STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable William Jeffrey Young, Circuit Court Judge

Opinion No. 5533 (S.C. Ct. App. Filed January 31, 2018)

11-GS-14-0294

THE STATE,

RESPONDENT,

V.

JUSTIN JERMAINE JOHNSON,

PETITIONER

APPELLATE CASE NO. 2014-001219

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

LANELLE CANTEY DURANT
Appellate Defender

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

ATTORNEYS 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 April 26, 2018.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in affirming the trial court's admission of the irrelevant pre-death photographs of each of the victims where their sole purpose was to arouse the sympathy and prejudice of the jury?

II. Whether the Court of Appeals erred in affirming the trial court's allowing one of the State's witnesses, Mason Moore, to testify via Skype in violation of Appellant's right under the Confrontation Clause of the Sixth Amendment and pursuant to S.C. CODE ANN. § 17-23-60, where the State failed to show any important public policy necessitating the use of video testimony and the trial court improperly required Appellant to show prejudice?

III. Whether the Court of Appeals erred in affirming the trial court's finding that Appellant's statement was voluntary where it was coerced by the investigators continuous lies regarding the evidence, threat of the death penalty if he did not change his "story," and emotional appeals and threats related to Appellant's two-year old daughter?

IV. Whether the Court of Appeals erred in affirming the trial court sentencing Appellant to five-years incarceration for possession of a weapon during the commission of a violent crime where (1) Appellant was sentenced to life for murder and first degree burglary and S.C. CODE ANN. § 16-23-490 expressly provides that the "five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime" and (2) the evidence did not show a sufficient nexus between possession of the firearm and the offense of kidnapping?

V. Whether the Court of Appeals erred in affirming the trial court's denial of Appellant's motion for mistrial and request to empanel a new jury where Appellant was led into the courthouse wearing orange handcuffs and accompanied by three to four armed guards prior to voir dire of the jury in violation of his right to due process?

VI. Whether the Court of Appeals erred in affirming the trial court's denial of Appellant's motion for mistrial and request to empanel a new jury where two of the State's witnesses discussed the facts and merits of the case in the hallway within arms-length of jurors in violation of Appellant's Sixth Amendment right to a fair and impartial jury?

STATEMENT OF THE CASE

On July 7, 2011, the Clarendon County grand jury indicted Appellant Justin Jermaine Johnson for the offenses of murder (two counts), attempted murder, first degree burglary, kidnapping, and possession of a weapon during the commission of a violent crime. R. 971. On March 6, 2014, Johnson appeared before the Honorable William Jeffrey Young for a pre-trial Jackson v. Denno[1] hearing. R. 1. On March 10-14 and 18-20, 2014, he appeared before the same judge and a jury for trial on the above offenses. Johnson was represented at the pre-trial hearing and trial by Scott Robinson, and the State was represented by solicitor Ernest Finney and assistant solicitor Christopher DuRant. R. 75. The jury found Johnson guilty of the murders of the minor victim, and of Maxine Caraway, first degree burglary, kidnapping, and possession of a weapon during the commission of a violent crime. He was found not guilty of the attempted murder of Kaisha Caraway. R. 932, ll. 9-24. Judge Young sentenced Johnson to three terms of life imprisonment for the two murders and first degree burglary and thirty years for kidnapping, to be served consecutively, and five years for possession of a weapon during the commission of a violent crime, to be served concurrently. R. 948, l. 19 – 949, l. 17. Trial counsel filed a timely notice of appeal. The Court of Appeals on January 30, 2018 affirmed Appellant Johnson's convictions and sentences. App. 1. On March 28, 2018, the Court of Appeals withdrew the first opinion and refiled a second published opinion again affirming Appellant's convictions and sentences. State v. Johnson, Op. No. 5533 (Ct. App. filed March 28, 2018). App. 19. Appellant counsel filed a second petition for rehearing which was denied on April 26, 2018. App. 49; App. 63. This petition for a writ of certiorari to the Court of Appeals follows.

---

[1] 378 U.S. 368, 84 S.Ct. 1774 (1964).

ARGUMENT

I

The Court of Appeals erred in affirming the trial court's admission of the irrelevant pre-death photographs of each of the victims where their sole purpose was to arouse the sympathy and prejudice of the jury which was not harmless error.

Johnson had two minor children in common with Kaisha Caraway, a son and a daughter. He was accused and convicted of the murder of Kaisha's grandmother, Maxine Caraway, and the murder of his nine-month-old son. He was also accused and convicted of first degree burglary, associated with the alleged forced entry into the home of Maxine and John Caraway; kidnapping, associated with driving Kaisha away from the home where the incident occurred; and possession of a weapon during the commission of a violent crime, associated with possessing or displaying a 12-gauge shotgun during the commission of the murders, kidnapping, and burglary. During the majority of his lengthy interrogation, Johnson maintained that Kaisha's boyfriend, Robert, was responsible and that he only fired one shot, which was directed at Robert when he fled the scene.

The trial court admitted pre-death photographs of both victims over defense counsel's objections that the photographs were irrelevant and unduly prejudicial. R. 117, ll. 1-17; R. 119, l. 12 – 120, l. 3. The solicitor's contrived explanation of relevance was his belief that it was within the jury's province to know something about Ms. Caraway while she was alive. He argued that the picture represented her separate and apart from this proceeding, and was not shown to arouse any passion or prejudice. It is just a picture to substantiate. R. 117, ll. 19-25.

In overruling defense counsel's preliminary objection to the photographs, the trial judge said "I think who the person was is a part of this case." R. 118, ll. 1-2; R. 120, ll. 4-6. This was an abuse of discretion given this State's jurisprudence precluding admission of such photographs where they are not relevant to any matter in dispute. This error was not harmless.

In accordance with State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), and State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), the Court of Appeals properly ruled that the trial court erred in admitting the pre-death photographs of Son and Maxine, because they were not relevant to establishing Johnson's guilt. However, the Court erred in finding that the trial court's error was "harmless based on the overwhelming evidence of guilt in the case and the nature of the error." The Court of Appeals reasoned:

> Johnson's statement and Kaisha's testimony indicate Johnson was the shooter. The physical evidence in the case corroborated Kaisha's testimony. Additionally, the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status. Overall, we conclude the introduction of the photographs could not have reasonably affected the outcome of the trial.

Respectfully, the evidence in this case was not overwhelming and sympathy is not a proper basis for the jury to render a verdict under any circumstance.

Whether an error is harmless depends on the circumstances of the particular case. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Id. "[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008). "To constitute unfair prejudice, the photographs must create a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." Id. (internal citations and quotations omitted).

Beginning with the prejudicial impact of the pre-death photographs themselves, it is notable that the Livingston Court found that though the testimony that accompanied the introduction of the pre-death photograph was "not extensive," "it create[d] a poignant image."

327 S.C. at 19, 488 S.E.2d at 314. Here, the pre-death photographs were admitted in conjunction with the testimony of Maxine Caraway's husband, John Caraway, Jr., and the testimony of the minor victim's mother, Kaisha Caraway. R. 162, l. 20 – 163, l. 20; R. 186, l. 13 – 189, l. 5. Mr. Caraway was conveniently called to testify on what would have been Maxine's sixty-second birthday, a fact the prosecution elicited on direct examination. He also testified that he and Maxine were married for thirty-seven years. R. 162, l. 20 – 163, l. 20. The minor child's picture was admitted while Kaisha Caraway testified about the child's birth and the purported lack of support that she received from Johnson in caring for their children. R. 186, l. 13 – 189, l. 5.

Notably, the pre-death photograph of Maxine was immediately preceded and followed by photographs of her injuries in the numerical order of the State's exhibits. See State's Exhibits 36, 37, 38, and 39 (Photographs). As such, the pre-death photograph appeared between the other photographs of the victim's injuries when presented to the jury during deliberations. In a case such as this, where the jury was also shown postmortem photographs of the victims, both of whom were shot in the face or head with a shotgun, the juxtaposition of the pre-death photographs is even more impactful upon the jury. Compare State's Exhibits 38 and 54 (Pre-death Photographs of Victims) (on file with the Court of Appeals) with State's Exhibits 15 and 36 (Postmortem Photographs of Victims) (on file with the Court of Appeals).

As the Court of Appeals found, the pre-death photographs in this case were not relevant to establishing Johnson's guilt. Rather, their sole and improper purpose was to pull on the heart strings of the jury and encourage them to view the case through a lens of emotion and prejudice. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have

been committed . . . ."). The Court of Appeals' determination that the prejudice to Johnson was somehow lessened because "the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status" is contrary to the fundamental precept of our justice system that a jury's verdict will be rendered based upon the evidence and not emotion. If anything, the fact that there was an intrinsically emotional element to the case increased the prejudice to Johnson from the admission of the pre-death photographs.

The Court of Appeals further erred in finding that there was overwhelming evidence of Johnson's guilt. This Court seems to have adopted Respondent's harmless error argument, which was premised only upon the evidence that supported the solicitor's theory of the case. See Brief of Resp., pp. 6-14. However, a harmless error analysis cannot be based solely upon the State's perceived strength of its case alone. See Holmes v. South Carolina, 547 U.S. 319, 331, 126 S.Ct. 1727, 1735 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt"). While that evidence may have been sufficient to present the case to a jury, it fails to establish overwhelming evidence of Johnson's guilt. See Langley, 334 S.C. at 101, 515 S.E.2d at 649.

Both Respondent and the Court of Appeals omitted that there was an unknown third parties' DNA and footprint found at the crime scene and never identified. R. 701, ll. 16-24; R. 702, ll. 7-13; R. 663, l. 10 – 666, l. 6; R. 674, ll. 1-8. Though Kaisha Caraway later changed her story, both she and Johnson originally told law enforcement that Kaisha's boyfriend, Robert, shot the victims. State's Ex. 55 (Recording of 911 calls) (on file with the Court of Appeals); State's Ex. 59-63 (DVDs of Apr. 6, 2011 Interrogation). Johnson maintained that Robert was the responsible

party throughout the majority of his interrogation. Johnson continues to challenge the admissibility of his statements to police. However, to the extent that the interrogation was admissible, the defense's position was that Johnson eventually provided an account consistent with the information fed to him by the officers.

Regarding the physical evidence, the discovery of Maxine Caraway's blood on Johnson's shoe and gunshot residue on Johnson's hand were explained by Johnson's admission that he was there when the incident occurred and fired one shot at Robert as he fled. Thus, the only evidence that actually placed Johnson as the triggerman when the deadly shots were fired was the testimony of Kaisha Caraway, who was angry with Johnson due to what she perceived as his deficient support for their children and his possible infidelity. In light of the gaps and flaws in the State's evidence, there is a reasonable probability that the improper admission of the pre-death photographs affected the outcome of the trial. See State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003) ("A defendant is not required to present a defense and can instead rely entirely on the weakness of the State's case since the State has the burden of proving guilt beyond a reasonable doubt."). Johnson is accordingly entitled to reversal of his convictions and a new trial.

ARGUMENT

II

The Court of Appeals erred in affirming the trial court's allowing one of the State's witnesses, Mason Moore, to testify via Skype in violation of Appellant's right under the Confrontation Clause of the Sixth Amendment and pursuant to S.C. CODE ANN. § 17-23-60, where the State failed to show any important public policy necessitating the use of video testimony and the trial court improperly required Appellant to show prejudice which was not harmless error.

Investigator Mason Moore was one of the two officers who conducted Johnson's interrogation on April 6, 2011 and participated in a second interview of Johnson on April 7, 2011.

Defense counsel did not object to Moore testifying via Skype[2] for purposes of the pre-trial Denno hearing held March 6, 2014, but indicated that he may object to that for trial purposes. R. 4, ll. 1-7.[3] The next day the trial court ruled regarding the admissibility of Johnson's statement, after which Judge Young began to address "the question as to the testimony by Skype whenever the trial begins." He indicated that he had reviewed the relevant case law and "checked around with other circuit court judges." Judge Young found that "apparently it's a pretty common practice, provided that there are certain situations." R. 63, l. 2 – 64, l. 1. He noted that in the present case the witness was 2500 miles away, was an "ancillary witness," "everything that was going on with him is available on videotape," and that there was another officer in the room for the majority of the interrogation. R. 63, ll. 1-9. He thus found that there would not be any prejudice to Johnson by allowing the testimony of Moore via Skype. R. 63, ll. 9-11.

---

2 Skype is a telecommunications application software product that specializes in providing video chat and voice calls from computers, tablets, and mobile devices via the Internet to other devices.

3 Two pages of the pre-trial hearing transcript are denoted as page "3." This citation refers to the second page 3.

The Court of Appeals properly ruled that the trial court erred in admitting the testimony of Investigator Mason Moore. Further, that Court erred in ruling that the circuit court's erroneous decision to permit Investigator Moore to testify via Skype was harmless. The reasoning for the finding of harmlessness set forth in the Court's opinion was:

> We are cognizant that Johnson's confession was an important piece of evidence in this case. Likewise, we recognize the admission of his confession turned on a finding of voluntariness that must be proven by the State through its witnesses and evidence. In this case, Investigator Coker's testimony plus the recordings of Johnson's interrogation met this burden. Investigator Moore's testimony was only relevant to events *not* presented by the videos or covered by Investigator Coker. Johnson does not allege wrongdoing by Investigator Moore other than through conduct contained in the videos. Consequently, Investigator Moore's testimony was largely cumulative to what was already before the jury.

This ruling essentially condoned the approach taken by the trial court in this case, which required the defense to prove prejudice at the trial level rather requiring the prosecution to meet its burden of showing that the video testimony was reliable and, most importantly, that denial of the right to confrontation was necessary to further an important public policy. R. 63, l. 2 – 69, l. 11; Maryland v. Craig, 497 U.S. 836, 850 (1990); State v. Bruce, 412 S.C. 504, 772 S.E.2d 753, 755-56 (2015) ("[I]t is clearly improper for the trial court to perform a harmless error analysis on its own evidentiary ruling. Trial courts cannot sit in judgment of their own rulings and proceedings.").

As more fully discussed in the brief and reply brief of appellant, the right to confrontation attaches to every witness and the proper inquiry for determining harmlessness is the impact on the jury's verdict. "The United States Supreme Court has dispensed with the notion that some witnesses for the prosecution are exempt from the Confrontation Clause." State v. Rogerson, 855 N.W.2d 495 (Iowa 2014) (citing Melendez–Diaz v. Massachusetts, 557 U.S. 305, 313-14 (2009) ("Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."). In State v. Schwartz, 327 P.3d

1108, 1116 (N.M. App. 2014), the court found that "even if the video testimony was cumulative, improperly admitted evidence that is cumulative is not ipso facto harmless beyond a reasonable doubt. Rather, even cumulative evidence may be harmful if it had an impact on the jury's verdict." Id. (internal citation and quotations omitted). Thus, the court held that, despite the State's efforts to minimize the role of witness Labance's video testimony, "there is no reasonable possibility that this evidence did not contribute to Defendant's conviction." 327 P.3d at 1117. The Schwartz court likewise rejected the State's argument that the video testimony was harmless because the documents admitted through the witness "could have been authenticated another way." The court ruled that "the State chose to rely on Labance to get the documents admitted. Having made that choice, the State cannot now argue, simply because there was another method for admission of the documents, that the jury did not rely on Labance's testimony to convict Defendant." Id. Accordingly, the court reversed Schwartz's convictions and remanded for a new trial. Id. at 1119.

Here, the State chose to call Investigator Moore as a witness and he was not merely cumulative. Their purpose was obvious, as a review of the entirety of Johnson's interrogation made clear that Coker was the "bad cop" and Moore was the "good cop." In fact, one of the DVDs mysteriously cut off just as Coker was yelling at Johnson. See State's Ex. 59 (DVD of Apr. 6, 2011 Interrogation) (on file with the Court of Appeals). Given that ultimately the jury would determine the voluntariness of Johnson's statements and the breaks in the video recording, the State did not want to rely solely on Coker's testimony regarding the interrogation. See State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (stating that after the trial judge makes an initial determination allowing a confession into evidence, "[i]t then is for the jury ultimately to decide

whether the confession was voluntary."), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

In addition to Coker's lies and threats to Johnson shown on the videos of the interrogation, his credibility was further damaged on cross-examination, where he made bold, unsupported accusations against Johnson and minimized his conduct during the interrogation as interview "techniques." R. 461, l. 4 – 501, l. 15. Thus, the State relied upon Moore's testimony to convince the jury of the voluntariness of Johnson's confession. As a result, it cannot be said that Moore's testimony did not impact the verdict and that its improper admission was harmless beyond a reasonable doubt. Johnson is accordingly entitled to reversal of his convictions and a new trial.

ARGUMENT

III

The Court of Appeals erred in affirming the trial court's finding that Appellant's statement was voluntary where it was coerced by the investigators continuous lies regarding the evidence, threat of the death penalty if he did not change his "story," and emotional appeals and threats related to Appellant's two-year old daughter.

During the eight hours of active interrogation, which followed a three-hour collection of gunshot residue, the investigators repeatedly lied to Johnson about the evidence that was collected at the scene, requiring Johnson to account for alleged inconsistencies that they created. The investigators also told Johnson that if he continued to tell them the same thing, he was "going to go prison...if not the death penalty," threatened to tell his two-year old daughter that he was a "cold-blooded killer," and told him "you aren't going to be seeing your daughter." State's Ex. 59-64 (DVDs of Apr. 6, 2011 Interrogation) (on file with the Court of Appeals). Under the totality of the circumstances Johnson's statements were not voluntary.

The Court of Appeals ruled that Johnson's statement to law enforcement was voluntary despite law enforcement's misrepresentations of evidence, threat of the death penalty, and emotional appeals and threats related to Johnson's two-year old daughter. Finding that none of these factors alone rendered Johnson's statement involuntary, that Court concluded that "the circuit court did not abuse its discretion in admitting Johnson's statement as the evidence supports a finding his will was not overborne by the various tactics employed during his interrogation." As discussed more fully in the brief of appellant, the threats and coercion utilized by the officers in this case to extract Johnson's alleged confession rendered his statements involuntary and inadmissible. Brief of Appellant, pp. 3-7 and 41-45.

In the initial phase of review by the trial judge, if a defendant was advised of his Miranda rights, but chose to make a statement anyway, the "burden is on the State to

prove *by a preponderance of the evidence* that his rights were voluntarily waived." State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (emphasis in original). The State bears this burden of proof even where a defendant has signed a waiver of rights form. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980), *cert. denied*, 449 U.S. 1037, 101 S.Ct. 616 (1980). The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused. State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982). When considering the voluntariness of a statement, the court and jury should consider "not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745 (1993) (omitting internal citations). "Coercion is determined from the perspective of the suspect." State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). Statements given pursuant to threats or under inherently coercive circumstances are not admissible. See Mincey v. Arizona, 437 U.S. 385, 398-99, 98 S.Ct. 2408 (1978); Minnesota v. Murphy 465 U.S. 420, 427, 104 S.Ct. 1136 (1984).

Here, the trial judge's assessment fell far below the required consideration of the totality of the circumstances. While Johnson was read his Miranda rights and offered breaks, food, and bathroom facilities, Judge Young failed to consider the false, coercive, and threatening statements made by the officers throughout the lengthy interrogation or Johnson's lack of experience with the criminal justice system. See R. 63, ll. 10-21. The investigators in this case continuously lied about the evidence in an effort to "wear on his [Johnson's] psyche" and "break him [Johnson] down." They told Johnson that the trunk of his car was analyzed and only his fingerprints were found, that his shoe matched a footprint left from kicking in the door, that his

ring matched a wound left on Kaisha, and that he could be heard in the background of the 9-1-1 calls made by Maxine and Kaisha. None of that was true. R. 463, l. 2 – 484, l. 16; R. 487, l. 13 – 488, l. 2; State's Ex. 55 (Recording of 911 calls) (on file with the Court of Appeals).

Further, investigators told Johnson that if he continued to tell them the same thing he was either going to go to prison or get the death penalty. Ex. 59 (DVD of Apr. 6, 2011 Interrogation, 1:17:33) (on file with the Court of Appeals). Immediately prior to Johnsons' alleged confession they spoke with him about what they would tell his daughter about him – threatening to tell her that he was a cold-blooded killer, that he did not "give a shit about her," and that the only reason he did not kill her was because he ran out of shells. They also told him that he was not going to get the opportunity to see his daughter. Ex. 64 (DVD of Apr. 6, 2011 Interrogation, 0:20:21) (on file with the Court of Appeals). Both investigators denied making any threats or coercive statements to Johnson, but agreed that it was only after the discussion of Johnson's daughter that Johnson changed his story. Coker also agreed that Johnson's original story matched the evidence at the scene and that it was countered only by Kaisha's statement and his alleged confession that followed seven hours of Johnson proclaiming his innocence. R. 387, ll. 8 – 402, l. 3; R. 461, l. 4 – 462, l. 20; R. 484, l. 17 – 485, l. 1; R. 496, l. 24 – 501, l. 15.

What the Court of Appeals missed in its analysis is that the officers increased the coercive nature of their "tactics" throughout the lengthy interrogation because they were continually unsuccessful in extracting a confession. The totality of the circumstances in this case necessitated exclusion of his statement to police. Johnson is accordingly entitled to reversal of his convictions and a new trial.

ARGUMENT

IV

The Court of Appeals erred in affirming the trial court sentencing Appellant to five-years incarceration for possession of a weapon during the commission of a violent crime where (1) Appellant was sentenced to life for murder and first degree burglary and S.C. CODE ANN. § 16-23-490 expressly provides that the "five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime" and (2) the evidence did not show a sufficient nexus between possession of the firearm and the offense of kidnapping.

Johnson was sentenced to a term of life for the offenses of murder and first degree burglary. R. 948 – 949. Under S.C. CODE ANN. § 16-3-20(A), a life imprisonment for murder "means until the death of the offender without the possibility of parole " such that Johnson was sentenced to life without parole for the offenses of murder and first degree burglary. He was also sentenced to a concurrent term of five years for possession of a firearm during the commission of a violent crime.

"If a person is in possession of a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime . . . he must be imprisoned for five years, in addition to the punishment provided for the principal crime." S.C. CODE ANN. § 16-23-490(A). This statute expressly provides, however that "the five-year sentence does not apply in cases where . . . a life sentence without parole is imposed for the violent crime" Id.

Though the error in imposing a sentence for the weapons offense was not preserved for appeal, Johnson asked the Court of Appeals to vacate the sentence in the interest of judicial economy. The majority refused to do so because "the State did not concede the circuit court erred in sentencing Johnson to five years for possession of a weapon during the commission of a violent crime." In the concurring opinion authored by the Honorable Paul E. Short, Jr., he agreed that the trial judge erred in sentencing Johnson for possession of a firearm in the commission of a violent crime because S.C. Code Ann. § 16-23-490(A) prohibits such a sentence

where life imprisonment without parole is imposed and would vacate the sentence in the interest of judicial economy.

Kaisha's testimony at trial made clear that the shotgun was left at the house and was not in the vehicle with them after they left. R. 230, l. 23 – 232, l. 8; R. 249, l. 25 – 251, l. 8. As such, the evidence would not have supported a conviction for possession of a firearm during the commission of the kidnapping. Johnson's sentence for the weapons offense should accordingly be vacated, or at the very least remanded for a finding regarding the nexus requirement.

ARGUMENT

V

The Court of Appeals erred in affirming the trial court's denial of Appellant's motion for mistrial and request to empanel a new jury where Appellant was led into the courthouse wearing orange handcuffs and accompanied by three to four armed guards prior to voir dire of the jury in violation of his right to due process.

On the first day of trial, Johnson was escorted into the courthouse wearing street clothes, orange handcuffs, and surrounded by three to four armed jailhouse personnel. Within an hour, Johnson appeared before the jury panel for voir dire in those **same** street clothes. How many of the jurors saw Johnson and whether it would influence their ability to be fair could not properly be determined through voir dire because it would have "re-rung the bell." R. 92, ll. 2-18; R. 93, l. 19 – 94, l. 25; R. 95, ll. 5-15. Despite the early stage of the proceedings and his finding that defense counsel's argument was "compelling and sincere," the trial judge denied the motion for mistrial and request to empanel a new jury. R. 95, ll. 16-22.

The Court of Appeals found that the trial court did not err in denying the motion for a mistrial because the record failed to show that any juror observed the activity. The Court of Appeals erred because due process requires that persons accused of a crime receive the "fundamental liberty" of a fair and impartial trial, and that such persons be afforded the presumption of innocence. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975). To implement this presumption courts must guard against factors which may "undermine the fairness of the fact-finding process" and thereby dilute "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt...." Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692 (1976). "The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and

innocent man, except as the necessary safety and decorum of the court may otherwise require." Eaddy v. People, 174 P.2d 717, 718-19 (Colo. 1946).

While the present case did not involve a defendant forced to stand trial in prison garb or shackled, the same constitutional rights and danger to the presumption of innocence are presented.

ARGUMENT

VI

The Court of Appeals erred in affirming the trial court's denial of Appellant's motion for mistrial and request to empanel a new jury where two of the State's witnesses discussed the facts and merits of the case in the hallway within arms-length of jurors in violation of Appellant's Sixth Amendment right to a fair and impartial jury.

Prior to the voir dire of the jury, defense counsel overheard two of the State's witnesses, Investigator Richards and Robert Brogdon, discussing the facts and merits of the case outside of the courtroom within earshot of potential jurors. R. 95, l. 25 – 96, l. 24. The voir dire of the jurors regarding whether they had heard anything about Johnson's case was insufficient to address this matter, as they were unlikely to realize that the hallway discussion involved Johnson's case until Richards or Brogdon actually testified or they heard more details beyond just the indictments. R. 87, ll. 1-6; R. 97, ll. 13-18. Given that this matter was brought to the court's attention before the jury was even sworn, the trial court should have granted the motion for mistrial.

A defendant in a criminal prosecution is constitutionally guaranteed the right to a fair trial by an impartial jury. U.S. CONST. AMEND. VI; S.C. CONST. ART. I, § 14. "It is the duty of the trial [court] to see that a jury of unbiased, fair and impartial persons is impaneled." State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 118 (1998). In State v. Cameron, the Court held that where there is a private communication between a court official and a member of the jury, "a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." 311 S.C. 204, 208, 428 S.E.2d 10, 12 (1993) (quoting Holmes v. United States, 284 F.2d 716, 718 (4th Cir. 1960)).

While the present case involved indirect communication to the potential jurors by State's witnesses rather than a court official, there is a parallel importance in protecting the sanctity of the jury system from any outside influence. The Cameron court noted that "[j]urors are simply

not to consider the opinions of neighbors, officials or even other juries." Id. (quoting State v. Thomas, 287 S.C. 411, 413, 339 S.E.2d 129, 129 (1986)). Even more troubling here is the trial court's blasé attitude toward the statements made by the State's witnesses in front of the potential jurors. 413, 339 S.E.2d 129, 129 (1986)).

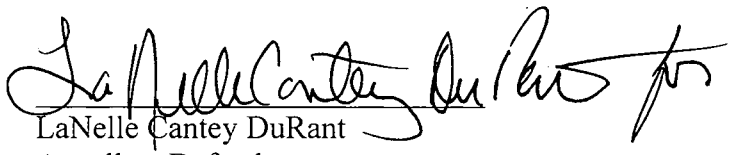
The Court of Appeals found that the circuit court did not err in denying Johnson's motion for a mistrial based on his attorney having overhear two witnesses discussing the evidence. The Court found that there was no evidence that any juror overheard the comments by the witnesses nor was prejudiced by them. This was error because if there were any chance that a juror overheard these comments, the trial court should have granted a mistrial to insure the sanctity of the jury's decision. There was no way to determine if a juror were prejudiced.

Johnson is accordingly entitled to a new trial based on this violation of his constitutional right to a fair and impartial jury.

CONCLUSION

For the foregoing reasons, Appellant Johnson respectfully requests this Court to grant the petition for a writ of certiorari; reverse his convictions and sentences; and grant him a new trial on Issues I-IV; and vacate his sentence Issue V (possession of a weapon during the commission of a violent crime.)

Respectfully Submitted,



LaNelle Cantey DuRant
Appellate Defender

Laura R. Baer
Appellate Defender

This 23rd day of May, 2018.

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAY 23 2018
S.C. SUPREME COURT

Certiorari to Clarendon County
Honorable William Jeffrey Young, Circuit Court Judge

Opinion No. 5533 (S.C. Ct. App. filed 1/31/2018)
11-GS-14-0294

THE STATE,

RESPONDENT,

V.

JUSTIN JERMAINE JOHNSON,

APPELLANT

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 William Edgar Salter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Justin Jermaine Johnson, #359323, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 23rd day of May, 2018.

LaNelle Cantey DuRant
Appellate Defender

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE ME this 23rd day of May, 2018.

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