STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NATHANIEL ANTRON HUNTER,

APPELLANT

APPELLATE CASE NO 2017-001125

INITIAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to declare a mistrial when, in opening statement, the prosecution referenced photographs of Appellant with a gun found on Appellant's phone, although, prior to opening statements, Appellant objected to the admissibility of the photographs, the trial judge withheld ruling on the admissibility of the photographs pending further testimony, and ultimately the photographs were not admitted in evidence?

2. Did the trial judge err in admitting a witness statement recorded by police while the witness was at the hospital being prepared for surgery and included statements by treating medical personnel without conducting a Rule 403 balancing test when portions of the recording were irrelevant and any possible probative value in the recording was substantially outweighed by the danger of unfair prejudice and the needless presentation of cumulative evidence pursuant to Rule 403, SCRE?

3. Did the trial judge err in admitting the content of text messages derived from a cell phone extraction report?

4. Did the trial judge err in refusing to declare a mistrial based on the fact that the cumulative effect of the errors adversely affected Appellant's right to a fair trial?

STATEMENT OF THE CASE

In December of 2014, the Lexington County Grand Jury indicted Appellant, Nathaniel Antron Hunter, for burglary first degree, criminal sexual conduct with a minor third degree, attempted murder and possession of a weapon during the commission of a violent crime, indictments #2014-GS-32-3687, 3688, 3689 and 3692. On April 24, 2017, Appellant proceeded to jury trial before the Honorable Thomas W. Cooper. Dayne C. Phillips, Jael D. Gilreath and Jason S. Chehoski represented Appellant at trial. Laura Suzanne Mayes and Robert E. McNair, III, prosecuted the case. The jury found Appellant guilty as charged. Judge Cooper sentenced Appellant to forty-five (45) years for burglary first degree, fifteen (15) years concurrent for criminal sexual conduct with a minor third degree, thirty (30) years concurrent for attempted murder and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was served on May 4, 2017. This appeal follows.

FACTS

On the evening of April 12, 2014, Larenda Simon was sleeping next to her daughter in their apartment. She woke up and saw a man standing over her with a gun. (Tr. p. 332, line 7 – p. 333, lines 1-6). Simon testified at trial that the man had on a hoodie and a ski mask that covered his whole face. (Tr. p. 333, lines 18-21). Simon testified that the man took her phone and told her to take off her panties. (Tr. p. 334, line 23 – p. 335, lines 1-23). When she told him she was menstruating, he told the daughter to take her clothes off. (Tr. p. 336, lines 1-25). A struggle ensued between Simon and the man resulting in Simon being shot. (Tr. pp. 338-340). The man fled and Simon and her daughter went to a neighbor's apartment and the neighbor called 911. (Tr. pp. 342-343). According to Simon, she remembered the man's eyes and voice and during the trial, for the first time, identified Appellant. (Tr. p. 358, line 18 – p. 359, lines 1-12).

Investigator Scott Neel with the West Columbia Police Department testified that he was present when another investigator, Charles Bramlett, collected evidence at the apartment. (Tr. p. 634, line 13 – p. 635, lines 1-12). According to Investigator Neel he was present when Investigator Bramlett collected a hoodie that contained a cap stuffed inside. (Tr. p. 647, line 1 – p. 648, lines 1-25). Investigator Bramlett passed away prior to trial. (Tr. p. 98, line 24 – p. 99, lines 1-6). The hoodie is listed in an incident report prepared by Investigator Bramlett and in the return to the search warrant. The cap is not. (Tr. p. 783, line 1 – p. 784, 785 lines 1-5). The West Columbia evidence custodian, Ms. Ottenbacher did not testify at trial. (Tr. p. 1002, lines 22-24). The first forensic technician at Sled to receive the cap, Amy Stephens, did not testify at

trial. (Tr. p. 1002, line 24 – p. 1003, line 1)[1]. Appellant was found to be a contributor to DNA found on the cap. (Tr. pp. 922-925). There was no other forensic evidence linking Appellant to Simon's apartment.

Upon Appellant's arrest the police seized his cell phone. (Tr. p. 516, line 1 – p. 517, lines 1-12). Investigator Michael Phipps with the Lexington County Sheriff's Office extracted information from Appellant's phone and generated an extraction report. (Tr. pp. 984-986). A summary of the extraction report was made, introduced over objection at trial and testified to by Investigator Phipps.

---

[1] The chain of custody as to the hoodie and cap, State's Exhibit #101, is not being challenged on direct appeal. At trial the chain was challenged based on the unavailability of Investigator Bramlett. (Tr. pp. 103-118). When the State moved to admit the items in evidence before the West Columbia evidence custodian, Ms. Ottenbacher, and before the first forensic technician at Sled to receive the cap, Amy Stephens, testified, the chain Appellant objected, "subject to prior motion" but not on the ground that the chain was incomplete. (Tr. p. 650, lines 22-24). The objection to the chain as being incomplete came later. (Tr. p. 954, line 20 – p. 955, lines 1-11; p. 1002, line 6 – p. 1003, lines 1-7).

ARGUMENTS

1. **The trial judge erred in refusing to declare a mistrial when, in opening statement, the prosecution referenced photographs of Appellant with a gun found on Appellant's phone, although, prior to opening statements, Appellant objected to the admissibility of the photographs, the trial judge withheld ruling on the admissibility of the photographs pending further testimony, and ultimately the photographs were not admitted in evidence.**

Prior to trial Appellant moved to suppress information extracted from his seized phone. (Tr. pp 206 – 221). Photos of Appellant with a gun were included in the suppression motion. (Tr. p. 208, lines 5-17; p. 211, lines 12-17). The trial judge withheld ruling on the motion to suppress in order allow both sides to present expert testimony. (Tr. pp. 216 – 221). During opening statement, prior to the judge ruling on the motion to suppress the photographs, the prosecutor told the jury, "Law enforcement eventually obtains his phone, his cell phone, and they search his phone. And on that phone are pictures of him holding that 40 caliber Glock." (Tr. p. 247, lines 17-19). Appellant responded, "Your Honor, we have a matter of law." (Tr. p. 247, line 22). The trial judge stated, "Yes, sir. There's still some evidentiary issues regarding the phone records and I would suggest that we not go any deeper into those at this point in time. Thank you. I note your objection. Thank you." (Tr. p. 247, line 23 – p. 248, line 1).

Later the trial judge stated:

> Folks, a couple of things. First of all, while we're -- while the jury is out during opening statements Mr. McNair made reference to telephone records and to photographs that were gleaned as a result of those records. He referred specifically to a photograph of the Defendant in possession of what appeared to be a Glock pistol and was going on further to talk about photographs. At that point in time Mr. Phillips objected and I made a notation to -- to deal with this out of the presence of the jury. At a sidebar I indicated that there had been a reference at some point in time -- as I understood it, someone had indicated that there was going to be testimony of a -- of a witness who was gonna testify about his possession of a gun. I, therefore, thought that would be cumulative in any event.

> And the matter of the phone records, of course, is still an evidentiary issue that has not been completely resolved. But in any event, I overruled the objection and,
>
> Mr. Phillips, I'll be glad for you to expand on that record if you'd like.

(Tr. p. 312, lines 6-25). Appellant then moved for a mistrial based on the fact that the judge had not yet ruled on admissibility and arguing that the photographs were inadmissible as irrelevant pursuant to Rule 401, SCRE and if relevant, the probative value of the photographs would be substantially outweighed by its prejudicial effect pursuant to Rule 403, SCRE. (Tr. p. 313, line 1 – p. 314, lines 1-9). The judge denied the motion for a mistrial stating, "I do not find that the mention of the Defendant being in possession of a weapon at whatever time it was has so irretrievably tainted these proceedings as to deny Mr. Hunter's right to a fair and impartial trial, so the motion for mistrial is respectfully denied." (Tr. p. 314, lines 10-18). The judge erred.

Later a redacted version of the phone extraction summary, marked as Court's Exhibit #11, was admitted, over objection, as State's exhibit #122. (Tr. p. 987, lines 2-10). The redacted version did not contain the photographs. (R. p. ** State's Exhibit #122). At the close of the State's case Appellant renewed the motion for a mistrial arguing, "In the opening statement, the solicitor referred to a timeline of one to five, that they could pin it down to no phone activity from one to five and that there would be photographs of Mr. Hunter holding a gun. Your Honor ruled that that information – or that evidence, excuse me, is inadmissible. In finding that the timeline and photographs were inadmissible and were not presented to the jury is misleading and highly prejudicial to his right to a fair trial, so we would renew the motion for the mistrial in the opening." (Tr. p. 1001, line 19 – p. 1002, lines 1-3). The judge again denied the motion for a mistrial. (Tr. p. 1004, lines 6-9).

" '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." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, [the rules of evidence], or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. "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.

The photographs were correctly excluded as irrelevant and highly prejudicial. It was unclear from the telephone extraction report when the photographs were taken or how the firearms in the photographs were connected to the trial. Although the prosecutor stated that one of the guns in the photo was a Glock and the weapon used in the shooting was a Glock, (Tr. p. 211, lines 12-17), the State's firearm expert testified that the projectiles recovered at the scene could have been fired by six different types of guns (Tr. p. 885, lines 19-22). Although Appellant's cousin, Tanisha Taylor, testified that she saw Appellant cleaning a gun once, (Tr. p. 855, lines 1-19), that testimony is far less damaging than the prosecutor's reference to the photograph of Appellant with a gun made in opening statement.

The trial judge erred in refusing to grant a mistrial when the prosecutor in opening statement referenced the photograph of Appellant with a gun when the photograph was properly excluded from evidence. In State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct.App. 2010) the State, in opening statement, made reference to an outstanding warrant. Wiley objected and the judge

sustained the objection and immediately instructed the jury that opening statements were not evidence. At the close of State's opening, Wiley moved for a mistrial. The trial judge denied the motion for a mistrial. The Court of Appeals affirmed the trial judge's denial of the mistrial motion writing:

> In this case, the State informed the trial court during pre-trial that Wiley had a bench warrant for possession with intent to distribute in Richland County. However, the State did not identify to the jury the substantive nature of the warrant during its opening statements. As a result, the jury was unaware of the precise nature of the warrant. Furthermore, the record reveals the reference to Wiley's warrant was for the purpose of establishing the legality of the traffic stop. Therefore, we believe the State's comment regarding Wiley's warrant was merely a vague reference to his prior criminal record that did not justify granting his motion for mistrial. Furthermore, even if the jury inferred that Wiley committed another crime from the State's opening statement, we believe Wiley was not prejudiced because the State never attempted to prove Wiley was convicted of some other crime. See State v. Robinson, 238 S.C. 140, 119 S.E.2d 671 (1961), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (concluding a reference to a defendant's past conduct was not prejudicial because even if the testimony created the inference in the jury's mind that the accused had committed another crime, the State never attempted to prove the accused had been convicted of some other crime). Therefore, we conclude the State's opening statement regarding Wiley's unrelated outstanding warrant was not sufficiently prejudicial to warrant a mistrial.

State v. Wiley, 387 S.C. at 496, 692 S.E.2d at 563. The generic warrant reference in Wiley is easily distinguished from the specific reference that police found, on Appellant's phone, pictures of Appellant holding "that 40 caliber Glock." The trial judge abused his discretion in refusing to declare a mistrial.

2. **The trial judge erred in admitting a witness statement recorded by police while the witness was at the hospital being prepared for surgery and included statements by treating medical personnel because portions of the recording were irrelevant and any possible probative value in the recording was substantially outweighed by the danger of unfair prejudice and the needless presentation of cumulative evidence pursuant to Rule 403, SCRE.**

On April 13, 2014, Chris Hall with Lexington County EMS transported Larenda Simon to the hospital. (Tr. pp. 283 – 289). Investigator Thomas Griffin with the West Columbia Police Department interviewed Simon in the trauma unit of the emergency room prior to her surgery. (Tr. p. 495. Line 12 – p. 496, 497, lines 1-21). Investigator Griffin testified that while he interviewed Simon doctors were preparing her for surgery and "it was an active emergency room." (Tr. p. 497, lines 6-10). Investigator Griffin testified at trial that he asked Simon about the description of the suspect and she provided a description. (Tr. p. 498, lines 13-25). The investigator then decided to record a statement from Simon. (Tr. p. 499, lines 16-25). The recording of Simon's statement was admitted, over objection, as State's Exhibit #63. (Tr. p. 503, lines 4-15). A sidebar conference was held and the tape was played for the jury. (Tr. p. 503, line 21 – p. 504, lines 1-3).

Later, outside of the presence of the jury, Appellant asked to address the sidebar conference. (Tr. p. 531, lines 8-11). The trial judge noted, "I think we're – I think we're up to the playing of the tape, State's Exhibit 67. The objection was made at sidebar that it was hearsay and inadmissible and, Mr. Phillips, I'll be glad for you to develop that more completely, if you'd like." (Tr. p. 531, lines 12-19). Appellant argued:

> Yes, Your Honor. For the audio recording of Larenda Simon by Investigator Griffin that was played in court, the objection that was made at sidebar at the request of the Court was essentially not only hearsay, but also under 401 that it was – that there were portions that were irrelevant and should have been redacted, there were places that were played before the jury that had medical personnel speaking. Also under Rule 403 that any probative value would be substantially
> outweighed by the danger of unfair prejudice and confusion of the issues. I believe Your Honor specifically even referenced that some parts of that with the medical personnel would be irrelevant and would be prejudicial. Your Honor did acknowledge that at sidebar. With that, the solicitor – since the interview was not redacted, they hand-manually on a laptop skipped different parts

> and as they were skipping different parts of the interview medical personnel – their comments were coming in randomly as it was skipped. And certainly we have a continued objection as to the entire tape. I know one of the arguments was made by the State under the rule of completeness and I understand Your Honor's argument that we're not trying to say that it should be played --

(Tr. p. 531, line 20 – p. 532, lines 1-17). Appellant additionally argued:

> So at that point when it was coming in, that they were not getting the entire audio recorded interview, that we are arguing that is inadmissible, but also that as it came in it was highlighting this medical personnel being manually played. I'm just trying to put into words what happened that only if you were here you'd be able to know. As it was manually skipped, the audio recording, as I tried to unartfully explain and probably more confusing for the record, that as it was skipped throughout the audio recording, it wasn't purposeful, they were trying their best I would imagine, but in that process medical personnel statements were still coming in rapidly because they weren't going to specific parts. It wasn't redacted to exclude those specific parts. And, Your Honor, it was also skipped – again, like I said before, certain parts of Ms. Simon's statement that in their argument to play that under the rule of completeness left out specific parts that would make other parts more relevant, but then had also medical personnel testimony or statements that came in. And, again, I know that was woefully argued, but my point would still be under hearsay and under rules 401 and 403.

(Tr. p. 532, line 24 – p. 533, lines 1-22). The judge found that the statement was admissible pursuant to 803(2). (Tr. p. 533, line 23 – p. 534, lines 1-24). The judge agreed that portions of the recording which dealt with treatment were irrelevant. (Tr. p. 534, line 25 – p. 535, lines 1-6). The judge, however, found that the recording was not prejudicial. (Tr. p. 535, lines 7-19). The judge additionally found no problem with the manner in which the tape was played for the jury. (Tr. p. 535, line 19 – p. 536, lines 1-2). The trial judge erred in admitting the recorded statement of Simon. The trial judge failed to identify any probative value in the admission of the recorded statement of Simon, which included comments by medical personnel.

The objection went to the recorded statement and not the description of the suspect Simon provided to the investigator. The statement by Simon, recorded by police at the hospital, was consistent with her trial testimony, which the jury had already heard. The prior statement was not offered to rebut a charge of recent fabrication or improper influence or motive pursuant to Rule 801(d)(1)(B). Any possible probative value in the recorded statement was substantially diminished by the fact that Simon had already testified consistently at trial. See State v. Forester, 354 S.C. 614, 622, 582 S.E.2d 426, 430 (2003) ("The plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence." (quoting State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001)).

"Evidence which is not relevant is not admissible." Rule 402, SCRE. "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. The judge acknowledged that portions of the recorded statement were irrelevant stating, "As to the fact that some of the things were irrelevant, you're exactly right. The treatment itself and the conversations going back and forth were irrelevant to these proceedings and so it was appropriate to try to cut those things out. To the extent that she could not, while they're irrelevant, that doesn't necessarily mean that they're prejudicial." (Tr. p. 534, line 25 – p. 535, lines 1-6). Irrelevant evidence does not become admissible simply because it is non-prejudicial. The trial judge failed to identify what parts of the recorded statement were relevant. Assuming that part of the recording was relevant, without admitting that, if the State was unable to redact

the irrelevant portions, then the whole statement should have been excluded. Appellant argues that the whole statement is irrelevant and should have been excluded.

The judge found the recorded statement met an exception to the rule against hearsay pursuant to Rule 803(2) as an excited utterance. (Tr. p. 533, line 23 – p. 534, lines 1-24). Exceptions to the rule against hearsay still must be excluded if the probative value is substantially outweighed by the danger of unfair prejudice and the needless presentation of cumulative evidence pursuant to Rule 403, SCRE. As stated, the trial judge failed to identify any probative value in the admission of the recorded statement of Simon, which included admittedly irrelevant comments by medical personnel. The recorded statement should have been excluded as both unfairly prejudicial and cumulative.

The trial judge erred in finding the recorded statement non-prejudicial without determining probative value. In State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014) the South Carolina Court of Appeals wrote:

> "Probative value" is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. "[T]he more essential the evidence, the greater its probative value." United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates. As our supreme court stated in State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010), "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are ... not *necessary* to substantiate *material* facts or conditions." 390 S.C. at 623, 703 S.E.2d at 228 (emphasis added). The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case. See State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008) ("When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." (citing State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007))).

The introduction of Simon's recorded statement in the trauma unit of the ER as she was being prepared for surgery was calculated to arouse the sympathy of the jury. Given Simon's testimony at trial, the recorded statement was not necessary to substantiate material facts or conditions. The probative value was low.

Unfair prejudice means an undue tendency to suggest decision on an improper basis. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). The admission of Simon's recorded statement in the trauma unit of the ER while medical personnel prepared her for surgery had an undue tendency to suggest that the jury make its decision based on sympathy for Simon. Additionally, Simon's recorded statement constituted a needless presentation of cumulative evidence. Weighing the low probative value of the recorded statement against the high level of undue prejudice and the needless presentation of cumulative evidence, the judge erred in refusing to suppress the statement.

3. The trial judge erred in admitting the content of text messages derived from a cell phone extraction report.

The redacted phone extraction summary discussed in issue one above and admitted, over objection, as State's Exhibit #122 (Tr. p. 987, lines 2-10), also contained the contents of text-messages. (Tr. p. 679, lines 24-25; p. 680, lines 3-4). Appellant objected to the summary on hearsay grounds. (Tr. p. 679, lines 5-7). The judge noted, "As to the content of these of these text messages, I suppose that has some relevance to their association during this period of time leading up to when he supposedly got the scratch, I guess, is that what that's all about: is that right?" (Tr. p. 698, lines 1-5). The prosecutor responded, "Yes, sir." (Tr. p. 698, line 6). The judge then stated, "That would be relevant. Going on to the test messages of the next day, this is

– tell me what—tell me what the purpose of those messages – the content of those messages is, Mr. McNair, exactly." (Tr. p. 698, lines 7-11). The prosecutor, Mr. McNair, answered, "Frankly, Judge, I don't know what angle they're gonna take with Tanisha Taylor and depending on that it may become relevant." (Tr. p. 698, lines 12-14). The judge then commented, "Okay. Well, if they do, if cross-examination makes them relevant, then I'll let you – you can revisit that." (Tr. p. 698, lines 15-17). The State called Tanisha Taylor as a witness but did not question her in reference to the text messages. (Tr. pp. 847-872).

Later, the judge overruled the objection and admitted the text messages stating, "Referring to Court's Exhibit Number 11, the cookies at the top of the page or the text messages at the top of the page, they will be allowed to stay in. The telephone calls with Nish will be allowed to say in. The screen shot will be allowed to stay in. The weather activity shown in green will be out. The continuing text messages between Nish and the defendant will be allowed to remain in on both Page 1 and 2." (Tr. p. 970, lines 3-10). Investigator Phipps, qualified as an expert in forensic examination of digital devices, was then allowed to testify as to the content of the text messages between Appellant and Nish. (Tr. p. 988, line 16 – p. 989, 990, 991, lines 1-6). At the close of the State's case Appellant renewed the objection to the content of the text messages arguing, "Also, Your Honor, we would renew our objection to the admissibility of the cell phone extraction report as a whole. Specifically, the content of the text messages as being hearsay. . . ." (Tr. p. 1003, lines 8-11). The judge again overruled the objection. (Tr. p. 1004, lines 6-9). The trial judge erred in admitting the content of the text messages listed as SMS in State's Exhibit #122 .

"The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. See

Rule 802, SCRE." Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 411, 764 S.E.2d 249, 253 (Ct. App. 2014). The content of the text messages is hearsay and does not meet an exception to the rule against hearsay. The content of text messages from a phone is distinguished from a log of numbers called by that phone, which may meet an exception to the rule against hearsay as a business record. The content of text messages is not a business record. Appellant was prejudiced by the improper admission of hearsay.

4. The trial judge erred in refusing to declare a mistrial based on the fact that the cumulative effect of the errors adversely affected Appellant's right to a fair trial.

After the jury returned the verdicts, Appellant moved for a new trial based on the cumulative error doctrine. (Tr. p. 1099, p. 20 – p. 1100, lines 1-2). The judge denied the motion. (Tr. p. 1100, lines 20-25). The trial judge erred in refusing to grant Appellant a new trial based cumulative error.

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." Id.). In State v. Peterson, 287 S.C. 244, 245, 335 S.E.2d 800, 801(1985) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the South Carolina Supreme Court reversed the death sentences imposed upon Peterson and his co-defendant, Stubbs, and remanded the cases for a new trial "[d]ue to the collective impact of numerous errors committed by the trial court . . ." The Court found that, "Some, if not all, of these arguments have some merit. The combination

of numerous errors committed by the trial court in this death penalty case compels us to reverse and remand for a new trial." Peterson, 287 S.C. at 246, 335 S.E.2d at 801.

In State v. Freeman, 319 S.C. 110, 123–24, 459 S.E.2d 867, 875 (Ct. App. 1995), the South Carolina Court of Appeals found that numerous unsolicited comments by the trial judge and the limitation of cross-examination unduly prejudiced the defendant. In Freeman the court wrote:

> Although each point of error raised alone is insufficient to warrant a new trial, the cumulative effect is enough to require that relief. See Myers v. Moffett, 312 S.W.2d 59, 65 (1958) (conduct of counsel of defendant in interrogation of witnesses and in argument to jury affected trial in such a way as to have substantial, prejudicial influence on verdict, so as to justify granting a new trial); see also Ryan v. United Parcel Service, 205 F.2d 362, 365 (1953) (although perhaps no one of the errors standing alone would call for reversal, in their totality they do). We are aware that every instance of trial error does not entitle an appellant to prevail on appeal. However, the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal. In their totality, the cumulative effect of the lack of latitude allowed the defense in cross-examining the State's investigating officers along with the court's comments, unfairly prejudiced the defense and necessitates the convictions be set aside.

319 S.C. at 123–24, 459 S.E.2d at 875.

In State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), this Court wrote:

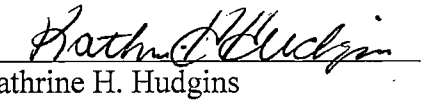
> In our opinion, the facts of this case do not support a finding cumulative errors warranted reversal. While the admission of the search warrant was prejudicial error, the error of refusing to admit the prior shoplifting conviction for impeachment purposes was not prejudicial and the inadvertent mention of the polygraph examination was not error. Respondent must demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial. See Tennant v. Marion Health Care Foundation, 194 W.Va. 97, 459 S.E.2d 374 (1995) (cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial). Here, respondent has failed to show he suffered prejudice warranting a new trial based on cumulative trial error. Compare with State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (although Court held cumulation of errors warranted reversal, each error caused prejudice against appellant); State v. Freeman, 319

S.C. 110, 459 S.E.2d 867 (Ct.App.1995) (finding the cumulative effect of the trial conduct, not trial errors, warranted reversal).

Appellant submits that while each of the above trial errors raised in issues one, two and three, warrant reversal on their own, alternatively, the combination of these errors deprived Appellant from receiving a fair trial.

CONCLUSION

Based on the above arguments presented individually in issues one, two and three, this Court should reverse the convictions and sentences and remand for a new trial. Alternatively, as presented in issue four, this Court should reverse based on the cumulative effect of the three errors.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NATHANIEL ANTRON HUNTER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Nathaniel Antron Hunter, #372378, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 4th day of April, 2018.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of April, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.