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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2018-000964

MICHAEL A. RICHARDSON,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT PURSUANT TO WHITE v. STATE

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STATEMENT OF ISSUE ON APPEAL

Although an alternate juror was mistakenly and improperly present in the jury room during the jury's brief deliberations, the trial judge did not abuse his broad discretion by denying the motion for a new trial based on that improper occurrence in light of the fact he only refused to grant the motion after questioning the alternate juror in the presence of the other jurors and determining the alternate juror did not participate in any way in the jury's ten-minute-long deliberations, which ensured Richardson did not suffer any actual prejudice as a result of the inadvertent jury misconduct that occurred.

STATEMENT OF THE CASE

In December of 2015, Petitioner Michael A. Richardson was arrested almost immediately after crack cocaine was sold to an undercover law enforcement officer. In August of 2016, the Greenville County Grand Jury indicted Richardson for one count of distribution of cocaine base and one count of conspiracy. On January 18, 2017, a jury trial was conducted in the Greenville County Court of General Sessions with the Honorable Roger E. Henderson, circuit court judge, presiding. At the conclusion of trial, the jury convicted Richardson as indicted, and the trial judge sentenced him to concurrent terms of imprisonment of twenty years for distribution of cocaine base and five years for conspiracy.

Following the trial, Richardson did not file an appeal. Instead, on June 8, 2017, Richardson filed an application for post-conviction relief. In response, the State filed a return and partial motion to dismiss requesting an evidentiary hearing on a number of Richardson's claims along with summary dismissal of some of the other claims.

Subsequently, on February 23, 2018, an evidentiary hearing was conducted in regard to Richardson's post-conviction relief application in the Greenville County Court of Common Pleas with the Honorable Frank R. Addy, Jr., circuit court judge, presiding. During the hearing, testimony was presented by both Richardson and Richardson's defense counsel, and the State conceded Richardson was entitled to belated appellate review pursuant to White v. State, 263 S.C 110, 208 S.E.2d 35 (1974). At the conclusion of the hearing, the post-conviction relief judge took the matter under advisement. Thereafter, through an order filed on May 17, 2018, the post-conviction relief judge granted Richardson belated appellate review pursuant to White and denied Richardson's other allegations. Richardson then timely filed a notice of appeal.

STATEMENT OF FACTS

On December 11, 2015, Deputy Quincy Whitner of the Greenville County Sheriff's Office attempted to purchase narcotics at various locations throughout Greenville County while working in an undercover capacity. (App'x pp. 43-45). Around 8:30 p.m. that evening, Deputy Whitner drove his unmarked vehicle into the parking lot of a convenience store located in an area known to be associated with drug trafficking and observed several people, including Alrad Cobbs, loitering there.[1] (App'x pp. 45-47; pp. 54-55; p. 77). Upon pulling into the parking lot, Deputy Whitner rolled down his vehicle's window, motioned for Cobbs to come over, and advised him he was looking for "twenty hard," which was a term for crack cocaine. (App'x p. 47; p. 58; p. 74). The undercover officer then handed Cobbs a twenty-dollar bill, and Cobbs promptly alerted Petitioner Michael A. Richardson, who was positioned nearby, he needed a "rock," which meant a piece of crack cocaine. (App'x pp. 47-48; p. 58). After that, Cobbs and Richardson met up with one another and conducted a quick hand-to-hand exchange, Cobbs returned to Deputy Whitner's vehicle with something he received from Richardson, and Cobbs handed the officer a white rock-like substance that appeared to be crack cocaine. (App'x pp. 49-50; p. 59; pp. 63-64). Deputy Whitner then drove away from the area, and, as soon as he did, several nearby deputies from the Greenville County Sheriff's Officer rapidly converged on the parking lot and arrested Cobbs and Richardson for distributing the crack cocaine.[2] [3] (App'x p. 49; p. 52; pp. 67-68; pp. 78-79).

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[1] At that time, Deputy Whitner was familiar with Cobbs from past encounters. (App'x p. 54).

[2] When Richardson was arrested, he was inside the convenience store attempting to exchange Deputy Whitner's twenty-dollar bill for smaller denominations. (App'x pp. 68-69; p. 75).

[3] Following the arrests, Deputy Whitner drove back by the parking lot and confirmed to the other officers they had apprehended the correct individuals. (App'x pp. 51-52).

Subsequently, Richardson was indicted for distribution of cocaine base and conspiracy, and he proceeded forward to trial. (App'x pp. 280-281; pp. 284-285). During the course of trial, Deputy Whitner recounted the details of the drug transaction to the jury, and he specifically identified Richardson in the courtroom as the individual he observed conduct a hand-to-hand transaction with Cobbs directly before Cobbs brought him the crack cocaine. (App'x pp. 43-64). Likewise, Cobbs testified on behalf of the State, and Cobbs confirmed he sold crack cocaine he received from Richardson to Deputy Whitner during the incident.[4] (App'x pp. 115-128). Furthermore, the other officers involved in the undercover operation testified about Cobb's and Richardson's arrests, the substance Deputy Whitner received during the transaction was confirmed to be crack cocaine, and recordings from several calls Richardson made from the detention center following his arrest were admitted into evidence and played for the jury. (App'x pp. 65-81; pp. 83-90; pp. 107-109; pp. 112-113). Through those calls, the jurors heard Richardson make incriminating statements and acknowledge he had sold crack cocaine to an undercover officer. (App'x pp. 93-95; pp. 151-152; pp. 160-161).

At the conclusion of trial, the jury convicted Richardson as indicted after just ten minutes of deliberations. (App'x pp. 190-191). When the jury returned to the courtroom, the trial judge realized the single alternate juror selected in the case had mistakenly been present in the jury room during the brief deliberations. (App'x pp. 23-24; p. 190). In response, the trial judge questioned the alternate juror in the presence of the other jurors as to whether he participated in the deliberations, and the alternate juror twice affirmed he had not. (App'x p. 190). At that point, defense counsel indicated he had an "obligation" to move for a new trial but readily

[4] Prior to Richardson's trial, Cobbs pled guilty to distribution of cocaine base and conspiracy based on his role in the incident. (App'x pp. 115-116; p. 119; p. 128).

acknowledged the alternate juror had indicated he did not participate in the jury's deliberations.[5] (App'x p. 194). However, based on the alternate juror's on-the-record affirmation he did not participate in the deliberations, the trial judge denied defense counsel's motion.[6] (App'x pp. 194-195). Thereafter, Richardson candidly apologized for "[his] wrong," and the trial judge sentenced him to an aggregate term of imprisonment of twenty years. (App'x p. 200; p. 207).

[5] Later on during the post-conviction relief proceedings, defense counsel asserted he was personally satisfied with the alternate juror's answers regarding his lack of participation in the deliberations. (App'x pp. 245-246; p. 261).

[6] As support for the conclusion the alternate juror did not participate in deliberations, the solicitor noted the alternate juror did not raise his hand when all the other jurors raised their hands to confirm the verdict. (App'x p. 191; p. 195).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Significantly, a decision as to whether to grant or deny a motion for a mistrial or new trial based on purported jury misconduct rests within the sound discretion of the trial judge, and a trial judge's ruling on such a motion will not be disturbed on appeal absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000); see State v. Coaxum, 410 S.C. 320, 331, 764 S.E.2d 242, 247 (2014) ("[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion."); State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." (citations omitted)). An abuse of discretion occurs where the trial judge's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ARGUMENT

Although an alternate juror was mistakenly and improperly present in the jury room during the jury's brief deliberations, the trial judge did not abuse his broad discretion by denying the motion for a new trial based on that improper occurrence in light of the fact he only refused to grant the motion after questioning the alternate juror in the presence of the other jurors and determining the alternate juror did not participate in any way in the jury's ten-minute-long deliberations, which ensured Richardson did not suffer any actual prejudice as a result of the inadvertent jury misconduct that occurred.

Richardson contends the trial judge erred by declining to grant a new trial after discovering an alternate juror was present in the jury room during the jury's deliberations.[7] In support of that contention, Richardson readily acknowledges the alternate juror affirmed to the trial judge he did not participate in the deliberations. Nonetheless, Richardson maintains a new trial should have been granted because the alternate juror's presence in the jury room "may have tainted the jury's decision in subtle ways." Unquestionably, the alternate juror's mistaken presence in the jury room during deliberations was improper. However, after that jury misconduct was discovered, the trial judge took immediate steps to determine its impact and, through those steps, ascertained the alternate juror had not participated in the jury's brief deliberations. Because the alternate juror did not participate in the ten-minute-long deliberations

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[7] Notably, during the post-conviction relief proceedings, Richardson raised a claim related to the alternate juror's presence in the jury room, and the post-conviction judge denied that claim after expressly finding both Richardson failed to show "he was prejudiced by the alternate's presence" and "the trial judge handled [the] irregularity appropriately." (App'x p. 212; p. 217; pp. 270-271; pp. 277-278). Although Richardson has now raised an appellate issue related to the alternate juror's presence in the jury room, Richardson has *not* challenged the post-conviction relief judge's express ruling regarding that jury misconduct. (Pet. for Cert. pp. 1-8). Under such circumstances, the post-conviction relief judge's unappealed and unchallenged ruling on the matter became the law of the case, and, therefore, it is highly questionable whether Richardson's appellate issue related to the jury misconduct can now properly be considered on belated appellate review. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (explaining unchallenged and unappealed rulings are the law of the case); see also Arizona v. California, 460 U.S. 605, 618 (1983) (explaining the law-of-the-case doctrine is a doctrine based on the idea a court's decision upon a rule of law reached in a case "should continue to govern the same issues in subsequent stages in the same case").

that occurred, Richardson did not suffer any prejudice as a result of the alternate juror being present in the jury room during deliberations, and Richardson wholly failed to demonstrate any actual prejudice occurred from that jury misconduct. Accordingly, the trial judge did not abuse his broad discretion by declining to employ the extreme remedy of a grant of a new trial in Richardson's case. Richardson's convictions should be affirmed.

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see Harris, 340 S.C. at 63, 530 S.E.2d at 627 ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). That right guarantees to a defendant a trial by a panel of impartial, indifferent jurors. State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 633 (Ct. App. 2008). Importantly, it is the duty of the trial judge to ensure a jury comprised solely of fair, impartial, and unbiased jurors ultimately decides a defendant's case. State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998).

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. Kelly, 331 S.C. at 141, 502 S.E.2d at 104. However, even if the jury is exposed to extraneous or outside influences, such an impropriety is not prejudicial unless it affects the jury's impartiality. Id. Significantly, in South Carolina, prejudice will *not* be presumed from improper influences on the jury and, instead, must be shown by the defendant in order to warrant the grant of a mistrial or a new trial. See State v. Aldret, 333 S.C. 307, 313-314, 509 S.E.2d 811, 814 (1999) ("Given that we have not found automatic reversal warranted even in cases of external influences on a jury's verdict, we decline to do so in the cases of internal misconduct consisting of premature deliberations. Our decision

is consistent with the majority of jurisdictions which hold a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial." (citations omitted)).

Notably, in State v. Bonneau, 276 S.C. 122, 123, 276 S.E.2d 300, 300 (1981), our Supreme Court was confronted with an issue involving an alternate juror's brief presence in the jury room during deliberations. In that case, the alternate juror retired to the jury room with the other jurors after the trial judge concluded his jury charge, the alternate juror was present there for roughly ten to eleven minutes, and only five to ten minutes of actual deliberations occurred at a maximum before the error was discovered. Id. at 124-125, 276 S.E.2d at 300. Bonneau then sought a mistrial based on the error, but the trial judge denied the motion. Id. Ultimately, the jury convicted Bonneau of armed robbery, and he appealed his conviction, arguing the alternate juror's presence in the jury room rendered his trial unfair. Id. at 123, 276 S.E.2d at 300. On appeal, the Supreme Court affirmed. Id. In doing so, the Supreme Court explained it was incumbent on Bonneau to demonstrate he was denied a fair trial by the jury misconduct. Id. at 125, 276 S.E.2d at 301. Thereafter, upon considering the circumstances of Bonneau's case, the Supreme Court concluded the alternate juror's presence was "an irregularity" at most and did not result in a denial of Bonneau's right to a fair trial. Id. at 126, 276 S.E.2d at 302.

Subsequent to that decision, our Supreme Court was again confronted with an issue involving an alternate juror's presence in the jury room during deliberations in State v. Grovenstein, 335 S.C. 347, 350, 517 S.E.2d 216, 217 (1999). In that case, the alternate juror was present in the jury room during deliberations for twenty to thirty minutes before the error was discovered, and the alternate juror actually participated in a preliminary vote during that time. Id. at 349, 517 S.E.2d at 217. After the error was discovered, the trial judge removed the alternate juror, instructed the remaining jurors they must reach a verdict without regard to

anything the alternate juror said or did, and queried the jurors to ensure none were improperly influenced by the alternate juror's presence. Id. at 349-350, 517 S.E.2d at 217. Ultimately, the jury convicted Grovenstein of multiple crimes, he appealed, and the Court of Appeals reversed after finding the alternate juror's presence in the jury room to be *presumptively* prejudicial. State v. Grovenstein, 328 S.C. 548, 559-560, 493 S.E.2d 865, 871 (Ct. App. 1997). However though, the Supreme Court subsequently reversed that decision. Grovenstein, 335 S.C. at 349, 517 S.E.2d at 217. In reversing, the Supreme Court held "the burden is on the defendant to demonstrate prejudice from the presence of an alternate juror during jury deliberations" and found Grovenstein failed to satisfy that burden in his case. Id. at 353-354, 517 S.E.2d at 219. Furthermore, for "[f]or the benefit of the bench and bar" in future cases, the Supreme Court suggested the following steps be taken by a trial judge upon discovering an alternate juror was inadvertently present in the jury room during deliberations: (1) remove the alternate jurors and inquire as to the extent of the alternate juror's participation; (2) conduct voir dire "as is necessary" to ascertain prejudice; and (3) tailor instructions "if practicable" to require the jury to disregard the alternate juror's input and being deliberations anew. Id.

In the case at bar, the trial judge—much like the trial judges in Bonneau and Grovenstein—was confronted with a situation in which an alternate juror was briefly present in the jury room during the jury's deliberations. In response to discovering that jury misconduct, the trial judge conducted the voir dire necessary to determine the impact of that misconduct and questioned the alternate juror *in the presence of the other jurors* to determine whether the alternate juror had participated in the jury's ten-minute-long deliberations.[8] See Aldret, 333 S.C.

[8] To the extent Richardson is contending on appeal the trial judge's voir dire was insufficient due to the fact he only questioned the alternate juror, that issue was not properly preserved for appellate review as defense counsel did *not* ask the trial judge to conduct any voir dire of the

at 313, 509 S.E.2d at 814 ("[T]he trial court has broad discretion in assessing allegations of juror misconduct."). Critically, through that questioning, the trial judge, who was naturally in the best position to evaluate the credibility of the responses he received, ascertained the alternate juror did *not* participate in the deliberations and, thus, concluded the alternate juror's presence in the jury room did not result in any prejudice to Richardson.[9] See United States v. Kelly, 875 F.3d 781, 785 (5th Cir. 2017) ("Though the alternate should not have been present in the jury room, the error does not necessarily undermine the verdict. An alternate's mere presence during deliberations is not the sort of inherently prejudicial error that requires *per se* reversal."); see also

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other jurors. See State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003) (finding any issue resulting from the trial judge's failure to individually question the jurors after a jury note was submitted to the court was not preserved for appellate review because Vang did not request individual questioning of the jurors after the trial judge spoke with the jury foreman and determined further inquiry was unnecessary).

[9] Further supporting the propriety of the trial judge's decision not to grant a new trial, the alternate juror's presence in the jury room could not have had any impact on the verdict reached in Richardson's case in light of the absolutely overwhelming evidence of guilt presented during trial, which included testimony from Deputy Whitner identifying Richardson as an active participant in the drug transaction, testimony from Richardson's accomplice indicating he received the crack cocaine directly from Richardson, and incriminating statements from Richardson himself confirming he sold crack cocaine to the undercover officer. See Harris, 340 S.C. at 63-64, 530 S.E.2d at 627-628 (recognizing the weight of the evidence properly before the jury can appropriately be considered when determining whether outside influences affected the jury and instructing the misconduct must have affected the verdict for the defendant to be prejudiced); State v. Elgin, 398 S.C. 39, 45, 726 S.E.2d 231, 234 (Ct. App. 2012) ("Jury misconduct that does not affect the jury's impartiality will not undermine the verdict."); see also Dallago v. United States, 427 F.2d 546, 558 (D.C. Cir. 1969) ("Certainly the weight of the prosecution's evidence becomes relevant in estimating 'what effect the error had or reasonably may be taken to have had upon the jury's decision.' " (footnote omitted)); cf. United States v. Blackwell, 459 F.3d 739, 769-770 (6th Cir. 2006) (concluding any error that resulted from jury misconduct was harmless and not prejudicial because the jury would have convicted Blackwell regardless of whether any misconduct had occurred in light of the evidence presented during trial); United States v. O'Neal, 180 F.3d 115, 118 (4th Cir. 1999) (concluding the district court judge did not abuse his discretion in denying O'Neal's motion for a new trial based on jury misconduct where the district court judge determined the jurors' professed fear of O'Neal caused by O'Neal's actions during trial did not affect the verdict in light of the overwhelming evidence of guilt that had been presented).

Harris, 340 S.C. at 63, 530 S.E.2d at 628 ("A mistrial should only be granted when absolutely necessary. The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court grants him broad deference on this issue." (citations omitted)); cf. State v. Johnson, 248 S.C. 153, 164, 149 S.E.2d 348, 353 (1966) ("[B]oth jurors unequivocally stated, notwithstanding the fact that they had been contacted and communicated with, that they were not conscious of any bias or prejudice, that they could give both the State and respondents a fair and impartial trial and render a verdict according to the law and the evidence; therefore, it cannot be said that the ruling of the trial judge was without evidentiary support."). Because nothing was presented to suggest the trial judge's conclusion regarding the lack of actual prejudice was somehow incorrect, the granting of new trial was simply not warranted under the circumstances. See Grovenstein, 335 S.C. at 351, 517 S.E.2d at 218 ("We have consistently required defendants to demonstrate prejudice due to improper jury influences."); see also United States v. Olano, 507 U.S. 725, 738 (1993) (instructing reversal would be pointless if no harm resulted from an alternate juror's intrusion into the jury room during deliberations); cf. State v. Stone, 290 S.C. 380, 383, 350 S.E.2d 517, 518 (1986) ("In light of [the jurors'] responses to the trial judge's questions, it was unnecessary for the trial judge to excuse either juror."). Accordingly, the trial judge did not abuse his broad discretion by declining to grant a new trial in Richardson's case, and Richardson has failed to establish the existence of any actual prejudice that would support a conclusion to the contrary. See State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989) ("The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court whose ruling will not be disturbed on appeal in the absence of an abuse of discretion amounting to an error of law."). Richardson's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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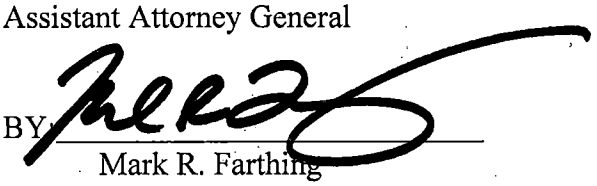
BY: 
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February 25, 2019

STATE OF SOUTH CAROLINA
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CERTIFICATE OF COUNSEL

The undersigned certifies this Brief of Respondent Pursuant to White v. State complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Brief of Respondent Pursuant to White v. State on Petitioner by sending two copies of the same to:

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I further certify that all parties required by Rule to be served have been served.
This 25th day of February, 2019.

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