

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

 ORIGINAL

THE STATE,

RESPONDENT,

V.

MICHAEL ANTONIO WILLIAMS,

APPELLANT

APPELLATE CASE NO 2013-000091

**RECEIVED**

Appeal from Greenville County

NOV 29 2017

Honorable Edward W. Miller, Circuit Court Judge

SC Court of Appeals

Opinion No. 2017-UP-427

PETITION FOR REHEARING

The Court of Appeals affirmed the above named Appellant's convictions and sentences on November 15, 2017. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rule 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Appellant Williams raised three issues on appeal: (1) The trial court erred in allowing the state to admit testimony by the state's witnesses using the term "gang" in reference to Appellant Williams' case when Appellant Williams had not been identified as a gang member nor charged pursuant to S.C. Code Section 16-8-230, the Gang Prevention Act, because the reference was

inflammatory and unduly prejudicial under Rule 403, SCRE; (2) the trial court erred by coercing Co-defendant DaQuan Bruster to testify incriminating Appellant by threatening to vacate his guilty plea so he would be facing LWOP because the judge found that Bruster's first testimony violated the plea agreement; and the judge vacated the guilty plea of Co-defendant Tavarus Holmes after his testimony because the judge said it violated his plea agreement; (3) the trial court erred in denying a mistrial based on the fact that jurors from this trial were overheard by a juror in another case talking in the restroom during the lunch break about Williams' case saying such things as "the need to decode the language", "I was chillin," and "he's going down.."

On Issue One, this Court, citing State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) found no error by the trial court in admitting testimony referencing gangs. This Court held that the admission of improper evidence was harmless when the evidence was merely cumulative to other evidence as the Court wrote that other evidence referencing gangs was admitted without objection.

On Issue Two, this Court found that the trial court did not err in threatening to vacate Co-defendant Bruster's guilty plea because his first trial testimony, where he claimed to not remember events, could invalidate his guilty plea. Bruster then testified against Appellant Williams. This Court relied on State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005), where this Court found that the trial court had the duty to supervise and control witnesses.

On Issue Three, this Court found no error by the trial court in denying Appellant Williams' motion for a mistrial based on juror misconduct because the trial court followed the procedure suggested in State v. Aldret, 333 S.C. 307, 509 S.E.2d 811, 813-815 (1999) to determine if juror misconduct warranted a new trial. Because all of the jurors in Appellant Williams' case affirmed

that no premature deliberations occurred and that they could be fair, this Court found no error and relied on the trial judge's determination of juror credibility.

Respectfully, this Court misapprehended these issues.

**Issue One:**

The Gang Prevention Act at South Carolina Code Section 16-8-230 (2), provides that "criminal gang" means a formal or informal ongoing organization, association, or group that consists of five or more persons who form for the purpose of committing criminal activity and who knowingly and actively participate in a pattern of criminal gang activity.

Defense counsel argued that the state had not charged any of the defendants with being a member of a gang. The solicitor actually told the court that she was not alleging that the defendants participated in a pattern of criminal gang activity. R. 95, ll. 1 – R. 96, ll. 25. Therefore, the state conceded the defendants were not a gang.

In State v. Sobers, 404 S.C. 263, 744 S.E.2d 588 (Ct. App. 2013), the judge correctly found that evidence suggesting gang associations of murder victim and witnesses were irrelevant. Sobers, who was in his car, watched a fight between the victim and another young man in the midst of a crowd of people. He claimed that he fired shots when one of the young men approached his car and tried to start a fight. This was due to comments Sobers made about the man's sister. Sobers testified that the crowd swarmed his car and he fired shots. One bullet hit the victim in the back of his head as he sat in the back of another car.

Defense counsel wanted to admit evidence of gang activity of the victim and witnesses because it went to the motive of self-defense. Defense had pictures from Facebook showing the victim and witnesses flashing gang signs. The trial court found that Sobers failed to show any relevance of gang associations to the shooting. Four of the witnesses even admitted they were

making gang signs in the photographs but denied being in a gang. They were just being together like “family” in the picture. The state argued that witnesses testified they were in a gang, and if they were, there was no evidence of a connection between gang activity and the shooting.

Williams’ case is very similar to that of Sobers except that it was the state in Williams’ case that wanted to admit the evidence. Investigator Brown, the gang investigator, even went so far as to say the hand signs in the club photo were those of the Folk Nation gang. R. 458, ll. 1 – R. 464, ll. 23.

Rule 403, SCRE, provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

The admission of any evidence relating to the word “gang” was prejudicial to Williams. The word “gang” was inflammatory to the jury and prevented Williams and his co-defendants from receiving a fair trial.

In her closing argument, the solicitor made reference to the “photos” that Investigator Brown had described as showing hand signs that were associated with gangs and especially the Folk Nation. Investigator Brown had identified some of the defendants as exhibiting these signs in the “photos.” R. 649, ll. 19 – R. 650, ll. 3; R. 662, ll. 8 – 14; R. 458, ll. 1 – R. 464, ll. 23.

The solicitor also argued for the jury to consider the pressure being exerted on the state’s witness, Larry Johnson, at the jail. She reminded the jury that he testified that he was threatened to recant his statement or he would be “x-ed” out. He was told “either you are with us or against us.” R. 657, ll. 7 – 15.

The solicitor also reminded the jury of Shaquille Hogan’s testimony when he said he had to give his .380 gun to Tavarus. He had to do what Tavarus told him because he’s “got that power.” R. 656, ll. 11 – 23.

Although the solicitor did not use the word “gang”, these references were clearly gang related.

Testimony by Investigator Brown was the first testimony by a witness regarding gangs. Once the judge allowed this testimony, any further objection by trial counsel about gangs would have been fruitless. Brown’s testimony was more prejudicial than that from other witnesses because he specialized in gangs and gang investigations. His testimony likely carried more weight with the jury because he was with law enforcement and had an authority identification. The state presented him as a witness for the purpose of making it appear that Appellant Williams was a gang member. It was the state’s way of getting in testimony about gangs without charging Williams with being a gang member.

This Court misapprehended that gang testimony from Investigator Brown was more prejudicial and not harmless and was not cumulative. Testimony about gangs was character evidence which was admitted without following the rules for admission. (See State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) that the accused must introduce evidence of character before the prosecution can attack it.)

**Issue Two:**

In People of the State of Illinois v. Manchilla, 250 Ill.App.3d 353, 620 N.E. 2d 1163 Dec. 846 (1993), the Appellate Court reversed Manchilla’s conviction for aggravated criminal sexual assault because the prosecutor violated Manchilla’s right to present witnesses by intimidating the witness with repeated statements concerning perjury and immigration status. The Illinois Appellate Court wrote that a fundamental element of due process is the right of an accused to present witnesses but that right was violated if the state or court exerted improper influence on defense witnesses causing them not to testify.

The United States Supreme Court in Webb v. Texas, 409 U.S. 95, 98, (1972), reversed the defendant's conviction because the trial judge drove a prospective defense witness from the stand by telling him that if he lied he could be prosecuted, and convicted for perjury, and have to serve more time.

In another Illinois case, People v. King, 228 Ill.App.3d 519, 170 Ill.Dec.805, 593 N.E.2d 694 (1993), the Appellate Court reversed the defendant's conviction where the circuit judge drove a prospective defense witness from the stand by threatening to revoke an earlier plea bargain made before that court if it believed the witness was lying. The Illinois Supreme Court affirmed the reversal. People v. King, 154 Ill.2d 217, 181 Ill.Dec.626, 608 N.E.2d 877.

In State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005), the South Carolina Court of Appeals held that giving false testimony at trial constituted the felony of perjury and subjected the person to a fine or imprisonment. The trial witness in Stanley contradicted his prior statement to police during his trial testimony and was guilty of perjury if the information to police was false and if it was true, then his trial testimony was perjury.

The trial judge warned the witness of perjury and ordered the witness to jail **after** dismissing the jury. The witness was allowed to consult with his attorney and testify again. The court found that all courts have the power to punish for contempt which was essential in judicial proceedings and to the due administration of justice. The court wrote that a judge has the responsibility for safeguarding both the rights of the accused and the rights of the public in the administration of justice.

The trial judge in Williams' case did not safeguard Williams' right to due process and a fair trial when the judge coerced the witness to testify a second time by threatening to vacate the

witness's plea, and he would then face the possibility of LWOP. It was prejudicial to Williams to coerce the witness to testify a second time.

The appropriate action by the judge would have been for him to charge the witness with perjury after the trial.

This Court misapprehended the significance that Bruster was facing LWOP if he did not do what the trial court was coercing him to do.

**Issue Three:**

In State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999), the Supreme Court held that premature deliberations could affect fundamental fairness of a trial such that the trial court could inquire into such allegations and could consider juror affidavits in support of such allegations.

Deliberate is defined in Black's Law Dictionary 294 (6<sup>th</sup> ed. 1991), as "to weigh in the mind, discuss, to consider the reasons for and against, etc."

In State v. Carmack, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010), the Court of Appeals ruled that premature jury deliberations may amount to misconduct that could affect fundamental fairness.

Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Jenkins, 408 S.C. 560, 759 S.E.2d 759 (Ct. App. 2014); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); citing State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508, 514 (1999). In order to receive a mistrial, a defendant must show error and resulting prejudice. Id. The party moving for a mistrial has the burden to show not only error, but resulting prejudice. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

The testimony from the questioned jurors indicated that they were discussing the case which met the definition of to “deliberate.” One of the trial attorneys argued that no witness had said anything about someone “going down.” This language indicated that one of the jurors had already made a decision before the case went to the jury, and was discussing her decision with another juror. This was the only conversation overheard. There was a reasonable probability that other conversations were held about the case prematurely. When the judge questioned each juror, some of the comments were as the record shows:

**Court:** Are you aware of any discussion about this case that has gone on either in the jury room or anywhere else? Do you know of any?

**Juror Harper:** I would say, yes. Not anything substantive but I would say that there hasn't been a group thing.

**Court:** Can you tell me what has been talked about?

**Juror Harper:** Probably at least what I'm aware of in the context of almost sadness over some of the things we've heard.

**Court:** I am calling each juror out individually to determine whether or not y'all have heard some discussion. ....Anything along those lines?

**Juror Ferguson:** There was some discussion yesterday after the initial charges were made as to how long this might take and that kind of thing. And then there has been --I'm trying to think--- some natural curiosity I think. There's been some discussion I think of the behavior of some people who have taken the stand that kind of thing. I don't think there's been any conclusions drawn. Does that make sense?

**Court:** It has come to light that there may have been some discussion or talk about the case among our jury. Have you been privy to any of that or heard any of that?

**Juror Tutiven:** Not specifics. Nobody has shared opinions. We have discussed or asked questions about names ... It's just been kind of a reflection on different facts.

**Court:** When you say facts, what do you mean?

**Juror Tutiven:** names and how many people we've listened to so far and how many witnesses we've had, sort of generic.

R. 189, ll. 4 – 22; R. 191, ll. 6 – 24; R. 198, ll. 4 – 24.

Trial counsel argued:

Your Honor was nice enough to note for the record we had that bench conference and I know you've heard most of this but for the record, my motion is to remove the two jurors that are alleged to have been involved in the activities specified in the note. That would then, unfortunately, leave us with 11 jurors and so you would have to declare a mistrial. That would be the second part of my motion.

The basis of it is that Your Honor charged the jury as part of his instructions and has consistently charged the jury every time we've taken a break not to discuss the case at all. Your Honor has not said don't discuss the facts but you can discuss some other part of the case. So clearly these jurors have violated the oath that they took at the beginning of the case as a part of which following your instructions.

R. 185, ll. 11 – R. 186, ll. 5.

The other attorneys joined in the motion. R. 187, ll. 1 – ll. 21.

The trial judge stated that the question was fundamental fairness and were these defendants going to be denied a fair trial. R. 187, ll. 22 – 25.

They were denied a fair trial because there was no way to know all of the jurors' discussions. The record made it clear that the jurors were discussing the case in spite of the judge's instructions.

WHEREFORE, we respectfully request this Court to reconsider its ruling, and remand Williams' case for a new trial.

Respectfully submitted,

  
LANELLE CANTEY DURANT  
Appellate Defender

This 29th day of November, 2017.

STATE OF SOUTH CAROLINA

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Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

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THE STATE,

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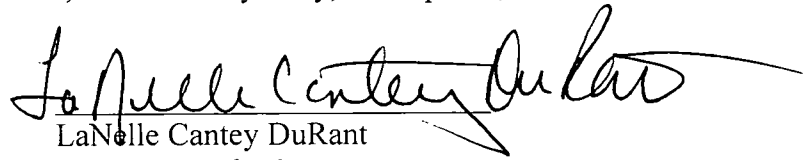
V.

MICHAEL ANTONIO WILLIAMS,

APPELLANT

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Michael Antonio Williams, #353957, at Lee Correctional Institution, 990 Wisacky Hwy, Bishopville, SC 29010, this 29th day of November, 2017.



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE  
ME this 29th day of November, 2017.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: July 5, 2027.