STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Roger M. Young, Sr., Circuit Court Judge
Appellate Case No. 2012-213143

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

BELVIN MAURICE PAGE,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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II. **Appellant's issue regarding a mistrial based upon juror misconduct is not preserved for appellate review because the same issue was not raised below. In any event, Appellant's issue is without merit where Appellant cannot show prejudice from the alleged juror misconduct.**

STATEMENT OF THE CASE

Appellant was indicted in Charleston County in June 2012 for distribution of crack cocaine. On September 17-18, 2012, he proceeded to trial before the Honorable Roger M. Young, Sr. The jury found Appellant guilty, and Judge Young imposed a sentence of fifteen years. A notice of appeal was timely served and filed.

ARGUMENT

I. The "prior bad acts" issue raised on appeal is not preserved for appellate review. In any event, any error in admission of the confidential informant's testimony about his prior purchases of drugs from Appellant was harmless because the testimony was merely cumulative to other un-objected-to testimony and because there was overwhelming evidence of Appellant's guilt.

Relevant Facts

After the confidential informant had already testified without objection that he met Appellant after moving to the area and that he bought drugs from Appellant, the solicitor posed the following question: "Now, how many times would you say that you bought drugs or hung out with [Appellant]?"[1] (R. p. 133). Defense counsel objected, stating his reason as "[b]ringing up prior conduct, or alleging prior conduct." (R. p. 133-34). The solicitor indicated that she could rephrase the question or withdraw it, and the judge said "[o]kay." (R. p. 134, lines 3-4). No testimony came in as a result of the objected-to question. (See R. p. 133-34). After posing a few more questions about the specific number of "interactions" the confidential informant had with Appellant, the solicitor asked the confidential informant whether he went to Appellant's house in the past for social reasons. (See R. p. 134, lines 13-16). Defense counsel again objected, stating as follows: "Objection. Same as before." (R. p. 134, line 17). The judge ruled that "that question itself is not objectionable" and allowed the solicitor to "go ahead." (R. p. 134, lines 18-19). The solicitor then asked whether some of the confidential informant's visits to Appellant's house were social. (R. p. 134, line 21). The confidential

[1] Note that defense counsel had previously insinuated that the confidential informant might have actually bought the drugs in question from Appellant's brother, Teddy, rather than from Appellant himself. (See R. p. 54, lines 9-20; p. 69-73; p. 97, lines 9-21; p. 125-26; see also p. 197-98). It appears that the solicitor's questions regarding the number of interactions the confidential informant had with Appellant were asked for the purpose of establishing that the confidential informant clearly knew Appellant and would have known whether he was dealing with Appellant or his brother Teddy. (See R. p. 133-36). See, e.g., State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) (finding the defendant opened the door to otherwise inadmissible evidence).

informant responded, "[n]o, not really. They were basically to buy drugs." (R. p. 134, line 22). Appellant made no objection to the witness's answer to the question. (See R. p. 134).

Issue Preservation

Appellant now argues that the trial judge erred in allowing the confidential informant to testify about his history of purchasing drugs from Appellant. However, this issue is not preserved for appellate review. The first time Appellant objected, the judge ruled in his favor by allowing the solicitor to "rephrase or withdraw" the question.[2] (See R. p. 134, lines 1-7). However, Appellant did not move to strike the solicitor's question, did not request a curative instruction, and did not request a mistrial. See State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) (where the trial judge sustains an objection and rules in a party's favor, the party must move to strike or request a curative instruction in order to preserve an issue for review); State v. Primus, 341 S.C. 592, 604, 535 S.E.2d 152, 158 (Ct. App. 2000) ("[T]he cases are legion in holding *if an appellant objects and the objection is sustained* but he does not move for a curative instruction or request a mistrial, he has received what he asked for and cannot be heard to complain on appeal") (emphasis in original), overruled on other grounds by State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002); see also State v. Parris, 387 S.C. 460, 466, 692 S.E.2d 207, 210 (Ct. App. 2010) (holding where a defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide).

[2] As mentioned previously, no testimony came in as a result of this particular question. (See R. p. 133-34). See State v. McEachern, 399 S.C. 125, 148, 731 S.E.2d 604, 616 (Ct. App. 2012) ("[W]e note that the mere asking of an improper question is not necessarily prejudicial, where no evidence is introduced as a result.") (citation omitted).

Further, Appellant did not object to the questions or answers that immediately followed regarding the number of "interactions" the confidential informant had with Appellant. See State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (a contemporaneous objection is required to preserve an issue for appellate review). The second time Appellant objected, he objected to a question that was not improper; therefore, the trial judge correctly overruled the objection. (See R. p. 143, lines 16-19). However, when the witness elaborated beyond what the question required, Appellant failed to contemporaneously object and/or move to strike the witness's answer. (R. p. 143). See Johnson, 324 S.C. at 41, 476 S.E.2d at 682. For all of these reasons, the "prior bad acts" issue being raised on appeal is not preserved for appellate review, and this Court should dismiss the issue on error preservation grounds.

Discussion

Assuming the issue had been properly preserved, any error in admission of the so-called "prior bad acts" evidence was harmless beyond a reasonable doubt. First, the evidence was merely cumulative to other un-objected-to testimony. *Before* Appellant made his first objection regarding "prior conduct" (R. p. 133-34), the confidential informant had *already* testified, *without objection*, that he had known Appellant for seven or eight years; that he met Appellant through others after he moved to the area; *and that he thereafter bought drugs from Appellant.* (R. p. 133, lines 13-21). In addition, Detective Euper had previously testified without objection that the confidential informant provided the police with Appellant's name as a person from whom he could buy drugs. (R. p. 59-60; see also p. 57-60). Detective Euper also testified without objection that the confidential informant knew several people who sold drugs out of that house but that Appellant was "the one that ran the show there." (R. p. 79, line 25 – p. 80, line 2). The

testimony being challenged on appeal was merely cumulative to the above un-objected-to testimony; therefore, any error in its admission was harmless. See State v. Johnson, 298 S.C. 496, 498-99, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence."); State v. Smith, 328 S.C. 622, 626, 493 S.E.2d 506, 509 (Ct. App. 1997) (even where certain testimony should have been excluded, the error in admitting it was harmless where the testimony was merely cumulative to the testimony of other witnesses); see also State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004).

Second, there was overwhelming evidence establishing Appellant's guilt. Appellant sold 8.62 grams of crack cocaine to the confidential informant on July 22, 2010. (R. p. 116, lines 8-9; p. 128-52). This transaction was recorded and the video was presented at trial. (See R. p. 140-42; see State's Exhibit #2, Video CD, on file with this Court). The confidential informant, who had known Appellant for seven or eight years, positively identified Appellant as the person who sold him the crack cocaine, and Detective McLean, who was acting undercover during the controlled buy, identified Appellant as the person who she observed with the confidential informant on the date in question. (R. p. 86-87; p. 151-52). Additionally, phone records corroborating the confidential informant's contact with Appellant were introduced into evidence. (See R. p. 61-62; p. 84-85; p. 136-39; p. 173, lines 2-6; p. 182-83; p. 217; p. 254-58). Therefore, assuming the issue is preserved for review and assuming the trial judge erred in allowing the confidential informant's testimony about his prior contact with Appellant, Appellant was not prejudiced. See State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (there is no reversible error where the evidence of guilt is overwhelming without any reference to wrongly-admitted evidence of a prior bad act); State v. Keenon, 356 S.C.

457, 459, 590 S.E.2d 34, 35-36 (2003) (because of the overwhelming evidence of the defendant's guilt, the admission of prior bad act evidence was harmless error).

II. Appellant's issue regarding a mistrial based upon juror misconduct is not preserved for appellate review because the same issue was not raised below. In any event, Appellant's issue is without merit where Appellant cannot show prejudice from the alleged juror misconduct.

Issue Preservation

Appellant now argues on appeal that the trial judge erred in denying his motion for mistrial based on "juror misconduct" because juror Kuhn recognized the confidential informant as someone he had prior dealings with, because the other jurors knew about his prior contact with the confidential informant, and because the jury verdict was "subjected to outside influences and therefore tainted." (Brief of Appellant, p. 7). Appellant also argues that a hearing should have been held to determine how the other jurors knew of juror Kuhn's contact with the confidential informant and what effect this information had on them. (Brief of Appellant, p. 8). These arguments are not preserved for appellate review. The only argument raised below was that a mistrial should be granted because the juror knew the confidential informant "personally" and in a "professional capacity" and in "a capacity that's sort of related to this as somebody receiving drug treatment and the allegation is that he's purchasing drugs." (R. p. 157, lines 13-18; see also p. 184, lines 15-18). Appellant made no argument below that the other jurors' knowledge of the prior contact "tainted" the jury panel. (See R. p. 152-58). Appellant also never requested a hearing on this issue. (See R. p. 152-58). Therefore, the arguments now raised on appeal are not preserved for review. See, e.g., State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party may not argue one ground at trial and another ground on appeal); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is

limited to the grounds raised at trial."); State v. Adams, 332 S.C. 139, 144-145, 504 S.E.2d 124, 126-27 (Ct. App. 1998) (argument not preserved for appeal where precise issue was not presented to the trial court); State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (issue regarding alleged juror misconduct not preserved for review where defendant failed to object at his earliest opportunity and failed to request a hearing on the issue prior to the verdict); see also State v. Carlson, 363 S.C. 586, 605, 611 S.E.2d 283, 293 (Ct. App. 2005) ("Furthermore, defense counsel made no objection on this ground at trial. Nor was any request made to have the bailiff or jurors examined to determine if any prejudicial exchange occurred."). Accordingly, the issue raised on appeal should be dismissed on error preservation grounds.

Discussion

Even assuming the mistrial issue was preserved for review, the issue is without merit. First, juror Kuhn did not intentionally conceal any information during voir dire, and he disclosed his familiarity with the confidential informant as soon as was practicable after he realized he recognized the confidential informant while he was on the witness stand. (See R. p. 4-5; p. 11, lines 6-9; p. 153, line 8 – p. 158, line 3). See generally State v. Woods, 345 S.C. 583, 590, 550 S.E.2d 282, 285-86 (2001) (if a juror intentionally conceals information on voir dire, the court must then determine whether or not the information concealed would have supported a challenge for cause or would have been a material factor in the use of respondent's peremptory challenges); cf. State v. Stone, 350 S.C. 442, 448, 567 S.E.2d 244, 247-48 (2002) (it was error to remove a juror where the juror recognized a witness only when the witness got on the witness stand and the juror and the witness had been merely casual acquaintances several years previously). Juror Kuhn also affirmed that he could be a fair and impartial juror despite his prior dealings

with Appellant, and the trial judge found this affirmation credible. (R. p. 154-55; p. 157-58). See, e.g., State v. Maxey, 218 S.C. 106, 110, 62 S.E.2d 100, 102 (1950) ("The findings of the trial court on questions of fact relating to the fitness of a juror are conclusive, and will not be disturbed on review unless manifestly erroneous.").

Second, as mentioned previously, Appellant did not request a hearing to determine how knowledge of juror Kuhn's prior dealings with the confidential informant may have affected the other jurors.[3] There is no evidence in the record that any other jurors were somehow rendered not "impartial" because of vague knowledge that a fellow juror had some prior contact with the confidential informant, and there is no plausible reason to assume or even suspect partiality under these facts. See State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct. App. 2000) ("Where the defendant seeks a new trial on the ground of impropriety involving the jury, he is required to prove both the alleged misconduct and the resulting prejudice."); see also Parker v. Evening Post Pub. Co., 317 S.C. 236, 248, 452 S.E.2d 640, 647 (Ct. App. 1994) ("Here, the record contains no competent evidence that the juror unduly influenced the jury or its verdict."). Appellant cannot show that the verdict was "tainted" or that he was prejudiced in any way by other jurors' knowledge of Kuhn's prior contact with the confidential informant. Therefore, the trial judge's denial of Appellant's mistrial motion must be upheld. See Covington at 163, 539 S.E.2d at 69-70 (the denial of a new trial based on alleged jury misconduct will not be reversed absent an abuse of discretion); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000) (the grant or denial of a mistrial lies within the sound discretion of the trial judge, whose ruling will not be disturbed on appeal absent an abuse of discretion or an error of law).

[3] Indeed, Appellant did not raise this issue to the trial judge in any way. (See R. p. 155-58).

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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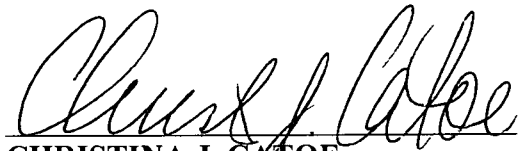

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September 6, 2013

STATE OF SOUTH CAROLINA

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.**

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September 6, 2013

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **WANDA H. CARTER**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **6th day of September, 2013.**

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SWORN to before me this 6th day of September, 2013.

Notary Public for South Carolina.
My Commission Expires: 5/11/2014