STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Letitia H. Verdin, Circuit Court Judge
Appellate Case No. 2012-211970

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHN J. DAY,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The issue raised on appeal is not preserved for review where Appellant moved for a mistrial but subsequently failed to object to the sufficiency of the judge's remedial measures; specifically, striking the challenged testimony from the record and issuing a curative instruction. In any event, a mistrial was not warranted where the challenged testimony was admissible under Rule 404(b), SCRE, and the *res gestae* theory; where the solicitor did not intentionally disobey the judge's pre-trial ruling; and where, even assuming the testimony was improper, Appellant suffered no prejudice necessitating the extreme measure of a mistrial where the testimony the jury heard did not reference the nature or details of the prior crime and where the trial judge struck the testimony about Appellant being convicted of a prior crime from the record and issued a curative instruction.

STATEMENT OF THE CASE

Appellant was indicted in Greenville County in August 2011 for criminal domestic violence of a high and aggravated nature. On April 19-20, 2012, Appellant proceeded to trial before the Honorable Letitia H. Verdin and the jury found him guilty. Judge Verdin sentenced Appellant to eight years, suspended upon service of five years of active time and three years of probation. A timely notice of appeal was served and filed.

ARGUMENT

The issue raised on appeal is not preserved for review where Appellant moved for a mistrial but subsequently failed to object to the sufficiency of the judge's remedial measures; specifically, striking the challenged testimony from the record and issuing a curative instruction. In any event, a mistrial was not warranted where the challenged testimony was admissible under Rule 404(b), SCRE, and the *res gestae* theory; where the solicitor did not intentionally disobey the judge's pre-trial ruling; and where, even assuming the testimony was improper, Appellant suffered no prejudice necessitating the extreme measure of a mistrial where the testimony the jury heard did not reference the nature or details of the prior crime and where the trial judge struck the testimony about Appellant being convicted of a prior crime from the record and issued a curative instruction.

Background Facts

The victim and Appellant met by accident via text message when the victim was a sixteen-year-old high school student and Appellant was thirty-six years old. (R. p. 19-20). Shortly thereafter, the victim and Appellant became romantically and sexually involved, and the victim moved in with Appellant when she turned seventeen. (R. p. 21-23). On the date in question, the victim and Appellant went to the courthouse in Greer because Appellant had been charged with a prior criminal domestic violence offense against the victim. (See R. p. 4-6; p. 24, lines 1-13). The victim spoke with the judge, and the judge subsequently made a decision finding Appellant guilty. (R. p. 24, lines 16-22). Appellant was "not happy" with the victim's testimony in this hearing, and after they left the courthouse, he told the victim that if he gets in trouble again, she was "going to be leaving in a body bag." (R. p. 27, lines 15-21). The victim and Appellant parted ways for a few hours, and, when the victim thought enough time had passed for Appellant to "cool down," she went home. (R. p. 27-28). Appellant met her outside and the two began arguing again. (R. p. 28). The victim returned Appellant's engagement ring and cell phone upon his request. (R. p. 28, lines 12-13). She also put her dog into her car, presumably because she was planning to leave Appellant and take the dog with

her. (See R. p. 28-29). After arguing for a while outside, Appellant asked the victim to come inside so that they could talk further. (R. p. 28, lines 15-21). The victim eventually agreed and the pair went inside to their bedroom. (R. p. 28, lines 18-21). The couple's roommate, Robert, was home but was in his bedroom at the opposite end of the house. (R. p. 28-29).

Inside their bedroom, the victim and Appellant began arguing again. (R. p. 29). Appellant grabbed a hammer and told the victim that if she didn't get her dog out of the car, he was going to break her car window and get the dog out because it was too hot in the car. (R. p. 29, lines 20-25). Appellant then threw the hammer across the room near where the victim was seated. (R. p. 29-30). The hammer hit the wall right beside the victim and fell to the floor. (R. p. 30). The victim quickly tried to hide the hammer by sliding it under the bed with her foot. (R. p. 30). They continued to argue, and Appellant came at the victim and punched her in the top of her head. (R. p. 30). In response, the victim kicked Appellant back with her feet, which "really made him mad." (R. p. 30, lines 6-8). Appellant then grabbed the hammer and struck the victim, using the round part of the hammer, once on her wrist and twice on her thigh. (R. p. 30, lines 17-23). Each of the blows broke the victim's skin and she also sustained bruising. (R. p. 31, lines 2-3). The victim screamed for Appellant to stop, which Appellant did after the three hits, and he then left the bedroom. (R. p. 30-31; p. 91). At that point the victim changed into clothes that would hide her injuries. (R. p. 31). She explained that she did not seek medical treatment or call the police because she that knew doing these things would get Appellant in more trouble and she was scared to do so. (R. p. 31, lines 14-22).

Appellant returned to the bedroom after the victim changed her clothes and asked to "see what [he] did." (R. p. 31, lines 23-24). The victim showed him her injuries, and

Appellant told her that they would have to figure out a cover story. (R. p. 31-32). They decided to tell people that the victim fell on the nails on the front porch and scraped her arm and her leg. (R. p. 32). Appellant then apologized for hitting the victim and told her it would never happen again. (R. p. 32, lines 9-10). The victim stated she "let it go" and they continued on as if it were a normal day. (R. p. 32, lines 9-16). Later that day, the victim spoke with their roommate, Robert, and began the process of covering up Appellant's abuse by telling him that she fell on the porch earlier. (R. p. 32-33; p. 92).

The victim continued living with Appellant for the next five days and went to work as usual. (R. p. 34-35). However, the Monday following Appellant's assault with the hammer, the victim and Appellant had another argument and Appellant threatened to use the hammer on the victim again. (R. p. 35, lines 9-16). The victim was scared and "really upset" about this incident, and later that day at work, she showed her injuries to her boss and her boss took pictures of them. (R. p. 35, lines 9-24). The victim then called Appellant and told him she was not coming back home. (R. p. 35, lines 24-25). The victim went to stay with her friend Melanie, whom she had known since seventh grade. (R. p. 36).

When the victim arrived at Melanie's house, she showed Melanie her injuries and explained what happened. (R. p. 36, lines 2-12). In response, Melanie insisted that the victim tell Melanie's mother, who also lived in the house, about the incident. (R. p. 36; p. 111-117). After learning about Appellant's assault on the victim with the hammer, Melanie's mother called the police and an officer came to the house to speak with the victim. (R. p. 36, lines 17-21; p. 116-117). Although the victim "didn't want to press the charges" at the time because she was scared Appellant would "come after" her, she spoke with the officer and told him what happened. (R. p. 36, lines 18-24). Meanwhile, that

evening, Appellant got drunk and told the roommate, Robert, that the victim left and he was not sure if she was coming back. (See R. p. 93-94). He also confessed that he hit the victim with a hammer. (R. p. 94, lines 3-4).

The victim spoke with Appellant about a week later on the telephone. (R. p. 37, lines 6-11). During this conversation, Appellant told the victim that he loved her and that he was sorry for the incident. (R. p. 40, lines 1-6). Appellant also told the victim she needed to sign a paper dropping the charges. (R. p. 37, lines 11-13). He instructed the victim to write him a letter setting forth their "cover story" about the victim being injured when she fell on the porch. (R. p. 37, lines 13-15). The victim, who believed she was still in love with Appellant at the time, did as Appellant requested and wrote the letter, and she also signed an affidavit stating that she wished to dismiss the case against Appellant. (R. p. 38-39; p. 68-69). The victim wrote a second, separate letter to Appellant expressing her true feelings and her trepidation about getting back together with him. (R. p. 38-39). However, despite the victim's misgivings, she and Appellant resumed their relationship and remained together for more than a year thereafter. (R. p. 43-44).

How the Issue on Appeal Arose Below

In a pre-trial hearing, the State informed the trial judge that it wished to present evidence establishing Appellant's motive and intent for the attack. (See R. p. 4-6). The solicitor indicated that he believed the evidence was admissible under State v. Sweat[1] and under the *res gestae* doctrine because the evidence was necessary for a full presentation of the case and to furnish part of the context of the crime. (R. p. 5-7). The solicitor explained that Appellant hit the victim with the hammer during the incident for which he

[1] 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004).

was on trial because Appellant was angry that the victim testified against him that same morning in a previous domestic violence case and Appellant was convicted. (R. p. 5, lines 4-12).

The judge stated that her concern at this point was Rule 403. (R. p. 8). She indicated that, while the fact that the victim would not give favorable testimony in a court case against Appellant "might be very necessary to prove [the State's] case," since the prior charge was the exact same type of charge as the one for which Appellant was on trial, it would be unfairly prejudicial to allow the jury to hear the nature of the prior charge. (See R. p. 8, lines 5-19). The judge suggested that simply having the victim testify about how her refusal to testify on Appellant's behalf during a court case angered Appellant and led to the incident in question - without going into "the facts and circumstances of the underlying case itself" - would remove any unfair prejudice. (See R. p. 8, lines 12-19). The judge ruled as follows:

> I'm going to allow her to testify as to the fact that she had gone to trial, gone to trial I guess in Magistrate's Court . . . in a case against him. That she was – that he wanted her to change her testimony and say what she told the policeman had been untruthful and that she refused to do so. And after the trial, went home, this incident happened. I will not let you say exactly what the charge itself was. The jury may infer it. They may infer it all day. But I don't think I can prevent that. But I'm not going to allow [the victim] to specifically go into that it was a criminal domestic violence. (R. p. 9, line 18 – p. 10, line 6).

The solicitor then noted that he was also seeking to admit into evidence the certified conviction from the previous magistrate court trial to corroborate the victim's testimony about going to court that day. (R. p. 10-11). The judge indicated the certified conviction would not be admissible because it would impermissibly bolster the victim. (R. p. 11, lines 8-12). The solicitor then asked if perhaps the certified conviction could

be redacted the remove references to the nature of the prior charge. (R. p. 11, lines 14-17). The judge responded:

> Well, let's back up. Let's talk about this for a second. You want to talk about this court case as a motive, as the motive for this. But now, now what you're seeking to do is use this case to, in some way, prove elements or to convince the jury of the truthfulness of this victim here today. I'm not going to allow you to enter any kind of conviction or anything like that. Just simply that she gave testimony not in accordance with what he wanted her to and – or he wanted her to change her story and she refused to do so. And after they returned home from court that day, then this incident happened. That's as far as I'm going to let you go with that. (R. p. 11, line 18 – p. 12, line 5).

Thereafter, during the State's opening statement, the solicitor stated as follows:

> This case is about a thirty-seven year old defendant attacking his teenage girlfriend with a hammer because she wouldn't follow his instructions. In June of 2010, on June 30, 2010, they were living together and they go to court because he's been charged for a prior crime. And they go to court and when they get to court the Judge asks her some questions. She answers those questions honestly and then the Judge, based on her answers, finds him guilty of the charge. He's livid. They are leaving the courthouse and he says to her, if you ever get me in trouble again, they'll be taking you out in a body bag. (R. p. 13, line 21 – p. 14, line 6).

Appellant made no objection to these comments. Later, just before the victim was called to the witness stand to testify, the judge reminded the solicitor that the victim "cannot say that this is a CDV" or "go into the underlying facts." (R. p. 15, line 23 – p. 16, line 2).

On direct examination, the victim testified as follows regarding the day of the incident in question:

Q. I assume you woke up that morning as normal?

A. Yes, sir.

Q. Where then did you go?

A. We went to the courthouse in Greer.

Q. Okay. Why did you go to the courthouse?

A. We had to take care of something that – it was for him and we went up there. And we took care of that and got done.

Q. Okay. Had he been charged with a prior crime?

A. He got charged that day, yes, sir.

Q. Okay. And that's what you were going to court for?

A. Yes, sir.

Q. Okay. When you got to court, did you speak with the Judge?

A. Yes, sir, I did.

Q. Okay. And did a Judge make a decision?

A. Yes, sir.

Q. And what was that decision?

A. He found John Day guilty.

Q. Okay. What happened –

(R. p. 24, lines 4-23). At that point, Appellant's counsel asked to approach the bench and the jury was removed from the courtroom. (R. p. 24, line 24 – p. 25, line 7). Appellant's counsel then stated as follows:

> Judge, at this point I'm inclined to ask for a mistrial. I mean, we're going down several different roads at a very quick pace. There's a number of things I have contention with me. Most concerning, I think they went outside the parameters of when he said pre-trial for the prior conviction of CDV. And then, of course, while I accepted your curative instruction at this point,[2] it's building to the point where I don't know that we keep giving these instructions at some point, they're going to think that we're hiding something from them. And I – for that reason, I think a mistrial is warranted in this case. (R. p. 25, lines 9-21).

The judge stated that "[m]y ruling was that his conviction was not admissible. And [solicitor], I believe you're going to say that you were talking about the piece of

[2] It appears that defense counsel was referring to previous instances where the court sustained objections and/or issued curative instructions on unrelated matters during the victim's testimony. (See R. p. 20-23).

paper, evidence in his conviction." (R. p. 25, lines 22-25). The solicitor agreed that it was his understanding that the judge had ruled pre-trial that the certified conviction was not admissible but that he would be permitted to elicit information that the judge found Appellant guilty of the prior crime because he did not see how the victim could talk about her testimony in court "and then leave out anything that the Judge did, and then have [Appellant] angry about that." (R. p. 26, lines 1-7). He reiterated that it had been his understanding that the pre-trial ruling only prohibited him from eliciting testimony that the prior charge involved criminal domestic violence. (R. p. 26, lines 7-9).

The judge denied Appellant's mistrial motion, but indicated she would give a curative instruction to the jury. (R. p. 26, lines 10-17). She also stated that she wanted to "move on from whether or not he'd been convicted of this [prior] crime," since it was her understanding that what made Appellant so upset that day, and was the motive for this alleged attack, was that the victim would not change her story in court. (R. p. 26, lines 17-25). When the jury returned to the courtroom, the judge instructed that "the guilt or innocence of the Defendant on any prior charge is not a matter for you to consider in any way on this particular charge. I'm going to order that portion of the testimony stricken and it's not to be considered by you in any way." (R. p. 27, lines 8-13). Appellant did not object to the sufficiency of the curative instruction or renew his motion for mistrial at that point. (See R. p. 26-27). The direct examination of the victim continued without any further reference to the fact that Appellant had been convicted of a prior crime. (See R. p. 27-44).

Error Preservation

Initially, the State submits that the mistrial issue is not preserved for appellate review. Although Appellant objected and moved for mistrial following the challenged

testimony, when the judge indicated she was denying the mistrial motion and issuing a curative instruction, Appellant did not object to the sufficiency of the curative instruction or renew his mistrial motion after the curative instruction was given. Therefore, the mistrial issue is not preserved. See State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct. App. 1996) (mistrial issue was not preserved for appellate review where, after making a motion for mistrial which the judge partially sustained, the defendants failed to object to the adequacy of the curative instruction); State v. McEachern, 399 S.C. 125, 146-47, 731 S.E.2d 604, 614-15 (Ct. App. 2012) (when a party's objection is sustained, the party must either move to cure or move for mistrial if a cure is insufficient in order to create an appealable issue; since the law assumes that a curative instruction will remedy an error, failure to object to the sufficiency of a curative charge renders the issue waived and unpreserved for review); cf. State v. Ferguson, 376 S.C. 615, 619-21, 658 S.E.2d 101, 103-104 n2 (2008) (noting that, although the defendant "made neither an overt contemporaneous objection as to the sufficiency of the curative instruction, nor a renewed motion for mistrial after the court gave the jury the curative instruction," the court would deem the issue preserved for review because additional statements between the court and defense counsel could be interpreted to satisfy the requirement of a contemporaneous objection); State v. Bantan, 387 S.C. 412, 419-20, 692 S.E.2d 201, 204-205 (Ct. App. 2010) (finding mistrial issue preserved where, after the trial judge indicated he was denying the defendant's mistrial motion and set forth a proposed a curative instruction, defense counsel did not accept the trial court's ruling and instead *again* argued that a mistrial would be appropriate); State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 850-51 (Ct. App. 1999) (concluding mistrial issue was preserved for review because, although defense counsel did not object to the sufficiency of the judge's

curative instruction, he did *specifically reserve* his mistrial motion). Accordingly, this Court should dismiss the appeal on error preservation grounds.

Discussion

Appellant focuses much of his appellate argument on the State v. Colf line of cases dealing with admission of prior convictions to impeach under Rule 609, SCRE. (See Brief of Appellant, p. 9-12). However, Appellant was not impeached with any prior convictions pursuant to Rule 609 in this case, and the sole issue on appeal is the propriety of the trial judge's denial of Appellant's mistrial motion.[3] The grant or denial of a mistrial lies within the sound discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion or an error of law. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000). "The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); see State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) ("The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment."). A mistrial should not be granted unless absolutely necessary, and instead, all other methods to cure any possible prejudice should be exhausted before granting the motion. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Importantly, a curative instruction to disregard

[3] The Rule 609 cases cited by Appellant address situations where the jury is *expressly informed* that a defendant has been convicted of a prior similar crime and where the *only* purpose of the evidence is to impeach the credibility of a testifying defendant. (See Brief of Appellant, p. 9-12). Notably, Appellant cites no cases actually addressing a mistrial issue in support of his position that a mistrial should have been granted in this case.

the testimony is generally deemed to cure any potential prejudice from improper testimony. State v. Ferguson, 376 S.C. at 619, 658 S.E.2d at 103.

Here, a mistrial was not warranted because the challenged testimony was not improper. To the contrary, the challenged testimony was admissible under Rule 404(b), SCRE, and the *res gestae* doctrine because the victim's testimony about attending the prior court hearing, and about Appellant's being found guilty in that hearing, explained Appellant's motive for the attack and provided a full picture of the events leading up to the attack.[4] See State v. Dennis, Op. No. 5111 (S.C. Ct. App. filed April 3, 2013) (Davis Adv. Sh. No. 15 at 34); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004); State v. Wood, 362 S.C. 520, 527-28, 608 S.E.2d 435, 439-40 (Ct. App. 2004); Anderson v. State, 354 S.C. 431, 435-36, 581 S.E.2d 834, 835-36 (2003). As the solicitor explained, the fact that Appellant was *actually convicted* of the prior crime demonstrated why Appellant was so angry with the victim, which led to the argument between the parties later that day and ultimately to Appellant's attack with the hammer. (See R. p. 26, lines 1-7).

Further, Rule 403, SCRE, did not preclude the evidence since the testimony did not make any reference to the nature or underlying details of the prior crime. See State v. Wood, 362 S.C. at 527-28, 608 S.E.2d at 439-40 (the probative value of *res gestae* evidence outweighed the prejudicial effect where the trial judge allowed the solicitor to refer to the prior crime - a fatal shooting of an officer - as an "incident" and did not allow into evidence any details of the prior crime). In that vein, the evidence was not "unfairly"

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[4] Because the evidence was properly admitted under Rule 404(b) and the *res gestae* theory, the fact that it may have incidentally reflected on Appellant's character was not a valid reason to exclude it. State v. Griffin, 277 S.C. 193, 197, 285 S.E.2d 631, 633 (1981), *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); State v. Thompson, 276 S.C. 616, 622, 281 S.E.2d 216, 219 (1981); State v. Faulkner, 274 S.C. 619, 621, 266 S.E.2d 420, 421 (1980).

prejudicial to Appellant. See State v. Dennis, Op. No. 5111 (S.C. Ct. App. filed April 3, 2013) ("'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which suggests a decision on an improper basis.'") (citation omitted). Therefore, since the challenged evidence was not improper, a mistrial was not warranted based upon admission of the evidence.

Furthermore, contrary to Appellant's argument, the solicitor did not intentionally elicit testimony exceeding the boundaries of the judge's pre-trial ruling. The judge's pre-trial ruling illustrated that the judge's primary concern was that the prior crime was "the exact same type of charge" for which Appellant was on trial, and the judge believed that the jurors should not receive this information in light of Rule 403, SCRE. (R. p. 8, lines 5-20; see also p. 8-12; p. 13, line 21 – p. 14, line 6; p. 15, line 22 – p. 16, line 2). The judge's ruling on this issue was that she would not let the solicitor "say exactly what the charge itself was" and would not allow the victim to testify that the prior charge was a criminal domestic violence charge. (R. p. 10, lines 1-6). When the solicitor *subsequently* sought a separate ruling on whether or not he could introduce into evidence the certified conviction document, the judge ruled that the certified conviction could not come into evidence. (R. p. 10-12). However, the judge never specifically ruled that the State could not present *testimony* that Appellant was convicted of the prior crime. (See R. p. 8-12). Indeed, the fact that there was no objection - and no *sua sponte* comment from the judge - when the solicitor mentioned Appellant's conviction for the prior crime in his opening statement supports that all parties believed such testimony would be admissible pursuant to the judge's pre-trial ruling. (R. p. 13, line 21 – p. 14, line 6). Additionally, the judge's comment to the solicitor just prior to the victim's testimony reminding him that the

victim could not mention the prior crime was "a CDV" or go into the "underlying facts" supports that the judge's principal interest was to exclude evidence regarding the *nature* of the prior crime, not necessarily to exclude testimony that Appellant was convicted. (See R. p. 15, line 22 – p. 16, line 2). Indeed, after Appellant made his motion for mistrial, the solicitor explained that it had been his belief that, although the certified conviction document could not come into evidence, testimony that Appellant was convicted of the prior crime was admissible because "the conviction was the whole motive" and was the reason Appellant was angry with the victim that afternoon. (R. p. 26, lines 1-7). Therefore, contrary to Appellant's assertion, the solicitor did not intentionally disobey the trial judge's ruling and this Court should not "heavily weigh" this against the State when assessing prejudice. (See Brief of Appellant, p. 12).

Finally, even assuming the challenged testimony was improper, the trial judge did not abuse her discretion by determining that a mistrial was not warranted considering the vagueness of the testimony and considering that the judge cured any possible prejudice to Appellant. First, contrary to Appellant's assertions, the testimony about Appellant's prior conviction did not necessarily suggest that the prior crime was a similar crime or even that the victim in this case was a victim in the prior case. (See R. p. 24). Indeed, the jury could have just as easily inferred that the prior conviction was for a traffic violation and the victim was merely a witness in the case. (See R. p. 24; p. 27). Cf. State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 (1961) ("We do not think that the testimony referred to creates the prejudicial inference asserted by the appellant," in case where defendant asserted that a vague reference to his going to the probation office suggested he was convicted of a prior crime).

Second, the trial judge, who was in the best position to evaluate the potential effect of the challenged testimony, determined that a curative instruction rather than the extreme measure of granting a mistrial was appropriate. See Jones at 324, 479 S.E.2d at 524. Importantly, a curative instruction to disregard the testimony is generally deemed to cure any potential prejudice from improper testimony. See, e.g., State v. Ferguson, 376 S.C. at 619, 658 S.E.2d at 103. Here, after denying Appellant's mistrial motion, the trial judge promptly struck the challenged testimony from the record and issued a curative charge to the jurors instructing them not to consider in any way Appellant's guilt or innocence on the prior crime. (See R. p. 27, lines 8-13). Notably, as mentioned above, Appellant did not specifically object to the sufficiency of the curative instruction; further, jurors are presumed to follow a judge's instruction to them. See, e.g., State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow curative instructions given to them by the judge). Accordingly, any possible prejudice to Appellant was cured. See State v. Ferguson, 376 S.C. 615, 619-21, 658 S.E.2d 101, 103-104 (2008); State v. McEachern, 399 S.C. 125, 143-45, 731 S.E.2d 604, 613-15 (Ct. App. 2012); State v. Jones, 325 S.C. 310, 323-24, 479 S.E.2d 517, 523-24 (Ct. App. 1996); State v. Bantan, 387 S.C. 412, 419-20, 692 S.E.2d 201, 204-205 (Ct. App. 2010); State v. Patterson, 337 S.C. 215, 224-28, 522 S.E.2d 845, 849-51 (Ct. App. 1999). Therefore, the trial judge's denial of Appellant's mistrial motion should be upheld.

CONCLUSION

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

Respectfully submitted,

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CHRISTINA J. CATOE
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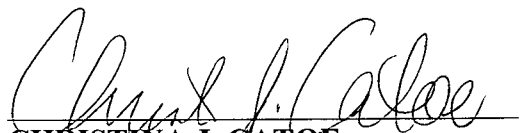

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CERTIFICATE OF COUNSEL

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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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **DAVID ALEXANDER**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **15th day of July, 2013.**

CHRISTINA J. CATOE
Assistant Attorney General

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SWORN to before me this 15th day of July, 2013.

Notary Public for South Carolina.
My Commission Expires: 7/18/2024