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S.C. SUPREME COURT

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 2017-UP-427 (S.C. Ct. App. Filed November 15, 2017)

11-GS-23-07958 to 07965, 03839A

THE STATE,

RESPONDENT,

V.

MICHAEL ANTONIO WILLIAMS,

PETITIONER

APPELLATE CASE NO 2013-000091

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 18, 2018. App. 22.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court's decision to allow 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. Whether the Court of Appeals erred in affirming the trial court's 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. Whether the Court of Appeals erred in affirming the trial court's denial of 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."

STATEMENT OF THE CASE

On May 29, 2012, the Greenville County Grand Jury indicted Michael Antonio Williams on seven counts of attempted murder, one count of conspiracy, and one count of assault and battery by mob second degree (A&B). On January 7, 2013, Williams proceeded to trial before the Honorable Edward W. Miller and a jury. He was tried along with three co-defendants.[1] Williams was represented by Scott Robinson; Esaiveus Booker was represented by Randy Chambers; Kinjta Sadler was represented by Thomas Quinn; and Raymond Young was represented by John Abdalla. The state was represented by Katrina Salisbury. The jury found Williams guilty of the seven attempted murders, conspiracy, and A&B by mob. He was found not guilty of the possession of a firearm during the commission of a crime of violence. R. 750, ll. 21 – R. 751, ll. 4. Judge Miller sentenced Williams to twenty–five years on each attempted murder charge, twenty years on the A&B by mob second degree, and conspiracy five years with all sentences to run concurrently. R. 755, ll. 6 – R. 756, ll. 6. Williams' attorney filed a notice of appeal. The Court of Appeals affirmed Williams' convictions and sentences on November 15, 2017. State v. Williams, 2017 WL5479869; Op. No. 2017-UP-427. App. 1-3. Williams' appellate counsel filed a petition for rehearing which the Court of Appeals denied on January 18, 2018. App. 22. This petition for a writ of certiorari to the Court of Appeals follows.

[1] Eight people were arrested and charged with the same charges. Four pled guilty prior to trial with sentencing deferred. Supp. R. 1, 11 1 – Supp R. 3, ll. 25.

ARGUMENT

I.

The Court of Appeals erred in affirming the trial court's decision to allow 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.

Relevant Facts

On July 17, 2011, around 3:30 in the early morning, a group of young people were at a Lil Cricket gas station in Greenville hanging out talking about a friend who had just been taken to the hospital because he was shot at the Red Planet night club earlier in the evening. R. 102, ll. 11 – 25. These young people were seated and standing around their cars while they talked. Suddenly, shots rang out in every direction. Seven people were shot with all requiring medical attention. R. 103, ll. 1 – 11. The victims could not identify the shooters as the faces of the shooters were covered. R. 518, ll. 2 – 17.

The assistant solicitor told the jury in her opening that eight young men were arrested and charged with attempted murder. Four of the eight were on trial and were also charged with conspiracy, possession of a weapon during a crime of violence, and assault and battery by a mob second degree. The solicitor believed that the defendants carried out their plan to park behind Lil Cricket, approach the gas station on foot, and open fire. R. 103, ll. 1 – R. 105, ll. 2.

The solicitor's version was that the reason for the shooting was that earlier that evening at the Red Planet Nightclub, some fights broke out in the parking lot and the defendants decided to retaliate by firing on the young men at the gas station. R. 103, ll. 7 – 16.

During pretrial motions, the state told the court that she had documents related to Defendant Young's gang affiliation that she planned to admit if they became relevant. Young's counsel argued that all of the defendants had a motion in limine to prevent the state from any mention of gangs or use of the word "gang" because the prejudicial effect outweighed any probative value. He argued that it would be very difficult for their clients to have a fair trial if the jury related it to gangs. He said that either the state could prove the case without the mention of gangs or not because the evidence was either there or not. The judge asked for a foundation and counsel said he would get back to that the next morning to which the judge agreed. R. 70, ll. 1 – R. 68, ll. 22.

On the next day, January 8, 2013, defense counsel for Williams argued the motion shared by all the defendants regarding any reference by the state to gangs. Counsel argued that the state had not charged any of the co-defendants with being a criminal gang under S.C. Code Section 16-8-230 which was the Criminal Gang Prevention Act. This Act defined a criminal gang and a criminal gang member. The second part of his motion was that it was unduly prejudicial under Rule 403, SCRE and was inflammatory because just the word "gang" took on an inflammatory appeal to the passions of the average person. R. 90, ll. 20 –R. 92, ll. 23.

The judge responded that the term was "pretty wide open" and he could not rule in a vacuum. Counsel for Co-defendant Booker argued that the state intended to call as a witness investigator Brown whose sole job was to investigate gangs because the state had pursued this case as though these young men were part of the gang known as the Folk Nation. The defendants asked to stop that before it happened. R. 93, ll. 1 – 24.

The state argued that there was no charge related to section 16-8-230 so that definition was not controlling. The solicitor stated she was not alleging that the defendants "participated in a pattern of criminal gang activity." But she said it could come out from witnesses that Co-defendant

Young was the leader of the Folk Nation sect in Greenville. It could come out that the investigation was pursued as a gang involvement because the witnesses thought it was. Appellant was unaware of any law that the opinion of the witness constitutes an evidentiary predicate to admit highly prejudicial matters. R. 95, ll. 1 – R. 96, ll. 25.

Defense counsel Robinson argued that any reference was also prevented under Rule 404(a) because it interjected the defendants' character into the evidence because the jury would think they were bad people if they heard the word "gang." The judge ruled that he could not limit the state on that, but he would see how "it played out." R. 97, ll. 1 – R. 101, ll. 15.

After several witnesses testified, defense counsel Chambers for Co-defendant Booker, told the court that the state's next witness was investigator Brandon Brown who was with the gang investigation unit. Counsel asked that Investigator Brown identify himself only as an investigator with the Greenville County Sheriff's Office and not identify himself as a gang investigator. Counsel argued that no foundation was laid by the state that these men were members of a gang. The judge said that the exception was noted for the record. The judge also acknowledged that all of the attorneys for the defendants joined in the objection. R. 431, ll. 7 – R. 432, ll. 23.

Investigator Brandon Brown was the next witness for the state. He described himself as a "gang investigator assigned to the Federal Bureau of Investigation as a task force officer." He was contacted by Investigator Wayne Campbell to respond to the shooting at Lil Cricket due to the multiple shootings. His job was to collect information and try to determine from information he knew as a gang investigator that could further the matter for the lead investigator. R. 433, ll. 23 – R. 435, ll. 23.

Many witnesses did not want to talk to him as several witnesses referred to the defendants as "them Folk Boys." Witnesses said the shooters were all wearing black and were an organized group

showing up together. Counsel Abdalla for Co-defendant Young objected to the testimony regarding this "whole gang thing." The judge overruled the objection. R. 437, ll. 1 – 23.

Investigator Brown continued to testify there was a picture on Facebook where Co-defendants Williams and Young were communicating, and there was a picture labeled "The Family." R. 438, ll. 10 – R. 439, ll. 25. This appeared to be a club picture. R. 440, ll. 14 – 25.

The state then showed investigator Brown several photographs and asked about hand signs as related to gangs. Investigator Brown's testimony was that hand signs were a popular way to identify gang members as they were universal signs. Several of them were in these photographs according to Brown. There were some signs associated specifically with the Folk Nation or the Gangster Disciples. He identified some of the defendants as exhibiting these signs in the photographs. R. 458, ll. 1 – R. 464, ll. 23.

One of the co-defendants, Larry Johnson, testified for the state that he was charged in this incident and pled guilty earlier to attempted murder and second degree assault and battery by a mob. His sentencing was deferred. R. 505, ll. 1 – 24. He went to the Red Planet and was with his friends which included the four co-defendants as well as Tavarus Holmes and Daquan Bruster. R. 506, ll. 1 – R. 507, ll. 23. Another friend, Brandon who was known as Black, was also there. Bandon and Michael Williams got into a fight outside the club with some other guys. Later, Johnson heard gunshots and he and his friends left. They met at another club, "864," to discuss what happened. Then Johnson learned that Brandon (Black) and another friend Bamm-Bamm were shot. R. 513, ll. 1 – R. 515, ll. 25.

They were driving down White Horse road past Lil Cricket when Co-defendant Young said those guys at the Lil Cricket looked like the ones that shot Bamm-Bamm. They returned to Club 864. Young told everyone who was going to come on. Young, Booker, Sadler, and Williams

covered their faces with black tee-shirts. They all drove to Lil Cricket and parked behind it R. 516, ll. 1 – R. 520, ll. 7. Then they all got out of their cars except Johnson and ran up the hill to Lil Cricket and started shooting. He heard a lot of shots. Then they returned to the cars and they left. R. 522, ll. 3 – R. 523, ll. 25.

Johnson admitted on cross examination that he gave a statement to Investigator Campbell which he recanted on November 10, 2012. He admitted that he had made false accusation against the four co-defendants and also Holmes and Bruster. R. 536, ll. 20 – R. 542, ll. 3.

On redirect, when the solicitor asked why he wrote the letter from the jail recanting, Johnson said that more of the people from the gang were in the dorm with him telling him to recant. He was told he would be "xed" out if he did not recant. R. 549, ll. 23 – R. 551, ll. 11.

Another co-defendant, Shaquille Hogan, testified for the state that he was friends with the four co-defendants on trial. R. 553, ll. 1 –R. 555, ll. 5. He described going to the Red Planet. A fight occurred inside first and then outside where the shots were fired. R. 555, ll. 6 – R. 556, ll. 23. He told how they all went behind Lil Cricket. Hogan stayed at the cars because he had given his gun to Tavarus, and Johnson went with the group that fired shots. R. 561, ll. 1 – R. 563, ll. 25.

Hogan gave a statement to police implicating the four co-defendants on trial. He later gave another statement that his first statement was not true. He did plead guilty to assault and battery by mob second degree and conspiracy but had not been sentenced. R. 565, ll. 14 - R. 575, ll. 17.

Discussion

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. 515, 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.

The Court of Appeals, 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. The Court of Appeals 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. App. 2.

The Court of Appeals 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.)

ARGUMENT

II.

The Court of Appeals erred in affirming the trial court's 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.

Relevant Facts

A third co-defendant, Daquan Bruster, was called to testify for the state. He admitted that he pled guilty on the Monday before trial started to seven counts of attempted murder, conspiracy, assault and battery by mob second degree, and possession of a weapon during the commission of a violent crime. He testified that he did not remember the events of that night, and then "pled the Fifth." The state received permission by the court to treat him as a hostile witness. He said he admitted these crimes because he just went with what the solicitor said. He did not understand that he was expected to testify. He said he did not want to testify. R. 588, ll. 19-R.591, ll. 21.

On cross examination Bruster admitted that he only pled guilty because he was facing life without parole if he did not plead. He had not been sentenced as of trial. After his testimony the judge, without any motion from the state, called for Bruster's attorney. The judge told the attorney that he was giving Bruster a chance to withdraw his guilty plea because it was not valid if he did not remember. R. 591, ll. 22 – R. 594, ll. 9.

The state then called the fourth co-defendant, Tavarus Holmes, to testify for the state. On the witness stand, he said his attorney was not present and that he had no testimony. R. 595, ll. 15 – R. 596, ll. 8. The state told the judge that Holmes had pled guilty on Monday also to one count of

attempted murder and had agreed to testify for the state as part of his plea. The judge, without a motion by the state, vacated Holmes' plea and noted he would be tried on seven counts of attempted murder. R. 595, ll. 15 – R. 599, ll. 25.

Defense counsel Abdalla for Co-defendant Young, objected that the defendant was not receiving a fair trial if the co-defendant was being forced to testify by threatening to vacate his plea. The judge said that did not affect Abdalla's client because the Co-defendant Holmes was backing out of his deal. R. 598, ll. 1 – 22.

The state then told the judge that the Co-defendant Bruster was there with his attorney and may have changed his mind. Defense counsel Abdalla objected to the coercive nature of the judge forcing the witness Bruster to come back and testify after he had already refused to testify. The judge responded that Bruster had violated his plea agreement and he was vacating his plea and would have to go to trial and face LWOP. Bruster's counsel said Bruster would testify. R. 600, ll. 22 – R. 601, ll. 25.

Counsel Chambers for Co-defendant Booker objected and argued to the court that their position was that once a person entered a plea, the plea could not be vacated just because the witness did not say what the state wanted him to say, and the witness could not be brought back and forced to testify. Counsel Quinn for Co-defendant Sadler objected to Bruster being recalled because he had been released as a witness. The concern was the court's coercive nature of compelling Bruster to withdraw his plea and face additional time. The judge stated that counsel's objection was noted for the record and said: "I assume everyone is in agreement with it." R. 602, ll. 1 – R. 605, ll. 10.

Bruster then testified for the state that he was at the incident at the Red Planet and Brandon Davis was shot in the back. Bruster went with Larry Johnson to Lil Cricket. Ten or eleven other

people were there and Bruster covered his face as Johnson told him to do. Bruster did not know who the other ten or eleven people were because their faces were covered also. He admitted participating in the shooting, and admitted to pleading guilty. R. 605, ll. 12 – R. 610, ll. 8. On cross examination, Bruster admitted that he was told to testify or LWOP was back on the table. R. 612, ll. 1 – 11.

Discussion

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 in Stanley 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.

The Court of Appeals 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. The Court of Appeals 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. App. 2.

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

ARGUMENT

III.

The Court of Appeals erred in affirming the trial court's denial of 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."

Relevant Facts

Early in the trial after several victim witnesses testified, the judge, in camera, had a bench conference with the attorneys. The judge then put the issue on the record. The judge received a note from a juror in another trial that said: "I overheard jurors from Courtroom B discussing what sounded like details of their case. "Need to decode language; I was chillin; he's going down." R. 183, ll. 24 – R. 184, ll. 6.

The judge explained that a bench conference was held with the attorneys and the attorneys had a motion for a mistrial. The judge cited the case of State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) which set forth the procedure to follow in cases of alleged juror premature deliberation which must establish prejudice. This procedure required a hearing to determine if it was premature deliberation and if it was prejudicial. If it was prejudicial, then a new trial was required. R. 184, ll. 6 – 25. The judge decided to discuss the problem with each of the jurors. R. 185, ll. 1 – 9.

Defense counsel Quinn for Co-defendant Sadler, moved for a mistrial with no further inquiry. The other three attorneys joined in the mistrial motion. Defense counsel's argument was that it was not known what else may have been said, and no witness had used the words "he's going down." Therefore, it sounded as though someone was going to be found guilty. R. 185, ll. 14 – R. 187, ll. 21.

The judge then questioned the jurors to determine if it happened as the question was fundamental fairness. R. 187, ll. 22 – 25. The judge then proceeded to question each of the jurors individually, and sent them back to a separate room so they could not discuss it. Defense counsel argued that the procedure was needed only if there was a motion in opposition to the mistrial motion. The judge decided the jury was under his jurisdiction and he was following the procedure because there may be a violation of fundamental fairness. R. 188, ll. 1 – 24. The judge said he would assume everyone joined in with what was said unless someone said something else. R. 189, ll. 1 – 6.

Juror Harper reported that what was discussed was sadness over some of the things heard. R. 189, ll. 7 – 22. Juror Ferguson stated that there was discussion about the initial charges and how long the trial would take. There was also talk about the behavior of some of the witnesses who had taken the stand which was mainly about demeanor, enunciation but no conclusions were drawn. R. 190, ll. 15 – R. 192, ll. 25. Juror Foxx reported that there was talk about the names and trying to get the names straight, and if they understood some of the conversations. R. 193, ll. 1 – 25. Juror Tutiven stated that there had been kind of a reflection on different facts such as names and how many people. R. 198, ll 1 – 25. The other jurors basically said different versions of what had been reported by the others. R. 195, ll. 1 – R. 205, ll. 12. The judge then denied the motion for a mistrial saying he found no prejudice. R. 205, ll. 12 – 17.

Three of the defense attorneys objected to the hearing procedure and the manner in which it was conducted because defense counsel was not given the opportunity to establish an appellate record. He also argued the juror who sent the note should testify. R. 205, ll. 18

- R. 208, ll. 7. Defense counsel Robinson for Co-defendant Williams stated: "I don't disagree with the Court. I believe it was conducted properly." R. 207, ll. 3 – 5. The other defense attorneys joined in the objection. R. 207, ll. 6 – 7.

Discussion

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 (6th 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. The Court of Appeals 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, the Court of Appeals found no error and relied on the trial judge's determination of juror credibility. App. 2-3.

Respectfully, the Court of Appeals misapprehended these issues.

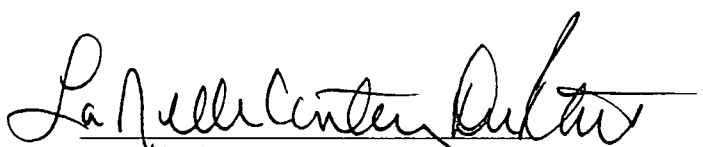
The trial judge stated that the question was fundamental fairness and were these defendants going to be denied a fair trial. R. 187, ll. 22 – 25.

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.

CONCLUSION

Based on the above, certiorari should be granted; Williams' convictions and sentences should be reversed; and his case remanded for a new trial.

Respectfully Submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of February, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 2017-UP-427 (S.C. Ct. App. filed November 15, 2017)
11-GS-23-07958 to 07965, 03839A

THE STATE,

RESPONDENT,

V.

MICHAEL ANTONIO WILLIAMS,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on 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 16th day of February, 2018.

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 16th day of February, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.