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

FINAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

On July 30, 2009, Eric Wright was indicted for assault and battery with intent to kill and possession of a weapon during a violent crime. R.459, (Indictments). On October 24 – 27th, 2011, Wright was tried in Beaufort County before the Honorable Carmen T. Mullen. R. 1. Ian C. Deysach and Gene G. Hood represented Wright. R. 1. Dawn Burke and James Bannon represented the State. R. 1. The jury found Wright guilty on both charges. R. 429, ll. 13 – 23. Judge Mullen sentenced Wright to eighteen years' imprisonment on the ABWIK charge and five years' imprisonment on the weapons charge to run concurrently. R. 448, ll. 9 – 17. On November 1, 2011, Wright filed and served his notice of appeal. R. 457 (Notice of Appeal and Affidavit of Service by Mail). This appeal follows.

ARGUMENT

1.

The trial court erred by not granting defendant's motion for a mistrial after the State deliberately elicited hearsay testimony identifying defendant as the suspect when such testimony had been ruled inadmissible prior to trial.

Relevant Facts

On July 28, 2008, Troy Jinks ("Jinks") was shot in the leg. R. 70, l. 24 – 140, l. 12. He was treated in the emergency room for a "couple of hours" and then released the same day. R. 174, ll. 1 – 4. The shooting took place in a neighborhood in Beaufort County called Pinckney Hill. R. 81, ll. 14. This neighborhood is called "Pinckney Hill" because only the Pinckney family lives there. R. 81, ll. 11 – 19. The defendant was indicted for the shooting as "Eric Wright aka Joseph Bo Derrick Wright." R. 459 (Indictments). The case was called before the entire jury panel as "State versus Erick Wright; also known as Joseph Bo Derrick Wright." R. 4, ll. 6 – 8. The trial judge repeated the name, including the a/k/a "Bo." R. 4, ll. 18 – 20. During the trial, a recording from a tip line was played in which the defendant denied committing the crime. R. 291, ll. 9 – 24.

Alexus Green was visiting her grandmother on Pinckney Hill and claimed she witnessed the shooting. R. 81, l. 24 – 149, l. 1. 2. At the back of Pinckney Hill is the Chicken Shack. R. 84, ll. 1 – 7. Green saw a car drive onto the hill towards the Chicken Shack. R. 84, ll. 19 – 25. The car then turned around and came back from the Chicken Shack. R. 86, l. 20 – 154, l. 2.

Green saw four people in the car. R. 86, l. 24 – 87, l. 4. She only knew two of the people—Monique Johnson ("Monique") and Octavia Scott ("Octavia"). R. 87, ll. 5 – 6. Green saw a young lady in the front passenger seat and a man sitting in the back. R. 87, ll. 7 – 19. As the car returned, Jinks pointed at the car, yelled, and made hand gestures. R. 87, ll. 20 – 25. Jinks said, "what's he in the car for?" R. 88, ll. 1 – 2. The man got out of the car, said "what you say," pulled out a gun, and shot twice. R. 88, ll. 14 – 21.

Before the trial began, Wright's attorney moved for the court to prohibit Green from testifying about the shooter's name. R. 61, l. 22 – 61, l. 11. The court ruled that such testimony would be inadmissible hearsay in the following exchange:

> MR. DEYSACH: . . . The other issue I wanted to bring up, Your Honor, is that in this case along with the folks that we've already talked about, Octavia, the person – the driver and [Jinks], there are other witnesses who want to say, I saw the shooting. **Alexus – for—for—one witness, for instance, says I don't know the guy, but they call him Bo.** Another witness says something to that effect. I'm not sure – I don't know the guy, but they call him Bo. And I want to make sure that my position is put on the record is clear, to say I don't know who the guy is, but they call him Bo is inadmissible hearsay, certainly when it's told to the police or in a testimonial situation such as this, to say that – I don't know the person, but I've heard that his name is Bo, essentially is what testimony might be.
>
> THE COURT: **I would agree that that's hearsay** other than if they actually with their own eyes saw it, if they were a witness standing there, they can identify him by his picture, let alone – even though by the name – I understand what you're saying. That could be two different things, I don't know him but they call him Bo. I don't know if the question was asked – even though you may not personally know him, have you seen him around and do you know that by his reputation, that that is him and that is Bo.
>
> **If they can ID him at the scene**, and I don't know where these people were, **then they can ID him through his photograph, they can ID him and say this is him. I would agree that if they don't know his**

name is Bo and they can't look at him and say, that's Bo, by their acknowledgment, they can't say it.

MR. DEYSACH: Right. That's – that's what I want to make sure. I don't think that these are people that know him by a reputation or know him by anything other than somebody – they've heard somebody call him Bo. They either know the person who did that is Bo, I want to make –

THE COURT: Okay.

MR. DEYSACH: There are people who are shown photo lineups obviously, or else we would have had Neil v. Biggers on that, but I want to make sure that were not eliciting any hearsay just to bolster that somebody may have said the word "Bo" and that be it. And so I want to make sure that is flagged for you.

R. 61, l. 22 – 63, l. 15 (emphasis added). Despite the court's ruling that Green could not testify that "they call him Bo" the solicitor asked the following:

Q. Alexus, the shooter, the person who who you saw [shoot Jinks] twice, do you know his name?

A. I don't know his real name, but I know **they call him Bo.**

R. 90, l. 25 – 91, l. 3 (emphasis added). Defense counsel immediately objected stating, "Objection, that's the hearsay that came out, Your Honor." R. 91, ll. 4 – 5. The court then made the following ruling:

All right. Okay. All right. Your objection is sustained. Ma'am, you can only say what you do know, what you know by your own independent knowledge. Ladies and gentlemen, that last question you are to strike and also her answer wasn't appropriate. She can only testify as to what she knows.

R. 92, ll. 6 – 12.

Defense counsel then objected, asked to approach, and a bench conference occurred. R. 91, ll. 13 – 18. The court noted for the record a bench motion. R.

91, ll. 19 – 20. Defense counsel then stated, "Your Honor, I have a motion I would like to be heard on when – at the appropriate time." R. 91, ll. 21 – 22.

After Green was excused, the court dismissed the jury. R. 99, ll. 3 – 20. Defense counsel then moved for a mistrial. R. 99, l. 5 – 100, l. 17. Defense counsel argued that the courts curative instruction was insufficient. R. 99, ll. 22 – 100, l. 11. Green never made an in-court identification of the defendant as the shooter. R. 100, l. 20 – 25. Green admitted telling police after the incident that she did not know the shooter. R. 95, ll. 14 – 16. The court denied the defendant's motion for a mistrial and stated its belief that the curative instruction remedied any prejudice. R. 102, ll. 8 – 14.

Discussion

The trial court should have granted the defense's motion for a mistrial because of Green's hearsay statement, "I don't know his real name, but I know they call him Bo," As a preliminary matter, the trial court correctly recognized this statement was inadmissible hearsay both before trial and at the time it was offered. R. 61, l. 22 – 63, l. 15; R. 91, ll. 6 – 12. "The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." State v. Jolly, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994).

The out-of-court statement here is "they call him Bo," and as the solicitor's question reveals, it was offered for the truth of the matter asserted—that the shooter's name was Bo. Therefore, the issue in this case is not whether the statement is hearsay, but whether Wright was prejudiced to the extent that a

new trial is required. The State will undoubtedly argue that because other witnesses identified the defendant as the shooter, any error is harmless. As will be seen below, this argument is not persuasive.

A. The Solicitor's Deliberate Elicitation of Inadmissible Hearsay Requires Reversal

The State's deliberate violation of Judge Mullen's pre-trial ruling demonstrates the prejudicial impact of this testimony. Without Green's hearsay statement, the State had no way to connect what she saw to the defendant. The State did not attempt to have Green identify Wright at trial. It presented no evidence that Green identified Wright as the shooter though a photographic lineup or otherwise. The State did not ask any questions of Green to lay a foundation that she knew the shooter through his reputation. The State obviously felt its need for this testimony was worth the risk of deliberately violating a pre-trial ruling on its inadmissibility. As defense counsel argued, "the bell was rung" and a mistrial was required.

"The purpose of a motion *in limine* is to prevent disclosure of potentially prejudicial matter to the jury." State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988). While pretrial rulings are not final and are subject to change based on developments during the trial, no developments occurred that would change the admissibility of this hearsay. As defense counsel stated, "[T]he response that the witness gave was exactly the response that she had written in her written statement that was provided as part of discovery." R. 99, ll. 15 - 18. The State knew what the response would be, knew it was inadmissible, knew it would be

highly prejudicial and could not be undone with a curative instruction, and still asked the question.

The deliberate nature of the solicitor's actions is further underscored by the events leading up to the question. The solicitor first asked Green, "What names did you give law enforcement of the four people in the vehicle?" R. 90, ll. 15 – 16. Defense counsel objected, stating "This is the hearsay we talked about yesterday." R. 90, ll. 17 – 18. The trial judge then held a bench conference. R. 90, ll. 21 – 23. The improper question was **the first question** asked after the 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.

In State v. Parker, 391 S.C. 606, 707 S.E.2d 799 (2011), a mistrial was granted in part due to the State's misconduct in using evidence previously agreed to be inadmissible. Id. at 609, 707 S.E.2d at 800. A videotape, which was originally redacted to remove graphic and prejudicial portions, was shown by the solicitor in full to the jury. Id. The defense moved for a mistrial based on prosecutorial misconduct. Id. The trial court ultimately granted a mistrial based on the cumulative effect of prosecutorial misconduct in the case. Id. The Supreme Court held that the State goaded the defense into moving for a mistrial and the double jeopardy clause barred the defendant's retrial. Id. at 615, 707 S.E.2d at 803. Similar to Parker, the State in this case intentionally put before the jury evidence it knew was inadmissible. The prejudicial impact of the hearsay identification of Green is demonstrated by the lengths to which the State went to

procure this evidence. The degree of the prejudice could not be undone by the curative instruction.

B. The Admission of an Identification Based Solely on Inadmissible Hearsay Is the Equivalent of a Violation of Neil v. Biggers.

Green's in-court identification of the shooter as "Bo" based on inadmissible hearsay is akin to identifications tainted by prior illegal identifications. See Neil v. Biggers, 409 U.S. 188 (1972). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Simmons, 384 S.C. 145, 166, 682 S.E.2d 19, 30 (Ct. App. 2009) (internal quotations omitted). Questions regarding the in-court identification of a defendant are dealt with outside of the jury's presence. SCRE 104(c); State v. Cheatham, 349 S.C. 101, 115-18, 561 S.E.2d 618, 625-27 (Ct. App. 2002). Such hearings are held outside of the jury's presence to prevent the prejudice that would ensue from an illegal identification.

Logically, there is no difference between an identification tainted by a suggestive lineup under the precedent flowing Biggers from and an identification based solely on hearsay. Similar to the Biggers procedure, the trial court ruled that Green could not identify the shooter as "Bo" if her testimony was based on hearsay. Therefore, as would be required under Biggers, reversal is required because of the prejudicial impact of Green's illegal identification of the shooter.

C. Wright was Prejudiced by Green's Statement

Green was the only "neutral" witness who testified regarding the incident. Because of Green's perceived objectivity, the jury gave her testimony more weight than the other witnesses who identified the defendant as the shooter.[1] The jury's emphasis on Green's testimony is clear because they asked for it to be replayed during their deliberations. R.424, l. 18 – 425, l. 16. The other witnesses were discredited during the trial. Therefore, this error was not harmless.

i. The Discrediting of Jinks

Defense counsel discredited Jinks during cross-examination. Jinks made an in-court identification of the defendant during direct examination. R. 215, ll. 7 – 23. Jinks admitted that Monique got out of the car wanting to fight him and threatening to have him shot. R. 139, ll. 1 – 18. He also admitted to having a one-night stand with the unidentified female passenger sitting beside Monique. R. 150, l. 24 – 218, l. 9.

During cross-examination, defense counsel impeached Jinks on whether he had made a deal with the State in exchange for his testimony. Jinks admitted to: (1) a 2003 conviction for breaking into an automobile; (2) a 2005 charge of possession of crack cocaine with intent to distribute in a school zone; (3) a 2007 arrest for assault and battery of a high and aggravated nature; (4) a 2007 charge for possession with intent to distribute marijuana; and (5) a 2007 charge for

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[1] As argued by defense counsel, Wright was not from the area and the other witnesses in this case had known each other for a number of years. As defense counsel stated, this was a "Bluffton neighborhood beef" and Wright was the outsider on whom they could blame the assault. R. 399, l. 18 – 400, l. 11.

failure to stop for a blue light. R.164, l. 22 – 167, l. 12. He admitted pleading guilty to the marijuana charge and failure to stop for a blue light charge and that the crack distribution and ABHAN charges, amounting to thirty-five years of possible punishment, were dismissed. R. 167, l. 23 – 235, l. 22. Jinks only received a two-year sentence suspended upon completion of eighteen months' probation. R. 168, ll. 15 – 22. This guilty plea was entered during the pendency of the State's prosecution of Wright. At the time of his testimony, Jinks had charges pending for resisting arrest and being a habitual traffic offender. R. 169, ll. 11 – 25.

Although Jinks denied making the statement at trial, defense counsel impeached him with the medical records written on the day of the shooting that said, "The patient says he does not know who shot him." R. 175 , l. 7 – 176, l. 11. The police witness did not dispute that the medical records stated that Jinks did not know who shot him. R. 305, l. 25 – 306, l. 8. The investigating officer confirmed that Jinks lied and told her he did not know the female passenger in the front seat. R. 309, ll. 4 – 10. Jinks also admitted smoking marijuana on the day of the shooting. R. 174, ll. 5 – 6.

When Jinks was receiving treatment at the hospital, his girlfriend Shirley was with him. R. 176, ll. 15 – 22; R. 305, ll. 1 – 7. Shirley was Octavia's best friend and the mother of Jinks' child. R. 228, ll. 7 – 16. Octavia claimed that Shirley called her shortly after the shooting and told them "y'all just shot Troy." R. 228, ll. 9 – 16. Octavia said that Shirley was with Jinks when she made that phone call. R. 254, l. 12 – 255, 1. 4. Shirley provided information to the police

during their interview with Jinks, but nothing about the phone call to Octavia ever made it into the officer's report. R. 306, l. 9 – 308, l. 5. The officer admitted that if she had learned of such an important detail, she "most probably" would have included it in her report. R. 306, ll. 17 – 19. These problems with Jinks' testimony show that, from the start, he was not truthful about what happened.

ii. The Discrediting of Octavia Scott

The State's other witness who claimed that Wright was the shooter was similarly discredited. Octavia identified the defendant as the shooter. R. 212, ll. 6 – 10. She claimed that she knew the defendant because they were once "sex partners." R. 213, ll. 15 – 21. She admitted to a deal with the State that her pending charges arising from the shooting would be dismissed if she "testified truthfully" at Wright's trial. R. 208, ll. 10 – 24.

Octavia admitted lying to the police regarding the incident. R. 239, l. 23 – 240, l. 2. She first told the police that the shooter was somebody she recognized from her job and picked up on the side of the road. R. 241, ll. 2 – 19. She initially said only three people were in the car. R. 246, ll. 2 – 16. She continued to lie when she told the police that, after the shooting, Monique would not let the shooter back into the car. R. 246, l. 22 – 247, l. 5. She lied when she told the police that she caught a ride to Georgia with a person she did not know, but whom she described in great detail. R. 248, l. 17 – 250, l. 19. Octavia admitting to concocting her lies with Monique. R. 253, ll. 3 – 12. Defense counsel proved Octavia to be a liar and her testimony was discredited.

iii. The Three Eyewitnesses' Stories Were Inconsistent

The stories told by Green, Jinks, and Octavia also differed from each other. In Green's version, the car drove past Jinks on the way to the Chicken Shack without any confrontation. R. 93, ll. 9 – 13. The confrontation between Jinks and the occupants of the vehicle only happened after the car returned from the Chicken Shack. R. 93, ll. 14 – 21. Green could not recall whether Monique ever got out of the car. R. 94, ll. 18 – 19. The unidentified girl in the front passenger seat got out of the car and started yelling at Jinks. R. 94, l. 25 – 95, l. 8. She did not see any girls taking off their jewelry and getting ready to fight. R. 95, ll. 17 – 20.

In Jinks' version, Monique got out of the car on its way to the Chicken Shack. R. 171, ll. 16 – 21. After this confrontation, the car continued up the hill toward the Chicken Shack. R. 171, ll. 22 – 24. When the car returned, Jinks claimed that nobody got out of the car except for the shooter. R. 172, l. 21 – 173, l. 4.

Finally, in Octavia's most recent version, which she claimed at trial was true, Monique jumped out of the car as soon as they pulled on to the hill. R. 218, ll. 18 – 20. Monique began taking off her jewelry preparing to fight Jinks. R. 219, l. 18 – 220, l. 5. Monique then got back in the car and they headed toward the Chicken Shack. R. 220, ll. 6 – 21. When they returned, Jinks came running to the car "saying a bunch of stuff." R. 222, l. 19 – 223, l. 2. Monique got out of the car again, argued with Jinks, and was on her way back to the car when the shooter leaned out of the car and fired. R. 223, ll. 8 – 13.

These inconsistencies about who got out of the car are important because they further discredit the stories told by Octavia and Jinks. Both Octavia and Jinks are convicted criminals. Both had pending charges at the time of trial. Both were from Bluffton. They were connected through their close relationship with Shirley. Their stories did not match. The lack of credibility of these witnesses magnified the importance of Green's hearsay identification which could not be undone by the judge's curative instruction. "Improper corroboration testimony that is merely cumulative to the victim's testimony, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." State v. Jolly, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). For these reasons, Wright was prejudiced by the hearsay identification and any argument that the error is harmless is without merit.

2.

The trial court erred by not granting defendant's Batson motion both after jury selection and after removal of one of only three men on the jury because the State's gender-neutral reason for striking male jurors was pretext.

Relevant Facts

During jury selection sixteen females and eight males were presented. R. 29, l. 14 – 40, l. 8. The State only struck two females. R. 31, ll. 5 – 11; R. 35, ll. 8 – 13. The State struck three of the eight males. R. 32, ll. 3 – 10; R. 34, l. 24 – 35, l. 7; R. 38, ll. 1 – 7. During the selection of the alternates, two females were presented and one male was presented. R. 39, l. 3 – 40, l. 8. The State did not exercise any strikes in the selection of alternate jurors. The defense was out

of strikes when Juror 119, Donna Humphreys, a female, was seated on the jury as an alternate. R. 39, ll. 3 – 24.

The defense made a Batson motion challenging the State's striking of male jurors. R. 48, ll. 6 – 11. The State claimed that it struck the male jurors because of prior arrests on their rap sheets. R. 48, ll. 12 – 19. The solicitor stated, with respect 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. She agreed with the defense's characterization of her strike strategy as striking anyone with an arrest resulting in a rap sheet being generated. R. 51, l. 22 – 53, l. 12. The solicitor stated that "[I]f they hit the radar for a criminal record, whether they have it [or] not... I struck them. R. 52, ll. 8 – 12.

However, Juror 119, the first alternate selected, also had a rap sheet. R. 53, ll. 7 – 15; R. 450, Court's Ex. 1 (rap sheet of Donna Humphreys). In an attempt to explain her failure to strike Humphreys, the solicitor introduced her notes which contained a handwritten notation regarding Humphreys stating "no charges on rap sheet." R. 454, Court's Ex. 3. Humphreys' rap sheet says "The criminal history record is maintained and available from the following: California.... The record(s) can be obtained through the interstate identification index by using the appropriate NCIC transaction." R. 451, Court's Ex. 1 (rap sheet of Donna Humphreys). The court ruled that the State's reason for striking males was race-neutral and denied the defense's Batson motion. R. 58, l. 21 – 59, l. 2.

On the morning of the third day of trial, the trial court excused the foreperson, who was one of only three men on the jury. R. 266, l. 7. – 271, l. 8. The foreperson allegedly had been complaining about the court running late and, according to the bailiff, began using profanity. R. 266, ll. 7 – 12. The defense objected to excusing him. R. 267, ll. 13 – 17. The court stated that it was worried about his effect on the other jurors. R. 268, ll. 1 – 3. The court brought the foreperson into the courtroom and questioned him. R. 269, l. 1 – 271, l. 8. The juror admitted that he was frustrated, but when asked if he was expressing his frustration in front of the other jurors he said "absolutely not." R. 269, ll. 16 – 19. After the court telling him that he would be excused, the foreperson protested stating, "I don't want to be released. I want to do this." R. 270, ll. 4 – 5. He also stated that his frustration "was blown out of proportion." R. 270, ll. 10 – 11.

The defense moved for a mistrial. R 272, ll. 1 – 3. The motion for a mistrial was based on the prior Batson motion, the lack of men on the jury, and that the court had no real reason to excuse the foreperson. R. 271, l. 9 – 272, l. 3. The court denied the motion for a mistrial. R. 272, ll. 4 – 9.

Discussion

The trial judge erred in finding that the State did not exercise its strikes in a discriminatory manner against men. Batson challenges apply to discriminatory strikes based on gender. J.E.B. v. Alabama, 511 U.S. 127 (1994); Batson v. Kentucky, 476 U.S. 79 (1986); State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006). "'The purposes of Batson and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's

right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process.'" Rayfield, at 112, 631 S.E.2d at 247 (quoting State v. Haigler, 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999)).

The party opposing the strikes must first make a prima facie case of discrimination. State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). Here, the defense challenged the State's elimination of three men from the jury. The proponent of the strikes must then present a non-discriminatory, neutral reason for the strikes. Id. Here, the State claimed that its strategy was to strike anybody with prior criminal history or an arrest on their rap sheets. R. 48, ll. 12 – 19. The solicitor stated that "[I]f they hit the radar for a criminal record, whether they have it [or] not... I struck them. R. 52, ll. 8 – 12. As the reason the State articulated was gender-neutral on its face, then the third step in the Batson analysis was required.

In the third step, the opponent of the strikes must show that the reason given was pretext. Id. "[P]retext generally will be established by showing that similarly situated members of another [class] were seated on the jury." Id. The defense proved pretext at the trial. Although the State had a strike available, it did not use it to strike a female, Humphreys. R. 39, ll. 16 – 22. Even though the solicitor had earlier stated that "if they hit the radar," meaning a rap sheet was generated, she backpedaled when it was revealed that Humphreys' rap sheet indicated she had a criminal record. The solicitor claimed she had a "blank Rap

sheet with no actual charges" and that she relied on her notes which said "no charges on Rap sheet." R. 54, ll. 7 – 16.

As pointed out by defense counsel, this was not true. R. 54, l. 20 – 56, l. 8. Humphreys' rap sheet states, "The criminal history record is maintained and available from the following: California.... The record(s) can be obtained through the interstate identification index by using the appropriate NCIC transaction." R. 451, Court's Ex. 1 (rap sheet of Donna Humphreys). According to the State's own rap sheet, Humphreys had a criminal record in California. This demonstrates that the State's facially gender-neutral reason was pretext. The only reason given by the trial judge for denying defendant's Batson motion was that "the printing of the Rap sheet showing actual specific charges is a difference." R. 58, l. 24 – 59, l. 2. This reasoning is directly contrary to the State's initial justification that if a potential juror "hit the radar," they would be struck. It is also contradicted by the solicitor's earlier statement regarding Juror 84 when she said she was not sure about an item on his record and struck him out of an abundance of caution. R. 48, ll. 12 – 19. Certainly Humphreys "hit the radar" and the State's reason was pretext. The trial court erred by not finding a Batson violation.

Wright's jury was tainted by this error. His jury originally consisted of nine females and only three males. R. 29, l. 14 – 40, l. 8; Clerk's "Present List for Panel." The jury was further tainted when one of the three males, the foreperson, was removed from the jury by the trial judge and replaced by a female alternate (Humphreys). R. 268, l. 9 – 272, l. 9. While the defense had no objection to Humphreys as an individual juror, defense counsel renewed his Batson motion

and requested a mistrial. R. 271, l. 9 – 272, l. 3. The trial court again denied this motion. R. 272, ll. 4 – 9. This ruling was clearly erroneous because Wright was tried by a jury of almost all women that was selected through discriminatory means. See State v. Taylor, 399 S.C. 51, 58, 731 S.E.2d 596, 600 (Ct. App. 2012) (upholding trial judge's finding of pretext where defense claimed to strike a juror based on a high education level, but sat a similarly situated juror with even more education). This Court should reverse.

3.

The trial court abused its discretion by removing the foreperson without good cause and over the defendant and foreperson's objection.

Removing the foreperson without cause was an abuse of discretion. As recounted above, the trial judge removed the foreperson from the jury based on his "frustration" and that she was worried about his effect on the other jurors. R. 268, ll. 1 – 3. The foreperson vehemently denied expressing his frustration to other jurors. R. 269, ll. 16 – 19. After the court telling him that he would be excused, the foreperson protested stating, "I don't want to be released. I want to do this." R. 270, ll. 4 – 5. He also stated that his frustration "was blown out of proportion." R. 270, ll. 10 – 11. The court did not question any of the bailiffs or other jurors on the record concerning the incident and the only evidence in the record, other than the trial judge's recounting of the bailiff's out-of-court statements, is the foreperson's testimony. The defense moved for a mistrial based, in part, on the ground that the court had no real reason to excuse the foreperson. R. 271, l. 9 – 272, l. 3.

While it is true that in South Carolina, a defendant has no right to any particular jury, only to a fair and impartial one, a trial judge is not free to dismiss a juror without cause. See Palacio v. State, 333 S.C. 506, 511 S.E.2d 62, 68 (1999). A trial judge was reversed on the sole ground of a juror's improper removal in Greer v. Norvill, 21 S.C.L. (3 Hill) 262 (1837). In Greer, an attorney objected to a sworn juror based on speculation of some bias against counsel and the trial judge dismissed the juror. Id. at *1. The Court reversed, stating that "Vague and capricious objections should not receive the countenance of the court." Id. at *3. "After a trial has commenced, and the jury is charged with the case, no juror can withdraw except from necessity, the consent of the parties, or the permission of the law . . . ." Id. at *2. The Greer Court held that prejudice was not a concern, stating, "It is probable that a new trial will result in the same verdict. But the motion for a new trial must be granted." Id. at *3. See also, State v. Woods, 343 S.C. 583, 588-89, 550 S.E.2d 282, 285 (2001) (holding, in a case dealing with a juror's nondisclosure of information during *voir dire*, that a prejudice inquiry is not required).

The case at bar is very similar to Greer. Here, the allegations against the foreperson and his negative influence on the jury were "vague and capricious." The foreperson asked to stay on the jury and objected to his removal. Jurors have a constitutional right to serve and cannot be removed for discriminatory reasons. See State v. Floyd, 353 S.C. 55, 58-59, 577 S.E.2d 215, 216 (2003) (holding that dismissal of juror for refusal to take a religious oath violated juror's constitutional rights and defendant had standing to assert such violation); see also S.C. Code Ann.

§ 14-7-360, Section 14-7-360 states in mandatory language that "When the name of a person is drawn from the jury box for jury service by the commissioners the person shall serve as a juror unless disqualified or excused by the court as may be provided by law." S.C. Code Ann. § 14-7-360 (emphasis added).

This Court has also recognized a juror's constitutional right not to be removed from a jury for an improper reason. See Greer, *supra.* The Greer Court eloquently expressed the right and privilege of a citizen to serve on a jury, stating, "This privilege is of little value ordinarily, but there may be occasions and junctures in the republic, when a citizen would sooner perish than yield his privilege." Greer, at *1. "[H]e can at no time be arbitrarily discharged against his consent." Id. Because of these important factors, the Court need not conduct a prejudice inquiry with regard to the dismissal of the foreperson.

Other states have recognized this issue and either refuse to require a showing of prejudice or recognize that removal of a juror selected with the defendant's approval inherently prejudices the defendant.[2] Like South Carolina, Georgia authorizes its trial judges to use their discretion when replacing jurors. See Dunn v. State, 706 S.E.2d 596, 598 (Ga. Ct. App. 2011). In Dunn, the trial judge dismissed a juror because he was allegedly sleeping and other jurors objected to his body odor. See id. The Georgia Court of Appeals reversed, finding that the trial judge's

[2] A prejudice inquiry will result in the erroneous removal of jurors for capricious reasons going uncorrected. Undoubtedly, the State will argue that Wright was not prejudiced because the foreperson was replaced with a competent alternate and made no objection to the alternate **as an individual juror**. But this reasoning would result in a right without a remedy because in almost every case, a juror will be replaced with a competent alternate.

exercise of his discretion "must be an informed exercise" and that "[d]ismissal of a juror without any factual support or for a legally irrelevant reason is prejudicial [to the defendant]." See id. at 598-99 (internal quotations omitted).

The New York Court of Appeals wholly rejects a prejudice or harmless error analysis regarding the removal of jurors. See People v. Anderson, 70 N.Y.2d 729, 730 (N.Y. 1987). The Anderson court stated, "We decline the People's invitation to apply a harmless error analysis based on the proof of defendant's guilt, or based on the fact that defendant participated in selecting the alternate who replaced the discharged juror." Id.

A sleeping juror, as in Dunn, is certainly a larger problem than an engaged, frustrated juror. In fact, trial judges in this state routinely apologize to jurors for making them wait while the court takes up matters of law outside of their presence. Frustration among jurors is a common problem and does not warrant removal. Jurors are frequently required to serve against their will when they would rather be tending to their own affairs. The Court should adopt the reasoning of Dunn and Anderson, decline to conduct a prejudice inquiry, and reverse because of the abuse of discretion in removing the foreperson.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and sentence and grant him a new trial.

Respectfully submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of May, 2013.

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 Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of May, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

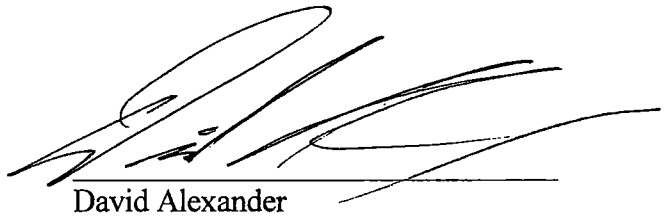
SUBSCRIBED AND SWORN TO before me
This 7th day of May, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 7, 2013



David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589