STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
The Honorable Frank R. Addy, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

vs.

DAZELLE SMITH,

Appellant.

Appellate Case No. 2018-000952

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The first jury trial was held on October 9-10, 2017, before the Honorable Donald B. Hocker and ended when Judge Hocker granted a mistrial after an officer inadvertently referred to one of the charges as Appellant's third offense. The second trial, in January 2018, proceeded with new counsel and a new judge, the Honorable Frank R. Addy, Jr., and it ended with a hung jury. At the third trial, on April 9-10, 2018, the jury found Appellant guilty as charged of trafficking cocaine, possession with intent to distribute crack cocaine, and possession with intent to distribute marijuana. Appellant was sentenced to twenty-five years' imprisonment for trafficking and concurrent sentences for the distribution level charges of twenty years' and ten years' imprisonment.

On May 11, 2018, Judge Addy heard a new trial motion where Appellant alleged a juror "concealed" that she knew Appellant and Appellant's Aunt, who testified for the State. Judge Addy ruled no intentional concealment occurred and found no juror misconduct. May 11, 2018 transcript (Mot. R.) pp. 281-83.

STATEMENT OF FACTS

Appellant was found in an illegally parked car in front of his Aunt's house with marijuana, cocaine, and crack cocaine.

Officer Jonathan Vaughn testified he was one of several officers patrolling the high crime/high drug neighborhood when he saw a vehicle illegally parked on the street. He and two other officers, Officer Harrrelson and Officer Boyter, decided to approach the vehicle to inform the man sitting in the car that it was illegally parked and to move the car. Within ten feet of the car, Officer Vaughn smelled marijuana, which became stronger as he came closer to the vehicle. Officers observed marijuana in the door panel of the car. The officers arrested Vaughn for possession of

marijuana. The officers then found two bags of marijuana, another freezer-sized bag of marijuana, two clear bags of white powder field-tested positive for cocaine, and a bag of off-white rock-like substance also testing positive for cocaine. In addition, the man, Appellant, had $232 of cash in his pockets. R. pp. 162-66.

Officer Martin Harrelson testified he approached the vehicle from the passenger side and shined the flashlight to see a clear bag that looked like it could have marijuana. R. pp. 200-01; p. 207. There were also baggies in the passenger side seat. R. p. 207.

Officer Cory Boyter testified similarly. He explained the car was illegally parked and they decided to approach. Officer Boyter detected the odor of unburnt marijuana as he approached the car. Appellant was alone in the car and the keys were in the ignition. Appellant was arrested after some resistance, and more drugs were found. R. pp. 211-24.

The SLED chemist tested the substances that amounted to over forty grams of cocaine, and 5.44 grams of cocaine base. R. pp. 189-192. Officer Griffin testified that 228 grams of marijuana were seized at the crime scene. R. pp. 180-82.

Arleen Smith, Appellant's aunt, also testified. She admitted the car was in her name and was parked in front of her house when Appellant was arrested. She explained Appellant drives and lives in the car. Smith has never been in the car. She testified she saw Appellant in the car in front of her house before she went to bed that night. She later testified Appellant asked her to say someone else used the car and someone else's drugs were in the car. R. pp. 130-33.

STANDARD OF REVIEW

The first issue concerns the denial of a mistrial motion: "A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). 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). Our courts favor 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).

The second issue is an evidentiary issue: Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." (emphasis added)).

The third issue is a claim the trial court erred by declining to suppress seized narcotics in violation of the Fourth Amendment: "South Carolina appellate courts review Fourth Amendment determinations under a clear error standard." State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "When reviewing a Fourth Amendment search and seizure case, an appellate court must

affirm if there is any evidence to support the ruling." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011).

The final issue is a claim the trial court erred in declining to order a new trial on the basis of juror misconduct: The denial of a new trial motion based on an allegation that a juror concealed information during voir dire will be affirmed absent a prejudicial abuse of discretion. State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004).

ARGUMENT

I.

The trial court did not err in denying Appellant's motion for mistrial and instead providing an extensive curative instruction for testimony elicited by Appellant's counsel.

Appellant complains the trial court should have granted a mistrial for testimony from Appellant's Aunt that Appellant's counsel elicited on cross-examination. However, as shown below, the trial court did not abuse its discretion and provided an extensive and stern curative instruction. During cross-examination, Appellant's counsel emphasized the car Appellant sat in was registered in Aunt's name and it was parked in front of her house. R. pp. 133-34. The following testimony elicited by counsel led to counsel's objection:

> Q: And you never have told anybody – anybody anything about any drugs in that car until the police came to you in . . . January of 2018; isn't that right?
>
> A: No, I didn't – I didn't say nothing about no drugs, because I didn't know what was in that car.
>
> **Q: But it was your car?**
>
> A: It was my car.
>
> **Q: It was your car –**
>
> A: It was in my name, but [Appellant] drove –
>
> Q: It was **your car** parked in front of **your house**?
>
> A: Huh-uh. [Appellant] in that car almost – he was living out of that car all the time. Long before they got him on Tanyard. He been arrested on Tanyard three times.

R. p. 134, line 20 – p. 135, line 7.

Counsel asked to approach the bench, the trial court sent the jury out, and counsel moved for a mistrial. The mistrial motion was denied and the trial court provided the following curative instruction:

> Additionally ladies and gentlemen, before we took a break the witness in this case testified about her supposed knowledge of the Defendant having been arrested previously. Understand, ladies and gentlemen, that, of course, an arrest is not a conviction in any sense of the word, and certainly that testimony cannot be considered by you as evidence of any kind in this particular case. I'm telling you that you are to excise that testimony from your mind, because it's not relevant to any issue involved in this case. As a practical matter, as you might very well be aware, many, many, many times, sometimes better than half the time, arrests end up in dismissal because there's simply no evidence to move forward, and that's why an arrest cannot be held against anyone, and you are specifically instructed that you cannot hold that testimony, you cannot consider that testimony in any way, shape or form as it relates to any issue involved in this particular case. Okay? So that is to be excised from your mind. You are to forget about it. You cannot discuss it or even think about it further. All right?

R. p. 158, lines 1-20.

In denying the motion for mistrial, the trial court observed:

> And again, the Court has to take into account the circumstances under which testimony is offered. I can see where her response is responsive to the implication that's being put out there by the question. It was your car parked in front of your house, ergo, it was your dope. That was clearly the implication of that line of questioning. As I said earlier, I saw her reaction. The stuttering manner in which she gives her answer indicated to me that she was quite defensive about the suggestion that she was the one in ownership of these drugs. Along those lines, it's to be expected that being defensive, assuming they're not her drugs, she is coming out swinging.

R. p. 143, lines 9-21.

"A mistrial should not be granted except in cases of manifest necessity and ought to be

granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). "The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way." State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000).

An appropriate curative instruction is generally considered to cure any error. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); see State v. Howard, 296 S.C. 481, 483-85, 374 S.E.2d 284, 285-86 (1988) (finding curative instruction admonishing the jury to disregard co-defendant's inadmissible testimony that murder defendant was involved in an earlier homicide was sufficient to cure error and mistrial was not warranted); State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior [crimes] 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.").

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). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. Howard, 296 S.C. at 483, 374 S.E.2d at 285 (1988).

In the instant case, Appellant's counsel was trying to insinuate with the questioning that the drugs could be Aunt's drugs, not Appellant's drugs, because it was Aunt's vehicle. Counsel was not dissuaded by her testimony that while the car title was in her name, she never stepped foot in the car.

Instead, Appellant's counsel endeavored to say it was her car parked in front of her house as many times as possible. Aunt naturally became defensive by the implication that she was responsible for the drugs. However, the trial court gave an extensive curative instruction. The actual testimony itself was a vague reference to prior incidents and the prosecution did not make any references to the supposed arrests. Therefore, the trial court did not abuse its discretion in denying the motion for mistrial.

II.

Because Appellant did not object to the officer testifying about the street value of narcotics, the issue of whether the officer needed to be qualified as an expert to testify about the value of narcotics is not preserved for review. The prosecution moved to qualify the officer as an expert in illicit narcotics, defense counsel objected without stating grounds, the trial court said the officer may provide the testimony without being qualified as an expert, and defense counsel thanked the trial court. Further, the officer had the requisite knowledge to provide the street value of the narcotics seized and Appellant was not prejudiced by the alleged error.

Appellant claims Officer Whitfield Brooks testified over Appellant's objection, but that is not accurate. Appellant objected to Officer Brooks being qualified as an expert witness and the trial court then told the prosecutor Officer Brooks did not need to be qualified as a witness. In response, Appellant's counsel thanked the trial court. R. p. 219, lines 6-21. Counsel never stated grounds for the objection, and counsel did not object to testimony about the value of the narcotics. So no issue is preserved for review.

Officer Brooks testified he has eleven years' experience as a law enforcement officer and he was in the narcotics division for three years. He was tasked with investigating drug distribution and drug trafficking cases. His training includes both basic and advanced narcotics investigation. He investigates drug distribution and trafficking cases targeting drug dealers. Part of his duties included his involvement in numerous controlled buys, which resulted in him being familiar with the going rate for illicit drugs. His work in the narcotics division made him familiar with the street value of cocaine, crack cocaine, and marijuana. Officer Brooks did not have any involvement in the investigation of the instant case. R. pp. 218-19.

When the prosecution moved to qualify Officer Brooks as an expert in illicit narcotic sales,

defense counsel objected without stating any grounds for the objection. The trial court responded:

> All right, I don't know that this is necessarily an area where one would need to testify as an expert. I think that he could probably testify based upon his own personal experience in his involvement with other cases what the value of the drugs are, if that's what you're getting at, Solicitor?

R. p. 219, lines 10-15. The prosecutor agreed he was intending to elicit testimony on the value of the seized drugs, and the trial court responded, "I think that's a matter of common experience based upon his background in this area. So I don't know that he needs to be qualified as an expert." R. p. 219, lines 17-19. The prosecutor accepted the trial court's ruling and defense counsel responded, "Thank you, Your Honor." R. p. 219, lines 17-21. Officer Brooks proceeded to testify as to the street value of the narcotics without any objection from counsel. R. pp. 219-20.

The argument is not preserved for review. The failure to object when evidence is offered constitutes a waiver of the right to raise the issue on appeal. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Counsel never objected to the officer's testimony and never complained he could not provide lay witness testimony about the value of the narcotics. Instead, counsel only objected to Officer Brooks being qualified as a witness, and the trial court, in effect, sustained his objection. State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (holding where one party obtains from the trial court the only relief sought, this Court has no issue to review on appeal).

Further, Officer Brooks was qualified to provide an opinion on the value of narcotics from experience. "A witness may be competent to testify as an expert although the witness acquired his

or her knowledge through practical experience **and not by scientific study, training, or research.**" Honea v. Prior, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988) (emphasis added). In the instant case, Officer Brooks was qualified to provide an opinion on the value of narcotics, but the trial court found it was unnecessary to qualify him as a witness. See State v. Williams, 321 S.C. 455, 464, 469 S.E.2d 49, 54 (1996) ("Some statements are not mere opinions, but are impressions drawn from collected, observed facts."). Ultimately, whether a lay witness or expert witness, Officer Brooks, based on his experience, possessed sufficient knowledge to provide the street value of narcotics.

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). The trial court did not abuse its discretion in finding that Officer Brooks possessed the requisite experience to provide a lay opinion on the street value of the seized narcotics.

Finally, the testimony was not unfairly prejudicial and any error was harmless. "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). 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). Because the street value of the seized narcotics was not an element of the offense or central to the State's case, and because of the overwhelming evidence of guilt, any conceivable error was harmless.

III.

The trial court did not err in denying the motion to suppress seized illegal drugs from Appellant's vehicle because when officers approached the vehicle to notify Appellant his vehicle was illegally parked, the officers smelled marijuana from ten feet away from the vehicle and subsequently saw marijuana in plain view inside Appellant's vehicle.

Appellant seeks for this Court to reverse the trial court's denial of Appellant's motion to suppress because of purported conflicting testimony from the officers. This ignores the proper standard of review. Because Appellant was illegally parked and law enforcement officers smelled, then saw, illegal narcotics when they approached Appellant's vehicle to request him to move it, the trial court did not err in denying the motion to suppress the seized narcotics.

As a preliminary matter, Appellant relies on the transcript of a suppression motion made during the first trial that ended in a mistrial before Judge Hocker. The record fails to indicate that a transcript of this proceeding was provided to Judge Addy.[1] Prior to trial on April 9, 2018, defense counsel moved to suppress the drugs seized, and told Judge Addy, "And I know this Court is familiar with the case, and I'd ask the Court to look at – at his Fourth and Sixth Amendment violations that might have taken place. And I understand the Court will look at that and rule accordingly as the trial goes on." R. p. 112, lines 7-13.

Judge Addy responded, "Just so that the record is clear, we did have a brief discussion and the intention is to handle it the same way that we did previously in January and a motion has been made at the close of the State's case if insufficient evidence or testimony exists as it relates to those

[1] At the suppression hearing before Judge Hocker, defense counsel claimed the testimony was inconsistent and Judge Hocker disagreed, finding, "I believe their testimony. All three officers, were pretty consistent." R. p. 77, lines 23-24.

two issues, then the Court will act appropriately and you'll be protected for the record, Mr. Yarborough." R. p.222, lines 14-22. Subsequently, defense counsel raised a motion to suppress the drugs at the close of the State's evidence and the trial court denied the motion. R. pp. 222-23. However, the record does not indicate that Judge Addy had the transcript of the mistrial before him when he ruled on the suppression motion. Rule 210(c) ("The Record shall not, however, include matter which was not presented to the lower court or tribunal"); "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373 628 S.E.2d 902, 919 (Ct. App. 2006); I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant **facts**, law, and arguments") (emphasis added); State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (excluding post-trial "Morris" letter not presented to the circuit court). Since the transcript of the pretrial hearing from Appellant's mistrial was not presented to Judge Addy, the transcript should not be considered in reviewing Judge Addy's ruling. State v. Morgan, 282 S.C. 409,412, 319 S.E.2d 335, 337 (1984) ("In as much as the trial judge had no opportunity to pass upon the issue, the question will not be considered on appeal."). Further, a mistrial is the equivalent of no trial, therefore evidentiary rulings do not carry forward to a future trial. State v. Smith, 336 S.C. 39, 43-44, 518 S.E.2d 294, 296 (Ct. App. 1999). "A mistrial is the equivalent of no trial and leaves the cause pending in the [trial] court." State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009).

Standard of review

"South Carolina appellate courts review Fourth Amendment determinations under a clear

error standard." State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011).

"A deferential standard of review applies in a Fourth Amendment challenge to a trial court's fact-driven affirmation of probable cause." State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005); see also Gavin v. State, 473 So.2d 952, 955 (Miss. 1985) ("even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire") (cited with approval, Clemmons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., dissenting)). The entirety of Appellant's argument is a challenge to the factual and credibility findings made by Judge Addy at the close of evidence and of Judge Hocker's during the mistrial. Therefore, the arguments fail under the standard of review.

Street encounter

The officers' decision to approach the vehicle and notify Appellant he needed to move because his car was illegally parked does not represent a Fourth Amendment event, but a mere street encounter. In Terry v. Ohio, the Court noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons." Terry v. Ohio, 392 U.S. 1, 19, n.16 (1968). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Id. However, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to

him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." Florida v. Royer, 460 U.S. 491, 497 (1983).

Law enforcement may approach an illegally parked vehicle

"In this case it is evident the officers were justified in approaching the car and making inquiries because it was illegally parked." United States v. Smith, 614 F.Supp. 25, 27 (D.D.C. 1984); see United States v. Thornton, 197 F.3d 241 (7th Cir. 1999) (finding, based on Royer and Whren v. United States, 517 U.S. 806 (1996), law enforcement may approach a vehicle rested in a spot violating a jurisdiction's parking regulation). The officers' original plan, to require Appellant to move his vehicle, is the opposite of a detention. However, the parking violation itself is probable cause sufficient to detain Appellant and his vehicle. State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (detaining a vehicle is reasonable if police have probable cause to believe a traffic violation has occurred). The circumstances occurring when the officers approached the vehicle and smelled, then saw, marijuana, warranted enlargement of any detention. State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999).

Plain odor, then plain view

Once the officers smelled, then saw, marijuana in Appellant's vehicle, the officers had probable cause to search the vehicle and arrest Appellant upon discovery of the contraband. Detecting the odor of marijuana alone may provide law enforcement with probable cause to conduct a search for illegal narcotics. United States v. Cephas, 254 F.3d 488, 495 (4th Cir. 2001); State v. Lane, 271 S.C. 68, 72, 245 S.E.2d 114, 116 (1978) (finding "it is evident that the odor [of marijuana] emanating from the packages alone was a sufficient basis to establish probable cause as to their contents when it is considered that an officer of the law, familiar with the odor of marijuana,

believed the odor being emitted was that of marijuana.") *cited by* State v. Dobbins, 420 S.C. 583, 803 S.E.2d 876 (Ct. App. 2017) ("The distinctive odor of a drug alone is sufficient basis to establish probable cause when a law enforcement official, familiar with the unique smell of that drug, recognizes its odor.").

Further, two officers saw marijuana through the car windows inside Appellant's vehicle in plain view. "[O]bjects falling within the plain view of a law enforcement officer who is rightfully in position to view these objects are subject to seizure and may be introduced in evidence." State v. Brown, 289 S.C. 581, 588, 347 S.E.2d 882, 886 (1986).

Automobile exception

Because the narcotics were in a motor vehicle, law enforcement was not required to seek a warrant. "Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007) (citing Maryland v. Dyson, 527 U.S. 465 (1999)). This exception to the warrant requirement is based on the ready mobility of vehicles and the potential for evidence to be lost or destroyed in conjunction with the lessened expectation of privacy in motor vehicles which are subject to government regulation. Weaver, at 320, 649 S.E.2d at 782. "The automobile exception does not contain a separate exigency requirement." Id. (citing Dyson).

Because law enforcement smelled, then saw, illegal contraband as they approached Appellant's illegally parked car, law enforcement had probable cause to seize the contraband and evidence supports the trial court's ruling. Therefore, the trial court did not err in denying Appellant's motion to suppress.

IV.

The trial court did not abuse its discretion in declining to grant a new trial on the basis of juror misconduct based on alleged concealment because the juror and the witness both acknowledged that they were not related nor did they have any close business or social relationships with each other as the jury panel was asked during voir dire.

Appellant argues Judge Addy erred in declining to grant a new trial because a juror knew Appellant and one of the State's witnesses. The juror and the witness agreed they were not related or have a close business or social relationship, which was Judge Addy's question on voir dire. Since the juror did not intentionally conceal any information from the court and the parties, the trial court did not err in declining to grant a new trial.

During voir dire, Judge Addy asked the jury panel the following: "[I]s there any member of the jury panel who is related by blood or marriage to, or has any close business or social relationships with the Defendant in this case, Dazzelle Demarcus Smith?" R. p. 96, lines 16-19. Judge Addy likewise asked if any member of the jury panel was "related by blood or marriage, or anyone who has any close business or social relationships with any of" the witnesses, which included witness Arleen Smith. R. p. 97, line 21- p. 98, line 10. Additionally, Judge Addy asked the jury panel if they knew of any reason they could not provide the State or Smith with a fair trial. R. p. 102, lines 1-6.

A hearing was held on May 11, 2018, before the trial court after it was discovered that one of the jurors knew one of the State's witnesses and Appellant. The juror testified that she knew one of the witnesses, because "we just grew up in the neighborhood." R. p. 271, lines 22-24. She explained, "We have no conversations. We don't deal with each other period. I moved out of the neighborhood." R. p. 271, line 24 – p. 272, line 2. The juror explained, "I knew her until I left off to

go to college." R. p. 272, lines 4-6. When asked if she knew Appellant, the juror responded, "I know his family. I know him and her, but we don't deal together. We don't go out and party and none of that stuff. I just know him. That's it." R. p. 272, lines 11-13. She did not know his reputation. R. p. 272, lines 14-19. The juror denied she knew that Appellant had been in some trouble. R. p. 272, lines 20-22. She admitted she knew he was born, "I knew his mom had him, so I know him like that." R. p. 272, line 25 – p. 273, line 1. She explained Appellant was a baby when she lived in the neighborhood and explained "I don't, you know, just go and talk to him or anything like that." R. p. 273, lines 2-6.

When Appellant's counsel asked why she did not tell the trial court she knew Appellant, the trial court intervened and asked her if she recalled that he asked if any juror had a close business or social or family relationship with any of the potential witnesses. The juror recalled the question but felt she did not have any close business, social, or family relationship with any of the witnesses. R. pp. 273-74. When asked if she knew Aunt, the juror replied, "From the neighborhood, that's it. **Me and her have no dealings with each other.** We don't even speak to each other. That's it." R. p. 274, line 25 – p. 275, line 2.

Appellant's counsel then called Aunt to the stand, who agreed the juror and her knew each other, but "I don't even—we grew up on the same street. We don't even speak. We're not friends." R. p. 276, lines 23-24. Aunt disagreed with counsel that Appellant grew up in the neighborhood: "His mama moved away. She moved away several times." R. p. 277, lines 13. So she explained that Appellant was not around the juror. R. p. 277, lines 14-25. She explained the juror knew of Appellant, but did not know him. R. p. 277, lines 22-25. She denied, as did the juror, that they were Facebook friends, "She's not my friend." R. p. 278, lines 11-12. Later on cross-examination she

admitted seeing the juror at Family Dollar, but "We never even speak." Mot. R. p. 102, lines 13-17. She never testified they "ran into each other" as Appellant claims in his brief. Br. of App. p. 38. Aunt explained the relationship with the juror as follows, "She don't like me and I don't like her." R. p. 279, lines 6-9.

Apparently, Appellant is the one who reported the supposed relationship with the juror and the trial court questioned why Appellant did not share the information sooner. R. p. 282. However, the trial court found no act of concealment occurred: "Their relationship was not close." R. p. 283, lines 7-9. The trial court found the juror's testimony "extremely credible" and also found Aunt's testimony credible. The trial court found no juror misconduct occurred. R. p. 283, lines 7-16.

If jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been struck through a preemptory challenge, challenged for cause, or excused by the court. State v. Gulledge, 277 S.C. 368, 371, 287 S.E.2d 488, 490 (1982). If the juror's concealment was intentional, the challenging party is not required to show prejudice, the prejudice is inferred. However, if the nondisclosure is unintentional, the trial court may exercise its discretion to determine whether to proceed with the trial with the juror in place, replace the juror with an alternate, or declare a mistrial. State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 245-46 (2014). The trial court "should not grant a mistrial based on a juror's concealment of information **unless absolutely necessary**." Id. (emphasis added).

The denial of a new trial motion based on an allegation that a juror concealed information during voir dire will be affirmed absent a prejudicial abuse of discretion. State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary

support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

The trial court did not err in finding juror misconduct did not occur because the testimony elicited at the hearing on the motion revealed the juror was not a close friend, business associate, or family member with Aunt or Appellant. Therefore, the juror did not conceal information from the trial court. Further, Appellant mistakenly claims the juror "hated" Aunt – the juror never testified or expressed any animosity towards Aunt, and Aunt was unable to state a basis for the belief the juror did not like Aunt.

In the instant case, the juror did not conceal any information because she did not have a close social, family, or business relationship with Appellant or his aunt. No juror misconduct occurs when the voir dire questions posed "do not clearly call for the juror to disclose [the purported relationship] and [the juror's] failure to respond [was] reasonable under the circumstances." Lynch v. Carolina Self Storage Centers, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014) (citations and internal quotation marks omitted).

In State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004), this Court found no juror misconduct when the juror did not respond to voir dire questions and the defendant alleged a connection between the juror and the victim's family. This Court found the trial judge only asked if any juror was a close personal friend or business associate of any of the potential witnesses, and none of the information provided in the affidavits in support of the motion indicated she had a close personal or business relationship with any of the witnesses. Id. at 404, 597 S.E.2d at 848.

Likewise, in State v. Guillebeaux, 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004), the trial judge asked if any juror had a close personal, business, or social relationship with the defendant. The juror in question admitted she knew defendant, but the relationship was limited to them saying "hi"

on the street to each other, and juror went to high school with the defendant's brother. She also knew what kind of car he drove. This Court found the trial court did not err in finding no intentional concealment, opining:

> Juror was not asked during voir dire if she knew any of the witnesses, she was asked if she had any type of social relationship with Smith. Juror's knowledge of who Smith was and the rare exchange of greetings with him in her community did not constitute a "social relationship." Juror answered the questions posed to her during voir dire honestly, her failure to reveal her knowledge of Smith was a reasonable response to the question posed, and her failure to respond did not amount to intentional concealment.

Id. at 275-76, 607 S.E.2d at 102.

In Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), it was only after trial that the PCR applicant realized that Juror Walling was someone he knew as "Rum Gully" when he was at a detention center. Walling recognized the applicant, but testified at the PCR hearing that he never spoke with the applicant. He denied having any bias or prejudice against the applicant when he was a juror. The applicant claimed Walling was biased against applicant because he threw urine on Walling and struck him with a mop while they were both incarcerated. Walling denied the mop incident and admitted someone threw urine on him at jail, but he did not know who it was and never suspected the applicant. The opinion noted that during voir dire, the trial judge had asked jurors if anyone was a "close personal friend" of the applicant. Id.

The Supreme Court determined:

> Here, it was reasonable for Juror Walling to remain silent when asked during voir dire whether any member of the jury pool was "related by blood or marriage or a close personal friend of [the applicant]." At the PCR hearing, Juror Walling testified that he and [the applicant] were not close friends. [The applicant] corroborated Walling's testimony when he acknowledged that he did not know Walling very

> well. Juror Walling also testified he did not have any bias or prejudice against Petitioner, and he and the other members of the jury held the State to its burden of proof before finding Petitioner guilty of the two murder charges.

Id. at 519, 654 S.E.2d 529-30.

In the instant case, the trial court did not abuse its discretion in finding no juror misconduct as the record demonstrates the lack of intentional concealment by the juror. The convictions and sentences should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
The Honorable Frank R. Addy Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

DAZELLE SMITH,

Appellant.

Appellate Case No. 2018-000952

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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