STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of General Sessions
Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2017-002265

THE STATE, ...RESPONDENT,

v.

COLE BROOKS GRAY,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-0368

DAVID R. WAGNER
Solicitor, Tenth Judicial Circuit

100 South Main St.
Anderson, SC 29624
(864) 260-4046

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge properly denied Appellant's motion for a mistrial because the State's reply argument to trial counsel's closing did not violate Appellant's right to due process or otherwise prejudice him. Further, any error in allowing the State's reply was harmless given the overwhelming evidence of Appellant's guilt.

II. The trial judge properly admitted the recording of Appellant's phone call from jail because it was substantive evidence of Appellant's guilt; throughout the phone call, Appellant admitted his guilt for his various offenses. Further, any error in the admission of the portions of the phone call containing profanity, racial slurs, and other inappropriate comments were harmless given the overwhelming evidence of Appellant's guilt.

III. Lieutenant Gebing's single, unsolicited reference to Appellant's previous arrests' was not so prejudicial as to warrant a mistrial of Appellant's case; any error in the admission of the statement was harmless given the overwhelming evidence of Appellant's guilt.

STATEMENT OF THE CASE

On May 23, 2017, the Anderson County Grand Jury indicted Appellant for trafficking in methamphetamine, more than one-hundred grams. On August 22, 2017, an Anderson County Grand Jury indicted Appellant for receiving stolen goods and failure to stop for a blue light, second or subsequent offense. On October 16–18, 2017, Appellant proceeded to a jury trial before the Honorable Alexander Macaulay. R. Joseph Oppermann, Esquire, represented Appellant; Solicitor David Wagner, Esquire, and Assistant Solicitor Mary Holahan, Esquire, represented the State. The jury found Appellant guilty as charged. The trial judge sentenced Appellant to a mandatory twenty-five years' incarceration for trafficking, five years' incarceration for failing to stop for a blue light, and three years' incarceration for receiving stolen goods, with all sentences to be served 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.

STATEMENT OF FACTS

On November 12, 2016, Officer Matthew Stipe of the Anderson County Sheriff's Office was on patrol when he observed a black truck ignore a stop sign and cross into the wrong lane of travel. Observing two separate traffic offenses, Officer Stipe decided to initiate a traffic stop and triggered his blue lights and sirens. In response, the driver of the truck, Appellant, accelerated and attempted to evade Officer Stipe. Officer Stipe contacted dispatch and informed them of the pursuit and requested backup. During Appellant's flight, he collided with another vehicle after ignoring another stop sign. The truck briefly stalled before Appellant continued his flight. (Tr.p.99, line 20–Tr.p.111, line 24; State's Exhibit 1).

During the chase, Officer Stipe requested dispatch "run the tag number" of the truck. The license plate number was associated with a sedan, leading him to suspect the vehicle was, in fact, stolen. As the chase continued, other officers were dispatched to the area to lay out "stop sticks" across the roadway to flatten Appellant's tires and end the chase. Appellant evaded one such set of stop sticks, but pulled in front of Officer Stipe and caused him run over the sticks and end his participation in the chase. (Tr.p.112, line 5–Tr.p.117, line 18; State's Exhibit 1).

Officer Casey Purdy, who joined the chase shortly before Officer Stipe's vehicle was incapacitated, continued the pursuit. At one point, Officer Purdy observed Appellant manipulating an item in his lap, and notified other officers of such in case the pursuit changed into a foot-chase. Eventually, stop sticks were successfully deployed on Appellant's vehicle. As Appellant's tires begin to deflate, he tossed "a bag containing a clear substance" into the road. Appellant is stopped and pulled form his vehicle. Officer Purdy backtracked to locate the bag, and found it in the appropriate spot approximately one minute after it was tossed by Appellant. He stayed with the bag and its contents while other officers arrived to photograph them and aid

in their clean-up; a "clear crystal substance" had leaked out of the bag when it hit the pavement. Additionally, a second small bag filled with the same substance was found in Appellant's vehicle. The substance in the bag tested positive for methamphetamine. Sergeant Chris Beusse arrived at the scene and collected evidence of Appellant's various crimes, which included gathering the methamphetamine off of the road and taking pictures of various items at the scene, including the multiple license plates in the bed of the truck. (Tr.p.150, line 22–Tr.p.170, line 25; Tr.p.191, lien 17–Tr.p.205, line 13; State's Exhibit 2).

Mr. John Davis, the truck's owner, testified at trial that his truck was the same one involved in the chase and that it was stolen in October or November of 2016. (Tr.p.188, line 2–Tr.p.190, line 21).

Meredith Lanford, the forensic chemist who analyzed the drugs collected by the officers, testified no debris or foreign objects were found inside the drugs when she weighed and analyzed them. In total, the contents of the two bags weighed 112.64 grams. (Tr.p.230, line 18–Tr.p.243, line 4).

Outside the presence of the jury, the State proffered the recording of a phone call made by Appellant while he was at the Anderson County Jail. After the courtroom listened to the call, trial counsel objected to various portions of it pursuant to Rules 403, 801, and 802 SCRE, including two specific statements: (1) Appellant stating "[officers stated] they found [Appellant] with 120 grams [of methamphetamine]"; Appellant claiming officers said, "Look at this [piece of shit]. He's got all these drugs and somebody's [food stamp] card." Trial counsel argued both of these statements were inadmissible hearsay. Submitted for "the truth of the matter asserted." Further, trial counsel also objected to portions of the call which contained profane language, discussion of hiring an attorney, and "suggesting that a crime has been committed," were

inadmissible pursuant to Rule 403, SCRE because they were more prejudicial than probative of Appellant's guilt. However, trial counsel did not dispute that certain portions of the recording, Appellant's direct admissions of guilt, were admissible. The State argued against excluding any portion of the recorded call, noting Appellant repeatedly mentions: (1) where he started the chase with the police; (2) colliding with the other vehicle; (3) driving through the backyard; and (4) trying to get rid of the drugs. The State also noted that the specific statements challenged by trial counsel were not hearsay. The trial judge ultimately denied the request to redact any portion of the recording, noting the comments were Appellant's statements and that, while he was paraphrasing others, he adopted those statements as his own and offered them as true to the recipient of his call. (Tr.p.206, line 11–Tr.p.218, line 7; Tr.p.221, line 9; State's Exhibit 4).

Lieutenant Robert Gebing with the Anderson County Sheriff's Office was the witness through whom the recording of the phone call was submitted. The State questioned Lt. Gebing as to whether the recorded phone call was the first one Appellant made after his arrest. Lt. Gebing responded it was "[n]ot the first one from the jail [but] [t]he first one during that particular arrest[.]" Trial counsel immediately moved for a mistrial, claiming Lt. Gebing's statement was a statement on Appellant's criminal history and thus impermissible character evidence. The trial judge denied the motion, claiming the jury would discover the existence of Appellant's criminal history due to Appellant's own references to prior incarceration during the recorded call. Thereafter, the recorded call was published to the jury. Throughout the call, Appellant admits to participating in the chase with police, sharing several details of the chase including his attempt to dispose of the drugs. Additionally, Appellant is asked during the call about a food stamp card belonging to a "Jesse," and he states that it was taken from him by officers and that it was not his or in his name. At various parts during the call, Appellant

references being attacked while in jail, and both he and the person to whom he is speaking use profanity. At no point during the call did Appellant claim he was previously arrested or convicted of another crime. (Tr.p.243, line 24–Tr.p.252, line 7; State's Exhibit 4).

After the State presented all of its witnesses, trial counsel informed the trial judge he did not intend to present evidence, instead focusing on "whether or not the State met its burden [of proof]." However, he requested that, given his decision to not present evidence, he be permitted to give his closing argument without rebuttal from the State. The State did not challenge the request. Accordingly, the trial judge ruled the State would not give a rebuttal except to "respond to . . . any new matter brought up by the defense." Neither party objected to this ruling. (Tr.p.265, line 5–Tr.p.286, line 16).

Prior to closing arguments, the trial judge explained the State would open on the law and the evidence, trial counsel would provide his own closing, and the State would give the final argument. The State gave a full summary of the case and the evidence demonstrating Appellant's guilt, displaying the video recordings and pictures to the jury. He emphasized that Lanford weighed the drugs and verified that they weighed over 100 grams and were free of debris. (Tr.p.293, line 13–Tr.p.306, line 11).

During his closing, trial counsel admitted Appellant was guilty of failing to stop for a blue light. However, he disputed whether the State met its burden on Appellant's remaining charges. He claimed the State failed to provide any evidence that Appellant knew the truck was stolen. He also argued the State failed to prove the large bag of drugs found on the ground came from Appellant, or that the evidence was not contaminated with road debris, stating "common sense" dictated that some debris would have been mixed in with the bag. He argued that if the jury found the collection of the drugs off of the road "unsound," but believed Appellant was in

possession of some amount of methamphetamine, it should find Appellant guilty of a lesser included offense, such as possession of methamphetamine or possession with intent to distribute methamphetamine. (Tr.p.306, line 13–Tr.p.328, line 11).

After a brief sidebar discussion, the State gave a brief reply argument, claiming Appellant knowingly possessed over 100 grams of methamphetamine which made him guilty of trafficking under the charged statute. He further noted the drugs were easily removed from the road and there was no evidence of any debris being included in the drugs. After another sidebar discussion, the trial judge charged the jury. (Tr.p.328, line 12–Tr.p.329, line 23).

Following the trial judge's instructions, trial counsel objected to the State's reply to trial counsel's closing. He claimed that because he did not present a case, the defense had the fight to close with its arguments and that the trial judge's failure to give him the last argument was grounds for a mistrial. The trial judge disagreed, noting he earlier ruled the State would be permitted to give a reply, but that he would be unable to raise any new matters in said reply and would be limited to responding to trial counsel's closing. (Tr.p.353, line 10–Tr.p.358, line 24).

ARGUMENT

I.

The trial judge properly denied Appellant's motion for a mistrial because the State's reply argument to trial counsel's closing did not violate Appellant's right to due process or otherwise prejudice him. Further, any error in allowing the State's reply was harmless given the overwhelming evidence of Appellant's guilt.

Appellant argues the trial judge erred in denying trial counsel's motion for a mistrial because the trial judge, by allowing the State to make a brief reply to Appellant's closing, committed reversible error. While the State agrees Appellant was entitled to close without a rebuttal by the State, the State disagrees with the allegation that Appellant was prejudiced by not having the final argument due to the overwhelming evidence of Appellant's guilt.

Standard of Review

Historically, the right to the final closing argument has followed the party with the burden of proof. *Stein Closing Arguments § 1:6: Right to open and close; order of argument* (2011-2012 ed.) ("Generally, the right to make opening and closing follows the person having the burden of proof."); Nicole Velasco, *Taking the "Sandwich" Off of the Menu: Should Florida Depart from Over 150 years of Its Criminal Procedure and Let Prosecutors Have the Last Word?*, 29 Nova L.Rev. 99, 112 (2004) ("At common law, the widely accepted rule in the United States is that the party with the burden of proof has the right to open and conclude final argument before the jury.").

In criminal trials in South Carolina, a solicitor is entitled to open and close the closing arguments to the jury unless the defendant has not offered any evidence. State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977). In those situations, the "defendant(s) have the right to

open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument." State v. Beaty, 423 S.C. 26, 42, 813 S.E.2d 502, 510 (2018).

"Generally, '[i]mproper comments made during closing argument] do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.'" Beaty, 423 S.C. at 43–44, 813 S.E.2d at 511 (quoting Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). "The relevant inquiry is whether the State's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. "A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997).

Analysis

As explained in Beaty, Appellant was entitled to the final closing argument because he did not present any evidence at trial. See Beaty, 423 S.C. at 42, 813 S.E.2d 510. Any error in allowing the State to respond to trial counsel's closing argument is harmless given the overwhelming evidence of Appellant's guilt. Davis confirmed the vehicle Appellant drove was his stolen truck. At trial, several officers testified regarding the car chase with Appellant, including his attempt to dispose of methamphetamine. The video recording of Appellant's apprehension clearly shows him throwing the bag of drugs out the window of the stolen truck he was driving. Further, Appellant himself admitted in the recorded phone call that he was in possession of the drugs and tried to dispose of them during the chase. Lanford testified the two bags of methamphetamine weighed 3.3 and 109.34 grams, pushing Appellant over the 100 gram threshold for his trafficking charge. Accordingly, due to this overwhelming evidence of

Appellant's guilt, Appellant was not prejudiced by the trial judge's decision to allow the State a rebuttal argument. See Beaty, 423 S.C. at 43–44, 813 S.E.2d at 511.

II.

The trial judge properly admitted the recording of Appellant's phone call from jail because it was substantive evidence of Appellant's guilt; throughout the phone call, Appellant admitted his guilt for his various offenses. Further, any error in the admission of the portions of the phone call containing profanity, racial slurs, and other inappropriate comments were harmless given the overwhelming evidence of Appellant's guilt.

Appellant argues the trial judge erred in admitting the entire recording of his jail phone call because it contained hearsay, profane language, and portrayed Appellant as a "habitual criminal," and this information had minimal probative value which was substantially outweighed by the danger of unfair prejudice to Appellant. The State disagrees with these allegations of error. Initially, the State notes Appellant's allegations of hearsay are incorrect as the challenged statements regarding the amount of drugs found and the discovery of cash and the food stamp card were not admitted to prove Appellant committed any of his charged offenses. Further, the trial judge properly admitted the recording after reviewing it and determining its probative value outweighed the few instances of inappropriate language within. Finally, any error in admitting the recording is minor given the overwhelming evidence of Appellant's guilt.

Standard of Review

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 716 S.E.2d 895, 903 (2011). A trial court has particularly wide discretion in ruling on Rule 403 objections. See State v. Adams, 354 S.C. 361, 580 S.E.2d 785, 794 (Ct.App.2003) (trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances, and the appellate court is obligated to give great deference to the trial court's Rule 403 judgment); State v. Collins, 398 S.C. 197, 727 S.E.2d 751,

754 (Ct. App. 2012). The failure to exercise discretionary authority is, itself, an abuse of discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

"[A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Probative" means "[t]ending to prove or disprove." Black's Law Dictionary 1323 (9th ed. 2009). Probative value is the measure of the importance of that tendency to the outcome of a case. Collins, 727 S.E.2d at 754. Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates. Id.

In South Carolina, hearsay is inadmissible "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. Our rules of evidence define hearsay as "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(c), SCRE.

Even if improper hearsay evidence is admitted, any error in the admission of the hearsay evidence is subject to a harmless error analysis and only warrants reversal if it results in actual prejudice. State v. Weston, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008).

Analysis

Initially, the State notes Appellant's comments regarding the amount of drugs for which he was charged and his possession of a food stamp card were not hearsay. The State did not claim either statement proved any elements of its case against Appellant, and Appellant was never charged with anything relating to the food stamp card. Further, the State used other evidence at trial to prove the weight of the methamphetamine recovered, and that number was below the 120 grams mentioned by Appellant. Accordingly, because neither statement was submitted for the "truth of the matter asserted," neither statement was hearsay. See Rule 801(c), SCRE.

Appellant argues his case is similar to State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), in which the Supreme Court of South Carolina found the trial court abused its discretion in admitting a fifteen-minute recorded phone call made by the defendant used by the State to prove the defendant owned the cell phone used to contact a cab company. The recording was "riddled with profanity, facial slurs, and impermissible references to King's prior bad acts." Id. at 69, 810 S.E.2d at 30. During trial, the court refused to listen to the recording prior to publishing it to the jury, which the Supreme Court found to be a failure of exercising the trial court's discretionary authority over its admission thus rendering it unable to determine whether the probative value of the recorded call outweighed the potential for unfair prejudice. Id. at 68–69, 810 S.E.2d at 29. The Supreme Court based its decision, in part, on the fact that the State possessed other evidence—detention center call logs—which also proved King's ownership of the cell phone. Id. However, the Supreme Court found the admission of the recording was harmless error as to King's convictions for armed robbery and possession of a firearm during the commission of a

violent crime due to the overwhelming evidence of King's guilt of those charges, which included a positive identification by the victim.

Notably, Appellant's case is distinguishable from King in several important ways. Most importantly, the trial judge reviewed Appellant's recorded phone call before admitting it into evidence. Thus, the decision to admit the recording was the result of the exercise of his discretion and not the lack thereof. See Smith, 276 S.C. at 498, 280 S.E.2d at 202 (stating the failure to exercise discretionary authority is, itself, an abuse of discretion). Further, admission of the recording in King was unnecessary given the other evidence of ownership of King's cell phone, but in the instant case the recorded phone call was direct evidence of Appellant's guilt of his trafficking and failure to stop for a blue light charges. Throughout trial, counsel disputed that the drugs originated from Appellant and the stolen vehicle. Additionally, many of Appellant's "inappropriate" statements were made while he described his failure to stop for a blue light, another of his charges. Thus, Appellant's recorded call, even the parts containing profanity, was direct evidence in the State's case.

Further, while Appellant did discuss aspects of his incarceration, there was no mention of whether Appellant was previously incarcerated or had any prior convictions. Notably, Appellant claimed he was the victim of an attack and was severely injured.

Finally, similar to King, any alleged error in admitting the entire recorded phone call is entirely harmless given the overwhelming evidence of Appellant's guilt. As noted supra, there was overwhelming evidence of Appellant's guilt, including the video recording of him throwing the methamphetamine out of his stolen vehicle and his own admissions of guilt during the unchallenged portions of the recorded phone call.

Accordingly, the trial judge did not err in admitting the entire recorded phone call.

III.

Lieutenant Gebing's single, unsolicited reference to Appellant's previous arrests' was not so prejudicial as to warrant a mistrial of Appellant's case; any error in the admission of the statement was harmless given the overwhelming evidence of Appellant's guilt.

Appellant argues the trial judge erred in "allowing" Lt. Gebing to testify Appellant had previously been arrested as that statement was inadmissible bad character evidence. Initially, the State notes the trial judge did not "allow" Lt. Gebing to make the statement: he unexpectedly made the statement during his testimony due to a misinterpretation of a question posed by the State. Additionally, Appellant's complaint that the trial judge improperly admitted bad character evidence is unpreserved for appellate review because he failed to make a specific objection to the evidence at trial. Further, trial counsel's only requested remedy was a mistrial, which the trial judge properly denied due to the unimportance of the statement.

Error 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 therefore 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).

The State notes Appellant's argument regarding the admissibility of this statement is not preserved. At trial, Appellant only provided a general objection that Lt. Gebing's statement was "character evidence not permitted by the South Carolina Rules of Evidence," without pointing to

any specific rule or articulating how the statement violated said rules. Without a specific objection, the trial judge was not provided a sufficient reason to rule in Appellant's favor. See Fleming, 254 S.C. at 421, 175 S.E.2d at 627. Accordingly, this issue is not proper for appellate review.

Analysis

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.

On the merits, any error in Lt. Gebing's statement is harmless given the overwhelming evidence of Appellant's guilt. Again, as noted supra, there was overwhelming evidence of Appellant's guilt, including the video recording of him throwing the methamphetamine out of his stolen vehicle and his own admissions of guilt during the unchallenged portions of the recorded phone call. This single reference to the fact that Appellant was arrested on more than one occasion could not have changed the jury's verdict given the substantial evidence of his guilt.

Accordingly, the trial judge did not err in denying Appellant's motion for a mistrial.

CONCLUSION

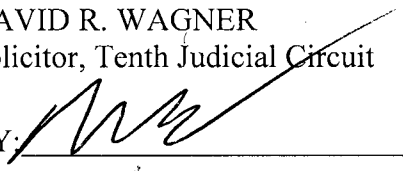
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

DAVID R. WAGNER
Solicitor, Tenth Judicial Circuit

BY: 

William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ATTORNEYS FOR RESPONDENT

January 15, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of General Sessions
Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2017-002265

THE STATE, ...RESPONDENT,

v.

COLE BROOKS GRAY,.....APPELLANT.

PROOF OF SERVICE

I, Troyeshi Brailey, 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 January, 2019.

Shana Montgomery
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ALAN WILSON
ATTORNEY GENERAL

January 15, 2019

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

RE: State v. Cole Brooks Gray – Appellate Case No. 2017-002265

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/ssm
Enclosures

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