STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2011-195446

THE STATE,

Respondent,

v.

DERRINGER YOUNG,

Appellant.

INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER AUTHORITIES

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in refusing to sustain Appellant's objection to and declare a mistrial based upon the prosecutor's closing argument that Appellant threatened three witnesses when no evidence in the record supported the statements, which so infected the trial with unfairness as to make the resulting conviction a denial of Appellant's right to due process?

II. Did the trial court err in failing to exclude expert testimony regarding toolmark identification where the record revealed the identification was not based upon reliable science?

STATEMENT OF THE CASE

On November 22, 2007, appellant murdered Maurice Maxwell and shot and wounded Danny Agerson. (Tr. p. 527). Both crimes occurred at the same location in North Charleston. (Tr. pp. 79-137, 141-164, 180-226). Appellant was arrested just a few minutes after the crimes. (Tr. pp. 79-137, 141-164, 180-220, 222-42). The Charleston County grand jury subsequently indicted appellant for murder and ABWIK. (Ind. Nos. 2008-GS-10-1082, 3646). (Tr. p. 1). Appellant was represented on the charges by Lorelle Proctor and Jessica Mullaney, Esquires. Assistant Solicitors Burns Wetmore and Peter McCoy prosecuted the case for the State. Appellant proceeded to trial from July 19-21, 2011 before the Honorable Kristi L. Harrington and a jury. At the conclusion of the trial, appellant was found guilty of Maxwell's murder and ABWIK for the shooting of Agerson. (Tr. pp. 527-28). Judge Harrington sentenced appellant to life imprisonment for murder and twenty (20) years concurrent for ABWIK. (Tr. pp. 540-41).[1] This appeal follows.

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[1]Prior to sentencing, Judge Harrington was provided with appellant's criminal record. Appellant was convicted in 2004 of reckless trespass, no driver's license, and failure to stop for a blue light. Appellant was convicted in 2005 of strong armed robbery. Appellant was also convicted in 2005 of possession with intent to distribute (PWID) cocaine. Appellant's parole was also revoked in 2006, and he was released from prison shortly before this current incident occurred. (Tr. p. 531).

RESPONDENT'S STATEMENT OF FACTS

On November 22, 2007, appellant Derringer Young ("appellant" or "Young") shot and wounded Danny Agerson immediately outside the front door of a nightclub (Club 843) in North Charleston. Young then walked across the club parking lot to a waiting automobile driven by his cousin, Renaldo Smalls ("Smalls" or "cousin"), where Young, his girlfriend (Shamera Brown), and Smalls got into the car. The murder victim, Maurice Maxwell, approached this vehicle on foot, and stood in front of the vehicle as if he were trying to block its path. Young got out of the car and approached Maxwell and pointed the same pistol he had shot Agerson with in Maxwell's face. Maxwell put his hands up and started backing away from Young. Young then shot Maxwell in the face killing him.[2] Young then got back into the car driven by his cousin, and he along with his cousin and girlfriend fled the scene. (Tr. pp. 79-137, 141-164, 180-220, 222-42, 262-78, 323-33, 337-51, 397-424, 426-38).

All of these events were witnessed by the acting manager/head bouncer of the nightclub, Joshua Crider. Mr. Crider testified that on the night of November 22, 2007, before the shootings, there was an altercation inside the nightclub in which a woman was slapped by the first (1st) shooting victim, Danny Agerson. This resulted in a brawl or melee inside the club that required Mr. Crider to turn on the lights inside the club and order everyone outside. As soon as he turned the lights on, Crider contacted 911 and was on the phone with authorities as these events unfolded. (State's Ex. 7 - 911 call). Eventually, Crider was standing outside the club in the parking lot and witnessed

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[2]The murder victim, Maurice Maxwell, died from a gunshot wound to the face that entered just below his eye, traveled through his brain, and struck his brain stem. The victim also had a grazing gunshot wound to the back. Three (3) fired 9mm shell casings were found immediately adjacent to the murder victim's body. (Tr. pp. 337-351, 229-32, 398-424).

appellant Young walk up to Agerson, point the pistol at Agerson, and shoot Agerson in the abdomen.[3] Crider then saw Young put the gun back in a clothes pocket and walk across the parking lot to the cousin's (Smalls') waiting vehicle, and Crider witnessed Young get in the car with his cousin and his girlfriend. Crider then saw the murder victim Maurice Maxwell walk toward the vehicle in which Young was sitting. Young got out of the car and approached Maxwell. Crider saw Young exchange words with the 2nd victim Maurice Maxwell. Crider then saw appellant Young pull out the same pistol and Maxwell raise his hands and back away from Young. Crider then saw Young point the pistol and shoot Maxwell in the face killing him. Crider was also able to describe the clothing Young had on and a distinctive hat which had the letter "A" embroidered on the front of it. (Tr. pp. 79-137).

Crider then witnessed Young re-enter the cousin's vehicle, and Young, his cousin and Young's girlfriend drove away in the cousin's car. Appellant's cousin was driving the car. Young was in the passenger seat, and appellant's girlfriend was in the back passenger area. (Tr. pp. 79-137).

Still on the phone with 911, Crider immediately gave out a description of the vehicle to law enforcement. Crider also watched the vehicle leave the parking lot of the club and drive away. Crider relayed to law enforcement the direction of travel of the vehicle and the street it was traveling on. Crider also informed law enforcement that the vehicle had a distinctive dent on the passenger door of the vehicle. (Tr. pp. 79-137, State's Ex. 7).

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[3]While the crimes occurred at night, the nightclub is located in the same parking lot as the Food Lion grocery store in North Charleston. Crider testified the shooting of Agerson occurred in the fire lane immediately in front of the club in an extremely well lit area. Crider also testified that the entire parking lot is well lit, and the murder that followed Agerson's shooting occurred directly under several bright street lights placed in the parking lot. (Tr. pp. 91-99).

As Young was fleeing the scene of the murder in his cousin's car, Young threw the murder weapon out the passenger window of the vehicle. Almost immediately, based on Crider's description of the vehicle, its direction of travel, and the road upon which it was traveling, police activated their blue lights and stopped appellant's cousin's car approximately one (1) mile from the night club and apprehended Young, his cousin, and his girlfriend. Young's cousin was still driving the vehicle, Young was still in the passenger seat, and the girlfriend was in the back seat. Both Young's cousin and his girlfriend immediately implicated Young as the shooter. Young was wearing clothing similar to that described by Crider, and police recovered the distinctive hat inside the vehicle. Police were unable to locate the murder weapon inside the vehicle since Young had already thrown it from the fleeing car. The vehicle also had the distinctive dent on the passenger's side door as described by Crider over the phone to police. (Tr. pp. 79-137, 141-167, 195-210, 211-20, 222-42, State's Ex. 7, State's Ex. 8).

Police brought the manager of the club, Crider, to the scene of the car stop. Crider immediately identified the vehicle as the one he had seen the shooter get into. While remaining in a police car, Crider also separately identified Young as the shooter, appellant's cousin as the driver of the car that fled the club parking lot, and Young's girlfriend as the passenger who was sitting in the vehicle when it left the club parking lot.[4] (Tr. pp. 79-137, 195-210, 211-20).

The three (3) persons found in appellant's cousin's car were taken into custody. Appellant's cousin, Smalls, was questioned at the North Charleston Police Department, where he admitted

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[4]Each occupant of appellant's cousin's vehicle was brought separately to the police car in which Crider was sitting. Without any prompting from police, Crider identified appellant as the shooter, the cousin as the driver, and the girlfriend as only a passenger. (Tr. pp. 79-137, 206-09, 214-20).

Young was the shooter of Maurice Maxwell, and that Young had thrown the gun out the window of his car as they were fleeing the scene. Appellant's cousin gave a written statement to police, which he signed, detailing Young's actions at the nightclub including the murder of Maurice Maxwell.[5] His statement was as follows:

> Detective James Hill is typing this statement for me at my request, in my own words, as I tell it to him. Me and my cousin, Derringer Young, are hanging out downtown with some friends. Everybody's talking about going to the party at Club 843 so we decided to go. We got to Club 843 almost at midnight. I was hanging out in the club chilling and talking to a girl. Had been there for a while and a fight started in the club. The people fighting the bouncers in the club. Chairs was getting thrown. It was bad. That's when the bouncers started telling everyone to get out of the club. I started looking for Derringer but I couldn't find him in the club. I got to the door of the club and started walking towards my car and made it to the first set of cars and I heard one gunshot. I looked over my shoulder towards the club and saw Derringer and the girl walking towards my car. Derringer and the girl was behind me when I got almost to the front of my car. I saw a another guy, I don't know his name, the guy Derringer shot, walking towards us. When he got to Derringer, they started having words. That is when Derringer shot the guy. I don't remember how many shots he fired because I was scared. I had never seen anybody be shot before. I jumped in the car and then Derringer and the girl got in the car and we left. When we was driving off, I was asking Derringer what was going on. He wasn't saying anything. We started going down the Dorchester Road when the girl in the back seat saw the police and said, they turning around. And she sounded like she was getting ready to cry. That's when Derringer rolled down the window and threw the gun out the window. And when he threw the gun out the window, he almost broke my window trying to get the gun out. The police turned on their blue lights, so I stopped. I can't remember exactly where we were at on Dorchester Road but I know we got stopped in front of the shopping center next to Bergman [phonetic]. What was Derringer wearing the detective asked. Black shirt, gray, blue pants. What did the gun look like. Black. Have you seen Derringer with a gun before. No. Did you handle the gun he had tonight at any time. No. Did you see the first guy get shot. No. The guy you saw Derringer shoot, what was he wearing. I don't remember. Do you know the guy that Derringer shot. No.

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[5]Appellant's cousin, Smalls, was called as a witness at trial. He admitted he drove appellant to the nightclub but claimed he could not remember anything after the altercation started inside the club. His written signed statement given to police the morning after the murder was admitted before the jury. (Tr. pp. 141-167, State's Ex. 8, 180-94).

(Tr. pp. 161-62, State's Ex. 8).

Appellant's girlfriend also gave police a written statement and took officers back to the area of the car's flight from the scene and showed police where the murder weapon was discarded. As a result of her assistance, police were able to recover the murder weapon one-half (½) mile from the crime scene in a used car dealership parking lot adjacent to the road appellant's cousin's vehicle was driving on. (Tr. pp. 141-67, State's Ex. 8, 180-194, 222-42, 273-79, 323-33).

Three (3) fired 9mm shell casings were found at the crime scene immediately adjacent to the murder victim's body. Forensic firearms and tool mark testing and examination determined the recovered weapon fired all three (3) casings found next to the victim's body. The recovered murder weapon was a Smith and Wesson semi-automatic 9mm pistol. The firearms examiner also testified the outside of the murder weapon contained scratches and scuffs typically seen when a weapon strikes pavement or concrete. (Tr. pp. 222-42, 398-424).

While being detained pre-trial, appellant Young was housed with inmate Larry Clayton. Young and Clayton were involved in several altercations. On two (2) separate occasions, Young threatened Clayton and made reference to the murder of Maurice Maxwell. Young told Clayton he would kill him just like he killed the man at the nightclub. (Tr. pp. 426-37).

ARGUMENT I.

The trial court did not err in overruling Young's initial objection to this portion of the Solicitor's closing argument because of the basis of the objection and the argument was based on reasonable inferences from the record. Young's argument that the trial court erred in failing to grant a mistrial is not preserved for appellate review because his motion for a mistrial was not timely. Further, any error in this portion of the Solicitor's closing argument did not deprive Young of a fair trial given the entire record including the overwhelming evidence of Young's guilt and the trial court's curative instructions to the jury.

What Occurred Below

At Young's trial, as previously stated, appellant's cousin (Smalls) testified he could not remember any of the events of the night of the shooting even though he gave a written statement just hours after the shooting implicating Petitioner as the murderer of Maurice Maxwell and stating he was an eyewitness to the murder. Petitioner's girlfriend (Shameka Brown), who showed police where Young threw the murder weapon out of the fleeing vehicle, cooperated with police up until the week before trial, but did not appear for trial even though she was under subpoena. (Tr. pp. 328-30). The surviving victim, Danny Agerson, did not appear or testify at trial either. (Tr. pp. 325-27).

During his closing argument, the Solicitor made reference to the fact that appellant's cousin was uncooperative, appellant's girlfriend did not appear, and Agerson was no where to be found. Both appellant's cousin and his girlfriend witnessed appellant murder Maurice Maxwell. Agerson also witnessed appellant's violence. Appellant shot Agerson. The Solicitor argued as follows:

> And let me talk about the three people who saw this happen: Joshua Crider, Shamera Brown, and Renardo Smalls. Is there a reason - - why Renardo Smalls got up on that stand and told you he didn't remember what happened that night? Is there a reason for that? There is a reason for that, and the reason is right here [indicates].[6] Is there a reason

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[6]The record *of the argument* does not reveal what the Solicitor was indicating at when arguing to the jury; however, defense counsel's closing argument and his later motion for a mistrial show the Solicitor was referring to bullets or shell casings in evidence, arranged on the

why Shemera Brown has cooperated with police from day one and has not shown up for this trial this week? Is there a reason for that? That reason is right here [indicates]. Is there a reason why Danny Agerson cooperated with the police from the very beginning - -

MS. PROCTOR: Your Honor, I object. This calls for speculation.

THE COURT: I'm going to allow it.

Ladies and gentlemen, I do remind you that everything in closing is not evidence. You may continue, Mr. McCoy.

MR MCOY; Is there a reason why Danny Agerson is not here this week and he's cooperated with the police? That reason is right here [indicates].

Joshua Crider, Danny Agerson, Shamera Brown, and Renardo Smalls have all seen firsthand with their eyes what this man is capable of. Joshua Crider came in here. He's locked up. Derringer Young can't get to him. He's locked up. He's in jail.

Lets talk about the other evidence you've heard from the police officers and the experts that came here to testify. (The closing argument continues).

(Tr. pp. 477-78). Appellant did not contemporaneously move for a mistrial. The motion for a mistrial came much later. The motion for a mistrial was not raised until after appellant's closing argument and after argument before the Court on the law to be charged to the jury.

The Lack of Merit of Appellant's Objection

The sole ground appellant asserted upon making this objection to the closing argument was that it called for speculation. (Tr. pp. 477-78). Based on the evidence presented at trial, the objection was properly overruled. The Solicitor argued a reasonable inference from the record, that the witnesses saw what Young had done with their own eyes and knew what he was capable of doing, and were afraid to testify in court against appellant because of their natural and reasonable fear of him given what they had witnessed him do. (Tr. pp. 477-78).

The record shows appellant's cousin (Smalls), his girlfriend (Brown), and Agerson (1st victim) had all seen what appellant was capable of doing. (Tr. pp. 90-99, 104-05, 213, 241, State's 8). Appellant Young's girlfriend and his cousin witnessed him kill Maurice Maxwell. (Tr. pp. 90-

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jury bar or a table before the jury. (Tr. pp. 495-96, 502-03).

99, State's Ex. 8, 104-05, 161-63, 180-94, 199, 201-03, 207-09, 216-18, 230-32, 234-35, 239, 242, 275-76, 328-32, 348-49). Agerson also witnessed first hand what appellant Young was capable of doing; he was shot by Young. (Tr. pp. 90-95, 104, 226-29, 241, 273-74, 324-25, 332). As the Solicitor stated in his argument, Crider was in fact in federal custody serving a federal sentence on charges unrelated to this case, and therefore even though he witnessed appellant's violent acts, he had no reasonable fear appellant would do to him what he did to Agerson and Maxwell. (Tr. pp. 130, 134-37).[7] The jury knew appellant Young's girlfriend cooperated with police from the time of the shooting until the week before trial and was even subpoenaed to testify in the trial, but she did not appear. (Tr. pp. 328-30). And, Agerson had also cooperated with police initially but could not be located before trial. (Tr. pp. 325-27). The jury also saw and heard appellant's cousin (Smalls) testify on the witness stand and how he attempted to deny recalling anything regarding the shootings even though he had given police a detailed statement that he witnessed Young shoot the murder victim and witnessed Young discard the murder weapon from his own vehicle. (Tr. pp. 141-67, State's Ex. 8, 180-94). The jury also had Smalls written statement before them in evidence detailing the acts of Young he witnessed, which were consistent with the eyewitness Crider's testimony and the testimony of the firearms and toolmark expert. (State's Ex. 8). Further, appellant's cousin's statement to police admits that he was afraid after appellant Young murdered Maurice Wallace. (State's Ex. 8). As a result, the Solicitor argued a reasonable inference from the record. The witnesses were afraid to testify against appellant because of what they had witnessed him do.

Wide latitude and freedom of counsel in arguments to the jury are allowed so long as the

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[7]Crider was arrested several months after this incident for conspiracy to distribute cocaine and pled guilty to that charge in U.S. District Court and was serving a federal prison sentence at the time he testified. (Tr. pp. 130, 134-37).

arguments are based on facts in the record or inferences from those facts. Edwards v. Lawton, 244 S.C. 276, 136 S.E.2d 708 (1964)(Solicitor may argue the evidence and reasonable inferences therefrom). The argument was not calculated to arouse the juror's passions or prejudices, and its content stayed within the record and the reasonable inferences therefrom. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). It was made to explain to jurors why certain witnesses did not appear or did not testify truthfully on the stand, based on the record.

Failure to Preserve the Mistrial Issue

Appellant argues Judge Harrington erred in failing to grant his motion for a mistrial. This issue is not preserved for appellate review. During the argument, appellant objected to the argument on the ground that it called for speculation. The objection was overruled; however, the Court gave the jury a curative instruction that the argument was not evidence in the case. Appellant did not object to the curative instruction. Appellant did not contemporaneously move for a mistrial. (Tr. pp. 477-83). The Solicitor finished his entire closing argument. In fact, after the Solicitor finished his closing argument, counsel for Young made her complete closing argument. (Tr. pp. 483-97).

Before the court instructed the jury on the law, counsel asked to take up a matter of law with the court. The jury was sent out. Then a discussion of several pages in length took place in which counsel objected to any jury charge on the permissive inference of malice from a deadly weapon based on the recent decision of the S.C. Supreme Court in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). (Tr. pp. 497-501). The record shows there was a sidebar conference with the court before the jury was sent out. (Tr. pp. 497-501). It is clear from the record that the purpose of excusing the jury before the court instructed the jury on the law, was so that counsel could object to to any charge on the permissive inference of malice from a deadly weapon under Belcher. (Tr. pp.

497-501).

It was only after the conclusion of this lengthy discussion of Belcher that counsel made the following statement:

> MS PROCTOR: And Your Honor, one thing.
>
> I objected to Mr. McCoy's closing argument when he was telling the jury that - - inferring that witnesses were not here because he had threatened them. And at this time, Your Honor, I think I'm going to ask for a mistrial. I think those were improper comments. I think what happened then is he shifted the burden and I had to get up there then and say that they were not threatened. And I think that they reflected [sic] the trial with unfairness and it violated his due process right. And I think there's case law on this. And he put in evidence of threats. There was no evidence at all in this trial that he's had any contact with any of the witnesses. And when he put bullets out there to show that he – they didn't come in because he was going to kill them, I think is highly prejudicial and denied Mr. Brown - - Mr. Young a fair trial.
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> THE COURT: At this time, I'm denying your motion for a mistrial.
>
> The Court instructed, prior to closing arguments, that the information contained and the arguments contained were not to be considered evidence in any way. At your objection to the State's closing, the Court the reminded the jury that - - of that instruction. I do not believe that the closing argument by the State rose to the level to require a mistrial. Note your exception to the record. Anything further?
>
> MS. PROCTOR: No, Your Honor.

(Tr. pp. 502-03). As a result, the motion for a mistrial is not preserved because it was not timely made. State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012); State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981); State v. Nathari, 303 S.C. 188, 399 S.E.2d 597 (Ct. App. 1990). Young did not contemporaneously move for a mistrial in response to the challenged argument or contemporaneously object to the sufficiency of the curative instruction, but instead accepted the court's ruling and allowed the closing argument to continue, and then made his closing argument. Counsel then made a separate argument on a jury charge issue, i.e. Belcher. It was only after this argument on whether the Court was going the charge the permissive inference of malice from the

use of a deadly weapon, that Young decided to raise any mistrial motion.[8] In fact, Young admitted the mistrial motion was not contemporaneous by stating below: "And at this time, Your Honor, I think I going to ask for a mistrial." (Tr. pp. 502-503). Counsel then argued a different basis for the mistrial than was argued as the basis for the objection, which was contemporaneous. (Tr. pp. 502-503). This issue is not preserved for appeal. State v. Simmons, 384 S.C. 145, n. 8, 682 S.E.2d 19, n. 8 (Ct. App. 2009)(*referencing* State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996)(finding issue is not preserved for appellate review if the objecting party accepts the court's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial).[9] The argument that the trial court erred in not granting a mistrial was not preserved for appellate review.

The Lack of Merit of this Ground

(Standard of Review)

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State

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[8]Young fails to mention in his brief that his motion for a mistrial was not made until almost twenty-five (25) pages later in the trial transcript. (See BOA).

[9]*See* State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)(issue relating to admission of improper testimony was preserved where defendant *renewed* his *request for a mistrial following curative* instructions); State v. Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996)(if objecting party accepts the ruling of the court and does not contemporaneously object to the sufficiency of the curative instruction or move for a mistrial, error deemed cured and not preserved for appellate review); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991)(no issue preserved for appeal if objecting party accepts judge's ruling on evidence and does not make an additional objection to the sufficiency of the curative charge or move for a mistrial); McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct. Ap. 1996)(if an appellant objects and the objection is sustained, but the appellant does not move for a curative instruction or request a mistrial, he has received what he asked for and cannot be heard to complain on appeal).

v. Culbreath, 377 S.C. 326, 659 S.E.2d 268(Ct. App. 2008); State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005); State v. Rowlands, 343 S.C. 454,458, 539 S.E.2d 717 (Ct. App. 2000). Granting a mistrial is a serious and extreme measure which should be taken only where an incident is so grievous that the prejudice can be removed no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); State v. Moore, 377 S.C. 299, 659 S.E2d 256 (Ct. App. 2008); Stanley, 365 S.C. at 34, 615 S.E.2d at 460. A mistrial should not be granted except in cases of manifest necessity and ought not to be granted lightly and only with great caution for very plain and obvious reasons. State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983). A mistrial should be declared only when absolutely necessary. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). "This Court favors the exercise of wide discretion of the trial court in determining the merits of [a mistrial] motion in each individual case." State v. Ferguson, 376 S.C. 615, 618, 658 S.E.2d 101, 103 (Ct. App. 2008), *citing* State v. Patterson, 337 S.C. 217, 226, 522 S.E.2d 845, 851 (Ct. App. 1999). The burden is upon the movant to demonstrate not only error, but resulting prejudice in order to justify a mistrial. State v.Wilson, 389 S.C. 519, 698 S.E.2d 862 (Ct. App. 2010); State v. Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012); State v. Tuckness, 257 S.C. 295, 185 S.E.2d 607 (1971). The "[g]ranting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. Generally, a curative instruction to disregard the evidence is deemed to have cured any alleged error." Edwards, 373 S.C. at 236, 644 S.E.2d at 69.

The Lack of Merit of the Mistrial Motion

There is no merit to this issue on appeal if it had been preserved. Contrary to Young's argument in his brief, the Solicitor did not argue the witnesses were threatened by appellant in order for them not to appear or cooperate. The Solicitor did not argue appellant had personally threatened the witnesses or had someone else communicate threats to the witnesses as Young alleges. The Solicitor argued a reasonable inference from the record, that the witnesses saw what Young had done with their own eyes and knew what he was capable of doing, and were afraid to testify in court against him because of their natural and reasonable fear of him given what they had witnessed him do. (Tr. pp. 477-78). And, the Solicitor was pointing at evidence introduced in the case in making the argument and in support of the reasonable inference. (Tr. pp. 495-96, 502-03).

The record shows appellant's cousin (Smalls), his girlfriend (Brown), and Agerson (1st victim) had all seen what appellant was capable of doing. **(Tr. pp. 90-99, 104-05, 213, 241, State's 8).** Appellant girlfriend and his cousin witnessed him kill Maurice Maxwell. **(Tr. pp. 90-99, State's Ex. 8, 104-05, 161-63, 180-94, 199, 201-03, 207-09, 216-18, 230-32, 234-35, 239, 242, 275-76, 328-32, 348-49).** Agerson witnessed first hand what appellant Young was capable of doing; he was shot by Young. **(Tr. pp. 90-95, 104, 226-29, 241, 273-74, 324-25, 332).** Crider was in fact in federal custody serving a federal sentence on charges unrelated to this case, and therefore even though he witnessed appellant's violent acts, he had no reasonable fear appellant would do to him what he had witnessed done to Agerson and Maxwell. **(Tr. pp. 130, 134-37).**[10] The jury knew appellant's girlfriend cooperated with police from the time of the shooting (including helping police locate the

[10]Crider was arrested several months after this incident for conspiracy to distribute cocaine and pled guilty to that charge in U.S. District Court and was in fact serving a federal prison sentence at the time he testified. **(Tr. pp. 130, 14-37).**

discarded murder weapon) until the week before trial and was even subpoenaed to testify in the trial, but she did not appear. **(Tr. pp. 328-30).** And the jury knew, Agerson had also cooperated with police initially but could not be located before trial. **(Tr. pp. 325-27).** The jury also saw and heard appellant's cousin's testimony on the witness stand and how he attempted to deny recalling anything regarding the shootings even though he had given police a detailed statement that he witnessed appellant shoot the murder victim and witnessed appellant throw the murder weapon from his own vehicle. **(Tr. pp. 141-67, State's Ex. 8, 180-94).** The jury also had appellant's cousin's written statement before them in evidence detailing the acts of appellant he witnessed, which were consistent with the eyewitness Crider's testimony and the testimony of the firearms and toolmark expert. **(State's Ex. 8).** Further, appellant's cousin's statement to police admits that he was afraid after appellant murdered Maurice Wallace. **(State's Ex. 8).** All of these facts were in evidence and before the jury. As a result, the Solicitor argued a reasonable inference from the record. The witnesses were afraid to testify against appellant because of what they had witnessed him do.

The content and the manner of arguments by attorneys to the jury are left to the broad discretion of the trial judge, and ordinarily her rulings on such matters will not be disturbed. State v. Bell, 302 S.C. 18, 393, S.E.2d 364 (1990); State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 91986); State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974); State v. McDonald, 184 S.C. 290, 192 S.E.365 (1937). As has been repeatedly noted by the appellate courts of this state, it is often difficult to draw the line between legitimate argument and an unauthorized statement, between what is and what is not allowable; and, as this pertains to the conduct of the case, it must, to a large extent, be left to the wise discretion of the trial court. State v. Green, 48, S.C. 36, 26 S.E. 234 (1897); State v. Turner, 36 S.C. 534, 15 S.E. 602 (1892); State

v. Robertson, 26 S.C. 117, 1 S.E. 443 (1887). Lastly, when speaking to the jury, attorneys should always use appropriate language, and stay within the record, however, allowances should be made by the trial judge to the presentation of arguments, because attorneys are expected to think and speak in strong terms, in the heat of the fight. State v. Jernigan, 156 S.C. 509, 153 S.E. 480 (1930).

An attorney has a right to give his version of the testimony and to comment on the weight to be given to the testimony of the witnesses. State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995); State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976); State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971). So long as an attorney stays within the record and draws reasonable inferences from the record, any argument is appropriate. State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999) In arguing to the jury, an attorney may argue reasonable inferences from the evidence, especially where the case is circumstantial in nature. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981).

As a practical matter, in the absence of an egregious misstatement of fact, objections to misstatements of facts seldom draw sustainable objections. This is due in part to the license granted to an attorney to give his version of the testimony, and because a jury is presumed to remember and know what testimony was given. State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971); State v. Jernigan, 156 S.C. 509, 153 S.E. 480 (1930). Typically, an objection to a misstatement of fact will result in the trial judge reminding the jury that an attorney is not presenting evidence or testimony and that the jury should rely upon their memory of the testimony and evidence presented during the trial.

The alleged impropriety of the solicitor's argument is reviewed in the context of the entire

record. Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010) *quoting* Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); State v. Finklea, 388 S.C. 379, 697 S.E.2d 543 (2010)(Court must review the argument in the context of the entire record): State v. Patterson, 324 S.C. 5, 482 S.E.2d (1997). Considerable latitude is generally allowed in matters of drawing and arguing inferences and deductions from evidence. Johnson v. Life Ins. Co. of Ga., 227 S.C. 351, 88 S.E.2d 260 (1955). Wide latitude and freedom of counsel in arguments to the jury are allowed so long as the arguments are based on facts in the record or inferences from those facts. Edwards v. Lawton, 244 S.C. 276, 136 S.E.2d 708 (1964)(Solicitor may argue the evidence and reasonable inferences therefrom). The argument stayed within the record and the reasonable inferences therefrom. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). It was made to show jurors why certain witnesses did not appear (Brown and Agerson) or did not testify truthfully on the stand (Smalls).

Lack of Prejudice

Even assuming *arguendo* error in the argument, Young cannot show prejudice on this record. This Court "..will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of defendant's guilt." Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010) *quoting* Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); State v. Finklea, 388 S.C. 379, 697 S.E.2d 543 (2010)(Court must review the argument in the context of the entire record): State v. Patterson, 324 S.C. 5, 482 S.E.2d (1997). Considerable latitude is generally allowed in matters of drawing and arguing inferences and deductions from evidence. Johnson v. Life Ins. Co. of Ga., 227 S.C. 351, 88 S.E.2d 260 (1955). A lapse of good taste will

rarely constitute prejudicial error nor will robust language introduce an arbitrary factor. State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984). Arguments must be confined to the evidence in the record and reasonable inferences therefrom, although failure to do so will not automatically result in reversal. State v. Huggins, 325 S.C. 103, 481 S.E2d 114 (1997). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). A new trial will not be granted unless the comments so infected the trial with unfairness so as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Bennett; Patterson. "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.; Finklea,; *see* State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997)("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."). "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." Bennett, *quoting* South Carolina State Highway Dep't v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971). Young has the burden of showing any alleged error in argument deprived him of a fair trial. State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). He has not met that burden.

The comments did not so infect the proceeding with unfairness as to make the resulting convictions a denial of due process. State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000); State v. Davis, 309 S.C. 326, 422 S.E.2d 133, 146 (1992); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). The argument was based on a reasonable inference from the record. Appellant's girlfriend

fully cooperated with police until the week before the trial, and then failed to appear even after being subpoenaed to be at trial. The information she had previously provided police incriminated appellant, including showing police where appellant had discarded the murder weapon. Appellant's cousin had given a written statement to police implicating appellant, and then at trial he claimed he could not remember the events of that night even though he had no problem remembering the events of that night shortly after the murder when he gave his signed statement. Finally, Agerson, had initially cooperated with police, and then disappeared before he could be subpoenaed. Agerson was wounded by appellant with a firearm. Given each of these witnesses witnessed what appellant did on the night in question, it was certainly a reasonable inference from the record that their lack of cooperation was based at least in part on their fear of appellant based on what they had seen him do the night of the incident.[11]

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[11]Appellant has cited several cases for the proposition that the Solicitor's argument deprived him of due process; however those cases are not apposite here. In Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994), a drug case, the Solicitor argued the defendant intimidated two witnesses and an informant was afraid of the defendant because she lived in the same neighborhood. There was no evidence of any threats *or* danger to the witnesses from the defendant. In State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985), the prosecutor elicited testimony from a state's witness that he was in protective custody at the time of trial. That did not occur in this case. Further, the Court found the trial court's curative instruction cured any prejudice. Id. In Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004), the Solicitor told the jury what witnesses would have testified to had they been there. The State did not do that in this case. The evidence of what the witnesses saw or experienced was introduced in evidence, not testified to by the Solicitor. In State v. Rogers, 96 S.C. 350, 80 S.E. 620 (1914) the Court held that introduction of evidence that someone attempted to influence a witness by fear or fright without any evidence that connected the defendant to the tampering would be a "prostitution of justice." That did not occur in this case. The State did not argue the defendant threatened or communicated any threat to any witness. The Solicitor argued the witnesses were afraid and reluctant to testify or testify truthfully based on the violent acts they witnessed the defendant commit with their own eyes. Further, the record shows the Solicitor was pointing to physical evidence admitted in the case when making this argument, and referencing testimony that was before the jury.

Further, this portion of the closing argument only took up a few lines (Tr. p. 477, ln. 23 - 478, ln. 9, p. 478, ll. 16-23) of a lengthy closing argument. (Tr. pp. 471-483). *See* Randall, (objected to argument only took up 10 lines in transcript); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)(challenged comment allegedly necessitating mistrial was 1 isolated event in whole argument) *citing* Chaffee, *supra* ("momentary lapse of good taste will rarely constitute prejudicial error").[12] The small portion of a lengthy argument in no way approaches the "overly zealous" argument disapproved of in State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007)(holding solicitor sought to inflame passions of jury with argument there would be open season on babies, improperly injected his own personal beliefs into the case, and staged a funeral procession before the jury).

Further, the trial court had instructed the jury immediately prior to the arguments of counsel, including the Solicitor's closing argument, that the arguments of counsel were not evidence. **(Tr. pp. 470, ll. 4-16).** When Young objected to this specific argument of the Solicitor in front of the jury, the trial judge immediately reminded the jury of her previous instruction that arguments of counsel are not evidence in the case. **(Tr. p. 478, ll. 10-14).** And, before submitting the case for deliberations, the trial judge specifically instructed the jury that their verdict could be based only on the evidence in the case, i.e. that from the witness stand and that admitted through exhibits, not arguments of counsel. **(Tr. pp. 504-519).** There could have been no prejudice to Young because the Court made clear this specific argument was not evidence and the jury could only decide the case based on evidence in the record. **(Tr. pp. 470, 478, 504-19).** Darden v. Wainwright, 477 U.S. 168, 179-82 (1986)(finding no due process violation where the trial court instructed the jury numerous times that their decision must be based on evidence and the arguments of counsel were not evidence

[12]*Overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

and the evidence against the defendant was heavy).

Furthermore, the challenged argument was harmless in the context of the entire record and in light of the overwhelming evidence of Young's guilt. *Cf.* State v. Gaskins, 284 S.C. 105, 119, 326 S.E.2d 132, 141 (1985)(solicitor's comment during closing in capital case that certain evidence was undisputed because of defendant's failure to testify was harmless error beyond a reasonable doubt in context of entire record and in light of overwhelming evidence of guilt).[13] The nightclub manager was an eyewitness to both shootings. He witnessed Young shoot Agerson in an extremely well lit area directly in front of the night club. He testified Young shot Agerson with a pistol and then placed the pistol back into a pocket and walked away from Agerson and directly toward his cousin's waiting car. The manager then witnessed Young point his gun, which he retrieved from his pocket, in the victim Maurice Maxwell's face, also in a well lit area of the parking lot. The manager then witnessed Young shoot Maxwell in the face as Maxwell had his hands up and was backing away from Young. The manager's testimony in this regard was corroborated by appellant's cousin's statement to police at the car stop, and appellant's girlfriend's statement to police that appellant was the shooter, and appellant's cousin's written statement admitted at trial (State's Ex. 8) that appellant shot and killed the murder victim in the club parking lot. The club manager testified appellant was wearing a dark shirt and a distinctive hat with the letter "A" sewn on it. The manager also was able to describe the vehicle Young would be riding in, the road on which it would be traveling, and the distinctive dent on the passenger door of the vehicle. (State's Ex. 7-911 tape). Within just minutes of the two shootings, police stopped the vehicle in which appellant was riding on the exact road the club manager described to police 1.2 miles from the nightclub. In the vehicle, was appellant's

[13] *Overruled on other grounds by* Torrence.

cousin, appellant's girlfriend, and Young wearing the similar clothing as described by the manager, and found in the car was the distinctive hat described by the manager. Appellant's girlfriend took police back to the path of travel of the getaway vehicle and showed them where appellant had discarded the murder weapon from the car. Exactly where she pointed police, they found the Smith and Wesson 9mm pistol. The manager's testimony was further corroborated by the fact police found three (3) 9mm Smith & Wesson fired shell casings at the crime scene next to the murder victim's body. Forensic firearm and toolmark examination showed those three (3) fired shell casings were fired by the gun appellant Young discarded from the fleeing vehicle driven by his cousin. Finally, appellant twice threatened a pre-trial detainee by referencing his murder of Maxwell at the nightclub.

The challenged argument and the court's denial of the late motion for a mistrial was harmless beyond a reasonable doubt. Given the overwhelming evidence of Young's guilt, the challenged argument was harmless. *See* Von Dohlen v. State, (applicant failed to show result of sentencing proceeding would have been different where challenged comment of solicitor did not so infect the trial with unfairness as to make the result a denial of due process); Humphries v. State, (solicitor's closing in penalty phase did not prejudice petitioner); State v. Tubbs, 333 S.C. 316, 509 S.E.2d (1999)(solicitor's isolated references to defendant as Cobra were harmless where they did not infect entire trial with unfairness) *citing* Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997)(occasional use of name "Mad Dog," during guilt and re-sentencing proceedings did not deny defendant due process).

Finally, the trial court instructed the jury that the closing arguments of the attorneys were not evidence, not once, but twice. (Tr. p. 470, ll. 4-16, 478, ll. 13-14). Thereafter, before being sent out for deliberations, the jury was instructed they could render their verdict only on the evidence presented from the witness stand and as introduced through exhibits. (Tr. pp. 504-519). Jurors are

presumed to follow a trial court's instructions. *See* CSX Transp., Inc. v. Hensley, 129 S.Ct. 2139, 2141 (2009); United States v. Olano, 507 U.S. 725, 740 (1993); Penry v. Johnson, 532 U.S. 782, 789 (2001); Greer v. Miller, 483 U.S. 756, 766 n. 8 (1987); Richardson v. Marsh, 481 U.S. 200, 206 (1987); Northcutt, 372 S.C. at 228 ("Our jurisprudence unwaveringly provides that we are to presume juries follow their instructions . . .")(Toal, C.J., dissenting); United States v. Runyon, 707 F.3d 475 (4th Cir. 2013)(recognizing almost invariable assumption of the law that jurors follow the trial court's instructions); United States v. Castillo-Pena, 674 F.2d 318, 322 (4th Cir. 2012)(absent some specific reason to doubt that the jury . adhered to the court's instruction, the appellate court will not conclude to the contrary). *See also* State v. Daniels, Shearhouse Advance Sheets, Opinion No. 27180 (Filed October 10, 2012)("Jurors are sworn to declare the facts of the case as they are proved from the evidence placed before them."), *Toal, C.J., concurring in result in a separate opinion, citing* 50A C.J.S. *Juries* Section 1 (2004). As a result, the *argument of counsel* was harmless. Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010) *quoting* Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)(This Court "..will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of defendant's guilt."); Merriman. Given this record, Young cannot show the argument deprived him of a fair trial. Darden v. Wainwright. This ground of Young's appeal must be dismissed.

ARGUMENT II.

The trial judge did not err in admitting the testimony of the S.L.E.D. firearms and tool mark examiner that the shell casings found at the scene were fired by the murder weapon recovered in the path of flight of the vehicle in which appellant was riding, and even if the court erred in admitting this evidence it was harmless given the overwhelming evidence of Young's guilt.

What occurred below

Prior to the testimony of the State's firearms and tool mark expert, Dan DeFreese, at trial, Young challenged the admissibility of his testimony that the three (3) fired shell casings found at the crime scene were fired by the Smith and Wesson 9mm recovered by police in the path of flight of the vehicle in which Young was riding.[14] Young objected to the admissibility of this testimony on the basis that the science of firearms and tool mark identification was unscientific or unreliable. Young also argued the trial court should have limited DeFreese testimony at trial to it is more probable than not that the shell casings were fired by the weapon recovered by police.

The trial court conducted an *in camera* Jones/Council[15] hearing to determine the admissibility of DeFreese's testimony. At the hearing, testimony was taken from the State's firearms and tool mark expert. (Tr. pp. 353-95). Young offered no evidence at the hearing other than DeFreese's testimony. DeFreese testified at the hearing to his extensive training and expertise in firearms and tool mark examinations, the methodology he used in making the comparison and identification in

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[14]The term "ballistics" is properly applied to the study of bullets and how they move or perform once fired. The term firearm and toolmark identification is the proper term when referring to what Mr. DeFreese did in this case, though many cases refer to his methodology as ballistics or forensic ballistics.

[15]State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

this case (Comparative Microscopy), to its reliability and acceptance in the field, and the strength and reliability of his identification in this case based on the quality of identifying marks left by this particular weapon. (Tr. pp. 353-95).[16] At the conclusion of the hearing, the court ruled the testimony of the firearms and tool mark examiner was reliable and scientific/technical and admissible in the trial of Young's case under Rule 702, SCRE and the standards of Jones/Council, declined Young's request that the expert's testimony be limited to more probable than not, and held the expert would be allowed to give his opinion to a reasonable degree of certainty in the field of firearms and tool mark identification. (Tr. pp. 353-95). The State's expert thereafter testified before the jury that in his expert opinion the three (3) fired shell casings found at the scene next to the murder victim's body were fired by the 9mm Smith and Wesson pistol recovered by police, with the assistance of appellant's girlfriend, in the path of the flight of appellant's cousin's car from the murder scene. (Tr. pp. 398-424). Young did not object that DeFreese' testimony exceeded the bounds or parameters of Judge Harrington's ruling. (Tr. pp. 398-424). Young cross-examined the State's firearms and tool mark examiner before the jury along the same lines as he did in the *in camera* hearing. (Tr. pp. 417-24).

Standard of Review

(On Appeal)

In criminal cases, an appellate court sits to review errors of law only. State v. Baccus, 367

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[16]At the hearing, DeFreese described in detail the test he performed in this case and how he came to his conclusions. DeFreese fired test bullets into a water tank and recovered the fired test shell casings from the weapon in question. He compared those fired test casings to the fired casings recovered in this case under a comparison microscope. Based on that microscopic comparison, and his expertise and training, DeFreese determined the shell casings found next to the murder victim's body were fired by the 9mm pistol recovered by police with the assistance of appellant's girlfriend. (Tr. pp. 353-95).

S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Thus, the appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.; State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004). On appeal, the appellate court is limited to determining whether the trial court abused its discretion. State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bridges, 278 S.C. 447, 448, 298 S.E. 2d 212, 212 (1982); State v. Patterson, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (Ct. App. 2006). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829 (internal citations omitted).

Standard of Review / Admission of Evidence

The admission or exclusion of evidence is within the sound discretion of the trial judge and is reversible only for an abuse of discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008) State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent a prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009); State v. Cope, 385 S.C. 274, 283, 684 S.E.2d 177 (Ct. App. 2009). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pittman, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007); State v. Wilson, 345 S.C. 1, 5-6. 545 S.E.2d 827, 829 (2001). 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. Rosemond, 335 S.C. 593, 518.S.E.2d 588 (1999). Where an appellant challenges the admissibility of an expert's testimony on the grounds that it is unreliable pursuant to Rule 702 SCRE, the appellate court reviews the admission of such testimony under an abuse of discretion standard. State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001), *citing* Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998). *See also* State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). The trial court's decision will not be overturned unless controlled by an error of law resulting in undue prejudice. State v. Brown, 389 S.C. 84, 697 S.E.2d 622 (Ct. App. 2010). "A trial judge's determination of admissibility of evidence will not be disturbed absent a showing of abuse of discretion that has resulted in prejudice to the complaining party. State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001)(*overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

The Lack of Merit of this Appellate Ground

Below, appellant relied on the 2008 Report of the National Research Council ("NRC") in arguing to exclude the testimony of the State's firearms and tool mark examiner.[17] Challenges to the validity of the science of firearms and tool mark identification and admissibility of the testimony as

[17]Appellant argues this Court should consider the 2008 NRC Report and another Report of 2009; however, neither of these reports were admitted at the Jones/Council hearing below and are not properly before this Court. *See* Jones v. United States, 27 A.3d 1130 (D.C. App. 2011)(finding these two reports were not properly before the appellate court but even considering them Court was not persuaded that pattern matching was no longer generally accepted).

introduced in this case, have been raised in both state and federal courts since the publication of the NRC report and rejected. State v. Britt, 718 S.E.2d 725 (N.C. App. 2011); Revis v. State, 101 So.3d 247 (Ct. of Crim. App. Ala. 2011)(firearm tool mark examiner's testimony that fired shell casings at scene came from defendant's uncle's rifle was admissible under Alabama Rule 702); Fleming v. State, 1 A.3d 572 (Md. 2010)(traditional comparative microscopy, as methodology used for state's expert testimony on firearm tool mark identification, remained generally accepted within the scientific community and was admissible under Frye/Reed); Turner v. State, 953 N.E.2d 1039 (Ind. 2011); United States v. Willock, 696 F.Supp.2d 536 (D. Md. 2010)(similar); Jones v. United States, 27 A.3d 1130 (Dist. of Col. Ct. App. 2011); Commonwealth v. Pytou Heang, 458 Mass. 827, 942 N.E.2dd 922 , 946, n. 31 (2011). Those courts have rejected the same or similar challenges finding the testimony as admitted here is reliable and admissible in a criminal trial. Id. *See also*; United States v. Otero, 849 F.Supp.2d 425, 431-35 (D.N.J. 2012)(examining Daubert factors and allowing ballistics expert to testify); United States v. Taylor, 663 F.Supp.2d 1170, 1175-78 (D.N.M. 2009)(admitting testimony under Daubert);; United States v. Montiero, 407 F.Supp.2d 351, 365-72 (D.Mass. 2006)(similar).[18]

Furthermore, South Carolina has previously recognized the admissibility of expert testimony in the field of firearms and tool mark identification involving ballistic evidence. State v. Hackett, 215 S.C. 434, 55 S.E.2d 696 (1949)(discussing ballistics identification and its science). *See generally* State v. Orr, 131 S.C. 276, 126 S.E.2d 766 (1925)(physician was qualified to give expert opinion on

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[18] *For unpublished opinions discussing the same or similar challenges see also* State v. Adams 713 S.E.2d 251 (N.C. App. 2011)(Table); United States v. Sebbern, 2012 WL 5989813 (E.D.N.Y. Nov. 30, 2012)(slip copy); United States v. Diaz, No. CR 05-00167 WHA, 2007 WL 485967, at *4-*11 (N.D. Cal. Feb. 12,2007)(**cited by Judge Harrington below**); Commonwealth v. Meeks, 2006 WL 2819423, at *29, 38-45, 50 (Mass. Super. Ct. 2006).

caliber of wadding found in wound and direction of bullet); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979)(trial judge did not err in permitting forensic pathologist to testify as to his opinion concerning the distance of a shotgun blast, and the absence of powder burns on the victim's clothing). North Carolina has also previously recognized the admissibility of testimony in this field for decades. State v. Gainey, 355 N.C. 73, 558 S.E.2d 463 (2002) State v. Felton 330 N.C. 619, 638, 412 S.E.2d 344, 356 (1992); State v. Britt, 718 S.E.2d 725 (Ct. App. N.C. 2011); State v. Anderson, 175 N.C. App. 444, 450, 624 S.E.2d 393, 398 (N.C. App. 2006).

The testimony admitted in this case is admissible because the expert was properly qualified and the science or technical expertise was reliable. Rule 702, SCRE provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE, (Testimony by Experts).

Expert testimony is evidence given by one who is specially skilled in a certain subject and concerns information beyond the range of ordinary observation and intelligence. State v. Bradley, 34 S.C. 136, 13 S.E. 315 (1891). An expert is one who has made the subject upon which he gives opinion a matter of particular study, practice, or observation, and he must have a particular and special knowledge on that subject. Id. An expert must be better qualified than the fact finder to form an opinion on the particular subject of the expert testimony, such that his expertise would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997); State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct. App. 1991). Where the subject

in question requires no special expertise, it is improper to elicit an expert's opinion as to the subject matter.

Before the testimony of an expert witness is received, his qualifications must first be proved. State v. Moore, 2431 S.C. 487, 129 S.E.2d 330 (1963). The burden of qualifying a witness as an expert falls on the party offering the witness, to show that the witness possesses the necessary learning, skill or practical experience to give opinion testimony. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990); State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997).

In establishing the expertise of an expert witness, there is no exact requirement concerning how knowledge must be acquired by the witness. State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct. App. 1991). It is not necessary that knowledge of an expert witness be derived solely from academic experience. State v. Henry, 329 S.C. 266, 495 S.e.2d 463 (1997). Thus, an expert witness need not have a degree in the speciality field he seeks to testify about, it is enough that his knowledge and expertise make him better qualified than the jury to form an opinion of the particular subject. State v. Peer, 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996). Generally, defects in an expert witness' training and education go to the weight of his testimony, not its admissibility. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Nathari, 303 S.C. 188, 399 S.E.2d 597 (Ct. App. 1990).

Whether a witness is qualified to testify as an expert is within the discretion of the trial judge. State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986); State v. Caldwell, 283 S.C. 350, 322 S.E.2d 662 (1984). There is no abuse of a judge's discretion in the qualification of a witness as an expert as long as the witness has acquired by study or practical experience such knowledge of the subject matter

that a witness' testimony would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (1997); State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct. App. 1997). In Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008)(which was referenced in State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), *affirmed in result, reversed in part*, 380 S.C. 473, 671 S.E.2d 600 (2009)), the South Carolina Supreme Court discussed the application of Rule 702:

> Rule 702 does not contain a set of mandatory qualifications that a witness must meet in order to be qualified as an expert. Instead, Rule 702 recognizes that there are a variety of ways in which a person can become so skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence. Because a specific licensing requirement is potentially inconsistent with the variety of ways a person may gain specialized knowledge, Baggerly recognizes that a trial court's decision to refuse to qualify a person as an expert based solely on the failure to meet a licensing requirement arguably impairs the truth-seeking function of courts.
>
> At the same time however, this Court's jurisprudence emphasizes the role the trial court as the gatekeeper in determining the qualifications of an expert and whether the expert's testimony will assist the trier of fact. *See* State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). While Baggerly makes it clear that non-compliance with licensing requirements or with the statutory law in specialized areas should not require, a fortiori,, a trial court to refuse to qualify a witness as an expert, Baggerly does not stand for the proposition that a trial court should not consider these factors when judging a purported expert's qualifications. Instead Baggerly supports the notion that in determining a witness's qualifications as an expert, the trial court should make an inquiry broad in scope. Specifically, the trial court ought to take into account the factors delineated in the rules of evidence, the statutory law, and any other sources of authority that may be relevant to the purported expert witness's level of skill or knowledge; and the trial court must further determine whether the offered testimony will assist the trier of fact. In this case, the trial court appears to only have considered the fact that Flaherty did not have the required license from the State of South Carolina. In our view, the trial court cannot have such a solitary focus. Although lack of licensing and violations of statutory law may often coincide with a lack of specialized skill or knowledge, these attributes are not always bedfellows. Id., 376 S.C. 545, 658 S.E.2d 80, 86 (2008).

There is no question that Mr. DeFreese was properly qualified as an expert in the field of firearm and tool mark identification. Agent DeFreese testified he had been engaged in the field of firearms and tool mark identification for over thirty-seven (37) years, was trained in firearms and tool mark identification for approximately two and one-half years before accepting case work, is certified by S.L.E.D. in firearm and took mark identification, had graduated from the F.B.I. Academy, is a member of the Association of Firearms and Toolmark Examiners (AFTE), the pre-eminent organization dealing with the field of firearm and toolmark identification, attends seminars put on by AFTE, had written several magazine articles, had been engaged in repeated proficiency testing since 1970s with an error rate of zero, regularly reviewed publications in the field, had compared shell casings with weapon "tens of thousands of times," and had testified 600-700 times as an expert in firearms and tool mark identification. (Tr. pp. 356-386, 402). United States v. Williams, 506 F.3d 151 (2d Cir. 2007)(adequate foundation laid where expert witness testified to 12 years of service, hands on training, attendance of seminars on firearms identification, publication of writings in peer review journal, her obvious expertise with tool mark identification, her experience examining 2,800 different types of firearms, and her prior expert testimony on 20 to 30 occasions); United States v. Humphreys, 468 F.3d 1051, 1052 (7th Cir. 2006)(ATF special agent qualified as expert because "he was trained in firearms identification and had identified between 1,500 and 2,000 firearms in his 25 years in law enforcement); State v. Gainey, 355 N.C. 73, 558 S.E.2d 463 (2002)(firearms identification expert met the standards of N.C.R.E. 702 where he had been an agent with S.B.I. for 26 years, worked in the firearms and toolmark laboratory, had done in excess of 500 to 1,000 comparisons in matching bullets to a particular gun that fired them, and tested the evidence on which

he provided his opinion).[19] In fact, the State's expert, Mr. DeFreese, had more experience than the expert in Williams above.

II.

In addition to a finding of a witness' expert qualifications, a trial court must also make any necessary findings as to the reliability of the method or practice which may have been employed by the expert. State v. White, 372 S.C. 318, 642 S.E.2d 590 (2007), *affirmed in result*, 382 S.C. 265, 676 S.E.2d 684 (2009). In White, the Supreme Court held that a trial court has an important gatekeeping role when determining the admissibility of nonscientific expert testimony, not only when determining the qualification of the witness as an expert, but also the reliability of the method or practice which may have been employed.

Expert testimony may fall into two generalized categories: (1) where the expertise of the witness is predicated upon a specialized skill or knowledge acquired through training and experience; and (2) where the expert's testimony is predicated upon the application of a specific scientific technique. State v. Whaley, 305 S.C. 138 406 S.E.2d 369 (1991); State v. White, 372 S.C. 318, 642 S.E.2d 590 (2007).

Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact;[20] (2) the expert witness is qualified; (3) the underlying science is reliable, (applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and

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[19]*See also* United States v. Cerna, 2010 WL 3448528, at *4-6 (N.D. Cal. Sept. 1 2010)(*not published in F.Supp.2nd).*

[20]Obviously DeFreese' testimony would assist the trier of fact in resolving an issue in dispute in the case, i.e. whether the weapon recovered by police fired the shots that killed Maxwell.

(4) the probative value of the evidence outweighs its prejudicial effect. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). The State v. Jones reliability factors to be considered are as follows:

(1) the publications and peer reviews of the technique;

(2) prior application of the method to the type of evidence involved in this case;

(3) the quality control procedures used to ensure reliability; and

(4) the consistency of the method with recognized scientific laws and procedures.

Thus in State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), the Court held that evidence presented on the admissibility of expert testimony on "barefoot insole impressions" was insufficient to meet the Jones' requirements, because the Court deemed it premature not accept that there exists a science of "barefoot insole impressions."

As noted, the admissibility of scientific evidence is dependent on whether the expert relied on scientifically and professionally established techniques. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). This standard is designed to prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods. State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997). Not all expert testimony involves scientific evidence that is subject to a Jones challenge. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991); State v. White, 372 S.C. 318, 642 S.E.2d 590 (2007). Thus in Whaley, in finding that expert testimony on eyewitness reliability was admissible, the Supreme Court rejected the necessity of a Jones analysis for that type of evidence to show that the field was a recognized area of expertise:

> The admissibility of *scientific* evidence depends upon "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979)(emphasis added). Dr. Coles' testimony, however, is distinguishable from "scientific"

> evidence, such as DNA test results, blood spatter interpretation, and bite mark comparisons. An eyewitness identification witness gives expert opinion evidence similar to the type given by doctors or psychiatrists. Where the witness is a qualified psychologist who simply explains how certain aspects of every day experience shown by the record can affect human perception and memory, and through them, the accuracy of eyewitness identification, we see no reason to require a greater foundation. People v. McDonald, 690 P.2d 709 (1984). Consequently, we are not persuaded that this type of testimony is required to meet the Jones test.

State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371-72 (1991)(emphasis in original).

The methodology used by Mr. DeFreese in this case is reliable. (Tr. pp. 356-394, 397-424). State v. Britt, 718 S.E.2d 725 (Ct. App. N.C. 2011)(finding methodology of forensic toolmark identification reliable); Fleming v. State, 1 A.3d 572 (Md. 2010)(traditional comparative microscopy, as methodology used for state's expert testimony on firearm tool mark identification, remained generally accepted within the scientific community and was admissible); United States v. Otero, ___ F.Supp.2d ___ (D.N.J. 2012)(AFTE method of firearms and toolmark identification was reliable and admissible under F.R.E. Rule 702); United States v. Willock, 696 F.Supp.2d 536 (D. Md. 2010)(similar); United States v. Montiero, 407 F. Supp.2d 351, 372 (S.D.N.Y.2006)(revisiting and closely examining the reliability of toolmark identification and finding methodology was reliable); United States v. Foster, 300 F.Supp.2d 375 (D. Md. 2004)(testimony of F.B.I. firearms and toolmark examiner established the reliability of ballistics, including comparisons of spent cartridge cases even where no "known" weapon is recovered); United States v. Natson, 469 F.Supp.2d 1253, 1261-62 (M.D.Ga. 2007)(concluding firearms and toolmark examiner's opinions were admissible because they are reliable and based upon a scientifically valid methodology); United States v. Taylor, 663 F.Supp.2d 1170 (D.N.M. 2009)(finding methodology employed by AFTE sufficiently reliable to admit under Rule 702, F.R.E.)

The determination of Judge Harrington is fully supported by the record of the Jones/Council hearing conducted in this case and similar holdings of other courts. Id. (Tr. pp. 353-95). After hearing the testimony of the State's firearm and tool mark expert, hearing arguments of counsel, and reviewing the provided authority, and reviewing authority she had discovered in her own research, Judge Harrington concluded the evidence met the required standards as set forth by our appellate courts in Jones and Council. (Tr. pp. 391-394). Her findings are fully supported by the record of the Jones/Council hearing and the previously cited authority. (Tr. pp. 353-395). Id. Her findings are also supported by the testimony of expert Defreese before the jury. (Tr. pp. 398-424).

(1) The publications and peer review of the technique used in this case are evident. United States v. Taylor, 663 F.Supp.2d 1170, 1175-78 (D.N.M. 2009)(discussing publication of peer reviewed AFTE journal and two (2) articles in peer reviewed publication *Journal of Forensic Science* on firearm and toolmark identification). This factor clearly weighs in favor of admissibility.

(2) The technique used in this case by Agent DeFreese has been applied and used to the evidence involved in this case has occurred for more than forty (40) years. (Tr. pp. 353-95). This factor clearly weighs in favor of admissibility.

(3) Quality control procedures were used to ensure reliability. The SLED laboratory is accredited by the American Society of Crime Laboratory Directors laboratory accreditation board. (Tr. p. 359). DeFreese was required to engage in proficiency testing usually twice or more in a year. (Tr. p. 358). DeFreese testified the comparison microscope that he uses to make comparisons is calibrated by the manufacturer and checked monthly. (Tr. p. 381-382). DeFreese testified his error rate in proficiency testing was zero. (Tr. p. 358). DeFreese testified there was a national standard for established by the AFTE and he followed that standard in conducting the tests in this case. (Tr.

pp. 377-378, 381). DeFreese testified the method he used for making a comparison and determining a match was the standard norm and the practice in South Carolina and throughout the United States. (Tr. p. 381). There was a newer method for making comparisons, but he does not use that method but the standard method. (Tr. pp. 385-386). DeFreese testified that his work in this case was subject to a review process as it is for all cases. (Tr. pp. 413-414). DeFreese testified another qualified examiner checks behind him, looks at the same evidence, to see if he concurs with his findings. (Tr. p. 414). This factor clearly weighs in favor of admissibility.

(4) The consistency of the method with recognized scientific laws and procedures has been repeatedly recognized by the Courts of this country, including one case cited by appellant, and were employed by DeFreese in this case. (Tr. pp. 353-95, 391-94, 398-424). Jones v. United States, 27 A.3d 1130 (D.C. App. 2011)(pattern matching is generally accepted); Fleming v. State, 1 A.3d 572, 590 (Md. App. 2010)(courts have consistently found the traditional method, [comparative microscopic pattern matching technique] to be generally accepted in the scientific community); United States v. Taylor (finding AFTE pattern matching is generally accepted in the scientific or expert community); Willock; Montiero; Glynn. This factor clearly weighs in favor of admissibility.[21]

Finally, given the testimony of DeFreese, and the reliability of the science or technical expertise, the probative value of the evidence outweighed any prejudicial effect. Further, given the

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[21]Even the 2008 NRC Report argued by Young below, but not admitted as an exhibit, found "Notwithstanding this finding, we accept a minimal baseline standard regarding ballistic evidence. Although they are subject to numerous sources of variability, firearms-related toolmarks are not completely random and volatile; one can find similar marks on bullets and cartridge cases from the same gun." *Quoted in* United States v. Taylor, 663 F.Supp.2d (D.N.M. 2009).

other overwhelming evidence of Young's guilt, the probative value of DeFreese's testimony outweighed any prejudicial effect. Jones; Council.

Young has failed to show Judge Harrington abused her discretion in the admission of this evidence under Rule 702, SCRE. Ramsey; Jones; Council; Natson; Taylor. This appellate ground has no merit.[22] Agent DeFreese' testimony was admissible. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

Further, Young cites no authority for requiring the firearms and toolmark expert to be limited to testifying only to "it is more probable than not" that the fired shell casings came from the recovered weapon, other than an opinion of one federal district court judge from New York in 2008. *See* State v. Glynn, 578 F.Supp.2d 567 (S.D.N.Y. 2008). Judge Harrington was fully aware of this decision and did not abuse her discretion in declining Young's request given the other extant authority. (See Tr. pp. 391-94). United States v. Natson, 469 F.Supp.2d 1253, 1261-62 (M.D. Ga. 2007)(permitting firearms expert to offer opinon of match " to a 100 % degree of certainty"). She limited the expert's opinion to a reasonable degree of certainty in the field of firearms and tool mark identification. (Tr. pp 391-394).[23]

Harmless Error

Further, even assuming *arguendo* the trial court erred in admitting the specific testimony challenged here, that the shell casings were fired by the recovered murder weapon, the error was

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[22]In fact, at the *in camera* hearing, Young called no expert of his own, only the State's expert, Dan Defreese, who testified to the reliability of his examination. Nor did Young offer any evidence to contradict or impeach the witness such as the NRC Report.

[23]Although not specifically raised in appellant's brief, to the extent Young argues DeFreese exceeded the parameters of his testimony, Young made no objection to DeFreese testimony in this regard. Therefore, this argument, if raised is not preserved for appeal.

harmless beyond a reasonable doubt. Even without this specific testimony, there was overwhelming evidence of Young's guilt.

First, even if the Court had sustained Young's *motion in limine*, the Court would not have excluded all of the firearms expert's testimony. The jury would still have been aware that the identifying markings on the fired shell casings found next to the murder victim's body were exactly the same as those markings on test casings fired by the same recovered weapon. (Tr. pp. 353-95, 398-424). Further, the jury was already aware that the weapon admitted in evidence was recovered in the path of flight of the vehicle in which Young was riding. Further, the jury was already aware that Young's girlfriend accompanied police to the location where the gun was thrown out of appellant's cousin's vehicle and with her assistance police were able to recover the 9mm Smith and Wesson pistol. Additionally, the shell casings found at the scene next to the victim's body were 9mm shell casings, consistent with the type of weapon recovered by police with the assistance of Young's girlfriend. Further, the jury was already aware Young had thrown the weapon from his cousin's moving vehicle. (Tr. pp. 329-30, State's Ex. 8). Further, the jury heard appellant's cousin's statement to police the morning after the murder, that appellant shot the murder victim Maurice Maxwell, and appellant threw the weapon from the cousin's vehicle as they were fleeing the scene. (Tr. pp. 161-62, State's Ex. 8). Finally, the jury heard the eyewitness testimony of the club manager who witnessed Young shoot the 1st victim [Agerson] with a pistol and witnessed Young shoot the murder victim [Maxwell] in the face with the same pistol exactly where the three (3) fired shell casings were recovered by police. And, the jury heard the testimony of police that they stopped the vehicle as described by the club manager on the road on which he stated the vehicle was traveling as it was fleeing from the murder, within minutes, and only 1.2 miles from the crime scene. Inside

the vehicle was Young, his cousin, and his girlfriend. Further, the jury heard the testimony of the club manager and police who testified the manager was brought to the scene and he separately identified Young as the shooter, appellant's cousin as the driver of the getaway vehicle, and appellant's girlfriend as the passenger. Finally, the jury heard the 911 tape and the testimony the vehicle in which appellant was captured in had a distinctive dent on the passenger side door consistent with the manager's description during the 911 call. (State's Ex. 7). As a result, the admission of the firearm's expert's *specific testimony* challenged here would not have changed the result at trial. This specific testimony was cumulative to other overwhelming evidence of Young's guilt. *See* Fleming v. State, 194 Md. App. 76, 1 A.3d 572 (Ct. of Sp. App. 2010)(ballistics testimony was harmless given other evidence in case of appellant's guilt and linking him to murder weapon). This appellate ground must be dismissed with prejudice.

Additionally, appellant brought out before the jury the same concerns he raised before the trial judge in cross-examining the firearms and tool mark expert. (Tr. pp. 417-24). Any error in not limiting the firearm's experts testimony was harmless beyond a reasonable doubt. Jones v. United States, 27 A.3d 1130 (Dist. of Col. Ct. App. 2011)(error harmless where cross–examination of fire arms expert brought out same concerns raised in pre-trial admissibility hearing); Commonwealth v. Pytou Heang, 942 N.E.2d 927 (Mass. 2011)(same).

CONCLUSION

For the above stated reasons, Young's convictions and sentences for murder and ABWIK should be affirmed and this appeal dismissed.

Respectfully submitted,

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April 3, 2013

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April 3, 2013

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Derringer Young
Appellate Case No. 2011-195446

Dear Ms. Kitchings:

Enclosed please find the ***Initial Brief of Respondent and Designation of Matter*** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosure

cc: Susan B. Hackett, Esquire
Scarlett A. Wilson, Solicitor
Sandi Wofford, Victims Assistance