

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Roger M. Young, Circuit Court Judge

ORIGINAL

RECEIVED

FEB 03 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MALCOLM BRABHAM,

APPELLANT

APPELLATE CASE NO. 2014-000959

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to declare a mistrial when the jury sent a note during the presentation of the state's case indicating the jurors had engaged in premature deliberations by discussing the evidence presented as the note evinced a lack of clarity regarding the timeline of events?

STATEMENT OF THE CASE

On September 20, 2013, a Beaufort County grand jury indicted Appellant for attempted murder (2013-GS-07-1230) and possession of a weapon during the commission of a violent crime (2013-GS-07-1231). R. 380. The state, represented by Mary Jordan Lempesis and Mary Concannon, called the case for trial before the Honorable Roger M. Young and a jury on April 21, 2014. Trasi Campbell represented Appellant. R. 1-2. The jury found Appellant guilty as charged. R. 363, lines 17-24. Judge Young sentenced Appellant to twenty years' imprisonment for attempted murder and five years' imprisonment for the weapons charge. He ordered the sentences to be served concurrently. R. 375, lines 6-9; R. 382.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

Chadwick Mitchell and Appellant met in 2003 when Appellant began dating Mitchell's sister, Reah Gonsalves. R. 139, lines 7-14. Over the course of the next several years, Appellant and Gonsalves had three children together and lived together on family land where Mitchell also lived. R. 140, lines 5-6; R. 141, lines 1-8; R. 163, line 14 – R. 164, line 2; R. 230, line 24 – R. 232, line 3.

On July 15, 2013, between 5:00 p.m. and 5:30 p.m., Appellant and Mitchell sat in the yard drinking beer and liquor. R. 141, lines 12-24. Appellant and Mitchell then travelled to an area of Lady's Island called "The Hole" where they socialized and continued drinking alcohol. R. 142, line 8 – R. 143, line 2; R. 164, lines 10-23. On the way to The Hole, Mitchell used a large quantity of cocaine. R. 156, lines 15-24; R. 165, lines 18-20; R. 165, line 24 – R. 166, line 11; R. 170, lines 17-22; R. 172, line 12 – R. 173, line 6.¹

At The Hole, Appellant and Mitchell met up with Elaine Blake, who was Appellant's cousin, and Norman Singleton, who was Blake's boyfriend. In his inebriated state, Mitchell believed Appellant was flirting with Blake. R. 143, lines 5-13. Mitchell became enraged and belligerent; he argued with everyone at The Hole. R. 157, line 24 – R. 158, line 5; R. 170, line 23 – R. 171, line 11; R. 174, lines 7-15; R. 176, line 23 – R. 178, line 2. After dark, Appellant and Mitchell decided to leave The Hole. R. 143, line 14; R.

¹ Mitchell admitted he had alcohol and cocaine in his system the day of the shooting and agreed he used cocaine that day. Asked where and when he used cocaine, Mitchell responded, "I was probably in [Appellant's] car." The prosecutor again prompted Mitchell to tell the jury when he used cocaine, and Mitchell responded, "Maybe right before we got to The Hole." R. 156, lines 22-25. According to the treating physician in the emergency room, Mitchell had very high levels of alcohol and cocaine in his system. R. 297, lines 16-24; R. 300, line 9 – R. 302, line 2. However, Mitchell denied drug and alcohol use upon his admission to the emergency room. R. 299, lines 16-25.

143, line 24 – R. 144, line 7; R. 166, lines 12-14. Blake joined Mitchell and Appellant in the car because Blake and Mitchell planned to go out later. R. 142, line 14 – R. 143, line 18; R. 157, lines 12 -23; R. 179, line 25 – R. 180, line 10. During the ride, Mitchell continued to accuse Appellant and Blake of improprieties, including calling Blake a “nasty bitch.” R. 145, lines 10-18; R. 178, line 23 – R. 179, line 3. Blake would not stand for Mitchell’s continued insults and demanded to be let out of the car. Appellant stopped the car and allowed Blake to get out. R. 145, line 21 – R. 148, line 11; R. 179, lines 3-12. However, Blake’s absence did not stop Mitchell’s abusive behavior. He continued to hurl accusations at Appellant. R. 148, lines 13-14. Finally, Appellant insisted Mitchell exit the car too. R. 148, lines 15-19.

Here, the evidence differed concerning what transpired next. Mitchell initially told the responding officer that Appellant reached into the open driver’s door, retrieved a gun, and shot him. R. 169, line 23 – R. 170, line 2. However, at trial, Mitchell claimed that Appellant also got out of the car, closed the driver’s door, and the two “started throwing more obscenities at each other.” Then, Appellant “kind of pulled the gun like a - - it was like a western movie. I didn’t even really see it coming. Between us arguing, he just pulled out and, boom, shot me, you know.” R. 149, lines 4-11; see also R. 166, line 15 – R. 167, line 10 (testifying that Appellant pulled the gun “from behind his jeans”); R. 167, line 15 – R. 168, line 1.² Mitchell claimed he grabbed his chest and collapsed while Appellant looked on. Mitchell further claimed that Appellant “looked around,” “jumped in the car and just

² Blake did not see Appellant in possession of a gun or a gun in the car. R. 184, lines 13-14; R. 185, lines 9-16.

peeled out,” leaving Mitchell on the side of the road. R. 150, lines 13-20. Mitchell bled profusely after the shooting. R. 154, lines 8-11.

After being shot in the chest, Mitchell, smelling of alcohol, walked to the first house with lights on, which was almost a mile from the alleged incident location, and asked the residents to call for help. R. 128, lines 18-24; R. 153, lines 1-6; R. 255, lines 1-4. He arrived at the house between ten and fifteen minutes after the shooting. R. 154, lines 1-5. The responding officer was dispatched at 9:15 p.m. and responded at 9:23 p.m. R. 134, lines 6-10. Mitchell told the residents and the police, who subsequently arrived, that his brother-in-law, Appellant, had shot him. R. 125, line 20 – R. 126, line 7; R. 132, lines 4-11; R. 153, lines 17-25; R. 154, lines 12-18.

Armed with Mitchell’s accusations, officers went to Gonsalves’s home looking for Appellant. R. 190, lines 4-12; R. 191, line 19 – R. 192, line 4. When the officer arrived at 10:00 p.m., Gonsalves stated Appellant was no longer at the residence, having left forty-five minutes prior to the officer’s arrival. R. 192, line 5 – R. 193, line 2; R. 245, line 7 – R. 246, line 2. Also, Appellant contacted Blake to say he was on his way to his mother’s home in Ridgeland around 9:15 p.m. R. 183, lines 3-9; R. 185, line 23 – R. 186, line 9. The following day, the police arrested Appellant at his job without incident. When the arresting officer interrogated Appellant regarding his alleged involvement in Mitchell’s shooting, Appellant informed the officer he had not shot Mitchell, but had left him on the side of the road at The Hole. R. 211, line 12 – R. 212, line 17; R. 264, line 20 – R. 265, line 3; R. 266, line 14 – R. 269, line 2.

No evidence of a shooting, such as blood, shell casings, projectiles, or gunshot residue, was found at the area where Mitchell claimed the shooting occurred or in

Appellant's car. In fact, no gun was recovered. R. 188, line 20 – R. 190, line 3; R. 252, lines 3-9; R. 252, line 22 – R. 253, line 7; R. 254, lines 2-25; R. 273, line 19 – R. 275, line 24; R. 283, line 23 – R. 284, line 5; R. 285, lines 5-25. Further, no one in the area heard any gunshots. R. 191, lines 5-18.

ARGUMENT

The trial judge erred in failing to declare a mistrial when the jury sent a note during the presentation of the state's case indicating the jurors had engaged in premature deliberations by discussing the evidence presented as the note evinced a lack of clarity regarding the timeline of events.

Relevant facts

During the state's case-in-chief, the jury sent a note to the trial judge remarking that the timeline was "a little fuzzy." The note further explained that witnesses used phrases, such as "after dark." Due to the unclear timeline, the jury note explained that "[i]t would be helpful to know what time sunset was on the date in question." R. 218, lines 9-12; R. 377.

When the judge received the note, he questioned the jury foreperson regarding its contents:

THE COURT: Okay. Help me understand how you all came up with this question?

JUROR NUMBER 52: All right. We heard from a number of different witnesses, ... the 911 operator arrived at the dinner party at 7:00. I think Mr. - - the gentleman who got shot, said that they had started drinking at 5:00 or 5:30. So, we hear a bunch of times, and then I hear: "Well, we left the bar. I don't know what time, but after dark."

And so, I wanted to kind of, you know, July, after dark's probably 8:00 or 8:30.

THE COURT: Um-hmm.

JUROR NUMBER 52: But there's a period of time there where a gentleman said, "I was taking cocaine," but I needed - - he took that over a period of two hours.

THE COURT: Um-hmm.

JUROR NUMBER 52: How does that two hours fit within all of those other times? That's - - that was my question.

THE COURT: Okay. So, the question that you've come up with and asked here, is this something that you all came up with back there, or is it just your question?

JUROR NUMBER 52: It is my question.

THE COURT: Have you discussed this issue with anybody back there?

JUROR NUMBER 52: Other people have heard me as I talked about the question, yes.

THE COURT: Who were you talking to about it?

BAILIFF: He started to ask me - -

JUROR NUMBER 52: I started - -

BAILIFF: - - and I told him to write it down, [Y]our Honor.

JUROR NUMBER 52: Right.

THE COURT: Okay. So, you all were - - this is when you were coming back from lunch?

JUROR NUMBER 52: No, this is before we went to lunch. As we departed here, I held back, and I said, "I've got a question." And I did not, you know, - - so, I started asking her the question, time line's fuzzy. I know that there were some other people around who heard that.

THE COURT: All right. Did you mention this to any other jurors when you went back after lunch?

JUROR NUMBER 52: No.

THE COURT: Or before lunch?

JUROR NUMBER 52: No, just what they may have overheard before I wrote that note.

THE COURT: So, nobody else asked the same question or brought it to your attention?

JUROR NUMBER 52: To my knowledge, no.

THE COURT: Has anybody else been discussing the question?

JUROR NUMBER 52: We have purposely not, per your orders, been discussing this case at all.

R. 218, line 15 – R. 220, line 21.

Appellant argued the jury had engaged in premature deliberations based upon the statements contained in the note and those made by the foreperson. Concerning prejudice, Appellant argued that “by virtue of the foreman providing this note to [Y]our Honor and providing it to the state, and the state has not finished their case yet, the foreman has provided the state the opportunity to answer one of his questions, and that is prejudicial to [Appellant].” Thus, Appellant moved for a mistrial. R. 221, line 13 – R. 222, line 7.

The trial judge determined the juror was “being conscientious” and the examination of the foreman indicated he had not discussed the matter with anyone. Based on those findings, the trial judge determined the jury had not engaged in premature deliberations. Further, the judge held Appellant suffered no prejudice. However, the judge refused to allow the prosecution to recall any witnesses to address the timeline. R. 222, line 24 – R. 223, line 18.

When the entire jury panel returned to the courtroom, the trial judge instructed the jury that questions during the course of the trial were not encouraged. He then stated that “one of the big problems” with the submission of a jury question during the trial was that it “suggests” the jury “may be deliberating” before hearing all of the evidence. The note made it necessary for the judge to ask if any of the jurors talked about the case. Further, the judge asked if any juror overheard the foreperson talking to the bailiff about his question. Three jurors responded affirmatively to the judge’s question. One juror indicated he was “wondering the same thing” as asked by the foreperson. However, all three jurors responded the question would not affect their deliberations. R. 227, line 14 – R. 229, line 7.

Appellant renewed his motion for a mistrial when he moved for a directed verdict. Appellant argued he suffered prejudice from the jury's premature deliberations because the prosecution was "given privy to insight and thought processes of one of the jurors prior to the close of their case." Despite the judge's ruling that the state could not re-call a witness to the stand, the prosecution knew the timeline was "an issue that they need[ed] to address" and "[would] likely address it in their closing." R. 314, line 24 – R. 315, line 16. The judge denied the motion. R. 315, lines 17-22.

Discussion

"A jury should not begin discussing the case, nor deciding the issues, until all the evidence has been introduced, the arguments of counsel complete, and the applicable law charged." State v. Joyner, 289 S.C. 436, 437, 346 S.E.2d 711, 712 (1986). As explained by the Supreme Court, "the reason for this rule is apparent":

[A] jury should not begin discussing a case, nor deciding the issues, until all of the evidence, the argument of counsel, and the charge of the law is completed. ... The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.

State v. McGuire, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979); see also Joyner, 289 S.C. at 437, 346 S.E.2d at 712. Premature jury deliberations involve a matter of fundamental fairness. State v. Aldret, 333 S.C. 307, 311, 509 S.E.2d 811, 812-813 (1999).

The South Carolina Supreme Court held that evidence of premature deliberations does not require automatic reversal. Rather, the defendant must demonstrate prejudice. Id. at 315, 509 S.E.2d at 815. Further, the Court established certain procedures to be followed

when an allegation of premature deliberations arises during the trial. Id.³ “[T]he trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial.” Id. Further, “[i]f requested by the moving party, the court may voir dire the jurors and, if practicable, ‘tailor a cautionary instruction to correct the ascertained damage.’” Id. (quoting United States v. Resko, 3 F.3d 684, 695 (3d Cir. 1993)). If the premature deliberations were prejudicial, then a new trial must be ordered. Id.

Deliberation is “[t]he act of carefully considering issues and options before making a decision or taking some action; esp., the process by which a jury reaches a verdict, as by analyzing, discussing, and weighing the evidence.” BLACK’S LAW DICTIONARY 438-439 (7th ed. 1999). The jury engaged in premature deliberations by considering the evidence as presented and noting the areas of strengths and weaknesses. The note clearly showed at least one member of the jury was considering and weighing the evidence. The trial judge’s voir dire of the jury showed that at least one other member of the jury was considering and weighing the same evidence. Thus, the trial judge erred in concluding the jury had not engaged in premature deliberations. Further, Appellant suffered prejudice as a result of the premature deliberations because the note put the prosecution on notice of at least one weakness in its case – the timing of the events. Because the prosecution received notice of this weakness – and the jury’s perception of this as a weakness – during the course of the

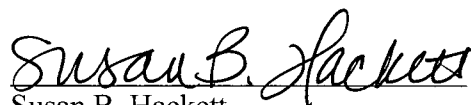
³ Although the body of the opinion suggests these procedures are optional at the discretion of the trial judge, the Court later indicated the procedures were required. State v. Aldret, 333 S.C. 307, 313 n. 3, 509 S.E.2d 811, 813 n. 3 (1999)(explaining that normally the Court would not address the merits of a procedurally barred issue, but did so here to set forth the “proper procedure for trial courts to follow in such cases”); see also, State v. Yarborough, 363 S.C. 260, 263, 609 S.E.2d 592, 594 (2005).

prosecution's case-in-chief, the prosecution had the opportunity to strengthen the timeline to support Mitchell's contention that Appellant shot him. The timeline was particularly important in this case because Appellant's defense was that he was with Gonsalves at the time that Mitchell was shot. The timeline before the jury indicated the call for help due to Mitchell's gunshot wound was made shortly after 9 p.m. However, Gonsalves told the police that Appellant left her home at approximately 9:15 p.m. The jury was interested in knowing what time Appellant and Mitchell left The Hole in order to determine whether Mitchell was shot while Appellant was in the area as Mitchell contended or whether Mitchell was shot while Appellant was with Gonsalves as Appellant contended. This was crucial evidence in the case. The jury's premature deliberation on this point prejudiced Appellant.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial based upon the jury's engagement in premature deliberations.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of February, 2015.

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Appeal from Beaufort County

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MALCOLM BRABHAM,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Malcolm Brabham states:

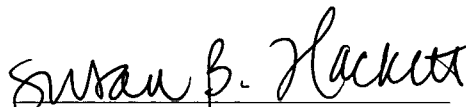
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Roger M. Young, which was held on April 24, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Malcolm Brabham.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of February, 2015.

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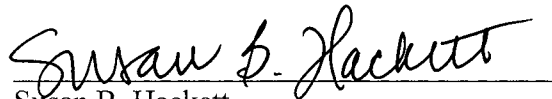
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Entire transcript of pretrial motions dated April 21, 2014;
- (2) Entire trial transcript dated April 21, 22, & 23, 2014;
- (3) Court's Exhibit # 2 (Note from jury)
- (4) Court's Exhibit # 3 (Note from jury)
- (5) Court's Exhibit # 4 (Note from jury)
- (6) True-billed indictments; and
- (7) Sentence sheets.

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

February 3rd, 2015



Susan B. Hackett
Appellate Defender

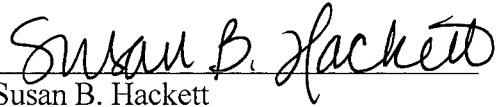
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

February 3, 2015


Susan B. Hackett
Appellate Defender

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Columbia, South Carolina 29211-15

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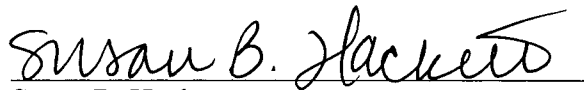
V.

MALCOLM BRABHAM,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Malcolm Brabham, #359777 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 3rd day of February, 2015.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of February, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.