

herein, this court denies defendant's motion for new trial on all grounds presented.

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I. Standard of Law

SCRE Rule 606(b) provides:

Upon an inquiry into the validity of a 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 that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, 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. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Subsection (b) is consistent with South Carolina jurisprudence that a juror may not present testimony as to the deliberations in the jury room, as to any mistake, irregularity, or misconduct on the part of the jurors, or which would impeach the verdict or contradict the record. See *Barsh v. Chrysler Corp.*, 262 S.C. 129, 203 S.E.2d 107 (1974); *State v. Wells*, 249 S.C. 249, 153 S.E.2d 904 (1967); *Caines v. Marion Coca-Cola Bottling Co.*, 196 S.C. 502, 14 S.E.2d 10 (1941). As a general rule, juror testimony may not be the basis for impeaching a jury verdict. See *State v. Thomas*, 268 S.C. 343, 234 S.E.2d 16 (1977); *State v. Parris*, 163 S.C. 295, 161 S.E. 496 (1931); *SCDHPT v. Galbreath*, 315 S.C. 82, 431 S.E.2d 625 (Ct.App.1993). However, when an extraneous influence is alleged, juror testimony may be used to investigate the allegations. See *State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). If the alleged misconduct is internal, courts are stricter. See *Tanner v. United States*, 483 U.S. 107 (1987). Normally, juror testimony involving internal misconduct is competent only when necessary

to ensure due process, i.e. fundamental fairness. See *McDonald v. Pless*, 238 U.S. 264 (1915); *State v. Long*, 93 S.C. 502, 510-15, 77 S.E. 61, 62-63 (1912)

II. Analysis

Defendant argues that on several occasions, including the night being which the jury was deliberating,⁵ Juror A violated the Court's instructions of the jury room.⁶ Defendant alleges that Juror A discussed the case, the deliberations, and even the "split" between jurors outside of the jury room and prior to the verdict. "Where the defendant seeks a new trial on the ground of impropriety involving the jury, he is required to prove both the alleged misconduct and the resulting prejudice." *State v. Covington*, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct.App.2000) rehearing denied Jan. 8, 2001, cert. denied June 21, 2001. See also *State v. Grovenstein*, 335 S.C. 347, 351-52, 517 S.E.2d 216, 218 (1999); *State v. Kelly*, 331 S.C. 132, 145-46, 502 S.E.2d 99, 106 (1998); *State v. Smith*, 338 S.C. 66, 72, 525 S.E.2d 263, 266 (Ct.App.1999) ("The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence.") Defendant argues prejudice results "any time you have a juror deliberating who has willfully violated the court's instructions."⁷ However, "[u]nless misconduct affects the jury's impartiality, such misconduct will not affect the verdict." *Kelly*, 331 S.C. at 143.

At the *in camera* hearing conducted during the morning of March 1, 2005, Juror A admitted to having a conversation with Mr. Gerhardt Schnibben, the

⁵ The Court asked counsel for the State and for the defendant on different occasions whether jury sequestration was requested. Each time, counsel indicated sequestration was not requested.

⁶ *Defendant's Second Motion*, p.7.

⁷ (Tr. p.13, lines 23-24)

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bartender of a local eating establishment, while the jury was in deliberation (Tr. p.107, lines 18-23) ("Aside from mentioning to him that I was on the jury, I do not remember saying anything else to him about any specific evidence or anything of that nature.") Juror A could not recall whether he told the bartender what his wife was going to be because he "was still . . . sorting out the evidence" at that point. (Tr. p.107, line 18 - p.108, line 5) Though Mr. Schnibben could not remember the entire contents of the conversation, he remembers Juror A stating that he was on the jury in this case and "that he thought the young gentleman was guilty." (Tr. p.91, lines 12-13) Mr. Schnibben also said he did not recollect "shar[ing] his views in any way whatsoever with Juror A." (Tr. p.93, line 17-19)

Juror A admitted that his wife had expressed her viewpoints to him but said he "did not express those to anybody else or let it affect [his] decision one way or the other." (Tr. p.110, lines 11-13) Upon the court's questioning regarding exactly what Juror A's wife said, Juror A stated that "[s]he disagreed with the age factor" but that "it was nothing that [he] really took into account, because there was nothing that [the jury] could do about that." (Tr. p.111, lines 1-5) Based on these statements, the court determined there was a basis presented to determine whether prejudice resulted from the alleged misconduct.

When the court asked each juror individually whether any juror said or indicated in any way whatsoever that they had talked with anyone about this case during the trial, none of the jurors mentioned a conversation between Juror A and Mr. Schibben but three of the jurors said that Juror A mentioned a conversation he had with his wife. The remaining jurors indicated no information from a family member or other person was presented. Juror B said that before deliberations, Juror A indicated that his spouse had mentioned that she saw

something on television regarding the case but that Juror A did not indicate that the spouse said anything about her views about the case (Tr. p.35, line 23). Juror C told the court that during deliberations Juror A said he and his wife did not "agree on the same thing about the case" (Tr. p.40, lines 16-17) and that she read into that statement to mean Juror A's wife wanted a verdict of not guilty whereas Juror A wanted a verdict of guilty. Both Juror B and Juror C indicated that the statement or statements Juror A made to them in no way affected their decision. (Tr. p.36, line 16 and p.43, line 11) Juror D stated that after the trial Juror A indicated he had discussed the case with his wife (Tr. p.77, lines 2-25) but that during the trial Juror A did not say anything that affected Juror D in any way (Tr. p.79, lines 4-7). As indicated, all of the jurors involved stated that any conversation did not affect them. Based on the responses of the jurors after questioning, this court finds that even if evidence of external conversations reached the jury during its deliberative process, the defendant was not prejudiced in any way. See, e.g., *Covington*, 343 S.C. at 164-65 (finding testimony of three jurors was insufficient to show that alleged jury misconduct occurred where majority of jurors denied or could not recall any misconduct, which was alleged to have involved prejudicial information about murder defendant and his violent past with his wife).

Defendant argues that "[u]ndoubtedly, if this Court had become aware during the course of the trial that Juror A was violating the Court's instructions, the Court could and would have disqualified him and seated the first of the three alternates in his place."⁸ Defendant goes on to discuss this alternate's affidavit⁹

⁸ Defendant's Second Motion, p.9.

⁹ Defendant attaches the affidavit of the alternate juror Roberta Diamond as Exhibit D to

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indicating that she was very strongly of the opinion that Chris Pittman was not guilty. Defendant makes an incorrect legal assumption with this assertion of prejudice. S.C. Code § 14-7-1340 controls as to alternates in criminal cases and provides that if the court discharges a juror, the court "draw[s] the name of one of the alternates, if there be more than one, by ballot to serve in the place" of the dismissed juror. Moreover, if allegations of jury misconduct surfaced during the trial, the court would not immediately excuse a juror but, instead, would inquire into whether there was an improper taint by questioning the juror involved as well as the other jurors. Even if the court could turn back the clock to conduct the proper inquiry and if it decided to dismiss Juror A for his alleged misconduct, there is no guarantee that Ms. Diamond would be the juror selected by the drawing.

Defendant also argues that internal jury misconduct occurred during deliberations.¹⁰ The court originally expressed concern that such an allegation may be problematic and troublesome to the court; however, the court further indicated that such a response does not necessarily mean that the law would mandate the grant of relief; as a result, this court has reviewed as many cases from all over the country that it could find on this issue. SCRE 606(b) clearly provides that a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything that influenced the juror to assent to or dissent from the verdict or indictment. An

Defendant's Second Motion.

¹⁰ Defendant argues that Juror A, in particular, violated the Court's Instructions to base his verdict solely on the evidence and let his own views take precedence over the Court's instructions. *Defendant's Second Motion*, p.7. Defendant asserts the juror's post-trial statements evince the violations. This court agrees with the State that there is no credibility in this allegation as there is an equally plausible conclusion that the juror's post-trial statements are a summary of the juror's position as it was developed through the consideration of the evidence and due deliberation. *State's Brief*, p.7.

exception to this strict rule has been made when the alleged internal misconduct implicates due process. See *McDonald*, 238 U.S. at 264 (1915); *Long*, 333 U.S. at 510-15.

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Upon the court's questioning of jurors regarding the allegations of external influence, certain references were made to discussions that took place during internal deliberations that caused the court to express concern and to decide that it wanted a very intense period of research to reflect on the matter. Specifically, references were made to a potential misunderstanding of the law. When the court asked Juror C whether Juror A's statement regarding a disagreement between he and his wife affected Juror C's decision in any way, Juror C indicated that she and a few other jurors did not want to render a guilty verdict. (Tr. p.43, lines 16-18) She stated she voted guilty because the rest of the jurors told her they had to put in a verdict. (Tr. p.44, lines 14-18) She said the rest of jury was bothering her to vote guilty (Tr. p. 45, line 25) and she responded affirmatively to the court's questions regarding whether she felt coerced and forced into voting guilty. (Tr. p.46, lines 1-5) When the court asked whether Juror C understood the court's request at the end of the trial for each juror to acknowledge whether or not it was the juror's verdict, Juror C indicated that she understood. (Tr. p.44, line 3) Juror C further indicated that she recalled the court's instruction that the verdict had to be unanimous and that everyone on the jury had to agree before there could be any verdict. (Tr. p.44, line 6). Upon further inquiry, the juror admitted that she voted guilty because the other jurors kept bothering her to vote guilty. (Tr. P.45, line 25).

When the court asked Juror D whether it was her "understanding that everyone on the jury agreed to the verdict in this case," Juror D responded that

"because of the law, what the law states it cannot be the majority, . . . I had say what the others said." (Tr. p.61, lines 8-12) The court said it is not understand what she meant by the statement and Juror D explained that "everybody had to come to the same agreement" but that she "had a different view." (Tr. p.61, lines 13-18) Juror D indicated that the verdict was not hers (Tr. p.61, lines 22-23) and that she answered affirmatively when asked at the end of the trial whether it was her verdict because "the majority ruled" and because "[e]verybody had to come to the same consensus." (Tr. p.61, line 24 – p.62, line 3) Juror D said she "never decided that he was guilty" (Tr. p.64, line 13) and that she "voted guilty because [her] understanding was that everybody had to be in the same agreement." (Tr. p.64, lines 18-19) Juror D stated that upon the voting of the jury, when she did not raise her hand for any verdict choice, another juror told her she had to vote one way or the other but did not indicate that she had to go with the majority. (Tr. p.71, lines 3-21) She herself felt she had to go with the majority, based on her understanding that everybody had to come to the same decision. (Tr. p.72, lines 4-8)

As indicated, the court was troubled by the references to a potential misunderstanding of the law; however, as was indicated at the *in camera* hearing, what may appear to be troubling is not the applicable legal standard. Each juror answered affirmatively when the court asked whether he or she heard the charge in which the court said it is not a majority verdict but a verdict in which each and every one of the jurors had to agree. See *Karl v. Burlington Northern Railroad Company*, 820 F.2d 68, 85 (8th Cir. 1989) ("We conclude that the evidence of the jury's misinterpretation of its instructions is deemed incompetent and inadmissible under Rule 606(b) and should not have been considered by the

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district court in amending the verdict."); *Galbreath*, 359 S.C. at 398 (finding misinformation provided by juror who, during deliberations, told other jurors that based on personal experience, defendant would not receive jail time required from internal jury misconduct rather than extraneous information or influence, and did not violate defendant's due process rights); *State v. Franklin*, 341 S.C. 555, 534 S.E.2d 716 (Ct.App.2000) (finding hold-out juror's affidavit was insufficient to show that she was coerced to vote guilty as a result of internal misconduct where she was allegedly called derogatory names and screamed at by fellow jurors); *State v. Osborn*, 988 S.W.2d 485 (1999) (holding that a juror's misunderstanding or beliefs based on erroneous representations may not be considered under evidentiary rule allowing juror testimony upon inquiry into validity of verdict where juror incorrectly believed that defendant's prior crimes were aggravated robberies and that they would not have imposed life sentence if they knew true facts).

Moreover, and significantly, the jury was polled after the verdict was read and when given the opportunity to express his or her decision in the matter, each juror indicated that the verdict was his or her verdict and that it was still his or her verdict. A juror's affirmative response to polling cures any doubt regarding whether that juror assented to the verdict. See *State v. Stone*, 320 S.C. 395, 399, 465 S.E.2d 576, 578 (Ct.App.1995) (holding a juror's unambiguous and unequivocal response of "Guilty" when she was polled cured any doubt regarding whether she assented to the verdict and cleared up any confusion that may have made her reluctant to go along with the verdict at first); see also *State v. Roper*, 274 S.C. 14, 260 S.E.2d 705 (1979) (finding that if a juror's answers leave doubt as to whether the juror has assented to the verdict but do not otherwise indicate

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involuntariness or coercion, a subsequent answer indicating clear and unequivocal assent will generally cure the defect). As a result of the questioning of the jurors, the court is convinced that all the jurors assented to the verdict. Further, this case clearly does not present the type of coercion, as may be alleged, that would warrant further review or analysis; that is, the testimony simply does not rise to the level of undue pressure or coercion that would implicate the constitutional guarantee of due process. If anything, the case presents a situation where a juror or two may have mistakenly felt an obligation or a desire to vote on a verdict or to go along with the majority while representing that the court's instructions on that matter were heard; alternatively, this case may present a situation in which a juror has simply changed his or her mind. To protect against these very types of situations, all jurors were given a final opportunity to express whether the verdict was each juror's individual verdict when the jury was polled but no juror indicated otherwise nor expressed any concern at that time. Moreover, when specifically asked at the *in camera* hearing, other jurors indicated that the verdict was the verdict choice of each and every juror. Case law binding on this court simply does not afford a basis upon which relief can be granted.

As indicated in *Franklin*, "the nature of the jury process can be intimidating to those who dislike confrontation and debate. It is all the more difficult in a criminal case, where jurors are most likely to feel the weight of their decision. In the setting of a confined deliberation room, it is understandable that some jurors become very sensitive to the outward manifestations of anger or animosity exhibited by other jurors who do not share the same point of view. Needless to

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say, not every juror is well versed in the gentle art of persuasion." *Franklin*, 341 S.C. at 561.

The law is very clear that especially in situations involving deliberations that do not implicate due process raising a question of fundamental fairness, concepts of finality must prevail. Otherwise, as the policy which underlies this legal doctrine suggests, every single juror could have a change of heart and subject a decision to scrutiny at any point based upon an expression that the decision was not now the decision of the juror. The policy underlying the rule dates back to the common law of England wherein Lord Mansfield proclaimed that a juror could not "allege his own turpitude." *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785) (refusing to accept into evidence the affidavits of jurors to show they had arrived at their verdict by lot). In *McDonald, supra*, Justice Lamar warned of the potential problems that could come with a court's refusal to adhere to the rule prohibiting intrusion into the deliberative process:

[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. . . . If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald, 238 U.S. at 267-68. See also, Jay M. Zitter, Annotation, *Impeachment of Verdict By Juror's Evidence That He Was Coerced Or Intimidated By Fellow Juror*, 39 A.L.R.4th 800 (2005) ("Such rule is based on a variety of considerations, such as the desire for the stability of verdicts, the conclusion of litigation, and the protection of jurors in their communications to fellow jurors made in the confidence of secrecy of the jury room). As further

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indicated in the same annotation, other considerations "include the protection of jurors from tampering and harassment by disappointed litigants, the foreclosure of jurors from abetting the setting aside of verdicts to which they might have agreed reluctantly in the first place or about which they might in the light of subsequent developments had doubts or a change of attitude, and the impossibility of proof of personal, mental processes through testimony." *Id.* For all of the reasons discussed herein, the motion for a new trial is hereby denied.

Defendant also moves for a new trial based on the "thirteenth juror doctrine."¹¹ Having considered the matter and the applicable law, that motion is hereby denied.

III. Conclusion

As indicated, the defendant's motion for new trial on all grounds is hereby denied. Attached to this order is an exhibit for purposes of the record which identifies the names of the jurors referenced herein. Based upon the fact that some testimony by the various jurors may be interpreted as invading the province of the jury's protected deliberations, the transcript of these new trial proceedings, as well as the attachment hereto identifying the referenced jurors by name, shall remain under seal until further order of this court or an appellate court as it deems appropriate. As the court in *Franklin* noted, "the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be lightly made." *Franklin*, 341 S.C. at 561. For this reason, the court finds it appropriate to seal these *in camera* proceedings as indicated until further order otherwise.

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¹¹ *Defendant's Second Motion*, p.10.

The Clerk is directed to provide copies of this order to counsel for the defendant and counsel for the state.

IT IS SO ORDERED.



Danny Pieper
Presiding Judge

Charleston, South Carolina
May 13, 2005


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