thigh, and one graze wound. (R. pp. 116-21). The forensic pathologist indicated one bullet entered in the victim's upper left shoulder, fractured the victim's scapula, fractured two ribs near his back, perforated his left lower lung, diaphragm, hit the small bowel three times, and perforated part of the aorta and the inferior vena cava in the victim's abdomen. (R. pp. 123-

24). While all of the other gunshots contributed to the victim's bleeding, this particular shot was the fatal wound. (R. p. 126). The cause of death was multiple gunshot wounds. (R. p. 128).

First Confrontation between Myers and his grand niece

Sherry Myers ("Sherry"), Myers' grand-niece, was dating the victim at the time of the shooting. (R. p. 76). Sherry testified she and the victim arrived at Toney's Lounge around 11 p.m. (R. p. 77). Myers was already at the bar when they arrived. (R. p. 77). Sherry and Myers had a bad relationship. (R. pp. 77-78). At approximately 1:10 a.m., Myers approached Sherry and called her "a no good bitch." (R. p. 79, ll 19-21).

Toney Lowman ("Lowman"), the owner of Toney's Lounge, knew Myers and the victim. (R. pp. 42-43). Lowman, who was initially outside the bar, indicated that shortly after he went inside, he saw Myers in Sherry's face. (R. p. 44). Lowman testified Myers "was calling her the baddest names a man could call a young lady." (R. p. 45, ll 23-24).

James Myers ("James"), Myers' nephew, and Myers stopped at Toney's Lounge after selling food that day. (R. pp. 186-88, 199-200). James thought they arrived at the bar around 11:30 p.m. (R. pp. 188, 201). James saw Sherry and the victim arrive at the bar. (R. pp. 189-90). James spoke with the victim (they were friends), and he talked with Sherry. (R. p. 190).

Marvin Moore, a friend of the victim and someone who knew Myers, was also at Toney's Lounge. (R. p. 318). Myers was at the bar when Moore arrived. (R. p. 319). The victim was there with Sherry. (R. p. 319). Moore saw Myers and Sherry arguing at the bar. (R. p. 319). Moore noted the victim was at the bar keeping to himself while the two argued. (R. p. 319).

Sherry did not respond to Myers, and Myers continued calling her names. (R. pp. 79-80). Sherry told Myers to go away and leave her alone, but Myers continued calling her names. (R. p. 80; see R. pp. 191-92). Myers put his hands on her, and which led Lowman to intervene. (R. pp.

80-81, 98-99). When Lowman intervened, Sherry attempted to hit Myers over Lowman. (R. pp. 46, 65-66). Myers and the victim did not exchange words during this confrontation. (R. p. 82). Lowman noted the victim came over and got Sherry to sit back down. (R. p. 46). The victim was also attempting to calm everyone down. (R. pp. 46-47).

Lowman, with help from James, got Myers outside. Lowman talked with Myers and calmed him down. (R. pp. 47, 191-92). Lowman and Myers stayed outside for a minute.[1] (R. pp. 190, 191, 202). Sherry saw Myers was taken outside, but Myers came back inside. (See R. pp. 82, 101). Lowman told Myers he would not be able to go back inside the bar. (R. p. 47).

Myers Returns Inside the Bar a Second Time

Myers told Lowman he was going to let go of all of the foolishness, and he promised everything was going to be all right. (R. p. 48). James noted Myers wanted to go back inside and get a drink; James was ready to go at that point because he felt trouble was going to happen if they did not leave. (R. p. 192). Lowman took Myers back inside the bar and arranged for him to get a drink. (R. p. 48). James stayed outside. (R. p. 193). Sherry and the victim were sitting at the bar at that time. (R. pp. 48-49). Shortly after re-entering the bar, Myers got into a second argument with Sherry. (R. p. 49). The victim was just sitting at the bar at this point. (R. p. 50). After this encounter, Lowman told his sister, a bartender, to call the police for Myers. (R. p. 50).

Myers Returns Inside the Bar a Third Time

When Myers returned to the inside, he had an interaction with the victim. (R. pp. 82, 102). Sherry did not know what Myers said to the victim, but the victim walked out of the bar shortly afterwards. (R. p. 82). Myers followed. (R. p. 82). Lowman also saw the victim got up and went outside, and Myers followed. (R. p. 51).

---

[1] James testified that before the altercation between Myers and Sherry, Myers had had four or five drinks, and James did not believe he was intoxicated. (R. p. 201).

The Confrontation Outside

Initially, Myers and the victim did not have an issue outside. The victim, Myers, and Lowman were involved in a conversation. (R. pp. 51-52). Sherry also went outside after retrieving her jacket. (R. pp. 83, 103). Sherry noted that when she first exited the bar, she observed Myers, the victim, and a third person talking. (R. p. 83).

Once Myers saw Sherry, he started calling her names again. (R. pp. 52, 83). Sherry testified Myers had hit her. (R. p. 103). Lowman stated Sherry hit Myers, and Myers turned around and hit Sherry on the back. (R. p. 52). In response, the victim hit Myers. (R. pp. 52, 67, 83, 103, see R. p. 93). Sherry indicated the victim hit Myers hard enough to knock him to the ground. (R. pp. 93, 103). When James (who had gone around to another door to order food) returned to the front, he saw Myers on the ground and the victim getting off the ground. (R. pp. 193, 204, 207). Myers was not bleeding at that time. (R. p. 194).

After the victim hit Myers, the victim and Sherry walked off. (R. pp. 52, 67). Myers was not bleeding at that time, and Lowman saw no bruises, scratches or scrapes on him. (R. p. 53). The victim headed towards his truck. (R. pp. 84, 104). Sherry had his keys. (R. p. 84).

The Shooting

James saw Myers pulling out a gun as he was getting up. (R. p. 194). James did not know Myers had a gun before then. (R. p. 195). The victim was right beside Myers. (R. p. 194). James told the victim Myers has a gun. (R. p. 194). When the victim looked and saw Myers pulling out the gun, he ran towards his truck. (R. pp. 194, 207). Myers started shooting, and he shot the victim in the back or something. (R. p. 195, see R. p. 205). According to James, the victim was running and trying to dodge bullets. (R. p. 195).

Sherry testified someone must have yelled out about Myers having a gun because the victim attempted to hide shortly thereafter. (R. pp. 84, 104-105). The security video reflected everyone was running at that time because someone had said Myers had a gun. (R. p. 84). Sherry did not see Myers immediately, but she did notice him running and she saw the flash from the gun. (R. p. 85). Sherry did not know how many shots were fired, but she remembered the victim saying Myers had shot him.[2] (R. pp. 85, 106).

Lowman indicated that a crowd had come outside the bar before the shooting. Shortly thereafter, he saw people were backing away. (R. pp. 53-54, 71). Lowman heard someone say Myers had a gun, and everyone started backing up. (R. p. 54). Lowman watched Myers walk between two vehicles, and he saw that he was fumbling around with something. (R. p. 55). Lowman then saw the gun in Myers's hand. (R. p. 55). "As soon as I saw the gun, he shot. I know whether he shot at Neil, in the air--." (R. pp. 55, l 25 – 56, l 1). Lowman was not sure if the victim was shot then because the victim was still standing. (R. p. 56). Lowman could not see anything for ten to twenty seconds. (R. p. 56).

After Myers shot the victim, the victim tackled Myers and started beating him. Sherry indicated that the victim had somehow gotten behind Myers, pushed him down, got on top of Myers, and was beating him. (R. pp. 85, 105-106). After hitting Myers two or three times, the victim just dropped and lay flat on top of Myers. (R. p. 85). Sherry saw blood on Myers after the shooting. (R. p. 88). When Lowman was next able to observe what was going on, he saw the victim on top of Myers, and he saw a hole in the victim's arm. (R. pp. 56, 71, 72, 73). Someone kicked the gun away from Myers. (R. p. 57). It was at this point that Lowman saw

[2] Sherry admitted during cross-examination that in her statement to law enforcement, she indicated that she heard three shots. (R. p. 105). She also indicated that she did not know the victim was shot in the back; she only saw the hole in his arm. (R. p. 105).

Myers was bloody. (R. p. 57). After the shots were fired, James and another man went over to Myers and the victim, and they took the victim off top of Myers. (R. p. 195). They then put the victim on his back. (R. p. 195).

Moore thought Sherry and the victim had left, but Lowman came back inside and said Myers had "shot that boy." (R. p. 322, l 15, see R. p. 326). Moore went outside and saw the victim on the ground. (R. pp. 322, 326). Myers was next to him, crawling. (R. pp. 322, 326). James saw that both Myers and the victim were bleeding. (R. p. 196). James asked the victim if he was alright, but the victim did not respond and the victim was not breathing.[3] (R. p. 196). James indicated that one of his cousins called 911. (R. p. 196). Sherry also testified she called 911. (R. p. 88).

Law Enforcement Arrives

Deputy Kristen Ellis of the Richland County Sheriff's Department responded to the 911 call at Toney's Lounge. (R. pp. 10-13). When she arrived, the victim was breathing shallowly, but he was unconscious. (R. p. 15). Myers' face was completely bloody. (R. p. 15). Deputy Robert Furgal also responded to the 911 call. (R. pp. 22-23). It was raining, wet, and dark when he and Ellis arrived. (R. p. 23). Furgal retrieved the handgun found on scene. (R. p. 24). There

[3] In his statement to law enforcement, James indicated his uncle had gotten loud with Sherry. (R. p. 209). James and Lowman took Myers outside. (R. p. 209). Myers bothered Lowman about going back in for another drink, and Lowman eventually relented. (R. p. 209). Then, Myers went back in for a beer, and while inside, he started cussing at the victim. (R. p. 209). Myers was taken out of the club again. (R. p. 209). James was inside ordering food when he heard something was going on. He went outside and saw Myers and the victim on the ground fighting. (R. p. 209). The victim was on top of Myers at that time. (R. p. 209). The victim stopped, got up, and went towards Sherry. (R. p. 209). That's when Myers went for his gun. (R. p. 209). The victim tried to get back to his truck, but Sherry had his keys. (R. p. 209). That was when Myers started shooting at him. (R. p. 209). James heard the victim say "he done shot me" real loud. (R. p. 209). The victim then came up behind Myers, got him to the ground, and they fought for about five minutes. (R. p. 209). Next thing James knew, the victim dropped down and was laying on top of Myers. Myers was taken out of the club three times. (R. pp. 209-10).

were no rounds remaining in the magazine. (R. p. 24). After securing the weapon, Furgal assisted with crowd control. (R. p. 26). According to Furgal, the victim was unconscious, and Myers was conscious. (R. p. 26). Furgal assisted the paramedics in performing CPR on the victim. (R. p. 26). The victim and Myers were loaded into separate ambulances. (R. p. 27). Furgal followed both ambulances to the hospital. (R. p. 27). At the hospital, Furgal stayed with Myers, collected his clothing, and instructed hospital personnel to put paper bags over Myers's hands to preserve any gunshot residue. (R. p. 28). Furgal turned over the evidence he collected to Investigator Woods when she arrived at the hospital. (R. p. 28).

A High Point 9mm Luger caliber pistol registered to Myers's wife was recovered at the scene. (R. pp. 24, 216, 284). The seven cartridge casings recovered from the scene were all fired by the gun. (R. pp. 221, 228). Law enforcement was unable to say anything conclusive about the relationship between the gun and the two fired bullets recovered from the victim's body. (R. pp. 222-23).

Myers Gave a Statement

John Carwell, the lead investigator on the case, testified about Myers's statement. In the statement, Myers discussed cooking and selling food on the morning and afternoon of the shooting. (R. p. 277). On the way home, Myers stopped at Toney's Lounge with his nephew, James. (R. p. 278). Myers indicated he was not intoxicated, and he did not drink during the day when he was working. (R. p. 278). Myers did not remember having a conversation with Sherry. (R. p. 278). Myers did note that he and Sherry had an up-and-down relationship, and he believed it was because of her changing moods. (R. pp. 278-79). Myers also did not have any problems with the victim, who Myers had known since the victim was a little boy. (R. pp. 279-80).

Myers's gun was one he received from his wife; he indicated he kept it in the car because people see him taking money for the food he sells. (R. p. 280).

Myers indicated in his statement that he did not remember shooting the handgun in the parking lot, getting assaulted, or arguing with anyone on the night of the shooting. (R. pp. 281, 282). He also indicated that he had an open-faced crown knocked out, a pearl knocked out, two more teeth besides them, and two teeth knocked out. He also suffered a fractured jaw and a fractured skull. (R. pp. 281-82). His mouth was wired for a week, and he had a trachea cut in his throat. (R. p. 282). He also suffered a bullet hole in his right foot. (R. p. 282).

ARGUMENT

I. Certiorari should be denied because the Court of Appeals properly found the trial court did not abuse its discretion in admitting Investigator Carwell's testimony regarding the surveillance video. His testimony was proper lay witness testimony, and any error in admitting his testimony was not prejudicial.

Myers contends the Court of Appeals erred in finding the trial court did not abuse its discretion in admitting portions of Investigator Carwell's testimony during the presentation of the surveillance video. Certiorari should be denied because the Court of Appeals properly found the trial court did not err in admitting Carwell's testimony. The Court of Appeals ruled as follows:

> We find the trial court did not err in admitting Investigator Carwell's testimony. "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). Initially, we note the only testimony Myers objected to and the trial court overruled was Investigator Carwell's testimony identifying Sherry Myers and Cornelius Green and describing that "everyone was fine" and "calm" at the beginning of the surveillance video. Although Myers made other objections to Investigator Carwell's testimony, those objections were sustained, and Myers did not move to strike the testimony or request a curative instruction. Accordingly, any issues with that testimony are unpreserved. See State v. Patterson, 324 S.C. 5, 18,482 S.E.2d 760, 766 (1997)

> (finding an issue not preserved when the trial court sustained appellant's objection, but appellant did not contemporaneously move to strike the testimony or request a curative instruction). Therefore, we address only the portion of Investigator Carwell's testimony that Myers objected to and the trial court allowed into evidence. We find Investigator Carwell's admitted testimony was not improper opinion testimony. Rather, we find the testimony was proper lay witness testimony because Investigator Carwell's identification of witnesses (1) was rationally based on his perception of the witnesses during his investigation, (2) was helpful because a lot of people were in and around Toney's Lounge, and (3) did not require special knowledge, skill, experience, or training. See Rule 701, SCRE ("If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."). Additionally, we find the admitted testimony was cumulative to the testimonies of other eye-witnesses and therefore Myers cannot show prejudice.

State v. Myers, Opinion No. 2017-UP-070 (Ct.App. Filed February 8, 2017).

Contrary to Myers' assertions, the Court of Appeals correctly found the testimony was admissible, and any error in admitting the testimony was not prejudicial because it was cumulative to testimony from other eyewitnesses.

What Occurred at Trial

At issue is Investigator John Carwell's testimony during the presentation of the video from the security cameras from Toney's Lounge. During his direct testimony, Carwell testified about what he considered to be important on the video. (R. pp. 252-53).

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

(R. p. 253, ll 3-9). In response to the objection, the State noted Carwell was asked what parts of the video were significant to him in terms of deciding how to charge in this case, and Carwell was indicating Myers had interjected himself into the victim's evening when they were otherwise

having a good time. (R. p. 253). The trial court requested the State restate the question. After questioning continued, Carwell was asked if the demeanor of the victim and Sherry was significant to him in the video.

He responded, "[y]es, it was fine. Everything was calm at this time." (R. p. 254, l 11). Myers objected, raising the same objection and also asserting the testimony would be hearsay. (R. p. 254). The trial court overruled the objection. (R, p. 254). Carwell continued to testify about what he observed in the video. Carwell indicated that later in the video, Lowman comes into the bar. (R. p. 254). Carwell identified Lowman on the video, and he noted Myers was on the video two minutes later. (R. p. 254). On the video, Myers was watching Sherry. (R. p. 254).

Carwell then identified James on the video. (R. p. 255). Carwell noted that at 1:10 on the video, Myers approached Sherry, and it appears he is saying something. (R. p. 255). Carwell testified that at 1:12:31, Lowman intervened and attempted to separate Myers and Sherry. (R. p. 255). Carwell continued to identify individuals involved in the incident in the video as he narrated what was occurring on the video. (R. p. 256). Carwell noted it was significant to him that he did not see the victim engage with Myers after Sherry hit Myers on the video. (R. p. 256). Carwell testified that at 1:16, Myers re-entered, and Lowman bought him a drink. (R. p. 256). Myers went right next to Sherry. (R. p. 256). The victim remained seated. (R. p. 256). At 1:20 on the video, Myers could be observed entering the bar with a tall gentleman. (R. p. 256). Carwell was unable to identify the tall gentleman. (R. p. 257). At 1:27 on the video, Lowman was visible, Myers just walked back up from the back of the bar, and the victim is speaking with Marvin Moore. (R. p. 257).

Carwell then explained the scene using the security video. (R. pp. 257-58). He noted there were blind spots where actions that occurred that night could not be captured by the

cameras. (R. p. 258). At 1:29, on the video, Sherry was coming from the back of the bar to leave at the front door. (R. p. 258). It was at this point in time the final argument occurred. Carwell identified Myers on the video in camera one. (R. p. 258).

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

(R. pp. 258, l 21 – 259, l 10). After the objection was sustained, there was some discussion between counsel as to what was improper from the testimony. Myers noted Carwell could testify as to who was on the video, but he could not discuss their actions or mental state. (R. p. 259).

Carwell then testified the victim was walking back to his vehicle, and Myers was walking between two cars. (R. p. 259). "He's going to come back up here and you're going to see him kneeling down." (R. p. 259, ll 19-21). Carwell then noted this part of the video was significant to him because it was his understanding it was when Myers was going for his gun. (R. p. 259). Myers objected on hearsay grounds. (R. pp. 259-60). Myers also noted that the response by Carwell was not responsive to the question asked, but the answer was based on hearsay. (R. p. 260). The trial court agreed the answer was not responsive to the question. (R. p. 260). The following exchange then followed:

> BY MS. WALKER:

Q. Once you saw -- use the word crouching, the Defendant crouching behind the vehicle and doing this motion, was that significant to you?

MR. MILLS: Objection, Your Honor, that has not been testified to, what she just –

THE COURT: The objection is sustained.

MR. MILLS: Thank you, Your Honor. Your Honor, I may have a motion at this time, Your Honor.

(R. p. 260, ll 15-23).

Standard of Review

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

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

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

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

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

Myers contends that much of Carwell's testimony presented during the presentation of the security video was improper opinion testimony. As correctly found by the Court of Appeals, much of this argument was not preserved for appellate review. At trial, Myers objected to Carwell's testimony as being improper opinion testimony at most, two times. The first was after Carwell indicated that early in the video, everyone was "They're having a fine time. Everybody is fine at this point. (R. p. 253). The second objection was Carwell's statement slightly later that at a particular point in the video, "everything was calm." (R. p. 254). Further, as discussed more below in response to the argument regarding the mistrial motion, Myers's objection to the question that led to the motion for a mistrial was not based upon alleged improper opinion. Thus, to the extent Myers asserts Carwell's testimony was improper opinion testimony outside of the two occasions when Myers objected on improper opinion grounds, his argument was not preserved for appellate review. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating an objection should be sufficiently specific to bring the exact error to the trial court's attention); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct.App.2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

B. Carwell's testimony was properly admitted.

Myers contends the testimony from Investigator Carwell regarding the security camera video was improper opinion testimony. To the extent Carwell's testimony was opinion

testimony, it was properly admitted under Rule 701, SCRE. As properly found by the Court of Appeals, Carwell's identification of witnesses on the video "(1) was rationally based on his perception of the witnesses during his investigation, (2) was helpful because a lot of people were in and around Toney's Lounge, and (3) did not require special knowledge, skill, experience, or training." Myers, Opinion No. 2017-UP-070 (Ct.App. Filed February 8, 2017).

Myers's argument is primarily based upon case law that is not applicable or analogous to the circumstances presented in his case. First, Myers's reliance upon State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011), is misplaced. In Commander, the Supreme Court held,

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

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

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

Carwell's testimony regarding the video was also helpful to the jury in determining facts or issues in the case. Almost all of Carwell's testimony regarding the security video consisted of identifying the eyewitnesses who testified at trial in the video. As noted by Myers, there are

portions of the video that are difficult to follow. Carwell's testimony in identifying eyewitnesses in the video and tracking some of the actions in the video would only assist the jury in utilizing the security video as evidence. In light of the fact Carwell was familiar with the eyewitnesses through his investigation, his testimony regarding the identity of those witnesses in the video was properly admitted. See Fripp, 396 S.C. at 439, 721 S.E.2d at 467; see also Mitchell, 399 S.C. at 417-20, 731 S.E.2d at 893-95.

C. Any error in admitting the testimony was not prejudicial.

The Court of Appeals also correctly found Myers failed to establish he was prejudiced by any error in admitting the testimony from Carwell.

First, the brief snippets of Carwell's opinion that were admitted were minimal. Second, the characterizations made by Carwell were cumulative to the testimony of eyewitnesses who testified at trial. For instance, Sherry testified that prior to the initial confrontation between Myers and Sherry, she and the victim were sitting at the bar having a drink. (R. p. 77). She also noted that before Myers initially approached her, she was talking with her daughter's cousin. (R. p. 79). Furthermore, Moore indicated everything in the bar was calm until Myers and Sherry got into an argument. (See R. pp. 319, 324). Also, several witnesses indicated that after the victim was made aware Myers had a gun, he was attempting to hide behind cars to avoid being shot by Myers. The video reflected the victim was hiding behind a truck after someone yelled Myers had a gun. (R. pp. 84, 104). James also saw the victim "running, like, hiding trying to dodge bullets." (R. p. 195, ll 19-20). Since Carwell's testimony was cumulative to other, properly admitted evidence, any error in its admission was harmless. State v. Williams, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996); State v. Douglas, 411 S.C. 307, 326, 768 S.E.2d 232, 243 (Ct.App.2014).

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

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. There was overwhelming evidence that Myers was guilty of the murder of Cornelius Green. First, there was overwhelming evidence that Myers shot and killed Green. Lowman testified Green, the victim, knocked Myers down after Myers made physical contact with Sherry. (R. pp. 52, 67). Several witnesses indicated that after Green knocked Myers down, he walked away and headed towards his vehicle. (R. pp. 52, 67, 83-84, 104, 193-94, 204, 209). Those witnesses indicated that when Myers got off the ground, he started pulling his gun out and started to shoot at the victim. (R. pp. 54, 68, 84-85, 105, 194-95, 207, 209). When Myers shot the victim, the victim was attempting to avoid being shot. (R. pp. 84, 104, 195, 209). Several witnesses also noted the victim seemingly identified Myers as the one who shot him. (See R. pp. 56, 85, 209). While the initial fight between the victim and Myers outside was not captured by the security camera, the testimony regarding the victim's attempt to run away and avoid getting shot by Myers is corroborated by the security camera video. (State's Exhibits 4, camera 3, 1:32:08-1:33:00).

There was also substantial evidence that the shooting was done with malice. All of the eyewitnesses indicated that prior to the brief confrontation outside, they had not seen any confrontation between Myers and the victim that night. (See R. pp. 46, 58, 89, 197, 320). Sherry and Lowman both indicated Myers initiated the confrontation outside by cursing and harassing Sherry, and by making physical contact with Sherry. Further, Myers shot the victim using a pistol. Malice can be inferred from the use of a deadly weapon. See State v. Belcher, 385 S.C. 597, 612, n. 9, 685 S.E.2d 802, 810 n. 9 (2009). The testimony presented at by the eyewitnesses all indicated Myers and the victim were not actively engaged in a physical confrontation when the shots were fired. All indicated the final confrontation that led to Myers's injuries occurred after he shot the victim. (R. pp. 52-53, 56-57, 88, 195-96, 205). Altogether, any error by the trial court in allowing the testimony from Carwell to which Myers objected was improper opinion testimony in Myers's trial was harmless. Certiorari should be denied on this issue.

II. Certiorari is not warranted regarding Myers' second issue because the trial court did not abuse its discretion in denying Myers' request for a mistrial. The objection to the question asked that led to the motion was sustained, and the trial court provided a proper curative instruction. A mistrial was not warranted.

Myers contends the Court of Appeals erred in finding the trial court did not abuse its discretion in denying his motion for a mistrial. Certiorari should be denied because the Court of Appeals properly found the trial court did not err in denying the request. The Court of Appeals ruled as follows:

> We find the trial court did not abuse its discretion by denying Myers's motion for a mistrial. See State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct.App.2005) ("The decision to grant or deny a mistrial is within the sound discretion of the trial [court]."); id. at 34, 615 S.E.2d at 460 ("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."); id. ("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." (quoting State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000)));

State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 863 (Ct. App. 2002) ("Generally, a trial [court]'s curative instruction is deemed to cure any error.").

State v. Myers, Opinion No. 2017-UP-070 (Ct.App. Filed February 8, 2017).

Contrary to Myers' assertions, the Court of Appeals correctly found the trial court did not abuse its discretion in denying the motion for a mistrial. The trial court correctly determined a mistrial was not warranted.

What Occurred at Trial

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

BY MS. WALKER:
Q. Once you saw -- use the word crouching, the Defendant crouching behind the vehicle and doing this motion, was that significant to you?

MR. MILLS: Objection, Your Honor, that has not been testified to, what she just –

THE COURT: The objection is sustained.

MR. MILLS: Thank you, Your Honor. Your Honor, I may have a motion at this time, Your Honor.

(R. p. 260, ll 15-23).

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

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

(R. p. 261, ll 5-10). After the trial court acknowledged Myers had objected and the objection was sustained, Myers moved for a mistrial. "And I would move for a mistrial. It is prejudicial for her to be showing actions that are -- that would be up to the jury to determine whether that's occurred. There's been no testimony to that effect at this point." (R. p. 261, ll 12-16). In response, the State argued it had attempted to rephrase the question after the prior objection. (R.

p. 261). Further, the State contended it was appropriate to ask the investigator about what parts of the investigation were significant to him and what assisted in his decision making process regarding how to charge Myers. (R. pp. 261-62).

The trial court then asked the solicitor about the time mark on the video that reflected the gesture that was used during the question. (R. p. 262). During the argument about what could be seen in the video, the solicitor stated,

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

(R. pp. 262, l 24 – 263, l 12). During further discussion, Myers and the solicitor disagreed whether it could be seen that Myers pulled out a gun. (R. p. 264). The trial court determined the question was improper because the gesture demonstrated in asking the question was not clearly demonstrated by the video.

> But whatever you said the Defendant did in your question, I cannot see him doing that. I don't see where he did that from my vantage point here on that video.
> ...
> And if there's some uncertainty, it's not clearly demonstrated, then it's an improper question. Improper in the sense that you would be testifying about the witness, number one. And as relates to the witness's ability to say what occurred, it has to be clearly demonstrated on the video.

(R. p. 264, ll 14-7, 19-24). The trial court noted the inference being made by the State could be argued to the jury during closing, but it could not be included in questioning. (R. p. 265). The trial court further noted it sustained the objection, and it believed that was sufficient. The trial court also denied the motion for a mistrial. (R. p. 265).

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

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

(R. p. 266, ll 14-8).

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct.App.1999). Appellate courts have favored the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851; see also State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.").

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

and resulting prejudice." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (internal citation omitted).

Discussion

The Court of Appeals properly found the trial court did not err in denying Myers's request for a mistrial. First, any prejudice created by the question asked by the solicitor was resolved by the trial court's curative instruction. It is well known "[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Goldsmith, 301 S.C. 463, 467, 392 S.E.2d 787, 789 (1990) (quoting State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct.App.2005)); see State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. Harris, 382 S.C. 107, 119, 674 S.E.2d 532, 538-39 (Ct.App.2009). Here, the trial court strongly instructed the jury to disregard the previous question. The jury was instructed that questions by the attorneys were not evidence. Under South Carolina law, jurors are presumed to follow the trial judge's instructions. State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct.App.2001), affirmed as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) quoting Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions."). In light of the curative instructions given by the trial court, the trial court did not abuse its discretion in denying the motion for a mistrial.

Myers's argument that the trial court should have granted the motion for a mistrial because the investigator provided improper opinion testimony was also not raised to the trial court. As reflected by the transcript, trial counsel's objection that led to the motion for a mistrial was not based upon a belief that the question asked was requesting improper opinion. Instead,

the basis for the objection was that the gesture made by the solicitor asking the question did not reflect testimony or evidence that was in the record. Thus, the question was based on a lack of proper foundation. Since the basis for the mistrial motion below differs from the argument raised on appeal, the argument was not preserved for appellate review. See Johnson, 363 S.C. at 58, 609 S.E.2d at 523 (stating an objection should be sufficiently specific to bring the exact error to the trial court's attention); Adams, 354 S.C. at 380, 580 S.E.2d at 795; see Perez, 334 S.C. at 565-66, 514 S.E.2d at 755 (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also Tucker, 319 S.C. at 428, 462 S.E.2d at 265 (party cannot argue one ground below and then another on appeal).[4]

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

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

As already noted in Argument I, there was overwhelming evidence that tended to prove Myers' guilt, which was wholly independent of the question regarding the gesture made by Myers. As such, Myers was unable to prove prejudice, and, as a result, any error is harmless. The trial court did not abuse its discretion in denying the motion for a mistrial. The Court of Appeals properly affirmed the trial court's ruling. Certiorari should not be granted on this issue.

CONCLUSION

Petitioner has failed to show that there is a special and important reason for this Court to grant his Petition. It raises no novel question of law. There is no conflict between the Court of Appeals' opinion and any prior decision of this Court. The Court of Appeals was correct in its findings. As a result, Myers' Petition for a Writ of Certiorari should be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
Bar No. 74713

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, South Carolina 29202

ATTORNEYS FOR RESPONDENT

By: _____
Alphonso Simon Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

June 20, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUN 20 2017
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable Clifton Newman, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Appellate Case No. 2017-001032 (Ct. App. Case No. 2014-001803)
Opinion No. 2017-UP-070 (S.C. Ct. App. Filed February 8, 2017)

THE STATE,

RESPONDENT,

V.

CALVERT MYERS,

PETITIONER.

PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert Dudek, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201.

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

This 20th day of June, 2017.

ALPHONSO SIMON, JR.
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT