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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOMINIQUE JULIUS AGURS,

APPELLANT

APPELLATE CASE NO. 2014- 000960

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court abuse its discretion by refusing to grant a mistrial where the lead investigator improperly placed Appellant's character and prior arrests at issue by making a comment on direct examination that he "had dealt with [Appellant] before" while assigned to the Street Crimes Unit?

II.

Did the trial court abuse its discretion in admitting Appellant's "mug-shot" photograph into evidence when the State failed to establish that the photograph was necessary to identify Appellant and the "mug-shot" was introduced only to draw attention to the circumstances under which it was taken and to suggest that Appellant had a criminal record; thus making it unfairly prejudicial?

III.

Did the trial court commit reversible error in refusing to grant a mistrial after members of the jury prematurely deliberated before closing arguments as an unsigned note inquired to the judge about photographs presented at trial that were critical to Appellant's defense, and the trial court posited highly suggestive leading questions to the foreman and alternate juror which failed to adequately determine whether premature deliberations took place or negatively impacted Appellant's right to a fair trial?

IV.

Did the trial court abuse its discretion in refusing to grant a new trial where the cumulative effect of the errors was so prejudicial as to deprive Appellant of a fair trial?

STATEMENT OF THE CASE

On December 12, 2013, the York County Grand Jury indicted for Appellant distribution of crack cocaine. R. * (Indictments). On February 24, 2014, the State filed notice of intent to seek a sentence of life without parole. Tr. 18, ll. 1-7.

On April 21, 2014, Appellant proceeded to trial before the Honorable John C. Hayes, III, and a jury. Tr. 1. Michael G. Mathews represented Appellant, and Assistant Solicitor Mathew Shelton represented the State. The jury found Appellant guilty as charged. Tr. 302, ll. 1-9. The court sentenced Appellant to life imprisonment without the possibility of parole. Tr. 308, ll. 25 – Tr. 309, ll. 1.

This appeal follows.

STATEMENT OF FACTS

On March 5, 2013, at the direction of law enforcement, Michael Tumblin, contacted an individual he knew only as D.J. to purchase one ounce of crack cocaine. Tr. 21, ll. 3-23. Tumblin, an admitted drug user with a lengthy criminal record, had agreed to work as confidential informant in order to receive cooperation credit and money to pay off outstanding traffic violations. Tr. 87, ll. 1 – Tr. 89, ll. 14; Tr. 155, ll. 12-24. To purchase the drugs, Tumblin was provided with eighty dollars. Tr. 97, ll. 5-14. Tumblin was searched and then driven by undercover officers to the location of the drug buy. Tr. 97, ll. 13 – Tr. 98, ll. 24. He was also equipped with a concealed, chest-mounted camera and microphone to record the transaction. Tr. 98, ll. 19 – Tr. 99, ll. 6.

Tumblin entered the target vehicle and left a few seconds later. Tr. 169, ll. 19-20. The driver of the vehicle never got out of the car and the undercover officers surveilling the area could not see who was in the vehicle or observe what transpired. Tr. 168, ll. 10 – Tr. 169, ll. 23. The video footage recorded by Tumblin did not show a hand to hand transaction or an exchange of money.[1] Tumblin left the vehicle and headed toward the undercover car, during his return he walked near to several people and parked vehicles. Tr. 169, ll. 11-24. Tumblin also briefly walked behind an adjacent building; later claiming to be looking for the police car. *Id.* Once in the police car, Tumblin handed over crack cocaine he claimed to have bought while in the vehicle. Tr. 172, ll. 16-24. The substance Tumblin produced was determined to be eight tenths of a gram of crack cocaine. Tr.181, ll. 14-16.

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[1] The video footage was entered into the trial record as State's Exhibit No. 2, and is on file with this Court.

During the course of the investigation, Tumblin identified Appellant as the individual he knew as D.J. in a photographic lineup chosen by Investigator Leland Harrelson.[2] Tr. 113, ll. 4-18. The lineup included two individuals with significantly lighter complexions than the Appellant. Tr. 221, ll. 2-6. Tumblin wrote the wrong date on the lineup, indicating it took place on March 5, 2012 instead of March 5, 2013. Tr. 199, ll. 6-10. Moreover, the time stamp on the undercover video recording indicated that the alleged controlled buy took place several years before the date of the investigation. Tr. 183, ll. 13-21. In addition, no law enforcement officer signed, dated, or time stamped the last page of the lineup where Tumblin acknowledged that the identification was not the result of intimidation or coercion. *Id.*

Police arrested Applicant on March 21, 2013. Tr. 213, ll. 4-8. None of the marked buy-money was recovered. Tr. 279, ll. 21 – Tr. 280, ll. 6.

<u>Pre-Trial Motions</u>

On April 21, 2014, defense counsel made a series of pre-trial motions. First, counsel objected to the State's plan to introduce Appellant's mug-shot into evidence.[3] Tr. 12, ll. 12-15. Initially, it was thought that Appellant would not be present for trial and so the mug-shot would have assisted the jury in identification. Tr. 40, ll. 17-19. Appellant was present for trial. The State nonetheless argued that Appellant's mug-shot would still help the jury determine the identification of the individual in the undercover video because the trial was over a year after the buy, so the mug-shot might somehow help the jury more accurately identify Appellant as he appeared at his arrest and that such an identification was relevant to their deliberations. Tr. 12,

[2] The photograph line-up was entered into the trial record as State's Exhibit No. 4, and is on file with this Court.

[3] This photograph was entered into the trial record as State's Exhibits No. 7 and 8 and is on file with this Court.

21-24. Despite finding that the State did not need the evidence, in light of Appellant's attendance, the trial court overruled the objection. Tr. 13, ll. 7-15.

Testimony of Confidential Informant Michael Tumblin

At trial, Tumblin was the State's second witness and the first to testify extensively on the controlled buy. Tr. 86, ll. 9 – Tr. 91, ll. 19. The State moved into evidence the video footage and the recording of a telephone call between Tumblin and D.J. Tr. 96, ll. 6-24; Tr. 99, ll. 7 – Tr. 100, ll. 14. Tumblin also testified regarding the above-referenced meeting with D.J. and his subsequent identification of the Appellant.

Testimony of Investigator Harrelson

The State also called Investigator Harrelson to testify. Tr. 145, ll. 1-17. Harrelson testified on his knowledge of drug sales, how law enforcement uses informants and the particular benefits Tumblin received for his involvement. Tr. 157, ll. 4 – Tr. 173, ll. 1. Harrelson then testified as to the chain of custody of the substance that he received from Tumblin following the buy. Tr. 173, ll. 2 – Tr. 179, ll. 8. When the State attempted to put a photograph of the substance in Tumblin's hand into evidence, defense counsel objected that under Rule 901 of S.C. R. Evid. there was no testimony authenticating or information supporting that the picture showed crack cocaine. Tr. 179, ll. 12-16. The court overruled the objection, however the Court did rule that Harrelson could not call the substance crack cocaine until it had been identified. *Id.* at ll. 17-18; Tr. 182, ll. 2-8.

The State then attempted to enter three photographs into evidence and, upon objection by counsel, the trial court held an *in camera* review. Tr. 185, ll. 15-20. The photographs purported to show: (1) Appellant in his vehicle taken by Tumblin's concealed camera; (2) the marked money that was used in the alleged drug buy, but never recovered; and (3) a picture of the

substance allegedly purchased from Appellant in Tumblin's hand. Tr. 184, ll. 19-23. The trial court overruled the objection, but instructed Harrelson no to testify that he believed it was Appellant in the photograph.

When the jury returned, Harrelson testified as to the content of the photographs within the limitations set by the trial court. Tr. 189, ll. 1-25. However, the State then asked Harrelson if he recognized the driver of the vehicle they observed. Tr. 190, ll. 1-3. Harrelson answered, "***Yes. I had dealt with him before when I was on the Street Crimes Unit with the City of Rock Hill.***" Tr. 190, ll. 5-6 (*emphasis added*). Defense counsel promptly objected and moved for a mistrial on the basis that Harrelson brought into issue Appellant's past criminal record before Appellant has decided whether or not to testify. *Id.* at ll. 13-25. The Court declined to grant a mistrial, "because I don't believe there is any manifest necessity based on that one interjection." Tr. 192, ll. 9-10. The trial court also expressed skepticism that a curative instruction would fix the problem, and instead warned Harrelson not to make such references again. Tr. 192, ll. 11-14; Tr. 193, ll. 11-22.Harrelson then testified that he knew Appellant prior to the drug buy and that he identified Appellant based on the video surveillance. Tr. 194, ll. 9-23.

The State's next witness, James Long, the records custodian at York County jail, testified about the circumstances in which the mug-shot was taken. Tr. 228, ll. 1-12. Long stated that he was the records custodian in March of 2013, but that he would have access to records predating his employment. Tr. 226, ll. 10-16. For unknown reasons, the State twice sought clarification from Long that the photographs were taken as a result of Appellant's March 2013 arrest. Tr. 226, ll. 20-22; Tr. 227, ll. 11-12. On the second occasion, Long replied: "[State's Exhibits No. 7 and 8] are from his 2013 booking." *Id.* Before the mug-shot was admitted, defense counsel renewed

his objection and was overruled. *Id.* at ll. 14-20. Defense counsel did not cross examine Harrelson. Tr. 229, ll. 12-15. Appellant did not testify.

<u>Premature Deliberation by the Jury</u>

Before closing arguments, the trial judge received a note from the jury. Tr. 255, ll. 7-19. The trial judge explained to the parties:

> Now we received [the jury's] note that says ***there is a question about the photos of the defendant.*** Was it allowed and if so, it was not published to the jury. The ***photos are [not] so much of a concern as the fact that they already got a question and they are not supposed to be discussing the case.***

Id. at ll. 14-19 (*emphasis added*). The trial judge then invited the parties to comment, *Id.* at ll. 20-23. The State declined. *Id.* Defense counsel requested a mistrial on the grounds of premature jury deliberation. Tr. 256, ll. 1-7.

Counsel argued it was obvious the jury was already deliberating and wanted access evidence not published by the State. *Id.* at ll. 8-15. The judge then asked the foreman of the jury, "***I instructed you several times not to discuss the case***, so Mr. Foreman, I hate to put you on the spot, but has the jury been discussing the case?" Tr. 257, ll. 22-25 (*emphasis added*). The foreman replied "***[t]here was no question [that] came up in <u>any discussions</u>***". Tr. 258, ll. 3-4 (*emphasis added*). The foreman did not deny discussions had occurred.

The alternate juror then stepped forward and claimed the question came from him. The alternate explained that he had not discussed this concern with the other jurors. *Id.* at 5-19. The trial judge decided to dismiss the alternate juror. *Id.* The defense then renewed its motion for mistrial which was overruled because the trial court believed dismissing the alternate addressed the issue. Tr. 259, ll. 14 – Tr. 260, ll. 4. The trial judge did not give a curative instruction to the remaining jurors and did not question or allow the parties to question the remaining jurors as to other possible deliberations referenced by the foreman's response.

ARGUMENT

I.

The trial court abuse its discretion by refusing to grant a mistrial where the lead investigator improperly placed Appellant's character and prior arrests at issue by making a comment on direct examination that he "had dealt with [Appellant] before" while assigned to the Street Crimes Unit.

Harrelson's comment that "I had dealt with [Appellant] before when I was on the Street Crimes Unit with the City of Rock Hill" was of such a highly prejudicial nature that a curative instruction could not ensure that Appellant would receive a fair trial. Tr. 190, ll. 4-6. Defense counsel correctly argued that a curative instruction could not solve the prejudice created by the improper comment and that Appellant could not get a fair trial before this jury because "the cat [is] out of the bag." Tr. 192, ll. 22-25.

The South Carolina Supreme Court has stated that the test for granting a mistrial is whether a "mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Ferguson*, 376 S.C. 615, 618, 658 S.E.2d 101, 103 (Ct. App 2008) (citing *State v. Edwards,* 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007)). "This Court favors the exercise of discretion of the trial court in determining the merits of [a mistrial] motion in each individual case." *Id.* (citing *State v. Patterson,* 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999)). "Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." *Ferguson*, 376 S.C. at 618-19, 658 S.E.2d at 103 (citing *Edwards,* 373 S.C. at 236, 644 S.E.2d at 69).

A "determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *State v. Douglas,* 367 S.C. 498, 523, 626 S.E.2d 59, 72 (Ct.App.2006) (citing *State v. Fletcher,* 363 S.C. 221, 609 S.E.2d 572 (Ct.App.2005)); *See also State v. Johnson,* 334 S.C. 78, 91, 512 S.E.2d 795, 803 (1999) ("The prejudicial character of the error must be determined from its relationship to the entire case"). Consequently, for the harmless error rule to apply, the Court must determine "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." *State v. Creech*, 314 S.C. 76, 86, 441 S.E.2d 635, 640 (Ct. App. 1993) (citing *Taylor v. State,* 312 S.C. 179, 439 S.E.2d 820 (1993)).

While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced. *State v. Simpson,* 325 S.C. 37, 479 S.E.2d 57 (1996). "The vital inquiry usually is whether or not the verdict was substantially influenced by the impropriety." 75A Am.Jur.2d *Trial* § 502 (1991) (footnotes omitted). Thus, to warrant reversal, "the errors must adversely affect [the defendant's] right to a fair trial." *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999).

Here, the "ends of public justice" require Appellant receive a new trial due to the prejudice created by Harrelson's improper comment for three reasons. First, the improper character evidence is especially prejudicial because it emphasized to the jury that Appellant had been involved in street crimes, clearly implying narcotics, in the past and thus had the propensity to be in involved in the drug trade. *Simpson*, 325 S.C. at 37, 479 S.E.2d at 57; *See also State v. Gore,* 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (when the previous alleged bad act is similar to the one for which the [defendant] is being tried, the danger of prejudice is enhanced).

Second, the jury could not have ignored Harrelson's improper comment due to its "highly prejudicial nature" and the numerous mistakes and gaps in evidence produced as a result of law enforcement's suboptimal investigation. *State v. Wilson,* 274 S.C. 635, 637-38, 266 S.E.2d 426, 427 (1980) (improper evidence of past crimes raises a legally unsound presumption of guilt in the minds of the jurors and the danger of prejudice is enhanced when there has been no trial and conviction for the alleged previous criminal activity).

For example, the State's video surveillance did not show an actual hand to hand exchange of drugs, none of the marked dollar bills were recovered, the time stamp on the video surveillance was inaccurate, and the date which the confidential informant signed the lineup identification was wrong. Tr. 27, ll. 13-25; Tr. 161, ll. 17-21; Tr. 183, ll. 12-23; Tr. 279, ll. 15-20. In addition, Tumblin admitted that he hoped to get a reduced sentence in his case for assisting law enforcement. Tr. 155, ll. 1-24. Finally, Tumblin claimed that law enforcement showed him the black and white identification lineup before the alleged controlled buy and the lineup included two individuals with a significantly lighter complexion than Appellant. Tr. 39, ll. 2 Tr. 40, ll. 24.

Third, the State "enhanced the prejudice" by highlighting the reliability and expertise of Harrelson no fewer than thirteen times in an effort to explain away the weaknesses and inconsistencies in the State's case. Tr. 276, ll. 21-25; Tr. 279, ll. 23-25; Tr. 281, ll. 11-16; Tr. 282, ll. 4-24; Tr. 283, ll. 14-19; Tr. 284, ll. 9-24; Tr. 287, ll. 14-17. Crucially, the State assured the jury the "defense attorney may suggest to you that we don't know that this is [Appellant] independent of [the informant's] identification from the photo lineup. . . . ***but Officer Harrelson knew him as well. Officer Harrelson identified him as*** [***Appellant***]." Tr. 286, ll. 1-5 (*emphasis added*). This is a direct reference to the earlier improper testimony.

The State also used Harrelson's identification of Appellant to boost the credibility of the confidential informant, "[t]he evidence presented suggests that [the informant] is telling the truth. Even though he didn't know a full name.... ***You heard Harrelson testify that's the man***." Tr. 287, ll. 13-18 (*emphasis added*).

Therefore, as a result of the trial court's abuse of discretion and looking to the trial record as a whole, "the public's interest in a fair trial designated to end in just judgment" did not occur. *Prince*, 279 at 33, 301 S.E.2d at 472.

II.

The trial court abused its discretion in admitting Appellant's "mug-shot" photograph into evidence when the State failed to establish that the photograph was necessary to identify Appellant and the "mug-shot" was introduced only to draw attention to the circumstances under which it was taken and to suggest that Appellant had a criminal record; thus making it unfairly prejudicial.

Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (citing Rule 401, SCRE (providing the definition of relevant evidence)). Although photographs may be used to corroborate other evidence, it is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial. *State v. Edwards,* 194 S.C. 410, 10 S.E.2d 587 (1940); *See* Rule 402, SCRE ("Evidence which is not relevant is not admissible").

The introduction of a "mug-shot" of a defendant is a reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.[4] *State v. Denson,* 269 S.C. 407, 237 S.E.2d 761 (1977) (citing *United States v. Harrington,* 490 F.2d 487 (2d Cir.1973)); *see also State v. Tate,* 288 S.C. 104, 341 S.E.2d 380 (1986)(in-court identification by victim and booking date on photograph made introduction of mug-shot a reversible error); *see also State v. Robinson,* 274 S.C. 198, 262 S.E.2d 729 (1980) (mug-shot admissible because defense emphasized informant's inability to identify defendant in line-up). Because of its prejudicial impact, our Supreme Court

[4] While a reversible error, the erroneous admission of a defendant's "mug-shot" is subject to harmless error analysis. *State v. Traylor*, 360 S.C. 74, 85, 600 S.E.2d 523, 528 (2004) (*citing State v. Locklair,* 341 S.C. 352, 535 S.E.2d 420 (2000), *cert. denied* 531 U.S. 1093 (2001)).

admonished: "we fervently caution trial court judges against utilization of mug shot photos unless absolutely necessary." *State v. Traylor*, 360 S.C. 74, 85, 600 S.E.2d 523, 528 (2004).

In this case, the Appellant's mug-shot was irrelevant, unnecessary to the State's case and presented solely for the improper purpose of drawing attention to Appellant's past criminal record in order to suggest that Appellant was guilty in the present case. The State sought to introduce the mug-shot photograph from Appellant's arrest because the State alleged it "can serve the jury in helping them to identify - helping them to find that he has been properly identified, [Appellant] as the individual who sold the crack on the day alleged." Tr. 13, 3-6. Defense counsel objected, arguing that the photograph is not relevant because the jury had watched the video recording and Appellant was present in the courtroom. Tr. 63, ll. 12-19.

The trial court committed a reversible error in admitting the mug-shot and the State's justification for using the mug-shot argues against well-established precedent in *Tate*, *Denson*, *Robinson*, and *Traylor*. Turning to the first admissibility factor, Appellant was present at trial for identification by Tumblin, meaning the State had no demonstrable need for the mug-shot. Finally, the State presented no evidence indicating that Appellant's physical appearance had changed since the date of the video recording.

Turning to the second and third factors, Harrelson's testimony regarding having "dealt with" Appellant during his time at street crimes as well as Long's testimony regarding the booking process; served to reinforce to the jury that Appellant must have been a drug dealer because he was known to law enforcement in the street crimes unit, had been arrested and appeared in a mug-shot. Moreover, the State's questioning of Long about the specific date the mug-shot was taken, clearly implies to the jury that Appellant had other mug-shots on record that

Long had access to. Tr. 226, ll. 20-22; Tr. 227, ll. 11-12. Accordingly, the sole purpose of the mug-shot in the present case was to improperly draw attention to its origin, and imply guilt.

Thus, the trial court committed a reversible error in admitting Appellant's mug-shot because the State had no identification related need for it and used it only to establish Appellant's guilt.

III.

The trial court committed reversible error in refusing to grant a mistrial after members of the jury prematurely deliberated before closing arguments as an unsigned note inquired to the judge about photographs presented at trial that were critical to Appellant's defense, and the trial court posited highly suggestive leading questions to the foreman and alternate juror which failed to adequately determine whether premature deliberations took place or negatively impacted Appellant's right to a fair trial.

The constitutional implications of juror misconduct strike at the fundamental fairness of judicial proceedings. *Shumpert v. State,* 378 S.C. 62, 661 S.E.2d 369 (2008) (holding that juror testimony involving internal misconduct "may be received when necessary to ensure fundamental fairness").

In *State v. Aldret,* the Supreme Court set forth the framework for analyzing allegations premature juror deliberation: "the trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial." 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999). The *Aldret* Court noted, "If requested by the moving party, the court may *voir dire* the jurors and, if practicable, tailor a cautionary instruction to correct the ascertained damage." *Id.* The misconduct must relate to a material matter and must indicate an influence of bias or prejudice of the jurors. *State v. Grovenstein*, 335 S.C. 347, 352, 517 S.E.2d 216, 218 (1999). The granting or refusing of a motion for a mistrial will not be disturbed on appeal absent an abuse of discretion. *State v. Harris,* 340 S.C. 59, 63, 530 S.E.2d 626, 627–28 (2000).

The internal misconduct in the present case directly implicated the Appellant's right to due process of law, and right to fundamental fairness as the juror's questions dealt with the identification of the perpetrator. Tr. 255, ll. 13-19; *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783 (1915). Moreover, the judge's leading questions to the foreman, prefaced with a stern reminder of his pre-trial instructions to the jurors, were highly suggestive of the answers desired by the court. Tr. 257, ll.

22 – Tr. 258, ll. 19. The trial court concluded that dismissing the alternate juror would cure any prejudice, but did not provide a curative instruction to the remaining jurors or allow further questioning. *Id.* at 14-21. Nor did the trial court properly consider the applicable law as premature deliberation by even a single juror is in error. *State v. McGuire*, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979).

Appellant was prejudiced because this case hinged on whether the State had established beyond a reasonable doubt that Appellant sold drugs to the informant and the inquiry raised by the jury's question is clearly concerned with the quantity of the State's evidence on the issue of identification. Tr. 258, ll. 5-8. The photographs in question are the Appellant's mug-shot and the still photograph allegedly of Appellant in a vehicle which was purported to have been taken from the Tumblin's undercover video. *Id.* This is crucial evidence as the video footage was inconclusive and failed to show a drug transaction.

The deliberations and note allowed the State the opportunity to tailor their closing argument to the issue of identity, thus leading the State to strategically emphasize Harrelson's improper remarks about recognizing Appellant from the Street Crimes Unit and Appellant's mug-shot. Tr. 276, ll. 21-25; Tr. 279, ll. 23-25; Tr. 281, ll. 11-16; Tr. 282, ll. 4-24; Tr. 283, ll. 14-19; Tr. 284, ll. 9-24; Tr. 287, ll. 14-17. Furthermore, the trial court failed to interview the individual jurors or ask the foreman to explain what he meant by "any discussions," despite requests for more questions by the parties. Tr. 256, ll. 8-25; Tr. 258, ll. 3-8.

Appellant submits that the jury prematurely deliberated on the evidence concerning the identity of the perpetrator and that Appellant was prejudiced by these deliberations. The judge should have ordered a mistrial. At a minimum, the trial judge should have taken additional juror testimony on this issue of fundamental fairness and due process.

IV.

The trial court erred in refusing to grant a new trial where the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial.

Discussion

In *State v. Johnson*, our Supreme Court held that an appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). Specifically, the errors must adversely affect a defendant's right to a fair trial to qualify for reversal. *Id.*

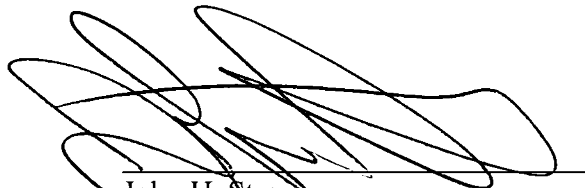
Even if this Court finds that the three previous errors standing alone do not require reversal, the cumulative effect of those errors and others, were so prejudicial as to deprive Appellant of a fair trial. *See Johnson*, 334 S.C. at 93, 512 S.E.2d at 803. For example: (1) the trial court admitted Appellant's "mug-shot" photograph despite Appellant being present for trial and its obvious implication of him being a "perp"; (2) law enforcement's use of a suggestive lineup when asking the informant to identify Appellant included two individuals of significantly different complexion than Appellant; (3) trial court's denial of a mistrial when the lead investigator stated he knew Appellant from dealing with him during his time in the street crimes division; and (4) the trial court's denial of a mistrial motion when the jury prematurely deliberated on identification evidence and the court failed to adequately question the jurors about possible deliberations.

Accordingly, the trial court erred in refusing to grant a new trial because the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial. *See Johnson,* 334 S.C. at 93, 512 S.E.2d at 803; *see also State v. Peterson*, 287 S.C. 244, 246, 335 S.E.2d 800, 801 (1985) (*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)) (combination of numerous errors committed by the trial court remand for a new trial).

CONCLUSION

By reason of the foregoing arguments, Appellant's convictions should be reversed and this case remanded to the York County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of January, 2015.