STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

RECEIVED
MAR 10 2016
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TROY STEVENSON,

APPELLANT,

Appellate Case No. 2015-002171

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the Circuit Court erred in its decision to deny Appellant's motion to dismiss the indictments after its previous ruling to grant the state's motion for mistrial, over the objection of the defendants when it was not supported by manifest necessity.

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

This appeal should be dismissed as interlocutory and not immediately appealable because no sentence has been imposed. Further, the trial court did not abuse its discretion to grant the motion for a mistrial based on manifest necessity when the record clearly showed: 1) the alternate juror made inappropriate comments early in the trial and attempted to influence other jurors; 2) the remaining jurors failed to report the misconduct and also discussed the evidence prematurely; and 3) the defendant's family attempted to intimidate the jury during their ingress and egress from the courthouse. Because manifest necessity supported the granting of the mistrial, jeopardy did not attach and the court properly denied Appellant's motion to dismiss the indictments before his re-trial.

RESPONDENT'S STATEMENT OF THE CASE

A Richland County grand jury indicted Appellant, Troy Stevenson, in February 2014, for murder, kidnapping, second degree burglary, and attempted armed robbery. (Indictments.) The grand jury also indicted Appellant's brother, Trenton Barnes (Barnes), and Lorenzo Young (Young). (T. p. 1.) Barnes and Young were tried jointly in November of 2014, and were found guilty of all charges.

On June 15, 2015, Appellant's case was called to trial before the Honorable Robert Hood. (T. p. 1). Aimee J. Zmroczek, Esquire, represented Appellant during the trial. (T. p. 1). Assistant Solicitors Dolly Garfield, Kathryn Campbell, and Nicole Simpson represented the State. (T. p. 1.) The trial continued from June 15, 2015, until June 22, 2015, when the jury began deliberations. Upon notice from the solicitor's office of possible juror misconduct, Judge Hood halted deliberations. (T. p. 1244-1245.) Judge Hood granted a mistrial on June 22, 2015. (T. p. 1290) On August 24, 2015, Judge Hood ordered Juror Lisa McLean to appear to show cause on whether she should be held in contempt of court for her actions during Appellant's trial. McLean was found in contempt and sentenced to six months in jail suspended on the payment of court costs and 300 hours of community service. (Order of Dismissal filed Oct. 16, 2015, pp. 5-6.) On September 10, 2015, Appellant filed a motion to dismiss the indictments. (Order of Dismissal filed Oct. 16, 2015, p. 1.) Judge Hood held a hearing on the matter October 12, 2015, and denied Appellant's motion. (Order of Dismissal filed Oct. 16, 2015, p. 6)

This interlocutory appeal follows.

RESPONDENT'S STATEMENT OF FACTS

In the early morning hours of July 1, 2013, Theresa Baskin heard the screams of thirty-three year old Kelly Hunnewell, who worked the early morning shift in the off-site bakery for the Carolina Café. (T. pp. 249-250.) Baskin, who lived across the street from the bakery on Tommy Circle, heard the dying words of the mother of four after she was shot by Lorenzo Young and Trenton Barnes, while Appellant Troy Stevenson served as the lookout for the robbery (T. pp. 251-253; 263; 429.)

Hunnewell arrived every morning at 3:00 am to make the bagels and sandwiches for the popular downtown deli. (T. p. 319; 465; 466.) On the morning of the murder, Young and Barnes intended to rob the nearby Original Ale House. (T. pp. 688-689.) When they realized the bar was closed, the men chose the next most convenient victim. Hunnewell was in the bakery next door with the lights on and the door propped open. (T. p. 760.) Appellant joined the men as they surveilled the bakery for approximately nineteen minutes before the murder occurred. While Appellant served as the lookout, Young and Barnes approached Hunnewell, who was working at the stove and had her back to the door. (T. pp. 696-697; 760.) After a struggle in which Hunnewell tried to defend herself, the men shot her multiple times. (T. pp. 396-401.) Kelly Hunnewell collapsed on floor with a bullet lodged in her back, drowning in her own blood. (T. pp. 545; 679-680.)

In contrast to the trial of Young and Barnes, in which the identity of the perpetrators was contested, the trial of Appellant centered on whether he knew of the robbery in advance and agreed to participate as the lookout. (T. pp. 421-424.) Appellant

claimed he had no involvement with his brother's crime and was only present at the scene because his mother told him to find his brother and bring him home. (T. p. 870.)

The State presented compelling evidence of Appellant's guilt. First, both the bakery and the nearby Ale House were equipped with security cameras that captured varying perspectives of the murder scene. (T. p. 336; pp. 341—342.) The police released portions of the videos to the media and soon received tips identifying Young, Barnes and Appellant as the men who committed the crime. (T. pp. 349-350; 362-364.)

Next, Donald Moore, a friend of Trenton Barnes and Troy Stevenson, testified under subpoena for the State. (T. p. 614, line 1 – p. 615, line 22; p. 633, lines 11-14.) Though he recanted his story later, he testified he contacted the police after he saw the story about the murder on television. (T. p. 616, line 10 – p. 617, line 15.) Moore told police Young and Stevenson talked about robbing the Ale House before the murder. (T. p. 618, lines 9-15.) Moore told police Appellant knew the model and color of the car driven by the manager of the Ale House, who would be leaving with the deposit bag (T. p. 689, 3-16.) Moore also testified Stevenson came to his house the morning after the murder and bragged about "plugging the bitch" the night before. (T. p. 693.) Moore's mother corroborated Appellant's presence at their house the morning after the crime. (T. pp. 716-718.)

Further, an inmate testified Appellant told him he was the designated lookout and relayed to the inmate details about the crime that had not been released to the media. (T. pp. 757-760.) The inmate also testified Appellant told him his mother would be his alibi. (T. p. 762.)

Appellant also changed his story to police, first denying any presence at the scene of the crime, then admitting he was present but denying any knowledge or involvement in his brother's activities, then later admitting he knew about the intended robbery ahead of time. (T. pp. 825-826; 840-841.) In a video downloaded from Lorenzo Young's phone, a man identified as Appellant is seen holding a gun consistent with the type of gun used in the murder with a mask covering his face, similar to the mask seen on the third man in the bakery video. (T. pp. 409-412; 862-863.)

Finally, the State's most compelling evidence against Appellant was the time-stamped security cameras from outside the Ale House and inside the bakery. Using video captured by these cameras, the State was able to show the third perpetrator, who wore something to conceal his face, arrived on scene nineteen minutes before the murder, at one point looked inside the bakery window, and appeared in the doorway of the bakery as the men inside shot the victim. (T. p. 779.)

How the Issue Was Raised at Trial

The jury began deliberations at 4:19 pm. (T. p. 1245.) Shortly after the jury began deliberating, an investigator for the State noticed one of the alternates embrace the Appellant's family members. The alternates got into the same car together, and were later seen walking down the street with Appellant's family. (T. p. 1272) Judge Hood discussed the matter with counsel for the State and Appellant, and both agreed he should examine the jurors individually to inquire about any misconduct. (T. p. 1273.) At 5:24 pm, Judge Hood ordered the jurors to stop deliberating so he could question each one in chambers. (T. p. 1245.)

Of the twelve jurors seated for the trial, eleven overheard one of the alternates, Lisa McLean, state something similar to, "This is ridiculous and I've already made up mind." (T. p. 1288.) The eleven jurors who overheard her talking about the case, despite Judge Hood's repeated warnings not to do so, failed to inform the court of the alternate's statements. One juror told Judge Hood the alternate whispered to her that the defendant was not guilty, and, "blacks should stick together." (T. p. 1288.)

Other jurors admitted commenting on the video evidence and overhearing the same alternate complain frequently about not wanting to be there for the trial. (T. p. 1288.) When questioned further, one juror said, "I'm sure trying to be fair," then began laughing. (T. p. 1288) Another juror said, "Oh, he was scary" regarding the presentation of some evidence before deliberations. (T. p. 1288) Another stated, "It's about to get real," when the video of the shooting was played for the jury. (T. p. 1288, lines 10-15.)

Significantly, during the course of the trial, members of Appellant's family appeared to intimidate the jury. As the jury was leaving one evening, a member of Appellant's family approached the juror and said, 'Have a good night or have a good day, Juror." (T. p. 1285.) The family member also created a funnel at the bottom of the stairs at the courthouse, so that when the jury exited the building, they had to pass through Appellant's family. (T. p. 1285.) When questioned by the judge, the jurors admitted they felt uncomfortable leaving the building and coming back in the courthouse. (T. p. 1286.) Judge Hood assigned deputies to walk the jurors to their cars and arranged for the jurors to enter and leave the courthouse by an alternate route. (T. p. 1286, lines 9-13.)

The Judge's Ruling on the Mistrial

Judge Hood cited the following numerous reasons for his ruling:

1) On several occasions the jurors spoke about the evidence admitted at trial before deliberations.
2) The alternate disobeyed her oath in many instances of misconduct, including her contact with Appellant's family, her statements out loud about her opinion of the case, her complaints about not wanting to be present for the trial, and, most egregiously, her deliberate attempts to influence the other jurors to band together on the basis of their race.
3) Appellant's family attempted to pressure the jury by speaking to them as they were leaving and crowding around the stairs of the courthouse.
4) The jurors failed to report the alternate's misconduct and the "pre-deliberation discussions about the evidence presented, specifically weighing on the defendant's guilt."

(T. p. 1289, lines 20-22.)

Furthermore, Judge Hood acknowledged the inadequacy of a curative instruction, stating, "There is no curative instruction that can undo the continuing improper influence that was exerted on this jury and the fact that the majority of the jury has simply failed to follow the Court's repeated orders to not discuss the case in any manner with anyone." (T. p. 1289, line 24 – p. 1290, line 4.) Though the State moved for the mistrial after the discussion in chambers, and over Appellant's objection, the court found a serious risk of prejudice to both the State and the defense, under the circumstances. (T. p. 1290, lines 5-7.) The court found the potential prejudice made granting the motion for a mistrial a "manifest necessity." (T. p. 1290, lines 7-8.)

The Contempt Hearing of the Alternate Juror

At the contempt of court hearing for the alternate held August 24, 2015, Lisa McLean elected to plead guilty. (T. Aug. 24, 2015, at pp. 1-3.) Judge Hood requested counsel representing McLean help him understand what she was thinking and any other mitigating factors that would explain her behavior. (T. Aug. 24, 2015, at p. 4.) McLean testified she initially told the court she was disabled, but was not asked, and did not inform the court, of the nature of her disabilities. (T. Aug. 24, 2015, at p. 6.) McLean testified she has anxiety, diabetes, and has a metal rod in her back. (T. Aug. 24, 2015, at p. 6.)McLean told Judge Hood she wanted to ask to be excused, but she was afraid, and she was late every day of jury duty and told everyone every day of duty she did not want to be on the jury. (T. Aug. 24, 2015, at p. 7.) McLean said she "felt like [she] was being caged in and wanted to get out." (T. Aug. 24, 2015, at p. 7, line 20.) McLean also testified she was deeply affected by the video of Hunnewell being shot. (T. Aug. 24, 2015, at p. 8.) McLean testified because her medications make her sleepy, she had to be frequently woken up during the trial by another juror. (T. Aug. 24, 2015, at p. 12.)

After a break in which Judge Hood dealt with other matters, the court sentenced McLean to six months' imprisonment suspended to 300 hours of community service and the repayment of $900 in reimbursement fees for the money paid to jurors during the trial. (T. Aug. 24, 2015, at pp. 19-21.) Emphasizing the significance of McLean's misconduct, he told her he following:

> You have 14 other members of your community that gave up 6 days of their lives to come in here to make a decision on a case that all left with the feeling of nothing been accomplished, okay, and you had 2 families, both the Honeywell family and Mr. Stevenson's family, that have yet another delay in a trial because of your conduct in your behavior which was inappropriate.

((T. Aug. 24, 2015, at p. 22)

Hearing on the Motion to Dismiss the Indictments

On October 12, 2015, the defense argued its motion to dismiss the indictments before Judge Hood. (T. Oct. 12, 2015, p. 1). The defense moved to dismiss on the grounds of double jeopardy. The State argued the mistrial was a manifest necessity because of the multiple instances of juror misconduct. The State also argued against the motion to dismiss because the order was not an appealable as a final decision of the court. (T. Oct. 12, 2015, p. 7-8.) Significantly, Judge Hood asked defense counsel whether her failure to ask for a mistrial would have been grounds for post-conviction relief, had the defendant been convicted. (T. Oct. 12, 2015, p. 11, lines 2-18.) Counsel acknowledged it would likely be an issue.

ARGUMENT

This appeal should be dismissed as interlocutory and not immediately appealable because no sentence has been imposed. Further, the trial court did not abuse its discretion to grant the motion for a mistrial based on manifest necessity when the record clearly showed: 1) the alternate juror made inappropriate comments early in the trial and attempted to influence other jurors; 2) the remaining jurors failed to report the misconduct and also discussed the evidence prematurely; and 3) the defendant's family attempted to intimidate the jury during their ingress and egress from the courthouse. Because manifest necessity supported the granting of the mistrial, jeopardy did not attach and the court properly denied Appellant's motion to dismiss the indictments before his re-trial.

Introduction

Appellant is not entitled to appeal the decision of the trial court to deny his motion to dismiss the indictments following the court's declaration of a mistrial because the decision is interlocutory and not immediately appealable. Even if this Court elects to decide the appeal on the merits, Appellant's contention the trial judge erred when it

refused to dismiss Appellant's indictments following the declaration of a mistrial must fail. The trial court did not abuse its discretion in finding a manifest necessity for a mistrial because of the jurors' misconduct. Further, because the jurors never reached a verdict, jeopardy did not attach to Appellant. In fact, trial counsel acknowledged Appellant would have cited her failure to request a mistrial in a post-conviction relief setting, had he been convicted. Given the misconduct of the majority of jurors on the panel, the trial court had no choice but to declare the mistrial for the protection of the State *and* Appellant.

The Order Is Not Appealable Because a Final Sentence Has Not Been Imposed

As a preliminary matter, Respondent has contemporaneously filed a Motion to Dismiss the appeal. Pursuant to S.C. Code Ann. § 14-3-330 (1976), a criminal defendant may not appeal a decision of the trial court until after sentence has been imposed. *State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986); *see also State v. Timmons*, 68 S.C. 258, 47 S.E. 140, 141 (1904) (The general rule is that a criminal defendant may not appeal "except from the final sentence imposed by the court.") In *State v. Clifford*, 335 S.C. 129, 515 S.E.2d 550 (Ct.App.1999), the Court of Appeals created an exception to this rule, permitting a criminal defendant to appeal a circuit court order remanding his case to magistrate court for further proceedings provided the issue is whether such proceedings would violate the defendant's double jeopardy rights. *See also State v. Gregorie*, 339 S.C. 2, 3, 528 S.E.2d 77, 78 (2000). In *Clifford*, however, the defendant's conviction in magistrate court was appealed to the circuit court. The circuit court reversed and remanded to the magistrate to take further evidence to make a new finding of guilt.

Clifford is distinct from the instant case because the defendant was actually convicted and the order of remand was essentially an order for a new trial.

In the case at hand, Appellant has not been convicted, and therefore the appeal is interlocutory. The jurors were interrupted in their deliberations before they reached a verdict. Thus, jeopardy did not attach. The proper avenue for appeal is at the conclusion of Appellant's re-trial.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only" and is "bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citation omitted). "The decision to grant or deny a mistrial is within the sound discretion of the trial court." *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct.App.2009). Our courts favor the exercise of wide discretion by the trial judge in determining the merits of such motion in each individual case. *State v. Howard*, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court. *Id.* ("The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law.")

Jeopardy Did Not Attach

The Double Jeopardy Clauses of the United States and South Carolina Constitutions prevent all citizens from being placed twice in jeopardy of life and liberty. *See* U.S. Const. amend. V ("No person shall be ... subject for the same offence to be twice put in jeopardy of life or limb ..."); S.C. Const. art. I, § 12 ("No person shall be

subject for the same offense to be twice put in jeopardy of life or liberty ..."). Accordingly, a defendant may not be (1) prosecuted for the same offense after acquittal, (2) prosecuted for the same offense after conviction, and (3) subjected to subsequent prosecution for the same offense after an improvidently granted mistrial. *State v. Kirby*, 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977).

Although jeopardy generally attaches when the jury is sworn and impaneled, circumstances exist in which the interests of justice are served by the discharge of the jury, even without the defendant's consent. *State v. Rowlands*, 343 S.C. 454, 457, 539 S.E.2d 717, 718 (Ct.App.2000).

> Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.

Arizona v. Washington, 434 U.S. 497, 50517 (1978). The court must consider "whether the 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). "Manifest necessity" is not a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. *State v. Baum*, 355 S.C. 209, 214-15, 584 S.E.2d 419, 422 (Ct. App. 2003). Further, the court need only find a "high degree" of necessity in order to conclude that a mistrial is appropriate under the circumstances. *Id.* at 506. Whether a

mistrial is mandated by manifest necessity is a fact specific inquiry. *Rowlands*, 343 S.C. at 457, 539 S.E.2d at 719.

The prohibition against double jeopardy is intended to condemn the practice of the prosecution requesting a mistrial for the sole purpose of buttressing weakness in its evidence; the strictest of scrutiny is appropriate when the basis for a mistrial is the unavailability of critical prosecution evidence. *Arizona v. Washington*, 434 U.S. 497 (1978). Therefore, the application of the double jeopardy bar is dependent on a showing of the prosecutor's subjective intent to cause a mistrial in order to retry a case. *State v. Parker*, 391 S.C. 606, 707 S.E.2d 799 (2011) (The State introduced an unredacted graphic video of the crime scene, accused the defense attorney of unethical conduct in coaching witnesses, and implied to the jury that is was their community duty to convict the Defendant of murder.); see also *Bellew v. State*, 697 S.E.2d 249, 251 (Ga. Ct. App 2010) ("Whether juror misconduct is so prejudicial as to require removal and a mistrial is a matter generally left to the trial court's discretion, and the absence of prosecutorial misconduct is a significant factor.") (citing *Cooke v. State*, 496 S.E.2d 337 (1998)); *Burleson v. State*, 384 S.E.2d 659, 661 (1989) (noting the significance that "no prosecutorial misconduct [was] involved").

Case law suggests jeopardy may attach when the prosecutor moves for the mistrial as a means of strategy—hoping for a second prosecutorial bite at the apple rather than losing the case through an acquittal. In this case, however, the facts do not warrant the conclusion the prosecution derived any benefit from the granting of the mistrial. On the contrary, at the time the misconduct came to light, the State had presented compelling evidence of Appellant's guilt. The State's decision to move for a mistrial following the

voir dire of the jury served the interests of justice because of the potential prejudice to both the State **and** the defense.

Manifest Necessity of the Mistrial

A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." *State v. Wasson*, 299 S.C. 508, 386 S.E.2d 255 (1989), *cited in State v. Patterson*, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). "A mistrial should only be granted when 'absolutely necessary' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." *State v. Stanley*, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted).

In the case *sub judice*, neither counsel nor witnesses for the State or the defense exhibited improper conduct. Instead, the trial court questioned the ability of the jury to be impartial because of juror misconduct, as well as intimidating behavior from Appellant's family. In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. *State v. Cooper*, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999) (citing *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998)). Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict. *Id.* "A motion for a mistrial or a new trial because of alleged jury misconduct must be granted if the evidence of misconduct indicates that a fair and impartial trial could not be had under the circumstances." *Summers v. State*, 831 A.2d 1134, 1141 (Md. 2003) (citations omitted). The right to an impartial jury cannot be compromised by even the hint of possible bias or prejudice that is not affirmatively rebutted. *Wardlaw v. State*,

971 A.2d 331, 338 (Md. Ct. App. 2009). Thus, when the mistrial is premised upon juror misconduct, the court must determine whether the jury's impartiality has been compromised.

In analyzing allegations of premature juror deliberations, "the trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. If requested by the moving party, the court may voir dire the jurors and, if practicable, 'tailor a cautionary instruction to correct the ascertained damage.'" *State v. Aldret*, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999) (quoting *United States v. Resko*, 3 F.3d 684, 695 (3d Cir. 1993)). In determining whether outside influences have affected the jury, the court may consider: "(1) the number of jurors exposed, (2) the weight of the evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice." *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000).

Following a conference in chambers off the record between the Court and counsel, the judge opted to voir dire the jurors individually in chambers. (T. p. 1245.) At the conclusion of the questioning, the trial judge considered the arguments of both the State and counsel for the defense. (T. pp. 1274-1283.) Although the State argued for the mistrial, and the defense opposed the motion, the trial judge found the juror misconduct "pervasive." (T. p. 1284.) Judge Hood cited three principle reasons for the necessity of granting the motion for mistrial: the misconduct of the alternate juror, the misconduct of the entire jury; and the misconduct of the defendant's family. (T. pp. 1285-1289.)

The trial court noted the jury was instructed in the opening charge they were not allowed to discuss any aspect of the case with each other or anyone else. (T. p. 1285.)

However, early in the trial, the alternate juror said, aloud and in front of the other jurors, "This is ridiculous, and I've already made up my mind." (T. p. 1288.) That same alternate whispered to another juror that the defendant was not guilty, and "blacks should stick together," clearly in an effort to improperly influence another juror to acquit the defendant. (T. p. 1288.) The alternate juror's misconduct alone was sufficient to justify the granting of the mistrial.

In light of the actions of the alternate juror, however, the impartiality of the remaining jurors who failed to report her misconduct was compromised. Only upon voir dire did the remaining jurors admit they had overheard the alternate's statements, and worse, in numerous instances discussed the evidence prematurely themselves. One juror stated, "he was scary," in response to evidence presented, and another said, "it's about to get real," when the videos of the shooting were played in court. Another juror indicated, upon questioning by the judge, she was "sure trying to be fair," and then laughed. (T. p. 1288.) The questioning of the jurors revealed the majority of the jury completed disregarded the court's instruction to refrain from discussing the case.

Finally, on Wednesday, June 17, 2015, approximately the middle of the trial, the jury informed the court that a member of the defendant's family approached a juror and said something similar to, "Have a good night, juror." (T. p. 1285.) The judge also learned the defendant's family and acquaintances were creating a funnel at the bottom of the stairs through which the jury would have to pass in order to leave the building. (T. p. 1285.) In an effort to remediate any influence or intimidation to the jury, the court arranged an alternative entrance and exit from the courthouse and assigned deputies to escort the jurors to their cars. (T. p. 1286.) Again, these actions alone might have resulted

in manifest necessity for a mistrial, but the cumulative effect of the misconduct in all three areas clearly compromised the integrity of the trial. Certainly the family's attempt to intimidate the jurors could have influenced the jury in either direction, but Appellant should not be given the benefit of attaching jeopardy to his trial when his own family is partially responsible for the granting of the mistrial.

Other jurisdictions have refused to attach jeopardy to a defendant in a trial when, in the midst of deliberation, the judge granted a mistrial because of juror misconduct. The Georgia Court of Appeals upheld the trial court's declaration of mistrial in codefendants' prosecution, finding retrial on the same charges did not violate codefendants' constitutional guarantee against double jeopardy. *See Pererz v. State*, 596 S.E.2d 191, 192 (2004). In *Perez*, the alternate reported the misconduct while jury was having lunch at a nearby restaurant. The alternate saw the family of one of the defendants enter the restaurant. The alternate heard one of the other jurors say to the other jurors, "Now here's our chance to make five thousand dollars." *Id.* The alternate reported to the court that, shortly thereafter, one of the family members walked past their table to go to the restroom, and the juror who made the improper remark jumped up suddenly and followed the family member into the restroom. *Id.* The appellate court found no abuse of discretion, stating:

> "A trial judge has acted within his sound discretion in rejecting possible alternatives and in granting a mistrial, if reasonable judges could differ about the proper disposition, even though in a strict, literal sense, the mistrial is not necessary. This great deference means that the availability of another alternative does not without more render a mistrial order an abuse of sound discretion. Deference to the judge's sound discretion also precludes a reviewing court from assuming, in the absence of record evidence, that the trial judge deprived a defendant of constitutional rights."

Id, at 84, 596 S.E.2d at 193; *citing Tubbs v. State*, 583 S.E.2d 853 (2003). Similarly, the Alabama Supreme Court found a trial court properly declared a mistrial when a juror had a conversation with the defendant's mother, and the juror had known the defendant for most of her life. *See Woods v. State*, 367 So.2d 982, 984 (Ala. 1978). The court said the trial judge need not have determined whether the conversation **did** influence the juror, but whether it **might have** influenced the juror, noting, "[i]t is the trial court's duty to preserve the impartiality of the jury. Even the appearance of impropriety may infect public respect for the verdict." *Id,* citing *United States v. Hewitt*, 517 F.2d 993 (3rd Cir. 1975). *See also State v. Phillips*, 656 N.E.2d 643, 660-661 (Ohio 1995) ("Juror misconduct creates a presumption of prejudice."); *United States v. Yonn*, 702 F.2d 1341, 1345 n. 1 (11th Cir.1983) ("Any discussion among jurors of a case prior to formal deliberations certainly endangers that jury's impartiality.").

In the case before this Court, the trial court acted within its discretion to grant the motion for a mistrial when the record clearly supported the decision for three reasons: 1) the alternate juror made inappropriate comments early in the trial and attempted to influence other jurors; 2) the remaining jurors failed to report the misconduct and also discussed the evidence prematurely; and 3) the defendant's family attempted to intimidate the jury during their ingress and egress from the courthouse. Because the misconduct created a manifest necessity for the mistrial, jeopardy did not attach to Appellant's trial.

Insufficiency of Curative Instruction

When the jury has shown they cannot follow instructions, then a curative instruction cannot be effective. Whether a curative instruction is a reasonable alternative

to a mistrial depends on whether the prejudice was so substantial as to deprive a party of the right to a fair trial and therefore warrant a mistrial. *See Bruton v. United States*, 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."). Appellant argues a curative instruction could have sufficed as an alternative solution to cure any prejudice caused by the misconduct of the alternate juror (I.B.O.A. p. 17.) ("The trial judge did not acknowledge the defense' request for a curative instruction and gave no curative instruction.") However, the trial court certainly considered and rejected this argument, stating:

> There is no curative instruction that can undo the continuing improper influence that was exerted on the jury and the fact that the majority of the jury has simply failed to follow the Court's repeated orders to not discuss the case in any manner with anyone.

(T. pp. 1289-1290.)

Finally, the trial court further noted in the motion hearing on October 12, 2015, that his refusal to grant the motion for mistrial at the request of the defense would likely constitute grounds for Appellant's post-conviction relief if he were to be convicted. (T. Oct. 12, 2015, p. 11.) Clearly, the trial court considered the alternatives to granting this mistrial, as well as the consequences of those alternatives. "If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court." *Illinois v. Somerville*, 410 U.S. 458, 464 (1973) (emphasis added).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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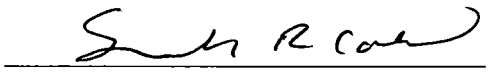
BY: 
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March 10, 2016
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