STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

APPELLATE CASE NO. 2013-000149

THE STATE, ... RESPONDENT,

v.

RAYMOND YOUNG, ... APPELLANT.

BRIEF OF APPELLANT RAYMOND YOUNG

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in denying the Appellant's Batson motion where the state's explanation for striking African American jurors was inherently racial, fundamentally implausible and, where the state failed to give a racially neutral reason for the uneven treatment between the African American jurors that were struck and at least one similarly situated white juror that was seated?

II. Whether the trial court erred in allowing testimony by the State's witnesses using the term "gang" in reference to Appellant's case where the solicitor failed to lay the proper foundation that Appellant was a gang member, the reference was inflammatory and unduly prejudicial under Rule 403, SCRE, and the reference constituted improper character evidence under Rule 404, SCRE?

III. Whether the trial court erred in admitting photographs of the co-defendants allegedly making "gang signs" where the solicitor failed to lay the proper foundation for their admission, they were not relevant to the facts at issue in the case, and they were unduly prejudicial?

IV. Whether the trial court erred in coercing co-defendant DaQuan Bruster to testify for the State by threatening to vacate his guilty plea such that he would be facing life without parole (LWOP) because the judge found that Bruster's first testimony violated the plea agreement?

V. Whether the trial court erred in failing to declare a mistrial where jurors from this trial were overheard by a juror in another case talking in the restroom during the lunch break about Appellant's case, saying such things as "the need to decode the language", "I was chillin," and "he's going down," followed by laughter?

STATEMENT OF THE CASE

On May 29, 2012, the Greenville County Grand Jury indicted Raymond Lewis Young along with Esaiveus Frantrez Booker, Kinjta Kadeem Sadler, and Michael Antonio Williams each on seven counts of attempted murder, one count of assault and battery by mob second degree, one count of conspiracy, and one count of possession of a weapon during the commission of a violent crime. R. * (Indictments).

On January 7, 2013, Young proceeded to a jury trial, the Honorable Edward W. Miller presiding. Young was tried along with the three co-defendants. Booker was represented by Randy Chambers; Michael Williams was represented by Scott Robinson; Kinjta Sadler was represented by Thomas Quinn; and Raymond Young was represented by John Abdalla. The State was represented by Katrina Salisbury. The jury found Young guilty of the seven counts of attempted murder, one count of assault and battery by mob in the second degree and one count of conspiracy. Young was was found not guilty of possession of a firearm during the commission of a crime of violence. Young was sentenced to thirty years on each of the attempted murder charges, with all sentences to run concurrently. Young was sentenced to five years on the conspiracy charge, which was also concurrent with the attempted murder charges. On the assault and battery by mob in the second degree Young was sentenced to ten years consecutive suspended with five years probation.

Subsequent to the filing of the appeal J. Falkner Wilkes was substituted as counsel for Raymond Young. Raymond Young has moved to consolidate this appeal with that of co-defendant Esaiveus Frantrez Booker (2013-000149). This appeal follows.

STATEMENT OF FACTS

Jury Selection

The four co-defendants in this case were African American. At the onset of the jury selection process, council for Esaiveus Booker (Chambers) indicated that with the consent of all counsel he would be speaking for the group. R. 36, l. 18-25. At the end of jury selection, still speaking on behalf of all co-defendants counsel stated: "Your Honor, we do have a matter regarding jury selection we'd like to take up outside the presence of the jury." R. 62, l. 17-19. Once the jury was excused counsel raised a Batson challenge based on the state's strike of three African American jurors. R. 63, l. 4-9. In the discussion of the objection Chambers clearly indicated that he was still speaking for the group, stating: "we don't believe the state articulated racially neutral causes." R. 65, l. 4-6. The Batson issue was therefore properly raised on behalf of all four defendants in this case.

In response to the Batson motion the court noted for the record that Juror No. 293 was an African American, and was seated. Juror No. 308 was an African American and was seated. Juror No. 281 was an African American and was struck by the State with its fourth preemptory challenge. Juror No. 81 was an African American and was struck by the State with fifth preemptory challenge. Juror No. 215, the first alternate was African American, was also struck by the State. R. 63, l. 10-19.

The defense challenged the state's strike of all three jurors. R. 63, l. 20-21. In response the solicitor stated reasons for each of the three strikes. R. 63-64. For juror 81, the solicitor stated that the strike was based on the comments made by the juror during the voir dire. R. 63, l. 23-64, l. 4. As to Juror 81 and 215 the reason stated for the strike was based on where the jurors resided.

R. 64. Specifically, the solicitor stated: "[Juror 81] lives on Prancer Avenue in Greenville County. It's my understanding that some of the witnesses in this case live in the area of Prancer Avenue and I was quite simply concerned that juror may become family with the witnesses even though she may not recognize their names off hand. That's my basis for striking her." R. 65, l. 5-11. As to Juror 215 the solicitor stated: "I note that Mr. Montgomery lives at Piedmont and I have the same reservations. There are many of these witnesses that live in the Piedmont area and have residences in Piedmont and again just out of an abundance of caution, I was concerned that he may be familiar with some of the witnesses in this case and decided that another alternate may be a better choice." R. 64, l. 12-19.

The defense (Chambers) argued that during voir dire the jurors certainly had the opportunity to identify any witnesses they may know. R. 64, l. 21-R. 65, l. 6. The defense's reference was to voir dire where the name of every potential witness in the case was announced after which the court inquired specifically as to whether any potential juror was "related by blood or marriage or has a business, personal, or social relationship with any of those potential witnesses whose names I have just read?" R. 48-50; 50, l. 16-20. The defense pointed out that the court had taken great effort "to ensure that anyone who had any problems serving could come forward." R. 64-65. Prior to the jury selection the solicitor had asked the judge to allow prospective jurors to come forward to the bench to discuss any particular responses to the voir dire in private, particularly in regards to the press and any familiarity with the parties involved. R. 35, l. 8-15. The court agreed and proceeded accordingly. R. 35, l. 16. The solicitor did not request any additional voir dire of the jury panel after the jury selection. R. 62, l. 14-15. The defense further pointed out that several prospective jurors did come forward to addressed

concerns and were excused for cause. R. 65. The court stated in response that the solicitor's reasons were racially neutral and that the defense would "have to show me something more than what you have to show that there's purposeful discrimination." R. 65, l. 8-11.

When the court asked if the defense had anything else to show purposeful discrimination the defense (Quinn) pointed out that the state seated a white juror [Juror 106] that lived at 13 Piedmont Avenue in Piedmont. R. 65, l. 12-18. Juror 106 was seated prior to the exhaustion of the state's strikes. R. 55, l. 22-24. The solicitor struck Juror 81 and Juror 215 after seating Juror 106. R. 60, l. 3-6. The solicitor failed to articulate any reason why the residence of the white juror living in Piedmont that was seated was any less a concern than the residence of the African American juror residing in Piedmont that was struck: "I just didn't indicate on my list that that was an address that I had some concern about. So I do and some I don't, but that doesn't make it the - -" R. 65, 19-22. The solicitor went on to say: " I didn't make that address on Ms. Fox [Juror ____], it is something that I had no concern. I had concerns about the Piedmont address but not this one. I don't know the geography of Greenville County with enough sophistication to appreciate the minor details of the community the basis of my strike, Judge." R. 66, ll. 2-9. Then, despite stating that the defense "makes a very valid point" about the disparate treatment between black and white jurors, the court nevertheless denied the defense's motion stating: "Okay. Well, Mr. Quinn makes a very valid point. I'm going to rely on State versus Tucker and Peyton versus Kirk Kearse {ph} that I don't see a discriminatory intent inherent in the proponent's explanation and so I believe those cases require me to find the reason offered to be deemed race neutral. So I'm going to deny your motion." R. 66, ll.. 10-16.

Incident

On July 17, 2011, at approximately 3:30 in the early morning, a group of young people was talking outside of their vehicles at a Lil Cricket gas station in Greenville. They had recently left the hospital, where they had taken their friend, Vincent Fant a/k/a "Buddha," who had been shot at the Red Planet night club earlier that night. R. 105, ll. 11-25; R. 140, l. 19 - 150, l. 12. Suddenly, shots rang out in every direction. Seven people were shot with all requiring medical attention. R. 106, ll. 1 - 11. None of the victims could identify the shooters. R. 157, ll. 20-23; R. 169, l. 10-25; R. 176, ll. 12-21; R. 226, ll. 5-9; R. 234, ll. 1-6; R. 245, ll. 1-12; R. 251, ll. 6-17; R. 253, ll. 2-11; R. 258, ll. 12-16; R. 263, ll. 1-17. Only one of the victims actually saw them, but he could not make any identification because the shooters were wearing black bandanas over their faces. R. 189, l. 14 - 190, l. 15.

The assistant solicitor told the jury in her opening statement that eight young men were arrested and charged in this case. Four of the eight were on trial and the other four would provide testimony against them. The solicitor believed that the defendants carried out their plan to park behind Lil Cricket, approach the gas station on foot, and open fire. R. 106, l. 3 - R. 111, l. 17. She theorized that the co-defendants shot at the victims in retaliation for another shooting that took place earlier that evening at the Red Planet Nightclub. R. 106, ll. 7-16.

Evidence Related to Gangs

During pretrial motions, the solicitor told the court that she had documents related to the defendants' gang affiliation that she planned to admit if they became relevant. The trial judge cautioned the solicitor that her witnesses needed to be careful about how they described any such documentation so that they did not "put a defendant's character into issue in violation of the

rules." R. 70, ll. 8-22. Counsel Abdalla for co-defendant Young argued that all of the defendants had a motion in limine to prevent the solicitor from any mention of gangs or use of the word gang because the prejudicial effect outweighed any probative value. He argued that it would be very difficult for their clients to have a fair trial if the jury related it to gangs. He said that "either they [the solicitor] can prove their case without that [the mention of gangs] or they cannot." The judge asked for a foundation that the jury would be prejudiced by "the mention of the word gang" and agreed to allow counsel to present further argument the next morning. R. 70, l. 23 - 71, l. 22.

The next day, January 8, 2013, counsel Robinson for co-defendant Williams argued the motion shared by all the defendants regarding any reference by the solicitor to gangs. Counsel argued that the solicitor had not charged any of the co-defendants with being a criminal gang under the Criminal Gang Prevention Act. This Act defined a criminal gang as "a formal or informal ongoing organization, association, or group that consists of five or more persons who form for the purpose of committing criminal activity and who knowingly and actively participate in a pattern of criminal gang activity." S.C. Code § 16-8-230(2). Counsel further argued that references to the defendant's gang involvement was unduly prejudicial under Rule 403, SCRE and that the word "gang" took on an inflammatory appeal to the passions of the average person. R. 93, ll. 20 - R. 95, ll. 23.

The judge responded that the term was "pretty wide open" and he could not rule in a vacuum. Defense counsel Chambers argued that the State intended to call as a witness investigator Brown whose sole job was to investigate gangs because the solicitor had pursued this case as though these young men were part of the gang known as the Folk Nation. The defendants asked to stop that before it happened. R. 96, ll. 1 - 24.

The solicitor argued that there was no charge related to S.C. Code Ann. § 16-8-230. Therefore, she reasoned, the statutory definition of "gang" was not controlling. The solicitor stated she was "not alleging that this group of defendants participated in a pattern of criminal gang activity," but that she was prepared to present evidence they were in a gang. She proffered that it would be apparent from her very first witness that the people the victims fought with earlier that night at the club were dressed in all black and known to them as "the G's." Additionally, she proffered that "several of the witnesses" would indicate that they knew co-defendant Young by name and knew him to be the leader of the Folk Nation sect in Greenville. She further stated that the investigators pursued leads from witnesses that a gang committed the attack and thus the testimony related to gangs was "critical to how the case was investigated." Additionally, since the defendants were charged with assault and battery mob, "the mob is the gang." R. 98, l. 1 - 100, l. 9.

Counsel Robinson for co-defendant Williams argued that any reference was also prevented under Rule 404(a) because it interjected the defendants' character into the evidence because the jury would think they were bad people if they heard the word gang. The judge ruled that he could not limit the solicitor's presentation of her case because it may impugn the defendants' character, but he would see how "it played out." R. 100, l. 1 - 101, l. 19; R. 102, l. 24 - 104, l. 13. Counsel Abdalla reiterated that the solicitor would not be prevented from putting on evidence to support its theory of the case by being prevented from using the word "gang." R. 101, l. 21 - 102, l. 23.

After several witnesses testified, defense counsel Chambers told the Court that the solicitor's next witness was investigator Brandon Brown who was with the gang investigation

unit. Counsel asked that Investigator Brown identify himself only as an investigator with the Greenville County Sheriff's Office and not identify himself as a gang investigator. Counsel argued that no foundation was laid by the solicitor that the defendants were members of a gang. The judge said that the exception was noted for the record. The judge also acknowledged that all of the attorneys for the defendants joined in the objection. R.. 472, l. 7 - 473, l. 23.

Immediately after that ruling, Investigator Brandon Brown was the next witness for the State. He described himself as a "gang investigator assigned to the Federal Bureau of Investigation as a task force officer." He was contacted by Investigator Wayne Campbell to respond to the shooting at Lil Cricket due to the multiple shootings. His job was to collect information and try to determine if there was any information he knew as a gang investigator that could assist the lead investigator. R. 475, l. 23 - 477, l. 16.

He was not able to speak with the victims, as they had all been transported away from the scene when he arrived. Many witnesses did not want to speak with the police, allegedly because they were scared. However, he was able to learn that the victims had an altercation at another location earlier in the night with "them Folk Boys," who were wearing all black. Investigator Brown heard the name "Mikey," but it did not have any significance to him at the time. Another investigator informed him that Brandon Edwards was one of the individuals shot at the previous location. Investigator Brown "knew him [Edwards] to be involved with several individuals specifically on the southern end of Greenville County which led [him] to possible names of people that are typically involved with them." He knew Edwards to be an associate and possibly a family member of co-defendant Raymond Young. R. 477, l. 17 - 479, l. 13. Counsel Abdalla for co-defendant Young objected to the testimony regarding this "whole gang thing." The judge

overruled the objection. R. 481, ll. 9-17.

Investigator Brown continued to testify that he found evidence that Williams and Young were communicating via Facebook. It was there that he located a picture labeled "The Family." R. 480, l. 10 - 481, l. 25. This appeared to be a club picture. R. 482, ll. 14-25.

The solicitor then showed Investigator Brown several photographs that he "received during the course of the investigation," and she asked about hand signs as they related to gangs. Investigator Brown's testimony was that hand signs were a popular way to identify gang members as they were "universal" signs. Several of them were in these photographs according to Brown. There were some signs associated specifically with the Folk Nation or the Gangster Disciples. He identified some of the defendants as exhibiting these signs in the photographs. The trial court admitted photographs over the defense objection. R. 500, ll. 1 - 506, ll. 23; State's Exhibit 51 and 54, photographs (on file with this Court).

Testimony of Co-Defendants

Prior to the commencement of the trial, co-defendants Larry Johnson, Shaquille Hogan, Daquan Bruster, Tavarus Dean Holmes, and Kiara Simmons all entered guilty pleas. With the exception of Simmons, all of the co-defendants were called to testify in the State's case-in-chief. Notably, there was no mention at the plea hearings that acceptance of the plea offers required any of those individuals to testify at the co-defendants' trial. R. 3, l. 3 - 34, l. 25. With respect to Daquan Bruster, the solicitor put on the record only that sentencing be deferred and that, as part of the plea, the solicitor agreed to withdraw the notice of intent to seek life without parole that it had filed. R. 18, ll. 16-19. With respect to Tavarus Holmes, the solicitor indicated that it would again defer sentencing and "agreed to dismiss six counts of attempted murder, the weapons

charge, and assault and battery by mob as part of the defendant's plea to these two charges." R. 29, ll. 13-18.

Testimony of Larry Johnson

One of the co-defendants, Larry Johnson, testified for the State that he was charged in this incident and pled guilty earlier to attempted murder and second degree assault and battery by a mob. His sentencing was deferred. R. 550, ll. 1-24.

According to Johnson, he went to the Red Planet and was with his friends, which included the four co-defendants as well as Tavarus Holmes and Daquan Bruster. R. 551, l. 1 - 552, l. 23. Another friend, Brandon who was known as "Black," was also there. Brandon and Michael Williams got into a fight outside the club with some other guys. Later, Johnson heard gunshots and he and his friends left. They met at another club, "864," to discuss what happened. It was there that Johnson learned that Brandon ("Black") and another friend, "Bram-Bram," were shot. R. 558, l. 1 - 560, l. 25.

Johnson maintained that while they were driving down White Horse road past Lil Cricket when co-defendant Young said those guys at the Lil Cricket looked like the ones that shot Bram-Bram. They returned to Club 864. Johnson testified that Young told everyone who was going to "come on." According to Johnson's testimony Young, Booker, Sadler, and Williams covered their faces with black tee-shirts. They, along with Johnson, Bruster, Holmes, and Hogan, all rode to Lil Cricket and parked behind it. R. 561, l. 1 - 565, l. 7. With the exception of Johnson and Hogan, they all got out of their cars and ran up the hill to Lil Cricket and started shooting. He heard a lot of shots. Then they returned to the cars and they left. R. 567, l. 3 - 569, l. 25.

Johnson admitted on cross-examination that he met with police and gave them varying statements on three consecutive days after the incident, on July 20, 21, and 22, 2012. He was told that he faced a potential thirty year sentence, which he would be required to serve day for day. On November 10, 2012, he executed a recantation, in which he wrote:

> On the dates of or between July 20th and 22nd, 2011, I, Larry Terrell Johnson, was made promises and even threatened by Greenville County Detectives to make false accusations against Michael Williams, Raymond Lewis Young, Tavarus Dean Holmes, Esaiveus Frantez Booker, Daquan Bruster Kinjta Sadler and myself, Larry Terrell Johnson, and Shaquille Hogan.
>
> I was under stress due to my recent arrest, misunderstood what the detectives was asking me. I was coerced to write and sign a false statement.
>
> The investigator typed a false statement and told me to sign it and claim[ed] they would help me get out of jail. I now wish to recant those false accusations and state the fact that on the date of July 17, 2011, I, Larry Terrell Johnson, did not participate or conspire nor witness any illegal actions or activity of any kind with the names listed above or anyone of that matter.

R. 578, l. 11 - 587, l. 3.

On redirect, when the solicitor asked why he wrote the letter from the jail recanting, Johnson said that more of the people from the gang were in the dorm with him telling him to recant. He was told he would be "xed" out if he did not recant. R. 594, l. 23 - 596, l. 11. Johnson further testified that he was receiving no benefit in exchange for his testimony. R. 588, ll. 17-23.

Testimony of Shaquille Hogan

Another co-defendant, Shaquille Hogan, testified for the State that he was friends with the four co-defendants on trial. R. 598, l. 1 - 600, l. 5. He described going to the Red Planet. A fight occurred inside first, and then outside where shots were fired. R. 600, l. 6 - 601, l. 23. He told how they all went behind Lil Cricket. Hogan stayed at the cars because he had given his gun

to Tavarus, and Johnson went with the group that fired shots. R. 606, l. 1 - 707, l. 25.

Hogan gave a statement to police implicating the four co-defendants on trial. However, he subsequently made two statements recanting his earlier statement. On September 6, 2011, he executed a recantation, asserting that: "Investigators told me what to say and claim if I went along with it, they would help me with my charges. I was manipulated and used and wish to recant those false accusations." This was prior to Hogan's being charged in the present case. Again, on June 10, 2012, he executed a recantation, stating that the police told him what to say in his original statement given on July 22, 2011 and that he just went along with it. R. 610, l. 14 - 620, l. 17. He also recalled a conversation with co-defendant Young in which he apologized for making a statement and told him that "Larry [Johnson] was in [his] ear and promising [him] the police would help [him] if [he] told them these things." R. 625, l. 18 - 626, l. 3. Even during the solicitor's direct examination, Hogan said that he was not given a chance to look over his statement to police or make any corrections. R. 610, ll. 20-24.

Testimony of Daquan Bruster

A third co-defendant, Daquan Bruster, was called to testify for the State. He admitted that he pled guilty on the Monday before trial started to seven counts of attempted murder, conspiracy, assault and battery by mob second degree, and possession of a weapon during the commission of a violent crime. He testified that he did not remember the events of that night, and then "pled the Fifth." The solicitor received permission by the court to treat him as a hostile witness. He said he admitted these crimes because he just went with what the solicitor said. He did not understand that he was expected to testify and did not want to testify. R. 633, l. 19 - 636, l. 21.

On cross-examination Bruster admitted that he only pled guilty because he was facing life without parole if he did not plead. He executed a statement on July 25, 2012 indicating that neither he nor his codefendants had anything to do with the alleged crimes. He again reiterated that he did not know that he had to testify. R. 636, l. 22 - 638, l. 9.

After his testimony the judge sua sponte ordered that Bruster's attorney be brought to court the next day. The judge said he would give Bruster a chance to withdraw his guilty plea because it was not valid if he did not remember. He further said: "We'll just have to try him separately. If he goes to trial, that gives other people an opportunity to testify. I understand there are some offers that have made and I will honor those until the first witness hits the witness stand tomorrow. After that, no." R. 638, l. 20 - R. 639, ll. 9.

Testimony of Tavarus Holmes

The next day, the solicitor began by calling co-defendant Tavarus Holmes to testify. On the witness stand, he said his attorney was not present and that he had no testimony. R. 642, l. 15 - 643, l. 8. The solicitor told the judge that Holmes had pled guilty to one count of attempted murder and conspiracy and had agreed to testify for the State as part of his plea. Holmes said that he was told "if I go in an[d] say this I get a deal on my plea." The Judge responded "You've already got your deal or your deal is going to disappear and you and Mr. Bruster will be tried separately because I'm going to vacate your plea. And I'm telling you right now Bruster is looking at life without parole, what's he looking at?" Initially it was indicated that Holmes would face a potential thirty-five year sentence if his plea was vacated and he went to trial. The judge advised him:

> You haven't even been alive 35 years. That would make you 56. I can remember what it was like to be 56. I have a hard time remember[ing] what it was like to be 21. I'm going to suggest that you speak with your counsel privately before you proceed any further. There's a private space back in there.

R. 642, ll. 15 - 645, l. 6. The solicitor later clarified that in the event the plea were vacated, she would reinstate the additional charges that it dismissed against Holmes and he would be facing over two hundred years. R. 645, l. 25 - 646, l. 10.

Counsel Abdalla for co-defendant Young objected that the defendants were not receiving a fair trial if the co-defendants were being forced to testify by threatening to vacate his plea. The judge said that the co-defendants were not affected by Holmes backing out of his deal. R. 645, ll. 1-22.

Holmes confirmed to the judge that he was coerced into entering his guilty plea. The judge, sua sponte, vacated Holmes' plea and noted he would be tried on seven counts of attempted murder. He also revoked his bond and ordered that he be taken into custody. R. 646, ll. 10-25.

Recall of Daquan Bruster

The solicitor then told the judge that co-defendant Bruster was present with his attorney and that he may have changed his mind. Counsel Abdalla objected to the coercive nature of the judge forcing the witness Bruster to come back and testify after he had already refused. The judge responded that Bruster had violated his plea agreement and he was vacating his plea. He would have to go to trial and face LWOP. Bruster's counsel said Bruster would testify. R. 647, ll. 22 - R. 648, ll. 25.

Defense counsel Chambers noted that the record reflected that each of the

witnesses took the stand and indicated that there was no deal in exchange of their plea and that no promises were made. The judge responded that there was no recommendation on sentencing but that the co-defendants were receiving the benefit of dismissal of other charges and withdrawal of the LWOP notice. Chambers argued that once a person entered a plea, the plea could not be vacated just because the witness did not say what the solicitor wanted him to say, and the witness could not be brought back and forced to testify. R. 649, l. 2 - 650, l. 4.

Even the solicitor admitted that the testimony was not necessarily a part of the plea negotiations, stating:

> I don't know what Mr. Holmes wants to do but I don't have any problem allowing him to maintain his guilty [plea] and quite frankly examine him with respect to these specific allegations that he admitted to. The understanding that I had Mr. Holmes would be the range would be up to 35 years and the extent to which he could control just how high that number was, was exclusively his depending on the extent to which he cooperated. I interviewed him, I met with him, we went over these videos. I was under the impression he was going to cooperate. I guess it's his choice. If he wants to [rescind] the guilty plea, that's his choice.

The trial judge disagreed and instructed Bruster to take the witness stand and be sworn as a witness. He instructed Bruster that he could either "come forward with the truth" or his plea would be vacated. R. 650, l. 5 - 651, l. 14.

Counsel Quinn for co-defendant Sadler objected to Bruster being recalled because he had been examined as a hostile witness and released. He also reiterated the coercive nature of compelling Bruster to withdraw his plea and face additional time if he did not testify again. The judge stated that counsel's objection was noted for the record and he said: "I assume everyone is in agreement with it." R. 649, ll. 1 - R. 652, ll. 10.

Bruster then testified for the State that he was at the incident at the Red Planet and Brandon Davis was shot in the back. Bruster went with Larry Johnson to Lil Cricket. Ten or eleven other people were there and Bruster covered his face as Johnson told him to do. Bruster did not know who the other ten or eleven people were because their faces were covered also. He admitted participating in the shooting, and admitted to pleading guilty. R. 652, ll. 12 - R. 657, ll. 8. On cross-examination, Bruster again stated that he specifically discussed whether he would be required to testify with his attorney prior to plea and was under the impression that his testimony was not required. He further admitted that he was told to testify or LWOP was "back on the table." R. 659, ll. 1 - 11.

Motion for Mistrial for Juror Misconduct

Early in the trial after several victim witnesses testified, the judge had an in camera bench conference with the attorneys. The judge then put the issue on the record. The judge received a note from a juror in another trial that said: "While in [the] restroom during lunch I overheard jurors from courtroom 8 discussing what sounded like details of their case. 'Need to decode language;' 'I was chillin;' 'He's going down.' [That was followed by] laughter." R. 192, l. 24 - 193, l. 6; R. 814 (Court's Exhibit 3, Note from Juror).

The judge explained that a bench conference was held with the attorneys and the attorneys had a motion for a mistrial. The judge cited the case of State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999), which set forth the procedure to follow in cases of alleged juror premature deliberation which must establish prejudice. This procedure required a hearing to determine if it was premature deliberation and if it was prejudicial. If it was

prejudicial, then a new trial was required. R. 193, ll. 6-25. The judge decided to discuss the problem with each of the jurors by calling them into the courtroom individually. R. 194, ll. 1- 9.

Defense counsel Quinn for co-defendant Sadler, moved for a mistrial with no further inquiry. The other three attorneys joined in the mistrial motion. Defense counsel's argument was that it was not known what else may have been said, and no witness had used the words "he's going down." Therefore, it sounded as though someone was going to be found guilty. The judge rejected counsel's additional contention that the jurors only needed to be questioned if there was opposition to the motion for mistrial. R. 194, l. 14 - 198, l. 6.

The judge then proceeded to question each of the jurors individually, and sent them back to a separate room so they could not discuss it.

Juror Harper reported that what was discussed was "sadness" over some of the things heard. R. 198, ll. 7-22. Juror Ferguson stated that there was discussion about the initial charges and how long the trial would take. There was also talk about the behavior of some of the witnesses who had taken the stand which was mainly about demeanor, enunciation but no conclusions were drawn. R. 199, l. 15 - 219, l. 25.

Juror Foxx reported that there was talk about the names and trying to get the names straight, and if they understood some of the conversations. R. 220, ll. 1-25. Juror Tutiven stated that there had been kind of a reflection on different facts such as names and how many people. R. 207, ll. 1-25. Many of the other jurors said different versions of what had been reported by the others. R. 204, l. 1 - 214, l. 12. The judge then denied the

motion for a mistrial saying he found no prejudice. R. 214, ll. 12-17.

Three of the defense attorneys objected to the hearing procedure and the manner in which it was conducted because defense counsel was not given the opportunity to establish an appellate record. They argued the juror who sent the note should testify. Further, no questions were asked about the specific misconduct alleged. Counsel Robinson for co-defendant Williams stated: "I don't disagree with the Court. I believe it was conducted properly." R. 214, l. 18 - 235, l. 7.

Even the solicitor expressed concern over Juror Whittenberg, who was alleged to have been a party to the conversation overheard in the bathroom. The solicitor noted that "he, more than anybody else denied any conversation having happened and that concerns me." R. 216, ll. 8-13; *see* R. 203, l. 19 - 204, l. 25. Despite this, the judge determined that the jurors did not actually deliberate as to the outcome of the case, and he maintained that he conducted the proper inquiry. R. 216, l. 14 - 217, l. 7.

ARGUMENT

I. THE COURT ERRED IN DENYING THE APPELLANT'S BATSON MOTION WHERE THE STATE'S EXPLANATION FOR STRIKING BLACK JURORS WAS INHERENTLY RACIAL, FUNDAMENTALLY IMPLAUSIBLE AND, WHERE THE STATE FAILED TO GIVE A RACIALLY NEUTRAL REASON FOR UNEVEN TREATMENT BETWEEN THE AFRICAN AMERICAN JURORS THAT WERE STRUCK AND AT LEAST ONE SIMILARLY-SITUATED WHITE JUROR THAT WAS SEATED.

Standard of Review

"Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). The judge's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous. Evins, 373 S.C. at 416, 645 S.E.2d at 909-10. "This standard of review, however, is premised on the trial court following the mandated procedure for a Batson hearing." State v. Cochran, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct.App.2006). "[W]here the assignment of error is the failure to follow the Batson hearing procedure, we must answer a question of law. When a question of law is presented, our standard of review is plenary." Id. at 312-13, 631 S.E.2d at 297. State v. McMillan, 400 S.C. 298, 734 S.E.2d 171 (S.C. App., 2012). In this case, the court failed to apply the proper law given the facts. Plenary review is therefore appropriate.

Discussion of the Issue

The defense raised a Batson challenge to the state's strike of three African American jurors. In denying the Batson motion the court cited to State v. Tucker and

Payton v. Kearse. Although Tucker and Payton are applicable in general, the facts presented in this case require additional analysis under Batson v. Kentucky, which the court failed to conduct. In its limited analysis the court stated: "I don't see a discriminatory intent inherent in the proponent's explanation and so I believe those cases [Tucker and Payton] require me to find the reason offered to be deemed raced neutral." R.66, l. 10-16. The court concluded its analysis with the finding that the state's explanation was not inherently discriminatory on its face. Although the defense pointed to disparate treatment between African American jurors and at least one white juror, the court failed to continue the analysis placing the burden on the state to explain the uneven treatment. The court's failure to conduct a through and complete analysis under Batson constitutes an error of law.

The Batson Analysis

In Batson, the Supreme Court held the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prevents the prosecution from striking potential jurors on the basis of race. McCrea v. Gheraibeh, 380 S.C. 183, 186, 669 S.E.2d 333, 334 (2008) (*citing* State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)); *see also* Batson v. Kentucky, 476 U.S. at 89. The Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. *See* Purkett v. Elem, 514 U.S. 765, 767-68 (1995); State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014).

The purposes of Batson v. Kentucky and its progeny are to protect the defendant's right to a fair trial by a jury of his peers, protect each venireperson's right not to be

excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of the justice system by seeking to eradicate discrimination in the jury selection process. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999); State v. Flynn, 368 S.C. 83, 627 S.E.2d 763 (Ct.App.2006). It is unconstitutional to strike a juror on the basis of race or gender. *See* J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venireperson on the basis of race. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Haigler, 334 S.C. at 628, 515 S.E.2d at 90. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson, 476 U.S. at 86, 106 S.Ct. 1712. A criminal defendant may object to race-based peremptory challenges on equal protection grounds regardless of whether the defendant and potential juror share the same race. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

Under Batson the prosecution is prohibited rom striking potential jurors on the basis of race. 476 U.S. at 89, 106 S.Ct. 1712. Batson was later expanded by the Supreme Court to also prohibit a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Georgia v. McCollum, 505 U.S. 42, 59, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). Thus, during jury selection, either the defendant or the State may oppose the peremptory challenge of a juror who is a member of a cognizable racial group. Once a peremptory challenge is opposed, the trial court

must, upon request, conduct a Batson hearing and adhere to the procedures set forth in Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), and adopted by our supreme court in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006)

Under Batson, a defendant must show the following in order to establish a prima facie case of discrimination: 1) that he is a member of a cognizable racial group; 2) that the State has exercised peremptory challenges to remove members of his race from the jury; and 3) that these facts and other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude venire persons from the petit jury on account of their race. If the defendant makes this prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors in the particular case being tried. 476 U.S. at 96-7, 106 S.Ct. at 1723, 90 L.Ed.2d at 87-88 (1986). State v. Oglesby, 379 S.E.2d 891, 298 S.C. 279 (S.C., 1989).

South Carolina has adopted the standard delineated by the United States Supreme Court in Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), for analyzing a Batson challenge: "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one." *See generally* State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999); State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998). In the present case, the state struck three African American jurors. All four of the defendants in the case are African American. The record therefore establishes a prima facie showing of discrimination (satisfying the first test under Batson) entitling the

defendant's to a Batson hearing.

Batson's Three Step Analysis

In State v. Giles, our supreme court explained the proper procedure for a Batson hearing:

> First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination. 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted).

State v. Stewart (S.C. App., 2015) *citing* State v. Giles.

The First Step Of The Analysis

First, the [party asserting the Batson] challenge must make a prima facie showing that the challenge was based on race. State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014). When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one. *See generally* State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999). In this case the defense objected to the state's strike of three African American jurors. This satisfies the first step of the Batson analysis.

The Second Step Of The Analysis

Once a prima facie showing has been made, the trial court will move to the second step in the process, which requires the [party opposing the Batson] challenge to provide a race neutral explanation for the challenge State v. Giles, 407 S.C. 14, ---, 754 S.E.2d 261,

263 (2014) (internal citations omitted); *see also* Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008) (*quoting* Miller-El v. Dretke, 545 U.S. 231, 277 (2005)); State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014).

Step two of the analysis is perhaps the easiest step to meet, as it does not require that the race-neutral explanation be persuasive, or even plausible. Purkett, 514 U.S. at 768; Randall v. State, 716 So. 2d 584, 588 (Miss. 1998). The explanation must only be "clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it." Giles, 407 S.C. at ---, 754 S.E.2d at 265; see., e.g., id. at ---, 754 S.E.2d at 262, 265-66 (finding that a defendant's explanation that he "did not feel the [struck] jurors were right for the jury," while "technically, semantically and intellectually racially neutral," would not allow the circuit court to "assess the plausibility of the proffered reason for striking the potential jurors"). State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014).

The Supreme Court observed "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible." *Id.* at 767-68, 115 S.Ct. 1769. At step two, therefore, the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations for the strikes." Adams, 322 S.C. at 123, 470 S.E.2d at 371. Therefore, "[u]nless a discriminatory intent is inherent" in the explanation provided by the proponent of the strike, "the reason offered will be deemed race neutral" and the trial court must proceed to the third step of the Batson process. Purkett, 514 U.S.

at 768, 115 S.Ct. 1769; *see e.g.*, Payton v. Kearse, 329 S.C. 51, 56, 495 S.E.2d 205, 208 (1998) (striking a juror because she was a "redneck" evinces a discriminatory intent and is therefore not facially race-neutral). State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006). The second step of the test therefore requires a determination of whether discriminatory intent is inherent in the proponent's explanation.

Discriminatory Intent Inherent In The Explanation

Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment. *Id.*; State v. Shuler, 545 S.E.2d 805, 344 S.C. 604 (S.C., 2001). South Carolina courts have found the stated reason for a juror strike facially discriminatory in at least two cases. In Payton v. Kearse, 329 S.C. 51, 56, 495 S.E.2d 205, 208 (1998), the court held a peremptory challenge based upon a characterization of the juror as a "redneck" was facially discriminatory, and therefore violative of Batson. In McCrea the court found a solicitor's "uneasiness" over a potential juror's dreadlocks was insufficient to satisfy the race-neutral requirement. Robinson v. Bon Secours St. Francis, 675 S.E.2d 744 (S.C., 2009). Both involved to some degree the application of a racial stereotype.

In the present case the solicitor's stated basis for the strikes of two black jurors was a concern that, living in the same area as some of the witnesses in the case, they might be familiar with those witnesses but not know or recognize their names off hand during the jury selection process. The solicitor's assumption that black jurors might not be aware of the names of their friends, neighbors, or relatives (as opposed to the white juror

seated) is a based on a stereotype, and therefore, inherently racial. "Where the stated reason is inherently discriminatory, the inquiry ends and a pretext inquiry is obviated." McCrea, 380 S.C. at 187, 669 S.E.2d at 335. The state's explanation, that the black jurors [as opposed to the similarly situated white juror seated] might not know the names of their friends, neighbors, and relatives, is inherently racial. No further inquiry should be required to establish a Batson violation, and the Appellant's case reversed.

The Third Step Of The Analysis

The Fundamentally Implausible Explanation

In addition to being inherently discriminatory, the state's explanation for the strike of two African American jurors is fundamentally implausible in light of the totality of the facts. Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment. Purkett, *supra*; Adams, 322 S.C. at 124, at 123, 470 S.E.2d at 372. State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006); Payton v. Kearse, 495 S.E.2d 205, 329 S.C. 51 (S.C., 1996). Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998). Although not generally required to be even plausible under the second step, an explanation is so lacking as to be "fundamentally implausible" under the totality of the facts and circumstances is unacceptable. In this case, the fundamental implausibility of the state's explanation was obvious in light of the record.

The state the strike of two African American jurors on a concern that they might be familiar with some of the witnesses in the case. The court however had already called

the name of every potential witness in the case and inquired specifically whether any of the venire knew, or were related to, any of the potential witnesses in the case. Indeed, several jurors that responded to the questions were excused for cause. Since the prospective jurors had already indicated during voir dire that they were not related to or knew any of the potential witnesses, the stated basis for the strikes is fundamentally implausible.

Discriminatory intent is inherent in a fundamentally implausible explanation. "Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." Edwards, 384 S.C. at 509, 682 S.E.2d at 822. Under some circumstances, the explanation given by the proponent may be so fundamentally implausible that the trial judge can find the explanation was mere pretext, even without a showing of disparate treatment. Haigler, 334 S.C. at 629, 515 S.E.2d at 91. State v. Stewart (S.C. App., 2015). Given the totality of the facts and circumstances, the state's explanation for its strikes was fundamentally implausible, no further analysis is necessary and reversal is required.

Although not necessary, further analysis makes the Batson violation clearer still.

Different Treatment For Similarly Situated Jurors

Assuming arguendo, that the strikes pass the fundamental implausibility and inherently discriminatory tests, further analysis reveals undeniable discrimination. The opponent of the strike [the defense] must make a bona fide showing that the proponent of the strike [the state] seated a juror who shared nearly every quality with the struck juror other than race to establish pretext. *See* State v. Jones, 293 S.C. 54, 58, 358 S.E.2d 701,

704 (1987), abrogated on other grounds by State v. Chapman, 317 S.C. 302, 306, 454 S.E.2d 317, 320 (1995); *see also* State v. Heyward, 357 S.C. 577, 580, 594 S.E.2d 168, 169 (Ct.App.2004). State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006). Even if race neutral on its face, that finding is nevertheless negated by the state's disparate treatment of at least one similarly situated white juror.

Step three of the Batson analysis requires the court to carefully evaluate whether the party asserting the Batson challenge [the defense in this case] has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. State v. Green, 655 So. 2d 272, 290 (La. 1995); *see also* Batson, 476 U.S. at 93-94 (stating that the court must consider "the totality of the relevant facts," including both direct and circumstantial evidence). During step three, the party asserting the Batson challenge must point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. Edwards, 384 S.C. at 508-09, 682 S.E.2d at 822; *see also* Haigler, 334 S.C. at 629, 515 S.E.2d at 91. In doing so, the party proves that the "originally neutral reason was . . . a pretext because it was not applied in a neutral manner." State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989). State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014); State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). Pretext generally will be established by showing that similarly situated members of another race were seated on the jury. Purkett, *supra*; Adams, 322 S.C. at 124, at 123, 470 S.E.2d at 372. State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006); Payton v. Kearse, 495 S.E.2d 205, 329 S.C. 51 (S.C., 1996); State v.

Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999). In the present case the solicitor struck three black jurors, two on the basis that they lived in the same area as some of the state's witnesses, yet seated at least one similarly situated white juror.

Although the record shows an uneven application of the state's stated reason for the strikes, the uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race-neutral explanation for the inconsistency. *See* State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (finding State provided a racially neutral explanation for why Solicitor did not strike juror with similar characteristics to one previously stricken). Under this prong, persuasiveness of the justification becomes relevant. Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). At this stage the court is required to conduct an inquiry into any reasoning for the uneven treatment between jurors appearing to be similarly situated. To the extent that the trial court conducted such an inquiry, it did not consider the state's failure to articulate a racially neutral explanation for the uneven treatment between jurors.

Here, the record shows that the trial court deviated from the Purkett-Adams procedure for a Batson motion by failing to conduct a proper analysis of the state's underlying reason for distinguishing between addresses of the jurors, which was the initial explanation given for the strike. Rather than considering the state's failure to articulate a race neutral distinction between the addresses of the jurors, the court instead held that it was bound to find the reason offered "to be deemed race neutral" under Tucker and Payton. Although correct as to the court's initial analysis, this was a

misstatement of the analysis required once the strikes were shown to have been applied in an uneven manner. Under Batson, only if the proponent of the strike articulates a valid reason can the uneven treatment between jurors be affirmed. The analysis contemplates the proponent of the strike providing an explanation where strikes are shown to be unevenly applied. It is at this stage of step three of the analysis that the "persuasiveness of the justification becomes relevant." Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995); State v. Edwards, 649 S.E.2d 112, 374 S.C. 543 (S.C. App., 2007). If the proponent of the strike fails to provide a valid explanation, then the uneven treatment negates the otherwise race neutral explanation, and strike fails the third step of the test.

The State's Failure to Explain the Uneven Application of Reason

Here the solicitor failed to give any explanation underlying why she had a problem seating African American jurors that might live near some of the witnesses but not a white juror that lived in the same area. Although claiming that she had concerns about some addresses but not others, the solicitor specifically stated that she was unfamiliar with the area: "I don't know the geography of Greenville County with enough sophistication to appreciate the minor details of the community the basis of my strike, Judge." R. 66, ll, 7-9. The solicitor's response clearly failed to explain why one address, the purported basis of the strike, was any more or less problematical than the other. Having shown unequal treatment of similarly-situated jurors in this case, the state was required to provide an explanation to allow the court to make a determination as to the neutrality of the reason. The state's failure to adequately explain with sufficient clarity to

allow judicial review of the reasons for distinguishing between the addresses negates any otherwise race neutral basis given for the strikes. *See* State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (S.C. App., 1996) (where defense counsel cited demeanor, an otherwise valid basis for a strike, but failed to point out any specific examples of why he disliked the juror's demeanor.) As in Easler, the state has failed to point out any specific reason of why she disliked the addresses of the two African American jurors' she struck over that of the white juror she seated.

Here the state's failure to articulate any difference between the addresses prevented the defense from demonstrating that the explanation was pretextual. "The explanation must only be "clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it." Giles, 407 S.C. at 21-22, 754 S.E.2d at 265; *see., e.g., id.* at 17, 23, 754 S.E.2d at 262, 265-66 (finding that a defendant's explanation that he "did not feel the [struck] jurors were right for the jury," while "technically, semantically and intellectually racially neutral," would not allow the circuit court to " assess the plausibility of the proffered reason for striking the potential jurors")." State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (S.C., 2014). Here the state failed to allow the trial court, or this Court on review, to assess the plausibility of the proffered reason for striking the African American jurors but not the similarly situated white juror. This negated the stated basis for the strikes.

In State v. Oblesby the court stated: "The reason given for striking the black male

was sufficiently neutral to withstand the Batson inquiry. The reason given for striking the black females was also neutral. The solicitor negated his reason, however, when he seated a white female juror who was also a patient of the doctor." State v. Oglesby, 379 S.E.2d 891, 298 S.C. 279 (S.C., 1989). Even if the stated basis for the strikes of the African American jurors in the present case appeared otherwise neutral, any validity is negated by the unexplained disparate treatment of at least one similarly situated white juror.

Similarly, in State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986), although the State offered a racially-neutral explanation for striking African American jurors, the court held that it negated the reason by seating similarly-situated Caucasian jurors. *See* Miller-El v. Dretke, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step."); State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason when he seated a white female juror who was similarly situated); id. ("In this case, an examination of the circumstances shows that the solicitor's originally neutral reason was proven to be a pretext because it was not applied in a neutral manner."). Based on the disparate treatment of white jurors, the strikes in Stewart were held impermissible.

The determination of whether the minimum quantum of evidence has been produced under this prong is flexible, for the trial court's ruling turns on an examination of the totality of the facts and circumstances in the record, including the credibility and demeanor of the strike's proponent, and the plausibility of a neutral, but otherwise

unpersuasive, reason. Casey, 325 S.C. at 452, 481 S.E.2d at 172. In deciding whether the opponent of a strike has carried the burden of persuasion, a court must undertake a sensitive inquiry into the circumstantial and direct evidence of intent. Haigler, 334 S.C. at 629, 515 S.E.2d at 91. A strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. *Id*; State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006). Here the trial court failed to conduct the proper totality analysis or consider all of the relevant facts in record.

An examination of the facts and circumstances in the present case shows that the solicitor's stated basis, even if originally appearing neutral was proven to be a pretext because it was not applied in a neutral manner. *See* State v. Oglesby, 379 S.E.2d 891, 298 S.C. 279 (S.C., 1989); Garrett v. Morris, 815 F.2d 509 (8th Cir.1987) *cert. denied*, --- U.S. ----, 108 S.Ct. 233, 98 L.Ed.2d 191 (1987) (prosecutor's asserted reason for excluding black prospective jurors was a pretext for racial discrimination in light of prosecutor's decision not to strike white jurors who differed in no significant way from black jurors who were excused). The same was true in Oglesby where the solicitor was adamant in his articulation of his reason for striking the black females, yet he did not strike a white female with the same characteristic. There the court said: "If the State were allowed to prevail despite the application of such blatantly inconsistent standards, Batson would be left without substance. Accordingly, appellant's conviction is reversed and this case is remanded for a new trial." State v. Oglesby, 379 S.E.2d 891, 298 S.C. 279 (S.C., 1989).

Here the court failed to consider the state's failure to articulate any basis for distinguishing between the addresses of jurors, the purported basis of the strikes. Step three of the analysis requires the trial court to carefully evaluate whether the party asserting the Batson challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. State v. Green, 655 So.2d 272, 290 (La.1995); *see also* Batson, 476 U.S. at 93-94, 106 S.Ct. 1712 (stating that the court must consider "the totality of the relevant facts," including both direct and circumstantial evidence). During step three, the party asserting the Batson challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. Edwards, 384 S.C. at 508-09, 682 S.E.2d at 822; *see also* Haigler, 334 S.C. at 629, 515 S.E.2d at 91. In doing so, the party proves that the "originally neutral reason was ... a pretext because it was not applied in a neutral manner." State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989). State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (S.C., 2014). Here the defense established the pretextual nature of the state's strikes by showing uneven treatment between similarly situated jurors.

The state was provided the opportunity yet failed to provide a race neutral reason for the uneven treatment of similarly situated jurors. The solicitor's strikes were based solely on where the jurors resided. One African American juror was struck because she lived in Piedmont. A white juror that lived in Piedmont was seated. When challenged, the solicitor could not identify any difference between the two jurors or their residences. The only difference discernable from the record was that juror that was struck was African

American and the other that was seated was white. "Once it is found that the exercise of even one peremptory challenge is racially motivated, this in and of itself gives rise to an inference of discriminatory purpose and violates the mandates of Batson, which explicitly prohibits the State from exercising strikes in a racially discriminatory manner. To hold otherwise, I believe, completely guts the notion of pretext, and offends the policies underlying Batson. *Id.* at 299-300, 460 S.E.2d at 421." Payton v. Kearse, 495 S.E.2d 205, 329 S.C. 51 (S.C. 1996).

The state gave no basis, much less a racially neutral one, for the disparate treatment between races. The record shows that the strikes were discriminatory, and therefore in violation of Batson v. Kentucky and its progeny. Based on the record, the trial court erred in denying the defense's Batson motion. "When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection *de novo*. See State v. Jones, 293 S.C. 54, 58, 358 S.E.2d 701, 704 (1987), *abrogated on other grounds* by State v. Chapman, 317 S.C. 302, 306, 454 S.E.2d 317, 320 (1995); *see also* State v. Heyward, 357 S.C. 577, 580, 594 S.E.2d 168, 169 (Ct.App.2004)." State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006). The trial court therefore committed reversible error in denying the defense's Batson motion.

II. The trial court erred in allowing testimony by the State's witnesses using the term "gang" in reference to Appellant's case where the solicitor failed to lay the proper foundation that Appellant was a gang member, the reference was inflammatory and unduly prejudicial under Rule 403, SCRE, and the reference constituted improper character evidence under Rule 404, SCRE.

Contrary to the solicitor's proffer to the Court during the motion in limine hearing, none of the victims in this case gave testimony identifying the co-defendants as being involved with a gang, much less a specific gang called Folk Nation, the G's, or Gangster Disciples. R. 70, ll. 8-22. Nonetheless, the solicitor was allowed to call Investigators Brown and Whitlock, who testified that they consulted on this case due to suspected gang involvement. R. 475, l. 19 - 508, l. 21. Further, over the defense's objection, Investigator Brown was allowed to testify regarding alleged gang signs shown in photographs of some of the co-defendants and specifically alleged that they were part of the Folk Nation. R. 475, l. 13 - 512, l. 12; *see argument infra*, Issue II. The defense argued that the solicitor failed to lay the proper foundation for the testimony, that the gang reference was inflammatory and prejudicial, and that the gang reference was improper character evidence. R. 70, l. 8 - 71, l. 22; R. 93, l. 20 - 104, l. 13; R. 472, l. 7 - 473, l. 23; R. 479, ll. 19-23; R. 481, l. 9-17; R. 506, ll. 1-23.

The Gang Prevention Act at S.C. Code § 16-8-230 (2), provides that "criminal gang" means "a formal or informal ongoing organization, association, or group that consists of five or more persons who form for the purpose of committing criminal activity and who knowingly and actively participate in a pattern of criminal gang activity." Defense counsel argued that the solicitor had not charged any of the defendants with being a member of a gang. The solicitor told the Court that because the defendants were

not charged under the Act, she was not required to present evidence that they met the statutory definition of a "criminal gang." She specifically stated that she was "not alleging that this group of defendants participated in a pattern of criminal gang activity." R. 98, ll. 1 - R. 99, ll. 25. Therefore, the solicitor conceded the defendants were not a criminal gang, or at the very least that she could not prove that they were a criminal gang.

Yet, in her closing argument, the solicitor made reference to the "photos" that Investigator Brown had described as showing hand signs that were associated with gangs and especially the Folk Nation. Investigator Brown had identified some of the defendants as exhibiting these signs in the "photos." R. 696, l. 19 - 697, l. 3; R. 709, ll. 8-14; R. 500, l. 1 - 506, l. 23. The solicitor also argued for the jury to consider the pressure being exerted on the State's witness, Larry Johnson, at the jail. She reminded the jury that he testified that he was threatened to recant his statement or he would be "x-ed" out. He was told "either you are with us or against us." R. 704, ll. 7-15. The solicitor also reminded the jury of Shaquille Hogan's testimony when he said he had to give his .380 gun to Tavarus. He had to do what Tavarus told him because he's "got that power." R. 703, ll. 11-23. Although the solicitor did not use the word "gang," these references were clearly gang related.

Failure to Lay Proper Foundation for Gang Evidence

Prior to Investigator taking the stand, none of the solicitor's first twenty-five witnesses made any mention of the co-defendants' involvement with a gang. Even so, Investigator Brown was allowed to testify that he was a gang investigator assigned to the FBI task force and that his responsibilities were to "maintain all gang intelligence

throughout Greenville County area, be responsible for knowing all players involved, all entities thereof throughout the county involving everything from A to Z as long as it pertains to gangs and violent crimes." He was called to determine if anything he knew "as gang investigator" could further the investigation. R. 476, l. 2 - 477, l. 14. He testified:

> While talking to several of the witnesses what we were able to get out of some of them was that there had been an altercation at another location and during that altercation, them Folk Boys, as they kept referring to them were involved. They further stated they were all wearing black, they all showed up together, they were an organized group and we continued to hear the name possibly of Mikey.

R. 478, ll. 4-13. There was no clarification of who Investigator Brown was referring to when he mentioned "several witnesses," and due to the lack of any mention of gangs by the solicitor's earlier witnesses, it was not obvious from the record either. Investigator Brown also pointed to "gang signs" that he recognized in photographs of some of the co-defendants. *See argument infra*, Issue II. He went so far as to say the hand signs in the photo were those of the Folk Nation gang. R. 500, ll. 1 - Tr. 506, ll. 23.

The only witness to mention gangs other than the investigators was Larry Johnson. He mentioned on cross-examination that the investigator he spoke with was trying "to find out if it was gang related or anything like that," though he later said that he did not know he was talked to a gang investigator but was told that he would be facing thirty years if it was gang related. R. 580, ll. 8-9; R. 592, l. 25 - 593, l. 7. It was not until redirect that any of Johnson's testimony even implied his own association with a gang. He said that he recanted his prior statement because of a threat to him by "more of the people from the gang" who were in the dorm with him. R. 594, l. 25 - 596, l. 11.

Although testifying that Young made a statement that "you either with us or against us," he did not expressly state Young's involvement in any gang. This scant testimony still failed to provide even a post hoc foundation for the earlier gang testimony.

Improper Character Evidence

"Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." State v. Brown, 344 S.C. 70, 73, 543 S.E.2d 552, 553 (2001); *see* Rule 404, SCRE. Rule 404(a), SCRE, provides that "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." An exception applies to the character of the accused if "a pertinent trait of character offered by an accused, or by the prosecution to rebut the same."

Here, the defendants made no attempt to introduce evidence of their good character so as to open the door to bad character evidence from the solicitor. *See* State v. Council, 335 S.C. 1, 12 n.6, 515 S.E. 2d 508, 514 n.6 (1999) (noting that "[a]n accused must introduce evidence of his character at trial before the prosecution can attack it" and where "appellant never testified or offered other evidence of his good character, his character was never an issue."). Thus, the gang evidence was improper character evidence under Rule 404(a), SCRE.

Probative Value Substantially Outweighed by Unfair Prejudice

Pursuant to Rule 404(b), SCRE, evidence of other crimes wrongs or acts may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Under the *res gestae* theory, "evidence of

other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005).

However, evidence considered for admission under the res gestae theory must satisfy the requirements of Rule 403 of the South Carolina Rules of Evidence. State v. Dennis, 402 S.C. 627, 742 S.C. 627 (2013). Rule 403, SCRE, provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (quotation marks and citations omitted).

In State v. Sobers, 404 S.C. 263, 744 S.E.2d 588 (Ct. App. 2013), the judge correctly found that evidence suggesting gang associations of murder victim and witnesses were irrelevant. Sobers, who was in his car, watched a fight between the victim and another young man in the midst of a crowd of people. He claimed that he fired shots when one of the young men approached his car and tried to start a fight. This was due to comments Sobers made about the man's sister. Sobers testified that the crowd swarmed his car and he fired shots. One bullet hit the victim in the back of his head as he sat in the back of another car.

Defense counsel in Sobers wanted to admit evidence of gang activity of the victim

and witnesses because it went to the motive of self-defense. The defense had pictures from Facebook showing the victim and witnesses flashing gang signs. The trial court found that Sobers failed to show any relevance of gang associations to the shooting. Four of the witnesses even admitted they were making gang signs in the photographs but denied being in a gang. They were just being together like "family" in the picture. The solicitor argued that witnesses testified they were in a gang, and if they were, there was no evidence of a connection between gang activity and the shooting.

The present case is very similar to Sobers except that it was the solicitor that wanted to admit the evidence here. Here too, even if the allegation of gang involvement were true, it was not proven to be a part of the incident. Co-defendant Larry Johnson testified that their friends "Bram-Bram" and Brandon ("Black") had been shot during an earlier incident at the Red Planet club. It was the individuals who shot Bram-Bram that Young allegedly saw at the Lil Cricket, prompting the attack. R. 551, l. 2 - 573, l. 12. There was no testimony that "Bram-Bram" or "Black" were affiliated with any gang. As noted *supra*, Johnson's only references to gang, at most, only imply involvement of a gang involving events after the incident. R. 580, ll. 8-9; R. 592, l. 25 - 593, l. 7; R. 594, l. 25 - 596, l. 11. Johnson, however, never expressly stated Young's gang affiliation and still failed to make any connection between the gang and the incident itself. Even in the solicitor's closing argument, she theorized that the shooting was retaliation for *"their friends* Brandon Edwards and Brandon Davis getting shot." R. 678, ll. 4-6; R. 706, ll. 12-16 (*emphasis added*). Thus, there was little or no probative value to the gang related evidence.

The admission of any evidence relating to gangs was unduly prejudicial to the Appellant. The word "gang" was inflammatory to the jury and prevented Young and his co-defendants from receiving a fair trial. *See* Clemons v. Walls, 202 F. Supp. 2d 767 (N.D. Ill. 2002), reversed on other grounds by, Clemons v. McAdory, 58 Fed.Appx. 657 (7th Cir. 2003) ("With regard to gang evidence, the Seventh Circuit has long recognized the substantial risk of unfair prejudice attached to such evidence, noting that evidence of gang membership is likely to be damaging to a defendant in the eyes of the jury and that gangs suffer from poor public relations. The Court of Appeals added that gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict. Consequently, while acknowledging that-under appropriate circumstances-gang membership and gang activity evidence has probative value that can outweigh claims of unfair prejudice, the Seventh Circuit demands careful consideration by district courts in determining the admissibility of such evidence." (internal quotations and citations omitted)).

The trial judge failed to appreciate why a reference to gangs was prejudicial, stating that "there's a lot of stuff that comes out in criminal cases that's prejudicial." The judge even cited the "dictionary.com" definition of gang, stating:

> The definition of a gang, 'A group or band, a gang of boys gathered around the winning pitcher; a group of youngsters, adolescents who associate closely often exclusively for social reasons; a group of people with compatible tastes or mutual interests who gather together for social reasons. I'm throwing a party for the gang I bowl with.' For all of the negative connotations that you all want to associate with

> that word. The fifth definition down on the list is, 'A group of persons associated for some criminal or other anti-social purpose.'

R. 71, ll. 15-18; R. 97, ll. 15-24. Respectfully, this response from the trial judge indicates that the trial judge had not properly weighed the prejudicial effect of "gang" related testimony, especially given the seriousness of the charges against the co-defendants. The trial judge's failure to recognize the obvious prejudice of the reference to the co-defendant's as being members of a gang was error.

The only purpose of presenting evidence of the co-defendant's gang involvement was to appeal to the passions and fears of the jury. The solicitor's argument that the gang evidence was essential to prove the elements of assault and battery by mob is without merit. S.C. Code Ann. § 16-3-210(a) defines a "mob" as "the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another." Whether the acts were premeditated does not rise or fall on whether these co-defendants were members of a gang. The solicitor presented evidence that the co-defendants all went to the Red Planet club earlier in the evening and video footage of at least some of them together at Waffle House later that evening. Additionally, she presented testimony of some of the co-defendants, who explained that they and their co-defendants saw the victims at the Lil Cricket, made a U-turn and went back to Club 864, and then proceeded back to the Lil Cricket and shot the victims. The gang evidence was never tied to the specific incident or the concept of premeditation. Thus, the gang evidence was an attempt to pile on prejudicial evidence that was not probative of the alleged crimes.

Therefore, the trial court erred in admitting the gang related evidence because the solicitor failed to lay the proper foundation for its admission, the evidence constituted improper character evidence, and the evidence's probative value was substantially outweighed by the danger of prejudice.

III. The trial court erred in admitting photographs of the co-defendants allegedly making "gang signs" where the solicitor failed to lay the proper foundation for their admission, they were not relevant to the facts at issue in the case, and they were unduly prejudicial.

On redirect of Investigator Brown, the solicitor asked him to identify several photographs. The sole purpose of the photographs was to serve as impermissibly spurious corroboration of the defendants' gang affiliation. Investigator Brown testified that he received the photographs during the course of his investigation "several days after the initial incident occurred." He testified that hand signs, which was one of the most popular ways to identify a gang member," in the photographs were those of the Folk Nation and Gangster Disciples.

In one of the photographs, taken outside of a restaurant in downtown Greenville, Investigator Brown claimed that the individuals were "throwing [what] was known as a three point crown and that was very specifically [sic] to the Folk Nation." He identified co-defendants Hogan, Booker, and Williams in the photograph and recognized the other two individuals but could not recall their names. R. 499, l. 14 - R. 502, l. 14; State's Ex. 51, photograph (on file with this Court). In a second photograph, Investigator Brown noted the use of the three point crown and "L" symbol. He identified Young in the

photograph and said that Holmes and Booker were also possibly in the photograph. R. 503, l. 2 - 504, l. 10; State's Ex. 54, photograph (on file with this Court). On cross-examination, Investigator Brown admitted that none of the co-defendants were displaying gang signs in the photograph that was actually taken at the Red Planet club earlier that night. R. 504, ll. 13-20.

Following the testimony and outside of the presence of the jury, the trial judge allowed the defense attorneys to place their objection to the photographs on the record, which was previously discussed at a bench conference. Defense attorney Chambers argued that no foundation was laid for the admission of the photographs and that they are not relevant to an issue in the case. He noted that no information was provided as to when or where they were taken. Counsel Abdalla for Young added that the photographs were unduly prejudicial as gang evidence. The judge indicated that he overruled the objection and was told that the photographs came off of co-defendant Young's cell phone. R. 506, ll. 1-24.

In her closing argument, the solicitor made reference to the "photos" that Investigator Brown had described as showing hand signs that were associated with gangs and especially the Folk Nation. R. 696, l. 19 - 697, l. 3; R. 709, ll. 8-14.

Rule 901(a), SCRE, provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." In the present case, the only question asked of Investigator Brown with respect to authentication was whether he received the photographs in his investigation. According to the judge, the photographs

were obtained from Young's cell phone, yet no records were produced by the solicitor to verify that claim or indicate when the photographs were taken. Further, the jury was given no information as to how and where the photographs were obtained in order to determine what weight to give them.

In addition to the lack of authentication, the photographs were irrelevant and unduly prejudicial. The solicitor had ample other evidence to show that the co-defendants were together on the night of the incident. Thus, the only purpose of the photographs was to establish the co-defendants' gang association. As argued supra, admission of gang related evidence was improper.

IV. The trial court erred where he coerced co-defendant DaQuan Bruster to testify for the State by threatening to vacate his guilty plea such that he would be facing life without parole (LWOP) because the judge found that Bruster's first testimony violated the plea agreement.

The trial judge's actions in threatening to vacate, and in one instance actually vacating, those co-defendant's guilty pleas who did not testify as the solicitor anticipated was improper. While the Court framed its ruling in the context of upholding the administration of justice by preventing perjury or allowing an invalid guilty plea, the Court's actions instead amounted to enforcement of a portion of plea negotiations that never existed. *See* State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005) (holding that a judge has the responsibility for safeguarding both the rights of the accused and the rights of the public in the administration of justice). The plea transcript mentions no requirement that Bruster testify for the State and he repeatedly stated that he did not

understand that he had to testify against the co-defendants and was specifically advised by his attorney that he did not have to do so. R. 11, l. 24 - 18, l. 19. Even the solicitor's comments imply that there was no requirement to provide testimony as a part of the plea. R. 650, ll. 5-17.

In People v. Manchilla, 620 N.E. 2d 1163 (Ill. App. Ct. 1993), the Appellate Court reversed Manchilla's conviction for aggravated criminal sexual assault because the prosecutor violated Manchilla's right to present witnesses by intimidating the witness with repeated statements concerning perjury and immigration status. The Illinois Appellate Court wrote that a fundamental element of due process is the right of an accused to present witnesses but that right was violated if the state or court exerted improper influence on defense witnesses causing them not to testify.

The United States Supreme Court in Webb v. Texas, 409 U.S. 95, 98 (1972), reversed the defendant's conviction because the trial judge drove a prospective defense witness from the stand by telling him that if he lied he could be prosecuted, and convicted for perjury, and have to serve more time. In another Illinois case, People v. King, 593 N.E.2d 694 (Ill. App. Ct. 1993), the Appellate Court reversed the defendant's conviction where the circuit judge drove a prospective defense witness from the stand by threatening to revoke an earlier plea bargain made before that court if it believed the witness was lying. The Illinois Supreme Court affirmed the reversal. People v. King, 608 N.E.2d 877 (Ill. 1993). These same principles that prohibit influence aimed to keep defense witnesses from testifying should apply to influences aimed at forcing State's witnesses to testify against

In State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005), the South Carolina Court of Appeals held that giving false testimony at trial constituted the felony of perjury and subjected the person to a fine or imprisonment. The trial witness in Stanley contradicted his prior statement to police during his trial testimony and was guilty of perjury if the information to police was false and if it was true, then his trial testimony was perjury. The trial judge warned the witness of perjury and ordered the witness to jail after dismissing the jury. The witness was allowed to consult with his attorney and testify again. The court found that all courts have the power to punish for contempt which was essential in judicial proceedings and to the due administration of justice. The court wrote that a judge has the responsibility for safeguarding both the rights of the accused and the rights of the public in the administration of justice.

The facts of Stanley are distinguishable from the present case where the problem was not perjury, but rather enforcement of the purported terms of the State's plea agreement. Here, Bruster indicated that he was under the impression that providing testimony against the co-defendants was not a requirement of his plea agreement. The trial judge did not safeguard the Appellant's right to due process and a fair trial when the judge coerced the witness to testify a second time by threatening to vacate the witness's plea such that he would face the possibility of LWOP. It was prejudicial to the Appellants to coerce the witness to testify **a second time** and certainly implied the Court's dissatisfaction with his earlier testimony as a hostile witness.

V. The trial court erred in failing to excuse the two jurors who engaged in misconduct and declare a mistrial where jurors from this trial were overheard by a juror in another case talking in the restroom during the lunch break about Appellant's case, saying such things as "the need to decode the language", "I was chillin," and "he's going down," followed by laughter.

Were it not for the honesty of a juror serving in another case, the defense may have never learned of the premature jury deliberations that took place in his trial. The trial court was alerted to the misconduct after the solicitor presented her fifth of thirty-seven witnesses. While the trial judge in this case seemed to think that a clear definition of "deliberations" needs to be promulgated by the appellate courts, it was obvious from the allegations in this case that at least some of the jurors were discussing more than just the demeanor of the witnesses. That in of itself comes close to discussions of witness credibility, an essential part of deliberations. The comment "he's going down" certainly implies that the juror or jurors intended to find at least one of the defendant's guilty. Thus, the trial court's finding that the jurors had not engaged in any deliberation was erroneous. Their deliberations did affect fundamental fairness, as they not only indicate a premature discussion in the case but a premature decision in the case against the defendants.

Trial counsel argued:

> Your Honor was nice enough to note for the record we had that bench conference and I know you've heard most of this but for the record, my motion is to **remove the two jurors that are alleged to have been involved in the activities specified in the note.** That would then , unfortunately , leave us with 11 jurors and so **you would have to declare a mistrial.** That would be the second part of my motion.
>
> The basis of it is that Your Honor charged the jury as part of his instructions and

> has consistently charged the jury every time we've taken a break not to discuss the case at all. Your Honor has not said don't discuss the facts but you can discuss some other part of the case. So clearly these jurors have violated the oath that they took at the beginning of the case as a part of which following your instructions.

R. 194, ll. 11 - 195, ll. 5. The other attorneys joined in the motion. R. 196, ll. 1-21.

"Deliberate" is defined in Black's Law Dictionary 294 (6th ed. 1991), as "to weigh in the mind, discuss, to consider the reasons for and against, etc." In State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999), the Supreme Court held that premature deliberations could affect fundamental fairness of a trial such that the trial court could inquire into such allegations. The Court set forth the following suggested procedures to follow if an allegation of premature jury deliberations arose during a trial:

> [T]he trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. If requested by the moving party, the court may voir dire the jurors and, if practicable, "tailor a cautionary instruction to correct the ascertained damage." *United States v. Resko*, 3 F.3d at 695. If the trial court determines the deliberations were prejudicial, such findings should be set forth on the record, and a new trial ordered.

333 S.C. at 315, 509 S.E.2d at 815.

The trial court attempted to follow this procedure in this case by conducting voir dire of all of the jurors. However, the judge did not allow any information to be put on the record regarding the allegation of misconduct other than the note written by the juror who overheard them. See Court's Exhibit 3, Juror Note (on file with this Court). The court also failed to inquire about the specific allegation of misconduct, instead just posing a general question to the jurors regarding whether there have been some discussion about the facts of the case. R. 198, l. 7 - 232, l. 11; R. 215, ll. 3-18. While the jurors in this case all claimed that they remained fair and impartial, it is difficult to fathom in what

circumstance a sworn juror would say otherwise. This is even more so where there is credible evidence that jurors previously failed to abide by the Court's instructions not to discuss the case.

In State v. Carmack, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010), the Court of Appeals ruled that premature jury deliberations may amount to misconduct that could affect fundamental fairness. Notably, in Carmack the juror was asked about the specific allegation that he had discussed the case with his girlfriend and denied it. Further, the information relayed to defense counsel in that case was that the juror's girlfriend told her employer "It's [a] cut and dry case. Everyone knows he did it." Thus, not even the extrinsic evidence of the alleged misconduct actually implicated the juror. This case is distinguishable because the allegation did implicate misconduct on the part of the jurors and the judge failed to question the jurors about the specific misconduct alleged, i.e. the bathroom conversation.

Even the general questioning by the judge elicited some of the following:

> **Court:** Are you aware of any discussion about this case that has gone on either in the jury room or anywhere else? Do you know of any?
>
> **Juror Harper:** I would say, yes. Not anything substantive but I would say that there hasn't been a group thing.
>
> **Court:** Can you tell me what has been talked about?
>
> **Juror Harper:** Probably at least what I'm aware of in the context of **almost sadness over some of the things we've heard.**

R. 198, ll. 4-22.

> **Court:** I am calling each juror out individually to determine whether or not y'all have heard some discussion. ....Anything along those lines?

Juror Ferguson: There was some discussion yesterday after the initial charges were made as to how long this might take and that kind of thing. And then there has been -I'm trying to think--- some natural curiosity I think. There's been some discussion I think of the behavior of some people who have taken the stand that kind of thing. I don't think there's been any conclusions drawn. Does that make sense?

R. 200, ll. 6-24.

Court: It has come to light that there may have been some discussion or talk about the case among our jury. Have you been privy to any of that or heard any of that?

Juror Tutiven: Not specifics. Nobody has shared opinions. We have discussed or asked questions about names … It's just been kind of a reflection on different facts.

Court: When you say facts, what do you mean?
Juror Tutiven: names and how many people we've listened to so far and how many witnesses we've had, sort of generic.

R. 207, ll. 4-24.

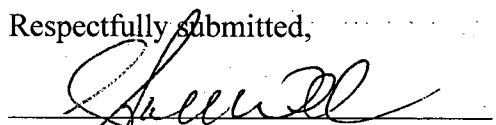
The testimony from the questioned jurors indicated that they were discussing the case which met the definition of to "deliberate." One of the trial attorneys argued that no witness had said anything about someone "going down." This language indicated that at least one of the jurors had already made a decision before the case went to the jury, and was discussing her decision with another juror. This was the only conversation overheard, but based on the juror's responses, there was a reasonable probability that other conversations were held about the case prematurely. Even the solicitor expressed concern over the retention of Juror Whittenberg, who denied having any discussions about the case despite being one of the jurors overheard in the bathroom. R. 216, ll. 8-13; *see* R. 203, l. 19 - 204, l. 25.

Appellants were denied a fair trial because the record made it clear that the jurors were discussing the case in spite of the judge's instructions. Moreover, it was apparent from the discussion that was overheard that at least some of the jurors had made a decision regarding guilt or innocence prior well before the conclusion of the case. Therefore, the trial judge erred in failing to declare a mistrial.

CONCLUSION

For the reasons set forth herein, Appellant Raymond Young respectfully requests this Court to reverse his convictions and remand for new trial.

Respectfully submitted,



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January 19, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

APPELLATE CASE NO. 2013-000207

THE STATE, ... RESPONDENT,

v.

RAYMOND YOUNG, ... APPELLANT.

CERTIFICATE

I certify that the Final Brief of Appellant is in compliance with Rule 211(b).

Respectfully submitted,

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