STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2015-002664

THE STATE,

Respondent,

v.

JAMES MILLER,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

205 E. Main Street
Lexington Judicial Center
Lexington, SC 29072
(803)785-8352

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUES ON APPEAL

I.

The trial court properly denied Appellant's motion to suppress the drugs found in the motel room where: (1) the knock and talk that led to the occupants opening the door was based on a tip from a named individual and (2) the occupants gave consent to search.

II.

The trial court did not abuse its discretion by declining to grant a mistrial under the circumstances of Appellant's case because the challenged question by the State to Appellant did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole, and any prejudice that could have resulted from the question was eliminated through the issuance of a curative instruction to the jury.

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant for possession of altered pseudoephedrine and manufacturing methamphetamine. (R.404–07) On August 10–13, 2015, a suppression hearing was held, during which the Honorable Doyet A. Early, III, denied Appellant's motion to suppress. On November 2–5 and 12, 2015, Appellant proceeded to a trial before Judge Early and a jury. Ola Johnson, Esquire, represented Appellant, and Assistant Solicitors Lester M. Bell and Casey Rankin represented the State. The jury found Appellant guilty of both charges, and Judge Early sentenced him to ten years' imprisonment for the manufacturing charge and three years' imprisonment for the possession charge, to be served concurrently. (R. 372, 394).

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 January 8, 2014, the Cayce Department of Public Safety received a call from a man named Jason Carroll reporting a possible methamphetamine (meth) lab in room 126 of the Motel 6 on Knox Abbott Drive. (T. 12, lines 7–14; T. 13, lines 9–19; T. 17, lines 9–17). Officers Jonathan Garcia and Findlay Wihlidal responded to the motel and knocked on the door of room 126. (R. 17, lines 18–20; R. 145, lines 18–3; R. 175, lines 4–8). When the officers knocked, a man looked out from behind a curtain and then disappeared behind the curtain. (T. 18, lines 11–24; R. 146, lines 3–5; R. 175, lines 8–11.) Eventually someone opened the door, and Officer Garcia smelled a chemical odor coming from inside the room. (R. 146, lines 6–15; R. 175, lines 11–18). Officer Garcia asked the man who opened the door whether there was anything illegal in the room and he said, "[N]o, we have nothing in here illegal[;] you can come in and search." (R. 21, lines 14–17). The officers entered the room where there were five people, including a woman who kept going back and forth to the bathroom. (R. 21, lines 19–25; R. 147, lines 2–4; R. 175, lines 19–25). Officer Wihlidal told the woman to stop going into the bathroom. (R. 36, lines 13–23; R. 176, lines 1–2). The officers observed a coffee pot containing a clear substance that had a chemical smell and a white ice bucket with a bluish liquid that smelled. (R. 22, lines 1–5; R. 177, lines 2–6). They asked all occupants to exit the room for their own safety due to the strong chemical smells inside. (R. 177, lines 7–14). The police detained all the occupants while they obtained a search warrant for the motel room. (R. 53, lines 18–25; R. 153, line 15–R. 154, line 18).

Officer Wihlidal waited with the motel occupants outside the motel room near some soda machines. (R.1778, lines 15–24). Appellant spontaneously made a comment that he was a sought-after meth cook. (R. 178, lines 11–23). Officer William Dougall waited with Appellant

while the other officers secured a search warrant. (R. 155, lines 11–15). He had patted Appellant down when he put him in handcuffs, but he then noticed him making motions toward his waistband like he was "digging for something." (R. 155, lines 2–10; 18–25). Suspicious that Appellant could have a concealed weapon, Officer Dougall moved him away from the soda machine and frisked him again. (R. 156, lines 1–9). When he moved Appellant away from the machine, Officer Dougall noticed a wallet wedged between the soda machine and the wall where Appellant had been standing. (R. 156, lines 11–14). The wallet held an identification card with Appellant's name and photo and a folded-up coffee filter containing a white powder. (R. 156, line 23–R. 157, line 3). Sergeant Jimmy Gleaton collected the white powder as evidence and it was later tested and found to be pseudoephedrine. (R. 213, lines 2–25; R. 214, lines 1–24; R. 254, line 1–R. 258, line 2).

Appellant was arrested and charged with possession of altered pseudoephedrine and manufacturing methamphetamine. Judge Early held a suppression hearing August 10–13, 2015, during which defense counsel argued *State v. Counts*[1] and the South Carolina Constitution provide a higher level of privacy than the Federal Constitution, requiring reasonable suspicion in order to conduct a knock and talk. He argued that because the officers who responded to the call did not know the tipster's name and did not do any surveillance of the motel room before knocking, there was not enough to establish reasonable suspicion for the knock and talk. (R. 85–92). The State argued this situation was different from *Counts* because meth is a great public hazard and because it was not a "targeted residence" as in *Counts*. The State also pointed out that the tip was not anonymous but rather police had both the tipster's name and telephone number. Furthermore, the State argued that at the time of the incident, *Counts* had not been

[1] 413 S.C. 153, 776 S.E.2d 59 (2015).

decided, so even if the case law now indicates more is needed before a knock and talk, at the time this method of investigation was allowed. Finally, the State pointed out that consent was given before the officers entered. (R. 97–104). The trial judge took the arguments under advisement, and the next morning he denied the motion to suppress. (R. 111).

On November 2–5, 2015, Appellant proceeded to trial. Officer Garcia testified he knocked on the door of room 126, a man opened and shut the curtains, one of the occupants opened the door, and Garcia smelled a chemical smell coming from the room. (R. 146, lines 2–15). Appellant objected to this testimony based on his previous argument and motion, and the trial judge overruled the objection. (R. 146, lines 16–18). Officer Dougall described waiting with Appellant near the soda machine, seeing Appellant digging in his waistband, and finding a wallet wedged behind where Appellant had been standing. (R. 155, line 4–R. 156, line 17). When the State asked what the wallet had in it, defense counsel objected based on a previous argument and was overruled. (R. 156, lines 18–22). Officer Dougall testified the wallet held an identification card with Appellant's name and photo and a folded-up coffee filter containing a white powder. (R. 156, line 23–R. 157, line 3).

Officer Wihlidal testified regarding responding to the motel room, entering the room, smelling a strong odor like nail polish remover, asking a woman to stop going into the bathroom, and seeing blue liquid in an ice bucket. He further testified that Appellant told him he was a sought-after meth cook, to which defense counsel objected and was overruled. (R. 175–178).

Sgt. Gleaton testified he had responded to 200 or more meth scenes in his job. (R. 185, lines 6–12). He arrived at the Motel 6 after Officers Garcia and Wihlidal had cleared the room. (R. 189, lines 3–23). As soon as he got out of his vehicle near room 126, he smelled a strong chemical odor. (R. 191, lines 6–13). The smell became stronger at the door. (R. 191, line 13–R.

192. line 9). He saw items in the room consistent with meth labs, so he obtained a search warrant. (R. 193, lines 20–22; R. 194, lines 11–15; R. 199, lines 3–11). In searching the room, he discovered a white bucket containing a blue liquid, a coffee pot inside a Walmart bag that smelled like nail polish [remover], Liquid Fire (sulfuric acid), Coleman camp fuel, tubing, a funnel, coffee filters, cold packs, muriatic acid, lye, a lithium battery, and several two-liter bottles. (R. 200–209). He also found a bag containing another of Appellant's identification cards. (R. 210, lines 3–23). He recounted Officer Dougall bringing him a wallet with a coffee filter and Appellant's identification inside. (R. 212, lines 1–22). The coffee filter matched the ones he found in the motel room and contained a suspicious substance. (R. 213, lines 7–23). He secured the substance as evidence, put it in a bag, took it to police headquarters, and later sealed it in a BEST kit. (R. 214, line 2–R. 216, line 24).

Willie Smith then testified as a SLED chemical analyst. (R. 247, line 13–Tr. 169, line 7). He testified and verified through a report that the substance in the BEST kit was .91 grams of ephedrine/pseudoephedrine. (R. 257, line 12–R. 258, line 2). Samuel Gunter, a lieutenant over the narcotics unit of the Lexington County Sheriff's Office, testified over Appellant's objection as an expert in clandestine meth labs. (R. 261, lines 6–23; R. 268, line 15–R. 266, line 18). He testified that meth labs can explode, are carcinogenic, and can kill people. (R. 267, lines 13–17). He also explained that the components used in meth labs should not be seized and put into evidence but rather must be made safe and disposed of properly due to safety regulations. (R. 268, line 19–R. 269, line 7). He explained the "shake-and-bake" process of making meth and how pseudoephedrine, starter fluid, acetone (finger nail polish remover), Coleman fuel, cold packs, lye, lithium batteries, soda bottles, tubing, and coffee filters are part of the process. (R. 271–283).

The State rested, defense counsel moved for a directed verdict, and the trial judge denied the motion. (R. 299, line 16– R. 300, line 2). After the trial judge went over Appellant's prior convictions, which could be used to impeach, Appellant decided to testify. (R. 300–303). Appellant claimed he was at the Motel 6 to check on a friend and just happened to be there when the police came. He denied the wallet was his and denied making a statement that he was a meth cook. (R. 309–311). When the State asked him about previously buying pseudoephedrine "60-plus times," defense counsel objected and moved for a mistrial. (R. 320, lines 11–19). The State made clear it was not trying to introduce pseudoephedrine logs and argued the question was relevant because Appellant said he did not know about making meth. (R. 322, line 2–R. 323, R. 325, line 5). The trial judge *sua sponte* decided he would give a curative instruction to the jury to disregard the question and would strike it from the record. (R. 325, lines 6–9). Defense counsel argued the error could not be cured and again moved for a mistrial. (R. 325, lines 15–17). The trial judge decided he would give the curative instruction and told defense counsel he could re-raise his motion for a mistrial later. (R. 326, lines 18–21).

After both parties presented closing arguments, the trial judge charged the jury, including a charge on mere presence. (R. 353–365). After defense counsel noted the trial judge did not charge actual and constructive possession, the judge recalled the jury, gave a complete possession charge, and recharged mere presence. (R. 366–368). Appellant renewed his objection to the curative instruction, his motion for a mistrial, and his motion for a directed verdict. The trial judge stood by his previous rulings and denied Appellant's motion for a directed verdict. (R. 371). The jury found Appellant guilty of both charges, and defense counsel moved for a new trial, which the judge denied. (R. 372–379). Judge Early sentenced Appellant

to ten years' imprisonment for the manufacturing charge and three years' imprisonment for the possession charge, to be served concurrently. (R. 372, 394).

ARGUMENT

I.

The trial court properly denied Appellant's motion to suppress the drugs found in the motel room where: (1) the knock and talk that led to the occupants opening the door was based on a tip from a named individual and (2) the occupants gave consent to search.

Appellant argues the trial judge erred in denying his motion to suppress the drugs found at the scene because the discovery of the drugs via the search and seizure of the motel room violated the Fourth Amendment where the tip given to police was uncorroborated and unverified and thus failed to justify the police officers' knock and talk and subsequent intrusion onto the premises. On the contrary, the trial judge's ruling was proper because (1) the knock and talk that led to the occupants opening the door was based on a tip from a named individual and (2) the occupants gave consent to search. This Court should affirm.

In criminal cases, appellate courts sit to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court reviews the circuit court judge's determinations under a clear error standard and will affirm the circuit court judge's determinations if they are supported by any evidence. *State v. Provet*, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013); *see State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). However, the appellate court is not barred from conducting its own review of the record to determine whether the circuit court judge's decision in a search and seizure case is supported by the evidence. *State v. Cheeks*, 400 S.C. 329, 334, 733 S.E.2d 611, 614 (Ct. App. 2012); *see Narcisco v. State*, 397 S.C. 24, 28, 723 S.E.2d 369, 371 (2012) ("[T]his Court is not

barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence.").

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). As a result, **only** unreasonable searches and seizures are constitutionally prohibited. *State v. Foster*, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); *see Maryland v. Buie*, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

For purposes of the Fourth Amendment, a search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Likewise, a seizure occurs when there is some meaningful interference with an individual's possessory interest in property or with the individual's freedom of movement. *Id.*; *see Terry v. Ohio*, 392 U.S. 1, 16 n.16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

In cases involving Fourth Amendment issues, the critical inquiry is "whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). "That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id.* Through its express language, the Fourth Amendment specifically delineates persons,

houses, papers, and effects as constitutionally-protected areas. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

Initially, the State submits Appellant does not have a legitimate expectation of privacy to challenge the search of the motel room under the Fourth Amendment. In *State v. Missouri*, 361 S.C. 107, 115, 603 S.E.2d 594, 597 (2004), our Supreme Court determined Missouri had an expectation of privacy in a friend's home because he frequently visited, occasionally spent the night, had a key, and kept a change of clothes there. The Court noted that the United States Supreme Court had recently held that defendants did not have a reasonable expectation of privacy in the home of another when the nature of their visit was "purely commercial, the visit was short, and there was no previous connection between the defendants and the lessee." *Id.* at 114, 603 S.E.2d at 597 (citing *Minnesota v. Carter,* 525 U.S. 83, 90 (1998)). Our Court explained that because the defendants in *Minnesota v. Carter* were only "essentially present for a business transaction and were only in the home a matter of hours," the U.S. Supreme Court held the defendants were not entitled to Fourth Amendment protection. *Id.* (quoting *Minnesota v. Carter,* 525 U.S. at 90). Appellant cited *Minnesota v. Olson*, 495 U.S. 91 (1990), in his Motion to Suppress for the proposition that "[t]he defendant in this case had a[n] expectation of privacy and has standing to challenge the search of Room 126 . . . ." (R. 400 (Motion to Suppress Search and Seizure p.1)). However, a close look at *Olson* reveals much more is needed to establish an expectation of privacy than what was present here. Olson's right was based on his being an overnight guest and the Court specifically focused on people being "at our most vulnerable when we are asleep." *Olson*, 495 U.S. at 98–99. This simply does not apply here, where Appellant had by his own account merely stopped by the motel room to check on his friend; he was not an

overnight guest or a guest of the motel at all. With no expectation of privacy there could not have been a Fourth Amendment violation.

Assuming he did have an expectation of privacy, Appellant argues "no reasonable suspicion or probable case" existed for the knock and talk "because the tip that led officers to the scene was uncorroborated and insufficiently detailed in light of the *Counts*[2] case where the Court held that the detailed tips supported the knock and talk and entry into the dwelling." (App.Br. 6–7). Appellant misconstrues the Court's holding in *Counts*. Initially, *Counts* is based on a knock and talk at a private residence, not a motel. Throughout the opinion, the Court emphasizes the privacy interest in "one's home," "a targeted residence," and "a private residence." 413 S.C. at 172, 776 S.E.2d at 69–70. Here, the knock and talk took place at a motel, where the outside doors open to a public area where anyone can approach. Thus, in the context of a knock and talk, the expectation of privacy for a motel guest, and surely for someone just visiting a motel guest, is severely diminished in comparison to that of a private homeowner. *But see Goins v. State*, 397 S.C. 568, 574, 726 S.E.2d 1, 3–4 (2012) (finding that, in the context of a general search, "[t]he Fourth Amendment generally protects a motel guest from unwarranted intrusion where police have entered a guest's room under no other authority than the consent of an employee"). Furthermore, even if the rule in *Counts* did apply to a visitor of a motel guest, it was a new rule that was not in effect at the time of the incident at issue here. *See Davis v. United States*, 564 U.S. 229, 231 (2011) (holding when police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply). That new rule as articulated by our Supreme Court is "that law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the

[2] *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015).

door." *Counts*, 413 S.C. at 172, 776 S.E.2d at 70. While the *Counts* Court certainly looked at the details that led law enforcement to satisfy this new reasonable suspicion requirement, it also clearly noted that "the United States Supreme Court ha[d] recently reaffirmed the 'knock and talk' technique as constitutionally permissible" and that it had found that police have "the investigative authority to approach the front door of [a] home in order to investigate the anonymous tip." *Counts*, 413 S.C. at 164–66, 776 S.E.2d at 66–70 (quoting *State v. Wright*, 391 S.C. 436, 445, 706 S.E.2d 324, 328 (2011)). The officers who approached the motel using the knock and talk technique here were operating under these U.S. Supreme Court parameters. Thus, the exclusionary rule would not apply even if this Court concluded their actions violated the new rule in *Counts*.

Appellant also cites *Florida v. Jardines*, 133 S. Ct. 1409 (2013), to support his argument that an unverified tip is not sufficient to conduct a knock and talk. However, *Jardines*'s facts are entirely different from this case. In *Jardines*, police had an unverified tip that someone was growing marijuana inside his home. Officers took a drug-sniffing dog onto Jardines' porch. The Court held this was an unreasonable search of the curtilage of the house. Here, the tipster reported a suspected meth lab in a motel, where police only had to walk on the publicly accessible walkway outside the motel to knock, rather than actually entering the curtilage of someone's private residence. Importantly, meth labs are extremely dangerous and can cause explosions whereas the marijuana plants in *Jardines* posed no immediate danger to society. Clearly this was a matter of great importance to the safety of the surrounding businesses and nearby school,[3] not to mention the other guests and employees of the motel. There was no time to set up surveillance or interview others; the police needed to act immediately in the public

[3] As the trial judge pointed out when explaining the allegations against Appellant to the jury, Motel 6 is located right beside Brookland-Cayce High School's stadium. (Tr. 11, lines 20–23).

interest. Thus, even if *Counts* did apply to this situation, the magnitude of the danger inherent in meth labs would undoubtedly allow the police to knock on the door of a motel room based on nothing more than an anonymous tip. Here, the Cayce Department of Public Safety knew the name and phone number of the tipster. Importantly, after that initial knock, the people in the motel room willingly invited the officers into the room and consented to a search. It was at that point that the police smelled the distinctive odor of the components of a typical meth lab and saw suspicious liquids. The officers then removed the occupants from the motel room and secured a search warrant.

Finally, Appellant cites *State v. Wright*, 391 S.C. 436, 706 S.E.2d 324 (2011), where he asserts "**a tip was upheld because the anonymous tip** (accusations of dog-fighting occurring at a particular residence) **was corroborated** by surveillance of the home in question, and where a spotlight was seen and many cars were parked at the house prior to the bust, and where many people with dogs ran from the house as police approached the scene." (App.Br.8) (emphasis added). This completely misconstrues the holding in *Wright*. In no way does the opinion state that the reason the tip was "upheld" was because it was corroborated. Indeed, the *Wright* Court laid out the observations the deputies made after responding to the tip but then explicitly wrote: "However, **even absent these observations**, the police had the investigative authority to approach the front door of the mobile home in order to investigate the anonymous tip." *Wright*, 391 S.C. at 445, 706 S.E.2d at 328 (emphasis added). Additionally, the Court noted that even defense counsel admitted police may lawfully knock on a door after receiving a complaint. *Id.* And, as noted earlier, *Counts* reaffirmed *Wright*'s analysis under the U.S. Constitution by acknowledging that police have "the investigative authority to approach the front door of [a] home in order to investigate the anonymous tip." *Counts*, 413 S.C. at 164–66, 776 S.E.2d at 66–

70 (quoting *Wright*, 391 S.C. at 445, 706 S.E.2d at 328). Therefore, it is disingenuous of Appellant to argue *Wright* stands for the proposition that an anonymous tip must be corroborated.

In sum, police received a tip from a named individual that a dangerous, potentially explosive meth lab was located in a motel room in an area surrounded by a school and other businesses. Acting on the tip, police arrived at the motel with outdoor room entrances that were accessible from the parking area, knocked on the door of room 126, as they clearly had investigative authority to do under *Wright*, smelled meth ingredients when the occupants willingly opened the door and invited them in, and secured a search warrant. No Fourth Amendment violation occurred because reasonable suspicion was not needed to perform the knock and talk and because the resulting entry was with consent.

II.

The trial court did not abuse its discretion by declining to grant a mistrial under the circumstances of Appellant's case because the challenged question by the State to Appellant did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole, and any prejudice that could have resulted from those remarks was eliminated through the issuance of a curative instruction to the jury.

Appellant argues the trial judge erred in denying his motion for a mistrial after "prior bad acts evidence surfaced regarding [his] numerous prior convictions for obtaining pseudo-ephedrine." (App.Br.9). He argues that because he was on trial for possession of pseudo-ephedrine and manufacturing methamphetamine, which requires the use of pseudoephedrine as an ingredient, prejudice resulted from the State's question regarding whether he had bought pseudoephedrine in the past. Contrary to Appellant's contentions, Appellant's right to a trial by a fair and impartial jury was not adversely impacted by the assistant solicitor's line of questioning because the trial court promptly cured any possible prejudice to ensure it did not impact the impartiality of the jury. The trial court did not abuse its broad discretion in refusing to grant the extreme measure of a mistrial in Appellant's case and this Court should affirm his conviction.

"It is well known '[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.'" *State v. Harris*, 382 S.C. 107, 119, 674 S.E.2d 532, 538 (Ct. App. 2009) (quoting *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005)); *see also* 75B Am. Jur. 2d *Trial* § 1284 (1992) ("By striking the evidence and instructing the jury to ignore it, the court may often cure its error in admitting the evidence, or render such error harmless, even in criminal

cases."). In *Harris*, the assistant solicitor improperly asked a witness whether the defendant had ever hit him. *Harris*, 382 S.C. at 119, 674 S.E.2d at 538. Defense counsel immediately objected and moved for a mistrial. *Id.* The trial court denied the mistrial motion but gave the jury the following curative instruction, "An objection was raised as to any hitting or spanking of the young man that was on the witness stand or the other children. I sustained the objection and I ask that you disregard the question that was raised by [the State]." *Id.* On appellate review, this Court determined "any alleged error was cured" by the trial court's curative instruction, noting the instruction "explained to the jury they were not allowed to consider the question in their deliberations" and specifically instructed the jury to disregard the question. *Id.*

In *State v. Howard*, 296 S.C. 481, 374 S.E.2d 284 (1988), the Supreme Court addressed what constitutes a sufficient curative instruction. It compared *Howard* to *State v. Smith*, 290 S.C. 393, 350 S.E.2d 923 (1986), where the Court found the trial court's instruction was inadequate when the judge merely asked the jurors if they remembered the solicitor's question and then told them to forget it. The Court required more. It stated: "Great care should be exercised in the 'delicate, difficult and important matter' of instructing the jury to disregard incompetent evidence," noting that the jury should be instructed to disregard the evidence and not consider it for any purpose during deliberations. *Howard*, 296 S.C. at 484, 374 S.E.2d at 285–86. The Court found the instruction in *Howard* was sufficient and far exceeded the casual remark in *Smith* because it instructed the jury to disregard what the codefendant said and admonished the jury that the statement "had nothing to do with this trial." *Id.* at 484, 374 S.E.2d at 286.

Here, the trial judge stated in his curative instruction:

> [P]lease **disregard**, and I've stricken from the record, the question that the solicitor posed about whether or not the defendant has purchased pseudoephedrine in the past. **That has absolutely nothing to do with this case.** We're trying this case based solely

> on what happened in this motel on the date in question. And that's an improper question which could rise to the level of a mistrial because it may – once somebody says something, it's hard for me to say disregard it. And you have to **disregard** it. So I'm asking you to **disregard** that.
> I'm striking it from the record, I'm telling you it's improper. I'll allow the trial to go on, but we'll see where we go. You may continue. **Disregard** it. It's struck from the record. It's an improper question.
>
> . . .
>
> **Disregard** it. **It hasn't got anything to do with this case.**

(R. 327, lines 1–17; R. 328, lines 5–6). He made clear to the jurors they were to disregard the question, mentioning it no fewer than five times. He also told them twice that it had nothing to do with this case. The curative instruction was sufficient and should be deemed to have cured.

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). That right guarantees to a defendant a trial by a panel of impartial, indifferent jurors. *State v. Parker*, 381 S.C. 68, 96, 671 S.E.2d 619, 633 (Ct. App. 2008). Importantly, it is the duty of the trial court to ensure a jury comprised solely of fair, impartial, and unbiased jurors ultimately decides a defendant's case. *State v. Powers*, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998). However, the "[g]ranting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." *State v. Ferguson*, 376 S.C. 615, 618–19, 658 S.E.2d 101, 103 (Ct. App. 2008) (citing *State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007)); *see also State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009) ("The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." (citations omitted)).

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." *State v. Thompson*, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003) (citations omitted). "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *Id.* "'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' stated into the record by the trial judge." *Id.* (quoting *State v. Kirby,* 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977). *See also State v. Beckham,* 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) (finding grant of motion for mistrial is extreme measure which should be taken only where incident is so grievous that prejudicial effect can be removed in no other way); *State v. Patterson,* 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) (finding mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons). "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." *Id.* at 560–61, 575 S.E.2d at 82 (citing *State v. Harris,* 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000)). *See also State v. Council,* 335 S.C. 1, 515 S.E.2d 508 (1999) (finding mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

In *Thompson*, this Court determined that a single reference to warrants that existed against Thompson did not constitute sufficient prejudice to justify a mistrial, finding "a vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes." 352 S.C. at 561, 575 S.E.2d at 82. Here, the solicitor made a single, vague reference to

what may have been a prior criminal record when he asked Appellant, "Isn't it true that you bought pseudoephedrine some 60-plus times- -." (R. 320, lines 11–12). However, he did not introduce evidence that Appellant had been convicted of other crimes. Just as in *Thompson*, this question was not enough to justify a mistrial, and the trial judge correctly denied Appellant's motion for a mistrial.

In *State v. White*, this Court emphasized, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of [the] party is affected . . . ." 371 S.C. 439, 447, 639 S.E.2d 160, 164 (Ct. App. 2006) (quoting Rule 103, SCRE). "The vital inquiry usually is whether or not the verdict was substantially influenced by the impropriety." *White*, 371 S.C. at 447, 639 S.E.2d at 164 (quoting 75A Am. Jur. 2d *Trial* § 502 (1991)). Here, Appellant argues he was prejudiced by prior bad acts evidence coming in through the question and, thus, his right to a fair trial was denied. However, in *White*, the error that occurred was the jury accidentally hearing an entire *in camera* hearing that was conducted outside the presence of the jury. Even this significant error was not enough to affect a substantial right of the party, as required by Rule 103, SCRE. This Court determined the curative instruction in *White* was sufficient to have cured any error, even while recognizing a mistrial could still be required after a curative instruction if the accused was prejudiced. *White*, 371 S.C. at 445–46, 639 S.E.2d at 163–64. Acknowledging that a mistrial is an extreme measure, this Court noted "[t]he trial judge should first exhaust other methods to cure possible prejudice before aborting a trial." *Id.* at 444, 639 S.E.2d at 162. The fact that this Court determined the jury's hearing an entire *in camera* hearing was not enough to have prejudiced White by substantially influencing the verdict and thus affecting a substantial right seems to demonstrate that a question asked by the State, which was immediately objected to, was not permitted to be answered, and was cured by telling the jury

to disregard it and that it had nothing to do with the case, was certainly not enough to have justified a mistrial.

Appellant cites several cases in which our appellate courts have addressed heightened prejudice in admitting prior crimes that are similar to the crime at issue in the trial. However, the cases he cites fail to support his argument. *State v. Tuffour*, 364 S.C. 497, 613 S.E.2d 814 (Ct. App. 2005), which Appellant mistakenly lists as a Supreme Court case, was actually a Court of Appeals case in which this Court reversed the trial court, finding it erred in the admission of prior, unrelated alleged drug transactions under the common scheme or plan exception to *State v. Lyle,* 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), SCRE. Subsequently, the Supreme Court issued an order vacating the opinion. *State v. Tuffour*, 371 S.C. 511, 641 S.E.2d 24 (2007). Appellant cites *State v. Campbell*, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994), to compare this Court's reversal after finding prior bad act evidence was admitted erroneously. The trial judge overruled Campbell's objection when the State introduced prior bad act evidence under *Lyle* as evidence of a common scheme. This Court determined the trial judge erred by admitting the evidence because it was not demonstrative of a scheme and was more prejudicial than probative. A similar situation occurred in *State v. Carter*, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996), where this Court reversed because the trial judge admitted testimony concerning a prior crack cocaine purchase over Carter's objection, finding there was not a close enough connection to fit a *Lyle* exception. *Campbell* and *Carter* are not applicable to the case at hand because here the objection was not overruled and the evidence subsequently admitted. Instead, the trial judge sustained the objection, did not permit Appellant to answer or the State to continue the line of questioning, and issued a curative instruction to the jurors telling them to disregard the question because it had nothing to do with the case.

Furthermore, Appellant's citation to *State v. Bostick*, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992), is inapplicable because in that case, the trial judge did not give a curative instruction to disregard the comment by a police officer regarding "intelligence" that Bostick had previously been selling crack cocaine, the very crime for which he was now accused. In *State v. Garner*, 304 S.C. 220, 403 S.E.2d 631 (1991), the Supreme Court determined that evidence of drug sale conversations was erroneously admitted under *Lyle* because its prejudicial effect exceeded its probative value. Ultimately the Court affirmed due to the harmlessness of the error. However, this is just one more example of a case cited by Appellant that does not apply to the case at hand because again, the trial judge did admit the evidence over the appellant's objection, which is not what happened here.

In the present case, the State asked a question about Appellant previously buying pseudoephedrine, Appellant objected, and the trial judge sustained the objection and issued a proper curative instruction. The curative instruction was sufficient to cure any possible error. *See State v. Walker,* 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) ("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."). Appellant showed no prejudice that would have affected the verdict and was not entitled to the extreme measure of a mistrial. The trial judge properly denied his motion for a mistrial, and this Court should affirm.

CONCLUSION

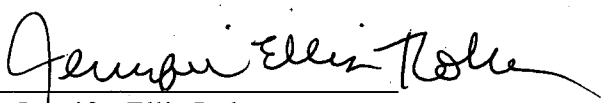
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY: 
Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 5, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2015-002664

THE STATE,

Respondent,

v.

JAMES MILLER,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY: Jennifer Ellis Roberts
Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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