

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL ANTONIO WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2013-000091

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in allowing the state to admit testimony by the state's witnesses using the term "gang" in reference to Appellant Williams' case when Appellant Williams had not been identified as a gang member nor charged pursuant to S.C. Code Section 16-8-230, the Gang Prevention Act, because the reference was inflammatory and unduly prejudicial under Rule 403, SCRE?
2. Did the trial court err by coercing Co-defendant DaQuan Bruster to testify incriminating Appellant by threatening to vacate his guilty plea so he would be facing LWOP because the judge found that Bruster's first testimony violated the plea agreement; and the judge vacated the guilty plea of Co-defendant Tavarus Holmes after his testimony because the judge said it violated his plea agreement?
3. Did the trial court err in denying a mistrial based on the fact that jurors from this trial were overheard by a juror in another case talking in the restroom during the lunch break about Williams' case saying such things as "the need to decode the language", "I was chillin," and "he's going down?"

STATEMENT OF THE CASE

On May 29, 2012, the Greenville County Grand Jury indicted Michael Antonio Williams on seven counts of attempted murder, one count of conspiracy, and one count of assault and battery by mob second degree (A&B). On January 7, 2013, Williams proceeded to trial before the Honorable Edward W. Miller and a jury. He was tried along with three co-defendants.¹ Williams was represented by Scott Robinson; Esaiveus Booker was represented by Randy Chambers; 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 Williams guilty of the seven attempted murders, conspiracy, and A&B by mob. He was found not guilty of the possession of a firearm during the commission of a crime of violence. R. 750, ll. 21 – R. 751, ll. 4. Judge Miller sentenced Williams to twenty –five years on each attempted murder charge, twenty years on the A&B by mob second degree, conspiracy five years with all sentences to run concurrently. R. 755, ll. 6 – R. 756, ll. 6. Williams' attorney filed a notice of appeal. This appeal follows.

¹ Eight people were arrested and charged with the same charges. Four pled guilty prior to trial with sentencing deferred. Supp. R. 1, ll. 1 – Supp R. 3, ll. 25.

STATEMENT OF FACTS

On July 17, 2011, around 3:30 in the early morning, a group of young people were at a Lil Cricket gas station in Greenville hanging out talking about a friend who had just been taken to the hospital because he was shot at the Red Planet night club earlier in the evening. R. 102, ll. 11 – 25. These young people were seated and standing around their cars while they talked. Suddenly, shots rang out in every direction. Seven people were shot with all requiring medical attention. R. 103, ll. 1 – 11. The victims could not identify the shooters as the faces of the shooters were covered. R. 518, ll. 2 – 17.

The assistant solicitor told the jury in her opening that eight young men were arrested and charged with attempted murder. Four of the eight were on trial and were also charged with conspiracy, possession of a weapon during a crime of violence, and assault and battery by a mob second degree. 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. 103, ll. 1 – R. 105, ll. 2. .

The solicitor's version was that the reason for the shooting was that earlier that evening at the Red Planet Nightclub, some fights broke out in the parking lot and the defendants decided to retaliate by firing on the young men at the gas station. R. 103, ll. 7 – 16.

During pretrial motions, the state told the court that she had documents related to Defendant Young's gang affiliation that she planned to admit if they became relevant. Young's counsel argued that all of the defendants had a motion in limine to prevent the state 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 the state could prove the case without the mention of gangs or not because the evidence was either there or not. The judge asked for a foundation and counsel said he would get back to that the next morning to which the judge agreed. R. 70, ll. 1 – R. 68, ll. 22.

On the next day, January 8, 2013, defense counsel for Williams argued the motion shared by all the defendants regarding any reference by the state to gangs. Counsel argued that the state had not charged any of the co-defendants with being a criminal gang under S.C. Code Section 16-8-230 which was the Criminal Gang Prevention Act. This Act defined a criminal gang and a criminal gang member. The second part of his motion was that it was unduly prejudicial under Rule 403, SCRE and was inflammatory because just the word “gang” took on an inflammatory appeal to the passions of the average person. R. 90, ll. 20 – R. 92, ll. 23.

The judge responded that the term was “pretty wide open” and he could not rule in a vacuum. Counsel for Co-defendant Booker argued that the state intended to call as a witness investigator Brown whose sole job was to investigate gangs because the state 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. 93, ll. 1 – 24.

The state argued that there was no charge related to section 16-8-230 so that definition was not controlling. The solicitor stated she was not alleging that the defendants “participated in a pattern of criminal gang activity.” But she said it could come out from witnesses that Co-defendant Young was the leader of the Folk Nation sect in Greenville. It could come out that the investigation was pursued as a gang involvement because the witnesses thought it was. Appellant is unaware of any law that the opinion of the witness

constitutes an evidentiary predicate to admit highly prejudicial matters. R. 95, ll. 1 – R. 96, ll. 25.

Defense counsel Robinson 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 state on that, but he would see how "it played out." R. 97, ll. 1 – R. 101, ll. 15.

After several witnesses testified, defense counsel Chambers for Co-defendant Booker, told the court that the state'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 state that these men were member 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. 431, ll. 7 – R. 432, ll. 23.

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 from information he knew as a gang investigator that could further the matter for the lead investigator. R. 433, ll. 23 – R. 435, ll. 23.

Many witnesses did not want to talk to him as several witnesses referred to the defendants as "them Folk Boys." Witnesses said the shooters were all wearing black and were an organized group showing up together. Counsel Abdalla for Co-defendant Young

objected to the testimony regarding this “whole gang thing.” The judge overruled the objection. R. 437, ll. 1 – 23.

Investigator Brown continued to testify there was a picture on Facebook where Co-defendants Williams and Young were communicating, and there was a picture labeled “The Family.” R. 438, ll. 10 – R. 439, ll. 25. This appeared to be a club picture. R. 440, ll. 14 – 25.

The state then showed investigator Brown several photographs and asked about hand signs as 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. R. 458, ll. 1 – R. 464, ll. 23.

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. 505, ll. 1 – 24. 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. 506, ll. 1 – R. 507, ll. 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. Then Johnson learned that Brandon (Black) and another friend Bamm-Bamm were shot. R. 513, ll. 1 – R. 515, ll. 25.

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 Bamm-Bamm. They

returned to Club 864. Young told everyone who was going to come on. Young, Booker, Sadler, and Williams covered their faces with black tee-shirts. They all drove to Lil Cricket and parked behind it R. 516, ll. 1 – R. 520, ll. 7. Then they all got out of their cars except Johnson 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. 522, ll. 3 – R. 523, ll. 25.

Johnson admitted on cross examination that he gave a statement to Investigator Campbell which he recanted on November 10, 2012. He admitted that he had made false accusation against the four co-defendants and also Holmes and Bruster. R. 536, ll. 20 – R. 542, ll. 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. 549, ll. 23 – R. 551, ll. 11.

Another co-defendant, Shaquille Hogan, testified for the state that he was friends with the four co-defendants on trial. R. 553, ll. 1 – R. 555, ll. 5. He described going to the Red Planet. A fight occurred inside first and then outside where the shots were fired. R. 555, ll. 6 – R. 556, ll. 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. 561, ll. 1 – R. 563, ll. 25.

Hogan gave a statement to police implicating the four co-defendants on trial. He later gave another statement that his first statement was not true. He did plead guilty to assault and battery by mob second degree and conspiracy but had not been sentenced. R. 565, ll. 14 - R. 575, ll. 17.

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 state 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. He said he did not want to testify. R. 588, ll. 19-R.591, ll. 21.

On cross examination Bruster admitted that he only pled guilty because he was facing life without parole if he did not plead. He had not been sentenced as of trial. After his testimony the judge, without any motion from the state, called for Bruster's attorney. The judge told the attorney that he was giving Bruster a chance to withdraw his guilty plea because it was not valid if he did not remember. R. 591, ll. 22 – R. 594, ll. 9.

The state then called the fourth co-defendant, Tavarus Holmes, to testify for the state. On the witness stand, he said his attorney was not present and that he had no testimony. R. 595, ll. 15 – R. 596, ll. 8. The state told the judge that Holmes had pled guilty on Monday also to one count of attempted murder and had agreed to testify for the state as part of his plea. The judge, without a motion by the state, vacated Holmes' plea and noted he would be tried on seven counts of attempted murder. R. 595, ll. 15 – R. 599, ll. 25.

Defense counsel Abdalla for Co-defendant Young, objected that the defendant was not receiving a fair trial if the co-defendant was being forced to testify by threatening to vacate his plea. The judge said that did not affect Abdalla's client because the Co-defendant Holmes was backing out of his deal. R. 598, ll. 1 – 22.

The state then told the judge that the Co-defendant Bruster was there with his attorney and may have changed his mind. Defense counsel Abdalla objected to the coercive nature of the judge forcing the witness Bruster to come back and testify after he had already refused to testify. The judge responded that Bruster had violated his plea agreement and he was vacating his plea and would have to go to trial and face LWOP. Bruster's counsel said Bruster would testify. R. 600, ll. 22 – R. 601, ll. 25.

Counsel Chambers for Co-defendant Booker objected and argued to the court that their position was that once a person entered a plea, the plea could not be vacated just because the witness did not say what the state wanted him to say, and the witness could not be brought back and forced to testify. Counsel Quinn for Co-defendant Sadler objected to Bruster being recalled because he had been released as a witness. The concern was the court's coercive nature of compelling Bruster to withdraw his plea and face additional time. The judge stated that counsel's objection was noted for the record and said: "I assume everyone is in agreement with it." R. 602, ll. 1 – R. 605, 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. 605, ll. 12 – R. 610, ll. 8. On cross examination, Bruster admitted that he was told to testify or LWOP was back on the table. R. 612, ll. 1 – 11.

Early in the trial after several victim witnesses testified, the judge, in camera, had a 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: “I overheard jurors from Courtroom B discussing what sounded like details of their case. “Need to decode language; I was chillin; he’s going down.” R. 183, ll. 24 – R. 184, ll. 6.

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. 184, ll. 6 – 25. The judge decided to discuss the problem with each of the jurors. R. 185, 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. R. 185, ll. 14 – R. 187, ll. 21.

The judge then questioned the jurors to determine if it happened as the question was fundamental fairness. R. 187, ll. 22 – 25. 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. Defense counsel argued that the procedure was needed only if there was a motion in opposition to the mistrial motion. The judge decided the jury was under his jurisdiction and he was following the procedure because there may be a violation of fundamental fairness. R. 188, ll. 1 – 24. The judge said he would assume everyone joined in with what was said unless someone said something else. R. 189, ll. 1 – 6.

Juror Harper reported that what was discussed was sadness over some of the things heard. R. 189, 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. 190, ll. 15 – R. 192, ll. 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. 193, 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. 198, ll. 1 – 25. The other jurors basically said different versions of what had been reported by the others. R. 195, ll. 1 – R. 205, ll. 12. The judge then denied the motion for a mistrial saying he found no prejudice. R. 205, 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. He also argued the juror who sent the note should testify. R. 205, ll. 18 - R. 208, ll. 7. Defense counsel Robinson for Co-defendant Williams stated: "I don't disagree with the Court. I believe it was conducted properly." R. 207, ll. 3 – 5. The other defense attorneys joined in the objection. R. 207, ll. 6 – 7.

ARGUMENT

I

The trial court erred in allowing the state to admit testimony by the state's witnesses using the term "gang" in reference to Appellant Williams' case when Appellant Williams had not been identified as a gang member nor charged pursuant to S.C. Code Section 16-8-230, the Gang Prevention Act, because the reference was inflammatory and unduly prejudicial under Rule 403, SCRE.

The Gang Prevention Act at South Carolina Code Section 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 state had not charged any of the defendants with being a member of a gang. The solicitor actually told the court that she was not alleging that the defendants participated in a pattern of criminal gang activity. R. 95, ll. 1 – R. 96, ll. 25. Therefore, the state conceded the defendants were not a gang.

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 wanted to admit evidence of gang activity of the victim and witnesses because it went to the motive of self-defense. 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 state 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.

Williams’ case is very similar to that of Sobers except that it was the state in Williams’ case that wanted to admit the evidence. Investigator Brown, the gang investigator, even went so far as to say the hand signs in the club photo were those of the Folk Nation gang. R. 458, ll. 1 – R. 464, ll. 23.

Rule 403, SCRE, provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

The admission of any evidence relating to the word “gang” was prejudicial to Williams. The word “gang” was inflammatory to the jury and prevented Williams and his co-defendants from receiving a fair trial.

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. 649, ll. 19 – R. 650, ll. 3; R. 662, ll. 8 – 14; R. 458, ll. 1 – R. 464, ll. 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. 515, 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. 656, ll. 11 – 23.

Although the solicitor did not use the word "gang", these references were clearly gang related.

ARGUMENT

II

The trial court erred by coercing Co-defendant DaQuan Bruster to testify incriminating Appellant by threatening to vacate his guilty plea so he would be facing LWOP because the judge found that Bruster's first testimony violated the plea agreement; and the judge vacated the guilty plea of Co-defendant Tavarus Holmes after his testimony because the judge said it violated his plea agreement.

In People of the State of Illinois v. Manchilla, 250 Ill.App.3d 353, 620 N.E. 2d 1163 Dec. 846 (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, 228 Ill.App.3d 519, 170 Ill.Dec.805, 593 N.E.2d 694 (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, 154 Ill.2d 217, 181 Ill.Dec.626, 608 N.E.2d 877.

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 trial judge in Williams' case did not safeguard Williams' 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, and he would then face the possibility of LWOP. It was prejudicial to Williams to coerce the witness to testify a second time.

The appropriate action by the judge would have been for him to charge the witness with perjury after the trial.

ARGUMENT

III

The trial court erred in denying a mistrial based on the fact that jurors from this trial were overheard by a juror in another case talking in the restroom during the lunch break about Williams' case saying such things as "the need to decode the language", "I was chillin," and "he's going down."

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 and could consider juror affidavits in support of such allegations.

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. 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.

Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Jenkins, 408 S.C. 560, 759 S.E.2d 759 (Ct. App. 2014); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); citing State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508, 514 (1999). In order to receive a mistrial, a defendant must show error and resulting prejudice. Id.

The party moving for a mistrial has the burden to show not only error, but resulting prejudice. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

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 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. There was a reasonable probability that other conversations were held about the case prematurely. When the judge questioned each juror, some of the comments were as the record shows:

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.

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?

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 ahs 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. 189, ll. 4 – 22; R. 191, ll. 6 – 24; R. 198, ll. 4 – 24.

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. 185, ll. 11 – R. 186, ll. 5.

The other attorneys joined in the motion. R. 187, ll. 1 – ll. 21.

The trial judge stated that the question was fundamental fairness and were these defendants going to be denied a fair trial. R. 187, ll. 22 – 25.

They were denied a fair trial because there was no way to know all of the jurors' discussions. The record made it clear that the jurors were discussing the case in spite of the judge's instructions.

CONCLUSION

Based on the above, Williams' convictions and sentences should be reversed, and his case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
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ATTORNEY FOR APPELLANT

This 29th day of January, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 29, 2016


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

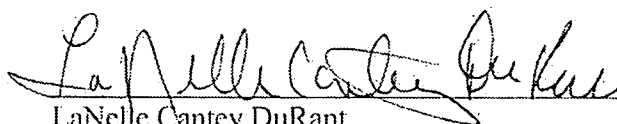
MICHAEL ANTONIO WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2013-000091

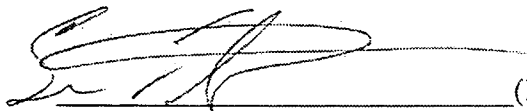
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of January 29, 2015.


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SUBSCRIBED AND SWORN TO before me
this 29th day of January 29, 2016.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-000091

THE STATE,..... RESPONDENT

v.

MICHAEL ANTONIO WILLIAMS,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly admitted testimony from gang investigator Brown where: (1) it was relevant as part of the res gestae of the crime and as proof of identity, intent, and motive, and (2) its probative value outweighed any danger of unfair prejudice.
2. Whether the trial court's warning to a co-defendant called as a witness by the State, that his failure to testify as to the same facts he admitted in his earlier guilty plea would constitute a breach of his plea agreement and would result in the court vacating the plea and allowing the State to proceed with the original charges, was not coercive and did not infringe upon Williams' right to due process and a fair trial.
3. Whether the trial court properly denied Williams' motion for a mistrial due to juror misconduct where in direct compliance with Aldret, the trial judge followed the precise procedure suggested by our Supreme Court as soon as he learned of the alleged juror misconduct and through voir dire determined Williams had suffered no prejudice.

STATEMENT OF THE CASE

Appellant, **Michael A. Williams (Williams)** (a/k/a “Mikey”),¹ was indicted at the May 2012 term of the grand jury for Greenville County for one (1) count of second-degree assault and battery by a mob (2012-GS-23-3039A), one count of possession of a weapon during the commission of a violent crime (2012-GS-23-7957), one (1) count of conspiracy (2012-GS-23-7958), and seven (7) counts of attempted murder (2012-GS-23-7959 to -7965).² He was represented by Scott Robinson, Esquire, of the Greenville County Bar. Respondent (the State) was represented by Assistant Solicitor Katrina Salisbury of the Thirteenth Circuit Solicitor’s Office. On January 7-11, 2013, Williams and three of his eight co-defendants, **Raymond Young (Young)** (a/k/a “Lil Ray” & “Randy”), **Esaiveus Booker (Booker)** (a/k/a “Trez”), and **Kinjta Sadler (Sadler)** (a/k/a “Ken”), proceeded to a joint trial by jury pursuant to which all were found guilty as charged. As explained below, the other four co-defendants entered pleas to various charges prior to trial. Williams was sentenced by the Honorable Edward W. Miller to twenty-five (25) years’ concurrent imprisonment for each count of attempted murder, twenty (20) years’ concurrent imprisonment for second-degree assault and battery by a mob, and five (5) years’ concurrent imprisonment for conspiracy. (R. p.759-785). He timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

¹ Nearly all of the codefendants, victims, and other fact witnesses have nicknames that were used throughout the trial. To the extent possible, the State has noted those nicknames in parentheses when each individual’s name is first used in the Statement of Facts.

² Five codefendants, Raymond Lewis Young, Esaiveus F. Booker, Kinjta Kadeem Sadler, Daquan Bruster, and Tavarus Holmes, were similarly indicted, and two codefendants, Shaquille Hogan and Larry Johnson, were indicted for only second-degree assault and battery by a mob and conspiracy.

STATEMENT OF FACTS

As explained in the solicitor's opening statement, in the early morning hours of July 17, 2011, a group of friends were hanging out in the parking lot of the Lil' Cricket (LC) gas station on Whitehorse Road in Greenville County. They gathered at the LC after a trip to the hospital where they had visited a friend who was shot earlier that night during a fight at the Red Planet (RP) nightclub. Unbeknownst to the friends, eight young men had devised a plan to retaliate for the fight at the RP. Williams, his three co-defendants at trial, and four other co-defendants, parked behind the LC, approached the gas station on foot, and opened fire. Seven people were hit as the victims ducked and ran for cover during the attack. (R.p.102-p.109).

Guilty Pleas

Before the commencement of the trial, four of the eight original co-defendants entered guilty pleas to charges associated with the shooting. **Shaquille Hogan (Hogan)** (a/k/a "Lipz") pled guilty to second-degree assault and battery by mob and conspiracy. He agreed with the solicitor's recitation of the facts and said the previous statement he had given to police, wherein he described how the attack was planned and carried out, was true. Hogan named the other seven co-defendants who participated in the attack, specifically identifying Williams as one of the shooters. (R.p.2-p.8). **Daquan Bruster (Bruster)** (a/k/a "Buddha") pled guilty to seven (7) counts of attempted murder, one count of possession of a weapon during the commission of a violent crime, and one count of conspiracy. He agreed that the facts recited by the solicitor were true, including the fact that he carried a handgun to the scene and opened fire along with five other co-defendants. The solicitor noted the State had agreed to withdraw notice of intent to seek life without parole as part of Williams' plea. (R.p.8-p.15). **Larry Johnson (Johnson)**

pled guilty to second-degree assault and battery by a mob and conspiracy. He also agreed to the facts recited by the solicitor. Johnson testified he drove to the LC with a gun but did not get out of the car and only shot several rounds into the air during the attack. He specifically testified that Bruster, Booker, Williams, Hogan, Young, Holmes, and Sadler were with him during the attack and that they all had guns. (R.p.15-p.22). **Tavarus Holmes (Holmes) (a/k/a "Varus")** pled guilty to conspiracy and one count of attempted murder. He agreed that the facts recited by the solicitor were true, including the fact that he was one of the six shooters at the LC and that he carried a .380 handgun and travelled to and from the scene with Young and Williams in a red Honda. The solicitor noted the State had agreed to dismiss six counts of attempted murder, a weapons charge, and assault and battery by mob as a part of Holmes' plea. (R.p.22-p.27). Finally, **Kiara Kerns** pled guilty to obstruction of justice for her role in subsequently hiding some of the firearms used in the assault. She accepted the facts presented by the solicitor as true, including that she was dating Booker at the time of the attack, had allowed him to use her car the night of the attack, and had given guns to her brother for disposal after the attack. The solicitor noted the State had agreed to dismiss an accessory after the fact charge as a part of Kerns' plea. (R.p.27-p.31). The State asked for deferred sentencing on the four co-defendants who pled guilty until after the trial of the four remaining co-defendants.

Pretrial Matters – Motion in Limine Regarding "gangs"

After accepting the pleas, the trial began and the judge conducted jury qualification and selection proceedings. (R.p.32-p.60). The court then held a brief Batson hearing before the parties agreed there was no need for a Neil v. Biggers hearing. (R.p.60-p.65). During a subsequent discussion of possible introduction of documentary

evidence, the solicitor noted she planned to submit “documents related to the defendants’ gang affiliation” if they became relevant during trial. Young’s counsel, John Abdalla, Esquire, advised: “the defendants have a motion in limine to prevent the State from any mention of gangs or use of the word gang because we believe the prejudicial effect outweighs any probative value.” He argued that if the jurors started hearing about gangs it would make it very difficult for them to give the defendants a fair trial. The trial judge asked if Young had any foundation for his motion and Young asked if the motion could be argued more fully the following morning. (R.p.65-p.68).

The trial court then gave brief preliminary instructions before swearing the jury. In addition to instructing the jury on the key concepts of the presumption of innocence, the burden of proof, and the roles of the judge and jury, the court twice cautioned the jury not to begin deliberations until the completion of the entire trial. (R.p.69-p.77). The judge specifically charged: “Do not come to a decision until the end of the case until you’ve heard all of the evidence, until you’ve heard all of the law, until you’re back there deliberating and talking about the case, keep an open mind.” (R.p.73, lines 8-12). He also charged: “The third very important thing that I ask you to do, instruct you to do, is not to discuss this case with anyone until you are free to deliberate at the end of trial.” (R.p.73, line 24-p.74, line 2). Before breaking for the day, the trial court then held a Jackson v. Denno hearing and found Williams’ post-arrest statement to the police was freely and voluntarily given and would be admitted at trial. (R.p.78-p.87).

When the proceedings resumed the following morning, Williams’ counsel argued the co-defendants’ joint motion in limine to prohibit the State’s witnesses from characterizing or employing the terms “gang,” “gang related,” or “criminal gang” in the

case. First, Williams argued that since none of the co-defendants had been charged pursuant to the Criminal Gang Prevention Act, Section 16-8-230 of the Code, any testimony suggesting they were in a gang should be prohibited. Second, Williams made a “[Rule] 403 objection in terms of being unduly prejudicial and inflammatory.” He contented the connotation of the word would arouse the passion of the jury to the point of causing prejudice. The trial judge reminded Williams that he needed some foundation for the argument because he could not rule “in a vacuum.” Counsel for Booker then argued the discovery material showed the police had pursued their entire investigation as though the eight co-defendants were in the Folk Nation gang or the “G’s.” He said the State intended to call Officer Brown as a witness, and Brown’s sole job is to investigate gangs in Greenville County. The judge declined ruling on the joint motion prior to the State presenting evidence, finding he could not rule on the propriety of testimony about gangs without knowing the context in which it was being offered. (R.p.90-p.95).

The solicitor then summarized the State’s theory of the case. She explained several witnesses were likely to indicate the co-defendants wore all black during the attack, were part of the “G’s,” and that Young was known to be a leader in the Folk Nation in Greenville. The solicitor argued this information was critical to the State’s case because the co-defendants retaliated as a unit in response to the fight at the RP. She explained the gang evidence would be probative of identity, motive, and intent. Williams responded that he also had an objection based on Rule 404(a) because the evidence of gang affiliation would improperly interject character into the case. The trial judge agreed the evidence would interject character into the matter but explained it sounded like it would be appropriate evidence under the State’s theory of the case. He said he would

“see how it plays out” based on the other evidence presented and again declined to make a pretrial ruling restricting the State’s ability to reference gangs. Young made one last argument, returning to his original contention that the word “gang” is simply so prejudicial that it would outweigh any probative value and prevent a fair trial. The trial judge disagreed and again denied the request for a pretrial limitation. He then questioned the solicitor as to how the State’s witnesses would describe their own group. The solicitor said her witnesses would testify they were in a rap group at which point the judge cautioned all the parties to be careful with how they proceeded since they were concerned about anyone using the term “gang.” (R.p.95-101).

Trial

The State and each co-defendant then made an opening statement, none of which mentioned gangs. (R.p.102-p.121). The State proceeded to elicit testimony from ten of the individuals who were hanging out at the LC prior to the attack, seven of whom were shot. First, **Vincent Fant (Fant) (a/k/a “Buddha”)**³ described going to the RP on the night of July 16, 2011, with his cousin, Cornelius Sins. They were going to a concert at the club where he met up with his cousins, including **Jamel Williams (Jamel) (a/k/a “Mel”)**. Over Young’s objection, the court admitted photographs of Fant and a bunch of his friends that were taken inside the RP that night. In camera, Fant had explained the photograph was taken of his rap group, the Hardliners. He said the hand gestures some of the people in the photograph were making were an “h” and an “l” and simply stood for Hardliners, not for a gang as alleged by Young. When the jury returned, Fant testified about a confrontation he had while in the RP. He said Williams and Young “got in his

³ Coincidentally, both Fant and codefendant Daquan Bruster go by the nickname “Buddha.”

face" because he was talking to a particular lady; however, the dispute ended when Jamel got them separated and took him to the other side of the club. (R.p.117-p.128).

Fant testified that later a fight broke out in the club and everybody started leaving. As he walked to the car he was approached by Williams. Williams took his shirt off and started swinging. Fant started fighting back when he felt something hit him in the back of the head. He was then shot in the arm but did not see who shot him. Fant spent three days in the hospital so he was not hanging out at the LC when his friends were attacked. He later identified Williams from a photo lineup and then made an in-court identification of Williams as the person he fought in the RP parking lot. He identified both Young and Williams as the two men who confronted him inside the RP. (R.p.128-p.135).

Next the State called **Raheem Adams (Adams) (a/k/a "Dex" & "Ra Ra")**. Adams is a member of the rap group and was with Fant at the RP on July 16, 2011. He noticed a commotion inside the club but did not see the actual confrontation involving Williams, Young, and Fant; however, when Adams went outside, he witnessed the fight in the parking lot and made an in-court identification of Williams. Adams testified he was pretty sure Young was the person who hit Fant in the back of the head and then made an in-court identification of Young. He testified he actually saw the person who shot Fant and was able to identify him to the police by his street name, "Smoke."⁴ (R.p.136-p.141). Adams went to the hospital to see Fant but after five or ten minutes he left with **Trevis Thompson (a/k/a Trap)** to get cigarettes at the LC. When they got to the LC they met up with **Russell Moore Patterson (Patterson)**, **Anthony Callahan (Callahan) (a/k/a "Ant" & "Antro")**, **Thomas Walker (Walker) (a/k/a "TJ")** and others. Adams

⁴ "Smoke" was later identified as **Travis Wear**. Wear was later arrested for the RP shooting but was not a codefendant in this case and was not a member of the Hardliners.

testified there were four vehicles at the LC. He was sitting on the back of a Crown Vic when he heard shots. Adams turned to look as he jumped from the car as he listened to what sounded like 100 shots. He was hit under the arm. The bullet exited his chest and lodged in his neck and was still there at the time of the trial. Adams was lying on the ground when he heard a second burst of shots and a car drive away. He testified that at least three or four people came from the dark and started shooting. (R.p.141-p.151).

Patterson testified somewhat reluctantly on behalf of the State. He was at the RP on July 16, 2011, and saw the confrontation in the club involving Williams and Young. He testified all the people in the photographs from the RP were in the Hardliners. Patterson went by the hospital after Fant was shot and then to the LC. He said he was sitting in Booker's car when the shooting started and that he was shot in the left leg. Patterson tried to call an ambulance because he could not run. He said he did not see the shooters. (R.p.152-p.162).

Walker testified he was also at the RP the night of July 16, 2011. He saw the fight between Williams and Fant inside the club and heard gunshots later when he saw Fant fighting in the parking lot. Walker got Fant into his car and drove him to the hospital. At the hospital he got into an argument with **Damont Suber (Suber) (a/k/a "Mont" & "Sub")** and then went to the LC. Walker said there were four cars at the LC: his, Dutchy's, Quan's, and Tres'. He was shot in the back of the thigh during the attack. Walker first ran and hid behind a white Impala and then ran away from the LC with **Dontavious Sullivan (Sullivan) (a/k/a "Tate")** and Booker. He admitted he had a gun in his car but did not shoot at the attackers because he did not have a chance. Walker spent a day and a half in the hospital. (R.p.163-p.172).

Javon Henry (Henry) testified he knows all of these guys and acknowledged he was part of the Hardliners and was in the photo. He was at the RP the night in question with Fant, Adams, Patterson, and Walker. Henry said he did not see a fight inside the club and but when he walked to the parking lot later, it was chaos. He went to the LC after leaving the RP. When he heard gunshots he hit the ground. Henry said he saw smoke and bodies. There were 5 to 10 attackers and they had their faces covered. A tire was shot out of one of the cars right beside him but Henry was not hit. (R.p.173-p.182).

Motion for Mistrial – Premature Jury Deliberations

After Henry left the stand, the jury was sent out so the trial court could address an issue that arose during trial. The judge explained he received a note from a juror in an unrelated case stating: "I overheard jurors from Courtroom 8 [this courtroom] discussing what sounded like details of their case. Need to decode language, 'I was chillin, he's going down.'" He noted the parties had participated in a bench conference resulting in the defendants moving for a mistrial. The trial judge referenced the 1999 case of State v. Aldret⁵ which sets forth both the burden of proof when there has been an allegation of premature jury deliberations, as well as the proper procedure for the court to follow when assessing such an allegation. He noted it was necessary for him to determine whether or not misconduct occurred and whether it was prejudicial and to make these determinations he would discuss the issue with the jurors one by one. The trial judge cleared the courtroom for the purpose of the hearing and invited the defendants to put their position on the record. (R.p.183, line 2-p.185, line 13).

Counsel for Sadler explained for the record that the specific motion was for removal of the two jurors alleged to have been involved in the premature deliberations.

⁵ State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999).

Because this would result in being left with only eleven jurors, he argued the court would be required to declare a mistrial. Sadler further argued there was no need for the court to question individual jurors because the comment “he’s going down” could only have meant a juror had already decided the defendants were guilty, which is prejudicial. He objected to the procedure outlined in Aldret and asked the court to simply declare a mistrial without further inquiry. Booker, Young, and Williams all joined in the objection. The trial judge noted that this Court had recently referenced Aldret with approval when analyzing a trial court’s handling of a juror misconduct issue in State v. Carmack,⁶ and denied the defendants’ request not to question individual jurors. (R.p.185, line 14-p.189, line 6).

The trial court proceeded to separately call each of the twelve sitting jurors and the single alternate juror into the courtroom to answer questions about the alleged misconduct. Although several jurors indicated there had been brief conversations about the behavior and enunciation of the witnesses, and comments about trying to keep their names straight, there had been no discussion about the content of the testimony and no conclusions drawn about the ultimate outcome of the case. In fact, each juror assured the court that nothing that was said would impair his or her ability to be fair and impartial to the State and the defendant. They all stated they could follow their oath to judge the case solely on the evidence and the law. (R.p.189-p.205). After the inquiry, the trial judge held as follows:

Okay. Based on what I’ve just done I’m going to deny the motion for mistrial at this time. I don’t find any prejudice to any defendant. I will give more cautionary instructions about discussion of the case and we’re get [sic] ready to go forward.

⁶ State v. Carmack, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010).

(R.p.205, lines 11-17). Sadler again objected to the procedure and noted Aldret only suggested voir dire of the jurors when requested by the moving party. He argued the trial court should not have done so on its own. Sadler also objected to how the procedure was handled, arguing the parties should have been allowed to ask questions to establish an appellate record on which prejudice could be reviewed on appeal, and arguing the original accuser should have been questioned about what he heard in the restroom. Young added to the objection that he believed the questions asked by the court were framed in such a way that the jurors were not able to freely express themselves. Booker joined in the objection; however, Williams did not, stating: "I don't disagree with the Court. I believe it was conducted properly." (R.p.207, lines 4-5). Although the solicitor expressed concerns about a particular juror, the State did not indicate any agreement with the defendants' request for a mistrial. Ultimately, the trial court overruled all objections to the procedure and maintained its denial of the motion for a mistrial. (R.p.205, line 18-p.208, line 7).

Trial – Continued

After denying the motion for a mistrial, the jury returned to the courtroom and the trial resumed. **Roshonques Perry (Perry) (a/k/a "Choc")** testified she was at the RP but never saw the fight inside or the fight outside. Afterwards she drove her green Ford Focus to the LC and was hanging out. A Crown Vic, an Escort and an Impala were already there. She heard shooting and saw smoke and ran. Perry was not shot but was scared the gas pumps would blow. (R.p.209-p.216). **Jamel** testified he was at the RP on the night of July 16, 2011, and was in the photo with the rap group. He was there with **Walker, Justin** and **Callahan**. **Jamel** saw **Fant** in an altercation inside and later saw **Fant**

scuffling in the parking lot before he heard gunshots. He drove to the hospital with Walker, Fant, and Callahan. Jamel admitted he had a gun but did not use it. He went to the LC to hang out after he left the hospital. When he heard gunshots from behind, he ran and was shot in the back. (R.p.217-p.227).

Callahan testified he knows everyone in the Hardliners but does not rap with them. He was at the RP and saw people going towards Fant and getting in an argument. Callahan then saw Williams shaking hands with Walker. He made an in-court identification of Williams. Callahan followed Walker and Jamel outside where he saw Jamel talking to Fant. He heard gunshots and went to help get Fant in the car to take him to the hospital. Afterwards, Callahan went to the LC. He said Justin, Thompson, Quan, Jamel, Walker, Henry, Adams, and maybe Perry were there. Callahan heard lots of shots and got hit in the arm. He ran and jumped over the edge of a bridge to get away. (R.p.228-p.236).

Sullivan testified he also knows everyone in the rap group but does not rap with them. He was at the RP on July 16, 2011, but did not see the fight inside. He saw people running out later but security at the club would not let people leave once shots were fired. He heard Fant was shot so he jumped in the car with Quan to go to the hospital. Sullivan then went to the LC in a white Impala. He was there for ten to fifteen minutes when he heard shots fired. He ducked and ran towards the bridge with Walker, but he was shot in the back of the head. (R.p.237-p.242).

Carroll Jackson (Jackson) (a/k/a "Warren") testified he was at the RP that night drinking and posing for pictures. He drives a white Impala. Jackson did not see the fight inside and security kept him from coming out at first, but when he did come out he

found Fant and helped Walker and Jamel get him to the hospital. He also went to the LC and heard the shots being fired, but he was not hit. (R.p.246-p.247). Thompson testified he was at work and not at the RP on July 16, 2011; however, when he got off he followed the other cars to the LC. He said he was part of the rap group. Thompson heard shots, ducked, and crawled under a car. He testified the shots came from the dark area beside the LC and he was hit in the leg. (R.p.248-p.254).

After hearing from all the victims, the State called Patricia Smith, the night clerk at the LC, to the stand. She was working in the store on the night of July 16, 2011, and the morning of July 17, 2011. It was a slow night with four or five cars in the parking lot when she heard gunshots. Smith ran into the store cooler and called 911 but did not see anything. (R.p.255-p.262).

Next, the State called a series of investigators from the Greenville County Sheriff's Office to describe their roles in the investigation of the shooting. Investigator Chris McCalmont was dispatched to the LC where he first encountered Jackson waving his arms and saying his friends had been shot. McCalmont provided medical assistance to several victims and later helped secure the scene. (R.p.263-p.270). Deputy Christopher Hill also responded to the scene and made contact with Sullivan and Walker as they were running away, injured. (R.p.271-p.273). Deputy James Brown was the first officer to respond to the scene where he found cars but no people in the parking lot. He taped off the scene and took witness statements. (R.p.274-p.279). Deputy Matthew Owens also responded to the LC. When he arrived he found four cars but no people. He drove towards highway 125 where he encountered Thompson running and suffering from a gunshot. (R.p.279-p.283).

The State then called Department of Public Safety Crime Scene Investigator Iona Ooten to the stand. Ooten walked the scene taking photos and marking evidence such as shell casings and blood. (R.p.284-p.315). Next, the State elicited testimony from forensic investigators Jonathan Derby and Jonathan Hamilton about the condition of the vehicles at the scene and evidence collected from those vehicles. (R.p.316-p.342). The State then called lead investigator Wayne Taylor Campbell to the stand. He gave detailed testimony about managing the investigation, from the collection and processing of physical evidence to finding and interviewing possible suspects, including Johnson and Hogan. Campbell testified that Travis Wear was ultimately arrested for shooting Fant, and that a person named Desmond Roberts was charged with shooting **Brandon Edwards (Edwards) (a/k/a "Black") and Brandon Davis (Davis) (a/k/a "Bram-Bram")**. (R.p.343-p.378). On redirect examination Campbell testified that Davis was with Bruster when the guns were recovered. (R.p.379-p.382).

Next, the State called more investigating officers. Investigator Shawn A. Peoples went to the RP on July 17, 2011, to collect evidence and talk to witnesses. She interviewed Williams and took his statement after he was Mirandized. (R.p.383-p.394). Former officer Michael Moore participated in Williams' arrest at Young's house. He described seeing a black duffle bag and dealing with the two uncooperative female residents. (R.p.395-p.400). Investigator Dustin Woodall responded to the LC but was later sent to the RP to assist Peoples. He testified he canvassed lots of people which led the investigation to Young. He later arrested Williams and saw the black duffle bag in the house before the execution of the search warrant. (R.p.401-p.412).

The State then called Joseline Mack to the stand. She was at the RP the night of July 16, 2011, and drove a burgundy Honda. She heard about the shooting in the parking lot and met Young later at Club 864. Mack said everyone was mad about the earlier shooting and planned to go to the Waffle House to eat. She testified a group of cars left Club 864 but then did a U-turn and returned, where she traded cars with Young and was told to go the Waffle House. Eventually Joel, Young, Booker, Williams, and Sadler arrived at the Waffle House. The next day Young called Mack and asked her to look for a gun in her car. She found it and gave it to Young. (R.p.413-p.430).

Gang Investigator Brandon Brown

Before the State called its next witness, Booker raised an objection to how that witness would be identified to the jury. He explained that GCSO Investigator Brandon Brown is in the gang investigation unit and objected to Brown being identified this way. Booker complained that to do so would imply Brown was called in because police were investigating a gang, and that the State had not laid any foundation from any witness that the defendants were actually in a gang. The trial judge noted the objection for the record and the fact that all co-defendants had joined in the objection; however, the objection was overruled. (R.p.431, line 7-p.432, line 23).

Investigator Brown then took the stand. He testified he was a "gang investigator" and that his responsibilities include maintaining all gang intelligence throughout Greenville County and knowing the players and entities involved as they pertain to gangs and violent crime. Brown explained he is often called to assist if an incident might involve a gang. He responded to the attack at the LC and began gathering information to see if any of his gang knowledge would help the investigation. Brown learned about the

prior incident at another location involving what people were calling the "Folk Boys" who all showed up together wearing black. Several witnesses mentioned the name "Mikey" but the name did not stand out as someone he associated with a gang. Meanwhile, another investigator learned an individual named Brandon Edwards had been shot at the previous location. Brown testified that Edwards' name definitely had significance because he knew Edwards to be associated with several notable individuals in Greenville, particularly Young. He described Edwards and Young as possibly "family." (R.p.433-p.437). Young objected to the testimony "involving this whole gang thing" and testimony about himself and Edwards. He argued it was prejudicial without a foundation. The objection was overruled and Brown continued explaining the investigation. (R.p.437, lines 14-23).

Brown next looked at Young's Facebook page, particularly a public conversation he had been having with Williams and a photo he posted which was titled "The Family." The photo came in without objection from Booker, Williams, or Young, and over the objection of Sadler. Brown testified they used the photo to start determining exactly which individuals associated together. After many hours and days of trying to identify and track down people in the photo, Brown was able to interview Johnson, who he said was very forthcoming with the legal names and nicknames of people in the photo. This led them to **Joseline Mack (Mack)**, who was involved with Young either romantically or as a friend. Mack shared more useful information about names and vehicles, and she told Brown she saw several guns in the residence where she and Young was staying. Mack also revealed that her roommate, Kerns, was involved with Booker, which was a new name that led Brown to more people from the photo. Mack told Brown the guns had

been brought into the residence by Booker in a black duffle bag. Based on all the new information, Brown obtained an arrest warrant for Williams and subsequently got a search warrant for the residence. When executing the search warrant, the police found paperwork belonging to Young as well as two canvas gun holsters. Although Kerns was originally uncooperative, she eventually helped the police locate the guns Mack had seen in the residence. (R.p.438-p.452).

On cross-examination by Booker, Brown admitted he was familiar with the Hardliners. He testified he had seen the photograph of them flashing hand signs and admitted that is something that can be common among gang members. Brown also admitted the police found weapons inside some of the victims' vehicles. (R p.452-p.457). Under redirect examination from the solicitor, Brown identified three photographs of groups of people who were making hand signs he recognized as being associated with gangs. The photos were admitted over objection and Brown identified Williams, Booker, and Hogan in those photos. (R.p.457-p.462). The trial judge then excused the jury to allow the defendants to argue their specific objections to the photos on the record. Counsel for Young renewed his objection to the prejudicial nature of gang information and the objection was overruled. The trial judge noted the photographs came from Young's cell phone. (R.p.457-p.465).

Trial – Continued

After Investigator Brown left the stand, the State called more investigators from the Greenville County Sheriff's Office to describe their roles in the investigation. Assistant Gang Investigator William Whitlock executed the search warrant at Amanda Bell's house. Bell was Kerns' mother. They did not find anything but the search

convinced Kerns and Ms. Bell to locate and turn the guns over. (R.p.465-p.470). Amanda Bell confirmed she retrieved the guns from her son Adrian Kerns and turned them over to the police. (R.p.471-p.473). Investigator Devon Hooper arrested Young, confiscated two cell phones from him, got search warrants for those phones, and turned them over for a forensic search. (R.p.473-p.475). Investigator David Weiner arrested Larry Johnson in a separate case and got consent to search his cell phone. (R.p.476-p.477). Investigator James Perry was in the data recovery unit and generated a cell phone forensic report for two phones, one provided by Weiner and one provided by Hoover. (R.p.478-p.482). Finally, forensic crime lab chemist and firearms examiner James Williams Armstrong described the testing he did on the bullet fragments and casings discovered at the scene of the shooting. He was able to determine seven different weapons had been fired, including three .380s, two .9mms, one .45, and one .40. (R.p.483-p.503).

Co-defendant Larry Johnson

To conclude its case, the State began calling each co-defendant who had previously entered a guilty plea to the stand. First, the State called Larry Johnson. Johnson acknowledged his earlier plea to attempted murder and second-degree assault and battery by a mob and then described the events of July 16-17, 2011. He testified he drove a black Cutlass Supreme to the RP after picking up Bruster from Young's house. Johnson was hanging out at the RP with Young, Bruster, Holmes, Sadler, and Booker and made an in-court identification of each defendant and then identified them in a photograph taken at the RP that night. There was an incident inside the club where words were exchanged. Then Edwards came in and walked to the back with Young. Later,

outside, Johnson saw two fights. Williams was fighting with someone and Edwards was fighting with Nitché when Johnson heard gunshots. After the gunshots stopped he got in his car and he saw Young and Williams get in a green Crown Vic. They all drove to a nearby nightclub, Club 864, where he learned Edwards had been shot and Davis had been shot. Johnson said there was a lot of commotion about Davis and Edwards being shot. (R.p.504-p.515).

Johnson testified they all left Club 864 in four cars and headed up Whitehorse road towards the LC. After driving past and seeing a group of guys parked at the LC, the cars did a U-turn and Young told the others they looked like the guys that shot Davis. Johnson's group then went back to Club 864 where Young traded cars with Mack and told the people who were not heading back to the LC to go to the Waffle House and wait. Johnson testified that Young, Williams, Sadler, and Booker all covered their faces with black t-shirts on the way. Johnson and Bruster were in Johnson's car while Williams, Holmes, and Young were in Mack's burgundy car and Sadler, Booker, and Hogan were in a green Camry. He stayed in his car and watched as six of the co-defendants ran up beside the LC. He heard lots of shooting before the group ran back and jumped in the cars to leave. They met up at the Waffle House after the attack where Young made them all swear not to tell. Johnson proceeded to identify a bunch of people from the Waffle House surveillance video. He said he originally withheld information from the police but eventually told them the whole truth in his third statement because he found out his friend Adams was one of the victims. (R.p.515-p.530).

Under cross-examination, Johnson acknowledged photos from his cell phone where he was displaying guns and money but denied an allegation that he was in the

Bloods. He was questioned about a recantation in which he claimed he had been coerced to give a statement to the police; however, he testified he was actually coerced to issue the recantation. (R.p.530-p.549). On redirect Johnson testified he recanted because of threats from people in the gang. He said Young wanted the recantation for trial or Johnson would get "x-ed." Johnson testified he understood this to mean murdered and explained he feared for his safety. (R.p.549-p.551).

Co-defendant Shaquille Hogan

Hogan made in-court identifications of Booker, Williams, Young, and Sadler, all of whom he testified were at the RP on the night of July 16, 2011, along with Johnson and Holmes. He acknowledged the confrontation that happened inside the RP and posing for the photograph. Hogan testified he came in a green Camry with Booker but left his .380 in the car. He did not witness the fight in the parking lot; however, he went to Club 864 with Booker and Sadler when they were finally able to leave the RP. Hogan said Holmes ordered him to hand over his gun, which he did because Holmes has "more power." He was told they were going to the LC. Hogan testified Johnson and Bruster were in a brown Altima, while Holmes, Williams, and Young were in a red car. They all parked behind the LC. The rest of the men got out of their cars but Hogan did not because he did not have a gun. Hogan heard gunshots and then the others came running back. He described each gun that was being used during the attack. Hogan denied meeting later in the Waffle House parking lot although this is what he said in his statement. (R.p.552-p.569). Under cross-examination, Hogan admitted that he also wrote a recantation. (R.p.569-p.585). On redirect Hogan testified he got the idea to recant from another inmate at the jail. (R.p.581-p.584).

Co-defendant Daquan Bruster

After briefly recalling Investigator Wayne Campbell in regard to details about the various guns that were described in Hogan's statement, (R.p.586-p.588), the State called Bruster to the stand. Bruster acknowledged pleading guilty to seven counts of attempted murder and possession of a weapon during the commission of a violent crime; however, he claimed he did not remember the events surrounding the shooting and attempted to "take the 5th." The solicitor asked to treat Bruster as a hostile witness and proceeded to question him about agreeing to the facts of the offenses when they were described at his plea. He admitted he did not want to testify and claimed he simply pled to whatever charges he was given. Under cross-examination Bruster testified he only pled guilty because the State had threatened him with life without parole and because his mother pled with him to do what the State wanted. He testified he did not know he would have to testify as a result of his guilty plea. The trial court then excused the jury and asked the solicitor to have Bruster's counsel come to the courtroom the following morning. The trial judge commented he would give Bruster a chance to withdraw his plea since he was now claiming he did not remember what happened, which would make the plea invalid. (R.p.588-p.594).

The following morning, the State called co-defendant Tavarus Holmes to the stand. Holmes made an in-court identification of Booker but then refused to answer any more questions without his attorney, Brian Beasley, present. The jury was sent out. After hearing from the solicitor about the terms of Holmes' plea deal, the trial judge vacated his plea, over Young's objection. Williams, Booker, and Sadler did not object. (R.p.595-p.599).

Next, Bruster's counsel advised the court that he had spoken with Bruster, and that to the extent of his knowledge, Bruster realized he was indeed guilty of the charges and would cooperate as to what he knows. Booker raised an objection. On behalf of all four defendants, he argued: "Our position is that once someone has entered a plea, that they can not be forced to withdraw that plea, that the plea cannot be vacated, that he came in here to testify after pleading guilty and just because he didn't say what they wanted him to say doesn't mean that he can now be brought back out here and essentially be forced to testify." The trial judge disagreed, noting that if this was true, it would allow someone to "game the system." The judge then called Bruster to the stand and explained he was going to give him another opportunity to testify truthfully, but that if Bruster continued to insist he could not remember what happened during the incident, the court would vacate his plea. Bruster said he would testify. (R.p.601-p.604).

Sadler objected to the State being allowed to recall Bruster as a witness, arguing the State had already had a full and fair opportunity to examine him. He again referenced what he called the "coercive nature" of the court's ability to compel withdrawal of the plea resulting in Bruster facing additional charges and additional time. The trial judge noted the objection for the record and noted that all defendants presumably joined in the motion before denying it and advising the defendants they were free to cross-examine Bruster about all of this. The jury reentered the courtroom and the State resumed examining Bruster. (R.p.604-p.605).

Bruster testified that although he did not remember everything that happened, he remembered some things from the RP and the LC. He was at the RP the night of July 16, 2011, and he left to go to the hospital when he heard Davis got shot in the back. He left

the hospital and went to the McDonalds near Club 864 where he got in a Cutlass with Johnson and rode with him to the LC. Bruster said he put a black shirt over his face and was carrying a .380. He testified he got out of the car at the LC with ten or eleven others, all of whom had their faces covered so he could not identify them. Bruster acknowledged that at his plea he admitted conspiring with Williams, Booker, Sadler, Young, Holmes, Hogan, and Johnson to attack the people at the LC; however, he testified he actually has no idea who was with him because their faces were covered. Bruster testified that he and Johnson got back in his car and went to the Waffle House. (R.p.605-p.613).

After playing portions of the security video from the Waffle House, the State rested. The defendants all moved for directed verdicts and those motions were denied. Each defendant then advised the trial court that he did not want to testify. Following a brief charge conference, the State and the defendants gave closing arguments. (R.p.614-p.619; Transcript - closing arguments, p.620-p.736). Finally, the trial court instructed the jurors on their role as the sole judges of the credibility of witnesses, the burden of proof, the presumption of innocence, reasonable doubt, direct and circumstantial evidence, and the elements of the crimes. (R.p.737-p.748). After being found guilty as charged, Williams was sentenced to twenty-five (25) years' concurrent imprisonment for each count of attempted murder, twenty (20) years' concurrent imprisonment for second-degree assault and battery by a mob, and five (5) years' concurrent imprisonment for conspiracy. (R. 759-785).

ARGUMENT

I.

The trial court properly admitted testimony from gang investigator Brown where: (1) it was relevant as part of the res gestae of the crime and as proof of identity, intent, and motive, and (2) its probative value outweighed any danger of unfair prejudice.

Williams argues the trial court erred in allowing the State to admit testimony from a witness using the term “gang” in reference to the investigation of his case because the word was inflammatory and unduly prejudicial under Rule 403, SCRE. He contends the danger of unfair prejudice substantially outweighed the probative value and prevented him from receiving a fair trial. Appellant further argues the solicitor then gave an improper and prejudicial closing argument because, although she did not actually use the word “gang,” several portions of her argument included references that were “clearly gang related.” (Brief of Appellant, p.16). The State disagrees and submits Williams’ arguments are without merit. Initially, the State notes Williams does not challenge relevance in his appeal, instead arguing that though relevant, the testimony should have been excluded as unduly prejudicial. However, the probative value of the testimony clearly outweighed any danger of unfair prejudice; therefore, it was properly admitted.

Standard of Review

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App.

2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

Rule 401, SCRE: Relevance

As a general rule, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treatment of Corley, 353 S.C. 451, 577 S.E.2d 451 (2003); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); Rule 401, SCRE ("‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

Here, evidence of Williams’ gang affiliation was relevant and admissible as part of the res gestae of the crimes charged. See State v. McGee, 408 S.C. 278, 287-88, 758 S.E.2d 730, 735-36 (2014) (discussing the res gestae theory of admissibility). It was also probative as to why several State’s witnesses initially recanted all or portions of the statements to law enforcement which identified Williams as one of the shooters. Furthermore, the identity of the individuals who committed the attempted murders was clearly of consequence to the jury’s determination of guilt or innocence at trial, particularly where Williams presented a defense that the State could not prove he participated in the shootings. Brown’s ability to connect the defendants to a local gang had a tendency to make the determination of the identity of the shooters more probable

than it would be without the testimony, particularly in the context of the State's theory of the case. Similarly, the testimony had a tendency to make a determination of motive and criminal intent more probable than it would have been without the testimony. The challenged evidence provided the answer to the question of why the attackers committed the shooting at the LC: their motive was to retaliate against the Hardliners, the rap group whose members had fought with and exchanged gunfire with Williams' gang earlier that night at the RP. Indeed, it was Brown, using his gang knowledge, who identified RP shooting victim Brandon Edwards as a close associate of Young. This connection fits squarely into the State's narrative that Young, Williams, Booker, Sadler, and the other gang members attacked the Hardliners at the LC in retaliation. Thus, as conceded by Williams in this appeal, Brown's testimony as a gang investigator was relevant. Rule 401, SCRE.

Rule 403, SCRE: Probative Value

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). Further, Rule 403, SCRE, requires there to be 'unfair prejudice' before the evidence will be excluded. "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 a decision on an

improper basis.” Id. at 529, 732 S.E.2d at 229. A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). The appellate courts review a trial court’s decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court’s judgment. Id. at 358, 543 S.E.2d at 593. See Aleksey, 343 S.C. at 35, 538 S.E.2d at 256 (finding the trial judge is given broad discretion in ruling on questions concerning relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion). “If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Here, the prejudice posited by Williams is vague. With reference to Rule 403, he simply claims that any evidence relating to the word “gang” is prejudicial and inflammatory and prevented him from receiving a fair trial. (Brief of Appellant, p.15). He relies on this Court’s opinion in State v. Sobers, 404 S.C. 263, 744 S.E.2d 588 (Ct. App. 2013) in support of his argument; however, Sobers dealt solely with a trial court’s ruling on relevance pursuant to Rule 401, not an analysis of prejudice. Id. Therefore, Sobers is not directly applicable. To the extent it does apply, Sobers stands for the proposition that deference must be given to the trial court regarding the admission or exclusion of evidence. Id. at 267-68, 744 S.E.2d at 590. Here, the trial court listened carefully to the defendants’ arguments and, after hearing testimony from many fact witnesses, determined the probative value of Brown’s testimony was significant. The

“unfair prejudice” claimed by Williams simply does not exist. Instead, the probative value of the testimony supports the trial court allowing it into evidence. Williams has shown no abuse of discretion and no exceptional circumstances to warrant reversing the trial court’s discretionary ruling to admit Investigator Brown’s testimony into evidence.

Because the testimony was properly admitted by the trial court, the solicitor’s reference to that testimony during closing arguments, either directly or implicitly, was likewise appropriate. See State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) (“[A] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.”). Furthermore, even if the reference was somehow improper, it would not require reversal because Williams cannot show he did not receive a fair trial due to the alleged improper argument. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Indeed, Williams could not have suffered unfair prejudice from the alleged inference that he was in a gang because the trial court thoroughly instructed the jurors on their role as the sole judges of the credibility of witnesses, the burden of proof, the presumption of innocence, reasonable doubt, direct and circumstantial evidence, and the elements of the crimes. (Tr.p.766-p.778). See Foye v. State, 335 S.C. 586, 590, n.1, 518 S.E.2d 265, 267 n.1 (1999) (“A jury is presumed to follow instructions.”). In any event, since none of the defendants objected to the solicitor’s closing argument, the challenge to that closing argument is not preserved for appellate review. State v. Carlson, 363 S.C. 586, 606, 611 S.E.2d 283, 283, 293 (Ct. App. 2005). Finally, given the direct evidence of Williams’ participation in the crimes as offered by his Hogan and Johnson, and the substantial circumstantial evidence of his

participation, the overwhelming evidence of Williams' guilt rendered any errors harmless beyond a reasonable doubt. Williams' convictions should be affirmed.

II.

The trial court's warning to a co-defendant called as a witness by the State, that his failure to testify as to the same facts he admitted in his earlier guilty plea would constitute a breach of his plea agreement and would result in the court vacating the plea and allowing the State to proceed with the original charges, was not coercive and did not infringe upon Williams' right to due process and a fair trial.

Williams argues the trial court erred by effectively coercing co-defendant Bruster to testify against him by threatening to vacate Bruster's guilty plea after finding Bruster's initial testimony violated his plea agreement, which left Bruster facing a sentence of life without parole. The State disagrees and submits Williams' argument is without merit.

Williams relies upon the United States Supreme Court's opinion in Webb v. Texas, 409 U.S. 95 (1972) as well as two cases from the Appellate Court of Illinois in support of his argument. He contends the trial judge in his case "did not safeguard [his] right to due process and a fair trial" when the judge effectively coerced Bruster to testify a second time and argues the appropriate action would have been for the judge to charge Bruster with perjury after the trial. (Brief of Appellant, p.18). However in Webb, the issue was whether the trial judge's threatening remarks, directed only at a single witness for the defense, effectively drove that witness off the stand, and thereby deprived Webb of due process of law under the Fourteenth Amendment. Id. at 98 (emphasis added). Similarly, the two cases from Illinois address situations where the State or the court exerted improper influence on defense witnesses causing them not to testify. People v. Mancilla, 620 N.E.2d 1163, 1167 (Ill. App. Ct. 1993); People v. King, 593 N.E.2d 694, 698 (Ill. App. Ct. 1992). Here, Bruster was not driven off the witness stand and was not subject to improper influence which caused him not to testify. To the contrary, Bruster

took the stand and was subject to both direct and cross-examination. Therefore, Webb and the Illinois cases cited by Williams are inapplicable.

Furthermore, the allegedly coercive nature of the influence being exerted by the State only appears coercive because Bruster was attempting to breach the terms of his plea agreement. He was not forced to testify for the State and he was not prevented from being called as a witness for the defense. Instead, Bruster was faced with a difficult choice, but a choice nonetheless. His ultimate decision to fulfill his obligations under the terms of his plea agreement rather than breaching that agreement and facing the same charges as Williams did nothing to deprive Williams of due process of law under the Fourteenth Amendment.

As recognized by this Court, it is the duty of the trial court to exercise supervision and control over the witnesses in attendance at trial. State v. Stanley, 365 S.C. 24, 35, 615 S.E.2d 455, 461 (Ct. App. 2005). “In South Carolina, it is firmly settled that the presiding judge has the right to order the arrest of a witness in open court who has made contradictory statements amounting to perjury.” Id. Indeed, in Stanley this Court found the claim the defendant was prejudiced when a witness was arrested and sent to jail, and then later returned to reverse his prior testimony, was meritless. This was true even though the judge cautioned the witness regarding perjury in front of the jury. Here, the trial court’s comments about giving Bruster a chance to withdraw his guilty plea were made outside the presence of the jury, lessening any possible prejudice.

While plea agreements are matters of criminal jurisprudence, this court has repeatedly recognized they are subject to contract principles. State v. Miller, 375 S.C. 370, 388, 652 S.E.2d 444, 453 (Ct. App. 2007); Reed v. Becka, 333 S.C. 676, 686, 511

S.E.2d 396, 401 (Ct. App.1999). Where a guilty plea is induced by prosecutorial promises, those promises must be fulfilled. Santobello v. New York, 404 U.S. 257 (1971). However, when a defendant breaches a plea agreement, the State is released from its obligations under the agreement. State v. Tillman, 320 S.C. 61, 463 S.E.2d 94, 96 (Ct. App. 1995). Here, Bruster attempted to gain the benefit of his plea agreement, which involved admitting the facts behind the underlying charges, and then sought to deny those same facts by claiming he did not remember them during Williams' trial. This was a breach of Bruster's contract with the State, which permitted the State to seek the remedy of nonperformance, and permitted the court to vacate the plea. The trial judge acted well within his discretion in advising Bruster of the very real consequences of his actions and the denial of Williams' request for a mistrial should be affirmed.

III.

The trial court properly denied Williams' motion for a mistrial due to juror misconduct where in direct compliance with Aldret, the trial judge followed the precise procedure suggested by our Supreme Court as soon as he learned of the alleged juror misconduct and through voir dire determined Williams had suffered no prejudice.

Williams argues the trial court erred in denying his motion for a mistrial based on juror misconduct in the form of premature jury deliberations. He contends that where the original note said a juror had used the phrase "he's going down," and no witness had used those words during trial, it "indicated that one of the jurors had already made a decision before the case went to the jury, and was discussing her decision with another juror." Williams goes on to claim: "There was a reasonable probability that other conversations were held about the case prematurely." He argues he was denied a fair trial "because there was no way to know all of the jurors' discussions." (Brief of Appellant, p.20-p.21). The State disagrees and submits Williams' arguments are without merit. The trial court followed the proper procedure as set forth in Aldret to explore the allegation of juror misconduct. The trial judge committed no error and Williams suffered no prejudice as the result of any alleged juror misconduct. Williams' convictions should be affirmed.

Standard of Review

"The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000). In order to safeguard a defendant's right to a fair trial by an impartial jury, the jury must reach its verdict free from any outside or improper influence. State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998). However, "unless [juror] misconduct affects the jury's impartiality, it is not such

misconduct as will affect the verdict.” Id.; see also Aldret, 333 S.C. at 313, 509 S.E.2d at 813-814 (instructing juror misconduct in the form of premature deliberations does not warrant automatic reversal and, instead, requires the defendant to demonstrate such misconduct affected the jury’s verdict before a reversal is granted).

When an allegation of juror misconduct arises, the trial judge is vested with broad discretion to assess and respond to such an allegation. State v. Pittman, 373 S.C. 527, 553, 647 S.E.2d 144, 157 (2007). Juror misconduct is a fact to be determined by the trial judge under the circumstances of each individual case. State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 266 (Ct. App. 1999). Decisions regarding how to address juror misconduct rest in the sound discretion of the trial judge, and the trial judge’s decisions on such matters will not be reversed absent an abuse of that discretion amounting to an error of law. Pittman, 373 S.C. at 553, 647 S.E.2d at 157.

Discussion / Analysis

Premature deliberations constitute a form of juror misconduct because “[a] jury should not begin discussing the case, nor deciding the issues, until all the evidence has been introduced, the arguments of counsel complete, and the applicable law charged.” State v. Joyner, 289 S.C. 436, 437, 346 S.E.2d 711, 712 (1986). The prohibition against premature deliberations is designed to prevent jurors from making up their minds prematurely by declaring a position on an issue while the trial is in progress and then standing by that declared position even in defiance of contrary evidence subsequently introduced. State v. McGuire, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979). The burden is on the party alleging premature deliberations to establish prejudice. Aldret, 509 S.E.2d at 815, 333 S.C. at 315.

In Aldret, our Supreme Court determined premature deliberations were a type of juror misconduct that could affect the fundamental fairness of a trial. Id., 333 S.C. at 312, 509 S.E.2d at 813. In order to assist the trial courts of South Carolina in responding to such misconduct, the Supreme Court proposed a “suggested procedure” to handle allegations of premature deliberations. Id. at 315, 509 S.E.2d at 815. Pursuant to the suggested procedure, if such an allegation arises during the trial, trial courts should conduct a hearing to first determine if the premature deliberations actually occurred and to then determine if they were prejudicial. Id. The Supreme Court noted the trial court may voir dire the jurors and, if practicable, issue a cautionary instruction to correct the damage. Id. Thereafter, the Supreme Court instructed that a trial judge should only grant a new trial in cases where the premature deliberations were found to be prejudicial. Id.

Here, the trial court did not abuse its discretion in conducting a hearing to ascertain whether premature deliberations occurred and whether any such deliberations were prejudicial. Rather, in direct compliance with Aldret, the trial judge followed the precise procedure suggested by our Supreme Court as soon as he learned of the alleged juror misconduct. The trial judge then properly questioned the jurors individually to ensure Williams and his co-defendants could receive a fair trial. The jurors all said they could follow their oath to judge the case solely on the evidence and the law, and each of the jurors who had listened to or participated in the brief conversation assured the court that nothing that was said would impair his or her ability to be fair and impartial to the State and the defendant. Thus, the evidence supports the trial court’s conclusion that the conversations were not prejudicial. See Kelly, 331 S.C. at 141, 502 S.E.2d at 104 (“The trial judge is in the best position to determine the credibility of the jurors; therefore, [the

appellate court] should grant him broad deference on this issue.”). Contrary to Williams’ assertion, it is not enough to claim there was a “reasonable probability” of other conversations between jurors. Aldret requires proof from the party alleging premature deliberations. Furthermore, the claim that there is no way to know all of the jurors’ discussions is not accurate. The trial judge specifically asked the jurors about any conversations and was satisfied by the answers that were given. Nothing more is required.

Nothing about the original note given to the trial judge proves any of the jurors engaged in an attempt to prematurely decide the case or declare a position regarding guilt or innocence, which is the type of conduct that the prohibition against premature deliberations is designed to prevent. See McGuire, 272 S.C. at 552, 253 S.E.2d at 105 (“The reason for the rule [prohibiting premature deliberations] is apparent. The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.”). To the extent the note suggests such misconduct, the suggestion was affirmatively rejected by the jurors during voir dire. Williams failed to establish the jury engaged in premature deliberations in his case and failed to establish he suffered any prejudice as a result of the brief conversations described by the jurors during voir dire. See State v. Grovenstein, 335 S.C. 347, 351, 517 S.E.2d 216, 218 (1999) (“We have consistently required defendants to demonstrate prejudice due to improper jury influences.”). Thus, the trial judge did not abuse his discretion in denying the motion for a mistrial. See Harris, 340 S.C. at 63, 530 S.E.2d at 627 (“The trial court has broad

discretion in assessing allegations of juror misconduct.”). Williams’ convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the conviction and sentence of the lower court be affirmed.

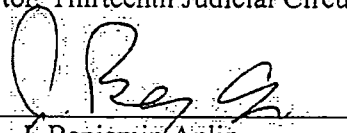
Respectfully submitted,

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Columbia, South Carolina
February 4, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-000091

THE STATE.....RESPONDENT

v.

MICHAEL ANTONIO WILLIAMS.....APPELLANT.

CERTIFICATE OF COUNSEL

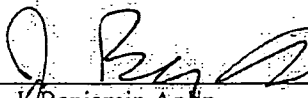
The undersigned hereby certifies the Final Brief of Respondent complies with Rule
211(b), SCACR.

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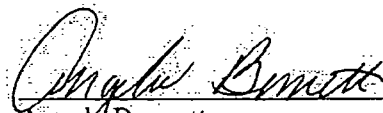
MICHAEL ANTONIO WILLIAMS, ...APPELLANT

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated February 4, 2016, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served.
This 4th day of February, 2016.


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