STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
The Honorable Carmen T. Mullen, Circuit Court Judge

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Appellate Case No. 2016-001799

THE STATE, .....RESPONDENT,

v.

HERSHEL M. JEFFERSON, JR., .....APPELLANT.

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# FINAL BRIEF OF RESPONDENT

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ALAN WILSON
Attorney General

RANEE SAUNDERS
Assistant Attorney General

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

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street
Charleston, South Carolina 29401
(843) 985-1900

ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

**The trial court properly allowed Officer Burton to testify that Appellant was the primary aggressor in the altercation and any challenge to the admissibility of this statement is unpreserved.**

## STATEMENT OF THE CASE

Appellant was indicted during the October 2014 term of the Charleston County Grand Jury for criminal domestic violence, third offense, 2014-GS-10-05892. (R.110-111.) Appellant failed to appear for trial and was tried *in abstentia* July 13, 2016 before the Honorable Carmen T. Mullen. The jury found Appellant guilty as charged and Judge Mullen imposed a sealed sentence. On August 25, 2016, Appellant appeared before the Honorable R. Markley Dennis, Jr., who pronounced the sentence of five years' imprisonment, suspended on the service of three years and five years' probation.

## STATEMENT OF FACTS

Officer Michael Burton of the City of Charleston Police Department responded to a 911 call reporting a man and a woman fighting and arrived on scene to find Felicia Edwards at the home of her neighbor, Amanda Powell, bleeding and bruised. (R.53–55.) Edwards displayed scratches on the right side of her face and neck, a scratch on the upper right side of her breast, lacerations on her forearm and fingers, and bruises to her face. (R.55.) Officer Burton spoke with Edwards and Powell about what happened, but Appellant had fled. (R.55,59.) He was apprehend a little over an hour later, and ultimately charged with criminal domestic violence (CDV). (R.10, 56.)

The case proceeded to a jury trial. On the day of trial, Appellant failed to appear and the case proceeded in his absence. (R.4.) The State presented the testimony of Edwards, who stated she and Appellant were in a romantic relationship and had three children together. (R.20.) Edwards testified that on the day of the incident, she and Appellant began arguing about financial issues because her electricity had been cut off and she was unable to get to work due to a car accident. (R.22.) She told Appellant she thought they should each go stay at their respective parents' homes until their issues were resolved. (R.23.) Appellant became incensed, accused Edwards of trying to leave him, and began "calling [her] names, [and] being very disrespectful." (R.22–23.) Edwards stated Appellant then packed a bag and left and she left the home as well and went to Powell's house to wait for her mother to come pick her up. (R.24.) However, Appellant came to Powell's house and began pounding on the door, asking Edwards to come unlock their house for him. (R.26.) She complied, but left and returned to Powell's house when Appellant went to the bathroom. (R.27.)

Edwards further testified that Appellant returned to Powell's house and asked to use her cell phone. (R.27.) Although she declined to give him her phone or open the screen door to

allow him in, Edwards agreed to call the people Appellant wished to contact on his behalf. (R.27.) After none of the calls went through, Appellant began yelling at Edwards again asking why he could not use her phone and she told him he needed to go home. (R.28.) Appellant then "snatched the screen door open" and punched Edwards in the face. (R.28.) He thereupon entered the home, placed Edwards in a headlock, and hit her in the face again. (R.29.) Edwards then began to hit back in an attempt to free herself from the headlock. (Tr.31.) She grabbed a glass candle off the table and warned Appellant she would hit him if he did not release her. (R.32.) When he failed to let her go, she hit Appellant over the head with the glass candle until it smashed apart, but Appellant still held on to her. (R.32.) She then grabbed a piece of glass and threatened to cut him; when he still refused to release her, she cut his arm with the glass shard. (R.33.) Appellant finally released Edwards from the headlock and fled. (R.34.) Edwards testified that she sustained numerous injuries as a result of the assault, including scratches, a swollen eye, and a "busted" nose. (R.34.)

Powell also testified at trial that she and Edwards were in her home on the night of the incident when Appellant arrived at the door and began to knock loudly. (R.45–46.) Powell further stated Edwards allowed Appellant the use of her phone through the closed screen door until Appellant "pulled open the screen door and started fighting her." (R.47.) In describing the assault, Powell noted Appellant "basically hit her in the face, tried to choke her and stuff like that" whereupon Edwards began to fight back. (R.48.) Powell emphasized Appellant initiated the fight by hitting Edwards first. (R.49.)

Finally, Officer Michael Burton testified he arrived on the scene and spoke with both Edwards and Powell. (R.55.) He noted Edwards suffered "several scratches to the right side of her face and neck." (R.55.) He further stated Edwards had a "scratch on the upper right side of her breast, a laceration approximately one inch on her forearm and a laceration on her right index

finger as well as some bruising to her face." (R.55.) In the course of direct examination, the solicitor elicited the following testimony regarding the events after the police located the Appellant later that evening:

> Q: What did you do after that?
>
> A: Based upon the evidence and the statements from the victim and the crime scene what we saw as well as the injuries we determined—
>
> Defense Counsel: Objection
>
> The Court: Basis?
>
> Defense Counsel: May we approach?
>
> The Court: Sure.
>
> (Off-the-record conference.)
>
> Q: As a result of your investigation you arrested the [appellant], correct?
>
> A: Yes. We found him to be the primary aggressor.
>
> Defense Counsel: Objection.

(R.56.) The trial court did not state a ruling to this objection on the record. Appellant did not attempt to explain his objection, move to strike, nor did he request a curative instruction.

At the close of the State's case, Defense Counsel moved for a mistrial "based on [his] previous objection and the testimony for the ultimate issue of the case in terms of [Appellant] being the primary aggressor." (R.61.) He also moved for directed verdict arguing the State failed to prove beyond a reasonable doubt that Appellant had not acted in self-defense. (R.62.) The trial court denied the directed verdict motion, holding Edwards' testimony alone was sufficient to create a jury question. (R.63.) Defense counsel then requested a ruling on the record for his mistrial motion and the trial court stated, "I denied it. The mistrial motion, yes." (R.63.)

Ultimately, the jury found Appellant guilty as charged. (R.97.) Judge Mullen imposed a sealed sentence that was pronounced at a later hearing by the Honorable R. Markley Dennis, Jr., as five years' imprisonment, suspended upon the completion of three years, with five years of probation. (R. p.108.)

## ARGUMENT

**The trial court properly allowed Officer Burton to testify that Appellant was the primary aggressor in the altercation and any challenge to the admissibility of this statement is unpreserved.**

Appellant maintains the trial court erred in allowing Officer Burton to testify he was the primary aggressor. Specifically, Appellant contends the statement invades the province of the jury as the ultimate fact-finder. These arguments are unpreserved and further, the testimony was properly admitted because it merely reflected Officer Burton's perception.

Initially, Appellant failed to assert the basis for his objection on the record so as to preserve it for appeal. "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." *York v. Conway Ford Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). Further, an objection must be articulated on a specific ground. *State v. Nichols*, 325 S.C. 111,120, 481 S.E.2d 118, 123 (1997). A general objection that does not specify the particular ground for the objection is insufficient to preserve a question for review. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

The record fails to reflect the basis for the objection. Although Appellant alludes to this objection in his subsequent mistrial motion as based on "the testimony for the ultimate issue of the case in terms of [Appellant] being the primary aggressor," he did not provide that rationale in a contemporaneous objection to the testimony nor does he articulate why the officer's statement would be inadmissible. As discussed *infra*, the Rules of Evidence recognize the general proposition that a witness may offer relevant testimony addressed to his opinion or inference even where those statements embrace the ultimate issue. *See* Rule 704, SCRE. Moreover, the record does not reflect an adverse (or any) ruling on this unspecified objection. Defense counsel

merely states he has an objection and never asks for a ruling to be placed on the record.[1] Absent a sufficiently specific objection and a corresponding ruling, there is nothing for an appellate court to review. *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." (internal citation omitted)). Accordingly, this Court should affirm.

Moreover, Appellant's argument fails on the merits. The officer's testimony is admissible because it reflects his opinion and the inferences he gleaned from the facts as he observed them. Thus, the trial court did not abuse its discretion in allowing him to state he concluded Appellant was the primary aggressor.

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion." *State v. Scott*, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013). "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. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012) (citation omitted).

Pursuant to Rule 701 of the South Carolina Rules of Evidence, a lay witness's testimony "is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." Rule 701, SCRE. "Testimony in the form of an opinion or inference otherwise admissible is not

[1] Although Defense Counsel does ask for a ruling on the mistrial motion, he has not appealed from that ruling.

objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE.

As Rule 704 of the South Carolina Rules of Evidence makes plain, witnesses are permitted to testify as to their opinion on the ultimate fact without invading the province of the jury. The jury ultimately draws its own conclusions on credibility and then bases its verdict upon its own view of the facts. Officer Burton's testimony regarding his determination that Appellant was the primary aggressor merely reflects his opinion based on his perception of the events. As Defense Counsel clarified through cross-examination, determining the primary aggressor is a necessary part of the investigation where both parties sustain injuries. (R.58.) Accordingly, Officer Burton testified he spoke with Edwards and Powell and observed Edwards' injuries and after concluding Appellant was the primary aggressor, he arrested him. The mere fact his testimony reflects his opinion of who was at fault in bringing about the difficulty does not preclude its admission. Powell and Edwards also indicated, without objection, that Appellant was the primary aggressor; the officer's testimony was therefore cumulative. Moreover, this evidence simply verbalizes the inescapable inference drawn from the fact that Appellant, and not Edwards, was arrested and charged with CDV.

Furthermore, the admission was harmless given the dearth of evidence supporting the claim of self-defense. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) "[An appellate court] will not set aside a conviction due to insubstantial errors not affecting the result." *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Both of the witnesses to the crime asserted Appellant began the altercation without provocation. As the trial court noted, "everything [it had] heard here was the victim testifying that [Appellant] was the aggressor and she was trying to fend him off." (R.65.) The only evidence to which Defense Counsel could

direct the court in requesting the self-defense charge was Officer Burton's testimony that he received an "opposing narrative from the Defendant." (R.66.) Ultimately, the trial court agreed to give the charge "out of an abundance of caution" despite conveying the sense that the claim of self-defense was specious. Given the absence of evidence of any alternative version of the events, Officer Burton's testimony could not have affected the jury's ultimate finding that the State had disproved self-defense beyond a reasonable doubt. Because the testimony was properly admitted and Appellant suffered no prejudice, this Court should affirm his convictions.

## CONCLUSION

Based on the foregoing, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

RANEE SAUNDERS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
Ranee Saunders
S.C. Bar # 100073

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

ATTORNEYS FOR RESPONDENT

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**CERTIFICATE OF COUNSEL**

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


ALAN WILSON
Attorney General

RANEE SAUNDERS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY:_____
Ranee Saunders
S.C. Bar # 100073

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

ATTORNEYS FOR RESPONDENT




May 3, 2017