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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2012-209166

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SC Court of Appeals

THE STATE,

RESPONDENT,

v.

RICHEY LAMONT BOYD,

APPELLANT

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred in refusing to grant appellant's motion for a mistrial where the Clerk of Court improperly informed the jury panel that co-defendant Williams was charged with intimidation of a witness, where appellant had already moved for a severance on the basis that his guilt would be inferred on all the same charges from the facts that he was on trial with Williams, where overwhelming evidence showed Williams was the shooter, since the jury would assume appellant was also involved in the witness intimidation which polluted the jury panel?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Richey Lamont Boyd, was indicted by the January 10, 2012 term of the Court of General Sessions for Greenville County for burglary in the first degree (2011-GS-23-6383), murder and possession of a weapon during the commission of a violent crime (2011-GS-23-6301), attempted armed robbery (2011-GS-23-6384), kidnapping (2011-GS-23-6382), and conspiracy (2011-GS-23-6385). ROA 526 -535. The Appellant was represented by Everett P. "Bill" Godfrey, Jr. of the Greenville County Bar. The Appellant's co-defendant, Lamar Williams, was represented by Larry H. Cooke of the Greenville County Bar.

On February 13, 2012, the cases were called to trial before the Honorable Carmen T. Mullen, Circuit Court Judge. The prosecution was handled by W. Jeffrey Weston of the Thirteenth Circuit Solicitor's Office. On February 16, 2013, the jury found Williams and Boyd guilty of all charges. ROA p. 518, l. 1 - p. 519, l. 16.

Judge Mullen sentenced Boyd to thirty (30) years imprisonment for murder (6382), thirty (30) years for burglary in the first degree (6383), twenty (20) years for attempted armed robbery (6384), five (50 years for conspiracy (6385) and five (5) years for possession of a weapon during the commission of a violent crime (6381). ROA 525, ll. 5-23. (Sentencing Sheets).

Judge Mullen sentenced the co-defendant Williams to life without parole for murder, life without parole for burglary in the first degree, five (5) years for possession of a weapon during the commission of a violent crime, twenty (20) years for attempted armed robbery, thirty (30) years for kidnapping, and five (5) years for conspiracy. ROA p. 523, l. 18 - p. 524, l. 13.

The Appellant filed and served a notice of appeal on February 25, 2012. This appeal follows.

RESPONDENT'S STATEMENT OF THE FACTS

This case involves the October 18, 2010 death of Wallace Cruell, Jr. The state's theory was that five men; Lamar Williams, Richey Boyd, Jeff Dornberg, Willie Taylor and Scottie Butler, combined to burglarize the victim's home because of a belief that there were a large quantity of drugs and money present.

Shirlene D. Cruell, the mother of the victim, Wallace Cruell, Jr., known as Jay testified as the initial state witness. ROA 28-44. She stated that her son lived near her home. ROA 30. In October 2010, Jay was living with his girlfriend and his 2 sons. ROA 34. She stated that her son's girlfriend would leave around 6:00 a.m. for work. ROA 35. On mornings when her son's girlfriend had to be at work early, Jay would take the kids to school. He would leave around 7:10 or 7:15 a.m. ROA 36.

She was home on the morning of October 18, 2010 with her husband. Her husband decided to go hunting for a little while that morning before he went to work. He walked through the woods area near their home. ROA 36.

Shirlene testified that Jay pulled into his driveway at 7:25 a.m. ROA 36. At 7:25, she was about to go for a walk when she saw her brother-in-law, Noah Cruell, coming around the front of her house. He didn't have shoes or many clothes on. He had a drop cord around his wrist. All Noah could say was "Jay shot." ROA 37-38. She stated that she ran down the path and went to her son's back door, which had been torn off the hinges and tilted sideways. ROA 39. When she entered the home, Jay was on the kitchen floor. She went over to him and shook him. Jay wouldn't answer. She looked for the phone and dialed 911. ROA 38-39. Nobody else was in the home. ROA 39. Shirlene testified that she didn't see anyone around the house that morning except for Jay pulling in and her

husband leaving to go hunting. ROA 39. She didn't hear gunshots. ROA 40. She testified that Noah Cruell has some communication deficiencies and is considered "slow." ROA 40. At that time, Noah was living with Jay. ROA 40.

Noah Cruell testified that he was living with Jay in October of 2010. ROA 47. He recalled that on October 18, he woke up to the dogs barking and heard something bust through the door. He then saw two people came in and tied him up. ROA 47-48. He saw three (3) people. He believes these people had guns. They asked him where the money was. ROA 48-49. He was on the floor of the living room when they came in. after they tied him up, they moved him into a back bedroom. ROA 49. He was unable to see them searching the house. ROA 49. He stated that while this was happening, Jay was taking his kids to school. ROA 49-50. He recalled one person stayed in the bedroom with him. ROA 50. He said he was still in the bedroom when Jay returned home. ROA 50. Noah stated that he didn't want to stay in the bedroom, but they wouldn't let him leave. ROA 50.

Noah testified that when Jay came home, he heard some scuffling and a gun go off. He heard one gunshot. ROA 50-51. After the gun went off, the person who was in the room with Noah left. ROA 51. After they left, Noah said he got up and took the drop cord off and went to Shirlene's house. He then told her what happened. ROA 51-52. He still had the drop cord hanging off his arm when he went to Shirlene's house. ROA 52.

Noah testified that when he came out of the bedroom, Jay was laying on the floor. ROA 52. Noah stated he spoke with the police when they arrived.[1] They asked him if Jay was involved with

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[1] Noah Cruell gave him an oral statement to the police. Noah said he was in the house at the time and that three (3) black males came into the house, tied him up, and took him to the back room. One of the men put a gun to the back of Noah's head and asked about the money. One of the men stayed in the back room with Noah while the other two went into another room. Jay came home and Noah

drugs. He showed the police areas where Jay kept the drugs in the backyard ROA 52-53. Noah stated that he didn't know the men who came into the house. They were wearing masks and gloves. ROA 53. He said that the men did not beat him up. Noah stated he didn't recognize anyone's voice and could not describe them. ROA 54-56.

When the police arrived, they located the body of the victim lying face down on the floor. ROA 62, 134. The house was messy and appeared to have been ransacked. ROA 64.

The pathologist testified that the victim died of a single gunshot wound. He opined that it entered his right upper back, passed from his back to his front and from his right to his left, and exited the left anterior chest just below the level of the clavicle. This path included ribs on the back right, right upper lobe lung, the aorta, and out the anterior chest at the level of the second rib. He stated that no bullet was recovered. ROA 107. There was also a laceration on the upper forehead caused by a blunt object. ROA 109. There was no evidence of gunshot residue on the clothes suggesting that the shooter was at least two to three feet away. ROA 114, 116. It was described as a distant range wound. ROA 116.

Crime scene investigators for forensics did not indicate finding any blood in the home except for where the victim was found. ROA 146. No footprints or fingerprints were found in the blood. ROA 146. The blood had not been disturbed. ROA 146. In addition, they did not find shell casings. ROA 146. While he was still on scene, Investigator Hammett received a call from the coroner about the condition of the body. The wound in the chest area that they thought was an entrance wound was actually an exit wound. In addition, there was another wound found in the right shoulder area of the

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heard one gunshot. Then, the three men left. Noah untied himself and went to Jay's parents' house to get help. ROA 66 - 67.

victim's back. ROA 146-147. The coroner didn't indicate they had found a projectile. ROA 148. Investigator Hammett testified that there were some marijuana roaches in an ashtray in the master bedroom. He stated it didn't appear to be part of the struggle between the victim and the suspects. ROA 151-152.

Investigator Hammett testified that Noah about possible drug use or sale at the house. Noah said narcotics were being sold at the house. They weren't kept inside the house. Noah took them to three different locations in the woods. There was nothing found. Noah told him that Wallace Cruell, Jr. was selling drugs. Noah then led them to an area behind the residence, adjacent to a dog pen in the backyard. In a tree stump, they found a large clear plastic bag with a compressed white substance in it and a significant amount of cash. The white substance was a kilo of cocaine. The money was packaged in small plastic bags rolled into tight bundles ($14, 000). ROA 152-160.

Investigator Hammett testified that on October 21, 2010, he received a message from someone named Scott. As a result of his conversation with Scott, he developed the names of three suspects, Jeff/Jeffrey Dornberg, Scottie Butler, and a man with the nickname Face. Butler and Dornberg were white males. Face was a black male. There were two (2) other unknown black males according to the information. ROA 168-170.

The investigation led to Scottie Butler, who was located at a motel in Laurens. He gave a statement to police. Next, they issued a warrant for Charles Jeffrey Dornberg. ROA 179. Dornberg was then arrested at a Wal-Mart in Simpsonville when he turned himself in. ROA 179-180. After meeting with Butler, he developed nicknames for other suspects: Esco and Solo. ROA 181. Solo was in Greenwood County and is Richey Boyd. ROA 181-182. Esco was in Greenville County and is Willie Taylor. ROA 182.

Wendy Bridges testified that she had known Lamar Williams for two years. In October 2010, she had known him about 6 months and suggested that they had been romantically involved. ROA 224-225. On October 23, 2010, Williams asked her to pick him up from Cadillac Apartments in Laurens and she took him back to her house. ROA 226. She stated that she also knew Jeff Dornberg and Scottie Butler. She stated that they had come to the house before with Lamar and that Lamar knew them in October 2010. She confirmed that they ran together.

She recalled a conversation she had with Lamar Williams on October 23 about Butler and Dornberg. ROA 227-227A. She stated that he told her that they had been locked up for murder and that he was real upset. ROA 227A, ll. 1-6. She testified that on October 23 while at her house, Williams received a telephone call from Dornberg's sister. ROA 227A-228. After the call the Williams asked her to take him by a house and then they went by Wal-Mart. Rather than being dropped off at the front, Williams asked her to let him out on a side road at the top of the parking lot. At that time, he asked her to take his gun to Laurens, because he could not take it into the Wal-Mart. ROA 228, ll. 23-24. He put it into a McDonald's bag. She took the gun back to his apartment in Laurens and to see a man there named Glenn. ROA 229-230. She said the gun looked like a revolver. ROA 230, ll. 3-4.

She stated that later that night, Williams called and asked her to take him to his mother in Lexington. ROA 230-31. She said he had a suitcase with him. When asked why he told her he was moving to Lexington, he told her with Jeff and Scottie being his friends, he told her that everybody would think he had something to do with it and Bridges thought he was just scared. ROA 231, ll. 4-7.

She stated that Williams asked her to take him by a house in Greenwood. ROA 235. She

testified that during the drive to Lexington, Williams asked her if someone was after her, where she would go to hide out. She recalled that Williams told her he might go to Charleston or San Antonio to hide out if someone was after him. ROA 236.

Accomplice Willie Taylor testified. He stated that hee was arrested in November of 2010 as a result of the incident that took place in Travelers Rest involving the death of Wallace Cruell, Jr. ROA 242. He stated that he had entered a guilty plea to voluntary manslaughter as a part of a plea agreement. He said the other charges against him were dismissed. ROA 242-243. He has not been sentenced yet. His sentencing is deferred until after this trial. ROA 243-44. In exchange for his plea agreement, he must give his statement. ROA 244.

Taylor stated he knows Williams through a mutual friend. He knew Williams in October of 2010 for about a month and a half. ROA 244-45. He also knows Boyd through a mutual friend. He knew him in October of 2010 for about a year. He had never been to Boyd's home ROA 245-46. He stated that Boyd's nickname was Solo. ROA 246. Taylor declared his nickname was Esco. ROA 246.

Taylor stated that he was present on the morning of October 18, 2010 when Wallace Cruell, Jr. was killed. He stated he was in the kitchen at the back door when Cruell was killed ROA 247. Taylor said he was with Face, Solo, J.D., and Scott when they went to Cruell's house that morning. He stated that "Face" is Lamar Williams. ROA 246-247. He stated that it was not the first time they had been to Cruell's house. He had been to Cruell's house with Face and Solo a week before he was killed. Taylor stated that he, Face, Solo, Guatto, and Scott went to the house to check it out in the late afternoon and evening /early evening. They sat and looked at the house. Scott drove the car. J.D. wasn't with them the first time . ROA 248-49. Guatto wasn't with them the second time they went

to the house when Cruell was killed. ROA 249.

Taylor testified that Williams called him the morning Cruell was killed and told him they were on their way so they could go to Cruell's house and rob him. ROA 250. He stated that they had talked about robbing Cruell the first time they went to the house because they thought he had money. ROA 250-51. He stated that Face (Williams) called him between 11:00 p.m. and 2:00 a.m. and told him that they were on the way to get him. ROA 251. Taylor stated that Scott was driving and Solo, Face, and J.D. were with him. Taylor stated that he was the last one to be picked up. ROA 251-52.

Taylor stated that while en route, they stopped at a Spinx convenience store in Greenville and then drove to Cruell's house. ROA 252. Taylor said four people got out of the car, while Scott stayed in the car. ROA 253. He stated that the plan was that they were going to wait until Cruell left and then go in the house. ROA 254. Taylor confirmed that he, Face, and Solo had guns, but J.D. did not. ROA 254. He said that Face and Solo were wearing gloves and everyone had their face covered. ROA 254-255. He opined that nobody was really in charge of leading them. ROA 255. They waited in the woods. ROA 255.

Taylor stated that the sun had come up by the time Cruell left. ROA 256. When he left, everyone went to the back of the house and kicked the door in. Taylor said everybody was in the house by the time he got to the back. When Taylor got there, the door was open. ROA 256.

When Taylor got inside, he saw an old man already tied up on the couch. He said that Face was standing in the living room. Solo was in the bedroom searching through things. They took the old man who was tied up into the bedroom. Face told Taylor to help pick the man up. When he picked him up, J.D. grabbed the man and put him in the bedroom. J.D. stayed in the bedroom with the old man. ROA 256-257. After they put the old man in the bedroom, Taylor said he went he went

back in the room. He found Solo was still searching the house. Face was just watching. ROA 257-258.

At that point, they heard a car pull up and saw Cruell was in the car. When Taylor heard Cruell getting out of the car, he went back out towards the back door. ROA 258. When Cruell was coming in the house, Taylor was going out the back door. Taylor stated that he next heard a a commotion. Taylor said he heard Face say get on the ground. Taylor came back inside. He stated that he saw Williams and Boyd put Cruell on the ground. He said that they were trying to tie Cruell up, but they couldn't. They asked J.D. for help, but J.D. just froze. Cruell tried to get off the ground. Taylor stated that was when he was shot, although he was in the back. ROA 258-259, 273.

Taylor said, at that point, they ran out the back door and called Scott. Scott picked them up on the gravel driveway. ROA 260. When they got to the car, Williams stated that he had shot him because he was trying to get up. ROA 260.

Taylor stated that they dropped him off first. ROA 261. He had a revolver. He thinks Williams and Boyd had the same type of gun. ROA 261. Taylor said that he had never seen J.D. before and has not seen him since. ROA 261. He stated that he didn't know Scott and had not seen Scott since. ROA 262. Taylor stated that when he got home, he put the gun in the attic. ROA 263. The gun was found when he was arrested. It was the gun he had the day they went to Cruell's house. Taylor stated that he didn't fire his gun. ROA 263. Taylor stated that Williams was the only one to fire a gun. ROA 264.

Scottie Butler testified similarly. He admitted his involvement in the incident as the driver and was arrested four days after it. ROA 284. He stated that the other people involved were: Lamar Williams, a.k.a. Scar Face; Richey Boyd, a.k.a Solo; Willie Taylor, a.k.a. Esco; and Jeff Dornberg

known as J.D. ROA 287. He said that Dornberg is his fiancée's brother. He had known Williams for about a year, but he did not know Boyd beforehand. ROA 287-88. He had seen Boyd twice before the morning of October 18th. He saw Boyd the other times they went to Cruell's house before October 18th. He said that they went to look at the house so that they could rob it. ROA 288. Butler stated that he didn't know Taylor before the incident. He had seen him twice before October 18th for the same reasons he saw Boyd. ROA 289.

Butler testified that he has seen Taylor in jail, but he has not had any conversations with him. He said did not speak to Taylor in between the time of the incident and giving his statement ROA 289-290.

Butler stated that Williams asked him to drive them to Cruell's house the first time. ROA 291. He said that the first time they went to the house, Butler, Williams, Boyd, Taylor, and Guatto went. Butler said he hasn't seen Guatto since then. ROA 292. They went to the house for the first time on October 15th in the morning. He pulled over on the side of the road and acted as if the car was messed up. They got out of the car and went into the woods to look at the house. They did that for about 1.5 hours. ROA 293. Butler said he was driving a blue Toyota Camry which was Dornberg's car. ROA 293.

He got a call from Williams, who asked him if he was ready to go back up to the house on October 17th about 6 or 6:30 p.m. He was at the America's Best Hotel when he got the call. Butler stated that he agreed to go back. ROA 294. The plan was that the next morning, they were going to go to the house, no one was supposed to be home and there was supposed to be money there. He stated that they were going to go in and get the money and drugs. ROA 294. Butler stated he left America's Best Hotel by himself. First, he went to Cadillac Apartments in Laurens to pick up

Williams and Dornberg. He let Williams drive. They went to Greenwood to pick up Boyd and then went to Greenville to pick up Taylor. Williams gave him directions. ROA 295-296. Butler stated that he wasn't armed on the 18th, although Williams, Boyd, and Taylor had revolvers. ROA 297.

The next time, Butler stated he drove his fiancée's 1999 Dodge Intrepid, maroon. ROA 298. He stated that when they got to the house, it was daylight. ROA 298. He said when they arrived, Taylor, Williams, Boyd, and Dornberg went into the woods and waited. Butler said nothing happened because people were in the home. They came back to the car because nobody left. Then, he took everyone home. This was before the 18th. ROA 299.

On the 18th, Butler said he picked up Williams and Dornberg, then Boyd, and, finally, Taylor. It was still dark when he picked them up. He picked up Williams and Dornberg on October 17th around 6 or 6:30 p.m. he picked up Boyd and Taylor around 10:30 or 11 p.m. ROA 300-301. After picking everyone up, Butler said they went to a Spinx in between Greenville and Travelers Rest. He thought that they were there for about 10 minutes. ROA 301. Afterwards, they went to Valley Road. ROA 301. Williams, Boyd, Taylor, and Dornberg went into the woods and then went to the trailer. ROA 301. They took their guns with them. ROA 302. Since about 2:30 or 3, they were in the woods. Butler stated that Williams called him on the walkie-talkie and told him they were cold. They came back to the car. ROA 303. He said they sat in the car for about 30 minutes, then they left again. ROA 304. Butler got nervous about people seeing him on the road, so he left and went to a church. He was there for about 20 minutes. Then, he went to an Ingles parking lot where he stayed until 7 or 7:30 am. ROA 304.

Butler stated that he left the Ingles parking lot because there was no signal on the walkie-talkies. He drove up and down the road a couple of times and didn't hear anything. He went

back to the church. After 5 minutes, Williams called him over the walkie-talkie and told him to hurry up and come get them. ROA 304.

When Williams got in the car, he told Butler that he had shot and killed a man. ROA ROA 305. Williams got in the car first, then Dornberg, Taylor and Boyd got in. ROA 305. Butler took everybody home. He said he took Taylor home first. He dropped Taylor off a couple of house down from his house. Then, he dropped Boyd off on Blake Road.

Then he took Williams to his fiancée's house. When they were about 5 miles away, Butler stated that Williams rolled down the window and threw the bullets out one by one. He dropped Williams off around 9:30 or 10:00 a.m. Then, he took Dornberg back to Cadillac Apartments. He went back to America's Best Inn. ROA 305-306. Williams called him at 6:30 p.m. that same day. He wanted to meet up and talk about what happened. Dornberg was there too when they met up at America's Best Motel.

Butler stated that they discussed the bullet. He said the bullet went straight through the victim and ended up in Boyd's boots. ROA 308-309. Butler recalled that Williams, Boyd, and Taylor were wearing gloves when they got out of the car. ROA 309.

He stated that Williams wore a "scream" mask, Boyd wore a beanie, and Taylor had a shirt over his face. ROA 308. He described Boyd has a gold tooth on the top row of his teeth ROA 309. Butler stated that he had not talked to Dornberg since that evening. ROA 309. He admitted that he was not able to pick Boyd out of a photo lineup. ROA 310.[2]

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[2] Butler confirmed on cross-examination that on December 1, 2010, he signed a statement saying that Williams didn't have anything to do with this incident. ROA 323-324. However, on re-direct Butler stated that he did not actually write that statement, but that Williams did. Butler stated that he was in rec court at the Greenville County Detention Center when the statement was written. When he

Charles Jeffrey Dornberg testified about his involvement in the incident. ROA 328-364. He said he pled guilty to voluntary manslaughter arising from the incident with sentencing deferred until after this trial. ROA 330. He stated he was in the home when Wallace Cruell was shot. ROA 332. He said he was with Butler, Williams, Taylor, and Boyd. ROA 332. He stated that he has known Butler for about 6 or 7 years and has four children with Butler's sister. He said he met Williams through a friend and had known him for about a year and a half. He hung out with Williams from time to time. He stated he did not know Taylor or Boyd before the incident. ROA 333. He said that Williams introduced him to Taylor and Boyd. ROA 334. The 18th was the first time he had been to the victim's house. Dornberg stated that he knew the others had been there before. ROA 334.

Dornberg stated he first found out about this when he was driving with Williams. Williams told him about a "lick," robbery. Williams told him there was a lot of drugs and money. Dornberg stated that he agreed to participate in it. ROA 334. He stated he first got involved on October 17th. ROA 335. He recalled that Butler picked him and Williams up at Cadillac Apartments in Laurens. ROA 335. Butler was driving Dornberg's sister's car, a Dodge Intrepid. ROA 335. After they got picked up, they went to Greenwood to pick up Boyd a.k.a. Solo. Williams told Butler how to get there. ROA 335-336. Then, they went to Greenville to pick up Taylor a.k.a. Esco. ROA 336. Before they got to Travelers Rest, they stopped at a Spinx. ROA 337. Butler let them out on a bridge. Butler didn't get out of the car. ROA 337.

Dornberg stated it was still dark outside when they got there. It was between midnight and 2 a.m. ROA 338. He said that when they got out of the car, they went into the woods to see what was

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signed, Williams was in rec court with him. Williams gave him the statement. In exchange for Butler giving his statement, Williams was going to sign a statement saying Butler had nothing to do with the incident. Williams said he had already given his lawyer that statement. ROA 325-26.

going on at the house. They were waiting for the people in the house to leave. He didn't know any of the details regarding the house or the people in the house. ROA 338. He said that they stayed in the woods for about 3 hours. ROA 338. At one point, they went back to Butler because it was cold. He said they rode around for about 20 minutes and then went back into the woods. Dornberg said he left the car with Williams, Taylor, and Boyd. ROA 339.

Dornberg stated that Williams, Boyd, and Taylor had revolvers, but he didn't have a gun ROA 339. He understood that he was supposed to help with anything. ROA 339.

He said it was daylight before anything happened. He heard a truck leaving. Then, they went up to the house. ROA 340. He stated that Williams and Boyd wore gloves and all of them had masks on. ROA 340. He stated that Williams popped the back door open; but that he didn't kick it open. ROA 340. He recalled that Williams went in first, then Boyd, then Dornberg, and Taylor was last. Williams held his gun at the uncle, tied him up, and put him on the couch. Williams had Taylor help the uncle off the couch. Williams gave the uncle to Dornberg, and he carried him to the kids' bedroom. ROA 341. Dornberg stated that he stayed in the doorway of the bedroom. ROA 341. He stated that Taylor and Boyd were in the master bedroom. Boyd was going through things. ROA 341.

Shortly, they heard the truck pull up. Dornberg stated that Williams stood slightly in front of him. He stated that when the man came in, he saw that Williams tried to wrestle him to the ground. He said Williams was trying to time him up, but the man was resisting. When the man got up, he looked like he was trying to run. At that point, Williams shot him in the back once. Cruell fell. Then, everybody ran out of the house and got in the car. ROA 341-343.

The car was waiting because Williams had called Butler to get them. ROA 343. When they got in the car, Williams said he had to kill Cruell because he was resisting. ROA 343.

They went to the neighborhood where they picked up Taylor and dropped him off. Then, they went to Greenwood to drop off Boyd. They then went to Waterloo where Williams' girlfriend lives. Butler dropped him off last at Cadillac Apartments. ROA 344.

Subsequently, Williams and Butler called him and picked him up in Williams' girlfriend's car. They rode around town and discussed how the police had no leads. Williams said the bullet projectile ended up in Boyd's shoe. ROA 344-345.

Dornberg stated that he had never met Taylor before the incident. ROA 345.

Neil Haltiwanger testified that he knew Williams from when he dated Williams mother. ROA 366-367. He said Williams came to his home and was looking for information on a computer about a crime that had happened. ROA 369-370. Williams said he knew the two guys. Williams did not show him any reports of the crime, but he saw that Williams was looking at the crime scene and family. ROA 369.

On the morning of October 24th, Haltiwanger stated that he had a conversation with Williams in Haltiwanger's bedroom. Williams asked about how much time he could get for doing something. Williams told him that he had gone into the house for the money, around $10,000. He said that the owner of the house had five guys with him and they all had hoods on and started shooting after he went in with his buddies. ROA 370-371.

He said that Williams left and came back into his bedroom about 10 minutes later. ROA 371. This time Williams told him he shot the guy. He said the bullet casing went in his shoe. ROA 371. He said he told Williams to turn himself in. Williams said he didn't want to because he wouldn't get a fair trial and he didn't trust the Greenville police. ROA 371-372.

Williams didn't ask for his help in eluding the police. Williams asked for help getting money.

He asked Haltiwanger to collect some money from a friend of Williams'. Haltiwanger told him no and told Williams to turn himself in. Williams said the police would have to catch him. Williams talked to him about going to Arizona or Virginia. ROA 372. Haltiwanger stated that he heard Williams on the phone that same morning. He heard him state "We need to get rid of her because of talking." ROA 373.

Haltiwanger stated that Williams told him he gave the gun to a friend so that he could melt it. He said that he also gave his clothes to his friend so that he could burn them. ROA 373.

The defense for Lamar Williams called Michael A. Williams as their initial witness. He met Mr. Cooke about 2 weeks ago. His lawyer was present during the meeting. They met at the law enforcement center. He spoke with Mr. Cooke about this case with his lawyer's permission. ROA 393-394. He told Mr. Cooke that he knew Lamar Williams. He is not related to Lamar Williams. He was on the same hall as Lamar Williams. ROA 394. He stated that he knows Dornberg from jail. They were in the same dorm. He socialized with Dornberg a little bit. ROA 396. The witness stated that about two or three months ago, he had a conversation with Dornberg about the murder of Cruell. He stated that Dornberg told him that he shot somebody, but everyone was saying Face did it. He stated that Dornberg said he was going to let Face get blamed for it, when Face wasn't even there. Dornberg told him what kind of weapon he used and that the bullet fell in his friend's shoe. ROA 396. He stated that he doesn't know Butler or Taylor. ROA 397. He claimed that Lamar Williams didn't put him up to this. ROA 397. He asserted that Dornberg sounded confident. ROA 397.

Jennifer Burnette testified that she had known Dornberg since she was 12 or 13. ROA 402. She stated that in the Fall of 2010, Dornberg went to her grandmother's house. She wasn't there when he got there. He was waiting in the car for her when she got back. ROA 403-404. She stated that

Dornberg told her that he was the one that shot "the guy." ROA 404. When Dornberg left, he told her not to say anything. ROA 404. She talked to Dornberg the next day. He wanted to talk to her. She asked him if he remembered what he told her the night before. He said he was "BS'ing." ROA 405. She stated that she told the police. ROA 405.

Kristine Sterling testified that she knows Williams since they met at the convenience store she was working at. ROA 409. She stated that she began dating Williams in 2008 and Williams was living with her in 2010 and at his apartment at Cadillac Apartments. Her mother was also living with her. ROA 410. She stated she and Williams broke up on October 11, 2010. She told him he couldn't be at her house when her grandmother was in town. ROA 411. She stated that he would occasionally visit her at work at the Wal-Mart. ROA 412.

She saw Williams on October 17th and that he spent the night with her. She stated that on the 18th, they woke up around 8:30 am or after and left the house around 9:15 or 9:30 a.m. She stopped at an ATM at a Hot Spot in Laurens. She withdrew $20. Then, they went to the bonds office in Laurens and paid $100 on Williams' bond. Then, they went to the social security office. There were there for about 15 or 20 minutes. They left because Williams didn't have his ID. ROA 412-13. Counsel shows her 2 pictures. The picture of her dog and Williams on the couch was taken after the left the social security office. ROA 413. After they left the social security office, they went back to her house. Williams couldn't find his ID. She claimed that they stayed in and watched TV. ROA 413-414. She stated that photos have dates on the back, December 3, 2010 and October 18, 2010. According to her, the photo with Williams and her dog is from October 18, 2010. ROA 414-415. She claimed Williams was with her the entire night and morning on October 17, 2010. ROA 415.

She said that they went to Reliable Bonding on Clinton Highway around 9:30 or 10 a.m. He

saw Iesha there. ROA 416. She claimed that they got a receipt from the bond company that Williams had paid $100 on his bond on October 18, 2010. ROA 425-426.

On cross-examination, it was noted that the pictures don't have times on them. ROA 417.

Iesha Scruggs testified that she works at Reliable Bail Bonding Agency. She has worked there since 2006. ROA 429. She stated that she knows Williams. She stated that she saw Williams on October 18, 2010 and stated that he came in to make a payment. She said that she received the payment and wrote him a receipt. ROA 429. She said that the receipt was written on October 18, 2010 for $100. ROA 430. She stated that no one came inside with him. He came in and paid by himself. ROA 430. She stated that Williams paid between 8:30 and 10:00 a.m. It was the first payment she received that day. She said that they opened at 8:30. ROA 431.

She testified that Williams was in the office alone. She stated that they didn't have anyone come in after 10:00 a.m. that day because they had a training session. ROA 432.

ARGUMENT

I. The trial judge did not abuse her discretion in denying a motion for a mistrial after the Clerk of Court mistakenly added a charge of intimidation of a witness to the list of charges for the trial to co-defendant Williams, not Appellant Boyd. The trial judge immediately advised the jury that the charge was "not a proper charge," to "strike it" and to "disregard it." This immediate action cured any potential for prejudice against the Appellant.

This initial issue arises from an error by the Clerk of Court at the outset of the trial while swearing in the jury when an indicted charge of intimidation or attempted intimidation of a witness or potential witness for co-defendant Lamar Williams was mistakenly included in the list of indictments stated when the jury was being sworn. ROA 7, ll. 22-24. The trial judge immediately corrected the mistake *sua sponte* noting it was "not a proper charge", "not a charge" and "to strike that and disregard it." ROA 8, ll. 9-12. No reference to this charge was made against Appellant Richey Boyd. A motion for a mistrial by Appellant Richey Boyd was properly denied by the trial judge in her discretion. ROA 26, l. 23 - p. 27, l. 5. Under the circumstances, the granting of a mistrial for Boyd was not absolutely necessary. The Appellant's claim must be denied.[3]

HOW THE ISSUE WAS PRESENTED AT TRIAL

After jury selection, Judge Mullen asked the Clerk of Court to give the jury its oath as to the charges it would decide. The following then occurred:

CLERK: The response to the oath is "I will."

You shall well and try case 2011-GS-23-20120, **State v. Lamar Dontray Williams**, indicted for burglary first degree; 2011-GS-

[3] Respondent note that this same issue is being raised as Issue One in co-defendant Lamar Williams' direct appeal. See State of South Carolina v. Lamar Williams, Appellate Case No. 2012-209188, Initial Brief of Appellant, dated March 28, 2013.

23-2011 for murder and possession of a weapon during the commission of a violent crime; 2011-GS-23-2012 for attempted armed robbery; and 2011-GS-23-2013 for kidnapping; 2011-GS-23-2014 for conspiracy; and **2011-GS-23-2035 for intimidation or attempted intimidation of a witness or potential witness, and a true verdict render**, according to the law and the evidence, so help you God.

(WHEREUPON, all jurors said "I will.")

CLERK: Additionally - -

COURT: Hold on just a minute.

MR. COOKE: I think you know what I was going to say.

COURT: Yes, absolutely.

Ladies and gentlemen, just - - you can put your hands down. You are absolutely fine.

There was one charge that was read in there that is not a proper charge, and was not a charge. It was the intimidation of a witness. So you are to strike that and disregard it, ladies and gentlemen. That is not a charge.

CLERK: I'm sorry.

COURT: That's all right.

And we'll go ahead. And you can go ahead and do it as to Mr. Boyd.

CLERK: Okay.

ROA p. 7, l. 16 - p. 8, l. 17 (emphasis added). At that point, the Clerk went through the charges with respect to Richey Boyd. ROA 8-9. No mention of the intimidation charge was made in reference to Boyd at any time.

Judge Mullen next gave a general instruction on the law. ROA 9- xx, Tr. 65-72. The parties

then made their opening statements. ROA 10-22 . The jury was then excused.

Boyd's Motion for Mistrial

Judge Mullen next recognized co-defendant's Boyd's counsel, Bill Godfrey, noting that he had previously made a motion at the bench conference and needed to renew it for the court reporter. ROA 23, ll. 6-8.

Counsel Godfrey for Boyd moved for a mistrial. Boyd's counsel stated that the Clerk of Court told the jury that there was an intimidation of a witness charge which they were not going forward on. ROA 23, ll. 9-17. The trial court noted that this was against Williams only, not Boyd. ROA 23, l. 13. Counsel Godfrey stated that the prosecutor's subsequent opening statement claimed that the case came down to three people. ROA 23, ll. 19-22. See ROA 10, ll. 7-15, p. 14, ll. 5-9, p. 15, ll. 1-12. Counsel Godfrey asserted that he had begun the day with a severance motion that was denied.[4] He claimed that it was sought because he was being tried with Williams and claimed now

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[4] Counsel Godfrey for Boyd had moved for a severance from a joint trial ROA 2-6, Tr. 15-19. Godfrey stated that Williams had given a statement indicating that Williams himself was the shooter. ROA 2, ll. 17-21. Godfrey stated that Boyd had not made any statement. He claimed it would be highly prejudicial to go to trial with the alleged shooter Williams and subject Boyd to improper inferences. ROA 2-3. The prosecution stated in opposition that Williams gave a confession, but never mentioned Richey Boyd in the statement. Solicitor Weston noted that there were no Bruton issues. ROA 4-5. The court denied the motion. ROA 5-6.

The Appellant does not challenge the denial of the motion to sever in the appeal. "A motion for severance is addressed to the sound discretion of the trial court." State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct.App.2002). "The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion." State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 394 (Ct.App.2006). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id. at 613, 629 S.E.2d at 395.

"Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." Simmons, 352 S.C. at 350, 573 S.E.2d at 860. "Offenses are considered to be of the same general nature where they are interconnected." State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct.App.1996). "Conversely, offenses which are of the same

with the intimidation of a state witness comment, the bell could not be unrung. ROA 23, l. 25 - p. 24, l. 19. Boyd's counsel asserted that the curative instruction cannot stop it. ROA 24, ll. 19-22.

Williams's Motion for Mistrial

Counsel Cooke for Williams asserted that he caught the trial judge's eye as soon as it was said. ROA 24, ll. 22-25. Judge Mullen declared: "I immediately cured it ..." ROA 25, l. 1. Counsel for Williams asserted that he adopted Boyd's argument. Counsel Cooke stated the State is relying upon the co-defendants testimony [Not Williams or Boyd] and that there is no other physical evidence, suggesting the intimidation of a witness comment would be in the jury's minds and Williams would be prejudiced. ROA 25, ll. 3-19.

The State's Response

Assistant Solicitor Weston noted that a mistrial should only be declared as a last resort. He noted the inadvertent reference was made and cured immediately, and was not even related to Boyd.

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nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together." Id.

"A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.App.2005) (emphasis added). An example of a specific trial right that may be prejudiced from a joint trial is the constitutional right to cross-examination when one codefendant's confession expressly implicates another codefendant but the confessor does not take the witness stand. Bruton v. United States, 391 U.S. 123, 135–37, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

"A defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction." State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct.App.2009). "The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime." Id. "A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." State v. Stuckey, 347 S.C. 484, 497, 556 S.E.2d 403, 409 (Ct.App.2001) (citations and quotation marks omitted).

Here, there was no basis for a severance. Although Williams made a statement, it did not name Boyd as one of the perpetrators.

ROA 25, l. 25 - p. 26, l. 2. Weston stated that the defense was misconstruing the breadth of the State's case. He confirmed that although he told the jury the case would hinge on the three co-defendants' testimony, other physical evidence would be placed into evidence against the defendants. ROA 26, ll. 2-9. Weston claimed he did not object to the misconceptions in counsels' opening statements and could have asked for a mistrial, but did not. ROA 26, ll. 10-15.

Assistant Solicitor Weston stated that the Clerk's inadvertent remark was a minor thing and was cured immediately by the trial court. ROA 26, ll. 14-22. He opined that it would not impede the jury's ability to give their clients a fair trial. Id.

Judge Mullen's Denial of the Motion.

Judge Mullen declared that she heard the comment and then cured it immediately. ROA 26, ll. 23-25. She stated to the jury that it was not a proper charge going forward and is not a charge at any time. She stated that she cured it immediately and could give an additional curative instruction during her jury charge as well. ROA 26-27. She denied the requests by Boyd and Williams for a mistrial. ROA 27, ll. 4-5.[5]

There was no further reference to this issue during the remainder of the trial. A review of the record reveals that the particular motion for mistrial was not re-asserted at the close of the State's case (ROA 381, l. 22 - p. 383, l. 5) or at the close of the defense case prior to charging the jury. ROA 434 - 436.

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[5] The record does not show any requests for additional curative instructions. During the final charge to the jury the trial judge read each of the proper indicted charges to the jury. ROA 493-494. Judge Mullen then declared: "I remind you that the fact that a defendant is arrested, charged, and indicted in a case is not evidence in the case, nor does it create any presumption of guilt ..." ROA 494, ll. 1-7. No exceptions or objections to the charges were made. ROA 517, ll. 5-13.

Post-verdict Motions

After the verdict, counsel Godfrey for Boyd made a general motion for a new trial and motion to set aside the verdict. He stated: "[T]his motion is based on previous motions and objections in the trial so far, and the fact that the evidence does not support the verdicts." ROA 521, ll 16-20.

Counsel Cooke, on behalf of Williams, made "the same motion." ROA 521, ll. 23-24. He claimed the State had not met their burden of proof and disagreed with the jury's verdict. ROA p. 521, l. 23 - p. 522, l. 2.

Judge Mullen denied the motions. She opined that there was "ample" and "overwhelming" evidence in this case and "I don't think there were any errors of law made." ROA 522, ll. 3-9.

STANDARD OF REVIEW

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." 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.; State v. White, 371 S.C. 439. at 443, 639 S.E.2d 160 at 162 (Ct. App. 2006); State v. Garris, 394 S.C. 336, 345, 714 S.E.2d 888, 893 (Ct. App. 2011). "The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." Id. "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." Id. "The 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." Id. at 495–96, 692 S.E.2d at 563.[6] See State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013) (any alleged error or prejudice arising when victim's mother approached witness stand with urn containing victim's ashes was cured, in prosecution for homicide by child abuse, by curative instruction to jury to base any decision on facts presented at trial, not on emotional response of improper conduct, and, therefore, no mistrial was required; defendant did not establish that any juror saw the item in mother's hands and could not show that the item would have been recognizable as victim's urn if in fact a juror had seen it); State v. Manning, 400 S.C. 257, 270, 734 S.E.2d 314, 320 - 321 (Ct. App. 2012) (a single reference to the schedule three drug charge contained in the indictments read at the beginning of trial, before trial court severed the drug charge from charge of felony driving under the influence (DUI), did not constitute sufficient prejudice to justify a mistrial, where ample evidence in the record supported defendant's conviction for felony DUI and there was no evidence the jury considered the severed drug charge in reaching its verdict).

South Carolina courts favor the trial court's exercise of wide discretion in determining the merits of such a motion in each individual case. Id. at 443–44, 639 S.E.2d at 162. Thus, this court will intervene and grant a new trial only in cases when an abuse of discretion results in prejudice to the defendant. Id. "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); State v. Garris, 394 S.C. 336, 345, 714

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[6] Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review. State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)(finding issue relating to admission of improper testimony was preserved where defendant renewed his request for mistrial following curative instructions).

S.E.2d 888, 893 (S.C.App. 2011).

A curative instruction is generally deemed to have cured any alleged error. State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005); State v. McEachern, 399 S.C. 125, 147, 731 S.E.2d 604, 615 (Ct. App. 2012) (the measure taken by the judge in instructing the jury to strike prosecutor's statement during cross examination of defendant regarding who defendant sold drugs to, was sufficient to cure any prejudicial error that may have resulted from the statement). See State v. Brown, 389 S.C. 84, at 95, 697 S.E.2d 622, at 628 (Ct. App. 2010) (noting a curative instruction is usually deemed to cure an alleged error); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App.1996) (holding a trial court should exhaust other available methods to cure prejudice before aborting a trial, and where the prejudicial effect is minimal, a mistrial need not be granted in every case where incompetent evidence is received and later stricken and a curative instruction is given).

ANALYSIS

In the Brief before this Court, Boyd cited to State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012), Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (S.C. App. 2003), and State v. Barroso, 320 S.C. 1, 462 S.E.2d 862 (Ct. App. 1995, *rev'd on other grounds*, State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997). In each of these cases, the appellate court concluded that a mistrial was not warranted. In Boyd's case, he contends that because a court official had relayed the message to the jury in the official capacity that it carried forward some special force.[7]

In contrast to the Appellant's argument about the comment coming from the Clerk of Court

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[7] Appellant Boyd ignores the fact that the Clerk's reference to the intimidation charge was solely related to Williams, not Boyd. This is a distinction with a difference.

is the special force that arises from the Judge Mullen's repudiation of the comments about the intimidation charge against Williams (not Boyd). Rather than endorsing the charging announcement, Judge Mullen quickly and firmly rejected it declaring:

a) "not a proper charge"
b) "not a charge"
c) "you are to strike that"
d) "disregard that"
e) "that is not a charge."

ROA 8, ll. 9-12. Similarly, rather than bring the "force and veracity of the entire judicial system," as Appellant's co-defendant suggested in his brief, the Clerk of Court apologized to Judge Mullen stating: "I'm sorry." ROA 8, l. 13. Plainly, the actions of immediately addressing the Clerk's mistake with the firm curative instruction remedied any risk of prejudice to the Appellant Boyd *who was never even connected to the Williams intimidation charge.*

The cases addressing mistrials cited by Appellant do not suggest that this denial of the mistrial motion was an abuse of discretion. In State v. Manning, supra, the Court of Appeals found no abuse of discretion in a felony DUI trial when the prospective jurors heard about a pending schedule three drug charge before it was severed from the trial. Similar to this case the jurors had been told that he was being tried on both charges, though, unlike the instant case, the actual indictment was read, not just the charge name. Alternatively addressing the merits, the Court of Appeals found the single reference to the removed drug charge read at the beginning of the trial did not sufficiently prejudice the case. The appellate court opined that there was ample evidence to support the felony DUI conviction and no evidence the jury considered the severed drug charge. In support of its conclusion, the Court of Appeals cited State v. Thompson, 352 S.C. 552, 561 575 S.E.2d 77, 82 (Ct. App. 2003), quoting "a vague reference to a defendant's prior [crimes] is not

sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes." Like Manning, it was a single reference to a pending indictment that was severed. Unlike Manning, Boyd's judge gave a cautionary instruction. Unlike Manning, the intimidation of a witness indictment was not read to the jury. Unlike Manning the intimidation charge was not even against Boyd, but his co-defendant. Like Manning no evidence of the severed charge was presented to the jury. Manning supports the use of discretion by Judge Mullen in denying the mistrial motion, particularly as it relates to Richey Boyd.

Similarly, the reliance on State v. Thompson, supra, by Appellant is misplaced. In Thompson, during trial, a police officer was asked a question about what they were trying to ascertain when they approach Thompson's home. In response, the deputy stated: "We were trying to ascertain if the suspect, the defendant at the time that we knew had warrants, Mr. Thompson, if he was in the home or not." Thompson, 352 S.C. at 560, 575 S.E.2d at 82. In finding no abuse of discretion, the Court found insufficient prejudice where there was no indication the warrants referred to unrelated charges or other bad acts of Thompson. The Court found the jury could have assumed from the evidence that it related to the BOLO concerning this particular attack on the victim. Further, the Court generally concluded that a vague reference to a defendant's prior record is not sufficient to justify a mistrial where there is no attempt to introduce evidence that the accused has been convicted of other crimes. Like Thompson, in the instant case there was no attempt at trial to present evidence of witness intimidation charges in any manner and specifically not against Boyd.

In State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004) a request for a mistrial was similarly denied. In Rogers, it had been brought to the court's attention that there was a newspaper article about the ongoing trial and the judge made inquiry of the jurors concerning their exposure to

the article. Five of the six jurors who had admitted looking at the newspaper that had been brought into the jury room testified it had not caused them to form any opinions. However, the judge excused a juror who recalled reading about details of the crime following a paragraph referencing the defendant's prior record. The Court found no error in the denying the mistrial where the trial court took steps to safeguard the defendant's right to a fair trial. In the instant case, Judge Mullen's quick and responsive action similarly safeguarded Williams right to a fair trial.

In State v. Knighton, 334 S.C. 125, 134, 512 S.E.2d 117, 121-122 (Ct. App. 1999), the Court rejected a mistrial request, which his co-defendant now relies upon. He claimed that Knighton supports his position for a mistrial where in response to evidence presented through Knighton that he asked for videotaping of his DUI arrest in Orangeburg and that Charleston and Greenville law enforcement centers made videotaping tests available. The Solicitor asked Knighton how he knew the tests were available in the other counties. The trial court immediately instructed the witness not to answer. The defendant moved for a mistrial, claiming the question implied to the jury that Knighton had a prior conviction for DUI. The trial court denied the motion, finding the court's interruption precluded the possible answer. In denying relief, the Court found that while there was potential for prejudicial testimony to have been submitted, the trial court's action prevented any prejudice, however, also noting the Appellant by inference had opened the door by his testimony. Nevertheless, the Court found no abuse of discretion in the denial. Like Knighton, the trial court quickly intervened to prevent potential prejudice. Here, the curative instructions remedied the potential problems.

Boyd claims that the intimidation of a witness charge comment was unduly prejudicial because it came from a judicial officer. He argues that an attempt to present such evidence at trial

would be error. He cites State v. Barroso, 320 S.C. 1, 462 S.E.2d 862 (Ct. App. 1995), *rev'd on other grounds*, State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997) to suggest that the admission of such evidence concerning intimidation of a witness without anything to connect it to a particular defendant could be extremely prejudicial. However, in Barroso held that the failure to declare a mistrial based upon the particular evidence was not an abuse of discretion. See also, Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994) (holding evidence of witness tampering or influence without evidence of a connection to the defendant is error); State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985) (same). This is not what occurred in Boyd's case with the brief, but repudiated comment by the Clerk which did not even apply to Richey Boyd.[8]

Respondent respectfully submits that the Appellant has failed to proof an abuse of discretion in denying the mistrial motion and that prejudice was not proven. In citing to Mincey, Appellant Boyd seeks to overstate the issue by claiming "it would be a prostitution of justice to permit evidence that someone attempted to influence a witness by fear or fright without evidence to connect the defendant with the tampering." *Initial Brief of Appellant*, p. 13. The flaw in Boyd's logic is that there

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[8] Respondent would further note that the Appellant's reliance on these cases is not applicable to this case. During the trial, there was evidence presented from witness Scottie Butler who confirmed on cross-examination that on December 1, 2010, he signed a statement saying that Williams didn't have anything to do with this incident. ROA 323-324. However, on re-direct Butler stated that he did not actually write that statement, but that Williams did. Butler stated that he was in rec court at the Greenville County Detention Center when the statement was written. When he signed, Williams was in rec court with him. Williams gave him the statement. In exchange for Butler giving his statement, Williams was going to sign a statement saying Butler had nothing to do with the incident. Similarly, when Neil Haltiwanger testified, he stated that he overheard Williams in conversation with someone on the telephone. He heard him state "We need to get rid of her because of talking." ROA 373. Unlike the suggestions in Barroso, Mincey and Merriman, these comments directly tie to the Williams, not Boyd.

was no evidence presented by the Clerk's repudiated announcement that Boyd ever tried to influence any witness. There was no reference by the Clerk that Boyd ever tried to create fear or fright to any witness. There was no suggestion that Boyd did anything related to a witness. His suggestion that the Clerk's would injure to his prejudice is frivolous.

In telling the jury to disregard, the trial judge dissipated the prejudice by the Clerk's announcement related to co-defendant Williams. See State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct.App. 2006) ("A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.") (citation omitted); see also State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006) ("Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially."); State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (emphasizing that a jury should be specifically instructed to disregard the evidence and not to consider it for any purpose during deliberations and that a mere general remark excluding the evidence does not cure the error).

A mistrial should not be ordered in every case where incompetent evidence is received and later stricken out. State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). "This Court favors the exercise of the wise discretion of the circuit judge in determining the merits of such motion in each individual case." Id., at 268, 227 S.E.2d 306. Among the factors to be considered are the character of the testimony, the circumstances under which it was offered, the nature of the case, the other testimony in the case, and perhaps other matters. Id.

Considering the overwhelming nature of the evidence of Boyd's guilt from the testimony of there accomplices, any possible error connected with this challenged testimony was not so prejudicial so as to have reasonably affected the result of the trial or to deprive Boyd of a fair trial.

Judge Mullen considered the Clerk's comment as immediately cured . ROA 26-27. In considering the other competent evidence besides any comment entered in error, the Court can easily determine that the error had little, if any, likelihood of having changed the result of the trial beyond a reasonable doubt. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993).

For the foregoing reasons, the assertion for a new trial must be denied.

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed and judgment of conviction affirmed.

Respectfully submitted,

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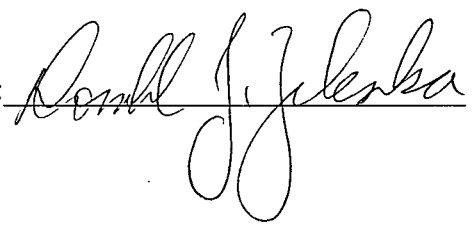
By: 

Columbia, South Carolina
October 7, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2012-209166

THE STATE,

RESPONDENT,

v.

RICHEY LAMONT BOYD,

APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with SCACR 211(b).

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

October 7, 2013

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2012-209166

THE STATE,

RESPONDENT,

v.

RICHEY LAMONT BOYD,

APPELLANT

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the Inter-Agency Mail Robert M. Dudek, Chief Appellant Defender, Division of Appellate Defense, 1330 Lady Street. Suite 401, Columbia, S.C. 29201-3332 this 7th day of October, 2013.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

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