STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Greenville County
Honorable Edward W. Miller, Circuit Court Judge

RECEIVED

Opinion No. 2017-UP-425 (S.C. Ct. App. filed Nov. 15, 2017)
Appellate Case No. 2013-000207

FEB 22 2018

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

ESAIVEUS FRANTREZ BOOKER,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 18, 2018. App. 33.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in ruling that the trial court properly admitted "gang" evidence and in finding that any error in its admission was harmless?

II. Whether the Court of Appeals erred in ruling that the trial court properly admitted photographs of the co-defendants allegedly making "gang signs" and in finding that defense counsel opened the door to admission of the photographs?

III. Whether the Court of Appeals erred in ruling that the trial court properly threatened to vacate DaQuan Bruster's guilty plea, such that he would be facing life without parole (LWOP), when he was not cooperative in testifying for the prosecution?

IV. Whether the Court of Appeals erred in ruling that the trial court properly denied the motion for mistrial where the trial judge refused to allow any questioning of the individual who overheard the conversation between the jurors on the record and where the trial judge erroneously determined that no premature deliberations occurred?

STATEMENT OF THE CASE

On May 29, 2012, the Greenville County Grand Jury indicted Esaiveus Frantrez Booker on seven counts of attempted murder, one count of assault and battery by mob second degree, one count of conspiracy, and one count of possession of a weapon during the commission of a violent crime. R. 815 – 830 (Indictments).

On January 7, 2013, Booker proceeded to trial before the Honorable Edward W. Miller and a jury. He was tried along with three co-defendants.[1] Booker was represented by Randy Chambers; Michael Williams was represented by Scott Robinson; Kinjta Sadler was represented by Thomas Quinn; and Raymond Young was represented by John Abdalla.[2] The State was represented by Katrina Salisbury. The jury found Booker guilty of the seven counts of attempted murder and assault and battery by mob. He was found not guilty of possession of a firearm during the commission of a crime of violence and conspiracy. R. 801, ll. 5-13. Judge Miller sentenced Booker to twenty years on each charge, with all sentences to run concurrently. R. 805, l. 21 – 808, l. 1.

Following a timely notice of appeal, Booker's direct appeal was perfected by the filing of the brief of appellant by undersigned counsel. The State filed its Brief of Respondent. On November 15, 2017, the South Carolina Court of Appeals issued an unpublished opinion affirming Booker's convictions and sentences. App. 1 (State v. Booker, Op. No. 2017-UP-425 (S.C. Ct. App. filed Nov. 15, 2017)). On November 29, 2017, Petitioner filed a petition for

---

[1] Eight people were arrested and charged with the same or similar charges. Four of them pled guilty prior to trial with sentencing deferred. R. 3 – 30. Booker was tried jointly with three remaining co-defendants, Kinjta Sadler, Michael Antonio Williams, and Raymond Lewis Young.

[2] The trial judge advised the defense attorneys that he would "assume, unless you all stand up and say something else, that everybody joins in with what's said." R. 198, ll. 4-6; *see also* R. 473, ll. 17-23; R. 652, ll. 7-9.

rehearing. App. 4 – 19. Respondent filed a return to the petition upon request by the Court. App. 20; App. 21 – 32. By order filed January 18, 2018, the Court denied the petition for rehearing. App. 33.

This petition for writ of certiorari to the Court of Appeals follows.

ARGUMENT

I. The Court of Appeals erred in ruling that the trial court properly admitted "gang" evidence and in finding that any error in its admission was harmless.

Introduction

This case arose from a multiple offender shooting that occurred in the early morning hours of July 17, 2011 outside of a Lil' Cricket gas station in Greenville, South Carolina.[3] Seven people were shot, with all requiring medical attention. R. 106, ll. 1 – 11. None of the victims could identify the shooters. R. 157, ll. 20-23; R. 169, l. 10-25; R. 176, ll. 12-21; R. 226, ll. 5-9; R. 234, ll. 1-6; R. 245, ll. 1-12; R. 251, ll. 6-17; R. 253, ll. 2-11; R. 258, ll. 12-16; R. 263, ll. 1-17. Only one of the victims actually saw the shooters but they were wearing black bandanas over their faces. R. 189, l. 14 – 190, l. 15. The prosecution theorized that the shooting was retaliation for an earlier dispute and shooting at the Red Planet nightclub. R. 105, l. 11 – 106, l. 16; R. 140, l. 19 – 141, l. 12. Prior to the commencement of the trial, co-defendants Larry Johnson, Shaquille Hogan, DaQuan Bruster, and Tavarus Dean Holmes entered guilty pleas and were called to testify in the State's case-in-chief.

On appeal, Booker argued that the trial court erred in allowing testimony by the prosecution's witnesses using the term "gang" in reference to their investigation and the case and, relatedly, in admitting photographs of the co-defendants allegedly making "gang signs." Booker further argued that the trial court erred in coercing co-defendant DaQuan Bruster to testify for the prosecution by threatening to vacate his guilty plea, such that he would be facing life without parole (LWOP) if he did not comply. Lastly, Booker argued that the trial court erred in failing to declare a mistrial where jurors engaged in premature deliberations.

---

[3] A complete Statement of the Facts is contained in the Brief of Appellant filed at the Court of Appeals, which is on file with this Court. Brf. of App., pp. 6-19.

This Court should grant certiorari to review the issues raised herein pursuant to Rule 242(b), SCACR. Despite the fact that four co-defendants were all tried together and that counsel for each of them joined in nearly all motions and objections, the Court of Appeals has reached vastly different decisions in their respective cases. Perhaps the most alarming is the dismissal of Kinjta Sadler's direct appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Sadler, Op. No. 2015-UP-013 (S.C. Ct. App. filed Jan. 14, 2015). In both Williams' and Booker's cases, the convictions were affirmed following the filing of briefs on the merits. App. 1; State v. Williams, Op. No. 2017-UP-427 (S.C. Ct. App. filed Nov. 15, 2017). Youngs' conviction was reversed based upon the trial court's failure to conduct a proper analysis under the third step of a Batson review. State v. Young, Op. No. 2017-UP-426 (S.C. Ct. App. filed Nov. 15, 2017). Williams appealed the Court of Appeals' decision in his case and the State appealed the Court of Appeals' decision in Young's case. State v. Williams, Appellate Case No. 2018-000231 (cert. filed Feb. 16, 2018); State v. Young, Appellate Case No. 2018-000208 (cert. filed Feb. 12, 2018).

Relevant Facts

During pretrial motions, the prosecutor told the court that she had documents related to the defendants' gang affiliation that she planned to admit if they became relevant. The trial judge cautioned the prosecutor that her witnesses needed to be careful not to "put a defendant's character into issue in violation of the rules." R. 70, ll. 8-22. Attorney Abdalla, for co-defendant Young, argued the defendants' joint motion *in limine* to prevent the prosecutor from any mention of gangs or use of the word gang based upon Rule 403, SCRE. The judge asked for a foundation that the jury would be prejudiced by "the mention of the word gang" and agreed to hear further argument the next morning. R. 70, l. 23 – 71, l. 22.

The next day, attorney Robinson, for co-defendant Williams, argued that the prosecutor had not charged any of the co-defendants with being a criminal gang under the Criminal Gang Prevention Act. The Act defines a criminal gang as "a formal or informal ongoing organization, association, or group that consists of five or more persons who form for the purpose of committing criminal activity and who knowingly and actively participate in a pattern of criminal gang activity." S.C. Code § 16-8-230(2). Counsel further argued that references to the defendant's gang involvement was unduly prejudicial and that the word "gang" took on an inflammatory appeal to the passions of the average person. R. 93, ll. 20 – R. 95, ll. 23. Attorney Chambers, for Booker, added that the State intended to call investigator Brown, whose sole job was to investigate gangs, because the prosecutor had pursued this case as though these young men were part of the gang known as the Folk Nation. The defendants asked to stop that before it happened. R. 96, ll. 1-24. The further 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. R. 100, l. 1 – 102, l. 23; R. 103, l. 12 – 104, l. 3.

The prosecutor argued that the statutory definition of "gang" was not controlling. She suggested that while she was "not alleging that this group of defendants participated in a pattern of criminal gang activity," she was prepared to present evidence they were in a gang. She contended that it would be apparent from her very first witness that the people the victims fought with earlier that night at the club were dressed in all black and known to them as "the G's." Additionally, she proffered that "several of the witnesses" would indicate that they knew co-defendant Young by name and knew him to be the leader of the Folk Nation sect in Greenville. She further stated that the investigators pursued leads from witnesses that a gang committed the attack and thus the testimony related to gangs was "critical to how the case was investigated."

Additionally, she argued "the mob is the gang" for purposes of proving the offense of assault and battery mob. R. 98, l. 1 – 100, l. 9. Despite the seriousness of the defense's concerns, the trial judge noted that the "dictionary.com" definition of gang did not mention criminality until the fifth example, suggesting that the defense attorneys' concerns over the negative connotations associated with gangs were unfounded. See R. 102, l. 24 – 104, l. 3.

Immediately prior to Investigator Brandon Brown's testimony, attorney Chambers asked that Brown identify himself only as an investigator with the Greenville County Sheriff's Office and not as a "gang" investigator. Chambers argued that no foundation was laid by the prosecutor that the defendants were members of a gang. The judge said that the exception was noted for the record and noted that all of the defense attorneys joined in the objection. R. 472, l. 7 – 473, l. 23. As discussed more fully *infra*, Investigator Brown then described his role in the investigation of the shooting, noting that he was a "gang investigator assigned to the Federal Bureau of Investigation as a task force officer." R. 475, l. 23 – 479, l. 13; R. 502, ll. 6-9. The judge overruled the renewed objection made during Brown's testimony. R. 481, ll. 9-17.

Discussion

The Court of Appeals erred in affirming the trial court's admission of testimony referencing the term gang. The Court further erred in ruling that the admission of improper evidence was harmless because it was merely cumulative to other evidence referencing gangs that was "admitted numerous times without objection." App. 2. In light of the lack of foundation laid for the gang evidence, the improper character evidence that it constituted, and the danger of unfair prejudice, the evidence regarding the co-defendants alleged gang involvement was improper. See Brief of Appellant, pp. 6-10, pp. 20-27.

The prosecutor failed to deliver on her averment that the victims in the case would give testimony identifying the co-defendants as being involved with a gang. R. 70, ll. 8-22. Nonetheless, she called investigator Brandon Brown, who testified that he was consulted due to suspected gang involvement. R. 475, l. 19 – 494, l. 10. Over the defense's objection, Brown was allowed to testify regarding alleged gang signs shown in photographs of some of the co-defendants and specifically alleged that they were part of the Folk Nation. R. 499, l. 16 – 506, l. 20. In addition to the lack of foundation for such testimony and evidence, the gang evidence constituted improper character evidence where the co-defendant's character had not first been put at issue by the defense. See Rule 404, SCRE; State v. Brown, 344 S.C. 70, 73, 543 S.E.2d 552, 553 (2001) ("Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged."); State v. Council, 335 S.C. 1, 12 n.6, 515 S.E. 2d 508, 514 n.6 (1999) ("An accused must introduce evidence of his character at trial before the prosecution can attack it.").

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

noted the Seventh Circuit's long recognition of "the substantial risk of unfair prejudice attached to such evidence, noting that evidence of gang membership is likely to be damaging to a defendant in the eyes of the jury and that gangs suffer from poor public relations." 202 F. Supp. 2d at 775. "[G]angs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict." Id.

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

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

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

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

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

Brown said that he consulted regularly with different divisions "whenever they believe there was possibly something involved in my field." R. 476, ll. 11-16. In the present case, Brown was contacted by investigator Wayne Campbell and responded to the scene of the Li'l Cricket. Brown gathered information at the scene to determine whether there was any information he knew as a gang investigator that could aid the lead investigator. R. 476, l. 17 – 477, l. 14. He recalled that the witnesses who remained at the scene were not forthcoming, noting "[t]hey didn't want to talk to us, didn't want to be seen talking to us, were literally scared." R. 477, l. 17 – 478, l. 3. Nonetheless, he said that the witnesses mentioned a prior altercation involving "them Folk Boys" and someone named "Mikey." R. 478, ll. 4-17. Brown's

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

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

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

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

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

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

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

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

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

II. The Court of Appeals erred in ruling that the trial court properly admitted photographs of the co-defendants allegedly making "gang signs" and in finding that defense counsel opened the door to admission of the photographs.

Relevant Facts

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

In one of the photographs, Investigator Brown claimed that the individuals were "throwing [what] was known as a three point crown and that was very specifically [sic] to the Folk Nation." He identified co-defendants Hogan, Booker, and Williams in the photograph and recognized the other two individuals but could not recall their names. R. 499, l. 14 – R. 502, l. 14; State's Ex. 51, photograph (on file with this Court). In a second photograph, Investigator Brown noted the use of the three point crown and "L" symbol. He identified co-defendant Young in the photograph and said that Holmes and Booker were also possibly in the photograph. R. 503, l. 2 – 504, l. 10; State's Ex. 54, photograph (on file with this Court). On cross-examination, Investigator Brown admitted that none of the co-defendants were displaying gang signs in the photograph that was actually taken at the Red Planet club earlier that night. R. 504, ll. 13-20.

Following the testimony and outside of the presence of the jury, the trial judge allowed the defense attorneys to place their objection to the photographs on the record. Attorney Chambers, for Booker, argued that no foundation was laid for the admission of the photographs and that they were not relevant to an issue in the case. There was no information provided as to when or where they were taken. Attorney Abdalla, for co-defendant Young, added that the photographs were unduly prejudicial as gang evidence. The judge overruled the objection and noted that the photographs were gathered from co-defendant Young's cell phone. R. 506, ll. 1-24. The prosecutor referenced the objectionable photographs in her closing argument. R. 696, l. 19 – 697, l. 3; R. 709, ll. 8-14.

Discussion

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

his investigation and recognized anyone in the photographs. R. 499, l. 16 – 500, l. 1. According to the judge, the photographs were obtained from Young's cell phone, yet no records were produced by the prosecutor to verify that claim or indicate when the photographs were taken. Further, the jury was given no information as to how and where the photographs were obtained in order to determine what weight to give them. In addition to the lack of authentication, the photographs were irrelevant and unduly prejudicial. The only purpose of the photographs was to establish the co-defendants' gang association. As argued *supra*, admission of gang related evidence was improper.

The Court of Appeals erred in ruling that the trial court properly admitted photographs of the co-defendants allegedly making "gang signs" because defense counsel "opened the door" to the evidence. App. 2. In State v. Robinson, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991), cited in the Court's opinion, Robinson complained of improper testimony linking Robinson to drug dealing when a witness testified that he was in charge of drug operations for the El Rukn gang in the 1980's and that he became acquainted with Robinson in 1983 or 1984. The Robinson Court found no such implication by the testimony, as the witness said the El Rukns rented a building from Robinson where their restaurant was located. 305 S.C. at 474, 409 S.E.2d at 408. The Robinson Court further found that it was Robinson's counsel who ***first*** brought out the El Rukn's involvement in drug dealing during her cross-examination of a prior witness. Id. It was upon that basis that the Court found "[s]ince appellant opened the door to this evidence, he cannot complain of prejudice from its admission." Id.

In the present case, Respondent argued that Booker cannot "complain gang sign evidence was unduly prejudicial where he was the one who first asked the witness questions about gang signs, and thereby opened the door to the responsive gang sign evidence offered by the State on

redirect." Brief of Resp., p. 33. It is most important to note that the trial judge had already admitted gang related evidence, over objection, during Brown's direct examination. Further, a full review of the content and context of defense counsel's cross-examination reveals that his questions regarding the photograph of the group of complainants did not open the door to the admission of additional photographs of the co-defendants.

On cross-examination, attorney Chambers asked if Brown was familiar with a group known as the Hardliners, with which several of the complainants had identified themselves as being associated. Brown responded "yes, sir, I am" but said that their investigation did not reveal that they were a "fairly organized group," like he had previously characterized Young and his associates. R. 495, ll. 14-20. Chambers asked Brown if he had seen the club photograph of the Hardliners "where they were altogether and they appeared to be flashing gang signs." R. 495, ll. 21-22. Brown said he had seen it and agreed they were displaying "the HL sign." R. 495, ll. 23-25. Brown agreed that such hand signs "can be" common among gang members but said they do not "in themselves" constitute gang signs. R. 496, ll. 1-8. However, Brown admitted that the complainants had weapons available to them at the Red Planet club earlier in the evening and inside of the vehicles during the Lil' Cricket shooting. R. 496, ll. 14-20. He also admitted that there were lots of other people at the Red Planet outside of the Folk Nation group, as described by Brown, and the Hardliners. R. 496, ll. 21-25. He agreed that it is not unusual for groups of friends to go to a club and hang out together or for there to be conflict between different groups at clubs. R. 497, ll. 1-9. The examination then moved on to other matters. R. 497, l. 10 – 499, l. 1.

On redirect, the prosecutor asked Brown to identify several photographs, which were admitted over objection. Brown received the photographs during the course of his investigation

"several days after the initial incident occurred" and recognized "several" of the individuals in the photographs. R. 499, l. 14 – 500, l. 1. The prosecutor then asked: "There's been a little bit of discussion about hand signs and what they may or may not mean, do you recognize the hand signs that are being exhibited in those photographs?" R. 500, ll. 2-5. Brown responded that he recognized many of the hand signs, explaining: "As part of our job as gang investigators, we have to have a basic knowledge and try to get as much advance investigation tools as we can. One of the most popular ways of identifying a gang member is very specific hand signs that are universal across the board. Several of these are them." R. 500, ll. 8-13. Brown described that many of hand signs displayed in the photograph were associated with the Folk Nation or Gangster Disciples. R. 500, l. 14 – 502, l. 3. In the first photograph, Brown identified Booker, Michael Williams, and Shaquille Hogan.[4] The next two photographs were too dark to make any positive identifications. In the fourth photograph, Brown identified Raymond Young and two people who he believed were Booker and Tavarus Holmes.[5] R. 502, l. 4 – 504, l. 8. It was only on re-cross of Brown that attorney Chambers asked him to review the previously admitted photograph from the night of the incident that did not show any of the co-defendants making any hand signs and the prevalence of hand signs in hip-hop culture. R. 504, l. 13 – 505, l. 17. At the conclusion of that testimony, the jury was excused and the defense was permitted to put their objections to the photographs on the record. R. 505, l. 22 – 506, l. 20.

It is axiomatic that counsel's questions are not evidence. Thus, the only evidence elicited on cross-examination was that the Hardliners displayed hand signs in the photograph taken of

---

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

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

them on the night of the incident but that such was not necessarily indicative of gang affiliation. This does not open the door to testimony regarding the co-defendant's use of potential gang signs and the admission of photographs purportedly displaying such. Moreover, in the event that defense counsel's cross-examination did somehow invite the admission of the photographs, the concept of "opening the door" does not dissolve the rules of evidence. The prosecution still failed to authenticate the photographs and they remained irrelevant and unduly prejudicial.

III. The Court of Appeals erred in ruling that the trial court properly threatened to vacate DaQuan Bruster's guilty plea, such that he would be facing life without parole (LWOP), when he was not cooperative in testifying for the prosecution.

Relevant Facts

There was no mention at the plea hearings that acceptance of the plea offers required any of those individuals to testify at the co-defendants' trial. R. 3, l. 3 – 34, l. 25. With respect to Daquan Bruster, the prosecutor put on the record only that sentencing be deferred and that, as part of the plea, the prosecutor agreed to withdraw the notice of intent to seek life without parole that it had filed. R. 18, ll. 16-19.

When called to testify, Bruster admitted that he pled guilty 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. However, he testified that he did not remember the events of that night, and then "pled the Fifth." The prosecutor received permission to treat Bruster as a hostile witness. He said that he was just going along with what the prosecutor said at the plea hearing. He did not understand that he was expected to testify and did not want to testify. R. 633, l. 19 – 636, l. 21. On cross-examination Bruster admitted that he only pled guilty because he was facing life without parole if he did not plead. He executed a statement on July 25, 2012, indicating that neither

he nor his codefendants had anything to do with the alleged crimes. He again reiterated that he did not know that he had to testify. R. 636, l. 22 – R. 638, l. 9.

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

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

Nonetheless, the trial judge instructed Bruster to take the witness stand and be sworn. He told Bruster that he could either "come forward with the truth" or his plea would be vacated. R. 650, l. 5 – 651, l. 14. Bruster then testified for the prosecution. R. 652, l. 12 – R. 657, l. 8. On cross-examination, Bruster said that he specifically discussed it with his attorney prior to the plea and understood that he would not be required to testify. He further admitted that he was told to testify or LWOP was "back on the table." R. 657, l. 11 – 659, l. 11.

Discussion

The Court of Appeals erred in ruling that the trial court properly threatened to vacate DaQuan Bruster's guilty plea when he testified at the co-defendants' trial that he did not remember the events underlying the charges. In support of this ruling, the Court cited State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005), for the proposition that the trial judge has the duty to supervise and control witnesses. App. 2. This was not a matter of upholding the administration of justice by preventing perjury or invalid guilty plea. Rather, the trial court enforced of a portion of plea negotiations that never existed. The plea transcript made no mention of a requirement that Bruster testify for the prosecution. R. 12, l. 15 – 18, l. 23. While Bruster initially said that he did not remember the events on the night of the incident and attempted to "plead the 5th," upon further questioning he averred that he accepted the plea to avoid a life sentence and that testifying against his co-defendants was not a part of his plea agreement. R. 633, l. 19 – 638, l. 9; see, e.g. Anderson v. State, 342 S.C. 54, 57-58, 535 S.E.2d 649, 651 (2000) (upholding guilty plea to lesser offense of voluntary manslaughter where the decision to do so "was simply a tactical maneuver to avoid the very real possibility that the jury might come back with a verdict of murder.").

The case of State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005), is not analogous to the present case. The trial witness in Stanley contradicted his prior statement to police during his trial testimony and was guilty of perjury if the information to police was false; if it was true, then his trial testimony was perjury. 365 S.C. at 35, 615 S.E.2d at 460. The trial judge warned the witness of perjury and ordered him to jail. Id. at 35, 615 S.E.2d at 461. The witness was allowed to consult with his attorney and testify again. Id. In finding no error, the Stanley Court wrote: "All courts have inherent power to punish for contempt. This power is essential to the preservation of order in judicial proceedings and the due administration of justice. The trial judge acted within his

discretion to warn Richard and to take action to prevent the miscarriage of justice by his perjury." Id. at 38, 615 S.E.2d at 462 (internal citations omitted).

Here, there was no perjury by Bruster. Rather, the trial judge enforced a non-existent term of the plea agreement. Even if Bruster's initial response that he did not recall the events did constitute perjury, the potential of an additional five year sentence for the commission of perjury is a far cry from vacating a guilty plea and exposing someone to a mandatory life without parole sentence. See S.C. CODE ANN. § 16-9-10. The trial judge's conduct was improper and failed to safeguard Bookers' right to due process and a fair trial. The trial judge's threat to vacate the plea and impose a sentence of life imprisonment coerced Bruster to testify **a second time** and implied to the jury the Court's dissatisfaction with the earlier testimony he provided as a hostile witness.

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

IV. The Court of Appeals erred in ruling that the trial court properly denied the motion for mistrial where the trial judge refused to allow any questioning of the individual who overheard the conversation between the jurors on the record and where the trial judge erroneously determined that no premature deliberations occurred.

Relevant Facts

The trial court was alerted to the misconduct after the prosecutor presented her fifth of thirty-seven witnesses. A juror sitting on another trial sent the following note: "While in [the] restroom during lunch I overheard jurors from courtroom 8 discussing what sounded like details of their case. 'Need to decode language;' 'I was chillin;' 'He's going down.' [That was followed by] laughter." R. 192, l. 24 – 193, l. 6; R. 814 (Court's Exhibit 3, Note from Juror). Attorney Quinn, for co-defendant Sadler, moved to remove the two jurors who engaged in the conversation, which would have left only eleven remaining jurors and necessitated a mistrial. R. 194, ll. 11 – 195, ll. 5. The other attorneys joined in the motion. R. 196, ll. 1-21.

The trial judge proceeded to question each of the jurors individually. Juror Harper reported that what was discussed was "sadness" over some of the things heard. R. 198, ll. 7-22. Juror Ferguson stated that there was discussion about the initial charges and how long the trial would take. There was also talk about the "behavior" of some of the witnesses, whether their testimony was clear, and their demeanor and enunciation. R. 199, l. 15 – 201, l. 25. Juror Foxx reported that there was talk about the names and trying to get the names straight, and if they understood some of the conversations. R. 202, ll. 1-25. Per Juror Tutiven, there had been kind of a reflection on different facts such as names and how many people. R. 207, ll. 1-25. Many of the other jurors said different versions of what had been reported by the others. R. 204, l. 1 – 214, l. 12. The judge then denied the motion for a mistrial, saying he found no prejudice. R. 214, ll. 12-17.

With the exception of attorney Robinson, for co-defendant Williams, all of the defense attorneys objected to the hearing procedure and the manner in which it was conducted because

defense counsel was not given the opportunity to establish an appellate record. They argued the juror who sent the note should testify. Further, no questions were asked about the specific misconduct alleged. R. 214, l. 18 – 217, l. 7. Even the prosecutor expressed concern over Juror Whittenberg, who was alleged to have been a party to the conversation overheard in the bathroom. The prosecutor noted that "he, more than anybody else denied any conversation having happened and that concerns me." R. 216, ll. 8-13; *see* R. 203, l. 19 – 204, l. 25. Despite this, the judge determined that the jurors did not actually deliberate as to the outcome of the case, and he maintained that he conducted the proper inquiry. R. 216, l. 14 – 217, l. 7.

Discussion

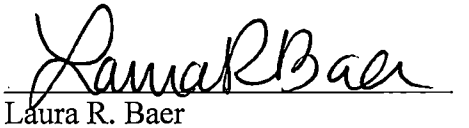
The Court of Appeals erred in ruling that the trial court properly denied the motion for mistrial based upon juror misconduct, finding that the trial judge followed the procedures outlined in State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999), regarding the handling of allegations of premature deliberations. The Court deferred to the trial court's assessment of the juror's credibility, noting that "the jurors all affirmed no premature deliberations occurred and they could be fair and impartial." App. 3. Pursuant to Aldret, the trial judge was responsible for conducting a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. 333 S.C. at 315, 509 S.E.2d at 815.

Initially, the trial judge erred in failing to have the juror from the other trial who overheard the improper discussion examined on the record and failed to inquire of the jurors about the specific allegation of misconduct. R. 198, l. 7 – 214, l. 11; R. 215, ll. 3-18. Further, the inquiry that was conducted did not reveal that no premature deliberations occurred. "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." The jurors admitted that they had discussed "sadness over some

of the things we've heard," "the behavior of some people who have taken the stand," and "a reflection on different facts" including the names and number of witnesses heard. R. 198, ll. 4-22; R. 200, ll. 6-24; R. 207, ll. 4-24. These discussions alone constituted deliberation. Further, the fact that none of the jurors admitted to having the conversation in the bathroom that the juror from another courtroom overheard, especially where they were never specifically asked about it, does not render the content of the note from the outside juror incredible. Notably, even the prosecutor expressed concern over the retention of Juror Whittenberg, who denied having any discussions about the case despite being one of the jurors specifically overheard in the bathroom. R. 216, ll. 8-13; see R. 203, l. 19 – 204, l. 25. Under these circumstances, Whittenberg should have been removed from the jury, along with the other juror with whom he was speaking. The trial judge's finding that the jurors had not engaged in any deliberation was erroneous. Consequently, the trial judge erred in failing to declare a mistrial.

CONCLUSION

Based on the foregoing, Petitioner Esaiveus Booker respectfully requests that this Court grant certiorari to review the Court of Appeals' decision in this case.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of February, 2018.

RECEIVED

FEB 2 2 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 2017-UP-425 (S.C. Ct. App. filed Nov. 15, 2017)
Appellate Case No. 2013-000207

THE STATE,

RESPONDENT,

V.

ESAIVEUS FRANTREZ BOOKER,

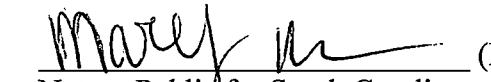
PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Esaiveus F. Booker, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 20th day of February, 2018.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 20th day of February, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027 .