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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. J.C. Buddy Nicholson, Circuit Court Judge
Appellate Case Tracking No. 2020-001665

The State, Respondent,

v.

Stewart Jerome Middleton, Petitioner.

Opinion No. 2020-UP-271 (S.C. Ct. App. filed September 30, 2020)

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Procedural History

Stewart Jerome Middleton (Appellant) was indicted at the May 2014 term of the grand jury for Charleston County for third-degree criminal sexual conduct (2014-GS-10-02602). (Indictment; R. 348). On October 23-26, 2017, Appellant proceeded to trial by jury pursuant to which he was found guilty as charged. (R.1). He was sentenced by the Honorable J.C. Nicholson, Jr., to six (6) years' imprisonment suspended upon the service of six (6) months' imprisonment and five (5) years' probation. (Indictment & Sentencing Sheet; R.p.348-350). Appellant timely filed a notice of intent to appeal.

After briefing and without oral argument, the Court of Appeals affirmed Petitioner's conviction and sentence. State v. Middleton, 2020-UP-271 (S.C. Ct. App. Filed September 30, 2020). Petitioner served and filed a Petition for Rehearing which was denied. (App.5-9).

Petitioner served and filed a Petition for Writ of Certiorari raising two issues. This Court granted the Petition for Writ of Certiorari as to Question II and denied as to Petitioner's Question I. Petitioner served and filed his Brief of Petitioner on October 21, 2021. This Brief of Respondent follows.

Factual Background

Victim explained she was employed by SKF Aerial Engineering and was hosting the annual Christmas party at the Embassy Suites on December 14, 2013. (R.33). Victim testified she booked a hotel room for the night because she knew she would be drinking and planned on sharing her room with her friend, Labelia Nelson. (R.33-34). Victim indicated she did not ask anyone else to stay with her that night. She said she checked into her room at 1 p.m. and then

went shopping and ate an early dinner around 3 or 4. Victim returned to her room and began drinking peach Ciroq vodka and Sprite. She said she drank two small plastic cups of half Sprite and half Ciroq, and explained she weighed 115 pounds and was five-four. Victim said her friend and coworker, Yolanda Alston, then came to her room to visit, and she had a third mixed drink before they went down to the party. She said she expected 75 people, but only about 30 or 40 were there yet. Victim said she knows Appellant as a coworker, but they never hung-out together outside of work, and he was not at the party when she and Alston arrived. She said she stayed at the party for about an hour and a half but started feeling sick and drunk and decided it was time to leave. Yolanda Alston, Victim's friend and coworker, indicated Victim needed to be taken from the party because she was already intoxicated. Alston indicated she could tell "very quickly" that Victim had been drinking. (R.81). She said she was an eight on a scale of one to ten for intoxication. (R.82).

Her friend and coworker, Jimmie Filbeck, indicated Victim was intoxicated but not incoherent when he first saw her at the party. He indicated later in the evening she was "pretty much out and out drunk." (R.95). Filbeck took her back to her room. As they walked to the elevator, Victim was "stumbling" and "hanging off of" Filbeck. Once in the elevator, Victim fell down onto the floor. (R.95). When they arrived at her room, Victim was "just drunk" and "basically incoherent." (R.96).

Victim asked Filbeck to come back and check on her and gave him a room key. When Filbeck left, Victim was clothed. (R.97). Victim said she was wearing her bra and underwear when she went to bed, but that it was not unusual for her to sleep in the nude.

Filbeck and his wife headed back to Victim's room to check on her. Appellant followed them onto the elevator. Filbeck waited for Appellant to push a button on the elevator, but when

he just stood there, Filbeck pushed the button for Victim's floor. (R.100). Victim woke up to Filbeck and his wife coming into the room and startling her. Victim jumped up and heard them say they were just checking on her. According to Filbeck, Victim was nude when she jumped up. He, his wife, and Appellant all left the room. (R.100-101).

Victim did not recall having any interaction with Appellant that night at all but knows she did not consent to sexual intercourse with anybody and was not in a state of mind to consent. The next thing she remembered was waking up in the hospital at Roper St. Francis.

Mitchell Rumsey, the guest services manager at the Embassy Suites, testified a gentleman came to the front desk about 10:25 that night seeking a key for his "girlfriend's room" and gave the number of the room where Victim was staying. (R.10-11; 24). Rumsey finished his shift and, as he exited, he came across Victim. She was "crying visibly" and "very distraught." He explained she was "crouched over in the fetal position, scared. Something not positive had occurred." (R.13). The first words from Victim were that "she had been raped." (R.14). Rumsey testified she had to lean on him because she could not walk easily on her own. He explained she could not talk to the 911 operator, so he made the call. (R.14-15). Rumsey indicated Victim was intoxicated and "definitely not sober" when he found her. (R.25). He indicated it was "difficult for her to put words together and form a conversation." (R.28). He was asked to place her intoxication on a scale of one to ten where one is "dead sober" and ten is "unconscious" and Rumsey indicated Victim was a seven. (R.28-29).

Joye McElroy, the emergency room nurse who treated Victim the next morning, indicated she was treated for alcohol intoxication and a reported assault. (R.155). Victim arrived at the hospital at 12:35 a.m. and had her blood drawn at 3:38 a.m., roughly five hours after the sexual assault. At the time of her blood draw, her blood alcohol level was still .264, with McElroy

explaining that .3 is considered toxic and that the alcohol concentration decreases over time when not consuming alcohol. (R.171-172).

Appellant gave a statement in which he said he knew Victim from work and although she is nice, she drinks a lot. He said he knows she always gets "hammered" at the annual office Christmas parties. He noted he saw Victim drink a lot at the Christmas party the year before the incident and heard she drank a lot again on the night of December 14, 2013. Appellant said that when he arrived at the party around 9 p.m., everyone was talking about Victim and how she was so "wasted" by 7 p.m. that someone had to help her to her room. He specifically mentioned someone named Sandra telling him Victim was very drunk. Appellant said it appeared Victim was drinking Ciroq peach vodka because he saw the nearly empty bottle in her room. He said it was a pretty big bottle and he thinks she may have drunk it all. Appellant acknowledged encountering Victim coming towards the door naked when he, Filbeck, and Filbeck's wife went to check on her around 10 p.m. He said that immediately after they left, she came out of the room wearing nothing but a towel and managed to lock herself out. Appellant said that after getting a key from the front desk to let Victim back into her room, she was crying and upset about the party being a bust, her having to leave the party drunk, and Filbeck seeing her nude. He said Victim then fell to the floor where they started kissing and then had sex. Appellant repeated his belief that Victim drank the whole bottle of vodka and admitted she was a "tiny girl" who had been drinking all day before they had sex on the floor of her hotel room. He said he knew she was drunk based on what he was told by other people at the party. (State's Exhibit #6 – DVD of interview).

ARGUMENT

I. The trial court properly admitted Detective Bailey's relevant testimony regarding her attempts to schedule interviews with Appellant because it was relevant to the process and direction of the investigation and the avoidance indicated a consciousness of guilt. Further, the issue as raised is not preserved for review on appeal. Finally, any error is entirely harmless in light of testimony directly elicited by Appellant which was significantly more prejudicial and admitted without objection.

The trial court properly admitted Detective Bailey's testimony regarding Petitioner's avoidance of appointments. The testimony was relevant to explaining the process and direction of the investigation as well as evidence of consciousness of guilt. Furthermore, the issue is not properly preserved for review on appeal and is raised in a different manner on appeal than it was at trial. Finally, even if this Court determines admission of the testimony was error, it was harmless because it could not reasonably have affected the outcome of the trial.

Relevant Facts

The solicitor questioned Detective Bailey about her interview of Appellant during the investigation. The solicitor asked: "How many times did you schedule an interview with him?" Detective Bailey began answering stating: "I think the first - - " (R.191). Appellant entered an objection. The Court asked for the legal objection, and Appellant responded: "Relevance." (R.192). The trial court overruled the objection and told the witness to go ahead. (R.192). Detective Bailey then testified:

> First time I made contact with the defendant, I want to say it was February 3rd. Don't quote me, around there, the 3rd, 4th. I know it took about 17 to 20 days for him to come in. He didn't show for the first two. He would call after the fact, or, like, 24 hours later. Then - - because we were having such a difficult time getting him to actually stick to an appointment and come in, I told him, Go home. Look at your schedule. Find a day that suits you and your place of employment, and then call me and you tell me

> what day you want to come in, and I'll accommodate - - whatever day, whatever time, I'll accommodate you.
>
> So he left city hall, and he never called me back. So I had to reach out to him again. It was like 12 or 13 days after not hearing from him, and then we finally met on February 20th.

(R.192). No objection was made to this statement. In particular, no objection was made at all to fact numerous days passed before Detective Bailey was able to meet with Appellant.[1]

On cross-examination, Appellant more deeply questioned Detective Bailey in regard to Appellant's interview. Detective Bailey acknowledged Appellant was under no obligation to talk to her at all. Appellant then probed further and asked: "The people that you wanted to talk to weren't running to the police station to see you. There were some delays otherwise than just Mr. Middleton, correct?" She acknowledged Mr. Rumsey did not want to come in and she had to go through his manager but ultimately saw him the day she called. She also admitted playing phone tag with Mr. Green prior to his being interviewed. (R.213).

Appellant's counsel then asked: "Right, and so - - it goes back to when you were trying to get people in. Sometimes they're not able to do that immediately, are they?" Detective Bailey responded:

> Your client is the only one who was ducking and dodging me. Everybody else - - except for maybe Rumsey who didn't want to come in that day, but his manager made him. Everybody else, it was just a scheduling issue. When can you come in, or, you know, we hadn't made contact, but with the defendant I had made contact. I had set appointments. He just didn't show, and he'd come in later or wouldn't call, and he didn't call back, and it took 13 days, and it just — I was trying to get him to come in.

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[1] Detective Bailey indicated Appellant was given his Miranda warnings when they finally met for an interview. There is no indication he received Miranda warnings at their first encounter or at any point prior to that first interview.

(R.213-214). Appellant did not object or otherwise move to strike this response, and instead returned to trying to discredit the police investigation. (R.214).

Preservation

Initially, the issue was not properly preserved for review on appeal. At trial, Appellant's counsel objected without receiving a response to the question: "How many times did you schedule an interview with him?" This question requires only a simple numerical answer or listing of the times they attempted an interview. This is the only time an objection was made, and significantly, the only argument raised was "Relevance."

On appeal, however, Appellant maintains the specifics of the testimony that followed the Court's overruling of the objection is the prejudicial aspect of Detective Bailey's testimony. He contends the testimony about Appellant missing appointments or not showing up until later was not relevant and prejudicial. (BOP.12). Additionally, he argues "The import of Detective Bailey's testimony was clear: She thought petitioner was avoiding her because he was guilty of an illegal sexual assault." (BOP.13). Finally, Petitioner asserts any inference of guilty knowledge or consciousness of guilt based on his avoidance of meeting Detective Bailey was improper.

None of these arguments were raised to the trial court. The trial court was never presented with the opportunity to determine whether the testimony actually given was proper or whether it sought an improper inference of guilty knowledge. Appellant's cursory "Relevance" objection after a single question does not properly preserve on appeal all the various ways in which he challenges the testimony that follows the objection. See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d

737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

A trial court must be given the opportunity to address an issue before it can be raised on appeal. See State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) ("A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured."); see also, Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (" '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.' " (quoting 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, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments."); State v. Morgan, 282 S.C. 409, 412, 319 S.E.2d 335, 337 (1984) ("Inasmuch as the trial judge had no opportunity to pass upon the issue, the question will not be considered on appeal.").[2]

[2] Petitioner also seems to assert the testimony by Detective Bailey was improper vouching and part of a trend of solicitors "using law enforcement officers to signal to the jury that they believe certain witnesses and not others" while citing to State v. Geter, Op. No. 5851 (Ct. App. filed August 18, 2021). No opinion testimony or commentary came out until Detective Bailey was questioned on cross-examination, and again, was admitted without objection. As a result, any

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41,48, 625 S.E.2d. 216, 220 (2006). The appellate 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. Indeed, the admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

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argument on this issue is clearly not preserved for review on appeal. Additionally, this argument was never presented to the trial court, the Court of Appeals, or this Court in the Petition for Writ of Certiorari. As a result, it is blatantly not preserved for review.

Merits

Appellant objected based on relevance. [3] The testimony regarding the number of times Detective Bailey sought to meet with Appellant is relevant in two ways: 1) It assists the jury understand the process and sequence of the investigation, especially in light of Appellant's counsel's questioning and closing argument regarding the efficacy of the investigation; and 2) It highlights Petitioner's consciousness of guilt by evading Detective Bailey.

Generally, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000); Rule 402, SCRE. Evidence that assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treament of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002); Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). It is not required that the inference sought should necessarily follow from the fact proved. See Sweat, 362 S.C. at 127, 606 S.E.2d at 513. Indeed, evidence is relevant if "logically relevant" to establish a material fact or element of the crime; it need not be "necessary" to the State's case in order to be admitted. Id. (citing State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)).

The testimony by Detective Bailey explained the logical chain of events in the overall investigation as law enforcement worked to gather evidence and talk to the relevant witnesses.

[3] It is important to note the objection was solely to relevance and did not include an argument under Rule 403, SCRE, that the testimony was unduly prejudicial.

Detailing who was interviewed and when is part of the overall sequential steps in the investigation, which ultimately led to the arrest of Appellant. The jury has a right and frequently a need to understand what law enforcement did prior to that arrest as a means of understanding its validity. This is especially true when Appellant challenged much of the investigation conducted in this case through cross-examination and argued the investigation was not credible in closing argument. (R.315-317; 319-320).

Further, the evidence was relevant to establish Appellant's knowledge of guilt and consciousness of guilt. "As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). This general rule applies to evidence of particular acts, including flight. State v. Martin, 403 S.C. 19, 26, 742 S.E.2d 42, 46 (Ct. App. 2013). Indeed, false and conflicting statements and attempts to run away are considered evidence of guilty knowledge and intent. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982). As explained by the Court of Appeals in Martin:

> Our supreme court has identified the "critical factor to the admissibility of evidence of flight" as "whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities ... [and his] actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose." State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006). In addition, this court has held evidence of "unexplained" flight is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee. However, we have further noted that [t]he critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. Flight evidence is relevant when there is a nexus between the flight and the offense charged. It is sufficient that circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking

> him for that purpose. Where the circumstances fail to show the necessary nexus between a defendant's flight and the current offense for which he is on trial, the flight evidence is not relevant and should not be admitted.

Martin, 403 S.C. at 26-28, 742 S.E.2d at 46. The Court found the test for determining the admissibility of evidence concerning flight also applies to evidence of evasive conduct. Martin, 403 S.C. at 30, 742 S.E.2d at 47 (emphasis added).

As far back as 1976 this Court recognized that evasive conduct, regardless of actual flight, was properly admitted at trial. McDowell, 266 S.C. at 515, 224 S.E.2d at 892 ("The statement of appellant was not that he had refused the offer of a polygraph test, but, rather, whether he could 'beat the test' and, inferentially at least, use the results to hide his guilt. The statement allegedly made was to avoid detection of guilt and, as such, was properly admitted into evidence."). This recognition is consistent with the law in many jurisdictions. See Currier v. Commonwealth, 779 S.E.2d 834, 838 (Va. 2015) (noting that evidence appellant was seeking to avoid contact with law enforcement officers after commission of the crime is probative evidence of guilt of that crime); Medina v. State, 254 So.3d 1148, 1152 (Fla. Dist. Ct. App. 2018) ("Evidence of a defendant's acts or statements calculated to defeat or avoid his prosecution is admissible against him as showing consciousness of guilt."); People v. Cunny, 80 N.Y.S.3d 457, 460-61 (N.Y. App. Div. 2018) ("While consciousness of guilt evidence has consistently been viewed as weak because the connection between the conduct and a guilty mind often is tenuous, even equivocal consciousness of guilt evidence may be admissible if 'it has a tendency to establish the fact sought to be proved—that defendant was aware of guilt."); State v. Austin, 97 N.E.3d 12166, 1273-74 (Ct. App. Ohio 9th Dist. 2017) ("An accused's flight, escape from custody, resistance to arrest, concealment, assumption of false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.'"); State v. Edwards,

156 A.3d 506-532-33 (Conn. 2017) ("It is well established that '[i]n a criminal trial, it is relevant to show the conduct of an accused, as well as any statement made by him subsequent to the alleged criminal act, which may fairly be inferred to have been influenced by the criminal act. . . . The state of mind which is characterized as guilty consciousness or consciousness of guilt is strong evidence that the person is indeed guilty . . . .'").

Here, the testimony elicited from Detective Bailey about the difficulty she had in getting Appellant to stick to an appointment time and come for an interview, and the fact that it ultimately took him 17 to 20 days to finally come in and talk after her first contact, was of consequence to the jury's determination of Appellant's guilt or innocence at trial. The testimony had a greater tendency, even if only slight, to allow the jurors to determine Appellant suffered from a guilty conscience and therefore was guilty, than they would have been without such testimony. For these reasons, the testimony was relevant and admissible.

Relying in part on State v. Pagan, 369 S.C. 201, 331 S.E.2d 262 (2006), Appellant argues the testimony elicited from Detective Bailey "was not evidence of flight in any manner, and it was only meant to impermissibly cast undue suspicion upon appellant for irrelevant reasons." However, this reliance on Pagan is misplaced. In Pagan, this Court held that evidence of Pagan's alleged failure to stop for a blue light was inadmissible as evidence of flight or guilty knowledge; however, this was because there was no nexus between the flight and the charged offense of murder. Id. at 209, 631 S.E.2d at 266. The Court noted the critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. Id. No such inference was created in Pagan. Id.

By comparison, there is no question Appellant had knowledge that Detective Bailey wanted to interview him about his, at the time, alleged sexual assault of the Victim. Thus, there was a clear nexus between Appellant's evasive conduct and offense that was charged. The State was entitled to introduce evidence to demonstrate Appellant's guilty conscience, as well as to explain the steps of the investigation to the jury, particularly where Appellant's theory of defense was, in part, to attack that law enforcement investigation. The testimony was relevant and properly admitted over Appellant's relevancy objection.

Harmless Error

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947).

Here, even if this Court determines the trial court erred in allowing the challenged testimony from Detective Bailey, Appellant was not prejudiced by the error where it was cumulative to more damaging testimony elicited by Appellant on cross-examination. Specifically, in response to Appellant's question, and without any objection from Appellant, Detective Bailey indicated Appellant was "the only one who was **ducking and dodging** me." (R.212-214) (emphasis added). The admission of Detective Bailey's testimony on direct could not be prejudicial in light of this testimony elicited by Appellant and admitted without any objection. See State v. Price, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006) (noting any error in admission of improper evidence is harmless when such is cumulative to other unobjected-to evidence admitted at trial); State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122

(Ct. App. 2008) (finding, while an objection to the testimony presented by the victim was preserved, appellant failed to timely object to the similar testimony by two other witnesses and, therefore, the admission of the victim's testimony would have been harmless error as it was merely cumulative to the other that was entered into evidence without objection).

Any minor undue suspicion cast upon Appellant by the reference to his evasive conduct pales in comparison to the suspicion Appellant cast upon himself by way of the statement he gave to Detective Bailey, which was inconsistent with the credible testimony offered by Rumsey, Filbeck, Alston, and other witnesses for the State. Thus, any possible error in allowing the testimony from Detective Bailey was entirely harmless because it could not reasonably have affected the result of the trial. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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