

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 0431

STATE OF LOUISIANA

VERSUS

CORDERRIUS DASHON MITCHELL

Judgment Rendered: SEP 21 2017

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 09-14-0338

The Honorable Michael R. Erwin, Judge Presiding

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Hillar C. Moore, III
District Attorney
Dylan C. Alge
Assistant District Attorney
Baton Rouge, Louisiana

Appellee,
State of Louisiana

Bertha M. Hillman
Covington, Louisiana

Defendant/Appellant,
Corderrius Dashon Mitchell

* * * * *

BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

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PENZATO, J.

Defendant, Corderrius Dashon Mitchell, was charged by grand jury indictment with attempted armed robbery, a violation of La. R.S. 14:27 and 14:64, and with second degree murder, a violation of La. R.S. 14:30.1.¹ He pled not guilty. Prior to trial, the state dismissed the charge of attempted armed robbery. Following a jury trial, defendant was found guilty as charged of second degree murder. Thereafter, the trial court sentenced defendant to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence. Defendant now appeals, alleging two assignments of error concerning issues related to the jury. For the following reasons, we affirm the conviction and sentence.

FACTS

On the evening of December 16, 2011, Fausto David Ortiz Herrera, a Honduran citizen, was shot and killed on Tracy Avenue in East Baton Rouge Parish. Around the time of the shooting, the victim's brother saw two black males in the area, but he did not recognize them.

Shortly after the time of the shooting, East Baton Rouge Parish Sheriff's Deputy Kevin Davis was responding to a suspicious vehicle complaint on Sunnybrook Drive, which dead ends near a wooded area bordering Tracy Avenue. As Deputy Davis turned onto Sunnybrook Drive, he saw the suspicious vehicle driving toward him with its lights off. When Deputy Davis activated his emergency lights, the vehicle sped away and led Deputy Davis on a brief chase down Joor Road, before ultimately stopping on Crestaire Drive. At the dead end of Crestaire Drive, the vehicle stopped and its occupants fled on foot, evading capture that evening. During an inventory of the abandoned vehicle, Deputy Davis found a bill of sale and Louisiana ID with defendant's name on them. Detectives discovered that

¹ Also charged in the same indictment were codefendants Keandre Duane Collins, Jerrico George, David Michael Betz, and Reshaud Johnson. These individuals were not tried with defendant and are not parties to this appeal.

defendant's residence was located on Courtland Drive, only a couple of blocks away from where the vehicle was abandoned.

Brendin Sanders testified at trial that he was with defendant on the day and evening of the shooting. Sanders described that he and defendant met up with Reshaud Johnson, Keandre "Kiki" Collins, and David Betz. These five men spent part of the evening riding around together and smoking marijuana. Sanders testified at trial that at some point, one of the others started talking about performing a "lick," or a robbery, on a "Mexican." Sanders stated that defendant drove his vehicle to a dead end in a neighborhood off of Joor Road. Sanders testified that the other four men exited the vehicle and went into the nearby woods while he waited in the car. Sanders stated that he had seen Betz with a gun, and he saw defendant hand Collins a gun. After the four others were gone for "fifteen to twenty-five minutes," defendant and Betz returned to the vehicle. Sanders testified that almost immediately after defendant and Betz reentered the car, a police vehicle approached and activated its lights, at which point defendant began to drive the car away. Sanders stated that he jumped out of the vehicle before it reached Joor Road. Sanders indicated that he later spoke with defendant, who asked Sanders to call defendant's mother and tell her that somebody had stolen his car. Sanders testified that he did not "really" know who the shooter was, but he told a detective he believed that Collins was the shooter because he "heard that."

The state presented evidence at trial that defendant's mother lied to the police about his whereabouts and made a false report of defendant's car being stolen. Defendant's mother admitted that she lied "to protect [her] son" and that she did not know where defendant was or who he was with on the night of the shooting. The state also introduced a video recording of a meeting that defendant had with his mother, grandmother, and uncle in the interrogation room of the police station. The video reflects that during this meeting, one of defendant's family members allowed

him to use a cell phone to call another family member and request an alibi for the night of the incident. Defendant did not testify at trial.

JURY ISSUES

In his only two assignments of error, defendant raises issues concerning the jury. In his first assignment of error, defendant contends that the trial court unlawfully placed time restraints on jury deliberations. In his second assignment of error, defendant argues that the trial court erred in dismissing a seated juror based upon comments she made during trial, replacing her with the alternate juror, and allowing the jury to deliberate without first making a determination regarding whether the other jurors had been tainted by the dismissed juror's remark. Because the first assignment of error is better addressed in light of the second, we address the second assignment of error first.

Dismissal of Juror

Following a lunch break on the last day of trial, the trial court went on the record outside of the presence of the jury and stated:

In light of the information that I received that Juror No. 209, Sylvia Davis, has indicated to Juror No. 40, I believe, that the justice system treats black people different, and that her son was beaten half to death by a police officer, and she sued the police department and won her case, and she didn't tell me that during voir dire. Not that I specifically asked that question, but I would assume as an algebra teacher, she's educated enough to know that that's the kind of information we would need to make a decision as to whether or not she could be a fair and impartial juror. And had the state – I don't think there's a way to bring her in and allow the defense to question her as to whether or not she could still be fair and impartial. First of all, because I don't think she can be with this information; and secondly, but if we do that and somehow she claims she can be fair and impartial and let her go back in the jury room, she would know where the information came from and it would make for a very contentious jury atmosphere that I don't think we need to get into. And had the state known of this information or I had known of this information before she was selected, I would have granted a challenge for cause. And even if I wouldn't have, the state – she was elected fourth juror – well, she was in the first panel, let's put it that way. And the State would have certainly used the peremptory challenge to get rid of her.

The trial court's remedy was to complete the trial with Juror Davis in the box and to excuse her after instructions were given to the jury.

Defense counsel objected on the ground that he did not know "the entire context as to how this exchange occurred between these two jurors." Defense counsel further stated that there was no opportunity to "question these jurors as to that context and how it may or may not affect their impartiality with regard to fairness."

After charging the jury, the trial court asked Juror Davis to remain in the courtroom while the other jurors and the alternate retired to the jury room with instructions for them not to begin deliberations yet. The trial court then informed Juror Davis that she was being dismissed because of the information received about her lawsuit against the Baton Rouge Police Department. Following Juror Davis's dismissal, the remaining jurors and alternate returned to the courtroom, the alternate was made part of the jury, and the trial court addressed the jurors:

During the course of the trial, I was informed that Ms. Davis had a lawsuit that she filed against the city police and won because they allegedly beat her son. And had that information been relayed to us during the jury selection process, I would have granted a motion for cause to dismiss her from the jury if the state had asked me to do so; or if they didn't and they had that information, they would have used one of their peremptory challenges. So that's why she has been excused. So now y'all can go deliberate.

On appeal, defendant does not challenge the dismissal of Juror Davis. Rather, he argues that the trial court should have questioned the remaining jurors either individually or in a group to see if Juror Davis's remark had any effect on them. Defendant contends that "[s]ome of the jurors may have resented and been antagonized by this remark made by a black [juror], and they could have transferred that resentment and antagonism toward [defendant] who is also black."

Louisiana Code of Criminal Procedure article 789(A) provides for the replacement of a juror with an alternate juror in the event the former becomes unable

to serve or is disqualified. Once a jury has been selected and sworn, the defendant has a right to have his case decided by the particular jurors selected to serve. See State v. Cass, 356 So.2d 396, 397 (La. 1977). A juror may not be discharged unless there is a legal cause, i.e., death, illness, or any other cause which renders a juror unable or disqualified to perform, and an absence of this legal cause will lead to reversal. See State v. Clay, 441 So.2d 1227, 1230 (La. App. 1st Cir. 1983), writ denied, 446 So.2d 1213 (La. 1984).

There is no serious issue in the instant case as to whether Juror Davis's dismissal was warranted, and defendant makes no such claim on appeal. Instead, defendant argues that it was incumbent upon the trial court to conduct an examination of the remaining jurors to determine whether they could be fair and impartial in light of Juror Davis's alleged remark concerning the justice system treating black people differently.

The jurisprudence is clear that, generally, once a juror has been qualified as competent to serve and sworn – all in the presence of the defendant – he cannot thereafter be disqualified as incompetent to serve unless the defendant is present and a hearing conducted. See State v. White, 244 La. 585, 606-07, 153 So.2d 401, 408-09 (1963); State v. Tennors, 2005-0538 (La. App. 3d Cir. 2/15/06), 923 So.2d 823, 834-39; see also La. Code Crim. P. art. 831(A)(3) (declaring the requirement of defendant's presence at "proceedings for the discharge of the jury or of a juror"). However, defendant has cited no authority for the proposition that the remaining jurors must be examined for their impartiality upon the dismissal of another juror.

While defense counsel objected at trial to the trial court's continuation of the trial without examining the remaining jurors, he did not move for a mistrial and/or the relief associated therewith. Under La. Code Crim. P. art. 771(2), a defendant may request the trial court to promptly admonish the jury to disregard an irrelevant or immaterial remark of such a nature that it might create prejudice against the

defendant, or the state, in the mind of the jury when the remark or comment is made by a person other than the judge, district attorney, or court official, regardless of whether the remark or comment is within the scope of La. Code Crim. P. art. 770. Louisiana Code of Criminal Procedure article 770(1) prohibits remarks concerning race, religion, color, or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury. Under Article 771 (emphasis added), “[upon] motion of a defendant,” the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial. In the instant case, defendant requested neither an admonition nor a mistrial.

Without a request for an admonition or mistrial, the trial court seated the alternate juror, informed the remaining jurors of Juror Davis’s dismissal and the reason therefor (which itself was a sanitized version of the available information), and ordered the jury to begin deliberations. The trial court has the discretion to utilize the service of an alternate juror, rather than to grant a mistrial, upon a proper finding that this is the best course of action. **State v. Fuller**, 454 So.2d 119, 123 (La. 1984). In the instant case, the trial court elected to utilize the alternate juror rather than *sua sponte* raise any issue related to a mistrial and examine the remaining jurors. On the record before us, we believe this course of action was permissible.

The alleged remarks made by Juror Davis – that the justice system treated black people differently and that she had sued the Baton Rouge Police Department in connection with an incident involving her son – were more prejudicial to the state’s case than to the defense. Contrast **State v. Jones**, 2009-0751 (La. App. 1st Cir. 10/23/09), 29 So.3d 533, 540 (where a juror’s use of a “pernicious racial slur” and “limited initiative on the part of the trial judge to rectify the situation” warranted a new trial). In **Jones**, 29 So.3d at 537-39, the trial court was given a note concerning the situation by a juror who both asked not to be named and who asked the court not

to divulge the name of the person making the statement, and the offending juror was allowed to remain seated on the jury without any questioning or rehabilitation. Unlike in **Jones**, the offending juror was removed from the panel in the instant case, and the comment was not a “pernicious racial slur,” but one perhaps evincing sympathy for defendant. While defendant now argues that the remaining jurors could have come to resent Juror Davis, a black woman, as a result of her comments and transferred that resentment to defendant, this claim is purely speculative and not supported by anything in the record.

In addition to the above, questioning the remaining jurors in the instant case may have served only to further highlight the impermissible comment, causing the examination itself to taint the jury. A fair reading of the trial judge’s initial statement indicates that Juror Davis’s comment appears to have been made solely to Juror No. 40, who reported it to the court. Particularly, Juror No. 40 expressed a concern that if the trial court questioned Juror Davis, she would become aware of “where the information came from,” indicating that this remark had likely been made only to a single person. Given this information, the trial court could have reasonably determined that it was unnecessary to question the remaining jurors about their exposure to Juror Davis’s remark. Juror No. 40’s reporting of the remark to the trial court demonstrated a respect for the impartiality required of the jury system, obviating any need for the trial court to question her impartiality under these circumstances.

Considering the above and the record as a whole, we find that the trial court did not err or abuse its discretion in declining to examine the remaining jurors about their ability to be impartial. The remark was not prejudicial to defendant on its face. Any alleged prejudicial impact of the remark is purely speculative and was not raised in a motion for mistrial. Further, the context indicates that the remark likely was not

made to the jury as a whole, making any examination of the remaining jurors unnecessary.

This assignment of error is without merit.

Time Limitation on Jury Deliberations

In his remaining assignment of error, defendant contends that the trial court unlawfully placed a time limitation on jury deliberations.

Following closing arguments, the trial court addressed the jury:

All right. Ladies and gentlemen, the law requires that once you begin deliberations, you have to be sequestered, which means that you have to be put up in a hotel room if you can't reach a verdict in a short period of time or – you know, of course, it's getting kind of late now. However, my good friend the high Sheriff, Sid Gautreaux, tells me they can't do it because they don't have the money, and they can't get a hotel on such short notice – somehow he's getting around the law – or we can stay here till midnight and declare a mistrial or something at that point. I've suggested that rather than do that we're going to come back here tomorrow morning at 9:00 and begin deliberations because once you start, we can't stop, unless it goes like four, five, six hours and I've got to declare a mistrial. And if it's going to take a long time, then I would rather y'all be fresh and ready to go, unless y'all tell me differently.

At that time, Juror Sharon Myshrall told the trial court that she needed to take care of her six grandchildren beginning the next day because both sets of their parents were out of town. She also indicated that she had a handicapped brother at home. Initially, the trial court told Ms. Myshrall to “bring [her grandchildren] on up here and we'll entertain them in my office.” Ms. Myshrall asked if the trial judge was serious, and he indicated he was. Ms. Myshrall then asked what would happen if the jury ended up sequestered, and the trial judge replied that they could not be sequestered because the sheriff would not let him do it. The following exchange then occurred:

Trial court: So the only other answer I have is we could go start deliberating right now, but I'm not going to stay up here till nine or ten o'clock at night, depending on how long it takes. So what do y'all think?

Ms. Myshrall: I'd rather stay to late, but that's just me. I'll do whatever.

Trial court: All right. We'll do it and it won't be long before I call a mistrial if y'all don't reach a verdict since we can't get around it.

The trial court then charged the jury.

Out of an abundance of caution, defense counsel lodged a vague objection, noting that "one of the jurors basically wanted to go forward." The trial court noted the objection and stated, "You understand we had the agreement ... but it fell apart and nothing I can do about it."

A jury is sequestered by being kept together in the charge of an officer of the court so as to be secluded from outside communication, except as permitted by La. R.S. 18:1307.2.² La. Code Crim. P. art. 791(A). In noncapital cases, the jury shall be sequestered after the court's charge and may be sequestered at any time upon order of the court. La. Code Crim. P. art. 791(C). Noncompliance with the sequestration provisions of Article 791 requires the reversal of a defendant's conviction. See State v. Willis, 371 So.2d 1327, 1328 (La. 1979) (per curiam).

The instant case presents a unique set of circumstances. Following closing arguments and presented with the late hour, the trial court suggested to the jury that they return to be charged and to deliberate on the following day, a Saturday. Only one juror expressed any opinions as to the matter and indicated that it would be preferable to proceed with deliberations on the same day due to personal scheduling conflicts the following day. Though the trial court expressed a willingness to provide childcare for this juror's grandchildren during deliberations, the juror had a clear preference to deliberate immediately. Complicating matters was the sheriff's apparent inability to accommodate a sequestered jury. Further complicating matters was the decision to select a single alternate juror who, though not seated at the time, was already anticipated to replace Juror Davis.

² This exception concerns absentee voting by members of a sequestered jury.

Upon the dismissal of Juror Davis and the seating of the sole alternate juror, the jury began to deliberate at 5:29 p.m. At 5:45 p.m., the jury returned to the courtroom to listen again to the definitions of second degree murder and manslaughter. The jury retired to continue deliberations at 5:50 p.m. and returned with a verdict at 6:18 p.m.

Defendant contends that the trial court's statements concerning the time window for the jury's deliberations constituted something akin to an impermissible **Allen**³ charge. An **Allen** charge is an instruction acknowledged to be calculated to dynamite jury deadlocks and achieve jury unanimity. **State v. Nicholson**, 315 So.2d 639, 641 (La. 1975). Such a charge, and any coercive modification thereof, is banned in the courts of Louisiana. **Id.** An **Allen** charge emphasizes that the jury has a duty to decide the matter at hand, which implies that the trial judge will not accept a mistrial in the case. Additionally, when the duty to reach a verdict is coupled with the trial court's admonition that those in the minority should reconsider their position, there exists an almost overwhelming pressure to conform to the majority's view. **State v. Washington**, 93-2221 (La. App. 1st Cir. 11/10/94), 646 So.2d 448, 454-55.

Contrary to defendant's contention, we do not find the trial court's statements to be a coercive modification of the prohibited **Allen** charge. The statements occurred prior to the beginning of jury deliberations, eliminating any possibility that the jury had deadlocked at this stage. More importantly, the statement did not indicate that the court would not accept a mistrial. See **Washington**, 646 So.2d at 455. In fact, the trial court indicated that it would have no choice but to declare a mistrial *if* the jury could not reach a verdict. The trial court never gave any indication to the jury that it would be required to reach a verdict.

³ **Allen v. U.S.**, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

The length of time of jury deliberation is a matter directed to the discretion of the trial judge and without more, it cannot constitute coercion. **State v. Simmons**, 414 So.2d 705, 707 (La. 1982). In the instant case, the trial court was presented, essentially, with two alternatives. Initially, the preferred course of action was to have the jury return the following day, at which point it could begin deliberations. However, Ms. Myshrall indicated a hardship. While the trial court expressed a willingness to alleviate that particular juror's hardship, Ms. Myshrall expressed a preference to begin deliberations immediately. Notably, no other jurors objected to this course of action.

Faced with these circumstances, the trial court had the option to allow the jurors to begin deliberating immediately, knowing that the sheriff could not accommodate sequestration. Alternatively, the trial court could have disregarded Ms. Myshrall's stated preference (the only one on the record), ordered the jurors to return the following morning, and trusted Ms. Myshrall to appear in court with her six grandchildren. Had Ms. Myshrall not appeared on the following day, there was no alternate juror to replace her, and the trial court would have been forced to declare a mistrial due to an inadequate number of jurors. See La. Const. art. I, § 17(A); La. Code Crim. P. art. 782(A); La. Code Crim. P. art. 775(3).

In stating to the jury that they would have a few hours on the current evening to deliberate before the declaration of a mistrial, the trial court's intent was not coercive, but factual. If the jury could not reach a verdict, the trial court would have no choice but to declare a mistrial. The jury was not instructed that a verdict was required, but they were informed that their time window for deliberation would be shortened due to circumstances beyond their and the trial court's control.

Defendant points to the relatively short length of deliberations as evidence that the jury felt coerced into arriving at a verdict. We note, however, that the jury appears to have taken its deliberations seriously, as is demonstrated by its request to

have the definitions of second degree murder and manslaughter re-read. Further, the unanimous verdict would seem to indicate that the brevity of deliberations was due more to the jury's acceptance of the state's evidence rather than any alleged coercion by the trial court. Notably, the trial court never gave the jury a definitive amount of time that it would be allowed to deliberate. Had the jury deliberated for a few hours, been called back to receive a true deadline, and returned with a verdict immediately before that deadline, defendant would potentially have a stronger argument that the jury was coerced into reaching a verdict within the time limits outlined by the trial court. Where, as here, the jury reached a unanimous verdict well in advance of any potential deadline, we cannot say that the trial court acted in a manner to coerce the jury.

This court clearly recognizes the trial court's obligation to insure that all parties receive a fair trial while also achieving the twin goals of professionalism and civility. However, considering the unique facts and circumstances of this case, and the record as a whole, we find that the trial court did not err or abuse its discretion in informing the jury that a mistrial would be declared if it could not reach a verdict in the instant case.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.