STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001296

THE STATE, ...RESPONDENT,

v.

TAPPIA DANGELO GREEN,..APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Any error in the admission of Detective Butler's testimony regarding his opinion of Victim's credibility is harmless error where said comments were cumulative to other, unchallenged testimony, Appellant undermined his own credibility during his testimony, and the overwhelming evidence at trial proved Appellant was guilty of his charged crimes.

II. The trial judge properly allowed the State to present evidence of Appellant's post-arrest silence because the evidence indicated Appellant was never given Miranda warnings.

III. The trial judge correctly refused to grant a mistrial because the record demonstrated Juror 280 was able to, and did, participate in jury deliberations.

STATEMENT OF THE CASE

On November 3, 2015, the Charleston County Grand Jury indicted Appellant for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. On May 22–25, 2017 Appellant proceeded to a jury trial before the Honorable Roger L. Couch. Mark Archer, Esquire, represented Appellant; Assistant Solicitors Daniel Cooper, Esquire, and Burns Wetmore, Esquire, represented the State. The jury found Appellant guilty as charged. The trial judge sentenced Appellant to fifteen years' incarceration for armed robbery, fifteen years' incarceration for kidnapping, and five years' incarceration for the possession of a weapon during the commission of a violent crime, with all sentences running concurrently.

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

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

I.

Any error in the admission of Detective Butler's testimony regarding his opinion of Victim's credibility is harmless error where said comments were cumulative to other, unchallenged testimony, Appellant undermined his own credibility during his testimony, and the overwhelming evidence at trial proved Appellant was guilty of his charged crimes.

Appellant argues the trial judge committed reversible error by allowing Detective Butler to testify she found Keith Lee (Victim) credible, bolstering his testimony. However, this issue is not preserved for appellate review; trial counsel failed to argue Detective Butler's statements constituted bolstering to the trial judge.

<u>Statement of Facts</u>

In April of 2015, Victim lived in North Charleston with his then-girlfriend Karissa Aiken. Both Victim and Aiken were employed by the Hardee's restaurant located in the Mount Pleasant area. On April 14, 2015, Victim took Aiken to deposit her paycheck at a local Wells Fargo bank. He waited for her in their car until an individual, later identified as Jonathan Johnson, exited the bank and went to his vehicle, a gold PT Cruiser. He tapped on Victim's passenger-side door and asked whether Victim had jumper cables and would be willing to jump start his car. After he jump-started the PT Cruiser, Victim was about to enter his vehicle when Johnson pressed a silver revolver against his head. Johnson forced Victim into the backseat of the PT Cruiser. (Tr.Vol.I.p.133, line 23–Tr.Vol.I.p.142, line 14).

Victim discovered two more individuals were in the PT Cruiser. Appellant, who wore a black shirt and black shorts and gold plating in his mouth sat in the front passenger seat, and an unidentified man[2] in the back seat wearing a white t-shirt and black pants. Johnson drove the

[2] This man's was never positively identified.

vehicle while Appellant and the unknown man pointed their guns at Victim and demanded his money and jewelry. Unsatisfied with what they received, Appellant threatened to kill Victim if he could not produce any additional loot. Johnson informed Victim he knew the latter worked at Hardee's and that he knew it was the day employees could pick up paychecks because he had just taken his own girlfriend to pick up hers. Appellant gave Victim's phone back so that the latter could call Hardee's and notify the manager he was picking up his paycheck early. The three men bound Victim's hands and feet and took him to the Hardee's in Mount Pleasant. (Tr.Vol.I.p.142, line 15–Tr.Vol.I.p.150, line 12).

Once they arrived at Hardee's, Appellant told Victim that if he signaled for help, the men would kill everyone inside the Hardee's. Appellant and the unknown man remained in the vehicle while Johnson escorted Victim into the restaurant. As they entered the restaurant, Johnson told Victim he did not want to hurt him and that he was forced to participate in the crime as part of a gang initiation. Johnson also told him that his mother worked at that same Hardee's, and that Victim and Aiken often gave the mother rides home from work. Johnson promised he would not let anyone harm Victim. (Tr.Vol.I.p.150, line 13–Tr.Vol.I.p.152, line 23).

While signing for his paycheck, Victim tried to mouth the word, "help" to his manager, but Victim was forced to cease his efforts when Johnson moved beside him. As they exited the building, Victim and Johnson heard the sirens from emergency vehicles. Appellant and the unknown man were approaching the building because they thought Victim triggered an alarm or alerted law enforcement. Appellant informed Victim the men were about to enter the building to kill Victim and everyone else inside. The men reentered the PT Cruiser, bound Victim's hands and feet, and Appellant took possession of Victim's paycheck. Shortly thereafter, the men

forced Victim to cash his paycheck at a local check-cashing business. Again, they threatened to kill everyone in the store if Victim sought help. After Victim and Johnson returned to the vehicle, Appellant took the cash and stated they needed to kill Victim because he had seen their faces. Johnson stood up for Victim, noting Victim had been completely cooperative and that Victim and Aiken look out for his mother. Appellant relented, and the men decided to drop Victim off at a local gas station. As Victim exited the PT Cruiser, he saw Aiken in the drive-through of a nearby fast-food restaurant. After the two went home, Aiken called the North Charleston Police Department to report the situation and Victim grabbed and went looking for the three men in the hopes of performing a citizen's arrest. The police intercepted Victim and convinced him to work with them. (Tr.Vol.I.p.152, line 24–Tr.Vol.I.p.164, line 21).

Officer Tracey Williams realized one of the descriptions provided by Victim matched Johnson. She left her contact information at Johnson's grandfather's house, a place he frequently stayed, and requested to speak with him. Johnson contacted Officer Williams and admitted the kidnapping and armed robbery occurred, but claimed he was also a victim and was unaware of the plan until he was forced to kidnap Victim. Johnson agreed to an official interview at the police station and showed up in the PT Cruiser used in the crime. At the station, he repeated the information from the phone conversation with Officer Williams and then-detective Alexander Kaufman. He also identified Appellant as the man in the front seat of the PT Cruiser who participated in the crime. Kaufman noted he found Victim and Aiken very credible due to their cooperation and the evidence discovered during his investigation. He further claimed it was not uncommon for victims of violent crimes to arm themselves afterwards and seek retribution. Trial counsel failed to object to any reference of Kaufman's believe in Victim's credibility until

Kaufman's redirect examination. (Tr.Vol.I.p.200, line 10–Tr.Vol.I.p.211, line 5; Tr.Vol.II.p.17, line 15–Tr.Vol.II.p.56, line 18).

Detective Jennifer Butler met with Victim and Aiken in the hours following the crime. She testified the two appeared genuinely shaken up and fearful, even more so than the average violent crime victim. The solicitor asked whether, based on their perceived fear, she believed Victim's and Aiken's stories. Trial counsel objected, arguing whether Detective Butler believed their stories was irrelevant to the case. In response, the trial judge stated Detective Butler could testify as to whether she "gave credibility" to their stories. Ultimately, Detective Butler stated that their attitudes and very real fear caused her to find their stories credible. On cross-examination, Detective Butler admitted she could not say what caused Victim and Aiken to appear fearful and conceded the source of the fear could have been that they had reported a crime and implicated Johnson, a man they knew through a coworker, as a participant. (Tr.Vol.I.p.214, line 19–Tr.Vol.I.p.219, line 8; Tr.Vol.I.p.225, line 8–Tr.Vol.I.p.228, line 11).

A search of the PT Cruiser uncovered Victim's paystub, its envelope, and other documents within such as Victim's earning statement between the front driver and passenger seats of the vehicle. Six identifiable fingerprints were found on these items; five belonged to Appellant and one belonged to Johnson. A search of Johnson's phone records along with footage from the security camera at the Hardee's showed and Appellant's Facebook page showed Appellant spoke with Johnson on the phone while the latter was inside the restaurant. Appellant's Facebook page also had a picture of him with gold plating in his mouth. (Tr.Vol.I.p.229, line 21–Tr.Vol.I.p.278, line 7; Tr.Vol.II.p.57, line 22–Tr.Vol.II.p.80, line 11; State's Exhibits 31–36).

Shortly after the crime, Victim was able to identify Appellant in a photographic lineup.

(Tr.Vol.I.p.164, line 22–Tr.Vol.I.p.168, line 13; Tr.Vol.II.p.2, line 21–Tr.Vol.II.p.11, line 4; State's Exhibits 37–38).

Johnson's trial testimony differed drastically from the information he provided police; notably, he claimed he could not remember any information he provided to the officers and was drunk and when he "fabricated" the story about the armed robbery. Johnson claimed that on the day in question, he ran into Victim at the bank by happenstance when he went to cash his own check. Prior to that, he had met Victim when he and Aiken had transported his mother to and from work. After requesting Victim jump start his car, he asked him for money owed from the prior sale of drugs[3] and Victim suggested they pick up his paycheck at the Mount Pleasant Hardee's and willingly cashed his paycheck and gave it to Johnson. Appellant accompanied them throughout the experience, but no crime occurred. Johnson also claimed Appellant wore white, not black, on the day in question. (Tr.Vol.II.p.90, line 20–Tr.Vol.II.p.92, line 18; Tr.Vol.II.p.95, line 11–Tr.Vol.II.p.98, line 19; Tr.Vol.II.p.185, line 19–Tr.Vol.II.p.186, line 22).

However, Johnson's letters to the solicitor contradicted his story to police and his trial testimony. In them, he claimed he and Victim planned to meet at the bank because the latter did not want Aiken to discover his drug habit. In the second letter, Johnson claimed Victim called him and asked to be picked up. In a letter to his prior defense attorney, Johnson did not deny a crime occurred, but said Appellant did not participate and that he identified him to alleviate the pressure on himself. (Tr.Vol.II.p.92, line 19–Tr.Vol.II.p.95, line 10; Tr.Vol.II.p.98, line 20–Tr.Vol.II.p.102, line 8; Tr.Vol.II.p.108, line 14–Tr.Vol.II.p.109, line 6).

[3] Johnson later claimed he began selling drugs to Victim because, two to three months prior to the crime, Victim dropped Johnson's mother off at home and immediately asked him whether he sold drugs. (Tr.Vol.II.p.186, lines 5–24).

On cross-examination, Johnson vacillated between his claims that he unexpectedly saw Victim at the bank and that the men had arranged to meet. When he claimed Victim called him that morning, but could not explain why Victim's phone number failed to appear in his cell phone records. He also claimed only three people were in the vehicle at any time. Confronted with the photographs from the Hardee's, Johnson admitted a fourth person was in the vehicle, but did not know his full name, only that his initials were L.B. Johnson confusingly claimed both Appellant and L.B. wore white, despite photographs to the contrary. He also alleged L.B. was using Appellant's phone that day. Johnson also claimed he did not own a gun and did not take pictures with guns; Johnson recanted after the solicitor provided photographs of Johnson posing with guns. Johnson readily admitted he knew Hardee's employees could pick up their paychecks that day because he had taken his mother to do the same that morning. Johnson could not explain why Victim abandoned his girlfriend and their vehicle at the bank. Similarly, despite claiming he had taken his mother to Hardee's earlier that day, Johnson then claimed he and Appellant had worked construction with Johnson's father all morning. (Tr.Vol.II.p.111, line 12–Tr.Vol.II.p.143, line 23).

Finally, the solicitor impeached Johnson's testimony with a video recording of his interview with police in which he admitted to the robbery, identified Appellant as a coconspirator, told officers Appellant wore an all-black outfit, and described the statements Victim made during the ordeal. Additionally, Johnson conceded he had pled guilty to his charges in the case[4] and the solicitor pointed out that during his plea hearing, Johnson agreed with the State's version of the facts. (Tr.Vol.II.p.102, lines 9–16; Tr.Vol.II.p.144, line 4–

[4] Johnson was charged with armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. (Tr.Vol.II.p.103, lines 4–18).

Tr.Vol.II.p.163, line 22; Tr.Vol.II.p.187, line 15–Tr.Vol.II.p.193, line 21; Tr.Vol.II.p.200, line 24–Tr.Vol.II.p.202, line 10; State's Exhibits 45–46).

Appellant testified he was with Johnson and Victim on the day in question. He claimed Johnson did not plan to meet Victim at the bank. Johnson talked to Victim about purportedly owed payment for drugs, and the men left for the Mount Pleasant Hardee's without jump starting the PT Cruiser. Appellant admitted he, not J.B., called Johnson while he was in the bank and in Hardee's. He admitted he touched Victim's paystub and its envelope after Victim cashed his paycheck. (Tr.Vol.II.p.209, line 12–Tr.Vol.II.p.221, line 16).

During cross-examination, Appellant admitted he was wearing black the day of the robbery and it was him in the photographs presented at trial. He claimed he had been drinking and smoking weed and got out of the PT Cruiser at Hardee's because he heard emergency sirens and thought there might have been a car accident on the other side of Hardee's. (Tr.Vol.II.p.221, line 24–Tr.Vol.II.p.224, line 23).

The solicitor also asked Appellant whether he had a gun that day. Appellant claimed he did not have one that day, but he owns guns because it was his constitutional right to bear arms. The trial judge found this was a misstatement due to Appellant's criminal history and the fact he is forbidden by law to own a firearm. Accordingly, he allowed the solicitor to mention Appellant has a felony conviction which prevents him from owning a gun. When the solicitor resumed his cross-examination, he questioned Appellant about this fact. Appellant noted he was forbidden by law to own a firearm but that if he decided it was important, he would disregard the law and buy one. (Tr.Vol.II.p.230, line 6–Tr.Vol.II.p.258, line 9; Tr.Vol.III.p.22, line 15–Tr.Vol.III.p.38, line 22).

Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005). A party may not argue one issue at trial and a different issue on appeal. State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000).

"'Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror.'" State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009)). Generally, bolstering is prohibited to prevent a witness from testifying whether another witness is credible, which is exclusively within the province of the jury. Id.

In the instant case, this issue is not preserved for appellate review. Trial counsel's only objection at trial was that it was "irrelevant whether [Detective Butler] believe[d] . . . the story." Trial counsel did not complain such testimony was bolstering or that it impacted the jury's determination of the Victim's credibility. The trial judge was not given the opportunity to rule

on these bases, rendering this issue unpreserved for review by this Court. See Dickman, 341 S.C. at 295, 534 S.E.2d at 269; Rogers, 361 S.C. at 183, 603 S.E.2d at 912–13.

Standard of Review

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct. App. 2012). Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence. Heller, 399 S.C. at 171, 731 S.E.2d at 320.

Analysis

Detective Butler's contested statements were not improper bolstering because she was not qualified as an expert witness nor did she claim to reach her conclusion as to Victim's veracity based on any expert knowledge or skill. Detective Butler claimed she believed Victim based on his apparent sincerity, something the jurors were able to observe and gauge themselves. See Taylor, 404 S.C. at 514, 745 S.E.2d at 128.

The State also notes any alleged error in the admission of Detective Butler's believe in Victim's credibility is harmless given said assessments were cumulative to the assessments of another witness at trial, Kaufman. Heller, 399 S.C. at 171, 731 S.E.2d at 320. Similar to Detective Butler, Kaufman explained the witnesses gave consistent statements cooperated with

the investigation and that these behaviors set Victim apart from other victims of violent crimes. However, trial counsel failed to object in any way to this testimony.

Accordingly, the trial judge did not err in admitting this portion of Dr. Butler's testimony.

II.

The trial judge properly allowed the State to present evidence of Appellant's post-arrest silence because the evidence indicated Appellant was never given Miranda warnings.

Appellant argues the trial judge erred in allowing the solicitor to question him regarding his post-arrest silence, claiming such questions constituted an improper comment on his exercise of his right against self-incrimination in violation of Doyle v. Ohio, 426 U.S. 610 (1976). Notably, this issue is unpreserved for appellate review; trial counsel failed to timely object to the initial cross-examining on the matter and further failed to move to strike these statements when his objection was sustained by the trial judge. Further, the State disagrees with the merits of Appellant's argument: the two officers who interacted with Appellant during his arrest both testified Appellant was not Mirandized at the time of his arrest and Appellant's own testimony supports this assertion. Thus, the overwhelming evidence presented to the trial judge demonstrated the solicitor's cross-examination did not constitute a Doyle violation.

Statement of Facts

When asked why he failed to tell police his side of the story, Appellant noted:

> What do you mean, why not tell the police. I was never questioned. There was, like, a warrant was issued directly for my arrest. I [] never wrote a statement; I [] never did an interview; I [] never did any of those things. This is the first time I'm [telling] this story since I was locked up.

He further explained he was not arrested until three months after the crime, at which time there was already a warrant for his arrest and no police officers questioned him. After several of these questions and responses, trial counsel objected, arguing the questions amounted to an "improper comment" on Appellant's Fifth Amendment rights. The trial judge sustained the objection. (Tr.Vol.II.p.224, line 24–Tr.Vol.II.p.228, line 9).

The following morning, the Court further discussed whether a potential Doyle violation occurred. The solicitor explained nothing in Appellant's file indicated he was Mirandized when he was arrested after the crime. Appellant claimed he was Mirandized by a bald officer, who appeared to be around thirty years old and wearing all green, outside the apartment complex where he was arrested. He claimed was not questioned, and a female officer immediately drove him to the police station in her cruiser. (Tr.Vol.III.p.5, line 1–Tr.Vol.III.p.22, line 14).

Officer Danielle Smoak, the officer who performed Appellant's arrest. She explained that after he fled from police, he hid in an apartment complex. When officers announced they were about to release a K-9 unit, he exited the building. She placed him in handcuffs and placed him in her patrol car until a transport van arrived. She explained transport officers do not Mirandize or question arrestees and that she did not Mirandize or question him about his various charges. She noted the only officer at the scene who matched the description of the man Appellant described was K-9 officer Brandon VanAusdal, who notably was bald and had a green uniform due to his position. Officer Smoak did not see any other officer Mirandize or otherwise communicate with Appellant. (Tr.Vol.III.p.63, line 11–Tr.Vol.III.p.73, line 6).

Officer VanAusdal noted he never provided Appellant with Miranda warnings; instead, he warned Appellant several times that he would release his K-9 if he did not surrender to police. Similarly, he did not witness Officer Smoak or any other officer Mirandize Appellant. As soon as Officer Smoak arrested Appellant, he returned his dog to his vehicle. (Tr.Vol.III.p.73, line 12–Tr.Vol.III.p.80, line 14).

Trial counsel moved for a mistrial, arguing the State did not prove, beyond a reasonable doubt, that no officer spoke with Appellant and Mirandized him. The solicitor countered noting the officers' testimonies demonstrated no Doyle violation occurred. The trial judge noted it was

not incumbent upon the solicitor to prove, beyond a reasonable doubt, that Appellant did not receive Miranda warnings, and that the he provided sufficient evidence to support his argument. (Tr.Vol.III.p.80, line 15–Tr.Vol.III.p.86, line 25).

Issue Preservation

Regarding the requirement that a timely objection be raised, a defendant must make a contemporaneous objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late.").

Pursuant to our issue preservation requirements in South Carolina, an issue must also be raised in a sufficiently specific manner to call attention to the exact error to the trial court. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so **it can be reasonably understood by the trial judge**." (emphasis added)). Importantly, "[a] party need not use the exact name of a legal doctrine in order to preserve it[.]" State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). However, in order for an issue to be preserved for review, "it must be clear that the

argument has been presented on that ground." Id. Significantly, "[w]here an objection and the ground therefor is not stated in the record, there is no basis for appellate review." State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991); see State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970) ("It is well settled that an issue which has not been presented to or passed upon by the trial judge will not be considered on appeal."). "When a witness answers a question before an objection is made, the objecting party must make a motion to strike the answer to preserve the issue of that statement's admissibility." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011); see also State v. Saltz, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001) (finding a motion to strike unnecessary because the objection to the hearsay testimony was overruled).

In the instant case, Appellant's issue is unpreserved for appellate review because he both failed to timely object and to move to strike the testimony in dispute. Notably, the solicitor questioned Appellant for several minutes as to why he failed to tell police he was not involved in a crime. Appellant spoke at length about sitting in jail and not speaking to law enforcement about the crime before trial counsel objected. Because trial counsel failed to object at his first opportunity, this issue is not preserved for review. See Williams, 303 S.C. at 411, 401 S.E.2d at 169. Further, when trial counsel finally objected and it was sustained by the trial judge, trial counsel failed to request the prior testimony regarding Appellant's silence be stricken from the record. Accordingly, this issue is also unpreserved due to this failure. See Byers, 392 S.C. at 444, 710 S.E.2d at 58.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law.

State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); State v. Meggett, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. Inman, 395 S.C. at 565, 720 S.E.2d at 45. "Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. Meggett, 398 S.C. at 524. 728 S.E.2d at 496.

Ordinarily, when circumstances exist that would naturally lead a defendant to reveal a pertinent fact but the defendant fails to do so, it is proper to question the defendant about his failure to reveal the pertinent fact when an opportunity existed to do otherwise because such a failure can be probative towards issues such as fabrication and credibility. See Jenkins v. Anderson, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."); see also Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) (recognizing silence can be probative while noting "if the shooting was an accident, petitioner had every reason – including to clear his name and preserve evidence supporting his version of the events – to offer his account immediately following the shooting"). However, when the defendant's silence follows the giving of Miranda warnings, such silence loses its probative force due to the fact "[s]ilence in the wake of [those] warnings may be nothing more than the [defendant]'s exercise of [those] Miranda rights." Doyle, 426 U.S. at 617. Accordingly, the use of a defendant's post-Miranda silence for impeachment purposes is improper and constitutes a violation of the defendant's due process rights. Id. at 619. "The obvious purpose [of that

prohibition] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions." Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000); see Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) ("The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.").

Analysis

In the instant case, the trial judge did not abuse his discretion in finding Appellant had not been given his Miranda rights and that the solicitor could question him about his post-arrest silence. Officer Danielle Smoak, the officer who arrested Appellant, testified she was the officer how handcuffed him and took him into custody and that no one, including herself, Mirandized Appellant or attempted to question him. Officer VanAusdal, the only officer who matched Appellant's description, testified he did not Mirandize Appellant, and that the only warnings he provided was that he would release his K-9 if Appellant did not allow the officers to take him into custody. He did not observe anyone other than Officer Smoak interact with Appellant, much less Mirandize him. Appellant's own testimony further evidences this conclusion: officers never attempted to question or communicate with him during or after his arrest.

Accordingly, the trial judge did not err in finding no Doyle violation occurred and denying trial counsel's motion for a mistrial.

III.

The trial judge correctly refused to grant a mistrial because the record demonstrated Juror 280 was able to, and did, participate in jury deliberations.

Appellant argues the trial judge erred in "not enforcing its grant of a mistrial" because one of the jurors was unable to participate in deliberations. However, the trial judge never granted a mistrial in the case and merely suggested he may need to because he feared the juror would not participate in deliberations. The trial judge properly avoided granting such a motion because he discovered the juror participated in deliberations and reached the same verdict as the remaining eleven jurors.

Statement of Facts

At the conclusion of the trial judge's instructions, he discharged a juror and one of the two alternates, and the remaining jurors began deliberations. A short time later, the trial judge received information that juror number 280 (280) was not participating in deliberations. He summoned her to the courtroom and she explained she was on the third day of her period, and she had bled all the way through her clothes; she feared sitting in a chair would leave a stain on the furniture. The trial judge explained he already released the alternates but that he would be glad to let her do whatever she needed to help. She explained she would just use a towel. When the trial judge offered to release the jurors early that day, she explained it "[didn't] really matter" at that point because she had already bled through her clothes. She also refused an offer to start late the next morning, again noting it "[didn't] matter." (Tr.Vol.III.p.174, line 6–Tr.Vol.III.p.176, line 6).

After the juror returned to the jury room, the trial judge informed the parties he had called the juror into courtroom because he heard she had been crying and not participating in the

discussions. Concerned she would not participate, the trial judge warned he would have to declare a mistrial. Trial counsel requested that they merely delay deliberations until the following Monday because there was no defect in the case. The trial judge feared only more problems would arise in that scenario and asked Appellant whether he was willing to proceed with only eleven jurors. Appellant did not waive that right. The trial judge decided to bring 280 back into the courtroom for further discussions. Before he could do so, the trial judge discovered the jurors had reached a verdict in the case. (Tr.Vol.III.p.176, line 7–Tr.Vol.III.p.178, line 12).

The trial judge asked the jury foreperson whether he believed the jury had an adequate opportunity to review the evidence and reach its decision, and he responded in the affirmative. He also asked 280 whether she had been able to participate in the deliberations and adequately consider the evidence, and she too responded in the affirmative. Then, all jurors raised their hands to indicate it was the verdict they collectively reached. (Tr.Vol.III.p.178, line 15–Tr.Vol.III.p.179, line 22).

After the verdict was read, trial counsel moved for a mistrial, claiming 280 indicated she was unable to effectively participate in the deliberations. The trial judge denied the motion, noting 280 specifically stated she had participated fully in the deliberations. (Tr.Vol.III.p.182, line 12–Tr.Vol.III.p.183, line 9).

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); State v. Meggett, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be

removed in no other way. Inman, 395 S.C. at 565, 720 S.E.2d at 45. "Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. Meggett, 398 S.C. at 524. 728 S.E.2d at 496.

The Constitution of South Carolina provides, "[t]he petit jury of the Circuit Court shall consist of twelve members and the number of jurors of other courts must be determined by law. S.C. Const. art. V, § 22. All jurors in any trial court must agree to a verdict in order to render the same . . ." Pursuant to Rule 14(a), SCRCrimpP, however, any time before the verdict the parties may agree in writing (with the court's approval) that a valid verdict may be returned by less than twelve jurors.

Analysis

The trial judge did not err in refusing to grant Appellant's motion for a mistrial. The record indicates 280 participated in the jury's deliberations. The complaints regarding 280's refusal to participate in discussions arose from the deliberations that occurred prior to her discussion with the trial judge. When she spoke with him on the record, she indicated she would sit on a towel and participate in discussions. The trial judge only considered granting a mistrial because he believed 280 would not participate after returning to the jury's chambers. However, before he could do so, the trial judge received word that the entire jury, including 280, had reached a verdict in the case. Both the jury foreperson and 280 confirmed the latter participated in deliberations, had adequately considered the case, and that the verdict was unanimous among the jurors. Accordingly, the record demonstrates the trial judge did not abuse his discretion in denying trial counsel's motion for a mistrial. See Inman, 395 S.C. at 565, 720 S.E.2d at 45.

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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Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

October 15, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
OCT 15 2018
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001296

THE STATE, ...RESPONDENT,

v.

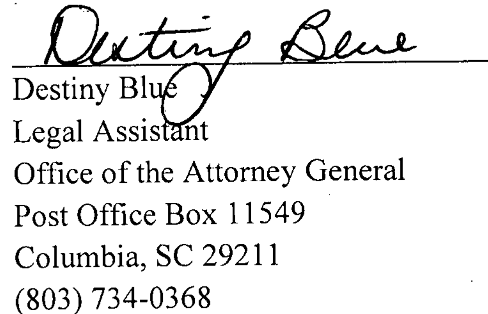
TAPPIA DANGELO GREEN, ...APPELLANT.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Joanna K. Delany, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 15th day of October, 2018.



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ALAN WILSON
ATTORNEY GENERAL

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OCT 15 2018
SC Court of Appeals

October 15, 2018

Joanna K. Delany, Esquire
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Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

RE: State v. Tappia Green – Appellate Case No. 2017-001296

Dear Ms. Delany:

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

Sincerely,

William F. Schumacher
Assistant Attorney General
Bar Number 100231

WFS/
Enclosures

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

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