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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case Nos. 2009GS0702636, 2009GS0702637, 2009GS0702639,
2009GS0702594, 2009GS0702595
Appellate Case No. 2013-002394

The State,.. Respondent,

v.

Earnest Stewart Daise,.. Appellant.

INITIAL BRIEF OF APPELLANT EARNEST STEWART DAISE

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STATEMENT OF ISSUES ON APPEAL

I. Was the EMT testimony regarding John Doe 2's responses not only hearsay but did it also violate Appellant's Confrontation Clause rights?

II. Did the trial court allow a witness for the State to impermissibly comment on the credibility of another witness?

III. Was the testimony that one of the victims was afraid of Appellant irrelevant, and, therefore, should have been excluded?

IV. Did the trial court err in failing to require that the Solicitor's office produce materials amounting to a handbook on how to circumvent the requirements of *Batson*, which prevented Appellant from making a viable *Batson* challenge?

V. Did the trial court err by admitting a photograph of Appellant appearing in a custodial pose because the danger of unfair prejudice substantially outweighed the probative value of the photograph?

VI. Did the trial court err when it admitted the photograph containing the birthday cake for one of the victims because the photograph impermissibly aroused the passions and prejudices of the jury?

VII. Did the cumulative errors committed by the trial court have the effect of preventing Appellant from receiving a fair trial, entitling Appellant to a new trial?

STATEMENT OF THE CASE

Appellant is currently serving a sentence of life in prison without the possibility of parole plus seventy years following his convictions for two murders, assault and battery with the intent to kill, trafficking of crack cocaine, and possession with intent to distribute marijuana. The Beaufort County Grand Jury indicted Appellant on the charges of murder, assault and battery with the intent to kill, trafficking of crack cocaine, and possession with intent to distribute marijuana. The case was called for trial on October 14, 2013, before the Honorable Carmen T. Mullen. On October 17, 2013, the jury returned a verdict of guilty as to the charges of murder, assault and battery with the intent to kill, trafficking of crack cocaine, and possession with intent to distribute marijuana. (Tr. p. 2519:1-2523:7; R. ___.) The trial court sentenced Appellant to life in prison without the possibility of parole plus seventy years to be served consecutively. (Tr. p. 3182:19-3183:17; R. ___.) Appellant timely filed his notice of appeal.

STATEMENT OF THE FACTS

On November 15, 2009, Jeanine Mullen and her four-year old son John Doe 1[1] were found dead in their home located at 20 Player Road, Beaufort, SC. (Tr. p. 1227:3-1728:3; R. ___.) Two-year old John Doe 2 was also found wounded at the scene and rushed to the hospital for treatment. (Tr. p. 1797:10-1799:5, 1805:10-11; R. ___.) While treating John Doe 2 in the ambulance, the emergency medical technicians ("EMTs") questioned him about who caused his injuries. (Tr p. 1805:17-1807:18, 182:8-22; R. ___.) John Doe 2 survived. (Tr. p. 1979:3-11; R. ___.) During this interrogation, John

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[1] The identity of the children in this matter has been redacted and protected in accordance with the Supreme Court of South Carolina's Order of April 15, 2014. The children are referred to as John Doe 1 and John Doe 2, respectively.

Doe 2 mumbled something that "sounded like Daddy," which was relayed to the police. (Tr. p. 1807:2-4; R. ____.)

Later that evening, Appellant was picked up by the police and questioned about the crime. (Tr. pp. 2252-2266; R. ___.) While the interrogation of Appellant was ongoing, the police executed a search warrant on the mobile home where Appellant lived and found crack cocaine and marijuana in his room. (Tr. pp. 2136-2161; R. ___.)

Articles of Appellant's clothing that were found in his room during the search were sent to SLED for processing. (Tr. p. 2287-2291; R. ___.) Appellant's jeans had a small amount of gunshot residue and traces of blood on them. (Tr. p. 2332:22; R. ___.) At trial, the State introduced a photograph of Appellant wearing the jeans. (Tr. p. 2129:5-8; R. ___.) Originally, Appellant was handcuffed in the photo, but the State digitally removed the handcuffs out of the photo using photo-manipulation software. (Pre-Trial Tr. p. 78:22-25; R. ___.) A law enforcement officer also testified that he personally removed the jeans from Appellant. (Tr. p. 2287:7-25; R. ___.) Paul Meeh, a forensic scientist for SLED, testified that the blood on the jeans matched the DNA of Appellant and the decedent Jeanine Mullen. (Tr. p. 2364:1-25; R. ___.)

The State also introduced several photographs of the crime scene at trial. (Tr. p. 1720:22-1724:6; R. ___.) In one of the photographs, John Doe 1's birthday cake is visible. (Pre-Trial Tr. p. 83:18-25; R. ___.) The photos, and the testimony of those who first discovered the family, established that there was no forced entry. (Tr. pp. 1719, 1986; R. ___.)

At trial, the State introduced more circumstantial evidence. In an attempt to place Appellant in the area near the crime scene, the State offered the testimony of Jamelle

Simmons, Appellant's roommate. Ultimately, Mr. Simmons gave conflicting testimony concerning Appellant's whereabouts on the day in question. (Tr. pp. 2065, 2072-2081, 2086-2091, 2097-2101; R. ___.) Mr. Simmons testified that he picked Appellant up off the side of the road near the crime scene. (Tr. pp. 2072-2078; R. ___.) At another point in his testimony, Mr. Simmons claimed that Appellant was attending a race and hung out with friends at various houses on the evening in question. (Tr. pp. 2088-2103; R. ___.) At one point, Mr. Simmons stated that he only placed Appellant near the crime scene because law enforcement had threatened to charge him as an accessory after the fact. (Tr. p. 2103:6-20; R. ___.) The State then called Staff Sergeant Jeremiah Fraser to explain the repeated questioning of Mr. Simmons during the investigation. During SSG Fraser's testimony the State asked, "[a]nd was the story he [Mr. Simmons] gave those officers credible?" (Tr. p. 2108:3-5; R. ___.) SSG Fraser proceeded to testify that he believed Mr. Simmons' original story to law enforcement officials was not credible. (Tr. p. 2108:5, 11, 24; R. ___.)

Finally, the State called Allen Porter, Jeanine's coworker and friend, to characterize Appellant and Jeanine's relationship as abusive. Ms. Porter testified, among other things, that Jeanine was "terribly afraid" of Appellant. (Tr. p. 2009:1; R. ___.)

STANDARD OF REVIEW

The appellate standard of review for questions of law is *de novo*. *See Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("We are free to decide a question of law with no particular deference to the circuit court."); *Fresmire v Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2008) ("This court reviews all questions of law *de novo*."). The appellate court will not disturb the trial

court's findings of fact unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). The admission of photographs is within the sound discretion of the trial judge and will only be disturbed upon a showing of an abuse of discretion. *State v. Torres*, 390 S.C. 618, 622-23, 703 S.E.2d 226, 228 (2010). However, when a combination of errors, while individually insignificant,[2] has the effect of preventing a party from receiving a fair trial, then that party is entitled to a new trial. *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999).

ARGUMENT

I. The EMT testimony regarding John Doe 2's responses was not only hearsay but also violated Appellant's Confrontation Clause rights.

The trial court committed reversible error when it allowed EMT testimony regarding John Doe 2's responses to interrogation. This testimony was hearsay that did not fit into any hearsay exception or exclusion. Furthermore, this testimony violated Appellant's right to confront his accuser. Accordingly, Appellant requests that this Court reverse the decision of the trial court to admit this testimony and remand for a new trial.

At trial the State introduced evidence that Appellant committed the crimes through the testimony of two EMTs concerning what the victim, a 2 year old boy, told them about who committed the crime during transport to the hospital. (Tr. p. 1805:17-1807:18, 1821:8-22; R. ___.) Defense counsel objected to the testimony of both EMTs. (Tr. p. 1806:17-1820:14; R. ___.) The trial court overruled this objection. (Tr. p. 1806:18-19, 1820:15-16; R. ___.) These statements were not only hearsay but the

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[2] Appellant contends that each argument here is sufficient to reverse; there is no insignificant error in this record. The combination of errors *a fortiori* demonstrates prejudice and mandates a new trial.

admission of this testimony also denied Appellant his constitutionally-guaranteed right to confront his accuser.

A. The EMT testimony was inadmissible hearsay.

Hearsay is an out of court statement offered to prove the truth of the matter asserted, and is only admissible if the statement falls under an exception to the hearsay rule. *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 758 (1997). The hearsay exception for medical treatment can only apply to a victim's statements if the statement is "reasonably pertinent" to medical treatment or diagnosis. Rule 803(4), SCRE; *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997) (finding that the fact that the defendant asked the victim if he could hug her before committing the crime was in no way reasonably pertinent to the victim's diagnosis or treatment). The "perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim." *State v. Brown*, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985); *State v. Camele*, 293 S.C. 302, 305, 360 S.E.2d 307, 308 (1987) (granting new trial where doctor's testimony concerning statement made by victim during medical examination as to the perpetrator's identity could not possibly have assisted the doctor in treating or diagnosing the victim); *accord State v. Hudnall*, 293 S.C. 97, 101, 359 S.E.2d 59, 62 (1987).

John Doe 2's responses to the EMT's questions were not necessary for medical treatment or diagnosis. At the scene of the crime, John Doe 2 was unresponsive. (Tr. p. 1803:5; R. ___.) The paramedics gave him an IV and treated his wounds in order to stabilize him and transport him to the hospital. (Tr. p. 1804:2-21; R. ___.) Although questioning John Doe 2 in an attempt to elicit a response from him could arguably be

necessary for treatment, it was unnecessary to discover the identity of the perpetrator in order to treat or diagnose John Doe 2. Neither of the paramedics testified extensively about how they treated John Doe 2. (Tr. p. 1804:2-21, 1818:4-20; R. ___.) Rather, the testimony revolved around the EMT's interrogation of John Doe 2 and his response of "Daddy." (Tr. p. 1805:25-1807:20, 1819-1821:13; R. ___.) Clearly, the only purpose of asking these questions—coincidentally, also the purpose of their testimony—was offered to prove who committed the crimes. The question, and John Doe 2's response, was not necessary for treatment or diagnosis. Because this testimony was offered to prove who committed the crimes, and does not fit into a hearsay exception, the trial court should have excluded the testimony and sustained Appellant's objection.

Additionally, John Doe 2 could not have testified in his own regard because he was two years old at the time the crime occurred. *See S. Carolina Dep't of Soc. Servs. v. Doe*, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987) (stating that in order to be competent to testify a child under fourteen years of age must be able, among other requirements, "to perceive facts accurately through the medium of the senses, [and] to recall them correctly"); *see also State v. Belton*, 24 S.C. 185, 190 (1886) (holding that a twelve-year-old boy was not a competent witness). Since John Doe 2 could not be a competent witness, his out-of-court statement should not enjoy a greater claim to admissibility through a hearsay exception than his in-court testimony would have. Accordingly, the trial court should have excluded the testimony.

B. The admission of the EMT testimony prejudiced Appellant.

The admission of this hearsay testimony prejudiced Appellant. The testimony is the only direct evidence that Appellant committed the crime. No other witness, or

evidence, directly placed Appellant at the scene of the crime. Additionally, hearing testimony that a two-year old boy accused his own father of committing these crimes inflames the passions and prejudices of the jurors. Certainly, the jurors understand the love and respect a two-year old child has for a father. To hear a two-year old accuse his own father of a horrible crime—despite the admiration he has for his father—therefore carries significant emotional weight with the jurors. Accordingly, the admission of this hearsay evidence prejudiced Appellant, and he is entitled to a new trial.

C. The admission of the EMT testimony violated Appellant's Confrontation Clause rights.

The EMT testimony also violated Appellant's constitutionally-guaranteed right to confront an adverse witness. The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause was violated by the admission into evidence of a witness's statement to police where the witness did not testify at trial. 541 U.S. 36, 59 (2004). In *Crawford*, the taped statements of the defendant's wife who did not testify were not admissible due to the defendant's Confrontation Clause rights. *Id.* at 68-69. Under the rule established in *Crawford*, the Confrontation Clause allows the admission of "[t]estimonial statements of witnesses absent from trial . . . *only* where the declarant is unavailable, and *only* where the defendant has had a prior opportunity to cross-examine." *Id.* at 59 (emphasis added). This rule applies whenever "testimonial evidence is at issue," though *Crawford* "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68.

Subsequent Supreme Court decisions have made clear that when statements are made to the agents of the police, then those statements qualify as testimonial, fall within the ambit of *Crawford*, and should be analyzed as if they were made during police interrogation. *See, e.g.*, *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006). While "statements to physicians in the course of receiving treatment," are non-testimonial, *Giles v. California*, 554 U.S. 353, 376 (2008), the fact that a statement is made to a medical professional does not automatically qualify the statements as non-testimonial when the statements are not related to treatment. *See, e.g. State v. Ortega,* 175 P.3d 929, 935 (N.M. Ct. App. 2007) (holding that a child's statements to a sexual assault nurse examiner were testimonial; the child's medical needs were "not the primary object" of the nurse's examination and "were secondary to its purpose of gathering evidence"). The identity of the perpetrator of a crime is almost never necessary for medical treatment. *See State v. Camele*, 293 S.C. 302, 305, 360 S.E.2d 307, 308 (1987); *State v. Hudnall*, 293 S.C. 97, 101, 359 S.E.2d 59, 62 (1987); *State v. Brown*, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985). Statements made to medical professionals for evidence gathering purposes are, therefore, testimonial and subject to *Crawford.*

Here, the purpose of the EMTs questioning was to obtain evidence, not treat the patient. John Doe 2's response of "Daddy" was passed on to law enforcement personnel. (Tr. p. 1807:2-4; R. ___.) The State never asked for, nor offered, an explanation for why the EMTs required the information about the perpetrator of the crime. Certainly, the information was not necessary to stabilize John Doe 2 and transport him to the hospital. The only reason the EMTs wanted to know the identity of the perpetrator was to pass the information on to law enforcement. At that time the EMTs became the agents of the

police. Thus, the statement is testimonial and is barred under *Crawford* since John Doe 2 did not testify. Accordingly, Appellant is entitled to a new trial.

II. The trial court allowed a witness for the State to impermissibly comment on the credibility of another witness.

During the trial, one of the State's witnesses, Mr. Simmons, gave conflicting testimony concerning Appellant's activities and demeanor on the day of the crime. (Tr. pp. 2065, 2072-2081, 2086-2091, 2097-2101; R. ___.) This is consistent with the conflicting information which Simmons gave law enforcement officials during their investigation of the crime. (Tr. pp. 2101-2105; R. ___.) Specifically, he originally told officers that he never picked Appellant up from the side of the road near the crime scene. (Tr. pp. 2101-2103; R. ___.) Only after being threatened with the possibility of being charged as an accessory after the fact, he later told law enforcement officials that he did in fact pick up Appellant on the side of the road near the crime scene. (Tr. p. 2103:6-20; R. ___.) The State then called Staff Sergeant Jeremiah Fraser to explain why Mr. Simmons was questioned again. During SSG Fraser's testimony the State asked, "[a]nd was the story he [Mr. Simmons] gave those officers credible?" (Tr. p. 2108:3-5; R. ___.) Appellant objected to this line of questioning and was overruled. (Tr. p. 2108:15-19; R. ___.) SSG Fraser proceeded to testify that he believed Mr. Simmons' original story to law enforcement officials was not credible. (Tr. p. 2108:5, 11, 24; R. ___.)

The credibility of a witness is an assessment within the exclusive province of the jury. *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499-500 (2013). Therefore, witnesses are not allowed to testify whether another witness is telling the truth. *Id*; *see also Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding it is improper "pitting" to ask a witness "to comment on the truthfulness . . . of an adverse witness");

State v. Sapps, 295 S.C. 484, 485-86, 369 S.E.2d 145, 145-46 (1988) (holding it was improper for the State to "ask[] appellant if each of the other three witnesses was lying"). These principles are incorporated into Rule 608(a) of the South Carolina Rules of Evidence, which provides that opinion evidence regarding credibility "may refer only to character for truthfulness or untruthfulness," and "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Rule 608(a), SCRE.

The trial court improperly allowed a witness for the State to comment on the credibility of another witness. Mr. Simmons gave two different accounts of Appellant's activities and demeanor on the day in question. Appellant demonstrated the reason for the two different accounts was the threat by law enforcement officials of charging Mr. Simmons as an accessory after the fact. (Tr. p. 2103:6-20; R. ___.) The State sought to demonstrate that the first account of the day in question was not true. To accomplish this, the State specifically asked a witness to comment on the credibility of Mr. Simmons testimony, which is not permitted under South Carolina law. *Burgess*, 329 S.C. at 91, 495 S.E.2d at 447; *Sapps*, 295 S.C. at 485-86, 369 S.E.2d at 145-46. The jury alone is allowed to determine which portions of Mr. Simmons' testimony to believe.

Allowing SSG Fraser to comment on the testimony prejudiced Appellant by taking the determination of the credibility of Mr. Simmons out of the exclusive province of the jury. The jury decides whether to believe Mr. Simmons' testimony, in full or in part. The State directly influenced that determination by asking another witness give an opinion on Mr. Simmons' credibility. Additionally, this opinion was that Mr. Simmons'

testimony that Appellant was not near the crime scene is not true, and due to this prejudice, Appellant is entitled to a new trial.

III. Testimony that one of the victims was afraid of appellant was not relevant, and, therefore, should have been excluded.

During Appellant's trial, Ms. Porter, Jeanine's coworker and friend, testified that Jeanine was "terribly afraid" of Appellant. (Tr. p. 2009:1; R. ___.) Appellant objected to this testimony. (Tr. p. 1942:16-1944:4; R. ___.) There are two instances where the victim's fear of a defendant is relevant: (1) when the defendant claims self-defense; and (2) when the defendant claims the victim died as the result of an accident. Appellant did not assert either possibility as a defense, so the victim's fear of Appellant was not relevant.

In *State v. Garcia*, the South Carolina Supreme Court held that the admission of evidence concerning the victim's fear of the defendant under the "present state of mind" exception to the hearsay rule was reversible error. 334 S.C. 71, 76-77, 512 S.E.2d 507, 509-10 (1999). Admittedly, the Court found the victim's state of mind to be relevant evidence. *Id.* at 75, 512 S.E.2d at 508. However, the victim's state of mind was only relevant because the defendant maintained the victim was killed due to an accident. *Id.* A victim's fear of a defendant is therefore only relevant when the defendant contends the death was the result of accident or to assist the jury in determining the aggressor. *See id.* at 76-77, 512 S.E.2d at 509-10; *State v. Bush*, 211 S.C. 455, 460, 45 S.E.2d 847, 849 (1948) (finding that, because the defendant alleged self-defense, testimony concerning the demeanor of the parties at the time of crime was relevant to help the jury determine who was the aggressor); *accord State v. Adams*, 68 S.C. 421, 47 S.E. 676, 677 (1904).

The testimony that the victim was "terribly afraid" of Appellant should have been excluded. The victim's state of mind was not relevant. Appellant did not assert self-defense or contend the murder was the result of an accident. Appellant did not offer a theory as to how the murder occurred—other than to maintain his innocence. Therefore, the jury did not need to determine if the crime was the result of an accident or self-defense.

Additionally, testimony that a victim was "terribly afraid" of Appellant is highly prejudicial and should have been excluded at trial. *See* Rule 403, SCRE (stating that evidence may be "excluded if its probative value is substantially outweighed by the danger of unfair prejudice"); *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999). Ms. Porter's testimony allowed the jury to believe that Appellant committed the crime simply because a victim feared him. Since the testimony was not relevant at all it should have been excluded due to its prejudicial nature. The resulting prejudice from allowing this testimony entitles Appellant to a new trial.

IV. The trial court erred in failing to require that the Solicitor's office to produce materials amounting to a handbook on how to circumvent the requirements of *Batson*, which prevented Appellant from making a viable *Batson* challenge.

The trial court committed reversible error when it refused to require the solicitor's office to produce training materials regarding jury selection. Depriving Appellant of those materials prohibited Appellant from obtaining the information necessary to make a viable *Batson* challenge and prejudiced Appellant. Appellant moved to compel the state to produce the handbook. (Pre-Trial Tr. p. 9:18-10:2; R. ___.) Accordingly, Appellant respectfully requests this Court to reverse the decision of the lower court and remand for a new trial.

Purposeful discrimination in the jury selection process constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986). When a *Batson* challenge is made, the trial court must undertake a three step process: (1) the Defendant must make a prima facie showing that the challenge was based on race; (2) the State must then provide a race neutral explanation for the challenge; and (3) if the State's burden is met, then the trial court must determine whether the Defendant has proved purposeful discrimination. *State v. Giles*, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014). The United States Supreme Court has made clear that "[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson* at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)).

The United States Supreme Court has also held that materials that amount to a handbook on jury selection with an emphasis on race are evidence that a prosecutor is conducting the jury selection process in an impermissible manner. *See Miller-El v. Dretke*, 545 U.S. 231 (2005). In *Miller-El*, the United States Supreme Court held the juror "selection process [was] replete with evidence that prosecutors were selecting and rejecting potential jurors because of race." *Id.* at 265. The Court further concluded that the prosecution utilized a Texas jury selection manual, both in this case and generally, that emphasized race. *Id.* at 255-66. The reliance on this manual caused the prosecution to ask disparate questions of prospective jurors depending on the color of the juror's skin in an attempt to induce a disqualifying answer from potential African-American jurors.

Id. The unconstitutionally disparate questioning based on the manual violated *Batson*. *Id.* at 266.

Similarly, the current Solicitor's office has materials that amount to a handbook on jury selection and help avoid a *Batson* challenge. (Pre-Trial Tr. p. 12:23, 10:21-19:11, 33:8-34:7; R. ___.) These materials consist of CLE training agendas, correspondence to prosecutors, materials created for training, newsletters, case summaries, and training manuals. (Pre-Trial Tr. p. 14:6-14, 17:23-19:11; R. ___.) African-American male jurors in Beaufort County are struck at a rate of four-and-a-half times that of a white male. (Pre-Trial Tr. p. 12:17-p. 13:1; R. ___.) Additionally, due to the small percentage of African-Americans in the population of Beaufort County, it is difficult to demonstrate a pattern of striking jurors in a racially discriminatory manner in a single case. (Pre-Trial Tr. p. 28:10-22; R. ___.) The requested documents from the Solicitor's office would help demonstrate this pattern and explain the intent behind the solicitor's actions during jury selection. The handbook is, therefore, both relevant and material.

The trial court committed reversible error in not ordering the Solicitor's office to turn over the materials on jury selection. Appellant never made a *Batson* challenge because he did not possess the handbook on jury selection.[3] (Tr. 1670, lines 1-4.) However, given the small percentage of African-American jurors in Beaufort County it was impossible for Appellant to make a viable *Batson* challenge without the manual. Any jury pool in Beaufort County will have only a few African-American members,

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[3] *See State v. Bolton*, 271 Kan. 538, 544-45, 23 P.3d 824, 829 (2001) (ordering the trial court to hold a *Batson* hearing because defendant was prevented from making a full *Batson* challenge when the trial court summarily decided the prosecution had race-neutral reasons for striking jurors without even asking for explanation from the prosecution, and finding that if the prosecution could not recall race-neutral reasons for strikes, then a new trial was required).

making it difficult for a pattern of inappropriate questioning and striking of jurors to be observed. Additionally, the trial court could not properly review the direct and circumstantial evidence surrounding the solicitor's conduct during jury selection without also reviewing the manual, as is required. The trial court should have ordered the solicitor's office to turn over the requested material to Appellant. The failure to do so is reversible error warranting a new trial.

V. The trial court erred by admitting a photograph of Appellant appearing in a custodial pose because the danger of unfair prejudice substantially outweighed the probative value of the photograph.

The State introduced into evidence a photograph of Appellant that impermissibly implied Appellant was in police custody. (Pre-Trial Tr. p. 78:1-25, Tr. p. 2129:5-8; R. ___.) In the original picture, Appellant is visibly handcuffed. (Pre-Trial Tr. p. 78:22-25; R. ___.) At trial, the State attempted to digitally remove the handcuffs from the picture, but even with that attempt, Appellant still appeared in a position depicting him in a custodial pose. (Pre-Trial Tr. p. 78:22-25; R. ___.) Appellant objected to the introduction of this photograph at trial and was overruled. (Tr. p. 2128:18-22; R. ___.) The photograph depicts how Appellant was dressed when taken into custody by the police. (Pre-Trial Tr. p. 78:14-15, Tr. p. 2128:6-16; R. ___.) The police handcuffed Appellant before taking him into custody. (Tr. p. 2253:7; R. ___.) The State introduced the photo to show the jury Appellant dressed in a pair of jeans. The State also used the photograph to establish the chain of custody of the jeans. (Pre-Trial Tr. p. 78:6-13; R. ___.) A law enforcement officer later testified that he personally took the jeans off Appellant. (Tr. p. 2287:7-25; R. ___.) Additionally, Appellant was willing to stipulate to the chain of custody for the jeans. (Pre-Trial Tr. p. 77:18-19; R. ___.) Testing revealed

the jeans contained gunshot residue and blood of Appellant and one of the victims. (Tr. p. 2332:22. 2364:1-25; R. ___.)

Photographs of criminal defendants where they appear to be in custody imply prior bad acts by the defendant and are inadmissible at trial. *State v. Traylor*, 360 S.C. 74, 85 ,600 S.E.2d 523, 528 n. 12 (2004). Three conjunctive requirements must be met in order for a photograph to be admissible where the defendant appears to be in custody: (1) the State must demonstrate a need to introduce the photographs; (2) the photographs must not imply the defendant has a prior criminal record; and (3) the manner in which the photographs are introduced at trial must not draw particular attention to the source or implications of the photograph. *State v. Denson*, 269 S.C. 407, 412, 237 S.E.2d 761, 763-64 (1977). Admission of a photograph if all three criteria are not met is reversible error. *Traylor* at 85, 600 S.E.2d at 528 n.12.

The State did not meet any of the three requirements of *Denson*. First, the State did not demonstrate a need to introduce the photograph into evidence. The officers who detained Appellant could—and did—testify to Appellant wearing the jeans in question. Furthermore, Appellant was willing to stipulate to the chain of custody of the jeans. The State did not need to introduce the photo of Appellant in order to establish Appellant wore the jeans, as a witness testified to personally taking the jeans off Appellant. Additionally, the photograph impermissibly implies that Appellant has a prior criminal record because he still is in the posture of a man who is handcuffed in the photo, despite the unhelpful attempt to remove the handcuffs from the picture. It makes no difference that the handcuffs can no longer be seen because of Appellant's custodial pose. Additionally, the jurors knew Appellant was handcuffed when he left his home in police

custody. The photograph depicted Appellant after he left home in police custody. Thus, the introduction of the photograph drew attention to the fact that Appellant was handcuffed and in police custody at the time. The State, therefore, cannot meet the requirements of *Denson*. Accordingly, Appellant is entitled to a new trial.

VI. The trial court erred when it admitted the photograph containing a birthday cake for one of the victims because the photograph impermissibly aroused the passions and prejudices of the jury.

The trial court further erred in allowing a photo of the living room where the crime occurred into evidence. (Tr. p. 1720:22-23, Pre-Trial Tr. p. 83:17-85:13; R. ___.) The photo was prejudicial because a birthday cake can be seen in the photograph. (Pre-Trial Tr. p. 83:18-25; R. ___.) The birthday cake is in the house because it was the fourth birthday of one of the victims, John Doe 1. (Pre-Trial Tr. p. 83:20-21; R. ___.) Appellant objected to the photo being entered into evidence and the trial court overruled the objection. (Tr. p. 1720:16-23; R. ___.) The photograph was introduced under the guise of establishing no signs of forced entry, but other photographs and witnesses were called to testify that there were no signs of forced entry. (Pre-Trial Tr. pp. 83-85, Tr. p. 1719, 1986; R. ___.) The photo was merely introduced to establish that one of the victims was killed on his fourth birthday.

Photographs calculated to arouse the sympathy or prejudice of the jury or that are irrelevant or unnecessary to substantiate facts should be excluded. *See State v. Haselden*, 353 S.C. 190, 201, 577 S.E.2d 445, 451 (2003) (holding that pictures of victim's anus in capital case were introduced to inflame the passions and prejudices of jurors and to give impression that victim was possibly sexually assaulted); *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (holding admission of photograph of victim was not

necessary to prove guilt and admission required new trial); *State v. Livingston*, 327 S.C. 17, 20, 488 S.E.2d 313, 314 (1997) (holding that photo of the victim, a good looking woman, taken shortly before her death was inadmissible in felony DUI case). A photograph containing information that a four year old was shot and killed on his fourth birthday certainly invokes the sympathy and prejudice of the jury. Additionally, the photograph was unnecessary as other photographs and testimony demonstrated there were no signs of forced entry. Thus, the photo was unnecessary to substantiate facts. The trial court erred in not excluding the photograph because the danger of unfair prejudice substantially outweighed the photograph's probative value.

VII. The cumulative errors committed by the trial court had the effect of preventing Appellant from receiving a fair trial, entitling Appellant to a new trial.

The cumulative error doctrine allows that, even if each error raised alone is insufficient to warrant a new trial, the cumulative effect of those errors is enough to require a new trial. *State v. Freeman*, 319 S.C. 110, 123, 459 S.E.2d 867, 875 (Ct. App. 1995). The doctrine recognizes that "the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal." *Id.* As previously demonstrated, the trial court committed numerous errors, each sufficiently prejudicial to warrant reversal individually. Specifically, the trial court: (1) admitted photographs where the probative value was substantially outweighed by their probative value; (2) allowed hearsay testimony that violated Appellant's Confrontation Clause rights; (3) allowed a witness for the State to impermissibly comment on the credibility of another witness; (4) allowed irrelevant testimony that a victim feared Appellant; and (5) failed to require the State to turn over the *Batson* manual preventing

Appellant from making a *Batson* challenge. Each error prejudiced Appellant, and the cumulative prejudicial effect of the errors to Appellant is overwhelming. Accordingly, Appellant is entitled to a new trial. *See 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) (holding that "numerous errors committed by the trial court in this death penalty case compels us to reverse and remand for a new trial").

The State capitalized on these errors at trial. During closing arguments, the State bolstered the version of events given by Mr. Simmons favored by law enforcement, further reminding the jurors that a law enforcement officer found Mr. Simmons' other version of events, where Appellant has an alibi, not to be credible. (Tr. p. 2462:5-2463:21, 2469:13-14; R. ___.) The State also made several mentions that it was John Doe 1's birthday; reminding the jurors that one victim was killed on his fourth birthday and of the impermissible photos of his birthday cake. (Tr. p. 2459:1-25, 2461:17-19; R. ___.) Furthermore, the State relied heavily on the impermissible hearsay statements of John Doe 2, which also violated Appellant's confrontation clause rights, during closing arguments in order to link Appellant to the crime. (Tr. p. 2470:16-2472:9; R. __.) The cumulative effect of these errors, each sufficient to warrant a new trial on its own, and the manner which the State capitalized on these error, requires this Court grant Appellant a new trial.

CONCLUSION

Consistent with the foregoing, the trial court committed reversible error when it refused to compel the State to turn over materials that amounted to a *Batson* handbook depriving Appellant of the ability to make a proper *Batson* challenge.

The trial court committed further reversible error entitling Appellant to a new trial in (a) allowing EMT testimony that was not only hearsay but violated Appellant's confrontation clause rights; (b) admitting a photograph of Appellant in a custodial pose that implied Appellant has a criminal history; (c) admitting a photograph showing the birthday cake of a victim where the prejudice substantially outweighed the probative value; (d) allowing a State witness to impermissibly comment on the credibility of another witness; and (e) allowing testimony that a victim feared Appellant where the testimony was irrelevant and substantially prejudiced Appellant.

Accordingly, Appellant respectfully requests this Court to reverse the decision of the lower court and remand for a new trial.

[*signature page attached*]

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Feb. 19, 2015

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2009GS0702636, 2009GS0702637, 2009GS0702639, 2009GS0702594, 2009GS0702595
Appellate Case No. 2013-002394

The State, ... Respondent,

v.

Earnest Stewart Daise, ... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Initial Brief of Appellant

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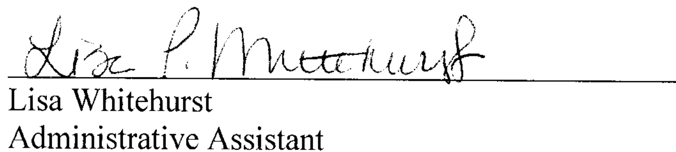

Lisa Whitehurst
Administrative Assistant

February 19, 2015

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February 19, 2015

RECEIVED

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

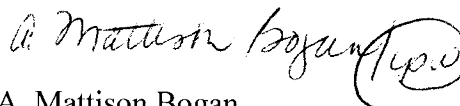
RE: The State v. Earnest Stewart Daise
Appellate Case No. 2013-002394
Our File No. 38769/01523

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal. We would ask that you file the original and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of these pleadings.

Very truly yours,



A. Mattison Bogan

AMB:lpw
Enclosures
cc: Alan M. Wilson, Esquire
Donald J. Zelenka, Esquire
Robert M. Dudek, Esquire