

ORIGINAL

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

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

S.C. SUPREME COURT

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

THE STATE,

RESPONDENT,

v.

DEMETRICE ROOSEVELT JAMES,

PETITIONER.

BRIEF OF RESPONDENT

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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. After six hours of deliberation, the jury remained deadlocked on the murder charge and the trial judge declared a mistrial. Petitioner 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 submitted a Petition for Writ of Certiorari on March 21, 2017, and the State filed its Return on April 20, 2017. On November 15, 2017, this Court granted the Petition and Petitioner timely filed his brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On the evening of January 25, 2013, Trenton Scott was spending some at time at his parents' home with his brother, Troy Scott, Troy's girlfriend Cari Pearson, and friends Joshua Williams and Brandon Jones. R. pp. 292-93. Trenton and Troy Scott live with their mother, Sugar Davis, and their step-father, Chandler Davis. R. p. 288. The downstairs area of the Davis home contains a salon where Mrs. Davis conducts her business, as well as a music studio and a game room. R. p. 290. While the group was hanging out in the studio room, Vincent Nelson came by the home. R. p. 294. Nelson previously stayed with the Davis family for a period of time before disappearing. R. p. 229. Chandler Davis testified that he and his wife occasionally help out less fortunate children from the neighborhood by giving them a place to stay, clothing, and food. R. pp. 228-29. When Nelson showed up to the Davis family home, Trenton Scott had not seen him in three months. R. p. 294. Scott testified that Nelson came in around 11:00 PM, which was unusual because they normally do not allow guests to come over at such a late hour. R. p. 295.

Trenton Scott noticed Nelson making a series of phone calls. R. p. 294. During one of the phone calls, Scott overheard Nelson say that he was in the house. R. p. 294. Following the phone calls, Nelson began pressuring Jones to go outside and smoke a cigarette with him. R. p. 295. Eventually Nelson, Jones, and Williams proceeded outside to smoke. R. p. 296. Once they were outside, an individual walked by and giggled. R. p. 200. The individual then turned around and approached Jones, telling him, "Don't move. Get down on the ground if you want to live." R. p. 200. Williams slowly put his hands up and looked at his attacker. R. p. 200. Williams was then struck in the head. R. p. 200. While Williams was on the ground, he heard Jones begging for his life. R. p. 201. Williams stated that there were three individuals that were proceeding down the

hill. R. p. 201. Williams heard a scuffle going on between Jones and the assailants. R. p. 202. Williams also heard the door to the house open and the sounds of glass breaking inside. R. p. 202. Williams remained on the ground and pretended that he was dead. R. p. 203. Williams then heard doors slamming and someone shouted, "Six hundred, don't do it. Don't do it." R. p. 203. Following the exclamation, a gun went off a number of times and Williams felt a jolt of pain hit his side. R. p. 203. Williams noticed he had been shot in his side. R. p. 204. Williams testified that after the gunshots he didn't hear Jones anymore. R. p. 203. Williams rushed to the upstairs of the Davis home to seek help. R. p. 204. Mr. Davis rushed downstairs and found Jones bleeding by the back door. R. p. 232. Davis testified that Jones had been shot and there was a lot of blood. R. p. 233. Cinnamon Wright, one of the paramedics who responded to the scene, testified that Jones suffered five gunshot wounds. R. pp. 373-74. Jones subsequently died at the hospital of his injuries. R. p. 436.

While Williams, Jones, and Nelson stepped outside to smoke, Trenton Scott ran upstairs to pick up some hangers. R. p. 297. When he arrived downstairs, Maurice Roberts entered the room with a gun pointed forward. R. p. 298. Scott testified that the gun was pointed at his head. R. p. 298. Roberts pistol-whipped Scott, who then hit Roberts in the face, causing him to fall onto a glass table. R. p. 299. During the struggle, Roberts dropped his gun on the floor. R. p. 299. Scott and Roberts began fighting to get to the gun on the floor. R. p. 299. While they were fighting for the gun, Petitioner walked in. R. p. 299. Scott did not know who Petitioner was at the time, however the room was well lit and he was able to get a clear look at both intruders' faces. R. pp. 299-300. Upon hearing the commotion downstairs, Troy Scott rushed into the room to aid his brother. R. p. 381.

Eventually, Roberts was able to outmaneuver Trenton Scott and pick up the gun. R. p. 300. Roberts then passed the gun to Petitioner. R. p. 375. Roberts subsequently tried to make further progress into the house. R. p. 301. Scott was able to slam Roberts to the floor. R. p. 301. Petitioner was standing in the door way with the gun, warning "I'm about to shoot. I'm about to shoot." R. p. 301. Trenton and Troy Scott were eventually able to overpower their assailants and force them to retreat towards the back door. R. p. 304. As they were fleeing, Trenton Scott attempted to grab Petitioner by the dreadlocks. R. p. 304. Petitioner then fired a shot. R. p. 304. The bullet struck Trenton Scott in his left arm. R. p. 307.

While he was at the hospital, police showed Trenton Scott a photo line-up where he identified Vincent Nelson. R. p. 313. Police later came to the Davis home and showed Trenton Scott another photo line-up. R. p. 315. In this lineup, Scott identified Maurice Roberts. R. p. 316. Trenton Scott was later shown another photo line-up where he identified Petitioner as the second intruder in the home and the man who shot him. R. p. 319. Police also showed a photo line-up to Troy Scott, who identified Petitioner as the man who shot his brother. R. pp. 392-93.

Vincent Nelson testified at trial. R. pp. 330-71. Nelson previously pled guilty to burglary in the first degree, two counts of attempted murder, and voluntary manslaughter. R. p. 330. Nelson was in a rap group called "600" with Deshawn McClary, Maurice Roberts, Jwaun Duckett, and Petitioner. R. p. 332. On the night of the incident, Nelson, Petitioner, Roberts, McClary, and Duckett were spending time together at Roberts' home. R. p. 333. Nelson began telling the group about the recording studio at the Davis home. R. p. 334. Upon hearing about the studio equipment, Petitioner, Nelson, McClary, and Roberts decided to go over to the Davis home and steal the studio equipment. R. p. 334. Roberts invited Duckett to join in the robbery,

however Duckett declined.¹ R. p. 274. The group decided to use Nelson to get into the house because he knew the Davis family. R. p. 335. Once he was inside the house, Nelson texted the others. R. p. 337. After obtaining a cigarette from Jones, Nelson walked outside with Jones and Williams to smoke. R. p. 338. Once they were outside, Roberts came outside with his gun pointed forward. R. p. 339. Roberts then hit Jones in the nose with the gun. R. p. 340. Once Jones fell to the ground, McClary stood over him. R. p. 340. Petitioner and Roberts then disappeared into the house. R. pp. 34-41. Nelson then heard a gunshot from inside the home and began running back to Roberts' house. R. p. 341.

On January 28, police officers came and spoke to Nelson about the incident. R. p. 344. Nelson waived his rights and told police what happened. R. p. 345. Nelson was shown photo line-ups. R. p. 345. In one of the line-ups, Nelson identified Petitioner. R. p. 353.

¹ At trial, Duckett testified that he was in a rap group named "600 squad" with Petitioner, Roberts, McClary, and Nelson. R. p. 248. Duckett was at the Roberts home with Nelson and Roberts the Sunday after the robbery. R. p. 257. When police arrived, Roberts threw Duckett his phone and told him to flush it. R. p. 260. Instead of flushing the phone, Duckett threw it in the bathroom. R. p. 260. Police subsequently found Duckett hiding in a closet. R. p. 290. Duckett told police that he was not at the scene of the attempted robbery, but he knew who did it. R. p. 263. Duckett knew about a phone call where Roberts, Petitioner, Nelson, and McClary agreed to rob a studio. R. p. 263. Duckett submitted that he was invited to participate in the robbery, however he told Roberts "I don't do licks." R. p. 274.

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 cautioned:

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 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 individually 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. At the conclusion of trial, after the jury deadlocked on the murder charge and found Petitioner guilty of the remaining charges, Defense Counsel again moved for a mistrial based on the jury's premature discussions. R. p. 782. The trial judge denied the motion, noting: And to some degree, while it's kind of in hindsight. The fact that they could not reach a verdict

on murder indicates they were serious in their deliberations and that they didn't reach some verdict during the week. They went from about 1:10 'til about 7:10." R. pp. 729-29.

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 content 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 argument is 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. Further, Petitioner's contention that it was incumbent upon

the trial judge to individually question the jurors regarding the substance of their discussions is misguided, as judicial intervention in the form of specific inquiry into what the jurors were discussing would undermine the sanctity of the jury system.

Error Preservation

As a threshold matter, Petitioner's argument to this Court is 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.² Petitioner's argument at the Court of Appeals was limited to the assertion that the judge erred in not 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

² It is telling that Resko, which is the fulcrum of Petitioner's argument to this Court, is present in the Brief of Appellant at the Court of Appeals only as a parenthetical citation. See Brief of Appellant p. 13.

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)).

Analysis

“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. See also United States v. Cuthel, 903 F.2d 1381, 1382 (11th Cir. 1990) (“The district court

has discretion to determine whether evidence of premature deliberation warrants an evidentiary hearing.”); United States v. Dominguez, 226 F.3d 1235, 1246 (11th Cir. 2007) (“The most salient aspect of the law in this area is the breadth of discretion given to judges who are called upon to deal with the possibility of juror misconduct. District court judges deal with jurors on a regular basis, and those judges are in the trenches when problems arise. The problems that present themselves are seldom clearly defined and a number of variables have to be considered. There are often no obviously right or wrong answers to the questions that arise. For all of these reasons, a trial judge is vested with broad discretion in responding to an allegation of jury misconduct, and that discretion is at its broadest when the allegation involves internal misconduct such as premature deliberations, instead of external misconduct such as exposure to media publicity.”); United States v. Yonn, 702 F.2d 1341, 1345 (11th Cir. 1983) (finding discretion extends to the trial judge’s initial decision regarding whether to interrogate the jurors).

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, this 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, this

Court offered a “suggested procedure” to handle allegations of premature of deliberations. Id. at 315, 509 S.E.2d at 815. Pursuant to the suggested procedure, this 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, this 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, this 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 this 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 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

were not 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.”).

In State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), Kelly contended the trial judge erred in denying his motion for a mistrial based on juror misconduct. In Kelly, the trial judge received a note from a juror indicating a religious pamphlet concerning God’s view on capital punishment was being circulated in the jury room. Id. at 140, 502 S.E.2d at 103. After questioning the jurors involved, the trial judge dismissed the juror disseminating the pamphlet and, after questioning them regarding their ability to render a fair and impartial verdict, concluded the remaining jurors were not biased by the pamphlet. Id., 502 S.E.2d at 104. In concluding Kelly failed to show prejudice, this Court noted:

[T]he trial judge is in the best position to determine the credibility of the jurors and he found them credible and capable of rendering an impartial verdict based solely on the evidence. The trial judge conducted extensive *voir dire* of the jurors both prior to empaneling the jury and during questioning concerning this incident. The trial judge questioned jurors extensively about potential biases and prejudices and, thus, placed himself in the best position to assess the truthfulness of the jurors. Further, the trial judge consistently admonished the jury not to discuss the case and not to consider extraneous material. The trial judge did not find members of the jury were being untruthful. We respect this finding.

331 S.C. at 142-43. 502 S.E.2d at 105. As was the case in Kelly, the trial judge in Petitioner’s case was in the best position to assess the credibility of the jurors and determine whether they were truthful about their ability to render an impartial verdict at the end of the trial based solely on the evidence presented.

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, a waste of the court's time, and violative of the sanctity of the jury process. 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 all the jurors and collectively 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 each juror 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 procedure found insufficient in Resko, and was consistent with the framework of Aldret. See also Dominguez, 226 F.3d 1235, 1247 ("While we conceivably might have followed a different course and even arrived at a different result than the district court did if we had been presiding

over the trial of this case, we were not. The whole point of discretion is that there is range of options open, which means more than one choice is permissible. . . . We cannot say that, all things considered, the district court's decision not to grant a mistrial was a clear error of judgment.”³ 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,

³ The Dominguez Court went out of its way to disagree with the ultimate conclusion in Resko that the trial judge was obligated to conduct further investigation into the juror's discussions. In finding the trial judge did not abuse its discretion in the case before them, the Dominguez Court emphasized: 1) the trial judge provided repeated jury instructions and, in concluding the jury should continue to serve, the trial judge essentially made a finding that the jury was capable of correcting any misbehavior and the trial judge was in the best position to determine whether the jury's error could be cured, and 2) the jury reached a split verdict, which in itself is “evidence that the jury reached a conclusion free of undue influence and did not decide the case before the close of evidence.” 226 F.3d 1235, 1247-48.

a trial judge should only grant a new trial in cases where the premature deliberations were demonstrably 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.

Here, not only did Petitioner fail to establish prejudice, but the jury's deliberations at the end of trial conclusively establish the jury carefully and fairly deliberated and that Petitioner was not prejudiced by the jury's earlier discussion of the case. As was observed by the trial judge, the jury deliberated for six hours, sent out multiple jury notes asking questions, and remained deadlocked on the murder charge. As noted by the trial judge, this is indicative of diligent deliberation on the part of the jury and directly refutes the argument that the jury reached a decision in the middle of the week, before the State presented its remaining witnesses and Petitioner presented his case. As in Dominguez, the fact that the jury reached a split verdict is strong evidence the jury reached a conclusion free of undue influence and did not decide the case before the close of evidence.

Finally, to create a rule where the trial judge must interrogate the jurors regarding the content of their discussions would undermine the secrecy and sanctity of our jury system. To allow judicial inquiry into the specific content of jury discussions would create two problems. First, to force jurors to disclose the content of their discussions would have a chilling effect on future deliberations where jurors would not feel they could be fully candid for fear that their comments would potentially reach a larger audience. Second, revealing the specific content of closed-door juror discussions would provide impermissible insight into the jury's minds regarding a portion of the proceeding and would thus ruin the sanctity and secrecy of the proceeding by allowing parties the unheard of advantage of tailoring arguments based on actual knowledge about the jury's deliberations.

As to the chilling effect on juror discussion, the confidential nature of the jury room creates an environment where jurors may freely discuss ideas and theories throughout the deliberative process. See Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 874-75 (2017) (Alito, J., dissenting) (“Jurors occupy a unique place in our justice system. The other participants in a trial—the presiding judge, the attorneys, the witnesses—function in an area governed by strict rules of law. Their every word is recorded and may be closely scrutinized for missteps. When jurors retire to deliberate, however, they enter a space that is not regulated in the same way. Jurors are ordinary people. They are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding. The jury trial right protects parties in court cases from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives. To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded.”). Compromising the secrecy of the juror’s discussion has the potential to stifle the free debate of the jury room, as jurors may not feel free to truly speak their minds. “Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.” Clark v. United States, 289 U.S. 1, 13 (1933); United States v. Antar, 38 F.3d 1348, 1367 (3rd Cir. 1994) (Rosenn, J., concurring) (“We must bear in mind that the confidentiality of the thought processes of jurors, their privileged exchange of views, and the freedom to be candid in their deliberations are the soul of the jury system.”); see also Rule 606 (b), SCRE (Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s

mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.""). Disclosure of the juror's discussions in this case, therefore, could have precluded them from later engaging in a complete and honest dialogue. Once their discussions were published one time, they might fear subsequent disclosure of the specific content of future deliberations.

Furthermore, disclosure of the specific commentary by the jury in Petitioner's case or any jury trial could undoubtedly tip the jury's hand regarding their thoughts and impressions about critical witnesses. This would violate a fundamental tenet of our justice system, as both parties would undoubtedly tailor their cases to the jury based on information they should never have had access to in the first place. The approach chosen by the trial judge, where he individually questioned the jurors generally about their ability to be fair and impartial rather than questioning them about the specific content of their discussions appropriately addressed the issue of premature discussions without destroying the sanctity of the proceeding. This Court should affirm the Court of Appeals' decision affirming the trial judge's ruling.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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January 26, 2017

STATE OF SOUTH CAROLINA
In the Supreme Court

On the 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

THE STATE,Respondent,

v.

DEMETRICE ROOSEVELT JAMESPetitioner.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Katherine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211

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

This 26th day of January, 2018.


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