

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

NOV 09 2017

SC Court of Appeals

Carmen T. Mullen, Circuit Court Judge

Case Nos. 2009GS0702636, 2009GS0702637, 2009GS0702639,  
2009GS0702594, 2009GS0702595  
Appellate Case No. 2013-002394

The State, ..... Respondent,

v.

Earnest Stewart Daise, ..... Appellant.

**Petition for Rehearing**

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Earnest Stewart Daise (“Daise”) requests rehearing of *The State v. Earnest Stewart Daise*, Op. No. 5520 (S.C. Ct. App. filed October 25, 2017) (Shearouse Adv. Sh. No. 40 at 70) (“the Opinion”). Daise respectfully submits that rehearing and/or issuance of a new opinion holding Daise is entitled to a new trial is warranted because the Court overlooked or misapprehended several matters of both fact and law.

Rehearing is proper in this action for several reasons. First, the Court misapprehended that a when a judge makes a ruling as to whether the Confrontation Clause bars testimony, the judge must first decide whether the testimony meets a hearsay exception. Thus, when Daise made his *Crawford*<sup>1</sup> objection, he raised the issue of hearsay to the trial court and the trial court ruled on the issue. The issue of whether John Doe 2’s statement to the EMTs was inadmissible hearsay is,

<sup>1</sup> *Crawford v. Washington*, 541 U.S. 36 (2004)

therefore, preserved. Second, the Court overlooked that John Doe 2's statement to the EMTs was inadmissible hearsay. Third, the Court misapprehended that the EMT testimony violated Daise's Fifth Amendment right to confront an adverse witness against him. Fourth, the Court misapprehended the prejudice to Daise caused by the impermissible pitting of a witness by the State. Fifth, the Court misapprehended the prejudice of allowing impermissible testimony concerning why a victim was afraid of Daise. Sixth, the Court misapprehended the prejudice to Daise of admitting the photograph of Daise in a custodial pose and admitting photographs of the crime scene. Finally, the Court misapprehended the cumulative effect of these errors. Rehearing and/or the issuance of a new opinion holding that Daise is entitled to a new trial is warranted as a result.

**I. The issue of whether John Doe 2's comments were hearsay is preserved.**

The Court's ruling that the hearsay arguments are unpreserved was in error. At trial the State introduced evidence that Daise committed the crimes through the testimony of two EMTs. The EMTs testified to what one of the victims, a two-year-old boy, told them during transport to the hospital about who committed the crime. (Tr. p. 1805:17-1807:18, 1821:8-22; R. 1890-1892, 1906.) Both at trial and at a pre-trial hearing, Daise objected to the testimony of both EMTs pursuant to *Crawford*. (Tr. p. 1806:17-1820:14; R. 1891-1905; 9/26/13 Pre-Tr. p. 44:25-45:6; R. 51-52.) The Court, however, misapprehended that a statement must first meet a hearsay exception before there is even a possibility of the statement being admissible under the Confrontation Clause. *See Crawford*, 541 U.S. at 68. Indeed, the United States Supreme Court in *Crawford* noted that the "primary object" of the Confrontation Clause is to bar "testimonial **hearsay**" from admission unless the person who made the statement was unavailable for trial and the defendant had prior opportunity to cross-examine. *Id.* at 53 (emphasis added). Thus, "[i]t is the testimonial character

of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” *State v. Brockmeyer*, 406 S.C. 324, 342, 751 S.E.2d 645, 654 (2013) (quoting *Davis v. Washington*, 547 U.S. 813, 821 (2006) (internal quotation marks omitted) (emphasis added).) It is therefore necessary for a judge to determine that a statement is admissible hearsay before ruling on a *Crawford* objection.<sup>2</sup> See *Brockmeyer*, at 342, 751 S.E.2d at 654. Any ruling on a *Crawford* objection necessarily includes a ruling that a hearsay exception applies. Accordingly, the issue of hearsay was raised and ruled upon by the trial court as a necessary component of the *Crawford* consideration. Daise’s *Crawford* objection, therefore, preserved the hearsay objection as well. See *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (holding party need not use exact name of a legal doctrine in order to preserve the issue).

The Court also overlooked that Daise’s initial brief argued the EMT testimony “does not fit into a hearsay exception,” *i.e.* that there is *no exception* to the hearsay rule that allows the testimony to be admissible. (Initial Brief p. 7.) It is true the only specific exception addressed in Daise’s initial brief is the medical treatment exception, because that is the only exception that even seemed remotely plausible.<sup>3</sup> In response, the State argued that two other exceptions also applied. Daise, therefore, addressed the State’s arguments that other exceptions were applicable. The issue

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<sup>2</sup> Making a determination as to hearsay prior to considering whether the testimony is barred under the Confrontation Clause is in keeping with the South Carolina Supreme Court’s guidance that a court should not reach a decision on a constitutional issue if the matter can be decided on other grounds. See *Riverwoods, LLC v. Cty. of Charleston*, 349 S.C. 378, 387, 563 S.E.2d 651, 656 (2002) (“It is this Court’s firm policy to decline to rule on constitutional issues unless such a ruling is required.”); see also *In re Under Seal*, 749 F.3d 276, 293 (4th Cir. 2014) (“The principle of constitutional avoidance . . . requires the federal courts to avoid rendering constitutional rulings unless absolutely necessary.”)

<sup>3</sup> The medical treatment exception is not applicable. See *infra*, Part II.

of whether the EMT testimony was inadmissible hearsay was, however, already presented to the Court in Daise's initial brief. It was error for the Court to find the argument unpreserved based on Daise using the reply brief to address the two additional grounds asserted—for the first time—in the State's brief. Accordingly, rehearing and/ or the issuance of a new opinion finding that the issue of hearsay was preserved is warranted. Further, as outlined below, the EMT testimony was inadmissible hearsay entitling Daise to a new trial.

**II. The Court overlooked that the EMT testimony was inadmissible hearsay.**

The Opinion does not address whether the EMT testimony is inadmissible hearsay. Since the testimony is, in fact, inadmissible hearsay, the Opinion overlooked this issue necessitating a rehearing.<sup>4</sup> The EMT testimony regarding John Doe 2's responses to the interrogation by the EMTs was presented to prove the truth of the matter asserted—that Daise harmed John Doe 2—and was, therefore, hearsay. *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 758 (1997) (defining hearsay). None of the hearsay exceptions apply under the facts of this case and the trial court should have excluded this testimony. The failure to do so prejudiced Daise and necessitates a new trial.

**a. The excited utterance exception is inapplicable.**

An excited utterance is a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Rule 803(2), SCRE. “A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception.” *State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). The burden of establishing the facts which qualify a statement as an excited

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<sup>4</sup> To be clear, Daise contends that no exception to hearsay applies to the EMT testimony. This brief addresses the three hearsay exceptions the State has thus far argued are applicable to the EMT testimony rather than address every single exception to the hearsay rule in turn.

utterance rests with the proponent of the evidence. *Id.* There “are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.” *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). The fact that a statement concerns a violent crime, even murder, is inadequate to establish an excited utterance. *Davis*, 371 S.C. at 179, 638 S.E.2d at 62. Further, where there is no indication of the amount of time that lapsed between the startling event and the statement, the excited utterance is inapplicable. *State v. Garcia*, 334 S.C. 71, 77 n.4, 512 S.E.2d 507, 510 n.4 (1999) (finding excited utterance inapplicable because the evidence made it impossible to “determine the timing of the events in relation to her statements”).

Here, the State cannot meet its burden to prove the elements of the exception. First, the record is silent as to the precise time period between John Doe 2’s injury and his statement. Accordingly, the excited utterance exception is inapplicable. *Id.*

Second, there is no testimony concerning John Doe 2 being under the excitement of the events causing his injury. This is because John Doe 2 was not under the stress of excitement. Rather, John Doe 2 was groggy, non-responsive, and uttering complete nonsense. (Tr. p. 1805:1-20, 1809:4-1810:14, 1822:16-22; R. 1890, 1894-1895, 1907.) When the EMTs first arrived, John Doe 2 was unconscious. (Tr. p. 1803:15-17, 1809:4-7, 1818:16-22; 1822:16-22, R. 1888, 1894, 1903, 1907.) He only responded to painful stimuli. (Tr. p. 1818:14-22, 1822:23-1823:1; R. 1903, 1907-1908.) When asked his name, John Doe 2 responded with a name that was not his. (Tr. p. 1805:16-20, 1820:8-12, 1821:4-9, R. 1890, 1905, 1906.) The EMTs considered John Doe 2 to be in an “altered mental state”:

Q: And your report indicates that he was in an altered mental state.

A: Yes. We consider when you're not normally, typically, verbally responsive, we consider that altered mental status.

Q: Right. And that was the status he was in.

A: Yes.

(Tr. p. 1810:8-14, R. 1895.) After mumbling nonsense answers to a few questions, John Doe 2 was unable to answer any more questions. (Tr. p. 1811:3-25; R. 1896.) Moreover, John Doe 2's statements were not spontaneous. Rather, they were made in response to questioning by the EMTs.

As there is no evidence demonstrating John Doe 2 made the statements to the EMTs while under excitement, Respondent cannot meet its burden to prove the other elements of the exception. Since Respondent cannot even demonstrate John Doe 2 was in an excited state, it stands to reason that there is no proof that the stress of excitement was caused by a startling event. Additionally, the fact that the statements may have concerned a violent crime is insufficient to prove the elements of the excited utterance exception. Therefore, John Doe 2's statements were not admissible under the excited utterance exception to the hearsay rule and the trial court should have excluded the EMT testimony.

**b. The present sense impression exception to the hearsay rule does not apply.**

Similarly, the present sense impression exception to hearsay is inapplicable. "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014). Where there is no indication of the amount of time between the event occurring and when the statement was made, the statement is not admissible under the present sense impression exception. *See Garcia*,

334 S.C. at 77 n.4, 512 S.E.2d at 510 n.4 (holding present sense impression exception inapplicable where “[t]here was no indication as [to] when appellant had kicked or threatened the deceased so as to determine the timing of the events in relation to her statements to Hopper and Estes.”).

Here, there is no direct evidence in the record that demonstrates the amount of time between when John Doe 2 sustained his injuries and when he made his statement to the EMTs. Moreover, when the evidence in the record is analyzed logically, the only inference is that a substantial period of time passed between the events that occurred at the home and John Doe 2’s statement to the EMTs. There was testimony that a friend in the area picked up Daise a little after 6 PM. (Tr. p. 2072:15-17, 2074:24-2075:18; R. 2157, 2159-2160.) Therefore, even assuming Daise committed the crime,<sup>5</sup> the incident must have occurred before 6 PM. John Doe 2 was not discovered until sometime between 6:30 and 7:00 PM. (Tr. p. 1984:17-20; R. 2069.) Once John Doe 2 was discovered, the police were not immediately called. Rather, the family members who discovered the scene had to be calmed and taken to a neighbor’s house. (Tr. p. 1988:8-25; R. 2073.) Only then were the police called. (Tr. p. 1988:8-25; R. 2073.) Two separate police officers arrived before the first EMT. (Tr. p. 1717:17-1718:2; R. 1805-1806.) Even then, John Doe 2 was not immediately taken to the hospital. (Tr. p. 1795:2-1798:15; R. 1880-1883.) Rather, the first EMT “waited until the scene was secure” before entering the residence and treating John Doe 2. (Tr. p. 1795:6-7; R. 1880.) After all this occurred, the another set of EMTs arrived and transported John Doe 2 to the hospital. (Tr. p. 1797:19-1798:10; R. 1882-1883.) During this drive, John Doe 2 made the statements at issue. (Tr. p. 1809:15-16, 1810:15-24; R. 1894, 1895.) Thus, even the limited information concerning the timeline of events demonstrates John Doe 2’s answers to the EMTs’ questions were not made contemporaneous with the events John Doe 2 witnessed. Rather,

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<sup>5</sup> Daise does not concede that he is guilty of any crime of which he is accused.

a substantial amount of time transpired between the statements and the events described. Accordingly, Respondent has not met its burden to demonstrate that the statement is admissible under the present sense impression exception. *See State v. Burroughs*, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997) (holding present sense impression exception inapplicable when a substantial amount of time transpired between events and statement).

**c. The medical treatment exception is inapplicable.**

The hearsay exception for medical treatment can only apply to a victim's statements if the statement is "reasonably pertinent" to medical treatment or diagnosis. Rule 803(4), SCRE; *Burroughs*, 328 S.C. at 501, 492 S.E.2d at 414 (finding the fact that the defendant asked the victim if he could hug her before committing the crime was in no way reasonably pertinent to the victim's diagnosis or treatment). The "perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim." *State v. Brown*, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985); *State v. Camele*, 293 S.C. 302, 305, 360 S.E.2d 307, 308 (1987) (granting new trial where doctor's testimony concerning statement made by victim during medical examination as to the perpetrator's identity could not possibly have assisted the doctor in treating or diagnosing the victim); accord *State v. Hudnall*, 293 S.C. 97, 101, 359 S.E.2d 59, 62 (1987).

John Doe 2's responses to the EMTs' questions were not necessary for medical treatment or diagnosis. In fact, the EMTs admitted that the identity of the person who harmed John Doe 2 was not necessary for medical treatment:

Q: Okay. And the identity of who may have shot him doesn't change his medical wounds; does it?

A: Not that I'm aware of.

Q: Right. That would have nothing to do with the extent of his injuries or his treatment and care?

A: No

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Q: -- the type of bandage you would apply to [John Doe 2] to stop bleeding, that decision's not going to change based on who he says hurt him.

A: Based on what? I'm sorry?

Q: Based on who he says hurt him.

A: No.

Q: And based on who he said hurt him wouldn't change the fluids you gave him.

A: No.

Q: Or any of the medical decisions you made in that ambulance.

A: No.

(9/26/13 Pre-Tr. p. 23:25-24:5, 25:1-12; R. 30-31, 32.) The EMTs initially testified that the medical purpose of questioning John Doe 2 "was to determine his level of consciousness and to determine his cognitive thought process, especially with the possibility of a gunshot wound to the head." (9/26/13 Pre-Tr. p. 25:16-19; R. 32.) The EMTs later testified that in addition to testing John Doe 2's cognitive abilities, the purpose of the questioning was also to ensure the wound was not self-inflicted, and determine if John Doe 2 knew what happened. (9/26/13 Pre-Tr. p. 29:20-30-9; R. 36-37.) However, it was unnecessary to discover the identity of the perpetrator in order to treat or diagnose John Doe 2. There is no rational explanation as to how a question the EMTs did not know the answer to, could be used to determine John Doe 2's cognitive thought process. The EMTs had no idea if John Doe 2's response as to who hurt him was correct or not. Similarly, the EMTs could not determine if John Doe 2 knew what happened as the EMTs themselves did not know what happened. Surely, the EMTs did not expect a two-year old, in an altered mental

state, to be able to accurately describe the events that led to his injury.<sup>6</sup> It is equally puzzling how the question “who hurt you,” which implies that the questioner expects you to give the name of another individual, could elicit the information regarding self-inflicted injuries. Clearly, the only purpose of asking these questions—and the purpose of the EMTs’ testimony—was to prove who committed the crimes. The question, and John Doe 2’s response, was not necessary for treatment or diagnosis. Because this testimony was offered to prove who committed the crimes, and does not fit into a hearsay exception, the trial court should have excluded the testimony.

**d. The admission of the EMT testimony prejudiced Daise.**

The admission of this hearsay testimony prejudiced Daise. The EMTs’ testimony is the only direct evidence that Daise committed the crime. No other witness, or evidence, directly placed Daise at the scene of the crime. Additionally, hearing testimony that a two-year-old boy accused his own father of committing these crimes inflames the passions and prejudices of the jurors. Certainly, the jurors understand the love and respect a two-year-old child has for his father. To hear a two-year-old accuse his own father of a horrible crime—despite this love and admiration he has for his father—therefore carries significant emotional weight with the jurors. Accordingly, the admission of this hearsay evidence prejudiced Daise, and he is entitled to a new trial. The Court, therefore, should allow rehearing and/or issue a new opinion holding Daise is entitled to a new trial.

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<sup>6</sup> The fact that young children often cannot recall events accurately is why children are not competent to testify at trial. *See S. Carolina Dep’t of Soc. Servs. v. Doe*, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987) (stating that in order to be competent to testify a child under fourteen years of age must be able, among other requirements, “to perceive facts accurately through the medium of the senses, [and] to recall them correctly”). Here, no determination as to John Doe 2’s competency was made as the State never called him as a witness.

### **III. The Opinion misapprehended that the admission of the EMT testimony violated Daise's Confrontation Clause rights.**

The EMT testimony also violated Daise's constitutionally-guaranteed right to confront an adverse witness. The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford*, the United States Supreme Court held that the Confrontation Clause was violated by the admission into evidence of a witness's statement to police where the witness did not testify at trial. 541 U.S. at 59. In *Crawford*, the taped statements of the defendant's wife who did not testify were not admissible due to the defendant's Confrontation Clause rights. *Id.* at 68-69. Under the rule established in *Crawford*, the Confrontation Clause allows the admission of "[t]estimonial statements of witnesses absent from trial . . . *only* where the declarant is unavailable, and *only* where the defendant has had a prior opportunity to cross-examine." *Id.* at 59 (emphasis added). This rule applies whenever "testimonial evidence is at issue," though *Crawford* "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68.

Subsequent Supreme Court decisions have made clear that when statements are made to the agents of the police, those statements qualify as testimonial, fall within the ambit of *Crawford*, and should be analyzed as if they were made during police interrogation. *See, e.g., Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006). To determine whether a statement is testimonial, courts employ the "primary purpose test." *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015). This is an objective test that requires a court to examine three factors: (1) whether there is an ongoing emergency that the statements were directed towards, (2) the formality of the questioning, and (3) standard rules of hearsay are also relevant. *Id.* In sum, "the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an

out-of-court substitute for trial testimony.’ ” *Id.* (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)).

Here, John Doe 2’s statements to the EMTs were testimonial and, therefore, should have been barred by the Confrontation Clause. The Court found that the statements occurred in the course of an ongoing medical emergency, thus distinguishing the statements made from formal police interrogation. (Opinion at \*9.) This ruling, however, overlooks that per South Carolina law, the identity of the perpetrator of a crime is not necessary for medical treatment. *See Brown*, 286 S.C. at 447, 334 S.E.2d at 817; *Camele*, 293 S.C. at 305, 360 S.E.2d at 308; *Hudnall*, 293 S.C. at 101, 359 S.E.2d at 62. This ruling also overlooks the actions of the EMTs upon arrival at the hospital which show the true purpose behind the questioning—to create an out-of-court substitute for trial testimony. Immediately upon arrival at the hospital, the EMTs immediately filled out sworn statements to preserve these statements for trial. (Tr. p. 1812:10-14; R. 1897; Def. Ex. 8; R. 2637.) This action cuts against the finding by the Court that John Doe 2’s statements were spontaneous as it demonstrates the calculated conduct of the EMTs in obtaining the statements through interrogation. Moreover, the questioning had some aspects of formality based on the EMTs’ focus on who injured John Doe 2. The statements, therefore, were testimonial.

Additionally, there was no ongoing public safety emergency requiring emergency personnel to know the name of the individual who harmed John Doe 2 to adequately respond. The EMTs testified the questions were not made in order to determine if the perpetrator was still lurking near-by or ensure anyone’s immediate safety. (9/26/13 Pre-Tr. p. 27:16-28:8, R. 34-35.)<sup>7</sup> As previously explained, there is no logical explanation for how the answer to the question “who hurt

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<sup>7</sup> This is further supported by the fact that the police had already secured the area. (Tr. p. 1717:17-1718:2, 1795:6-7; R. 1805-06, 1880.)

you” could be utilized to gather the information the EMTs claim the question sought. Further, the EMTs admitted the name of the perpetrator was not necessary for medical treatment. (9/26/13 Pre-Tr. p. 23:25-24:5, 25:1-12; R. 30-31, 32.) This is supported by South Carolina case law. *See Brown*, 286 S.C. at 447, 334 S.E.2d at 817; *Camele*, 293 S.C. at 305, 360 S.E.2d at 308; *Hudnall*, 293 S.C. at 101, 359 S.E.2d at 62.

Although John Doe 2 was only two-years-old when he made the statements to the EMTs, this does not change the fact that the EMTs’ purpose in seeking the information was to assist the police—making the EMTs agents of the police. Indeed, the interaction between citizens and EMTs is much more akin to the interaction between citizens and police officers than the relationship in other cases involving non-law enforcement personnel. *See Clark*, at 2183. Statements made to agents of the police are testimonial and inadmissible under the Confrontation Clause. *See, e.g. Davis*, 547 U.S. at 823 n.2. It was, therefore, error for the Court to determine that the statements were necessary to respond to an on-going emergency, rather than testimonial.

Finally, as previously outlined, no traditional indicia of reliability are present. No exception to hearsay applied to the testimony. Thus, all three factors under the primary purpose test are in favor of excluding the EMTs’ testimony.

Accordingly, John Doe 2’s statements are testimonial and should have been excluded under the Confrontation Clause. The failure of the trial court to exclude the statements prejudiced Daise, entitling Daise to a new trial. This Court, therefore, should allow rehearing and/or issue a new opinion holding Daise is entitled to a new trial.

**IV. The Opinion makes a witness credibility determination—which an appellate court may not do—to support a holding that the impermissible pitting of a witness by the State did not prejudice Daise.**

**a. The Opinion impermissibly makes a credibility determination.**

“Because [the Court of Appeals is] not a jury, [the Court of Appeals] do[es] not weigh the evidence and . . . do[es] not decide matters of credibility.” *Laney v. Bi-Lo, Inc.*, 309 S.C. 37, 38, 419 S.E.2d 809, 810 (Ct. App. 1992); *see also Weaver v. Lentz*, 348 S.C. 672, 680–81, 561 S.E.2d 360, 365 (Ct. App. 2002) (“In a law case tried before a jury, it is the jury that must decide what part of the witness’s testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses.”). The Court correctly held Staff Sergeant Jeremiah Fraser’s “testimony regarding the credibility of [Mr.] Simmons’s conflicting testimony constituted improper witness pitting.” (Opinion at \* 12.) The Court, however, incorrectly held Daise was not prejudiced by this error. (*Id.*) To reach this holding, the Court found that Mr. “Simmons effectively impeached his own credibility.” (*Id.*) Thus, the Court made its own determination regarding the credibility of the witness. This ruling overlooks that the Court of Appeals’ own precedent that, as an appellate court, it may not make witness credibility determinations. *See Laney*, 309 S.C. at 38, 419 S.E.2d at 810; *see also Frampton v. S.C. Dep’t of Transp.*, 406 S.C. 377, 391, 752 S.E.2d 269, 277 (Ct. App. 2013) (“The jury chose to believe and use Harnett’s assessment of the damages, and this court may not second-guess determination[s] of credibility by the trier of fact.”)

Further, the Court’s ruling that SSG Fraser “never stated that he did not find [Mr.] Simmons’s trial testimony credible—only that he did not find [Mr.] Simmons’ initial police statements credible”—overlooks that his trial testimony was the same as the initial story he gave

police. Thus, the effect of stating one version of events was not credible was to testify that the portion of Mr. Simmons' testimony that gave Daise an alibi also was not credible. As set forth below, it was for the jury, and the jury alone, to believe Mr. Simmons in whole or in part and the impermissible pitting took that determination from the jury prejudicing Daise. Rehearing and/or the issuance of a new opinion holding Daise is entitled to a new trial is warranted as a result.

**b. The State's impermissible pitting of a witness prejudiced Daise.**

During trial, one of the State's witnesses, Mr. Simmons, gave conflicting testimony concerning Daise's activities and demeanor on the day of the crime. (Tr. pp. 2065, 2072-2081, 2086-2091, 2097-2101; R. 2150, 2157-2166, 2171-2176, 2182-2186.) This is consistent with the conflicting information which Mr. Simmons gave law enforcement officials during their investigation of the crime. (Tr. pp. 2101-2105; R. 2186-2188.) Specifically, he originally told officers that he never picked Daise up from the side of the road near the crime scene. (Tr. pp. 2101-2103; R. 2186-2188.) Only after being threatened with the possibility of being charged as an accessory after the fact did he later tell law enforcement officials that he did in fact pick up Daise on the side of the road near the crime scene. (Tr. p. 2103:6-20; R. 2188.) At trial, the State called SSG Fraser to explain why Mr. Simmons was questioned again. During SSG Fraser's testimony the State asked, "[a]nd was the story he [Mr. Simmons] gave those officers credible?" (Tr. p. 2108:3-5; R. 2193.) SSG Fraser proceeded to testify that he believed Mr. Simmons' original story to law enforcement officials—and consequently portions of Mr. Simmons' testimony—was not credible. (Tr. p. 2108:5, 11, 24; R. 2193.)

Allowing SSG Fraser to comment on Mr. Simmons' credibility prejudiced Daise by taking the determination of Mr. Simmons' credibility out of the exclusive province of the jury. The jury, and the jury alone, gets to decide whether to believe Mr. Simmons' testimony, in full or in part.

*State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499-500 (2013). The jury could reasonably believe that Mr. Simmons began to tell the police what he believed they wanted to hear in order to ensure he was not charged with a crime. To combat that reasonable belief, the State had SSG Fraser comment that he did not find the portion of Mr. Simmons' testimony that helped Daise credible. This prevented the jury from believing the portion of Mr. Simmons' testimony which gave Daise an alibi and would allow a reasonable juror to acquit Daise. The impermissible pitting by the State, therefore, prejudiced Daise by preventing the jury from acquitting Daise. *See State v. Bryant*, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (holding defendant was prejudiced by the State's impermissible pitting of witnesses). Since the impermissible pitting of a witness prejudiced Daise, rehearing and/or the issuance of a new opinion holding Daise is entitled to a new trial is warranted.

**V. The impermissible testimony that one of the victims was afraid of Daise prejudiced Daise.**

The Court correctly held that the testimony of Ms. Porter that Jeanine Mullen was afraid of Daise and that Ms. Porter overheard Daise tell Ms. Mullen, "I'll kill you and your mother f'ing kids" was "inadmissible because [the statements] not only revealed Jeanine's fearful state of mind, they described the reason for it." (Opinion at \*14.) The Court, however, overlooked the prejudice the admission of this testimony caused Daise.

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). Ms. Porter's testimony allowed the jury to believe that Daise committed the crime simply because a victim feared him as a violent person. Thus, the inclusion of the testimony unfairly prejudiced Daise as it allowed the jury to decide the case on an improper basis. *See United States v. Lentz*, 58 Fed. App'x 961, 967-68 (4th Cir. 2003) (affirming decision not to admit evidence that was probative of victim's fear, but was

unfairly prejudicial to the defendant because a jury, upon hearing the evidence, “could be moved to decide the case on sympathy and emotion” instead of the facts). Accordingly, rehearing and/or the issuance of a new opinion holding Daise is entitled to a new trial is warranted.

**VI. The Court overlooked the unfair prejudice in the admission of photos of Daise in a custodial pose and of photos containing a birthday cake for one of the victims.**

**a. Photos of Daise in a custodial pose allowed the jury to convict Daise because they impermissibly implied Daise had a criminal record.**

The State introduced into evidence a photograph of Daise that impermissibly implied Daise was in police custody. (10/7/13 Pre-Tr. p. 78:1-25, Tr. p. 2129:5-8; R. 127, 2214.) In the original picture, Daise is visibly handcuffed. (10/7/13 Pre-Tr. p. 78:22-25; R. 127.) At trial, the State attempted to digitally remove the handcuffs from the picture, but even with that attempt, Daise still appeared to be in a position implying he was in custody. (10/7/13 Pre-Tr. p. 78:22-25; R. 127.) The Court overlooked that this photo impermissible and prejudicially suggested Daise had a criminal history.

Photographs of criminal defendants where they appear to be in custody imply prior bad acts by the defendant and are inadmissible at trial. *State v. Traylor*, 360 S.C. 74, 85 n.12, 600 S.E.2d 523, 528 n.12 (2004). Three conjunctive requirements must be met in order for a photograph to be admissible where the defendant appears to be in custody: (1) the State must demonstrate a need to introduce the photograph; (2) the photograph must not imply the defendant has a prior criminal record; and (3) the manner in which the photograph is introduced at trial must not draw particular attention to the source or implications of the photograph. *State v. Denson*, 269 S.C. 407, 412, 237 S.E.2d 761, 763-64 (1977). Admission of a photograph when all three criteria are not met constitutes reversible error. *Traylor*, 260 S.C. at 85 n.12, 600 S.E.2d at 528 n.12.

The State did not meet any of the three requirements of *Denson*. First, the State did not demonstrate a need to introduce the photograph into evidence. The officers who detained Daise could—and did—testify to Daise wearing the jeans in question. Furthermore, Daise was willing to stipulate to the chain of custody of the jeans. (10/7/13 Pre-Tr. p. 77:18-19; R. 126.) Moreover, the State did not need to introduce the photo of Daise in order to establish he wore the jeans, as a witness testified to personally taking the jeans off him. (Tr. p. 2287:7-25; R. 2372.) Additionally, the photograph impermissibly implies that Daise has a prior criminal record because he still is in the posture of a man in handcuffs in the photo, despite the unhelpful attempt to remove the handcuffs from the picture. It makes no difference that the handcuffs can no longer be seen because of Daise’s custodial pose. The nature of the custodial pose is even further enhanced in one of the photographs, which appears to be the classic sideways profile photo of a mug shot. (Ex. 49; R. 2633.) Furthermore, the jurors knew Daise was handcuffed when he left his home in police custody and the picture depicts Daise in police custody. (Tr. p. 2253:7; R. 2338.) Thus, the introduction of the photograph was cumulative and unnecessarily drew attention to the fact that Daise was handcuffed and in police custody at the time. The State, therefore, cannot meet the requirements of *Denson*. Accordingly, the Court overlooked the fact that the admission of this photograph was reversible error.

**b. The Court misapprehended the prejudice to Daise of the admission of a photo containing a birthday cake for one of the victims because the photo impermissibly aroused the passions and prejudices of the jury.**

Another photograph was introduced at trial under the guise of establishing that there were no signs of forced entry at the crime scene. (10/7/13 Pre-Tr. pp. 83-85, Tr. p. 1719, 1986; R. 132-134, 1807, 2071.) The true purpose, however, was to include photographs in evidence containing a birthday cake in order to remind the jurors that one of the victims was killed on his fourth birthday

in an effort to inflame the passions and prejudices of the jury. (10/7/13 Pre-Tr. p. 83:18-25; R. 132.) This is apparent because other photographs and testimony were presented evidencing that there were no signs of forced entry. (10/7/13 Pre-Tr. pp. 83-85, Tr. p. 1719, 1986; R. 132-134, 1807, 2071.) The Court, therefore, overlooked that there was no need for the photographs as they were cumulative of other evidence, and therefore their probative value was far outweighed by their prejudice to Daise.

Photographs calculated to arouse the sympathy or prejudice of the jury or that are irrelevant or unnecessary to substantiate facts should be excluded. *See State v. Haselden*, 353 S.C. 190, 201, 577 S.E.2d 445, 451 (2003) (holding that pictures of victim's anus in capital case were introduced to inflame the passions and prejudices of jurors and to give impression that victim was possibly sexually assaulted); *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (holding admission of photograph of victim was not necessary to prove guilt and admission required new trial); *State v. Livingston*, 327 S.C. 17, 20, 488 S.E.2d 313, 314 (1997) (holding that photo of the victim, a good looking woman, taken shortly before her death was inadmissible in felony DUI case). A photograph containing information that a four-year-old was shot and killed on his fourth birthday clearly invokes the sympathy and prejudices of the jury. Additionally, the photograph was unnecessary as other photographs and testimony demonstrated there were no signs of forced entry. Thus, the photograph was unnecessary to substantiate facts. The Court overlooked the true purpose behind the State's admission of the photograph and the resulting prejudice to Daise by the admission of the photograph. Accordingly, rehearing and/or the issuance of a new opinion holding Daise is entitled to a new trial is warranted.

**VII. The cumulative errors committed by the trial court had the effect of preventing Daise from receiving a fair trial, entitling Daise to a new trial.**

The cumulative error doctrine requires a new trial be granted where, even if each error raised alone is insufficient to warrant a new trial, the cumulative effect of those errors is sufficient to require a new trial. *State v. Freeman*, 319 S.C. 110, 123, 459 S.E.2d 867, 875 (Ct. App. 1995). The doctrine recognizes that “the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal.” *Id.* As previously demonstrated, the trial court committed numerous errors, each sufficiently prejudicial to warrant reversal individually. Specifically, the trial court: (1) allowed hearsay testimony that violated Daise’s Confrontation Clause rights; (2) allowed a witness for the State to impermissibly comment on the credibility of another witness; (3) allowed impermissible testimony about why a victim feared Daise; and (4) admitted photographs where the probative value was substantially outweighed by their prejudicial nature. Each error prejudiced Daise, and the cumulative prejudicial effect of the errors to Daise is overwhelming. Accordingly, Daise is entitled to a new trial. *See State v. Peterson*, 287 S.C. 244, 246, 335 S.E.2d 800, 801 (1985), *overruled on other grounds, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 by (1991) (holding that “numerous errors committed by the trial court in this death penalty case compels us to reverse and remand for a new trial”).

The Court overlooked how the State capitalized on these errors at trial. During closing arguments, the State bolstered the version of events given by Mr. Simmons favored by law enforcement, further reminding the jurors that a law enforcement officer found Mr. Simmons’ other statement of events, where Daise has an alibi, not to be credible. (Tr. p. 2462:5-2463:21, 2469:13-14; R. 2543-2544, 2550.) The State also made several mentions that it was John Doe 1’s birthday, reminding the jurors that one victim was killed on his fourth birthday and of the

impermissible photos of his birthday cake. (Tr. p. 2459:1-25, 2461:17-19; R. 2540, 2542.) Furthermore, the State relied heavily on the impermissible hearsay statements of John Doe 2, which violated Daise's Confrontation Clause rights, during closing arguments in order to link Daise to the crime. (Tr. p. 2470:16-2472:9; R. 2551-2553.) The cumulative effect of these errors, each sufficient to warrant a new trial on its own, and the manner which the State capitalized on them, requires a new trial. Accordingly, rehearing and/or the issuance of a new opinion holding Daise is entitled to a new trial is warranted.

**Conclusion**

For the foregoing reasons, rehearing and/or issuance of a new opinion holding Daise is entitled to a new trial is warranted.

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November 9, 2017.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

NOV 09 2017

Carmen T. Mullen, Circuit Court Judge

SC Court of Appeals

Case No. 2009GS0702636, 2009GS0702637, 2009GS0702639,  
2009GS0702594, 2009GS0702595  
Appellate Case No. 2013-002394

The State, ..... Respondent,

v.

Earnest Stewart Daise, ..... Appellant.

PROOF OF SERVICE


I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Petition for Rehearing

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November 9, 2017

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
SC Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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NOV 09 2017

SC Court of Appeals

RE: The State v. Earnest Stewart Daise  
Appellate Case No. 2013-002394  
Our File No. 38769/01523

Dear Ms. Kitchings:

Enclosed are the original and six (6) copies of a *Petition for Rehearing* in the above-referenced matter. We would appreciate it if you would file the original document and return a clocked copy to us via our firm's courier.

By copy of this letter to all counsel, we are hereby serving them with copies of the above referenced pleading.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Phillips L. McWilliams'.

Phillips L. McWilliams

PLM:kdm

cc: Donald J. Zelenka, Esquire  
Robert M. Dudek, Esquire