ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE, RESPONDENT,

V.

MARK ANTHONY BAYNE, APPELLANT

APPELLATE CASE NO 2016-000809

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

The *Allen* charge given by the trial court was unconstitutionally coercive where it was improperly directed to the juror or jurors voting not guilty; it impermissibly commented on the facts of the case; and inaccurately told jurors to consider in their deliberations the burden that a second trial would impose on the parties, the trial court, and future jurors.

II.

The trial court erred by refusing to order a mistrial after key State's witness, Nikiki Gardner, testified that Appellant had been previously incarcerated as any relevance this testimony had was substantially outweighed by its unduly prejudicial effect, since it impermissibly informed the jury that Appellant had a prior criminal record, and thereby diluted the presumption of innocence.

STATEMENT OF THE CASE

On September 22, 2015, the Greenville County Grand Jury indicted Appellant, Mark Anthony Bayne, for two counts of armed robbery, two counts of kidnapping, one count of criminal conspiracy, one count of carjacking, and two counts of possession of a weapon during the commission of a violent crime. R. 383 – 388.

On April 6-8, 2015 Appellant proceeded to trial before the Honorable D. Craig Brown and a jury. John Abdalla represented Appellant, and Assistant Solicitor Justin Holloway represented the State.

The jury found Appellant guilty of one count of armed robbery, one count of possession of a weapon during the commission of a violent crime, one count of kidnapping, and carjacking. R. 357, l. 18 – 359, l. 15. The trial court sentenced Appellant to twenty years imprisonment. R. 368, l. 19 – 369, l. 15.

This appeal follows.

STATEMENT OF THE FACTS

Introduction

On October 18, 2016, Vickie Trammell and her daughter Nikki Gardner knocked on the door of Vickie's neighbor Aaron "Rich Boy" Shunk. The women were hoping that Shunk would sell them pain pills. Shunk was alone at his house celebrating his birthday. He was highly intoxicated. R. 84, l. 20 - 97, l. 2.

Shunk told them that he did not have any pain pills, but would buy some for the women if they drove him to his drug dealer. *Id.* Shunk and Vickie Trammell drank several beers and smoked marijuana for an unknown period of time before all three got into Shunk's 2005 gold colored Dodge pickup with Gardner driving. *Id.*

During their drive to the drug dealer's house, Shunk started propositioning Gardner for sex and groping her. Gardner and Vickie began arguing with Shunk over his treatment of Gardner. The argument between the two women and Shunk escalated. Vickie called her son, Donald Trammell, and told him about Shunk's insulting his sister, Gardner. *Id.*

Gardner, who was driving during the altercation, decided that the group would give up on buying drugs and simply head back to Vickie Trammell's residence (hereinafter "Trammell residence"). She decided to drop Shunk off after she dropped off her mother. R.130, l. 20 - 139, l. 23. Donald Trammell was not allowed to live at the Trammell residence at the time of the incident.

As the group stopped in the driveway of the Trammell residence, Donald Trammell, Appellant, Larry Trammell (Donald's father), and Appellant's girlfriend, Corrie Morgan, approached the truck from behind the trailer. *Id.* Trammell, Appellant, and Morgan were surprised to see Vickie Trammell, Gardner, and Shunk.

As he reached the pickup truck, Trammell pulled out a pistol and forced Shunk out of the truck. He ordered his mother and sister inside the Trammell residence. Shunk was hit in the mouth and escorted to the back porch of the residence. *Id.* Appellant drove Shunk's pickup truck around into the backyard. Shunk was unable to describe or identify any of his assailants other than Trammell. Shunk could not identify any of his attackers with the exception of Trammell. R. 55, ll. 1-24.

Five to ten minutes later, a local drug dealer and family friend of the Trammells, David Ennis arrived at the Trammell residence. R. 180, l. 4 - 196, l. 21. Trammell had earlier arranged to buy methamphetamine from Ennis. *Id.* Trammell would testify at trial that he forced Shunk into the back yard and his sister and mother into the trailer because he did not want to startle Ennis and did not want to fight Shunk until he had purchased methamphetamine from Ennis. R. 197, l. 3 - 211, l. 11

Trammell further averred that he had not initially planned to rob Ennis, a man he had known since he was a child. *Id.* Trammell explained to the solicitor:

> When [Ennis] arrived, I walked to the -- he pulled in the driveway to the left, in front of the trailer. And I walked up to the car and he rolled his window down. And he left the car running, but it was late that night. And so I told him that -- because my grandpa was there, I told him to turn the car off. And so I leaned on the window seal. And when I did, he reached in the -- the little glove compartment beside him and got his scales and stuff out, and reached -- then he reached under the -- under his seat and pulled a big bag of dope out to start -- because I had called him to bring some dope down to -- or I had called him to bring some dope, and he told me to meet him at my mom's house. . . .
>
> [W]hen he pulled the dope out, it -- it -- he had a large amount of it and it surprised me. It put me in shock. And so at that time, I just reached in and snatched the bag of dope from him.
>
> I had a big hoodie on and I put it in my hoodie. And he looked at me like I was crazy, and wanted to know if I was really -- he

> thought I was kidding with him, you know, or playing with him at the time. And, you know, I let me know that I wasn't.
>
> So, um, at that time, I told him -- he -- I told home that I wasn't playing or whatever. So I told him, I said, well, I want your money too. And he said, no, he wasn't giving it to me.
>
> So I actually reached inside the car and struck -- he didn't force me or nothing. And I struck my hand in this --in this side of his pocket, closest to the door, and pulled out a wad of money.

R. 203, l. 1 - 205, l. 5.

This spur of the moment robbery netted Trammell twelve hundred dollars in cash and a substantial amount of methamphetamine. R. 205, ll. 6-25. In an effort to address Appellant's armed robbery charge, the solicitor asked Trammell, if there "was some threat or intimidation" involved in his theft from Ennis. *Id.*

Trammell responded, "**No. Actually I just reached in and snatched it. . . . I wasn't even planning on doing it or anything, you know, because I had the money to buy what I told him to bring. And -- but, when I seen it, I just snatched it from him**. . . ." R. 205, l. 20 - 206, l. 3 (*emphasis added*). At the State's prompting, Trammell claimed that Appellant was rummaging around Ennis' backseat while holding a shotgun as Trammell started walking away from Ennis' car with the stolen methamphetamine, cash, and Ennis' cell phone. R. 207, l. 3 - 208, l. 15.

According to Trammell, Appellant was otherwise uninvolved in the incident as the theft from Ennis was spontaneous act on Trammell's part. Trammell could not testify as to whether or not Appellant actually stole anything from Trammell. After stealing from Ennis, Appellant drove Gardner and Vickie Trammell away from the Trammell residence in Shunk's gold Dodge pickup. R. 210, l. 7 - 211, l. 11. Trammell followed in a borrowed Extera.

Following the theft, Ennis drove home and called the police. He was able to identify

Trammell as the man who robbed him, but could not identify anyone else involved. Like Shunk, he failed to identify Appellant in a single-photograph show-up and instead identified Appellant's son as one of the robbers. R. 238, l. 22 - 243, l. 16. After staying on the back porch of the Trammell residence for a period of time, Shunk ran to his house and called police. R. 56, l. 6 - 64, l. 9.

On October 23, 2015, law enforcement received "information" that a gold Dodge pickup truck was parked at Corrie Morgan's residence. R.72, l. 9 - 75, l. 4. As police pulled up to the house, the gold pickup fled. A high speed chase briefly ensued. The pickup truck escaped the pursuing officers. *Id.*

On October 25, 2015, police visited Appellant's residence and arrested Trammell. Law enforcement found the keys to Shunk's stolen Dodge pickup in Trammell's shoes. R. 222, l. 14 - 225, l. 2. Police also found to fake pistols in a pile of Trammell's dirty clothes. Appellant was not home when Trammell was arrested, but was arrested the next day at Morgan's house. R. 234, l. 13 - 235, l. 19.

Appellant's Trial

Ennis never testified. He refused to appear after being served. Likewise, Appellant's girlfriend Corrie Morgan did not testify. Larry Trammell, Donald Trammell and Nikki Gardner's father and the estranged husband of Vickie Trammell, also did not testify. Appellant's son did not testify.

The State was forced to rely on testimony Vickie Trammell, Nikki Gardner, Donald Trammell, and Aarron Shunk. Vickie Trammell and Gardner stated that they did not witness the incident between Trammell and Ennis. Trammell had ordered both of them into the Trammell residence before he forced Shunk around the back of the residence at gunpoint. Both received

substantial benefits from the State in exchange for their testimony.

As detailed above, Trammell testified that his theft of methamphetamine and money from Ennis was not preplanned. He simply decided to take Ennis' unexpectedly large amount of methamphetamine and money when the opportunity presented itself. R. 196, l. 2 - 211, l. 3. With respect to Appellant, all Trammell could testify to was that Appellant was looking through the backseat of Ennis' truck while holding a shotgun. *Id.* Despite police searching both his house and Morgan's house, no shotgun was ever recovered, nor was the State able to produce evidence that Appellant actually took any items from Ennis' truck.

Like his mother and sister, Trammell received substantial benefits for his testimony. The State allowed Trammell to plead guilty to a lesser included offense of attempted armed robbery, as well as burglary second, breaking into a motor vehicle, and grand larceny. His remaining charges of possession of a weapon during the commission of a violent crime, kidnapping, two counts armed robbery, two counts of criminal conspiracy, and carjacking were dismissed. R. 218, l. 5 - 225, l. 24. He received a five year sentence that also included the termination of his probation.

Jury Deliberations

Jurors began deliberations at 3:19 p.m. on April 7, 2016. At 4:18 p.m., jurors requested an explanation of the law of hand-of-one, hand-of-all. R. 340, l. 1 - 343, l. 8. After being re-charged on the applicable law, the jury resumed deliberations. At around 5:30 p.m., the jury asked, "[i]f we can't come to a verdict on a charge, what do we do?" R. 343, ll. 19-24.

Defense counsel requested that the Court not give any instruction, believing that the jurors' verdicts on the remaining charges may render moot the impasse over the single charge. The Court disagreed and announced its intention to give an *Allen* charge. R. 344, l. 13 - 346, l.

20. The State readily agreed to the *Allen* charge. Defense counsel objected, noting that "I always object to an *Allen* charge and I know there's a lot of case law both ways on that. *Id.*

When the jurors re-entered the room, the Court gave its versions of the *Allen* charge:

> You've indicated that you have been unable to agree on a verdict in this case. And as it pertains to this note, it says as to a -- "a" charge. As I instructed you earlier, ladies and gentlemen, the verdict of the jury must be unanimous.
>
> And in this particular case, there are eight different counts. **Your verdict must be unanimous as to each count.** When a manner -- when a matter -- any matter is in dispute, it isn't always easy for even two people to agree. **So when 12 people must agree, it becomes even more difficult. In most cases, absolute certainty cannot be reached.**
>
> However, you have a duty to make every reasonable effort to reach a unanimous verdict as to each count. In doing this, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way.
>
> Discuss your differences with open minds. Although the verdict of the jury as to each of these charges must be unanimous, everyone of you has the right to your own opinion.
>
> The verdict that you agree on must be your own verdict, the result of your own convictions, and you should not give up your firmly held beliefs merely to be in agreement with your fellow jurors.
>
> **The majority should consider the minority's position. And the minority should consider the majority's position. You should carefully consider and respect the opinions of each other, and re-evaluate your position for reasonableness.**
>
> If you do not agree on a verdict in this case, as to a charge, or as to more than one charge, the court would have to declare a mistrial as to those charges -- as to that charge or those charges.
>
> **In that case, it does not mean that anyone wins. It means that at some future time, that me or some other judge will try this case with some other jury -- some other jury sitting where you now sit. The same participants will come and the same lawyers will ask basically the same questions and get basically the same**

> **answers, and we will go through the whole process again.**
>
> **You were selected, ladies and gentlemen, in the same manner and from the same source as any future jury will be. And there is no reason for me to suppose the case will ever be submitted to 12 more competent jurors than you, or that more or clearer evidence will be produced on one side or the other.**
>
> I, therefore, ask that you return to your deliberations at this time.

R. 346, l. 24 - 349, l. 15 (*emphasis added*). Jurors resumed deliberations at 5:39 p.m. At sometime around 6:30 p.m., jurors informed the Court that they were still struggling with apply the concept of hand-of-one, hand-of-all. *Id.* After conferring with the attorneys, the trial court decided to release the jurors for the day.

Deliberations resumed at 9:30 a.m. on April 8, 2016. At the start of their second day of deliberations, the Court sent jurors a written instruction on the hand-of-one, hand-of-all. R. 355, l. 3 - 356, l. 25. At 10:30 a.m., the jury announced that they had reached a verdict in Appellant's case.

The jury found Appellant guilty of the armed robbery and kidnapping of David Ennis. Appellant was also found guilty of possession of a weapon during the commission of a violent crime and carjacking. The jury found Appellant not guilty with respect to the remaining charges. R. 357, l. 15 - 359, l. 20. Appellant was also found not guilty of conspiracy. *Id.*

ARGUMENTS

I.

The *Allen* charge given by the trial court was unconstitutionally coercive where it was improperly directed to the juror or jurors voting not guilty; it impermissibly commented on the facts of the case; and inaccurately told jurors to consider in their deliberations the burden that a second trial would impose on the parties, the trial court, and future jurors.

Discussion

An *Allen* charge is a supplemental instruction that a trial court may give to a purportedly deadlocked jury. *Allen v. United States*, 164, U.S. 492 (1896). Under our current jurisprudence a impartially given *Allen* charge is permissible. Our courts and those of other jurisdictions have long recognized the potential coercive impact of an *Allen* charge on jurors who are either in the minority or in favor of acquittal. *See Dawson v. State*, 352 S.C. 15, 572 S.E.2d 445 (2002) (holding that counsel was ineffective for failing to object to constitutionally coercive *Allen* charge.) *see also Workman v. State*, 412 S.C. 128, 771 S.E.2d 639 (2015) (*Allen* charge was unconstitutionally coercive and counsel was ineffective for failing to object); *State v. Thomas*, 342 P.2d 197 (Az. 1959) (prohibiting the use of *Allen* charges).

As with any jury instruction, an *Allen* charge must correctly state the law and the juror's obligations. *Sheppard v. State,* 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). Court have also recognized that there may simply be trials where the facts and circumstances render an *Allen* charge improper. *Fields v. State*, 487 P.2d 831 (AK 1971). Therefore, "'[w]hether an *Allen* charge is unconstitutionally coercive must be judged in its context and under all the circumstances.'" *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988)). This State's Supreme Court has explained:

> In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel. Instead, an *Allen* charge should be even-handed, directing both the majority and the

> minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. **It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.**

Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (internal citations omitted)(*emphasis added*).

In *Tucker*, the South Carolina Supreme Court adopted the standard set by the United States Supreme Court in *Lowenfield* to determine whether an *Allen* charge is unconstitutionally coercive. In *Lowenfield*, the Supreme Court considered the following factors:(1) whether there are indications that the charge was directed to the minority juror(s); (2) whether the judge used mandatory, suggestive or threatening language; (3) the length of deliberations before the charge, after the charge, and in total; (4) whether the jury requested additional instructions; and (5) whether there was an inquiry into the jury's numerical division, which is generally coercive. *Tucker*, 346 S.C. at 492, 552 S.E.2d at 716 (citing *Lowenfield*, 484 U.S. at 237).

Applying the above outlined factors, the Supreme Court found the *Allen* charge given in *Tucker* was unconstitutionally coercive. Specifically, the court concluded (1) when viewed as a whole, the jury charge was directed to the minority juror or jurors; (2) while the trial court did not use mandatory language, the jury was told of the importance of a unanimous verdict; (3) even though the jury informed the trial judge of their numerical split, the judge failed to instruct the jurors not to disclose their division in the future; and (4) Tucker's jury returned a verdict approximately an hour and a half after receiving the *Allen* charge. *Tucker*, 346 S.C. at 492-94, 552 S.E.2d at 717-18.

Here, the *Allen* charge in Appellant's trial was unconstitutionally coercive. The charge was given after jurors had already informed the court that they were at an impasse regarding the application of the law of hand-of-one, hand-of-all. R. 340, l. 1 - 343, l. 8. Under the

circumstances, such a question clearly indicated that jurors could not decide whether Appellant had acted in conjunction with Trammell to steal from Ennis. R. 339, l. 3 - 343, l. 10.

Given these facts, the court's admonition that "[i]n most cases, absolute certainty cannot be reached" was obviously directed to the juror or jurors voting in favor of acquittal. R. 347, l. 11 - 349, l. 23. Similarly, the court's instruction that jurors "carefully consider and respect the opinions of each other, and re-evaluate your position for reasonableness" was also directed towards jurors who believed the State had not met its burden of proving Appellant guilty beyond a reasonable doubt. *Id.*

In addition, the court's *Allen* charge impermissibly commented on the facts of the case. *State v. Sosebee,* 284 S.C. 411, 326 S.E.2d 654, n. 1 (1985) (*citing State v. Pruitt*, 187 S.C. 58, 196 S.E. 371 (1938)(holding that trial courts should refrain from making any comment on the facts of the case); *see also State v. Kennedy*, 272 S.C. 231, 250 S.E.2d 338 (1978); *State v. Smith*, 288 S.C. 329, 342 S.E.2d 600 (1986). Specifically, the trial court informed jurors that if they could not reach a verdict "the same participants will come and the same lawyers will ask basically the same questions and get basically the same answers, and we will go through the whole process again." R. 347, l. 11 - 349, l. 23.

A similar instruction was found by the Supreme Court of Indiana to have "dangerously approached commenting on evidence and the conduct of trial." *Lewis v. State*, 424 N.E.2d 107 (1981). In *Lewis*, the trial court instructed jurors that:

> There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence would be produced on behalf of either side.

424 N.E.2d at 110. As in our state, the Court cautioned that a trial court "must refrain from imposing himself and his opinions on the jury." *Id.* Citing to the American Bar Association

Standards for Criminal Justice, the *Lewis* Court held that trial courts should no longer give the *Allen* charge as a stand-alone charge but, rather give a limited *Allen* charge as part of the initial jury instruction. If the jury later indicated that they are deadlocked, courts should re-read the entire jury charge. *Id.* at 111.

In Appellant's case, the trial court was even more explicit; instructing jurors that if they could not reach a verdict, virtually the same trial - with the same witnesses - would be replayed in front of another jury. R. 347, l. 11 - 349, l. 23. Moreover, the trial court admonished jurors that, in the case of a mistrial "it does not mean that anyone wins" and that "[a]nd there is no reason for me to suppose the case will ever be submitted to 12 more competent jurors than you, or that more or clearer evidence will be produced on one side or the other." *Id.*

Most problematically, the *Allen* charge given in Appellant's case interjected irrelevant considerations into jurors' deliberations. As noted, the trial court informed jurors that if they could not reach a verdict, a second trial would impose significant burdens on the parties, the trial court, and future jurors. R. 348, l. 18 - 349, l. 11. By implication a second trial would cost the judicial system - and necessarily the taxpayers - money.

Such considerations have no place in the jury's deliberations. The sole responsibility of the jury is to determine whether the State has proven beyond a reasonable doubt the allegations against a defendant. *See State v. Alesky*, 343 S.C. 20, 538 S.E.2d 248 (2000) (holding that language instructing jurors to seek the truth was improper and risks reducing the state's burden of proof to preponderance of the evidence). Verbiage stressing the cost of a second trial is akin to providing jurors with the sentencing ranges for different offenses. The trial court's language clearly emphasized to jurors that they should consider the material cost to the judicial system that a mistrial would impose and should strive to reach a verdict to avoid those costs.

The language is also legally incorrect and contradicts other portions of the juror's instruction, likely sowing confusion among jurors. *See State v. Salts*, 200 P.3d 464 (Kan. 2009) (*Allen* charge instructing jurors that "another trial would be a burden on both sides" was improper). As an initial matter, a criminal trial is not a burden to Appellant; it is his right. Nor is a trial a burden to the State; it is the prosecutor's obligation. A trial is the court system's *raison d'etre.*

Moreover, instructing jurors that they must consider the costs a new trial would impose on the judicial system contradicted earlier portions of the charge that correctly instructs jurors that their sole duty to weigh the evidence adduced at trial. "Both the State and the Defendant have a right to expect that you will carefully consider and evaluate the evidence and apply the law of this case to it. . . . You must decide each charge separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other charge." R. 317, l. 3 - 318, l. 23.

Applying, the factors identified by our Supreme Court in *Tucker* makes clear that the *Allen* charge in Appellant's case was unconstitutionally coercive. *Tucker*, 346 S.C. at 492, 552 S.E.2d at 716 (citing *Lowenfield*, 484 U.S. at 237). When viewed as a whole, the jury charge applied pressure to the juror or jurors voting in favor of acquittal. R. 346, l. 24 - 349, l. 15. While the trial court did not use mandatory language, the jury was told of the importance of a unanimous verdict and, erroneously, of the high cost of a mistrial. *Id.* Following the charge, jury returned a verdict after two hours of additional deliberations. *Id.*

Accordingly, the court reversibly erred in giving an *Allen* charge that was unconstitutionally coercive under the circumstances of Appellant's case.

II.

The trial court erred by refusing to order a mistrial after key State's witness, Nikiki Gardner, testified that Appellant had been previously incarcerated as any relevance this testimony had was substantially outweighed by its unduly prejudicial effect, since it impermissibly informed the jury that Appellant had a prior criminal record, and thereby diluted the presumption of innocence.

Relevant Facts

Pre-trial Appellant moved to exclude any potential testimony that Appellant had been previously incarcerated. "[T]he other item I discussed was I would like the court, in addition to the solicitor, to tell witnesses ahead of time they're not to, one, identify my client when they've not previously identified him; that being the two victims. And, secondly, not for any witness to blurt out. 'Well, he's been in trouble before with the court, regarding my client." Tr.p . 37, ll. 2-9.

Nikki Gardner was a vital witness for the State given the limited memories, the character flaws, and the obvious motives to lie of the State's other witnesses. Shunk could not identify Appellant. Ennis failed to appear for trial. Vickie Trammell was highly intoxicated and could not clearly remember the events of the night. Donald Trammell insisted that he acted alone and without any forethought. Gardner was also more credible than Vickie or Donald Trammell because she had not received substantial assistance on pending criminal charges for her testimony. R. 112, l. 23 - 113, l. 22.

Unlike the State's other witnesses, Gardner was sober on the night of incident. By the time of trial she was pregnant, attempting to reconcile with her husband, and to gain custody of her children. She was on the waiting list for a drug rehab facility. R. 114, l. 16 - 116, l. 5. In its closing argument the State repeatedly urged jurors to remember her testimony and to find her credible. R. 281, l. 4 - 302, l. 17.

During direct examination by the State, Gardner testified that she had known Appellnat

her entire life. When the State asked her how she knew Appellant's wife, Gardner responded that she met Appellant's wife "[w]hen I was younger, as a child. But from when I can remember back in -- when I actually remember her is when he had -- **he hadn't been released from prison yet.** R. 117, ll. 2-17 (*emphasis added*).

Appellant immediately objected and moved for a mistrial on the basis that Gardner had clearly told the jury that Appellant had been previously incarcerated. Moreover, the wording of her response strongly suggested that Appellant had been incarcerated either for a very long time or had been incarcerated on many different occasions. R. 117, l. 19 - 123, l. 20.

The trial court denied the motion for a mistrial and offered to give the jury a curative instruction. The defense declined a curative instruction on the grounds that it would draw more attention to the improper testimony. *Id.* Defense counsel argued that Appellant's presumption of innocence had been fatally undermined.

"The jury now knows, or should know, that he has been in prison. And I believe that it's almost impossible for a jury not to consider that, whether he's been in jail before, or he's one of those kind people with that burden." R. 122, ll. 6-12. The Court again refused to grant a mistrial, but offered to provide a curative instruction. Defense counsel refused the curative instruction and Appellant never testified.

Discussion

Defense counsel properly objected to the state placing testimony before the jury that clearly showed appellant had previously been incarcerated. The United States Supreme Court, this Court, and courts of other jurisdictions have clearly recognized prejudice from the dilution of the presumption of innocence when a jury learns from evidence or other factors that the defendant on trial has a prior criminal record.

The South Carolina Supreme Court has stated that the test for granting a mistrial is whether a "mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Ferguson*, 376 S.C. 615, 618, 658 S.E.2d 101, 103 (Ct. App 2008) (citing *State v. Edwards,* 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007)).

A "determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *State v. Douglas,* 367 S.C. 498, 523, 626 S.E.2d 59, 72 (Ct.App.2006) (citing *State v. Fletcher,* 363 S.C. 221, 609 S.E.2d 572 (Ct.App.2005)).

An accused has the right to rely entirely upon this presumption of innocence and the weakness in the State's case against him. *See State v. Posey,* 269 S.C. 500, 238 S.E.2d 176 (1977). "A necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998) (*quoting State v. Melcher,* 678 A.2d 146, 151 (N.H. 1996). The State may not attack the character of the defendant unless the defendant first places his character in issue. *Mitchell v. State,* 298 S.C. 186, 379 S.E.2d 123 (1989).

The trial court should have ordered a mistrial when it became clear that Gardner had destroyed Appellant's presumption of innocence by referencing his earlier incarceration. While it was a single reference, Gardner was a critical witness for the State and the solicitor aggressively peddled her credibility to the jury. R. 281, l. 4 - 302, l. 17. By explicitly stating that Appellant had been incarcerated on a prior occasion, Gardner made it substantially more likely

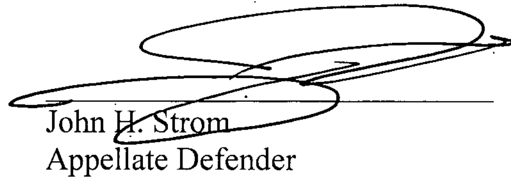
that the jurors simply saw Appellant as the "kind of person" who would steal from a drug dealer. Her testimony fatally diluted the presumption of innocence that Appellant was constitutionally entitled to rely on and resulted in Appellant being tried and convicted for who he was, not what the State proved he did. *See State v. Posey,* 269 S.C. 500, 238 S.E.2d 176.

Accordingly, the trial court erred refusing to grant a mistrial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

August 11, 2017

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