STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY

Court of General Sessions
Edgar W. Dickson, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2016-000275

THE STATE,

Respondent,

v.

TASHON EARL HURELL,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

Cases:

Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000) 22

Jackson v. Virginia, 443 U.S. 307 (1979) 12

State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) 16

State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016) 10, 13, 14

State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) 9

State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997) 16

State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000) 16

State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012) 16

State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014) 17

State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) 22

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955) 13, 14

State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000) 13

State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016) 13

State v. Queen, 264 S.C. 515, 216 S.E.2d 182 (1975) 23

State v. Robinson, 310 S.C. 535, 426 S.E.2d 317 (1992) 12

State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) 16

State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) 13

State v. Johnson, 298 S.C. 496, 381S.E.2d 732 (1989) 18

State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) 12

State v. Wilson, 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010) 21, 22

Other Authorities:

Rule 401, SCRE 16

Rule 402, SCRE 16

Rule 403, SCRE 16, 17

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 12

I. The trial court properly denied Appellant's directed verdict motion because the State presented substantial circumstantial evidence to allow a reasonable juror to find him guilty beyond a reasonable doubt 12

II. The trial court properly allowed the following evidence: testimony by Shelby Bradt that Tramaine Hurell was not the suspect in the video, testimony by Detective Weaver regarding his showing Appellant a photograph of the suspect in a particular sweatshirt, and photographs and testimony about red and black shoes, because it was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. (This combines Appellant's Issues II, IV, and V.) 16

III. The trial court did not abuse its discretion by declining to grant a mistrial under the circumstances of Appellant's case because the challenged testimony by Appellant's sister did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole 21

CONCLUSION 24

STATEMENT OF ISSUES ON APPEAL

I.

The trial court properly denied Appellant's directed verdict motion because the State presented substantial circumstantial evidence to allow a reasonable juror to find him guilty beyond a reasonable doubt.

II.

The trial court properly allowed the following evidence: testimony by Shelby Bradt that Tramaine Hurell was not the suspect in the video, testimony by Detective Weaver regarding his showing Appellant a photograph of the suspect in a particular sweatshirt, and photographs and testimony about red and black shoes, because it was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. (This combines Appellant's Issues II, IV, and V.)

III.

The trial court did not abuse its discretion by declining to grant a mistrial under the circumstances of Appellant's case because the challenged testimony by Appellant's sister did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole.

STATEMENT OF THE CASE

A Dorchester County Grand Jury indicted Appellant for attempted murder, armed robbery, and kidnapping. (R. *Indictments). On February 8–10, 2016, Appellant proceeded to a trial before the Honorable Edgar W. Dickson and a jury. John Loy, Esquire, represented Appellant, and Assistant Solicitors Glenn Justis and Kyle Ward represented the State. The jury found Appellant guilty of all charges, and Judge Dickson sentenced him to thirty years' imprisonment for each charge, to be served concurrently. (Tr. 366).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On April 23, 2014, Mary Pecorora (Victim) was working at the Kangaroo gas station in the early morning hours when someone entered the store wearing a mask and carrying a bat. (Tr. 52, line 10–Tr. 53, line 17). He threatened to cut her throat and then he hit her in the head with the bat before grabbing her by the neck and dragging her to the cash register. (Tr. 53, line 20–Tr. 54, line 5). She opened the register upon his command, and he grabbed the money, hopped over the counter, and took off out the door. (Tr. 54, lines 9–15). Victim described the assailant as Afro-American, slender, five feet, ten inches to five feet, eleven inches tall, and wearing a ski mask, bandana, hooded jacket, gloves, and red shoes. (Tr. 54, line 16–Tr. 55, line 2). Following the attack, she called 911 and EMS and the police came to the scene. (Tr. 55, lines 3–25). She did not have much of an opportunity to speak to the police because EMS was attending to her medical needs and she was subsequently transported to MUSC for several days of treatment, including surgery. (Tr. 56, lines 1–16).

Officer Bernard Nelson of the Summerville Police Department responded to the crime scene, gathered information from Victim, and relayed a description of the suspect to all units. (Tr. 63, line 17–Tr. 65, line 10). He took photos at the scene and viewed the surveillance video to gather a better description of the suspect. (Tr. 65, lines 11–12; Tr. 67, lines 13–21). The description he provided to the other units was: "black male subject wearing a light hoodie with the multi-colored graphic designs on the front. Bright lime green hoodie, black pants, red shoes, black gloves, dark colored bandana over his face. He was a medium build and had a husky voice carrying a baseball bat." (Tr. 68, line 22–Tr. 69, line 1). The solicitor showed Officer Nelson State's Exhibit #18, a screenshot from the video of the suspect jumping over the counter, and Nelson verified that he described the shoes as red. (Tr. 68, lines 3–4; Tr. 69, lines 2–4).

Officer Hobie Williams, also of the Summerville Police Department, responded with his K-9 to the scene of the crime and his K-9 was able to track from the Kangaroo to the Somerset Apartments. (Tr. 91, line 19–Tr. 94, line 23). Officers were unable to continue the track at that point because they did not have available officers to set up a perimeter. (Tr. 95, lines 2–7). Instead, he and another officer searched for evidence on the path between the Kangaroo and the Somerset Apartments. (Tr. 95, lines 8–15). At Building G, they saw a white male smoking on the upper level and decided to talk to him. (Tr. 95, lines 15–19). He reported to the officers that he had seen a black male with a bat running to the apartment below his, G-4. (Tr. 96, line 18–Tr. 97, line 1). Officer Williams saw a dollar bill lying on the ground inside the breezeway of the balcony. (Tr. 97, lines 5–6; Tr. 98, lines 1–8). He noted the bill was dry even though the area all around was wet, and the bill also had blood on it. (Tr. 98, lines 9–14). He collected the dollar bill with gloves and secured it in an evidence bag. (Tr. 102, lines 6–22). Officer Williams then talked to Tashima Jones, Appellant's sister and the occupant of the apartment, who allowed him to come in and search. (Tr. 99, lines 4–21). Traquan Hurell, one of Appellant's brothers, was also in the apartment. (Tr. 99, lines 22–25).

Lucas Hartman, the man who lived above apartment G-4, testified he was sitting on his balcony on April 23, 2014, around 1:30 to 2:00 a.m. when he saw a man wearing black clothes and carrying a baseball bat and a backpack jump over the balcony below and heard the door open. (Tr. 112, line 3–Tr. 113, line 20). He then witnessed the man come back out, jump over the balcony, and drive off in a white vehicle, possibly a Mustang, and then come back and do the same thing again. (Tr. 113, line 19–Tr. 114, line 1).

Detective Michael Weaver of the Summerville Police Department got involved in the case on April 23, 2014, and obtained the officers' reports. (Tr. 140, line 22–Tr. 141, line 22).

He used DMV records to find out who lived at apartment G-4 and found that in addition to Jones, Traquan Hurell and Appellant were listed in the records. (Tr. 142, lines 2–17). He then obtained photo lineups from SLED of Traquan and Appellant. (Tr. 143, lines 6–11). Based on Hartman's statement that he heard someone going in and out of the apartment below, Det. Weaver obtained a search warrant for apartment G-4, obtained a key from the apartment manager, and searched the apartment while no one was home, finding nothing of evidentiary value. (Tr. 144, lines 1–23). His findings included two pairs of red shoes, but when he discovered they did not match the ones in the surveillance video, he returned them. (Tr. 144, line 23–Tr. 145, line 8). After returning the key to the apartment manager, he noticed a car was parked in front of G-4, so he knocked on the door and found Jana Hurell, Appellant's mother, there. Appellant was also at the apartment at the time. (Tr. 147, lines 3–7). When the solicitor asked Det. Weaver whether he showed either Ms. Hurell or Appellant any photographs, and he said that he did, defense counsel told the trial court he had a matter of law to take up. (Tr. 147, lines 8–13). The solicitor proffered what he was going to ask, which was what photograph he showed Appellant, and Det. Weaver described the photograph as one taken from behind the cash register during the incident, which shows the bright green sweatshirt the suspect was wearing. (Tr. 148, lines 2–15). He showed it to Appellant to see if he recognized the shirt and testified that Appellant "laughed and said who would wear something like that during this?" (Tr. 148, lines 20–22). Defense counsel objected that the above comment "simply attempts to show that if, in fact, he laughed in the face of this bloody picture[] and stuff, attempts to paints him as cold-hearted or villainous." (Tr. 150, lines 3–5). Specifically, his objection was based on relevance and prejudice. (Tr. 150, line 19–Tr. 152, line 2). The trial judge stated that he thought Appellant's comment was humorous and seemed to show he was not worried about it, not that he

was being callously indifferent. (Tr. 152, lines 18–20; Tr. 156, lines 2–5). He ruled that he would allow the State to ask the question. (Tr. 156, lines 6–8).

Det. Weaver testified he showed Victim each of the three lineups that contained photos of the three Hurell brothers. She identified Tramaine as someone who had been at the gas station that night and said he was a regular customer. (Tr. 161, line 4–Tr. 162, line 7). Det. Weaver testified that he spoke to Tramaine during the investigation and that he was tall and skinny and had a high-pitched voice that did not sound like the suspect in the video. (Tr. 168, lines 2–12). He testified part of his investigation involved looking on Facebook, where he discovered a photo of Appellant wearing shoes that looked similar to the ones pictured in the video of the crime. (Tr. 163, line 19–Tr. 164, line 25).

Next, the State proposed calling Shelby Bradt to the stand, to which defense counsel objected. (Tr. 202, line 3–Tr. 203, line 3). Specifically, he objected to her giving her opinion after watching the video that it was not Tramaine, the Hurell brother she dated, in the video. (Tr. 204, line 3–Tr. 205, line 25). He argued it would confuse the jury, was not relevant, and was more prejudicial than probative. (Tr. 206, line 1–13). The trial judge noted that because the apartment was a place where any of the three brothers could have been living, and because it was a circumstantial evidence case, the State could show evidence to try to prove who in the apartment would not be the suspect. (Tr. 207, lines 1–5). For those reasons, and because testimony had already been provided that Tramaine was taller and had a higher voice than the suspect, the trial judge allowed Bradt to testify. (Tr. 207, lines 5–11).

Bradt then testified that she dated Tramaine for three or four months, including during April 2014, and had met Appellant four or five times. (Tr. 209, lines 5–19). She identified a family photo taken at Traquan's graduation that included all three brothers. (Tr. 210, lines 1–

10). The solicitor showed her a video clip and asked if she recognized the individual in the video; she did not and said it did not look or sound like Tramaine. (Tr. 211, lines 6–14).

Next, Tashima Jones, Appellant's sister who lived in apartment G-4, testified. (Tr. 212, lines 10–17). She recalled being awoken by a bang on the door by police, who reported to her that a robbery had just taken place at the nearby Kangaroo and asked if they could come in. (Tr. 212, line 20–Tr. 213, line 3). They asked her who else was home and she answered that her son and brother (Traquan) were home, and she allowed the officers to come in and search. (Tr. 213, lines 6–15). When asked where Appellant was living at the time, she reported that he stayed at both his girlfriend's and his mother's house and often came to Jones's house but did not stay there. (Tr. 214, line 13–Tr. 215, line 1). When the State asked whether she was aware Appellant listed her address as his with the DMV, she answered, "Prior to him getting out from serving some time, yes, I am." (Tr. 217, lines 17–22). Defense counsel told the trial judge he had a matter of law to discuss and the judge excused the jury. (Tr. 217, line 25–Tr. 218, line 7). Defense counsel moved for a mistrial due to Jones's response being a comment on a prior conviction that was clearly prejudicial to Appellant. (Tr. 218, lines 9–20). The solicitor was quick to point out he simply asked if she was aware he was using her address and in no way intended to elicit that response. (Tr. 218, line 22–Tr. 219, line 2). Before defense counsel argued his motion, he asked for time to confer with Appellant, and after a discussion that lasted over thirty minutes, defense counsel reported to the court that he would be withdrawing the motion for mistrial while reserving his right to renew later if it became necessary. (Tr. 219, line 20–Tr. 221, line 17). Defense counsel then went over everything he and Appellant talked about, clarifying with Appellant along the way, and concluded by saying, "Once we put it back and the

jury starts going, it gets waived, it's over. We don't get to renew it down the road." (Tr. 221, line 17–Tr. 223, line 15).

Traquan then testified that police visited him at his workplace in April 2014 to ask him questions about a picture of a man in a hoodie. (Tr. 231, line 22–Tr. 232, line 8). He claims he told them he did not recognize the person but did recognize the hoodie as having a picture of the Tasmanian Devil on the front and being made by Warner Brothers. (Tr. 232, lines 11–19). He testified he told police he did not own a hoodie like that. (Tr. 232, lines 19–20). He specifically denied telling police that was his hoodie and that he got it in the eighth grade and that it was in his closet recently. (Tr. 233, lines 1–6). At that point, the State recalled Det. Weaver, who testified that Traquan told him the sweatshirt was given to him by a friend when he was in the eighth grade. (Tr. 234, lines 2–24). He also pointed out that one could not tell from the side angle of the photo that the Tasmanian Devil was on the front of the sweatshirt. (Tr. 234, line 24–Tr. 235, line 2).

Sergeant Nick Santana then testified that he was with Det. Weaver when they spoke to Traquan and that he saw Weaver show him a side photograph of the suspect and ask if he recognized the clothing. (Tr. 237, line 14–Tr. 238, line 5). He testified that Traquan told them he did recognize the sweatshirt as one that was given to him in the eighth grade by a friend and reported that it should be in his closet. (Tr. 238, lines 6–10). Derek Cheek, an investigator with the solicitor's office, then identified a photograph from Appellant's Facebook page showing Appellant wearing red and black shoes with a white mark, possibly a Nike swoosh. (Tr. 240, line 13–Tr. 241, line 23). He testified the suspect in the surveillance photo was wearing red and black shoes and identified those shoes in a still shot from the video. (Tr. 241, line 23–Tr. 242, line 8). He then identified a photograph of a shoe print left behind at the incident location in the

victim's blood. (Tr. 242, lines 9–12). He then began searching on the internet for those shoes and found some that were red and black with a white Nike swoosh and that had a similar tread pattern to the print. (Tr. 242, lines 13–23). When the State tried to move the photos from the internet into evidence, defense counsel objected claiming no foundation had been laid and that it was not relevant because no shoes had been recovered. (Tr. 244, lines 2–13). The trial court overruled the objection because the witness indicated the photos were a fair and accurate representation. (Tr. 244, lines 14–16).

Samuel Stewart, a forensic scientist for SLED, was then qualified as an expert in DNA analysis. (Tr. 246, line17–Tr. 258, line 8). He testified he received a swab from the dollar bill officers found at the apartment and a buccal swab from the victim, both in sealed bags. (Tr. 259, lines 19–25). He analyzed and compared the two samples, and the results of the comparison showed that Item 1, the swab from the dollar bill, matched Item 2, the DNA profile of Victim. (Tr. 261, line 7–Tr. 262, line 5).

The State rested, and defense counsel moved for a directed verdict, relying on *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011). (Tr. 269–77). He argued all the evidence had shown was that Appellant's family used Tracfones and someone at or near his sister's apartment was arguably involved in the crime. (Tr. 277, lines 14–18). He claimed there was no DNA and no circumstantial evidence to support a verdict of guilt. (Tr. 277, lines 19–25). The State relied on the more recent *State v. Bennett*[1] case, in which the Supreme Court clarified the proper standard of review for a directed verdict circumstantial evidence case: whether substantial evidence exists from which a jury could reasonably infer guilt. (Tr. 278, lines 5–14). The solicitor listed the evidence that existed: a physical description of the suspect given by the

[1] 415 S.C. 232, 781 S.E.2d 352 (2016).

victim; the testimony that Appellant has access to the apartment, which would give him access to the sweatshirt based on Traquan's statement to police that it was in his closet; he had access to a white car similar to the one described by Hartman; his cellphone was pinging off towers in that area, which matches the eyewitness's account that a man with a bat went in and out of apartment G-4; he had red shoes similar to the ones in the surveillance footage and with a similar tread pattern to the bloody print. (Tr. 278, line 15–Tr. 279, line 21). Defense counsel then argued that the evidence the State listed merely raised a suspicion and that a directed verdict should have been granted. (Tr. 280, lines 18–21). The trial judge noted that the line in *Bennett* that gave him the most concern was that the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt. (Tr. 281, lines 6–10). The trial judge then went through the evidence again and determined "there is the existence of evidence that a reasonable juror could believe if they believe every[y] step in the chain of circumstantial evidence that the State has presented" and denied the motion. (Tr. 281, line 6–282, line 12).

After the defense rested, each side made closing arguments, and the trial judge charged the jury on the presumption of innocence, reasonable doubt, the types of evidence, believability of witnesses, experts, and the element of the crimes. (Tr. 291–331). After the jury began deliberations, it sent a note to the trial judge saying it would like to review the sister's testimony, specifically asking, "Did she say when he got out he sometimes stayed with her?" (Tr. 332, line 9–Tr. 333, line 1). Defense counsel attempted to renew his motion for a mistrial due to the note indicating to him that the jury was deliberating about this topic. (Tr. 333, lines 1–18). Another note came out after that one that said to please disregard the last request. (Tr. 333, line 22–Tr. 334, line 2). The State argued it was improper to try to guess what the jury is deliberating,

especially because the second note came immediately following the first. (Tr. 334, lines 1–14). The trial judge took a recess to consider the issue. (Tr. 335, lines 2–7). The trial judge came back and reminded defense counsel he had spoken to Appellant and Appellant knowingly and intelligently waived his mistrial motion after hearing the sister's testimony. (Tr. 335, lines 10–17). He then stated that he was initially concerned when the jury sent the first note wanting more information about the sister's testimony and would have reconsidered a motion for mistrial if that had been a question the court had to resolve. (Tr. 335, lines 18–23). However, because the jury immediately asked the court to disregard the question, he was taking the position that the jury was also disregarding the question and denied the motion. (Tr. 335, line 23–Tr. 336, line 11).

Ultimately the jury found Appellant guilty of all charges, and the trial judge sentenced him to thirty years' imprisonment for each charge, to be served concurrently. (Tr. 366).

ARGUMENT

I.

The trial court properly denied Appellant's directed verdict motion because the State presented substantial circumstantial evidence to allow a reasonable juror to find him guilty beyond a reasonable doubt.

Appellant argues the trial court erred in denying Appellant's directed verdict motion, claiming the State did not present substantial circumstantial evidence placing him at the scene of the crime. Additionally, he argues the evidence only raised a suspicion of his guilt and that the trial judge incorrectly reasoned that the directed verdict standard had changed. On the contrary, the State did present substantial circumstantial evidence, which established more than merely a suspicion of guilt, to submit the case to the jury. Additionally, the trial judge did not opine that the directed verdict standard had changed, nor did he use an incorrect standard. Thus, this Court should affirm the trial court's denial of Appellant's directed verdict motion.

It is axiomatic that in ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not its weight. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *Id.* "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." *Id.* at 292–93, 625 S.E.2d at 648. Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. *State v. Robinson*, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing *Jackson v. Virginia*, 443 U.S. 307

(1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 807 (2016).

Appellant argues that the trial judge acknowledged conflicting evidence existed in regard to the shirt worn by the suspect in the surveillance video. However, because the evidence and all reasonable inferences are looked at in the light most favorable to the State, the fact that there was conflicting testimony is of no moment.

Inexplicably, Appellant argues the trial judge thought *Bennett* changed the standard of review for a directed verdict. Thus, he argues the trial judge used an incorrect standard and should have instead considered the "substantial circumstantial evidence" standard from *Bostick*, *Schrock*,[2] and *Mitchell*[3]. On the contrary, the standard in *Bostick*, *Shrock*, and *Mitchell* is not incompatible with the Supreme Court's holding in *Bennett*, and all three cases are still good law. As the Supreme Court pointed out in *State v. Pearson*[4], which came out after *Bennett*, the holdings in cases such as *Bostick* and *Mitchell* are "limited to their peculiar facts" because each inquiry is necessarily fact-intensive. In any case, *Bennett* did nothing to change the "substantial circumstantial evidence" standard. It simply clarified what has been the law in South Carolina going all the way back to *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955), which is "when ruling on a directed verdict motion, the trial court views the evidence in the light most favorable

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[2] *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984).
[3] *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000).
[4] 415 S.C. 463, 474 n.5, 783 S.E.2d 802, 808 n.5 (2016).

to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *Bennett*, 415 S.C. at 236–37, 781 S.E.2d at 354 (citing *Littlejohn*, 228 S.C. at 329, 89 S.E.2d at 926). It then furthered clarified, "This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *Id.* at 237, 781 S.E.2d at 354. Thus, Appellant's argument that the trial judge "committed an error of law by applying the wrong directed verdict standard" is preposterous, as is his insinuation that if the trial judge had used the correct "substantial circumstantial evidence" standard, the State would have failed to meet it. Because the trial judge did use the correct standard, and because the State presented substantial circumstantial evidence from which a reasonable juror could find Appellant guilty beyond a reasonable doubt, this Court should affirm the denial of the directed verdict motion.

The substantial circumstantial evidence presented by the State in this case includes (1) the video which shows the suspect committing the crimes; (2) a physical description given by the victim; (3) an independent witness who saw a person matching the description given by the victim, including carrying a bat, going in and out of the apartment rented by Appellant's sister and visited on a regular basis by him (which was also listed as his address with the DMV); (4) the fact that Appellant had access to a white car owned by his mother that resembled the car described by witness Hartman; (5) a dollar bill with blood on it that matched the victim's DNA, which was found in the area where the man was seen; (6) phone records of Appellant's phone that shows pinging from towers that support leaving and coming back to the apartment; (7)

testimony that the sweatshirt seen on the suspect was in the apartment; and (8) red shoes in Appellant's Facebook photo that are similar to the ones in the surveillance video with similar tread pattern to the photo officers had of the bloody print. The trial judge correctly found this was substantial circumstantial evidence that was sufficient to survive the directed verdict stage and submit the case to the jury for its resolution. That finding should be affirmed.

II.

The trial court properly allowed the following evidence: testimony by Shelby Bradt that Tramaine Hurell was not the suspect in the video, testimony by Detective Weaver regarding his showing Appellant a photograph of the suspect in a particular sweatshirt, and photographs and testimony about red and black shoes, because it was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice.

Admission of evidence in sound discretion of trial judge

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. 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." *State v. Brown*, 401 S.C. 82, 736 S.E.2d 263 (2012). The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion. *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Aleksey*, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Evidence is unfairly prejudicial if it has an undue

tendency to suggest a decision made on an improper basis, such as an emotional one. *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (citations and internal quotation marks omitted).

Shelby Bradt testimony was properly admitted

Appellant argues the trial court erred by allowing Shelby Bradt, the former girlfriend of Appellant's brother Tramaine, to testify it was not Tramaine in the surveillance video, claiming such testimony was confusing and irrelevant. On the contrary, the police collected evidence that showed that the suspect went into the apartment where Tramaine's sister lived and that the suspect was a black male, so it was logical to believe that any black male who had a connection to that apartment could have been the suspect. Therefore, it was relevant to the State's case to eliminate alternative suspects in order to prove Appellant committed the crime. Whether Appellant was pursuing a defense of third party guilt is of no moment. The State still had the right to introduce relevant evidence to show Appellant's guilt. Thus, the trial court properly allowed this testimony and this Court should affirm.

When the State proposed calling Shelby Bradt to the stand, defense counsel objected. (Tr. 202, line 3–Tr. 203, line 3). Specifically, he objected to her giving her opinion after watching the video that it was not Tramaine, the Hurell brother she dated, in the video. (Tr. 204, line 3–Tr. 205, line 25). He mentioned that this was a retrial and that this testimony was not offered in the first trial. (Tr. 204, lines 19–20). He argued it would confuse the jury, was not

relevant, and was more prejudicial than probative. (Tr. 206, line 1–13). The trial judge noted that because the apartment was a place where any of the three brothers could have been living, and because it was a circumstantial evidence case, the State could show evidence to try to prove who in the apartment would not be the suspect. (Tr. 207, lines 1–5). He also pointed out that testimony had already been provided that Tramaine was taller and had a higher voice than the suspect, which indicated he did not find the testimony more prejudicial than probative. (Tr. 207, lines 5–11).

This evidence would not have confused the jury or distracted from its function of deciding whether the State had produced sufficient evidence to prove Appellant's guilt beyond a reasonable doubt. On the contrary, the jury had already heard Det. Weaver testify that he spoke to Tramaine during the investigation and that he was tall and skinny and had a high-pitched voice that did not sound like the suspect in the video. (Tr. 168, lines 2–12). It is not reasonable to think that hearing essentially the same type of testimony again would confuse the jury. Furthermore, the fact that Bradt testified she knew Appellant, yet also testified she did not know the person in the video, was actually beneficial to Appellant and further diminished any possible prejudice.

Additionally, even of this Court finds the evidence was admitted in error, the fact that unobjected-to testimony was already presented makes any error harmless. *See State v. Johnson*, 298 S.C. 496, 499, 381S.E.2d 732, 733 (1989) (any error in admission or denial of evidence cumulative to other unobjected-to evidence is harmless).

Detective Weaver's testimony was properly admitted

Appellant argues the trial court erred in allowing Detective Weaver to testify that Appellant laughed when shown a photograph of the sweatshirt the suspect was wearing in the

surveillance video still shot. Appellant claims the suspect was holding the victim in the photo and, thus, it painted Appellant as "cold-hearted and villainous." On the contrary, Det. Weaver's testimony that Appellant "laughed and said who would wear something like that during this" when he was shown the photo and asked if he recognized the shirt did not indicate any bad traits of character. The trial court correctly allowed the testimony and this Court should affirm.

As soon as Det. Weaver was asked about photos he had shown Appellant, defense counsel objected and the jury was excused. The State then proffered its next questions, including what Appellant's response was to the photo of the suspect wearing the sweatshirt in the still shot. Det. Weaver answered, "He laughed and said who would wear something like that during this?" (Tr. 148, lines 10–22). He then said he asked Appellant for basic information and Appellant declined to give any. Defense counsel then referred to the officer's report, which stated Appellant told him he was not giving him anything but then the officer reapproached him with the photo and asked him about it, at which time he laughed and made the challenged comment. Defense counsel argued this was an involuntary conversation because Appellant had said he had nothing for the officer. He also argued the comment about the photo was not probative of anything because Appellant did not say he wore that shirt, he had seen the shirt, or that anyone he knew had a shirt like that, but instead was prejudicial because it "simply attempts to show that if, in fact, he laughed in the face of this bloody picture[] and stuff, attempts to paint him as cold-hearted or villainous."[5] (Tr. 149, line 3–Tr. 150, line 9). The trial judge noted that while he understood defense counsel's take on the comment, he took it to mean Appellant seemed like someone who did not have to worry about it rather than someone who was being callously

[5] Notably, the still shot at issue does not show any blood.

indifferent. This demonstrates that there were definitely other ways the comment could have been interpreted, so Appellant's prejudice argument fails.

Photographs and testimony about shoes were properly admitted

Appellant argues the trial court erred in admitting photographs and testimony regarding red and black shoes, claiming no foundation was established. Furthermore, he argued it was not relevant because no shoes were linked to the crime and, thus, invited confusing speculation. On the contrary, the evidence was relevant because surveillance video captured the red and black shoes the suspect wore, law enforcement discovered similar shoes on Appellant's Facebook page, and a bloody shoe print was found near the scene that was similar to the shoes found on an Internet website that seemed to match the ones Appellant wore in his Facebook photograph. Appellant's challenges to the evidence go to its weight and not its admissibility. Thus, the trial judge properly admitted the photographs and the testimony, and this Court should affirm.

III.

The trial court did not abuse its discretion by declining to grant a mistrial under the circumstances of Appellant's case because the challenged testimony by Appellant's sister was competent evidence that was admitted without objection after Appellant initially moved for a mistrial contemporaneous to the testimony and then withdrew that motion.

Appellant argues the trial court erred by refusing to declare a mistrial, claiming it was clear the jury was discussing the fact that his sister inadvertently told the jury he had been in prison, which meant the jury was impermissibly considering his prior record when trying to determine his guilt. On the contrary, there was nothing impermissible about the jury discussing what the sister testified to about his using her address "prior to him getting out from serving some time." That piece of testimony was admitted without objection after defense counsel initially moved for a mistrial and subsequently withdrew and waived that motion after conferring with his client. Thus, it was competent evidence and nothing unfair or impermissible occurred even if the jury considered it during deliberations. This Court should affirm the trial court's decision for this reason alone.

Even if this Court construes Appellant's motion for a mistrial as a valid challenge to the jury's deliberations, there are several other grounds on which the trial court should be affirmed. "The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Wilson*, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and internal quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." *Id.* at 585-86, 698 S.E.2d at 865. "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." *Id.*

at 586, 698 S.E.2d at 865 (citation and internal quotation marks omitted). "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *Id.* at 586, 698 S.E.2d at 865–66 (citation and internal quotation marks omitted). The trial court is in the best position to ascertain the potential prejudicial effect of any offending testimony and the Supreme Court favors the exercise of wide discretion of the circuit court in ruling on a motion for mistrial in each individual case. *State v. Jones*, 325 S.C. 310, 324, 479 S.E.2d 517, 524 (Ct. App. 1996).

Appellant cites *Green v. State*, 338 S.C. 428, 527 S.E.2d 98 (2000), to support his argument that sometimes the prejudice from the admission of improper prior criminal offenses cannot be cured even with a limiting instruction. Initially, the State notes Appellant did not ask for a curative instruction of any kind, so *Green*'s applicability is questionable. Appellant argues the sister's testimony conveyed to the jury that he had a prior criminal offense and had been incarcerated. He also argues the question from the jury indicated the jury wanted to listen to the sister's testimony again and inquire into his criminal record. Appellant's argument makes a number of unwarranted assumptions. First, although the sister's comment undoubtedly indicated Appellant had served time, the jury had no idea what he was serving time for and, thus, what his prior criminal offense was. Therefore, any argument Appellant makes that knowledge of a prior similar offense can logically lead a jury to find someone guilty of a similar crime is misplaced. If the jury does not know whether he was serving time for child support arrearage, forgery, or murder, it cannot possibly have found him guilty based on the likelihood that he committed a similar crime this time—when it did not know what crime he committed before. Second, Appellant's assumption that the jury's question somehow indicated it wanted to inquire into his criminal record is a stretch at best and disingenuous at worst. The note simply said the jury

would like to review the sister's testimony and then asked, "Did she say when he got out he sometimes stayed with her?" (Tr. 332, line 23–Tr. 333, line 1). The most logical explanation of the note meant the jury was interested in whether he actually stayed with her or just used her address. The question in no way exhibits any interest in what crime he was serving time for or in his criminal history in general. So, even if the jury had not immediately sent a note telling the judge to disregard its question, no mistrial was warranted in this situation.

Furthermore, in his general charge to the jury, the trial judge properly instructed the jury on its role, telling it that the presumption of innocence remains with the defendant until it has been stripped from him by evidence satisfying you of his guilt beyond a reasonable doubt. (Tr. 318, lines 17–25). The trial judge also cautioned the jury that its verdict could not be based on sympathy, passion, prejudice, emotion or any other consideration not in evidence in this case. (Tr. 328, line 22–24). Jurors are presumed to follow the trial court's instructions. *State v. Queen*, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). The jury was permitted to consider any competent evidence during its deliberations, and it presumably based its decision on whether the State presented evidence satisfying it of Appellant's guilt beyond a reasonable doubt. For all these reasons, no mistrial was warranted under the circumstances of this case. This Court should affirm.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 24, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY

Court of General Sessions
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2016-000275

THE STATE,

Respondent,

v.

TASHON EARL HURELL,

Appellant.

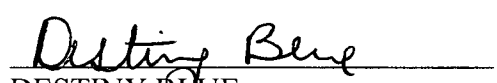
PROOF OF SERVICE

I, Destiny Blue, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

RECEIVED
AUG 24 2017
SC Court of Appeals

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 24th day of August, 2017.



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August 24, 2017

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RE: State v. Tashon Earl Hurell
Appellate Case No. 2016-000275

Dear Mr. Dudek,

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

RECEIVED
AUG 24 2017
SC Court of Appeals

JER/db
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division