STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
OCT 12 2012
S.C. Supreme Court

Certiorari to Edgefield County
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

STEVEN LOUIS BARNES,

Petitioner.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

Lexington Judicial Center
205 E. Main St.
Lexington, South Carolina 29072
(803) 785 - 8352

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUE ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

ARGUMENT

The trial court properly instructed the jury to continue deliberations and did not err in denying the motion for mistrial. 2

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). 2

Buff v. South Carolina Dep't of Transp., 342 S.C. 416, 537 S.E.2d 279 (2000) . . 8, 9, 10

Buff v. South Carolina Dep't of Transp., 332 S.C. 472, 505 S.E.2d 360 (Ct. App. 1998). .8

Commonwealth v. Valliere, 321 N.E.2d 625 (Mass. 1974) 11

Commonwealth v. Winbush, 442 N.E.2d 416 (Mass. App. Ct. 1982) 11

Edwards v. Edwards, 239 S.C. 85, 121 S.E.2d 432 (1961) 7, 9

Rowland v. Harris, 218 S.C. 42, 61 S.E.2d 397 (1950) 6

State v. Drakeford, 120 S.C. 400, 113 S.E. 307 (1922) 5, 9, 11

State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005) 4

State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916) 5, 8, 11

State v. Kelley, 45 S.C. 659, 24 S.E. 45 (1896). 6-7

State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996) 3, 7

State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) 4

State v. Rowell, 75 S.C. 494, 56 S.E.23 (1906) 9

State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) 4

State v. Simon, 126 S.C. 437, 120 S.E. 230 (1923). 5-6

Statutes and Rules

S.C. Code Ann. § 14-7-1330 . . . . 3, 4, 7, 9

STATEMENT OF ISSUE ON APPEAL

The trial judge properly instructed the jury to continue deliberations and did not err in denying the motion for mistrial.

STATEMENT OF THE CASE

Petitioner Barnes was indicted by the Edgefield Grand Jury for throwing bodily fluids on a prison guard. Following a jury trial, Barnes was convicted as charged on March 12, 2008, and sentenced by the Honorable R. Knox McMahon to fifteen years imprisonment consecutive to any other sentence being served.

Barnes timely appealed. The Court of Appeals affirmed the conviction and sentence in an unpublished opinion. State v. Barnes, 2010-UP-427 (S.C. Ct. App., filed October 11 2010). Barnes' petition for rehearing was denied on January 28, 2011. This Court granted Barnes' petition for writ of certiorari on March 9, 2012.

ARGUMENT

The trial court properly instructed the jury to continue deliberations and did not err in denying the motion for mistrial.

Barnes complains the trial court erred in sending the jury out for further deliberations when, for the second time, they indicated they were deadlocked. The jury first indicated they could not reach a verdict after only fifty-six minutes. The jury deliberated a total of just an hour and forty minutes by the second time they reported being deadlocked, only fifteen minutes after the jury was recharged on the law of circumstantial evidence. The trial court did not err as circumstances do not suggest the jury thoroughly deliberated either the first or second time they returned to the courtroom. Further, the trial court properly determined the jury was not unwilling to return the following morning to further deliberate.

After receiving the trial court's instructions, the jury began deliberations at 4:42 p.m. At 4:45 p.m., the jury requested a laptop to view a video clip that was introduced during trial. After only fifty-six minutes, at 5:38 p.m., the jury sent a note to the trial judge stating: "We are unable to reach a verdict in this case." The trial court gave a detailed Allen charge[1], emphasizing that while a jury verdict must be unanimous, every juror has the right to his own opinion and the verdict must be the result of each juror's own conviction. The trial court instructed the jury they "should not give up your firmly held beliefs merely to be in agreement with your fellow jurors." The jury returned to the jury room to continue deliberations at 5:45 p.m. R. pp. 56-59. At 6:14 p.m., the jury requested a re-charge on the "difference between circumstantial evidence, the weight of circumstantial evidence against

[1] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

physical evidence." R. pp. 60-61. The trial court gave the requested charge and the jury retired to continue deliberations at 6:29 p.m. At 6:44 p.m. the jury sent another note stating, "One not guilty, lock, will not change their vote." R. pp. 61-64.

The trial court indicated an overnight recess might be needed and asked the jury whether they would be amenable to recessing for the night and returning in the morning. The Foreman's response was, "Based on the discussions in the office back there, you have the numbers, and I don't think the other person will be able to change his mind." R. pp. 64-67. The trial court declined to declare mistrial and asked the jury to return in the morning. The jurors were excused at 6:53p.m. R. p. 67. The jury reached a verdict the following morning at 10:05 a.m. R. pp. 69-70.

After excusing the jury, the trial court noted it reviewed Section 14-7-1330 and State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). The trial court noted the second time the jury indicated they could not reach a unanimous decision, they had been deliberating less than two hours. The trial court found the jury was not withholding their consent to continue deliberations and felt, in its discretion, it was best to send the jurors home for the evening and allow them to return in the morning. The trial court did not get any indication the jury was unwilling to continue deliberations. R. pp. 72-74.

South Carolina Code Ann. § 14-7-1330 provides as follows:

> When a jury, **after due and thorough deliberation** upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, **it shall not be sent out again without its own consent** unless it shall ask

from the court some further explanation of the law.

(Emphasis added).

First, the issue is not preserved. Barnes' counsel objected to further enquiry of the jury on the basis that "they had been in there plenty of time", that "[t]hey are not requesting further instruction at this point", and that "it would be extremely unfair to my client to send them back again." R. p. 64, lines 21-25. After the trial court's request for the jury to return to deliberate the next morning, counsel made the following objection: "The foreman indicated he didn't think it would be fruitful to deliberate any further." R. p. 68, lines 12-16. Neither objection cited or addressed the statute made subject to this appeal. Following the verdict, the trial court referenced S.C. Code § 14-7-1330 and case law to explain its prior ruling.

A "general objection that does not specify the particular ground on which the objection is based is insufficient to preserve a question for review." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). Just "the trial court's mentioning the issue does not preserve it for appeal." State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) *reversed on other grounds by* State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). In the instant case, the objections were made seemingly unaware of § 14-7-1330 and failed to refer to the subject matter of that provision. The issue is not preserved for review.

Further, the trial court correctly exercised its discretion. The primary concern for the

courts is whether the jury is coerced or forced into reaching a verdict. "[T]he object of the statute was to prevent forced verdicts, and to prevent undue severity of jury service." State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916).

In Freely, the jury returned twice unable to agree on a verdict and were returned for further deliberations after twenty hours of deliberations. The trial court did not advise the jury they could not be returned without their consent. The South Carolina Supreme Court found no error in sending the jury back to deliberate a third time, finding as follows:

> If the circumstances satisfied the judge, in a wise exercise of his discretion, that the jury consented to the return, then it was lawful to return them. The exercise of such a discretion at so delicate stage of a trial ought not to be disturbed unless it was obviously wrongly exercised.

Id., at 644.

In State v. Drakeford, 120 S.C. 400, 113 S.E. 307 (1922), the Supreme Court found no violation of the statute and no coercion exercised by the trial court in sending the jury back for further deliberations. The Court noted that whether the jury exercised "due and thorough deliberation upon any cause" without reaching a unanimous verdict must be determined by the trial court in the exercise of sound discretion. Id., at 309. Notably, the Supreme Court observed: "While a trial judge may not coerce a jury he is not precluded from indicating very plainly that he will not be coerced by the jury." Id., at 310.

The Supreme Court found the following in State v. Simon, 126 S.C. 437, 120 S.E. 230 (1923):

> [I]t was the clear intendment of the statute to give the jury the right to indicate to the court its own view of when time for due and thorough deliberation had elapsed by returning a

> second time without having agreed upon a verdict, and to make that action decisive of the question if accompanied by any expression of unwillingness to return for a third time.

The Supreme Court reversed Simon's conviction and remanded for a new trial based upon the judge's threat the jury would be required to spend the night in the jury room unless agreement was sooner reached. The Court found the combination of informing the jury it intended to keep them together for a specified time, along with the provisions of the statute regarding sending the jury back for further deliberations, resulted in a reasonable ground to believe the verdict resulted from the judge's ultimatum rather than concurrence by the deliberate and conscientious judgment of twelve jurors. Id., 120 S.E. at 233.

In two other cases, the Supreme Court reversed convictions based on violation of the statute at issue. In Rowland v. Harris, 218 S.C. 42, 61 S.E.2d 397 (1950), the jury, after deliberating for some time on a Friday evening, informed the trial court that they were unable to reach a verdict. The judge instructed the jury about the desirability of the verdict and went home, leaving the jury in the hands of the clerk. The Court found the jury could not know about the judge's secret instruction to the clerk that if the jury did not reach a verdict by 11:00 p.m. to release the jury, and the jury could reasonably assume they would be confined over the weekend unless they reached a verdict. Id., 61 S.E.2d at 398.

In State v. Kelley, 45 S.C. 659, 24 S.E. 45 (1896), the Court found the trial judge abused his discretion in sending the jury back for a third time after they had already been deliberating for over twenty-four hours, had been denied food for a time, and had informed the trial judge that they could not reach an agreement. The Court was no doubt concerned by the trial judge's return, reporting the following: "Supper was furnished the first night, and

breakfast the next morning; and I then told the deputy sheriff, . . . , to give them nothing more to eat, that they would never agree if we kept on giving them sumptuous meals every meal time." Id. at 47.

In Edwards v. Edwards, 239 S.C. 85, 121 S.E.2d 432 (1961), the Supreme Court again found no abuse of discretion by the trial judge who sent the jury back a third time to deliberate. The jury deliberated for approximately twelve hours when they came out the second time and informed the judge they could not reach a decision. The judge sent them back for a third time and a verdict was reached shortly thereafter. The Court found the pertinent words of the statute for the case were "they shall not be sent out again without their own consent." S.C. Code Ann. § 14-7-1330. Upon the jury's second return, the trial court asked the jury to make one more attempt and if they could not reach a verdict, he would not send them back again. The Supreme Court found the jury's consent was implied by the lack of response to the judge's comments. "[U]nder the circumstances, if the Judge was satisfied in the exercise of his discretion that the jury consented to return for further deliberation, he should not have dismissed them but permitted further deliberation as was done in instant case." Edwards, 121 S.E.2d at 436.

In two more recent cases, the Supreme Court found implied consent by the jury to continue deliberations. In State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996), the jury informed the judge a second time that they could not reach a decision on two of the eight charges. The trial judge gave the jury an Allen charge on both occasions. The foreman expressed doubt the positions of the jurors would change, but other jurors stated a verdict could be reached and requested to be allowed to submit questions to the judge the following

day. The following morning, the jury submitted a question asking the judge "whether the guilty verdicts would stand on the other six charges should a unanimous decision not be reached on the two counts of murder or would the whole case be retried." The judge then informed the jury they could not reach a verdict on the two counts, the entire case would have to be tried over. The Court found no abuse of discretion on the part of the trial judge when, although the jury foreman expressed doubt that opinions would change, other jurors indicated a verdict was possible and the jury submitted a written question, indicating consent to continue deliberations.

In Buff v. South Carolina Dep't Of Transp., 342 S.C. 416, 537 S.E.2d 279 (2000), the Supreme Court again found the jury consented to continue deliberations and found no abuse of discretion on the part of the trial judge in determining the jury consented to continue deliberations. The jury, after deliberating for a little over three hours, informed the trial court it was deadlocked. The trial judge gave an Allen charge and deliberations resumed the next morning. At some point the next morning, the jury again informed the court, "we are deadlocked 11-1 with no chance of reaching an agreement." The trial judge gave a second Allen charge and asked the jury to make one last effort to reach a unanimous decision. On appeal, the South Carolina Court of Appeals reversed and found the jury's silence after the second Allen charge could not be construed as consent. Buff v. South Carolina Dep't of Transp., 332 S.C. 472, 505 S.E.2d 360 (Ct. App. 1998).

The Supreme Court reversed the Court of Appeals and found the question was whether, under all the circumstances, it appeared to the trial judge the jury consented to deliberate a third time. "The exercise of such a discretion at so delicate stage of a trial ought

not to be disturbed unless it was obviously wrongly exercised." Id. (citing Freely, supra). The Court noted nothing in the language of Section 14-7-1330 or in case law required the trial judge to inform the jury consent is necessary before sending the jury to deliberate a third time and it declined to impose such a requirement. Buff, at 422, 537 S.E.2d at 282. Lastly, the Court found, "under all circumstances of this case," the trial judge did not abuse his discretion by determining the jury consented to return for further deliberation. Id., at 423, 537 S.E.2d at 283.

As in Buff, the jury did not verbalize its consent to further deliberations, but neither did they express reluctance to reconvene in the morning and further deliberate. The Foreman's comment, "I don't think the other person will be able to change his mind," fails to indicate dissent. While the Foreman expressed concern the one holdout would not change his mind, the Foreman did not say it was impossible, nor did he indicate any dissatisfaction with the judge's instruction to return in the morning, nor does he indicate the remaining jurors held this view. His comment reveals sheepish skepticism, not resolute objection.

The trial judge was in the best position to determine the willingness of the jury to reconvene in the morning. Edwards, supra (jury's consent to continue deliberations may be implied from lack of verbal response to request or failure to indicate unwillingness to resume deliberations); Drakeford, supra (consent implied where jury did not insist verdict could not be rendered and jury did not complain about further deliberations); State v. Rowell, 75 S.C. 494, 56 S.E.23 (1906) (consent implied where jury did not indicate it was unwilling to deliberate a third time).

The trial court did not abuse its exercise of discretion in determining the jury was not

unwilling to further deliberate. Buff, 342 S.C. at 422, 537 S.E.2d at 282 (The "trial judge who is in the best position to observe the jury's demeanor should have some flexibility in guiding a case to its final resolution while protecting the parties' rights to a fair, impartial, and conscientious verdict"). The jury obviously did not shy from communication with the court as they sent four notes to the judge. Buff, 342 S.C. at 423, 537 S.E.2d at 283 (noting the judge had not previously hesitated to communicate with the trial judge sending four notes to the judge, but did not express an unwillingness to further deliberate). The judge was in the best position to determine their willingness to continue. He determined they were not unwilling to continue deliberations and correctly refused to declare mistrial.

Further, the record indicates the jury had not exercised "due and thorough deliberation". See Buff, 342 S.C. at 420, 537 S.E.2d at 281 n. 3 (noting that whether the jury "duly and thoroughly deliberated prior to declaring itself deadlocked as required was not an issue in that case). The jury deliberated less than an hour the first time they were deadlocked, a short amount of time that indicates they had not thoroughly deliberated. This indication is borne out by their request, shortly after, for further instruction on the law from the trial court. Given that the jury came back indicating deadlock a second time, with less than two hours total deliberation and only fifteen minutes after re-instruction on circumstantial evidence, it is questionable whether the jury truly exercised due and thorough deliberation until they reached a verdict the following morning.

The Appellate Court of Massachusetts analyzed its strikingly similar state statute and commented "it is open to the judge to determine whether the jury's deliberations have been due and thorough; an assessment necessarily calling for an evaluation of several consider-

ations including the complexity of the case, the extent of evidentiary conflict on material issues, and the total length of time the jury has spent in attempting to resolve those conflicts." Commonwealth v. Winbush, 442 N.E.2d 416, 418 (Mass. App. Ct. 1982) (internal quotations omitted) (citing Commonwealth v. Valliere, 321 N.E.2d 625 (Mass. 1974)). In the instant case, the jury spent minimal time attempting to resolve whatever evidentiary conflicts existed and it is clear that the jury did not engage in thorough deliberation when it first reported it could not reach a verdict after less than an hour.

As Drakeford observed, the trial court must not coerce a jury, but also, he should not be coerced by an impatient jury, perhaps waiting overlong for dinner, into declaring a mistrial where evidence of thorough deliberation remains wanting. See Drakeford, supra.

A review of events surrounding the jury deliberation process refutes argument that the verdict was forced or that the jury's duty was unduly severe. Freely, supra. The jury deliberated for only two hours and fifteen minutes total. The trial court properly exercised its discretion and did not err.

CONCLUSION

Based on the foregoing, the conviction and sentence should be affirmed.

Respectfully submitted,

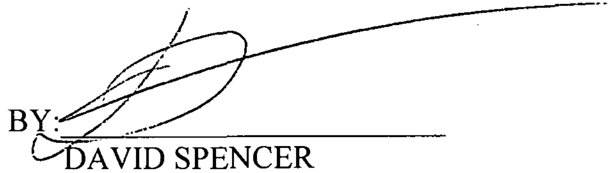
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit



BY: ______________________
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

October 12, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Edgefield County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

STEVEN LOUIS BARNES,

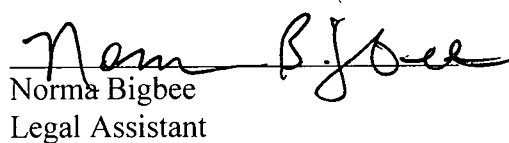
Petitioner.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211.

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

This 12th day of October, 2012.



Norma Bigbee
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

October 12, 2012

RECEIVED
OCT 12 2012
S.C. Supreme Court

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211

Re: **<u>State of South Carolina v. Steven Louis Barnes</u>**
Appellate Case No: 2011-186426

Dear Ms. Hudgins:

Enclosed please find two (2) copies of the Brief of Respondent along with proof of service in the above-referenced case.

Sincerely,

David Spencer
Assistant Deputy Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: The Honorable Daniel E. Shearouse
(original & 14 enclosed)
Ms. Trisha Allen - with enclosure