
NO. 34721

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

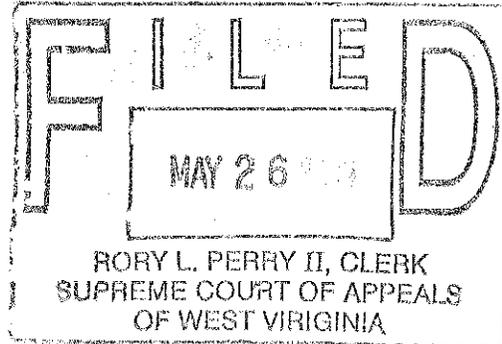
STATE OF WEST VIRGINIA,

Appellee,

v.

RONNIE ALLEN RUSH,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

Following a jury trial in the Circuit Court of Jackson County (Evans, J.) a petit jury convicted Ronnie Allen Rush (“Appellant”) on two counts of voluntary manslaughter (a lesser included offense of first degree murder), robbery, nighttime burglary, and conspiracy to commit robbery. The trial court sentenced him to 15 years on each manslaughter count, 35 years on the robbery count, 1 to 15 years on the burglary count, and 1 to 5 years on the conspiracy count. With the exception of the conspiracy count, the court ordered that all of the sentences run consecutively.

On appeal, this Court affirmed in part, reversed in part, and remanded Appellant’s case for a new trial. *State v. Rush*, 219 W. Va. 717, 639 S.E.2d 809 (2006) (*per curiam*). Appellant’s second trial began on November 6, 2007, and ended on November 9, 2007. The trial court moved Appellant’s trial to Jackson County. The jury convicted the Appellant on two counts of first degree

murder, one count of first degree robbery, one count of nighttime burglary, and one count of conspiracy to commit a felony. Pursuant to Syllabus Point 1, *State v. Young*, 173 W. Va. 1, 3, 311 S.E.2d 118, 120 (1983), the court entered a judgment of conviction on two counts of voluntary manslaughter, one count of robbery, one count of nighttime burglary, and one count of conspiracy. The Appellant received the same sentence he had received after the first trial.

The trial court convened an evidentiary hearing on Appellant's Motion for a New Trial on April 24, 2008. The Appellant called one witness, Juror Lakrisa Rhodes. (Tr., 309-315, Apr. 24, 2008.) Upon due consideration of the evidence before it, including the evidence adduced at the previous evidentiary hearing on this matter, the trial court denied Appellant's motion.

Appellant appeals the court's sentencing order and order denying him a New Trial.

II.

STATEMENT OF FACTS

The facts surrounding Appellant's conviction are set forth in this Court's first opinion. *See State v. Rush*, 219 W. Va. at 719, 639 S.E.2d at 811. Given its limited scope, the relevant facts of this appeal need not be recited in great detail.

Both parties agree that State Trooper Doug Starcher engaged in conversation with four male jurors during the second day's lunch break. Trooper Starcher was the State's representative, and remained at counsel table for the entire trial. The conversation took place in front of the Jackson County Courthouse, and was witnessed by defense counsel who brought it to the attention of the trial court judge. The court immediately convened an *in camera* evidentiary hearing during which Trooper Starcher and the four jurors testified.

Trooper Starcher testified that he spent part of his lunch break chewing tobacco in front of the courthouse. (Tr., 1005, Nov. 8, 2007.) He engaged in a conversation with men he knew to be members of the jury. (Tr., 1006.) They talked football, and coyote hunting: They did not discuss the case. (Tr., 1007.)

Appellant's Defense counsel Rocky Holmes testified that he saw Trooper Starcher speaking with four jurors in front of the courthouse. (Tr., 1011.) As he walked past the group, Mr. Holmes asked Trooper Starcher whether he enjoyed his lunch. (Tr., 1013.) Mr. Holmes did not hear any conversations relating to the case. (Tr., 1014.)

Juror Dennis Wallen spoke with Trooper Starcher during the lunch break. (Tr., 1016.) He recalled discussing football, deer and coyotes: No one mentioned the case. (Tr., 1017-18.) The entire conversation lasted between 12 and 15 minutes. (Tr., 1019.)

Juror Richard Spencer testified that he spoke with Trooper Starcher. He claimed that he, Trooper Starcher, and two other jurors talked football: They did not discuss the case. (Tr., 1022.) After hearing from Juror Reed, the trial court recalled Juror Spencer who admitted that he had spoken to Trooper Starcher about a mutual friend, State Trooper Michael Mace. (Tr., 1042.) When asked what he thought about the conversation, Juror Spencer said, "To be truthful about it, I didn't – I didn't think anything of it." (Tr., 1023.)

Juror Ricky Hoschar also claimed that he and Trooper Starcher talked football, deer hunting and coyotes. (Tr., 1025.) The conversation lasted between 15 and 20 minutes. (Tr., 1026.) They did not discuss the case. (*Id.*)

Juror Richard Reed testified that he spoke with Trooper Starcher for a few minutes. (Tr., 1029.) Mr. Reed asked Trooper Starcher if he know Trooper John Miller. Trooper Starcher said he

did. (Tr., 1030.) Trooper Miller was a good friend of Juror Reed. (*Id.*) Juror Reed also overheard Juror Spencer ask Trooper Starcher if he knew Trooper Mace.

Upon hearing all of the evidence and argument of counsel, the trial court denied defense's motion for a mistrial. The court excused the two jurors who had friends in common with Trooper Starcher--Jurors Reed and Spencer. (Tr., 1039, 1046.) Jurors Hoschar and Wallen remained on the panel.¹ Hoschar was later elected jury foreperson. (Tr., 1247.)

III.

ARGUMENT

A. **THE TRIAL COURT'S DECISION NOT TO DECLARE A MISTRIAL WAS WELL WITHIN THE BOUNDS OF ITS DISCRETION.**

1. **The Standard of Review.**

A motion for a new trial on the ground of misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of.

Syl. Pt. 7, *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932). See also Syl. Pt. 2, *State v. Holland*, 178 W. Va. 744, 364 S.E.2d 535 (1987) (*per curiam*).

A mistrial is an extraordinary remedy which should only be resorted to when there is an obvious failure of justice. The decision is left to the sound discretion of the trial court. See *State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983) ("A trial court is empowered to exercise this discretion only where there is a 'manifest necessity' for discharging the jury before it has rendered a verdict.") (citations omitted). "The manifest necessity in a criminal case . . . may arise from various circumstances. Whatever the circumstances they must be forceful to meet the statutory prescription." Syl. Pt. 2, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938).

¹During voir dire the trial court impaneled two alternates.

2. Discussion.

This Court affords trial courts substantial latitude when addressing issues of jury misconduct. In the case at bar, the trial court fashioned a remedy, *i.e.* discharging the two jurors who discussed specific individuals with Trooper Starcher while keeping the other two, which was well within the bounds of its discretion. Testimony adduced during the *in camera* evidentiary hearing failed to produce concrete evidence that the Appellant was prejudiced or injured. The subject matter of these conversations, football and hunting, were innocuous; neither side raised or discussed the trial. Trooper Starcher was not the only law enforcement officer to testify at the Appellant's hearing. Indeed, although he was the State's representative, his involvement ended after he obtained a statement from the Appellant. The Appellant has never argued that Trooper Starcher falsified this statement.

Any argument suggesting that Trooper Starcher's conduct may have "subtly creat[ed] juror empathy with the party and reflect[ed] poorly on the jury system"² is speculative. The trial court, pursuant to *State v. Holland*, 178 W. Va. at 748, 364 S.E.2d at 539, fashioned a remedy addressing this potentiality without administering the harsh medicine of a mistrial.

Appellant's reliance upon *State v. Robinson*, 20 W. Va. 713, 1882 WL 3541 (1882), is misplaced. Although not overruled, it is doubtful that its draconian holding is still good law. A court may no longer categorically presume prejudice from every outside contact. "It is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

²*Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983).

As this Court held in *State v. Kelley*, 192 W. Va. 124, 130, 451 S.E.2d 425, 431 (1994):

[T]here is no automatic requirement that mandates the reversal of a conviction whenever a witness for the State comes into contact with the jury. Instead what is required is a factual analysis that focuses on the length and degree of contact between the jury and the witness, as well as inquiry into whether the witness provided testimony that was crucial to the conviction, or merely formal in nature.

Although Trooper Starcher was one of the first officers to arrive at the crime scene, his testimony was largely corroborated by Calhoun County Sheriff Carl Ballengee (Tr., 894-901, 902-03, 914-15, 918-28, Nov. 8, 2007), and Sheriff A.D. Parsons (Tr., 728-29, 741-47, Nov. 7, 2007).

Furthermore, unlike the jury in the case at bar, the *Robinson* jury was sequestered. “Sequestration is an extreme measure, one of the most burdensome tools of the many to assure a fair trial.” *Drake v. Clark*, 14 F.3d 351, 358 (7th Cir. 1994). *See also* W. Va. Code 62-3-6 (“After a [sequestered] jury has been impaneled no sheriff or other officer shall converse with, or permit anyone else to converse with, a juror unless by leave of court.”). Even if this Court were to find *Robinson* good law, the circumstances surrounding that trial were not the same as those of the case at bar.

State v. Holland reflects this Court’s present approach to this issue. The *Holland* Court adopted a fact-intensive, case-specific approach. In *Holland* one of the arresting officers spoke with several jurors after they had been impaneled. *Holland*, 178 W. Va. at 748, 364 S.E.2d at 539. The conversation lasted about five minutes. Much like the case at bar the topics discussed were football and deer hunting. The Appellant’s case was never discussed. After conducting an *in camera* hearing, the trial court denied defense counsel’s motion for a mistrial. (*Id.*)

Relying on Syl. Pt. 7, *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932),³ this Court held that although the conversation is not condoned or approved; since there was no talk about the defendant's trial, or any evidence of prejudice, the trial court's decision was well within the bounds of its discretion.

Appellant seeks to distinguish the case at bar from *Holland* on four separate grounds: None are persuasive. First, Appellant claims that the nature of the case--felony murder as opposed to DUI second offense--required a truer balance than that struck in *Holland*. Appellant's claim makes no sense. There is no sliding scale requiring greater vigilance from trial courts trying more serious cases. Such a holding would penalize misdemeanor defendants.

Appellant then holds the trial court's attempt to fashion a reasonable remedy against it. Two of the four jurors asked Trooper Starcher if he knew their friends in law enforcement. The trooper said that he did. Unlike the other topics of conversation, this one focused on the trooper's relationship with friends of the other two jurors. The trial court, out of an abundance of caution, released these two jurors replacing them with the two alternates.

Appellant also points to the length of these conversations. In *Holland* the conversations lasted about five minutes. In the case at bar, the conversation was between ten and twenty minutes long. Although this is a factor to be weighed by the trial court, refusing to presume prejudice from the length of time alone did not constitute an abuse of discretion. There is no evidence that during this time period the case was discussed. Nor is there independent evidence of prejudice or harm.

³"A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of." Syl. Pt. 7, *State v. Johnson*.

Appellant then points to this Court's decision in *State v. Waugh*, 221 W. Va. 50, 650 S.E.2d 149 (2007) (*per curiam*), as further support for his position. In *Waugh*, this Court held that the defendant's constitutional rights to a fair trial and due process were not violated when deputy served as both witness and bailiff. The deputy was not a key witness: His testimony was cumulative.

Waugh is not dispositive. Trooper Starcher was not performing the pro-typical actions of a court bailiff. *Id.* at 55, 650 S.E.2d at 154. Thus, there was no undue "aura of credibility" surrounding Trooper Starcher.⁴ Nor was his exposure to the jurors the sort of close and continual association which this Court held fosters a jury's confidence in his testimony. The conversation occurred the day after Trooper Starcher testified; thus, the jury had already observed his demeanor and heard his testimony. Trooper Starcher spoke with the jurors for twenty minutes; the subject matter was general and had nothing to do with the case-at-bar. The two jurors who had friends in common with the Trooper were removed by the trial court.

B. THE APPELLANT WAS NOT ENTITLED TO A NEW TRIAL.

1. The Standard of Review.

A motion for a new trial on the ground of misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of.

Syl. Pt. 7, *State v. Johnson*. See also Syl. Pt. 2, *State v. Holland*.

⁴Some may argue that Trooper Starcher's employment as a West Virginia State Trooper provided the same aura of credibility as the deputy in *Waugh*. Clearly, this did not convince the *Holland* court. Once again, the trial court's balancing of factors, although not identical to *Waugh* was not an abuse of discretion.

2. Discussion.

Appellant next claims that the trial court decision not to grant his Motion for a New Trial constituted an abuse of discretion. The trial court convened an evidentiary hearing on Appellant's motion on April 24, 2008. Although the defense failed to call any of the four jurors involved in the conversation, it did call former juror Lakrisa Rhodes. Ms. Rhodes testified that one of the two jurors left on the panel, she could not recall his name,⁵ was visibly upset after speaking to the court, saying again that he had only talked to Trooper Starcher about football. (Tr., 311-12, Apr. 24, 2008.) Because the defense failed to call the juror, there is no evidence that his anger was directed at the Appellant.

Rule 606(b) of the West Virginia Rules of Evidence states in part:

Upon an inquiry into the validity of the 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 his or any other jurors mind or emotions as influencing him to assent or dissent from the verdict. . . 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. . . .*

(Emphasis added.)

Even if this Court were to find a fellow juror's demeanor an extraneous influence, there is no evidence that it had any effect on Ms. Rhodes' verdict. Indeed the opposite is true. (Tr., 314, Apr. 24, 2008.) Although Ms. Rhodes testified that the unnamed juror was still angry the day deliberations began,⁶ she never connected the juror's demeanor with the Appellant. Without this

⁵It would appear to have been Juror Hoschar. (Tr., 1246-47, Nov. 9, 2007.)

⁶The taint hearing occurred two days before the jury began deliberations. (Tr., 313, Apr. 24, 2008.)

testimony Appellant's claim is speculative. Indeed, it is unlikely that the trial court's questions, brought at the Appellant's behest, constituted extraneous prejudicial information. The court's questions were, by definition, part and parcel of the trial; thus, the juror's reactions to those questions are privileged under 606(b).

IV.

CONCLUSION

For the foregoing reasons, this Honorable Court should affirm the judgment of the Circuit Court of Jackson County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee's* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 26th day of May, 2009, addressed as follows:

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