

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable John C. Few, Circuit Court Judge

RECEIVED

JAN 27 2012

S.C. Supreme Court

THE STATE,

Petitioner,

vs.

JONATHAN KARON HILL,

Respondent.

APPENDIX (Part 2 of 2)

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The South Carolina Court of Appeals

The State,

Respondent,

v.

Jonathan K. Hill,

Appellant.

The Honorable John C. Few
Greenville County
Trial Court Case No. 2002-GS-23-01807
2002-GS-23-01808
2002-GS-23-02590
2002-GS-23-02737
2002-GS-23-02738

ORDER

Counsel for Appellant has submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and has petitioned this Court to be relieved as counsel. We deny the petition to be relieved and direct the parties to brief the following issue:

- (1) Did the trial court err in denying Appellant's motion for a new trial after the jury, during deliberations, mistakenly received two statements made by the Appellant that were not admitted into evidence during trial?

Appellant shall file and serve a brief addressing these issues within thirty (30) days of the date of this Order. Respondent shall file and serve its brief within thirty (30) days thereafter.

IT IS SO ORDERED.

Kaye L. Hearn, C.J.

Columbia, South Carolina

December 31, 2009

cc: Deputy Chief Appellate Defender Wanda H. Carter
Jonathan K. Hill # 290606
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
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FILED
12/31/09

APP'X 500

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN K. HILL,

APPELLANT

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial court erred in denying defense counsel's motion for a new trial after the jury mistakenly received and reviewed appellant's two statements which were not admitted into evidence during their deliberations because the same constituted extrinsic evidence that ultimately improperly influenced the jurors and therefore violated appellant's right to due process and fundamental fairness at trial.

STATEMENT OF THE CASE

Appellant Jonathan Hill, aka Jonathan Green, was convicted of resisting arrest, two counts of conspiracy and two counts of armed robbery during the February, 2003 term of the Greenville County General Sessions Court before the Honorable John C. Few, Judge. Appellant received an aggregate thirty-year sentence. Appellant appealed. This brief follows.

ARGUMENT

The trial court erred in denying defense counsel's motion for a new trial after the jury mistakenly received and reviewed appellant's two statements which were not admitted into evidence during their deliberations because the same constituted extrinsic evidence that ultimately improperly influenced the jurors and therefore violated appellant's right to due process and fundamental fairness.

The state alleged that Melvin Warren, Damian Taylor, and appellant robbed Marvin Somarriba at the LaQuinta Inn and Raquar Borei at the Hampton Inn on January 31, 2002, and February 1, 2002, respectfully. Somarriba and Borei testified that two men wearing ski masks and all black clothing (and one carried a gun) robbed them. R. p. 104, line 10 – p. 113, line 18; R. p. 124, line 23 – p. 136, line 7. The men were caught when their car crashed out of control and they fled, but the police who gave chase apprehended them.

Damian Taylor testified that on the night in question, he, Melvin Warren and appellant went to the LaQuinta Inn and that appellant and Warren went in and got the money, and then they went to the Hampton Inn and did the same. Taylor stated he was driving and stayed in the car. R. p. 234, line 6 - p. 248, l. 3. Melvin Warren testified that they were all in agreement to commit the robbery of the hotels and that Taylor stayed in the car while he and appellant went into the hotels. Warren stated that he carried the pistol both times. R. p. 279, line 13 - p. 294, l. 13.

Appellant testified that he had only known Warren and Taylor a month and a half before the events occurred and that on the night in question they asked him to ride out with them. Appellant stated that he agreed to ride out not knowing that the two had

planned to rob motels and that Warren and Taylor went in the hotels while he sat in the car and that he never saw masks or a weapon on that night. R. p. 310, line 9 – p. 325, line 23.

Prior to trial, a Jackson v. Denno hearing was held with respect to appellant's statement (state's exhibit number one) given to Officer Ralph Bobo therein explaining that Warren and Taylor wanted him to ride out with them; and that while riding around they drove to the La Quinta Inn and the Hampton Inn wherein Taylor and Warren went in and robbed the both places. R. p. 61, line 1 – p. 62, line 21. Appellant also gave a statement (state's exhibit number four) to Officer Wesley Smith therein explaining that he was in the car with Taylor and Warren when they robbed the two hotels, but that he (appellant) was just sitting in the back seat. R. p. 77, line 9 – p. 80, line 10. The two statements were marked as exhibits, but the solicitor did not introduce the statements into evidence at trial.

A new trial motion was made by the defense when the trial judge learned after the jury verdict that the jury reviewed both of the defendant's statements. The trial judge explained that the statements "got mixed in with the evidence that had been admitted." Supp. R. p. 1, line 17 – p. 2, line 20. The court denied the motion for a new trial on the ground that this was harmless error, especially since appellant's testimony was almost identical to the content of the statements, and because it appeared that the statements did not contribute to the jury's guilty verdicts. Also, the trial judge noted that he would have admitted the statements into evidence had the state presented the statements for admission into evidence.

As a rule, jurors take an oath to decide the case based “only and solely” on the testimony, evidence and law presented to them. State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (2004). Any information jurors received which has not been received into evidence would be defined as extraneous matter. See State v. Galbreath, supra, citing to State v. Robinson, to the extent that external influences on a jury would involve situations where jurors receive information during deliberations from some an outside source. Also, when an allegation is made that extraneous information may have improperly influenced the jury, the relevant factors to be considered are: 1.) the number of jurors exposed; 2.) the weight of the evidence properly before the jury; 3.) and the likelihood the curative measures were effective in reducing the prejudice. State v. Covington, 343 S.C. 157, 539 S.E.2d 69 (Ct. App. 2000); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998).

In the case at bar, the jurors were exposed to extraneous information in the form of a review of appellant’s statements giving to police to the extent that said statements were not offered into evidence. Undoubtedly, this extraneous evidence was prejudicial and improperly influenced the jury for several reasons. First, all twelve of the jurors were exposed to appellant’s statements. Second, no curative measures were taken to reduce the prejudice because the error was not discovered until after the jury verdicts were handed down in the case. Finally, the weight of the evidence properly before the jury was not overwhelming in favor of guilt. For instance, the state’s case lacked forensic evidence. In addition, there was no confession made by appellant. The state’s case hinged primarily on the testimony of Taylor and Warren. For example, Taylor testified that appellant and Warren went in and committed the robberies, but note that

Taylor gave a statement previously indicating that "he (Taylor) and Warren needed some money and made plans [to commit the robberies] and that we asked [appellant] to come along, but at first we did not tell [appellant] what we were doing . . . [and appellant] just thought we were riding around. R. p. 252, lines 7 - 13. Warren testified that he and appellant committed the robberies, but Warren gave a statement previously indicating that he (Warren) stayed in the car and Taylor and appellant went into the hotels to commit the robberies. R. p. 295, line 18 - p. 297, line 1. Finally, note that appellant testified that he knew nothing of the plan to commit these robberies and was not guilty as charged. R. 310, l. 9 - p. 325, l. 23.

Clearly, there was a sufficiency of the evidence problem with respect to proof that appellant was a conspirator to commit armed robbery and to commit armed robbery. Conspiracy is an agreement between two or more persons to do an unlawful act. State v. Ameker, 735 S.C. 330, 535 S.E.2d 48 (1906); State v. Ferguson, 221 S.C. 306, 70 S.E.2d 355 (1952). Furthermore, the element of the agreement is the crux of the offense of conspiracy as there must be a tacit mutual understanding, resulting in the willful and intentional (mental matter) adoption of a common design by two or more persons to do an unlawful act either as a means or an unlawful act either as a means or an end. State v. Fleming, 243 S.C. 265, 133 S.E.2d 800 (1963); State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997). Here, there was no proof beyond a reasonable doubt that appellant conspired to and committed armed robberies. The state did not prove beyond a doubt every element of the offenses charged. Jackson v. Virginia, 443 U.S. 307 (1979).

The extraneous outside influences in this case prejudiced appellant's case because there was no overwhelming proof of conspiracy and armed robbery, which meant that the

statements, although identical to appellant's testimony that he did not conspire to rob nor rob the victims, somehow emphasized twice that appellant was in the presence of law breakers on that night and twice rehearsed the activities of the law breakers. Undoubtedly, the repeated reminder to the jury that this event actually took place and the details therein occurred bolstered the state's case such that questions were surely raised regarding appellant's association the others and his role in the activities. The review of the statements subconsciously in the jurors' minds strengthened the state's case even though the evidence against appellant was insufficient.

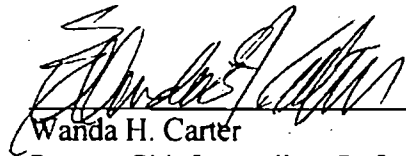
The Sixth and Fourteenth Amendments guaranteed a defendant a fair trial by a panel of impartial jurors that must be free from all extraneous or improper influences. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998); Smith v. State, 375 S.C. 507 654 S.E.2d 523 (2007); State v. Cameron, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 1993). Appellant's trial was not free from extraneous and improper influences. Also, the error was not harmless because it cannot be said that the extraneous information did not contribute to the verdicts and it cannot be said that the error was unimportant in relation to everything else the jury considered. Lowery v. State, 376 S.C. 499, 657 S.E.2d 760 (2008).

The trial court erred in denying appellant's motion for a new trial after the jury mistakenly received and reviewed appellant's two statements which were not admitted into evidence at trial in violation of his right to due process and a trial by an impartial jury guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and article 1 §14 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing argument, appellant's conviction should be reversed and his case remanded to the Greenville County General Sessions Court for a new trial.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

February 1, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN K. HILL,

APPELLANT

CERTIFICATE OF SERVICE

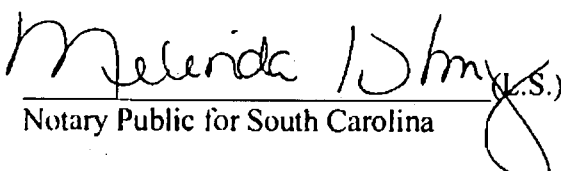
The undersigned attorney hereby certifies that a true copy of Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201; and the Brief of Appellant have been served upon Jonathan K. Hill, #290606 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of February 1, 2009.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2010.



Notary Public for South Carolina

My Commission Expires: October 30, 2018.

APP'X 512

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Honorable John C. Few, Circuit Court Judge

THE STATE,

Respondent,

vs.

JONATHAN KARON HILL,

Appellant.

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse his discretion in denying Appellant's motion for a new trial based on the jury's mistaken reception of Appellant's statements during deliberations even though the statements had not been introduced at trial because the evidence could not have contributed to the verdict and any error in the jury's reception of the evidence was harmless.

STATEMENT OF THE CASE

Appellant Jonathan Karon Hill was arrested and indicted in Greenville County for two counts of armed robbery, two counts of conspiracy, and one count of resisting arrest. A jury trial was commenced in the Greenville County court of general sessions on February 3, 2003, with the Honorable John C. Few, circuit court judge, presiding. At the conclusion of the trial, Appellant was convicted as charged. On February 5, 2003, Appellant was sentenced to concurrent terms of imprisonment of thirty (30) years for each count of armed robbery, five (5) years for each count of conspiracy, and one (1) year for the single count of resisting arrest.

Following sentencing, Appellant filed a motion for a new trial. On February 20, 2003, the trial judge conducted a hearing on Appellant's new trial motion and took the matter under advisement. On June 11, 2003, the trial judge held another hearing and orally denied the motion for a new trial. However, the trial judge did not file a written order. Appellant did not appeal his convictions.

On October 29, 2004, Appellant filed an application for post-conviction relief based on trial counsel's failure to file a notice of appeal. On April 7, 2005, Judge Larry R. Patterson, circuit court judge, conducted a post-conviction relief hearing. Appellant's application was denied and dismissed without prejudice based on Appellant's pending motion for a new trial for which a written order had not yet been filed.

In an order dated February 9, 2007, the trial judge denied Appellant's motion for a new trial. Appellant then filed a timely notice of appeal. Subsequently, an Anders brief, a petition to be relieved as counsel, and a pro se brief were submitted to the Court. On December 31, 2009, the Court of Appeals denied the petition to be relieved as counsel

and directed the parties to brief the following issue from trial: "Did the trial court err in denying Appellant's motion for a new trial after the jury, during deliberations, mistakenly received two statements made by the Appellant that were not admitted into evidence during trial?". This appeal follows.

STATEMENT OF FACTS

On the evening of January 31, 2002, Marvin Somarriba, a front desk clerk, was working at the La Quinta Inn in Greenville. (R. p. 105). Around 7:50 p.m., Somarriba heard two men run into the hotel and looked up to see one of the men aiming a silver gun at him. (R. pp. 107-108). The robbers were both wearing dark clothes and ski masks. (R. p. 109). The armed man pushed the gun into Somarriba's head and demanded money in a threatening tone. (R. p. 108; p. 110). One of the men came around the counter and took the money from the cash drawer along with Somarriba's wallet. (R. p. 108; pp. 110-111). In total, the robbers absconded with roughly \$120.00 in cash from the drawer plus \$30.00 in cash and credit cards from Somarriba's wallet. (R. pp. 110-111; p. 112).

Terrified and fearing for his life, Somarriba called his manager and the police after the robbers left. (R. p. 113). Somarriba also quickly cancelled his credit cards and later discovered someone attempted to use one of the cards on the same night as the robbery. (R. p. 119). Officers were dispatched to the hotel. (R. pp. 121-122). However, they were unable to get a facial description of the suspects or a description of the suspects' vehicle. (R. p. 124).

Around midnight in the early morning hours of February 1, 2002, Ragnar Borei, a night auditor and maintenance man, was working at the Hampton Inn in Simpsonville. (R. p. 126; p. 128). Borei was returning to the back office from the lobby when he heard a noise. (R. pp. 128-129). He turned around, and a silver gun was pressed against his nose. (R. p. 129). Two men wearing dark-colored clothing and ski masks demanded money. (R. pp. 130-131). Borei opened the cash drawer and accidentally dropped it onto the floor. (R. pp. 133-134). One of the men collected all the bills while the other forced

Borei to lay in the floor and hand over his wallet, which contained his credit cards, money, and identification. (R. p. 134). The robbers took approximately \$178.00 in cash from the drawers and \$15.00 from Borei. (R. p. 136).

Borei waited until the robbers left and then contacted law enforcement. (R. p. 135). Officers were quickly dispatched to the hotel. (R. pp. 144-145). Although shaken and upset, Borei was able to provide officers with a thorough description of the firearm and the robbery. (R. pp. 146-147).

Officer William Kennedy of the Mauldin Police Department was on patrol when he received a call about the hotel robbery around 12:30 a.m. (R. pp. 148-149; p. 150). Officer Kennedy headed in the direction of the Hampton Inn and observed a white car speeding away from Simpsonville with its high-beam lights on. (R. p. 151). He turned his patrol car around and attempted to stop the vehicle. (R. pp. 151-152). The white car turned into a grocery store parking lot and slowed down. (R. pp. 152-153). Officer Kennedy observed the three occupants of the vehicle rummaging around inside the car, including a person in the back seat wearing a red shirt. (R. pp. 153-155). However, the car never completely stopped. (R. p. 155).

Suddenly, the white car accelerated rapidly and exited the parking lot, nearly striking another police vehicle driven by Officer Brian Lewis. (R. pp. 155-156). The officers pursued the white car with their sirens and blue lights activated. (R. p. 156). The high-speed chase reached speeds of up to ninety miles per hour before the white car spun off the road and crashed while attempting to turn at a high rate of speed. (R. pp. 156-157). Immediately after the crash, all three occupants jumped out of the car and fled into nearby woods. (R. p. 158). The officers pursued on foot, commanding the suspects to

stop. (R. p. 158; pp. 174-175). However, the three men continued fleeing and were able to escape into the woods. (R. p. 175).

Within minutes, numerous officers were on the scene and a tight perimeter was established around the woods. (R. p. 159). Officers also secured the suspects' vehicle. (R. pp. 160-161). During a subsequent search of the vehicle, officers found a black leather coat, a gray fleece sweatshirt, a football jersey, and a black ski mask in the rear seat. (R. p. 269).

Officer Brian Lewis, along with Deputy Mike Atwell of the Greenville County Sheriff's Office, continued the pursuit through the woods and apprehended the driver, Damian Taylor. (R. p. 181; p. 232). A short time later, Deputy Harold Lee Harris of the Greenville County Sheriff's Office captured another suspect, Melvin Warren, as he attempted to walk out of the woods. (R. p. 185; p. 191). Deputy Harris recovered a black ski mask, money, black stocking headwear, and other items from Warren's pockets. (R. pp. 191-192). Additionally, Deputy Warren located Borei's wallet in Warren's pockets. (R. p. 192).

Deputy Robert Smith, a K-9 handler with the Greenville County Sheriff's Office, responded to the scene with his police dog, Armor. (R. pp. 203-204; p. 205; p. 210). Armor picked up the scent from the suspects' vehicle and tracked the scent into the woods. (R. p. 218). While following the trail, Deputy Smith discovered clothing abandoned by the suspects, including a bloody shirt, a tennis shoe, and a baseball cap. (R. pp. 218-220). Nearly two hours into the hunt, Armor began showing strong signs of an alert. (R. p. 223). The police dog led Deputy Smith to a creek bed and started barking. (R. p. 223). Deputy Smith observed an individual in a red shirt curled up and hiding in

the creek bed. (R. p. 224). The individual, Appellant Jonathan Karon Hill, surrendered and was arrested. (R. p. 225). During a pat-down search, officers discovered a large quantity of bills in Appellant's pockets, totaling \$143.00 in cash. (R. p. 227; p. 229; p. 279).

At trial, Appellant's accomplices, Taylor and Warren, testified for the prosecution. Taylor testified he was involved in the hotel robberies with Warren and Appellant. (R. p. 238). The three left their homes with the intention of robbing a drug dealer. (R. p. 239). Taylor indicated he formulated the plan with Warren and later discussed it with Appellant, and all three were in agreement. (R. p. 239). Unable to find a drug dealer, the three headed to the La Quinta Inn. (R. p. 241). Taylor testified they went to the hotel to rob it and everyone was aware of the plan. (R. p. 241). Taylor indicated everyone understood what was going on, but they had not discussed it. (R. p. 241). However, Taylor also testified they discussed with Appellant the planned robberies, but they did so only after picking Appellant up that night (R. p. 251; p. 252). Taylor indicated he drove them to the La Quinta Inn. (R. p. 241). Warren and Appellant donned ski masks, went inside for three or four minutes, and returned to the car. (R. p. 242). The group then drove to the mall, and Warren unsuccessfully attempted to use the stolen credit cards. (R. pp. 243-244). Taylor then drove the group to the Hampton Inn, Warren and Appellant again went in, and then they all headed away before an officer began following their car. (R. p. 245; p. 246). Taylor testified they tried to flee and crashed. (R. pp. 245-246). Everyone then ran into the woods, and he was arrested. (R. pp. 246-247).

Warren testified he participated in the robberies of the La Quinta Inn and the Hampton Inn with Taylor and Appellant. (R. p. 282). The three got together and agreed to rob a hotel. (R. p. 283). Warren testified he and Appellant went into the La Quinta Inn while Taylor remained in the car. (R. p. 284). Warren scouted ahead, and then he and Appellant went inside wearing ski masks, black coats, and gloves. (R. p. 285; p. 286). Warren carried the gun. (R. p. 287). Warren indicated he aimed the gun at the clerk while Appellant took the money. (R. p. 287). They also took the clerk's credit cards and then headed to the mall. (R. p. 288). After the mall, Warren testified they went to the Hampton Inn. (R. p. 289). He indicated they were all in agreement they were headed there to rob the hotel. (R. p. 289). Again, Taylor stayed in the car while Warren and Appellant went inside wearing ski masks, coats, and gloves. (R. pp. 289-290). Warren again pointed the gun at the clerk while Appellant collected the money. (R. p. 291). Warren then took the clerk's wallet. (R. p. 291). They left and headed to Greenville, with Warren up front and Appellant in the rear seat. (R. p. 292). Warren testified an officer pursued them, there was a chase, they crashed, and everyone ran away. (R. p. 292). Warren identified the coat recovered from the vehicle as Appellant's coat. (R. pp. 293-294).

Appellant testified in his own defense. Appellant testified he knew Taylor and Warren from the neighborhood. (R. p. 313). On January 31, Taylor and Warren left and then returned, asking him if he wanted to go ride around. (R. pp. 314-315). Appellant claimed he never heard any discussions about robbing hotels. (R. p. 315). Appellant indicated they left the neighborhood and then returned to get marijuana because they were all smoking marijuana and drinking. (R. p. 316). Appellant testified they then drove to a

hotel and saw a group of people outside drinking. (R. p. 317). Warren got out, talked to the group, got money for a beer, and then went inside. (R. pp. 317-318). Warren came back outside, waved Taylor inside, and both men returned five minutes later with a credit card. (R. p. 318). Appellant indicated he remained in the car the entire time. (R. p. 319). The group then went to the mall. (R. p. 318). Appellant testified Warren unsuccessfully attempted to use the credit card to buy clothes and jewelry, but Appellant told them he wanted nothing to do with any credit cards. (R. p. 318). Appellant told the group he wanted to go home, and, after stopping at a gas station, they drove somewhere and parked. (R. p. 319; p. 320). Appellant testified Taylor and Warren left the car, came back after five minutes, and drove off. (R. p. 321). Appellant indicated he again remained in the car the entire time, never saw a weapon, and never saw any ski masks. (R. p. 322). Appellant testified the police then attempted to stop the car, a chase ensued, and Taylor crashed the vehicle. (R. pp. 323-324). Appellant then indicated they all ran away. (R. p. 324). Appellant testified he did not personally try to get away and just waited in the woods until law enforcement came and got him. (R. p. 325). Appellant testified he ran because it was his first instinct and admitted to hiding from the police. (R. p. 325; p. 328). He also admitted to knowing Taylor and Warren had committed prior robberies, but he denied agreeing to participate. (R. p. 327). Appellant also discussed his statement to police in which he indicated he was aware of the gun, but he denied knowing they had it at the time. (R. pp. 333-334).

Before deliberations, counsel reviewed the exhibits and determined which items should be sent back to the jury. (R. pp. 386-387). Deliberations began, proceeded into

the evening, and were recessed until the following morning. (R. p. 393). After deliberating the next day, the jury found Appellant guilty of all charges. (R. p. 398).

Following the verdict, the trial judge discovered Appellant's written statements, which had not been entered into evidence at trial, were mistakenly sent to the jury room on the second day of deliberations. (Supp. R. pp. 1-2). Appellant moved for a new trial after discovering the error. (Supp. R. p. 3).

In Appellant's first statement, which was introduced into evidence only during a Jackson v. Denno hearing, Appellant told officers he knew both Taylor and Warren and was aware they had committed robberies in the past. (R. p. 61). He also knew Warren had a pistol. (R. p. 61). The two asked him if he wanted to go for a ride, and the group drank and used marijuana. (R. p. 61). Appellant stated they then went to the La Quinta Inn, Warren bought a beer from some people, and Warren and Taylor went inside and robbed the hotel. (R. p. 61). They all then left and went to the mall. (R. pp. 61-62). At the mall, Warren unsuccessfully tried to use the stolen credit card. (R. p. 62). Appellant then thought they were going home. (R. p. 62). Instead, they went to a gas station and then to the Hampton Inn. (R. p. 62). Warren and Taylor went in, robbed the hotel, and they left. (R. p. 62). Appellant indicated a police officer tried to stop their car, they fled and ran off the road, and then he was later arrested. (R. p. 62). Appellant concluded by stating: "I am sorry that these places were robbed." (R. p. 62).

In Appellant's second statement, which again was introduced only during a Jackson v. Denno hearing, Appellant began by stating: "I have decided that I wanted to clear all this up and get everything in the open." (R. p. 77). He told law enforcement he knew Taylor and Warren from his neighborhood, and they were involved in robbing and

stealing. (R. p. 78). Lately, the two had been robbing hotels. (R. p. 78). They all went to La Quinta Inn, and Appellant was in the back seat. (R. p. 78). Appellant stated Warren talked to people in the parking lot, bought a beer from them, went inside, let Taylor inside, and then they both returned to the car within five minutes. (R. pp. 78-79). Afterwards, the group went to the mall, and Warren unsuccessfully tried to buy clothing and jewelry with a credit card. (R. p. 79). Appellant told them they were being greedy. (R. p. 79). The group then left the mall and went to a gas station. (R. p. 79). Appellant indicated he told Warren and Taylor he wanted to go home, but they went to the Hampton Inn instead. (R. p. 79). Warren and Taylor robbed the hotel, and the three left. (R. p. 79). Appellant indicated the police then caught and arrested them after a chase. (R. p. 79). Appellant further stated he had heard Warren and Taylor previously talk about robbing another hotel. (R. p. 79).

Both statements contained language confirming Appellant spoke to law enforcement voluntarily after being informed of and waiving his rights without threats or promises. (R. pp. 60-61; pp. 76-77). Appellant signed each of the written statements. (R. p. 62; p. 80). At the conclusion of the Jackson v. Denno hearing, the trial judge found both written statements to have been voluntarily made after Appellant waived his rights, thus making the statements admissible during trial. (R. p. 83; Supp. R. pp. 3-4).

Shortly after the trial, the trial judge conducted a hearing on Appellant's motion for a new trial. During the February hearing, Appellant asserted prejudice must be presumed from the erroneous submission of the statements to the jury, and there was no way the jurors could have been questioned because a verdict had already been reached before the discovery of the error. (Sec. Supp. R. pp. 4-5). Appellant argued the error

resulted in a denial of his constitutional rights, including the right to confrontation, the right to cross-examination, and the right to call witnesses about the two written statements. (Sec. Supp. R. p. 5). Furthermore, Appellant argued he might have altered his trial strategy and might not have testified at trial if the statements had been admitted. (Sec. Supp. R. p. 5). He noted it was impossible to determine whether the statements influenced the jurors without questioning them. (Sec. Supp. R. pp. 5-6). Additionally, he noted his statements about being sorry the hotels were robbed and his acknowledgment he wanted to get everything in the open suggested a guilty conscience. (Sec. Supp. R. p. 6). The Solicitor argued the burden of establishing prejudice was on Appellant, the evidence of guilt was overwhelming, the statements were not damaging, and they corroborated Appellant's trial testimony. (Sec. Supp. R. pp. 10-11). The trial judge considered the arguments and took the motion under advisement. (Sec. Supp. R. p. 15).

During the June hearing on the motion for a new trial, the trial judge found the statements did not contribute to the verdict, would have properly been admitted if introduced at trial, and essentially tracked Appellant's testimony from trial. (Supp. R. p. 4). The trial judge offered Appellant an opportunity to show how his testimony would have been altered by the admission of the statements and where prejudice could have arisen, but Appellant did not proffer any evidence or testimony. (Supp. R. p. 5). Finding harmless error, the trial judge denied Appellant's motion for a new trial. (Supp. R. p. 6).

ARGUMENT

The trial judge did not abuse his discretion in denying Appellant's motion for a new trial based on the jury's mistaken reception of Appellant's statements during deliberations even though the statements had not been introduced at trial because the evidence could not have contributed to the verdict and any error in the jury's reception of the evidence was harmless.

Appellant contends the trial judge erred in denying Appellant's motion for a new trial based on the jury's mistaken reception of his unadmitted statements during deliberations. While acknowledging the statements were nearly identical to his trial testimony, Appellant maintains the jury's review of these statements subconsciously strengthened the case against Appellant in the jurors' minds and unduly emphasized the facts from Appellant's testimony, namely that Appellant was present with both Taylor and Warren on the night of the robbery. The trial judge properly denied Appellant's motion for a new trial because the statements were essentially cumulative to testimony presented at trial and could not have contributed to the verdict. Appellant failed to establish how the jury's reception of the statements resulted in prejudice, and any error was harmless. The trial judge did not abuse his discretion. The trial judge's ruling and Appellant's convictions should be affirmed.

A. Lack of Prejudice from the Jury's Mistaken Reception of the Statements

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 107, 111 (2000).

The decision to grant or deny a motion for a new trial is left to the sound discretion of the trial judge, and that decision will not be reversed on appeal absent an

abuse of discretion. State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); see State v. Jamison, 221 S.C. 312, 319, 70 S.E.2d 342, 344 (1952) (“The grant or refusal of a motion for a new trial is within the discretion of the Trial Judge and unless he commits an abuse of discretion, this Court is powerless to interfere.”). “[I]f competent evidence supports the jury’s verdict, the trial judge may not substitute his own judgment for that of the jury and overturn that verdict.” State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002). A trial judge’s denial of a new trial motion based on allegations of jury misconduct is reviewed for an abuse of discretion. State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005).

“The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors.” State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000). The constitutional standard of fairness mandates trials by an impartial, indifferent panel of jurors. State v. Council, 335 S.C. 1, 10, 515 S.E.2d 508, 512 (1999). In order to protect a defendant’s constitutional rights, a jury must render a verdict free from any outside influences. Harris, 340 S.C. at 63, 530 S.E.2d at 627.

Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each particular case. State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 266 (Ct. App. 1999). When a defendant moves for a new trial based on alleged impropriety involving the jury, the defendant must establish both jury misconduct and prejudice. State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct. App. 2000). When considering an allegation of jury misconduct, the trial judge must initially determine if misconduct occurred. Id. If misconduct is found, the trial judge must

determine if it affected the verdict, thus warranting a new trial. Id. at 164, 539 S.E.2d at 70. “Unless the misconduct affects the jury’s impartiality, it is not such misconduct as will affect the verdict.” Zeigler, 364 S.C. at 108, 610 S.E.2d at 866.

In criminal prosecutions, the conduct of jurors must be free from all extraneous, improper, or outside influence. State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998). External influence on jurors involves situations where the jury receives information from an outside source during deliberations, and consideration of this outside information may constitute jury misconduct. Zeigler, 364 S.C. at 110, 610 S.E.2d at 867.

In assessing whether outside influences potentially affected a jury, relevant factors to consider include: (1) the number of jurors exposed; (2) the weight of the evidence properly before the jury; and (3) the likelihood that curative measures were effective in reducing any prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 627; see also State v. Lyles, 94 N.C. App. 240, 249, 380 S.E.2d 390, 396 (N.C. Ct. App. 1989) (“In assessing the impact of extraneous evidence on the mind of the hypothetical ‘average juror,’ the court should consider: (1) the nature of the extrinsic information and the circumstances under which it was brought to the jury’s attention; (2) the nature of the State’s case; (3) the defense presented at trial; and (4) the connection between the extraneous information and a material issue in the case.”). Whether the introduction of extraneous matter resulted in prejudice must be left to the broad discretion of the trial court and is a matter for determination by the trial judge. Harris, 340 S.C. at 63, 530 S.E.2d at 627; see State v. Galbreath, 359 S.C. 398, 403, 597 S.E.2d 845, 847 (Ct. App. 2004) (“Generally, the determination of whether extraneous information received by a juror during the course of the trial is prejudicial is a matter for determination by the trial judge, and we see no

reason to upset the judge's findings that there was no prejudice."); State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989) (finding a trial judge has broad discretion when ruling on prejudice resulting from the jury reading extraneous documents).

In State v. Rogers, 96 S.C. 350, 80 S.E. 620 (1914), the South Carolina Supreme Court considered the effect of evidence mistakenly submitted to the jury during deliberations. Rogers was tried and convicted of malicious injury to property and other charges. Id. at 351, 80 S.E. at 620. During the trial, the prosecution attempted to introduce an affidavit from Roger's wife indicating Roger's father attempted to bribe her into not testifying against Rogers. Id. at 353, 80 S.E. at 621. The trial judge found the affidavit to be inadmissible, but it was inadvertently submitted to the jury. Id. at 352, 80 S.E. at 620. The mistake was not discovered until after the jury convicted Rogers. Id. The Supreme Court reversed and remanded the case for a new trial, finding the jury received no instruction to disregard the inadmissible affidavit and resulting prejudice could not be ruled out in light of the other evidence presented at trial. Id. at 353, 80 S.E. at 621.

In State v. Wasson, the trial judge overheard the jury discussing a newspaper article on Wasson's case after returning a guilty verdict. Id., 299 S.C. at 509, 386 S.E.2d at 256. The newspaper article, published on the second day of the trial, summarized trial testimony and discussed other allegations of crimes committed by Wasson, including his suspected involvement in a theft ring and in other cases from around the country. Id. at 509-510, 386 S.E.2d at 256. Wasson moved for a mistrial. Id. at 510, 386 S.E.2d at 256. The trial judge denied the motion, finding the article, although read by several jurors before reaching a decision, did not contribute to the verdict. Id. at 511, 386 S.E.2d at

257. Additionally, the entire panel did not discuss the article until after reaching a verdict. Id. The Supreme Court affirmed, finding the trial judge did not abuse his discretion. Id.

In State v. Kelly, Appellant moved for a mistrial after the trial judge discovered the presence of a religious pamphlet advocating capital punishment in the jury room during the penalty phase of a capital trial. Id., 331 S.C. at 139, 502 S.E.2d at 103. The trial judge denied the motion, finding the pamphlet could not have impacted the guilt phase, the jury's impartiality, or the verdict. Id. at 141, 502 S.E.2d at 104. The Supreme Court affirmed, finding the deliberations were not tainted and the trial judge did not abuse his discretion. Id. at 144, 502 S.E.2d at 105.

In State v. Harris, Harris was convicted of murder instead of the lesser-included offense of manslaughter. Id., 340 S.C. at 61, 530 S.E.2d at 627. After sentencing, a juror indicated she read the definitions of the offenses in Black's Law Dictionary the previous night to clarify their meaning. Id. at 61, 530 S.E.2d at 627. The trial denied Harris' motion for a mistrial based on a lack of prejudice. Id. The trial judge noted the definitions read by the juror were nearly identical to the charged instructions, meaning reading the definitions merely could have helped reaffirm what was heard at trial. Id. The Supreme Court affirmed, finding the trial judge did not abuse his discretion, no prejudice resulted from the juror's misconduct, and the misconduct could not have affected the verdict. Id. at 64-65, 530 S.E.2d at 628.

Although not controlling, the Fourth Circuit Court of Appeals also addressed the issue of extraneous influence on the jury in Leland v. United States, 153 F.2d 438 (4th Cir. 1946). Leland was convicted of conspiracy related to the manufacture of distilled

spirits. Id. at 438. At trial, the prosecution proffered a newspaper article detailing the seizure and destruction of a whiskey still by law enforcement officers, including Leland who was a county policeman. Id. at 439. The trial judge ruled the article inadmissible. Id. In contradiction to the newspaper account, witnesses testified Leland took the whiskey still home instead of destroying it as suggested in the article. Id. at 440. In response, other testimony was admitted without objection, detailing Leland's statements to federal agents he had destroyed the whiskey still. Id. The newspaper article, although never admitted, was inadvertently given to the jury along with other properly admitted exhibits. Id. at 439. Leland moved for a new trial, but the trial judge denied the motion, finding the information contained in the article was testified to in substance by the defendant himself. Id. at 440. The Fourth Circuit Court of Appeals affirmed, noting the trial judge did not abuse his discretion because "the contents of the clipping contained nothing not testified to by others[.]" Id. The cumulative nature of the evidence to other properly admitted testimony, coupled with no evidence to suggest the jury considered the evidence in reaching its verdict, resulted in no prejudice to Leland. Id.

In the case sub judice, the trial judge properly exercised his discretion in determining Appellant was not prejudiced by the inadvertent submission of his unadmitted statements to the jury during deliberations. Appellant concedes on appeal the statements are consistent with his trial testimony. Appellant argues the statements emphasized his testimony he was in the presence of law breakers on the night of the robberies, a fact not in dispute. Like in Leland, the statements did not introduce any new evidence to the jury. Appellant's statements, much like the newspaper article in Leland, were cumulative to Appellant's testimony at trial. Just like in Harris, the statements

merely reaffirmed Appellant's version of the events on the night of the robberies. If anything, the statements stood to enhance Appellant's credibility to the jury as they showed he consistently repeated his version of the events.

Appellant also contends on appeal the statements could have potentially strengthened the case against him. The statements are virtually identical to Appellant's trial testimony, in which he denied any involvement in the robberies. In both the statements to authorities and at trial, Appellant indicated he was merely riding along with the actual perpetrators and never participated in the crimes in any way. Even after the trial court ruled the statements were admissible, the State decided not to introduce Appellant's statements into evidence most likely because they did not strengthen the case against Appellant. The statements completely contradict the version of events offered by the State through the testimony of Appellant's accomplices during trial. When viewing the statements and Appellant's testimony, the erroneous submission of the statements to the jury could not have resulted in any prejudice to Appellant, particularly in light of the fact the statements were ruled admissible and were simply not offered into evidence. See Gilliam v. Foster, 75 F.3d 881, 900 (4th Cir. 1996) ("Moreover, a jury's exposure to evidence that is admissible, but not admitted, does not require reversal of a conviction." (citing State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972))).

Furthermore, during the first hearing on the motion for a new trial, Appellant asserted certain language in his written statements suggested a guilty conscience. While Appellant expressed in his first statement he was sorry the hotels were robbed, he does not indicate he is sorry for robbing the hotels. He merely stated he felt badly the crimes occurred. Additionally, it is important to note this comment was preceded by a lengthy

denial of any participation or assistance in the robberies, which was consistent with his trial testimony. In his second written statement, Appellant stated he wished to get all the facts in the open. Following this remark, Appellant again denied any role in the robberies and offered testimony consistent with his trial testimony. Contrary to Appellant's assertions during the February motion hearing, these statements do not suggest a guilty conscience, but instead, suggest Appellant was sensitive to the impact of the crimes, which he indicated were committed by others, and was cooperative with law enforcement. These comments were clearly not prejudicial.

The trial judge properly considered the nature of the documents inadvertently sent to the jury room during deliberations in conjunction with the other evidence properly presented at trial, including Appellant's consistent testimony. After considering the totality of the circumstances, the trial judge properly exercised his discretion in denying the motion for a new trial. The statements could not have altered the verdict rendered in the case and resulted in no prejudice to Appellant. Unlike in Rogers, the other evidence against Appellant was strong and the statements did not introduce any new evidence into the trial tending to affect the jurors' impartiality. The jury's decision hinged on a determination of which testimony was more credible. Even though the statements were not properly in evidence, they only stood to strengthen and lend credibility to Appellant's trial testimony because the statements were nearly identical to this testimony. As the statements were cumulative, could not have altered the verdict, were not prejudicial, and could not have impacted the impartiality of the jury, Appellant was not entitled to a new trial. See State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996) ("Error without prejudice does not warrant reversal."); see also Gilliam, 75 F.3d at 899

("[B]ecause these photographs could have been admitted into evidence, could not have caused the jury to have been confused or misled, and could not have biased or inflamed the jury, there is no basis upon which to conclude that the jury could not have reached an impartial verdict.").

Determinations of the prejudicial effect of extraneous material during deliberations are left to the discretion of the trial judge, who was in the best position to weigh the evidence and testimony from trial along with the effect it may or may not have had on the jury. This decision should only be reversed when there is a clear indication of an abuse of discretion. In the present case, the trial judge did not abuse his discretion.

Furthermore, after considering the circumstances of the case, the trial judge presented Appellant with an opportunity to show how the admission of the statements would have altered his testimony at trial or how he was prejudiced. (Supp. R. p. 5). During the February hearing on the motion for a new trial, which was roughly two weeks after the trial, Appellant could have presented affidavits from jurors or requested the trial judge to subpoena and reassemble the jurors to determine any possible effect of the evidence. See State v. Aldret, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999) (instructing when there is jury misconduct discovered after the verdict, the trial court can consider juror affidavits and can reassemble the jury upon request to ascertain the nature and extent of the error). Instead, Appellant relied on a presumption of prejudice without showing how the trial would be affected. See Id. at 313-314, 509 S.E.2d at 814 ("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)). He merely speculated his strategy **might** have been different without proffering any testimony conclusively showing how. (Sec. Supp. R. p. 5).

Appellant did not make any showing of how he was prejudiced or how the trial would have proceeded in a different fashion, essentially waiving his prejudice argument. See, e.g. State v. Jackson, 364 S.C. 329, 335, 613 S.E.2d 374, 377 (2005) (finding a defendant waives any argument on the failure to admit evidence when he decides not to introduce the evidence at trial). Appellant had the burden of establishing prejudice resulting from the inadvertent submission of the statements to the jury, and he has failed to meet that burden. See, e.g. Gilliam, 75 F.3d at 896 (“[A]ll relevant evidence by definition is prejudicial to some extent in that it is intended to support the proponent’s case and prejudice the opponent’s. But, the ‘prejudice’ engendered simply by the jury’s viewing of relevant evidence, when that evidence could not improperly bias the jury or adversely affect its deliberations, generally could not support a finding of manifest necessity for a mistrial.”). The trial judge properly exercised his discretion after considering all the relevant circumstances of the trial. No abuse of discretion occurred. The trial judge’s denial of Appellant’s motion for a new trial should be affirmed.

B. Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C.

41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). An admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). When overwhelming evidence of guilt has been established, any trial error may be harmless. State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988).

In the present case, any error in the mistaken submission of Appellant's statements to the jury was harmless in light of the overwhelming evidence of Appellant's guilt. While Appellant denied any involvement in the robberies, substantial evidence established his guilt. Primarily, both of Appellant's accomplices testified he was actively involved in the robberies. Both Taylor and Warren indicated Appellant went into the hotels and assisted Warren in the robberies while Taylor remained in the car and subsequently drove them away.

Furthermore, the jury could clearly infer Appellant's guilt from evidence other than the accomplices' testimony. An officer attempted to stop the vehicle Appellant was riding in as it sped away from the scene of the crime. Appellant was seen in the rear seat of the vehicle during the attempted traffic stop and subsequent high-speed chase. After

Appellant and the others abandoned the car and fled into the woods, officers discovered the clothing worn during the robberies in the rear seat of the vehicle where Appellant had been sitting. Officers found a ski mask worn during the robberies along with a black coat linked to Appellant. Additionally, Appellant fled from police and hid for nearly two hours before he was located hiding in a creek. Appellant's flight from police can be considered as evidence of his guilt. See State v. Odems, 385 S.C. 399, 404, 684 S.E.2d 573, 575 (Ct. App. 2009) (finding flight from law enforcement is relevant evidence to be considered by the jury). Furthermore, a significant quantity of cash was located in Appellant's pockets after he was apprehended.

When viewing the evidence in this case, Appellant's guilt was conclusively proven through the testimony of his accomplices, the evidence and clothing recovered from his rear seat in the car, the amount of cash found in his pockets, and his flight from police. This evidence clearly established Appellant's guilt and rendered any error in the mistaken submission of his written statements to the jury harmless. Furthermore, appellant's statements were merely cumulative to other properly admitted testimony. See State v. Griffin, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670 (2000) ("There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted."). The submission of these statements could not have altered the verdict in light of the other evidence presented at trial. See State v. Knight, 258 S.C. 452, 454, 189 S.E.2d 1, 2 (1972) ("[A] conviction will not be reversed for non-prejudicial error in the admission of evidence."). Based on the cumulative nature of the erroneously submitted statements and the other competent evidence properly admitted, the result of Appellant's trial would be the same with or without the error. The evidence of Appellant's guilt was

overwhelming. Any error in the mistaken submission of the statements was harmless.

Appellant's convictions should be affirmed.¹

¹On appeal, Appellant also appears to be challenging the sufficiency of the evidence in regards to the conspiracy convictions. This issue is outside the scope of the issue identified by the Court. Additionally, the issue is not preserved for appellate review. See State v. Rice, 375 S.C. 302, 323, 652 S.E.2d 409, 419 (Ct. App. 2007) ("In order to preserve for review an alleged error, the objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably be understood by the trial court."); State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("[I]ssues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review."); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). However, even if preserved, sufficient evidence was presented at trial to support Appellant's conspiracy convictions.

Appellant's accomplices both testified they discussed the planned robberies with Appellant. (R. p. 239; p. 241; pp. 251-252; p. 283; p. 289). Appellant, at the least, knew the group stole a credit card and was with them when they unsuccessfully attempted to use it. (R. p. 318). He also was aware of other planned robberies. (R. p. 327). Furthermore, clothing from the burglaries was discovered in Appellant's seat after he fled from authorities, and a significant quantity of money was recovered from his pockets. (R. p. 229; p. 269). Clearly, based on the evidence and testimony from trial, the jury could find Appellant guilty of conspiracy. See State v. Stanley, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct. App. 2005) ("If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury."). Therefore, even if the issue was preserved and properly presented on appeal, the argument must fail on the merits.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

March 10, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Honorable John C. Few, Circuit Court Judge

THE STATE,

Respondent,

vs.

JONATHAN KARON HILL,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 10th day of March, 2010.



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APP'X 545

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Jonathan K. Hill,

Appellant.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 4867
Heard February 8, 2011 – Filed August 10, 2011

REVERSED AND REMANDED

Deputy Chief Appellate Defender Wanda H. Carter,
of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, and
Assistant Attorney General Mark R. Farthing, Office
of the Attorney General, all of Columbia; Solicitor
William W. Wilkins, III, of Greenville, for
Respondent.

APP'X 546

WILLIAMS, J.: Pursuant to Anders v. California¹, Jonathan K. Hill (Hill) appeals his convictions for two counts of armed robbery, two counts of conspiracy to commit armed robbery, and one count of resisting arrest.² After review, this court ordered the parties to brief the issue of whether the circuit court erred in denying Hill's motion for a new trial after the jury mistakenly received two statements made by Hill during deliberations that were not admitted into evidence during trial. We find the circuit court erred and accordingly reverse.

FACTS

On the evening of January 31, 2002, and the early morning hours of February 1, 2002, the La Quinta Inn and the Hampton Inn (the motels) were both robbed in Greenville County. Hill and his co-conspirators, Damian Taylor (Taylor) and Melvin Warren (Warren), were arrested after fleeing from police pursuit. A grand jury indicted Hill for two counts of armed robbery, two counts of conspiracy to commit armed robbery, and one count of resisting arrest. Taylor and Warren pled guilty and agreed to testify against Hill in exchange for a deal on pending charges.

Hill proceeded to trial from February 3-5, 2003. At a pre-trial Jackson v. Denno³ hearing, the State admitted two written statements made by Hill to the Simpsonville Police Department and the Greenville County Sheriff's Office. In his statements, Hill admitted to being a passenger in a Ford Escort (the vehicle) that was used to commit the armed robberies. Hill explained he lived in the same neighborhood as Taylor and Warren and knew they had a reputation for committing robberies. Hill also indicated Taylor and Warren wanted him to ride with them and to "work with them." Hill stated he remained in the vehicle while Taylor and Warren went inside the motels.

¹ 386 U.S. 738 (1967).

² In 1998 or 1999, Jonathan Hill changed his name to Jonathan Green. However, because the initial case caption referred to Appellant as Jonathan Hill, we refer to his former name for purposes of this appeal.

³ 378 U.S. 368 (1964).

The circuit court held Hill's written statements were voluntarily given at the Jackson v. Denno hearing. However, the State did not offer Hill's statements into evidence at trial.

The State presented several witnesses during its case-in-chief. Marvin Somarriba, an employee of the La Quinta Inn, testified he heard a "noise at the door" and "two guys running" on the evening of January 31, 2002. Somarriba testified that one of the robbers placed a gun against his head and took \$30 and credit cards from his wallet, and that the other robber took approximately \$120 from the cash drawer. Furthermore, Somarriba stated the robbers wore dark clothing and dark ski masks.

Rangar Borei, an employee of the Hampton Inn, testified two men wearing dark ski masks and dark clothing entered the Hampton Inn during the early morning hours of February 1, 2002. Borei stated one of the robbers placed a gun against his nose. The robbers took approximately \$178 from the cash drawer as well as Borei's wallet, which contained \$15, credit cards, and Borei's driver's license and Social Security card.

Officer William Kennedy of the Mauldin Police Department was on patrol when he heard a robbery had occurred over the Simpsonville Police Department's scanner. Subsequently, Officer Kennedy observed the vehicle speeding with its bright headlights on, prompting him to activate his blue lights and follow the vehicle to a Bi-Lo parking lot. Officer Kennedy stated the vehicle did not completely stop, the occupants in the vehicle were "rummaging around," and the occupant in the rear seat of the vehicle appeared to be wearing a red shirt. Shortly after the vehicle entered the parking lot, Officer Kennedy stated the vehicle accelerated "very fast" and made a left turn onto West Butler Road. At this point, Officer Kennedy pursued the vehicle. During the pursuit, the vehicle "slid off" into a dirt area, and the three occupants exited the vehicle and ran into the woods. Officer Kennedy identified Taylor as the driver of the vehicle and Warren as the front passenger and further indicated that Taylor and Warren were wearing dark clothing.

Officer Brian Lewis of the Mauldin Police Department assisted Officer Kennedy in the police chase. He testified that Taylor, the driver of the vehicle, and the vehicle's front passenger were wearing dark clothing; whereas, the passenger in the rear seat was wearing a red shirt. However, Officer Lewis testified Taylor was wearing black baggy pants and no shirt when he was captured. Officer Harold Harris of the Greenville County Sheriff's Office arrested Warren and testified that Warren had a black ski mask, Borei's wallet, driver's license, and credit cards in his pockets.

In addition, Officer Robert Smith of the Greenville County Sheriff's Office testified his canine tracked Hill to a creek bed. In the process of tracking Hill, Officer Smith discovered a white t-shirt that appeared to be covered in blood, a black tennis shoe, and a New York Yankees hat. Smith noted Hill was wearing a red t-shirt while hiding in the creek bed and that "a wad of unfolded loose cash" was retrieved after Hill was searched. On cross-examination, Officer Smith indicated that Hill did not have a black ski mask in his possession after he was arrested.

Officer Ralph Bobo of the Simpsonville Police Department testified he took photographs of the contents inside the vehicle, which included a black coat and a white shirt located in the rear seat. Officer Bobo also stated that he took photographs of the ski mask and Borei's wallet that were found on Warren after his arrest. Officer Bobby Alexander of the Greenville County Sheriff's Office conducted an inventory search of the vehicle. Officer Alexander noted that a black hooded leather coat, a gray fleece sweatshirt, a football jersey, and a dark colored ski mask were located in the back seat of the vehicle.

Co-conspirators Taylor and Warren testified on behalf of the State. Taylor stated that he drove the vehicle and that Hill and Warren agreed to ride to a drug area with the intention of robbing a drug dealer; however, they were unsuccessful. At this point, Taylor stated they changed their plans and agreed to go to the La Quinta Inn with the intent of robbing the motel.⁴ Taylor testified he remained in the vehicle while Hill and Warren robbed the

⁴ Taylor stated, "[We did] not actually discuss[] [robbing the La Quinta], but it was understood by each one of us what was going to go on."

motels. During cross-examination, Hill questioned Taylor regarding his written police statement in which Taylor indicated that Hill was unaware of the armed robbery plan and thought they were just riding around. Taylor clarified his statement and claimed he told Hill about the robbery plans after Hill entered the vehicle. According to Warren, Hill agreed to participate in the robbing of the motels. Warren stated Hill accompanied him inside both of the motels and participated in the robberies while Taylor remained in the vehicle. Warren also testified he took off his black coat while in the woods and that Hill wore the black coat that was located in the rear seat of the vehicle. On cross-examination, Warren admitted he lied in his police statement when he told the police that he remained in the vehicle while Taylor and Hill robbed the motels. Both Taylor and Warren testified Hill wore a black ski mask and gloves.

After the State's case-in-chief, Hill testified in his own defense. Hill stated he agreed to ride with Taylor and Warren on the belief that they were going to a party and to meet some girls. According to Hill, Taylor parked the car by the La Quinta Inn. Hill stated Taylor and Warren subsequently entered the La Quinta Inn. Soon thereafter, Taylor and Warren returned to the vehicle, and Warren came back with a credit card. After leaving the La Quinta Inn, Hill testified they went to a mall, and Warren unsuccessfully attempted to purchase clothing and jewelry with the credit card stolen from the La Quinta Inn. After leaving the mall, Warren drove to a gas station and purchased gas and beer. Upon leaving the gas station, Hill claimed Taylor parked near a wooden fence and informed him that he and Warren "would be back." Again, Hill asserted he remained in the vehicle and Taylor and Warren returned approximately four to five minutes later. Hill also claimed he did not observe Taylor and Warren with any ski masks or weapons upon exiting the vehicle. During his testimony, Hill averred he did not agree to commit nor have any knowledge of the robbery plans. Hill stated Taylor and Warren threw clothes in the rear seat and he remembered seeing a black coat in the vehicle that belonged to Warren; however, Hill denied observing any ski masks in the rear seat. Hill also indicated that Taylor and Warren did not tell him about the robberies, and he was only aware that the police were pursuing the vehicle. However, Hill acknowledged on cross-examination that he was aware Taylor and Warren had committed robberies in the past, but repeatedly denied having knowledge about their plans to rob the motels.

The jury found Hill guilty of two counts of armed robbery, two counts of conspiracy to commit armed robbery, and one count of resisting arrest. The circuit court sentenced Hill to concurrent sentences of thirty years, five years, and five years, respectively.

After the jury was dismissed and Hill was sentenced, the circuit court judge went into the jury room to speak with the jurors. According to the circuit court judge, the foreman informed him that Hill's written statements were submitted to the jury during deliberations, and the jury considered these statements as important evidence. The circuit court judge questioned the bailiff and was shown the exhibits, which included Hill's two written statements. Soon thereafter, the circuit court informed the parties about the error, and Hill moved for a new trial.

On February 20, 2003, the circuit court conducted a hearing on Hill's motion for a new trial and took the matter under advisement. On June 11, 2003, the circuit court conducted a second hearing on Hill's motion for a new trial. In explaining the inadvertent submission of Hill's statements, the circuit court judge stated, "Apparently what happened is the State's Exhibits that I just referred to got mixed in with the evidence that had been admitted and was submitted back into the jury room not the first day when they deliberated but on the second morning." The circuit court judge orally denied Hill's motion for a new trial during the second hearing and applied a harmless error analysis to consider if the admission of Hill's statements contributed to the guilty verdict. The circuit court concluded the admission of Hill's written statements was harmless because "[Hill's] [in-court] testimony essentially tracks what's in the statement. There's really not [anything] significant in the statement that wasn't in his testimony." Additionally, the circuit court concluded that it would have admitted Hill's statements into evidence if the State sought to introduce this evidence at trial. The circuit court filed a written order denying Hill's motion for new trial on February 9, 2007.⁵

⁵ Hill filed an application for post-conviction relief (PCR) based on his trial counsel's failure to file a notice of appeal. On April 7, 2005, Judge Larry Patterson conducted a PCR hearing. Judge Patterson denied and dismissed the application without prejudice because Hill had a pending motion for a

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Martucci, 380 S.C. 232, 246, 669 S.E.2d 598, 605-06 (Ct. App. 2008). This court is bound by the circuit court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence. State v. Moore, 374 S.C. 468, 473-74, 649 S.E.2d 84, 86 (Ct. App. 2007).

LAW/ANAYLSIS

Hill contends the circuit court erred in denying his motion for a new trial because the jury considered his written statements during deliberations. Hill alleges the submission of his written statements was prejudicial and improperly influenced the jury because (1) all twelve jurors were exposed to his statements; (2) no curative instructions were given because the error was only discovered after the jury verdict; (3) the weight of the evidence against Hill was not overwhelming; and (4) Hill did not confess to the crime at trial. We agree.

It is well settled that the grant or refusal of a new trial is within the sound discretion of the circuit court. State v. Taylor, 348 S.C. 152, 159, 558 S.E.2d 917, 920 (Ct. App. 2001). Where there is no evidence to support a conviction, an order granting a new trial should be upheld. State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). However, where there is competent evidence to sustain the jury's verdict, the circuit court may not substitute its judgment for that of the jury. State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993)

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors. State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104

new trial for which a written order had not yet been filed by the circuit court judge.

(1998). In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict. Id. Relevant factors a court should consider in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice. Id. at 141-42, 502 S.E.2d at 104.

In State v. Rogers, 96 S.C. 350, 80 S.E. 620 (1914), our supreme court confronted a similar factual situation concerning the discovery of the jury's receipt of incompetent evidence after the jury rendered its verdict and was dismissed from service. Rogers was convicted for willful and malicious injury to the cars and engine of the Atlantic Coast Line Railroad Company and endangering the lives of the train's passengers and crew. Rogers, 96 S.C. at 351, 80 S.E. at 620. During trial, the State offered an affidavit signed by Rogers' wife. Id. Rogers objected to the affidavit, and the trial court sustained the objection finding the affidavit inadmissible. Id. at 351-52, 80 S.E. at 620. After all the evidence was presented and the case went to the jury, the trial court inadvertently submitted the affidavit to the jury when he handed the indictment to the foreman. Id. at 352, 80 S.E. at 620.

Rogers was convicted and sentenced by the circuit court. Rogers, 96 S.C. at 352, 80 S.E. at 620. After the trial court adjourned, the State and Rogers discovered that the inadmissible affidavit was inadvertently submitted to the jury. Id. Rogers appealed his conviction. Id. On appeal, our supreme court reversed and granted Rogers a new trial. Id. at 353, 80 S.E. at 621. In regard to the specific issue relating to the submission of the inadmissible affidavit to the jury during its deliberations, our supreme court stated:

The affidavit got to the jury after his honor had ruled it incompetent, without any explanation on the part of the court that it was incompetent, and to be disregarded, not denied by the father, who was alleged to have attempted to improperly influence Hattie Rogers' testimony, and unexplained by him or the defendant, and we cannot say that, taken with all

of the evidence in the case, it was not prejudicial to the defendant; but, on the contrary, the jury might have arrived at the conclusion that they did by the incompetent testimony, and we have no doubt, if it had been discovered before his honor adjourned the court what had transpired, but that he would have set the verdict aside, and granted a new trial.

Id.

In addition to Rogers, we note the Washington Supreme Court's opinion in State v. Pete, 98 P.3d 803 (Wash. 2004), also provides guidance on the issue presented in this case. Although not controlling, the Washington Supreme Court addressed the issue of whether a jury's exposure to extrinsic evidence during deliberations warranted a new trial where a police report contradicted the defendant's written statement to the police.

In Pete, two Seattle police officers responded to an alleged assault and observed what appeared to be the defendant attempting to take a case of beer from the victim's hand. Id. at 804. After the police officers parked their car, they observed the defendant taking the beer from the victim. Id. The defendant was subsequently arrested, and the police found two beers in the defendant's pocket and a case of beer close to where the defendant was standing. Id. While in transport to the police station, the defendant told an officer that "he only took some beer" from the victim and that the co-defendant assaulted the victim. Pete, 98 P.3d at 805. After arriving at the police station, the defendant signed a written statement that indicated the victim offered him a beer as the co-defendant arrived. Id. The defendant further explained the victim "handed" him the rest of the beer and instructed him to walk away. Id. at 805. At this point, the defendant indicated he walked away from the victim and did not look back to ascertain what the co-defendant and the victim "were doing." Id. at 805, 807.

At a pre-trial hearing, the trial court held the police officer's report, which contained the defendant's oral statement that "he only took some beer," and the defendant's written statement that the victim offered him a beer and "handed" him the rest of the beer were admissible. Pete, 98 P.3d at 805. However, the police report and the defendant's written statement were not introduced into evidence at trial. Id.

After the jury reached a verdict, but before the verdict was rendered, the trial court informed the parties the police report and the defendant's written statement were mistakenly sent to the jury room. Pete, 98 P.3d at 805. After this discovery, the bailiff retrieved the officer's statement and "grabbed" a second document. Id. However, the second document had been properly admitted into evidence. Id. Upon this discovery, the bailiff returned the second document, retrieved the other piece of unadmitted evidence, and instructed the jury to disregard the police report and the defendant's written statement. Id. After the trial court explained the course of events, the State and the defendant both agreed the verdict should be received and the jury should be polled about their knowledge concerning the police report and the defendant's written statements. Id. at 805.

During polling, the jurors indicated the bailiff told them to disregard the police report and the defendant's written statement. Pete, 98 P.3d at 806. Nonetheless, some members of the jury panel stated they saw and/or read the police report and the defendant's written statement. Id. The defendant was convicted of second-degree robbery. Id.

The defendant made a motion for a new trial and argued the mistaken submission of the police report and his written statement to the jury was prejudicial. Pete, 98 P.3d at 806. The trial court denied the motion and held the error was harmless because the documents were in the jury room for a brief period of time, the jury was instructed to disregard the documents, and the statements in the police report and the written statement were exculpatory. Id. Division One of the Washington Court of Appeals affirmed and held there was no reasonable ground to believe that the defendant was prejudiced by the nonadmitted documents and the evidence presented at trial was sufficient to sustain the conviction. State v. Pete, No. 50404-5-I, 2003 WL 21387208, at *3 (Wash. Ct. App. June 13, 2003).

On appeal, the Washington Supreme Court reversed the court of appeals' decision and granted the defendant's motion for a new trial. Pete, 98 P.3d at 807. The State argued the inadvertent submission of the police report and the defendant's written statement to the jury was harmless error because the evidence was "very strong" to sustain the conviction. Id. Namely, the State argued (1) two police officers caught the defendant and the co-defendant robbing the victim; (2) the victim's statements corroborated the

police officers' observations; (3) the victim's inconsistent statement at the scene compared to his in court testimony did not absolve the defendant from any criminal activity because the victim stated "he thought [the defendant and co-defendant] wanted to rob him;" and (4) the police report and the defendant's written statement were exculpatory in nature. Id.

In reversing the court of appeals' decision, the Washington Supreme Court noted the police officers' testimony regarding their observations that the defendant and co-defendant were in the act of robbing the victim was to some extent refuted. Pete, 98 P.3d at 807. At trial, the victim testified he "gave" beer to the defendant and the co-defendant so they would leave him alone. Id. Moreover, the court concluded the police report was not completely exculpatory because the defendant informed the officer that "he only took some beer." Id. This statement, according to the court, "may be considered inculpatory because it indicates that the defendant participated in taking property from [the victim] while [the victim] was being assaulted by [co-defendant]." Id. Additionally, the court further stated, "[W]hen the two unadmitted statements are viewed together, they are harmful to [the defendant] in the sense that they are contradictory and could suggest to a jury that [the defendant] is a liar who cannot be believed." Id.

In analyzing whether the defendant was prejudiced by the inadvertent submission of the police report and his written statements, the court noted (1) the defendant denied any wrongdoing; (2) the defendant did not testify and instead relied on the victim's testimony that the defendant did not speak or touch the victim, and the victim voluntarily gave beer to the defendant; and (3) the victim had problems remembering the events on the night in question. Pete, 98 P.3d at 807. Based on the facts of the case, the court concluded the submission of the police report and the defendant's written statement "seriously undermined [the defendant's] defense and nothing short of a new trial can correct the error." Id.

Furthermore, the Washington Supreme Court observed that even though the evidence was deemed admissible at a pre-trial hearing, the State did not offer or admit the evidence at trial. Pete, 98 P.3d at 808. The court pronounced:

The jury's receipt of this extrinsic evidence after the close of its evidence presented a "no win" situation

for [the defendant] because he was not able to object to or explain the extrinsic evidence. Furthermore, his counsel was unable to cross-examine either the transport officer or the officer who took [the defendant's] statement. The fact that the bailiff instructed the jurors to not consider the extrinsic evidence does not, in our view, mitigate the harmfulness of the error. Even if the trial court had given the instruction, which would be the appropriate practice, the same can be said.

Id.

In the present case, we conclude the improper submission of Hill's two written statements to the jury is reversible error. Although the circuit court ruled Hill's written statements were voluntarily given, the State did not introduce Hill's statements into evidence at trial. Thus, the entire jury panel was exposed to evidence that had not been admitted during trial, thereby unduly prejudicing Hill.

Nevertheless, the State contends despite any error in the inadvertent submission of Hill's statements, such error is harmless based on the evidence presented at trial. In support of its argument that the admission of Hill's written statements was harmless error, the State argues (1) Taylor and Warren's testimony indicated that Hill actively participated in the commission of the armed robberies; (2) Hill was seen in the back seat of the fleeing vehicle after an officer attempted to stop the vehicle; (3) officers found a ski mask along with a black coat linked to Hill; and (4) Hill fled from the police and was discovered hiding in a creek bed. We disagree.

Whether an error is harmless depends on the circumstances of the particular case. State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Id. Error is harmless when it "could not reasonably have affected the result of the trial." Id. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, [an appellate] court should not set aside a

conviction because of errors not affecting the result[]." State v. Kirton, 381 S.C. 7, 25, 671 S.E.2d 107, 115-16 (Ct. App. 2008) (citation omitted).

A comparison of Hill's trial testimony and Hill's written statements implicates Taylor and Warren's direct involvement in the commission of the robberies of the motels and that Hill remained in the vehicle. Specifically, Hill's written statement given to the Simpsonville Police Department provides in pertinent part:

I know [Taylor and Warren] have been jacking (robbing) people or places. I have heard they have robbed the Motel 6 where [Warren's] girlfriend works there. [Warren] had a .380 pistol. [Taylor and Warren] said it was stolen. They have tried to get me to ride with them before. About nine p.m. [Taylor] and [Warren] came to my girlfriend's house. They wanted me to go ride with them. They said if I wanted to go to work to work with them We went to the La Quinta Inn and [Warren] went to some white boys and bought a beer. They let them in the side door. Both [Taylor] and [Warren] robbed the motel and we left and went to a mall [Warren] attempted to use a credit card that was taken and it did not work. We left in a white car. I thought we were going home. We drove to Simpsonville and stopped at the gas station. . . . We parked in a white motel near the Hampton Inn. [Warren] and [Taylor] got out of the car and went around a gate and went into the Hampton Inn. They later came back and [Warren] said that he had went back and got him. This meaning [Warren] had went back behind the counter and robbed the clerk. [Warren] had the billfold which was taken from the clerk at the Hampton Inn. [Taylor] was driving away. Then the police got behind us. He pulled over [to] stop[] briefly. Then [Taylor] pulled onto the road again. We later went off the road and I was later arrested by the police. I am sorry that these places were robbed.

(emphasis added).

Hill's statement to the Greenville County Sheriff's Office provides in pertinent part:

I have decided that I wanted to clear all this up and get everything in the open. I told [Officer] Bobo about how I was involved in the robbery at the Hampton Inn and who I was with. I also told him about a robbery at the La Quinta Inn on 85 [Warren] and [Taylor] are involved with some other people who are going around catching likes (sic) on people. Catching likes means robbing people or stealing something. Anything to come up with money quick. Lately [Warren] and [Taylor] have been robbing motels and that's who [I] was with when the Hampton Inn got robbed. Before we went to the Hampton Inn we went to the La Quinta Inn I was sitting in the back seat of the car we were in. It was a white Ford Escort. [Warren] got out of the car and he walked up on a group of white guys in the parking lot. [Warren] walked back to the car and said let me get a dollar so he could buy a beer from one of the white guys. [Warren] walked back over and one of the white dudes opened the back door, like on the end of the hallway, and let them in. [Warren] went in with the white guys and came back a few minutes later and got [Taylor] and [Warren and Taylor] went back into the motel. [Warren] and [Taylor] were in there not even five minutes and they came running to the car. I didn't see no money or gun but they had a wallet. [Warren] said we got to go to the mall, we got to go to the mall. We went over to Haywood Mall. We went to a store upstairs. It was a clothing store. [Warren] tried to buy a hooded sweatshirt with a credit card out of the wallet, but it was declined. Then we went over to a jewelry stand and [Warren] tried to buy something there. I walked off and

[Taylor] came over there by me. I was saying that they were getting greedy and stop being greedy. [Warren] couldn't buy anything at the jewelry store They went to the Hampton Inn in Simpsonville and hit it and we ran This group that is hitting things is mainly [Warren] and [Taylor] and whoever they could get to go with them.

Hill's statement to the Simpsonville Police Department reveals his knowledge that Taylor and Warren wanted him to "ride with them" and to "work with them." This phrase, in conjunction with the context of Hill's statement to the Simpsonville Police Department, indicates that Taylor and Warren wanted Hill to ride with them to participate in an armed robbery. However, at trial, Hill testified he was unaware of any robbery plans and explicitly denied any involvement in the robberies. In fact, Hill specifically stated he rode with Taylor and Warren on the belief that they were going to a party and going to meet some girls.

When viewed together, Hill's statement to the Simpsonville Police Department and his trial testimony are contradictory and undermine Hill's credibility to the jury. Because Hill's credibility was impermissibly impugned by evidence not admitted at trial, this contradiction strongly suggested to the jury that Hill was untruthful during his testimony and could not be believed. Due to the gravity of this error, we conclude Hill's entire defense was prejudiced because his credibility was substantially damaged. See State v. Outlaw, 307 S.C. 177, 180, 414 S.E.2d 147, 148 (1992) ("[E]rror which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense.") (citation omitted); see also Pete, 98 P.3d at 807 (noting the inadvertent submission of contradictory evidence not admitted at trial suggested to the jury that defendant was a liar).

Additionally, unlike many South Carolina cases in which a circuit court may issue a curative instruction to cure the prejudicial effect of the jury's consideration of extrinsic evidence, the circuit court was unable to issue a curative instruction due to the timeframe when the error was discovered. Moreover, this error was furthered compounded because the foreman of the jury informed the circuit court that the jury considered Hill's statements to be

important evidence. Nevertheless, we note the holding in Rogers provides guidance on the appropriate remedy. See Rogers, 96 S.C. at 353, 80 S.E. at 621 (noting the jury's receipt of incompetent evidence without a curative instruction could have caused the jury to rely on the improper testimony in reaching its conclusion and thus a new trial was the appropriate remedy). Under the circumstances of this case, the absence of a curative instruction, in conjunction with the jury's belief that Hill's statements were considered important evidence, precludes us from being able to unequivocally ascertain whether the jury's verdict rested on the evidence presented at trial or whether the verdict was improperly affected by Hill's written statements. See State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.") (citation omitted); see also State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006) ("Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially.") overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

Finally, at the second motion for a new trial hearing on June 11, 2003, the circuit court judge indicated that it would have admitted Hill's written statements at trial. However, the written statements were solely admitted into evidence for purposes of the Jackson v. Denno hearing. Because the written statements were not admitted at trial, and the jury was exposed to Hill's written statements during its deliberations, Hill was denied the opportunity to object to or explain his written statements. See Pete, 98 P.3d at 808 (noting defendant was not able to object to or explain the extrinsic evidence when the jury received the evidence after the close of evidence). Additionally, Hill was unable to cross-examine Officer Bobo and Officer Smith regarding his written statements.⁶ Pete, 98 P.3d at 808 (finding defendant was denied the right to cross-examination when the jury received extrinsic evidence after the close of all the evidence). Based on the foregoing, we conclude the circuit

⁶ Officer Wes Smith of the Greenville County Sheriff's Office took Hill's written statement and testified at the Jackson v. Denno hearing. However, Officer Smith did not testify at trial. Officer Bobo's testimony was limited to his actions in taking photographs at the scene where Hill, Taylor, and Warren were arrested in the early morning hours of February 1, 2002.

court abused its discretion in denying Hill's motion for a new trial as to his convictions for armed robbery and conspiracy to commit armed robbery.

CONCLUSION

Accordingly, the circuit court's decision is

REVERSED and REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable John C. Few, Circuit Court Judge

THE STATE,

Respondent,

vs.

JONATHAN KARON HILL,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On August 10, 2011, this Court issued an opinion in which it reversed the trial judge's ruling denying Appellant Jonathan Karon Hill's motion for a new trial as to his armed robbery and conspiracy to commit armed robbery convictions and remanded the matter to the circuit court. State v. Hill, Op. No. 4867 (S.C. Ct. App. filed Aug. 10, 2011). Pursuant to Rule 221(a), SCACR, Respondent ("the State") respectfully petitions for rehearing on the following points the State believes were possibly misapprehended or overlooked by this Court.

A. Appellant's Failure to Establish a Sufficient Showing of Prejudice and the Court's Improper Reversal on a Ground Different Than the Basis of Prejudice Identified By Appellant

Initially, the State respectfully believes this Court overlooked the argument raised by Appellant and reversed on a basis in direct contradiction with the argument advanced by Appellant in support of his position. The State respectfully contends Appellant failed to make a sufficient showing of prejudice to warrant reversal, and this Court impermissibly reversed

Appellant's conviction on different grounds of prejudice than those identified by Appellant and properly before this Court. For these reasons, the State respectfully asks this Court to rehear the matter, reconsider its ruling solely on the limited grounds Appellant properly raised on appeal, and affirm Appellant's conviction.

An appellate court is precluded from considering any issues that were not presented to or passed upon by the trial judge. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). A defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (“[A] party cannot argue one theory at trial and a different theory on appeal.”); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (“[A] defendant may not argue one ground below and another on appeal.”). On appeal, an appellant is limited solely to the grounds raised during trial. State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and **arguments.**” I'on v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) (emphasis added).

Likewise, the appellate court is limited to addressing only the issues and arguments properly presented to it in an appellate brief. See State v. Culbreath, 377 S.C. 326, 332, 656 S.E.2d 268, 271 (Ct. App. 2008) (acknowledging an appellate court is limited to addressing only the issues properly raised in an appellate brief). The appellate court cannot reverse a conviction or ruling for any grounds appearing in the record. I'on, 336 S.C. at 421-422, 526 S.E.2d at 724. Therefore, the appellate court is precluded from reversing a case based on issues and arguments not properly presented to the trial court **and** raised on appeal. See State v. Prioleau, 345 S.C.

404, 412, 548 S.E.2d 213, 217 (2001) (reversing the decision of the Court of Appeals where the Court of Appeals reversed Prioleau's conviction on a different basis than the one Prioleau argued on appeal); State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding Benton's challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence)"); Adams, 354 S.C. at 380, 580 S.E.2d at 795 (declining to address one of the grounds raised on appeal in support of Adams' mistrial motion when that ground was never presented to the trial judge).

In the case sub judice, Appellant challenged his convictions by arguing the trial judge erred in denying his motion for a new trial based on the inadvertent submission of Appellant's statements to the jury during deliberations. (App. Br. p. 6). In order to establish reversible error, Appellant was required to show both that extraneous information was presented to the jury and that prejudice resulted from the error. See State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct. App. 2000) ("Where the defendant seeks a new trial on the ground of impropriety involving the jury, he is required to prove both the alleged misconduct and the resulting prejudice."). Appellant failed to satisfactorily meet this burden.

During trial, Appellant argued prejudice must be presumed from the submission of extraneous information to the jury. (Sec. Supp. R. p. 4). However, our courts have consistently rejected such a presumption of prejudice. See 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." (emphasis added)); State v. Smith, 338 S.C. 66, 74, 525

S.E.2d 263, 267 (Ct. App. 1999) (“Moreover, we are guided by a recent line of juror misconduct cases in which our Supreme Court rejects a per se reversible error rule.”). Thereafter, Appellant only identified two potentially problematic portions of the submitted statements: (1) the portion where Appellant stated he was sorry the places were robbed; and (2) the portion where Appellant stated he intended to get everything out in the open.¹ (Sec. Supp. R. p. 6). Then, critically, the trial judge directly presented Appellant with an opportunity to identify any differences between his testimony and the statements he believed entitled him to a new trial, and Appellant merely responded, “Okay.” (Supp. R. p. 5). When presented with an opportunity to identify any prejudicial distinctions between his testimony and the statements, Appellant elected not to take advantage of the opportunity. Furthermore and importantly, Appellant never argued to the trial judge the statements were prejudicial because they contradicted his testimony or impugned his credibility.

Subsequently, on appeal, Appellant asserted the improperly submitted statements were “identical to [his] testimony” and argued to this Court the statements were prejudicial because they emphasized twice to the jury he was in the presence of the lawbreakers who committed the crimes and because “the statements subconsciously in the jurors’ minds strengthened the state’s case[.]” (App. Br. p. 8). Furthermore, during oral argument, Appellant continued to assert the prejudicial impact of the statements resulted from the cumulative nature of the evidence.²

¹ These allegedly problematic portions of the statements could have resulted in no prejudice to Appellant because they were either preceded by or followed by a lengthy denial by Appellant of any participation in, involvement in, or assistance with the commission of the crimes. (R., pp. 61-62; pp. 77-79). Regardless, Appellant abandoned this particular argument by not raising it on appeal. See *Ahrens v. State*, 392 S.C. 340, 357, 709 S.E.2d 54, 63 (2009) (“An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.”); see, e.g., *Jones v. Leagan*, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) (“An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal. Accordingly, any argument regarding exclusivity or hostility is abandoned.” (citations omitted)).

² Notably, even if Appellant had changed his argument during oral argument and claimed the statements were prejudicial because they were contradictory as opposed to cumulative, Appellant could not have prevailed on this

Thereafter, despite Appellant's argument on appeal that the cumulative nature of the statements made them unduly prejudicial, this Court concluded the submission of Appellant's statements to the jury was prejudicial because the statements were contradictory to Appellant's trial testimony, resulting in undue damage to his credibility. In particular, this Court assigned substantial significance to the passage in Appellant's statements indicating he told the officers his accomplices asked him to "ride with them" and to "work with them," which this Court believed created an inference Appellant was aware his accomplices wanted him to ride with them to participate in an armed robbery. However, critically, Appellant never asserted such an inference could be drawn from this particular language and never alleged he suffered prejudice from the submission of the statements for this reason. Therefore, by reversing on the basis the statements were contradictory and impeaching, this Court reversed Appellant's conviction on a basis never presented to the trial court, never raised by Appellant, and in direct conflict with the argument advanced by Appellant on appeal. Accordingly, this Court improperly reversed Appellant's conviction on a basis not properly before the Court due to the fact it was never presented to the trial court and never raised by Appellant. Therefore, the State respectfully submits this Court's ruling should be reconsidered.

The burden to establish a level of prejudice sufficient to entitle Appellant to a new trial fell entirely and solely to Appellant. When reviewing the argument raised by Appellant on appeal, this Court is limited to considering only the grounds raised by Appellant in his appellate brief. See State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 816 (Ct. App. 1991) (instructing that appellate courts cannot reverse based on arguments not raised to them and do not speak to and answer questions they are not asked). When limited only to the grounds he raised, Appellant

claim because oral argument cannot be used to raise new arguments to the Court not appearing in the appellate briefs. See State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("It is axiomatic that oral argument may not be used as a vehicle to argue issues not argued in the appellate brief.").

failed to establish prejudice sufficient to entitle him to a new trial. Thus, he was not entitled to reversal of the trial judge's ruling.

While this Court has identified different grounds of prejudice it believed were sufficient to warrant reversal, an argument on those grounds was not raised to the trial judge and was not raised by Appellant on appeal. Therefore, this Court could not properly reverse Appellant's conviction on that basis. See L'on, 336 S.C. at 421-422, 526 S.E.2d at 724 ("An appellate court may not, of course, *reverse* for any reason appearing in the record." (italics in original)).

Otherwise, this Court would be finding the trial judge abused his discretion in denying the new trial motion on grounds not raised to or presented to him, effectively denying the trial judge an opportunity to consider the basis of reversal relied upon by this Court. See Id. at 422, 526 S.E.2d at 724 ("[T]he losing party generally must both present his issues **and arguments** to the lower court and obtain a ruling before an appellate court will review those issues **and arguments**." (emphasis added)). Because Appellant failed to make a sufficient showing of prejudice and because this Court reversed Appellant's conviction on a basis in direct conflict with the argument raised by Appellant on appeal, the State respectfully asks this Court to rehear the matter, reconsider its ruling, and affirm Appellant's conviction. Cf. Prioleau, 345 S.C. at 412, 548 S.E.2d at 217 ("Because the Court of Appeals considered a basis for reversal which was neither presented below **nor argued on appeal**, we reverse its finding as to this issue." (emphasis added)).

B. Error in Reversing the Denial of the New Trial Motion Based on the Circumstances of the Case and the Overwhelming Evidence of Appellant's Guilt

Notwithstanding the issue preservation concerns, the State respectfully believes this Court overlooked the State's arguments regarding the lack of prejudice entitling Appellant to a new trial and the presence of overwhelming evidence of guilt regardless of any error in the jury's

reception of Appellant's statements. In reaching its decision, this Court failed to address the State's argument Appellant failed to meet his burden of establishing prejudice, which Appellant was required to do before it even became necessary to conduct a harmless error analysis based on overwhelming evidence. In Appellant's case, the State contends Appellant failed to establish sufficient prejudice to entitle him to a new trial, and this Court applied an incorrect standard when evaluating the prejudice allegedly suffered by Appellant. Additionally, the State contends reversal was not warranted in light of the overwhelming evidence of guilt even if the inadvertent submission of the statements to the jury was sufficiently prejudicial to entitle Appellant to a new trial and trigger a harmless error analysis. For these reasons, the State asks this Court to rehear the matter; reconsider its ruling in light of Appellant's argument, the proper standard of evaluating prejudice, and the appropriate deferential standard of review; and affirm Appellant's conviction.

i. Application of Improper Standard of Prejudice by this Court

Initially, the State respectfully submits this Court misapprehended the law in finding the improper submission of the statements was reversible error without further analysis. Before evaluating the relationship of the statements to the other evidence presented during the trial, which this Court did when evaluating whether there was overwhelming evidence of guilt, this Court held:

In the present case, we conclude the improper submission of Hill's two written statements to the jury is reversible error. Although the circuit court ruled Hill's written statements were voluntarily given, the State did not introduce Hill's statements into evidence at trial. Thus, the entire jury panel was exposed to evidence that had not been admitted during trial, thereby unduly prejudicing Hill.

To the extent this Court concluded Appellant was unduly prejudiced solely by the submission of the documents to the jury and the exposure of all of the jurors to the documents, this ruling is

inconsistent with our prior precedent rejecting a presumption of prejudice in cases involving the submission of extraneous information to the jurors.

Because our courts have consistently rejected a presumption of prejudice resulting from jury exposure to extraneous matter during deliberations, the mere fact all of the jurors were exposed to Appellant's statements did not automatically establish reversible error. Cf. Aldret, 333 S.C. at 313-314, 509 S.E.2d at 814 ("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."); Covington, 343 S.C. at 163, 539 S.E.2d at 70 ("Where the defendant seeks a new trial on the ground of impropriety involving the jury, he is required to prove both the alleged misconduct and the resulting prejudice."); Smith, 338 S.C. at 74, 525 S.E.2d at 267 ("Moreover, we are guided by a recent line of juror misconduct cases in which our Supreme Court rejects a per se reversible error rule."). Critically, the Supreme Court in Rogers, a case relied upon by this Court, only found reversible error after considering the mistakenly-submitted evidence in light of the other evidence and circumstances of the case. See State v. Rogers, 96 S.C. 350, 353, 80 S.E. 620, 621 (1914) ("[W]e cannot say that, taken with all of the evidence in the case, it was not prejudicial to the defendant[.]"). Before concluding the submission of the error was prejudicial, this Court was required to look beyond simply the exposure of the jury to extraneous information. Respectfully, to the extent this Court's opinion can be construed to suggest otherwise, this Court's ruling was erroneous, and the State asks the Court to reconsider this ruling and rehear the matter.

ii. Lack of a Sufficient Showing of Prejudice

Additionally, as previously discussed, the State contends this Court may have overlooked its argument regarding the insufficiency of Appellant's showing of prejudice, which was

necessary for Appellant to be entitled to a new trial based on the inadvertent submission of the statements to the jury. This Court's ruling focused solely on the State's argument regarding overwhelming evidence while failing to address entirely the State's argument Appellant failed to establish sufficient prejudice. In light of the arguments raised to the trial judge and on appeal, the State contends the trial judge did not abuse his discretion in denying Appellant's motion for a new trial. The State further contends this Court overlooked Appellant's arguments presented to the trial judge and on appeal and failed to apply the appropriate deferential standard of review to the trial judge's ruling in light of the arguments raised. For these reasons, the State asks this Court to reconsider its ruling, address the State's argument on Appellant's failure to establish prejudice, rehear the matter, and affirm Appellant's conviction.

The decision to grant or deny a motion for a new trial is left to the sound discretion of the trial judge, and that decision will not be reversed on appeal absent an abuse of discretion. State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); see State v. Jamison, 221 S.C. 312, 319, 70 S.E.2d 342, 344 (1952) ("The grant or refusal of a motion for a new trial is within the discretion of the Trial Judge and unless he commits an abuse of discretion, this Court is powerless to interfere."). "[I]f competent evidence supports the jury's verdict, the trial judge may not substitute his own judgment for that of the jury and overturn that verdict." State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

Likewise, a trial judge's denial of a new trial motion based on allegations of jury misconduct is reviewed for an abuse of discretion. State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005). Whether the introduction of extraneous matter resulted in prejudice must be left to the broad discretion of the trial court and is a matter for determination by the trial judge. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000); see State v. Galbreath, 359

S.C. 398, 403, 597 S.E.2d 845, 847 (Ct. App. 2004) (“Generally, the determination of whether extraneous information received by a juror during the course of the trial is prejudicial is a matter for determination by the trial judge, and we see no reason to upset the judge’s findings that there was no prejudice.”); State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989) (finding a trial judge has broad discretion when ruling on prejudice resulting from the jury reading extraneous documents). Thus, the trial judge’s ruling on the potential prejudicial effect of extraneous information is entitled to substantial deference due to the trial judge’s superior position to hear the evidence presented during trial, observe the jurors and the witnesses, evaluate the arguments presented, and make the most accurate determination of the prejudicial effect of an alleged error. See, e.g., United States v. Bagnariol, 665 F.2d 877, 884-885 (9th Cir. 1981) (“The trial judge is uniquely qualified to appraise the probative effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature. He or she observes the jurors throughout the trial, is aware of the defenses asserted and has heard the evidence. The judge’s conclusion about the effect of the alleged juror misconduct deserves substantial weight.”).

In this case, Appellant failed to make a sufficient showing of prejudice to the trial judge to entitle him to a new trial. Although the trial judge was aware the jury had been exposed to Appellant’s statements, the trial judge was not presented with any credible arguments about the possible harmful effect the statements could have had in regards to the jury’s impartiality. Instead, Appellant chose to rely on an unsupported presumption of prejudice, which has consistently been previously rejected by our courts. (Sec. Supp. R. p. 4). Thereafter, the trial judge provided Appellant with any opportunity to establish any prejudice he believed could have resulted from the statements, and Appellant failed to do so. (Supp. R. p. 5). The trial judge

properly considered the nature of the documents inadvertently sent to the jury room during deliberations in conjunction with the other evidence properly presented at trial, including Appellant's testimony which Appellant has asserted on appeal is "identical" and cumulative to his inadvertently-submitted statements. After considering the totality of the circumstances, the trial judge properly exercised his discretion in denying the motion for a new trial, and his ruling was entitled to substantial deference.

Likewise, on appeal, Appellant failed to make a sufficient showing of prejudice to entitle him to a new trial. Instead of arguing the submission of the statements exposed the jury to contradictory evidence and damaged his credibility as this Court concluded, Appellant asserted the statements were prejudicial because they were "identical" to his trial testimony and emphasized certain statements from that testimony. (App. Br. p. 8). Based on these grounds, Appellant's argument must fail because he could not suffer prejudice from the admission of evidence cumulative to evidence he presented even if the evidence was improper. See State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence."); State v. Jarrell, 350 S.C. 90, 101, 564 S.E.2d 362, 368 (Ct. App. 2002) ("[B]ecause we find Gillespy's statement cumulative and **substantially identical** to other properly admitted evidence, any error caused by the admission of the prior consistent statement is **harmless**." (emphasis added)); see also State v. Washington, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1993) (holding an appellant cannot complain on appeal about the admission of evidence he elicited). Therefore, because Appellant failed to sufficiently meet his burden of establishing prejudice at trial or on appeal, this Court erred in reversing the trial judge's denial of the new trial motion as an abuse of discretion.

Additionally, the State believes this Court may have overlooked a substantial distinction between the case law it relied upon in finding undue prejudice. In Rogers, a case this Court stated was factually similar to Appellant's case, the Supreme Court considered the effect of evidence mistakenly submitted to the jury during deliberations. Id., 96 S.C. at 351, 80 S.E. at 620. Rogers was tried and convicted of malicious injury to property and other charges. Id. During the trial, the prosecution attempted to introduce an affidavit from Roger's wife indicating Roger's father attempted to bribe her into not testifying against Rogers. Id. at 353, 80 S.E. at 621. The trial judge found the affidavit to be **inadmissible**, but it was inadvertently submitted to the jury. Id. at 352, 80 S.E. at 620. The mistake was not discovered until after the jury convicted Rogers. Id. After evaluating the error in light of the other evidence presented during trial, the Supreme Court reversed and remanded the case for a new trial, finding the jury received no instruction to disregard the inadmissible affidavit and resulting prejudice could not be ruled out in light of the other properly-admitted evidence. Id. at 353, 80 S.E. at 621.

Critically, the key distinction between Appellant's case and the circumstances in Rogers is the fact the affidavit in Rogers was entirely inadmissible and improper while the statements in Appellant's case constituted admissible and competent evidence. Because the evidence in Appellant's case was admissible and competent, its submission to the jury was not sufficient to render the jury impartial and unable to fairly decide Appellant's case. See Gilliam v. Foster, 75 F.3d 881, 900 (4th Cir. 1996) ("[A] jury's exposure to evidence that is admissible, but not admitted, does not require reversal of a conviction." (citing State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972))). For this reason, the State asks this Court to reconsider its reliance on Rogers, a highly distinguishable case.³

³ Furthermore, the State believes this Court may have overlooked the case of State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000), which is particularly relevant in light of Appellant's argument the statements were identical to his trial

Appellant's statements, although inadvertently submitted to the jury, were not such that they would confuse the issues for the jury or bias or inflame the jury. See Gilliam, 75 F.3d at 899 ("[B]ecause these photographs could have been admitted into evidence, could not have caused the jury to have been confused or misled, and could not have biased or inflamed the jury, there is no basis upon which to conclude that the jury could not have reached an impartial verdict."). Considering the allegations of prejudice raised by Appellant and applying an appropriately deferential standard of review, the trial judge did not abuse his discretion in denying Appellant's motion for a new trial. Therefore, for the foregoing reasons, the State asks this Court to reconsider its ruling in light of the arguments and evidence presented while applying the appropriate deferential standard of review, rehear the case, and affirm Appellant's conviction.

iii. Overwhelming Evidence of Guilt

Finally, the State contends this Court may have overlooked its argument the other evidence of Appellant's guilt was sufficiently overwhelming to overcome any possible prejudice he could have suffered from the inadvertent submission of his statements to the jury. Even if the submission of the statements to the jury was unduly prejudicial, the other evidence presented was so overwhelming that no other result could have been reached by the jury. For this reason and from a practical standpoint, the State contends it is unnecessary to remand Appellant's case for a new trial during which the allegedly unduly prejudicial statements could be again submitted to

testimony and emphasized that testimony. In Harris, Harris was convicted of murder instead of the lesser-included offense of manslaughter. Id. at 61, 530 S.E.2d at 627. After sentencing, a juror indicated she read the definitions of the offenses in Black's Law Dictionary the previous night to clarify their meaning. Id. at 61, 530 S.E.2d at 627. The trial denied Harris' motion for a mistrial based on a lack of prejudice. Id. The trial judge noted the definitions read by the juror were nearly identical to the charged instructions, meaning reading the definitions merely could have helped reaffirm what was heard at trial. Id. The Supreme Court affirmed, finding the trial judge did not abuse his discretion, no prejudice resulted from the juror's misconduct, and the misconduct could not have affected the verdict. Id. at 64-65, 530 S.E.2d at 628. Much like the situation in Harris, Appellant argued his improperly submitted statements were identical to the testimony the jury already heard. Therefore, just like in Harris, the trial judge did not abuse his discretion in finding no prejudice resulted from the submission of this evidence.

the jury. Therefore, the State asks this Court to reconsider its ruling, rehear the matter, and affirm Appellant's conviction.

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). An admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). When overwhelming evidence of guilt has been established, any trial error may be harmless. State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988).

In the case at bar, the State contends this Court may have overlooked the significance of the overwhelming evidence of Appellant's guilt. This Court listed the following evidence as the evidence identified by the State as overwhelmingly establishing Appellant's guilt: (1) the accomplices' testimony indicating Appellant was actively involved in robberies; (2) the fact Appellant was observed in the back seat of the vehicle fleeing from an officer attempting to make a traffic stop; (3) the fact officers found a ski mask and a coat linked to Appellant; and (4)

the fact Appellant fled from police and hid in a creek bed. This evidence, along with other evidence presented during trial, constituted overwhelming evidence of Appellant's guilt such that any error in the submission of his statements to the jury was entirely harmless.

Critically, this Court may have overlooked some of the details related to this evidence and may have overlooked some of the other evidence presented during trial. Initially, Appellant's accomplices both testified against Appellant and implicated him in the crimes. Their testimony was substantial evidence of Appellant's guilt. Aside from this damaging testimony, not only was Appellant observed in the back seat of a vehicle fleeing from the direction of the location of the last robbery, but Appellant affirmatively testified he was in the back seat during trial. Critically, officers testified they discovered a ski mask and jacket used during the robbery in the back seat where Appellant testified he had been. Furthermore, although this Court correctly noted Appellant fled from the officers, this Court may have overlooked the significant particular circumstances of Appellant's flight. Appellant not only immediately fled from the officers after the vehicle crashed but Appellant ran into the woods, hid himself under a muddy bank in a creek bed, and successfully evaded officers for over two hours. Appellant's extreme and extraordinary efforts to evade law enforcement were very strong evidence of his involvement in the armed robberies. Finally, Appellant was arrested with approximately \$143 in his pocket, which was roughly half of the total amount of money taken during the robberies.⁴

Looking to all of the properly admitted evidence in totality, this evidence clearly established Appellant's guilt and rendered any error in the mistaken submission of his written statements to the jury harmless. Furthermore, as Appellant argued his testimony and statements

⁴ This Court appears to have overlooked the State's argument regarding this particular evidence on appeal. (Resp. Br. p. 24).

were identical and cumulative on appeal, Appellant's statements were merely cumulative to other properly admitted testimony, rendering their inadvertent submission to the jury harmless. See State v. Griffin, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670 (2000) ("There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted."). The submission of these statements could not have altered the verdict in light of the other evidence presented at trial. See State v. Knight, 258 S.C. 452, 454, 189 S.E.2d 1, 2 (1972) ("[A] conviction will not be reversed for non-prejudicial error in the admission of evidence."). Based on the cumulative nature of the erroneously submitted statements and the other competent evidence properly admitted, the result of Appellant's trial would be the same with or without the error. Therefore, in light of the overwhelming evidence of guilt and the arguments raised by Appellant, the trial judge properly declined to grant Appellant's motion for a new trial. Any error in the mistaken submission of the statements was harmless. For these reasons along with all of the foregoing reasons, the State asks this Court to reconsider its ruling, rehear the case, and affirm Appellant's conviction.

Conclusion

Based on the foregoing, Petitioner requests that the panel reconsider and rehear this matter, and affirm Appellant's conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARK R. FARTHING
Assistant Attorney General

By: 
Mark R. Farthing

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August 25, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable John C. Few, Circuit Court Judge

THE STATE,

Respondent,

vs.

JONATHAN KARON HILL,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Respondent's Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 25th day of August, 2011.



ELLEN R. DuBOIS
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JONATHAN K. HILL,

APPELLANT

Appeal from Greenville County

John C. Few, Circuit Court Judge

Opinion No. 4867

RETURN TO PETITION FOR REHEARING

The respondent filed a petition for rehearing per Rule 221(a), SCACR, on August 25, 2011 in response to the Court of Appeals' decision in the above titled appeal. See State v. Hill, Op. No. 4867 (S.C. Ct. App. filed August 10, 2011). This return follows.

A.) The Court of Appeals' prejudice analysis was proper and completely supported by the record in the case.

The respondent argues that the court improperly reversed the case on a finding of prejudice and a prejudice analysis that was neither raised at trial nor on appeal in the case. To the contrary, the respondent has confused the Court of Appeals' prejudice analysis with the subject of error preservation. A contemporaneous objection is required to preserve an

error for appellate review. State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997).

At the trial level in this case, trial counsel raised this issue of the jury's viewing of two statements made by appellant that were not admitted into evidence and the trial judge entertained and ruled on the prejudicial/harmless of this. See Supplemental ROA.

On appeal, appellate counsel argued the same, i.e. that prejudicial error occurred when the jury viewed two statements made by appellant which were not admitted into evidence at trial. See appellant's brief at pages five and six. The rule that a party cannot argue one ground at trial and another ground on appeal is an acknowledged rule that was not contested by appellant. Nevertheless, in the case at bar, this rule was not violated as there was no variance by neither trial counsel nor appellate counsel on the sole issue raised at trial and on appeal, i.e. that it was prejudicial error to have the jury view statements made by appellant that were not admitted into evidence at trial. Compare the following true variances that violate this rule. For example, in State v. Myers, 344 S.C. 532, 544 S.E.2d 851 (Ct App. 2001), and State v. Richardson, 358 S.C. 586, 595 S.E.2d 858 (2004), the Court noted the violation of this rule where the issue of relevancy was raised at trial with respect to certain testimony, but later made an impermissible character violation argument on appeal regarding the same was made on appeal. See also State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003), where a trial objection was made on the ground that a solicitor's comment shifted the burden of proof, but on appeal the argument was made that this comment improperly referred to the defendant's right to remain silent. Contrast State v. Benjamin, 341 S.C. 160, 533 S.E.2d 606 (2000), where the defendant argued at trial that 17-25-45 violated the equal protection clause, but argued on appeal that the same violated state and federal due process. Here, the issue raise at trial and on appeal were identical.

Thereafter, since there was no error preservation violation in the case and since the sole issue raised in the case on appeal was the same issue raised below at trial, then the Court of Appeals properly moved forward with its error and prejudice analysis as presented in its opinion in the case. The Court of Appeals' analysis on the issue of prejudice included a comparison of appellant's statements versus his (appellant's) testimony, and a finding that appellant's credibility was damaged by the unadmitted statements because they contradicted his testimony at trial. Note further that the Court of Appeals' prejudice analysis was reasonable and supported by the record. See Lawson v. Morgan, 2011 WL 1135895 (D.Md. March 25, 2011). Appellate judges not only have a duty to make reasonable analyses, which was done in this case, but they have the prerogative to analyze cases, overrule precedent or put forth rulings as warranted. Compare McDonald v. City of Chicago 130 S.Ct. 3020 (2010); and Roper v. Simmons, 543 U.S. 551 (2005).

Furthermore, the respondent argued that the Court of Appeals erroneously held that the jury's exposure to statements made by appellant, which were not admitted into evidence, resulted in a presumption of prejudice, which was an improper standard. The respondent refers to the portion of the opinion where the Court of Appeals held as follows:

In the present case, we conclude the improper submission of Hill's two written statements to the jury is reversible error. Although the circuit court ruled Hill's written statements were voluntarily given, the State did not introduce Hill's statements into evidence at trial. Thus, the entire jury panel was exposed to evidence that had not been admitted during trial, thereby unduly prejudicing Hill.

To the contrary, the Court of Appeals did not apply a presumed prejudice analysis in this case. For example, this paragraph above appeared on page seven of a nine-page opinion, which occurred after the Court of Appeals conducted a detailed summary of the background, facts, and testimony from the case and how the issue arose, all or which can be found on page one to page four

in the opinion. Then, the Court of Appeals followed with an analysis of the case law on this issue on pages five and six in the opinion. Subsequently, the Court of Appeals produced the paragraph in question (again as reprinted above) that appeared on page seven of the opinion. This paragraph found on page seven in the opinion was the culmination of an exhaustive analysis of the facts and applicable law in the case, rather than a summarily written presumption of prejudice holding. For example, the following facts and findings and case law preceded and supported the conclusion in the paragraph in question:

- 1.) Damian Taylor testified that he remained in the care while appellant and Melvin Darren went inside the La Quinta Inn and committed robbery.
- 2.) Taylor gave a statement indicating that appellant was unaware of his (Taylor) and Warren's robbery plans and that appellant thought they were just riding around.
- 3.) Subsequently, Taylor stated that he told appellant about the robbery plans.
- 4.) Warren stated that he and appellant went inside both the La Quinta Inn and the Hampton Inn and committed the robberies while Taylor remained in the car.
- 5.) Warren admitted he lied in his police statement when he told police he remained in the car while appellant and Taylor robbed both motels.
- 6.) Appellant testified that he agreed to ride with Taylor and Warren believing that they were going to a party to meet some girls. Appellant stated that he remained in the vehicle while Taylor and Warren robbed the hotels.
- 7.) An outline and overview of the case law on the affect of the jury's exposure to outside influences and extraneous matter.
- 8.) A summary of appellant's unadmitted statements, which indicated that appellant knew Taylor and Warren had a reputation for committing robberies and that Taylor and Warren wanted him (appellant) to "ride with them" and "work with them."
- 9.) An outline and overview of the holdings in cases¹ where the extrinsic evidence contradicted the defendants' story.
- 10.) Then, the submission of the paragraph in question from the opinion which stated a conclusion based on an analysis of the facts, testimony, and the unadmitted statements and case law that the review of said statements was prejudicial error.

Compare and contrast the **nature** of the following cases of holdings where prejudice was presumed.

For example, when counsel is absent from a critical state at a defendant's trial, then prejudiced is

presumed. McKnight v. State, 320 S.C. 356, 456 S.E.2d 352 (1995). In some instances, the failure to issue a certain charge (self defense) would mean that prejudice is presumed. State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002). Similarly, an erroneous charge would result in presumed prejudice in some cases. Cole v. Raut, 365 S.C. 434, 617 S.E. 740 (2006). Also, if one is not afforded discovery rights, then prejudice is presumed. Conway v. Charleston Lincoln Mercury, 363 S.C. 301, 609 S.E.2d 838 (2005). Moreover, if a disputed juror is seated on the jury where the court improperly granted a Batson motion, then the erroneous Batson ruling would taint the jury and prejudice is presumed. State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009). Compare also the rule where prejudice is presumed if an alternate juror is present in the jury room when the petit jury deliberates. State v. Grovenstein, 328 S.C. 548, 493 S.E.2d 865 (1998). Thus, numerous presumed prejudice cases involve legal matters of law. Prejudice presumptions are usually rare. United States v. Cronin, 466 U.S. 648 (2004).

This case at bar is similar to the United States Supreme Court case of Florida v. Nixon, 540 U.S. 1217 (2004), where the Court held that the complainant's allegation that counsel failed to test the prosecution's case did not automatically presume prejudice sans an analysis of the circumstances of the case. Here, the Court of Appeals did not find a presumption of prejudice, but rather, as in Florida v. Nixon, analyzed the circumstances of this case before making a finding of prejudice. Clearly, the paragraph in question, which the respondent makes much of was a finding of prejudice (not presumed prejudice) based and full analysis of the circumstances of this case.

B. The Court of Appeals' findings that the error in question was not harmless and that there was no overwhelming evidence of appellant's guilt were completely supported by the record the case.

¹ State v. Rogers, 96 S.C. 350, 80 S.E. 620 (1914); and State v. Pete, 98 P.3d 803 (Wash. 2004).

Clearly, the Court of Appeals' findings that the existence of prejudice in the case was not harmless error and that no overwhelming evidence of appellant's guilt existed in the case supported and warranted the reversal of the case.

The Court of Appeals' comparison of appellant's testimony versus the contents of appellant's two statements, which were not admitted into evidence, but which were viewed by the jury nonetheless, clearly showed sufficient prejudice to support the reversible error holding because appellant's testimony was to the effect that he no knowledge or involvement in Taylor's and Warren's robbery plans and that he thought they picked him up to take him to a party when appellant's statements included references to the contrary. For instance, the statements indicated that appellant knew Taylor and Warren robbed places and that they picked him up so he could ride and work with them, which in turn suggested that he was indeed a coconspirator and an accomplice in the robberies. Therefore, the Court of Appeals properly held that appellant's statements were "contradictory" and "undermined [his] credibility to the jury," which can be translated to mean that "his credibility was substantially damaged." See State v. Outlaw 307 S.C. 177, 414 S.E.2d 147 (1992), as cited to by the Court of Appeals in this opinion for the rule that error which substantially damages the defendant's credibility is essential to his defense is reversible error.

Moreover, the court found that this error was not harmless error. Error is harmless if it does not contribute to the jury verdict or could not have affected the result of the trial. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985). Clearly, the error of the jury's inspection of the statements made by appellant which were not admitted into evidence at trial and contradicted appellant's testimony of no involvement and his defense of no knowledge, contributed to the jury verdict of guilty as charged, especially since the content of those statement negated his credibility as a witness at trial. Note that appellant's credibility could not have been rehabilitated because the

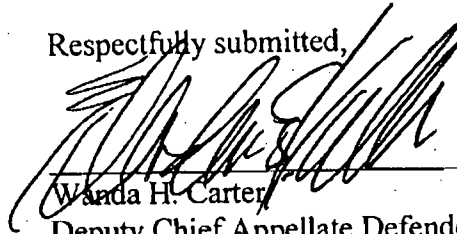
information regarding the jury's viewing of the statements came after the trial ended. As a rule, when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside the conviction because of insubstantial errors not affecting the jury verdict. State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). Again, the error in the case at bar was not insubstantial, but rather material, substantial, and affected the result of the trial by contributing to the jury's guilty verdict.

In addition, there was no overwhelming evidence of guilt in the case. For example, witnesses Taylor and Warren were not stellar pillars of the community whose testimony was worthy of belief. In addition, their stories were conflicting, convoluted, and riddled with finger pointing. Taylor stated in his statement that appellant was unaware of his and Warren's planned robberies, but then testified that he (Taylor) stayed in the vehicle while Warren and appellant robbed the motels. Warren said that he and appellant went in to commit the robberies while Taylor stayed in the car, but then appellant stated that he stayed in the car. Appellant stated that he no idea that these two had planned to commit robberies. However, appellant's statements that were viewed by the jury contradicted appellant's declaration that he was a non-participant in the crimes and had no knowledge of the conspiracy. In other words, there was no overwhelming evidence of appellant's guilt in the case. Since appellant's guilt was not proved by neither competent nor overwhelming evidence in the case, and since the jury's view of appellant's unadmitted statements constituted error that was sufficiently prejudicial and not harmless error, then the jury verdict was undoubtedly affected.

CONCLUSION

Based on the foregoing return, appellant requests that the petition for rehearing be denied and the ruling of the Court of Appeals upheld.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 8th day of September, 2011.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

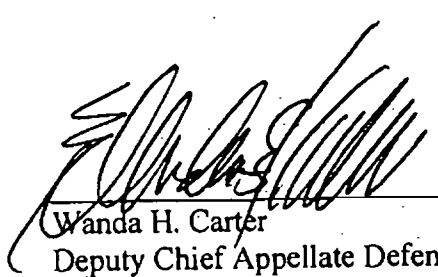
V.

JONATHAN K. HILL,

APPELLANT

CERTIFICATE OF SERVICE

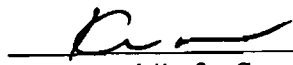
The undersigned attorney hereby certifies that a true copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of September, 2011.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 8th day
of September, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

APP'X 589

The South Carolina Court of Appeals

The State,

Respondent,

v.

Jonathan K. Hill,

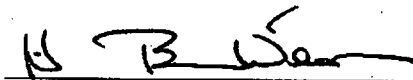
Appellant.

The Honorable John C. Few
Greenville County
Trial Court Case No. 2002-GS-23-01807
2002-GS-23-01808
2002-GS-23-02590
2002-GS-23-02737
2002-GS-23-02738

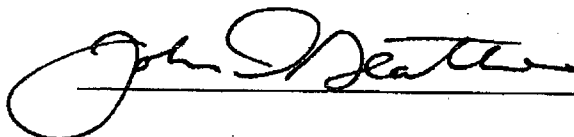
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

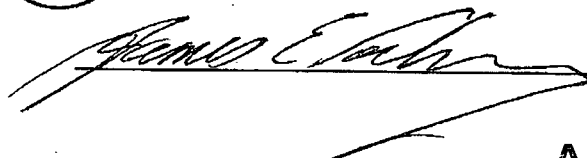
It is, therefore, ordered that the Petition for Rehearing be denied.



J. Williams



J. Geathers



J. Lockemy

APP'X 590

Columbia, South Carolina

cc: Deputy Chief Appellate Defender Wanda H. Carter
Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General Mark R. Farthing
William W. Wilkins, III

FILED

SEP 22 2011

APP'X 591