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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

SAMMIE L. GERRICK,

APPELLANT

APPELLATE CASE NO. 2014-000385

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by admitting into evidence a "root" associated with witchcraft and a can of "Law Stay Away" that were seized from the center console of Appellant's truck pursuant to a search warrant because this evidence was not relevant and any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Appellant?

2.

Whether the court erred by denying Appellant's motion for a mistrial after a law enforcement officer characterized the "brown piece of paper bag" that was "taped up" to form some sort of "capsule" with weeds, twigs, and a penny inside and the words "Set me Sammie Gerrick free from murder and revoked bonds" written on the outside as a "witchcraft root" in front of the jury since this testimony was highly prejudicial and the court's curative instruction failed to cure the prejudice suffered by Appellant?

3.

Whether the court erred by refusing to grant a mistrial after the state showed a videotape of Appellant's interview with law enforcement before his arrest with a polygraph machine clearly visible on the table since this was unduly prejudicial and denied Appellant a fair trial?

## STATEMENT OF THE CASE

A Barnwell County Grand Jury indicted Appellant at the November 2013 term of General Sessions for the offense of murder. R. 638-639. On October 29, 2013, a hearing was held before the Honorable Doyet A. Early, III pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), to determine Appellant's competency to stand trial. R. 14, ll. 1-6. After Appellant was found competent, a second hearing was held on November 13, 2013 before Judge Early to resolve numerous pretrial motions. R. 16, ll. 1-10.

Appellant's case was ultimately called to trial on November 18, 2013 before Judge Early, and a jury. R. 1. Assistant Attorneys General S. Creighton Waters and Jason S. Anders represented the state, and Daniel W. Williams represented Appellant. R. 1.

On November 21, 2013, the jury found Appellant guilty. R. 553, ll. 21-25. He was sentenced by Judge Early to life without parole. R. 555, ll. 17-21.

This appeal follows.

## STATEMENT OF FACTS

Kimberly ("Kim") Smith, the decedent's girlfriend at the time of his death, testified that she last heard from the decedent, Tyrone Donaldson, around 1:30 pm on July 21, 2011. She said she sent him numerous text messages that afternoon and called him when she got off of work that evening, but Tyrone never responded. When she got home, she noticed Tyrone's small white Honda was not in the driveway. R, 53, l. 16 – 54, l. 24. Upon entering the house, she asked Tyrone's young daughter if she had seen her father. According to Kim, the daughter "said she didn't know where he went but he came in the house and changed his shoes and he went in the closet and got a gun out and left. Said he'd be right back." R. 55, ll. 4-18.

Kim drove around Blackville that evening looking for Tyrone and stopping in areas where she knew he would "hang out," but could not find him. R. 55, l. 25 – 56, l. 12. She then contacted Tyrone's mother, who said she had not heard from Tyrone since earlier that day. R. 56, l. 25 – 57, l. 8.

According to Kim, it was unusual for Tyrone not to respond to text messages and telephone calls and she had never known him "to just leave and not call like this." R. 54, ll. 9-15; R. 58, ll. 22-24. Kim testified that Tyrone's mother said "if I don't hear from him by in the morning then she was going to go to the police." R. 58, ll. 2-5.

Maurice Williams testified that he had known Tyrone "all [his] life growing up" and Appellant "was kind of part of my family." He and Appellant "lived right next door to each other." R. 63, ll. 15-21; R. 65, ll. 11-14. Maurice testified that he received a telephone call from Appellant on Friday, July 15, 2011. According to Maurice, Appellant said he was in jail and asked Maurice "did I have any money and how [much] I had to contribute towards

getting him out of jail." Maurice maintained that he told Appellant that he "only had $2,500 which [he] was saving up for a down payment on a house." R. 65, l. 21 – 66, l. 18. He testified that Appellant "told [him] to get with Tyrone [the decedent]. And that was basically the end of that conversation." R. 66, ll. 19-23.

Maurice claimed that he "did get with Tyrone" and Tyrone already knew "that Sammie [Appellant] was wanting us to get him out of jail" and he would "get back with me when he find out how much it cost." R. 66, l. 23 – 67, l. 1. Tyrone contacted him a few days later and said it was going to cost $6,600 "to get him out." R. 67, ll. 11-14. Tyrone told Maurice "that he couldn't pay it all by himself. And, you know, would I help him. Would I give half." R. 67, ll. 15-20. Maurice was concerned about being paid back, but claimed Tyrone told him "that Sam [Appellant] said he'd give it [the money] to us 30 minutes after he get out of jail." R. 67, l. 21 – 68, l. 4. He testified that he agreed to meet Tyrone at the bank on the morning of July 21, 2011 and give Tyrone his half of the money. He claimed he met Tyrone shortly after 10:00 am, gave him $3,300, and then went back to work. R. 68, l. 10 – 71, l. 13.

Tyrone called Maurice later that day between 1:00 and 1:30 pm and said, "I got him [Appellant]. We're on our way back to Blackville. Do you want to talk to him?" R. 71, l. 18 – 72, l. 3. According to Maurice, Appellant then got on the telephone and said, "I appreciate y'all doing that for me. We going to get the money [that Appellant owes them]. I'm going to bless y'all boys." He claimed Appellant was "insinuating [by this last comment] that he was going to give us more money than we gave him." R. 72, ll. 4-18. Maurice also testified that Appellant said "Tyrone should have my [Maurice's] money when I get off work." R. 73, ll. 7-14.

Maurice next heard from Tyrone between 2:00 and 2:30 pm. Tyrone told Maurice he had dropped Appellant off at home to change his clothes and that Tyrone had went home as well to switch cars before "going back to get the money." R. 72, l. 19 – 73, l. 6. Maurice claimed he "had no more contact with either one of them" after this conversation so he called Tyrone when he got off work around 5:30 pm to check on his money. He called Tyrone numerous times, but there was "no answer." R. 73, ll. 15-22. Maurice found this to be "unusual" especially since they "had been talking all day." R. 75, ll. 5-10.

Later that night sometime "between seven and eight o'clock," Maurice spoke to Appellant in the yard near the side of Appellant's house.[1] Maurice said Appellant "asked me did I see Tyrone. And I was like, no, the last time I talked to him y'all was together. He was like, well I gave him the money. He got your money." Maurice claimed Appellant told him he and Tyrone "went out there and dug the safe up . . . [and] when we got the safe open and Tyrone seen all those hundred dollar bills, he kissed me on my forehead." According to Maurice, Appellant did not say where the two went to dig up this safe, but he said there was between $90,000 and $100,000 in the safe. Maurice testified that Appellant then said "we took that money and we loaded that little Honda down with money. Had the back of that Honda loaded down with money because I didn't want to ride with it in the truck." He claimed Appellant said, "Tyrone took off going his way and he [Appellant] went his way" and then Appellant asked, "[D]o you reckon that nigger took my money?" Maurice said that after the two had this conversation he had "a nervous feeling" and "didn't know what was going on." R. 75, l. 22 – 77, l. 20.

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[1] As noted above, Maurice testified he and Appellant were next door neighbors. See R. 65, ll. 12-14.

The following night, Maurice received a text message from a telephone number he did not recognize. The text message said, "help me this Tyrone am hurt Kim ex got me help please." After he got this text message, Maurice said he called his friend, Jamaal Berry. Jamaal told Maurice that he had received "basically the same text" from the same number. R. 82, l. 4 – 84, l. 5. Maurice claimed that "[t]he way he [the person who sent the text message] spelled I'm" stood out to him because "it was spelled am, A-M instead of I-M." He testified, "When I paid attention to it, I was like, I know somebody else that text like that. So I went . . . through my phone and I have some texts from Sammie Gerrick [Appellant] in there. And all the text [messages] in there where he used the word I'm, he misspelled it A-M. The same exact way." R. 84, l. 12 – 85, l. 1. For example, Appellant had previously sent Maurice a text message that said, "[M]an am worried like hell didn't sleep or eat dog damn man damn." R. 86, ll. 16-20. Maurice said, "It's supposed to be I'm, but it's spelled A-M, am." R. 86, ll. 21-23.

Additionally, Maurice testified that when he saw Appellant on July 22, 2011, the day after Tyrone disappeared, Appellant "had some scratch marks on his chest." R. 87, ll. 19-25. Maurice said he asked Appellant "what happened" and Appellant told him that law enforcement had tazed him when he was arrested earlier in July and "they had him face down in the parking lot on the pavement. So . . . he was insinuating that the pavement rubbed against his chest and scratched him." R. 88, ll. 1-17.

Bradley Smith testified that in July 2011 he lived in Blackville with his mother, his brother, and Appellant. Smith's mother, Claudette Daniels, was Appellant's girlfriend for nearly a decade and the two were dating in July 2011. R. 115, l. 24 – 116, l. 24. Smith testified that he saw both Appellant and Tyrone Donaldson on July 21, 2011, the day Tyrone

went missing. He said he first saw the two at his house around one or two o'clock in the afternoon. He explained, "Tyrone pulled up. Sam [Appellant] was in the car with him. He [Tyrone] dropped him [Appellant] off. Sam came in the house, changed [his clothes]. Tyrone left. Tyrone probably about 30, 40 minutes later came back. Tyrone was sitting outside on the phone. I looked out the window and saw him. Then Sam came out [of] the [bed]room, got in the car with him [Tyrone]. And they talked and he [Appellant] got back out the car, went behind the barn, grabbed two shovels, put them in the back of his [Appellant's] pickup truck. And he [Appellant] pulled out first [in his pickup truck], then Tyrone pulled out after [in his own car]." R. 117, l. 9 – 118, l. 11.

Smith said he saw Appellant again later that night around ten o'clock. He claimed "[y]ou could tell something was wrong" "[b]ecause he [Appellant] was sitting outside on the steps for hours. He just looked - - just looked like he was facing - - like he had a lot on his mind." R. 118, ll. 12-24.

Shaneka DeLoach testified that she saw Appellant and Tyrone Donaldson around 3:15 pm on July 21, 2011 at a "BP gas station." She claimed, "I seen Tyrone sitting in the car. Tyrone never got out his car. And Sam [Appellant] was standing at the driver's side talking to Tyrone. And I kept noticing that they could have been fussing because he [Appellant] was moving his hands and like looking real mean." R. 123, ll. 9-23. DeLoach said that "Tyrone was in a white Honda Civic" and she thought Appellant was driving a burgundy Dodge truck. R. 123, l. 24 – 124, l. 7. She later admitted that she never actually saw Tyrone, she simply recognized his car. R. 124, ll. 21-22; R. 126, ll. 11-15. According to DeLoach, when Appellant left the gas station he headed in the direction of Denmark, but she could not remember which direction Tyrone went. R. 125, ll. 7-15.

Jamaal Berry testified that he knew both Appellant and Tyrone Donaldson and that Maurice Williams was his best friend. He first learned Tyrone was missing when Kim, Tyrone's girlfriend, called and asked him on July 21, 2011 whether he had seen or heard from Tyrone that day. He said Maurice called him later that night and said "[h]e needed to talk to me real bad. Come to Blackville right now." R. 131, l. 14 – 132, l. 10. According to Jamaal, when he got to Maurice's house around eight or nine o'clock, Maurice "was really scared" and told him "what was going on with Sammie Gerrick [Appellant] and the money." R. 132, l. 11 – 133, l. 4. Specifically, Maurice told Jamaal that Appellant allegedly told him "about that safe in the woods" and "[a]bout digging up the safe out in the woods and putting that money in Tyrone's car." R. 139, ll. 11-23. Jamaal also claimed that Maurice told him "if anything happened to him tell the police Sam [Appellant] did something to me." R. 140, ll. 5-6.

The following night, July 22, 2011, Jamaal received an unusual text message from a telephone number he did not recognize. The message said, "Help me I'm hurt Kim's ex-husband has me or something similar to that or whatever." Jamaal said he talked to Maurice and Kelsea Hallingquest, Tyrone's sister-in-law, about the text message because they had both received a similar message. He also called Appellant. According to Jamaal, when he told Appellant about the text message, Appellant said, "I told you it wasn't me. Maybe this will take some heat off me, or something like that." R. 133, l. 18 – 136, l. 10.

Kelsea Hallingquest was Tyrone's sister-in-law and was living with him at the time of his death. On the morning of July 21, 2011, Tyrone asked her to babysit his daughters and then left. She said she "knew he was going to get Sammie [Appellant] out of jail, but [she] didn't know what jail he was in." Kelsea claimed that Tyrone returned later that

afternoon sometime after one o'clock, changed his shoes, and left again, this time with a shotgun. She said Tyrone told her that he was leaving, but did not tell her where he was going. R. 141, l. 9 – 144, l. 2. When Tyrone did not return later that night, she called his friends looking for him, but she "couldn't get anybody." R. 144, ll. 3-18.

The following night, July 22, 2011, Kelsea received a text message from a telephone number she did not recognize. The message said "help me sister-in-law Kim ex-husband got me am hurt." R. 144, l. 25 – 145, l. 10. She claimed that Tyrone never called her his sister-in-law and that she "was either Kelsea or his sister." R. 145, ll. 11-18. She also explained that on that same day, July 22, 2011, Lana Joyner called her and said she had seen Tyrone's car parked behind the China Express in Orangeburg. After Lana called her, Kelsea reported this information to the Blackville Police Department and drove to Orangeburg. R. 146, l. 25 – 148, l. 12.

John Holston, the Chief of Police for the Blackville Police Department, testified that his agency was contacted by Tyrone's mother, Carol Bracey, on July 22, 2011. Bracey told him that "she believed her son was missing because he had not come home the night before . . . That herself and other family members . . . weren't able to contact him." R. 151, ll. 7-23. After speaking with Bracey, the Blackville Police Department began investigating the report as a "missing person's case" and entered the "vehicle information" for the white Honda Civic, which was the car Tyrone "was last seen driving," into the "National Crime Information Center" (NCIC) database. Holston explained that his office was "contacted by a representative from Orangeburg Public Safety advising that they had located a vehicle matching that description. After they confirmed the information we had entered in NCIC,

they notified us it was indeed the vehicle that was last seen driven by Mr. Donaldson [Tyrone]." This was also on July 22, 2011. R. 152, l. 5 – 153, l. 9.

That same day, July 22, 2011, Holston interviewed Appellant for the first time because, through his initial investigation, he learned Appellant was the last person seen with Tyrone before he went missing. According to Holston, Appellant told him during this interview that Tyrone had gotten him out of jail that day, that they had gone to Enterprise Bank so Appellant could cash a check, and then they "went to the Junior Food Mart, which is the BP station in Blackville." Holston testified that Appellant said this was the last time he had seen Tyrone. R. 153, l. 14 – 154, l. 9.

Holston interviewed Appellant a second time on July 23, 2011. During this second interview, Appellant told Holston the same account he had given the day before, but provided more detail. According to Holston, Appellant explained during this interview that he had been sentenced to six months imprisonment for failing to pay child support and that he was later charged with escape after he ran from the courthouse while he was in custody. Appellant said a Bamberg County Detention Center employee named Johnell Rice helped him contact Tyrone several times while he was in jail about getting the money to post his bond. Tyrone ultimately picked Appellant up on that Thursday morning, July 21, 2011, in his white Honda Civic and drove him home. Once home, Appellant said he went inside, cut his hair, shaved, and showered. After he "cleaned up," Appellant and Tyrone went to Enterprise Bank where Appellant cashed a check for a hundred and four dollars. The two then went to Junior Food Mart where Appellant put thirty dollars worth of gasoline into his 1998 Dodge pickup truck. Appellant again indicated that this was the last time he had seen Tyrone before he disappeared. R. 155, l. 6 – 158, l. 9. Also during this interview, Appellant

told Holston that Tyrone had given him his ATM card that day and he had since used it. R. 154, l. 10 – 155, l. 4; R. 158, ll. 19-24. Holston claimed he also noticed some scratches across Appellant's arms and chest during this interview and photographed them. R. 159, l. 11 – 160, l. 13.

About a week later on July 30, 2011, Holston received a telephone call from Appellant. Holston claimed that when he answered Appellant said, "Tyrone's not - - he not dead . . . they've got him. He said that Black's got Tyrone and they want $25,000 in cash for him. He said, I don't have that kind of money, but I'll do anything to get him back . . ." Holston testified he asked Appellant "do you know where he [Black] got him [Tyrone]" and Appellant said "over around Springfield . . .where Black was from." He claimed he told Appellant that "if they call you back, get more information and then call me back and then we'll see where we'll go from there." R. 160, l. 20 – 162, l. 22. According to Holston, Appellant also told him during this conversation that he had talked to Tyrone and Tyrone said "he was hurt and that he needed help, and they got me." R. 162, l. 23 –163, l. 3.

Appellant's wife, Charlene Gerrick, chose to invoke her marital privilege not to testify about her communications with Appellant. R. 170, l. 18 – 172, l. 7. According to Charlene, Appellant came to her house on July 21, 2011, the day Tyrone disappeared, around nine or ten o'clock at night. She claimed that after they "spent some time together," she "took him [Appellant] to go get a white car . . . back up in the woods." She said they went down a paved road and then "turned and went on a dirt road" into the woods. She identified the car as a white Honda Civic. Charlene alleged that Appellant "got out [of] my car, got into that car [the white Honda Civic], and we came back out [of the woods] and he drove it over to Orangeburg" and parked it behind "the China Express." After Appellant

parked the car, Charlene gave him a ride back to her house and Appellant went home. R. 174, l. 10 – 179, l. 19.

On August 3, 2011, Charlene was interviewed by Lieutenant Shaun Harley, an agent with the South Carolina Law Enforcement Division (SLED). She told Harley exactly what she had told the jury about driving Appellant to the woods to move the white car and how Appellant had driven the white car to the China Express in Orangeburg. Charlene explained that after she told Harley this information, she took the police out to the wooded area off the dirt road where she had gone with Appellant to move the white car and showed them where it was located. R. 180, l. 5 – 181, l. 9.

Lieutenant Harley explained that Chief Holston of the Blackville Police Department had contacted SLED on July 22, 2011 and asked for assistance with this investigation. R. 182, l. 12 – 183, l. 10. He was then assigned to the case. That same day, he drove to Blackville and was "briefed" by Holston about what law enforcement knew about the case at that time. Holston also told Harley about his first interview with Appellant. R. 184, l. 12 – 185, l. 15. Harley then participated in the second interview of Appellant with Holston. This interviewed occurred sometime after midnight on the morning of July 23, 2011. R. 185, ll. 16-24. Harley claimed that during this interview he noticed scratches on both of Appellant's arms and his chest. According to Harley, Appellant said he received these scratches while he was incarcerated at the Bamberg County Detention Center when "a light fixture fell on top of him."[2] R. 187, l. 1 – 188, l. 3.

[2] Danny Abraham, a corrections officer at the Bamberg County Detention Center, testified that on July 19, 2011, he found glass from a broken light fixture on the ground of Appellant's cell. However, he claimed he examined Appellant and Appellant did not have any cuts on his arms or chest nor was he bleeding. R. 346, l. 2 – 347, l. 25.

Harley also interviewed Charlene Gerrick on August 3, 2011. After the interview, Charlene took him to the wooded area where she had gone with Appellant to move the white car. Harley said they went "down a road called Sunshine Road. And off Sunshine Road is a little dirt road called One Way . . . After we made the little left off of Sunshine Road onto One Way . . . it was like two houses to your right. Farther [down] it goes into a heavy wooded area . . ." R. 196, l. 25 – 198, l. 25.

The next day, August 4, 2011, a team of officers from SLED, the Barnwell County Sheriff's Office, and the Blackville Police Department searched the wooded area Charlene had shown them. The officers formed a line standing parallel to each other, but spaced apart, and walked together combing the area. They were "looking for anything that looked out of place or disturbed." Harley testified that the captain of the Barnwell County Sheriff's Office was walking with a stick and would poke the ground as he walked. According to Harley, the captain "came across a disturbed area . . . and when he poked his stick into the ground . . . an odor came up." He claimed this odor smelled like decomposition. R. 199, l. 3 – 200, l. 22. After this discovery, the officers contacted SLED and requested the crime scene division "come down to look at the area." R. 200, l. 23 – 201, l. 5.

Melissa Skipper Wallace, the lead crime scene technician, and her team arrived at the site around 10:45 am. Wallace claimed that when she probed the ground in the area identified as a "potential burial site," it "smelled like rotten meat." The officers removed the soil around the site "very slowly" and then sifted through the soil searching for any evidence. Once they located what appeared to be cotton material from a t-shirt, they notified the coroner. After the coroner arrived, they continued to excavate the area and, around 10:30 that night, they removed the body of a black male identified as Tyrone

Donaldson. R. 272, l. 17 – 274, l. 15; R. 275, ll. 19-21; see also R. 202, ll. 6-25. The body was decomposing and there "were bindings around the wrists and ankles. It [the body] was face down and the knees were bent as if put into the ground on the stomach with the legs bent up." Tyrone's "arms were underneath his chest" and "there was a piece of root that actually went through his arms. And it [the root] was connected on both ends so his arm had gone through and around the root." R. 279, l. 10 – 280, l. 5.

During their search of the area near the burial site, law enforcement found a fishing lure and "some green netting." However, these items were not collected or preserved because "we thought it could possibly be trash." R. 275, ll. 5-18; see R. 294, ll. 3-9.

Lieutenant Harley testified that after they discovered the body, law enforcement, pursuant to a warrant, searched Appellant's Dodge pickup truck, his home with Claudette Daniels, and Charlene Gerrick's house. R. 203, ll. 10-21. All of the searches took place on August 5, 2011. Inside the center console of Appellant's truck officers found "a brown piece of paper bag" that was "taped up" to form some sort of "capsule." Inside the capsule were weeds, twigs, dust, and a penny. The brown paper bag also had words written on it. R. 210, l. 23 – 212, l. 8. On one side of the brown paper it said, "Set me Sammie Gerrick free from murder and revoked bond. Jack Early set me free now. Jack Early set me free now. Jack Early set me free now. Sammie Gerrick, Sr. Sammie Gerrick, Sr. Sammie Gerrick, Sr. So shall it be. So shall it be. So shall it be. Amen. Amen. Amen." On the other side of the brown paper bag were the words from Psalms 130, a verse from the Bible. R. 213, l. 7 – 214, l. 13.

A handwriting expert compared the writing on the brown paper bag to Appellant's handwriting. He concluded the words on the brown paper were **not** written by Appellant.

R. 252, ll. 4-18. Lieutenant Harley admitted that he did not know how the brown paper capsule got into Appellant's truck or who put it there. R. 252, l. 19 – 253, l. 1. Law enforcement also found a bottle or canister inside the center console of Appellant's truck near this brown paper capsule with the words "Law Stay Away" written on the outside. R. 289, ll. 16-18.

During the search of Appellant's home he shared with Claudette Daniels, law enforcement found "green netting and fishing lures which were similar to what [they] had seen [near] the body."[3] R. 291, ll. 13-20; see R. 472, l. 17 – 473, l. 12. They collected the green netting and fishing lures from Appellant's house, but could not compare them to the netting and fishing lure found near the body because they had never collected these items from the grave site. R. 293, l. 25 – 294, l. 12; see R. 299, ll. 15-23.

Dr. Janice Ross Edwards, the pathologist who conducted the autopsy, testified that when she received the body it "was very much covered with dirt and was decomposing." She maintained that the decomposition was "moderate to severe," that there was "skin slippage" where the "skin actually falls away from the body, and some soft tissue had deteriorated. R. 302, l. 21 – 303, l. 18. According to Edwards, the advanced stage of the decomposition made it difficult to see any bruising, abrasions, or other external soft tissue injuries. However, she did do a full body x-ray and found no bone fractures or bullets inside the body. R. 303, l. 22 – 304, l. 20.

[3] Bradley Smith, Claudette Daniels' son, testified that about a year before Tyrone went missing, he, Appellant, his brother, and his mother put down new sod around their house. He claimed the sod came with "some sort of green netting" around it. See R. 118, l. 25 – 119, l. 10.

Edwards testified that "externally the only marks [she] could see were some defects in the back of the left forearm. They were splits in the skin consistent with a laceration." R. 305, ll. 5-7. She claimed this could have been a defensive wound. R. 312, ll. 2-22. In addition to this external wound, Edwards also observed "some ligatures that were essentially like shoe strings around his wrists and his ankles." R. 305, ll. 1-4. The ligatures left marks on the skin. R. 306, l. 2 – 308, l. 19.

Edwards maintained, "The fact that he was buried underneath dirt, and without evidence of shooting or fractured skull, for instance from a beating, it is most likely that there was some kind of asphyxiation. In other words, some kind of strangulation around the neck with . . . an arm as a cause of death. But the whole scenario . . . together makes it a homicide for manner of death." R. 309, ll. 1-8. She also opined that his death could have resulted from "being incapacitated and then buried" alive. R. 309, ll. 9-18.

On cross-examination, Edwards said there was no dirt inside Tyrone's throat or nostrils. She also admitted that there were no visible signs of strangulation on the body. She conceded that while "we all know he was found buried," she does not know exactly how he died. R. 315, ll. 13 – 316, l .6.

Angela Cotton, the assistant branch manager for SRP Federal Credit Union in Barnwell, testified that Tyrone Donaldson's ATM card was used at 8:01 pm on July 21, 2011 at the ATM machine at Enterprise Bank in Blackville. This withdrawal was for $302.50. His card was used again on July 22, 2011 at 12:31 am for a "bill payment transaction" to SCANA Energy in the amount of $603.50. It was used a third time at 12:34 am on July 22, 2011 for a "bill payment transaction" to SCANA Energy in the amount of $103.50. On July 22, 2011 at 8:17 am, the card was used at an ATM machine at Bank and

Trust in Barnwell. This withdrawal was for $403.00. The card was then used three times at 8:21 am, 8:22 am, and 8:25 am on July 22, 2011 at the Palm Pantry in Bamberg. The first two transactions were withdrawals from an in-store ATM. The third was an in-store purchase. The amount of the transactions were $202.00, $102.00, and $35.00, respectively. The card was last used at 8:37 am on July 22, 2011 at Bamberg Auto Parts in the amount of $36.36. R. 408, l. 7 – 414, l. 20. Cotton claimed that in order to make these ATM withdrawals one would have to have had the "PIN number." R. 415, ll. 9-14.

Law enforcement collected several receipts indicating Appellant was the one who used Tyrone's ATM card. See R. 239, ll. 20-22; see also R. 251, ll. 1-19. Appellant also admitted to using the card during his interview on July 23, 2011. R. 158, ll. 19-24; R. 164, l. 7 – 165, l. 3. He said that he and Tyrone had received $18,000 from the sale of "backhoe equipment" and that this joint money was in Tyrone's bank account, which is why Tyrone gave him his debit card on July 21, 2011 and provided him with the "PIN number." R. 194, l. 20 – 195, l. 23.

Lieutenant Harley testified that they interviewed Appellant again on August 17, 2011. Appellant was incarcerated at the Charleston County Detention Center at the time because of a "violation of bond or probation." R. 196, ll. 19-24; R. 203, l. 22 – 204, l. 12. The U.S. Marshall's Task Force transported him to the Barnwell County Sheriff's Office.[4] R. 204, ll. 7-12. Because he was in custody, Harley advised Appellant of his Miranda[5] rights. According to Harley, Appellant said he understood his rights and signed the waiver form. R. 213, l. 16 – 216, l. 23. During this interview, Appellant allegedly mentioned a

[4] It is unclear from the record why the U.S. Marshall's Task Force transported Appellant as opposed to a different agency.

man named "Big Joe" and talked about going to Orangeburg, but did not admit to moving the white car. R. 223, ll. 1-4. After this interview, Appellant was served with a warrant for murder and transported to the Barnwell County Detention Center. R. 223, l. 24 – 224, l. 3.

A couple of hours later, Appellant contacted someone at the detention center and requested to speak with law enforcement again. He was then transported back to the Barnwell County Sheriff's Office. Harley claimed they read Appellant his Miranda rights again and Appellant agreed to waive his rights. During this second interview on August 17, 2011, Appellant allegedly told law enforcement that Tyrone was supposed to complete a drug transaction with Andre Hightower, O'Shane Dixon, and a "Big Joe" after the two parted at the Junior Food Mart that afternoon. Tyrone was supposed to give Appellant $7,000 from the transaction and Appellant was "to repay Tyrone Donaldson $3,000 out of that 7,000" for the bond money. Appellant also allegedly admitted to moving Tyrone's white Honda Civic. Harley claimed Appellant told him "Andre Hightower called and told me to do it" and Hightower was supposed to pay him $400. R. 227, l. 4 – 230, l. 18.

Moreover, Appellant told Harley that he had last seen Tyrone around 3:45 that afternoon and denied he had ever been to the wooded area where the body was found. R. 233, l. 25 – 234, l. 22. Harley said he "bluffed" and told Appellant that one of the homeowners who lived in one of the two houses off Sunshine Road near where the body was found had described seeing a Dodge pickup truck similar to his truck. Appellant still denied he had ever been to that area. R. 234, l. 19 – 236, l. 8.

The next day, August 18, 2011, Appellant requested to speak with Jeff Croft, who at the time was an investigator with the Barnwell County Sheriff's Office. Appellant allegedly

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[5] Miranda v. Arizona, 384 U.S. 436 (1966).

explained how his truck could have been seen in the area near the burial site. Croft claimed Appellant's "explanation" was "a drug deal gone bad." According to Croft, Appellant said that there was a "kilo of cocaine that had been messed up" and "[t]he money was never received by the person who supplied the cocaine" who was "a gentleman by the name of Big Joe." Appellant allegedly went on to say that "when Mr. Donaldson had gotten him out of jail they had discussed about the package [the cocaine] being messed up and that Mr. Donaldson had between eight- and $9,000 that he was going to take out there and make things right." Appellant supposedly said that he went to Andre Hightower's house with Tyrone and Andre "lured them" into the woods a "pretty good way" behind the house. When they went out into the woods, they met Big Joe, O'Shane Dixon, and Andre Hightower. Croft testified that Appellant told him O'Shane and Andre then "grabbed Tyrone and Big Joe began to hit him." Appellant was told to leave to "go get the money" so he left in his truck to see if he could find some money. R. 456, l. 9 – 458, l. 1.

Lieutenant Harley testified that the narcotics division at the Barnwell County Sheriff's Office had never conducted any narcotics investigations involving Tyrone Donaldson. There was also no mention throughout the community about Tyrone being involved in drug activity. R. 241, ll. 11-22. Harley also interviewed Andre Hightower and O'Shane Dixon to corroborate Appellant's statements, but he found no evidence either was involved in Tyrone's death.[6] R. 241, ll. 2-10. He also interviewed Kim Smith's ex-husband, Andre Smith, based on the text messages Maurice Williams, Kelsea Hallingquest,

[6] Andre Hightower and O'Shane Dixon were also called to testify at trial. Both denied any involvement in the death of Tyrone Donaldson. See R. 417, l. 12 – 418, l. 16 and R. 424, l. 18 – 429, l. 5.

and Jamaal Berry had received, but Smith did not know anything about the case. R. 240, l. 3 –241, l. 1.

Early Glover, who was incarcerated at the time of trial at the Orangeburg County Detention Center, admitted that, in addition to his pending charges, he had prior convictions for criminal domestic violence of a high and aggravated nature and third degree burglary. He also served prison time for a probation violation. Glover testified that in October 2011, he was incarcerated at Kirkland Correctional Institution and met Appellant. R. 438, l. 23 – 440, l. 16.

Glover claimed he "struck up a friendship with" Appellant and, a few days after they met, Appellant told him "he was in a bind" and "needed two people." Appellant "was saying [something] about a statement. He needed a statement." R. 441, ll. 4 – 442, l. 25. Glover agreed to help Appellant in exchange for a thousand dollars. R. 444, ll. 7-13. He claimed "a few days pass[ed] and he [Appellant] had end[ed] up writing a statement which was about three or four pages [long]." Appellant allegedly "gave it to [Glover] and told [him] this is how it [the statement] need to be written." R. 443, ll. 2-22. Glover then took the statement to his cell and copied it in his own handwriting and signed the back page. R. 443, l. 24 – 445, l. 19. He then gave the statement he wrote and the original one Appellant wrote back to Appellant. However, Appellant never paid him the one thousand dollars. R. 447, ll. 2-21; R. 449, ll. 19-22. Glover could not remember what the statement said, but he recalled the name Tyrone and that Tyrone, Appellant, and Glover were "supposed to meet two guys . . . [i]n the woods somewhere" and "Sammie [Appellant] and one of the guys started arguing" and Glover "was told to stay in the car." R. 445, l. 5 – 446, l. 21.

The jury ultimately found Appellant guilty and Judge Early sentenced him to life without parole. R. 553, l. 21 – 554, l. 6; R. 555, ll. 17-21.

## ARGUMENT

The court erred by admitting into evidence a "root" associated with witchcraft and a can of "Law Stay Away"[7] that were seized from the center console of Appellant's truck pursuant to a search warrant because this evidence was not relevant and any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Appellant.

**Relevant Facts**

During the pretrial hearing held on November 13, 2013, defense counsel moved to suppress the "root" associated with witchcraft and the canister with the words "Law Stay Away" written on the outside that were found in the center console of Appellant's pickup truck and seized pursuant to a search warrant. R. 20, ll. 5-23.

The "root" was essentially "a brown piece of paper bag" that was "taped up" to form some sort of "capsule." Inside the capsule were weeds, twigs, dust, and a penny. The brown paper bag also had words written on it. R. 210, l. 23 – 212, l. 8. On one side of the brown paper it said, "Set me Sammie Gerrick free from murder and revoke bond. Jack Early set me free now. Jack Early set me free now. Jack Early set me free now. Sammie Gerrick, Sr. Sammie Gerrick, Sr. Sammie Gerrick, Sr. So shall it be. So shall it be. So shall it be. Amen. Amen. Amen." On the other side of the brown paper bag were the words from Psalms 130, a verse from the Bible. R. 213, l. 7 – 214, l. 13; State's Exhibit Nos. 29-30 (on file with this Court); State's Exhibit Nos. 43-46 (on file with this Court).

Defense counsel argued, "I think that there will be people in the jury box who think

[7] The can of "Law Stay Away" was a small canister or bottle with a label on the outside stating "Law Stay Away." See R. 289, ll. 16-18 and State's Exhibit No. 43 (on file with this Court).

that this is some kind of witchcraft, some kind of devil worship. As soon as they hear it and they connect it to Mr. Gerrick [Appellant], they're going to form an unfavorable opinion of him just because of that. And they may want to convict him not based upon the evidence but upon their emotions about root doctors and witchcraft." R. 21, ll. 15-22. He went on further to say, "But the rule says if it's evidence that's likely to cause a jury to make a decision based upon emotion and not upon the facts in front of them, then it should be excluded. And for that reason, because it doesn't say who wrote it, because it's not clear what it means, and because it has or could have an unfair and prejudicial effect in front of the jury, we think it should be excluded." R. 22, ll. 3-9. Defense counsel maintained that the "canister of Law Stay Away" should also be excluded because it "also appears to be part of this same witchcraft or voodoo." R. 22, ll. 10-16.

The assistant attorney general argued that "long standing law in South Carolina" says "that any act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." R. 22, l. 24 – 23, l. 3. He claimed Appellant had constructive possession of these items because they were found in the center console of his truck "where people keep personal items." R. 23. ll. 16-23. He also argued that there was a connection between this evidence and the murder offense for which Appellant was charged. He maintained, "At the time they were discovered, Mr. Gerrick [Appellant] had already been interviewed repeatedly by police and was clearly aware, not only of the victim's disappearance, but also that [he] was sort of a central figure in this particular investigation." R. 23, l. 24 – 24, l. 3. Lastly, the assistant attorney general argued that "the text of the letter itself . . . is in the nature of [an] admission. Set me free, protect me from this murder, Jack

Early set me free, set me free. So clearly that's in the nature of an admission." R. 26, ll. 9-13.

Defense counsel responded that "any probative value it [the "root" and the canister] may have is substantially outweighed by" its prejudicial effect. R. 30, ll. 10-13.

The court held that the "root letter, the root itself, and the Law Stay Away can" allegedly found in Appellant's truck were admissible because the evidence "could be construed by the jury as . . . some type of evidence of consciousness of guilt. Therefore I find that it should be admitted and then obviously the jury can give it any weight, whatever weight, or no weight, that it decides it should give it, if any." The court also ruled that the probative value of the evidence outweighs any prejudicial effect to Appellant. R. 208, l. 11 – 209, l. 13.

**Discussion**

The court erred by admitting into evidence the "root" supposedly associated with witchcraft and the can of "Law Stay Away" that were seized from the center console of Appellant's truck because this evidence was not relevant and any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Appellant.

"Generally, all relevant evidence is admissible. Rule 402, SCRE. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice." State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011) (citing State v. Pittman, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007) and Rule 403, SCRE). "Evidence is unfairly

prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)).

"As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." State v. Martin, 403 S.C. 19, 26, 742 S.E.2d 42, 46 (Ct. App. 2013) (quoting State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976)) (internal quotation marks omitted). "It has long been the rule in South Carolina that evidence of witness intimidation and evidence of attempted flight are probative of the accused's consciousness of guilt." Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (internal citations omitted). However, "[w]here the circumstances fail to show the necessary nexus between a defendant's flight and the current offense for which he is on trial, the flight evidence is not relevant and should not be admitted." Orozco, 392 S.C. at 220, 708 S.E.2d at 231 (citing State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006)). Additionally, in 2011, this Court also held "that evidence of a suicide attempt is probative of a defendant's consciousness of guilt."[8] Orozco, 392 S.C. at 219-220, 708 S.E.2d at 231.

Unlike the state argued below, evidence of the "witchcraft root" and the canister of "Law Stay Away" was not relevant or probative to show consciousness of guilt. It was undisputed that Appellant **did not** write the words that appeared on the outside of the brown paper bag that was used to create the "witchcraft root." See R. 252, ll. 4-18. Additionally, there was no evidence presented as to how the "witchcraft root" and the canister of "Law Stay Away" got into the center console of Appellant's pickup truck. The record is unclear

[8] Our Supreme Court granted a petition for writ of certiorari to review this Court's decision in Orozco. However, Juan Carlos Orozco later moved to dismiss his appeal and our Supreme Court granted his motion before issuing an opinion.

as to the exact date, but Appellant was arrested on a bond revocation sometime between July 31, 2011 and August 2, 2011. See R. 195, l. 24 – 197, l. 6. This evidence was not discovered until August 5, 2011. Therefore, it is possible that the "witchcraft root" and the canister of "Law Stay Away" were placed in Appellant's truck after Appellant was arrested and without his knowledge. See State v. Quattlebaum, 338 S.C. 441, 454, 527 S.E.2d 105, 111-112 (2000). Consequently, there is not a sufficient connection between the "witchcraft root" and the can of "Law Stay Away" and Appellant. See Mincey v. State, 314 S.C. 355, 358, 444 S.E.2d 510, 511-512 (1994).

Furthermore, the meaning of the "witchcraft root" and the canister of "Law Stay Away" is ambiguous thereby making its probative value, if any, extremely low. At most, and this is still sheer speculation, this evidence showed Appellant was aware that there were *suspicions or accusations* that he was involved in the decedent's death because he was the last person to be seen with the decedent before he disappeared. It certainly does not demonstrate Appellant knew law enforcement sought him for murder. In fact, law enforcement **had not even** obtained a warrant for Appellant's arrest at the time this evidence was discovered and certainly had not obtained a warrant before Appellant was arrested on the bond revocation.

Moreover, this evidence was highly prejudicial to Appellant. See Kansas v. Leitner, 272 Kan. 398, 416, 34 P.3d 42, 56 (2001) ("It seems evident that our culture associates witchcraft with Satanic worship and other evil practices. Any mention of a defendant's involvement with witchcraft is highly prejudicial."); see also Dunkle v. Oklahoma, 139 P.3d 228 (2006). It would be evident to most jurors, if not all, that the brown paper capsule with incantations written on the outside and the canister of "Law Stay Away" were associated

with witchcraft or voodoo. Since witchcraft and voodoo have always been associated with the devil and feared by the American people there is no doubt that this evidence prejudiced Appellant and likely caused the jury to convict him based on an improper basis. See Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989).

Additionally, this evidence improperly attacked Appellant's character and was thereby prejudicial. As defense counsel argued below, this evidence likely caused the jury "to form an unfavorable opinion of him [Appellant]" and "convict him not based upon the evidence but upon their emotions about root doctors and witchcraft." R. 21, ll. 15-22; See Mitchell, 298 S.C. at 188-189, 379 S.E.2d at 124.

Because any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Appellant, the court erred by allowing the state to present this evidence to the jury. As a result, Appellant's conviction should be reversed and this case remanded for a new trial.

2.

The court erred by denying Appellant's motion for a mistrial after a law enforcement officer characterized the " brown piece of paper bag" that was "taped up" to form some sort of "capsule" with weeds, twigs, and a penny inside and the words "Set me Sammie Gerrick free from murder and revoked bonds" written on the outside as a "witchcraft root" in front of the jury since this testimony was highly prejudicial and the court's curative instruction failed to cure the prejudice suffered by Appellant.

**Relevant Facts**

Melissa Skipper Wallace testified during direct examination that she searched Appellant's Dodge Ram pickup truck on August 5, 2011. She identified a photograph of the inside of the center console of Appellant's truck that was taken during the search of the vehicle. R. 287, l. 16 – 288, l. 24. The following exchange then took place on the record:

> BY MR. WATERS:
>
> Q: And I want to point out two items. First of all, this little brown thing right there. Can you tell me what that is?
>
> A: Yes. It was a taped-up package that we opened up and it was later determined to be a - - it was told to me ***it was a witchcraft root***.
>
> THE COURT: Whoa, whoa. Disregard that, ladies and gentlemen of the jury.
>
> BY MR. WATERS:
>
> Q: Okay. And what's this other bottle, right there?
>
> A: It was a canister that the title on it said something about Law Away.

Q: Okay. All right. And if I could, this is the little brown capsule that you were talking about right there?

A: The package, yes.

Q: And then that is the bottle of Law Away; is that correct?

A: It is.

R. 289, ll. 6-24.

Shortly thereafter, the state concluded its direct examination of Wallace and the court instructed the jury to take its afternoon break. R. 291, ll. 21-23. After the jury was excused, defense counsel immediately moved for a mistrial based on Wallace's testimony that the brown paper capsule was a "witchcraft root." He argued the court's curative instruction to "[d]isregard that" was insufficient and drew more attention to the prejudicial testimony. R. 292, ll. 8-12. The court stated in response, "She's [Wallace] obviously not qualified to give that opinion. Just sort of blurted it out. I gave a curative instruction, and I'll respectfully deny the same." The court later acknowledged that "the cat's out of the bag," but maintained his curative instruction cured any prejudice since it was immediately given. R. 292, ll. 13-20.

**Discussion**

The court erred by denying Appellant's motion for a mistrial after Wallace referred to the brown paper capsule as a "witchcraft root" in front of the jury since this testimony was highly prejudicial and the court's curative instruction failed to cure the prejudice suffered by Appellant.

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an

error of law." State v. White, 371 S.C. 439, 443, 639 S.E.2d 160, 162 (Ct. App. 2006) (citing State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997) and State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999)). In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the 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) (internal citations omitted). Specifically, the trial court is to consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (internal citation omitted). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. See State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

The trial court acknowledged that Wallace's testimony referring to the brown paper capsule as a "witchcraft root" was error because "[s]he's obviously not qualified to give that opinion" and "[j]ust sort of blurted it out." R. 292, ll. 13-14. It is also clear from the record that the court found Wallace's testimony was error since he immediately interrupted her after she made the prejudicial comment and sua sponte instructed the jury to "[d]isregard that." See R. 289, ll. 7-14.

Not only was this testimony error, it was also unfairly prejudicial to Appellant. As argued above, any mention of a defendant's involvement in witchcraft or voodoo is highly prejudicial. See Leitner, 272 Kan. at 416, 34 P.3d at 56 ("Any mention of a defendant's

involvement with witchcraft is highly prejudicial."); see also Mitchell, 298 S.C. at 188-189, 379 S.E.2d at 124. Wallace's testimony specifically referring to the brown paper capsule as a "witchcraft root" directly confirmed the jurors' thoughts that this evidence was associated with witchcraft, voodoo, or some other devil worshiping religion. Unfortunately, it likely led the jury to convict Appellant on an improper basis, namely that he engages in witchcraft or voodoo which is associated with devil worshiping. This is especially true in this case where the state failed to present any direct evidence of Appellant's guilt and relied solely on circumstantial evidence to establish his guilt.

Moreover, the court's basic and rudimentary instruction, "Disregard that, ladies and gentlemen of the jury," was wholly insufficient to cure the prejudice suffered by Appellant. Despite telling the jury to "disregard that," the court failed to specifically instruct the jury that it was not to consider this prejudicial testimony during its deliberations. State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) ("The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations. A mere general remark excluding the evidence does not cure the error."). The court also failed to instruct the jury that Wallace was not qualified to make such a determination and that her testimony was improper speculation.

However, even if the court had properly instructed the jury during its curative instruction, the instruction still would not have cured the prejudice to Appellant because, as the trial court recognized, at that point "the cat's out of the bag" and one cannot unring the bell. See R. 292, ll. 13-20; see also State v. Kennedy, 272 S.C. 231, 250 S.E.2d 338 (1978) (recognizing some errors are not curable by instruction).

Because the trial court erred in denying Appellant's motion for a mistrial based on Wallace's highly prejudicial testimony and the court's curative instruction was insufficient to cure the prejudice suffered by Appellant, his conviction should be reversed and this case remanded for a new trial.

3.

The court erred by refusing to grant a mistrial after the state showed a videotape of Appellant's interview with law enforcement before his arrest with a polygraph machine clearly visible on the table since this was unduly prejudicial and denied Appellant a fair trial.

**Relevant Facts**

At the pretrial hearing held on November 13, 2013, defense counsel moved to suppress the videotaped interview of Appellant with a polygraph machine clearly visible on the table. R. 16, l. 25 – 17, l. 5. The assistant attorney general argued that the polygraph machine is "not like the old-school polygraph where you've got the big machine and the graphs . . . It's just a computer . . .I don't think . . . that the jurors would know what it is. It just looks like a computer and some papers on a table just like people would have in an office." R. 17, l. 22 – 18, l. 14. Defense counsel argued in response, "I disagree and think if he's going to put something in there it ought to be audio only and not show any kind of machines." R. 19, ll. 2-5.

Without ruling, the court stated, "We'll discuss that on Monday. But there will be absolutely no mention of a polygraph. And if they even come close to looking like anything other than a computer, who's to say that people on the jury don't know that that's the new polygraph. Who knows. We'll see. We'll deal with it." R. 19, ll. 6-12.

In the middle of trial, the assistant attorney general informed the court that "obviously there was the issue with regards to Agent Burnett's interview that showed the computer on the table. And our position was you couldn't really tell that was a polygraph but understanding Mr. Williams' concern essentially what we're going to do is we're going to play it and I'm going to take a little program box and just put it right up on there so the

full portion of the desk cannot be seen by the jury so they won't be able to see that and **nobody who may know what that is** can draw any conclusions in that regard." Defense counsel and the court agreed that this was the proper way to proceed. R. 206, ll. 4-23 (emphasis added).

John Burnett, a law enforcement officer with SLED, interviewed Appellant on July 25, 2011. The interview was audio and video recorded. During Burnett's testimony, the state presented the videotape of the interview. R. 258, l. 17 – 259, l. 16. The video, Court's Exhibit No. 2, is on file with this Court. Before the tape was published to the jury, the following exchange took place between the court and the assistant attorney general:

> THE COURT: Pursuant to pretrial rulings on the screen, you know how to handle it.
>
> MR. WATERS: Yes, sir. I'm setting that up right now to be consistent with your ruling. Yes, sir.

R. 257, l. 24 – 258, l. 2.

A portion of the videotaped interview was then published to the jury. After Burnett identified himself and Appellant on the tape, the court excused the jury from the courtroom. When the jury had exited the room, defense counsel stated, "Your Honor, they did show the machine on the tape" and then moved for a mistrial. R. 260, ll. 3-15. The court indicated that "[t]he pretrial ruling was that during the interview conducted by Mr. Burnett the machine to his right, to Mr. Gerrick's left, would be covered to avoid any appearance that this machine might be a polygraph machine." The state argued that the polygraph machine was just "a laptop computer." R. 261, ll. 3-15.

Defense counsel argued that publishing the video with the polygraph machine visible was prejudicial because "it seems to me that this is a box here, there are wires here

that possibly run off to them. And I'm scared it's going to - - somebody on there [the jury] is going to identify it as a polygraph." R. 261, ll. 18-23. The witness, John Burnett, admitted that there were wires present on the table, but claimed he could not see them in the video played for the jury. Defense counsel also said the wires were difficult to see on the screen shown to the jury, but were visible on his computer. R. 262, ll. 4-15.

The court stated, "I cannot see, as the Judge in this case, how that . . . video with that, those instruments, i.e., laptop computer - - and you say a black box. I can't discern a black box. - - papers, I don't see how that's prejudicial at all either, how it could be deemed to be a machine of any type. Mr. Coleman (verbatim) [sic] had it hid pursuant to our pretrial instructions. And I think he inadvertently let it slide off or something when he was trying to get the sound off." R. 262, l. 18 – 263, l. 2. The court ultimately denied the motion for a mistrial and instructed the state to "make sure it [the polygraph machine] stays covered." R. 263, ll. 7-9.

**Discussion**

The court erred by refusing to grant a mistrial after the state showed the videotape of Appellant's interview with John Burnett on July 25, 2011 with a polygraph machine clearly visible on the table since this was prejudicial and denied Appellant a fair trial.

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." White, 371 S.C. at 443, 639 S.E.2d at 162 (citing Crim, 327 S.C. at 257, 489 S.E.2d at 479 and Patterson, 337 S.C. at 226, 522 S.E.2d at 851). In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the 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." Prince, 279 S.C. at 33, 301 S.E.2d at 472 (internal citations omitted). Specifically, the trial court is to consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." Craig, 267 S.C. at 269, 227 S.E.2d at 310 (internal citation omitted). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. See Edwards, 373 S.C. at 236, 644 S.E.2d at 69.

"The general rule is that no mention of a polygraph test should be placed before the jury." State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) (holding the trial court did not abuse its discretion in granting a new trial based on a reference by a state's witness to a polygraph test that she had taken). "Mention of a polygraph test might arise in any one of many ways. The safer course would normally be to avoid ***any*** mention of a polygraph examination." State v. McGuire, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979) (emphasis added). Additionally, "[e]vidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible." State v. Pressley, 290 S.C. 251, 252 349 S.E.2d 403, 404 (1986) (holding the trial judge improperly allowed repeated references to the defendant's submission to a polygraph examination where the evidence showed the defendant confessed immediately after taking the polygraph, thus reversing and remanding for a new trial).

The trial court erred in refusing to grant a mistrial after the state published a video to the jury that clearly showed a polygraph machine on the table during Appellant's pre-arrest interview with Agent Burnett in violation of the judge's ruling. See State v. Parker, 391

S.C. 606, 707 S.E.2d 700 (2011). Portions of this interview were the first clips of Appellant's numerous interviews with law enforcement shown to the jury. It is the only interview where a computer, wires, and other equipment are visible on the table. During all the other interviews, the only items that appear on the table are papers and photographs. Despite what the state argued below, the equipment was not just a laptop computer. As defense counsel pointed out, it was obvious that there were wires connecting the laptop computer to a black box in the upper left hand corner of the table.

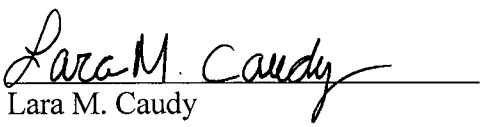
It was error for the state to publish the polygraph machine to the jury, especially after the court ruled the footage displaying the machine was inadmissible because "who's to say that people on the jury don't know that that's the new polygraph." R. 19, ll. 8-12; See Johnson, 376 S.C. at 11, 654 S.E.2d at 836 ("[N]o mention of a polygraph test should be placed before the jury."). Appellant was prejudiced by this error because the jury likely determined this equipment was a polygraph machine and inferred that law enforcement had given Appellant a polygraph test during the early stages of the investigation because they suspected he was being deceptive. This is particularly true since the state argued throughout the trial that Appellant was lying during his interviews with law enforcement and purposefully being deceptive throughout the investigation. This interview also took place before Appellant's arrest. Therefore, the jury also likely inferred that Appellant was arrested because he failed the polygraph test and because law enforcement determined he was being deceptive during his interview on July 25, 2011.

Because the court erred by refusing to grant a mistrial thereby denying Appellant a fair trial, this Court should reverse and remand for a new trial.

## CONCLUSION

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

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of May, 2015

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



May 20, 2015

Lara M. Caudy

Lara M. Caudy
Appellate Defender

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

SAMMIE L. GERRICK,

APPELLANT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Caroline M. Scrantom, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of May, 2015.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of May, 2015.

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