STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of General Sessions
Thomas W. Cooper, Circuit Court Judge

Appellate Case No. 2017-001125

THE STATE,

Respondent,

v.

NATHANIEL ANTRON HUNTER,

Appellant.

FINAL BRIEF OF RESPONDENT

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II.

Whether the trial court erred by admitting an audio recording of Victim's statement in the emergency room where immaterial or indiscernible statements of medical personnel can be heard in the background.

III.

Whether the trial court erred by admitting text messages extracted from Appellant's phone where the messages were not hearsay.

IV.

Whether Appellant suffered prejudice when evidence of his guilt was overwhelming.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249 (Ct. App. 2006). Appellant raises two issues challenging the trial court's admission of evidence. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). Appellant raises one issue challenging the trial court's decision to deny Appellant's motion for mistrial. "The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

STATEMENT OF THE CASE

A Lexington County grand jury indicted Appellant for Burglary 1st Degree, Attempted Murder, Criminal Sexual Conduct with a Minor 3rd Degree, and Possession of a Weapon during the Commission of a Violent Crime. Appellant proceeded to jury trial before the Honorable Thomas W. Cooper on April 24, 2017. Appellant was convicted of each charge. Judge Cooper sentenced Appellant to forty-five, thirty, fifteen, and five years' incarceration on the respective charges, to be served concurrently. This appeal follows.

STATEMENT OF FACTS

Larenda Simon (Victim) and her nine-year old daughter (Child) lived in an apartment complex in West Columbia. R. 272-74. During the early morning hours of April 13th, 2014, Victim and Child were asleep in Victim's bed when Victim awoke to see a man in a ski mask and hoodie standing over her holding a gun. R. 277. The man was dressed in all black and wearing boots. R. 277. Victim began to plead with the man, telling him she did not have any money. R. 277. The man took her phone and told her to take off her panties. R. 278-79. Victim asked that Child be allowed to leave the room, and the man told Child to go into the bedroom closet. R. 279. Victim removed her panties but informed the intruder that she was menstruating. R. 280. The man then asked how old her daughter was, and told Child to come out of the closet and remove her clothes. R. 280. While holding Victim at gunpoint, the intruder began to take out his penis. R. 281. Rather than allow the man to rape her daughter, Victim jumped on the intruder and attempted to wrestle the gun from him. R. 282.

Victim and the intruder struggled over the gun, and the intruder told Victim that he was going to kill her. R. 282. As Victim tackled the intruder, the weight of her body carried the two across the hall into the bathroom. R. 282. During the struggle, the man shot Victim several times, but Victim continued to fight. R. 282-84. The intruder finally fled from the apartment, leaving Victim with gunshot wounds to her chest, arm, hand, and underarm. R. 284; 554. Victim and Child fled the apartment and sought aid from a neighbor, who called 911. R. 286-287. Victim required surgery, but survived her injuries. R. 288.

Victim described the intruder to police as around five feet and four to six inches tall. R. 442. Although Victim could not see the intruder's hands or other body parts because he was wearing a disguise, she recalled looking directly into his eyes and hearing his voice. R. 233.

After having an opportunity to look Appellant in his eyes and hear him speak during court proceedings, Victim identified him as her attacker. R. 302-03. Child testified, corroborating Victim's account. R. 395-404. Child testified that the intruder's handgun was black. R. 402.

Investigators with the West Columbia Police Department investigated the scene. R. 574-76. Police found five shell casings in the bathroom of Victim's apartment and collected four projectiles from Victim's and her neighbor's apartments. R. 593. These items were tested by a ballistics expert at the State Law Enforcement Division (SLED), who concluded they were fired from a 40 caliber pistol made by either Glock or Smith and Wesson. R. 828-29. Inside Victim's bathroom, police also discovered a black hoodie sweatshirt with a skull cap tucked inside the hood. R. 591-94. Victim testified the clothing did not belong to her. R. 298. Officers requested an expedited DNA analysis of the clothing. R. 778. SLED technicians conducted an "ownership swab" of the cap and hoodie in an attempt to extract skin and other cells deposited in the clothing over time. R. 848. DNA extracted from the skull cap matched Appellant's DNA, which was entered into the state's DNA database in 2004. R. 773; 869-70.

On April 16, three days after the burglary, Appellant called the Department of Probation, Pardon and Parole (DPPP) and SLED to request that his DNA be removed from the state's DNA database. R. 155-56; 455, l. 4-5; 768-69; 777-78. Appellant provided the agencies with his name and telephone number. R. 769. Appellant called DPPP again on April 17th to follow up on his request, and answered a return phone call at the number he provided. R. 771. Prior to trial, police searched Appellant's phone and extracted call log, text message, and internet browser data. R. 928-31. The data showed caller ID-blocked outgoing calls to the Richland County Sheriff's Office warrants division, Columbia Police Department warrants division, and SLED between April 15th and 17th. R. 936-39. The data also showed calls to a rental car company and

the Carolina Trader magazine that were not caller ID-blocked. R. 938-39. The State presented evidence showing Appellant took out an advertisement in the Carolina Trader to sell his car on April 17th. R. 568-70. The data also showed numerous internet searches related to removal of DNA from DNA databases, visits to local crime news sites, the U.S. Marshalls most wanted fugitives list, and a news article entitled "Arrest Warrant Issued for Burglary Suspect." R. 937-40. The State originally intended to offer the data to show an absence of activity on the phone during the time of the incident, but after hearing extensive, contradictory, and inconclusive testimony from both prosecution and defense experts, the court ruled the State could not introduce the data for that purpose. R. 717; 905-18.

Based on the DNA tests and Appellant's suspicious attempts to destroy his DNA sample, officers obtained an arrest warrant for Appellant. R. 454. On April 17th, SLED agents tracked Appellant to an apartment complex in Columbia near Interstate 277. R. 456-57. Police spotted Appellant leaving the apartments driving a rental car. R. 457; 462. When signaled to stop, Appellant fled. R. 457-58. Disregarding traffic signals and speed limits, Appellant led police on a three mile chase until he eventually pulled over near 2548 North Main Street, where they arrested him. R. 458. Officers observed scratch marks on Appellant's face and an abrasion on his shoulder. R. 468-70. Appellant denied involvement in the burglary, but offered the police information on an unrelated murder case in exchange for a plea deal. R. 502. When confronted with information that his DNA was found at the scene, he told officers he had given away clothes to a thrift store or a "crackhead." R. 495. When asked about the scratches on his face, he told officers that he'd gotten the scratches while play-fighting with his cousin and roommate, Tanisha Taylor. R. 496. Appellant gave officers a different phone number than he had given employees of DPPP. R. 73; 85.

Taylor denied causing the injuries. R. 796. She testified she awoke around four o'clock on the morning of the incident date and saw Appellant washing clothes. R. 793-94. Appellant was wearing only boxer shorts and a tank top, and made a comment about the injuries to his face. R. 794-95. Appellant did not have the injuries the night before. R. 796. Taylor testified Appellant owned a black handgun which she believed to be a 40 caliber Glock. R. 799-800. After being shown a picture of Appellant holding a black handgun, Taylor testified she believed it was the same gun she saw Appellant with on prior occasions. R. 803. The trial judge prevented the State from publishing the photograph to the jury because it also showed Appellant holding a second handgun. R. 803; 837-38. Taylor testified Appellant was upset with her for telling law enforcement about the gun. R. 815. The gun was never located. R. 738.

ARGUMENT

I.

The trial court did not abuse its discretion by refusing to grant a mistrial based on the prosecutor's comment during his opening statement that the jury would see a photograph of Appellant holding a gun like one used to shoot victim, where the court allowed a witness to view the photograph and testify she recognized the gun as similar to Appellant's, but did not allow the jury to view the photograph because it also showed Appellant holding a second gun.

Appellant claims the trial court erred by refusing to grant a mistrial based on the prosecutor's remark during his opening statement that law enforcement discovered a picture on Appellant's phone of Appellant holding a 40 caliber Glock pistol. Defense counsel contemporaneously objected to the comment because the court had not yet ruled on his motion in limine to exclude the picture. R. 191. The court noted that it had yet to rule on Appellant's motion to exclude the picture, and suggested the prosecutor not go into further detail. R. 191. Defense counsel later moved for a mistrial at a time provided by the court. R. 257. The court denied the motion, finding the mere mention of Appellant being in possession of a weapon did not necessitate a mistrial. R. 258. The court indicated it would give a curative instruction if necessary. R. 258. During the course of trial, the State produced evidence that the crime was committed using a 40 caliber pistol; that a data extraction was performed on Appellant's phone; and that Appellant owned a 40 caliber handgun. A witness testified Appellant owned a 40 caliber handgun, and was allowed to view the photograph in question. She testified she recognized the gun as Appellant's. R. 798-800. However, the trial judge did not allow the State to publish the picture to the jury because it showed Appellant holding two guns, not just the gun recognized by the State's witness, and the court believed the photograph would be cumulative and unfairly prejudicial to Appellant. R. 860, l. 10-13; 837-38. Appellant moved for a mistrial

again at the close of the State's case, and the court again denied the motion. R. 945-46. The court did not err because the State produced competent evidence reasonably supporting the comment, and Appellant suffered no prejudice.

The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). A mistrial should not be granted unless absolutely necessary. State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Id. In order to receive a mistrial, the defendant must show error and resulting prejudice. Id.

Although Appellant claims the "photographs were correctly excluded as irrelevant and highly prejudicial," Brief of Appellant p. 7, Appellant mischaracterizes the trial court's ruling. The court never found that evidence that Appellant owned a 40 caliber pistol was irrelevant or prejudicial. Rather, the court simply ruled the photograph would not be published to the jury because Taylor had already testified the gun in the picture appeared to be the same gun she saw Appellant with in the past, and the picture's depiction of the second gun created a danger of unfair prejudice. R. 837-38. The court reasoned that "the jury certainly does not need to see [the second gun] in this case as there's not been any evidence or testimony at this point of any other firearm." R. 837-38. This is not a case where the prosecutor made an improper reference to prejudicial facts and then failed to produce any evidence to support it. Rather, the prosecutor merely stated a probative fact the State intended to prove, produced evidence in support of that fact, but was ultimately prevented from publishing the picture itself because it contained extraneous, irrelevant information that might unfairly prejudice Appellant's right to a fair trial.

"The solicitor is permitted in opening statement to outline the facts the State intends to prove. As long as the State introduces evidence to reasonably support the stated facts, there is no error." State v. Kornahrens, 290 S.C. 281, 284, 350 S.E.2d 180, 183 (1986) (internal citations omitted). "The law does not require that opening trial statements be completely supported by evidence introduced during the trial. Such a rule, rigidly enforced, would effectively eliminate opening remarks and deprive the jury of a very useful outline of the trial as the attorneys expect it to unfold. . . . (T)he failure to sustain all opening remarks during the trial is not automatically ground for a new trial. The decision is discretionary and is for the trial judge." Mares v. United States, 409 F.2d 1083, 1085 (10th Cir. 1968).

The underlying fact that the photograph was offered to prove (that Appellant had access to a 40 caliber handgun) was relevant. Tanisha Taylor testified Appellant owned what she believed to be a 40 caliber Glock handgun. R. 798-800. This testimony made it more likely Appellant had the means to commit the crime. See Rule 401, SCRE ("'Relevant evidence' means evidence having **any tendency** to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") (emphasis added). Appellant did not object to this testimony as irrelevant or prejudicial. Taylor's testimony removed any prejudice that would have resulted had the prosecutor not been able to provide any support for the statement, and justifies the court's decision not to grant a mistrial. Improper comments by a prosecutor do not automatically require reversal if they are not prejudicial to the defendant. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); United States v. Brockington, 849 F.2d 872, 875 (4th Cir. 1988). Additionally, the trial judge instructed the jury that opening statements are not evidence, further curing any possible prejudice caused by the prosecutor's remark. R. 183. See Johnson v. State,

325 S.C. 182, 188, 480 S.E.2d 733, 735–36 (1997) (trial judge's instruction cured improper argument by prosecutor).

The court's decision not to declare a mistrial is supported by case law, and was within the court's discretion. As stated above, the State produced evidence that reasonably supported the prosecutor's remarks, and the judge correctly found Appellant suffered no prejudice. Placed in context, the prosecutor's isolated comment did not present the "manifest necessity" of a mistrial. See Wasson, supra. The trial court did not err.

II.

The trial court did not err by admitting an audio recording of Victim's statement in the emergency room where immaterial or indiscernible statements of medical personnel can be heard in the background.

Appellant claims the trial court erred by admitting a recorded audio statement of Victim given in the emergency room shortly after the incident, arguing "the whole statement is irrelevant." Brief of Appellant, p. 12. Alternatively, Appellant argues the entire statement should have been excluded because it contains unspecified "irrelevant comments" that could not be redacted because they were entwined with Victim's statement. Brief of Appellant, p. 11-12. Finally, Appellant claims the court "failed to identify what parts of the recorded statement were relevant." Brief of Appellant, p. 11. Not only are Appellant's final two arguments unsupported by authority, each argument ignores the appropriate standard of review— abuse of discretion. The trial court did not err.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." SCRE 403. Unfair prejudice means "an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Sweat, 362 S.C. 117, 128, 606 S.E.2d 508, 514 (Ct. App. 2004). "A trial court has particularly wide discretion in ruling on

Rule 403 objections." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct.App.2012). "A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App.2013).

Appellant first claims the statement is irrelevant. However, a nearly contemporaneous account from the only adult eyewitness to a crime is relevant evidence of what occurred. It doesn't matter that the victim/ eyewitness also testified at trial. Her statement was admitted as an excited utterance, which the law recognizes as carrying a "special reliability." State v. Burdette, 335 S.C. 34, 42, 515 S.E.2d 525, 529 (1999). Appellant does not contest the trial court's admission of the statement as an excited utterance, but instead remarkably claims that the whole statement is irrelevant despite the fact that the statement describes in detail what occurred, including the physical characteristics of her attacker. Few pieces of evidence could be more probative than a first-hand description of events given by the only adult eyewitness less than two hours after the incident. R. 228, l. 11, State's Exhibit 67.

Appellant also claims the recording was unfairly prejudicial because it contained "irrelevant comments" by medical personnel. Appellant does not cite any specific comments, nor does he offer any explanation how the statements suggested the jury make its decision on an improper basis. A review of State's Exhibit 67 reveals that Victim's statement to the investigating officer was interrupted midway through by an ER doctor who calmly explained to Victim that her injuries would require surgery. Recognizing that the doctor's explanation of medical procedures was not relevant to the underlying facts, the prosecutor fast-forwarded through this portion of the interview. R. 476. Despite this curative measure (that Appellant requested), defense counsel then objected to the entire tape. R. 476. Indeed, defense counsel

objected repeatedly to nearly every piece of evidence offered by the State throughout the trial. Now, Appellant claims the trial court erred by not excluding the entire statement because it was not possible to redact unspecified irrelevant comments by medical personnel heard in the background during Victim's statement to the officer. State's Exhibit 67 contains few, if any, intelligible comments by medical personnel apart from the doctor's explanation of what procedures would be performed (which was redacted), and none that could reasonably be viewed as unfairly prejudicial to Appellant. Because Appellant cites no authority to support his extreme argument that otherwise admissible evidence should be totally excluded if **any** irrelevant, immaterial comments are incapable of redaction, this argument is not preserved for review. Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (holding "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Even if preserved, it has no merit.

Finally, Appellant argues the trial court erred because he "failed to identify what parts of the recorded statement were relevant." Brief of Appellant p. 11. Of course, this is not the correct standard of review. The correct standard is "whether the trial judge's ruling is supported by any evidence." State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249 (Ct. App. 2006). Again, Appellant cites no authority in support of this argument. The trial court did not err.

III.

The trial court did not err by admitting text messages extracted from Appellant's phone because the messages were not hearsay.

Lastly, Appellant claims the trial court erred by admitting text messages extracted from Appellant's cell phone, arguing the content of the messages is hearsay. However, because the text messages were not offered for their truth, they are not hearsay. The court did not err.

"'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(c), SCRE. In this case, the text messages were not offered for their truth. For example, the messages were not offered to prove whether Taylor "ate her chicken" or whether Taylor was busy at work. State's Exhibit 122. They were admitted to corroborate Taylor's testimony that she did not cause the scratches on Appellant's face (no mention of which was made in the messages), and to more completely show Appellant's state of mind in the hours and days following the incident. Again, Appellant fails to offer any reasoning or authority why the messages are hearsay, or even specify which messages he objects to. Therefore, the issue is not preserved for review. See Glasscock, supra. In any case, the trial court did not err because the statements are not hearsay.

IV.

Even if the trial court erred, Appellant suffered no prejudice because evidence of his guilt was overwhelming.

Even if the trial court erred, any error was harmless because evidence of Appellant's guilt was overwhelming. Error is harmless where it could not reasonably have affected the result of the trial. State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Perhaps as damning as Appellant's DNA being recovered from the skull cap that Victim ripped off of him during the struggle for her life, or Victim's in-court identification of Appellant as her attacker, is the guilty mind Appellant demonstrated in the days following his crime. Not only did Appellant desperately attempt to have his DNA removed from the State's DNA database three days after the attack, he rented a car and tried to sell his own. R. 568; 770. Despite Taylor's testimony that Appellant owned a 40 caliber handgun, no gun was recovered in a search of Appellant's residence or car. R. 738. Appellant never denied committing the crime. R. 757. Instead, he tried to negotiate a deal with investigators. R. 757. He lied to investigators about how he received the scratches on his face. R. 496. He blocked his number in every call he made to a law enforcement agency, yet inexplicably left the same phone number with the employee he spoke with regarding the DNA database. R. 769; 939. Finally, he fled from police when they attempted to pull him over. R. 457-58. Appellant's actions strip any credence from his excuse that he gave his clothing to a "crackhead" sometime before the incident. R. 495. Appellant's guilt was proven so conclusively that no other rational conclusion could be reached. His conviction should be affirmed.

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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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."

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