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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in refusing to grant Appellant's motion for a mistrial.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in refusing to grant Appellant's motion for a mistrial.

Appellant contends the trial court erred denying his motion for a mistrial based on testimony by one of the victims that Appellant provided her with marijuana. The testimony was not so prejudicial as to warrant the granting of a mistrial. Further, any error could have been cured by a curative instruction, but Appellant did not ask for one.

First, it is questionable whether this issue is preserved for review on appeal. Appellant told the court immediately after making the motion for a mistrial that a curative instruction would not fix the testimony's admission. The trial court denied the motion for a mistrial and asked if Appellant had anything further. Counsel responded: "No, Sir, Your Honor." (T.198-199; R. 122-123). As a result, counsel effectively waived his right to a curative instruction, just as if he refused a request offered by the trial court. Therefore, the issue is not properly preserved for review on appeal. See State v. Manning, Op. No. 5017 (S.C.Ct.App. filed August 1, 2012) (holding refusal of a curative instruction waives any objection to the circuit court's denial of his motion for mistrial); State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct.App.1996) (holding a defendant waives objection if curative instruction is refused).

On the merits, a trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial

judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

During the testimony of the victim who was shot, Christina Carroll, the solicitor explored her drug use after she was shot without objection through the following colloquy:

Q. Okay, were you in a lot of pain?
A. Yes.
Q. At some point did somebody offer you some drugs?
A. Yes.
Q. And did you take them?
A. Yes.
Q. What kind of drugs?
A. I smoked weed and I was drinking alcohol.

(T.195; R. 119). Later during her testimony she was again asked about the drugs and indicated she received the drugs from the suspects. When asked specifically which ones,

she responded Appellant. (T.197; R. 121). At this point, counsel made his motion for a mistrial.

In the instant case, the testimony was clearly not sufficiently prejudicial so as to warrant the extreme result of a mistrial. Appellant was on trial for burglary first degree, kidnapping, armed robbery, ABWIK, and possession of a firearm. The fact he gave the victim, who had been shot in the leg, marijuana for the pain is not reasonably going to affect the outcome of the trial or render the trial unfair in light of the evidence presented at trial.

Four of the five victims testified regarding the events leading to the numerous and significant charges against Appellant. Rosa Milton testified she arrived at the house with three of the other victims. She arrived and was met at the door by Appellant who was holding a gun. She testified Appellant and the other defendants took her belongings and held her and one other victim until they were let go. (T.77-78; R.23-24).

Jamie Powell testified she was asleep on the couch and woke up when Appellant and his co-defendants were coming in the door. She testified they put a gun in her face and made her remove her clothes. (T.163-164; R. 87-88). She testified when the other victims returned to the house, Appellant and the other defendants put guns to their heads, made them remove their clothes, and took their belongings. (T.167-168; R. 91-92). Powell testified one of the victims, Christina Carroll, fought with one of the defendants telling them to get out of the house. Carroll was shot in the kitchen. (T.168-169; R. 92-93). Powell also remembered Appellant hitting Carroll in the forehead with a gun. (T.169; R. 93). She testified she did not feel like she could leave. She testified several of

the co-defendants took her to try and cash a check, but they ultimately returned unsuccessful. (T.171-172; R. 95-96).

Carroll testified she arrived with several of the other victims and they began unloading groceries. She testified she heard a commotion in the house and fighting in the house and ran to hide behind the air conditioner. (T.183-184; R. 107-108). She testified Appellant came out looking for her, found her, "roughed [her] up," and hit her in the head with the butt of a pistol. (T.185-186; R. 109-110). She testified she was forced into the kitchen, made to dump her purse, and took her jewelry and other belongings. (T.188; R. 112). At trial she was able to identify a bracelet taken from her during the burglary. (T.189-190; R.113-114).

Carroll then testified she tried to force the burglars out of the house. She testified Appellant told another defendant to shoot her. Carroll was shot one time in the thigh. (T.191-193; R. 115-117). She testified she was in significant pain as a result of the gun shot which entered and exited her thigh. (T.193-195; R. 117-119). She testified she was not allowed to leave. (T.195; R. 119).

Carroll explained Appellant's co-defendants initially took Powell to try and get some money by cashing checks. She said they returned and Appellant left with William Douglas, her fiancé who was also a victim in the robbery. (T.194-195; R. 118-119). She testified Georgetown SWAT arrived and she was helped away. (T.196; R. 120).

William Douglas, who owned the home being burglarized, testified he arrived home after grocery shopping. When he entered, "all this chaos stated and people stated come running out of the bedrooms. They run out with guns, shot in the floor, towards my feet, screaming and hollering." (T.211; R.135). Douglas testified Appellant was one of

the individuals and then identified the gun Appellant had in his possession. (T.211-212; R. 135-136). He testified the robbers made him remove his clothes, took his jewelry and money, and then allowed him to put back on his clothes. He identified a gold necklace taken from him during the robbery. (T.212-214; R.136-138).

Douglas testified when Carroll was brought into the home, she was covered in blood. He testified she had been hit in the head. Douglas explained Carroll started fighting with one of the burglars and Appellant told the co-defendant to shoot her. He testified Carroll had been shot in the leg. (T.212-213; R. 136-137).

Douglas testified Appellant took him to try and obtain some money. Appellant threatened to have the woman at the house killed if Douglas did not cooperate. (T.216; R. 140). Appellant allowed Douglas to enter a convenience store alone and Douglas got a manager to call the police after he left. Douglas and Appellant were pulled over and Appellant arrested, initially for failure to have a driver's license. (T.217-218; R. 141-142).

In addition to the victims, one of Appellant's co-defendants testified against him at trial. Herman McCray testified Appellant identified the house where Douglas lived and indicated they were going to get some money. (T.234; R. 158). He identified the gun Appellant had in his possession when they entered the house. (T.235-236; R. 159-160). He testified when the other four victims arrived, they all hid and then held them at gunpoint. (T.237-238; R. 161-162). He testified some of the victims were released, but others were not allowed to leave until the next morning when the Georgetown Sheriff's Office arrived. (T.241-244; R.165-168).[1]

[1] It is important to note that when McCray started discussing the drug use in the home, he indicated Appellant "had roll up some marijuana," and the testimony was admitted without objection. Further, the

The evidence presented more than adequately supported a conviction for burglary, kidnapping, armed robbery, ABWIK, and possession of a firearm. All four victims testified Appellant and his co-defendants were not properly in the home, took items from them, and discussed the injuries to Carroll. Finally the co-defendant testified and admitted the events of that night.

Additionally, Appellant's counsel was the one who originally brought up the drug use the night of the burglary. When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005); State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999). In his cross-examination of Powell, the following colloquy occurred:

> Q. Do you recall – you said at some point in time everything quieted down or something to that affect?
> A. Yeah.
> Q. There was some drug use going on at that point in time, wasn't there?
> A. I'm not sure.

(T.175; R. 99). By the time the solicitor asked Carroll about the marijuana use, the jury already knew drug use had occurred because it was raised originally by Appellant and then followed up on by the solicitor. Appellant cannot demonstrate how he was sufficiently prejudiced so as to warrant a mistrial by the testimony of Carroll.

Finally, a simple curative instruction would have easily negated any possible slight prejudice Appellant received as a result of the testimony. A mistrial should not be ordered in every case when incompetent evidence is received and later stricken out. State

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solicitor instead of delving into the testimony, immediately stopped McCray from testifying further about the drugs. (T.242; R. 166).

v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct.App.1996) (holding a trial court should exhaust other available methods to cure prejudice before aborting a trial, and where the prejudicial effect is minimal, a mistrial need not be granted in every case where incompetent evidence is received and later stricken and a curative instruction is given). "Generally, a curative instruction is deemed to have cured any alleged error." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); see also, State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (instruction to disregard inadmissible evidence is usually viewed as having cured the error in its admission); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (if trial judge sustains timely objection to testimony and gives jury curative instruction to disregard testimony, error is deemed to be cured).

Appellant made his motion for a mistrial and immediately told the court: "A curative instruction can't fix that." (T.198; R. 122). The court denied the motion for a mistrial finding the testimony was not so prejudicial as to render the trial unfair and indicated Appellant raised the issue regarding the drug use. He then asked if there was Anything further from Appellant and counsel responded: "No, Sir, Your Honor." (T.199; R.123). If counsel had requested a curative instruction, it would have been more than sufficient to cure any slight prejudice experienced by the testimony. Because he never asked for a curative instruction, he cannot now complain of prejudice that would have been cured if a curative instruction had been given.

Accordingly, even if the testimony was improperly admitted, the prejudice resulting from its admission did not warrant a mistrial. The lack of prejudice is especially

evident in light of the significant testimony supporting the charges Appellant faced. Additionally, Appellant originally raised the issue of the drug use and the State was entitled to explore that drug use. Finally, Appellant cannot now complain of prejudice, which would have been cured if he had allowed the court to issue a curative instruction.

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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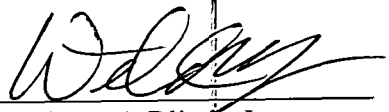
BY: 
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December 7, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case Tracking No. 2011-195627

The State, Respondent,

vs.

Rondell Leon Carter, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 7th day of December, 2012.

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