STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARLES BRETT WALSHAW,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by failing to conduct a hearing pursuant to the procedure set forth in *State v. Aldret*[1] to ascertain whether the members of the jury had prematurely deliberated where, prior to closing arguments, an unsigned note was sent out by the jury inquiring about facts presented at trial that were critical to Appellant's defense, and the trial court's highly suggestive leading question to the jury foreman denied Appellant his fundamental right to a fair trial?

[1] *State v. Aldret*, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999) (providing "[i]f such an allegation arises during trial, the trial court should conduct a hearing to acertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. If requested by the moving party, the court may *voir dire* the jurors and, if practicable, tailor a cautionary instruction to correct the ascertained damage") (footnote, internal quotation, and citation omitted).

STATEMENT OF THE CASE

On October 14, 2010, Appellant Charles Brett Walshaw was indicted by the York County Grand Jury for: (1) six counts of breaking into a motor vehicle;[2] (2) two counts of criminal conspiracy; and (3) five counts of petty larceny. R. 148.

On April 11, 2011, Appellant proceeded to trial before the Honorable John C. Hayes, III, and jury. R. 1. Appellant was represented by Melissa Inzerillo, and the State was represented by assistant solicitor E.B. Springs. R. 1. The State *nol prossed* one of Appellant criminal conspiracy charges because the trial court "noticed that both [of] the criminal conspiracies are alleged to have occurred on June 29, 2010," when one of the charges was alleged to have occurred on June 7, 2010. R. 122, l. 6 – 123, l. 9. The jury found Appellant: (1) guilty on one count of breaking into a motor vehicle and not guilty on the other five counts; (2) guilty of criminal conspiracy; and (3) guilty on one count of petty larceny and not guilty on the other four counts. R. 138, l. 19 – 140, l. 16.

After Appellant was served a probation citation, Judge Hayes found that Appellant had substantially violated the conditions of his probation and ordered Appellant to serve his prior Youthful Offender sentence not to exceed six years. R. 142, l. 14 – 146, l. 19. Judge Hayes then sentenced Appellant: (1) to five years imprisonment for the breaking into a motor vehicle conviction; (2) to five years imprisonment suspended to five years probation on the criminal conspiracy conviction; (3) and to thirty days suspended on the petty larceny conviction. R. 146, l. 18 – 147, l. 1. The sentences were to be served consecutively.

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[2] After the jury began deliberating, the trial court amended indictment #3514 over defense counsel's objection due to a note from the jury, which indicated that the indictment had the incorrect date based on the evidence presented at trial. R. 136, l. 12 – 137, l. 14. The jury found Appellant not guilty on indictment #3514. R. 140, ll. 1-4.

STATEMENT OF FACTS

Relevant Facts

At trial, the State presented testimony that on June 7 and 29, 2010, "three vehicles had been broken into and things were taken out of the vehicles" between "twelve a.m. and five a.m." by Appellant, Matt Nance, and Andrew Mead. R. 10, ll. 7-20; 30, ll. 2-24; 33, ll. 14-23. Although Nance and Mead ultimately testified against Appellant at trial, both admitted to being under the influence of narcotics at the time they gave their initial statements to police. R. 56, l. 9 – 85, l. 4; 79, ll. 19-22. Notably, Appellant's brother and father provided alibi testimony, and the State failed to present physical evidence linking Appellant to the crimes charged.

Matthew Nance maintained at trial that he acted as "the watch out" while Appellant and Andrew Mead broke into cars on June 29, 2010. R. 50, l. 19 – 52, l. 9. After being arrested later that day, Nance gave three statements to police containing contradicting information. R. 55, l. 5 – 63, l. 7. Nance claimed that he was "high" and "all messed up . . . on pills" when he gave his initial statement to police, which did not implicate Appellant, and that he was not "high on pills" twenty minutes later when he first implicated Appellant in his second statement to police. R. 56, l. 9 – 58, l. 7.

Nance also claimed that on June 29, 2010: (1) he was staying at Appellant's parent's house; (2) the house had a burglar alarm; (3) he and Appellant "used to sneak out [of] the window . . . [since the burglar alarm] wasn't attached to the window[;]" (4) he and Appellant "got back through a sliding glass door[;]" and (5) he does not believe the burglar alarm was activated that night. R. 53, ll. 1-21.

Andrew Mead claimed at trial that he broke into cars with Appellant and Nance on June 7 and 29, 2010. R. 70, l. 20 – 72, l. 18. However, Mead cried on direct examination and admitted that he was under the influence of pills when he gave his statement to police. R. 68, l. 10; 74, l. 19 – 75, l. 7. Mead also admitted that if he did not testify against Appellant, he would be in violation of his probationary sentence and could go to prison. R. 73, l. 18 – 74, l. 11.

Appellant's brother, Stacy Walshaw, testified that on June 29, 2010: (1) Appellant and Nance came home at eleven o'clock at night; (2) Appellant and Nance slept in the same room, but in two separate beds; (3) Nance slept in the same room on the floor; and (4) Appellant and Nance "were exactly where they were when [he] went to sleep" when he woke up in the morning. R. 93, l. 19 – 98, l. 7.

Appellant's father Dwayne Walshaw testified that Appellant was home on nights of June 7 and 29, 2010, and that Appellant did not leave the house because the alarm system he installed would have been triggered. R. 98, l. 20 – 100, l. 3. Appellant's father also testified that he installed the alarm himself since he works for an alarm system company and that Appellant did not know how to disarm burglar alarm. R. 100, l. 20 – 101, l. 9. Appellant's father further testified that he confirmed the alarm system was automatically activated at 10:32 p.m. and deactivated at 5:32 a.m. on June 7 and 29, 2010, by running a report of the alarm's activity. R. 101, l. 10 – 106, l. 23; R. 158 (Defendant's Exhibit #1).

Prior to closing arguments, an unsigned note was sent out by the jury inquiring "about whether the windows fell under the alarm system of the house. . . ." R. 119, l. 21 – 120, l. 10; R. 161 (Court's Exhibit 1, Jury Note). Consequently, defense counsel argued:

> Your Honor, my only concern at this point is [the jury note is] not signed by any particular juror or a number of jurors

> but my concern now is despite the Court's admonition to the jury to not discuss the case beforehand but there has been some thought of that coming out of the jury room and we would just ask that at least the Foreman be brought out determine how he received the note or if he wrote the note or if there has been any discussion up until this point about any of the facts in the case.

120, ll. 7-19. Without conducting a hearing, the trial court replied, "*I did not take the note to be an assessment based on discussion but rather one person's concern and so I'm not going to go into whether they've discussed the case or not.*" R. 121, l. 23 – 153, l. 1 (emphasis added). However, when the jury re-entered the courtroom, the trial court did ask the jury foreman, "I received a note from the jury, I presume that [it] was just a note from an individual and not collective since the jury is not supposed to discuss the case. Is that correct?" The jury foreman replied, "Yes." R. 121, ll. 10-14.

ARGUMENT

The trial court erred by failing to conduct a hearing pursuant to the procedure set forth in *State v. Aldret* to ascertain whether the members of the jury had prematurely deliberated because, prior to closing arguments, an unsigned note was sent out by the jury inquiring about facts presented at trial that were critical to Appellant's defense, and the trial court's highly suggestive leading question to the jury foreman denied Appellant his fundamental right to a fair trial.

The South Carolina Supreme Court has held that "[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). "[T]he reason for this rule is apparent[:]"

> The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.

State v. McGuire, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979). The South Carolina Supreme Court has also held that "premature jury deliberations may affect the fundamental fairness of a trial. . . ." *State v. Aldret*, 333 S.C. 307, 311, 509 S.E.2d 811, 813 (1999).

Furthermore, in *State v. Aldret,* the Supreme Court set forth the following procedure for when premature deliberation is alleged: "If such an allegation arises during trial, the trial court should conduct a hearing to acertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial." *Id.* at 333 S.C. at 315, 509 S.E.2d at 815 (footnote omitted). The *Aldret* Court noted, "If requested by the moving party, the court may *voir dire* the jurors and, if practicable, tailor a cautionary instruction to correct the ascertained damage." *Id* (internal quotation and citation omitted). The Court further noted, "[T]he burden is on the party alleging premature deliberations to establish prejudice." *Id.*

In this case, prior to closing arguments, an unsigned note was sent out by the jury inquiring "about whether the windows fell under the alarm system of the house. . . ." R. 119, l. 21 – 120, l. 10; R. 161 (Court's Exhibit 1, Jury Note); *See Joyner*, 289 S.C. at 437, 346 S.E.2d at 712. Defense counsel indicated to trial court that the jury note was "not signed by any particular juror" and requested "that *at least* the Foreman be brought out determine how he received the note or if he wrote the note or if there has been any discussion up until this point about any of the facts in the case." R. 151, ll. 7-19 (emphasis added). Instead of following the proper procedure set by the Supreme Court in *Aldret*, the trial court erroneously stated, "*I did not take the note to be an assessment based on discussion but rather one person's concern and so I'm not going to go into whether they've discussed the case or not.*" R. 121, l. 23 – 153, l. 1 (emphasis added); *See Aldret*, 333 S.C. at 315, 509 S.E.2d at 815 (footnote omitted). Thus, "the trial court should have conduct[ed] a hearing to acertain if, in fact, such premature deliberations occurred, and . . . if practicable, tailor a cautionary instruction to correct the ascertained damage." *Id.* (internal quotation and citation omitted).

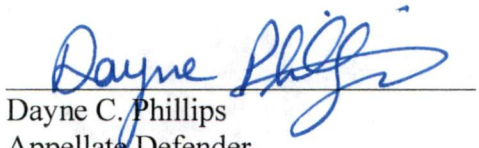
Additionally, although the trial court ultimately asked the jury foreman about the note, the trial court's question was highly suggestive of the answer the trial court sought: "I received a note from the jury, *I presume that* [it] *was just a note from an individual and not collective since the jury is not supposed to discuss the case. Is that correct?"* R. 121, ll. 10-14 (emphasis added). Accordingly, the trial court misinterpreted the law because premature deliberation even by one juror is in error. *See McGuire*, 272 S.C. at 552, 253 S.E.2d at 105.

Appellant was prejudiced because this case hinged solely on the credibility of the witnesses and the question raised in the jury note is clearly based upon the contradicting evidence presented by Matthew Nance and Appellant's father at trial. Appellant's father testified that Appellant was home on the nights of June 7 and 29, 2010, and that Appellant did not leave the house because the alarm system would have been triggered. R. 98, l. 20 – 100, l. 3. Appellant's father supported his testimony by providing a report of the alarm's activity, which showed that the alarm system was automatically activated at activated at 10:32 and deactivated at 5:32 a.m. on both days. R. 101, l. 10 – 106, l. 23; R. 158 (Defendant's Exhibit #1). Nance, however, claimed at trial that the alarm system was not attached to the window and that he does not believe the alarm system was activated. R. 53, ll. 1-21. Therefore, the trial court erred by failing to conduct a hearing pursuant to the procedure set forth in *State v. Aldret* to ascertain whether the members of the jury had prematurely deliberated, and the trial court's highly suggestive question to the jury foreman denied Appellant his fundamental right to a fair trial. *Aldret*, 333 S.C. at 315, 509 S.E.2d at 815.

CONCLUSION

For the foregoing reasons, Appellant Charles Brett Walshaw requests that this Court reverse his convictions and remand this case to the Cherokee County Court of General Sessions for a new trial.

Respectfully submitted,



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This 1st day of October, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 1, 2012

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