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Jul 23 2026

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from State Grand Jury County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL FOSTER MCCOY, JR.,

APPELLANT

APPELLATE CASE NO. 2025-001350

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred by refusing to suppress Facebook messages obtained from appellant's purported Facebook account because the search warrant was facially invalid as the warrant affidavit failed to establish a basis for probable cause?

II.

Whether the trial court erred by refusing to declare a mistrial when several jury members witnessed appellant wearing prison attire, shackles, and being escorted or surrounded by armed guards during trial?

III.

Whether the trial court erred by refusing to declare a mistrial after the state elicited testimony that appellant was in "lockup," in direct contravention of the trial court's ruling that any mention of appellant being in prison would be excluded and where the prejudicial effect of the testimony could be removed no other way?

STATEMENT OF THE CASE

At the December 14, 2023, session of the State Grand Jury of South Carolina, a sixth superseding indictment charged appellant and several codefendants,¹ as relevant, with trafficking methamphetamine 400 grams or more conspiracy. R *(Indictment).² On June 23, 2025, appellant's case was called to trial in Pickens County before the Honorable R. Scott Sprouse and a jury. Tr. I, p. 1.³ Monier Abusoft represented appellant and assistant attorney general Savanna Goude represented the state. Tr. I, p. 1. The jury ultimately found appellant guilty as indicted. Tr. II, p. 103, ll. 21-24. Judge Sprouse imposed a sentence of life without the possibility of parole, pursuant to S.C. Code Ann. § 17-24-45. Tr. 113, 11-20. Appellant timely filed a notice of appeal. R *(Notice of appeal).

This brief follows.

¹ Matthew David McCoy, a/k/a “Bossman,” and Randall Gene Posey, a/k/a “RJ,” were tried in a joint trial with appellant as codefendants. *See* Tr. I, p. 1.

² The state charged appellant with several other offenses but ultimately proceeded only on trafficking methamphetamine 400 grams or more conspiracy charge at trial.

³ For ease of reference, “Transcript I” refers to the transcript of the proceedings on June 23-26, 2025, while “Transcript II” refers to the transcript of the proceedings on June 27, 2025.

STANDARD OF REVIEW

“In criminal cases, appellate courts sit to review errors of law only.” *State v. English*, 443 S.C. 49, 55, 902 S.E.2d 385, 388 (2024). “[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means [appellate courts] review the trial court’s factual findings for any evidentiary support, but the ultimate legal conclusion . . . is a question of law subject to *de novo* review.” *State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022).

This Court reviews a trial court’s decision on a motion for mistrial for abuse of discretion. *State v. Benton*, 443 S.C. 1, 6, 901 S.E.2d 701, 703 (2024).

ARGUMENT

I.

The trial court erred by refusing to suppress Facebook messages obtained from appellant's purported Facebook account because the search warrant was facially invalid as the warrant affidavit failed to establish a basis for probable cause.

Relevant facts

The state alleged that for a nearly three-year period, appellant and his brother, Matthew McCoy, were the leaders of a large methamphetamine distribution conspiracy. R. *(Indictment); Tr. I, p. 218, ll. 19-25. Appellant, Matthew McCoy, and Posey were tried together. Tr. I, p. 99, ll. 2-7. Matthew McCoy was represented by Scott Hayes and Posey was represented by Alex Kornfeld. Tr. I, p. 1. During trial, the state relied in large part upon the testimony of cooperating codefendants and a confidential informant (CI). The state presented evidence concerning a number of controlled buys which were conducted by law enforcement. Sabrina Rochester, Tracy Fore, Matthew Moody, and Michael Payne each testified that they received directions from appellant to complete drug transactions. *See* Tr. I, p. 230-273; p. 381-430; p. 431-501; p. 643-661. During trial, the state entered Facebook messages purportedly between Appellant, Matthew McCoy, and other people the state alleged to be part of the methamphetamine distribution network pursuant to a search warrant. *See generally*, Tr. I, p. 699-726; R. *(State's Exhibits 19-35); R. *(Court's Exhibits 3, 6).

Pretrial motion to suppress

During pretrial motions, codefendant Posey moved to suppress the search warrant for Facebook records. Tr. I, p. 155, l. 23 – 156, l. 3; *see also* R. *(Court's Exhibit 3). He argued that the warrant was based on CI information which required the reliability of the informant to be

verified, citing *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). Tr. I, p. 156, ll. 8-19. He asserted that the affidavit was void as to the CIs reliability. Tr. I, p. 156, ll. 17-24. He requested that the court suppress the Facebook search warrant and the return. Tr. I, p. 157, ll. 17-19.

The state called Special Agent William Sexton to testify regarding the Facebook search warrants. Tr. I, p. 158, ll. 2-11. He testified that Court's Exhibit 6 was the search warrant obtained for Matthew McCoy. Tr. I, p. 159, ll. 9-15. He testified that the probable cause for the warrant was conducting numerous controlled purchases with debriefs of cooperating defendants wherein the controlled purchases were arranged through Facebook messages. Tr. I, p. 159, ll. 19-21. He obtained a search warrant for Facebook records to gather corroborating evidence for controlled buys. Tr. I, p. 160, ll. 1-3. He testified that CIs would reach out to the defendant on Facebook Messenger in their presence to arrange the purchases. Tr. I, p. 160, ll. 5-10. During cross-examination conducted by Hayes, Sexton testified that he knew the informants were reliable because Matthew Moody was his informant. Tr. I, p. 162, l. 25 – 163, l. 4. He testified that Moody had been his informant for “probably over a year, maybe two to three years.” Tr. I, p. 163, ll. 5-6. Moody completed 10 to 12 buys in this case. Tr. I, p. 165, ll. 15-24. Sexton agreed that the search warrants were “identical” for the McCoy's except the words “DJ,” and “Matthew,” and the URLs for the Facebook accounts. Tr. I, p. 166, l. 24 – 167, l. 2. Sexton also testified that there was not anything outside of the four corners of the search warrants that he talked to the signing judge about. Tr. I, p. 168, ll. 11-14.

The state contended that if appellant was challenging his search warrant, there would need to be separate testimony. Tr. I, p. 169, ll. 7-11. Appellant confirmed that he was challenging his search warrant. Tr. I, p. 169, ll. 12-14. The state confirmed that Sexton issued

the search warrant for both McCoy's. Tr. I, p. 170, ll. 2-4. The trial court allowed questioning for appellant and stated that "we'll go ahead and deal with Mr. Abusoft's motion at the same just for judicial economy." Tr. I, p. 170, ll. 5-8.

Appellant cross-examined Sexton. Sexton testified that he completed the warrant for appellant and confirmed that the substantive testimony was the same for appellant. Tr. I, p. 170, ll. 12-23. Sexton obtained both McCoy warrants at the same time with the same judge. Tr. I, p. 170, ll. 22-23. He testified there was no verbal testimony that was not included in the search warrant. Tr. I, p. 171, ll. 7-16. He did not walk the signing judge through the individual CIs. Tr. I, p. 171, l. 25 – 172, l. 5. He agreed that he did not go through the reasons why the CI was trustworthy in the affidavit. Tr. I, p. 173, ll. 9-11. He agreed he did not give the signing judge any more information than what was contained in the warrant affidavit. Tr. I, p. 173, ll. 20-23. He agreed that his affidavit did not say that he was present for the deals. Tr. I, p. 176, ll. 12-13.

Appellant then contended that he stood on the arguments made on behalf of Matthew McCoy. Tr. I, p. 176, l. 25 – 177, l. 2. He argued that "this is just a generic change the name search warrant that they've got a Judge to sign off on without the basis for the probable cause determination." Tr. I, p. 177, ll. 12-17. He asserted that the warrant did not provide any information about the CIs themselves, which would be pertinent to the probable cause determination. Tr. I, p. 177, ll. 18-21. He argued that the warrant, lacking in information about the CIs trustworthiness, was invalid. Tr. I, p. 177, ll. 21-23. He requested that anything resulting from the search warrant be suppressed. Tr. I, p. 177, ll. 24-25. He concluded by asking the court to take notice "that even the officer noted that this is a copy and paste search warrant from another case . . . So another person . . . That is – that is absolutely evidence that this cannot be specific to the probable cause determination of [appellant]." Tr. I, p. 178, ll. 1-5.

The state responded that the affidavit was not solely based on information from the CI but by multiple buys concerning a CI. Tr. I, p. 178, ll. 12-14. The state argued that Sexton established the sufficiency of the affidavit and probable cause for the affidavit. Tr. I, p. 179, ll. 9-11. Appellant responded that the affidavit contained only bald assertions. Tr. I, p. 179, ll. 14-20. He argued that the officer testified that he did not supplement the affidavit with his own observations and the affidavit did not contain anything to allow a determination of the CIs trustworthiness. Tr. I, p. 179, l. 21 – 180, l. 3. He concluded that the warrant was invalid. Tr. I, p. 180, ll. 4-8.

The trial court stated that it heard the testimony and reviewed the exhibit, noting there were two search warrants in the case: one for appellant and one for Matthew McCoy both with identical language. Tr. I, p. 181, ll. 20-23. The court stated there was very little information provided in the affidavit about the informant; however, it determined that the CI was one factor and it was not the sole basis for the affidavits. Tr. I, p. 181, l. 25 – 182, l. 5. The court noted that the officer testified to and placed in his affidavit the controlled purchases and mentioned the contraband cellphone. Tr. I, p. 182, ll. 6-8. The trial court concluded that it would find that “while there is vagueness regarding the CI that there are other elements in the search warrant which would establish probable cause.” Tr. I, p. 182, ll. 18-21. The court thus denied the motions to suppress. Tr. I, p. 182, ll. 21-23.

Search warrant testimony

During trial, the state called Special Agent Sexton, who testified, in part, regarding the information obtained as a result of the Facebook search warrant. He testified that Matthew Moody was his CI and he was a “very reliable informant.” Tr. I, p. 668, l. 15 – 669, l. 25. He testified that he identified appellant’s Facebook page because their CI was communicating

directly with that page. Tr. I, p. 678, ll. 21-25. He explained that appellant's Facebook was public and they were able to confirm his identity. Tr. I, p. 678, l. 25 – 679, l. 1. He testified that "Perro Grande," was appellant's Facebook account being used to facilitate drug trafficking, and thus, he sought the records to collect evidence. Tr. I, p. 679, ll. 2-22. He received records from August 1, 2021, to October 1, 2022. Tr. I, p. 680, ll. 1-2. Sexton explained that after controlled purchases were conducted, he sought the search warrant to collect evidence to corroborate the controlled buys that were set up over Facebook. Tr. I, p. 680, ll. 10-14. Appellant objected to the admission of the Facebook records. Tr. I, p. 683, ll. 10-12.

Appellant argued that state had not properly authenticated the records and they were hearsay. Tr. I, p. 684, ll. 1-19. Appellant argued the state chose not to enter the records during the testimony of the individuals who claim to be part of the messages and because of this Sexton did not have the requisite personal knowledge to authenticate the messages. Tr. I, p. 685, ll. 1-4; p. 686, ll. 1-19. The state responded that the authentication standard is not high and cited *State v. Green*.⁴ Tr. I, p. 686, ll. 11-23. The state argued a certification was provided with the initial Facebook records and contended the records were not hearsay because they were statements of the defendants who were on trial. Tr. I, p. 688, ll. 7-15.

Appellant responded that the first step is authentication and the state merely "claim[s] these Facebook messages are attributable to our clients without doing it." Tr. I, p. 688, ll. 20-25. He reiterated that the "easiest way," was to bring the people in that are part of the messages. Tr. I, p. 690, ll. 1-3. He argued that *Green* established that the writings "in and of themselves cannot authenticate themselves." Tr. I, p. 690, ll. 12-15. Appellant also noted that one CI said his Facebook account was "Perro Grande," and another witness said it was "Big Red Dog." Tr. I, p.

⁴ *State v. Green*, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019), *affirmed as modified State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020).

693, ll. 20-24. The state argued that the records appellant “were supplied for identifier 100070720068887.” Tr. I, p. 695, ll. 1-3.

The trial court stated that it reviewed *Green* and Rule 901. Tr. I, p. 696, ll. 4-14. The court explained that there were a number of distinctive characteristics in the testimony and testimony that the officer viewed the transactions in real time. Tr. I, p. 696, ll. 4-19. The court explained that the screen names, albeit disputed, were in the record and the profiles were public. Tr. I, p. 696, ll. 19-25. The court overruled the objections pursuant to *Green* and Rule 901 noting that there were enough to authenticate the documents. Tr. I, p. 697, ll. 3-12. Appellant asked for a continuing objection to the messages. Tr. I, p. 697, ll. 14-18. The court noted that appellant objected to State’s exhibits 19 through 37 under the same objections. Tr. I, p. 698, ll. 11-14.

State’s exhibits 19 through 35

The state entered exhibit 19, a conversation between Perro Grande and Matthew Moody from March 15-17, 2022, into evidence. Tr. I, p. 699, ll. 6-20; R *(State’s Exhibit 19). Sexton testified that Perro Grande told Moody that three and one-half zips was \$900 and sent him to Satin Street. Tr. I, p. 700, l. 1 – 702, l. 7. Sexton then testified that 100070720068887 was the identifying number associated with the Perro Grande account. Tr. I, p. 702, ll. 11-15.

The state entered exhibit 20, conversations between Perro Grande and Moody and between Perro Grande and “Still Stackin Alatapaper,” into evidence. Tr. I, p. 703, l. 14 – 704, l. 4; R *(State’s Exhibit 20). Messages between Moody and Perro Grande on March 25, 2022, showed Perro Grande sending Moody to a Hot Spot and Moody telling him to put money towards his outstanding debt. Tr. 704, l. 6 – 706, l. 3. Sexton testified that Perro said “168 grams, owe for a zip, or ounce,” and Moody asked for Perro’s CashApp which he

responded was “DJthebossMcCoy.” Tr. I, p. 706, ll. 4-8. The state also entered exhibit 21, which comprised of further conversations on March 25, 2022, between Perro Grande and Still Stackin Alatapaper. Tr. I, p. 707, ll. 2-10; R *(State’s Exhibit 21).

Next, the state entered exhibit 23, a conversation between Moody and Perro Grande from May 5, 2022, to May 15, 2022, and exhibit 24, a conversation between Perro Grande and Malary Lynn from May 11, 2022, to May 17, 2022, into evidence. Tr. I, p. 710, ll. 3-17; R *(State’s Exhibits 23-24). Sexton testified concerning the controlled purchase on May 12, 2022, with Malary Lynn Bates and read the pertinent messages associated with that buy. Tr. I, p. 710, l. 19 – 712, l. 12. The state entered exhibit 25, a conversation between Perro Grande and Moody from July 13, 2022, to August 2, 2022, into evidence. Tr. I, p. 712, ll. 14-21; R *(State’s Exhibit 25). Sexton testified that those messages concerned a controlled buy from Abygail Talor at Tony McCoy’s house on Satin Street. Tr. I, p. 712, l. 23 – 713, l. 8. The state entered additional messages between Perro Grande and Moody concerning controlled buys. Tr. I, p. 713, l. 9 – 714, l. 21; p. 715, ll. 14-20; R *(State’s Exhibits 26-27).

Finally, the state entered exhibits 30, 34, and 35, which comprised of messages between Perro Grande and Still Stackin Alatapaper. Tr. I, p. 717, ll. 5-13; p. 725, ll. 17-22; p. 726, ll. 16-24; R *(State’s Exhibits 30, 34, 35). Sexton read the pertinent messages from exhibit 30 and explained it appeared they were discussing the ledger of debts owed. Tr. I, p. 717, l. 15 – 718, l. 22. Sexton read the pertinent messages from exhibits 34 and 35. Tr. I, p. 725, l. 24 – 727, l. 10.

On cross-examination, Sexton testified that his firsthand information and testimony concerning cooperating defendants and CIs connected appellant to the Facebook account. Tr. I, p. 744, ll. 10-20. He testified that he was “not sure,” if his explanation about the verifying number associated with the account and his testimony on that matter was in the search warrant.

Tr. I, p. 747, ll. 1-4. Sexton testified that he could rule out that appellant was not physically at the controlled buys. Tr. I, p. 762, ll. 1-14.

State's closing argument

After the parties rested, the state presented its closing argument to the jury. The state argued that Michael Payne told the jury appellant's Facebook name. Tr. II, p. 29, ll. 10-12. The state read several of the Facebook messages to the jury. Tr. II, p. 30, l. 7 – 31, l. 2; p. 31, l. 15 – 33, l. 11; p. 34, ll. 4-18; p. 36, ll. 3-20 . The state asserted that “[w]e know D.J.’s Facebook name is Perro Grande.” Tr. II, p. 31, ll. 3-6.

Discussion

The trial court erred by refusing to suppress Facebook messages obtained from a Facebook account which the state asserted was appellant's because the search warrant failed to establish a sufficient basis for probable cause as it contained only conclusory assertions and lacked information concerning the CIs reliability.

“A search warrant may issue only upon a finding of probable cause.” *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. It provides that “no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.” *State v. Brown*, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) (citing U.S. Const. amend. IV). “A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found . . .” *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

When an appellate court reviews the decision to issue a search warrant it must decide whether the magistrate had a substantial basis for concluding probable cause existed. *State v. Dupree*, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). In determining the validity of the search warrant, a reviewing court may only consider information which was brought to the magistrate's attention. *State v. Martin*, 347 S.C. 522, 527, 556 S.E.2d 706, 709 (Ct. App. 2001). "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Gates*, 462 U.S. at 239.

When a search warrant affidavit relies upon information gathered from other people, such as informants, the informants' "veracity," "reliability," and "basis of knowledge" are "all highly relevant in determining the value of his report." *Id.* at 230. Thus, "a warrant based solely on information provided by a confidential informant *must* contain information supporting the credibility of the informant and the basis of his knowledge." *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000) (emphasis added). Importantly, "[i]nformants' tips, like all other clues and evidence coming to a policeman on the scene may vary greatly in their value and reliability." *Adams v. Williams*, 407 U.S. 143, 147 (1972).

In this state, search warrants may only be issued "upon affidavits sworn to before the magistrate . . . establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140. The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. *Franks v. Delaware*, 438 U.S. 154 (1978). Conclusory statements and affidavits provide no basis to make a judgment that probable cause exists. *See State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990); *see also State v. Baccus*, 367 S.C. 41, 52, 625 S.E.2d 216, 222 (2006) (determining

that the affidavit failed to set forth any facts as to why police believed appellant committed the crime where the affidavit lacked specificity and contained conclusory statements). Further, there must be sufficient nexus, described in the affidavit, between the items to be seized and the criminal behavior alleged. *State v. McGuinn*, 268 S.C. 112, 232 S.E.2d 229 (1977).

In *Smith*, our Supreme Court held the warrant affidavit was insufficient because it “sets forth no facts as to *why* police believed Smith robbed the Master Host Inn.” 301 S.C. at 373, 392 S.E.2d at 183 (emphasis in original). There, a knife was seized pursuant to an affidavit supporting the warrant which stated,

That on May 12th at approximately 11:45 p.m. Reginald Jerome Smith went into the Master Inn located at 1468 Savannah Hwy., Charleston, S.C. and he then robbed the manager at knife point. Smith has been staying at The Host of America Room 216 since Jan. 1, 1988 and there is every reason to believe the weapon and clothes used in the robbery will be located in the room. This information was confirmed in person by Sgt. Sherman on 05/13/88.

Id. at 372, 392 S.E.2d at 183. Our Supreme Court determined that the affidavit was defective on its face as “[m]ere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.” *Id.*

In *State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997), our Supreme Court determined that under the totality of the circumstances, the warrant affidavit at issue “could not have provided the ministerial recorder with a substantial basis for finding probable cause to search Weston’s car.” *Id.* at 292, 494 S.E.2d at 803. There, a box of .25 caliber bullets was seized, and the underlying warrant affidavit provided,

On March 18, 1994 at approx 2245 hours the victim (Claude Crumlin) was the victim of an armed robbery and assault with intent to kill at 5126 Farrow Rd. The defendant in this incident is a Kelvin Weston. Kelvin Weston, by S.C. highway depts., is the registered owner of the above listed vehicle. Also investigation

revealed through witness in this matter that defendant was driving the above vehicle at the time of the incident. The search for the above items are needed to fully complete this investigation.

Id. at 189, 494 S.E.2d at 802. Our Supreme Court explained that the affidavit failed to set forth any facts as to why the police believed that Weston committed the Crumlin crime as the first three sentences were mere conclusory statements and the fourth sentence offered nothing to link Weston to the crime itself. *Id.* at 291-92, 494 S.E.2d at 802. Further, our Supreme Court determined that the affidavit at issue “lacked any indicia of probable cause,” and thus, “the good-faith exception would not apply.” *Id.* at 293, 494 S.E.2d at 803. Therefore, our Supreme Court held that the trial court erred by refusing to suppress the ammunition. *Id.*

In appellant’s case, the search warrant affidavit failed to provide sufficient information to the issuing magistrate necessary to establish a substantial basis to find probable cause. *Dupree*, 354 S.C. at 683, 583 S.E.2d at 441. Importantly, the affidavit merely alleged that undercover controlled purchases were made from appellant, the deals were facilitated by appellant using a contraband cellphone, appellant used Facebook to communicate with the CIs and co-conspirators, appellant communicated with suppliers to arrange for the delivery of methamphetamine to South Carolina, and “Through information provided by confidential sources, informants, cooperating defendants, and other investigative methods” appellant’s Facebook was the one identified in the warrant. *See R.** (Court’s Exhibits 3, 6). Moreover, Sexton testified that no verbal testimony was included for the affidavit and that the search warrant for appellant was identical to Matthew McCoy’s except for changing the name and Facebook URL. *Tr. I*, p. 166, l. 24 – 167, l. 2; p. 171, ll. 7-16; *Martin*, 347 S.C. at 527, 556 S.E.2d at 709 (explaining that a reviewing court may only consider information which was brought to the magistrate’s attention).

First, the search warrant affidavit failed to set forth *why* law enforcement believed that undercover drug buys were made by appellant. *See Smith*, 301 S.C. at 373, 392 S.E.2d at 183. Specifically, the affidavit lacked any information concerning who completed the drug buys or how the buys were performed. Instead, the affidavit merely provided that controlled purchases were made from appellant. R *(Court's Exhibits 3-6). As in *Smith*, where our Supreme Court found the language "there is every reason to believe the weapon and clothes used in the robbery will be located in the room," was defective, *see Smith*, 301 S.C. at 372, 392 S.E.2d at 183, appellant's warrant affidavit merely provided that law enforcement investigated appellant and his associates and that appellant used Facebook messengers to communicate. To that end, the warrant affidavit is comprised of conclusory statements which lack any information to suggest why law enforcement believed what they believed. *See Weston*, 329 S.C. at 291-292, 494 S.E.2d at 802 (explaining that the affidavit failed to set forth any facts as to why the police believed that Weston committed the Crumlin crime as the first three sentences were mere conclusory statements and the fourth sentence offered nothing to link Weston to the crime itself). Thus, as a whole, the warrant failed to set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. *See generally Franks v. Delaware*, 438 U.S. 154 (1978).

Second, to the extent that the warrant can be construed as stating that law enforcement gained the information contained in the affidavit from confidential informants, the warrant remains defective. Of note, it is unclear whether the final sentence, "through information provided by confidential sources, informants, cooperating defendants, and other investigative methods," is intended to apply to the entirety of the affidavit or if the statement is a stand-alone, conclusory allegation, as to the identification of appellant's Facebook account. R *(Court's

Exhibit 3, 6). Under either interpretation, the affidavit is insufficient. However, assuming that the language is meant to apply to the whole affidavit, “[a] warrant based solely on information provided by a confidential informant *must* contain information supporting the credibility of the informant and the basis of his knowledge.” *192 Coin-Operated Video Game Machines*, 338 S.C. at 192, 525 S.E.2d at 881 (emphasis added). The language contained in the search warrant affidavit is silent as to what “information” was provided, what “confidential sources” means, who the “informants” are, whether the informants are reliable, how the informants know the information they provided, which “cooperating defendants” provided information, whether the cooperating defendants were reliable, the basis of the cooperating defendants knowledge, or what “investigative methods” were used. R *(Court’s Exhibits 3, 6). Therefore, the warrant lacks sufficient information for the magistrate to determine probable cause where no information was provided as to the veracity, reliability, or basis of knowledge as to the informants law enforcement relied upon. *Gates*, 462 U.S. at 239; *Adams*, 407 U.S. at 147.

In sum, the search warrant affidavit in appellant’s case consists only of conclusory statements, based only on generalized references to information gathered “during this investigation.” R *(Court’s Exhibits 3, 6). The trial court’s ruling that although the warrant was vague as to the reliability of the CIs used there were “other elements in the search warrant which would establish probable cause,” *see* Tr. I, p. 182, ll. 18-21, was in error where the conclusory statements and bare conclusions of others could not have provided the issuing judge a sufficient basis for probable cause, *Gates*, 462 U.S. at 239. Accordingly, the trial court erred by refusing to suppress the Facebook messages obtained from the defective warrant. Tr. I, p. 182, ll. 21-23.

II.

The trial court erred by refusing to declare a mistrial when several jury members witnessed appellant wearing prison attire, shackles, and being escorted or surrounded by armed guards during trial.

Relevant facts

Pretrial arguments

During pretrial motions, defense counsel for codefendant Matthew McCoy raised concerns of the defendants appearing in chains before the jury. Tr. I, p. 91, ll. 19-22. Posey's counsel cited *Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001), and argued that the jury should not know the defendants are incarcerated. Tr. I, p. 92, ll. 4-8. Matthew McCoy's counsel argued that there were "several guys dressed in, basically, full SWAT out front of the courthouse. They were holding AK-47s like they were guarding it, like, they expected some serious violence. And all these jurors came in for the State Grand Jury case . . ." Tr. I, p. 92, ll. 15-24. He continued that "it's obvious I think probably to everybody that these guys are in custody and they're serious security threats for whatever reason. I think the jury probably got that impression when they came through the front." Tr. I, p. 93, ll. 5-9. Appellant argued that "the law is pretty harsh on if there's any accusation that a juror perceives shackles," and stated that the defendants were also on a leash. Tr. I, p. 95, ll. 11-16. Matthew McCoy's counsel asserted that the number of officers present during the trial gave the appearance as though "they've already been found guilty." Tr. I, p. 96, ll. 8-12.

Motion for mistrial

Codefendant Matthew McCoy's counsel brought to the trial court's attention that two jurors witnessed one of the McCoy's being dropped off at the courthouse surrounded by "SCDC

people, who had big guns.” Tr. I, p. 183, ll. 1-15. He argued that one of the McCoy’s was in the yellow jumpsuit and “[i]t was obvious what was going on.” Tr. 183, ll. 10-16. He asserted that the prejudicial effect on the jury and their ability to render a fair and impartial verdict in the case was compromised. Tr. I, p. 183, ll. 17-22. He requested a mistrial. Tr. I, p. 184, ll. 1-3.

The state responded that SCDC had reason to believe that they were dangerous and received information they were planning an escape attempt on the way to court. Tr. I, p. 184, l. 22 – 185, l. 3. The state continued that threats existed in the case. Tr. I, p. 185, ll. 3-5. The state argued that granting a mistrial was an extreme measure and should not be granted unless absolutely necessary, which the state did not believe was the case at bar. Tr. I, p. 185, ll. 6-13.

Appellant requested to proffer the incident for the court and the record. Tr. I, p. 185, ll. 17-22. Appellant then testified that when pulling up officers stood on all corners of the parking lot with ARs and shotguns. Tr. I, p. 186, ll. 11-13. He explained that he was surrounded until he got out of the van and the officers walked with him, while lay people were scattered around watching. Tr. I, p. 186, ll. 13-21. He testified that he was dressed in his yellow jumpsuit, he was surrounded when he stepped out of the van, and the officers had long rifles and shotguns. Tr. I, p. 187, ll. 3-12. He explained that he was on a leash, “shackled, belly chain, black box and cuffs.” Tr. I, p. 187, ll. 16-19.

Appellant argued that the Supreme Court has made it clear that it is important that jurors do not get the impression that “these guys are even incarcerated at this time, much less that there’s some kind of – they’re required to have this sort of security sweep.” Tr. I, p. 188, ll. 4-11. He argued that while the defendants did have to be transported there were available alternatives to ensure that they would not be seen in prison attire and shackled. Tr. I, p. 188, ll. 12-19. He argued that SCDC could get the defendants there earlier and sweep the area. Tr. I, p.

188, ll. 12-15. He asserted that there was no way to question the jury because questioning the jury would infect the entire jury. Tr. I, p. 188, ll. 20-23. He explained that they were stuck to either accept infecting the entire jury or accepting that “maybe two of them saw him look like some crazy cartel member or terrorist and then ask them to be neutral.” Tr. I, p. 188, l. 23 – 189, l. 1. Therefore, counsel requested a mistrial. Tr. I, p. 189, l. 2.

The state responded that defense argued that “if” a juror saw them and emphasized that they did not know if a juror saw the defendants enter the courtroom in the manner described. Tr. I, p. 189, ll. 3-10. Posey’s counsel noted that he believed Juror #13 and Juror #156 were the jurors in question. Tr. I, p. 190, ll. 7-8. He continued that there were alternatives to avoid members of the jury seeing the defendant’s in their prison attire and shackled. Tr. I, p. 190, ll. 13-21. He cited *Humbert* and argued that it was generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing. Tr. I, p. 190, l. 22 – 191, l. 1.

After hearing arguments from the parties, the trial court ruled as follows:

Well, the statement has been made by Defense Counsel that if I question the jury that that’s going to...call attention to the issue, which I’m not inclined to do that. I will give an instruction to them if the Defense would request it that they’re to draw no conclusions on the case by the fact that there are law enforcement officers in the courtroom. However, I don’t know that – again, that may just draw more attention to the issue than it would solve.

Logistically, there has to be a way for the Defendants to get into the courthouse. This facility is what it is. And the way into the facility complicates this when we have defendants who are in the custody of the Department of Corrections.

These are serious charges. There are a number of witnesses. The State has concerns about security, which I understand the Defense contest that. And the Court’s not making any judgment regarding those allegations. But when an inmate is being brought from the Department of Corrections to the courthouse, the Court has a

responsibility to see that the inmate is brought in safely and that the public is safe while the inmate is being brought in.

So I'm not going to order the sheriff's department of Pickens County to set up a security perimeter around the courthouse and prohibit people from entering during that time period. I don't see how logistically that could work in this situation. And, unfortunately, the entrance to the courthouse is the same for everyone. The front's not used. You go in the back where all the jurors go in. That's where the Court goes in the entrance in the back, the back parking lot there. So I don't know of a practical solution for this.

And Defense Counsel, we made great effort yesterday to ensure that your clients could sit with you and not be in jail clothing and where their restraints were removed. Again, the clerk's office worked very hard to get that set up.

So I'm going to deny the motion for mistrial. If there is some specific juror that is affected and the Court gets a message of that, I will question that. But I think at this point it would cause more problems and draw more attention to it if I questioned them than if we just moved on.

Tr. I, p. 191, l. 13 – 193, l. 6.

Renewed motion for a mistrial

After the close of the state's case, appellant's trial counsel renewed all of his requests for a mistrial. Tr. I, p. 807, ll. 6-7. The trial court ultimately denied the renewal of counsel's mistrial motions. Tr. I, p. 812, ll. 3-5.

Trial

On the final day of trial, appellant's counsel brought to the trial court's attention that when court adjourned the day prior multiple jurors were able to watch appellant loaded into the prison van. Tr. II, p. 4, ll. 13-19. The trial court stated that it would question the jury about contact with third parties while noting that the situation the day prior was chaotic since the power

went out. Tr. II, p. 4, ll. 20-23. The court noted that it was concerned about the issue and would question the jury. Tr. II, p. 4, ll. 23-25.

The trial court then asked the jury if any member of the jury had contact with third-parties or other individuals during the power outage the day prior. Tr. II, p. 23, ll. 8-16. No member of the jury responded. Tr. II, p. 23, ll. 17-19. The court then inquired if any member of the jury had any interaction with third-parties whatsoever at any time during the case. Tr. II, p. 23, ll. 18-21. No member of the jury responded. Tr. II, p. 23, ll. 23-24.

After the defense rested, Tr. II, p. 24, ll. 4-6, appellant's counsel renewed all his requests for a mistrial, which the court noted for the record, Tr. II, p. 24, ll. 12-16.

Discussion

The trial court abused its discretion by refusing to declare a mistrial after appellant and his codefendants were led into the courtroom in view of several jurors in their prison attire and surrounded by armed guards with high-powered rifles. Moreover, the trial court failed to make an individualized finding of a special need to justify appellant appearing restrained in the jury's presence. Accordingly, this Court should reverse.

“A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial.” *State v. Wilson*, 389 S.C. 579, 585-86, 698 S.E.2d 862, 865 (Ct. App. 2010). “Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence.” *Id.* (citing *State v. White*, 371 S.C. 439, 447-48, 639 S.E.2d 160, 164 (Ct. App. 2006)). “The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.” *Id.* at 586, 698 S.E.2d at 866.

Compelling a criminal defendant to appear before a jury in prison attire is violative of due process and incompatible with the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (collecting cases); *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986) (shackling a criminal defendant is “inherently prejudicial”). This weakening of the presumption of innocence extends to forcing a defendant to appear before the jury in physical restraints under heavy guard. *See Deck v. Missouri*, 544 U.S. 622 (2005); *State v. Heyward*, 441 S.C. 484, 895 S.E.2d 658 (2023).

Importantly, “[t]he law has long forbidden routine use of visible shackles during [a jury trial]; it permits a State to shackle a criminal defendant only in the presence of a special need.” *Deck*, 544 U.S. at 626. “Thus, a defendant in a criminal trial may not be required to wear handcuffs, leg shackles, or other restraints in the presence of the jury unless the trial court makes specific findings on the record as to the particular reasons the restraints are necessary. If the court finds restraints are necessary, it must make every reasonable effort to ensure the restraints are not visible to the jury.” *Heyward*, 441 S.C. at 493, 895 S.E.2d at 663 (2023). This prohibition extends to the visual impact of other aspects of a defendant’s appearance before the jury that implies a guilty verdict is required based upon the way the accused is presented to the jury. *See Ryals v. State*, 439 S.C. 230, 237, 886 S.E.2d 239, 243 (Ct. App. 2023) (“Balancing the impact of Ryals’ forced appearance at his trial in prison clothing visible to the jury against the strength of the State’s evidence against him, there is a reasonable probability that, but for trial counsel’s failure to object to his appearance at this trial in prison clothing, the result of the proceeding would have been different.”); *Humbert*, 345 S.C. at 337, 548 S.E.2d at 865 (holding “counsel was deficient by allowing the trial to proceed while petitioner was dressed in prison

clothing. We find it generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing.”).

In *Deck*, the United States Supreme Court analyzed a case where a criminal defendant, over objection, was placed in “leg irons and a belly chain” during the penalty phase of a capital murder trial. *Id.* at 625. In that case, the defendant was permitted to be shackled because he “[had] been convicted,” and the shackles “[took] any fear out of their minds.” *Id.* The Supreme Court held that, generally, a criminal defendant should not be restrained. *Id.* at 632. Ultimately, the Supreme Court held that Missouri had violated *Deck*’s due process rights because, while there are cases where there exist “indisputably good reasons for shackling,” the trial court in *Deck* did not make any specific findings of necessity other than that *Deck* had already been convicted, and the shackles “would take any fear out of the juror’s minds.” *Id.* at 634-35 (internal quotation marks omitted). Ultimately, “the Constitution forbids the use of visible shackles...*unless* that use is ‘justified by an essential state interest’—such as the interest in courtroom security—specific to the defendant on trial.” *Id.* at 624 (emphasis in original).

By contrast, in *State v. Moore*, 257 S.C. 147, 184 S.E.2d 546 (1971), our Supreme Court considered a trial court’s refusal to grant a mistrial in a case where the jury saw the defendants “being shackled and being prepared to be taken to the county jail.” *Id.* at 151, 184 S.E.2d at 548. In that case, the Supreme Court found no error in the denial of a mistrial. *Id.* As relevant, the Court found: “We think that when a jury or members thereof see an accused outside the courtroom in chains or handcuffs the situation is psychologically different and less likely to create prejudice in the minds of the jurors People normally expect to see a prisoner under some restraints in situations where he is able to escape if not in restraints.” *Id.* at 152-53, 184 S.E.2d at 549 (quoting *State v. Cassel*, 48 Wis.2d 619, 625, 180 N.W.2d 607, 611 (1970)).

First, the trial court failed to make a specific finding that a special need existed to shackle appellant and to subject him to heightened courtroom security. *Deck*, 544 U.S. at 626; *Heyward*, 441 S.C. at 493, 895 S.E.2d at 663. Instead, the trial court deferred to the decisions of SCDC and stated that it was “not making any judgment regarding” the state’s allegations concerning security. Tr. 191, l. 13 – 193, l. 6. The record does not contain any express on-the-record finding by the trial court that appellant threatened witnesses or the court, nor did the trial court cite any concerns for escape or a prior history of escape to justify a special need for shackling. Thus, because the lower court made no specific finding of special need to restrain appellant during trial, it abused its discretion and committed an error of law. *See State v. Cook*, 440 S.C. 308, 316, 891 S.E.2d 35, 39 (Ct. App. 2023) (“The trial court’s decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law.”). Although the state asserted that there were allegations of a potential escape plan, the state’s allegations were vague, and the trial court did not adopt those allegations as it expressly stated it would not make any judgment as to the state’s allegations. Tr. I, p. 184, l. 22 – 185, l. 5; p. 191, l. 13 – 193, l. 6. The trial court’s failure to make the required individualized finding of a need for the enhanced security thus resulted in further violations of appellant’s right to a fair trial when several members of the jury witnessed appellant shackled and subjected to the improper use of security. *See State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995) (“The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security.”).⁵

⁵ *See also Mendoza v. State*, 1 S.W.3d 829, 831 (Tex. Crim. App. 1999) (Explaining that although the court noted that appellant had in the past attempted to escape and had a prior conviction for escape, there was no factual basis in the record to support the use of restraints in the present case); *Grayson v. State*, 192 S.W.3d 790, 792 (Tex. Crim. App. 2006) (holding that requiring appellant to be tried in shackles in the absence of any exceptional circumstances where

Critically, appellant testified that officers stood on all corners of the parking lot with ARs and shotguns, he was surrounded by officers who walked with him, he was dressed in his yellow jumpsuit, and he was on a leash, “shackled, belly chain, black box and cuffs.” Tr. I, p. 186, ll. 11-21; 187, ll. 3-19. All of these heightened security measures were on full view to several jury members who witnessed appellant being led into the courtroom. Due to the prejudice caused by requiring appellant to be unnecessarily shackled during trial and the prejudicial nature of forcing appellant to enter the courthouse in full prison attire under heavy guard, the trial court should have granted a mistrial. Tr. I, p. 186, l. 11 – 187, l. 19; p. 191, l. 13 – 193, l. 6; p. 812, ll. 3-5; *Wilson*, 389 S.C. at 585-86, 698 S.E.2d at 865. Importantly, when ruling on the motion for a mistrial, the trial court avoided making a finding that it was necessary for appellant to be led into the courtroom shackled before the jury and instead focused on the logistics by finding that the state’s venue made such interactions unavoidable. Tr. 191, l. 13 – 193, l. 6. The prejudicial impact of members of the jury observing appellant in full prison attire, shackled, and under heavily armed guards cannot be understated as it impinges on the presumption of innocence and appellant’s due process rights. See *Estelle*, 425 U.S. at 504-05; *Holbrook*, 475 U.S. at 568-69. As the Supreme Court observed in *Deck*:

The third argument fails to take account of this Court’s statement in *Holbrook* that shackling is ‘inherently prejudicial.’ 475 U.S., at 568, 106 S.Ct. 1340. That statement is rooted in our belief that the practice will often have negative effects, but—like ‘the consequences of compelling a defendant to wear prison clothing’ or of forcing him to stand trial while medicated—those effects ‘cannot be shown from a trial transcript.’ *Riggins*, *supra*, at 137,

nothing in the record indicated that appellant was a security risk or showed any tendency for violent behavior was an abuse of discretion); *Gonzalez v. Piller*, 341 F.3d 897, 900 (9th Cir., 2003) (“[N]o person should be tried while shackled . . . except as a last resort.”); *Ghent v. Woodford*, 279 F.3d 1121, 1132 (9th Cir. 2002) (“[A] defendant has the right to be free of shackles and handcuffs in the presence of the jury, unless shackling is justified by an essential state interest.”).

112 S. Ct. 1810. Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove ‘beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.’ *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967).

Deck, 544 U.S. at 635. Accordingly, no showing or adequate justification was made by the trial court to justify its refusal to prevent the jury from being exposed to the image of appellant under heavy security and the negative image it impressed upon the jurors.

In addition, appellant’s case differs from *Moore*. In *Moore*, the jury observed the defendants in routine shackles for transport back to the county jail. *Id.* at 151, 184 S.E.2d at 548. In contrast, several members of appellant’s jury observed appellant being led into the courtroom surrounded by heavily armed guards. Tr. I, p. 183, ll. 1-15; p. 186, ll. 11-21; 187, ll. 3-19. Thus, our Supreme Court’s discussion in *Moore* that “People normally expect to see a prisoner under *some* restraints in situations where he is able to escape if not in restraints,” falls flat where appellant was subjected to abnormal security by being surrounded by guards with assault rifles and bound to a leash. *But see id.* at 152-53, 184 S.E.2d at 549.

Therefore, the trial court abused its discretion in failing to grant appellant a mistrial when the State’s selected venue forced appellant to be paraded by the South Carolina Department of Corrections under heavy guard, in full prison attire and shackled. Since it is inherently prejudicial, it would follow that a mistrial in such setting would equate to a manifest necessity dictating the grant of a mistrial if the matter may not be otherwise adequately addressed through a finding of a special need for such security.

III.

The trial court erred by refusing to declare a mistrial after the state elicited testimony that appellant was in “lockup,” in direct contravention of the trial court’s ruling that any mention of appellant being in prison would be excluded and where the prejudicial effect of the testimony could be removed no other way.

Relevant facts

Pretrial rulings

During pretrial motions, the state argued that eliciting testimony that appellant and his brother were in prison at the time the offenses occurred was “very probative because it explains why the Defendants were not out on the street conducting these transactions themselves.” Tr. I, p. 195, ll. 4-11. The state explained that there were no buys directly from the McCoy’s because they were in prison. Tr. I, p. 195, ll. 11-14. The state continued that while it may be prejudicial the evidence had high probative value because if the state cannot explain why they were not physically present the jury may wonder why the McCoy’s were not in physical possession of drugs. Tr. I, p. 195, ll. 15-19. Appellant’s counsel responded that the state’s position was that the McCoy’s controlled the conspiracy over the phone and Facebook, and thus, it was unnecessary for the state to suggest where the McCoy’s were. Tr. I, p. 195, l. 24 – 196, l. 4. He continued that what the state sought was to “get before the jury that the McCoy’s were in prison so then they can make the assumption that because they were in prison, they do bad acts, they do bad things, and, therefore they’re still committing crimes.” Tr. I, p. 196, ll. 7-11. He argued that there was no prejudice to the state and requested the court to prevent any mention of the McCoy’s physical location. Tr. I, p. 196, ll. 17-19. The state argued that it created a “false narrative,” to disregard the McCoy’s location. Tr. I, p. 197, ll. 4-5. The state reiterated that

although the evidence was prejudicial it had high probative value to the McCoy's involvement in the conspiracy. Tr. I, p. 197, ll. 11-12.

The trial court ruled that the state certainly had probative value with respect to the whereabouts of the McCoy's, but the risk of unfair prejudice exceeded the probative value. Tr. I, p. 198, ll. 18-21. The trial court ruled that it would not allow reference to prison in the testimony and stated that it was not necessary for the state's case. Tr. I, p. 198, ll. 21-23.

Trial

During trial, the state called Matthew Moody, a CI for the state, to testify. Tr. I, p. 431, l. 12 – 433, l. 19. While he was explaining his involvement with the conspiracy and how appellant would contact him about conducting a buy, the state asked Moody why he would sometimes deal with Matthew McCoy. Tr. I, p. 441, ll. 18-19. Moody replied that, “Whenever I dealt with him is *because D.J. was in lockup* or --” Tr. I, p. 441, ll. 20-21 (emphasis added). Appellant's counsel stated that “at the appropriate time, I'd like to address a scheduling matter that just came up . . .” Tr. I, p. 441, l. 25 – 442, l. 3. The trial court stated it would deal with his scheduling issue “in just a moment.” Tr. I, p. 442, l. 8. The state continued its direct examination of Moody. *See generally* Tr. I, p. 442.

While the parties dealt with an exhibit pertaining to Moody's testimony outside of the presence of the jury, appellant's counsel requested to address his “other issue.” Tr. I, p. 447, ll. 6-7. He explained to the court that he had raised a scheduling issue earlier because he did not want to draw attention to what happened. Tr. I, p. 447, ll. 9-11. He explained that the state elicited testimony that the McCoy's were in lockup. Tr. I, p. 447, ll. 11-12. He continued that he needed to contemporaneously “get something on the record,” and was hoping it would draw a break without giving the jury attention. Tr. I, p. 447, ll. 13-15. Counsel requested a mistrial

because the trial court made a ruling that the state could not elicit testimony about the McCoy's being in prison and the state elicited that testimony. Tr. I, p. 447, ll. 16-19.

The state responded that it did not ask Moody if the McCoy's were in prison but was instead inquiring about how he communicated with the brothers. Tr. I, p. 447, ll. 21-23. The state argued that when Moody stated that he communicated with Matthew McCoy when he could not communicate with appellant because he was in lockup, the state asked Moody if he meant that appellant was unavailable to clarify his testimony. Tr. I, p. 448, ll. 1-3. The state explained it did not proceed down the line of questioning and contended that the jury did not know what lockup means. Tr. I, p. 448, ll. 3-5. Appellant's counsel responded that the state strenuously argued that it needed to connect the dots with testimony that the McCoy's were in prison and that the state elicited that very testimony. Tr. I, p. 448, ll. 10-23. Counsel argued that a curative instruction would draw more attention but offered as a solution that the witness retract his response. Tr. I, p. 449, ll. 1-5. He reiterated that the court made a ruling and the state violated the ruling. Tr. I, p. 449, ll. 5-6.

The trial court ruled that the testimony was not a direct response to a question by the state and determined that the state was not trying to elicit that response. Tr. I, p. 449, ll. 12-15. The court noted that the state rephrased the question. Tr. I, p. 449, ll. 16-17. Therefore, the court denied the motion for a mistrial as the response did not refer to prison. Tr. I, p. 449, ll. 17-18. The court continued that it would caution the state because it was a sensitive issue. Tr. I, p. 449, ll. 19-20.

Thereafter, appellant made a formal request for a curative instruction. Tr. I, p. 451, ll. 20-24. The court said that it could do that but asked if counsel was certain he wanted the court to call attention to the "one word." Tr. I, p. 451, l. 25 – 452, l. 2. Counsel responded that he did

not, but he did not know how to preserve his issue for appellate review without formally asking for it. Tr. I, p. 452, ll. 3-5. He stated, “if you want to deny it, Your Honor, I understand.” Tr. I, p. 452, ll. 5-6. Matthew McCoy’s counsel addressed the court and argued that the practical result of the instruction could have more of a prejudicial effect than the testimony itself. Tr. I, p. 454, ll. 11-15.

The trial court ruled “that it would be inappropriate for me to give a curative instruction for the very reason Mr. Hayes just stated. It’s going to call attention to something that’s not specific and was mentioned briefly. And I think it would prejudice the Defendant’s more than help them in this situation.” Tr. I, p. 455, ll. 10-16. The trial court continued that appellant’s “motion is preserved for the purposes of the record.” Tr. I, p. 455, ll. 17-18. The court nonetheless emphasized “that this should not happen again in any form.” Tr. I, p. 455, ll. 18-19.

During special agent Scott Gardner’s testimony, appellant requested to ask the witness if appellant waws “locked up,” during the CI buys. Tr. I, p. 567, ll. 23-25. Appellant acknowledged that they had a “conundrum of how do we deal with that, how do we fix it,” in regard to the state eliciting testimony that appellant had been locked up. Tr. I, p. 567, ll. 12-19. He argued that his question would be an equitable solution to our prior issue. Tr. I, p. 568, ll. 1-3. The state responded that “opens the door wide open.” Tr. I, p. 568, ll. 5-6. Appellant responded that the state got the testimony, the court did not grant a mistrial, and his proposed solution balanced the playing field. Tr. I, p. 568, ll. 7-15. The trial court reiterated that the testimony was volunteered by the witness and that going down this road, “even with the utmost care,” would be extremely difficult to keep within the necessary parameters if the court granted his motion. Tr. I, p. 568, ll. 16-23. The court denied appellant’s request. Tr. I, p. 569, ll. 3-4. Appellant proffered the testimony he sought to ask the witness. Tr. I, p. 569, l. 17 – 570, l. 5.

The trial court determined it would not allow that questioning and it would open the door completely to appellant's incarceration. Tr. I, p. 570, ll. 7-13. Appellant then renewed his request for a mistrial because the state got testimony that appellant was in lockup and "they have that advantage." Tr. I, p. 571, ll. 1-4. He argued that "the legal principle of opening the door is just an equity principle," and thus, renewed his request for a mistrial. Tr. I, p. 571, ll. 4-7. The trial court denied the motion. Tr. I, p. 571, l. 8.

After the state rested, Tr. I, p. 798, ll. 2-3, appellant renewed all of his motions and requests for mistrial, Tr. I, p. 807, ll. 6-7. He noted that even if he wanted to open the door, regarding appellant's whereabouts in prison, it would prejudice his codefendant. Tr. I, p. 809, ll. 15-23. He explained he would have been willing to open the door about prison because "everybody that's been brought up here either has been in prison or is in prison clothing." Tr. I, p. 810, ll. 19-24. He argued that appellant's due process had been violated and thus asked the trial court for a mistrial. Tr. I, p. 811, ll. 9-11. The court denied the renewal of the mistrial motion because the "Court, in essence, was upholding its decision to grant the Defendants' motion from the beginning of trial." Tr. I, p. 812, ll. 1-5.

Discussion

The trial court erred by refusing to declare a mistrial after the state elicited testimony from its confidential informant, Moody, that appellant was in "lockup," as that testimony violated the trial court's ruling that any mention of appellant being in prison would be excluded. Moreover, the prejudicial effect of the testimony could be removed no other way, and thus, a mistrial was required.

"Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." *State v. Ferguson*, 376 S.C. 615, 619, 658 S.E.2d 101, 103 (Ct. App. 2008)

(citing *State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007)). However, “an overruled party is under no obligation to accept a curative instruction to preserve the issue for [this Court’s] review.” *Wilson*, 389 S.C. at 584, 698 S.E.2d at 865. Moreover, “[t]he granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing *State v. Wiley*, 387 S.C. 490, 495-96, 692 S.E.2d 560, 563 (Ct. App. 2010)).

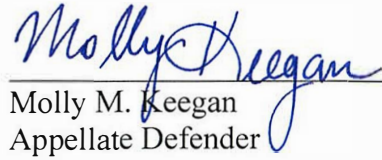
During the direct examination of the state’s CI, Moody, that state inquired why Moody would sometimes deal with appellant’s brother, Matthew McCoy, rather than appellant. Tr. I, p. 441, ll. 18-19. In response, Moody stated that, “Whenever I dealt with him is *because D.J. was in lockup* or --” Tr. I, p. 441, ll. 20-21 (emphasis added). However, the trial court expressly ruled during pretrial motions that mention of prison would be prohibited due to the substantial danger of unfair prejudice. Tr. I, p. 198, ll. 18-23. Thus, the testimony elicited from Moody concerning appellant’s whereabouts and status in “lockup,” was in direct contravention of the trial court’s ruling to exclude mention of prison. Moreover, the trial court’s reasoning that the testimony did not specifically reference “prison,” is inapposite as the term “lockup,” made clear to the jury that appellant was detained. Tr. I, p. 449, ll. 17-18; *See Lockup*, Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/lockup> (last visited July 15, 2026) (defining “lockup,” as jail, “*especially*; a local jail where persons are detained prior to court hearing.”). In addition, despite the fact that defense counsel requested a curative instruction, for purposes of preservation on appeal, and the trial court denied giving a curative instruction in an effort not to emphasis the improper testimony, the prejudicial effect of the testimony nonetheless remained. Tr. I, p. 451, ll. 20-24; p. 452, ll. 5-6; p. 455, ll. 10-16; *Wilson*, 389 S.C. at 584, 698

S.E.2d at 865; *Ferguson*, 376 S.C. at 619, 658 S.E.2d at 103. The result is that the prejudicial effect of the improper testimony could be removed by no other way. *Dial*, 405 S.C. at 257, 746 S.E.2d at 500.

Further, although Moody's testimony that appellant had been in "lockup," was relatively limited, it cannot be considered brief and isolated where several jurors witnessed appellant wearing prison attire and being escorted into the courtroom surrounded by highly armed law enforcement officers. *But see United States v. Vogt*, 910 F.2d 1184, 1192-1993 (4th Cir. 1990) (explaining that testimony elicited from the prosecution that a defense witness met Vogt when he was in jail was not prejudicial where the matter came up only incidentally, there was not a repeated reference by the prosecution or the witness, and the court carefully instructed as to its permissible use). Considering the entire record and specific facts of appellant's case, the trial court abused its discretion by refusing to grant a mistrial given that Moody's testimony that appellant was in "lockup," made it clear to the entire jury, and confirmed to the several jurors who witnessed appellant in prison attire, of appellant's detained status. *See Wilson*, 389 S.C. at 585-86, 698 S.E.2d at 865.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and sentence and remand this case for a new trial.


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Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of July, 2026.