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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON CONNELL PALMER,

APPELLANT

APPELLATE CASE NO. 2024-001930

FINAL BRIEF OF APPELLANT

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II.

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STATEMENT OF THE CASE

A Chester County grand jury indicted Appellant for one count of Reckless Homicide during the January 2023 term. A month later, the Chester County grand jury returned an indictment for one count of assault and battery of a high and aggravated nature (ABHAN). Both charges arose out of a traffic accident that had occurred on Interstate 77. R. 975-982.

The state, represented by Candice Lively, called the case to trial on October 28, 2024, before the Honorable Brian M. Gibbons and a jury. Appellant was represented by William Frick and Kay Boulware. R. 1. At the conclusion of a week-long trial, Appellant was found guilty as indicted.[1] R. 936, l. 18 – 937, l. 6. Judge Gibbons sentenced Appellant to ten years' imprisonment on the reckless homicide to be served consecutively to twenty years' imprisonment on the ABHAN. R. 966, l. 14-24.

[1] Appellant had also been indicted for Possession of Cocaine Base and Possession of Marijuana, of which he was acquitted. R. 936-938.

ARGUMENTS

I.

The circuit court erred in denying Appellant's motion for a directed verdict as to the ABHAN charge where the State failed to establish that Appellant had the necessary *mens rea* to support the charge.

Standard of Review

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Passio, 433 S.C. 666, 673, 861 S.E.2d 785, 789 (Ct. App. 2021) quoting State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." Id. "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." State v. Passio, 433 S.C. 666, 673, 861 S.E.2d 785, 789 (Ct. App. 2021) quoting State v. Frazier, 386 S.C. 526, 531, 689 S.E.2d 610, 613 (2010). "When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." Id.

Relevant Facts

On July 10, 2022, the South Carolina Highway Patrol (SCHP) was dispatched to a collision that occurred in the north-bound lane on Interstate 77 between 5:15 and 5:30 that evening. R. 164, ll. 8-25. Eyewitnesses to the accident described seeing a white cargo van operated by Appellant, driving aggressively, erratically, and at a high rate of speed just before the van struck the back left side of a white SUV that was occupied by Jessica, Corey, Max, and Griffin Shanks. R. 86, l. 5 –

88, l. 25; R. 99, l. 21 – 100, l. 14; R. 116, l. 23- - 117, l. 25; R. 718, ll. 1-18; R. 730, l. 5 – 731, l. 17.

The force of the collision sent both vehicles spinning in opposite directions. Appellant's van went through the cable barrier towards the south-bound lane of I-77 before angling back towards the north-bound lane. It came to rest in the middle of the median, having been stopped by the cable barrier as it went to cross them a second time. R. 347, l. 5 – 350, l. 22. The Shanks's SUV went toward the shoulder of the interstate into the tree line, striking one tree with significant force on the passenger side of the SUV. R. 357, l. 10 – 358, l. 11. As a result of the accident, Corey Shanks suffered a traumatic brain injury and fractured right arm. R. 454, l. 15 – 457, l. 15. Tragically, Max Shanks was pronounced deceased on scene. R. 197, ll. 12-22

Former Trooper Cyteco Dye[2] was the primary investigator of the accident. Dye spoke with Appellant on scene prior to Appellant being transported to the hospital. He described Appellant as "obviously sad, he was crying, he was upset," saying he did not know what had happened. Appellant informed Dye he had looked down, looked back up, and hit the SUV. Appellant could not recall how fast he was going at the time of the accident. R. 283, l. 11 – 285, l. 19.

The damage to the vehicles required that they be towed from the scene of the accident. Prior to the vehicles being towed, Dye performed inventory searches, pursuant to SCHP policy. During the inventory search of Appellant's van, Dye located a black sunglasses case that contained

[2] Dye was given the opportunity to resign following an investigation that revealed he had mishandled drug evidence in a prior case. Dye had found a single package of marijuana in a vehicle with three occupants and none of the occupants claimed the marijuana. Dye, instead of charging each person with possession with intent to distribute, repackaged the marijuana into three separate bags and charged each individual with simple possession of marijuana. R. 279, l. 9 – 282, l. 23.

a small amount of marijuana and crack cocaine. In the grass near the van, Dye located a black bookbag containing unopened beers. R. 290, ll. 12-22; R. 291, l. 21 – 294, l. 24.

At the hospital, Trooper Scott Darby performed "modified" field sobriety test on Appellant. He checked for both horizontal and vertical gaze nystagmuses but did not find any. Darby was also a certified Drug Recognition Expert which enabled him to check for lack of convergence of Appellant's eyes as well as the color of the eye's conjunctiva. He noted a lack of convergence and redness of the conjunctiva, which he stated was indicative of drug use. R. 166, l. 18 – 168, l. 8. Based on the items found at the scene, the witness statements, and Darby's assessment of Appellant, a search warrant was drafted for Appellant's blood. R. 169, ll. 14-24. Appellant was arrested for felony driving under the influence, death resulting and felony driving under the influence, great bodily injury resulting. R. 173, ll. 6-9. However, the toxicology of Appellant's blood revealed that there was no alcohol in his system. A comprehensive narcotics panel was run on Appellant's blood by both SLED and an outside lab with the results showing only a metabolite, not the active component, of THC. R. 503, l. 8 – 506, l. 24; R. 508, l. 10 – 510, l. 13.

Members of the SCHP Multi-Disciplinary Accident Investigation Team (MAIT) investigated the crash. R. 522, l. 23 – 523, l. 3. The general and mechanical examinations of Appellant's vehicle revealed that nothing was wrong with the van prior to the accident. R. 527, ll. 16-21; R. 532, l. 18 – 534, l. 7; R. 590, l. 15 – 591, l. 1. The Event Data Recorder (EDR) for each vehicle was imagined and analyzed. The data from the SUV showed it was traveling at seventy-seven miles per hour in the five seconds preceding the collision, sped up slightly to seventy-eight miles per hour, and was traveling at seventy-six miles per hour at the time of impact. The SUV EDR reflected that the brakes of the vehicle were pushed at the point of impact. R. 645, l. 16 – 647, l. 4.

The data from Appellant's van indicated that half-a-second before the crash, the van was traveling at ninety-eight miles per hour. At a half-second before the crash, there was no indication that Appellant used the breaks. R. 648, l. 16 – 650, l. 21. The EDR of the van also included the accelerator pedal percentage which showed how far down the accelerator pedal was pushed. That data indicated Appellant was "on and off" the gas pedal in the moments preceding the accident. In the three-to-five seconds leading up to the crash, the gas pedal was pushed down 28%, then 23%, and then 0% down, back to 18% depressed, then 32% depressed, before dropping back to 0% in the second-and-a-half prior to the collision, which meant Appellant was not applying any pressure to the gas pedal at that point. Despite the varied change in the gas pedal usage, the speed and RPM's reported by the EDR in the van did not change. R. 652, ll. 7-25; R. 664, l. 5 – 665, l. 21

The state ultimately charged Appellant with reckless homicide for the death of Max Shanks and ABHAN for the injury to Corey Shanks. Prior to trial, defense counsel moved to quash the ABHAN indictment on three grounds: that the indictment was not specific as it listed an Express Van as the vehicle driven by Appellant in the accident, that the indictment was based on prosecutorial vindictiveness, and that ABHAN was a specific intent crime. R. 39, l. 19 – 43, l. 18. Defense counsel argued that "the legislature got rid of all the old law, instituted this new statutory scheme, intended it – intended for there to be specific conduct, specific intent for something to happen." R. 47, ll. 2-6. The state argued that the law as written only required an unlawful injury to another person and that the act could be committed with any level of *mens rea.* In support of its position, the state relied upon U.S. v. Clemons, 442 S.C. 670, 901 S.E.2d 280 (2024), wherein our Supreme Court held that under some circumstances a person may be convicted of assault and battery second degree and/or criminal domestic violence of a high and aggravated nature with a

mens rea of recklessness as defined by the Model Penal Code. The state surmised that the Supreme Court's holding in Clemons stood for the proposition that the *mens rea* for assault and battery second degree was the same *mens rea* for ABHAN "because the only difference in those two statutes is the level of harm that results from the unlawful act." R. 48, l. 22 – 52, l. 23

In response to questioning about whether a criminal statute should be strictly construed against the state, the solicitor argued that that the state had checked the boxes of the statute regarding unlawful conduct and an injury, and the legislature had not provided a specific intent thus any *mens rea* would suffice. She noted that in preparing the case for the grand jury, she had researched why South Carolina did not have some type of reckless great bodily injury charge. She found that the legislature had attempted to amend the reckless driving statute in 2024[3] and was thus "aware of issues related to great bodily injury in cases and this that don't fit necessarily in the fact scenario that we have here." R. 53, l. 1 – 54, l. 14. After further discussion, Counsel Frick argued the language of the ABHAN statute which states "unlawfully injures another person" suggested to him a requirement of some specific conduct to occur. He argued the specific conduct would not be merely reckless driving but would require intent to strike the car or cause the accident. R. 62, ll. 7-25. The trial court denied the motion to quash the indictment. R. 63, l. 14 -64, l. 11.

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3 General Bill H. 4677, "Maddie's Law" was introduced during the 2023/2024 legislative session and sought to amend the reckless driving code section to increase the penalty for reckless vehicular homicide and to create offense of reckless driving with great bodily injury. https://www.scstatehouse.gov/sess125_2023-2024/bills/4677.htm (last accessed March 6, 2026) Similarly, general bill S. 385 was proposed also increasing the penalty for reckless homicide and creating felony reckless driving resulting in great bodily injury. https://www.scstatehouse.gov/sess125_2023-2024/bills/385.htm (last accessed March 6, 2026) Currently there are similar bills pending before the house and senate for the 2025/2026 legislative session such as bills S. 208, S. 52, H. 3171 (Maddie's Law), and H. 4005. The penalty provisions for the newly-created felony reckless driving offense ranges from three years for moderate bodily injury to ten years for great bodily injury.

After the state rested, defense counsel made a motion for a directed verdict on the ABHAN charge. He reiterated his arguments from the motion to quash that ABHAN required a *mens rea* higher than recklessness. He argued that to support a conviction for ABHAN, the state had to prove a level of specific intent because the commission of ABHAN required some specific intended conduct. He relied upon State v. Guderyon, 438 S.C. 476, 884 S.E.2d 202 (Ct. App. 2022) wherein this Court upheld a jury charge on ABHAN that read "the state must prove beyond a reasonable doubt that the Defendant intended to unlawfully injure another person" which supported a more specific intent requirement than mere recklessness. R. 756, l. 6 – 759, l. 2.

The state relied upon its prior arguments and the holding in Clemons, *supra*, that the charge could be supported depending upon the facts of the case. The state agreed that while the "offer or attempt" portions of the assault and battery statutory scheme required specific intent, the actual injury portions only required a general intent. The *mens rea* requirement for ABHAN was simply "the unlawfulness of the act." R. 763, l. 15 – 767, l. 11. The trial court questioned whether the legislature's intent could be gleaned from the fact that victims of car accidents who receive great bodily injury did not have a remedy in the criminal law but for an ABHAN charge. Counsel Frick responded that the legislature could not have intended that the punishment for recklessly taking the life of a person was less severe than recklessly injuring a person. While reckless homicide carried a maximum of ten years, ABHAN would subject Appellant to up to twenty years at eighty-five percent. Counsel Frick closed by stating that the legislature had placed the recklessness *mens rea* throughout the code for offenses such as reckless homicide, reckless operation of a boat, hazing, and involuntary manslaughter where it had clearly wanted to impose a lesser standard of culpability. However, the legislature had specifically not placed the recklessness standard into the assault and battery statutes, which suggested that the legislature intended a more specific level of

mens rea. Counsel Frick acknowledged there was a hole in the criminal law for factual situations such as the one in the case but stressed it was not the role of the state or the court to stretch a statute to fill that gap. R. 767, l. 12 – 770, l. 1.

The trial court denied the directed verdict motion ruling:

> And I'm keenly aware of what this Court has to do when trying to interpret the meaning of a statute, you know, supposed to try to employ its plain and ordinary meaning, and try to ascertain the intent of the legislature. The statute here that the Defendant is charged with, the ABHAN is -- says that a Defendant can be convicted of ABHAN if he unlawfully injures another person, which results in great bodily injury, in the – or the act is accomplished by means likely to produce great bodily injury or death. So, the statute includes that language there, in fact let me pull up the statute real quick. All right, 16-3-600(b)(1), a person commits the offense of assault and battery of a high and aggravated nature, if the person unlawfully injures another person, and great bodily injury to another person results; or the act is accomplished by means likely to produce great -- to produce death or great bodily injury. What this means and, you know, I put that in there for what does the word means mean, well that necessarily goes to the state of mind of a defendant, which I mean I --- the black letter law or the state of mind of the defendant is intent, which has to be determined by the circumstances surrounding an alleged criminal incident. And the State bears the burden to prove beyond a reasonable doubt the unlawful – an unlawful injury. Well, what does unlawful mean. The State bears the burden of proving that, and how do you prove unlawfully injures but to get to the state of mind of the defendant, which is recklessness or criminal negligence. I -- I just --I have a hard time reaching what I would call an absurd conclusion that our legislature did not intend, non-deceased victims of arguably reckless driving to not have recourse through the criminal justice process. I just -- I can't imagine that hole in the law was their intent. I mean we have involuntary manslaughter for example for a death involving the reckless -- using that reckless language, a reckless disregard of others, or the unintentional killing of another. We have specifically the charge of reckless homicide for a death involving reck -- driving recklessly and killing somebody. You know, we have of course felony DUI, which is the original charge here, involving great bodily injury. But we don't have something which just covers great bodily injury for reckless driving? I -- I just can't reach that absurd conclusion in the eyes of the law, respectfully. I'm not saying you're absurd, I'm saying that that conclusion would be absurd by me interpreting the

> law the way I interpret it. So, your motion for a directed verdict is respectfully denied as to the charge of ABHAN, okay.

R. 770, l. 2 – 772, l. 6

Discussion

Criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense. State v. Fennell, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). A defendant may not be convicted of a criminal offense unless the state proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense. Id. citing State v. Ferguson, 302 S.C. 269, 271, 395 S.E.2d 182, 183 (1990) (required mental state for particular crime may be purpose (intent), knowledge, recklessness, or criminal negligence).

The level of *mens rea* required for conviction of a statutory offense is a question of legislative intent. State v. Ferguson, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990). "When a criminal statute is silent as to the intent necessary for a conviction, we consider the common law and the development of the statute to decide whether the Legislature intended the crime to require criminal intent and, if so, what level of intent. State v. Jefferies, 316 S.C. 13, 19, 446 S.E.2d 427, 430–31 (1994).

In 2010, the General Assembly passed the Omnibus Crime Reduction and Sentencing Reform Act which replaced this state's prior common law assault and battery offenses with statutory offenses of varying degrees. Pursuant to S.C. Code Ann. § 16-3-600(B) "a person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person and 1) great bodily injury to another person results, or 2) the act is accomplished by means likely to produce death or great bodily injury." ABHAN is statutorily

classified as a violent crime pursuant to S.C. Code Ann. § 16-1-60, as a serious crime pursuant to S.C. Code Ann. § 17-25-45, and carries a maximum of twenty years' imprisonment.

Under the common law, ABHAN was misdemeanor punishable by up to ten years in prison. State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516 (2000). To prove ABHAN under the common law, the state was required to show the unlawful act of violent injury to another accompanied by circumstances of aggravation. Circumstances of aggravation included the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516–17 (2000).

In United States v. Clemons, 442 S.C. 670, 901 S.E.2d 280 (2024), our Supreme Court was tasked with answering, in the abstract, whether a defendant may be convicted of assault and battery second degree and criminal domestic violence of a high and aggravated nature with a *mens rea* of recklessness as defined by the Model Penal Code. Our Court held that under some circumstances, a person may be convicted of AB2d or CDVHAN with a *mens rea* of recklessness as defined by the Model Penal Code. Importantly, Clemons does not set forth the proposition that ABHAN can be proven with a *mens rea* of recklessness in South Carolina.

The state failed to prove the necessary *mens rea* to sustain an ABHAN conviction for injuries arising out of a car accident. For Appellant to be guilty of ABHAN under a theory of recklessness, the state would have to prove that he was indifferent to the consequences of recklessly driving his vehicle *and* that he purposefully drove his van into the Shanks's vehicle. There was no evidence in the record that Appellant purposefully struck the Shanks's vehicle. Stated differently, while the state does not have to prove that Appellant intended to specifically

harm any one individual, the state does have to prove that Appellant intended the act that resulted in the harm.

This is not to say that a car wreck could never give rise to an ABHAN conviction. For example, if a person drove their car directly at a pedestrian to pin them against a wall that would meet the elements of ABHAN. Similarly, if a person drove their car directly into another vehicle with the purpose of striking that vehicle and caused injury to an occupant, an ABHAN conviction could be sustained. But when the injury results from a true traffic accident, as here where there is no intent to act or harm, the facts do not support a charge of ABHAN.

The legislature expressly criminalized reckless driving that resulted in death in the reckless homicide statute. It did not, however, criminalize reckless driving that resulted in great bodily injury. It cannot be overlooked that the legislature has recognized a gap in the law exists and now seeks to remedy it by passing felony reckless driving statutes which would specifically criminalize the type of conduct at issue in this case. That the legislature now seeks to criminalize that conduct is further evidence that ABHAN was not drafted with the intent to prosecute car accidents arising from reckless conduct.

Further, ABHAN is classified as a violent and serious offense. In State v. Rogers, 338 S.C. 435, 439, 527 S.E.2d 101, 104 (2000), our Supreme Court noted that the legislature ended the need for a case-by-case analysis into the specific convictions of each capital defendant's history when determining whether a capital defendant is entitled to a charge stating they do not have a significant history of prior criminal convictions involving the use of violence against another person "by providing a list of the crimes which are to be defined as violent." The natural conclusion is that crimes listed in § 16-1-60 involve the use of violence directly against a person and thus require a higher level of *mens rea* than mere recklessness.

The legislature has clearly criminalized and proportionally penalized reckless conduct that results in death while driving a car. It has yet to do criminalize the conduct when the result is something less than death. The trial court allowed the ABHAN charge to proceed to the jury in large part because the court believed the legislature intended non-deceased victims of arguably reckless driving to have some recourse through the criminal justice process. This was error. It was not the job of the trial court to expand the criminal law to cover the unique factual situation in Appellant's case but to apply the law as written. This court should reverse Appellant's conviction and sentence for ABHAN by finding the state failed to provide evidence of the *mens rea* necessary to support the charge.

II.

The trial court erred in denying Appellant's third motion for a mistrial where the cumulative impact of the numerous errors, including the two prior mistrial motions, adversely affected Appellant's right to a fair trial.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Cook, 440 S.C. 308, 316, 891 S.E.2d 35, 39 (Ct. App. 2023) *quoting* State v. Martucci, 380 S.C. 232, 246, 669 S.E.2d 598, 605 (Ct. App. 2008). "The decision to grant or deny a mistrial is within the sound discretion of the trial court." Id. *quoting* State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010). "The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id.

Relevant Facts

During trial, defense counsel made three mistrial motions. The first mistrial motion occurred during the testimony of the fourth witness, Felicia Logan. Ms. Logan was relaying how Appellant had asked to use her cellphone after the accident when the solicitor asked whether Appellant had said anything about his phone. Ms. Logan replied that Appellant was mumbling, saying, "I can't go back to jail. I can't go back to jail." Counsel Frick immediately objected, the trial court sustained the objection, and the jury was excused. R. 138, ll. 7-25.

Counsel Frick explained that the statement Ms. Logan had testified to was likely in relation to Appellant's pending charges in North Carolina which he believed would not come in at trial should Appellant testify. He argued that he did not believe any curative instructive could be given to "unring that bell" and requested a mistrial. R. 139, ll. 5-17.

The state argued the statement about going back to jail was not specific and could have referred to a misdemeanor. Ms. Logan had never made that statement prior to trial and did not have knowledge of Appellant's pending North Carolina charges. The state believed a curative instruction would suffice because the statement was "not in relation to necessarily any specifics as to what that particular situation was." R. 140, ll. 1-23. The trial court questioned whether Appellant had any prior record the state would seek to use for impeachment purposes should he testify. Appellant had a 2004 larceny of a vehicle that the state believed was proper impeachment as a crime of moral turpitude but had not provided the requisite notice under Rule 609(b), SCRE. R. 141, l. 9 – 144, l. 23.

The trial court questioned why the statement was not admissible as a statement against interest. Counsel Frick emphasized the unfairly prejudicial nature of the statement arguing that it went from highly prejudicial to unfairly prejudicial when coupled with the fact that he was "already dealing with implicit bias from a guy who's been described as looking like Bob Marley." R. 147, l. 3 – 148, l. 4. The trial court confirmed that the first time Ms. Logan ever reported that Appellant stated he could not go back to jail was on the witness stand in front of the jury. R. 149, ll. 16-20.

The trial court considered that the jury had received the court's opening remarks regarding objections approximately ninety minutes prior and then denied the mistrial motion stating, "I am going to give this jury a curative instruction and we will proceed." He then cautioned the witness, and the state, that if Appellant's alleged statement was repeated it would constitute grounds for a mistrial. R. 150, ll. 9-22. When they jury returned to the courtroom, they were instructed:

> All right, thank you ladies and gentlemen of the jury. Before we took a break I ruled on an objection. I sustained an objection, and remember what I told you, ladies and gentlemen, I denied -- I sustained the objection after the witness had answered the question, okay. And as I told you earlier before you were -- before we started this trial, when I sustain an objection, that means the answer to the

> question cannot be answered, okay, and you're not supposed to speculate about what the answer would be, okay. I sustained that objection after the witness had responded, okay. So, what the witness [said] shall not and cannot be considered by you in any manner whatsoever. What she said, if you recall, or if you heard it, is not in evidence in this case and cannot be used by you when you start determining whatever your verdict's gonna be. Everybody understand? Thank you. We'll move on.

R. 152, l. 10 – 153, l. 3. Counsel Frick contemporaneously objected to the curative instruction and was overruled. R. 152, l. 10 – 153, l. 8.

The second mistrial motion occurred at the start of the second day of trial. Prior to the state calling its first witness for the day, the parties approached the bench and requested to take up a matter of law. After the jury was excused, the solicitor explained that when the jury entered, former Trooper Cyteco Dye stated the two African American gentlemen seated next to each other in the front row were his first cousins. R. 221, ll. 1-21. Mr. Dye informed the court that Perez Colvin (Juror 26) and Jeffery Ferguson (Juror 50) were his father's brother's children. Counsel Frick observed that the two jurors shared the same address on the jury list. The state requested the two jurors be dismissed and replaced with the alternates. Defense counsel requested the trial court bring the jurors into the courtroom, one at a time, for questioning to determine if they could be fair and impartial. R. 222, l. 3 – 224, l. 11.

Juror 50 stated that he did not know Dye's name, which is why he did not respond when asked if he knew any witnesses. Although he and Dye were related, they did not hang out together. They both worked at Giti Tire but on different shifts. He confirmed he lived with Juror 26, that they had not discussed the case, and that he could be fair and impartial. Juror 26 similarly stated that he did not know Dye's real name but knew him only as "Teet" and that he was not super close with Dye. He confirmed he lived with Juror 50, stated they had not discussed the case, and that he could be fair and impartial. R. 224, l. 12 – 230, l. 24.

The court decided to disqualify the two jurors and replace them with the two alternates. Counsel Frick then made a motion for a mistrial, stating he used all his strikes in seating the initial twelve jurors and would have used those strikes differently had the jurors disclosed any of the information regarding Dye and their living together during *voir dire*. R. 232, l. 5 – 234, l. 7. The state argued a mistrial was an extreme remedy when there was an effective way to deal with the issue by replacing the jurors. The court questioned the state about the impact of the juror issue combined with the prior issue of the witness blurting out for the first time that Appellant stated he could not go back to jail. The solicitor responded that was the reason she did not want to keep those two jurors as "there's no way they're not talking about this case when they go home." R. 234, l. 8 – 236, l. 25. The court then mused that the parties bore some responsibility in not noting that the two jurors had the same address on the jury list prior to jury selection. The court then abruptly denied the mistrial motion. R. 237, ll. 11-23.

At the break after the first witness, the trial court revisited the two mistrial motions that had been made to fully set forth its reasoning for denying the two motions. Regarding the first mistrial motion, the court recognized the prejudicial impact of the witness's testimony but stated it cured the prejudice by instructing the jury not to consider the testimony during deliberations. Regarding the jurors, the court stated it removed them and replaced them, curing any potential prejudice. The court further stated that it understood Counsel Frick's argument regarding the use of strikes but believed the defense had strikes left that were not used. The court continued:

> All right, a mistrial, of course everybody know -- the lawyers know, this language, a mistrial should only be granted in cases of manifest necessity, and with the greatest caution for very plain and obvious reasons. Well, we've had two, hopefully we won't have three. You know, the third time is -- is the charm, is not a legal basis for anything, but it could be in this case. And hopefully there won't be, Madam Solicitor, you understand?

R. 274, l. 23 – 275, l. 7. The court noted our Supreme Court had recently held that a mistrial should be declared cautiously and only in the most urgent circumstances for plain and obvious reasons. The court found that the circumstances of the first mistrial motion were urgent, but he "cured it by giving a curative instruction." The court found the circumstances of the two jurors was cured within minutes by removing the two men from the jury. R. 275, l. 9 – 277, l. 11.

The third and final mistrial motion was made at the start of the fourth day of trial. Counsel Frick informed the court that a juror had potentially seen Appellant handcuffed in his jail jumpsuit being loaded into the prisoner transport van at the end of the previous day. The court questioned the transportation officer who said that he had made sure the area was clear prior to bringing Appellant outside to the van. Appellant was the person who noted the juror and brought it to his attention as he was getting into the van. When the transportation officer looked at the juror, the juror was looking up the street with a cigarette in his mouth. He did not notice the juror looking at the van or Appellant. The parties and the court reviewed the security footage of the parking lot but were unable to see the juror. The video did corroborate the activity that the transportation officer testified about. With consent of the parties, the court interviewed the juror in question in chambers. R. 687, l. 14 – 704, l. 15.

The juror was asked what he saw after court the prior day. He reported he saw some employees leaving the courtroom who spoke to him, a man riding a bicycle up the road, and a woman leave in a white vehicle. When asked if he saw the judge, he stated he did. He maintained he did not see anything else and that he had not discussed the case with anyone. He was not asked outright if he saw Appellant or any individuals in jail attire. R. 704, l. 16 – 707, l. 22.

Counsel Frick discussed the video, noting there was a shadow cast in the video by someone off-screen which could have been the juror in the case. That shadow was in an area where the

juror would have seen Appellant being loaded into the transport van. Counsel Frick voiced concern that the juror very clearly saw people leaving the court house and could remember later that he had seen Appellant in the jail jumpsuit and handcuffs. R. 708, ll. 1-25. Counsel Frick continued:

> Your Honor, just *given everything that has gone on in this case* from witnesses who have talked about my client can't go back to jail, to jurors who have had -- been excused because of their relationship with witnesses and their relationship with each other, just the culmination of the facts, Judge, I think at this point *my client's rights to a fair trial are in extreme jeopardy and I think we -- we keep using the word abundance of caution, but we have not used it in terms of my client's funda -- right to fundamental and fair trial. And I think out of abundance of caution at this point, the fundamentally fair thing to do is grant a mistrial.* And as I've stated -- and Your Honor, has known me a long time, I don't say that lightly. I want resolution, Mr. Palmer wants resolution, I know the family wants resolution. But, Judge, *I'm concerned with what's gone on in this case* that only – that we will be re-litigating this one day and I would rather have a clean slate, and I would ask you to grant my request for a mistrial, the third time that I've asked for it in this case.

R. 709, ll. 1-22 (emphasis added). The state set forth the arguments it had previously made against the mistrial motions. Regarding the juror potentially seeing Appellant, the state maintained the juror did not see anything, and therefore there was no unfairness to Appellant. R. 709, l. 25 – 712, l. 9. The court agreed with the state and denied the mistrial motion. It reiterated the previous grounds for denying the first two mistrial motions then reviewed the events of that morning. R. 712, l. 10 – 714, l. 10. The court ruled:

> He [the juror] never said he saw an officer load up a prisoner. He never said he saw the defendant, okay. And I find his statement to me to be credible. I also find that the various camera angles to back up what he said, I find that's credible. I mean, I don't see the grounds for a mistrial here, especially on the eve of this trial concluding. So, having considered all of that, your motion for mistrial is therefore denied.

R. 714, ll. 10-18. Outside of the mistrial motions, the transcript reflects there were other odd goings-on during Appellant's trial. At the start of the second day of trial, the court inquired as to

whether the state had spoken with its "people" about outbursts. The solicitor ensured the court that the matter had been discussed, and if it happened again "she will be removed from the courtroom." R. 211, ll. 2-25. The trial court also questioned the Shanks's civil lawyer, Jodie Lawson, to ensure that she had spoken with the family about refraining from outbursts "and things like that, which could hurt these proceedings?" She assured the court she had spoken with the family and stated she would do so again. The court continued, "[t]he important thing is, as you understand, as inflammatory as this is to the victim's family, and I'm trying to walk a fine line here, we got to make sure this man here gets a fair trial. Okay? And if they're going to act out like that, that hurts those proceedings on down the line in the event he is convicted." R. 217, l. 1 – 218, l. 23.

Later that same day, during a break in the testimony of Trooper Holland, a member of the Shanks family approached Holland, thanked him for being there to testify, and apologized that he had "to go through this again" before the pair embraced. Defense counsel made a record of the interaction but made no objections, and no actions were taken to address the breach of the rules between the witness and family member. R. 362, ll. 4-24.

Discussion

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. White, 371 S.C. 439, 443–44, 639 S.E.2d 160, 162 (Ct. App. 2006) citing State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct.App.1999). "Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case." Id. citing State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result

in prejudice that this court will intervene and grant a new trial." Id. quoting State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Id. *quoting* Patterson, 337 S.C. at 227, 522 S.E.2d at 851.

Our Supreme Court has explained that "the proper general rule is this: 'The American cases hold generally that there must be a manifest necessity for the discharge of the jury and leave the Courts to determine in their discretion whether under all the circumstances of each case such necessity exists.'" State v. Bilton, 156 S.C. 324, 342, 153 S.E. 269, 276 (1930) (emphasis removed). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Kelsey, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998). Therefore, "[t]he trial judge should first exhaust other methods to cure possible prejudice before aborting a trial." White, 371 S.C. at 444, 639 S.E.2d at 162 (cleaned up).

"Generally, a curative instruction is deemed to have cured any alleged error." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129-130 (Ct.App.2005). "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." Id. Accordingly,

> Great care should be exercised in the "delicate, difficult and important matter" of instructing the jury to disregard incompetent evidence. The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations. A mere general remark excluding the evidence does not cure the error.

White, 371 S.C. at 446, 639 S.E.2d at 163 *quoting* State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (internal citations omitted). "Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object

to a curative instruction as insufficient or move for a mistrial to preserve an issue for review." Patterson, 337 S.C. at 226, 522 S.E.2d at 850; see also State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (no issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial).

While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced. White, 371 S.C. at 446–47, 639 S.E.2d t 164 at citing State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). "Error is not, however, always rendered harmless by instructions to the jury to disregard improperly admitted evidence or to give it only a limited effect. The test is one of prejudice." 75A Am. Jur. 2d Trial § 1032 (footnotes omitted).

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." State v. Eubanks, 437 S.C. 458, 489, 878 S.E.2d 335, 352 (Ct. App. 2022) citing State v. Beekman, 405 S.C. 225, 236-37, 746 S.E.2d 483, 489-90 (Ct. App. 2013). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." Id.

Defense counsel made three valid mistrial motions during Appellant's trial. In requesting a mistrial for the third time, defense counsel argued that the cumulative impact of "everything that has gone on in this case" including the prior mistrial motions had resulted in a violation of Appellant's right to a fundamentally fair trial. Critically, when the court ruled on the third mistrial

motion, it did so in a vacuum, only considering if the juror saw Appellant in his jail uniform and handcuffs. The court failed to consider whether the cumulative effect of the errors necessitated a mistrial.

As this Court wrote in State v. Freeman, 319 S.C. 110, 123–24, 459 S.E.2d 867, 875 (Ct. App. 1995), "[w]e are aware that every instance of trial error does not entitle an appellant to prevail on appeal. However, the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal." In the matter *sub judice*, the aggregation of the multiple mistrial motions, along with the other circumstances that occurred during the trial, amounted to sufficient prejudice to warrant a mistrial. A witness blurted out that Appellant stated he could not go back to jail which placed firmly in the jurors' minds that Appellant had be to jail in the past. This error was incredibly prejudicial by itself, as it painted Appellant as a bad actor when the state was precluded from mentioning any of Appellant's prior convictions or pending charges. Admittedly, the judge offered a curative instruction which sought to remove the taint of the witnesses testimony. However, the instruction was somewhat vague and did not instruct the jury to disregard that Appellant had been to jail before. Further, a curative instruction does not remove the fact from the minds of the jurors. As defense counsel stated, that bell cannot be unrung.

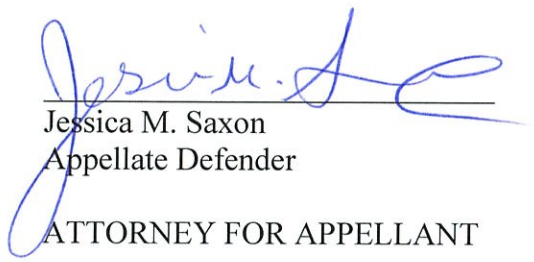
Two jurors failed to disclose their relationship to the a key witness, Dye, and that they lived together. A third juror potentially saw Appellant dressed out in jail attire and handcuffs. Each of these jurors was brought into the courtroom and questioned. The mere fact that three separate jurors had to be questioned during trial about their conduct was sufficient to taint the remainder of the jury. Further, defense counsel had used all of his strikes during the selection of the initial twelve jurors, thus he did show prejudice, in that he would have used his strikes differently had he

known of the two juror's relationship with Dye. Additionally, it should not be overlooked that there were at least some outbursts by members of the Shanks family during the trial, as well as improper conduct between a testifying witness and a family member. All of these errors were prejudicial to some extent, in their own right.

The trial judge failed to consider the totality of the errors and only ruled that each instant, by itself, had been cured such that a mistrial was not necessary. This was error. When taken together, the numerous oddities and errors that occurred during Appellant's trial produced a cumulative effect of prejudice sufficient to justify reversal of his convictions and sentences. See Freeman, *supra.* This court should find the trial court erred in failing to grant a mistrial based on the cumulative impact of the errors.

CONCLUSION

Based on the foregoing arguments, as to Issue I, Appellant respectfully requests that this Court reverse and remand his conviction for ABHAN. As to Issue II, Appellant respectfully requests this Court hold the lower court erred in refusing to grant a mistrial and remand both charges for a new trial.



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ATTORNEY FOR APPELLANT

This 9th day of March, 2026.

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SC Court of Appeals

CERTIFICATE OF COUNSEL

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

This 9TH DAY OF MARCH, 2026.

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