ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County
Maite Murphy, Circuit Court Judge
Appellate Case No. 2016-001977

THE STATE,

Respondent,

vs.

BREANNA FLANNERY,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Flannery was stopped by law enforcement on September 1, 2014, and arrested for driving under the influence (DUI). She was tried and convicted by a jury before the Honorable Magistrate Brandt Shelbourne on April 13, 2015, for DUI and unlawful use of a license. Flannery appealed the conviction and sentence. Magistrate Shelbourne filed a Return of Appeal with attached documentary exhibits and photographs, but did not include a recording or transcription of the trial and did not include the video recording showing the deputy following Flannery's vehicle, which Magistrate Shelbourne relied on to find reasonable suspicion for the traffic stop. Flannery did not move to include these matters in the record and the appeal proceeded to oral argument on April 19, 2016, before the Honorable Maite Murphy. Judge Murphy affirmed the conviction and sentence for DUI, while reversing the conviction for unlawful use of a license in an order dated August 3, 2016.

Due to the lack of a transcript or recording of trial, the only facts properly before this Court are the facts outlined in the magistrate's return or those properly gleaned from the attached exhibits.

ARGUMENT

I.

Because the police officer identified the video as the one taken while he was driving his patrol vehicle and following the appellant's vehicle, and the magistrate found appellant's counsel agreed it was the officer's video, the magistrate did not err in finding a sufficient foundation was established to admit the video. Appellant failed to establish a sufficient record for review.

Flannery argues it was error to admit the traffic stop video. The record fails to support the facts he asserts in support of this claim. Additionally, testimony as outlined in the magistrates' return established authentication of the video and its admission was not an abuse of the magistrate's discretion. In his return, the magistrate made the following findings concerning the admissibility of the traffic stop video:

> The Court found that the video was properly introduced into evidence. Deputy Hayes testified **as to it being his video taken while he was driving.** Further, the Court had an opportunity to review the video pursuant to Defendant's motion to dismiss for lack of probable cause. Deputy Hayes, in the hearing prior to trial, testified to the video being his and taken while he was following the Defendant. **Defense Counsel agreed at the hearing that it was Deputy Hayes' video** and argued it was insufficient to support probable cause for an arrest. As discussed above, this motion was denied. At trial Hayes testified that he took the video and entered into the Sheriff's evidence.

R. p. 7 (emphasis added).

Flannery complains the prosecution failed to lay a sufficient foundation; however, Flannery does not explain why Deputy Hayes' testimony identifying the video was insufficient to satisfy the requirement for a foundation. Further, Flannery complains that the video was entered after, rather than during, his testimony. However, Flannery fails to cite any authority suggesting that it was error

for the magistrate to allow the video to be admitted into evidence after, rather than during, testimony. State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (finding the argument was too conclusory and therefore abandoned on appeal). Note under Magistrate's Court Rule 13(a), the South Carolina Rules of Evidence apply, "but may be relaxed in the interests of justice." There was nothing improper about allowing properly authenticated evidence be admitted after, rather than during, testimony authenticating the video recording.

Sufficient foundation existed to authenticate the video recording. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. The rule provides non-exclusive examples of how the authentication requirement may be satisfied. Rule 901(b), SCRE.

"The burden to authenticate is not high and requires only that the proponent offer a satisfactory foundation from which the jury could reasonably find that that evidence is authentic." Deep Kell, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) (internal quotation marks and alterations omitted); see generally Willett v. Russell M. Stookey, P.C., 568 S.E.2d 520, 526 (Ga. Ct. App. 2002) (finding "[t]he fact that the tapes exist at all is evidence that the tape recorder was functional and that [the operator] knew how to operate it" and also noting plaintiff identified the voices in the conversation as the defendant and himself, and plaintiff testified that it was a fair, accurate, and complete recording of the conversation).

Further, Flannery failed to provide a sufficient record for review, the recording or transcript of the magistrate's trial was not submitted for the circuit court's review on appeal. Flannery only offers her attorney's personal recollection of the hearing that was recited during oral argument before

the common pleas judge. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are . . . not evidence."); Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) ("A court cannot consider facts appearing only in argument of counsel."). The burden is on appellant to provide a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). Flannery fails to provide a record sufficient for review outside the four corners of the magistrate's return, and accordingly, this Court would be unable to effectively review the record to determine error or prejudice (or error preservation) on the complaints he raised.

II.

Law enforcement "produced" an incident site video within the meaning of section 56-5-2953, regardless of whether the trial court erred in admitting the video into evidence, and appellant failed to provide a sufficient record for review.

Flannery complains the trial court should have dismissed the case because the trial court should not have admitted the incident site video into evidence and therefore, dismissal was necessary under S.C. Code § 56-5-2953. Flannery was seeking a windfall, suppression of the video that he agrees, as the magistrate noted, represented the traffic stop made by Deputy Hayes when he discovered Flannery was driving under the influence. An issue conceded in trial court is not preserved for review. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). However, as discussed in Issue I, the video was properly authenticated. Accordingly, the trial court did not err as the video was properly admitted into evidence.

Further, S.C. Code § 56-5-2953 merely requires a video recording of the incident site be "produced." This Court held in State v. Branham, 392 S.C. 225, 232, 708 S.E.2d 806, 810 (Ct. App. 2011) that the legislature intended "produce" to simply mean that a video recording is created. Therefore, whether or not the video was admitted into evidence during the jury trial is irrelevant as to whether the statutory requirements of producing a video recording were met.

Flannery also complains about the chain of custody. However, the video is not a fungible item so no chain needed to be established. The foundation for the video during Deputy Hayes' testimony was sufficient. See State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004) (finding chain of custody for purse and fingerprint lifted from purse was unnecessary as the purse is not a fungible item).

Flannery argues alleged omissions in Deputy Hayes' testimony supports his argument, relying on her own counsel's recollection of the proceedings rather than the record. However, Flannery failed to supply a recording or transcript of the magistrate's court proceedings for this Court or the common pleas court to determine the sufficiency of the testimony supporting omission. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are . . . not evidence."); Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) ("A court cannot consider facts appearing only in argument of counsel."). Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). Accordingly, this Court should not review this issue.

III.

The trial court did not abuse its discretion in regards to Appellant's sequestration motion, and Appellant provided an insufficient record for the Court of Common Pleas or this Court to review.

Flannery complains the trial court erred in allowing Deputy Tuck, the deputy prosecuting the case, to remain in the courtroom and examine Deputy Hayes. The magistrate did not abuse his discretion and Flannery makes an incomplete record preventing this Court from assessing what prejudice, if any, ensued from his ruling.

At the request of a party, the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. Rule 615, SCRE. A party is not entitled to the sequestration of witnesses as a matter of right. State v. Caldwell, 378 S.C. 268, 662 S.E.2d 474 (Ct. App.2008); State v. Fulton, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App.1998). A motion to sequester is addressed to the sound discretion of the trial judge. State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975). The court's ruling on a motion to sequester a witness will not be disturbed absent an abuse of discretion and prejudice to the appellant. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (superseded in part by State v. Gilchrist, 342 S.C. 369, 536 S.E.2d 868 (2000)).

In the instant case, the magistrate reported the following in his return:

> Defendant argued that Deputy Tuck should not have been allowed to be in the Court room while Deputy Hayes testified. However, Defendant recognized that Deputy Tuck was the deputy charged with prosecuting the case. The Court found that as the prosecuting deputy it was necessary and appropriate for Tuck to remain in the Court room despite witnesses being sequestered. South Carolina law allows an arresting deputy to prosecute a case in Magistrate's Court and there was no practical way to exclude Deputy Tuck, the arresting

> deputy, from the Court room during the testimony of the other witnesses if Tuck was to be able to conduct direct examination and re-direct examination of the State's witnesses.

R. p. 6.

Flannery argues he was prejudiced because Deputy Tuck would be able to examine Deputy Hayes then testify. However, "[t]he mere opportunity for the State's witnesses to compare testimony is insufficient to compel sequestration." Sullivan, 277 S.C. at 46, 282 S.E.2d at 844; see also State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). Because the magistrate acted within his discretion, no error ensued.

Further, Flannery failed to show actual prejudice and merely hypothesizes that Deputy Tuck might have tailored his testimony. Flannery failed to provide a recording or transcript of the trial, so this Court is unable to determine what prejudice, if any, ensued from the magistrate's ruling. Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). Prejudice must be based on review of the entire record. State v. White, 371 S.C. 439, 448, 639 S.E.2d 160, 164 (Ct. App. 2006) cited in State v. Wilson, 389 S.C. 579, 586, 698 S.E.2d 862, 866 (Ct. App. 2010) (finding prejudice not demonstrated where record on appeal only contained twenty-five pages of a transcript in excess of four hundred pages).

Finally, the same deficiency in supplying an adequate record for this Court's review prevents this Court from properly determining if Flannery's specific arguments in his brief were presented to the magistrate. See State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993) (The ground asserted on appeal must be supported by the objection raised at trial).

IV.

The magistrate did not err in declining to grant a mistrial, the testimony was not hearsay, the record fails to reflect that appellant objected after the magistrate gave a curative instruction, and appellant failed to provide a sufficient record for review before the common pleas judge or this Court.

Flannery complains the trial court erred in not granting a mistrial because: (1) during opening argument, Deputy Tuck mentioned Deputy Hayes was "flagged down in reference to an impaired driver," (2) Deputy Tuck asked Deputy Hayes, "What reason did you have to be following the Defendant's car?" (3) when Deputy Tuck asked Deputy Hayes to say what happened on the arrest date, Deputy Hayes answered, "Well I was flagged down in reference to an impaired driver." As is common throughout Flannery's brief, the arguments are unsupported by the record beyond her counsel's personal recollections counsel related to the common pleas court. The record therefore is insufficient for review, but further the evidence was not hearsay, and the record is incomplete to determine what prejudice, if any, ensued from the alleged error. Finally, the magistrate did not err in denying the mistrial motion.

The magistrate's return indicates the following:

> As for statements by the prosecution or its witnesses that the deputy was "flagged down," the Court granted Defendant's motion to exclude this testimony. Despite this, there was what appeared to be inadvertent reference by Deputy Hayes to being "flagged down by a concerned citizen." The Court did not believe that Deputy Hayes intentionally disregarded this Court's ruling on not admitting that statement or evidence. The court gave a curative instruction to the jury that they should disregard any comments made by the witnesses towards that end. The Court has no reason to believe that the jury did not follow the Court's instructions on disregarding said comments and considering only the evidence presented to the jury by the sworn testimony and evidence admitted at trial.

R. p. 7.

The statement is not even hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001). "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted." State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003).

An out of court statement is not hearsay if offered for the limited purpose of explaining why a government investigation was undertaken. Thompson, 352 S.C. at 558, 575 S.E.2d at 81. Thompson found no error because the out of court statement was admitted not for the truth of the matter asserted but "to explain and outline" law enforcement's investigation and why law enforcement went to Thompson's home. Id. at 559, 686 S.E.2d at 81. In the instant case, because the out of court statement explains why the deputy started to follow and video-record Flannery's driving, it was not offered for the truth of the matter asserted and is not hearsay.

Further, assuming the testimony was improper, a mistrial was not warranted because the magistrate provided curative instructions to the jury. An appropriate curative instruction is generally considered to cure any error. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989). On appeal, a denial of a motion for mistrial will not be reversed absent a showing that the trial court abused its discretion. Id.

"A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)

(noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial).

"The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way." State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000). In the instant case, the curative instruction, as related by the magistrate in his return, was sufficient to cure the error. Accordingly, the magistrate did not abuse his discretion.

Further, the record fails to reflect whether counsel renewed his motion for mistrial after the magistrate provided the jury a curative instruction. State v. McEachern, 399 S.C. 125, 146, 731 S.E.2d 604, 615 (Ct. App. 2012) (noting the law assumes a curative instruction will remedy an error; therefore, failure to object to the sufficiency of that charge renders the issue waived and unpreserved for appellate review).

Again, Flannery chose to proceed in Common Pleas without a transcript or recording of the trial. So the common pleas court and this Court simply does not have an adequate record to determine if the issue is preserved, whether the testimony actually was properly considered hearsay, whether any prejudice ensued, or whether the alleged error was not harmless. Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). Prejudice must be based on review of the entire record. State v. White, 371 S.C. 439, 448, 639 S.E.2d 160, 164 (Ct. App. 2006) cited in State v. Wilson, 389 S.C. 579, 586, 698 S.E.2d 862, 866 (Ct. App. 2010) (finding prejudice not demonstrated where record on appeal only contained twenty-five pages of a transcript in excess of four hundred pages). Because Flannery failed to provide a record for the common pleas judge and this Court to determine if there was error

and if it was preserved for review, and further to determine prejudice of the alleged error in relation to the rest of the trial, this Court should decline to review the alleged error.

V.

The magistrate did not err in finding law enforcement had reasonable suspicion to initiate a traffic stop, and appellant failed to provide a sufficient record for review as the video recording upon which the magistrate relied to make his ruling was not part of the record on appeal before the common pleas court.

The magistrate found reasonable suspicion existed because a pedestrian reported Flannery's vehicle was weaving and the deputy saw Flannery cross the traffic lines. The magistrate based his ruling on the video made while the deputy followed Flannery's vehicle. That video was not made part of the record on appeal. The magistrate's ruling is supported by evidence and should be affirmed. Further, Flannery failed to provide a sufficient record for review of the issue.

Reasonable suspicion, under federal law, consists of "'a particularized and objective basis' that would lead one to suspect another of criminal activity." State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). The reasonable suspicion standard "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. . . ." Illinois v. Wardlow, 528 U.S. 119, 123 (2000). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) ("Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch."). "Reasonable suspicion depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Navarette v. California, 134 S.Ct. 1683 (2014) (citations and internal quotation marks omitted).

In the instant case, the magistrate indicated the following in his return:

> As for reasonable suspicion for the stop and probable cause, the Court reviewed the video taken by Deputy Hayes and observed Defendant's vehicle crossing the lines. Further Hayes testified, outside the presence of the jury, that he pulled the Defendant over because he was earlier flagged down by a concerned citizen and because he saw Defendant cross over the lines. Based on that the Court found that there was probable cause for the stop.

R. p. 7.

"When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). In State v. Vinson, 400 S.C. 347, 349, 734 S.E.2d 182, 183 (2012), a trooper observed the vehicle he was following weave within the lane and initiated a traffic stop on the belief Vinson was under the influence of alcohol. The Supreme Court found the trooper had reasonable suspicion to believe Vinson violated S.C. Code § 56-5-1900, which requires a driver to stay, generally speaking, within a single lane of a two lane road. In the instant case, law enforcement had reasonable probability to believe Flannery committed a traffic offense as well as reasonable suspicion to believe she was driving under the influence based on the tip from a pedestrian and the deputy's own observations.

Further, it appears from the record that Flannery failed to ensure the video was presented to the common pleas court so the common pleas court could review whether the video, along with other evidence, supports the magistrate's ruling. Consequently, the video is not part of this Court's record for review. Flannery's entire argument is not based on evidence in the record, but her counsel's personal recollection of the evidence. Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). Prejudice must be based on

review of the entire record. State v. White, 371 S.C. 439, 448, 639 S.E.2d 160, 164 (Ct. App. 2006) cited in State v. Wilson, 389 S.C. 579, 586, 698 S.E.2d 862, 866 (Ct. App. 2010) (finding prejudice not demonstrated where record on appeal only contained twenty-five pages of a transcript in excess of four hundred pages).

Moreover, Flannery's argument is premised on the NHTSA manual. Nothing in the limited record presented indicates that Flannery argued the applicability of the manual, if any, to a determination of a Fourth Amendment issue. See State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999) (finding the ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial).

VI.

Any purported issue of maintenance of the datamaster machine went to weight rather than admissibility of the datamaster results. The record is insufficient for review to determine whether a defect existed, whether appellant was prejudiced, and whether any error was harmless beyond a reasonable doubt.

Flannery alleges that SLED procedure was not followed in maintenance of the datamaster, again relying his own recollection of the trial, not on a recording or transcript of the trial. To the extent a sufficient record might have been established for this Court to review this issue, the trial court did not abuse its discretion in finding the issue went to weight rather than admissibility of the test results. Further, Flannery did not supply a sufficient record for review.

The magistrate ruled as follows:

> Defendant objected to the introduction of the breath test results contending that the breathalyzer machine was not working properly and was not reliable. Defendant requested that the Court make a determination that SLED policy and procedures were violated and that there was a material question about the reliability of the machine's reading warranting the exclusion of the results. The Court denied this request finding that the alleged unreliability went to the weight of the evidence. Defendant [did] not attempt to introduce any evidence or testimony that the machine was unreliable or that the results were unreliable or that there were any other challenges to the test data. This Court was not in a position to make findings of fact as to the reliability of a data master machine as this was within the jury's province.

R. pp. 7-8.

In State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002), the Supreme Court found no prejudice from the failure of the breathalyzer operator to use the statutorily required simulator test solution. The Court found there was no question the breathalyzer machine operated properly and the results were reliable. Accordingly, the Supreme Court found the question went to weight, not

admissibility of the appellant's breathalyzer results. Id.

In the instant case, no recording or transcript of the trial was made part of the record, so this Court is unable to determine prejudice from the alleged deficiency. For that matter, beyond counsel's personal recollections made to the Common Pleas judge, there is no evidence of a variance from any statute or rule. Appellant bears the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). Prejudice must be based on review of the entire record. State v. White, 371 S.C. 439, 448, 639 S.E.2d 160, 164 (Ct. App. 2006) cited in State v. Wilson, 389 S.C. 579, 586, 698 S.E.2d 862, 866 (Ct. App. 2010) (finding prejudice not demonstrated where record on appeal only contained twenty-five pages of a transcript in excess of four hundred pages).

The magistrate found the issue went to weight rather than admissibility. Without a transcript, this Court cannot review to determine what other evidence of intoxication was presented to the jury, what explanation was provided by officers for any issues concerning the maintenance of the machines or the reliability of the test results, or even what arguments Flannery's counsel made to the magistrate. Accordingly, this Court should find that Flannery failed to provide a sufficient record for review and further, that the magistrate did not abuse his discretion in declining to suppress the datamaster results.

VII.

The trial court did not err in allowing the jury to continue deliberating until it reached a verdict at 9 p.m.

Flannery argues that the trial went too late. It ended at 9 p.m. The magistrate noted in his return that Flannery did not raise this ground in his motion to set aside the verdict. Further, the record fails to reflect that Flannery objected to the trial proceeding after the magistrate asked the jury if it wished to continue or conclude the trial at a later date. The jury indicated it unanimously wished to continue. Return of Appeal p. 1. Given the wide discretion provided to trial courts, this was certainly not error. "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983).

The record does not indicate an objection was raised, accordingly, the issue is not preserved for review. "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). The burden is on appellant to provide a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996).

Further, Flannery fails to cite any authority for the argument that the magistrate erred. Accordingly, this Court should not review the conclusory argument. Flannery's argument is "so conclusory as to be an abandonment of the issue on appeal." Cole v. South Carolina Electric and Gas, Inc., 355 S.C. 183, 196, 584 S.E.2d 405, 412 (Ct. App. 2003) (citing First Sav. Bank v.

McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)); see also State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal).

VIII.

The trial court did not err in requiring counsel to turn down the volume during a portion of the recording counsel wanted redacted, and counsel never objected, so the issue is not preserved for review.

Flannery complains his counsel should not have been required to turn down the volume during a discussion on video concerning "Zero Tolerance" in order for the discussion to be redacted as Flannery wanted. Flannery never objected to being required to turn down the volume in order to redact the offending "Zero Tolerance" language from the jury's ears. See R. p. 7. Accordingly the issue is not preserved for review. A defendant cannot acquiesce in an issue at trial and then complain about it on appeal. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998); State v. Morris, 307 S.C. 480, 486, 415 S.E.2d 819, 823 (Ct. App. 1992) (finding an issue is not preserved for review where a party accepts the trial court's ruling without objection).

Moreover, because Flannery fails to cite any authority finding error where a redaction of evidence is accomplished by one of the attorneys lowering the volume of a video, this Court should refrain from reviewing the issue. State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal).

The conduct of a criminal trial is left largely to the sound discretion of the trial judge. State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) (citing State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981)). The trial court found a practical procedure to ensure that the requested redaction was made pursuant to defense counsel's request – there was no error.

Further, the State disagrees based on the record before this Court that any prejudice ensued.

State v. Preslar, 364 S.C 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005) ("In order for an error to warrant reversal, the error must result in prejudice to the appellant."). Certainly, the jury based its verdict on the evidence it saw and heard, not on a portion of the video the jury would understand was not for its consideration.

IX.

Because no errors were committed and the record was insufficient for review of the alleged errors, there was not cumulative error, and the issue was not ruled upon by the common pleas court so it is not preserved for review.

Flannery failed to show error in any of the eight issues she raised on appeal, and she failed to show prejudice. Flannery saves a good bit of vitriol for arguing the cumulative impact of alleged errors. In doing so, Flannery asks this Court to reverse on opposing counsel's version of events that are unsupported by the record. Germain v. Nichol, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983) (finding appellant failed to provide a sufficient record for review where appellant did not provide the Court with any of the trial testimony). Further, Flannery's argument is unsupported by citation to any legal authority. Flannery's argument is "so conclusory as to be an abandonment of the issue on appeal." Cole v. South Carolina Electric and Gas, Inc., 355 S.C. 183, 196, 584 S.E.2d 405, 412 (Ct. App. 2003) (citing First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)); see also State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal).

Based on the lean, nearly non-existent record provided to the common pleas judge and now to this Court, Flannery is not entitled to a new trial based on the alleged cumulative effect of errors that are not preserved for review. There is no record to judge prejudice from the asserted errors in comparison with the evidence of guilt. This case does not warrant reversal on cumulative error. "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998)

(finding reversal on cumulative error doctrine not warranted).

Finally, the issue was not ruled upon by the Court of Common Pleas, and therefore is not preserved for review. An issue must be raised to and ruled upon by the circuit court in order to be considered on appeal. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 213 (Ct. App. 2002).

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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February 6, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County
Maite Murphy, Circuit Court Judge
Appellate Case No. 2016-001977

THE STATE,

Respondent,

vs.

BREANNA FLANNERY,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

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