ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge
Appeal Case No. 2013-000488

THE STATE

RESPONDENT,

V.

JERRY SCANTLING,

APPELLANT

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in not granting a motion for a mistrial for an alleged Doyle violation made by the solicitor during closing argument when the objection was not timely made, the objection was not ruled upon by the trial court, the solicitor did not improperly comment on any invocation by the Appellant of his right to remain silent, and when any error by the solicitor during the closing argument was harmless?

2. Whether the trial court erred in not granting a motion for a mistrial when a witness inadvertently mentioned a prior burglary charge when a proper curative instruction was given immediately after the objection was made, and a mistrial was not warranted?

STATEMENT OF THE CASE

On June 24, 2010, Appellant Jerry Scantling ("Appellant") was indicted for one count of possession of a stolen vehicle. (R. pp. 721-22). On July 11, 2011, Appellant Jerry Scantling ("Appellant") was indicted by the Beaufort County Grand Jury for one count of murder, one count of armed robbery, and one count of possession of a weapon during the commission of a violent crime. (R. pp. 719-20, 723-26). On February 25-28, 2013, Appellant was tried by a jury for the murder of Leonard Green, armed robbery, possession of a weapon during the commission of a violent crime, and possession of a stolen vehicle. Appellant was tried in the Beaufort County Court of General Sessions before the Honorable Carmen T. Mullen, Circuit Court Judge. Matthew Walker, Esquire and Lauren Carroway, Esquire, both with the Fourteenth Circuit Public Defender's Office, represented Appellant. The State was represented by Deputy Solicitor Sean P. Thornton, Esquire of the Solicitor's Office for the Fourteenth Judicial Circuit.

On February 28, 2013, Appellant was convicted of Murder, Armed Robbery, Possession of a Weapon during the Commission of a Violent Crime, and Possession of a Stolen Vehicle. (R. pp. 701-02). Prior to trial, Appellant had been notified the State was seeking a Life without Parole sentence under S.C. Code § 17-25-45. (R. p. 708). He was sentenced to life without parole for the murder conviction, life without parole for the armed robbery conviction, five years confinement for the possession of a weapon during the commission of a violent crime conviction, and five years confinement for the possession of a stolen vehicle conviction. (R. p. 714). All of the sentences were to run concurrent to

one another. (R. p. 714). Before this Court is Appellant's direct appeal of his convictions for murder, armed robbery, possession of a weapon during the commission of a violent crime, and possession of a stolen vehicle. Appellant requests this Court reverse his convictions and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm his convictions.

STATEMENT OF FACTS

On the early morning of May 23, 2010, Appellant Jerry Scantling shot and killed the victim, Leonard Green, near the Pinckney Island landing in Beaufort County.

The victim suffered two gunshot wounds. (R. p. 596). The first entered on the left side of the abdomen, went through portions of the small and large intestines, then into the muscle and fractured the right hip. (R. pp. 596-97). The bullet was recovered from the right hip. (R. p. 597). The second gunshot wound was almost in the middle of the back. (R. p. 597). It struck the kidney, the small intestine, and went through the stomach. (R. pp. 597-98). The forensic pathologist testified that it appeared the victim suffered two scrapes on the head, one on the upper left side of the back of the head, and the other kind of on the back left side of the head. (R. p. 598). There were also abrasions to the victim's nose. (R. pp. 598-99). Several other lacerations were located on the victim's scalp and in the face. (R. pp. 599). The pathologist indicated that some of the abrasions and lacerations could have been caused by blunt force trauma from a sharp object or a blunt object with an edge. (R. p. 599).

Several witnesses testified that Appellant was driving a red or burgundy Ford F-150 sometime after the shooting. William Barnes testified that on May 23, 2010, a man stopped by his apartment and offered to sell him the truck. (R. pp. 188-89, 195). Barnes noted the man told him that he got the truck from Savannah. (R. p. 192). Barnes also noted that the man requested that Barnes throw some clothes that were in a briefcase into the trash for him, but Barnes

refused. (R. pp. 190-91). In the courtroom, Barnes identified Appellant as the man who attempted to sell him the truck. (R. pp. 193-94).

Ishmil Frazier, another resident at the apartment complex, testified that on May 23, 2010, he saw a guy at the complex in a truck that he recognized. (R. p. 202). Frazier also indicated that it was a red Ford truck. (R. pp. 203-04). In the courtroom, Frazier also identified Appellant as the man he saw driving the truck. (R. pp. 205-06).

Derik King testified that he was at the apartment complex on the early morning of May 23, 2010. (R. pp. 213-14). He indicated that a red truck pulled in recklessly into the complex. (R. p. 215). King noted that the man driving the truck also attempted to sell the truck. (R. pp. 215-16). In the courtroom, King also identified Appellant as the person who was driving the red truck that morning. (R. pp. 216-17). King also testified that he saw Appellant driving a black Monte Carlo at a later date. (R. pp. 217-18).

Altovise Green also lived in the same apartment complex as Barnes and Frazier. (See R. p. 228). She saw Appellant cleaning out a big pickup truck in front of a dumpster at the apartment complex around 2:30 a.m. on May 23. (R. pp. 229-30, 233). Green also noted that she saw Appellant later that morning in a black Monte Carlo that kept breaking down. (R. p. 230). Green also testified that she recalled Appellant had flashed a pistol when he was around a group at some other date. (R. pp. 231-32).

Frazier, King, and Green also identified Appellant in photo lineups. (R. pp. 394-97). The victim's cell phone records indicated that calls from the phone were

placed to a number associated with Donald Cooper and Ramona Coleman between 11:57 p.m. on May 22 and 2:37 a.m. on May 23. (R. pp. 390-91, see R. pp. 407-08).

A Hi-Point .45 caliber pistol was recovered from the scene. (R. pp. 90, 92). It was stipulated that the gun was stolen from the home of its owners. (R. pp. 70, 93). Blood on the firearm was determined to belong to the victim. (R. pp. 495-98). The projectile recovered from the victim's body was consistent with being fired by a Hi-Point .45 firearm, but could not be conclusively matched to the firearm that was recovered from the scene. (R. pp. 485-86, 487-90).

Several items with the victim's name were recovered from the dumpster at the apartment complex. (R. pp. 262-64). A pair of black headphones with Appellant's DNA was recovered from the murder crime scene. (R. pp. 171, 257-59, 298, 499-501). The victim's cell phone was located at a Wal Mart in Savannah. (R. pp. 266, 338-39). The victim's truck was also found in Savannah. (R. pp. 270).

Appellant was arrested in a stolen Monte Carlo from Savannah. (R. pp. 299, 379-81). A 1986 Monte Carlo average retail value was $5150. (R. pp. 591-92).

Appellant made several statements to both law enforcement and to two individuals at the Beaufort County Detention Center.[1]

[1] Testimony from corrections officers at the Beaufort County Detention Center reflected that it was possible for Appellant, Raines, and Padgett to talk through the vents. (R. pp. 526-29).

Captain Robert Bromage testified that he interviewed Appellant three times. (R. p. 410). During the first interview, which occurred on May 27, 2010, Appellant initially denied knowing the victim. (R. pp. 412-13). Appellant eventually admitted to running into the victim twice on the Saturday the victim disappeared, once in the late morning and once between 11 and 12 that night. (R. p. 413). He asserted that he saw the victim at the Wal Mart on Hilton Head. (R. p. 413). The second time would have been within a couple hours of the victim's murder. (R. p. 414). Appellant had suggested the victim was gay and that the victim had made an advance on Appellant. (R. p. 414). Appellant eventually admitted that he had asked for a ride from the victim in the morning meeting, but he did not get a ride from him. (R. p. 414). According to Bromage, he later admitted that he did receive a ride from the victim to an apartment complex. (R. p. 416).

Appellant indicated that when he saw the victim on the night of May 22, the victim was trying to get Appellant to go with him to Ridgeland. (R. pp. 415, 417). Appellant also admitted to using the victim's cell phone. (R. p. 417). He did not provide law enforcement with the name of the person he called. (R. pp. 417, 418). Appellant did admit to stealing the Monte Carlo in Savannah. (R. p. 416).

In the second interview, conducted on May 28, 2010, Appellant identified the victim's truck in a photograph. (R. p. 419). Appellant also identified the victim in a photograph. (R. p. 419). Appellant again admitted that he stole the car from Savannah, but he also denied using the victim's cell phone and denied

being in the victim's truck. (R. p. 420). According to Bromage, during the second interview, Appellant maintained that he saw the victim between 11 and 12 on May 22. (R. p. 421). Appellant stated that he and the victim had a three to five minute conversation in which the victim attempted to convince Appellant to go to the victim's house with him. (R. p. 421). Appellant indicated that he declined the victim's invitation. (R. p. 421).

In the third interview, which was done on the day Appellant was charged with the murder, Bromage showed Appellant a print made from a still from a surveillance video of the outside of a Wal Mart in Savannah on May 23, 2010. (R. pp. 421-22). Bromage indicated that he knew the individual in the print was Appellant. (R. pp. 422-23). Appellant would not identify the individual in the still. (R. p. 423).

Brittany Raines, Appellant's ex-girlfriend who was being held at the Beaufort County Detention Center in May 2011, testified that she communicated with Appellant through a vent in a wall between her cell and Appellant's cell. (R. pp. 533-35). She testified that Appellant told her that he killed a gay man with a Highpoint .45 caliber gun. (R. p. 535). Appellant stated that he shot the man twice, and that he pistol whipped the man. (R. p. 535). According to Raines, Appellant admitted to her that he also stole the man's truck and went to Savannah. (R. p. 535). Raines also indicated Appellant stated he had used the victim's cell phone to make a few phone calls, including one to Donald Cooper. (R. p. 536). Raines also testified that Appellant informed her that he stole a Monte Carlo to return to Beaufort. (R. pp. 535-36).

Cynthia Padgett, Brittany Raines' mother who was also incarcerated at the Beaufort County Detention Center in May 2011, testified she also talked with Appellant through a vent in the wall at the detention center. (R. pp. 545-47). Padgett noted that Appellant told her that he met the man he shot through Donald Cooper. (R. p. 549). Appellant had indicated that the man worked with Donald Cooper at Pizza Hut. (R. p. 549). Appellant had stated the man was shot, and Appellant took the man's truck to Savannah to sell it. (R. pp. 549-50). Appellant also stated that he stole a car to come back to South Carolina, and he had the man's cell phone. (R. p. 550). According to Padgett, Appellant had told her that the altercation between him and the man occurred on Joe Frazier Road, and the police found the man's body at Pinckney Island between the bridges. (R. p. 550).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT GRANTING A MISTRIAL AFTER THE SOLICITOR REFERENCED A STATEMENT MADE BY APPELLANT DURING CLOSING ARGUMENTS; THE ARGUMENT WAS NOT PRESERVED FOR APPELLATE REVIEW AS THE OBJECTION WAS NOT TIMELY AND THE TRIAL COURT NEVER RULED UPON THE MOTION FOR A MISTRIAL; THE SOLICTIOR'S STATEMENT DID NOT CONSTITUTE A DOYLE VIOLATION, AND ANY ERROR BY THE SOLICITOR WAS HARMLESS.

Relevant Facts and Argument

At issue in this claim is whether the solicitor improperly commented on Appellant's assertion of his right to remain silent based upon a portion of Appellant's statement during his third interview with Captain Robert Bromage in June 2011.

During his direct testimony, Captain Bromage testified that he interviewed Appellant on three occasions; May 27, 2010, May 28, 2010, and June 9, 2011. (R. p. 410). In discussing the third interview, Bromage first noted that the interview on the day Appellant was charged with murder, and that the interview was short. (R. p. 421). During that interview, Bromage showed Appellant a print of a still from video that was taken outside of a Wal-Mart in Savannah, which was where the victim's phone was located in the trash can in the men's room. (R. p. 422). Bromage, who had known Appellant since Appellant was twelve or thirteen, testified that he identified Appellant in the video still. (R. pp. 422-23). Bromage showed the image to Appellant.

> Q [solicitor]. And what was his response?
>
> A [Bromage]. I ain't going to take -- I ain't going to say it's me, I ain't going to say it ain't, I don't want to incriminate myself. That's exactly what he said.

Q. Now --

MR. WALKER: I have to object at this point, Your Honor.

THE COURT: Subject to your prior, yes, objection. Noted for the record. Thank you, sir.

MR. WALKER: But I also want to avoid any comments on his exercising any of his rights --

THE COURT: All right. Just keep going. Let's get past that.

MR. THORNTON: Yes, ma'am.

THE COURT: Thank you.

(R. p. 423, ll 5-19).

After Bromage completed his testimony, Appellant placed his objection to the statement on the record.

MR. WALKER: I just want to put on the record the sidebar we had about the statement Officer Bromage said that Jerry made to him regarding the photograph purported to be of him entering the Wal Mart.

THE COURT: When he commented he said, I'm not going to say it's me but I'm not going to say that it wasn't me?

MR. WALKER: And then the last part of that statement was, I don't want to incriminate myself. And we would --

THE COURT: I don't want to incriminate myself.

MR. WALKER: -- we would just argue that any focus on that statement would be a comment on my client's --to exercise his right against self-incrimination.

THE COURT: Other than he's the one that mentioned it.

(R. p. 458, ll 9-25).

In response, the solicitor argued that the statement at issue was not an assertion of Appellant's wish to exercise his right to remain silent.

> MR. THORNTON: Your Honor, I understand where Mr. Walker is going, but I do disagree with him because the case law is very clear that any assertion as to his rights to counsel or anything else have to be clear and unequivocal. And I ain't going to say it's me and I ain't going to say it ain't, I don't want to incriminate myself, is not a clear indication of his right to remain silent or his indication of right to counsel or anything else. It's, at best, ambiguous and I don't think it's even a reference to his rights. So I would disagree and I think both of those comments are a fair statement.
>
> THE COURT: I do, too. And I overruled you from the bench. And I appreciate you remembering – your reminding me to put it on the record, Mr. Walker.
>
> MR. WALKER: Yes. And again and because of that and because if I were him, I would want to harp on it, probably. I wanted to stand up now, not having to put reasoning on the record at the time it occurred, if it did occur. We would just again submit it's a-- violation and it's-- the comment on it is improper. And we're not saying that the assertion-- the right was violated or that he didn't assert that any comment on the attempted assertion, is our issue.
>
> So that -- if it does become an issue, I can renew my earlier objection.
>
> THE COURT: That's fine.
>
> MR. WALKER: Thank you.

(R. p. 459, l 2 – R. p. 460, l 4).

During closing argument, the solicitor made the following statement.

> What does he tell Bob Bromage and tell Brittany Raines? That he used the victim's cell phone. Who does he tell Brittany he calls? Donald Cooper. When they find the victim's phone at the Wal Mart where Jerry Scantling just happened to magically appear, whose number is on the phone at 2:30 in the morning? Donald Cooper's. Isn't it interesting -- and by the way, if Mr. Walker gets up again and talks about Donald Cooper, you might want to think

about the fact that if Donald Cooper had anything to do with this, why would he be calling his own number from the victim's phone at two o'clock in the morning? Jerry Scantling admitted, I used the victim's phone. He told Brittany, I tried to call Donald Cooper. Donald Cooper's number is in the victim's phone after he would have had to have been dead. The victim's phone and truck are at Wal Mart.

Who else is seen at Wal Mart? **I ain't going to say it's me and I ain't going to say it's not.** Is this picture fantastic? No, it's blurry. Did Jerry Scantling tell Bob Bromage, no, man, I wasn't in Savannah; that's not me. No, he didn't. What did he say? **I ain't going to say it's me and I ain't going to say it's not.** What does he tell Captain Bromage? What am I looking at if I tell y'all how it went down; he tried to get me to his house that night; the dude tried to make a move on me and I wasn't having it. Talks about using the phone. Something ain't right about him; somebody would bust his ass.

(R. p. 628, l 19 – R. p. 629, l 22)(emphasis added). At the conclusion of the State's closing argument, Appellant noted that he had a matter of law he would like to take up, and the court agreed to hear the matter after Appellant's closing argument. (R. p. 635).

After Appellant's closing argument, Appellant placed his objection to the solicitor's closing argument on the record:

Yes, Your Honor. It would be a Boyle[2] violation, Your Honor. Mr. Thornton addressing the jury said, did he tell them he wasn't in Savannah, no, he didn't, commenting on the defendant's silence. And we would move for a mistrial.

(R. p. 665, ll 21-25).

In response, the solicitor noted that Doyle did not apply to the statement at issue because Appellant did not exercise his rights to counsel and to post-Miranda silence.

[2] Respondent submits that it appears there is a typographical error in the transcript, and that Appellant was stating there was a Doyle violation.

> Judge, it's because this is a -- Doyle only applies if he exercises his rights to counsel, which he never did. Doyle applies as post Miranda silence. What he said was, and what I was referencing, was a statement, which I actually very carefully stayed away from the last sentence, which seemed to be Mr. Walker's main issue with that, which was -- and I don't want to incriminate myself. I didn't even mention that part. I just said, I ain't going to say it was me and I ain't going to say I wasn't. That's the part I was talking about. And I don't believe that is a Doyle violation.

(R. p. 666, ll 2-13).

In response, Appellant contended that it was not the solicitor's use of the statement that was necessarily the problem; instead, he contended that the solicitor's reference to the statement inferred to the jury that Appellant should have told them where he was and the fact that he did not do so implies some sort of guilt. (R. p. 666). Appellant further noted the solicitor did tell the jury that Appellant never said that he was not in Savannah. (R. pp. 666-667).

The trial court did not rule upon the objection.

After Appellant was sentenced, he moved for a new trial in part based, in part, upon the comments by the solicitor during closing argument. (R. p. 716). The trial court denied the motion for a new trial based on all of its earlier rulings. (R. p. 717).

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct.App.1999). Appellate courts have favored the exercise of wide discretion of

the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "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; see also State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.").

"The appropriateness of a solicitor's closing argument and the decision whether to grant a defendant's motion for a mistrial are matters within the trial judge's discretion that ordinarily will not be disturbed on appeal." State v. Carlson, 363 S.C. 586, 607, 611 S.E.2d 283, 293-94 (Ct. App. 2005) (citing State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct.App.2000)). The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); State v. Washington, 315 S.C. 108, 432 S.E.2d 448 (1992). On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record. Copeland, 321 S.C. at 324, 468 S.E.2d at 624-25. The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Id.

1. **This claim should be denied because it is not preserved for appellate review. The trial court did not rule upon Appellant's motion for a mistrial after closing argument.**

Appellant's claim in this argument is not preserved for appellate review. First, the objection was not timely made. "An objection made after closing argument and out of the presence of the jury is not timely and will not be reviewed by exception on appeal." McElveen v. Ferre, 299 S.C. 377, 380, 385 S.E.2d 39, 40 (Ct. App. 1989) (citing Varnadore v. Nationwide Mutual Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986)). Here, Appellant's objection was not made during closing argument. Instead, he informed the trial court that he had a matter of law at the conclusion of the State's closing argument. Thus, the objection was not timely, and the issue is not preserved for appellate review.

Second, the trial court did not rule upon Appellant's untimely motion for a mistrial. To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996)(citing State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994); Varnadore, supra; State v. Vanderbilt, 287 S.C. 597, 340 S.E.2d 543 (1986)). Since the trial court did not rule upon the motion for a mistrial, the issue is not preserved for appellate review. This claim for relief should be dismissed.

2. **The solicitor did not commit a Doyle violation when he quoted Appellant's third statement during closing argument. The solicitor's recitation of the statement was not a comment on Appellant's exercise of his constitutional rights.**

At issue in this appeal is whether the solicitor improperly commented on Appellant's exercise of his constitutional rights when he stated

> Who else is seen at Wal Mart? **I ain't going to say it's me and I ain't going to say it's not.** Is this picture fantastic? No, it's blurry. Did Jerry Scantling tell Bob Bromage, no, man, I wasn't in Savannah; that's not me. No, he didn't. What did he say? **I ain't going to say it's me and I ain't going to say it's not.** What does he tell Captain Bromage?

(R. p. 629, ll 11-17). Appellant specifically contends that these two mentions of Appellant's third statement were comments on Appellant's right to remain silent.

The statements made by the solicitor were not comments on the Appellant's exercise of his right to remain silent. In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the United States Supreme Court reversed a drug conviction where the state impeached a defendant using his post-arrest silence. 426 U.S. at 619-20. In reaching this conclusion, the Court premised its ruling on preserving the prophylactic safeguard Miranda warnings place on one's Fifth Amendment rights, stating, "while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." Id. at 617-18 (emphasis added). Further explaining their ruling, the Court, in footnote ten, noted the error in Doyle stemmed from a fear that one's exercise of their right to silence could, via subsequent impeachment at trial, be perceived by the jury as evidence of guilt. Id. at 619 n.10. It was in this context that the Court found "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. at 618.

In footnote eleven of Doyle, the Court illustrated other uses of post-arrest silence which, it explained, did not violate Due Process:

> It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. *In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.*

Id. at 620 n.11. (emphasis added).

Unlike the case in Doyle, the comment made by the solicitor here was not a comment upon the defendant's exercise of his right to remain silent. Instead, the solicitor was commenting on the statement made by Appellant after he was given his Miranda warnings.

> While Doyle bars the use against a criminal defendant of silence maintained after receipt of government assurances, Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), a defendant who voluntarily speaks after being given Miranda warnings has not heeded the admonitions of the government and has not in any way relied on governmental assurances, but to the contrary, has chosen not to remain silent.

State v. Kimsey, 320 S.C. 344, 346, 465 S.E.2d 128, 130 (Ct. App. 1995).

Appellant's contention that the statement he made was an invocation of his right to remain silent is not supported by the record. As noted by the trial court and the solicitor, the statement itself is ambiguous as to whether Appellant wanted to end the interrogation or invoke his right to silence. It merely reflected that Appellant did not want to identify the person in the still he was shown from the surveillance video. Since Appellant's statement was not an invocation of his right to remain silent, it was fair for the solicitor to comment on the statement during his closing argument because it was evidence presented at trial. See

Copeland, supra (noting solicitor's closing argument must be confined to evidence in the record).

To the extent Appellant contends that the statement by the solicitor in which he notes that Appellant never told Bromage that he was not in Savannah constituted a comment on Appellant's invocation of his right to remain silent, his contention is not supported by the record. First, it must be noted that Appellant never denied that he was in Savannah. To the contrary, Appellant admitted that he stole the Monte Carlo in Savannah. (R. p. 416). Second, the question that prompted the statement from Appellant was not whether he was in Savannah; it was whether he could identify the person in the still photo. In light of the testimony regarding the statements already made by Appellant regarding the fact that he was in Savannah, Respondent submits the solicitor's comment was a fair comment based upon the evidence presented at trial. Altogether, there was no Doyle violation.

3. Even if the solicitor violated Doyle in mentioning Appellant's third statement during closing argument, any error was harmless.

Even if this Court finds the solicitor improperly commented on Appellant's invocation of his right to remain silent, any error should be harmless pursuant to the standard set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993) and the factors announced in State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). In particular, the comment during closing argument on the statement at issue was very limited. Furthermore, the evidence supporting Appellant's guilt was overwhelming.

In Brecht v. Abrahamson, 507 U.S. 619 (1993), the United States Supreme Court held that Doyle violations squarely fit into the category of Constitutional violations termed by the Court as "trial error." 507 U.S. at 529. Trial error "occur[s] during the presentation of the case to the jury," and is subject to harmless-error analysis because it "may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." Arizona v. Fulminante, 499 U.S. 279, 307-308 (1991). Accordingly, on direct review, an alleged Doyle violation is subject to the harmless error standard first laid out in Chapman v. California, 386 U.S. 18 (1967) that the error in question must be "harmless beyond a reasonable doubt." Brecht, 507 U.S. at 630; see State v. Pickens, 320 S.C. 528, 530, 466 S.E.2d 364, 366 (1996)(holding in the context of a Doyle violation, the Court applies a harmless-error analysis). In Pickens, our Supreme Court elaborated on the relevant factors a court should consider when reviewing whether a Doyle violation is harmless, stating, "[t]he record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming. Id. at 531, 466 S.E.2d at 366.

Applying the Pickens factors, it is clear the Doyle violation alleged by Appellant, if it is error at all, is harmless. First, there was only one reference with respect to Petitioner's invocation of his right to remain silent, specifically the reference by Captain Bromage. Additionally, the State never commented upon

or alluded to Petitioner's invocation of his right to remain silent in argument. Instead, the solicitor only commented on the statement that Appellant did make during his third interview. Petitioner's guilt was overwhelming. First, he admitted to law enforcement on several occasions that he stole the Monte Carlo while he was in Savannah. (R. p. 416). Thus, there is no question that he was guilty of possession of a stolen vehicle. Second, there was overwhelming evidence establishing Appellant was guilty of murder, armed robbery, and possession of a weapon during the commission of a violent crime. Two witnesses testified that Appellant admitted to them that he shot and killed the victim. Ms. Raines testified that Appellant had told her that he shot the man twice, and that he pistol whipped the man. (R. p. 535). The pathologist testified that the victim suffered from two gunshot wounds, and that he had abrasions and lacerations on his face that was consistent with being struck by a sharp object or a blunt object with a sharp edge. (R. pp. 596-99). Ms. Raines also testified that Appellant told her that he shot the victim with a Hi-Point firearm. (R. p. 535). The firearms analyst testified that the projectile recovered from the victim was shot by a Hi-Point firearm, and that the projectile was consistent with being fired by the Hi-Point firearm that was found at the scene. (R. pp. 485-86, 487-90). According to Raines, Appellant admitted to her that he also stole the man's truck and went to Savannah. (R. p. 535). The victim's truck was found in Savannah. Raines also indicated Appellant stated he had used the victim's cell phone to make a few phone calls, including one to Donald Cooper. (R. p. 536). Law enforcement also found the victim's cell phone, and they were able to determine that calls were placed to a phone

number associated with Donald Cooper between 11:57 p.m. and 2:33 a.m. (R. pp. 390-91). Raines also testified that Appellant informed her that he stole a Monte Carlo to return to South Carolina. (R. pp. 535-36). Appellant was caught in a Monte Carlo that he admitted to law enforcement was stolen.

Ms. Padgett testified Padgett noted that Appellant told her that he met the man he shot through Donald Cooper. (R. p. 549). Appellant had indicated that the man worked with Donald Cooper at Pizza Hut. (R. p. 549). The victim did, in fact, work with Donald Cooper at a Pizza Hut. (R. pp. 403-04). Appellant told Padgett the man was shot, and Appellant took the man's truck to Savannah to sell it. (R. pp. 549-50). Appellant also stated that he stole a car to come back to South Carolina, and he had the man's cell phone. (R. p. 550). According to Padgett, Appellant had told her that the altercation between him and the man occurred on Joe Frazier Road, and the police found the man's body at Pinckney Island between the bridges. (R. p. 550). The victim was found at the Pinckney Island landing.

Four eyewitnesses testified that they saw Appellant in a truck that fit the description of the victim's pickup truck very early in the morning after the shooting was believed to have occurred. (R. pp. 188-94, 202-06, 213-16, 228-30, 233, 394-97). All four eyewitnesses identified Appellant as the driver of the truck, and items belonging to the victim were found in a dumpster where one of the eyewitnesses saw Appellant cleaning out the truck. (R. pp. 188-94, 202-06, 213-16, 228-30, 233, 262-64, 394-97). Appellant was also caught on surveillance video outside a Wal Mart in Savannah where the victim's cell phone

was located, and also near where the victim's truck was located. Headphones with Appellant's DNA were found at the murder scene. (R. pp. 171, 257-59, 298, 499-501). Accordingly, should this Court find the trial court erred in allowing the solicitor's statement, the State asks the Court to further find that, when viewed against the entirety of the record, any error was harmless beyond a reasonable doubt. See Chapman, 386 U.S. at 24 (concluding an error must be harmless beyond a reasonable doubt in order to be considered harmless).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR A MISTRIAL AFTER CYNTHIA PADGETT MENTIONED APPELLANT WAS AT THE DETENTION CENTER RELATING TO A BURGLARY CHARGE; APPELLANT RECEIVED AN ADEQUATE CURATIVE INSTRUCTION, AND KING FAILED TO SHOW A MISTRIAL WAS WARRANTED.

Relevant facts

During Appellant's trial, the parties agreed that they would need an in-camera hearing prior to the presentation of testimony from Brittany Raines. (R. p. 461). During that discussion, the State noted that Ms. Raines had given a statement to law enforcement based upon statements made to her by Appellant. (R. p. 461). The State noted that part of those statements involve the burglary. The solicitor noted that he had cautioned Ms. Raines to not mention the burglary during her testimony. (R. p. 461).

After Ms. Raines' testimony was proffered, and the court agreed her testimony was admissible, the court admonished Ms. Raines to not mention the burglary. "The only thing I need to also caution you on, Ms. Raines: I don't want to hear the word burglary come out of your mouth. Do you understand?" (R. p. 522, ll 3-6). Ms. Raines indicated that she understood. (R. p. 522). The solicitor also indicated that he had also instructed Ms. Raines to not mention that the gun was stolen. (R. p. 522). He further requested the opportunity to tell Ms. Padgett, Raines' mother, to not mention any prior bad acts that of which she may be aware. (R. pp. 522-23). The solicitor noted that there was no mention of anything in her statement that would indicate Ms. Padgett knew anything regarding the burglary or anything else. Id.

Ms. Raines testified without incident. During Cynthia Padgett's direct testimony, the following exchange occurred:

> Q [solicitor]. All right. What does it [Padgett statement to law enforcement] say then?
>
> A [Padgett]. By the man that he had met through Donald Cooper, he said that the man had worked with Donald Cooper at the Pizza Hut; he says that the man was shot; he said that he took the man's truck to Savannah to sell and stole a car to come back in; he said that he had the man's cell phone; and he said that there was an altercation that had taken place or -- he said that the incident altercation had taken place on Joe Frazier Road. I'm not sure if that's the incident where he was disrespected --
>
> Q. Right.
>
> A. -- or if it was the incident where the man was shot or -- I'm not sure exactly because, I mean, it was a long time ago. And he says that the man's body was that the police found the man's body at Pinckney Island between the bridges.
>
> Q. And are those the statements that Jerry Scantling made to you about --
>
> A. That is correct.
>
> Q. -- what his charges were?
>
> A. That is correct.
>
> Q. And what he did?
>
> A. That -- he didn't make any statement to – he had told me that his charges, that he had been there on a burglary and but then he said --
>
> MR. WALKER: Your Honor, objection.
>
> THE WITNESS: I'm sorry. I mean, I --
>
> THE COURT: Ladies and gentlemen, I'm going to strike that. It's not appropriate. You are not to consider it.
>
> MR. WALKER: I've got a matter of law, Your Honor.
>
> THE COURT: Yes. We're going to finish with this -- go.

(R. p. 549, l 22 – R. p. 551, l 3).

> At the next break, Appellant moved for a mistrial.
>
> As to the -- not the previous witness but the witness today, Ms. Padgett, there was a reference to a pending burglary charge of my client, he said he's-- that's why he was in jail. Of course, we've taken extraordinary precautions about that particular charge in this case. It was severed.
>
> As far as the jury knows, the only other criminal activity he's charged with is stealing the Monte Carlo, that's why he was arrested and placed in jail, according to the testimony here. She was specifically warned ahead of time.
>
> We discussed with the State the importance of keeping that information [phonetic]. And it's out there, we can't unring that bell, and we would move for a mistrial, Your Honor.

(R. p. 566, ll 2-16). In response, the solicitor noted that the statement about the burglary was not intentional. (R. p. 566). He further noted that they had taken great effort to avoid having any testimony about the burglary not because of the burglary, but because the fruit of the burglary was the firearm. Id. The solicitor contended that the comment was not elicited on his part, and that the judge could tell that the witness did not intentionally mention the burglary. (R. pp. 566-67). The solicitor further asserted that it would be different had the witness said the gun that was used was taken in the burglary, but here there was just a mere mention of burglary. (R. p. 567). It did not rise to the level of requiring a mistrial, and the State would not object to a curative instruction. Id.

> The trial court denied the motion for a mistrial.
>
> Okay. Well, obviously, we had told everyone not to state the word burglary. But I really don't see any resulting prejudice.
>
> Again, your client himself has already admitted to the possession of a stolen vehicle.

> I made and did a curative instruction immediately after the statement to wipe it away. We kept going with the testimony in an effort not to draw attention to it, as well. So I think I've done absolutely everything I can. And as you all know, a mistrial is a very extreme measure to be avoided if at all possible.
>
> Respectfully, I'm going to deny your motion for a mistrial.

(R. p. 567, l 14 – R. p. 568, l 2).

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct.App.1999). Appellate courts have favored the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "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; see also State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.").

"[A] mistrial should not be ordered in every case in which incompetent evidence is improperly admitted." State v. White, 371 S.C. 439, 444, 639 S.E.2d

160, 162 (Ct.App.2006)(citing State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999) and Patterson, 337 S.C. at 227, 522 S.E.2d at 851). "[T]he trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (internal citation omitted).

Argument

1. The trial court did not abuse its discretion in denying the motion for a mistrial. A proper curative instruction was given, and a mistrial was not warranted.

The trial court did not err in denying Appellant's request for a mistrial. First, any prejudice created by the comment made by Ms. Padgett was resolved by the trial court's curative instruction. It is well known "[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Goldsmith, 301 S.C. 463, 467, 392 S.E.2d 787, 789 (1990) (quoting State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct.App.2005)); see State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. Harris, 382 S.C. 107, 119, 674 S.E.2d 532, 538-39 (Ct.App.2009). Here, the trial court immediately struck the statement from the record and instructed the jury to disregard Ms. Padgett's comment. Under South Carolina law, jurors are presumed to follow the trial judge's instructions. State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct.App.2001), affirmed as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) quoting Foye v. State, 335

S.C. 586, 590, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions."). In light of the curative instructions that were given by the trial court, Respondent submits the trial court did not abuse its discretion in denying the motion for a mistrial.

2. The denial of the mistrial motion should be affirmed because the comment made by Ms. Padgett was harmless.

Respondent submits that the denial of the mistrial motion should be affirmed because the admission of the comment made by Ms. Padgett was ultimately harmless. Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Adams, 354 S.C. 361, 380-81, 580 S.E.2d 785, 795 (Ct. App. 2003); see also State v. Curry, 370 S.C. 674, 636 S.E.2d 649(Ct.App.2006)(error is harmless when it could not have reasonably affected the result of the trial). An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant. State v. Lee-Grigg, 374 S.C. 388, 414-15, 649 S.E.2d 41. 55 (Ct.App.2007). No definite rule of law governs finding an error harmless; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Lee-Grigg, supra; see also State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002)(in determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict).

As explained in section three of Argument I, there was overwhelming evidence that tended to prove the Appellant's guilt, which was wholly independent of any speculative knowledge of a prior burglary. As such, Respondent submits that Appellant is unable to prove prejudice, and that as a

result, any error is harmless. Thus, the trial court did not abuse its discretion in denying the motion for a mistrial based upon Ms. Padgett's comment. Therefore, Respondent submits that this claim should be denied, and that this Court should affirm the findings of the lower court.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm his convictions in the murder of Leonard Green, armed robbery, possession of a weapon during the commission of a violent crime, and possession of a stolen vehicle.

Respectfully submitted,

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December 30, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge
Appeal Case No. 2013-000488

THE STATE

RESPONDENT,

V.

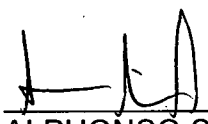
JERRY SCANTLING,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 30th day of December, 2014.



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