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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County
Honorable Maite Murphy, Circuit Court Judge
Appellate Case No. 2019-000926

THE STATE,

Respondent,

vs.

DERRICK TYLER MILLS,

Appellant.

FINAL BRIEF OF RESPONDENT

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Did the trial judge prejudicially abuse her broad discretion or otherwise reversibly err by rescinding a mistrial granted on an inaccurate basis and by promptly reassembling the jurors for the purpose of receiving their previously-reached verdict when the jurors were successfully reassembled within only a few minutes of being mistakenly discharged, the jurors all unwaveringly confirmed they reached a unanimous verdict before the mistrial was granted, and nothing suggested the jurors were subjected to any improper external influences during the brief period that occurred between the granting of the mistrial and the jury's reassembly?

STATEMENT OF THE CASE

In April of 2017, Appellant Derrick Tyler Mills was arrested in connection to a fatal shooting following a protracted manhunt that went on for more than two years before he was tracked down. In November of 2017, the Calhoun County Grand Jury indicted Appellant for one count of murder and one count of armed robbery. In March of 2018, the Calhoun County Grand Jury indicted Quintin Desean Mills, Appellant's son, for the same two offenses. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a sentence of life without parole upon conviction based on Appellant's prior convictions for multiple "most serious" offenses. On May 13, 2019, a joint jury trial was commenced in the Calhoun County Court of General Sessions with the Honorable Maite Murphy, circuit court judge, presiding. At the conclusion of the evidentiary phase of the three-day trial, the jury began deliberating, and, following a period of deliberations, the jury foreman submitted a note inquiring what would occur if the jury was unable to come to an agreement in "one case." In response, the trial judge permitted the jury to announce the verdict that had been reached up to that point, and the jury convicted Appellant's son of armed robbery while acquitting him of murder. After that, the trial judge provided further instructions to the jury, and the jury resumed deliberating on Appellant's charges. A little less than an hour later, the jury foreman submitted another note indicating the jury still could not reach an agreement. In response, the trial judge declared a mistrial, and the jury was dismissed. However, less than half an hour later, the jury was reassembled after the trial judge discovered a verdict had, in fact, been reached on one of Appellant's charges prior to the granting of the mistrial. The jury's verdict finding Appellant guilty of armed robbery was then announced. Following the announcement of the verdict, the trial judge sentenced Appellant to a mandatory sentence of life without parole.

STATEMENT OF FACTS

Around 6:40 p.m. on the night of December 13, 2014, Jarvis Mack placed a frantic call to 911 to report Charles Brown ("Victim"), who was his stepfather, had just been shot at a location in Gaston, South Carolina. (R. p. 197; pp. 217-218; p. 232; p. 243; pp. 247-248; pp. 256-257; pp. 273-274). In response, law enforcement officers from the Calhoun County Sheriff's Office rapidly responded to the scene, which was a dark and secluded area outside an abandoned house located down a one-lane dirt road. (R. pp. 136-138; pp. 247-249; pp. 316-318; pp. 331-332). Upon arriving, they found Victim's body on the ground outside the residence. (R. p. 250; p. 261; pp. 277-278; p. 319; p. 344). At that time, Victim was deceased, and he had been shot six times, including in the back and once just below the ear. (R. pp. 108-113; p. 319). Beyond that, Victim's pants and shoes had been removed, and some of his personal effects appeared to have been scattered around the yard.[1] (R. p. 265; p. 278; p. 319).

During the ensuing investigation into the shooting, officers identified Appellant and his son ("Quintin") as the prime suspects, and they began attempting to locate them. (R. p. 198; pp. 323-324; p. 335). On the following day, Quintin agreed to surrender, and he was subsequently apprehended at a parcel of property belonging to his family and situated less than a quarter of a mile away from the scene of the shooting. (R. pp. 335-338). Meanwhile, Appellant's whereabouts remained unknown, and the search for him continued until he was finally captured over two years later. (R. pp. 338-339).

Subsequently, both Appellant and Quintin were indicted for murder and armed robbery in connection to the incident, and they jointly proceeded forward to trial. (R. pp. 24-27;

[1] Later on, a .357-caliber revolver was found concealed in Victim's sweater along with $172 in cash. (R. p. 279; pp. 289-290; p. 308; p. 345). However, that revolver was determined not to have been capable of firing the bullets that inflicted Victim's fatal injuries as those bullets were consistent with being .22-caliber projectiles. (R. pp. 301-303; p. 305).

Indictments). During the course of the trial, the law enforcement officers and other personnel involved in the investigation into Victim's killing recounted their discoveries that led to Appellant's and Quintin's arrests. (R. pp. 104-126; pp. 247-265; pp. 267-269; pp. 273-294; pp. 296-312; pp. 316-329; pp. 331-374). Likewise, Mack and Kendrell Thompson, who was a friend of Victim's, provided eyewitness accounts of the events that culminated in the fatal shooting. (R. pp. 129-194; pp. 197-244).

More specifically, Mack and Thompson recounted they were lured along with Victim to the abandoned house where Victim was ultimately killed after several hours of communications with Quintin related to the purported sale of a motorcycle, Quintin was not actually in possession of the model of motorcycle he claimed to have available for sale when they arrived at the scene, the transaction quickly fell apart as a result, and they began to leave with Victim.[2] (R. pp. 132-140; p. 152; pp. 154-158; pp. 167-168; pp. 177-178; p. 190; pp. 199-211; pp. 231-232; p. 236). However, before they were able to leave, both Mack and Thompson indicated Appellant angrily pulled out a gun and pointed it at Victim. (R. pp. 140-146; pp. 211-214; p. 220). Thompson recounted Quintin then grabbed and restrained him, and Mack stated he fled when he saw what was occurring with the others. (R. pp. 140-146; pp. 211-214). After that, Thompson testified Appellant robbed and repeatedly shot Victim while Mack reported hearing the gunshots as he fled. (R. pp. 144-146; p. 148; pp. 193-194; pp. 216-217). Furthermore, Thompson stated his property, which was never recovered, was taken from him by Quintin during the course of the incident, and he indicated Quintin appeared to be acting at Appellant's prompting when he stripped him of his belongings. (R. pp. 182-184; p. 186; p. 188).

[2] Supporting Thompson's and Mack's accounts of what had occurred, testimony was presented establishing officers examined Mack's phone after the shooting and verified he engaged in multiple communications with Quintin from approximately 3:16 p.m. until roughly 6:30 p.m. on the date of the incident. (R. pp. 323-324).

Following the presentation of that testimony and evidence, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. p. 374; p. 388; pp. 391-449). In instructing the jury on the law, the trial judge explained the jurors had to decide each of the indictments separately and could elect to return different verdicts for each charge and each defendant. (R. pp. 433-434). The trial judge further noted the jury would be provided with two separate verdict forms—one for each defendant with the different charges listed. (R. p. 448). After those instructions were presented, the jury began deliberations. (R. p. 449).

A little over four hours later, the jury foreman submitted several notes to the trial judge. (R. pp. 449-450). Through one of the notes, the jury asked: "What happens if we can't come to an agreement on one case?" (R. pp. 449-450; Supp. R. p. 2). In response, the trial judge advised the jurors their verdict in one case could be received while they would be provided further instructions on the other. (R. p. 450; Supp. R. p. 2). Shortly thereafter, the jurors indicated they were "ready," they returned to the courtroom, and they announced their verdicts on the charges related to Quintin. (R. pp. 450-451; Supp. R. p. 2). As to those verdicts, the jury convicted Quintin of armed robbery and acquitted him of Victim's murder. (R. p. 451).

Following the announcement of the jury's verdicts regarding Quintin's charges, the trial judge presented jury instructions based on Allen v. United States, 164 U.S. 492 (1896), in an effort to aid the jurors in breaking their deadlock.[3] (R. pp. 451-452). Once those instructions were presented, the jurors exited the courtroom and resumed their deliberations. (R. p. 454).

[3] Through her supplemental instructions, the trial judge explained the importance of the jurors making every "reasonable effort" to reach a verdict but stressed the verdict must be their own and they "should not give up [their] firmly held beliefs merely to be in agreement with [their] fellow jurors." (R. pp. 452-454).

Less than an hour later, the jury foreman submitted another note to the trial judge indicating the jurors still were unable to reach an agreement. (R. pp. 457-458; Supp. R. p. 3). In response, the trial judge advised the parties she must declare a mistrial, and the jurors were returned to the courtroom.[4] (R. p. 458). The trial judge then confirmed with the jury foreman the jury had been unable to reach an agreement and, upon doing so, advised the jurors she had to declare a mistrial.[5] (R. p. 458). At that point, the jury was excused, and the jurors exited the courtroom at approximately 4:35 p.m.[6] (R. p. 458).

However, shortly after the jurors were excused, the verdict form was found in the jury room, and it had been marked to indicate the jurors had found Appellant guilty of armed robbery. (R. pp. 458-459; Supp. R. p. 4). Likewise, the indictments were recovered from the jury room, and the armed robbery indictment was signed by the jury foreman, dated, and marked as "guilty" as to the verdict. (R. p. 459; pp. 471-472).

After those documents were discovered, the trial judge—at 4:58 p.m.—noted the jury had been reassembled and advised the parties she intended to have the jurors returned to the courtroom so she could verify if they had actually reached a verdict on one of Appellant's two charges while only being deadlocked as to the other. (R. pp. 459-460). In response, defense counsel objected. (R. p. 460). As support for the objection, defense counsel asserted the case was "done" once the mistrial was granted, and he further opined the jurors may have been

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[4] When presented with an opportunity to do so, defense counsel did not raise any objections to the trial judge's proposed course of action of granting a mistrial. (R. p. 458).

[5] More specifically, the trial judge asked: "Mr. Foreman, I'm receipt -- in receipt of your note that states you cannot reach an agreement, no one will change their mind; is that correct?" (R. p. 458). The jury foreman responded: "Yes, ma'am." (R. p. 458).

[6] Notably, before they were excused, the jurors were *not* expressly told they were free to discuss the case with others. (R. p. 458).

subjected to "an institutional form of coercion" by being reassembled after they were excused. (R. pp. 460-461). As a result, he contended it would be improper for the trial judge to bring the jurors back. (R. p. 462). However, in the event the trial judge elected to permit the jury to be reassembled, defense counsel urged the trial judge to provide "as little explanation" as possible to the jurors and only ask them a single "simple" question. (R. p. 460). Specifically, defense counsel contended the jurors should only be asked: "Did you reach a verdict on one of the two charges?" (R. p. 460).

Upon considering the arguments of counsel, the trial judge indicated she believed it would be a "miscarriage of justice" to ignore a verdict that had been properly reached before the jury was excused. (R. p. 463). She further explained the questioning that had occurred earlier regarding the jury's purported deadlock had not been focused on the individual indictments, which appeared to have led to the confusion that resulted. (R. pp. 462-463). However, the trial judge indicated she would follow defense counsel's suggestion and not conduct lengthy questioning of the jurors regarding what transpired. (R. p. 463).

At that point, defense counsel renewed his assertion the jurors had been "tainted" by the allegedly "coercive nature" of the process by which law enforcement brought them back to the courtroom after they were released. (R. pp. 463-464). However, the trial judge responded the vast majority of the jurors were still just outside the courthouse when they were asked to return while the only two jurors who were not just outside had simply gotten into their cars before voluntarily returning when contacted. (R. p. 464). She further noted there was nothing indicating anything coercive actually occurred. (R. p. 464). Based on that, the trial judge indicated she did not believe defense counsel's remarks about the coercive nature of the jury's reassembly were accurate. (R. p. 464). In response, defense counsel candidly asserted he agreed

and acknowledged he had not been present when the reassembly occurred, but he contended that was equally true of all the people in the courtroom at that moment. (R. p. 464).

A few minutes later, the jury reentered the courtroom, and the trial judge made the following remarks to the jurors:

> There's been a question. Once you were released, the court personnel went into the court room and found the verdict form, along with the indictments, which were in the jury room while you were in there with your deliberations.
>
> And on the verdict form, it does find that y'all found a verdict as to one of the charges; and on the indictment itself for the armed robbery, it appears that Mr. Foreperson . . . has signed the verdict of guilty on the armed robbery and signed and dated that.
>
> My question to the jury is: Before you were released, did you come to a verdict on one charge, but were deadlocked on the second charge?

(R. p. 465). In response, the jurors all shook their heads in affirmation, and the trial judge conducted individual polling to verify the jurors unanimously had reached a verdict of guilty as to the armed robbery charge prior to the grant of the mistrial. (R. pp. 465-466). Once again, each of the jurors confirmed the verdict of guilty. (R. pp. 466-468). Following that, the trial judge sentenced Appellant to life without parole for the armed robbery conviction as was required based on Appellant's prior convictions for "most serious" offenses. (R. pp. 468-469).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing a decision regarding the manner in which a criminal trial was conducted, an appellate court will not reverse the trial judge's decision unless it constituted a *prejudicial* abuse of discretion in light of the fact such decisions are ordinarily left largely to the sound discretion of the trial judge. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."). Similarly, decisions regarding mistrials and jury misconduct typically rest within the sound discretion of the trial judge, and a trial judge's ruling on such matters will not be disturbed on appeal absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000); see State v. Coaxum, 410 S.C. 320, 331, 764 S.E.2d 242, 247 (2014) ("[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion."); State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." (citations omitted)). "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. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see also United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's discretionary ruling constituted an abuse of discretion unless it was arbitrary and irrational).

ARGUMENT

The trial judge did not prejudicially abuse her broad discretion or otherwise reversibly err by rescinding a mistrial granted on an inaccurate basis and by promptly reassembling the jurors for the purpose of receiving their previously-reached verdict because the jurors were successfully reassembled within only a few minutes of being mistakenly discharged, the jurors all unwaveringly confirmed they reached a unanimous verdict before the mistrial was granted, and nothing suggested the jurors were subjected to any improper external influences during the brief period that occurred between the granting of the mistrial and the jury's reassembly.

Appellant contends his conviction should be reversed on appeal and the mistrial that was granted should be reinstated. As support for that contention, Appellant maintains the trial judge lacked jurisdiction to accept the jury's verdict after the mistrial was declared due to a purported deadlock, the trial judge did not have any authority to reassemble the jurors even though it was subsequently discovered they had not actually been deadlocked on all the charges, and the jury's verdict was rendered "suspect" by what transpired. Contrary to Appellant's claims, the trial judge did not lose jurisdiction over Appellant's case simply by declaring a mistrial and, instead, had the authority to rescind that interlocutory order upon quickly discovering it had been issued on an incorrect basis.[7] Likewise, because the jurors were rapidly reassembled within just a few minutes of being mistakenly discharged and no evidence existed supporting a conclusion they were exposed to or affected by any improper external influences prior to their reassembly, there are no grounds upon which to conclude the unanimous verdict they reached *prior to* the grant of

[7] Although Appellant expressly states on appeal the basis upon which his conviction should be reversed is a lack of jurisdiction, Appellant did not identify even a single authority to support his assertion the trial judge lost jurisdiction over the case the moment the mistrial was declared. (App. Br. pp. 1-13). Therefore, that particular assertion has effectively been abandoned on appeal. See State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); cf. State v. Mazique, 419 S.C. 282, 299, 797 S.E.2d 730, 739 (Ct. App. 2016) ("Mazique fails to cite to any case law for these assertions; therefore, we find he has abandoned them."); State v. Tumbleston, 376 S.C. 90, 102, 654 S.E.2d 849, 855 (Ct. App. 2007) ("Tumbleston failed to argue or identify supporting authority on this issue in his brief on appeal. Consequently, we deem this issue abandoned.").

the mistrial was anything other than just and proper. Under such circumstances, the trial judge did not abuse her broad discretion by accepting a unanimous verdict properly reached by a jury after a multi-day trial, and Appellant neither suffered any identifiable prejudice nor was deprived of a fair trial by the manner in which his trial was conducted. Appellant's conviction should be affirmed.

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see Harris, 340 S.C. at 63, 530 S.E.2d at 627 ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). To protect that right, a trial judge is typically afforded broad discretion over the manner in which a criminal trial is conducted. State v. Humphery, 276 S.C. 42, 43, 274 S.E.2d 918, 918 (1981); see State v. Clyburn, 16 S.C. 375, 378 (1882) ("The conduct of a case in the Circuit Court, so far as relates to the time when testimony may be introduced, must be left to the discretion of the Circuit judge, to be governed by the particular circumstances of each case."); see also State v. Bonneau, 276 S.C. 122, 126, 276 S.E.2d 300, 302 (1981) ("It should be noted that the [state and federal constitutions] mandate jury trial in the most general terms. The respective legislatures and the congress may legislate relative to the details of conducting trials. In like fashion, the court may promulgate rules. At the same time, the mandates for conducting jury trials are basically of common law origin. The customs, traditions, and precedents have come into being as law by reason of the development of the common law."). Critically, "[a] trial is a search for the truth; concomitantly, liberality is the linchpin of the rule." State v. Wren, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) (citation omitted).

In conducting a criminal trial, the trial judge will almost certainly be confronted with some sort of error or irregularity at some point during the proceedings. See Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (recognizing the occurrence of an error during the course of a criminal trial is "virtually inevitable"). When an error occurs, one potential course of action available to a trial judge is to grant a mistrial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). However, a mistrial is an extreme remedy that should only be granted when absolutely necessary. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). In determining whether to grant a mistrial, the trial judge should consider whether the mistrial is dictated by manifest necessity and no other legitimate courses of action remain available. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002); see State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) ("The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment.").

Typically, when a mistrial has been granted, the result is the matter is treated as if no trial took place. State v. Mills, 281 S.C. 60, 62, 314 S.E.2d 324, 326 (1984); see State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009) ("A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court."). However, a mistrial is *not* a final judgment and does not divest the trial judge of jurisdiction over the case the precise moment one is granted simply by virtue of being declared. See Good v. Hartford Acc. & Indem. Co., 201 S.C. 32, __, 21 S.E.2d 209, 211-212 (1942) (recognizing an order granting a mistrial is not a final judgment and, instead, is an interlocutory order); see also State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) ("Circuit courts obviously have subject matter jurisdiction to try criminal matters."); State v. Hinson, 303 S.C. 92, 94, 399 S.E.2d 422, 422 (1990) ("It is a long-standing rule of law

that a trial judge is without jurisdiction to consider a criminal matter once *the term of court* during which judgment was entered *expires*." (emphasis added)); State v. Patterson, 272 S.C. 2, 4, 249 S.E.2d 770, 771 (1978) (recognizing terms of court generally last for one week).

As a result, some limited circumstances can exist upon which a jury can properly be reassembled even after a mistrial has been granted. Cf. State v. Myers, 318 S.C. 549, 550, 459 S.E.2d 304, 304 (1995) (affirming the trial judge's decision to recall the jury moments after it was dismissed during a capital trial to ascertain whether it had found the existence of aggravating circumstances). In fact, different courts throughout the country have developed a variety of divergent viewpoints as to when a jury can properly be reassembled following a discharge. See David J. Marchitelli, Annotation, Criminal Law: Propriety of Reassembling Jury to Amend, Correct, Clarify, or Otherwise Change Verdict After Jury Has Been Discharged, or Has Reached or Sealed Its Verdict and Separated, 14 A.L.R. 5th (1993) (collecting cases outlining the "handful of views" that have emerged regarding if, when, and how a jury can be reassembled after being discharged and specifically identifying a number of cases addressing the issue of when a jury can be reassembled following the grant of a mistrial).

Representing one such viewpoint on the matter, the Tennessee Supreme Court in Clark v. State, 97 S.W.2d 644, 646 (Tenn. 1936), articulated the following unyielding rule: "[A]fter the discharge of a jury in a felony case and the separation of the jurors to such a degree that outside contacts may have been even momentarily had, the members of that jury may not be reconvened for the taking of any action whatever involving the fate of the accused." Significantly, the basis for that unyielding rule rested upon the presumption prejudice *may* have occurred as a result of jurors' potential exposure to external influences once they were no longer within the court's control. Id.; see State v. Edwards, 552 P.2d 1095, 1097 (Wash. Ct. App. 1976) ("A discharge

will occur in fact when a jury is permitted to pass from the sterility of the court's control and allowed to separate or disperse and mingle with outsiders. In such cases, contamination is presumed even though the jurors may not have taken advantage of the opportunity to discuss the case."). Therefore, because the jurors separated and left the court's control following the grant of a mistrial in Clark's case, the Tennessee Supreme Court found the jurors could not subsequently be reassembled to announce a verdict even though they were reported to have reached one before the mistrial was granted. Clark, 97 S.W.2d at 647.

Meanwhile, representing another viewpoint, the Florida District Court of Appeals in Masters v. State, 344 So. 2d 616, 620 (Fla. Dist. Ct. App. 1977), was confronted with an issue involving the recall of a discharged jury for purpose of clarifying an inconsistency with a verdict that had been returned. In that case, the inconsistency with the verdict was quickly discovered, and the jurors were only discharged for a brief period of time before they were recalled to *reconsider* their inconsistent verdict. Id. at 619. However, the record was silent as to how many minutes elapsed before the jurors were reassembled, whether the jurors had actually separated from one another prior to reassembly, and whether "any outside influence had been brought to bear upon" them after they had been discharged. Id. Upon considering the matter, the Florida District Court of Appeals acknowledged the general rule against reassembly of a jury that has been discharged and has dispersed. See id. at 620 (Fla. Dist. Ct. App. 1977) (noting the "general rule" is "once the jury has been discharged it cannot be re-impaneled to hear any matters relating to the same case" and explaining "[t]he reason for this rule is that upon discharge the members of the jury lose their separate identity as a jury and can be affected by extra-trial influences"). However, the Florida District Court of Appeals nonetheless affirmed the post-recall verdict returned by the jury because the jurors were reassembled quickly and there was no evidence "the

jury had communicated with any outsider or that any outside influence was exerted upon them, or attempted." Id. Thus, the Florida District Court of Appeals did not presume prejudice from the circumstances and, instead, found the burden fell to Masters "to establish that any such communication with or influence upon the jury had occurred" in order for him to be entitled to reversal on such a basis. Id.

Beyond those decisions, the Third Circuit Court of Appeals adopted yet another viewpoint through its decision in Gov't of the Virgin Islands v. Smith, 558 F.2d 691, 694 (3d Cir. 1977), which affirmed a verdict announced by a jury that had been permitted to disperse for *more than a day* following the declaration of a mistrial that was only declared due to a mistaken belief the jurors had been deadlocked as to all the charges even though they actually were not. In doing so, the Third Circuit Court of Appeals recognized the general rule followed pursuant to early common law prohibited a jury from separating before reaching a verdict, which, if applicable, would not have allowed the jury in Smith's case to validly be reassembled. Id. at 693. However, the Third Circuit Court of Appeals noted many of the rigid rules based upon early common law had been relaxed over the years in favor of a "more pragmatic approach." Id. at 693-694. Upon examining the circumstances of Smith's case with such an approach in mind, the Third Circuit Court of Appeals determined the jury's verdict was a valid one as the verdict form containing the guilty verdict had been signed prior to the grant of the mistrial and all the jurors confirmed they were in agreement with that verdict when polled after they were successfully reassembled a few *days* after the mistrial was granted. Id.

In regard to South Carolina's viewpoint on the matter, none of our state's published decisions appear to have directly confronted the issue of whether and when a jury can be reassembled following the grant of a mistrial in a criminal case, but our Supreme Court—in a

case affirming the recall of a jury for purposes of announcing its "actual" verdict subsequent to a non-mistrial-related discharge—did speak approvingly of reasoning that would limit the ability of a trial judge to reassemble jurors once they had both been discharged and dispersed. See Myers, 318 S.C. at 552, 459 S.E.2d at 305 (expressing concurrence with the reasoning of Summers v. United States, 11 F.2d 583 (4th Cir. 1926), which affirmed a verdict issued by jurors who had previously been discharged based on the fact the jurors had not dispersed prior to being recalled). However, in related jury-issue contexts, our courts have concluded jurors are *not* required to be sequestered in an unyielding fashion during the course of a criminal trial in South Carolina and, instead, can be separated from one another and potentially exposed to outside contact—including after deliberations have begun—without jeopardizing the legitimacy of a verdict subsequently returned. See, e.g., State v. Evans, 309 S.C. 471, 476, 424 S.E.2d 512, 515 (Ct. App. 1992) (recognizing jurors can validly be permitted to separate during the course of a trial and instructing a trial judge's decision to permit jurors to do so will not warrant reversal *unless* prejudice is shown to have resulted from that decision). Likewise, South Carolina courts do *not* mechanically and reflexively presume prejudice has occurred whenever jurors are exposed to improper influences—either external or internal—and, instead, require defendants to establish *actual* prejudice in order for jury misconduct to warrant reversal. See, e.g., State v. Aldret, 333 S.C. 307, 313-314, 509 S.E.2d 811, 814 (1999) ("Given that we have not found automatic reversal warranted even in cases of external influences on a jury's verdict, we decline to do so in the cases of internal misconduct consisting of premature deliberations. Our decision is consistent with the majority of jurisdictions which hold a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial." (citations omitted)); Kelly, 331 S.C. at 144, 502 S.E.2d at 105 (finding no prejudice was established even though the jury

was unquestionably exposed to improper external information during the course of the penalty phase of a capital trial). Therefore, similar to the courts that have eschewed inflexible rules regarding reassembly of a jury, courts in South Carolina traditionally tend to favor more pragmatic approaches when responding to jury issues that arise in criminal cases. See State v. Black, 400 S.C. 10, 29, 732 S.E.2d 880, 891 (2012) ("[A] defendant is entitled to a fair trial, not a perfect one."); cf. Smith, 558 F.2d at 693 (noting "we have held it permissible for jurors to disperse during the period of deliberations" as support for its decision to follow a pragmatic approach in regard to the propriety of the reassembly of a jury following the grant of a mistrial); Masters, 344 So. 2d at 620 ("[T]here is not any evidence that the jury had communicated with any outsider or that any outside influence was exerted upon them, or attempted. The burden is upon the appellant to establish that any such communication with or influence upon the jury had occurred.").

In the case sub judice, the trial judge—during the course of the jury's deliberations—was advised on two separate occasions the jury was deadlocked in regard to Appellant's "case." As a result, it appeared manifest necessity existed for the grant of a mistrial, and the trial judge—without objection—declared a mistrial as was seemingly mandated under the circumstances involved. See Yeager v. United States, 557 U.S. 110, 118 (2009) ("[A] jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled."); see also S.C. Code Ann. § 14-7-1330 (mandating a jury "shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law" if it returns from deliberations for a second time without agreeing to a verdict).

However, within just a few minutes of the mistrial being granted, the trial judge discovered evidence strongly suggesting the jury had not, in fact, been deadlocked in regard to one of Appellant's charges but, instead, had actually reached a unanimous verdict of guilty as to the armed robbery indictment prior to being discharged. When confronted with those unusual circumstances, the trial judge immediately took a pragmatic course of action, attempted to correct the error that had occurred in order to prevent an otherwise validly-reached verdict from being ignored simply because of a misunderstanding, and had the jurors reassembled, which was accomplished in—*at most*—twenty-three minutes. Cf. State v. Thompson, 68 S.C. 133, __, 46 S.E. 941, 943 (1904) (recognizing a trial judge "[c]learly" should "at once" correct an error that has been made if the trial judge becomes "conscious of [that] error" because "[c]ourts are organized to dispense justice"). Then, *without* having the jurors engage in any further deliberations or substantive considerations of any kind, the trial judge briefly queried the jurors to see if they had actually reached a verdict before being discharged, and the jurors all unwaveringly confirmed they had, in fact, done so. See State v. Linder, 276 S.C. 304, 308, 278 S.E.2d 335, 338 (1981) (recognizing polling of the jurors to determine if they "assented and still assent to the verdict" is proper and, under some circumstances, required); cf. Myers, 318 S.C. at 552, 459 S.E.2d at 305 (distinguishing a valid decision to reassemble a jury from one that was found to be problematic based on the fact the valid decision involved a jury that was not given any new information or required to make any additional findings while the problematic decision involved a jury asked to both return after being discharged overnight and address new sentencing options).

Critically, just as the trial judge recognized, nothing appearing in the record suggests the jurors were subjected to external influences between the point they were discharged and the point

they were reassembled just a few minutes later. See Aldret, 333 S.C. at 313-314, 509 S.E.2d at 814 (declining to find automatic reversal was warranted as a result of potential jury misconduct); Bonneau, 276 S.C. at 125, 276 S.E.2d at 301 ("It is, of course, incumbent upon an appellant in this court to prove that he was denied a fair trial."); cf. Masters, 344 So. 2d at 620 (finding the burden was on the appellant to establish the jury had been subjected to external influence after being discharged where there was no actual evidence of external influence). Likewise, after they were reassembled, the jurors were not asked to take any additional actions aside from simply confirming *what they had already done*. Cf. James v. State, 453 So. 2d 786, 792-793 (Fla. 1984) (finding the concerns underlying the general rule against a jury be reconvened after discharge and dispersal were not applicable to James's case even though the jury was not recalled until *a week later* because "[t]he jury members when reconvened, merely had to say 'yes' or 'no,' [and] they did not have to hear or consider anything more relating to the case"); Myers, 318 S.C. at 552, 459 S.E.2d at 305 ("The jury here was given no **new** information nor was it required to make additional findings. On the contrary, the forewoman advised the Court that the jury had, in fact, found the existence of aggravating circumstances prior to being 'discharged' but had failed to write them down. Accordingly, reassembly in this case served not to amend or alter the jury's verdict, but to reflect the actual verdict reached. Under the limited factual circumstances presented, we find no abuse of discretion in recalling the jury to permit it to accurately report its true verdict.").

Viewing those circumstances from a pragmatic point of view and in a manner consistent with our case law that has consistently declined to presume prejudice from jury misconduct, no compelling reasons exist for the jury's verdict to be ignored in Appellant's case, and any decision to the contrary would necessarily have to be based purely on speculation as to what

might possibly have occurred during the brief period of time the jury had separated.[8] See State v. Grovenstein, 335 S.C. 347, 351, 517 S.E.2d 216, 218 (1999) ("We have consistently required defendants to demonstrate prejudice due to improper jury influences."); see also Smith v. Phillips, 455 U.S. 209, 217 (1982) ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable."); cf. Bonneau, 276 S.C. at 126, 276 S.E.2d at 302 ("We appreciate the fact that the two Constitutions mandate that a jury trial shall be conducted so that no person shall be deprived of his liberty without due process of law. Simply put, and in laymen's language, this merely means that every defendant is entitled to a fair trial. We have reviewed the entire record in the light of applicable law, and we conclude that this defendant has not been denied a fair trial. To hold otherwise would substitute form for substance. It would necessitate a new trial based on the most flimsy of technicalities."). Moreover, in light of the fact jurors are routinely permitted to go their separate ways and then resume their places in the jury box during the course of criminal trials conducted in our state, such speculation regarding hypothetical

[8] Although the trial judge potentially could have questioned the jurors after they were reassembled to determine if they had been exposed to any external influences following the grant of the mistrial, defense counsel did not ask the trial judge to conduct such questioning and, instead, asked the trial judge to do the *exact opposite* and only query the jurors as to whether they had reached a verdict on one of Appellant's two charges. See State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003) (finding any issue resulting from the trial judge's failure to individually question the jurors after a jury note was submitted to the court was not preserved for appellate review because Vang did not request individual questioning of the jurors after the trial judge spoke with the jury foreman and determined further inquiry was unnecessary). Therefore, because the trial judge limited her questioning of the jurors after they were reassembled at defense counsel's *express* request, Appellant cannot now validly complain on appeal about the lack of evidence regarding what actually occurred during the window between the grant of the mistrial and the reassembly of the jury. See State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct has induced."); cf. Bryant, 372 S.C. at 314, 642 S.E.2d at 587 ("Without more to substantiate a claim of prejudice, Bryant may not now claim that the trial strategy he opted for warrants a new trial.").

possibilities should not be sufficient to warrant reversal without any evidence of any kind to suggest even a single juror was affected by—or exposed to—any improper external influence after being discharged. See State v. Johnson, 159 S.C. 119, __, 155 S.E. 599, 600 (1930) ("The common-law rule was that the jury should be kept together, in any criminal case, until a verdict was rendered, and to allow them to separate for any reason was error. This rule, however, has been greatly modified and relaxed; and, while the courts are always careful to protect the rights of the defendant, the general rule now is that a new trial will not be granted for the mere separation of the jury, even though it is a jury impaneled to try a capital offense, *unless it is shown that the defendant was injured thereby*." (emphasis added)); cf. State v. Bates, 87 S.C. 431, __, 69 S.E. 1075, 1075 (1911) ("The third exception is as follows: 'That it was an abuse of the discretion of the trial judge, in the conduct of the trial, to permit the jury to disperse and go at large over the city, in a case of this character, after the arguments were in and the case completed, with the exception of the charge, and that it was error for his honor to refuse the motion in arrest of judgment, based upon that fact.' The conduct of the case must be left in large measure to the discretion of the presiding judge, from which there is no appeal, unless there has been an abuse of discretion, which has not been made to appear in this case."). Therefore, the trial judge, who had not yet lost jurisdiction over Appellant's case by the time the jury was reassembled, should not be found to have abused her broad discretion by taking a prudent course of action that ensured a just verdict reached by a fair and impartial jury at the conclusion of an otherwise-routinely-and-properly-conducted three-day trial was afforded the honor and respect it deserved under the law. See Bryant, 372 S.C. at 312-313, 642 S.E.2d at 586-587 (explaining a trial judge "is given enormous discretion in conducting a criminal trial" and will not be reversed in the absence of a *prejudicial* abuse of that discretion); see also State v. Pfeiffer, 427 S.C. 10,

13, 828 S.E.2d 764, 766 (2019) ("In a criminal case, once *the term of court ends*, the trial court lacks jurisdiction to consider additional matters unless a party files a timely post-trial motion." (emphasis added)); State v. Meyer, 953 S.W.2d 822, 825 (Tex. App. 1997) (recognizing a trial judge with jurisdiction over a criminal matter does not lose jurisdiction by declaring a mistrial and, therefore, "has authority to withdraw or rescind the order of mistrial").

Accordingly, since nothing appearing in the record supports a conclusion Appellant received an unfair trial or suffered any actual prejudice as a result of the manner in which his trial was conducted and the jury's verdict received, there are no proper or purposeful grounds upon which to reverse Appellant's conviction on appeal. See Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) ("It is well established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice."); see also United States v. Hasting, 461 U.S. 499, 508-509 (1983) ("[T]here can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial. . . . [W]hen courts fashion rules whose violations mandate automatic reversals, they retreat from their responsibilities, becoming instead impregnable citadels of technicality." (citations, internal quotations, and brackets in original omitted)); cf. United States v. Olano, 507 U.S. 725, 738 (1993) (instructing reversal would be *pointless* if no harm resulted from an alternate juror's intrusion into the jury room during deliberations). Appellant's conviction should be affirmed.

CONCLUSION

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

Respectfully submitted,

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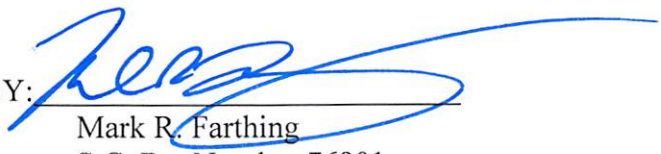
BY: 
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October 30, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Oct 30 2020
SC Court of Appeals

Appeal from Calhoun County
Honorable Maite Murphy, Circuit Court Judge
Appellate Case No. 2019-000926

THE STATE,

Respondent,

vs.

DERRICK TYLER MILLS,

Appellant.

CERTIFICATE OF COUNSEL

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

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