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September 18, 2017

Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
1220 Senate Street
Columbia, S.C. 29201

RECEIVED

SEP 18 2017

SC Court of Appeals

Re: State v. Thomas Shewtzuk, Appellate Case No. 2016-001957

Dear Ms. Kitchings:

Please find enclosed a clocked copy of Judge Murphy's order in the above-referenced case. I request that the case remain in abeyance pending receipt of the transcript from the reconstruction hearing. We requested the transcript on July 19, 2017. As soon as we receive it, we will advise the court of its receipt.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Susan B. Hackett
Appellate Defender

Enclosure: Clocked Order

cc: Hon. Maite Murphy
Donald J. Zelenka, Esquire (w/ enclosure)
Thomas Shewtzuk (w/ enclosure)

STATE OF SOUTH CAROLINA)
DORCHESTER COUNTY)

STATE OF SOUTH CAROLINA)

V.)

THOMAS ROBERT SHEWTZUK,)
DEFENDANT.)

) IN THE COURT OF GENERAL SESSIONS
) INDICTMENT NO. 2015-GS-18-0951-0954; -0972

ORDER

2017 SEP 13 PM 2:50
OFFICE OF THE CLERK OF COURT
DORCHESTER COUNTY
SC

Pursuant to the Order of the South Carolina Court of Appeals, filed on May 11, 2017, remanding this case to the Circuit Court to reconstruct the record of the bench conferences that occurred during Thomas Shewtzuk's trial, a hearing was held on July 17, 2017, in Dorchester County. Glenn Justis, Esquire, of the First Circuit Solicitor's Office, was present on behalf of the State of South Carolina. Susan Barber Hackett, Esquire, of the Office of Appellate Defense, was present on behalf of Mr. Shewtzuk. The defendant was present for the hearing as well. This Court heard testimony from Leslie Sarji, who represented Mr. Shewtzuk at his trial, and Mr. Justis.

PROCEDURAL HISTORY

On July 9, 2015, a Dorchester County grand jury indicted Mr. Shewtzuk for murder, possession of a weapon during a violent crime, and two counts of kidnapping. On June 2, 2016, the grand jury indicted Mr. Shewtzuk on a third count of kidnapping. The State, represented by Mr. Justis and Kyle Ward, called the case to trial on September 6, 2016, before this Court and a jury. Ms. Sarji represented Mr. Shewtzuk. The jury found Mr. Shewtzuk guilty as charged. This Court sentenced Mr. Shewtzuk to life imprisonment without the possibility of parole for murder, five years' imprisonment for the weapon, and thirty years' imprisonment on two counts of kidnapping. There was no sentence imposed for one of the kidnapping convictions pursuant to S.C. Code Ann. § 16-3-910.

On September 16, 2016, Ms. Sarji filed and served the notice of appeal. On October 17, 2016, the Office of Appellate Defense ordered the trial transcript from Heather Landry, Circuit Court Reporter. On February 23, 2017, the transcript was received. On March 3, 2017, Ms. Hackett was assigned to represent Mr. Shewtzuk. Upon initial review of the transcript, Ms. Hackett realized the bench conferences had not been transcribed and that repeated assurances had been given that the bench conferences were being recorded and would be preserved as part of the record. Within the index, the court reporter made a “[n]ote regarding bench conferences.” According to the court reporter, “[t]he backup recordings used to capture the bench conferences were found to be unintelligible. This is due to the background noise that is played over the courtroom’s sound system during bench conferences that are held in the presence of a jury. Therefore, these are not included as part of the record as requested.”

On April 6, 2017, Ms. Hackett filed a motion for an order to reconstruct the record of the bench conferences at Mr. Shewtzuk’s trial. On May 1, 2017, the State filed its return. The State “concur[red] that a remand [was] appropriate to reconstruct the record” to preserve the appellate record. In short, the State had “no objection” to the “reasonable request for a remand for a reconstruction hearing limited to the bench conferences.” On May 9, 2017, Ms. Hackett filed a reply, noting the State’s agreement and providing additional information regarding the necessity of reconstructing the record to permit meaningful appellate review.

May 11, 2017, the Court of Appeals granted the request to remand for reconstruction of the record. In compliance with the appellate court’s order, this Court held a hearing on June 17, 2017. After considering the testimony from the witnesses presented at the hearing, this Court’s own review of the partial transcript, and this Court’s recollection of the trial proceedings, this Court makes the following findings.

FINDINGS

The first unrecorded bench conference occurred on page 37, lines 6-7 of the transcript. This Court finds that during this conference, Ms. Sarji preserved her request for additional jury *voir dire*. The written request for *voir dire* submitted by Ms. Sarji is attached to this Order. This Court declined to use the submitted *voir dire*, noting the questions asked adequately covered the concerns or questions raised by the defense.

The second unrecorded bench conference occurred on page 37, lines 9-10 of the transcript. This Court finds this conference concerned scheduling. It is likely that during this conference, this Court was explaining to defense counsel why she was not asking certain questions from the requested *voir dire*.

The third unrecorded bench conference occurred on page 43, lines 8-9. This Court finds this conference concerned scheduling as well. This finding is supported by the surrounding portions of the transcript revealing the seating of the jury immediately prior to the bench conference.

The fourth unrecorded bench conference occurred on page 55, lines 8-9. This Court finds this conference concerned the scheduling of the first witness to testify. Additionally, as it was almost 5 p.m., this conference likely concerned recessing for the day.

The fifth unrecorded bench conference occurred on page 55, lines 14-15. This Court finds this conference concerned the State, Mr. Justis, confirming the sequestration order. This conference possibly addressed scheduling as well.

The sixth unrecorded bench conference occurred on page 75, lines 8-9. This Court finds this conference concerned defense counsel's objection based on hearsay and speculation. This objection was overruled. While this Court is unable to recall the reason for the ruling, it is likely

this Court found the testimony was not hearsay as it was possibly a statement against interest because the State had asked the witness, Doug Vaughan, why the defendant was trying to sell a gun. The Court likely considered this to be more probative than prejudicial.

The seventh unrecorded bench conference occurred on page 82, lines 5-6. This Court finds that during this bench conference, defense counsel's objections to the potential testimony based on the grounds of hearsay and relevance were discussed and the objections were sustained. The witness was questioned about Mr. Shewtzuk's tattoos. To the extent the witness would have testified that Mr. Shewtzuk had a teardrop tattoo on his face and that such a tattoo meant he killed someone, this Court sustained defense counsel's objection. Ultimately, the State withdrew the question.

The eighth unrecorded bench conference occurred on page 88, lines 2-3. This Court finds this bench conference addressed defense counsel's objection based on relevance to purported testimony about Mr. Shewtzuk's employment. This Court sustained the objection. The State asked the witness, Kaitlin Dubois, whether Mr. Shewtzuk was employed at the time of the shooting. According to the State, the question was relevant to the State's theory that Mr. Shewtzuk was attempting to rob the deceased and would support the State's theory of Mr. Shewtzuk's alleged motive for selling the gun.

The ninth unrecorded bench conference occurred on page 100, lines 1-2. This Court finds this bench conference concerned defense counsel's objections to cell phone logs proposed to be entered into evidence by the State. The first objection from defense counsel concerned the date discrepancy between the records in the possession of the records custodian for Verizon, while testifying, and the records provided to defense counsel, which were obtained by the State using a search warrant. The second issue concerned the State organizing the text messages

chronologically and placing names by the phone numbers. When the State received the text messages from Verizon, the messages were not in chronological order and were identified by numbers only, not names. Therefore, the State created charts placing the messages in chronological order and associated the numbers with names. Defense counsel objected to the charts because the State could not prove the person whose name the state associated with the number was the person actually using the cell phone at the time of the sending and/or receiving of the text messages. Overruling the objection, this Court ruled the number would be referred to as "the number associated with the phone known to have been used by this person." However, the exhibit was admitted and the parties were allowed to argue their positions. The defense had the opportunity to argue that the fact that certain text messages were sent from a particular phone does not prove that a particular person sent the text messages.

The tenth unrecorded bench conference occurred on page 141, lines 23-24. This Court finds that during this bench conference, a break was scheduled.

The eleventh unrecorded bench conference occurred on page 145, lines 5-6. This Court finds that during this bench conference, the defense raised the issue of a witness, Kaitlin Dubois, committing perjury. To address this issue, the court reporter played the testimony of Ms. Dubois. This Court further finds the nature of this conference was adequately covered on the record.

The twelfth unrecorded bench conference occurred on page 191, lines 7-9. This Court finds this bench conference addressed defense counsel's objection to the admission of a cigarette butt and the results of forensic testing of the cigarette butt based on the State's failure to prove the chain of custody. This Court overruled the objection and permitted the introduction of the evidence. During the bench conference, defense counsel argued the State failed to establish a complete chain of custody as far as practicable to permit admissibility of evidence. The State

argued (1) that it need not prove each rung in the chain, (2) that the persons who collected the items and sealed them testified to sealing the package and giving it to SLED, and (3) the SLED agent testified there was no evidence of tampering to the package. The Court ruled that the probative value outweighed its prejudicial effect and any deficiencies would go to the weight of the evidence and not its admissibility.

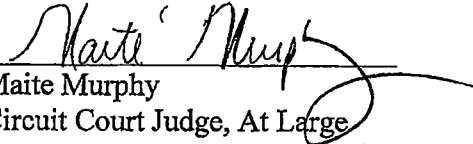
The thirteenth unrecorded bench conference occurred on page 242, lines 1-4. This Court finds this bench conference concerned scheduling. As mentioned earlier, an issue arose during the trial regarding a witness, Kaitlin Dubois, when the defense asserted that Ms. Dubois committed perjury regarding her contact with Mr. Shewtzuk. This matter was discussed during this bench conference as well, and, as discussed above, the matter was adequately covered on the record.

The fourteenth unrecorded bench conference occurred on page 291, lines 5-7. This Court finds this bench conference addressed the playing of the convenience store surveillance video that captured the shooting. The State asked this Court to inform those present in the courtroom that the video was graphic to enable individuals who did not wish to see the video to leave the room.

The fifteenth unrecorded bench conference occurred on page 294, lines 14-15. This Court finds this bench conference concerned defense counsel's objection to the admission of still shots from the video from the convenience store where the shooting occurred. Defense counsel objected that the still shots were inadmissible under Rule 403, SCRE, because they were inflammatory and unfairly prejudicial. The solicitor argued the photographs showed Mr. Shewtzuk's distinctive tattoos. This Court overruled the objection and permitted the introduction of the still shots by finding that their probative value outweighed its prejudicial effect.

CONCLUSION

Upon issuance of this Order, this Court has complied with the Order of the South Carolina Court of Appeals remanding this case to the Circuit Court to reconstruct the record of the bench conferences that occurred during Mr. Shewtzuk's trial.


Maite Murphy
Circuit Court Judge, At Large

August 31, 2017.