STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Greenville County
Honorable G. D. Morgan, Jr., Circuit Court Judge
Appellate Case No. 2024-001413

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THE STATE,

Respondent,

vs.

LEVY ERNEST DUNN, III,

Appellant.

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# INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

"Did the trial judge err in failing to rule on the mistrial motion based on prejudicial premature deliberations among three jury members and instead offering the Hobson's choice of proceeding with the three biased jurors in question or removing the three jurors, replacing them with the two alternate jurors, and proceeding with a jury of only eleven members pursuant to Rule 14 of the South Carolina Rules of Criminal Procedure?"

## COUNTER-STATEMENT OF ISSUE ON APPEAL

Was any issue concerning alleged premature deliberations waived by Appellant when: (1) with a full awareness the trial judge had not yet determined how he was going to rule upon the mistrial motion, Appellant elected to agree in writing to the trial proceeding forward with an eleven-member jury that did not include any of the jurors who had been accused of premature deliberations; and (2) by removing the three accused jurors from the jury, the trial judge eliminated any conceivable prejudice that could have existed under the circumstances involved and, thus, no longer had any possible need to grant a mistrial?

## STATEMENT OF THE CASE

In April of 2021, Appellant Levy Ernest Dunn, III—who, at one point, was described as a "lovesick" man—was arrested after he was tracked down in connection to an incident that occurred a few weeks earlier in which he attacked and repeatedly stabbed his then-wife[1] with a knife before absconding from their home. In May of 2022, the Greenville County Grand Jury indicted Appellant for domestic violence of a high and aggravated nature. On August 19, 2024, a jury trial was commenced in the Greenville County Court of General Sessions with the Honorable G. D. Morgan, Jr., circuit court judge, presiding. At the conclusion of the three-day trial, the jury—which, pursuant to a written agreement[2] entered into by both parties and approved by the trial judge, was comprised of only eleven jurors—convicted Appellant as indicted.[3] Following the verdict, the trial judge sentenced Appellant to an eighteen-year term of imprisonment and issued a permanent restraining order barring Appellant from all contact with his victim. Appellant then timely filed a notice of appeal.

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[1] Appellant's victim was no longer married to him by the time of trial. (Tr. p. 286).

[2] Specifically, the written consent agreement was signed by defense counsel, the solicitor, and the trial judge and read as follows: "During the trial of the above referenced matter, the parties agreed to the removal of three jurors, placing both alternates on the jury and proceeding with eleven (11) jurors pursuant to Rule 14 of the S.C. Rules of Criminal Procedure." (Tr. p. 591; Court's Ex. # 2 (Rule 14 Agreement)).

[3] Sadly, that was not the first time Appellant—who had a lengthy prior criminal record that spanned two decades—had been convicted of engaging in an act of domestic violence upon the victim. (Tr. pp. 596-597).

## STATEMENT OF FACTS

On the evening of March 17, 2021, Nneka Rita Dunn[4] ("Victim") returned home to her apartment located in Simpsonville, South Carolina, after going shopping for groceries. (Tr. pp. 286-287; p. 478). Upon returning home, Victim immediately detected an unusual odor of smoke emanating from somewhere inside. (Tr. p. 287; p. 338). At the same time, her then-husband,[5] Appellant, was sitting in the living room watching television but also seemed to be "acting funny." (Tr. pp. 287-288). Victim proceeded to put the groceries away, and she then headed to the bathroom to take off her wig. (Tr. pp. 287-288). Oddly, when she did, Appellant noticeably increased the volume on the television to make it very loud. (Tr. p. 288). Following that, Victim sat down on the bed in the pair's shared bedroom. (Tr. p. 288).

A short time later, Appellant entered the bedroom with black gloves covering his hands, and he quickly asked Victim for the keys to her vehicle.[6] (Tr. pp. 288-289). Aware Appellant did not have a valid driver's license, Victim responded by questioning why Appellant wanted the keys. (Tr. p. 289; p. 305). Suddenly, at that moment, Appellant lunged at Victim, began punching her, and said he was going to kill her. (Tr. p. 289). A struggle ensued between the two, and, during it, Appellant pulled out a knife and began brutally stabbing Victim with it in her face and neck.[7] (Tr. p. 289). As the struggle continued, the two fell onto the floor. (Tr. pp. 289-290). Victim, now bleeding, pleaded with Appellant to stop and tried to scream for help. (Tr.

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[4] By the time of trial, Victim had changed her name to Nneka Rita Chidibere Okeke. (Tr. p. 285).

[5] Victim, who was originally from Nigeria, met Appellant when she was on a visit to the United States in 2017, and they subsequently wed in May of 2018. (Tr. p. 286; p. 332; p. 334).

[6] The vehicle was registered in Victim's name. (Tr. p. 463).

[7] At one point, Appellant also bit Victim. (Tr. p. 339).

pp. 289-290). However, Appellant covered her mouth with his hand in response and accused her of turning everyone against him. (Tr. pp. 290-291). The struggle only ceased when Victim, weakened from blood loss, stopped trying to speak and turned her neck to the side. (Tr. p. 291). Perhaps believing she was dead, Appellant then got up and returned to the living room, leaving his bloody victim behind on the floor. (Tr. pp. 291-292).

Once Appellant was gone, Victim, who thought she was dying, got up from the floor and tried to make her way to the apartment's front door. (Tr. p. 292). Along the way, she picked up a small exercise dumbbell from the floor to use in case she needed to protect herself from Appellant. (Tr. p. 294). Unfortunately, she did; Appellant saw her trying to escape, expressed surprise she was still alive, and resumed attacking her. (Tr. p. 296). Again, a struggle ensued, and Appellant once again stabbed Victim with his knife as she futilely swung the dumbbell around. (Tr. p. 300; pp. 302-304). Eventually though, Victim was able to kick Appellant in the groin, and that painful blow enabled her escape. (Tr. p. 303; p. 305). As soon as she could, Victim ran out the door and fled to an adjacent apartment building while crying out for help. (Tr. p. 305).

Fortunately, some of Victim's neighbors heard her screams, and she was able to get inside a nearby apartment. (Tr. p. 111; p. 114; pp. 118-121; p. 139; p. 305; State's Ex. # 2 (Photograph)). Meanwhile, Appellant, who had taken the keys from Victim while she was on the bedroom floor, fled from their shared apartment and sped off in Victim's vehicle. (Tr. pp. 308-309).

Shortly after that, the brutal attack was reported to authorities, and law enforcement officers and medical personnel—including some who lived at the apartment complex—rapidly responded to the scene. (Tr. pp. 105-107; p. 111; p. 114; pp. 137-138; pp. 156-158; pp. 167-168;

State's Ex. # 1 (911 Call Recording); State's Ex. # 3 (Photograph); State's Ex. # 81 (Body Camera Recording)). Due to the "very serious" nature of her injuries, Victim was then rushed to the hospital. (Tr. pp. 139-140; p. 158; p. 174; pp. 177-178; p. 181; p. 313; pp. 408-409).

As a result of the attack, Victim sustained stab wounds to her face, neck, scalp, lip, shoulder, and upper back. (Tr. pp. 185-186; p. 409; p. 411; State's Ex. # 77 (Photograph); State's Ex. # 78 (Photograph); State's Ex. # 79 (Photograph); State's Ex. # 80 (Photograph)). One of those stab wounds injured Victim's carotid artery in a manner that was life-threatening and posed a risk of—amongst other things—"sudden death," paralysis, and blindness. (Tr. pp. 411-413; pp. 433-434). Beyond that, Victim's face was swollen, and she suffered lacerations to her ear and the bridge of her nose. (Tr. p. 185; pp. 410-411). Had Victim not received treatment, she could have died. (Tr. pp. 433-434). Fortunately though, the medical professionals at the hospital were able to treat Victim, get her bleeding under control, and suture her knife wounds. (Tr. p. 414; p. 429). Nevertheless, Victim still had to be hospitalized until March 22, 2017, based on the extent of her injuries, and she needed follow-up care after that. (Tr. p. 414).

While Victim was receiving the life-saving care at the hospital, officers began investigating the crime scene. (Tr. pp. 200-201; p. 282; pp. 440-441). During that investigation, they found a large amount of blood spread throughout Victim and Appellant's apartment, which was "disheveled" and—for good reason—looked like it had been the scene of an altercation, along with spatters of blood leading away from the apartment along Victim's escape path. (Tr. p. 163; p. 205; pp. 211-215; pp. 224-226; pp. 233-234; p. 446; pp. 448-450; State's Ex. # 24 (Photograph); State's Ex. # 26 (Photograph); State's Ex. # 27 (Photograph); State's Ex. # 32 (Photograph); State's Ex. # 33 (Photograph); State's Ex. # 59 (Photograph); State's Ex. # 60 (Photograph); State's Ex. # 61 (Photograph); State's Ex. # 65 (Photograph)). In addition to that,

investigators located a bloody knife handle with a missing blade on the bed, a dumbbell near the front door, pieces of black gloves in the bedroom, and an envelope in the kitchen with the message "I love my wife so much" handwritten on each side. (Tr. p. 163; p. 227; pp. 236-237; p. 397; p. 453; State's Ex. # 47 (Photograph); State's Ex. # 48 (Photograph)). However, Appellant himself could not be located that day despite immediate efforts to find him. (Tr. pp. 502-503).

In the weeks that followed, Appellant remained missing, but investigators were able to gain access to location data from Victim's vehicle.[8] (Tr. p. 458; p. 463; pp. 502-503). Through that data, officers finally tracked down Appellant, who was actively using and appeared to be living in Victim's vehicle, and he was swiftly taken into custody on April 7, 2021.[9] (Tr. pp. 435-437; pp. 458-461; p. 471; pp. 502-503).

Subsequent to his arrest, Appellant was indicted for domestic violence of a high and aggravated nature, and he elected to proceed forward to trial.[10] (Tr. p. 64; Indictment). During trial, Victim recounted the terrifying details of Appellant's knife attack upon her and described her shocking injuries, which resulted in scarring and persistent pain and—based on the expert testimony presented—were life-threatening in nature. (Tr. pp. 285-364; p. 377; pp. 405-418; pp. 428-434; State's Ex. # 83 (Photograph); State's Ex. # 84 (Photograph); State's Ex. # 85 (Photograph); State's Ex. # 86 (Photograph); State's Ex. # 87 (Photograph)). In addition to that, several of Victim's neighbors recounted their disturbing experiences on the evening of the

[8] Prior to that, Victim alerted investigators her credit card—which was inside her vehicle when Appellant fled with it—had been used in Rocky Mount, North Carolina. (Tr. pp. 317-318; p. 357; pp. 455-456). Notably, Appellant previously lived in that area, and he had family members who still resided there. (Tr. p. 318; p. 457).

[9] At the time he was arrested, Appellant did not appear to be noticeably injured. (Tr. p. 438).

[10] Leading up to the trial, Appellant—who had been ordered to have no contact with Victim—apparently made several attempts to reach Victim through phone calls and messages to say he was sorry and convey his supposed love for her. (Tr. pp. 319-324; p. 471; pp. 556-557; p. 599).

incident, and the law enforcement officers and other personnel involved in the response to the attack detailed what was uncovered through their investigation, which culminated in Appellant's arrest when he was found weeks after the crime. (Tr. pp. 101-127; pp. 129-141; pp. 155-165; pp. 167-188; pp. 200-217; pp. 223-240; pp. 263-282; pp. 435-438; pp. 440-503).

After all that testimony and evidence was presented, the State—on the trial's last day—rested its case. (Tr. p. 503). Following that, Appellant personally confirmed he was not going to testify, and the defense rested without introducing any additional testimony or evidence. (Tr. p. 515; p. 520). The trial judge then excused the jurors for a lunch recess. (Tr. p. 520).

Once that recess was over, the trial judge noted some new information had been brought to his attention. (Tr. p. 520). More specifically, the trial judge indicated he had been advised three jurors were—according to an assistant public defender and another person associated with the defense—overheard purportedly talking about the case at a particular sandwich shop during the lunch break. (Tr. pp. 520-521). In response and with the agreement of counsel, the trial judge proceeded to conduct an inquiry into the matter. (Tr. pp. 521-522).

During that inquiry, three members of the jury confirmed they had eaten lunch at the identified sandwich shop at issue. (Tr. p. 522). Based on that, the trial judge questioned those three jurors one by one. (Tr. pp. 522-526). All three confirmed they ate lunch with the other two. (Tr. p. 522; pp. 524-525). However, the first of those jurors—Juror # 40—flatly denied discussing the case at lunch in any manner, including about Appellant's guilt or the number of years Appellant could receive if convicted. (Tr. p. 523). Similarly, Juror # 29 stated the three talked "about lots of different things" at lunch, but she indicated she did not recall talking about the case, including about Appellant's guilt or the length of the potential sentence. (Tr. pp. 524-525). Juror # 29 further acknowledged they "maybe" discussed how much longer they were

going to be there, but she insisted they had no discussions about the case aside from that. (Tr. p. 525). Finally, Juror # 49 denied having any discussions about the case, stated he could not recall talking about guilt or the length of any potential sentence, and affirmed none of them had any conversations about the trial. (Tr. p. 526).

Upon questioning those jurors, the trial judge excused the three and noted they all had denied discussing the case. (Tr. p. 526). Nevertheless, defense counsel promptly moved for a mistrial. (Tr. pp. 526-527).

As support for that motion, defense counsel maintained the jurors' accusers had no reason to fabricate their accounts. (Tr. pp. 526-527). Furthermore, while conceding credibility was a matter for the trial judge to resolve, she suggested there were—at least in her view—reasons to doubt the jurors' credibility since "all three" seemed unable to recall something that had happened only moments earlier, she *thought* one of the jurors had looked up at the ceiling when speaking and had avoided direct eye contact, and she *thought* another of the jurors looked down or away during the questioning. (Tr. p. 527). For those reasons, defense counsel argued the grant of a mistrial was warranted. (Tr. p. 527).

After listening to defense counsel's arguments, the trial judge decided to question the jurors' accusers. (Tr. pp. 528-531). The first—who was identified as "Ms. Burkette"—testified as follows:

> So the girl and the guy with the goatee, their backs were to me, so I heard more the first guy who came. He had said -- he joked about not guilty and started laughing. He said something about 20 years. And somebody said, No, I think it's five. When they were asking for the check, he said, What are they going to do, fire us? Then they got up and left.

(Tr. p. 528). Outside of those limited fragments of conversation, Burkette confirmed she could not recall anything else. (Tr. p. 529). Similarly, the second accuser—Anastasia Walker,

Esquire, an assistant public defender who worked for defense counsel's office[11]—recounted what she overheard as follows:

> I was sitting with my back to the individuals behind us, I heard the phrase, not guilty and then loud laughter from a man's voice. I heard 20 years. And then I heard, I think's it's five. I don't know if it was a man or woman that said those things, but 20 years was a man. I can't remember who, if it was the man or woman. Then I heard, I think we're going to be late and what are they going to do about it.

(Tr. p. 531). Walker further emphasized: "That was exactly the things that I could hear and decipher." (Tr. p. 531).

Following that, defense counsel confirmed Burkette and Walker sent text messages to her as they were leaving the sandwich shop and then quickly came to her to further report on what they had overheard. (Tr. p. 531). Beyond that, defense counsel indicated it was "curious" to her twenty years had been overheard since Appellant's offense carried a maximum penalty of twenty years, which made her concerned the jurors were investigating the penalty for the charged offense. (Tr. pp. 531-532). Based on that coupled with everything presented, defense counsel asserted there was "prima facie evidence that [the three jurors] were deliberating during lunch and discussing the case"[12] and, therefore, a mistrial was supposedly the "only possible outcome" under the circumstances involved. (Tr. p. 532).

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[11] Appellant's defense counsel was and is the circuit public defender for the Thirteenth Judicial Circuit. S.C. Commission on Indigent Defense Circuit Public Defender List, https://sccid.sc.gov/about-us/circuit-public-defenders.

[12] Defense counsel also asserted "there may have been more overheard[.]" (Tr. p. 532). However, it appears unclear what defense counsel meant by that particular assertion since Burkette and Walker confirmed what they reported through their testimony constituted the entirety of what they heard when eavesdropping on the jurors during the lunch break. (Tr. p. 529; p. 531).

After listening to those remarks, the trial judge noted he did not doubt the credibility of Burkette and Walker. (Tr. pp. 532-533). However, he further noted what those two had overheard was limited in nature, that limited matter could have been about "something else," and all three jurors had denied talking about the case. (Tr. pp. 532-533). As a result, the trial judge explained defense counsel's request for a mistrial hinged on an assumption the jurors must have been discussing the case. (Tr. p. 534).

In response, defense counsel candidly acknowledged her arguments rested upon an assumption but maintained her assumption the jurors were discussing the case was "not a stretch" in light of the specifics of what was overheard. (Tr. p. 534). Defense counsel then again asked the trial judge to grant a mistrial. (Tr. p. 534).

At that point, the trial judge expressly confirmed he was still considering the matter and had not yet reached a decision. (Tr. pp. 534-535). Upon confirming the mistrial motion remained undecided, the trial judge then asked the parties if they would be willing to agree in writing to the case being decided by a jury of eleven pursuant to the mandates of Rule 14 of the South Carolina Rules of Criminal Procedure. (Tr. pp. 534-535). A break was then taken to allow the parties to discuss that possibility. (Tr. p. 535).

After that break, the solicitor indicated she believed the jury should remain intact because a mistrial was unwarranted by the circumstances but affirmed the State would nevertheless agree in writing to the case proceeding forward with eleven jurors. (Tr. p. 535). Following that, defense counsel stated "obviously, [the defense] would continue with [its] motion for a mistrial[.]" (Tr. p. 536). However, due to her "understanding The Court's not inclined . . . to grant that motion," defense counsel indicated the defense—based on her discussions with Appellant, who was present in the courtroom—would agree to go forward with eleven jurors to

"fill th[e] gap" that would result if Juror # 40, Juror # 29, and Juror # 49 were removed and replaced with the two available alternate jurors. (Tr. p. 536).

Significantly, immediately in response to those remarks, the trial judge clarified he "obviously" had not yet fully ruled on the mistrial motion and noted the parties "may or may not have an idea the way [he was] going to rule" on it. (Tr. p. 536). He then sought confirmation from the parties as to whether they were "fine" with the trial proceeding forward with only eleven jurors. (Tr. p. 536).

Defense counsel responded:

> Yes. The way I presented it is if The Court doesn't grant the mistrial, the options presented to The Defendant was that those three jurors, still realizing from being questioned or otherwise, there may still be some prejudice that exist even if it -- or some bias, but doesn't rise to the level of prejudice. But some less than deliberations still occurred, that I believe that that option would be that he could go forward not with those three, they would be excused, but that he could go forward with 11 and the two alternates would step in to fill the gap, we would opt for the 11.

(Tr. pp. 536-537). Likewise, the solicitor—while correctly noting the trial judge's "ruling ha[d] not been made" yet on the mistrial motion—again confirmed the State was also comfortable proceeding forward with eleven jurors. (Tr. p. 537).

Upon receiving that confirmation, the trial judge explained the information that had come to light did "give [him] some concern." (Tr. pp. 537-538). He further indicated he found Burkette and Walker were "certainly . . . very credible" but also believed the jurors when they said they did not discuss the case. (Tr. p. 538). In light of that, he affirmed the "better option" was simply to excuse the three jurors, replace them with the two available alternate jurors, and continue forward with eleven jurors *as agreed to* by the parties. (Tr. pp. 538-539).

Consistent with that ruling, the trial judge then excused Juror # 40, Juror # 29, and Juror # 49 and—with the written agreement of the parties—replaced those three with the two alternate jurors. (Tr. pp. 539-540; Court's Ex. # 2 (Rule 14 Agreement)). The parties then presented their closing arguments[13] to the jury, and the trial judge—without objection—instructed the jury on the applicable law, including on the need for a unanimous verdict. (Tr. pp. 546-583).

Following that, the case was submitted to the jury. (Tr. p. 583). Just over thirty minutes later, the eleven-member jury returned with its verdict and unanimously convicted Appellant as indicted. (Tr. p. 583; p. 591).

Subsequently, only after the jury's guilty verdict had been announced, defense counsel lodged a number of post-trial motions, including "a motion notwithstanding the verdict,"[14] while also contending the trial judge "should have granted a mistrial" based on the "irregularities" with the three *removed* jurors. (Tr. p. 598). However, the trial judge rejected those motions without specifically addressing defense counsel's renewed mistrial claim. (Tr. p. 598).

[13] Defense counsel's closing argument was primarily focused on attempting to attack the quality of the law enforcement investigation into the knife attack and floating unsupported alternative theories, such as a suggestion the massive amount of blood found at the crime scene theoretically could have been Appellant's since it was not specifically analyzed for identification purposes. (Tr. pp. 560-566).

[14] As has long been recognized in South Carolina, a motion for a judgment notwithstanding the verdict is solely a "civil trial motion," and, therefore, "it is improper for a party to move for" one in a criminal case. State v. Follin, 352 S.C. 235, 258, 573 S.E.2d 812, 824 (Ct. App. 2002).

## STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review *preserved* errors of law. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). When reviewing a decision regarding a mistrial, an appellate court will not disturb a trial judge's discretionary ruling on such a matter absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000); see State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("In order to receive a mistrial, the defendant must show error and resulting prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Patterson, 425 S.C. 500, 507, 823 S.E.2d 217, 221 (Ct. App. 2019) (citation and internal quotations omitted).

## ARGUMENT

**Any issue concerning alleged premature deliberations was waived by Appellant because: (1) with a full awareness the trial judge had not yet determined how he was going to rule upon the mistrial motion, Appellant elected to agree in writing to the trial proceeding forward with an eleven-member jury that did not include any of the jurors who had been accused of premature deliberations; and (2) by removing the three accused jurors from the jury, the trial judge eliminated any conceivable prejudice that could have existed under the circumstances involved and, thus, no longer had any possible need to grant a mistrial.**

Appellant contends the trial judge reversibly erred by failing to rule upon and grant his mistrial motion after allegations of premature deliberations arose during trial. As support for that contention, Appellant maintains the trial judge should have found the alleged premature deliberations had been established based on what defense counsel's associates reported, should have likewise found those premature deliberations were prejudicial because he purportedly proved the three "biased" jurors thought "a not guilty verdict was laughable," and should have granted a new trial after making such findings. Furthermore, Appellant suggests the mistrial issue can still properly be raised and addressed on appeal despite the absence of an actual ruling on it because he purportedly only agreed to the remedial measure that was employed to correct the matter because the trial judge supposedly offered him "the Hobson's choice" of either proceeding forward with a jury containing the three "biased" jurors or proceeding forward without the biased jurors but with a jury comprised of only eleven members. As should be obvious from the fact Appellant is now attempting to appeal a ruling he *concedes* the trial judge did not make, Appellant is wrong, and any issue he may have had concerning the alleged premature deliberations was waived by virtue of his written agreement to the trial judge's proposed remedial measure, which was one that eliminated any conceivable prejudice that could have existed and rendered it unnecessary for any definitive determination about the premature deliberations to be made. Under such circumstances, the grant of a mistrial was simply not

warranted in Appellant's case, and there are no legitimate grounds upon which Appellant's conviction can now be reversed on appeal. Appellant's convictions should be affirmed.

In every criminal case tried in South Carolina, a defendant indisputably has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see Harris, 340 S.C. at 63, 530 S.E.2d at 627 ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). That right provides the guarantee of a trial by a panel of impartial, indifferent jurors. State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 633 (Ct. App. 2008). Importantly though, it does *not* guarantee a trial by a jury composed of any particular jurors. Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999); see U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury*[.]" (emphasis added)); S.C. Const. art. I, § 14 ("The right to trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial *by an impartial jury*[.]" (emphasis added)). Indeed, that particular right does not even unyieldingly guarantee a trial by a jury composed of twelve jurors.[15] See Williams v. Florida, 399 U.S. 78, 102 (1970) (explaining "the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics' " and concluding a jury of less than twelve in a criminal trial is not unconstitutional); see also Rule 14(a), SCRCrimP ("A jury shall be composed of twelve members, but at any time before verdict, the parties may agree in writing with the approval of the court that the jury shall consist of any number less than twelve or that a

[15] Although the constitutional right to a fair trial does not mandate a jury of a particular size, another provision of the South Carolina Constitution does state a circuit court jury in South Carolina "shall consist of twelve members[.]" S.C. Const. art. V, § 22.

valid verdict may be returned by a jury of less than twelve should the court find it necessary to excuse one or more jurors for any just cause after trial commences.").

To safeguard a defendant's right to a fair trial by an impartial jury, the jury must reach its verdict free from any improper external or internal influence. Kelly, 331 S.C. at 141, 502 S.E.2d at 104. However, even if the jury is exposed to improper influences, such an impropriety is not prejudicial unless it affects the jury's impartiality. Id. Significantly, in South Carolina, prejudice will *not* be presumed from improper influences on the jury and, instead, must be shown by the defendant to warrant the grant of a mistrial or the disqualification of any jurors. State v. Grovenstein, 335 S.C. 347, 351, 517 S.E.2d 216, 218 (1999); 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. 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)).

Premature deliberations are one form of internal juror misconduct that could *potentially* affect the partiality of jurors and the fairness of a trial, and, therefore, they are not proper. State v. Joyner, 289 S.C. 436, 437, 346 S.E.2d 711, 712 (1986); see Aldret, 333 S.C. at 312, 509 S.E.2d at 813 (recognizing premature deliberations *may* affect the fundamental fairness of a trial). The prohibition against premature deliberations is designed to prevent jurors from making up their minds prematurely by declaring a position on an issue while the trial is in progress and then standing by that declared position even in defiance of contrary evidence subsequently introduced. State v. McGuire, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979). Simply put, "[a] fair trial is more likely if each juror keeps his own counsel until the appropriate time for

deliberation." Id. Importantly though, premature deliberations—although improper—are generally considered to be far less serious than juror misconduct involving external influences because "when there are premature deliberations amongst jurors with no allegations of external influences on the jury, the proper *process* for jury decisionmaking has been violated, but there is no reason to doubt the jury based its ultimate decision only on evidence formally presented at trial." United States v. Resko, 3 F.3d 684, 690 (3d Cir. 1993).

To aid in the proper resolution of such matters when they arise, our Supreme Court has articulated a "suggested procedure" to handle allegations of premature of deliberations. Aldret, 333 S.C. at 315, 509 S.E.2d at 815; see State v. Pittman, 373 S.C. 527, 553, 647 S.E.2d 144, 157 (2007) (recognizing decisions regarding how to assess and respond to allegations of juror misconduct rest in the broad discretion of the trial judge). Pursuant to that *suggested* procedure, a trial judge—in a case in which the allegations arose during the trial—is encouraged to conduct a hearing to determine: (1) if premature deliberations did, in fact, occur; *and* (2) if any that did occur were actually prejudicial. Aldret, 333 S.C. at 315, 509 S.E.2d at 815. In addressing the matter, a trial judge "*may*" question the jurors and issue a cautionary instruction where practicable to respond to allegations of premature deliberations "[i]f requested by the moving party[.]" Id. (emphasis added); see Resko, 3 F.3d at 695 (recognizing the damage caused by premature deliberations that are discovered during trial can potentially be corrected through a cautionary instruction); cf. United States v. Winbourn, 799 F.3d 900, 913 (7th Cir. 2015) (concluding several jurors' "comments were not of such nature to rebut the presumption that they could not be addressed by an instruction from the court" even though the girlfriend of one of the defendants overheard several jurors offer personal opinions about the defendants' guilt during a mid-trial lunch break). Furthermore, a trial judge should *only* grant a new trial or mistrial in

cases where the premature deliberations resulted in actual prejudice. Aldret, 333 S.C. at 315, 509 S.E.2d at 815; see Resko, 3 F.3d at 695 (explaining prejudice from premature deliberations will *not* be assumed because courts "are far less certain that premature deliberations will lead to prejudice in every, or nearly every, instance"); see also State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002) (explaining a trial judge should only grant a mistrial when one is dictated by manifest necessity *and* no other legitimate courses of action remain available).

With all that in mind, the trial judge in the case at bar was confronted with allegations of premature deliberations that purportedly occurred shortly after the evidentiary phase of the trial had concluded. In response to those allegations, the trial judge did exactly what he should have done under such circumstances and promptly conducted an inquiry into the matter. See Aldret, 333 S.C. at 315, 509 S.E.2d at 815 (explaining a trial judge should conduct a hearing and may question the jurors when an allegation of premature deliberations arises during trial). As a result of that inquiry, he was presented with testimony about *fragments* of discussions that occurred between three jurors during the lunch break. And, since only isolated snippets of the jurors' conversations were overheard, the trial judge simply did not have the complete context needed to be able to definitively conclude the three jurors—who all denied discussing the case—had, in fact, engaged in premature deliberations based on the overheard remarks standing alone.

Demonstrating that fact, the reference to "not guilty" that was deciphered by the jurors' accusers theoretically could have been an imprudent comment that was directly related to Appellant's guilt or innocence. However, at the same time and as the trial judge aptly recognized, it *also* could have been something else entirely, including something as simple as an innocuous courtroom-themed jest made in response to one of the jurors at the table spilling a glass of water. Indeed, it did lead to laughter, which would suggest something comical occurred.

Meanwhile, the same ambiguities existed concerning the overheard references to twenty years and the number five, which could have related to many different things that had no connection to the trial whatsoever or might simply have been sarcastic remarks about how much longer the proceedings were going to take. See Swan v. State, 248 A.3d 839, 880 (Del. 2021) ("Two statements taken out of context do not evidence improper jury conduct."), abrogated on other grounds by Willis v. State, 302 A.3d 417 (Del. 2023); see also United States v. Diaz, 597 F.3d 56, 63 (1st Cir. 2010) ("Conversations between jurors concerning the case they are hearing do not always amount to premature deliberations."); cf. United States v. Sabhnani, 599 F.3d 215, 249-250 (2d Cir. 2010) (concluding the trial judge properly declined to grant a new trial after finding a claim one of the jurors was overheard saying "guilty, guilty" during a break in the proceedings lacked context and, therefore, did not demonstrate premature deliberations had actually occurred).

Critically, because the overheard remarks were limited and ambiguous, the first portion of the trial judge's analysis of the premature deliberations claim he had been confronted with largely hinged on the determinations he made about the credibility of the witnesses and the inferences to be drawn from the evidence presented, which were matters resting almost exclusively in his discretion. See Kelly, 331 S.C. at 141, 502 S.E.2d at 104 ("The trial judge is in the best position to determine the credibility of the jurors; therefore, [the appellate court] should grant him broad deference on this issue."); State v. Simpson, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996) ("A juror's competence is within the trial judge's discretion and is not reviewable on appeal unless wholly unsupported by the evidence."). Those determinations were further complicated here by the fact the trial judge indicated he believed both the jurors' accusers' statements about what they overheard *and* the jurors' assertions they had not discussed the case.

And, there was still the matter of prejudice, which was something Appellant bore a heavy burden to establish. See Ethier v. Fairfield Mem'l Hosp., 429 S.C. 649, 655, 842 S.E.2d 355, 359 (2020) (recognizing the burden to demonstrate prejudice from premature deliberations is a "high" one); see also United States v. York, 600 F.3d 347, 358 (5th Cir. 2010) ("[I]n evaluating a claim of juror misconduct, the law also presumes that the jury is impartial and the burden rests on the defendant to show otherwise."); cf. State v. Wood, 608 S.E.2d 368, 370 (N.C. Ct. App. 2005) ("While the jurors' lunch conversations did violate the judge's instructions by discussing the demeanor of witnesses before the close of all evidence, this misconduct did not substantially and irreparably prejudice Defendant's case. Therefore, the trial court did not abuse its discretion in denying a mistrial." (citations omitted)).

No matter what, though, the fairness and impartiality of the jury in Appellant's case could not possibly have been compromised by the alleged premature deliberations *if* the three jurors supposedly involved in those deliberations were removed from it. See State v. Williams, 321 S.C. 455, 460, 469 S.E.2d 49, 52 (1996) (recognizing any possible prejudice that could result from a particular juror's presence on a jury is generally eliminated when that juror is removed from the jury). Recognizing that fact, the trial judge—*before* ruling on defense counsel's mistrial motion—proposed a remedial measure that, if agreed to by the parties, would have eliminated any possibility of prejudice along with the need for the trial judge to complete his analysis of the premature deliberations claim. And, that remedy—proceeding forward with only eleven jurors—was one that: (1) was expressly permitted by South Carolina law; and (2) would not adversely impact the fairness of the trial for either side. Rule 14(a), SCRCrimP; see Williams, 399 U.S. at 101-102 ("In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury

composed of fewer members." (footnote omitted)). Therefore, the trial judge committed no error whatsoever by proposing that permissible remedial measure to the parties. See Crosby v. Seaboard Air Line Ry., 81 S.C. 24, __, 61 S.E. 1064, 1065 (1908) (concluding the trial judge did nothing improper by asking the parties whether they were willing to consent to proceeding forward with eleven jurors prior to granting a mistrial based on the unavailability of a juror); State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) ("[T]he trial judge should exhaust other methods to cure possible prejudice before aborting a trial.").

And, in proposing that available remedial measure, the trial judge did not present Appellant with a "Hobson's choice" of any kind. Instead, the trial judge—on multiple occasions—made it clear to everyone he had *not* yet reached a decision on the mistrial motion before inquiring if the parties would be willing to go forward with a jury comprised of only eleven members. Cf. State v. Mueller, 319 S.C. 266, 269, 460 S.E.2d 409, 411 (1995) ("[I]f a party has *obtained a final ruling* on the admissibility of impeachment evidence, that party does not lose his right to challenge on appeal the admissibility of the evidence by eliciting the evidence during direct examination." (emphasis added)). Thus, Appellant was free to voluntarily agree to the remedial measure proposed by the trial judge or continue with his claim a mistrial was warranted. See United States v. Mezzanatto, 513 U.S. 196, 209 (1995) (recognizing criminal defendants face "a number of difficult choices" routinely as a part of the criminal justice process and the imposition of such choices is not automatically improper); South Dakota v. Neville, 459 U.S. 553, 564 (1983) ("[T]he criminal process often requires suspects and defendants to make difficult choices."); Middendorf v. Henry, 425 U.S. 25, 48 (1976) ("The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right,

even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." (citations and internal quotations omitted)); see also Corbitt v. New Jersey, 439 U.S. 212, 218 (1978) ("The cases in this Court . . . have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid.").

After consulting with defense counsel, Appellant freely and voluntarily agreed to the remedial measure, and that agreement—consistent with South Carolina law—was reduced to writing. Rule 14(a), SCRCrimP; cf. People v. Waters, 641 P.2d 292, 293-294 (Colo. App. 1981) (concluding a criminal defendant validly waived his right to have his case decided by twelve jurors when defense counsel—after consultation with the defendant—agreed to a particular juror being excused and the trial proceeding forward with only eleven jurors remaining in the presence of the defendant, who "voiced no objection to his counsel's statements"). By doing so, Appellant authorized the trial judge to correct any possible prejudice that could have been caused by the alleged premature deliberations, and the trial judge did just that by proceeding forward with an eleven-member jury that no longer contained any of the jurors that had been accused of engaging in the premature deliberations.[16] Under such circumstances, no conceivable prejudice

[16] Notably, the Texas Court of Appeals in Roberts v. State, 987 S.W.2d 160 (Tex. App. 1999), was confronted with an issue somewhat analogous to the one at the heart of Appellant's case. During Roberts's trial for several counts of aggravated robbery, a juror during a lunch break—after having been admonished not to discuss the facts of the case with anyone—ended up eating his meal with an officer involved in the case who had not yet testified. Id. at 161. The two casually chatted as they dined together, but, according to both, they never at any point discussed Roberts's case. Id. Once that information came to light, the trial judge swiftly conducted an inquiry into the matter, and the juror acknowledged the contact but affirmed the discussions that occurred would not affect his ability to fairly decide the case. Id. Following that, defense counsel moved for a mistrial based on what had occurred. Id. However, the trial judge expressly denied the mistrial motion after the prosecutor confirmed the State would no longer call the officer as a witness. Id. At that point, defense counsel asked the trial judge to remove the juror and proceed forward with only the eleven remaining jurors, and the trial judge did just that. Id.

from the premature deliberations remained, and, resultantly, there could not possibly have been any manifest necessity that would have justified the grant of a mistrial. See Kelly, 331 S.C. at 142, 502 S.E.2d at 104 ("A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." (citations omitted)); cf. Patterson, 337 S.C. at 227-228, 522 S.E.2d at 851 (concluding the trial judge's remedial measure "cured any possible error and eliminated any conceivable prejudice" such that "[n]o manifest necessity for declaring a mistrial existed").

Despite that, Appellant now contends his conviction should nevertheless be struck down on appeal because—even though none of the jurors that decided his case were alleged to have been involved in any premature deliberations—the trial judge should have found the three *removed* jurors engaged in such improper deliberations in a manner sufficiently prejudicial to warrant the grant of a mistrial prior to their removal. But the trial judge did not—as Appellant readily concedes on appeal—actually rule upon the mistrial motion, so there is no mistrial ruling to now review. See State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised *but not ruled on*, it is not preserved for appeal." (emphasis added)); see also State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been

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Roberts was subsequently convicted, received a life sentence, and appealed, arguing—in part—the trial judge erred by proceeding forward with eleven jurors *and* by denying his mistrial motion. Id. at 161-162. On appeal, the Court of Appeals affirmed. Id. In doing so, the Court of Appeals found it was proper under Texas law to continue the trial with eleven jurors since the parties agreed to do so based on the request made. Id. Furthermore and more importantly, the Court of Appeals likewise found Roberts could no longer properly complain on appeal about the trial judge's failure to grant a mistrial because, since the juror at issue was removed and the trial permissibly proceeded forward with less than twelve jurors by agreement of the parties, any issue concerning the denial of the request for a mistrial was "rendered moot." Id. at 162.

ruled on below can be reviewed[.]"). Similarly, since Appellant did not demand the trial judge first rule on the mistrial motion before he chose to accept the remedial measure, he cannot validly contend the trial judge erred by failing to do so on appeal pursuant to well-established South Carolina law.[17] See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (recognizing a party is *required* to seek a ruling "when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review"); see also State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 489 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."); cf. State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003) (finding any issue resulting from the trial judge's failure to individually question the jurors after a jury note was submitted to the court was not preserved for appellate review because Vang did not request individual questioning of the jurors after the trial judge spoke with the jury foreman and determined further inquiry was unnecessary). Furthermore, since Appellant agreed to the remedial measure in writing, he received exactly what he asked for

[17] Instead of demanding such a ruling, Appellant chose to agree to and proceed forward with an eleven-member jury and then wait to see what that jury's verdict would be. (Tr. p. 537; p. 591). Thereafter, when that verdict ended up being one not to his liking, Appellant attempted to renew his mistrial motion related to the premature deliberations. (Tr. p. 592; p. 598). For obvious reasons, that post-verdict motion could not fairly be treated as having been a valid or timely one. See State v. Burnett, 226 S.C. 421, 424, 85 S.E.2d 744, 746 (1954) ("A defendant may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial."); State v. Ballew, 83 S.C. 82, __, 63 S.E. 688, 690 (1909) ("The general principle that a party cannot take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just. It has been often applied in this state when the defendant has failed to make known his objection to individual jurors or to the panel until after the trial."); cf. Aldret, 333 S.C. at 312, 509 S.E.2d at 813 (holding Aldret's premature deliberations claim was not properly preserved for appellate review because he was aware of the issue prior to the verdict but first raised the issue on the record after the verdict); State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("Although counsel objected to the remarks of the solicitor during closing arguments, a motion for mistrial was not made until after the verdict. One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal.").

and, thus, cannot validly complain about the trial judge following a course of action to which he provided his written consent. See State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) ("Counsel got the relief asked for and cannot complain on appeal."); State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."). For those reasons, any issue Appellant may have had with the alleged premature deliberations was waived and can no longer validly be raised or considered on appeal. See Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004) (recognizing South Carolina's issue preservation requirements are a fundamental component of appellate procedure). Appellant's conviction should be affirmed.

## CONCLUSION

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

Respectfully submitted,

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