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ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Daniel F. Pieper, Circuit Court Judge

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APR - 4 2012

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

DAVID M. ROCQUEMORE,

APPELLANT

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the trial judge committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial?

STATEMENT OF THE CASE

David Michael Rocquemore was indicted for murder and possession of a firearm during the commission of a violent crime. R. 738-741. On July 9 through 19, 2007, David Rocquemore stood trial in Charleston County, before the Honorable Daniel F. Pieper and a jury. He was represented by Andy Savage. R. 1, 10 – 2, 1. 2.

The judge charged the jury the law of murder, voluntary manslaughter, involuntary manslaughter, and self-defense. R. 682, 1. 8 - 697, 1. 16. The jury convicted Rocquemore of voluntary manslaughter. R. 706, ll. 10-14. This case was Rocquemore's first contact with the criminal justice system. R. 720, ll. 8-10. As defense counsel pointed out, he had never been thought of as "anything but a good young man." R. 720, ll. 10-12.

On direct appeal to the South Carolina Court of Appeals, one of the two issues Rocquemore raised was:

The trial judge committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial.

The Court of Appeals affirmed in an unpublished opinion holding, as to this issue, "[A]ssuming, without deciding, that the trial [judge] committed error, we find Rocquemore failed to demonstrate any prejudice." State v. David Michael Rocquemore, 2010-UP-331 (filed June 28, 2101. App. 1-3. Rocquemore sought rehearing. App. 4-6. However, rehearing was denied. App. 7-8.

Rocquemore sought certiorari which was granted by all five Justices of this Court. This brief of Petitioner Rocquemore follows.

STATEMENT OF FACTS

Rocquemore acknowledged that he had shot and killed the decedent, Hershall Denson, but insisted that he did so while defending himself from a homicidal lynch-mob, which included Denson among its number. “[A]s I was tackled and beaten to the ground,” Rocquemore explained, “the gun went off.” R. 521, l. 14 – 522, l. 11. Denson was shot twice: once in the upper left abdomen – the fatal injury – and once close to the left armpit. R. 307, ll. 1-12.)

During the early morning hours of August 14, 2005, Rocquemore went to an after-hours party with a friend, but he did not know many of the people there. R. 393, l. 21 – 394, l. 7. A State’s witness remembered him as a polite and “[q]uiet guy” who “[b]arely said two words all night.” R. 77, ll. 1-8. In fact, Rocquemore appeared to be “the only sober one in the crowd.” R. 77, ll. 9-13.¹

The tone of the gathering abruptly turned ugly when another man became sexually aggressive toward a disinterested female and threw a drink, a beer, in her friend’s face when she sought to intervene. R. 108, l. 19 – 109, l. 14; R. 243, ll. 10-22; R. 325, l. 17 – 331, l. 8. This lout and his friends hastily departed before the friends of the woman he had assaulted could find him and retaliate. R. 359, l. 4 – 361, l. 8. However, they returned after the party had broken up and confronted Rocquemore and his friend, who were also preparing to leave, in the street. R. 110, l. 20 – 111, l. 10; R. 116, ll. 8-15; R. 178, ll. 13-22; R. 245, l. 17 – 246, l. 9; R. 397, l. 7 – 399, l. 6; R. 468, l. 11 – 471, l. 1.

¹ His attorney, Andy Savage, would later tell the judge that Rocquemore, had “no prior record with the criminal justice system. He has no contact with the police department. He had no problems in school, no problems with his family, never thought of him as being a bully or anything but a good young man.” R. 720, ll. 8-12.

These men, upon whom the State's case depended, testified that the killing of decedent Denson was "senseless" and unprovoked. R. 233, l. 16 – 234, l. 2. "Nobody laid a hand on [Rocquemore]" before he opened fire, one of them, Troy Eason claimed. R. 188, ll. 8-11. Two witnesses even went so far as to assert that the decedent's hands were raised in surrender and that he was backing away when Rocquemore fired the first shot. R. 185, l. 6 – 187, l. 2; R. 283, l. 22 – 284, l. 3.

But the physical evidence did not support this account of the incident. The decedent had traces of gunshot residue on the back of his right hand but not his shirt. R. 301, l. 20 – 302, l. 25. These findings indicate that he was in the process of throwing a punch at Rocquemore when he was shot. R. 306, ll. 8-14.

Detective Prindle confirmed that the scene was intense and as he approached "he saw a group of men fighting." R. 15, ll. 1-7. One officer testified:

[I]t was a pretty agitated scene. They were pretty agitated. It took several orders to tell them to get off. One of the individuals kicked him [Petitioner Rocquemore] in the groin. I think one more might have punched him.

R. 21, ll. 2-15. A lynch-mob atmosphere still prevailed. Officers feared for their own safety and called for backup. R. 40, ll. 11-18; R. 42, ll. 22-24.

As previously indicated, Rocquemore specifically testified that he shot the decedent in self-defense after he and his friend were brutally attacked without provocation. R. 469, l. 6 – 472, l. 9; R. 479, ll. 2-15. He believed he had no other choice. R. 490, ll. 7-9. Rocquemore's friend, who was also attacked, corroborated his account of the incident. They did nothing to provoke the altercation: "[A] young lady had got some beer poured on her or in her face, and they had shortly left. Shortly after that, a vehicle comes flying down the street with no lights on, a gentleman hanging out the

window, yelling all sorts of things. And they pulled up in front of Dexter Brown's house. They got out of the car in an aggressive manner, traveling towards myself, Chris, Dexter Brown, and David Rocquemore. . . ." R. 398, l. 8 – 409, l. 7.

As stated above, the jury was given verdict options of not guilty by reason of self-defense, guilty of involuntary manslaughter, guilty of voluntary manslaughter or guilty of murder.

ARGUMENT

The trial judge committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial.

None of the potential jurors responded when the judge asked:

Are any of you related by blood, connected by marriage, or have any social, business, or professional dealings with [the prosecutors on Rocquemore's case], or any dealings or connections with the Solicitor's office?

R. 1, ll. 16-22.

After the State had rested its case, the defense learned that a sitting juror was in fact the cousin of an Assistant Solicitor in that very office. R. 376, l. 6 – 380, l. 18. At no time did the State disclose this information to the judge or the defense. When this juror was seated, the defense had used only four of the ten peremptory strikes allotted. R. 2, l. 3 – 6, l. 16.

Further investigation by the defense revealed that the juror had been in contact with his cousin the Assistant Solicitor by text message and telephone **during the trial**. R. 380, l. 22 – 383, l. 14. Defense counsel then moved to have this juror dismissed and replaced with an alternate. R. 383, ll. 15-18. The State did not object. R. 384, ll. 11-12. The judge granted the motion. R. 389, ll. 3-6.

Defense counsel next asked the judge to determine whether this juror's presence on the jury had "tainted any other jury members." R. 384, l. 22 – 385, l. 4. Under questioning by the judge, the juror admitted that he had a cousin who worked in the Solicitor's office, but claimed he did not disclose that information during jury qualification because he did not feel it would have any effect

on his ability to be fair, *not that he did not understand the question*. R. 386, l. 7 – 387, l. 8. He and his cousin had “talked ... [a]bout his wedding and stuff” since the start of trial. R. 387, ll. 9-18. The juror denied having discussed the matter with his fellow jurors. R. 387, l. 19 – 388, l. 3.

But the incident continued to be troubling. R. 573, l. 8 – 575, l. 2. The Assistant Solicitor in question testified that his cousin had called to tell him that he was on Rocquemore’s jury and that he had responded to a second phone call made during the trial with a text message stating, “I’m sorry, I can’t talk to you.” R. 596, l. 16 – 598, l. 19. He communicated this information to one or two of the three attorneys prosecuting Rocquemore. R. 600, l. 14 – 601, l. 6. The Deputy Solicitor acknowledged that the Assistant Solicitor told him as they passed in the hall that “his cousin was on the jury.” R. 604, ll. 3-22. He claimed not to realize it was something he needed to follow up or disclose. R. 604, l. 23 – 605, l. 1.

“I think he told me that his cousin was on the jury panel,” he explained, “but I didn’t know who his cousin was.” R. 608, ll. 2-15. Another member of the prosecution team revealed that he also knew his colleague had “a cousin on the jury panel.” R. 607, ll. 20-24. “[T]hat was before qualification,” he added, and “I didn’t go to qualification. ... I didn’t know his name.” R. 607, l. 24 – 608, l. 5.

Defense counsel got right to the point:

[N]ames don’t matter. ... It could have been any juror. The name doesn’t matter. They’re on notice that “a juror” misled the court when he was seated on this jury.

R. 608, ll. 17-23. He suggested -- and the judge agreed-- that the remaining jurors should be questioned individually. R. 610, l. 3 – 611, l. 1.

Most of the jurors were unaware that their fellow juror had a cousin in the Solicitor’s Office. One had gone to school with him and knew of the relationship independently. R. 617, l. 24 – 618, l.

5. Another, on the other hand, had overheard the juror announce that his cousin was a prosecutor and that he was going to ask him what was going on in the courtroom while they waited in the jury room *after jury selection*. R. 621, l. 10 – 623, l. 18. Another juror partially corroborated this account. R. 627, ll. 1-13.

At this point, defense counsel moved for a mistrial:

The only reason that this is a problem before the court this morning is because the State failed to disclose [the relationship between the juror and the Assistant Solicitor] in a timely basis. *Therefore, the State should be sanctioned, and we believe that the sanction is a mistrial.*

R. 634, ll. 1-5. (emphasis added).

The Assistant Solicitor suddenly became less certain about when he had told the prosecution team “my cousin’s on the jury.” R. 638, l. 9 – 641, l. 16. He had assumed this information would have come to light during jury qualification. R. 641, l. 25 – 642, l. 4.

The judge observed, “I’m not prepared to say there was some kind of intentional conduct on the part of the State.” R. 644, ll. 11-17. He subsequently added, “I do believe that the juror should have disclosed that information, and I’m not convinced that the juror misunderstood the question.” R. 659, ll. 11-16.

The defense renewed its mistrial motion:

My client’s due process rights have been violated by the failure to disclose that there was a seated juror who was not honest with the court, who had a relationship – a special relationship – with a member of the Solicitor’s office.

R. 656, ll. 8-12. Defense counsel added: “If the information ... had been brought *to the attention of the defendant at that time, we could have exercised a peremptory.*” R. 659, ll. 20-24. The judge denied the mistrial motion. R. 660, ll. 7-15.

After Rocquemore had been found guilty of voluntary manslaughter, defense counsel renewed the mistrial motion based on “new information” the defense had uncovered. R. 708, ll. 19-21. Specifically:

[I]t appears that the juror and the Assistant [Solicitor] were not forthright with the court in the court’s examination of the number of contacts. ... There has now been established twenty contacts between the juror and the member of the Solicitor’s staff.

R. 710, ll. 6-13. In support of this motion, counsel introduced telephone records documenting the contacts, but not their substance. R. 719, ll. 9-24; R. 723-728. Defense counsel subsequently filed a written motion requesting an order “for the release of the substance of the text-messages sent and received” by the Assistant Solicitor during Rocquemore’s trial. R. 735-736.

Following a conference call, the judge denied the motion by written order. R. 737. (The Court of Appeals denied a similar motion filed by his appellate attorney during the pendency of this appeal.) The judge denied the mistrial motion. R. 718, l. 17 – 719, l. 8.

S.C. Code Section 14-7-1020 states in relevant part, “The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party.”

In accordance with this directive, the trial judge asked the prospective jurors in Rocquemore’s case to reveal any relationship “by blood” with the Solicitor’s Office. By their own admission, two of the three prosecutors knew at that point that one of the potential jurors was the cousin of an Assistant Solicitor in their office. Yet they did not reveal this information to either the judge or defense counsel when no one responded to the judge’s inquiry. They apparently believed they were under no obligation to reveal the deception of a juror unless they had actual knowledge of his identity.

“It is fundamental that a defendant is entitled to a trial by an impartial jury.” State v. Gullede, 277 S.C. 368, 287 S.E.2d 488, 489 (1982), citing the Sixth Amendment to the United States Constitution and Article 1, Section 14, of the South Carolina Constitution.

Every fair-minded person will readily recognize the importance of having the jury to whom a case is submitted for trial composed of persons who, as far as practicable, are free from any bias or prejudice, either for or against one or the other of the parties, whether the same arises from interest, by reason of relationship or otherwise, or from having previously formed or expressed an opinion as to the merits of the controversy.

State v. Robertson, 53 S.C. 147, 31 S.E. 868, 869 (1899). Gullede acknowledges that “a relationship with counsel” is a primary source of juror bias. 287 S.E.2d at 490. “Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial.” State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001). Nevertheless, “[t]here is no absolute rule of disqualification based on a juror’s relationship to an attorney in the case.” Thompson v. O’Rourke, 288 S.C. 13, 339 S.E.2d 505, 506 (1986). Here, obviously the problem is much more exacerbated because the Assistant Solicitor cousin and another Assistant Solicitor were not forthcoming when they knew the nature of the situation. “Prosecutors are ministers of justice and not merely advocates.” State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 109 (2000), citing Rule 3.8, Rules of Professional Conduct.

By neglecting to reveal the blood relationship between an Assistant Solicitor in their office and a juror on Rocquemore’s case, the State failed to exercise even a modicum of due diligence. See, for example, Wilson v. Childs, 315 S.C. 431, 434 S.E.2d 286 (Ct. App. 1993). “All are duty bound to be on guard against any impropriety which might undermine confidence in our system of justice.” Jackson v. State, 374 A.2d 1, 3 (Del. 1977).

Their unconscionable silence prevented the defense from moving to strike for cause or from intelligently exercising its peremptory strikes. Cf. Wall v. Keels, 331 S.C. 310, 501 S.E.2d 754 (Ct. App. 1998); See State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284, citing State v. Gullledge, 277 S.C. at 370, 287 S.E.2d at 490 (“Through the judge, parties have a right to question jurors on their voir dire examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge.”)

This relationship may have supported the challenge for cause but would definitely have been a material factor in the defense’s use of its peremptory strikes. If this information had been brought to his attention in a timely manner, defense counsel stated, “we could have exercised a peremptory.” R. 659, ll. 20-24. Cf. State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991), certiorari denied January 22, 1992.

In Jackson v. State, 374 A.2d 1, 2-3 (Del. 1977), the Delaware Supreme Court noted that prior to jury selection on of the jurors was aware he was the uncle of a Deputy Attorney General. The jury information card in the possession of the Attorney General’s Office contained a notation acknowledging the relationship. When neither the juror nor the prosecution revealed the relationship, the Court noted that: “Aside from protecting the rights of the parties, in the fair and impartial administration of justice, respect for the courts calls for their condemnation of any improper conduct, however slight, on the part of a juror, of a party, or of any other person, calculated to influence the jury in returning a verdict. So delicate are the balances of weighing justice that what might seem trivial under some circumstances would turn the scales to perversion. Not only the evil, in such cases, but the appearances of evil, if possible should be avoided.” *citing* George F. Craig & Co. v. Pierson, 169 Ala. 548, 53 So. 903 (1910).

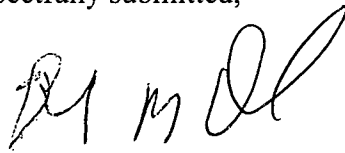
While it should be clear beyond cavil that the juror and the Assistant Solicitors should have revealed the Solicitor-cousin relationship, the Court of Appeals affirmed on direct appeal because it found “Rocquemore failed to demonstrate any prejudice.” The Court’s unpublished opinion does not address the culpability of the Solicitor’s Office, nor does it acknowledge the trial judge’s refusal – and its own – to allow trial and appellate counsel access to the content of the text-messages sent and received by the Assistant Solicitor and his cousin during Rocquemore’s trial. It is deeply troubling to deny defense counsel access to the means of establishing actual prejudice -- if this is even necessary-- and then bootstrapping that restriction into a finding of no prejudice. Both of these omissions bear directly on the question of prejudice.

Based on the foregoing argument, this Court respectfully should reverse David M. Rocquemore’s convictions for voluntary manslaughter and possession of a firearm during the commission of a violent crime.

CONCLUSION

For the foregoing reasons, David Rocquemore's convictions for voluntary manslaughter and possession of a firearm during the commission of a violent crime should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of April, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Daniel F. Pieper, Circuit Court Judge

REC
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S.C. Supreme C.

THE STATE,

RESPONDENT,

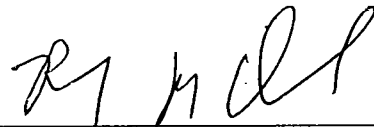
v.

DAVID M. ROCQUEMORE,

APPELLANT

CERTIFICATE OF SERVICE

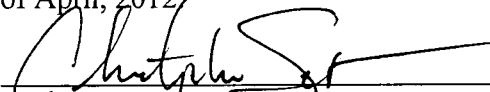
I certify that a true copy of the brief of petitioner, in this case has been served on Deborah R.J. Shupe, Esquire, this 4th day of April, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of April, 2012

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021