STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

L. Casey Manning, Circuit Court Judge

SHARON SMITH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2012-213022

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

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APPELLANT

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by refusing to summon the jurors for questioning where Juror Mark Pleasant admitted in his affidavit he committed extraneous misconduct by printing and bringing into the jury room for discussion his own research from the internet pertaining to first degree and second degree murder and voluntary and involuntary manslaughter since this admitted misconduct made interviewing the jurors necessary prior to ruling on the motion for a new trial?

2.

Whether the court erred by refusing to grant a new trial where Juror Mark Pleasant admitted in his affidavit he committed extraneous misconduct by printing his own research from the internet pertaining to first and second degree murder and voluntary and involuntary manslaughter and taking it into the jury room for discussion during deliberations, since the research was inapplicable and confusing, and denied appellant her right to a reasoned determination of guilt or innocence on instructions given by the court?

STATEMENT OF THE CASE

Appellant was indicted by the Richland County grand jury for the offense of murder. R. *. Her case was called to trial on June 23, 2005 before the Honorable Reginald I. Lloyd, and a jury. April Sampson and Debra Ahrens represented appellant. John Meadors and Todd Wagoner were the solicitors.

On June 23, 2005 the jury found appellant guilty of murder. Judge Lloyd sentenced appellant to forty-eight years imprisonment. Appellant subsequently filed a notice of motion and a motion for a new trial. R. *. Appellant also filed a memorandum in support of defendant's motion for a new trial, and attached an affidavit from Juror Mark Pleasant. R. *.

The state filed a memorandum in opposition to defendant's motion for a new trial. R. *.

A hearing on the motion for a new trial was held on August 15, 2005 before the Honorable Reginald I. Lloyd. April W. Sampson represented appellant. John P. Meadors and Todd M. Wagoner were again the assistant solicitors. Tr. 1.

At the conclusion of the hearing Judge Lloyd took the matter under advisement. Tr. 59, ll. 2 – 9. On February 2, 2006 Judge Lloyd issued a Form 4 order denying the motion for a new trial. R. *.

On February 7 a notice of intent to appeal was filed with this Court. Appellant's appeal from her murder conviction proceeded in the interim. Present counsel filed the Final Anders Brief of Appellant on July 19, 2006. This Court dismissed the appeal and granted

counsel's motion to be relieved in State v. Sharon L. Smith, Up.-Op.-No. 2007-UP-2005 (filed May 22, 2007). [1]

[1] This case may be in an odd procedural posture. Undersigned counsel wrote a letter to the Clerk of this Court on April 24, 2007, seemingly at the request of this Court, to explain why two separate appeals appeared to be taken from the same murder conviction. Counsel explained to the Court in that letter, which was copied to Donald J. Zelenka, Esquire, that two separate files were opened in this office upon the filing of two separate notices of intent to appeal. Counsel is not aware of whether a motion to suspend appeal and remand for a hearing on a motion for a new trial was filed between the June 23, 2005 guilty verdict and the August 15, 2005 motion for a new trial hearing. The original notice of intent to appeal was filed on June 30, 2005, and that appeal proceeded as seen above.

ARGUMENT

1.

The court erred by refusing to summon the jurors in for questioning after Juror Mark Pleasant admitted in an affidavit filed with the motion for a new trial that he committed extraneous misconduct by printing definitions from the internet regarding first and second degree murder, voluntary and involuntary manslaughter for discussion by the jury during deliberations. The juror's admission of his own misconduct made such a hearing with juror testimony necessary.

Relevant Facts

Following appellant's conviction for murder on June 23, 2005 appellant filed a notice of motion and motion for a new trial dated July 1, 2005. R. *. Counsel also filed a memorandum in support of defendant's motion for a new trial dated July 8, 2005. Attached to this memorandum was an affidavit from Juror Mark Pleasant. R. p. *.

Pleasant stated in this affidavit that the jury was split during its deliberations. R. p. *. The only verdict options the jury was given, as explained in appellant's Final Anders Brief, were murder or not guilty. Juror Pleasant wrote in his affidavit:

> As we began to focus on the charge of murder, there were several questions regarding the legal definition of murder and the term of malice aforethought. The jury requested that the judge again read the full charge to clarify the definition.
>
> As we continued our deliberation, I expressed my personal concerns regarding the appropriateness of the murder charge. I shared several definitions that I printed from the internet regarding first degree and second degree murder, voluntary and involuntary manslaughter. I shared my belief that the action took place without premeditation and without the intent to kill, but that her actions happened in the heat of passion as the result of a physical and verbal altercation. In my opinion, many of the jurors agreed, but we all recognized

> that as jurors we did not have discretion to find her guilty of a lesser charge.

R. p. *.

In his Memorandum in Support of the Motion for a New Trial defense counsel noted that the state wanted a charge on voluntary manslaughter in addition to murder. Defense therefore requested that if the judge charged voluntary manslaughter that he also charge the jury on involuntary manslaughter and accident.[2] Motion at 1 and 2. R. p. *.

The judge finally determined he would only charge murder and not guilty as the jury options. Memorandum at page 2; R. p. *. During the hearing defense counsel Sampson told the judge that as "is my habit" to call the jurors after they had been excused for the week. One of the jurors she talked with was Mark Pleasant. Pleasant told Sampson that:

> Yes, [on] the afternoon of the 22nd after they had heard the charges, he went home and went on the Internet and did his own research. He came back to the deliberation room with charges on involuntary manslaughter, voluntary manslaughter, first degree murder and second degree murder.
>
> He - - not only did he bring that information into the jury room with him, he printed it up and brought it in there with him. They discussed the different charges, the different elements of all of those things. He showed the printouts to all of the other jurors and they had discussions about it.
>
> The Court: And as I understand from our discussions, the juror in question actually brought not only other information

[2] Appellant understands that this Court retains the original copy of the appeal record once an appeal is concluded. Appellant's murder conviction was affirmed in State v. Sharon L. Smith, 2007-UP-2005 (filed May 22, 2007). Counsel would incorporate by reference that record here. The trial judge also heard the motion for a new trial, and everything in the prior incorporated record was obviously before the trial judge. Appellant has retained copies of the prior appeal, and he is, of course, willing to provide additional copies to this Court.

> into the jury room, *but false information. It had something to do with murder in the first, murder in the second, which we don't have in South Carolina.*
>
> Ms. Sampson: He also, Your Honor, and I did not put this in the memo, but when I spoke to him about it, he also discussed with them what she was facing as far as the sentence. *He had looked up the actual statute. They discussed whether she would even get a 30 year sentence.* They all concluded - - well, I wouldn't say all, but according to m conversations with Mr. Pleasant, that she wouldn't - - that maybe that wasn't actually accurate.

Tr. 5, l. 23 – 6, l. 24. (emphasis added).

Sampson argued this was clearly extraneous misconduct and she repeatedly asked the judge to the summon the jurors in for questioning if he was not convinced on the record alone that he should grant appellant a new trial. Tr. 7, ll. 8 – 21; Tr. 27, l. 25 – 28, l. 4; Tr. 35, ll. 15 – 18; Tr. 37, l. 25 – 38, l. 21; Tr. 39, ll. 6- 11; Tr. 40, l. 20 – 41, l. 21; Tr. 46, ll. 14 – 16.

As stated, at the end of the hearing the judge told the attorneys that he would take the matter under advisement and issue a written order "for both sides on that so that the record is complete." Tr. 59, ll. 2 – 9. As seen, the judge later issued a form order denying the motion for a new trial in a single sentence.

During the hearing defense counsel continued to argue that Pleasant brought in not only extraneous evidence but incorrect information. Tr. 45, l. 19 – 46, l. 1. Counsel also argued that the jurors became concerned about the "heat of passion" they thought was involved in the fatal incident. Tr. 9, ll. 9 – 19; Tr. 38, ll. 7 – 21; Tr. 52, ll. 6 – 18.

Defense counsel noted that Pleasant's extraneous information from the internet made this situation very confusing because the jurors thought appellant was guilty "of

something," and they struggled to figure out a proper verdict with this extraneous information. Tr. 10, l. 4 – 12, l. 14; Tr. 43, ll. 10 – 22; Tr. 49, l. 15 – 52, l. 18.

Defense counsel argued that the jurors had not followed the judge's instructions because they considered the extraneous information. Counsel also asserted that misconduct was clear in this case since Pleasant admitted in his affidavit to bringing the extraneous information into the jury room for use during deliberations. Tr. 47, l. 11 – 51, l. 7.

Counsel also noted that Pleasant's affidavit, in effect, was "watered down" since he had been advised by an attorney after talking to counsel. Counsel had talked to Pleasant for "30 to 45 minutes on the subject and its way more than what I even put in this motion or in his affidavit, and after being advised by counsel "[h]e was not willing to add or talk about it anymore." Tr. 30, ll. 4-15; 36, ll. 19-24.

Discussion

In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. State v. Kelly, 331 S.C. 131, 141, 502 S.E.2d 99, 104 (1998); State v. Salters, 273 S.C. 501, 257 S.E.2d 202 (1979). Here, not only were the allegations of jury misconduct regarding extraneous influence credible, they were admitted in the affidavit of the wrongdoing juror, even after he was advised by an attorney. See State v. Aldriet, 333 S.C. 307, 509 S.E.2d 811 (1999).

Rule 606(b), SCRE allows an exception to the rule that jury testimony is not admissible to impeach a jury verdict. That exception is that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. That is exactly what occurred in this case.

The court here erred by refusing to take jury testimony where Juror Pleasant admitted the extraneous misconduct in his *own affidavit*. This was not a case of one juror accusing other jurors of misconduct after his or her own "buyer's remorse" following a vote of guilty, and then feeling guilty. It is a case where the juror himself admitted introducing the extraneous information into jury deliberations. The judge was obligated to, and he abused his discretion by not, summoning the jurors in for questioning about the misconduct under these circumstances. See State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003); Cf. State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (2005).

2.

The court erred by refusing to declare a new trial based on extraneous juror misconduct. Juror Pleasant admitted in his affidavit that he brought in legal information for deliberations off of the internet on first degree and second degree murder and voluntary manslaughter and involuntary manslaughter. The judge charges the law in South Carolina, and this extraneous and confusing legal material being introduced into jury deliberations required a new trial.

As seen, Juror Mark Pleasant admitted in his affidavit that the jurors were split during deliberations. R. p. *. The jurors apparently had somewhat of a consensus that while they thought the stabbing was intentional, that it also was done in a heat of passion.

South Carolina obviously only has murder, voluntary manslaughter and involuntary manslaughter, and not first and second degree murder. The out-of-state legal materials that Juror Pleasant invoked during deliberations therefore had to be confusing.

Appellant was prejudiced because the jury, as defense counsel argued, thought appellant was guilty of something even though it may not have been murder. The solicitor's reasoning that appellant benefited from this extraneous information coming into the deliberations was flawed. The solicitor somehow reasoned that the jury considered voluntary manslaughter, even though it was not a verdict option, and then decided that the state proved malice aforethought, and convicted appellant of murder.

The jury had no way of giving voice to its alleged thinking that the stabbing occurred in a heat of passion. Voluntary manslaughter is defined as the unlawful killing of a human being in a sudden heat of passion upon sufficient legal provocation. State v.

Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003).[3] The jury should have been requesting additional guidance from the trial judge on the law, in the presence of appellant, and not using a juror's extraneous legal research off of the internet. See Article V, §21 of the South Carolina Constitution, "Judges shall . . . declare the law." What occurred during these jury deliberations is, respectfully, intolerable. Jurors floundering with internet materials on first and second degree murder, and voluntary manslaughter and involuntary manslaughter, and deciding what the law was independent of the court, made a mockery of appellant's right to a fair trial.

Appellant was entitled to a verdict based on what occurred in court. That was and is basic. Appellant showed at the motion for a new trial hearing that she was prejudiced by the *admitted juror misconduct*. See State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998).

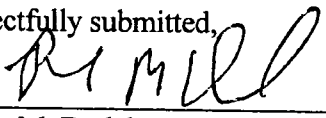
The judge abused his discretion by denying appellant's motion for a new trial.

[3] Certiorari denied March 14, 2004.

CONCLUSION

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

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

This 1st day of November.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s);
(2) Entire April 15, 2005 Motion for a New Trial Hearing;
(3) Notice of Motion and Motion for a New Trial;
(4) Memorandum in Support of Defendant's Motion for a New Trial;
(5) Memorandum in Opposition to Defendant's Motion for a New Trial;
(6) Order denying Motion for a New Trial;
(7) Record on Appeal from Appellant's Murder Conviction and briefs incorporated by reference or reprinted.

I certify that this designation contains no matter which is irrelevant to this appeal.

November 1st, 2007

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

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CERTIFICATE OF SERVICE

The undersigned attorney 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 Donald J. Zelenka, Esquire, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 1st day of November, 2007.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 1st day of November, 2007.

(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008 .