ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

John C. Few, Circuit Court Judge

RECEIVED

APR 27 2012

S.C. Supreme Court

JONATHAN K. HILL,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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South Carolina Commission on Indigent Defense
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ATTORNEY FOR RESPONDENT

INDEX

QUESTION PRESENTED

The Court of Appeals did not err in finding that the extrinsic evidence (respondent's two un-admitted statements) which the jury viewed at trial resulted in prejudicial error and warranted a reversal in the case because the extrinsic evidence was contrary to the respondent's testimony and therefore prejudicial to his credibility and the credibility of his defense, particularly where the state's case against the respondent was not overwhelming.

STATEMENT OF THE CASE

The respondent Jonathan Hill, aka Jonathan Green, was convicted of resisting arrest, two counts of conspiracy and two counts of armed robbery during the February, 2003 term of the Greenville County General Sessions Court before the Honorable John C. Few, Judge. The respondent received an aggregate thirty-year sentence. App 1 – 452. The respondent appealed.

After oral arguments were heard, the Court of Appeals issued an opinion on August 10, 2011 reversing and remanding the case. See State v. Hill, 394 S.E.2d 312, 714 S.E.2d 879 (Ct. App. 2011). App. 546 – 562. On September 22, 2011, the Court of Appeals denied the petitioner's petition for rehearing filed in the case. App 590 – 591. See also App. 563 – 589. The petitioner filed a petition for writ of certiorari dated January 27, 2012. This return by the respondent follows.

ARGUMENT

The Court of Appeals did not err in finding that the extrinsic evidence (respondent's two un-admitted statements) which the jury viewed at trial resulted in prejudicial error and warranted a reversal in the case because the extrinsic evidence was contrary to the respondent's testimony and therefore prejudicial to his credibility and the credibility of his defense, particularly where the state's case against the respondent was not overwhelming.

The state's indictment alleged that the respondent, Damian Taylor, and Melvin Warren committed the armed robberies of two motels on the morning of February 1, 2002. Taylor testified at trial that he drove while respondent and Warren went into the two motels and committed the armed robberies. Warren testified at trial that the respondent went in the motels with him (Warren) and committed the robberies while Taylor drove the car. The respondent testified at trial swearing that he was not involved in the robberies. App. 234, l.6 – p. 248, l. 3; App. 279, l. 13 – p. 294, l. 13.

Respondent stated at trial that he rode out with Taylor and Warren thinking that they were going to a party to meet some girls, but instead Taylor drove them to two motels and that Taylor and Warren went inside and committed the robberies. App 310, l. 9 – p. 325, l. 23. The respondent stated that he did not have knowledge of or agree to Taylor's and Warren's plans to commit the robberies. **However**, the gist in the two unadmitted statements made by the respondent which the jury viewed (but should not have viewed) was that he knew Taylor and Warren were robbers and that Taylor and Warren wanted him "**to ride with them**" and "**work with them**" and that "**they tried to get [him] to ride with them before.**" This contradicted the respondent's testimony to the jury that he had no knowledge of Taylor's and Warren's criminal plans to commit the robberies and to the contrary, suggested that the respondent was indeed aware of the fact that criminal activities would occur and that he willingly participated in the criminal activities. App. 558 – 560.

As a result of the jury's having viewed this extrinsic evidence, the Court of Appeals appropriately held that:

> When viewed together, [respondent's] statement to the Simpsonville Police Department and his trial testimony are contradictory and undermine [respondent's] credibility to the jury. Because [respondent's] credibility was impermissibly impugned by evidence not admitted at trial, this contradiction strongly suggested to the jury that [respondent] was untruthful during his testimony and could not be believed. Due to the gravity of this error, we conclude [respondent's] entire defense was prejudiced because his credibility was substantially damaged. See State v. Outlaw, 307 S.C. 177, 180, 414 S.E.2d 147, 148 (1992) ("[E]rror which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense.") (citation omitted); see also Pete, 98 P.3d 803 (Wash. 2004) (noting the inadvertent submission of contradictory evidence not admitted at trial suggested to the jury that defendant was a liar). App. 560.

Thus, the unadmitted statements served to contradict the respondent's testimony and undermine his credibility as a witness at trial and the credibility of his defense at trial.

HEARINGS AND INQUIRIES REGARDING JUROR MISCONDUCT

The respondent argued that the contradiction and credibility findings in the case did not amount to the required showing of prejudice and went on to compare this case to a line of cases where the outcomes on appeal resulted in findings of no prejudice. However, these cases cited by the respondent can be distinguished from the case at bar. For example, in many cases where no prejudice was found per juror misconduct, the jurors were questioned by the trial judge or hearings were held on the misconduct issue in order to ascertain whether prejudice existed as a result. Unfortunately, however, the jurors in the respondent's case were not questioned by the trial judge regarding the extrinsic matter they viewed. For example, in State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), the trial judge held a hearing after learning of a report of juror misconduct (a juror's inappropriate conversation about the case with his girlfriend) and questioned that juror and

other jurors who stated they were coerced into voting guilty before finding that the misconduct yielded no prejudice. In State v. Carmack, 388 S.C. 190, 694 S.E.2d 224 (2010), where premature jury deliberations occurred during the trial, the court upheld the trial judge's refusal to dismiss the juror who allegedly discussed the case with his live-in girlfriend because the trial judge met twice with this juror in question and questioned him under oath regarding the matter before finding that no prejudice existed in reference to the misconduct. See also State v. Covington, 343 S.C. 157, 539 S.E.2d 67 (2000), where it was alleged that two particular jurors shared information about the defendant's prior domestic violence against his wife, and where the trial judge found no misconduct or prejudice after having spoken with those two jurors and the remaining jurors who claimed they were not influenced by the rumors. Compare State v. Bantan, 387 S.C. 412, 692 S.E.2d 201 (2010), and State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989), where the trial judges interviewed the jurors to find out whether they had been influenced after hearing statements and reading articles about that the defendants' connections to other similar charges and found no prejudice. Compare also State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999), where the misconduct was an alternate juror's temporary presence in the jury deliberation room, and where the trial judge found no prejudice after questioning the jury members to determine if the alternate juror's presence during their deliberations affected their verdict.

In some cases, the trial judge may conduct an internal hearing regarding juror misconduct. For instance in State v. Smith, 338 S.C. 66, 525 S.E.2d 263 (1999), the juror misconduct was a sleeping juror, but the trial judge watched for himself and found no prejudice because she was alert.

In addition, cases exist where hearings were held by the trial judge on juror misconduct whereinafter prejudice was not found by the trial judge, but nevertheless the appellate court found prejudice. See State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003), where the trial judge held a

hearing via an individual's voir dire of the jurors in response to information presented by the defendant that the police questioned the jurors' family members about the jurors' willingness to impose the death penalty and found no error, but the appellate court reversed and held that this was error that affected the jury's impartiality.

Therefore, these cases cited by the respondent were cases in which the trial judges had opportunities to interview, voir dire, and question the jurors in connection with the alleged misconduct before finding the non-existence of prejudice. Nevertheless, in this case there was no hearing held in order to assess whether prejudice resulted due to the jurors' viewing of the extrinsic evidence at issue.

INSTRUCTIONS (CURATIVE OR OTHERWISE) REGARDING JUROR MISCONDUCT

Not only did the petitioner cite to cases of juror misconduct where the defendant received the benefit of the trial judge's having questioned or conducted hearings on the subject of juror misconduct and prejudice, but the respondent also cited to cases where instructions (curative or otherwise) were given to cure any prejudice that might have arisen due to any juror misconduct. However, the respondent did not have the benefit of a curative instruction or any instruction at all to counter the misconduct that occurred in this case. For instance, in the case of Grovenstein, supra, where an alternate juror was temporarily in the jury room during jury deliberations, the fact that the trial judge questioned the jurors and gave a curative instruction to disregard incompetent evidence (alternate juror's opinion), and instructed the jurors to follow the oath as instructed to them certainly cured any prejudice that might have arisen despite the juror misconduct in the case. See also State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000), where juror misconduct occurred when the jurors looked up on their own the definitions of "malice aforethought" and "manslaughter" in Black's Law Dictionary, but no prejudice was found as the trial judge's instructions on the crimes that were given

to the jury were adequate and in keeping with the law in the case. Finally, in State v. Pittman, supra, there was no finding of prejudice where two of the jurors voted guilty because they misunderstood the law because the trial judge correctly instructed them on the law and also polled the jury after the verdict was read in the case.

Therefore, these cases cited by the petitioner were cases where the trial judges were able to give instructions (curative or otherwise) that precluded findings of prejudice due to juror misconduct; but in the case at bar, there were no instructions to cure the juror misconduct at issue.

CONTRADICTORY STATEMENTS AND DENIAL OF ADVERSARIAL TESTING

In State v. Pete, 152 Wash.2d 546, 98 P3d 803 (2004), which was cited to by the Court of Appeals in the respondent's opinion, it is clear that the additional wrinkle of the respondent's inability to explain away any extrinsic evidence adds to the prejudice to the extent that the respondent was afforded not opportunity to explain, through direct or cross–examination or otherwise, the damaging extrinsic evidence to the jury. In Pete, the prosecution alleged that Pete and his codefendant robbed the victim of his beer; but Pete, who did not testify at trial, presented a defense that was a denial of any involvement in the robbery. However, when the jury was inadvertently exposed to Pete's two unadmitted statements (one stating "that he only took some beer" and another indicating that the victim handed and offered him the beer while it was the codefendant who came up and committed the assault), the Pete court held that:

> ...even though the State downplays the trial court error by pointing out that the evidence was deemed admissible...the fact remains that the documents were not offered or admitted at trial. The jury's receipt of this extrinsic evidence after the close of its evidence presented a "no win" situation for Pete because he was not able to object to or explain the extrinsic evidence. Furthermore, his counsel was unable to cross-examine either the transport officer or the officer who took Pete's statement. The fact that the bailiff instructed the jurors to not consider the extrinsic evidence does not, in our view,

> mitigate the harmfulness of the error. Even if the trial court had given the instruction, which would be the appropriate practice, the same can be said.

See the case of State v. Rogers, 96 S.C. 350, 80 s.E.620 (1914) cited by the court of Appeals in this case where the court reversed because neither was the trial judge able to give an instruction nor the defendant able to give an explanation regarding the unadmitted affidavit which was inadvertently submitted to the jury. In Rogers, the jurors viewed an unadmitted and unexplained affidavit signed by the defendant's wife that revealed that the defendant's father was bribing her not to testify against the defendant, who was on trial for malicious injury to railroad cars, which in turn led the court to decide that the same influenced the jury under the following rationale:

> ...the affidavit of Hattie Rogers, the wife of the defendant, shows that the father of the defendant attempted to prevent her from testifying against the defendant, and telling what she knew in the case, and offered valuable inducement to prevent her testifying. There was nothing to connect the defendant with this attempt on the part of the father to suppress testimony, and the affidavit got to the jury after his honor had ruled it incompetent, without any explanation on the part of the court (i.e. instruction) that it was incompetent, and to be disregarded, not denied by the father, who was alleged to have attempted to improperly influence Hattie Rogers' testimony, and unexplained by him or the defendant, and we cannot say that, taken with all the evidence in the case, it was not prejudicial to the defendant; but, on the contrary, the jury might have arrived at the conclusion that they did by the incompetent testimony, and we have no doubt, if it had been discovered before his honor adjourned the court what had transpired, but that he would have set the verdict aside, and granted a new trial.

Clearly, not only was the respondent damaged in the instant case with respect to his credibility and the credibility of his defense by the jurors' having viewed his two unadmitted statements, but note that the irrevocable damage with respect to the respondent's inability to respond to the statements (error was a post trial discovery), which in turn heightened the damage he suffered in the case.

CONTRADICTORY STATEMENTS AND THE ISSUE OF CREDIBILITY

Clearly, contradictory statements can damage one's credibility and result in sufficient prejudice to require a new trial. In State v. Outlaw, 307 S.C. 177, 414 S.E.2d 147 (1992), where the defendant denied committing the sexual assault and where the solicitor attempted to impeach him with prior crimes without proof of his prior crimes, the Court held it was error for the trial court to give a curative instruction on prior crimes when there was nothing to contradict the defendant on the prior crimes because this improperly impugned the defendant's credibility, especially where his credibility was essential to his defense. The credibility issue in State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990), was similar to Outlaw. In Reeves, the court held that in essence the defendant's credibility was damaged with respect to the lewd act charge for which he was on trial when the state exposed the defendant's prior rape conviction and that the error was not harmless because the case was a swearing contest between the victim and the defendant. See also State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (Ct App 2002), where the Court upheld the trial judge's ruling to exclude the testimony of a witness regarding prior instances in which the defendant's wife (the victim's aunt) physically abused the victim in a criminal sexual conduct because the testimony was an impermissible attempt to attack the credibility of the defendant's wife through the admission of extrinsic evidence.

The present case, however, is most similar to the murder case of State v. Rebecca Smith, 308 S.C. 442, 424 S.E.2d 496 (1992), where the defendant (Rebecca) was on trial for the murder of her husband. In Smith, supra, the defendant's nephew stated that the defendant's son went into the deceased's home with the defendant, and that the defendant killed the husband while he (nephew) and the defendant's lover (Billy) stayed in the vehicle; but the defendant's son testified that it was the defendant's lover (Billy) who was armed with a baseball bat and went into the

defendant's husband's residence and murdered the husband while the defendant was in another city (note that the defendant testified at trial that she was in another city). When the defendant's counsel in Smith, supra objected to the nephew's statement that the defendant and her son used cocaine before the defendant allegedly committed the murder, the Court held as follows on the issue of credibility:

> Finally, the prejudice of this testimony was heightened when the State employed it to impeach Rebecca's character witnesses and, in closing argument, referenced her drug use. The testimony in this case produced diametrically opposite versions of what occurred, so that witness **credibility** was crucial to the jury's determination of who and what to believe. The "prior cocaine use" testimony was so destructive to Rebecca's character, hence her **credibility**, that it cannot be held harmless error or cumulative. *State v. Outlaw*, 307 S.C. 177, **414 S.E.2d 147** (1992).

However, the **exact case on point** is the case of State v. Pete 152 Wash. 2nd 546, 98 P.3d 803 (2004). As stated above, in Pete the state alleged that Pete and his codefendant robbed the victim of his beer; but Pete, who did not testify at trial, presented a defense that was a denial of any involvement in the case. However, when the jury was inadvertently exposed to Pete's two unadmitted statements (one stating "that he only too some beer" and another indicating that the victim handed and offered him the beer while it was the codefendant who came up and committed the assault), the Pete court held on the issue of credibility that

> In addition, when the two unadmitted statements are viewed together, they are harmful to Pete in the sense that they are contradictory and could suggest to a jury that Pete is a liar who cannot be believed. While it is undisputed that the jury received evidence that it should not have seen, the critical question that remains is whether the jury's receipt of this evidence prejudiced Pete. Pete's defense throughout the trial was a general denial of participation in any wrongdoing. Although Pete did not testify, he clearly relied on [the victim's] testimony at trial that Pete did not speak to him or touch him the night of the incident, that [the victim] voluntarily gave the beer to Pete....[but] [t]he submission

> of the two documents to the jury seriously undermined this defense and nothing short of a new trial can correct the error. We conclude that the introduction of these documents into the sanctity of the jury room did prejudice Pete and that the trial court, therefore, abused its discretion in not granting a new trial.

Therefore, contradictory statements that damage a defendant's credibility and the credibility of his defense in cases where credibility is an issue will result in errors that are not harmless.

CUMULATIVENESS AND THE ISSUE OF CREDIBILITY

Should the issue of cumulativeness become an issue in this case, then it must be understood that cumulativeness does not presume harmless error as argued by the respondent. To the contrary, cumulativeness adds to the error where credibility is an issue at trial. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), where the social worker's hearsay testimony was not found to be harmless error merely because it was cumulative to other inadmissible hearsay testimony and the victim's testimony, but rather it was the sheer cumulativeness of the same that added additional impact to the error. The Jolly Court held that the improper corroboration testimony that was merely cumulative to the victim's testimony "[could not] be harmless because it is precisely this cumulative effect which enhances the devastating impact" of the trial error. The Jolly Court took this position due to the fact that the credibility of the witnesses was a central issue in the case. See also State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989). Apparently, when the cumulativeness of evidence bears on issues of credibility, trial errors cannot be deemed harmless. See also State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), where the court held that it was error, i.e., hearsay, to admit portions of the forensic interviewer's written reports of the meeting with the minor child and that:

> As this court has held before, where credibility was the ultimate issue in the case, improper corroboration evidence that is merely cumulative to the victim's testimony is not harmless. Jolly,

> Dawkins, Smith ...because the children's credibility was the ultimate for the jury to make in deciding guilt [and] the trial court's error in admitting the reports could not have been harmless.

Compare Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) where numerous witnesses testified sans objections regarding the victim's out of court conversations with them concerning the alleged abuse and the court held that:

> ...because improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless. As we state in *Jolly*.
> ***157** "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *See Jolly*, 314 S.C. at 21, 443 S.E.2d at 569. Consequently, petitioner should be granted relief for the ineffective assistance of counsel.

Also, note that instances of the non-harmlessness of cumulativeness have bearings on credibility in cases other than criminal sexual conduct cases. For example, in the **identification** case of Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), the court held that the forensic interviewer's hearsay testimony was not harmless error as it impermissibly corroborated the victim's testimony where the outcome of the case hinged on the victim's credibility regarding the identification of the perpetrator. Also, compare the **prosecutorial misconduct** case of State v. Inman, where cumulativeness was a factor that impacted the error. In State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011), the court held that the prejudicial effect of prosecutorial misconduct is determined by the cumulative effect of such misconduct, and the strength of the admitted evidence, and any curative actions taken by the court. Moreover, note that in the Doyle[1] **post arrest silence** cases, the first factor under the test to determine whether a Doyle error is harmless is whether the record has established that the Doyle reference was a "single reference," which suggests that more than one Doyle reference would bear on the issue of cumulativeness, which in

turn would weigh against the argument that the Doyle error was harmless. See State v. McIntosh, 358 S.C. 432, 595 S.E.2d 484 (2004).[2] Furthermore, in assessing the factors of a harmless error analysis, two of the factors listed include the importance of the witness' testimony in the prosecution's case and whether that testimony was cumulative in the case.[3] See State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002).

Thus, any cumulativeness argument with respect to the error of the jurors' having viewed the unadmitted statements in this case would weigh against a no harmless error argument in the case.

ERROR PRESERVATION

The petitioner argued that the court improperly reversed the case on a finding of prejudice because a prejudice analysis that was neither raised at trial nor on appeal in the case. To the contrary, the petitioner has confused the Court of Appeals' prejudice analysis with the subject of error preservation. A contemporaneous objection is required to preserve an error for appellate review. State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App.

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[1] 426 U.S. 610 (1976)

[2] To establish whether a Doyle error is harmless, the record must establish that:
1.) The reference of the defendant's right to silence was a single reference;
2.) The reference was tied to the exculpatory story;
3.) The exculpatory story was totally implausible;
4.) The evidence of guilt was overwhelming.

[3] State v. Mizzell, supra, listed the following factors to be considered in a harmless error analysis:
1.) The importance of the witness' testimony in the prosecution's case;
2.) Whether the testimony was cumulative;
3.) The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;
4.) The extent of the cross-examination; and
5.) The overall strength of the prosecution's case.

1997). At the trial level in this case, trial counsel raised this issue of the jury's viewing of two statements made by appellant that were not admitted into evidence and the trial judge entertained and ruled on the prejudicial/harmless of this. On appeal, appellate counsel argued the same, i.e. that prejudicial error occurred when the jury viewed two statements made by the respondent which were not admitted into evidence at trial. See appellant's brief at pages five and six.

The rule that a party cannot argue one ground at trial and another ground on appeal is an acknowledged rule that was not contested by appellant. Nevertheless, in the case at bar, this rule was not violated as there was no variance by neither trial counsel nor appellate counsel on the sole issue raised at trial and on appeal, i.e. that it was prejudicial error to have the jury view statements made by appellant that were not admitted into evidence at trial. Compare the following true variances that violate this rule. For example, in State v. Myers, 344 S.C. 532, 544 S.E.2d 851 (Ct App. 2001), and State v. Richardson, 358 S.C. 586, 595 S.E.2d 858 (2004), the Court noted the violation of this rule where the issue of relevancy was raised at trial with respect to certain testimony, but later made an impermissible character violation argument on appeal regarding the same was made on appeal. See also State v.Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003), where a trial objection was made on the ground that a solicitor's comment shifted the burden of proof, but on appeal the argument was made that this comment improperly referred to the defendant's right to remain silent. Contrast State v. Benjamin, 341 S.C. 160, 533 S.E.2d 606 (2000), where the defendant argued at trial that 17-25-45 violated the equal protection clause, but argued on appeal that the same violated state and federal due process. Here, the issue raise at trial and on appeal were identical.

Thereafter, since there was no error preservation violation in the case and since the sole issue raised in the case on appeal, which was the prejudice of the extrinsic evidence in question, was the same issue raised below at trial, then the Court of Appeals properly moved forward with its error and prejudice analysis as presented in its opinion in the case.

PREJUDICE

Prejudice is defined as a reasonable probability that the jury's verdict was influenced by the challenged evidence. Watson v. Ford Motor Company, 389 S.C. 434, 699 S.E.2d 169 (2010). A jury must render a verdict free from outside influences and the defendant must prove the misconduct and the resulting prejudice. State v. Cameron, 311 S.C. 204, 428 S.E.2d 10 (1993).

As a rule, jurors take an oath to decide the case based "only and solely" on the testimony, evidence and law presented to them. State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (2004). Any information jurors received which has not been received into evidence would be defined as extraneous matter. See State v. Galbreath, supra, citing to State v. Robinson, to the extent that external influences on a jury would involve situations where jurors receive information during deliberations from some an outside source. Also, when an allegation is made that extraneous information may have improperly influenced the jury, the relevant factors to be considered are:

> 1.) the number of jurors exposed;
> 2.) the weight of the evidence properly before the jury;
> 3.) and the likelihood the curative measures were effective in reducing the prejudice.

State v. Covington, 343 S.C. 157, 539 S.E.2d 69 (Ct. App. 2000); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). Also, note that jurors are not trained or experienced or disciplined to disregard prejudicial matters and to separate during the mental process of adjudication, the admissible from the inadmissible, after hearing both. State v. Inman, supra.

First note that all twelve jurors were exposed to the extrinsic evidence in this case. Also, there were no instructions given by the trial judge to cure the error. Again, note that there were no instructions or hearings held in this case. Note also that there was contradictory evidence present, but no opportunity to explain the same, and that the respondent's credibility was a crucial issue in the case and that that credibility was damaged. Finally, the weight of the evidence was not overwhelming in favor of guilt. For instance, the state's case lacked forensic evidence. And, the state's case lacked identification testimony from the two victims in the case. In addition, there were no statements made by the respondent that were **admitted into evidence into the state's case in chief at trial.** Undoubtedly, the state's case hinged primarily on the testimony of Taylor and Warren, but Taylor gave a statement previously indicating that "he (Taylor) and Warren needed some money and made plans [to commit the robberies] and that we (Taylor and Warren) asked [the respondent] to come along, but at first we did not tell [the respondent] what we were doing . . . [and the respondent] just thought we were riding around. R. p. 252, lines 7 – 13. Warren testified that he and respondent committed the robberies, but Warren gave a statement previously indicating that he (Warren) stayed in the car and that Taylor and respondent went into the hotels to commit the robberies. R. p. 295, line 18 – p. 297, line 1. Finally, note that the respondent testified at trial swearing that he knew nothing of the plan to commit these robberies and was not guilty as charged. R 310, l. 9 – p. 325, l. 23.

In light of the incredible stories told by the codefendants and the respondent's testimony that he lacked knowledge of the codefendants' plans, then the case became a swearing contest between Taylor, Warren, and the respondent. This meant that the state's case against the respondent was not overwhelming and that the respondent's contradictory statements made in his two un-admitted statements indicating that he indeed had knowledge his codefendants' criminal

plans certainly affected his credibility and the credibility of his defense at trial. Therefore, the jurors' viewing of the unadmitted statements was sufficiently prejudicial and soundly affected the jury's verdicts in the case. It bears repeating the truth that jurors are not trained or experienced or disciplined to disregard prejudicial matters and to separate during the mental process of adjudication, the admissible from the inadmissible after hearing both. State v. Inman, supra.

HARMLESS ERROR

Moreover, Court of Appeals properly found that the error in this case was not harmless error. Error is harmless if it does not contribute to the jury verdict or could not have affected the result of the trial. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985). Clearly, the error of the jury's inspection of the statements made by respondent which were not admitted into evidence at trial, which ultimately contradicted the respondent's testimony and lead to his damaged credibility in a case where his credibility mattered and where there was **no** overwhelming evidence of the respondent's guilt ultimately and unequivocally contributed to the jury verdict against the respondent of guilty as charged. Note that the error was exacerbated by the fact that the respondent's credibility could not have been rehabilitated by any explanation about the unadmitted statements, or by any instructions given regarding the unadmitted statements, or by any jury voir dire and questioning in reference to the unadmitted statements, which in turn cemented the non-harmlessness of the error of the jurors' having viewed the unadmitted statements came after the trial ended as extrinsic evidence. As a rule, a court can set aside a conviction if guilt has not been conclusively proven by competent and if an error in the case is **substantial**. State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). Here, guilt was alleged and shown only by two codefendants gave self serving testimony pointing their fingers at the respondent, which means that the error of the

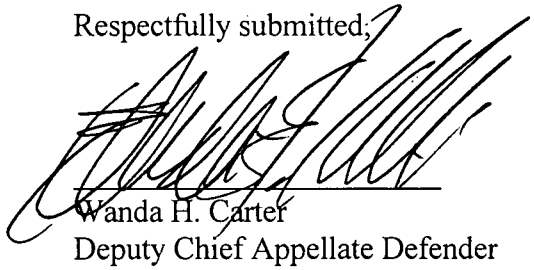
admittance of the two unadmitted statements damaged respondent's credibility at trial combined cannot be considered harmless error.

In other words, the Court of Appeals did not err in reversing and remanding the case.

CONCLUSION

Therefore, based on the foregoing arguments, this Court should deny the petitioner's petition for writ of certiorari and uphold the decision of the Court of Appeals in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 27th day of April, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

John C. Few, Circuit Court Judge

JONATHAN K. HILL,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of April, 2012.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 27th day
of April, 2012.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013

SCCID
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED
APR 27 2012
S.C. Supreme Court

April 27, 2012

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Jonathan K. Hill (case tracking # 2011-201546)

Dear Mr. Shearouse:

Enclosed are the original and six copies of the return to petition for writ of certiorari in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/kam

Enclosures

cc: Court of Appeals