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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

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SC Court of Appeals

The Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2014-001779

THE STATE OF SOUTH CAROLINA, RESPONDENT,

v.

DAMIAN D. ANDERSON, APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

S.C. Code § 14-7-1330 was not implicated under the facts of this case where Appellant's jury was never "deadlocked" in the first place. However, even assuming for argument's sake that the jury returned twice without having agreed upon a verdict, the trial judge did not abuse his discretion by requesting that the jury resume deliberations where the jury consented.

STATEMENT OF THE CASE

Appellant was indicted in Charleston County for committing an assault on a police officer while resisting arrest. On August 4-6, 2014, Appellant was tried before the Honorable W. Jeffrey Young and a jury. The jury found Appellant guilty, and Judge Young sentenced Appellant to ten years. A timely notice of appeal was served and filed.

ARGUMENT

S.C. Code § 14-7-1330 was not implicated under the facts of this case where Appellant's jury was never "deadlocked" in the first place. However, even assuming for argument's sake that the jury returned twice without having agreed upon a verdict, the trial judge did not abuse his discretion by requesting that the jury resume deliberations where the jury consented.

Relevant Facts

Appellant's jury began deliberating around 11:00 am on August 6, 2014. (See R. p. 213-15). After asking two questions regarding the law of resisting arrest and assault, and after re-hearing Appellant's trial testimony around 1:00 pm, the jury reported it had reached a verdict shortly before 2:00 pm. (See R. p. 215-18). When the jury returned to court with its verdict, the foreperson stated that the jury had reached a verdict and that the verdict was unanimous. (R. p. 218-19). The clerk read the verdict of guilty and all twelve jurors raised their hands to affirm that the verdict was guilty. (R. p. 219, lines 6-14). The defense requested polling of the jury. (R. p. 219, lines 15-18). After the clerk polled several jurors, one juror indicated that the guilty verdict was not her verdict and that her verdict was not guilty. (R. p. 222, lines 6-17). The trial judge then stated "I will send the jury back to the jury room to continue your deliberations." (R. p. 222, lines 18-19). The jury went back into the jury room at 2:03 pm. (R. p. 222, lines 20-21). Subsequently, the jury requested a transcript of Appellant's testimony and a transcript of the testimony of two police officers. (R. p. 222-24).

Shortly before 4:30 pm, the jury sent out a note stating as follows: "**If** we cannot come to a decision **today**; what would be the next step?" (R. p. 224, lines 5-6; see Court's Exhibit # 3) (emphasis added). The trial judge told the attorneys he would provide an Allen charge to the jury and "see what happens after that." (R. p. 224, lines 9-

10). Defense counsel objected, arguing that sending the jurors back to deliberate again without their consent would violate S.C. Code § 14-7-1330. (R. p. 224, lines 14-23). The judge responded that the jurors did not "return into court without having agreed upon a verdict" previously because they in fact returned stating that they *had* agreed upon a verdict and it was not until polling that it was revealed that the verdict was not unanimous. (R. p. 224, line 24 – p. 225, line 1). The judge noted defense counsel's objection. (R. p. 225, line 1). The jury then returned to the courtroom and the judge provided a standard Allen charge. (R. p. 225-27). The jurors, without voicing or indicating any unwillingness, returned to their deliberations at 4:31 pm. (R. p. 227, lines 5-6).

The trial judge asked if there were any objections and noted that he would declare a mistrial if the jurors came back again without reaching a verdict. (R. p. 227, lines 7-11). Defense counsel stated he objected on the ground that he was "worried maybe [the juror] was coerced into going along with the other 11, and when she came out in the open courtroom, feels more comfortable to express her views." (R. p. 227, lines 12-16). The judge responded: "Sometimes people think they are okay being in a group, but when it gets polled, they don't like it. And that's their right, and I will declare a mistrial if I need to." (R. p. 227, lines 17-20). Thereafter, the jury asked about having a transcript of some of the officers' testimony. (R. p. 227-28). The judge informed the jurors they could come into court and listen to the requested testimony. (R. p. 228, lines 4-6). At 4:57 pm, the jury returned to court with a guilty verdict, and all jurors responded affirmatively in the subsequent poll. (R. p. 228-31). Following release of the jury, defense counsel renewed his motion for mistrial, arguing that he felt like "maybe that last juror was

coerced by coming out the first time and the jury not being unanimous, and then sending back a note saying they are still unable to come to a verdict, and after the Allen charge seemed to come pretty quickly, so I would make a motion for mistrial based on that." (R. p. 234, lines 9-15). The judge denied the motion. (R. p. 234, lines 19-23).

Discussion

The sole issue before this Court is whether or not the trial judge violated S.C. Code § 14-7-1330. This statute states as follows:

> When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may sent it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

Here, this code section was not implicated because, as the trial judge pointed out, the first time the jurors came back into the courtroom, they did not return to court "without having agreed upon a verdict" within the meaning of the statute where they returned to court for the sole purpose of reporting a unanimous verdict. (See R. p. 218-19; p. 224, line 24 – p. 225, line 1). See Kirven v. Lawrence, 235 S.C. 380, 385, 111 S.E.2d 692, 694 (1959) (pointing out that a jury's "return," under the predecessor of S.C. Code § 14-7-1330, "primarily implies voluntary action, ***actuated by, and based upon, the jury's inability to agree***." (emphasis added & citation omitted)); State v. Drakeford, 120 S.C. 400, 113 S.E. 307, 309 (1922) ("We do not think there was a 'return' for the 'second time without having agreed upon a verdict' in the sense contemplated by the statute. . . . Such return primarily implies voluntary action, actuated by, and based upon, the jury's inability to agree."). Indeed, all twelve jurors affirmed the unanimous verdict by raising

their hands and it was not until the time of polling that a juror changed her mind about her verdict.[1] (See R. p. 218-22). Accordingly, contrary to Appellant's contentions, a "return" of the jury "without having agreed upon a verdict" did not occur under these circumstances. See State v. Kelly, 372 S.C. 167, 172, 641 S.E.2d 468, 471 (Ct. App. 2007) (finding that an Allen charge is not required after a juror retracts her verdict at polling because this is not a situation where the jury has "expressed a deadlock and cannot come to a unanimous conclusion"). As a result, S.C. Code § 14-7-1330 was never implicated in this case.

Additionally, regardless of Appellant's characterizations, the jury did **not** subsequently indicate to the trial judge that it was actually deadlocked. Despite the fact that the judge construed the jurors' note as indicating they were at an "impasse" and provided the jury with an Allen charge in response, in fact, the jurors' note merely inquired as to what would happen "**if**" they did not reach a decision that day. (See Court's Exhibit #3; p. 224-27). In light of the fact that it was nearing 5:00 pm, it is hardly suprising the jurors were wondering whether or not it would be possible to return the next day to continue their deliberations. Since the jurors never returned into court to report they were deadlocked, S.C. Code § 14-7-1330 was, again, not implicated.

Finally, even assuming for argument's sake that the jury did return into court two times "without having agreed upon a verdict," the jury resumed deliberations by its own consent. If there is "no indication of any unwillingness on the part of the jury to retire a third time," a trial judge does not abuse his discretion by concluding the jury consents to

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[1] Although the propriety of the court's action in sending the jury back to deliberate after the first poll is not at issue in this appeal, the State would note that the trial judge's response was entirely proper. See State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 576 (1995) ("If it is made known to the court when it is time to render the verdict that any juror does not assent to it, the verdict cannot be received and the jury should retire to their room until they have agreed.").

continue deliberations. State v. Rowell, 75 S.C. 494, 56 S.E. 23, 29 (1906); see also State v. Freely, 105 S.C. 243, 89 S.E. 643, 644 (1916) ("The exercise of such a discretion at so delicate stage of a trial ought not be disturbed unless it was obviously wrongly exercised."); Buff v. South Carolina Dept. of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) ("[T]he trial judge who is in the best position to observe the jury's demeanor should have some flexibility in guiding a case to its final resolution while protecting the parties' rights to a fair, impartial, and conscientious verdict."). A mistrial should be declared only if a jury indicates, either through words or conduct, that further deliberations would be fruitless and that it wishes to be discharged. See Freely, 105 S.C. 243, 89 S.E. 643; Buff, 342 S.C. at 422-23, 537 S.E.2d at 282-83.

Here, the trial judge did not abuse his discretion by requesting that the jury make another attempt to reach a unanimous verdict where there were no verbal remarks made by any of the jurors indicating they did not consent and no conduct or circumstances indicating any of the jurors did not consent. Furthermore, as discussed above, the jurors' note did **not** indicate they were hopelessly deadlocked but instead merely indicated they wanted to break for the evening. The jury's consent to continue deliberations can be readily inferred considering the nature of the jury note and the lack of any evidence of unwillingness on the part of any of the jurors. See Drakeford, 120 S.C. at 400, 113 S.E. at 310 ("There was no insistence here that a verdict could not be agreed on and no objection or complaint (as in State v. Kelley, 45 S. C. 659, 24 S. E. 45) on the part of the jury as to retiring for further deliberation. We are therefore clearly of the opinion that there was no violation of the statute in question and no coercion exercised by the trial court in again charging the jury and sending them back on the last occasion.").

Accordingly, the trial judge did not abuse his discretion in concluding the jurors consented to continue their deliberations. See Buff at 423, 537 S.E.2d at 283 ("Here, the trial judge properly responded to the jury's second note stating it was deadlocked. The court informed the jury of the desirability of reaching a verdict and advised the jury no other twelve individuals were more capable of deciding the matter, yet reminded the jury no juror should surrender his or her conscientious conviction simply to reach a unanimous verdict. The trial judge's request, " *to try if you can* to make one last effort at *trying* to reach a unanimous verdict, *if possible* " and "both sides would like, *if possible,* for you to reach a unanimous verdict *if you can,*" urged the jury to make one last attempt at reaching a unanimous verdict. It did not require deliberations continue for a certain length of time or imply that the jury *must* reach a verdict. Although the jury had not previously hesitated to communicate with the trial judge, none of the jurors expressed any unwillingness to comply with the trial judge's request. In fact, within the hour, the jury informed the trial judge it was making progress and reached a unanimous verdict. Accordingly, the record indicates the jury consented to a third attempt at deliberations." (emphasis in original)); Edwards v. Edwards, 239 S.C. 85, 93 121 S.E.2d 432, 436 (1961) ("There was no response or indication of unwillingness on the part of any member of the jury, but on the contrary they returned immediately to the jury room for further deliberation. No verbal acceptance of the request of the trial Judge was made, but consent was implied. Had there been a statement to the effect that further consideration of the case was without their consent, it would have become the duty of the trial Judge to discharge them. However, under the circumstances, if the Judge was satisfied in the exercise of his discretion that the jury consented to return for further deliberation, he

should not have dismissed them but permitted further deliberation as was done in instant case."); Freely at 243, 89 S.E. at 644 ("So the question is, did it appear to the judge, under all the circumstances there presented, that the jury consented to return the third time? Plainly if the jury had said: 'We can't agree. It's no use to send us back; we desire to be discharged'- the duty would have been imperative upon the judge to discharge them. If the same thing had been manifest from all the circumstances, the same imperative duty would have operated. If the circumstances satisfied the judge, in a wise exercise of his discretion, that the jury consented to the return, then it was lawful to return them."); cf. State v. Barnes, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013) ("Here, the judge appears to have inadvertently coerced the jury when he indicated that he could order the jury to continue to deliberate. In the context of this case, we view the foreman's diplomatic response, that is, that he did not think that further deliberations would be fruitful, as manifesting a lack of consent. That the jury did in fact return the next day does not convince us that this jury manifested consent through its conduct, especially in light of its having been told that the judge would order continued deliberations if necessary."). S.C. Code § 14-7-1330 was not violated in this case, and Appellant is not entitled to a new trial on this basis.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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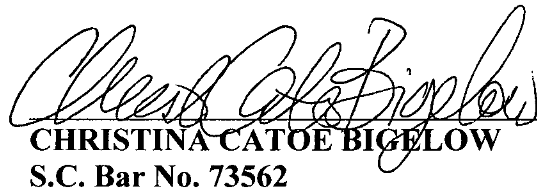

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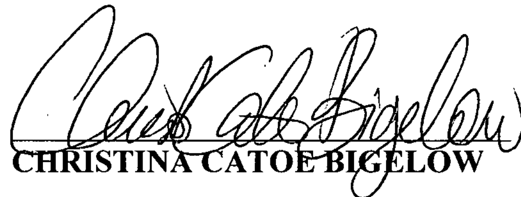
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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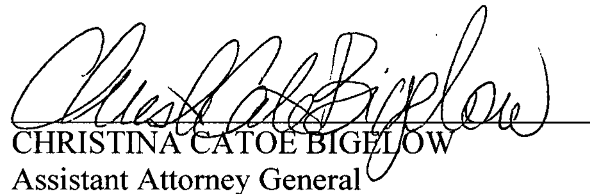
PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Wanda H. Carter,** South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **22nd** day of **June, 2015.**



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