STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No: 2011-204886

THE STATE,

Respondent,

v.

COREY GETHERS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II.

The trial court correctly sustained the State's objection to Appellant's questioning of Deputy Cain on excessive force because the record does not reflect whether Appellant contemplated litigation. Furthermore, Appellant was able to develop the issue of bias in other ways during his cross-examination of Deputy Cain so the limitation did not result in unfair prejudice.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for failure to stop for a blue light. (R.* Indictment.) He was also charged with assault on a police officer while resisting arrest, but that charge was determined to have been dismissed by *nolle prosequi* at trial and was officially disposed of by *nolle prosequi* on December 6, 2011. (Tr. 6, lines 21-24; Tr. 114, lines 21-25; R.* Indictment/Warrant Status Change Form.) On December 1-2, 2011, Appellant proceeded to trial before a jury on the charge of failure to stop for a blue light. Andrew David Grimes, Esquire, and Victoria Anderson, Esquire, represented Appellant, and James P. Stack, Esquire, and Emmanuel Ferguson, Esquire, represented the State. The jury found Appellant guilty, and the Honorable Deadra L. Jefferson sentenced Appellant to one year's imprisonment.

On December 12, 2011, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On December 21, 2009, Deputy Jason Cain of the Charleston County Sheriff's Office was on his way to Rivals Sports Bar to serve a warrant when he noticed a dark-colored Suzuki Forenza leaving the bar's parking lot. (Tr. 62, lines 12-25; Tr. 63, lines 1-2.) He followed the vehicle to a stop light, where he observed it stop beyond the white line. (Tr. 63, lines 2-11.) As the vehicle prepared to turn left, Deputy Cain activated his blue lights to conduct a traffic stop. (Tr. 63, lines 11-14.) The vehicle pulled into a nearby Piggly Wiggly and began accelerating through the parking lot. (Tr. 63, lines 14-23.) Deputy Cain continued following the vehicle onto Highway 78 and called for backup because he thought the person in the car might be the one on whom he was supposed to serve a warrant. (Tr. 63, lines 21-25; Tr. 64, lines 1-2.) The chase escalated until the Forenza was travelling at approximately 100 miles per hour. (Tr. 64, lines 18-22.) When the car finally stopped, Deputy Cain saw Appellant exit from the driver's seat side and run. (Tr. 65, lines 5-12 Tr. 66, lines 13-25; Tr. 67, lines 1-4.) He followed Appellant, yelling for him to stop. (Tr. 65, lines 12-16.) As Appellant attempted to climb a fence, Deputy Cain used his taser on him and was able to pull him off the fence. (Tr. 65, lines 19-24.) Appellant resisted while Deputy Cain attempted to handcuff him, and consequently, Deputy Cain deployed his taser approximately eight times trying to get Appellant under control. (Tr. 66, lines 1-4.) When Appellant still would not stop fighting him, Deputy Cain drew his gun and told him he would shoot him if he did not stop, and at that point Deputy Cain was finally able to handcuff Appellant. (Tr. 66, lines 4-12.) Appellant was charged with failure to stop for a blue light and assault on a police officer while resisting arrest, and the assault charge was officially disposed of by *nolle*

prosequi on December 6, 2011. (Tr. 6, lines 21-24; Tr. 114, lines 21-25; R.* Indictment; R.* Indictment/Warrant Status Change Form.)

At his trial for failure to stop for a blue light, the State called Deputy Cain to the stand. (Tr. 60, lines 20-21.) He testified regarding the events surrounding Appellant's arrest, and he specifically identified Appellant as the person he saw emerge from the driver's seat side of the car when it stopped. (Tr. 66, lines 13-25; Tr. 67, lines 1-4.) The State published Exhibit 1, a DVD of the chase, to the jury and had Deputy Cain narrate. (Tr. 69, lines 11-25.) He testified he saw two people in the car while chasing it. (Tr. 77, lines 1-3.) He further testified he only saw one person exit the car, began chasing that person, and never lost sight of him during the approximate one and one-half to two minutes of the chase. (Tr. 78, lines 7-25; Tr 79, lines 1-6.) Deputy Cain also testified that he did not see anyone in the back seat of the car as he was chasing it and that there would not have been time between when the car stopped and when Appellant exited it for him to have switched seats from back to front or from left to right. (Tr. 79, lines 16-25; Tr. 80, lines 1-5.) When asked if there was anything in the back seat of the car, Deputy Cain testified there were two child safety seats in the back seat that were strapped in with seatbelts. (Tr. 76, lines 3-6.)

On cross-examination, Appellant questioned Deputy Cain about what Appellant told him in regards to whether Appellant was the driver and where he was seated in the car. (Tr. 87, lines 5-11.) The following exchange took place:

> Q: Nonetheless, he told you he was not the driver. Correct?
>
> A: Yes.
>
> Q: And he told you that he was in the back seat?

A: After several minutes. Several minutes passed. It wasn't immediately, when he said he was in the back seat.

Q: But he mentioned it?

A: He mentioned it, yes.

Q: And you said, "No, you couldn't have been because there were two child restraint seats back there. You couldn't have fit in there." Correct?

A: That's correct.

Q: I was wondering if the child restraint seats are in evidence?

A: No, sir.

Q: Were they photographed?

A: No, sir.

Q: Documented in any way?

A: No, sir. Actually, they are **on the tow sheet**.

Q: Okay.

A: They are listed on the tow sheet.

Q: And, apart from that, they are not documented in any other way?

A: No.

Q: Not documented in your report? Just the tow sheet?

A: That's it.

(Tr. 87, lines 5-25; Tr. 88, lines 1-6.) (emphasis added). When Appellant questioned Deputy Cain about whether he had written in his report about talking to another suspect, Deputy Cain could not recollect. (Tr. 90, lines 2-7.) At that point, Appellant introduced Exhibit 1 for identification, a copy of the deputy's report. (Tr. 90, lines 8-14.) Appellant

asked Deputy Cain questions about the report and the deputy read portions of the report back. (Tr. 90, lines 23-25; Tr. 91, lines 1-15.)

Appellant then began questioning Deputy Cain regarding the tow sheet. (Tr. 91, lines 16-17.) He asked, "Is there a registered owner listed as Andrew Dunham?" and Deputy answered, "Yes, sir."[1] (Tr. 91, lines 19-20.) Deputy Cain then confirmed that Appellant was not listed as the registered owner of the car. (Tr. 91, lines 21-22.) Appellant next asked, "The report says there were miscellaneous papers found in the car. Do you know if any of those - - they don't say that those were connected to [Appellant] in any way. Do they?" and Deputy Cain answered, "No, sir." (Tr. 92, lines 22-25; Tr. 93, line 1.) During cross-examination, Appellant questioned Deputy Cain regarding his chase and arrest of Appellant. (Tr. 94, lines 2-25; Tr. 95, lines 1-19.) Deputy Cain testified that he drew his service revolver and threatened to shoot Appellant, specifically stating, "I believe I told him I was going to cap him." (Tr. 94, lines 20-25; Tr. 95, lines 1-5.) He also confirmed that he told Appellant, "You are lucky I'm not giving you more." (Tr. 95, lines 14-19.)

On redirect-examination, the State handed the tow sheet to Deputy Cain and asked him to identify it. (Tr. 98, lines 18-23.) The State then asked him whether the tow sheet listed two child seats, and the deputy confirmed that it did. (Tr. 98, lines 24-25.) Appellant did not object. Later, during recross-examination, Appellant asked Deputy Cain whether a brown jacket was listed on the tow sheet, and the deputy said he would have to see it. (Tr. 100, lines 13-15.) At that point, Appellant marked the tow sheet for

[1] While the record does not indicate whether Appellant handed Deputy Cain the tow sheet at this point, it would appear from the nature of the exchange that defense counsel was reading off the tow sheet while asking questions and that Deputy Cain also may have been referring to the tow sheet in answering the questions. (Tr. 91, lines 16-25; Tr. 92, lines 22-25; Tr. 93, line 1.)

identification as Defense Exhibit 2. (Tr. 100, lines 18-20.) Appellant then handed the tow sheet to Deputy Cain and asked him whether it said, "Brown jacket recovered." (Tr. 101, line 2.) Deputy Cain answered, "Yes, sir." (Tr. 101, line 3.)

Appellant took the stand in his defense. (Tr. 127, line 5.) During direct examination, he testified someone named Tony picked him up on the night of the arrest and another man named Roy was sitting in the front passenger seat. (Tr. 134, lines 1-20.) Appellant testified that he got in the back seat behind the passenger and that there was the base of a child's seat in the back with him. (Tr. 134, lines 21-25; Tr. 135, lines 1-4.)

On cross-examination, the following exchange took place:

> Q: Okay. So, you are in the back seat on the passenger side and in that back seat were also two child seats. Isn't that correct?
>
> A: No, sir.
>
> Q: Okay. May I approach, Your Honor?
>
> The Court: Yes, you may.
>
> Q: I am going to show you Defense Exhibit, Defense Exhibit No. 2, which has already been entered into evidence.
>
> [Defense counsel]: Objection.
>
> The Court: Basis?
>
> [Defense counsel]: Improper impeachment.
>
> The Court: Overruled. It goes to his knowledge of what was actually in the vehicle. It's an extraneous statement and serves to impeach his testimony. You may proceed. He was given the opportunity to answer the question affirmatively, "yes" or "no[.]" You may proceed.

(Tr. 159, lines 16-25; Tr. 160, lines 1-7.) The State then continued to question Appellant using the tow sheet, asking Appellant to read along with him. (Tr. 160, lines 8-10.)

While reading what was listed on the tow sheet, the State asked Appellant, "And 'two child seats.' Is that correct?" and Appellant answered, "Yes, sir." (Tr. 160, lines 19-20.)

Appellant testified he was in the back seat on the passenger side and ducked down when he saw the deputy make a U-turn. (Tr. 162, lines 4-25; Tr. 163, lines 1-19.) He testified the base of a child's seat was in the middle of the back seat, not tied down, and he was seated behind the passenger with it to his left. (Tr. 172, lines 16-25; Tr. 173, lines 1-7.) He then testified that he was on the left hand side behind the driver when he jumped out of the car. (Tr. 173, lines 21-22.) He claimed he had switched to that side and moved over behind the driver. (Tr. 174, lines 2-6.) Appellant admitted he did not know the last name of the driver or the passenger who were with him in the car. (Tr. 181, lines 19-24.)

During its closing argument, the State argued:

> You see evidence, or you will see evidence, that tow sheet, where there were two child seats in that back seat. I asked the officer, "Were they laying there or were they strapped in by regulation with seat belts?["] He said they were strapped in. Two child seats, not a part of one laying there. When you look at the tow sheet, which is Defense Exhibit No. 2, I believe - - -
>
> [Defense counsel]: Objection.
>
> The Court: Basis?
>
> [Defense counsel]: Arguing item not in evidence.
>
> The Court: Please approach.
>
> (Bench Conference Off the Record)
>
> [The State]: You have heard the testimony from the Defendant in this case when I showed him this tow sheet that the Defense put in without contest.

(Tr. 199, lines 13-25; Tr. 200, lines 1-3.)

After the jury began its deliberations, it submitted a note to the trial court asking, "May we have a copy of the tow sheet?" (Tr. 215, lines 2-3.) The trial judge proposed to tell the jury her standard instruction, which is: "I make certain determinations about the admissibility of documents. You have everything you can see. Don't draw any inferences from it. If you need any testimony re-played, let us know." (Tr. 215, lines 3-8.) She told counsel she would relay these instructions in writing and asked if they had any objection. (Tr. 215, lines 8-9.) Neither side objected. (Tr. 215, lines 8-12.)

During Appellant's cross-examination of Deputy Cain, he attempted to question the deputy about his use of excessive force when he arrested Appellant. (Tr. 95, lines 6-25; Tr. 96, lines 1-5.) The State objected several times on the basis of relevance and the trial court sustained the objections, telling Appellant, "Unless you can draw it to the elements of failure to stop for a blue light, it is not relevant." (Tr. 95, lines 6-25; Tr. 96, lines 1-13.) Appellant requested a proffer. (Tr. 96, lines 14-15.) Later, the trial court allowed Appellant to proffer Deputy Cain's testimony regarding excessive force. (Tr. 107-09.) Appellant asked about the circumstances of the arrest and whether Deputy Cain "could face civil liability if [Appellant] wanted to proceed with excessive force." (Tr. 108, lines 15-16.) Appellant then asked the deputy whether it might make a difference in a civil lawsuit whether Appellant had been convicted rather than found not guilty, and Deputy Cain said he did not know the answer. (Tr. 109, lines 3-18.) When asked by the trial court why that would be relevant, Appellant answered, "I said I believe it would be relevant, because it shows he may have a bias against [Appellant] to get a conviction here to prevent, perhaps, a civil lawsuit." (Tr. 109, lines 22-24.) The trial court pointed out that no lawsuit had been filed and was therefore speculative, emphasizing the statute of

limitations on filing would run in less than a month. (Tr. 109, line 25; Tr. 110, lines 1-22.) The trial court then explained that the speculative nature of any potential civil claim would be very misleading to the jury and further acknowledged that if the trial involved the charge of assaulting a police officer while resisting arrest, the topic would be germane. (Tr. 111, lines 14-22.) The trial court noted that charge had been disposed of by *nolle prosequi.* (Tr. 114, lines 21-25.) Finally, the trial court stated, "You have to have a good faith basis in asking those questions and some underlying factors to support it and it simply is not apparent, nor has it been elicited in this case." (Tr. 115, lines 8-11.) Upon the trial court's suggestion, the State then inquired of Deputy Cain, "Were you subject to any type of discipline as a result of this action?" and Deputy Cain said he was told to watch his language. (Tr. 115, lines 22-25.) Defense counsel did not call Appellant to testify as to whether he was filing a civil lawsuit against Deputy Cain. When defense counsel further explained the importance of showing whether Deputy Cain had animosity toward Appellant, the trial court told defense counsel he could have asked the deputy if he was aggravated or whether Appellant got on his nerves because he had to chase him down. (Tr. 116, lines 19-25; Tr. 117, lines 1-4.) The trial court further stated, "Well, I mean you could have explored all of that. All of that goes to bear on his credibility. . . . I would have let you ask it." (Tr. 117, lines 7-10.)

Ultimately, the jury found Appellant guilty, and the trial court sentenced him to one year in prison. (Tr. 232, lines 9-13; Tr. 233, lines 4-6.)

ARGUMENTS

I.

The trial court did not abuse its discretion in permitting the State to impeach Appellant on cross-examination by reading aloud from a document that was a defense exhibit marked for identification after Appellant opened the door by using the document in its cross-examination of a witness and marking the document as an identification exhibit. Regardless, any error was harmless in light of the cumulative nature of the information provided by the exhibit.

Appellant argues the trial court erred by permitting the State to impeach Appellant on cross-examination by reading aloud before the jury from a document, the tow sheet, and questioning Appellant after each line read where the tow sheet was never entered in to evidence, where the State relied upon the tow sheet in its closing argument, and where the jury specifically requested to see the tow sheet during deliberations. However, Appellant opened the door by introducing the tow sheet as an identification exhibit and using it to cross-examine another witness. Thus, the trial court was within its discretion in allowing the State to use the tow sheet in its cross-examination of Appellant. Additionally, Appellant suffered no prejudice by the State's addressing the tow sheet in its closing argument because the State was merely reviewing the testimony the jury had already heard. Furthermore, when the jury requested to see the tow sheet during deliberations, the trial court correctly denied the request because it was not in evidence. Finally, any error was harmless in light of the cumulative nature of the testimony.

The admissibility of evidence is within the trial judge's discretion, and, therefore, evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of a prejudicial legal error. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000). Likewise, a decision as to whether a

party opens the door to the admission of otherwise inadmissible evidence during a trial is left to the sound discretion of the trial judge. State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008); see State v. Adcock, 194 S.C. 234, 239-240, 9 S.E.2d 730, 732 (1940) ("It appears that counsel opened wide the door for the presentation to the [c]ourt of the facts touching appellant's connection with the slot machine. . . . [T]his Court will not interfere with the trial [court]'s exercise of [its] discretion, unless there is a manifest abuse of it . . . .").

It is firmly established that otherwise inadmissible evidence can be properly admitted after opposing counsel opens the door to that evidence. Page, 378 S.C. at 482, 663 S.E.2d at 359. "[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999); see State v. Young, 364 S.C. 476, 485, 613 S.E.2d 386, 391 (Ct. App. 2005) ("The jurisprudence of this State contains a plethora of enlightening cases establishing and explicating the proposition that a defendant may open the door to what would otherwise be improper evidence."). "[A]n appellant cannot complain of prejudice resulting from the admission of evidence to which she opened the door." State v. Rice, 375 S.C. 302, 329, 652 S.E.2d 409, 422 (Ct. App. 2007), overruled on other grounds by State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). See also Beam, 336 S.C. at 53, 518 S.E.2d at 301 ("A party may not complain of error caused by his own conduct.").

Here, the tow sheet was never admitted in to evidence.[2] However, the situation is similar to the above cases because defense counsel introduced the tow sheet, had it marked for identification, and used it in its cross-examination of Deputy Cain. Thus, Appellant opened the door to using the tow sheet and cannot complain when the State used it to cross-examine Appellant.

Prior to any use of the tow sheet at trial, the State had already elicited testimony from Deputy Cain, based on his own personal observation, that two child safety seats were present in the back seat of the vehicle when he stopped it. Deputy Cain further testified that both child seats were strapped in by the seatbelts. Appellant then cross-examined Deputy Cain regarding the two child seats, asking whether they were documented in any way. Deputy Cain answered that they were documented on the tow sheet. Appellant later referred to the tow sheet when asking who the owner of the car was and whether some papers found in the car were known to be connected to Appellant. It is unclear from the record whether Deputy Cain was given a copy of the tow sheet when he was asked these questions, but the exchange seems to indicate Appellant was reading from the tow sheet when asking the questions, just as the State did when cross-examining Appellant. Next, the State conducted its redirect examination, during which it handed the tow sheet to Deputy Cain and questioned him on its contents. Significantly, Appellant did not object to the State's handing the tow sheet to Deputy Cain, even though it had not been marked for identification or admitted. Appellant marked the document as

[2] The State submits this may have been trial strategy on the part of defense counsel so that he could have the last argument if Appellant chose not to testify. However, the tow sheet would likely have been admissible under Rule 803(6), SCRE, as a record of regularly conducted activity or under Rule 106, SCRE, as the remainder of a writing introduced by a party.

an identification exhibit when, on recross-examination, he gave it to Deputy Cain so he could answer whether a brown jacket was listed on it.

By the time defense counsel objected to the State's use of the tow sheet in its cross-examination of Appellant, the information on the tow sheet that two child safety seats were found in the car had already been referred to. Additionally, Deputy Cain had already testified to his personal observation of two child safety seats in the car when he stopped it. Thus, any information obtained after Appellant's objection was cumulative and there would have been no basis to exclude the tow sheet at that point. In Page, 378 S.C. at 482-83, 663 S.E.2d at 360, after defense counsel had cross-examined a detective, the State moved to admit an unredacted statement on the basis that Page had opened the door to the testimony contained in the statement due to his questions to the detective. The trial court admitted the statement based on defense counsel's "opening the door." Id. at 483, 663 S.E.2d at 360. However, this Court found the trial court's ruling in error. Id. Nevertheless, this Court found that any resulting error was harmless, finding the contents of the statement were "merely cumulative to the evidence already on the record." Id. at 484-85, 663 S.E.2d at 361.

When Appellant objected on the basis of improper impeachment to the State's use of the tow sheet to impeach Appellant, the trial court overruled the objection. In her ruling, the trial judge stated, "It goes to his knowledge of what was actually in the vehicle. It's an extraneous statement and serves to impeach his testimony. You may proceed. He was given the opportunity to answer the question affirmatively, 'yes' or 'no[.]'" Appellant attempts to explain the trial court's ruling based on two different rules of evidence the court never mentioned. Appellant first argues the trial court overruled the objection based on Rule 613(b), SCRE. On the contrary, Rule 613(b), SCRE, applies to

prior inconsistent statements by a witness and does not apply to this situation at all. Likewise, Appellant's next suggestion that the impeachment was improper under Rule 608(b), SCRE, is similarly inapplicable. That rule involves conduct of a witness and has no bearing on a document such as the tow sheet.

While the trial court's ruling does not appear to have been based on one of the above rules, as Appellant argues, the State acknowledges its ruling is a bit unclear. However, regardless of the reasoning behind the ruling, no harm occurred by the trial court's allowing the State to question Appellant using the tow sheet. No new information was presented that had not already come out properly and without objection. Thus, even if the trial court erred in allowing the State to use the tow sheet to impeach Appellant, any error was harmless due to the fact that the tow sheet's information regarding the number of child safety seats was already presented to the jury without objection through both direct and cross-examination of Deputy Cain. See Page, 378 S.C. at 484-85, 663 S.E.2d at 361 (finding any resulting error harmless when the contents of the statement were "merely cumulative to the evidence already on the record.").

South Carolina courts have not examined this specific issue. However, other jurisdictions have considered similar issues concerning unadmitted evidence and provide some insight. The Court of Appeals of North Carolina has held a court's mistaken reference to an exhibit not in evidence does not require reversal. State v. Haskins, 238 S.E.2d 196 (N.C. 1977). In Haskins, the trial court mistakenly made reference to an exhibit that had been used during a *voir dire* hearing but had not been admitted into evidence. Id. at 198. The trial court corrected its mistake by asking the jurors to strike the reference from their minds. Id. The Court of Appeals determined the mistake had no bearing on the outcome of the case. Id.

The Superior Court of Pennsylvania has held that submission of unadmitted evidence to the jury is not reversible error. Commonwealth v. Hoke, 552 A.2d 1099 (Pa. Super. Ct. 1989). In Hoke, a diagram was used as an exhibit during an officer's testimony but was not admitted into evidence. Id. at 1101. Nevertheless, the diagram was mistakenly given to the jury when it began deliberations. Id. Because the exhibit was in the jury room for a brief time, the appellant moved for a mistrial, claiming it was so prejudicial it resulted in the denial of a fair trial. Id. The Superior Court found the diagram's mistaken, brief presence in the jury room had no prejudicial effect on the appellant's right to a fair trial. Id. at 1102. The court based its decision on the fact that the exhibit was marked for identification and the jury already had prior exposure to it when the Commonwealth made references to it during trial, combined with the instructions the trial court gave to the jury to ensure the exhibit would not be a factor in its decision. Id.

In Lewis v. State, 631 S.W.2d 813 (Tex. 1982), the Court of Appeals of Texas held there was no error when it found no bad faith on the part of a prosecutor who referred to a jacket that had not been admitted into evidence but had been identified and discussed in the testimony of more than one witness. Two witnesses testified without objection to the jacket. Id. at 815. The prosecutor also referred to the jacket during his closing argument, and the appellant objected to his specific comment regarding an officer's testimony about the jacket. Id. The trial court overruled the objection, and the Court of Appeals found the reference was not in error because there was no showing of bad faith on the part of the prosecutor. Id.

The above cases are not completely on point for this precise set of circumstances. However, each examines other instances in which exhibits not admitted into evidence

were in some way mistakenly treated as admitted evidence. The courts in all three cases determined no prejudicial effect resulted from the mistakes. Also, each case is a good example of the proper use of identification exhibits in cross-examination. Both the Texas case and the North Carolina case involved somewhat similar situations to the case at hand, where a mistaken reference was made to an unadmitted exhibit as admitted evidence. In both cases, the appellate courts found the errors harmless. In the Pennsylvania case, the court determined that even though the unadmitted evidence had entered the jury room, the jury had already been exposed to it when the Commonwealth made references to it as an identification exhibit during trial and the trial court instructed the jury the exhibit should play no role in its decision. Here, the prejudicial effect was much less, considering the fact that the exhibit was not given to the jury at all. On the contrary, when the jury asked for the exhibit, it was instructed by the trial court, "I make certain determinations about the admissibility of documents. You have everything you can see. Don't draw any inferences from it." (Tr. 215, lines 3-7.)

Appellant argues in his brief that the South Carolina Rules of Evidence only permitted the State to ask Appellant what he saw in the back seat of the car and then had to accept his response without resorting to extrinsic evidence to impeach him. However, this argument applies to specific acts of conduct pursuant to Rule 608(b), SCRE: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." This rule is inapplicable to the case at hand because the tow sheet was not an instance of conduct.

Appellant argues specifically that the State relied upon the tow sheet in its closing argument to discredit Appellant's testimony regarding his position in the car. When the

State referred to the tow sheet as evidence in its closing, Appellant objected on the basis of "Arguing item not in evidence." After an off-the-record bench conference, the State continued its closing, referring to "this tow sheet that the Defense put in without contest." One can only speculate about what the trial court's ruling was, but this next reference by the State seems to demonstrate the trial court allowed the State to refer to the tow sheet as being "put in without contest" but not as evidence, thus sustaining the objection. At that point, it was Appellant's duty to request that the trial court instruct the jury to disregard the improper conduct. See 75 Am. Jur. 2d *Trial* § 426 ("It is misconduct on the part of counsel, including a prosecuting attorney, to exhibit to a jury objects or items not introduced in evidence, although such misconduct is not necessarily so prejudicial so as to require a reversal or a new trial. As a general rule, in order to predicate error upon such misconduct, the complaining party must make timely objection in the trial court at the time the misconduct occurs, **and must request the trial court to instruct the jury to disregard the improper conduct**.")

Appellant also argues the fact that the jury sent a note to the trial court requesting the tow sheet shows "the jury clearly focused on this information during its deliberations." However, the trial judge cured any potential error by telling the jury she had already made decisions about the admissibility of documents, they had everything they could see, and not to draw any inferences from it. "Generally, a curative instruction is deemed to have cured any alleged error." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005). Significantly, Appellant did not object to the trial court's instructions to the jury on this matter; thus, this particular issue is not preserved. "Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as

insufficient or move for a mistrial to preserve an issue for review." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999).

In sum, the trial court did not err in permitting the State to impeach Appellant with the same document that had been used by Appellant to question another witness and introduced as an identification exhibit by Appellant. Furthermore, the document contained information that had already been presented through testimony. Moreover, no unfair prejudice resulted from the State's inadvertent reference to the tow sheet as evidence in its closing argument, and the trial court's instruction following the jury's request to view the tow sheet was proper. Accordingly, this Court should affirm the trial court's ruling on this issue.

II.

The trial court correctly sustained the State's objection to Appellant's questioning Deputy Cain on excessive force because the record does not reflect whether litigation was contemplated. Furthermore, Appellant was able to develop the issue of bias in other ways during his cross-examination of Deputy Cain so the limitation did not result in unfair prejudice.

Appellant argues the trial court erred in preventing Appellant from cross-examining Deputy Cain regarding the details of excessive force used by him when arresting Appellant and the possibility of a lawsuit where Appellant sought to impeach him by showing bias, prejudice, or motive to misrepresent. However, the record does not reflect whether Appellant was contemplating a civil lawsuit. Moreover, Appellant was able to elicit testimony from Deputy Cain on cross-examination regarding the amount of force used in his arrest of Appellant. Thus, any error in the trial court's limitation of cross-examination was harmless.

"This Court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to "to be confronted with the witnesses against him" during trial. U.S. Const. amend. VI. "Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses." State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). This right guarantees to a criminal defendant the opportunity to cross-examine the witnesses against him concerning bias. State v. Gillian, 360 S.C. 433, 450, 602 S.E.2d 62, 71 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C.

601, 646 S.E.2d 872 (2007); see also Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

When cross-examining a witness in regards to the potential for bias, considerable latitude must be allowed. Gillian, 360 S.C. at 450, 602 S.E.2d at 71. Any fact may be elicited which tends to show interest, bias, or partiality of the witness. State v. Brewington, 297 S.C. 97, 101, 226 S.E.2d 249, 250 (1976). Limitations placed on a defendant's ability to cross-examine a witness constitute a Confrontation Clause violation when the defendant is prohibited from engaging in "**otherwise appropriate cross-examination**" designed to show a prototypical form of bias from which jurors could draw inferences relating to the reliability of the witness. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (emphasis added). "The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." Gillian, 360 S.C. at 450, 602 S.E.2d at 71.

However, although a defendant is entitled to an opportunity for meaningful cross-examination, the scope of that cross-examination still rests in the trial judge's sound discretion. State v. Whitner, 380 S.C. 513, 519, 670 S.E.2d 655, 659 (Ct. App. 2008). A defendant's right to confront the witnesses against him does not deprive the trial judge of his usual discretion in limiting the scope of cross-examination. State v. Turner, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007). Trial judges may impose reasonable limitations on cross-examination designed to show bias "based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness's safety, or interrogation that is repetitive or only marginally relevant." State v. Jenkins, 322 S.C. 360, 364, 474

S.E.2d 812, 814 (Ct. App. 1996). The limitation of cross-examination constitutes reversible error only if the defendant establishes unfair prejudice resulted from the limitation. State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

Appellant argues, based on State v. McFarlane, 279 S.C. 327, 331, 306 S.E.2d 611, 613 (1983), "Evidence of contemplated litigation is relevant and admissible to demonstrate bias." However, the Supreme Court found in McFarlane that "the record fail[ed] to reflect whether or not litigation was contemplated." Id. The Court determined "appellant should have asked the trial judge to excuse the jury so appellant could make an offer of proof." Id. Because of his failure to do so, combined with the overwhelming evidence of guilt, the Court found even if the trial court's ruling was error, it was harmless and not prejudicial. Id.

In the case sub judice, Appellant proffered Deputy Cain's testimony regarding whether he had used excessive force on Appellant and even questioned him regarding whether he could face civil liability, be reprimanded, or be criminally prosecuted if Appellant wanted to proceed with excessive force charges. However, defense counsel did not proffer any testimony from Appellant as to whether he was contemplating litigation. As the trial court correctly pointed out to defense counsel here, "You have to have a good faith basis in asking those questions and some underlying factors to support it and it simply is not apparent, nor has it been elicited in this case." (Tr. 115, lines 8-11.) Defense counsel could have, at that point, called Appellant to proffer whether he was contemplating a civil suit. However, he did not. Therefore, just as in McFarlane, the record here fails to demonstrate whether a lawsuit was contemplated. Additionally, the trial court told defense counsel he could have asked the deputy if he was aggravated or whether Appellant got on his nerves because he had to chase him down. (Tr. 116, lines

19-25; Tr. 117, lines 1-4.) The trial court told defense counsel he would have let him ask those types of questions to explore Deputy Cain's credibility. (Tr. 117, lines 7-10.) Accordingly, any error in the trial court's ruling is harmless and not prejudicial.

Furthermore, Appellant's cross-examination elicited similar evidence of bias when he questioned Deputy Cain regarding his chase and arrest of Appellant. (Tr. 94, lines 2-25; Tr. 95, lines 1-19.) Deputy Cain testified that he drew his service revolver and threatened to shoot Appellant, specifically stating, "I believe I told him I was going to cap him." (Tr. 94, lines 20-25; Tr. 95, lines 1-5.) He also confirmed that he told Appellant, "You are lucky I'm not giving you more." (Tr. 95, lines 14-19.) The jury also had the opportunity at trial to view the videotape of the chase, in which Deputy Cain can be heard cursing at Appellant, yelling at him to get on the ground, and threatening to "cap" him. (State's Exhibit 1 (DVD).)

Additionally, during the proffer, the trial court properly noted that because contemplation of a civil suit was merely speculative, it could be very misleading to the jury. Furthermore, the trial court also pointed out that the only crime for which Appellant was on trial was failure to stop for a blue light and that what Appellant elicited on the proffer was not relevant to that charge. The trial court commented on the fact that a connection might have been made between what was elicited and the issue of assaulting a police officer while resisting arrest but that charged had been disposed of by *nolle prosequi*.[3] See Jenkins, 322 S.C. at 364, 474 S.E.2d at 814 ("Trial judges may impose

[3] Appellant emphasizes the fact that the assault on a police officer while resisting arrest charge was not actually disposed of by *nolle prosequi* until four days after the trial for failure to stop for a blue light. (App. Br. 21.) However, the trial was only for failure to stop for a blue light and the record is clear it was the understanding of the trial judge and the attorneys that the other charge either had been or was going to be disposed of by *nolle prosequi*. (Tr. 6, lines 21-24; Tr. 114, lines 21-25.)

reasonable limitations on cross-examination designed to show bias "based on concerns about . . . confusion of the issues, . . . or interrogation that is . . . only marginally relevant."

Considering the opportunity for meaningful cross-examination when Appellant elicited testimony from Deputy Cain regarding his treatment of Appellant during the chase and arrest, combined with the fact that the record does not show evidence of appellant's contemplation of a civil suit against Deputy Cain, the trial court properly sustained the State's objection and, in any case, no unfair prejudice resulted from the ruling.

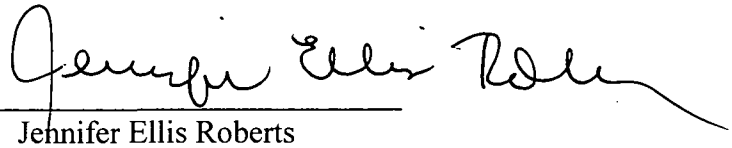
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

March 4, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

Respondent,

v.

COREY GETHERS,

Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

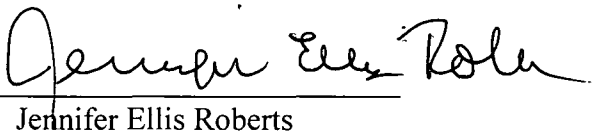
Respondent proposes the same Designation of Matter to be Included in Record on Appeal as Appellant.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

BY: 

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Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No: 2011-204886

THE STATE,

Respondent,

v.

COREY GETHERS,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Breen Richard Stevens, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 4th day of March, 2013.

Angela Bennett

ANGELA BENNETT
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