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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVONTAE JAHWAN MITCHELL,

APPELLANT

APPELLATE CASE NO. 2023-001323

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred in sentencing Appellant to terms of imprisonment of forty-five and thirty years, where Appellant was sixteen years old at the time of the offenses, but the court failed to give Appellant's sentence individualized consideration and failed to consider the mitigating factors of youth required by *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014)?

II.

Whether the court erred where it denied Appellant's mistrial motion, where State's witness Shamontae Graham testified that Appellant had a gun during a "second shooting" the day of this crime, since this was highly prejudicial testimony that could only be remedied by granting a mistrial?

III.

Whether the court erred in admitting mugshots of Appellant and his codefendants, since the photographs were irrelevant to any matter at issue, and they were very prejudicial to Appellant since they had the impermissible tendency to invite speculation about other criminal conduct?

IV.

Whether the court erred by admitting the statement of Appellant's nontestifying codefendant, Che Ransom, since the hearsay violated Appellant's Confrontation Clause rights and *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny?

STATEMENT OF THE CASE

On January 25, 2023, an Horry County Grand Jury indicted Travontae Mitchell, Appellant, for murder and three counts of attempted murder. R. 643-650. Appellant was tried before the Honorable Benjamin H. Culbertson and a jury, from May 22 – 25, 2023. Appellant was tried jointly with codefendants Don Brown and Che Ransom. R. 1. Appellant was represented by Clay Pinkerton. Johnny Garner represented Brown, and Jarrett Bouchette represented Ransom. Nancy Livesay and Christopher Helms prosecuted the case. R 2.

Appellant was convicted as indicted, and he received forty-five years' imprisonment for murder, and thirty years' imprisonment for each of the three counts of attempted murder, with the sentences to be served concurrently. R. 612, l. 21 – 613, l. 12; R. 626, ll. 6-11. On August 9, 2023, Appellant reappeared before Judge Culbertson for a motion to reconsider sentencing and a motion for a new trial. R. 628. The court denied the motions. R. 635, ll. 13-17.

This appeal follows.

STATEMENT OF FACTS

It was approximately 7:15 p.m. on September 12, 2020, when Tronahz Whittington shot and killed Jamie Johnson (Decedent) at a stop sign in Conway while Decedent was driving his distinctively “squatted” Chevy Tahoe. R. 101, l. 4 – 107, l. 14; R. 84, l. 24 – 85, l. 19; R. 121, ll. 2-8; R. 129, l. 14 – 142, l. 13; R. 212, l. 25 – 213, l. 1; R. 253, ll. 11-15. Jacob Hill, Orlin Lopez, and Britney Milam were in the Tahoe with Decedent. Hill, Milam, and Lopez agreed that a car blocked them off at the stop sign, Whittington got out of the front passenger seat with a gun, and a few other people got out of the back seat. According to Hill and Milam, several black males in their teens or twenties got out of the back seat. R. 133, l. 21 – 135, l. 12; R. 193, l. 5 – 203, l. 1; R. 217, l. 18 – 218, l. 22.

Hill saw Whittington point a gun at the Tahoe. Hill got down on the floorboard. Decedent was shot in the head. Hill heard a “handful” of shots. R. 136, ll. 16-24; R. 171, ll. 3-17; R. 143, ll. 16-25; R. 222, ll. 1-5. Milam saw Whittington get out of the car with a big, long gun. She saw three other people get out of the back seat of the car—one of them had a scratch or mole under his eye. According to Milam, all three of the people who got out of the back seat had guns. Milam claimed the four assailants got in a line and began to shoot at the Tahoe. R. 193, l. 5 – 199, l. 19. Lopez saw three or four guys get out of the car and claimed he saw all of them shooting at the Tahoe. R. 217, l. 18 – 220, l. 20.

The Tahoe was hit by two bullets. One, which went through the front windshield, struck Decedent in the head and killed him. The other hit the engine block of the car. R. 90, l. 16 – 92, l. 13. Nine shell casings from three different guns were found in the road: two casings were consistent with being fired from an AR-15, and seven casings were consistent with being fired from two different .9 mm guns. R. 105, ll. 4-15; R. 431, ll. 22-24; R. 524, l. 5 – 528, l. 6.

Appellant was tried jointly with Che Ransom and Don Brown. Tronahz Whittington had already been separately tried and convicted of the murder of Decedent and the attempted murders of Hill, Milam, and Lopez when this case came to trial. R. 194, ll. 22-25; R. 174, l. 19 – 175, l. 2. The State's theory was that six people were in a blue Chevy Caprice and they followed Decedent in order to rob him. The State alleged that Whittington, Appellant, Brown, and Ransom, as well as two other men, Shamontae Graham and Mikkie McLeod, were all in the car and were all guilty. Don Brown was alleged to be the driver. R. 340, l. 13 – 343, l. 15; R. 544, l. 1 – 546, l. 16. There was testimony of an "axe to grind" between Decedent and Whittington over stolen drugs. R. 163, l. 4 – 166, l. 1.

Appellant was a sixteen-year-old high school student. R. 20, ll. 9-21. His case was transferred from family court to general sessions court. R. 29, l. 2 – 30, l. 1; R. 630, ll. 18-19. Appellant put forth a defense of mere presence. R. 79, l. 19 – 80, l. 3. He was interrogated by law enforcement without being able to speak with his parents. R. 30, ll. 2-10. Appellant admitted being at the scene of the shooting but denied having a gun and he denied participating in the crime. R. 391, ll. 12-22. Whittington did not testify and neither did any of the defendants who were on trial. Instead, the State called Shamonte Graham and Mikkie McLeod as witnesses. Graham was Appellant's half-brother. R. 269, ll. 10-13.

Graham, whose charges in this case were pending, testified that Whittington, McLeod, and Ransom got out of the car and fired at the Tahoe. R. 252, l. 3-10; R. 274, l. 25 – 275, l. 16; R. 230, l. 14 – 234, l. 23. Graham stated Appellant got out of the car briefly, but got right back in. R. 276, ll. 4-6; R. 275, ll. 5-10. Graham testified he saw Whittington fire the fatal shot through the Tahoe's front windshield. R. 253, ll. 9-15. Graham stated he did not see Appellant with a gun at the scene. R. 268, ll. 18-21. Graham testified there was no plan, but Whittington said he wanted to rob

Decedent and Whittington told Brown to pull in front of the Tahoe when it got to the stop sign. R. 273, l. 8 – 274, l. 20; R. 253, ll. 9-11. Graham stated that he and Appellant were just catching a ride home from Whittington when Whittington spotted Decedent’s Tahoe. R. 252, ll. 15-23.

McLeod, whose charges in this case were also pending, had a noticeable mole under his eye. R. 467, ll. 15-22; R. 503, l. 14 – 504, l. 2. As seen, Britney Milam testified one of the assailants who shot at the Tahoe had a distinctive scratch or mole under his eye. Nevertheless, McLeod claimed he never got out of the car. According to McLeod, Whittington saw Decedent and said, “There goes Jamie, he owe me money,” and Whittington told Brown to follow the Tahoe. McLeod confirmed Whittington had an AR-15 and got out of the car and shot. McLeod confirmed Ransom also got out of the car and fired a .9 mm gun at the Tahoe. However, McLeod claimed that Appellant, not him, got out of the car and fired the other .9 mm. R. 475, l. 24 – 482, l. 14.

As seen, complainant Britney Milam testified that four people got out of the car and shot. No one said the driver got out of the car and there were six people in the car. That left one person in the car who appears to have simply been in the wrong place at the wrong time. If Milam was telling the truth about the number of shooters, then both Shamontae Graham and Mikkie McLeod were lying—they both claimed only three shooters got out of the car.

Ransom did not testify, but he was interviewed by law enforcement and admitted firing shots. R. 366, l. 16 – 367, l. 11. Law enforcement testified that Ransom claimed “they” had a plan to rob Decedent. R. 368, ll. 11-17.

The State’s case against Appellant was thin. None of the complainants identified him as a shooter. He did not confess, and he argued mere presence. The only person who testified that Appellant shot was McLeod, who was clearly lying about what happened, as evidenced by the mole on his face. Nevertheless, Appellant was found guilty. Several critical errors were

committed by the trial judge in this case which contributed to the convictions. The court also erred by sentencing Appellant to terms of imprisonment that did not account for his youth.

ARGUMENT

I.

The court erred in sentencing Appellant to terms of imprisonment of forty-five and thirty years, where Appellant was sixteen years old at the time of the offenses, but the court failed to give Appellant’s sentence individualized consideration and failed to consider the mitigating factors of youth required by *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

The court treated all of the defendants the same for sentencing purposes. This was error because Appellant was sixteen years old at the time of the crimes. Appellant’s youth was entitled to consideration at sentencing.

Standard of review

“When considering whether a sentence violates the Eighth Amendment’s prohibition on cruel and unusual punishments, the appellate court’s standard of review extends only to the correction of errors of law. Therefore, this court will not disturb the circuit court’s findings absent a manifest abuse of discretion. An abuse of discretion occurs when the circuit court’s finding is based on an error of law or grounded in factual conclusions without evidentiary support.’ *State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019)[.]” *State v. Mack*, 441 S.C. 526, 535–36, 894 S.E.2d 820, 825 (Ct. App. 2023).

Relevant facts

Appellant was sixteen years old at the time of the crimes, and his case was “waived up” to general sessions court from family court. At sentencing, the court heard from Appellant’s trial counsel and from Appellant’s mother in mitigation. Trial counsel asked the court for a sentence that accounted for Appellant’s youth.

Your Honor, when this occurred, my client was 16 years old. He was a juvenile. As we know people’s brains aren’t fully developed until they’re at least 23, 24 years old.

He got wrapped up in a situation that absolutely got out of hand, Your Honor. He was just trying to get home, riding with his brother, and the situation got out of control.

Your Honor, he has been incarcerated now since 2020. He has not seen his family since then, Your Honor.

My client is now 19. And as you know, any sentence you can impose here today, even the mandatory minimum, is longer than my client's been on this planet, Your Honor.

We'd respectfully ask if you would consider the minimum on this case and show any kind of leniency you can, Your Honor.

R. 620, l. 23 – 621, l. 17. Appellant's mother, Kissie Graham, told the court that Appellant was not a bad child, that he played baseball, and that he had gotten himself baptized. R. 621, l. 18 – 622, l. 16.

The court pronounced sentence simultaneously for all three defendants.

All right. Gentlemen, I don't see any justifiable reason to sentence you to any more than the other codefendant who was found guilty. Likewise, I don't see any justifiable reason to sentence you to any less than the codefendant.

So, for each of you, the sentence of the Court on the charge of murder is that you be confined to the State Department of Corrections for 45 years. On each of the attempted murder charges, sentence of the Court is that you be confined to the State Department of Corrections for 30 years. All sentences will run concurrently.

R. 626, ll. 1-11.

Appellant reappeared before the trial court for a motion to reconsider sentencing. Trial counsel addressed the court, and asked the court to resentence Appellant in manner commensurate with his youth and lessened culpability.

Your Honor, my client was 16 at the time. He was waived up from juvenile court . . . He was given 45 years. That is over half—that's literally more time than he's been on this earth, Your Honor.

Your Honor, we would ask for any leniency you might have, Your Honor. There was testimony—only one person that even testified that my client had a gun, and that was a cooperating State’s witness who was trying to save himself, Your Honor. No one else even testified my client even had a gun during this incident, Your Honor. We would ask for any mercy you can have. We would respectfully, if you will, consider a minimum of 30 versus the 45 you imposed at trial.

R. 630, ll. 11-19; R. 631, ll. 3-17.

However, the court denied the motion. “I’m going to deny the motion to reconsider the sentence . . . he got the same sentence as the other codefendants.” R. 635, ll. 13-17.

Discussion

The Eighth Amendment prohibits the imposition of cruel and unusual punishments. U.S. Const. amend. VIII. Similarly, the South Carolina Constitution prohibits the imposition of cruel, corporal, or unusual punishments. S.C. Const. art. I, § 15. “[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Miller v. Alabama*, 567 U.S. 460, 479 (2012). “[A]ppropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Id.* Therefore, when a minor faces a life without parole sentence, the sentencer must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.*, 567 U.S. at 480.

In *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572, 577 (2014), the South Carolina Supreme Court held that *Miller* established “an affirmative requirement that courts fully explore the impact of the defendant’s juvenility on the sentence rendered.” “Although a court may still sentence a juvenile to life without parole after an individualized hearing,” the sentencer must consider: “(1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence; (2) the family and

home environment that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender’s participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender’s inability to deal with police officers or prosecutors (including on a plea agreement) or the offender’s incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.” *Id.*, 410 S.C. at 534-44, 765 S.E.2d at 575-77 (cleaned up). The South Carolina Supreme Court held that these principles applied “prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole.” *Id.*, 410 S.C. at 545, 765 S.E.2d at 578. The Court explained that a juvenile was a person under the age of eighteen. *Id.*, 410 S.C. at 537 n. 1, 765 S.E.2d at 573 n. 1.

“This Court’s decision in *Aiken* requires juveniles receive an individualized hearing where the mitigating hallmark features of youth are fully explored before being sentenced to life without parole.” *State v. Smart*, 439 S.C. 641, 648, 889 S.E.2d 573, 577 (2023) (cleaned up). “[I]n keeping with our prior decisions regarding sentencing juveniles, circuit court judges must consider the mitigating factors of youth as identified in *Aiken v. Byars* when sentencing.” *Jones v. State*, 440 S.C. 14, 19, 889 S.E.2d 590, 593 (2023) (footnote omitted). “[J]uveniles are entitled to careful sentencing under the Eighth Amendment[.]” *Id.*, 440 S.C. at 25, 889 S.E.2d at 596. When a minor appears before the circuit court rather than the family court by operation of statute, the sentencer must consider the *Aiken* factors. “[W]e direct circuit courts to consider the mitigating factors of youth in sentencing juveniles falling under the ambit of subsection 63-19-20(1).” *Id.*, 440 S.C. at 29, 889 S.E.2d at 598.

In *Jones*, the statute at issue was the definitional statute in the Juvenile Justice Code, which defines “child” and “juvenile,” and delineates when the jurisdiction of a minor’s case resides in

family court or circuit court, based on the minor's age and the statutory classification of the offense. *See* S.C. Code Ann. § 63-19-20(1). In this case, jurisdiction initially resided in family court, since Appellant was sixteen years old, and met the definition of a child in § 63-19-20(1).¹ However, jurisdiction was transferred to the circuit court pursuant to S.C. Code Ann. § 63-19-1210(5); i.e., Appellant's case was "waived up." That provision permits the family court to transfer jurisdiction of a fourteen, fifteen, or sixteen-year-old's qualifying charges after investigation and hearing. Appellant was therefore sentenced as an adult in circuit court due to the operation of statute.

Pursuant to *Aiken*, sentencing for Appellant's murder charge required the court to consider the mitigating factors of youth. Pursuant to *Jones*, Appellant's attempted murder sentences also required the court to consider the *Aiken* factors. The court did not conduct an individualized hearing and consider the *Aiken* factors. Instead, the court pronounced sentence on all three

¹ At the time of Jones's offenses, 63-19-20(1) (2010) provided that: "'Child' or 'juvenile' means a person less than seventeen years of age. 'Child' or 'juvenile' does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. An additional or accompanying charge associated with the charges contained in this item must be heard by the court with jurisdiction over the offenses contained in this item."

At the time of the offenses in this case, 63-19-20(1) (2019) had been amended to provide: "'Child' or 'juvenile' means a person less than eighteen years of age. 'Child' or 'juvenile' does not mean a person seventeen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person seventeen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. An additional or accompanying charge associated with the charges contained in this item must be heard by the court with jurisdiction over the offenses contained in this item."

defendants at once, and stated it saw no reason to treat Appellant, a minor, any differently from his codefendants or from Tronahz Whittington. This was error. The court had before it information that went to Appellant's youth and diminished culpability. For example, Appellant was sixteen years old and a high school student. He was riding in the car with his older brother and other older codefendants. He was alleged to have been one of six codefendants. He did not invoke his *Miranda* rights, and he did not testify against his codefendants. He was not allowed to speak with his parents before being interrogated. Appellant had a supportive mother and he enjoyed playing baseball. Appellant had gotten himself baptized.

The court heard this information during the pretrial *Jackson v. Denno*, 378 U.S. 368 (1964), hearing, during the conduct of the trial, and from Appellant's mother and his counsel during sentencing. The court also heard and denied a motion to reconsider sentencing, in which Appellant's juvenility was again raised as a mitigating circumstance. The court was aware Appellant was "waived up" from family court. The court should have considered (or reconsidered) all of this information pursuant to Appellant's state and federal constitutional rights, instead of simply sentencing Appellant as though he were cut from the same cloth as his codefendants. Although the law considers the hand of one, hand of all to be a proper theory of criminal liability for minors, it is not a permissible substitute for consideration of the mitigating factors of youth during sentencing. The court erred when it failed to conduct an individualized sentencing hearing and consider the factors required by *Aiken v. Byars*, 410 S.C. at 534-44, 765 S.E.2d at 575-77. U.S. Const. amend. VIII; S.C. Const. art. I, § 15; *Miller v. Alabama*, 567 U.S. at 479; *Jones v. State*, 440 S.C. at 29, 889 S.E.2d at 598.

II.

The court erred where it denied Appellant’s mistrial motion, where Shamontae Graham testified that Appellant had a gun during a “second shooting” the day of this crime, since this was highly prejudicial testimony that could only be remedied by granting a mistrial.

The allegations in this case were that a group of young men brazenly tailed, trapped, and shot at a car full of people in residential Conway. Appellant’s defense was mere presence. The State elicited inadmissible testimony that Appellant had a gun at a second shooting the day of this crime. The judge sustained Appellant’s objection and instructed the solicitor not to get into the second incident. However, the solicitor continued with the same line of questioning and elicited a similar answer. The court should have granted Appellant a mistrial.

Standard of review

A trial judge’s decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). “Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.” *Id.* at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted). Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)).

Relevant facts

During direct examination by the solicitor, Shamontae Graham testified he did not see Appellant with a gun during the incident.

Q Now, who all had a gun in the car?

A Me, Che, Mikkie, Tronahz.

Q And how about your brother Travontae?

A I didn't see Travontae with a gun.

Q Have you said in the past he had a gun?

A No. I said the same thing. I haven't seen Travontae with a gun.

Q You never told the police he had a gun?

A No.

R. 268, l. 18 – 269, l. 1.

During cross-examination by codefendant Ransom's counsel, the following occurred.

Q And your brother had a gun too; correct?

A I'm not sure if my brother had a gun or not.

Q Well, didn't you say your brother had a handgun?

A I don't recall saying that he had a handgun.

Q Have you testified before that he had a handgun?

A No, sir.

Q Okay. You testified previously in the trial of Mr. Whittington; correct?

A Yes, sir.

Q Did you testify in that trial that your brother had a handgun?

A No, sir.

Ransom’s counsel then refreshed Graham’s recollection by showing him the transcript of the prior trial. R. 304, l. 24 – 306, l. 8. Cross-examination continued on the topic.

Q . . . Does that refresh your recollection that—

A Yes, sir.

Q —that you did say that he had a handgun?

A Yes, sir. But a clarification: I didn’t know he had it at the scene. I found out he had a gun at the second scene where me and my family was attacked, and they asked me questions about both interviews.

Q Well, with regard to this incident, I mean, your brother had his access to a handgun; correct?

A I didn’t know that at the scene, just afterwards.

Q But as we sit here now, you know he had access to a handgun; is that safe to say?

A Yes, sir.

R. 306, ll. 10-23.

On redirect examination, the solicitor returned to the topic.

Q Okay. And what did it [the transcript] say that you said about Travontae Mitchell?

A He had a small handgun.

. . .

Q Okay. And so now, all of a sudden, this time you’re saying he didn’t have a gun?

A **Well, it was kind of asked funny in that trial because they were both—were also talking about the second shooting that happened out on 501.**

R. 320, l. 9 – 321, l. 24 (emphasis added). Trial counsel objected, and argued the second shooting was unrelated to this incident, and the testimony was “doing nothing but tainting the jury about this.” The court sustained the objection, and instructed the solicitor: “Don’t get into the second

incident.” R. 321, l. 25 – 323, l. 3. Nevertheless, the solicitor continued the same line of questioning.

Q Okay. And you looked at the transcript?

A Yes, ma’am.

Q And you see that the last time you said that Travontae Mitchell did have a gun?

A Just not—I didn’t see it on the scene, but the second incident that’s not related, that’s when I know—

R. 323, ll. 5 – 18.

Trial counsel objected, and the court sustained the objection. Trial counsel moved for a mistrial.

Your Honor, you specifically told the solicitor not to go into the second incident. She elicited more testimony about a second incident that’s not related to the case here at hand that involves handguns, it involves shootings. The jury has heard that. They’re absolutely tainted at this point because now they know there’s a second incident involving my client . . .

The court told the solicitor: “you showed that there was another separate incident that involved shootings, that involved guns, that had nothing to do with this case.” However, the court replayed the testimony and ruled: “She didn’t ask about the second incident, so I’m just going to instruct the jury to disregard the witness’s last response. It was unresponsive to the question asked.” R. 323, l. 19 – 326, l. 20.

Counsel stated: “Your Honor, if I may, she asked that question to absolutely elicit that testimony. Your Honor, I can’t help what the witness said, but she elicited that testimony to get that reaction. The jury has already heard now twice that there was the second incident involving guns involving these clients. That is not related here today to this trial. It absolutely should be a mistrial, Your Honor, and we would renew our objection.” The court did not change its ruling,

and it instructed the jury: “I have sustained an objection by the defense. The jury is to disregard the witness’s last response to Ms. Livesay’s question. It was unresponsive to the question she asked; therefore you’re to disregard his response in its entirety.” R. 326, l. 21 – 330, l. 7.

Discussion

Whether a mistrial should be granted is “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.” *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). While a mistrial should be granted only when “absolutely necessary” and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident “is so grievous that the prejudicial effect can be removed in no other way.” *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013). A mistrial must be granted when there is “manifest necessity.” *State v. Bilton*, 156 S.C. 324, 153 S.E. 269 (1930). This Court has held a “mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial.” *State v. Wilson*, 389 S.C. 579, 585-586, 698 S.E.2d 862, 865 (Ct. App. 2010).

“[A]n instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced.” *State v. Hale*, 284 S.C. 348, 354, 326 S.E.2d 418, 422 (Ct. App. 1985). “Because a trial court’s curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient *or* move for a mistrial to preserve an issue for review.” *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) (emphasis in original). “Generally, the consideration of whether there was any prejudice requires that a motion for mistrial be made after the trial judge attempts to cure the error.” *State v. Craig*, 267 S.C. 262, 268, 227 S.E.2d 306, 309 (1976).

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Rule 404(b), SCRE. “Rule 404(b) prevents the State from introducing evidence of a defendant’s other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial.” *State v. Perry*, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020).

“[E]vidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution’s theory of the defendant’s guilt of the particular crime charged.” *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). “Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution’s theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence.” *Id.* “[T]he inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors.” *Id.*

The court correctly sustained Appellant’s objection the first time the solicitor elicited the improper testimony from Graham, and the court instructed her not to get into the second shooting. There was no argument the second shooting was admissible in this case. Nevertheless, the solicitor continued the same line of questioning, and again elicited similar testimony. The court denied Appellant’s mistrial motion, finding the solicitor did not ask about the second incident.

However, the solicitor asked similar questions and got similar answers. Appellant was prejudiced. Rule 404(b), SCRE; *State v. Lyle*, 125 S.C. 406, 118 S.E. at 807 (“the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors”). The instruction to disregard was insufficient to remove the prejudice to Appellant since this

trial was for a brazen and unjustified shooting, Appellant's defense was mere presence, but the jury heard Appellant was involved in another unrelated shooting the same day. The jury was given the impression Appellant should be locked up as a danger to the community. On these unusual facts, the judge abused his discretion by failing to grant a mistrial.

III.

The court erred in admitting mugshots of Appellant and his codefendants, where the photographs were irrelevant to any matter at issue, and they were very prejudicial to Appellant since they had the impermissible tendency to invite speculation about other criminal conduct.

The court should not have permitted the mugshots. The State needlessly introduced the mugshots, and it did so in a manner that brought attention to their origin and implied the defendants were well-known to jail personnel.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *Id.*; see also *State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

Immediately after eliciting the “second shooting” testimony from Graham, the State called a sheriff’s department employee from the jail, a records custodian, and asked her if the jail kept business records regarding the defendants, and if those records included photographs. The witness responded that they did. The solicitor then asked the witness if she recognized the jail’s mugshots of the defendants, and the witness responded affirmatively and named each of the defendants. The solicitor then offered mugshots of the defendants into evidence. R. 331, l. 22 – 333, l. 7.

Appellant’s counsel objected and argued: “This is not relevant at all. These are booking photos. The witnesses have already described the people they saw on the scene. This is doing

nothing but inflame the jury.” The court admitted the photographs over objection. R. 333, l. 9 – 334, l. 3. The booking photographs were State’s Exhibits #55 – 60.

Discussion

Rule 401, SCRE, provides: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 402, SCRE, provides that, “Evidence which is not relevant is not admissible.”

The photographs were not relevant. The State claimed the photographs were relevant based on the description of the shooters by the complainants. However, the complainants did not identify anyone besides Whittington. As defense counsel correctly argued, the jury did not need to see photographs of the defendants—Brown, Ransom, and Appellant were sitting there in front of the jury. The jury also had visuals of the remaining defendants, as McLeod and Graham testified in front of the jury, and photographs of Whittington from social media were before the jury. *See, e.g.,* State’s Exhibit #27. The defendants’ height could not be seen in the booking photographs. Nor could their pants be seen, if they were even arrested the day of this incident and wearing the same pants, which was not established by the record. Ransom was not interrogated until ten days after the murder, and Appellant was not interrogated until six days after the murder. R. 637-638; R. 16, ll. 8-12; R. 42, ll. 11-12. The mugshots did not move the ball forward on the facts of this case—they did not make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would have been without the evidence. Rule 401, SCRE; Rule 402, SCRE.

The error was not harmless. “Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.” *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (citing *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). “[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.” *Pagan*, 369 S.C. at 212, 631 S.E.2d at 267 (internal quotations omitted) (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)). See *State v. Lawson*, 424 S.C. 51, 63, 817 S.E.2d 509, 515 (Ct. App. 2018) (“with limited evidence linking the defendant to the crime, the evidence suggesting Appellant had a prior criminal record was prejudicial because it could have influenced the jury’s verdict”); *Deck v. Missouri*, 544 U.S. 622, 630 (2005) (“Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process”); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (State may not compel an accused to stand trial before a jury while dressed in identifiable prison clothes since the clothing may affect a juror’s judgment and impair the presumption of innocence).

“The introduction of a ‘mug-shot’ of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.” *State v. Traylor*, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004) (citing *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986); *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980); *State v. Denson*, 269 S.C. 407, 237 S.E.2d 761 (1977)). “[T]he rationale for this holding is that such photos are prejudicial because they imply a defendant’s prior bad acts.” *State v. Traylor*, 360 S.C. at 85 n. 12, 600 S.E.2d at 528 n. 12 (citing *State v. Denson*,

supra). “[W]e strongly admonish the state against utilization of such photos except in the rarest of cases[.]” *State v. Traylor*, 360 S.C. at 84, 600 S.E.2d at 528.

See Denson, 269 S.C. at 412–13, 237 S.E.2d at 764 (no error in admission of mugshots where there was a demonstrable need, they did not imply the defendant had a prior record, and the admission did not focus the jury’s attention on the source of the pictures); *Tate*, 288 S.C. at 105–06, 341 S.E.2d at 381 (admission of mugshots required reversal where there was other competent evidence of identity, and where content of photographs would cause jury to infer defendant had a prior record); *State v. Ford*, 334 S.C. 444, 450, 513 S.E.2d 385, 388 (Ct. App. 1999) (photographic lineup containing defendant’s mugshot was admissible where State had demonstrable need to introduce the evidence since the victim had mistakenly given police an incorrect first name of the suspect but picked him out of the lineup, and where the photographs were displayed “in such a way as to hide any indication of their origin”).

The photographs were clearly mugshots. They all had the same background, of chairs bolted to the ground, and were taken from the same angle. More importantly, however, they were introduced through Sandy Lowe, who testified she was the records custodian at the J. Reuben Long Detention Center. Lowe stated her records included “photographs and information about people that were charged with a crime.” She then named the defendants as the people in the mugshots. R. 331, l. 22 – 332, l. 22. Lowe also testified she also had records of the defendants’ aliases. R. 335, ll. 1-10. The photographs suggested Appellant (and each of his codefendants, in a hand of one, hand of all case) had been booked into the jail, and they were introduced in such a way as to draw attention to their origin or implication. As defense counsel correctly argued, the mugshots were inflammatory—they suggested impermissible considerations to the jury. Their admission was error. Although the parties stipulated the defendants did not have rap sheets, the booking

photographs implied the defendants were a bunch of criminals who were well-known by jail personnel, but apparently had just not been convicted yet. The State did not have a demonstrable need to introduce the photographs, the photographs suggested the defendants had been jailed, and the photographs were introduced in such a way as to draw attention to their origin or implication. *State v. Traylor*, 360 S.C. at 84, 600 S.E.2d at 528.

This was a thin case against Appellant, and he argued mere presence. Only four out of six people in the car got out and shot. None of the complainants identified Appellant—they only identified Whittington. The only person who stated Appellant shot was McLeod, who was clearly lying, since McLeod had a noticeable mole under his eye but claimed he never got out of the car, yet one of the complainants testified one of the shooters had a distinctive mole under his eye. McLeod's story was also inconsistent with Britney Milam's testimony regarding the number of shooters. The irrelevant and improper mugshots could have easily affected the verdict. *Pagan*, 369 S.C. at 212, 631 S.E.2d at 267; *State v. Lawson*, 424 S.C. at 63, 817 S.E.2d at 515.

IV.

The court erred by admitting the statement of Appellant’s nontestifying codefendant, Che Ransom, since the hearsay violated Appellant’s Confrontation Clause rights and *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny.

The court impermissibly admitted the confession of Che Ransom, who was unavailable for cross-examination. Ransom’s statement implicated Appellant.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *Id.*; see also *State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

Counsel for the defendants moved in limine that statements made by the non-testifying codefendants were inadmissible in the joint trial pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), *Crawford v. Washington*, 541 U.S. 36 (2004), and as hearsay. Although some of the argument was made by counsel for codefendants, Appellant joined in the objections. R. 56, l. 14 – 60, l. 3; R. 287, l. 8 – 293, l. 3. The defense argued the statements would necessarily implicate the codefendants. The prosecutor stated she would introduce the statements through testimony from law enforcement about the interviews, rather than through written statements. The court ruled that the statements were admissible and stated that the prosecution would not violate *Bruton*. R. 287, l. 17 – 292, l. 23.

When Detective Edwards was called to testify about his interrogation of codefendant Che Ransom, Appellant objected to the admission of the testimony, since Appellant was unable to cross-examine Ransom, who was exercising his right to remain silent at trial. “[H]earsay and also our previous objection pursuant to *Crawford* and *Bruton*, Your Honor, involving the other non-testifying codefendants in this case.” The court permitted the testimony. R. 361, ll. 18-22. Detective Edwards interviewed Ransom ten days after the murder. R. 637; R. 42, ll. 11-12. Detective Edwards testified as follows, regarding his interview of Che Ransom.

Q Now, did he tell you whether or not there was a plan?

A Yes.

Q What did he tell you was the plan?

A He said he knew the victim in this case from Snapchat and **they had**—he had saw that he had weed money, and a plan was formulated to rob him for money and/or weed.

Q So he told you he had a plan?

A Yep.

...

Q All right. Well, you talked about this plan to rob. Was the—who originated this supposed plan to rob Jamie?

A I believe he said Tronahz Whittington.

Q So he told you Tronahz wanted to rob Jamie; correct?

A Yes.

Q Okay. **And that plan originated after they were already in the car**; correct?

A Yes.

...

Q Detective Edwards, Mr. Bouchette, do you remember, asked you about when the plan originated; correct?

A Yes, ma'am.

Q **And he asked you if the plan came about while they were in the car?**

A Yes, ma'am.

Q And is that when the plan came about?

A To the best of my knowledge, I believe so.

Q And you told Mr. Bouchette, correct, that's when the plan came about?

A Yes.

Q And that's what Che Ransom told you?

A Yes. That's what he told me.

Q So the question wasn't if there was a plan; correct?

A Right.

Q Just when the plan originated?

A Yes ma'am.

Q And the answer was, **when they were in the car?**

A Yes, ma'am.

R. 368, ll. 8-17; R. 373, ll. 1-8; R. 374, l. 21 – 375, l. 14 (emphasis added).

Discussion

“The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant ‘to be confronted with the witnesses against him.’ The right of confrontation includes the right to cross-examine witnesses.” *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (citing *Pointer v. Texas*, 380 U.S. 400, 401 (1965)). “In *Bruton v. United States*, the United States Supreme Court held that a defendant’s Confrontation Clause rights are violated when a nontestifying codefendant’s confession that

implicates the defendant is admitted during a joint trial.” *State v. McDonald*, 412 S.C. 133, 139, 771 S.E.2d 840, 843 (2015) (citing *Bruton v. United States*, 391 U.S. 123, 127-28 (1968)). “Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness ‘against’ a defendant if the jury is instructed to consider that testimony only against a codefendant.” *Richardson v. Marsh*, 481 U.S. at 206. However, “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” *Bruton*, 391 U.S. at 135. “Such a context is presented [] where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect[.]” *Id.*, 391 U.S. at 135-36.

However, with a proper limiting instruction, when a nontestifying codefendant’s confession does not incriminate the defendant because it has been redacted to eliminate “not only the defendant’s name, but any reference to his or her existence,” the Confrontation Clause is satisfied. *Richardson v. Marsh*, 481 U.S. at 211. The redacted confession may not refer to the existence of the nonconfessing defendant by inserting a blank space or using the word “deleted” or a similar symbol, because “the obvious deletion may well call the jurors’ attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession’s accusation—once the jurors work out the reference.” *Gray v. Maryland*, 523 U.S. 185, 193 (1998). *Bruton* therefore prohibits “those confessions which facially incriminate through inference.” *State v. Henson*, 407 S.C. 154, 164, 754 S.E.2d 508, 513 (2014). “[E]ven a confession redacted through the use of neutral pronouns

violates the Confrontation Clause if it facially incriminates a nonconfessing codefendant.” *Id.* (citing *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690 (2009)).

In this case, the confession of Che Ransom incriminated Appellant.² Edwards testified Ransom told him the plan came up when “they” saw Decedent had “weed money” on Snapchat. Edwards stated Ransom told him the plan came about while “they” were in the car. It was undisputed Appellant was in the car with the other codefendants. This was a hand of one, hand of all case and a joint trial—Ransom’s statement “they” came up with a plan in the car referred to the other occupants of the car, which included Appellant. The solicitor certainly believed Ransom’s statement implicated Appellant and the other codefendants. She argued it was evidence against them all in closing:

All six of them are in the car armed and behind the victim within 45 minutes . . . **Che says the plan developed. He told Drew Edwards**—you can listen to any of his testimony that you want to—**that the plan came up while they were in the car** . . . Shamontae told you it was a plan. Che Ransom told you it was a plan. And the plan, they told you, was robbery. They told you **they were going to rob him**. That’s what the evidence of **them** stalking behind him says, with four guns in the car.

R. 544, ll. 1-20. The testimony violated Appellant’s Confrontation Clause rights pursuant to *Bruton*. Appellant was not allowed to cross-examine Ransom, and Ransom’s statement incriminated Appellant.

² Even if it had not incriminated Appellant, there still would have been a Confrontation Clause violation since the jury was not instructed to consider Detective Edwards’s testimony about Che Ransom’s statement only against Che Ransom. “Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness ‘against’ a defendant *if* the jury is instructed to consider that testimony only against a codefendant.” *Richardson v. Marsh*, 481 U.S. at 206 (emphasis added). See *Samia v. United States*, 599 U.S. 635, 648 (2023) (introduction of codefendant’s altered confession coupled with a limiting instruction did not violate the Confrontation Clause).

Because of the failure to comply with *Bruton*'s limitations on the admissibility of this type of evidence, the evidence was testimonial hearsay. The Confrontation Clause applies to witnesses—those who bear testimony. See *Crawford v. Washington*, 541 U.S. 36, 52-59 (2004) (Testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine the declarant.); *Davis v. Washington*, 547 U.S. 813, 822 (2006) (“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”). Ransom confessed while being interrogated by Detective Edwards ten days after the murder. His statement was testimonial. *Davis*, 547 U.S. at 822.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. A statement is not hearsay if: “The statement is offered against a party and is (A) the party’s own statement . . .” Rule 801(d)(2), SCRE. “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute.” Rule 802, SCRE. Because Ransom’s confession did not comply with *Bruton* in that it impermissibly implicated Appellant, the statement was not “offered against” only Ransom—it was also “offered against” Appellant within the meaning of the evidentiary rules, but it was not Appellant’s own statement. In addition to violating Appellant’s confrontation rights, the admission of this evidence was hearsay. Rule 802, SCRE.

“Violations of the Confrontation Clause are subject to a harmless error analysis.” *State v. Holder*, 382 S.C. at 285, 676 S.E.2d at 694. Where there is overwhelming evidence of guilt a *Bruton* violation is harmless beyond a reasonable doubt. *State v. McDonald*, 412 S.C. at 143, 771 S.E.2d at 845 (2015) (citing *Schneble v. Florida*, 405 U.S. 427, 430 (1972)). “In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant’s admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.” *Schneble v. Florida*, 405 U.S. at 430. In this case, the evidence was not overwhelming as to Appellant. Only three or four out of six people in the car got out and shot. None of the complainants identified Appellant—they only identified Whittington. The only person who stated Appellant shot was McLeod, who was clearly lying, since McLeod had a noticeable mole under his eye but claimed he never got out of the car, yet one of the complainants testified one of the shooters had a distinctive mole under his eye. All the State established conclusively was that Appellant was in the car. Whether he participated in the planning or execution of the crime was largely dependent on the testimony of McLeod, whose testimony was not true if complainant Britney Milam’s testimony was true. This error was not harmless.

CONCLUSION

Based on the foregoing argument, as to Issues II, III, and IV, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial. As to Issue I, Appellant respectfully requests this Court reverse his sentences and remand for a new sentencing hearing pursuant to *Aiken v. Byars*.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of February, 2025.

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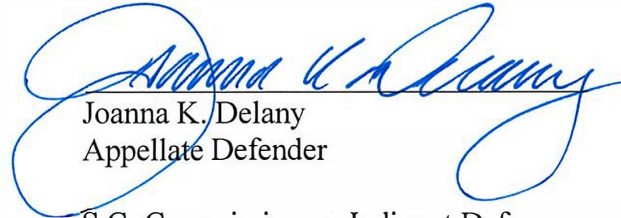
Feb 20 2025

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

This 20th day of February, 2025.



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Feb 20 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

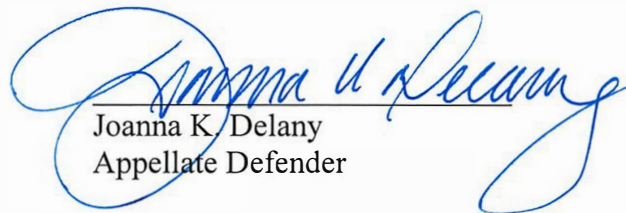
TRAVONTAE JAHWAN MITCHELL,

APPELLANT

APPELLATE CASE NO. 2023-001323

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Tommy Evans, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 20th day of February, 2025.



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