ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ESAIVEUS FRANTREZ BOOKER,

APPELLANT

APPELLATE CASE NO 2013-000207

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 2017-UP-425

PETITION FOR REHEARING

On November 15, 2017, this Court affirmed Appellant Esaiveus Booker's convictions for seven counts of attempted murder and one count of assault and battery by mob in an unpublished, per curiam opinion.[1] Pursuant to Rule 221(a), SCACR, Booker respectfully petitions this Court for a rehearing of its opinion based upon the following points overlooked or misapprehended by the Court:

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[1] Booker was tried jointly with three co-defendants, Kinjta Sadler, Michael Antonio Williams, and Raymond Lewis Young. Sadler's direct appeal was dismissed by this Court following review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Sadler, No. 2015-UP-013 (S.C. Ct. App. filed Jan. 14, 2015). On the same day as the opinion was filed in Booker's case, Williams' convictions were affirmed by this Court in an unpublished opinion. State v. Williams, No. 2017-UP-427 (S.C. Ct. App. filed Nov. 15, 2017). Also on the same day, Young's convictions were reversed and his case was remanded for new trial in an unpublished opinion. State v. Young, No. 2017-UP-426 (S.C. Ct. App. filed Nov. 15, 2017).

As this Court will recall, this case arose from a multiple offender shooting that occurred in the early morning hours of July 17, 2011 outside of a Lil' Cricket gas station in Greenville, South Carolina. The prosecution theorized that the shooting was retaliation for an earlier dispute and shooting at the Red Planet nightclub. R. 105, l. 11 – 106, l. 16; R. 140, l. 19 – 141, l. 12. On appeal, Booker argued that the trial court erred in allowing testimony by the prosecution's witnesses using the term "gang" in reference to their investigation and the case and, relatedly, in admitting a photograph of the co-defendants allegedly making "gang signs." Booker further argued that the trial court erred in coercing co-defendant DaQuan Bruster to testify for the prosecution by threatening to vacate his guilty plea, such that he would be facing life without parole (LWOP) if he did not comply. Lastly, Booker argued that the trial court erred in failing to declare a mistrial where jurors engaged in premature deliberations.

A. The trial court erred in admitting testimony referencing gang involvement and the error was not harmless.

This Court erred in ruling that the trial court properly admitted the testimony referencing the term gang. This Court further erred in ruling that the admission of improper evidence was harmless because it was merely cumulative to other evidence referencing gangs that was "admitted numerous times without objection." State v. Booker, No. 2017-UP-425, ¶ 1 (S.C. Ct. App. filed Nov. 15, 2017).

In light of the lack of foundation laid for the gang evidence, the improper character evidence that it constituted, and the danger of unfair prejudice, the evidence regarding the co-defendants alleged gang involvement was improper. See Brief of Appellant, pp. 6-10, pp. 20-27. The prosecutor failed to deliver on her averment during the motion *in limine* hearing that the victims in the case would give testimony identifying the co-defendants as being involved with a gang. R. 70, ll. 8-22. Nonetheless, she called investigator Brandon Brown, who testified that he was

consulted due to suspected gang involvement. R. 475, l. 19 – 494, l. 10. Further, over the defense's objection, 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. 499, l. 16 – 506, l. 20. In addition to the lack of foundation for such testimony and evidence, the gang evidence constituted improper character evidence where the co-defendant's character had not first been put at issue by the defense. See Rule 404, SCRE; State v. Brown, 344 S.C. 70, 73, 543 S.E.2d 552, 553 (2001) ("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. Council, 335 S.C. 1, 12 n.6, 515 S.E. 2d 508, 514 n.6 (1999) ("An accused must introduce evidence of his character at trial before the prosecution can attack it.")

Further, the probative value of the gang evidence was substantially outweighed by the danger of unfair prejudice. See Rule 403, SCRE. There was no testimony to support the prosecutions' speculation that the incident itself was gang related. It was further not necessary to the prosecutor's ability to prove its case for assault and battery by mob, as contended by the prosecution. See R. 99, l. 20 – 102, l. 16. Moreover, the admission of gang evidence was unduly prejudicial to Booker, as it was inflammatory and meant to prey upon the fears and prejudices of the jurors. In U.S. ex rel. Clemons v. Walls, 202 F. Supp. 2d 767, 774-78 (N.D. Ill. 2002), *reversed on other grounds by*, Clemons v. McAdory, 58 Fed.Appx. 657 (7th Cir. 2003), the United States District Court of the Northern District of Illinois held that the admission of gang-related evidence deprived the petitioner of his due process right to a fundamentally fair trial. The Clemons Court noted the Seventh Circuit's long recognition of "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." 202 F. Supp.

2d at 775. "[G]angs 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." Id. Despite the seriousness of the defense's concerns, the trial judge noted that the "dictionary.com" definition of gang did not mention criminality until the fifth example, suggesting that the defense attorneys' concerns over the negative connotations associated with gangs were unfounded. See R. 102, l. 24 – 104, l. 3.

In addition to erring in finding the gang evidence admissible, this Court further erred in finding that the admission of the gang evidence was harmless because the evidence was "merely cumulative to other evidence." While this Court found that "evidence referencing gangs was admitted numerous times without objection," counsel was not required to object to every mention of the term "gang" in order to prevent a finding that the evidence tying the co-defendants to a gang was "merely cumulative."

In State v. Blackburn, 271 S.C. 324, 327, 247 S.E.2d 334, 336 (1978), cited in this Court's opinion, the improperly admitted testimony consisted of the deceased victim's statement to a rescue squad worker that "she (Pamela Tanner) felt sure that Gary Blackburn was behind all of this, that she was a star witness, was supposed to be a witness in a case of his." The Blackburn Court found the error in the statement's admission harmless because it was cumulative to other evidence received in the case. 271 S.C. at 329, 247 S.E.2d at 337. Specifically, six of the State's witnesses testified that Blackburn plotted Tanner's murder because she planned to testify against him. Id.

Here, the defense first objected to the admission of gang related evidence through a pre-trial motion *in limine*, which the trial judge denied. R. 70, l. 10 – 71, l. 20; R. 93, l. 20 – 104, l. 13.

Officer Michael Moore did testify: "My role was basically as a cover officer because of the violence that went on that day. I was assigned to the warrant task force and the gang task force at that point in time as a cover officer." R. 437, ll. 3-8. However, he provided no testimony regarding any gang-related aspect of the investigation itself, instead stating that his role was to assist in the service execution of arrest warrants and a search warrant. R. 437, l. 9 – 441, l. 19.

The defense renewed its objection to the gang evidence outside of the presence of the jury before investigator Brandon Brown began testifying, anticipating that he would delve into the specifics of the gang aspect of the investigation. The trial judge noted the objection but allowed the testimony. R. 472, l. 7 – 473, l. 23. Brown proceeded to testify that he worked in the Greenville County Sheriff's Office as a gang investigator assigned to the Federal Bureau of Investigation as a task force officer. R. 475, l. 25 – 476, l. 4. His responsibilities included maintaining "all gang intelligence throughout [the] Greenville County area;" in other words "knowing all [of the] players involved, all entities thereof throughout the county involving everything from A to Z as long as it pertains to gangs and violent crimes." R. 476, ll. 5-10. Brown said that he consulted regularly with different divisions "whenever they believe there was possibly something involved in my field." R. 476, ll. 11-16.

In the present case, Brown was contacted by investigator Wayne Campbell and responded to the scene of the Li'l Cricket. Brown gathered information at the scene to determine whether there was any information he knew as a gang investigator that could aid the lead investigator. R. 476, l. 17 – 477, l. 14. He recalled that the witnesses who remained at the scene were not forthcoming, noting "[t]hey didn't want to talk to us, didn't want to be seen talking to us, were literally scared." R. 477, l. 17 – 478, l. 3. Nonetheless, he said that the witnesses mentioned a prior altercation involving "them Folk Boys" and someone named "Mikey." R.

478, ll. 4-17. Brown's partner learned that the victim of the prior shooting at the club was Brandon Edwards, who Brown knew "to be involved with several individuals specifically on the southern end of Greenville County." R. 478, l. 18 – 479, l. 4. Brown said that when he heard the name Brandon Edwards, "the very first name that popped in [his] head was Raymond Young" because they "associated close" and were possibly family. R. 479, ll. 5-12. The defense objected again to the gang testimony, but it was overruled. R. 475, l. 25 – 479, l. 13; R. 479, ll. 14-23.

Brown then recounted his review of what purported to be Raymond Young's Facebook page, from which he learned that Young and Michael Williams were both at the club during the earlier incident. Brown thought Michael Williams might have been the "Mikey" referred to by the witnesses with whom he spoke. R. 479, l. 25 – 481, l. 3. He also located a group photograph labeled "the Family," which was shown to co-defendant Larry Johnson. Johnson provided the legal names and nicknames of many people in the photograph. R. 481, l. 4 – 484, l. 1. Brown said that it was their "job as gang investigators to be able to determine if these individuals were involved together, if they were associated together and furthermore were they in the picture of the club that night." R. 484, ll. 2-13. Brown further testified about his contact with Joseline Mack, a former girlfriend or friend of Young, who assisted police in the recovery of two guns potentially involved in the shooting. R. 484, l. 14 – 494, l. 2. Brown and his partner "continued to help throughout the entire investigation as information led to possible suspects involved, we were involved in every aspect of locating them, taking them into custody." R. 494, ll. 3-10.

During Brown's redirect testimony, photographs purportedly showing the co-defendants flashing "gang signs" were also admitted over the defense's objection. R. 499, l. 16 – 504, l. 8; R. 506, ll. 1-17; State's Exhibit 51 and 54, photographs (on file with this Court). As will be more fully discussed *infra*, their admission and the accompanying testimony that Booker and others of the co-

defendants were displaying "hand signs" of the Folk Nation or Gangster Disciples was improper and not invited by the defense's cross-examination.

Subsequently, deputy William Whitlock testified that he was "with vice and narcotics assisting in gang investigations" in July 2011. R. 508, ll. 16-18. However, the remainder of Whitlock's testimony centered on his involvement with the execution of a search warrant and recovery of a gun. He did not utter the word "gang" again. R. 508, l. 19 – 512, l. 6.

By the time that co-defendant Larry Johnson testified, the gang testimony from investigator Brown had already been admitted over the repeated objections. Johnson testified that an agent of the Federal Bureau of Investigations told him that he was involved to find out if the shooting was "gang related or anything like that." R. 579, l. 17 – 580, l. 9. However, Johnson did not realize at the time that the person was specifically a "gang investigator." Rather, Johnson thought he was a federal detective, who threatened that that the penalty would be thirty years "if it was gang related." R. 592, l. 25 – 593, l. 7. He further discussed being threatened to recant his original statement to police by Raymond Young and that he was housed in a dormitory with "more of the people from the gang" who told him how to go about it. R. 595, l. 2 – 596, l. 11. Johnson did not testify that Booker was affiliated with a gang.

Having been unsuccessful in their attempts to have the gang evidence excluded, the defense attorneys properly addressed the gang aspect of the case in their closing arguments. R. 713; R. 719; R. 727; R. 740 – 741; R. 744; R. 755; R. 765 – 767 ; R. 769; see also In re Gonzalez, 409 S.C. 621, 636 n.3, 763 S.E.2d 210, 218 n.3 (2014)) ("[A]rguments made by counsel are not evidence."). As Respondent noted in its brief, once the gang evidence was admitted, it was not improper to comment upon it in closings. Brief of Resp., p. 31. Likewise, it was not improper for counsel to address Larry Johnson's spontaneous mention of the inquiry by

the investigators into whether the shooting was gang related. R. 579, l. 17 – 580, l. 9; R. 592, l. 25 – 593, l. 7. When Johnson mentioned his and Young's involvement in a gang on redirect, objection would have been futile, as the trial judge made clear his intention to allow the gang evidence. R. 595, l. 2 – 596, l. 11; see State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) ("[O]ur courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused.").

In sum, it was investigator Brandon Brown who initially supplied the improper gang evidence. The defense properly renewed their pre-trial objections before and during Brown's testimony. The mention of the term "gang" by other members of law enforcement was in reference to their general duty assignments and never tied to this specific investigation. Larry Johnson's testimony was subsequent to admission of Brown's testimony such that Brown's testimony could not be cumulative to it. Accordingly, the trial judge erred in admitting the gang evidence and its admission was not harmless.

B. The trial court erred in admitting photographs of the co-defendants allegedly making "gang signs" and defense counsel did not open the door to the admission of the photographs.

This Court erred in ruling that the trial court properly admitted photographs of the co-defendants allegedly making "gang signs" because defense counsel opened the door to the evidence. State v. Booker, No. 2017-UP-425, ¶ 2 (S.C. Ct. App. filed Nov. 15, 2017). In State v. Robinson, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991), cited in this Court's opinion, Robinson complained of improper testimony linking Robinson to drug dealing when a witness testified that he was in charge of drug operations for the El Rukn gang in the 1980's and that he became acquainted with Robinson in 1983 or 1984. The Robinson Court found no such

implication by the testimony, as the witness said the El Rukns rented a building from Robinson where their restaurant was located. 305 S.C. at 474, 409 S.E.2d at 408. The Robinson Court further found that it was Robinson's counsel who ***first*** brought out the El Rukn's involvement in drug dealing during her cross-examination of a prior witness. Id. It was upon that basis that the Court found "[s]ince appellant opened the door to this evidence, he cannot complain of prejudice from its admission." Id.

In the present case, Respondent argued that Appellant cannot "complain gang sign evidence was unduly prejudicial where he was the one who first asked the witness questions about gang signs, and thereby opened the door to the responsive gang sign evidence offered by the State on redirect." Brief of Resp., p. 33. It is most important to note that the trial judge had already admitted gang related evidence, over objection, during Brown's direct examination. Further, a full review of the content and context of defense counsel's cross-examination reveals that his questions regarding the photograph of the group of complainants did not open the door to the admission of additional photographs of the co-defendants.

On cross-examination, defense counsel Chambers asked if Brown was familiar with a group known as the Hardliners, with which several of the complainants had identified themselves as being associated. Brown responded "yes, sir, I am" but said that their investigation did not reveal that they were a "fairly organized group," like he had previously characterized Young and his associates. R. 495, ll. 14-20. Chambers asked Brown if he had seen the club photograph of the Hardliners "where they were altogether and they appeared to be flashing gang signs." R. 495, ll. 21-22. Brown said he had seen it and agreed they were displaying "the HL sign." R. 495, ll. 23-25. Brown agreed that such hand signs "can be" common among gang members but said they do not "in themselves" constitute gang signs. R. 496, ll. 1-8. However, Brown

admitted that the complainants had weapons available to them at the Red Planet club earlier in the evening and inside of the vehicles during the Lil' Cricket shooting. R. 496, ll. 14-20. He also admitted that there were lots of other people at the Red Planet outside of the Folk Nation group, as described by Brown, and the Hardliners. R. 496, ll. 21-25. He agreed that it is not unusual for groups of friends to go to a club and hang out together or for there to be conflict between different groups at clubs. R. 497, ll. 1-9. The examination then moved on to other matters. R. 497, l. 10 – 499, l. 1.

On redirect, the prosecutor asked Brown to identify several photographs, which were admitted over objection. Brown received the photographs during the course of his investigation "several days after the initial incident occurred" and recognized "several" of the individuals in the photographs. R. 499, l. 14 – 500, l. 1. The prosecutor then asked: "There's been a little bit of discussion about hand signs and what they may or may not mean, do you recognize the hand signs that are being exhibited in those photographs?" R. 500, ll. 2-5. Brown responded that he recognized many of the hand signs, explaining: "As part of our job as gang investigators, we have to have a basic knowledge and try to get as much advance investigation tools as we can. One of the most popular ways of identifying a gang member is very specific hand signs that are universal across the board. Several of these are them." R. 500, ll. 8-13. Brown described that many of hand signs displayed in the photograph were associated with the Folk Nation or Gangster Disciples. R. 500, l. 14 – 502, l. 3. In the first photograph, Brown identified Booker, Michael Williams, and Shaquille Hogan.[2] The next two photographs were too dark to make any positive identifications. In the fourth photograph, Brown identified Raymond Young and two

[2] Shaquille Hogan accepted a guilty plea prior to the beginning of the joint trial. R. 4, l. 25 – 11, l. 22. Hogan later testified against his remaining co-defendants. R. 597, l. 20 – 630, l. 16.

people who he believed were Booker and Tavarus Holmes.[3] R. 502, l. 4 – 504, l. 8. It was only on re-cross of Brown that defense counsel Chambers asked him to review the previously admitted photograph from the night of the incident that did not show any of the co-defendants making any hand signs and the prevalence of hand signs in hip-hop culture. R. 504, l. 13 – 505, l. 17. At the conclusion of that testimony, the jury was excused and the defense was permitted to put their objections to the photographs on the record. R. 505, l. 22 – 506, l. 20.

It is axiomatic that counsel's questions are not evidence. Thus, the only evidence elicited on cross-examination was that the Hardliners displayed hand signs in the photograph taken of them on the night of the incident but that such was not necessarily indicative of gang affiliation. This does not open the door to testimony regarding the co-defendant's use of potential gang signs and the admission of photographs purportedly displaying such. Moreover, in the event that defense counsel's cross-examination did somehow invite the admission of the photographs, the concept of "opening the door" does not dissolve the rules of evidence. The prosecution still failed to authenticate the photographs and they remained irrelevant and unduly prejudicial. See Brief of Appellant, pp. 28 – 30.

C. The trial court erred in threatening to vacate Bruster's guilty plea.

This Court erred in ruling that the trial court properly threatened to vacate DaQuan Bruster's guilty plea when he testified at the co-defendants' trial that he did not remember the events underlying the charges. In support of this ruling, this Court cited State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005), for the proposition that the trial judge has the duty to supervise and control witnesses. State v. Booker, No. 2017-UP-425, ¶ 3 (S.C. Ct. App. filed Nov. 15, 2017).

[3] Tavarus Holmes initially accepted a guilty plea prior to the beginning of the joint trial. R. 25, l. 22 – 30, l. 8. Holmes refused to testify against his remaining co-defendants when called and his guilty plea was vacated. R. 642, l. 9 – 646, l. 25.

This was not a matter of upholding the administration of justice by preventing perjury or invalid guilty plea. Rather, the trial court enforced of a portion of plea negotiations that never existed. The plea transcript made no mention of a requirement that Bruster testify for the prosecution. R. 12, l. 15 – 18, l. 23. While Bruster initially said that he did not remember the events on the night of the incident and attempted to "plead the 5th," upon further questioning he averred that he accepted the plea to avoid a life sentence and that testifying against his co-defendants was not a part of his plea agreement. R. 633, l. 19 – 638, l. 9; see, e.g. Anderson v. State, 342 S.C. 54, 57-58, 535 S.E.2d 649, 651 (2000) (upholding guilty plea to lesser offense of voluntary manslaughter where the decision to do so "was simply a tactical maneuver to avoid the very real possibility that the jury might come back with a verdict of murder.").

After his testimony the trial judge 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.

The next morning Bruster and his attorney appeared before the court. Defense counsel objected the court's coercive tactics toward Bruster and asserted that there was no "deal" to testify. R. 647, l. 22 – 648, l. 6; R. 649, ll. 1 – 652, ll. 10. The judge responded that Bruster's plea required him to testify and that he had violated his plea agreement such that his plea would be vacated and "he's going to go to trial on all of it and I presume he's facing L[W]OP." R. 648, l. 7 – 650, l. 4. 7, ll. 22 – 648, ll. 25. However, even the prosecutor admitted that the testimony was not necessarily a part of the plea negotiations. R. 650, ll. 5-17.

Nonetheless, the trial judge instructed Bruster to take the witness stand and be sworn as a witness. He told Bruster that he could either "come forward with the truth" or his plea would be vacated. R. 650, l. 5 – 651, l. 14. Bruster then testified for the prosecution. R. 652, l. 12 – R. 657, l. 8. On cross-examination, Bruster said 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. 657, l. 11 – 659, l. 11.

As cited in Appellant's brief, other courts have cautioned against the intimidation of defense witnesses by prosecutors and trial judges. See, e.g., Webb v. Texas, 409 U.S. 95, 97-98 (1972) (reversing conviction where trial judge drove a prospective defense witness from the stand with a lengthy and intimidating warning regarding perjury); People v. Manchilla, 620 N.E. 2d 1163 (Ill. App. Ct. 1993) (reversing conviction where the prosecutor made repeated statements concerning possible perjury prosecution and immigration status of defense witness); People v. King, 593 N.E.2d 694 (Ill. App. Ct. 1993), *affirmed by* 608 N.E.2d 877 (Ill. 1993) (reversing conviction where trial 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). These same principles that prohibit influence aimed to keep defense witnesses from testifying should apply to influences aimed at forcing potential witnesses to testify for the prosecution.

The case of State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005), is not analogous to the present case. 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; if it was true, then his trial testimony was perjury. 365 S.C. at 35, 615 S.E.2d at 460. The trial judge warned the witness of perjury and ordered him to jail. Id. at 35, 615 S.E.2d at 461. The witness was allowed to consult

with his attorney and testify again. Id. In finding no error, the Stanley Court wrote: "All courts have inherent power to punish for contempt. This power is essential to the preservation of order in judicial proceedings and the due administration of justice. The trial judge acted within his discretion to warn Richard and to take action to prevent the miscarriage of justice by his perjury." Id. at 38, 615 S.E.2d at 462 (internal citations omitted).

Here, there was no perjury by Bruster. Rather, the trial judge enforced a non-existent term of the plea agreement. Even if Bruster's initial response that he did not recall the events did constitute perjury, the potential of an additional five year sentence for the commission of perjury is a far cry from vacating a guilty plea and exposing someone to a mandatory life without parole sentence. See S.C. CODE ANN. § 16-9-10. The trial judge's conduct was improper.

D. The trial court erred in denying the motion for mistrial based upon premature jury deliberations.

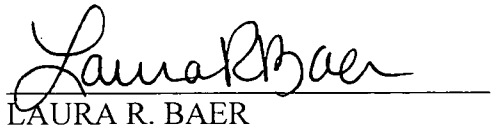
This Court erred in ruling that the trial court properly denied the motion for mistrial based upon juror misconduct, finding that the trial judge followed the procedures outlined in State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999), regarding the handling of allegations of premature deliberations. This Court deferred to the trial court's assessment of the juror's credibility, noting that "the jurors all affirmed no premature deliberations occurred and they could be fair and impartial." State v. Booker, No. 2017-UP-425, ¶ 4 (S.C. Ct. App. filed Nov. 15, 2017). A note, stating the following, was received from a juror in another trial: "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). Pursuant to Aldret, the trial judge was responsible for conducting a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. 333 S.C. at 315, 509 S.E.2d at 815.

Initially, the trial judge erred in failing to have the juror from the other trial who overheard the improper discussion examined on the record and failed to inquire of the jurors about the specific allegation of misconduct. R. 198, l. 7 – 214, l. 11; R. 215, ll. 3-18. Further, the inquiry that was conducted did not reveal that no premature deliberations occurred. As discussed more fully in Appellant's Brief, the jurors admitted that they had discussed "sadness over some of the things we've heard," "the behavior of some people who have taken the stand," and "a reflection on different facts" including the names and number of witnesses heard. R. 198, ll. 4-22; R. 200, ll. 6-24; R. 207, ll. 4-24; see Brief of Appellant, pp. 36-37. These discussions alone constituted deliberation. Further, the fact that none of the jurors admitted to having the conversation in the bathroom that the juror from another courtroom overheard, especially where they were never specifically asked about it, does not render the content of the note from the outside juror incredible. Notably, even the prosecutor expressed concern over the retention of Juror Whittenberg, who denied having any discussions about the case despite being one of the jurors specifically overheard in the bathroom. R. 216, ll. 8-13; *see* R. 203, l. 19 – 204, l. 25. Under these circumstances, Whittenberg should have been removed and mistrial declared.

CONCLUSION

For the reasons set forth herein, Appellant Esaiveus Booker respectfully requests that the Opinion of the Court of Appeals be withdrawn, that his convictions and sentences be reversed, and that his case be remanded for a new trial.

Respectfully Submitted,



LAURA R. BAER
Appellate Defender

This 29th day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon Esaiveus F. Booker, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067, this 29th day of November, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 29th day of November, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .