

STATE OF SOUTH CAROLINA  
In The Supreme Court

On Writ of Certiorari to the Court of Appeals  
Appeal from Richland County  
Court of General Sessions

The Honorable John C. Hayes, III, Circuit Court Judge

Opinion No. 2017-UP-028 (S.C. Ct. App. filed 1/11/17)  
Appellate Case No. 2017-000700

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

v.

DEMETRICE ROOSEVELT JAMES,

PETITIONER.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## STATEMENT OF ISSUE ON APPEAL

The Court of Appeals properly found the trial judge did not abuse his discretion in refusing to declare a mistrial where the judge followed the procedure outlined in State v. Aldret and correctly determined that there was no manifest necessity to warrant the declaration of a mistrial.

## STATEMENT OF THE CASE

Petitioner was indicted at the February 2013 term of the grand jury for Richland County for two counts of attempted murder, burglary in the first degree, attempted armed robbery, and murder. Petitioner proceeded to a trial by jury from September 29-October 3, 2014, in Columbia, South Carolina. At the conclusion of trial, Petitioner was found guilty of two counts of attempted murder, burglary in the first degree, and attempted armed robbery. He was sentenced by the Honorable John C. Hayes, III to imprisonment for a term of thirty years on each count of attempted murder, thirty years for burglary in the first degree, and twenty years for attempted armed robbery, with all sentences running concurrently.

On January 11, 2017, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. James, Op. No. 2017-UP-028 (S.C. Ct. App. filed January 11, 2017). Petitioner subsequently filed a petition for rehearing on January 25, 2017. The Court of Appeals denied the petition for rehearing on February 23, 2017. Petitioner timely submitted a Petition for Writ of Certiorari, and this Return follows.

## ARGUMENT

**The Court of Appeals properly found the trial judge did not abuse his discretion in refusing to declare a mistrial where the judge meticulously followed the procedure outlined in State v. Aldret and correctly determined that there was no manifest necessity to warrant the declaration of a mistrial.**

### **Relevant Facts**

At the beginning of trial on October 2, 2014, the Court stated:

We had it brought to my attention that there's been some possible discussion, maybe not of the case itself, but at least of a witness and I'm not really sure because I haven't - - I wasn't really privy to it, but Mr. Tolbert, the bailiff, and Mr. Truitt, the court coordinator - I guess that's his official title - both overheard some conversations through the door. Mr. Tolbert heard them and alerted Mr. Truitt that there was some discussion regarding, if not the case, at least a witness.

R. pp. 395-96. The trial judge noted he had looked at State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) and decided to call Tolbert and Truitt to testify as to what they heard. R. p. 396. The trial judge stated he would then call in the jurors one at a time and ask them whether they could still be fair and impartial. R. p. 396. Prior to the hearing, Defense Counsel moved for a mistrial, asserting her client's right to a fair trial and due process rights had been violated. R. pp. 397-98. The trial judge ruled, "I don't believe at this time that there's a manifest necessity to grant a mistrial, but I will take it under consideration. And don't let me forget to address it after and let you renew it after we've queried the jury." R. p. 399. Mr. Tolbert explained to the court that he overheard the jury discussing the two prisoners who came in during trial. R. p. 400. Truitt told the Court he did not hear anything specifically, it just sounded like the jury was discussing the case. R. p. 401.

Following Tolbert and Truitt's recollection of what they heard, the judge called the foreman of the jury forward. R. p. 401. The foreman testified the jury was discussing the testimony they heard so far. R. p. 402. The Court stated:

I told you at the beginning of the case that you were not to discuss the case among yourselves or make up your own mind until we reached a point in the trial where I instructed you to jointly deliberate and return a unanimous verdict. With that being said, having this discussion, could you still, you yourself – I’ll ask all the other jurors this – still - - would this prior discussion affect your ability to be fair and impartial to Mr. James in regard to your ultimate deliberation?

R. p. 402. The foreman replied that he could be impartial. R. p. 402. The Court then asked:

Okay. And would you still be able to base your decision solely on the law and the evidence that you receive at the end of the trial, that is, on all the facts from all the witnesses and the law as I give it to you at that time?

R. p. 402. The foreman replied, “yes, sir.” R. p. 403. The Court then stated:

And do you understand - - again, you’re the liaison. Go ahead and instruct the jurors that I - - there should be no further discussions, but I will - - I’m going to call all of them in and ask them the same type things. And - - but go ahead and tell them to stop if they’re doing it now.

R. p. 403. The foreman replied, “Okay. Yes, sir.” R. p. 403. Finally, the Court asked:

So the bottom line is: Do you, in spite of the prior discussions, think you could disabuse your mind of that and base your - - and still be fair and impartial and not be prejudiced by the discussions to date?

R. p. 403. The foreman replied. “Yes, sir.” R. p. 403.

Defense Counsel then asked the Court to query each juror as to what specifically they were discussing. R. p. 403. The Court responded “If they’ve been discussing it, we can assume they’ve discussed a little bit of all of it, and from my perspective I’m treating it as though they’ve been discussing everything. So - - and I think if we bring them in and ask each one what they’ve been discussing, we’ll be here ‘til midnight tonight.” R. p. 404. The Court then asked the remaining jurors the same questions he asked the foreman. R. pp. 404-16. All of the jurors responded they would be able to be fair and impartial to Petitioner, the discussion thus far had not prejudiced them in any way against Petitioner, and that they would still be able to deliver a fair and impartial verdict in the case. R. pp. 404-16.

When asked whether the State had any comments, the Solicitor stated they would defer to the jurors. R. p. 416. When further asked by the Court whether the State took any position on the matter, the Solicitor stated the State took no position on the matter. R. p. 416. The Defense then renewed its motion for a mistrial. R. p. 417. The trial judge ruled:

I deny the motion. I find that there's not any manifest necessity. I don't believe - - the case law, the Aldret case says it is up to the party alleging the premature deliberation to establish prejudice. We're not alleging premature deliberation; we know there was premature deliberation. But I think the prejudice factor is still one that the Court must consider and the courts have set forth the procedure and - - to voir dire the jurors, as I have, and it says, "If practicable, tailor a cautionary instruction to correct the ascertained damage." . . . This jury was fair and impartial, vetted when we started the trial. They did fall off the precipice to some degree in not following my instructions, but they have all indicated to me that that would not - - that that transgression would not affect their ability to be fair and impartial nor would it prejudice them against Mr. James. So I deny the motion.

R. p. 418. Following his ruling, the trial judge instructed the jury:

Members of the jury panel, I'm just going to remind you what I've told each of you individually and I told you at the first of trial: That there will be no further discussions of the case until I instruct you to jointly deliberate and return a unanimous verdict. And I instruct you now to disabuse your mind of all the discussions you've had to this point. I can't say we're starting on a new slate because we've got testimony in the record, but as far as your discussions, that's a new slate. So you're not to discuss the case further and you're to just disabuse your mind of any discussions that you've already had and not let that come into your deliberations in any way whatsoever. I also instructed you not to discuss the case with anyone outside the courtroom. Don't see if there's any news coverage or use any devices to receive information about the trial. Has anybody had any problem with that? That is, has anybody discussed the case outside the courtroom with anyone, accessed any information regarding the case through any electronic devices or has anyone - I don't know that there was any news coverage - been exposed to any news coverage? If so, I need you to raise your hand. No one raises their hand.

R. pp. 423-24.

## **Discussion**

Petitioner contends the Court of Appeals erred in finding the trial judge properly declined to declare a mistrial once he was informed the jury was prematurely discussing the case.

Specifically, Petitioner contends the trial judge failed to evaluate the nature of the discussions by declining to individually question the jurors as to the nature of the premature discussions. Petitioner avers that, because the trial judge declined to individually question the jurors regarding the content of their discussions, he should not be required to prove prejudice. Petitioner's arguments are not preserved for review by this Court. Further, this argument is without merit, as the trial judge fully complied with the procedure outlined in Aldret, and conducted a hearing where he determined whether premature deliberations occurred, conducted voir dire of the jurors to determine whether there had been any prejudice and whether they could still be impartial, and tailored a cautionary instruction to correct any potential damage. Under the Aldret procedure, there is absolutely no requirement that the trial judge engage in the needless and time-consuming task of questioning the jury as to exactly what was discussed. In formulating his questions to the jury to determine whether there was prejudice to Petitioner, the trial judge expressly stated he was treating the case as if **everything** had been discussed by the jury. There was therefore no need for the trial judge to individually question each juror as to the content of their discussions where he was already treating the case as if everything in the case thus far had been discussed by the jury. After questioning the jury concerning any prejudice and their ability to be fair and impartial moving forward, the trial judge correctly determined there was no manifest necessity to warrant the declaration of a mistrial.

As a threshold matter, Petitioner's arguments to this Court are not preserved for review. In his petition for rehearing at the Court of Appeals, Petitioner for the first time asserted he should be exempted from showing prejudice because the trial judge declined to question the jurors as to the content of the premature discussions. In the petition for rehearing, Petitioner included a lengthy examination of United States v. Resko, 3 F.3d 684 (3rd Cir. 1993), to support

the proposition that he should be exempted from demonstrating prejudice. Petitioner made no such argument in his Final Brief of Appellant at the Court of Appeals. Petitioner's argument at the Court of Appeals was limited to the assertion that the judge erred in declaring a mistrial because premature deliberations occurred and therefore the jurors must have already formed an opinion as to Petitioner's guilt. While Petitioner did note the trial judge refused any further inquiry of the jury as to the content of their discussions, Petitioner offered no substantive argument that, as a result, he was somehow exempted from demonstrating prejudice. See Final Brief of Appellant pp. 14-15. Petitioner is therefore barred from raising this argument to this Court, as he failed to raise the issue to the Court of Appeals prior to his petition for rehearing. See State v. Primus, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002) (an issue not raised in the brief to the Court of Appeals, but instead raised for the first time in the petition for rehearing is not properly preserved for the Supreme Court's consideration in a petition for writ of certiorari) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); See also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 77 (2nd ed. 2002) ("There are two prerequisites to preserving an issue for consideration by the Supreme Court on a writ of certiorari: (1) the issue must have been raised in the **initial arguments to the Court of Appeals**, and (2) the issue must have been raised in the petition for rehearing before the Court of Appeals." (emphasis added))

"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. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000). In order to safeguard a defendant's right to a fair trial by an impartial jury, the jury must reach its verdict free from any outside or improper influence. State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998). However, "unless [juror] misconduct

affects the jury's impartiality, it is not such misconduct as will affect the verdict." Id.; see also Aldret, 333 S.C. at 313, 509 S.E.2d at 813-814 (instructing juror misconduct in the form of premature deliberations does not warrant automatic reversal and, instead, requires the defendant to demonstrate such misconduct affected the jury's verdict before a reversal is granted).

When an allegation of juror misconduct arises, the trial judge is vested with broad discretion to assess and respond to such an allegation. State v. Pittman, 373 S.C. 527, 553, 647 S.E.2d 144, 157 (2007). Juror misconduct is a fact to be determined by the trial judge under the circumstances of each individual case. State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 266 (Ct. App. 1999). Decisions regarding how to address juror misconduct rest in the sound discretion of the trial judge, and the trial judge's decisions on such matters will not be reversed absent an abuse of that discretion amounting to an error of law. Pittman, 373 S.C. at 553, 647 S.E.2d at 157.

Premature deliberations are a form of juror misconduct because "[a] jury should not begin discussing the case, nor deciding the issues, until all the evidence has been introduced, the arguments of counsel complete, and the applicable law charged." State v. Joyner, 289 S.C. 436, 437, 346 S.E.2d 711, 712 (1986). The prohibition against premature deliberations is designed to prevent jurors from making up their minds prematurely by declaring a position on an issue while the trial is in progress and then standing by that declared position even in defiance of contrary evidence subsequently introduced. State v. McGuire, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979).

In State v. Aldret, the South Carolina Supreme Court determined premature deliberations were a type of juror misconduct that could affect the fundamental fairness of a trial. 333 S.C. at 312, 509 S.E.2d at 813. In order to assist the trial courts of South Carolina in responding to such

misconduct, the Supreme Court proposed a “suggested procedure” to handle allegations of premature of deliberations. Id. at 315, 509 S.E.2d at 815. Pursuant to the suggested procedure, the Supreme Court advised trial judges to conduct a hearing if allegations of premature deliberations arose during trial to first determine if the premature deliberations actually occurred and to then determine if they were prejudicial. Id. Significantly, the Supreme Court instructed that a trial judge “**may**” question the jurors and issue a cautionary instruction where practicable to respond to allegations of premature deliberations “[i]f requested by the moving party[.]” Id. (emphasis added). Thereafter, the Supreme Court instructed that a trial judge should only grant a new trial in cases where the premature deliberations were prejudicial. Id.

In Petitioner’s case, the trial judge carefully followed the procedure outlined by the South Carolina Supreme Court in Aldret. The trial judge questioned Tolbert and Truitt as to what they overheard jurors discussing. The trial judge also called the foreman of the jury, who informed him the jurors had been discussing the testimony they heard thus far. The trial judge then questioned each juror as to whether their discussions had prejudiced them in any way against Petitioner and whether they would be able to be fair and impartial to Petitioner. Finally, the trial judge issued a cautionary instruction where he instructed the jurors to disabuse their minds of the previous discussions and to not discuss the case any further until told to begin deliberations. While the judge declined to question the jurors further as to what specifics were discussed, the trial judge was under no requirement to do so, as the decision on whether to question jurors is completely discretionary. The trial judge stated that he was treating the situation as if the jury had discussed **everything** in the case thus far and took appropriate action to determine whether there was any prejudice.

Based on the trial judge's discussions with the bailiffs and the jurors, the trial judge appropriately concluded the juror's discussions were not prejudicial. Each juror testified they had not been prejudiced by the discussions and they would be able to be fair and impartial in reaching their verdict. Petitioner failed to establish he suffered any prejudice as a result of the jury prematurely discussing the case. See State v. Grovenstein, 335 S.C. 347, 351, 517 S.E.2d 216, 218 (1999) ("We have consistently required defendants to demonstrate prejudice due to improper jury influences.").

While Petitioner contends he should not be required to show prejudice in this case because of the trial judge's refusal to individually question the jurors, this assertion ignores the fact that the trial judge's remedial measures were catered towards a scenario where the jury discussed everything in the case thus far. By treating the situation as a "worst case scenario," the trial judge ensured his remedial action would be sufficient. Exhaustively questioning each juror individually about what they discussed, where the trial judge was already treating the situation as if everything had been discussed, would have been redundant and a waste of the court's time. The questions asked by the trial judge comported with the procedure outlined in Aldret, and went far beyond the measures employed by the court in United States v. Resko, 3 F.3d 684 (3rd Cir. 1993). As noted by Petitioner, in Resko, the court summoned the jurors and asked them two questions: (1) Had they discussed the facts of the case with one or more other jurors during the trial, and (2) Whether they formed an opinion about the guilt or innocence of the defendant as a result of discussions with other jurors. Id. at 689. The Third Circuit subsequently found, "that the district court erred by declining to engage in further inquiry such as individualized voir-dire upon which it could have determined whether the jurors had maintained open minds." Id. at 691. In Petitioner's case, the trial judge engaged in individual voir dire with the jurors in order to

ascertain whether the discussions affected their ability to be fair and impartial, whether they would be prejudiced towards Petitioner based on the discussions, and whether at the conclusion of trial they would be able to apply the law as charged and render a fair and impartial verdict. This goes beyond the insufficient procedure in Resko, and was consistent with the framework of Aldret. Petitioner, therefore, should not be exempted from showing prejudice and should be held to the applicable standard of proving manifest necessity to warrant the declaration of a mistrial.

Without any showing of prejudice, there was no manifest necessity to warrant the declaration of a mistrial. “The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court’s decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law.” State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and quotation marks omitted). Our courts favor the exercise of wide discretion of 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 granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). “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). “The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice.” State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). As found in Aldret, a trial judge should only grant a new trial in cases where the premature deliberations were prejudicial. 333 S.C. at 315, 509 S.E.2d at 815. Without any showing of prejudice by Petitioner,

the trial judge did not abuse his discretion in declining to grant a mistrial. This Court should deny certiorari.

CONCLUSION

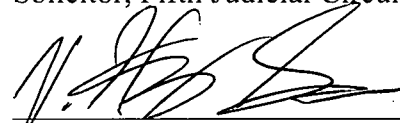
For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 20, 2017

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Petitioner.

**PROOF OF SERVICE**

I, Anne Mueller, certify that I have served the Return to the Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Kathrine H. Hudgins, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 20<sup>th</sup> day of April, 2017.



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