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STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2018-001891

THE STATE, Respondent,

v.

JYQUEZ JULIUS FREEMAN, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

180 Magnolia Street
Spartanburg, SC 29306
(864)-596-2575

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 6

ARGUMENT 7

I. The trial judge properly replaced Juror #107 with an alternate juror when Juror #107 admitted that he knew Appellant's sister and the Solicitor explicitly stated that he would have used a preemptive strike on Juror #107 had he not concealed his relationship with Appellant's sister 7

II. The trial judge properly refused to declare a mistrial after a law enforcement officer made a single, vague reference to multiple armed robberies and investigations when the reference did not prejudice Appellant enough to warrant a mistrial and even if Appellant did suffer prejudice, any error was entirely harmless in light of the overwhelming evidence presented against Appellant at trial 10

CONCLUSION 16

TABLE OF AUTHORITIES

Cases:

State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014) 6, 8

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) 11

State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998) 8

State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) 11

State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984) 14

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) 14

State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990) 14

State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003) 6, 11, 13, 14

State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) 7, 8

STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial judge properly replaced Juror #107 with an alternate juror when Juror #107 admitted that he knew Appellant's sister and when the Solicitor explicitly stated that he would have used a preemptive strike on Juror #107 had he not concealed his relationship with Appellant's sister?

II.

Whether the trial judge properly refused to declare a mistrial when a law enforcement officer made a single, vague reference to multiple armed robberies and investigations where the reference did not prejudice Appellant enough to warrant a mistrial and if Appellant did suffer prejudice from the reference, whether any error was entirely harmless in light of the overwhelming evidence presented against Appellant at trial?

STATEMENT OF THE CASE

In September 2017, the Spartanburg County Grand Jury indicted Appellant for one count of murder (2017-GS-42-4859), one count of armed robbery and one count of possession of a weapon during the commission of a violent crime (2017-GS-42-4861), and four counts of kidnapping (2017-GS-42-4864, 4860). On October 8-11, 2018, a jury trial was held in the Spartanburg County Court of General Sessions with the Honorable J. Derham Cole presiding. Appellant was represented by Michael Morin, Esq. The State was represented by Seventh Circuit Solicitor Barry Barnette. At the conclusion of trial, the jury convicted Appellant of all counts. Following the verdict, the trial judge sentenced Appellant to a term of forty years' imprisonment for murder, thirty years' imprisonment for armed robbery, 30 years' imprisonment for each count of kidnapping, and five years' imprisonment for possession of a weapon during the commission of a violent crime. The sentences ran concurrently with each other resulting in an aggregate sentence of forty years' imprisonment. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On March 31, 2017 two men wearing masks, black jackets, and latex gloves robbed the Kentucky Fried Chicken (KFC) restaurant on Cedar Springs Road in Spartanburg. (State's Exhibit #48). The men were each armed with pistols. The two men went to the office of the restaurant where they confronted the store manager, Anthony Tiffany, and asked him to empty the safe. Tiffany did not comply with their request and eventually engaged in a physical altercation with one of the men. (State's Exhibit #48). One of the masked men then shot Tiffany six times. (R. 301). After shooting Tiffany, one of the men took Tiffany's wallet. (State's Exhibit #48). Employee Malik Smith ran out of the store as soon as he heard gunshots coming from the office. (R. 150). As he exited the store, Smith encountered one of the masked men who pointed a black revolver at him. (R. 151). Smith described the man as wearing a mask, a black jacket and a blue bandana. (R. 151). The masked man eventually lowered his gun and Smith ran to safety. (R. 151). Smith subsequently returned to the KFC after the masked men left and provided first aid to Tiffany. (R. 152). Tiffany died as a result of the gunshot wounds (R. 302).

The morning after the robbery, Richard Behnke, the resident of a home less than half a mile away from the KFC, found a black jacket, a mask, and a pistol near his truck. (R. 137, 188, 409). Behnke called law enforcement who arrived shortly thereafter to collect the items. (R. 137, 187). Law enforcement also located a blue bandana laying in Behnke's yard. (R. 192). The gun collected was a revolver with two fired shell casings and two unfired shell casings. (R. 187, 191). Each of the items was swabbed for DNA testing. (R. 255-57).

On April 7, 2017, law enforcement executed a search warrant at 1452 Old Canaan Road in Roebuck. (R. 194). The residence at 1452 Old Canaan Road belonged to Valencia Garcia. (R. 224). Valencia lived at the residence with her son, De'Adrian Garcia. (R. 224). According to

Valencia, Appellant began living with her and De'Adrian in March 2017 and was still living there on April 7, 2017. (R. 232). Valencia stated that Appellant lived in the last bedroom on the right side of the house, while De'Adrian lived in the front bedroom on the right side of the house. (R. 227). Among the items collected during the search of Valencia's home included a black and white skull mask, multiple boxes of latex gloves, two black jackets, a black Halloween costume, a blue book bag with money inside, and a black Smith and Wesson semi-automatic pistol found underneath a pillow in De'Adrian's bedroom. (R. 206, 221, State's Exhibit #87, #96, #98, #104, #106, and #109).

Prior to the search warrant being executed, De'Adrian was located outside the residence and placed under arrest. (R. 275). As De'Adrian was being placed under arrest, a black male was seen running away from the area by Nathan Cantrell of the Spartanburg County Sheriff's Office. (R. 241, 275). After law enforcement executed the search warrant and left the area, Appellant was located and arrested in a wooded area near the Garcia residence. (R. 243, 277). Appellant had the same blue book bag in his possession that law enforcement located inside his bedroom. (R. 249, State's Exhibit #106, #110).

After Appellant was arrested, he met with law enforcement. During this meeting, Appellant was provided two bottles of water to drink. (R. 234-35). Appellant drank out of the bottles and they were collected for analysis by law enforcement. (R. 235, 237). The swabs taken from the items left at Behnke's house were compared with Appellant's DNA sample from the two water bottles. Appellant's DNA matched the sample taken from the mask left in Behnke's yard. (R. 286).

SLED Analyst, Michelle Eichenmiller, examined five shell casings collected from the KFC as well as four bullets recovered from Tiffany's body (R. 266-67). Eichenmiller concluded

that four out of the five shell casings and the four bullets from Tiffany's body were fired from the Smith and Wesson pistol found in De'Adrian's room. (R. 267-68, 410-12). Quentin Meadows lived across the street from Valencia, De'Adrian and Appellant. (R. 110). On March 31, 2017, Meadows gave De'Adrian and Appellant a ride to a house close to the KFC in the vicinity of Francis Marion Drive and Cedar Springs Road. (R. 115-16, 409). Meadows testified that De'Adrian was wearing a black jacket and Appellant was wearing a burgundy hoody. (R. 114-15). Later that night De'Adrian called Meadows and asked to be picked up near an area called club corner. According to Meadows, club corner is less than a mile from the KFC. (R. 119). At the conclusion of trial, Appellant was convicted of all charges.

STANDARD OF REVIEW

I.

"[I]f a juror's nondisclosure is unintentional, the trial court may exercise its discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial." State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 246 (2014).

II.

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id.

ARGUMENT

I.

The trial judge properly replaced Juror #107 with an alternate juror when Juror #107 admitted that he knew Appellant's sister and the Solicitor explicitly stated that he would have used a preemptive strike on Juror #107 had he not concealed his relationship with Appellant's sister.

Appellant argues the trial judge erred by removing Juror #107 because the State failed to prove the juror was potentially biased. In support of his argument, Appellant contends Juror #107 had a minimal connection with Appellant's potential witness, Tishiana Lee, and that connection would not have supported a challenge for cause nor would it be a material factor in the State's exercise of its peremptory strikes. On the contrary, Juror #107 had a significant connection with Lee, who was not only a potential witness for Appellant but also his sister. (R. 321, 407). Juror #107's connection with Appellant's sister would have supported a challenge for cause. However, even if we assume the trial judge would have declined to strike Juror #107 for cause, Juror #107's connection with Appellant's sister certainly would have been a material factor in the State's exercise of peremptory strikes. In fact, the Solicitor explicitly noted on the record that he would have used a peremptory challenge on Juror #107 had he known of the juror's connection with Lee. (R. 324). Therefore, the trial judge did not abuse his discretion in removing Juror #107 from the jury panel and replacing him with an alternate juror.

"When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). The first question an appellate court must address in a juror disqualification analysis is whether the juror intentionally concealed information during *voir*

dire. State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 106-107 (1998). An "intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." Woods 345 S.C. at 588, 550 S.E.2d at 284.

An unintentional concealment "occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." Id. "If a juror's nondisclosure is unintentional, the trial court may exercise its discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial." Coaxum 410 S.C. at 328, 764 S.E.2d at 246. "Paralleling the inquiry in cases of intentional concealment, the trial court in the unintentional concealment situation must determine whether the information concealed would have supported a challenge for cause or would have been a material factor in a party's exercise of its peremptory challenges." Coaxum 410 S.C. at 328-329, 764 S.E.2d at 246.

Here, the trial judge determined that Juror #107's concealment was unintentional. Juror #107 was questioned by the trial judge about his connection with Lee after Investigator Shawn Cloran noticed eye contact being made between Juror #107 and Appellant's family. (R. 325). Cloran notified the Solicitor of his observation and a search of Juror #107's Facebook page was conducted. The search revealed that Lee was a suggested Facebook friend of Juror #107. (R. 404). Juror #107 admitted knowing Lee and even knew where she went to high school. (R. 320). Juror #107 maintained that he didn't know Lee's real name but knew her by the nickname "Ti-Tot." (R. 320-22). In fact, Juror #107 said he could have identified Lee if she had been present in

the courtroom during jury selection. (R. 321-22). The following exchange took place between the trial judge and Juror #107:

> The Court: But I'll ask you to be certain. You're saying you do – there's no question that you do know Tishiana Lee?
>
> Juror #107: Yeah.
>
> The Court: And you're friends of hers?
>
> Juror #107: I know her son's father. I know her son's father, and I'm – I'm very close, well, ain't going to say very close. But I used to be very close with him.
>
> The Court: Okay. With them?
>
> Juror #107: With him, not – well, she was there, but me and her had no ties.
>
> The Court: Okay. No question you know her.
>
> Juror #107: Yes, Sir.
>
> The Court: And had she been in the courtroom when the witnesses were called, you could have identified her.
>
> Juror #107: Yeah I could have.

(R. 321-22, lines 15-5).

Despite the unintentional concealment by Juror #107, the trial judge nonetheless properly removed Juror #107 because of his relationship with a member of Appellant's immediate family, namely Appellant's sister. Juror #107's relationship with Appellant's sister would not only have supported a challenge for cause, but would have been a material factor in the State's exercise of its peremptory challenges had the trial judge denied the State's challenge for cause. This Court need not speculate on how Juror #107's relationship with Lee would have affected the State's use of peremptory challenges because the Solicitor clearly stated his intentions on the record. The Solicitor made the following argument to the trial judge: "we ask for [Juror #107] to be removed, because, obviously, if I had that information beforehand, I would have struck him. And

I had strikes left." (R. 324, lines 8-11). Accordingly, the trial judge did not abuse his discretion in replacing Juror #107 with an alternate juror when Juror #107 admitted that he knew Appellant's sister and used to be very close with her son's father. Even if the trial judge determined Juror #107's relationship with Appellant's sister did not warrant a removal from the jury for cause, the Solicitor plainly stated that he would have exercised a peremptory challenge on Juror #107 in light of the concealed information. Therefore Juror #107's relationship with Lee would have been a material factor in the exercise of a peremptory challenge. Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly refused to declare a mistrial after a law enforcement officer made a single, vague reference to multiple armed robberies and investigations when the reference did not prejudice Appellant enough to warrant a mistrial and even if Appellant did suffer prejudice, any error was entirely harmless in light of the overwhelming evidence presented against Appellant at trial.

Appellant next argues the trial judge erred in refusing to grant a mistrial after Investigator Mark Gaddy of the Spartanburg County Sheriff's Office implied that Appellant was involved in multiple armed robberies. In support of his contention, Appellant argues that Gaddy's use of the plural terms "armed robberies" and "investigations" implied that Appellant was involved in multiple armed robberies and thus constituted impermissible character evidence. Appellant's argument is meritless. Gaddy's references to "armed robberies" and "investigations" were vague and did not reference Appellant or his co-defendant directly or indirectly. Furthermore, the State did not attempt to introduce evidence that Appellant had been convicted of other crimes and the plural references to "armed robberies" and "investigations" were not responsive to the question asked by the Solicitor. Appellant did not suffer any prejudice from Gaddy's testimony because it is unlikely the jury made any connection between Gaddy's use of plural terminology and

Appellant's involvement in the KFC robbery that he stood trial for. Other than Gaddy's isolated statement, no evidence was introduced by the State or mentioned by any witness that would inform the jury that other armed robberies had taken place in the surrounding area. Appellant's attempt to draw a connection between Gaddy's statement and evidence of other robberies in the surrounding area of the KFC is attenuated at best. However, even if this Court determines that Appellant suffered prejudice from Gaddy's statements, the prejudice was not significant enough to warrant the extreme remedy of a mistrial. Furthermore, any error on in the admission of Gaddy's statement was entirely harmless in light of the evidence against Appellant.

Appellant Suffered No Prejudice

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." Thompson, 352 S.C. at 560, 575 S.E.2d at 82. "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. "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." State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977). "A mistrial should not be granted unless absolutely necessary." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). "Instead, the 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." Id.

Here, the following exchange took place on the State's direct examination of Investigator Gaddy:

> Solicitor Barnette: Back on April 7th of 2017, was you part of a team that went to 1452 Old Canaan Road?
>
> Gaddy: Yes, sir.
>
> Solicitor Barnette: If you would, tell the jury what your—what you did that day?

> Gaddy: As a part of this ongoing investigation with the city we had been out on that night from like midnight up looking for people that were involved in these armed robberies.
>
> Solicitor Barnette: Wait, wait, wait. Involved in the armed robbery of the K.F.C.?
>
> Gaddy: Yes. It was all in conjunction because the stuff that we had compared as far as the investigation were paralleling each other.

(R. 245, lines 9-21).

Appellant did not suffer any prejudice from Gaddy's vague statement. Gaddy merely used the plural form of the words "robbery" and "investigation." Gaddy's answer did not refer to Appellant or his codefendant or otherwise indicate that either Appellant or his co-defendant were suspected of more than one robbery. Gaddy's statement was vague enough that he did not even specify there had been more than one armed robbery in the area of the KFC or more than one robbery in all of Spartanburg County, let alone one in which Appellant was involved. Furthermore, Gaddy's answer was nonresponsive to the broad question "tell the jury what your—what you did that day?" (Tr. 245, lines 12-13). The State did not solicit information about other armed robberies or attempt to introduce any prior bad acts of Appellant or his co-defendant. Gaddy's answer was entirely unsolicited and only made a vague reference to other armed robberies and investigations. In fact, the Solicitor focused the jury specifically on the KFC armed robbery with his follow up question. (R. 245). No connection was made nor was a connection attempted to be made between other armed robberies in the surrounding area and Appellant.

The trial judge agreed that Gaddy's answer did not clearly refer to other armed robberies in general or other armed robberies in which Appellant may be involved. However, the trial judge exercised caution in sending the jury out of the courtroom in case Gaddy did make a more

explicit reference to additional armed robberies. The trial judge articulated his reasoning in his ruling:

> The Court: I understand what your concern is and I understand where I thought he was going. That's why I sent the jury out, but it wasn't clear to me that he was referring to anything other than this one, but I anticipated that he might, and that's the reason I excused the jury. So at this point I don't think it's necessary to grant a motion for a mistrial, and so that motion is denied.

(R. 246, lines 19-25). The trial judge acted with an abundance of caution in recognizing the potential improper testimony that might have come from Gaddy, but he was not persuaded that Gaddy had even made a reference to a robbery other than the robbery for which Appellant was standing trial. The trial judge did not abuse his discretion in refusing to grant the extreme remedy of a mistrial for a vague, isolated statement by one police officer.

Contrary to Appellant's assertion, Gaddy's testimony was not more prejudicial than the testimony this Court considered in State v. Thompson. (Initial Brief of Appellant 11). In Thompson this Court considered whether an officer's explicit reference to Thompson having outstanding arrest warrants required the trial judge to grant a mistrial. Thompson, 352 S.C. at 560, 575 S.E.2d at 82. This Court held the trial judge did not abuse his discretion in refusing to grant the extreme remedy of a mistrial and wrote "a vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes." Thompson, 352 S.C. at 561, 575 S.E.2d at 82. Here, the reference to "armed robberies" and "investigations" was less explicit than the reference to arrest warrants made in Thompson. Unlike Thompson, there was no connection made between Appellant and outstanding arrest warrants or any other prior bad acts by Appellant. Even if Gaddy had made a more explicit reference to other armed robberies or

Appellant's outstanding warrants, a single vague reference to a prior bad act would not warrant a mistrial.

Harmless Error

"Whether an error is harmless depends on the circumstances of the particular case." Thompson, 352 S.C. at 562, 575 S.E.2d at 83. "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." Id. "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Error is harmless when it could not reasonably have affected the result of the trial." State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). "[W]here guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result." State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984).

If this Court determines that Appellant did suffer prejudice from Gaddy's vague reference to other investigations, any error in the admission Gaddy's testimony is harmless in the light of the overwhelming evidence presented against Appellant at trial. Contrary to the assertion in Appellant's brief, the evidence implicating Appellant in the KFC robbery was not "scant." (Initial Brief of Appellant 11). At trial, the State presented three surveillance videos from the KFC depicting two men wearing black jackets, hoods, latex gloves, and masks entering the restaurant with guns drawn. (State's Exhibit #48, #59, #60). A black jacket, a revolver, a mask, and a blue bandana were found in a yard less than half a mile away from the KFC. (R. 137, 188, 409, #71). The blue bandana and the revolver matched the description given by Malik Smith. (R. 151, State's Exhibit # 71). A DNA sample taken from the mask matched Appellant's DNA. (R.

286). When law enforcement searched the residence that Appellant and his co-defendant were living in on the day of the robbery, they found an additional mask, two black jackets, a black Halloween costume, boxes of latex gloves, a black pistol which fired the bullets that killed Tiffany, and a blue book bag with money inside that was later found on Appellant's person when he was arrested. (R. 203, 227, 232, 267-68, 410-12, State's Exhibit #96, #98, #107, #109, and #110). Additionally, Meadows testified that on the night of the robbery he dropped Appellant off near the KFC and later picked him up in another area close to the KFC. (R. 115-16, 119).

The evidence presented against Appellant was overwhelming. It is more likely the jury was convinced of Appellant's guilt based on the incriminating items found inside his residence and the presence of his DNA inside a mask found alongside a gun, a black jacket, and a blue bandana less than half a mile from the crime scene than from Gaddy's vague references to "armed robberies" and "investigations." Any error in the admission of Gaddy's statements was harmless and had no effect on the outcome of the trial. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the sentences and convictions of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

180 Magnolia Street
Spartanburg, SC 29306
(864)-596-2575

BY:
SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

180 Magnolia Street
Spartanburg, SC 29306
(864)-596-2575

BY: Scott Matthews
Scott Matthews

Bar # 101464

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