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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Calhoun County
Honorable Maite Murphy, Circuit Court Judge
Appellate Case No. 2022-001254

THE STATE,

Respondent,

vs.

DERRICK TYLER MILLS,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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"Did the circuit court err as a matter of law when it conducted any proceedings after declaring a mistrial, specifically in requiring jurors to return to the courtroom, reading a verdict form, and sentencing Petitioner?"

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals correctly find Petitioner's appellate challenge to the trial judge's receipt of the jury's verdict was abandoned on appeal when it was not supported by any authority? Furthermore, even assuming the Court of Appeals's finding of abandonment was somehow incorrect, 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: (1) the jurors were successfully reassembled within only a few minutes of being mistakenly discharged; (2) the jurors all unwaveringly confirmed they reached a unanimous verdict before the mistrial was granted; and (3) 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

Procedural History

In April of 2017, Petitioner 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 Petitioner for murder and armed robbery. In March of 2018, the Calhoun County Grand Jury indicted Quintin Desean Mills, Petitioner's son, for the same two offenses. Prior to trial, the solicitor served timely notice on Petitioner indicating the State would seek a sentence of life without parole upon conviction based on Petitioner's prior convictions for multiple "most serious" offenses. On May 21, 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 Petitioner'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 Petitioner'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 Petitioner's charges prior to the granting of the mistrial. The jury's verdict finding Petitioner guilty of armed robbery was then announced. Following the announcement of the verdict, the trial judge sentenced Petitioner to a mandatory sentence of life without parole. Petitioner then timely appealed.

On appeal, the Court of Appeals—following briefing and oral argument—issued an unpublished decision unanimously affirming Petitioner's convictions based on abandonment and issue preservation grounds. State v. Mills, Op. No. 2022-UP-309 (S.C. Ct. App. filed July 20, 2022). Thereafter, Petitioner timely filed a petition for rehearing, and that petition was denied. Petitioner then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

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 Petitioner 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 that was situated less than a quarter of a mile away from the scene of the shooting. (R. pp. 335-338). Meanwhile, Petitioner'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 Petitioner 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; 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 Petitioner'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).

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[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).

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 Petitioner 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 Petitioner 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 Petitioner's prompting when he stripped him of his belongings. (R. pp. 182-184; p. 186; p. 188).

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

[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).

be provided with two separate verdict forms—one for each defendant. (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).

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, without objection, the jurors were returned to the courtroom for that purpose. (R. p. 458). The trial judge then confirmed with the jury foreman the jury had been unable to reach an agreement and, upon doing

[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).

so, advised the jurors she had to declare a mistrial. (R. p. 458). At that point, the jury was excused, and the jurors exited the courtroom at approximately 4:35 p.m.[4] (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 Petitioner 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 Petitioner'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 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

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

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 Petitioner to life without parole for the armed robbery conviction as was required based on Petitioner's prior convictions for "most serious" offenses. (R. pp. 468-469).

Subsequently, Petitioner appealed, arguing the trial judge committed a reversible error of law because "jurisdiction" was purportedly lacking once the mistrial was granted. (App. Br. pp. 1-13). Notably though, Petitioner did not cite any authorities of any kind to support his argument in that regard. (App. Br. pp. 1-13).

On appeal, the Court of Appeals affirmed. State v. Mills, Op. No. 2022-UP-309 (S.C. Ct. App. filed July 20, 2022). Significantly, in doing so, the Court of Appeals did not address the merits of Petitioner's appellate argument. Id. Instead, the Court of Appeals found Petitioner's argument was abandoned, instructing: "[Petitioner's] argument that the trial court erred as a matter of law when it conducted any proceedings after declaring a mistrial because the trial court's jurisdiction over his case ended when a mistrial was declared is not supported by any authority; thus, it is abandoned." Id. Similarly, to the extent Petitioner contended a violation of Rule 606(b) of the South Carolina Rules of Evidence had been committed, the Court of Appeals found that particular issue was not properly preserved for appellate review because it was never presented to the trial judge. Id.

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). 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. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("In order to receive a mistrial, the defendant must show error and resulting prejudice.").

ARGUMENT

The Court of Appeals correctly found Petitioner's appellate challenge to the trial judge's receipt of the jury's verdict was abandoned on appeal because it was not supported by any authority. Furthermore, notwithstanding the fact the Court of Appeals correctly found the issue was abandoned on appeal, 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: (1) the jurors were successfully reassembled within only a few minutes of being mistakenly discharged; (2) the jurors all unwaveringly confirmed they reached a unanimous verdict before the mistrial was granted; and (3) 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.

In Petitioner's case, the Court of Appeals affirmed on appeal after finding Petitioner's appellate contention alleging the trial judge erred by receiving the jury's verdict was abandoned because it was not supported by any authority. Now, through his petition for a writ of certiorari, Petitioner has *not* raised an issue specifically challenging the Court of Appeals's finding of

abandonment. Instead, Petitioner simply repeats—in a largely unchanged fashion—his earlier appellate contention the trial judge erred as a matter of law while now including a brief statement alleging his failure to cite to any authority should not be held against him due to a purported absence of any pertinent authority.[5] However, just as the Court of Appeals found, Petitioner abandoned his issue on appeal by failing to include any pertinent authority to support his arguments. Furthermore, even if the Court of Appeals's finding regarding abandonment was somehow incorrect, reversal was nonetheless not warranted because the trial judge did not lose jurisdiction over Petitioner'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. 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 were and are no grounds upon which to conclude the unanimous verdict they reached *prior to* the grant of 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 Petitioner neither suffered any identifiable prejudice nor was deprived of a fair trial by the manner in which his trial was conducted. The petition for a writ of certiorari should be denied.

A. <u>Correctness of the Court of Appeals's Finding the Issue was Abandoned on Appeal</u>

Fundamentally, in an appeal, the appellant shoulders the burden of proving to the appellate court a prejudicial error occurred during trial in order to be entitled to any relief. <u>State</u>

[5] Perhaps based on the Court of Appeals's finding he failed to support and, thus, abandoned his *jurisdiction*-based appellate argument, Petitioner has now omitted from his petition for a writ of certiorari the statement from his earlier appellate brief indicating his contention was "the basis for reversing this mistrial [wa]s lack of jurisdiction." (App. Br. p. 9; Pet. for Cert. p. 8).

v. Attardo, 263 S.C. 546, 551, n. 1, 211 S.E.2d 868, 869, n. 1 (1975); see State v. Glover, 91 S.C. 562, __, 75 S.E. 218, 219 (1912) (concluding affirmance was warranted on appeal because "the appellant has failed to show that there was error" and prejudice). And, to satisfy that burden, the appellant must present non-conclusory arguments supported by citation to authority. State v. Crocker, 366 S.C. 394, 399, n. 1, 621 S.E.2d 890, 893 (Ct. App. 2005); see United States v. Fernandez Sanchez, 46 F.4th 211, 219 (4th Cir. 2022) (explaining "a party . . . waives an issue by failing to develop its argument—even if its brief takes a passing shot at the issue" (citations, internal quotations, and brackets omitted)). Otherwise, the unsupported argument or issue will be deemed abandoned and will *not* be considered by the appellate court. Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 252, n. 3, 734 S.E.2d 161, 164, n. 3 (2012); see State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) ("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.").

In the case sub judice, Petitioner alleged on appeal the trial judge committed an error of law by receiving the jury's verdict under the particular circumstances involved, and he expressly identified a purported lack of "jurisdiction" as the reason why his conviction should be reversed. However, in doing so, Petitioner did *not* cite to any case law discussing jurisdiction or any authorities concerning the impact of a jury separating during trial. Cf. Fernandez Sanchez, 46 F.4th at 219 ("Given the complexity of the issue, we cannot say this single sentence suffices to preserve the Government's argument. And we decline the Government's unspoken invitation to wade through the case law and make its argument for it." (footnotes omitted)); Howard, 384 S.C. at 218, 682 S.E.2d at 45 ("Howard failed to cite any authority in support of his assertion that the trial court erred in denying his motion for a mistrial. Therefore, Howard abandoned this issue on appeal, and we decline to consider the argument."). Because no supporting authority was

presented or identified, Petitioner did not present his appellate issue in an adequate manner for meaningful review pursuant to South Carolina law. See Rule 208(b)(1)(E), SCACR ("The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and *citations of authority*." (emphasis added)); 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."). Therefore, the Court of Appeals correctly deemed Petitioner's appellate issue abandoned, and there is no logical reason for the Court of Appeals's sound finding in that regard to now be disturbed. See State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding a conclusory, unsupported argument was abandoned on appeal); see also State v. Attardo, 263 S.C. 546, 551, n. 1, 211 S.E.2d 868, 869 (1975) ("The burden of proof is on the appellant to convince this Court that the lower court was in error." (citation and internal quotations omitted)); 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."). The petition for a writ of certiorari should be denied.

B. Absence of Any Trial Error Concerning the Receipt of the Jury's Guilty Verdict

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 89 (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 (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 this 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 in the past speak approvingly of older 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 at bar, the trial judge—during the course of the jury's deliberations—was advised on two separate occasions the jury was deadlocked in regard to Petitioner'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 Petitioner'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 Petitioner'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.[6] 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

[6] 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 Petitioner'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); 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.").

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 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 Petitioner'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, notwithstanding the fact the Court of Appeals correctly found the matter was abandoned on appeal, there were and are no proper or purposeful grounds upon which Petitioner's conviction should have been reversed on appeal since nothing appearing in the record supported a conclusion Petitioner received an unfair trial or suffered any actual prejudice as a result of the manner in which the jury's verdict received. 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). The petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted Petitioner's petition for a writ of certiorari should be denied.

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