

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable John C. Few, Circuit Court Judge

THE STATE,

Petitioner,

vs.

JONATHAN KARON HILL,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals err in reversing the trial judge's denial of Hill's new trial motion where Hill failed to meet his burden of establishing to the trial judge that prejudice resulted from the jury's exposure to his non-admitted exculpatory statements and where the other evidence presented during trial overwhelmingly established Hill's guilt for the indicted offenses irrespective of the inadvertent submission of his exculpatory statements to the jury?

STATEMENT OF THE CASE

Procedural History

Respondent Jonathan Karon Hill was arrested after he fled from officers and was discovered hiding in a creek bed. In March of 2002, the Greenville County grand jury indicted Hill for armed robbery and conspiracy to commit armed robbery. In April of 2002, the Greenville County grand jury indicted Hill for an additional count of armed robbery and conspiracy to commit armed robbery along with one count of resisting arrest. On February 3, 2003, a jury trial was commenced in the Greenville County court of general sessions with the Honorable John C. Few, circuit court judge, presiding. At the conclusion of trial, Hill was convicted as indicted. The trial judge sentenced Hill to concurrent terms of imprisonment of thirty years for each count of armed robbery, five years for each count of conspiracy, and one year for resisting arrest.

After the trial, Hill filed a motion for a new trial. On February 20, 2003, the trial judge held a hearing on the motion and took the matter under advisement. On June 11, 2003, the trial judge conducted another hearing on Hill's new trial motion and orally denied the motion. However, no written order memorializing the ruling was filed, and Hill did not file an appeal. Subsequently, on October 29, 2004, Hill filed an application for post-conviction relief based on his trial counsel's failure to file a notice of appeal. On April 7, 2005, the Honorable Larry R. Patterson, circuit court judge, conducted a hearing on Hill's post-conviction relief application. At the conclusion of the hearing, the post-conviction relief judge denied Hill's application and dismissed it without prejudice based on the fact no written order had been filed on Hill's pending motion for a new trial.

On February 9, 2007, the trial judge issued an order denying Hill's motion for a new trial. Hill then timely filed a notice of appeal. Subsequently, Hill's appellate

counsel submitted an Anders brief and a petition to be relieved as counsel, and Hill filed a pro se brief on his own behalf. On December 31, 2009, the Court of Appeals denied the petition to be relieved as counsel and directed the parties to brief the following trial issue: “Did the trial court err in denying Appellant’s motion for a new trial after the jury, during deliberations, mistakenly received two statements made by the Appellant that were not admitted into evidence during trial?” Briefs were submitted on the issue, and the Court of Appeals heard oral arguments on the case on February 8, 2011.

Subsequently on August 10, 2011, the Court of Appeals reversed the trial judge’s ruling denying Hill’s motion for a new trial and remanded the matter to the trial court. State v. Hill, 394 S.C. 312, 714 S.E.2d 879 (Ct. App. 2011). The State petitioned the Court of Appeals for rehearing, and the petition was denied. The State then timely filed a petition for a writ of certiorari in the Supreme Court.

Factual History

Around 7:50 p.m. on the evening of January 31, 2002, Marvin Somarriba, a front desk clerk at the La Quinta Inn in Greenville, heard two men run into his hotel and looked up to see one of the men aiming a silver gun at him. (R. p. 105; pp. 107-108). The armed man, who along with his accomplice was clad in dark clothing and a ski mask, pushed the gun against Somarriba’s head and demanded money in a threatening tone. (R. pp. 108-110). The robbers then took Somarriba’s wallet and the money out of the hotel cash drawer before fleeing. (R. p. 108; pp. 110-111). In total, the robbers absconded with approximately \$150 in cash along with the credit cards from Somarriba’s wallet. (R. pp. 110-113). After the robbers fled, Somarriba quickly alerted law enforcement of the robbery, and officers responded to the hotel. (R. p. 113; pp. 121-122). However,

Somarriba was unable to provide a facial description of the suspects or a description of the suspects' vehicle.¹ (R. p. 124).

Around midnight in the early morning hours of February 1, 2002, Ragnar Borei, a night auditor and maintenance man at the Hampton Inn in Simpsonville, was returning to the back office from the lobby when he heard a noise and turned around. (R. p. 126; pp. 128-129). When he did, two men wearing dark clothing and ski masks pressed a gun against his nose and demanded money. (R. pp. 129-131). In response, Borei opened the hotel's cash drawer and accidentally dropped it onto the floor. (R. pp. 133-134). One of the robbers then collected the money while the other forced Borei to lie onto the floor and hand over his wallet, which contained his credit cards, money, and identification. (R. p. 134). The robbers then fled with approximately \$178 in cash from the drawers and \$15 from Borei. (R. p. 136). After the robbers fled, Borei contacted law enforcement, and officers were quickly dispatched to the hotel. (R. p. 135; pp. 144-145). Borei then described the details of the crime and robbers' firearm to the officers. (R. pp. 146-147).

Shortly thereafter at around 12:30 a.m., Officer William Kennedy of the Mauldin Police Department was alerted of the robbery, headed towards the Hampton Inn, and observed a white car speeding away in the opposite direction with its high-beam lights on. (R. pp. 148-151). Officer Kennedy then turned his patrol car around and attempted to stop the speeding vehicle. (R. pp. 151-152). After the officer activated his blue lights, the white car continued on before turning into a grocery store parking lot and slowing down. (R. pp. 152-153). Officer Kennedy observed the three occupants of the vehicle rummaging around inside of the car, including a person in the back seat wearing a red

¹ Additionally, Somarriba quickly cancelled his credit cards after the robbery and later discovered someone attempted to use one of the cards shortly after the crime. (R. p. 119).

shirt. (R. pp. 153-155). However, the car never completely stopped. (R. p. 155). Instead, it accelerated rapidly and exited the parking lot, nearly striking another police vehicle driven by Officer Brian Lewis. (R. pp. 155-156). The officers then pursued the white car with their sirens and blue lights activated at speeds reaching ninety miles per hour before the car spun off the road and crashed. (R. pp. 156-157). Immediately after the crash, all three occupants jumped out of the car and fled into nearby woods, ignoring the officers' commands to stop. (R. p. 158; pp. 174-175).

Within minutes, numerous officers arrived on the scene and established a tight perimeter around the woods. (R. p. 159). Officers also secured the suspects' vehicle and located a black leather coat, a gray fleece sweatshirt, a football jersey, and a black ski mask in the rear seat of the vehicle. (R. pp. 160-161; p. 269). Officer Brian Lewis, along with Deputy Mike Atwell of the Greenville County Sheriff's Office, continued the pursuit into the woods and apprehended the driver, Damian Taylor. (R. p. 181; p. 232). A short time later, Deputy Harold Lee Harris of the Greenville County Sheriff's Office captured another suspect, Melvin Warren, as he attempted to walk out of the woods. (R. p. 185; p. 191). Officers then recovered a black ski mask, money, black stocking headwear, Borei's wallet, and other items from Warren's pockets. (R. pp. 191-192).

Meanwhile, Deputy Robert Smith, a canine handler with the Greenville County Sheriff's Office, responded to the scene with his police dog, Armor. (R. pp. 203-205; p. 210). Armor picked up the scent from the suspects' vehicle and tracked the scent into the woods. (R. p. 218). While following the trail, Deputy Smith discovered clothing abandoned by the suspects, including a bloody shirt, a tennis shoe, and a baseball cap. (R. pp. 218-220). Subsequently, Armor began showing strong signs of an alert nearly two hours into the search. (R. p. 223). Armor led Deputy Smith to a creek bed, and the

officer observed an individual in a red shirt curled up and hiding underneath a bank in the creek bed. (R. pp. 223-224). After being discovered, the individual, Respondent Jonathan Karon Hill, surrendered and was arrested. (R. p. 225). After his arrest, officers discovered "a wad of unfolded loose cash" totaling \$143 in Hill's pockets. (R. p. 227; p. 229; p. 279).

Thereafter, Hill agreed to speak with law enforcement about the hotel robberies and told officers he knew both Taylor and Warren and was aware they had committed robberies in the past. (R. p. 61). He also stated he knew Warren had a pistol. (R. p. 61). Hill told the officers the two asked him if he wanted to go for a ride, and the group drank and used marijuana. (R. p. 61). Hill stated they then went to the La Quinta Inn, Warren bought a beer from some people, Warren and Taylor went inside and robbed the hotel, and then they all left and went to the mall. (R. pp. 61-62). At the mall, Hill stated Warren unsuccessfully tried to use the stolen credit card. (R. p. 62). Hill informed the officers he then thought they were going home, but they went to a gas station and the Hampton Inn instead. (R. p. 62). Hill claimed Warren and Taylor then went in, the two robbed the hotel, and they left. (R. p. 62). Hill stated a police officer then tried to stop their car, they fled and ran off the road, and he was subsequently arrested. (R. p. 62). Hill concluded by stating: "I am sorry that these places were robbed." (R. p. 62).

Subsequently, Hill provided a second statement to law enforcement, which he began by stating: "I have decided that I wanted to clear all this up and get everything in the open." (R. p. 77). He then told law enforcement he knew Taylor and Warren from his neighborhood, and they were involved in robbing and stealing, claiming the two had been robbing hotels most recently. (R. p. 78). Hill stated they all went to La Quinta Inn with him riding in the back seat. (R. p. 78). Hill told the officers Warren talked to

people in the parking lot, bought a beer from them, went inside, let Taylor inside, and then returned to the car with Taylor within five minutes. (R. pp. 78-79). Afterwards, Hill claimed the group went to the mall, and Warren unsuccessfully tried to buy clothing and jewelry with a credit card. (R. p. 79). Hill claimed he told them they were being greedy before they left and went to a gas station. (R. p. 79). Hill stated he told Warren and Taylor he wanted to go home, but they went to the Hampton Inn instead. (R. p. 79). Hill claimed Warren and Taylor robbed the hotel, and the three then left. (R. p. 79). Hill stated they were then apprehended and arrested after a chase. (R. p. 79). Hill further stated he previously heard Warren and Taylor talk about robbing another hotel in the past. (R. p. 79). Following his statements, Hill was subsequently charged with numerous offenses, and he proceeded to trial. (R. pp. 405-413A).

At the outset of trial, the trial judge conducted a hearing to determine the admissibility of Hill's pre-trial statements to law enforcement, and the statements were introduced into evidence for purposes of that hearing only. (R. p. 58; p. 69). Regarding the voluntariness of the statements, each of Hill's signed statements to law enforcement contained language confirming Hill provided the statements voluntarily after being informed of and waiving his rights. (R. pp. 60-62; pp. 76-77; p. 80). At the conclusion of the hearing, the trial judge ruled the written statements were voluntarily-made after Hill waived his rights and were admissible during trial. (R. p. 83; Supp. R. pp. 3-4).

Thereafter, the trial proceeded, and Hill's accomplices, Taylor and Warren, testified for the prosecution. (R. p. 234; p. 282). Taylor testified he was involved in the hotel robberies with Warren and Hill. (R. p. 238). He stated the three left their homes under an agreed-upon plan to rob a drug dealer. (R. p. 239). After their efforts to find a drug dealer were unsuccessful, Taylor claimed the three then headed to the La Quinta Inn

with the intention of robbing it.² (R. pp. 239-241). Taylor stated he drove the others to the La Quinta Inn, Warren and Hill donned ski masks and went inside for three or four minutes, and Warren and Hill then returned to the car. (R. pp. 241-242). Taylor testified they then drove to the mall, and Warren unsuccessfully attempted to use the stolen credit cards. (R. pp. 243-244). Afterwards, Taylor stated he drove the group to the Hampton Inn, Warren and Hill again went in, and then they all drove away before an officer began following their car. (R. pp. 245-246). Taylor testified they tried to flee and crashed, everyone ran into the woods, and he was arrested. (R. pp. 245-247).

Likewise, Warren testified he participated in the robberies of the La Quinta Inn and the Hampton Inn with Taylor and Hill. (R. p. 282). Warren claimed the three met up and agreed to rob a hotel. (R. p. 283). Warren stated he scouted ahead, and then he and Hill entered the La Quinta Inn wearing ski masks, black coats, and gloves while Taylor, the driver, remained in the car. (R. pp. 283-286). Warren testified he aimed a gun at the clerk while Hill took the money. (R. p. 287). Warren stated they also took the clerk's credit cards, left and headed to the mall, and then went to the Hampton Inn under an agreement to rob it. (R. pp. 288-289). Once at the Hampton Inn, Warren testified Taylor again stayed in the car while he and Hill went inside wearing ski masks, coats, and gloves. (R. pp. 289-290). Warren stated he then again pointed the gun at the clerk while Hill collected the money. (R. p. 291). Warren claimed he then took the clerk's wallet before they left and headed to Greenville, with Warren in the front seat of the car and Hill in the rear seat. (R. pp. 291-292). Thereafter, Warren testified an officer pursued them, a

² Regarding the plan to commit the robbery of the hotel, Taylor initially testified everyone understood "what was going to go on" but had not actually discussed it. (R. p. 241). However, Taylor also testified they discussed the planned robberies with Hill beforehand, but they did so only after picking Hill up that night. (R. pp. 251-252).

chase ensued, they crashed, and everyone ran away. (R. p. 292). Warren identified the coat recovered from the vehicle as Hill's coat. (R. pp. 293-294).

Subsequently, Hill testified in his own defense. (R. p. 311). Hill testified Taylor and Warren, two men he knew from his neighborhood, asked him if he wanted to go ride around on January 31, 2002. (R. pp. 313-315). Hill stated they left the neighborhood and then returned to get marijuana because they were all smoking marijuana and drinking. (R. p. 316). Hill testified they then drove to a hotel and saw a group of people outside drinking, but he denied hearing any discussions about robbing hotels. (R. p. 315; p. 317). Hill claimed Warren got out, spoke with the group of people, got money for a beer, and then went inside of the hotel. (R. pp. 317-318). Hill testified Warren came back outside, waved Taylor inside, and both men returned five minutes later with a credit card. (R. p. 318). Hill claimed he remained in the car the entire time. (R. p. 319). Hill stated the group then went to the mall, Warren unsuccessfully attempted to use the credit card to buy clothes and jewelry, and he told them he wanted nothing to do with any credit cards. (R. p. 318). Hill testified he told the group he wanted to go home, and, after stopping at a gas station, they drove somewhere and parked. (R. pp. 319-320). Hill testified Taylor and Warren left the car, came back after five minutes, and drove off. (R. p. 321). Hill claimed he again remained in the car the entire time, never saw a weapon, and never saw any ski masks. (R. p. 322). Hill testified the police then attempted to stop the car, a chase ensued, Taylor crashed the vehicle, and they all ran away. (R. pp. 323-324). Thereafter, Hill testified he did not personally try to get away and just waited in the woods until law enforcement came and got him. (R. p. 325). Hill claimed he ran because it was his first instinct while acknowledging he was hiding from the police. (R. p. 325; p. 328). He also acknowledged he knew Taylor and Warren had committed prior robberies,

but he denied agreeing to participate. (R. p. 327). Notably, Hill also discussed his statement to police in which he indicated he was aware of the gun, but he denied knowing they had it at the time. (R. pp. 333-334).

Subsequently, before the jury began its deliberations, counsel reviewed the exhibits and determined which items should be sent back to the jury. (R. pp. 386-387). Deliberations began, proceeded into the evening, and were recessed until the following morning. (R. p. 393). On the following day, the jury found Hill guilty of all charges. (R. p. 398). After the verdict was announced, the trial judge discovered that Hill's written statements, which had not been entered into evidence at trial, were mistakenly sent into the jury room on the second day of deliberations. (Supp. R. pp. 1-2). In light of this discovery, Hill moved for a new trial. (Supp. R. p. 3).

A few weeks after the trial, the trial judge conducted a hearing on Hill's motion for a new trial. (Sec. Supp. R. p. 3). During the hearing, Hill asserted prejudice must be presumed from the erroneous submission of the statements to the jury and there was no way the jurors could have been questioned because a verdict had already been reached before the discovery of the error. (Sec. Supp. R. pp. 4-5). Hill argued the error resulted in a denial of his constitutional rights, including the right to confrontation, the right to cross-examination, and the right to call witnesses about the two written statements. (Sec. Supp. R. p. 5). Furthermore, Hill argued he "may" have altered his trial strategy and might not have testified at trial if the statements had been admitted. (Sec. Supp. R. p. 5). He noted it was impossible to determine whether the statements influenced the jurors without questioning them. (Sec. Supp. R. pp. 5-6). Additionally, he noted his statements about being sorry the hotels were robbed and his acknowledgment he wanted to get everything in the open suggested a guilty conscience. (Sec. Supp. R. p. 6). In response,

the solicitor asserted the burden of establishing prejudice was on Hill, the evidence of guilt was overwhelming, and the statements were not damaging and corroborated Hill's trial testimony. (Sec. Supp. R. pp. 10-11). At the conclusion of the hearing, the trial judge took the motion under advisement. (Sec. Supp. R. p. 15).

Subsequently, during another hearing on the motion for a new trial, the trial judge concluded the statements did not contribute to the verdict, would have properly been admitted if introduced at trial, and essentially tracked Hill's testimony from trial. (Supp. R. p. 4). The trial judge offered Hill an opportunity to show how his testimony would have been altered by the admission of the statements and where prejudice could have resulted from those statements, but Hill did not proffer any evidence or testimony. (Supp. R. p. 5). Thereafter, the trial judge found the error to be harmless and denied Hill's motion for a new trial. (Supp. R. p. 6).

Subsequent to the trial judge's ruling, Hill appealed the denial of his new trial motion to the Court of Appeals, arguing the erroneous submission of his statements to the jury violated his constitutional rights to due process and fundamental fairness. (App. Br. p. 4). Specifically, Hill contended the jury's exposure to the statements was prejudicial because "the statements, although identical to [his] testimony that he did not conspire to rob nor rob the victims, somehow emphasized twice that [he] was in the presence of law breakers on that night and twice rehearsed the activities of the lawbreakers." (App. Br. pp. 7-8). Additionally, Hill alleged the statements "subconsciously in the jurors' minds strengthened the state's case even though the evidence against [him] was insufficient." (App. Br. p. 8). Hill further asserted the error was not harmless in light of the other evidence presented during trial. (App. Br. p. 8).

Thereafter, the Court of Appeals reversed the trial judge's denial of Hill's new trial motion and remanded the matter to the circuit court. State v. Hill, 394 S.C. 312, 329, 714 S.E.2d 879, 888 (Ct. App. 2011). In reaching that determination, the Court of Appeals concluded "the improper submission of Hill's two written statements to the jury [was] reversible error." Id. at 324, 714 S.E.2d at 886. The Court of Appeals found Hill was unduly prejudiced based on the fact the entire jury was exposed to evidence not admitted during trial. Id. The Court of Appeals next considered whether the error was harmless and concluded it was not after focusing on several key pieces of evidence. Id. at 324-325, 714 S.E.2d at 886. Furthermore, the Court of Appeals focused on the portion of Hill's statements indicating his accomplices wanted him to "ride with them" and to "work with them" and found that portion of the statements was contradictory to Hill's trial testimony and undermined his credibility. Id. at 327, 714 S.E.2d at 887. Finally, the Court noted no curative instruction was issued due to the circumstances by which the error was discovered and Hill was prevented from challenging the evidence under the circumstances. Id. at 327-328, 714 S.E.2d at 888. For those reasons, the Court of Appeals determined the trial judge abused his discretion in denying Hill's new trial motion. Id. at 328-329, 714 S.E.2d at 888. Following the decision of the Court of Appeals, the State unsuccessfully petitioned for rehearing. This petition for a writ of certiorari follows.

ARGUMENT

Did the Court of Appeals err in reversing the trial judge's denial of Hill's new trial motion where Hill failed to meet his burden of establishing to the trial judge that prejudice resulted from the jury's exposure to his non-admitted exculpatory statements and where the other evidence presented during trial overwhelmingly established Hill's guilt for the indicted offenses irrespective of the inadvertent submission of his exculpatory statements to the jury?

The Court of Appeals reversed Hill's conviction after finding the trial judge abused his discretion in denying Hill's new trial motion. The Court of Appeals concluded the jury's inadvertent exposure to Hill's non-admitted exculpatory statements unduly prejudiced Hill because the statements contradicted Hill's testimony. The Court of Appeals further held the other evidence presented during trial did not overwhelmingly establish Hill's guilt. To the contrary, the Court of Appeals erred in finding the trial judge abused his discretion because Hill failed to meet his burden of establishing prejudice either at trial or on appeal. Furthermore, the Court of Appeals erred in reversing the trial judge's ruling on a ground not raised by Hill and in direct contradiction to Hill's appellate argument. Because Hill failed to establish any prejudice from the jury's exposure to his statements, the trial judge did not abuse his discretion in denying Hill's new trial motion. Furthermore, even if inadvertent submission of Hill's statements to the jury was prejudicial, any error was harmless in light of the cumulative nature of his statements coupled with the other overwhelming evidence of Hill's guilt. Accordingly, the petition for a writ of certiorari should be granted, the decision of the Court of Appeals should be reversed, and Hill's conviction should be affirmed.

A. Hill's Failure to Meet his Required Burden of Establishing Prejudice Resulting from the Jury's Inadvertent Exposure to his Statements

The decision to grant or deny a motion for a new trial is left to the sound discretion of the trial judge, and that decision will not be reversed on appeal absent an

abuse of discretion. State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); see State v. Jamison, 221 S.C. 312, 319, 70 S.E.2d 342, 344 (1952) (“The grant or refusal of a motion for a new trial is within the discretion of the Trial Judge and unless he commits an abuse of discretion, this Court is powerless to interfere.”). If competent evidence supports the jury’s verdict, the trial judge must not substitute his own judgment for that of the jurors and overturn their verdict. State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002). Likewise, a trial judge’s denial of a new trial motion based on allegations of jury misconduct is reviewed for an abuse of discretion. State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005).

“The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors.” State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000). It is the duty of the trial judge to ensure a jury comprised solely of fair, impartial, and unbiased jurors is impaneled. 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 influence. State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998). 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. 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 new trial. State v. Grovenstein, 335 S.C. 347, 351, 517 S.E.2d 216, 218 (1999); see State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct. App. 2000) (“Where the defendant seeks a new trial on the ground of impropriety involving the jury, he is required to prove both the alleged misconduct and the resulting prejudice.”); see also 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)).

In assessing whether outside influences potentially 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. When considering such an allegation, the trial judge must initially determine if misconduct occurred. Covington, 343 S.C. at 163, 539 S.E.2d at 70; see State v. Smith, 338 S.C. 66, 72, 525 S.E.2d 263, 266 (Ct. App. 1999) (“The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence.”). If misconduct is found, the trial judge must then determine if it affected the verdict, thus warranting a new trial. Covington, 343 S.C. at 164, 539 S.E.2d at 70. “**Unless the misconduct affects the jury’s impartiality**, it is not such misconduct as will affect the verdict.” Zeigler, 364 S.C. at 108, 610 S.E.2d at 866 (emphasis added); see also Patton v. Yount, 467 U.S. 1025, 1038 (1984) (instructing that a trial judge’s determinations on the impartiality of the jury are presumed to be correct and are entitled to special deference on appeal).

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 was in the best position to assess the jurors’ impartiality and credibility. Kelly, 331 S.C. at 142, 502 S.E.2d at 104; see State v. Galbreath, 359 S.C. 398, 403, 597 S.E.2d 845, 847 (Ct.

App. 2004) (“Generally, the determination of whether extraneous information received by a juror during the course of the trial is prejudicial is a matter for determination by the trial judge, and we see no reason to upset the judge’s findings that there was no prejudice.”). The trial judge must be afforded broad discretion in making such a determination. See State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989) (finding a trial judge has broad discretion when ruling on prejudice resulting from the jury reading extraneous documents).

In the case sub judice, the Court of Appeals erred in reversing the trial judge’s decision to deny Hill’s new trial motion because Hill failed to establish sufficient prejudice to warrant a grant of that motion. During the trial, the jury was exposed to Hill’s admissible but non-admitted statements in which he denied any involvement in the robberies. See Gilliam v. Foster, 75 F.3d 881, 900 (4th Cir. 1996) (“Moreover, a jury’s exposure to evidence that is admissible, but not admitted, does not require reversal of a conviction.” (citing State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972))). In order to establish reversible error, it was incumbent on Hill to show both that extraneous information was presented to the jury and that prejudice resulted from the error. See Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct. App. 2000) (“Where the defendant seeks a new trial on the ground of impropriety involving the jury, he is required to prove both the alleged misconduct and the resulting prejudice.”). The trial judge could not have abused his discretion in denying the new trial motion unless Hill met his burden of establishing both error and prejudice in the trial court, and, critically, Hill failed to do so. See State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) (“The burden is upon the appellant to satisfy this court that there has been prejudicial error.”).

During trial, Hill argued prejudice must be presumed from the submission of extraneous information to the jury, which was a position our courts have consistently rejected. See Aldret, 333 S.C. at 313-314, 509 S.E.2d at 814 (noting the Supreme Court has found automatic reversal is not warranted even in cases of external influences on a jury's verdict); Smith, 338 S.C. at 74, 525 S.E.2d at 267 ("Moreover, we are guided by a recent line of juror misconduct cases in which our Supreme Court rejects a per se reversible error rule."). Thereafter, Hill only identified two potentially problematic portions of the submitted statements: (1) the portion where Hill stated he was sorry the places were robbed; and (2) the portion where Hill stated he intended to get everything out in the open.³ Then, critically, the trial judge directly presented Hill with an opportunity to identify any differences between his testimony and the statements he believed entitled him to a new trial, and Hill merely responded, "Okay." Thus, when presented with an opportunity to identify any prejudicial distinctions between his testimony and the statements, Hill elected not to take advantage of the opportunity.

Subsequently, on appeal, Hill asserted the improperly submitted statements were "identical to [his] testimony" and argued to the Court of Appeals that the statements were prejudicial because they emphasized twice to the jury he was in the presence of the lawbreakers who committed the crimes and because "the statements subconsciously in the jurors' minds strengthened the state's case[.]" Furthermore, during oral argument, Hill continued to assert the prejudicial impact of the statements resulted from the

³ These allegedly problematic portions of the statements could have resulted in no prejudice to Hill because they were either preceded by or followed by a lengthy denial by Hill of any participation in, involvement in, or assistance with the commission of the crimes. (R. pp. 61-62; pp. 77-79). Regardless, Hill abandoned this particular argument by not raising it on appeal. See Ahrens v. State, 392 S.C. 340, 357, 709 S.E.2d 54, 63 (2009) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."); see, e.g., Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) ("An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal. Accordingly, any argument regarding exclusivity or hostility is abandoned." (citations omitted)).

cumulative nature of the evidence. Most notably, Hill never argued to the trial judge or on appeal that the statements were prejudicial because they contradicted his testimony or impugned his credibility.

Thereafter, despite Hill's contentions on appeal that the **cumulative** nature of the statements made them unduly prejudicial, the Court of Appeals independently concluded the submission of Hill's statements to the jury was prejudicial because the statements were **contradictory** to Hill's trial testimony, resulting in undue damage to his credibility. In particular, the Court of Appeals assigned substantial significance to the passage in Hill's statements indicating he told the officers his accomplices asked him to "ride with them" and to "work with them," which the Court of Appeals believed created an inference Hill was aware his accomplices wanted him to ride with them to participate in an armed robbery. However, critically, Hill himself never suggested such a negative inference could be drawn from that particular language and never alleged he suffered prejudice from the submission of his statements on that basis. Accordingly, the Court of Appeals erred by reversing the trial judge's ruling on a basis neither raised to the trial judge or raised by Hill on appeal. See State v. Prioleau, 345 S.C. 404, 412, 548 S.E.2d 213, 217 (2001) ("Because the Court of Appeals considered a basis for reversal which was neither presented below **nor argued on appeal**, we reverse its finding as to this issue." (emphasis added)); State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding Benton's challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence)"); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct.

App. 2003) (declining to address one of the grounds raised on appeal in support of Adams' mistrial motion when that ground was never presented to the trial judge).

Pursuant to the arguments raised by Hill, Hill failed to meet his burden of establishing he was prejudiced by the inadvertent submission of his statements to the jury. During the hearings on Hill's motion for a new trial, the trial judge was not presented with any credible arguments about the possible harmful effect the statements could have had in regards to the jury's impartiality. Instead, Hill chose to rely on an unsupported presumption of prejudice, which has consistently been previously rejected by our courts. Thereafter, the trial judge provided Hill with an opportunity to establish any prejudice he believed could have resulted from the statements, and Hill failed to do so. The trial judge properly considered the nature of the documents inadvertently sent to the jury room during deliberations in conjunction with the other evidence properly presented at trial, including Hill's testimony which Hill described on appeal as "identical" and cumulative to his inadvertently-submitted statements. After considering the totality of the circumstances, the trial judge properly exercised his discretion in denying the motion for a new trial, and his ruling was entitled to substantial deference on appeal based on his superior position to observe the jurors and hear the testimony and evidence presented. See, e.g., United States v. Bagnariol, 665 F.2d 877, 884-885 (9th Cir. 1981) ("The trial judge is uniquely qualified to appraise the probative effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature. He or she observes the jurors throughout the trial, is aware of the defenses asserted and has heard the evidence. The judge's conclusion about the effect of the alleged juror misconduct deserves substantial weight.").

Likewise, on appeal, Hill failed to make a sufficient showing of prejudice to entitle him to a new trial. Instead of arguing the submission of the statements exposed the jury to contradictory evidence and damaged his credibility as the Court of Appeals concluded, Hill asserted the statements were prejudicial because they were “identical” to his trial testimony and emphasized certain portions of his testimony. Based on the grounds raised by Hill, Hill’s argument was insufficient to establish prejudicial error due to the harmless cumulative nature of the evidence. See State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) (“[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence.”); State v. Jarrell, 350 S.C. 90, 101, 564 S.E.2d 362, 368 (Ct. App. 2002) (“[B]ecause we find Gillespy’s statement cumulative and **substantially identical** to other properly admitted evidence, any error caused by the admission of the prior consistent statement is **harmless**.” (emphasis added)); see also Leland v. United States, 153 F.2d 438, 439-440 (4th Cir. 1946) (affirming the trial judge’s denial of a new trial motion raised after the jury was exposed to an inadmissible newspaper article contradicting testimony from witnesses at trial because the contents of the newspaper article were testified to in substance by Leland himself). Therefore, because Hill failed to sufficiently meet his burden of establishing prejudice at trial or on appeal, the Court of Appeal erred in reversing the trial judge’s denial of the new trial motion as an abuse of discretion.

Hill’s statements, although inadvertently submitted to the jury, were not such that they would confuse the issues for the jury or bias or inflame the jury. See Gilliam, 75 F.3d at 899 (“[B]ecause these photographs could have been admitted into evidence, could not have caused the jury to have been confused or misled, and could not have biased or inflamed the jury, there is no basis upon which to conclude that the jury could not have

reached an impartial verdict.”). Hill failed to meet his burden of establishing the jury’s exposure to his non-admitted exculpatory statements impacted the jury’s impartiality and resulted in prejudice. 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.”). When appropriately considering only those allegations of prejudice raised by Hill and when applying an appropriately deferential standard of review, the trial judge did not abuse his discretion in denying Hill’s motion for a new trial. Therefore, the Court of Appeals erred in finding the trial judge abused his discretion on a ground not raised by Hill and in direct contradiction with Hill’s appellate arguments. See I’on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-422, 526 S.E.2d 716, 724 (2000) (“An appellate court may not, of course, *reverse* for any reason appearing in the record. . . . [T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.” (italics in original)). Accordingly, for the foregoing reasons, the State’s petition for a writ of certiorari should be granted, the decision of the Court of Appeals should be reversed, and Hill’s conviction should ultimately be affirmed.

B. Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on

the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”). “When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.” State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Thus, when overwhelming evidence of guilt has been presented or when erroneously admitted evidence is merely cumulative to other properly admitted evidence, any trial error may be harmless. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) (“[I]n view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt.”); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (“Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.”).

In the case at bar, the trial judge correctly determined any error in the erroneous exposure of the jury to Hill's statements was harmless in light of the other overwhelming evidence of Hill's guilt. In reaching a conclusion to the contrary, the Court of Appeals listed the following evidence as the evidence identified by the State as overwhelmingly establishing Hill's guilt: (1) the accomplices' testimony indicating Hill was actively involved in robberies; (2) the fact Hill was observed in the back seat of the vehicle fleeing from an officer attempting to make a traffic stop; (3) the fact officers found a ski mask and a coat linked to Hill; and (4) the fact Hill fled from police and hid in a creek bed. See Hill, 394 S.C. at 324-325, 714 S.E.2d at 886. Contrary to the Court of Appeals'

conclusions, this evidence, along with several other key pieces of evidence that were overlooked on appeal, constituted overwhelming evidence of Hill's guilt such that any error in the jury's exposure to the statements was harmless.

Turning to the evidence presented during trial, Hill's accomplices **both** testified against Hill and implicated him in the robberies, and their testimony constituted substantial evidence of Hill's guilt. Additionally, aside from this damaging testimony, Hill affirmatively testified he was in the back seat of the getaway car as it fled from the second robbery, and Officer Kennedy observed Hill in that rear seat. This testimony is highly significant because a ski mask and jacket used during the robbery were located in the back seat where Hill testified he had been, and one of Hill's accomplices identified the jacket as belonging to Hill. Furthermore, Hill's flight from law enforcement and the particular circumstances of that flight constituted substantial evidence of his guilt for the armed robberies. Hill not only **immediately** fled from the officers after the getaway vehicle crashed but Hill ran into the woods, hid himself under a muddy bank in a creek bed, and successfully evaded officers for over two hours. Hill's extreme and extraordinary efforts to evade law enforcement were very strong evidence of his involvement in the armed robberies. Finally, Hill was arrested with a wad of unfolded cash constituting roughly half of the money taken during the robberies stuffed into his pocket, and this key fact was overlooked by the Court of Appeals in its harmless error analysis. Notably, the other money found on the suspects was recovered from Warren, who was other robber identified as going into the hotels by Hill's accomplices.

Finally, just as Hill argued on appeal, Hill's trial testimony and pre-trial statements were consistent and virtually identical, meaning Hill's statements were merely cumulative to other properly admitted testimony. See State v. Griffin, 339 S.C. 74, 77-

78, 528 S.E.2d 668, 670 (2000) (“There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted.”). Tellingly, Hill characterized his statements as “identical to [his] testimony[.]” Because the jury was only erroneously exposed to statements cumulative to the testimony presented during trial and consistent with the theory Hill advanced in his defense, any error in the inadvertent submission of the those statements to the jury was rendered entirely harmless.

Looking to all of the properly admitted evidence in totality, the evidence presented during trial clearly established Hill’s guilt for the crimes and rendered any error in the mistaken submission of his written statements to the jury harmless. The submission of these statements could not have altered the verdict in light of the other evidence presented at trial. See State v. Knight, 258 S.C. 452, 454, 189 S.E.2d 1, 2 (1972) (“[A] conviction will not be reversed for non-prejudicial error in the admission of evidence.”). Based on the cumulative nature of the erroneously submitted statements along with the overwhelming nature of the other competent evidence of Hill’s guilt properly admitted during trial, the result of Hill’s trial would have been the same with or without the error regarding the statements. Therefore, in light of the overwhelming evidence of Hill’s guilt, the trial judge did not abuse his discretion in declining to grant Hill’s motion for a new trial. For these reasons along with all of the foregoing reasons, the petition for a writ of certiorari should be granted, and Hill’s conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted. In requesting this relief, counsel for Petitioner certifies a petition for rehearing was made and finally ruled upon by the Court of Appeals.

Respectfully submitted,

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January 27, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County
Honorable John C. Few, Circuit Court Judge

THE STATE,

Petitioner,

vs.

JONATHAN KARON HILL,

Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 27th day of January, 2012.

Ellen R. DuBois

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