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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Dorchester County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2014-002337

THE STATE,

Respondent,

vs.

TYRONE DARIUS ELLISON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Although the jury was exposed to misconduct after one of the jurors was improperly approached during a trial recess, the trial judge did not abuse his broad discretion by denying Appellant's mistrial motion in light of the fact he only declined to grant the motion after ensuring the misconduct had not affected the impartiality of the jury by removing and replacing a juror who could no longer remain impartial, questioning the remaining jurors to ensure they had not been impacted by the improper contact, and instructing the jurors they could only consider the evidence and testimony presented during trial when deciding the case.

STATEMENT OF THE CASE

In July of 2013, Appellant Tyrone Darius Ellison was arrested following an investigation into the armed robbery of a bank located in North Charleston, South Carolina. In December of 2013, the Dorchester County Grand Jury indicted Appellant for one count of entering a bank, depository, or building and loan association with the intent to steal. In April of 2014, the Dorchester County Grand Jury additionally indicted Appellant for one count of armed robbery. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a sentence of life without parole upon conviction based on Appellant's prior conviction for the "most serious" offense of assault and battery with intent to kill. On October 20, 2014, a jury trial was commenced in the Dorchester County Court of General Sessions with the Honorable D. Craig Brown, circuit court judge, presiding. At the conclusion of the multi-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for armed robbery along with a concurrent term of imprisonment of thirty years for entering a bank, depository, or building and loan association with the intent to steal. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

Around 10:30 a.m. on the morning of Monday, April 1, 2013, a man wearing a long black wig, a black visor, and sunglasses entered the SunTrust Bank located on Dorchester Road in North Charleston, South Carolina, and quickly pulled a gun out of his pocket while holding it with a white latex glove. (R. pp. 42-44; pp. 55-57; pp. 63-65; p. 68; pp. 76-77; p. 79; pp. 90-91; p. 170). The man then demanded the bank's money at gunpoint and forced the tellers to give him the cash contained in the bank drawers. (R. pp. 44-45; pp. 57-58). After that, the robber rapidly fled from the bank with over $6,000 in stolen funds before running into a nearby wooded area. (R. pp. 45-46; p. 58; p. 71; p. 83; p. 85).

Once the robber fled, David Lewis, a customer inside the bank during the robbery, quickly ran outside, got into his truck, and pursued the robber. (R. p. 72; p. 75; pp. 90-92). During his pursuit, Lewis noticed an older, green Honda vehicle that was in poor condition and "didn't fit the spot" driving in close proximity to the scene of the robbery. (R. pp. 93-94). Suspicious, Lewis followed the car to a nearby apartment complex and watched as the robber ran out of the wooded area he had fled into and jumped into the waiting Honda without his disguise. (R. pp. 92-95). After that, the suspicious car sped off, and Lewis chased after it until it began to weave in and out of traffic at speeds of nearly one-hundred miles per hour. (R. p. 93; pp. 97-98). At that point, Lewis decided to cease his pursuit and returned to the bank. (R. pp. 97-98).

Meanwhile, the bank's stunned employees alerted the authorities of the robbery, and officers from the North Charleston Police Department quickly responded to the bank, secured the scene, and spoke with the witnesses at that location. (R. p. 46; p. 59; p. 70; p. 84; pp. 100-103; p. 265). Through those actions, the officers obtained a description of

the suspect and learned he fled in an older, green Honda vehicle with a South Carolina license plate partially containing the numbers 1-5-3 or 1-9-3. (R. p. 98; p. 266). Furthermore, the officers ascertained the direction in which the robber fled on foot and deployed a police tracking dog to follow his scent. (R. p. 103; p. 108). While tracking the scent, the police dog led the officers away from the bank into a wooded area. (R. pp. 103-105; pp. 108-111). In the wooded area, the police dog tracked the suspect's scent to a location where a black visor, a black wig, a latex glove, and a .380-caliber handgun had been abandoned, and that evidence was secured in light of the fact it was consistent with the items the robber had used during the bank robbery. (R. p. 111; p. 173; p. 177). The police dog then continued on the suspect's trail until it reached a location next to the apartment complex where the suspicious car had been observed by Lewis. (R. pp. 92-95; pp. 104-105; pp. 111-112).

As the investigation into the bank robbery continued, officers reviewed the bank's surveillance footage, observed the vehicle in which the robber had fled in that footage, and determined the vehicle was a 1999 to 2001 Honda Civic. (R. pp. 271-272). However, during a subsequent search, they were unable to locate a vehicle that fit the description of the robber's getaway car. (R. pp. 271-272). From that point on, the identity of the bank robber remained unknown until Appellant Tyrone Darius Ellison was apprehended in July of 2013 after he participated in another robbery of the same bank, led law enforcement officers on a high speed chase, and crashed his vehicle during that chase. (R. pp. 272-273; pp. 560-561).

After Appellant was captured, officers discovered his skin tone, physical build, and facial hair were wholly consistent with the skin tone, physical build, and facial hair of the robber who committed the armed robbery at the SunTrust Bank a few months

earlier. (R. pp. 274-275). As a result, the officers contacted Appellant's mother, Annette McKinney, and spoke with her about the earlier bank robbery. (R. p. 333). During the ensuing conversation, McKinney indicated she believed Appellant had owned a green Honda Civic for a few weeks, and she stated she was 75% certain Appellant was the robber depicted in footage from the April bank robbery. (R. pp. 335-337; p. 350).

Thereafter, a buccal swab was collected from Appellant and submitted for analysis along with the evidence recovered during the investigation into the robbery. (R. pp. 158-159; pp. 171-172; pp. 178-183; p. 185). Agent Catherine Leisy, a forensic scientist at S.L.E.D. and an expert in the field of D.N.A. analysis, then developed a D.N.A. profile for Appellant and compared it to D.N.A. profiles developed from the black wig, the black visor, the latex glove, and the gun. (R. pp. 219-220; pp. 227-228; p. 230; p. 232; pp. 234-235). Upon analysis, she conclusively determined Appellant was the major contributor of the D.N.A. located on the wig, visor, and glove but was not a contributor of the D.N.A. located on the gun. (R. p. 230; pp. 232-236).

Subsequently, Appellant was indicted for armed robbery and entering a bank, depository, or building and loan association with the intent to steal, and he proceeded to trial. (R. pp. 9-10; pp. 565-569). At the outset of trial, the trial judge presented preliminary instructions to the jurors and explained to them they were required to decide Appellant's case based on "the testimony [they] hear and the other evidence introduced in court." (R. pp. 26-34).

Thereafter, during trial, numerous witnesses testified for the State in regard to the evidence linking Appellant to the April bank robbery of the SunTrust Bank. (R. pp. 42-46; pp. 55-59; pp. 64-72; pp. 76-85; pp. 89-98; pp. 100-118; pp. 122-135; pp. 153-154; pp. 193-194; pp. 230-236; pp. 265-275; pp. 292-294). Specifically, the witnesses present

during the robbery discussed the physical characteristics of the bank robber, and those details were fully consistent with the physical characteristics of Appellant. (R. pp. 43-44; p. 57; p. 72; p. 92; pp. 274-275). Additionally, the investigating officers testified about their discovery of the items used by the robber during the bank robbery, and Agent Leisy confirmed she conclusively determined Appellant's D.N.A. was on the robber's wig, visor, and latex glove.[1] (R. p. 111; p. 173; p. 177; pp. 228-236). Furthermore, Lewis testified about his pursuit of the robber's getaway vehicle, which was an older, green Honda Civic with a South Carolina license plate partially containing the numbers 1-5-3 or 1-9-3, and testimony was presented establishing Appellant purchased and insured an older, green Honda Civic roughly a week before the robbery, also possessed a South Carolina license plate containing the numbers 1-5-3 at that time, and did not surrender the license plate or cancel his insurance on the Honda Civic until a few weeks after the robbery. (R. pp. 93-95; p. 98; pp. 153-154; pp. 193-194; p. 197; pp. 292-295). Notably, Terrance Bryant, an acquaintance of Appellant, also stated Appellant was in possession of a green Honda Civic on the day of the robbery, sold it to him on the evening of April 1, 2013, and subsequently provided him with an incorrect bill of sale that wholly omitted Appellant's name from the vehicle's purchase history. (R. pp. 122-135).

Following the presentation of that testimony and evidence, the State rested its case, and defense counsel offered the testimony of several witnesses in Appellant's defense. (R. pp. 306-364; pp. 370-400; pp. 404-410; pp. 412-419). Through that testimony, Appellant's mother, McKinney, indicated she purchased a Honda Civic for Appellant on March 23, 2013, but claimed he told her he sold it shortly thereafter and no

[1] During her testimony, Agent Leisy further explained the odds of randomly selecting an unrelated individual with a matching D.N.A. profile was one in over two quintillion. (R. p. 230; p. 232; p. 235).

longer had the vehicle on March 25, 2013.[2] (R. pp. 306-309; p. 331; p. 333). However, she conceded she told a detective investigating the robbery Appellant had the Honda Civic for a few weeks after he purchased it and she personally took the vehicle to get its windows tinted a few days after it was bought.[3] (R. pp. 335-337; pp. 341-343). Additionally, Dr. Robert Bennett, an expert in forensic science, testified he analyzed the items discovered after the robbery but was unable to obtain a sufficient D.N.A. profile to make a comparison because the S.L.E.D. analyst had done an "overly thorough" job in analyzing the items. (R. pp. 371-379; p. 393). However, he conceded the S.L.E.D. analyst did nothing wrong or improper in conducting her analysis. (R. pp. 399-400). Furthermore, Chunte Green, a shift manager at the Burger King restaurant where Appellant worked, claimed Appellant had to have been working on April 1, 2013, and stated he was the only male that worked at the restaurant at the time. (R. pp. 404-407). However, Green acknowledged she was not personally present at work on April 1, 2013, conceded she had no firsthand knowledge in regard to whether Appellant actually worked that day, and indicated her testimony was based on the fact Appellant typically handled the restaurant's deliveries, which were made every Monday at some time between 6:00 a.m. and midnight, coupled with the fact a delivery was received on April 1, 2013.[4] (R. pp. 405-407; p. 409). Similarly, Candida Payne, another Burger King employee, stated

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[2] Subsequently, Appellant's stepfather, Dennis McKinney, offered similar testimony, stated Appellant's mother purchased a car for Appellant at some point in March of 2013, and indicted he no longer saw Appellant with that car a few days later. (R. pp. 423-424).

[3] As part of her testimony, McKinney also stated she had deposited $20,000 into Appellant's bank account several months before the bank robbery while claiming Appellant was still in possession of that money at the time of the robbery. (R. pp. 313-315; p. 323). However, she also acknowledged Appellant was not initially aware the money had been transferred into his account and admitted she told him about it for the first time after he had been arrested and incarcerated for the bank robbery. (R. pp. 323-235; pp. 327-329).

[4] On cross-examination, Chunte further conceded several other male employees actually did work at the restaurant, including individuals named Tyrone Bailey and Christopher Coburn. (R. pp. 409-410).

she worked at the restaurant from 11:43 a.m. to 4:30 p.m. on April 1, 2013, and claimed she remembered Appellant working there that day.[5] (R. pp. 412-413; p. 416). However, she could not remember the names of the other employees who worked on that date, and she alleged Appellant took her home from work in a vehicle he did not purchase or insure until several weeks later.[6] (R. p. 195; p. 295; p. 413; pp. 416-417; p. 419).

Thereafter, at the conclusion of the evidentiary phase of trial, the trial judge adjourned court for the day, canceled the trial for the following day due to a prior engagement, and ordered the jurors to return for duty on the upcoming Friday. (R. pp. 460-461; p. 463). Subsequently, when the trial resumed on Friday morning, the trial judge cleared the courtroom and asked for Juror # 151, William White, to be brought out to discuss a matter that had been called to the trial judge's attention. (R. pp. 464-465). The trial judge then questioned White, and White revealed under oath he had been approached at his home on the preceding day by an individual he believed was related to Appellant who asked him to vote in a certain way during the trial. (R. pp. 464-465). White further revealed he quickly told the person to leave his property, and he indicated he did not believe he could remain impartial in light on that encounter. (R. pp. 464-467). The trial judge then inquired if White had mentioned the encounter to the other jurors, and White responded he simply let all the other jurors know he was approached while advising them to be careful. (R. pp. 466-467; p. 469).

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[5] Subsequently, Samuel Powers, an employee of the company that owned the Burger King franchise for which Appellant worked, offered rebuttal testimony and indicated the company had no record of Appellant working on April 1, 2013. (R. pp. 426-427; pp. 455-456).

[6] During her testimony, Payne also acknowledged she had previously been convicted of numerous crimes, including defrauding a hotel or restaurant, financial transaction card fraud, making a false statement to obtain a license, and six counts of shoplifting. (R. pp. 414-416).

In response to White's statements, the trial judge excused White from further service in Appellant's case. (R. p. 467). Thereafter, he asked for the remaining jurors to be brought into the courtroom before asking them if White had advised them he had been approached about the case on the preceding day, and the jurors all responded affirmatively. (R. pp. 470-471). The trial judge then asked the jurors if any of them did not believe they could be fair and impartial or decide the case based solely upon the evidence presented during trial, and no juror responded. (R. p. 471). After that, the trial judge inquired if any of the remaining jurors had been approached or contacted in any way in regard to the case, and, again, no jurors responded. (R. pp. 471-472). The trial judge then asked the jurors for a second time if any of them could not be fair and impartial or decide the case based solely upon the evidence and testimony presented during trial, and, once again, none of the jurors responded. (R. p. 472).

Following the questioning of the jury panel, the jurors retired to the jury room, and defense counsel moved for a mistrial. (R. pp. 472-473). In support of that motion, defense counsel argued the remaining jurors might "in the back[s] of their mind[s] somewhere" believe Appellant was guilty based on the actions of one of his apparent agents despite the fact those jurors all responded they could remain fair and impartial under the circumstances. (R. p. 473). In response, the solicitor asserted the grant of a mistrial would simply reward Appellant's improper behavior while noting Appellant was recorded calling someone from the jail on the preceding day and asking them to "tak[e] care of something" on the street upon which the juror who was subsequently contacted on Appellant's behalf lived. (R. pp. 473-474). At that point, neither defense counsel nor Appellant disputed or challenged the solicitor's representations. (R. pp. 474-475). Instead, defense counsel simply asserted he did not personally believed Appellant "had

the wherewithal" to know his actions could have resulted in a mistrial if they were discovered while further contending the grant of mistrial would not actually be beneficial to Appellant. (R. p. 474).

After considering the issue, the trial judge denied the mistrial motion. (R. p. 475). In support of that decision, the trial judge noted all the jurors were exposed by White to the misconduct but determined a mistrial was nonetheless inappropriate under the circumstances in light of the fact all the jurors unequivocally indicated they could remain fair and impartial when he questioned them coupled with the fact the evidence establishing Appellant's guilt was substantial. (R. pp. 476-478). The trial judge then inquired of the parties if they had any further arguments in regard to the mistrial motion, and both the solicitor and the defense counsel indicated they did not. (R. p. 478).

Subsequently, the trial proceeded forward, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 483-553). During his jury instructions, the trial judge again reminded the jurors they could only consider the testimony and evidence presented during trial when determining whether the State had met its burden of proof. (R. p. 541). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 555). The trial judge then sentenced Appellant to an aggregate sentence of life imprisonment without the possibility of parole based on Appellant's prior conviction for a "most serious" offense. (R. p. 561; p. 563).

ARGUMENT

Although the jury was exposed to misconduct after one of the jurors was improperly approached during a trial recess, the trial judge did not abuse his broad discretion by denying Appellant's mistrial motion in light of the fact he only declined to grant the motion after ensuring the misconduct had not affected the impartiality of the jury by removing and replacing a juror who could no longer remain impartial, questioning the remaining jurors to ensure they had not been impacted by the improper contact, and instructing the jurors they could only consider the evidence and testimony presented during trial when deciding the case.

Appellant contends the trial judge erred by denying a mistrial motion that was raised after one of the jurors was approached during a trial recess by an apparent agent of Appellant, was asked to vote in a certain way, and subsequently informed the trial judge and his fellow jurors of the improper contact. In support of that contention, Appellant maintains the improper communication with White incurably tainted the entire juror panel and, as a result, the trial judge's failure to immediately abort the trial abridged his constitutional right to have his case decided by a fair and impartial jury. Contrary to Appellant's contentions, Appellant's right to a trial by a fair and impartial jury was not adversely impacted by the misconduct directed at one of the jurors because the trial judge employed a variety of curative measures to ensure the misconduct did not impact the impartiality of the jury. After employing those curative measures, the trial judge determined the impartiality of the jury was not impacted by the improper contact, and his determination in that regard was supported by the evidence presented during trial, including the unequivocal representations of the jurors who ultimately decided Appellant's case indicating they could remain fair and impartial despite the misconduct. Under those circumstances, the trial judge did not abuse his broad discretion in refusing to grant the extreme measure of a mistrial in Appellant's case. Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Significantly, a decision as to whether to grant or deny a motion for mistrial rests within the sound discretion of the trial judge, and a trial judge's ruling in regard to a mistrial motion will **not** be disturbed on appeal absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000); see State v. Coaxum, 410 S.C. 320, 331, 764 S.E.2d 242, 247 (2014) ("[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion."); State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." (citations omitted)). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ANALYSIS

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see Harris, 340 S.C. at 63, 530 S.E.2d at 627 ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). That right guarantees to a defendant a trial by a panel of impartial, indifferent jurors. State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 633 (Ct. App. 2008). Importantly, it is the duty of the trial judge to ensure a jury comprised solely of fair,

impartial, and unbiased jurors ultimately decides a defendant's case. State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998).

In order to safeguard a defendant's right to a fair trial by an impartial jury, the jury must reach its verdict free from any outside or improper influence. Kelly, 331 S.C. at 141, 502 S.E.2d at 104. However, even if the jury is exposed to extraneous or outside influences, such an impropriety is not prejudicial unless it affects the jury's impartiality. Id. Significantly, in South Carolina, prejudice will **not** be presumed from improper influences on the jury and, instead, must be shown by the defendant in order to warrant the grant of a mistrial or the disqualification of any jurors. State v. Grovenstein, 335 S.C. 347, 351, 517 S.E.2d 216, 218 (1999); see State v. Aldret, 333 S.C. 307, 313-314, 509 S.E.2d 811, 814 (1999) ("Given that we have not found automatic reversal warranted even in cases of external influences on a jury's verdict, we decline to do so in the cases of internal misconduct consisting of premature deliberations. Our decision is consistent with the majority of jurisdictions which hold a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial." (citations omitted)).

When an allegation of juror partiality resulting from extraneous or outside influences is raised, the appropriate remedy is to conduct a hearing in which the defendant is provided with an opportunity to prove **actual** bias. See Smith v. Phillips, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."); see also State v. Bryant, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) ("In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias."); see generally Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) ("It is well

established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice."). "Preservation of the opportunity to prove **actual bias** is a guarantee of a defendant's right to an impartial jury." Dennis v. United States, 339 U.S. 162, 172 (1950) (emphasis added); see Remmer v. United States, 347 U.S. 227, 230 (1954) (**remanding** a case to the district court for a hearing to determine whether an attempt by an individual to bribe a juror during the course of Remmer's trial "was harmful to [Remmer]").

In assessing during such a hearing whether outside influences affected a jury, relevant factors to consider include: (1) the number of jurors exposed; (2) the weight of the evidence properly before the jury; and (3) the likelihood curative measures were effective in reducing any prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 627; see United States v. Basham, 561 F.3d 302, 320 (4th Cir. 2009) ("Courts look at a variety of factors in determining if this standard has been met, including the extent of the improper communication, the extent to which the communication was discussed and considered by the jury, the type of information communicated, the timing of the exposure, and the strength of the Government's case."). Generally, the determination of whether the exposure of the jury to extraneous matter was prejudicial must be left to the sound discretion of the trial judge, who is in the best position to assess the jurors' impartiality and credibility. Kelly, 331 S.C. at 142, 502 S.E.2d at 104. However, in most hearings, the issue "will frequently turn upon the testimony" of the jurors themselves in regard to whether they were affected by the outside influence. Smith, 455 U.S. at 217, n. 7.

Critically, a trial judge's determination of the neutrality or impartiality of a juror should not be disturbed on appeal absent manifest error. DeLee v. Knight, 266 S.C. 103, 111-112, 221 S.E.2d 844, 847 (1975) (citing Irvin v. Dowd, 366 U.S. 717 (1961)); see

State v. Simpson, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996) ("A juror's competence is within the trial judge's discretion and is not reviewable on appeal unless wholly unsupported by the evidence."). Deference should be given to the trial judge's decision regarding the qualification of the jury as the trial judge is able to actually see and hear the jurors in assessing their demeanor, credibility, and impartiality. State v. Evins, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007); see Patton v. Yount, 467 U.S. 1025, 1038 (1984) (instructing a trial judge's determinations on the impartiality of a juror are presumed to be correct and are entitled to special deference on appeal). "The findings of the trial court on questions of fact relating to the fitness of a juror are conclusive, and will not be disturbed on review unless manifestly erroneous." State v. Maxey, 218 S.C. 106, 110, 62 S.E.2d 100, 102 (1950). "This principle of law is so well established it hardly becomes necessary to cite authority to sustain it." Id.

In the case sub judice, the jury panel was exposed to extraneous information when a fellow juror, White, advised all the other jurors to be careful in light of the fact he had been approached about the case and asked to vote in a certain way during a trial recess. In light of the jury's exposure to extraneous information, the trial judge conducted a hearing to determine the extraneous information's effect, if any, on the jury panel. During that hearing, the trial judge first spoke with White and, through speaking with him, ascertained the circumstances of the improper contact, the extent to which that information had been relayed to the jury panel as a whole, and the impact that contact had on White. In light of the fact White revealed he did not personally believe he could remain fair and impartial as a result of the improper contact, the trial judge removed White from the jury and replaced him with an alternate juror. Thereafter, the trial judge questioned the remaining jurors about their knowledge of the improper contact with

White, verified none of the remaining jurors had been personally approached by anyone in regard to Appellant's case, and questioned the jurors several times regarding whether they could remain fair, remain impartial, and decide the case solely upon the evidence and testimony presented during trial. In response to that questioning, the remaining jurors unequivocally confirmed they could remain fair and impartial in Appellant's case while doing nothing to make the trial judge question the sincerity of their responses in any way, shape, or form. Only then did the trial judge deny Appellant's mistrial motion.

Critically, by conducting a hearing to determine what impact the third-party contact with White had on the jury, the trial judge took the appropriate steps in response to discovering the jury misconduct, which did **not** automatically necessitate the abandonment of the trial.[7] See Remmer, 347 U.S. at 229-230 ("The trial court . . . should

[7] On appeal, Appellant contends the trial judge erred by not finding the improper contact to be presumptively prejudicial while further contending the trial judge incorrectly failed to apply the framework utilized by the federal courts in analyzing the effect of misconduct on a jury. Significantly though, courts in South Carolina do **not** presume prejudice when addressing matters of jury misconduct. See, e.g., Aldret, 333 S.C. at 314, 509 S.E.2d at 814 ("[A] defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial."). Furthermore, to the extent the federal courts do presume prejudice in situations involving jury misconduct, state courts are **not** required to draw such a presumption just as they are **not** required to analyze matters of misconduct using the same framework employed by the federal courts. See United States v. Cheek, 94 F.3d 136, 143 (4th Cir. 1996) ("None of these cases purports to modify the presumption of prejudice **applicable to federal cases** arising from 'any private communication, contact, or tampering' with a juror, which is explained in Remmer I." (emphasis added)); Young v. Herring, 938 F.2d 543, 558, n. 7 (5th Cir. 1991) ("In Remmer, . . . the Supreme Court was exercising its supervisory powers over the lower federal courts rather than ruling on the Constitution."); People v. Hunter, 43 Colo. App. 406, 408, 607 P.2d 1026, 1027 (Colo. Ct. App. 1980) ("Our reading of the Remmer decisions . . . convinces us that they arise as an exercise of the Supreme Court's supervisory power to formulate and apply proper standards for enforcement of the criminal law in federal courts, and not as a matter of constitutional compulsion. Thus, they are not binding on the states."); see also United States v. Williams-Davis, 90 F.3d 490, 496 (D.C. Cir. 1996) (recognizing the Remmer decision's presumption of prejudice was subsequently substantially narrowed by the United States Supreme Court's decision in Smith); United States v. Pennell, 737 F.2d 521, 532-533 (6th Cir. 1984) (holding the Remmer decision's presumption of prejudice was eliminated by subsequent United States Supreme Court case law and instructing a defendant is now required to demonstrate actual prejudice resulted from improper contact with a juror in order to be entitled to a new trial); cf. Murphy v. Florida, 421 U.S. 794, 797-798 (1975) ("Noting that the jurors had been exposed to information with a high potential for prejudice, this Court [in Marshall v. United States, 360 U.S. 310, 311-312 (1959)] reversed the conviction. It did so, however, expressly '(i)n the exercise of (its) supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts,' and not as a matter of constitutional compulsion. In the face of so clear a statement, it cannot be maintained that Marshall was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States." (citation omitted)).

determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."); see also Smith, 455 U.S. at 217 ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in Remmer and held in this case."). Furthermore, in light of the fact he employed a variety of curative measures to ensure Appellant suffered no prejudice as a result of the misconduct directed at White, the trial judge did not abuse his broad discretion in declining to grant the extreme remedy of a mistrial once he was assured the misconduct had not affected the jurors who ultimately decided Appellant's case. See Harris, 340 S.C. at 63, 530 S.E.2d at 628 ("A mistrial should only be granted when absolutely necessary. The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court grants him broad deference on this issue." (citations omitted)); see also State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.").

Regarding the curative measures, the trial judge first and foremost removed and replaced White after he indicated he could not remain fair and impartial. Such a step substantially eliminated any potential for prejudice that could have resulted from the misconduct as White was the **only** juror directly exposed to any improper communications. See Kelly, 331 S.C. at 143, 502 S.E.2d at 105 ("In our opinion, the trial

judge did not abuse his discretion in denying appellant's motion for a mistrial. Instead, the trial judge took appropriate action by removing the tainted juror from the jury and replacing her with an alternate juror to ensure appellant received a fair and impartial verdict."); see also State v. McDaniel, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980) (finding the removal of a juror during the middle of trial was not prejudicial where the removed juror was replaced with a qualified alternate juror).

Additionally, beyond removing and replacing White, the trial judge questioned the remaining jurors to ensure they were unaffected by the misconduct, and, importantly, the jurors who ultimately decided Appellant's case unanimously and unequivocally indicated they were not impacted by the improper contact with White and could fairly and impartially decide the case based solely upon the evidence and testimony presented during trial. Significantly, in light of the fact those jurors had **no** incentives whatsoever to be anything but forthright in regard to whether they were unbiased as they had not committed any misconduct and had no stakes in the outcome of the trial, the trial judge properly relied upon the jurors' representations in determining their impartiality was not impaired as a result of the misconduct.[8] See Smith, 455 U.S. at 255 (O'Connor, J.,

[8] Consistent with the argument raised by defense counsel during trial, Appellant appears to suggest on appeal the jurors **were** influenced by White's comments despite their contentions to the contrary. Notably though, aside from pure speculation, the only evidence presented during trial in regard to the jurors' impartiality was their unequivocal representations to the trial judge they could remain fair and impartial, and the trial judge fully credited those representations in finding the jurors were **not** affected by the misconduct, which was a finding entitled to substantial weight on appeal. See Kelly, 331 S.C. at 143, 502 S.E.2d at 105 ("The trial judge did not find members of the jury were being untruthful. We respect this finding."). Critically, as the United States Supreme Court has made clear, the representations of jurors in regard to their impartiality often resolve questions as to the effect of misconduct on the impartiality of the jury, and such representations are in no way inherently suspect. See Smith, 455 U.S. at 217, n. 7 ("Respondent correctly notes that determinations made in Remmer-type hearings will frequently turn upon the testimony of the juror in question, **but errs in contending that such evidence is inherently suspect**." (emphasis added)). As a result, notwithstanding his base speculation the jurors were untruthful in his case, Appellant has wholly failed to meet his burden of establishing the jurors were influenced by the misconduct involving White. See Calderon v. California, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually

concurring) (explaining a hearing "could adequately determine whether or not the juror was biased" in a situation such as one involving a third-party attempt to bribe a juror because a juror in such a situation would not personally be involved in any misconduct, would not have an actual stake in the outcome of trial, and would have "no significant incentive to shield his biases"); see also Dennis, 339 U.S. at 170-171 ("We must credit [the jurors'] representations, and that is particularly so in the absence of any evidence which would indicate an opposite opinion among [the challenged jurors]. One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.").

Furthermore, the trial judge considered the substantial evidence of Appellant's guilt that had been presented during trial before the improper contact occurred, which included testimony that conclusively established Appellant's D.N.A. was on the robber's wig, visor, and glove, linked Appellant to the getaway car, showed Appellant sold the getaway car just hours after the bank robbery before subsequently trying to eliminate his name from the car's purchase history, and demonstrated Appellant's own mother was 75% certain Appellant, whose physical characteristics fully matched the physical characteristics of the robber, committed the robbery after seeing surveillance footage from the incident.[9] In light of that overwhelming evidence, the misconduct's ability to

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prejudiced by the error." (citations omitted)); see also State v. Bonneau, 276 S.C. 122, 126, 276 S.E.2d 300, 302 (1981) ("The defendant was entitled to a fair trial, but not necessarily one satisfactory to him. This he has had.").

[9] On appeal, Appellant contends the trial judge's consideration of the strength of the evidence was improper and unconstitutional. However, Appellant did **not** raise such an argument to the trial judge during trial and is, therefore, precluded from raising such an argument for the first time on appeal. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at

have an affect or impact on the jury and the verdict was, at a minimum, substantially reduced. See Dallago v. United States, 427 F.2d 546, 558 (D.C. Cir. 1969) ("Certainly the weight of the prosecution's evidence becomes relevant in estimating 'what effect the error had or reasonably may be taken to have had upon the jury's decision.' " (footnote omitted)); see also United States v. Blackwell, 459 F.3d 739, 769-770 (6th Cir. 2006) (concluding any error that resulted from jury misconduct was harmless and not prejudicial because the jury would have convicted Blackwell regardless of whether any misconduct had occurred in light of the evidence presented during trial); United States v. O'Neal, 180 F.3d 115, 118 (4th Cir. 1999) (concluding the district court judge did not abuse his discretion in denying O'Neal's motion for a new trial based on jury misconduct where the district court judge determined the jurors' professed fear of O'Neal caused by O'Neal's actions during trial did not affect the verdict in light of the overwhelming evidence of guilt that had been presented).

Finally, both before and after the misconduct occurred, the trial judge instructed the jurors they could only consider the evidence and testimony presented during trial in deciding the case. Significantly, the jurors who decided Appellant's guilt were presumed to follow those instructions, and nothing that occurred during trial even remotely suggested they failed to faithfully follow them. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("The jury was instructed to determine petitioner's guilt

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trial and a different theory on appeal."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). Moreover, as both our state courts and the Fourth Circuit Court of Appeals have recognized, consideration of the strength of the government's case is wholly appropriate when attempting to ascertain the effect of misconduct on the jury. See Harris, 340 S.C. at 63, 530 S.E.2d at 627 ("In determining whether outside influences have affected the jury, relevant factors include (1) the number of jurors exposed, (2) the weight of the evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice."); see also Basham, 561 F.3d at 320 (explaining consideration of the strength of the government's case is an appropriate consideration when determining whether misconduct impacted a jury). Therefore, the trial judge committed no error by considering the strength of the State's case as part of his analysis of the misconduct that occurred in Appellant's case.

based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded those instructions, this Court declines to presume prejudice." (citations omitted)); Grovenstein, 335 S.C. at 353, 517 S.E.2d at 219 ("An instruction to disregard incompetent evidence is usually deemed to have cured the error. Moreover, jurors are presumed to follow the law as instructed to them." (citations omitted)); State v. Arther, 290 S.C. 291, 295, 350 S.E.2d 187, 189 (1986) ("The trial judge did charge the jury not to consider anything heard outside the courtroom. This charge was adequate under the circumstances to ensure the jury would render a verdict based upon the evidence presented."); see also State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005).

Critically, after employing those curative measures, the trial judge concluded the jurors he allowed to remain on the jury were **not** affected by the improper attempt to influence the jury in Appellant's favor, and his determination in that regard was fully supported by the evidence and entitled to substantial deference on appeal. See State v. Bantan, 387 S.C. 412, 423, 692 S.E.2d 201, 207 (Ct. App. 2010) ("In any event, the trial court did not deny Bantan's motion for mistrial until after determining the jury's ability to proceed solely on the evidence presented at trial. We find no abuse of discretion."); see also State v. Johnson, 248 S.C. 153, 164, 149 S.E.2d 348, 353 (1966) ("[B]oth jurors unequivocally stated, notwithstanding the fact that they had been contacted and communicated with, that they were not conscious of any bias or prejudice, that they could give both the State and respondents a fair and impartial trial and render a verdict according to the law and the evidence; therefore, it cannot be said that the ruling of the trial judge was without evidentiary support."). Under those circumstances, a mistrial was not warranted, and Appellant failed to establish any actual prejudice that would have

justified a conclusion to the contrary. See Grovenstein, 335 S.C. at 351, 517 S.E.2d at 218 ("We have consistently required defendants to demonstrate prejudice due to improper jury influences."); cf. Thompson v. State, 260 Ga. App. 253, 257, 581 S.E.2d 596, 599 (Ga. Ct. App. 2003) ("We cannot conclude that the bribery attempt of a juror on behalf of the defense, even if the other jurors learn of it, is such a fundamental violation of a defendant's right to trial by a fair and impartial jury that the only available remedy is a mistrial. To find that a new trial was absolutely required under the circumstances here would encourage improper contact with jurors on behalf of defendants. We conclude that the trial court did not abuse its discretion in denying Thompson's motions for a mistrial, to set aside the verdict, and for a new trial."). Accordingly, the trial judge did not abuse his discretion by refusing to grant the extreme remedy of a mistrial in Appellant's case. See State v. Carrigan, 284 S.C. 610, 614, 328 S.E.2d 119, 121 (Ct. App. 1985) ("The power to declare a mistrial is generally left to the sound discretion of the trial judge and ought to be exercised with the greatest of caution, only for plain and obvious causes."). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Appeal from Dorchester County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2014-002337

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Respondent,

vs.

TYRONE DARIUS ELLISON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Final Brief of Respondent on Appellant by delivering two copies of the same to:

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I further certify that all parties required by Rule to be served have been served.
This 12th day of February, 2016.

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