

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

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S.C. Supreme Court

THE STATE,

RESPONDENT,

v.

ERIC WRIGHT,

PETITIONER.

APPELLATE CASE NO. 2014-001017

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

The State, Respondent,

v.

Eric Wright, Appellant.

Appellate Case No. 2011-202547

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2014-UP-091
Heard November 6, 2013 – Filed March 5, 2014

AFFIRMED

Appellate Defender David Alexander, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General William M. Blich, Jr., both of
Columbia, for Respondent.

PER CURIAM: Eric Wright was convicted of assault and battery with intent to kill (ABWIK) and possession of a weapon during the commission of a violent crime. He appeals, arguing the trial court erred in (1) failing to grant his motion for mistrial based on the admission of hearsay testimony, (2) failing to grant his

*Batson*¹ motion, and (3) removing the foreperson from the jury without good cause. We affirm.

1. We find no error in the trial court's denial of Wright's motion for mistrial based upon the admission of alleged hearsay testimony. Wright complains about testimony from Alexis, an eyewitness to the incident, after the trial court made an *in limine* ruling excluding any hearsay testimony from a witness that "they call [the shooter] Bo," if the witness did not know the shooter. In response to the solicitor's question whether Alexis knew the name of the shooter, she stated, "I don't know his real name, but I know they call him Bo." Even if we were to assume this testimony constituted hearsay,² we find no reversible error. Prior to her testimony that she did not know the shooter's real name but she knew "they call him Bo," Alexis had already testified, without objection, that "Bo got out of the car, and pointed a gun He pointed the gun at [Victim] and shot twice." Wright argues Alexis' testimony "they call him Bo" was improper because it was hearsay testimony that identified him, Bo, as the shooter. Because Alexis had already identified the shooter as "Bo," her later testimony "they call him Bo" could not have prejudiced Wright. *See State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (noting improper admission of hearsay evidence is reversible error only when the admission causes prejudice; the admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence). At any rate, the trial court's explicit instruction to the jury to strike the question and strike Alexis' answer cured any possible error, and the prejudicial effect would have been minimal such that a mistrial would not have been warranted. *See State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) (noting a curative instruction to disregard the testimony is usually deemed to cure any alleged error); *State v. Dempsey*, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000) (holding "a mistrial should not be ordered in every case where incompetent evidence is received and later stricken from the record," and noting an instruction

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

² We are not convinced this testimony was inadmissible hearsay. The context in which Alexis testified, "I don't know his real name, but I know they call him Bo" is unclear. Although the trial court initially agreed with defense counsel's characterization of such testimony as hearsay, it underpinned that ruling based on a foundation issue, i.e., whether the witness had an independent knowledge that the person was known as "Bo." Here, how Alexis came to understand the shooter's name was "Bo" was never explored at trial.

to disregard incompetent evidence will usually be deemed to cure any error in its admission unless under the facts of the particular case "it is probable that, notwithstanding such instruction, the accused was prejudiced.").

2. We find no merit to Wright's assertion that the trial court erred in denying his *Batson* motion. Wright contends, though the State provided a gender-neutral reason on its face, the defense proved the reason was actually pretext.³ Here, the record supports the trial court's denial of Wright's *Batson* motion. The State provided a gender-neutral explanation for using peremptory challenges on Jurors 173 and 46, elucidating that the two male jurors had charges, or "items," on their rap sheets, and this explanation was not fundamentally implausible. While the solicitor agreed that a conviction was not necessary to trigger strikes, she specified her decision was based upon whether the potential juror "hit the radar for a criminal record." Though Wright challenged the explanation as pretext based upon the State's acceptance of female Juror 119, the solicitor made clear that the absence of charges on a rap sheet would not trigger the criminal record she looked for in making her decision to strike a potential juror. Because the rap sheet on Juror 119 included no charges or disposition of charges, the solicitor interpreted it as including nothing to show an arrest, and the juror therefore having no record. Thus, the State provided a meaningful distinction between female Juror 119 and male Jurors 173 and 46. Giving the trial court's finding due deference and reviewing the trial court's ruling under a clearly erroneous standard, we find the record supports the trial court's finding of a gender-neutral explanation for the strikes and its denial of Wright's *Batson* motion. See *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 822-23 (2009) (noting, in determining whether a *Batson* violation has occurred, appellate courts give the trial court's findings great deference on appeal; the trial court's determination concerning whether purposeful discrimination has occurred rests largely on the court's evaluation of demeanor and credibility; the demeanor of the challenged attorney will often be the best and only evidence of discrimination, and an evaluation of the attorney's mind lies peculiarly within a trial court's province).

³ While Wright's stated issue on appeal asserts error, in part, on the trial court's failure to grant his *Batson* motion after removal of the foreperson, Wright did not ask to renew his *Batson* motion following removal of the foreperson. Accordingly, this argument is not preserved for our review. See *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding an argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review).

Further, even if we were to accept Wright's argument, that the fact that Juror 119 had a rap sheet indicated she had a criminal record, the uneven application of a gender-neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a gender-neutral explanation for the inconsistency. *State v. Cochran*, 369 S.C. 308, 334, 631 S.E.2d 294, 308 (Ct. App. 2006). *See also State v. Casey*, 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct. App. 1997) (holding, although the State applied its facially valid reason inconsistently in permitting a like-situated female juror to be seated, the State's explanation of mistake for the omission was gender-neutral). The solicitor indicated she did not use a strike on Juror 119 because she did not believe her to have an arrest record. The solicitor's explanation was based upon her interpretation of Juror 119's purported rap sheet, i.e., that it showed no charges against the juror. Mindful that a determination as to whether a *Batson* violation has occurred must be based upon the totality of facts and circumstances in the record, as well that great deference is to be afforded the trial court's findings and that the appellate court's review of the trial court's ruling is under a clearly erroneous standard, we find the State provided a gender-neutral explanation for any inconsistency.

3. Wright contends the trial court abused its discretion by removal and replacement of the foreperson without good cause, and over both his and the foreperson's objection. We disagree. "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." *Smith v. State*, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) (quoting *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999)). The trial court has a "duty to assure [itself] that every juror is unbiased, fair and impartial." *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982). *See also State v. Powers*, 331 S.C. 37, 43, 501 S.E.2d 116, 118 (1998) ("It is the duty of the trial [court] to see that a jury of unbiased, fair and impartial persons is impaneled."). Further, "a trial [court] has the inherent power to maintain order and decorum in [its] courtroom." *State v. Beckham*, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999). *See also State v. Shelton*, 270 S.C. 577, 580, 243 S.E.2d 455, 457 (1978) ("A trial judge has the inherent power to preserve order in his court and to see that justice is not obstructed by any person or persons. He has the authority to take such measures as appear reasonably necessary to secure orderly proceedings and to preserve the security of those participating in the trial or lawfully attending the proceedings."). Additionally, "[i]n a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." *State v. Kelly*, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998); *State v. Hill*, 394 S.C. 312, 320, 714 S.E.2d 879, 883 (Ct. App. 2011). The determination of whether to dismiss a juror and replace him with

an alternate is within the sound discretion of the trial court, and such will not be disturbed on appeal absent an abuse of discretion. *State v. Carmack*, 388 S.C. 190, 198, 694 S.E.2d 224, 228 (Ct. App. 2010). *See also State v. Lindsey*, 372 S.C. 185, 194, 642 S.E.2d 557, 562 (2007) (finding no abuse of discretion in the denial of the appellant's motion to remove a juror and replace the juror with an alternate, noting it is within the trial court's discretion whether to dismiss a juror and substitute with an alternate juror); *State v. Simmons*, 360 S.C. 33, 43, 599 S.E.2d 448, 452 (2004) (holding the trial court acted within its discretion in excusing a juror for the juror's unauthorized communication with his wife).

We hold the trial court acted within its discretion in removing the foreperson from the jury. The trial court placed on the record valid reasons for its concern with the foreperson continuing to serve. The court noted it had been informed the foreperson was "cursing in the middle of the hallway" and "acting so badly" the situation required the intervention of two officers, and the deputy had to engage the head of security to have a discussion with the foreperson. The court noted it was particularly concerned with the foreperson's cussing, and was concerned with the effect his conduct may have on the other jurors given his position as foreperson. Further, while the foreperson denied he had exhibited such behavior in the jury room around the other jurors, he did not deny he had been cursing in the hallway about running late and he admitted he was frustrated. Additionally, the foreperson's self-proclaimed suitability to remain on the jury is not dispositive. *See id.* at 43 n.4, 599 S.E.2d at 452 n.4 (noting, in a case involving removal of a juror that did not involve removal for concealing information during *voir dire*, the juror's self-proclaimed impartiality was not dispositive). Based on the record before us, and recognizing the trial court was in the best position to observe the character and demeanor of the foreperson and evaluate the situation, we find no abuse of discretion in the court's dismissal of the foreperson and replacement with an alternate. *See State v. Thompson*, 278 S.C. 1, 9, 292 S.E.2d 581, 586 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315, (1991) ("Because we do not have the benefit of observing first hand the character and demeanor of the jurors as did the trial judge, we rely on his wisdom and judgment unless the record firmly establishes an abuse of discretion.").

AFFIRMED.

HUFF, GEATHERS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ERIC WRIGHT,

APPELLANT

APPELLATE CASE NO. 2011-202547

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

Opinion No. 2014-UP-091

PETITION FOR REHEARING

Appellant asks this Court to re-examine its opinion in this case. Respectfully, the Court's opinion contains several errors and omissions which led to an incorrect affirmance of appellant's conviction. Appellant asks the Court for rehearing on the first two issues in the opinion.

Issue 1

The first issue addressed in the Court's opinion is whether the trial court erred in failing to grant a mistrial after hearsay testimony from Alexis. The Court's opinion omits perhaps the most important point regarding this improper testimony: it was deliberately elicited by the State after the trial judge ruled it was inadmissible. The State intentionally violated the trial judge's

ruling excluding this testimony. R. 61, l. 22 – 63, l. 15. R. 90, l. 25 – 91, l. 3. R. 92, ll. 6 – 12. R. 102, ll. 8 – 14. The improper question was **the first question** asked after a bench conference. R. 90, l. 24 – 158, l. 1. The question was not asked during the rush of trial, but was asked deliberately after a break in the questioning and with the opportunity for reflection. A mistrial should have been granted based on the flagrant and deliberate violation of the trial judge's *in limine* ruling. See State v. Parker, 391 S.C. 606, 707 S.E.2d 799 (2011). Had the Court not overlooked this important part of appellant's argument, it would have understood the context of the remaining arguments concerning the failure to grant a mistrial.

In footnote two of the opinion, the Court erroneously shifts the burden of proving that Alexis had no independent knowledge of appellant's nickname. The fact that she had no independent way of knowing appellant's nickname was not even contested by the State during the trial. The glaring proof of this fact is that the State never even sought to have Alexis make any identification of appellant during the trial. No Neil v. Biggers, 409 U.S. 188 (1972) hearing was held. The notion that Alexis' statement is not hearsay is also disproved within the very statement itself. She said, "I don't know his real name, but I know they call him Bo." R. 90, l. 25 – 91, l. 3. This sentence contains every element of inadmissible hearsay. She first admits she does not know appellant. She then says she heard another unknown person(s) say his nickname was "Bo." It was offered for the truth of the matter asserted—that appellant's name was Bo and he was the shooter.

The Court also misapprehended the severe prejudice that appellant suffered from the solicitor's intentional violation of the trial judge's order. The Court emphasized that Alexis had already (in violation of the trial judge's ruling) mentioned the name "Bo" earlier in her testimony. Alexis said "we saw Bo get out of the car" during a long narrative describing the

events. R. 80, l. 20 – 81, l. 10. Very likely, trial counsel elected not to object at this point because her mention of “Bo” was lost in her narration and he did not want to draw attention to it with an objection and a curative instruction.

Trial counsel could not have anticipated the solicitor’s egregious violation of the trial judge’s order that followed. As stated earlier, the solicitor’s question was the first question after a pause in the proceedings when the jury’s attention would be highly focused. The solicitor’s question directly asked the witness to identify appellant as the shooter when the solicitor knew that she could not do so. It is hard to imagine better evidence of prejudice than the fact that the solicitor was willing to intentionally defy a trial judge’s ruling—risking a mistrial or contempt—to get this evidence before the jury. Furthermore, during deliberations, the jury asked for the replay of Alexis’ testimony. R.424, l. 18 – 425, l. 16. She was presented as a “neutral” witness and the State’s other witnesses were thoroughly discredited during the trial. Respectfully, the Court’s conclusions regarding this issue are in error.

Issue 2

Respectfully, the Court's opinion regarding the Batson decision is erroneous. The Court overlooked the solicitor's statement with regard to Juror 84: "He actually, um, had [an] item on his record that I was not sure if it was a conviction or not and out of abundance of caution I decided to strike him." R. 48, ll. 16 – 19. Yet, when Juror 119's rap sheet showed a criminal history in California, she did not strike her. The Court failed to address the solicitor's dubious reliance on her notes that stated "no charges on rap sheet." R. 454. R. 54, ll. 7 – 16. The Court's decision allows attorneys to insulate themselves from undisputable factual information about jurors by making inaccurate (or misleading) notes about jurors they want on their jury.

Imagine a scenario where an attorney only wants black jurors and wants to strike whites. Under the rule used by the Court, the attorney could make erroneous notes about every white juror that would provide a race-neutral reason for striking the juror and, if called down for discriminatory behavior, could simply say he relied on his notes. This example is not any different from what happened in appellant's case because there can be no dispute that Juror 119's rap sheet showed a criminal record which directly contradicted what the solicitor wrote in her notes. The burden of proving pretext is generally established by showing similarly situated members of the panel were seated on the jury. State v. Cochran, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006). The solicitor had no other reason for striking this juror other than the one which was proved false.

Finally, the Court's footnote three is mistaken. The Court's footnote states that appellant did not renew his Batson motion after removal of the foreperson. Immediately after the trial judge removed the foreperson, defense counsel stated:

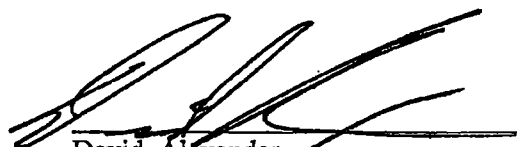
I do want to put a few things on the record. I do want to object to his being relieved. That is one of three men who was sitting on the panel, including the alternate that when I made the Batson motion, it was both as to gender and race that she be—the strikes for men, who had criminal histories, not convictions, but not for the woman, the one who's being sat.

R. 271, ll. 9 – 16. Defense counsel made further argument regarding another error and then asked for a mistrial. R. 271, l. 17 – 272, l. 3. The judge denied the motion. R. 272, ll. 4 – 9. This information regarding preservation was included on page eighteen of appellant's brief. **Even the State did not claim this issue was unpreserved.** If there is some doubt that this issue is preserved, it must be resolved in appellant's favor. Atlantic Coast Bldrs & Contractors, LLC v. Lewis, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in part and dissenting in part). Furthermore, appellant had no need to renew his Batson motion as that ruling was final after jury selection.

CONCLUSION

For these issues, and additionally for the issues raised in appellant's brief and at oral argument, the Court should grant rehearing and reverse appellant's convictions.

Respectfully submitted,



David Alexander
Appellate Defender

This 14th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

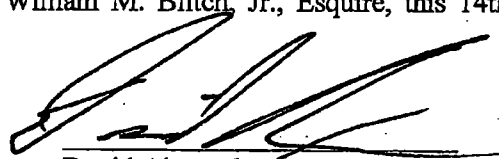
ERIC WRIGHT,

APPELLANT

APPELLATE CASE NO. 2011-202547

CERTIFICATE OF SERVICE

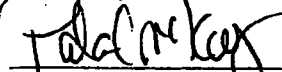
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blicht, Jr., Esquire, this 14th day of March, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day
of March, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022

The South Carolina Court of Appeals

The State, Respondent,

v.

Eric Wright, Appellant.

Appellate Case No. 2011-202547

ORDER

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

Thomas C. Hoff

J.

John D. Beston

J.

James E. Edwards

J.

Columbia, South Carolina

cc:
David Alexander, Esquire
William M. Blich, Jr., Esquire

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SC OFFICE OF
APPELLATE DEFENSE

FILED

April 11, 2014