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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRONE DARIUS ELLISON,

APPELLANT

APPELLATE CASE NO. 2014-002337

INITIAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

During an overnight recess, a juror was approached by a man he believed was related to appellant and asked to vote for appellant. The juror told the rest of the jury about the attempted influence and told them to be careful. Did the trial court err in refusing to grant appellant's motion for a mistrial because the appellant's right to a fair and impartial jury was violated after the communication to the entire jury about the attempted influence and that they needed to be careful?

2.

When determining whether to declare a mistrial because of outside influences on the jury, does the Sixth Amendment allow a trial judge to consider the weight of the evidence against a criminal defendant as a factor in his decision?

STATEMENT OF THE CASE

On April 7, 2014, appellant Tyrone Ellison was indicted by a Dorchester County grand jury for armed robbery and entering a bank with intent to steal. R. ___. On October 20, 2014, appellant was tried before the Honorable D. Craig Brown and a jury. Tr. 1. Don Sorenson and Phil Giese represented the State. Tr. 1. James Falk represented appellant. Tr. 1. The jury convicted appellant. Tr. 619, ll. 15 – 23. Judge Brown sentenced appellant to concurrent terms of thirty years' imprisonment on the bank charge and life imprisonment without the possibility of parole for armed robbery pursuant to South Carolina's recidivist statute. Tr. 626, l. 1 – 627, l. 24. This appeal follows.

ARGUMENT

1.

During an overnight recess, a juror was approached by a man he believed was related to appellant and asked to vote for appellant. The juror told rest of the jury about the attempted influence and told them to be careful. The trial court erred in refusing to grant appellant's motion for a mistrial because the appellant's right to a fair and impartial jury was violated after the communication to the entire jury about the attempted influence and that they needed to be careful.

Factual Background

On April Fool's Day, 2013, a man wearing a wig, visor, and dark glasses robbed a bank in Dorchester County. Tr. 106, l. 19 – 110, l. 23. None of the five people in the bank that morning were able to identify the robber. David Lewis ("Lewis"), a retiree, was a customer at the bank that morning. Tr. 153, ll. 16 – 154, l. 13. Lewis had "been in a couple robberies." Tr. 155, ll. 7 – 18. He was in one of the offices and was suspicious of the robber when he entered the bank. Tr. 155, ll. 7 – 23. The bank employee with Lewis called 911 when it became obvious that a robbery was happening. Tr. 155, ll. 7 – 156, l. 4. After taking cash from the tellers, the robber left the bank. Tr. 156, ll. 1 – 4. Tr. 109, l. 4 – 110, l. 23.

Lewis left the bank, got in his truck, and followed the robber. Tr. 156, l. 5 – 157, l. 15. The robber went into the woods. Tr. 157, ll. 16 – 158, l. 6. Lewis drove into an apartment complex bordering the woods. Tr. 158, ll. 3 – 19. He noticed "an older model, dark green Honda with another fellow in it" that, to Lewis, did not belong in the neighborhood. Tr. 158, ll. 9 – 19. He turned his truck around and followed the green

Honda. Tr. 158, ll. 16 – 19. A man that Lewis thought resembled the robber, but without the disguise, came out of the woods and got in the car. Tr. 159, ll. 1 – 13. Tr. 157, ll. 11 – 15.

Lewis followed in his truck. Tr. 159, ll. 14 – 21. The Honda ran a red light and Lewis continued to give chase at speeds approaching 100 miles per hour. Tr. 161, ll. 2 – 24. The Honda eventually lost Lewis in traffic. Tr. 161, l. 18 – 162, l. 5. The Honda had a South Carolina license tag that began with either a "153" or a "193." Tr. 162, l. 13 – 163, l. 5. While it was undisputed that appellant at one point had a green Honda that his mother purchased for him, the State's witnesses and the defense witnesses contradicted each other on whether appellant still had the Honda on the day of the robbery. Tr. 188, l. 1 – 193, l. 20. Tr. 206, ll. 10 – 23. Tr. 371, l. 14 – 377, l. 2. Tr. 487, l. 21 – 488, l. 7. According to appellant's mother and stepfather, appellant sold the Honda a week before the robbery. Tr. 371, l. 14 – 377, l. 2. Tr. 487, l. 21 – 488, l. 7.

A K-9 unit responded to the bank. Tr. 172, ll. 8 – 17. The dog led police into the woods. Tr. 173, l. 23 – 175, l. 3. The police eventually found a black visor, the latex glove, a wig, and a pistol. Tr. 175, ll. 5 – 16. An expert from SLED testified that DNA found on the wig and visor contained a mixture of DNA from at least two individuals, one of whom was appellant. Tr. 293, l. 20 – 301, l. 11. DNA found on the pistol was a mixture of at least three people, but appellant was excluded as a contributor. Tr. 299, ll. 1 – 6. A defense DNA expert attempted to analyze the items, but could not because SLED's testing removed all of the usable DNA from the evidence. Tr. 442, l. 4 – 450, l. 19.

Appellant worked at Burger King. Tr. 469, ll. 3 – 4. The shift manager testified that appellant was the only person in April 2013 who unloaded delivery trucks. Tr. 469, l. 11 – 471, l. 15. She testified that appellant would have been the person who unloaded the delivery truck on the day of the robbery. Tr. 470, l. 21 – 471, l. 21. Another Burger King employee testified she worked on April 1, 2013, and that appellant unloaded the delivery truck. Tr. 477, ll. 7 – 25.

Juror White

The parties finished presenting their evidence on Wednesday, October 22, 2014. Tr. 318, l. 20. Tr. 524, l. 7 – 525, l. 22. The trial judge had other business the next day – Thursday – so he dismissed the jury until Friday. Tr. 524, l. 17 – 525, l. 22. When court resumed on Friday morning, Judge Brown cleared the courtroom. Tr. 527, l. 19 – 528, l. 5. Judge Brown then had the bailiff bring in juror William White ("White"). After swearing Juror White, Judge Brown asked him about an encounter with someone during the break in the trial who asked the juror "to vote a certain way." Tr. 528, ll. 8 – 21.

Juror White described someone coming to his house at around 4:00 PM the previous day (Thursday) "on behalf of the defendant." Tr. 528, l. 22 – 529, l. 15. Juror White believed the person was "somebody related to the defendant." Tr. 529, ll. 2 – 4. Juror White told the person to leave his front porch. Tr. 529, ll. 2 – 4.

Juror White told Judge Brown:

> Let me ask you this: when you guys made us jurors, you didn't set up blank guidelines what to do if something like that happens, so I just went to work.
>
> THE COURT: Say that again now.

THE JUROR: When you guys decided who would be jurors, you didn't – you didn't say, "Do this in case this happens," so I – it was really no way for me to react to that.

THE COURT: You're okay. You did exactly what you were supposed to do this morning.

Tr. 529, ll. 16 – 24. After getting a description of the man who approached Juror White, Judge Brown asked him if he knew "whether or not anybody else in the jury has been approached in this case." Tr. 530, ll. 9 – 11. The following colloquy then occurred:

THE JUROR: No, sir, but I wasn't sure if that fell under your rules as don't speak about the case, **but I did let them know just because I'm a family man and, you know, I think they would <u>want to know to be careful</u>, so I did let them know.**

THE COURT: Let me ask you this: if you were allowed to remain on this jury, do you believe you could be fair and impartial and decide the case based upon the evidence as presented in this courtroom?

THE JUROR: No, sir, with my military background, **I feel like if somebody is desperate enough to approach me on behalf of the defendant, then I believe they are guilty.**

THE COURT: And you do not believe you can be fair and impartial?

THE JUROR: To be honest with you, based on the evidence that was presented to me and him approaching me, no, I've already decided, Your Honor.

THE COURT: Mr. Sorenson?

MR. SORENSON: I don't have anything.

THE COURT: Excuse him.

MR. FALK: I would excuse him, but I have another concern now.

THE COURT: And you haven't discussed it with the rest of the jury?

THE JUROR: I just let them know that I was approached <u>and for them to be careful</u>, you know.

Tr. 530, l. 12 – 531, l. 12 (emphasis added). Juror White's comments about the approach made by someone he believed was related to the defendant and warning to be careful was made to all the jurors. Tr. 533, ll. 6 – 9.

Judge Brown then brought the rest of the jury into the courtroom. Tr. 534, ll. 9 – 19. He asked the jury whether Juror White had conveyed to all of them "that someone approached him yesterday about this case." Tr. 534, l. 20 – 535, l. 2. The transcript notes that the jurors indicated affirmatively. Tr. 535, l. 3. The court failed to ask about Juror White's admonition to be careful. The trial judge then asked the jurors whether they could remain fair and impartial, "based upon your knowledge that someone approached Mr. White about this case, asking him to vote in a certain way." Tr. 535, ll. 10 – 22. The transcript notes that no jurors raised their hand to tell the judge they could not be fair and impartial. Tr. 535, ll. 18 – 23. The judge asked the jurors to raise their hands if they had been approached by anyone "in any way, shape or form." Tr. 535, l. 24 – 536, l. 5. No jurors raised their hands. Tr. 536, ll. 6 – 8. Judge Brown asked one more time whether anyone could not be fair and impartial. Tr. 536, ll. 9 – 15. No juror responded. Tr. 536, ll. 9 – 15. The jurors then returned to the jury room. Tr. 536, ll. 16 – 19.

Appellant moved for a mistrial. Tr. 536, l. 25 – 537, l. 18. Appellant argued that, despite their collective assent to the judge's question about whether they could still be fair, the jury had been tainted and would believe appellant guilty because of the attempted influence of Juror White. Tr. 537, ll. 4 – 18. The solicitor argued that granting a mistrial would "be rewarding" appellant because he believed that appellant was "complicit." Tr. 537, ll. 20 – 23. The solicitor told the trial judge that on a jail call,

appellant was overheard referencing "Margaret" and that Juror White lived on Margaret Street. Tr.537, l. 25 – 538, l. 7. This jail call was not introduced into evidence.

Judge Brown took a recess to research the issue, stating before he left the bench that he was "not inclined to grant a mistrial, because there is absolutely nothing that could prohibit it from going on again and again and again and again unless the entire jury panel, every time this young man's tried, is sequestered and put up in a hotel room, and that's not the way our system works." Tr. 538, ll. 8 – 19. Judge Brown stated he agreed with the solicitor that granting a mistrial "would be, in some sense, rewarding the defense. . . ." Tr. 538, ll. 20 – 24.

When Judge Brown returned to the bench, he immediately ruled and denied the motion for a mistrial. Tr. 539, l. 17 – 542, l. 4. The court first cited State v. McDaniel, 275 S.C. 222, 268 S.E.2d 585 (1980) for the proposition that the matter was within his discretion. Tr. 539, ll. 17 – 25. He then cited State v. Carrigan, 284 S.C. 610, 328 S.E.2d 119 (Ct. App. 1985), for the proposition that a "defendant must show prejudice resulting from the outside influence on the jury to obtain a mistrial." Tr. 540, ll. 1 – 3. Finally, the judge cited several factors from State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). Tr. 540, l. 4 – 542, l. 4. The first factor considered was the "number of jurors exposed." Tr. 540, l. 4 – 542, l. 4. Judge Brown found that one juror, Juror White, was exposed. Tr. 540, l. 4 – 542, l. 4. He then stated that although it was "abundantly clear" that the jury learned of the attempt to influence Juror White, that only Juror White was actually exposed to someone trying to influence his vote. Tr. 540, l. 4 – 542, l. 4. The judge stated that none of the jurors indicated they could not be fair. Tr. 540, l. 4 – 542, l. 4.

The judge also interpreted Kelly as requiring him to assess the strength of the State's case. Tr. 540, l. 4 – 542, l. 4. Judge Brown stated there was "substantial evidence" of appellant's guilt which weighed in the State's favor. Tr. 540, l. 4 – 542, l. 4. After his ruling, the attorneys made their closing arguments and the trial judge gave his charge. Tr. 547, l. 2 – 617, l. 17. The jury returned a guilty verdict in thirty-eight minutes. Tr. 618, l. 14 – 619, l. 5.

Discussion

Once it became "abundantly clear" that Juror White told the other jurors about the attempt to influence his vote and that they should be afraid, the trial court was required to declare a mistrial. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. Const. amend. VI. "The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors." State v. Hill, 394 S.C. 312, 320, 714 S.E.2d 879, 883 (Ct. App. 2011). "The integrity of jury proceedings must not be jeopardized by unauthorized invasions." Remmer v. United States, 347 U.S. 227, 229 (1954). "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." Id.

In Remmer, the defendant was convicted of income tax evasion. Id. at 228. After the verdict, the defendant learned that "a person unnamed" had communicated with the jury's foreman and "remarked to him that he could profit by bringing in a verdict favorable to the [defendant]." Id. The juror told the judge, who informed the prosecution

and the FBI, but did not tell the defendant. Id. The judge concluded the statement was made in jest. Id.

The United States Supreme Court reversed. Id. at 229-30. The defendant argued that had he known of the incident, he would have moved for a mistrial. Id. at 229. The Court concluded that a presumption of prejudice attaches when an outside party attempts to influence a juror. Id. at 229. "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." Id. The Fourth Circuit applies the Remmer presumption in such a way that shifts the burden to prove that "there exists no reasonable possibility that the jury's verdict was influenced by an improper communication." United States v. Cheek, 94 F.3d 136, 141 (4th Cir. 1996) (internal quotations omitted).

In this case, the trial judge failed to recognize that prejudice was presumed. Instead, the trial judge assumed that granting a mistrial would reward the defendant. Tr. 538, ll. 8 – 22. The analysis used by the trial court to reach its conclusion was flawed. While McDaniel does say that mistrials are often within the trial judge's discretion, no motion for a mistrial was made in McDaniel. McDaniel at 223-24, 268 S.E.2d at 586. McDaniel dealt only with a juror making "improper remarks and gestures." Id. The juror was replaced by a qualified alternate and the defendant did not move for a mistrial. Id. The Court stated, "Admittedly, the appropriate remedy for improper communication between jurors and outsiders is the declaration of a mistrial." Id. The trial judge erred by ignoring this important statement of law and focusing on the abuse of discretion standard of review.

The trial judge also erred in his use of Carrigan. In Carrigan, a juror had a short conversation with a prosecution witness about the witness's sister having lost weight. Carrigan at 613, 328 S.E.2d at 120-21. The juror had no conversation with the witness about the trial. Id. The trial judge excused the juror and replaced him with an alternate. Id. This Court ruled that the "benign nature of the conversation" did not warrant a mistrial. Id. Far from any in-depth analysis of prejudice (because none was warranted), the Court observed that "the mere fact that some conversation occurs between a juror and a witness for the State does not necessarily prejudice a defendant." Id. The trial judge erred by focusing on this offhand comment concerning prejudice instead of the black letter law in the opinion that a criminal defendant is "constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influence. Id. Once the jury had been influenced by Juror White's comments, the trial court was required to declare a mistrial.

The judge also erred in his analysis under Kelly. Kelly involved a pro-death penalty pamphlet that one juror attempted to circulate during the penalty phase of a capital trial. Kelly at 139-44, 502 S.E.2d at 103-05. Kelly did not involve a contact from one of the parties who attempted to influence or intimidate a juror. The trial judge in Kelly found that no jurors other than the one who possessed the pamphlet were sufficiently exposed for it to cause their impartiality to be questioned. Id. The juror who brought the pamphlet was dismissed. Id. The trial judge erred in this case by using the Kelly court's finding that the extraneous influence was confined to the juror who possessed the pamphlet as analogous to Juror White being the only juror exposed to outside influence.

The crucial difference between this case and Kelly is that Juror White transmitted the attempt to influence him to the entire jury. All of the jurors learned that somebody associated with the defendant attempted to influence Juror White. Even worse, Juror White told all of the jurors to be careful. Tr. 530, ll. 12 – 16. Tr. 531, ll. 11 – 12. Juror White essentially told the jurors they should be afraid of appellant because there is no reason to be careful unless someone is dangerous. Even though no juror chose to single themselves out and respond to the judge that they could not be fair, once this element was introduced into the jury, it could not be impartial and decide the case on the evidence. Juror White should have informed only the court of the improper contact. Instead, he disobeyed the trial court's instructions not to talk about the case and informed the other jurors.

This case is similar to State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003). In Bryant, after juror qualification, the police contacted jurors' families and associates to find out if they could vote for the death penalty. Id. at 392-94, 581 S.E.2d at 158-60. The jurors themselves were not contacted. Id. The jurors learned from family members, neighbors, and each other about the contacts. Id. The trial judge denied the defendant's motion for a new trial finding that the jury was fair and impartial. Id.

The Court reversed. Id. Citing Remmer, the Court held that the defendant's right to an impartial jury had been compromised. Id. at 395-96, 581 S.E.2d at 160-61. The Court held that the questioning "could have been perceived as an attempt to intimidate jurors." Id. The questioning resulted in a jury that "was not fair and impartial and, therefore, appellant's Sixth and Fourteenth Amendment rights were violated." Id. At no

point in Bryant did the Court discuss the weight of the evidence or the strength of the State's case against the defendant. The Court conducted no harmless error analysis.

Like in Bryant, the jurors in this case were aware of the attempt to influence one of their number. Nothing in the Bryant decision states that any juror expressly said it caused them not to be fair or impartial, although the jurors expressed concern and one felt it might be jury tampering. Consistent with Remmer, the Court in Bryant did not focus on whether the jurors **said** they could be fair or impartial, but instead assumed that such contacts would result in a tainted jury. The trial court in this case failed to recognize this crucial distinction between cases where jurors have innocuous conversations with witnesses or read the newspaper and cases where one of the parties attempts to influence jurors directly or indirectly.

The trial judge also erred in its assessment of the evidence against appellant. As will be shown in Issue 2, trial courts should not consider this as a factor and to that extent, Kelly and our cases that include this factor should either be overruled or limited to cases that do not involve intimidation or attempts at influence by a party. Even if the weight of the evidence can be constitutionally considered, the evidence against appellant was not overwhelming. The State's best evidence was the DNA on the items found in the woods. Witnesses contradicted each other on whether appellant had access to a green Honda. None of the people in the bank could identify appellant. Appellant never gave any incriminating statements. Witnesses testified on appellant's behalf that he was working at Burger King on the day of the robbery. This evidence is not sufficient to foreclose any possibility that appellant would have been acquitted.

Furthermore, the trial judge should not have considered appellant's possible complicity. No evidence—only the solicitor's proffer concerning jail calls—was admitted conclusively tying appellant to the person who approached Juror White. Without taking any evidence that conclusively connected appellant to the tampering attempt, it allowed the jurors to speculate about whether the defendant was responsible. See Mincey v. State, 314 S.C.355, 358, 444 S.E.2d 510, 511 (1994) ("References to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats."). "It would be a 'prostitution of justice' to permit evidence that someone attempted to influence a witness by fear or fright without any evidence that connects the defendant with the tampering." Id. To a juror, an attempt to influence another juror would cause more fear and prejudice them against the defendant than the references to intimidation of a witness in Mincey. This Court should reverse and remand this matter for a new trial.

2.

When determining whether to declare a mistrial because of outside influences on the jury, the Sixth Amendment does not allow a trial judge to consider the weight of the evidence against a criminal defendant as a factor in his decision.

The trial court erred in considering the weight of the evidence against appellant. The Sixth and Fourteenth Amendments guarantee criminal defendants a fair trial by an impartial jury even if they are guilty beyond all doubt. U.S. Const. amends. VI, XIV. The federal cases interpreting the Sixth Amendment with respect to allegations of jury tampering do not consider the weight of the evidence. See, e.g., Remmer, Cheek. See also Mattox v. United States, 146 U.S. 140 (1892). The Sixth Amendment only allows

inquiry into the prejudice of the jury and whether the impartiality of the jury can be questioned.

The Fourth Circuit's discussion of the Sixth Amendment analysis in Cheek is instructive. Cheek, 94 F.3d at 140-44. The Fourth Circuit described a "three-step process" that does not include any assessment of the evidence of the underlying crime. Id. at 141. "The party who is attacking the verdict bears the initial burden of introducing competent evidence that the extrajudicial communications or contacts were more than innocuous interventions." Id. (internal quotations omitted). "If this minimal standard is satisfied, the *Remmer I* presumption is triggered automatically." Id. "The burden then shifts to the prevailing party to prove that there exists no reasonable possibility that the jury's verdict was influenced by an improper communication." Id. (internal quotations omitted).

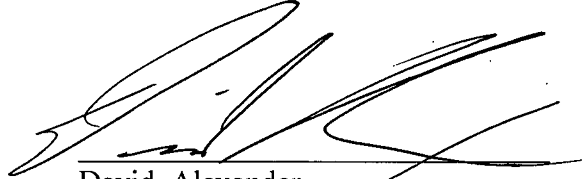
Judge Brown used the factors listed in Kelly to make his decision. Kelly includes as a factor "the weight of the evidence properly before the jury." Kelly at 142, 502 S.E.2d at 104. This factor is incompatible with the Sixth Amendment. It unconstitutionally removes the fact finding function from the province of the jury and erroneously allocates it to the trial judge. It also amounts to a trial judge conducting a harmless error analysis—which is the function of an appellate court. State v. Bruce, 412 S.C. 504, 509, 772 S.E.2d 753, 755-56 (2015) ("As both parties agree, it is clearly improper for the trial court to perform a harmless error analysis on its own evidentiary ruling."). This Court should use this case to recognize that use of the weight of the evidence is unconstitutional and, to the extent necessary, limit or overrule this portion of

Kelly. Because the trial judge used an unconstitutional consideration, this case must be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and this matter remanded for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of August, 2015.

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THE STATE,

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TYRONE DARIUS ELLISON,

APPELLANT

APPELLATE CASE NO. 2014-002337

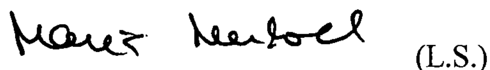
CERTIFICATE OF SERVICE

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 Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Tyrone D. Ellison, #324947, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 25th day of August, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of August, 2015.



_____________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.