

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

KANETHIA EDWARDS

APPELLANT

VS.

FILED
JUN 20 2008
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

NO. 2007-KA-1064-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE AND FACTS

This appeal proceeds from a judgment of conviction for Aggravated Assault in the First Judicial District of Bolivar County, Mississippi, Honorable Albert B. Smith, III, presiding.

A Bolivar County Grand Jury indicted Kanethia Edwards on March 5, 2007, for Aggravated Assault in violation of § 97-3-7 (2)(b) Miss. Code Ann of 1972, as amended. Edwards had stabbed Angelique Lewis with a knife during an argument at school. (RE 1). Edwards was served with a capias and arraigned on March 8, 2007. (RE 2; 4). Edwards entered a plea of not guilty and proceeded to trial by jury on April 16, 2007, where she was found guilty. (RE 27; 28).

After reading the verdict, Judge Smith, acting on his own motion, polled the members of the jury as to their vote. The trial transcript is silent as to the responses of jurors Eight, Ten and Twelve when the judge asked each juror "... is that your verdict, yes or no." (RE 180; T 209). At the conclusion of the poll, Judge Smith stated "All right. The jury has been polled. It's unanimous decision." (RE 180; T 209). The verdict and judgment were promptly filed with the clerk of court on the day of trial. (RE 27; 28).

On April 25, 2007, the court sentenced Edwards to six years in the custody of the Mississippi Department of Corrections, with four years suspended and two years to serve, and ordered her to pay restitution and court costs. (RE 32; T 210-15) On the same date Edwards' trial counsel, Martin A. Kilpatrick, sought review of her conviction and sentence through post-trial relief by filing Defendant's Alternative Motion for New Trial or Judgment of Acquittal. The defense listed several reasons why a new trial or judgment of acquittal should be awarded: the verdict was against the overwhelming weight of the evidence; the jury was comprised of ineligible voters; the jury was comprised of persons who mislead the court about their relationship to the victim; the jury was biased against Edwards; and finally that Edwards' sentence was excessive. The part of Edward's motion most pertinent to the issues in this appeal states: "3. When said trial was concluded on April 16, 2007, the persons selected as regular jurors returned into Open Court after deliberations, with a unanimous verdict of "Guilty"." (RE 37).

On April 27, 2007, the trial court denied Edwards motion. The order was filed with the clerk of court at 1:03 p.m. on May 1, 2007. (RE 34, 47).

At 3:11 p.m. May 1, 2007, Johnnie E. Walls, Jr., entered his appearance as counsel for Edwards and filed a Supplement to Defendant's Motion for a New Trial or Judgment of Acquittal Motion for Reasonable Bail Pending Appeal with Affidavit of Anthony Usry attached thereto. (RE 40; 42; 44). On May 8, 2007, the trial court denied Edwards' supplement to her motion for a new trial. (RE 35; 48).

On May 29, 2007, Edwards filed a Motion to Reconsider Order Denying Supplement to Defendant's Motion for a New Trial or Judgment of Acquittal. (RE 49; 36) On June 4, 2007, the trial court denied the motion to reconsider with the order being filed with the clerk on June 5, 2007. The trial court based its denial of the supplement to the motion for a new trial "in part on the fact

that the Court polled the jury and the jurors indicated that the verdict of the jury was also their individual verdict, the Court denied the motion.” Judge Smith, ruled

“It is the opinion of the Court that the law is clear and an evidentiary hearing is not necessary in this matter. According to Mississippi Rules of Evidence 606(b), a juror is not a competent witness to impeach the validity of the jury’s verdict following trial. The only exception is where there is an allegation that extraneous extrajudicial information was improperly brought before the jury.”

The court went on to state that Edwards’ motions did not contain such allegations and were therefore dismissed. (RE 51; 38).

On June 14, 2007, Edwards filed her Notice of Appeal and Designation of Record. (RE 53; 55). Present counsel, Johnnie E. Walls, Jr., subsequently filed Edward’s brief with this Court raising the following issues:

Whether the court was in error by failing to grant the appellant a judgment of acquittal, a judgment notwithstanding the jury verdict or a new trial when the record shows that the polling of the jury failed to verify a verdict of guilty as reported by the jury and accepted by the court thereby denying the appellant a fair trial?

Whether the jury’s abandoning the court’s instructions that a verdict shall be unanimous and using the majority rule to reach a verdict constituted the introduction of extraneous prejudicial material into the jury deliberations thereby denying the appellant a fair trial and whether the failure of the court to conduct an evidentiary hearing to determine whether the appellant was entitled to a judgment of acquittal or a new trial was error?

Whether the cumulative effect of errors warrants reversal of conviction and sentence?

SUMMARY OF THE ARGUMENT

The trial court properly denied Edwards' post trial motions, including the motion for a judgment notwithstanding the verdict or a new trial, the supplement to the motion, and the motion to reconsider. Even though the trial transcript is silent to the audible responses of the three of the jurors, the record as a whole indicates the jurors confirmed in some nonaudible manner that the verdict of the jury was also their verdict. After the jury was polled, the trial judge and attorneys agreed the verdict was unanimous.

Edward's trial counsel failed to object to the responses to the jury poll at the time of trial and in her Motion for a New Trial or Judgment of Acquittal, therefore she is procedurally barred from raising it on appeal.

Edwards contends that because the court denied her an evidentiary hearing to investigate her claim of jury misconduct she is entitled to a reversal of the verdict or a new trial. It has long been held in this state that a juror cannot testify to impeach the jury's verdict, unless there is an outside influence or extraneous prejudicial information presented to the jury. Edwards failed to provide sufficient evidence to conclude good cause existed to believe that such improper outside influence or extraneous prejudicial information was improperly brought before this jury, and therefore she is not entitled to an evidentiary hearing.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED EDWARD'S ALTERNATIVE MOTION FOR NEW TRIAL OR JUDGMENT OF ACQUITTAL; SUPPLEMENT TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL; AND MOTION TO RECONSIDER ORDER DENYING SUPPLEMENT TO DEFENDANT'S MOTION FOR A NEW TRIAL OR JUDGMENT OF ACQUITTAL.

In her first assignment of error, Edwards' contends the trial court should have granted her a judgment of acquittal, judgment notwithstanding the verdict or new trial because the polling of the jury failed to verify a unanimous verdict, since the record did not show affirmative audible responses from each juror. In support of this argument, Edwards directs the court's attention to two occurrences: (1) the affidavit of Juror Anthony Usry and (2) the trial transcript recording the polling of the jury.

Edwards directs the court's attention to Usry's affidavit as proof that extraneous prejudicial information was introduced to the jury. (Appellant's Brief 9-10). His affidavit alleges the jury's verdict was reached by majority vote and was not a unanimous decision. Edwards argues that because the court instructed the jury to base its verdict on a unanimous decision, the jury's alleged use of a majority vote 'was contrary to the law' and thus 'extraneous prejudicial information was introduced to the jury.' (Appellant's Brief 9-12). Edwards seemingly uses the trial transcript as both support for the truth of the allegations asserted in the affidavit" and as an alternative argument that even if there was no affidavit attesting to these allegations the jury was improperly polled since the transcript does not reflect affirmative audible responses from each juror."

In support of her contention, Edwards cites (1) *Gatewood v. Sampson*, 812 So.2d 212, (Miss.2002); (2) *State v. Taylor*, 544 So. 2d 1387 (Miss. 1989); and (3) *McLarty v. State*, 842 So. 2d 590 (Miss. 2003).

State v. Taylor, 544 So.2d 1387 (Miss. 1989), is more supportive of the State's position. In *Taylor*, the Court considered the issue of whether a trial court could instruct jurors to continue deliberations after a verdict had been received and ordered filed. The *Taylor* trial court received a 'not guilty' verdict from the jury, announced the verdict and ordered it filed in open court. After the court ordered the verdict filed, the State requested the court poll the jury. Upon polling the jury, the court discovered one juror did not agree with the verdict and thus directed the jury to continue deliberations. This second verdict found the defendant 'guilty.' The Court reversed the trial court's acceptance of the second verdict holding that 'because the jury returned in proper form a verdict of not guilty which the Circuit Court received and ordered filed, the accused stands effectively and irrevocably acquitted and the subsequent jury deliberations of no effect.'

In *McLarty v. State*, the Court decided the issue of whether a trial court must poll jurors at the defendant's request. In *McLarty*, the court received a 'guilty' verdict from the jury. After the verdict was announced in open court, defendant's counsel requested the jury polled but the court denied this request. The Court held the trial court's denial was reversible error observing that 'although defendant's counsel was tardy in his request for a jury poll, the jury was still in the courtroom.' In reaching its decision, the Court described the three-fold purpose of polling a jury: (1) to give each juror an opportunity to declare in open court his assent to the verdict, (2) to give the court and parties an opportunity to discern whether the jury has reached an unanimous verdict and (3) to give the court and parties an opportunity to ascertain whether a juror has been coerced or induced to agree to a verdict. *Id.* at 592.

In the present case, the jury was polled in open court immediately after the verdict was announced; the court's action did not go against the procedure outlined in *Taylor*. Moreover, Edwards did not request the jury poll, the court decided to do so on its own motion, therefore the

court's action could not have defied the *McLarty* holding.

A. Edwards is procedurally barred from raising the issue on appeal.

In *Edwards v. Roberts*, 771 So.2d 378, 384 (Miss.App.2000) and *Griffin v. State*, 565 So.2d 545, 550 (Miss. 1990), it was held that a trial judge had no authority to revoke his earlier order for a new trial. The *Edwards* court citing *Griffin* opined:

“We start with the settled law that after a motion for new trial has been denied, no right exists to file for reconsideration. We find that reasoning equally applicable to motions for JNOV. “When the procedure authoring a motion for a new trial has been followed and, pursuant to proper notice, the parties have made their representations to the court, and the court has duly considered and made his decision upon that motion, that completes both the duty and prerogative of the court.”

In the case *sub judice*, Edwards' failure to object to the polling at trial and to raise the issue in her first motion for a new trial procedurally bars her from raising the issue on appeal. See *Galloway v. State*, 735 So.2d 1117 (Miss.App. 1999). On April 27, 2007, when Judge Smith denied Edwards' first motion for a new trial, the trial court lost authority to rule on the May 1, 2007 Supplement to the Motion for a New Trial and the May 29, 2007 Motion to Reconsider.

B. Edwards' trial counsel failed to make a timely objection.

Edwards asserts the unanimous verdict announced in open court was 'not verified on the record' arguing that 'upon polling the jury had the Court made sure each juror clearly answered his inquiries he would have known that three of the jurors did not answer affirmatively that they had voted for a guilty verdict.'

The trial transcript does not reflect an audible response from at least three jurors or an objection by Edward's trial counsel to such an occurrence.

The State contends that because Edwards failed to object at trial when the jury was polled and in her Defendant's Alternative Motion for a New Trial or Judgment of Acquittal, she is procedurally barred from complaining on appeal that three jurors did not answer the jury poll with

an audible response.

In *Commonwealth v. Banmiller*, 162 A.2d 354 (Pa. 1960), the defendant challenged the verdict alleging two jurors did not respond in a way that evidenced their assent to the verdict. In resolving the issue of whether the two jurors responded effectively, the court noted the following:

“...in the present case neither the defendant nor his counsel raised any question concerning the answers of the two jurors in question or requested that the jurors be interrogated further. It is clear that they were satisfied that the jurors did assent to the verdict. The Court was likewise satisfied from the manner of the jurors and all of the circumstances that their answers did indicate their assent to the verdict as stated by their foreman (forelady), and directed that the verdict be recorded.” *Id.* 356-57.

The court denied the defendant’s challenge and affirmed the lower court’s ruling. The *Banmiller* court relied on the defendant’s failure to object to the juror’s responses during the jury polling as support that the jurors effectively voiced their assent to the verdict.

Some courts go so far as to place a duty on the defendant to object before the jury is dismissed. In *Myles v. State*, 124 N.E.2d 205 (Ind. 1955), the defendant requested the jury polled after the verdict was announced in open court. The defendant’s counsel did not make any objections about the polling process until later during the defendant’s sentencing hearing. The *Myles* court responded to the defendant’s untimely objection stating ‘it was the duty of appellant to object to its return before the jury was discharged...if the court’s intrinsic record did not correctly state the proceeding at the time the jury was polled, it was the duty of appellant to bring the matter into the record...” *Id.* at 356-57.

In the present case, the defendant did not object to the jurors’ alleged failure to respond to the court’s poll until she filed her “Supplement to Motion for a New Trial, or Judgment of Acquittal and Motion for Reasonable Bail Pending Appeal” at least fifteen days after the verdict was announced and the jury was polled and discharged. Defendant’s objection was not even included

in the original “Motion for a New Trial, or Judgment of Acquittal and Motion for Reasonable Bail Pending Appeal.”

B. Edwards’ trial counsel failed to make a timely objection.

Edwards asserts the unanimous verdict announced in open court was ‘not verified on the record’ arguing that ‘upon polling the jury had the Court made sure each juror clearly answered his inquiries he would have known that three of the jurors did not answer affirmatively that they had voted for a guilty verdict.’

The trial transcript does not reflect an audible response from at least three jurors or an objection by Edward’s trial counsel to such an occurrence.

The State contends that because Edwards failed to object at trial when the jury was polled and in her Defendant’s Alternative Motion for a New Trial or Judgment of Acquittal, she is procedurally barred from complaining on appeal that three jurors did not answer the jury poll with an audible response.

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In the present case, the defendant did not object to the jurors' alleged failure to respond to the court's poll until she filed her "Supplement to Motion for a New Trial, or Judgment of Acquittal and Motion for Reasonable Bail Pending Appeal" at least fifteen days after the verdict was announced and the jury was polled and discharged. Defendant's objection was not even included in the original "Motion for a New Trial, or Judgment of Acquittal and Motion for Reasonable Bail Pending Appeal."

C. The trial court correctly concluded each juror confirmed the verdict announced in open court was also their verdict.

Even if Edwards had made a timely objection, the challenge was not warranted. Edwards contends 'the rule and procedure regarding polling of the jury presupposes the court would assure jurors give an audible response...' and that because the record does not reflect an affirmative audible response from all jurors 'the only conclusion to be reached is that those jurors that failed to give an affirmative audible response did not agree with the verdict.' The State asserts that the only conclusion to be reached is that the three jurors affirmed their verdict. The trial judge and defense attorney both stated the verdict was unanimous. Edwards motion for a new trial filed by Martin Kilpatrick, her trial counsel, states "3. When said trial was concluded on April 16, 2007, the persons selected as regular jurors returned into Open Court after deliberations, with a unanimous verdict of

“Guilty”.” (RE 37).

In *Thomas v. State*, 549 S.E.2d 408 (Ga.2001), the court held that despite one juror’s inaudible response to the trial judge’s question regarding his assent to the verdict, the verdict was unanimous. In *Thomas*, the record indicated one juror did not give an audible response to the court’s question of ‘whether she heard the verdict read, whether it was her verdict then, and whether it was her verdict now.’ *Id* at 411. The court was not swayed by this revelation stating ‘although the record did not reflect an audible response, the record also did not reflect the juror disagreed with the verdict. *Id*. In ruling there was no reversible error, the court went on to note that ‘defense counsel was present at the polling of the jury, but did not object to the lack of a verbal response from the juror.’ *Id*.

II. THE TRIAL COURT PROPERLY EXCLUDED THE JUROR’S AFFIDAVIT AND DENIED EDWARDS AN EVIDENTIARY HEARING TO DETERMINE POSSIBLE JURY MISCONDUCT.

Edward’s second argument raises two issues: (1) whether an allegation by a juror that the jury’s verdict was based on a majority vote rather than a unanimous decision constitutes the introduction of extraneous prejudicial information to the jury and (2) whether submitting an affidavit alleging juror misconduct is sufficient to require the court to hold an evidentiary hearing on the matter.

A. The trial court correctly concluded good cause did not exist to believe an improper outside influence or extraneous prejudicial information was introduced to the jury and therefore properly denied Edwards request for an evidentiary hearing on the matter.

In *Gladney v. Clarksdale*, 625 So.2d 407 (Miss. 1993), the Court provided Mississippi courts with the method for determining when a trial court must hold an evidentiary hearing to determine if extraneous prejudicial information was introduced to the jury:

“Once an allegation of juror misconduct arises, then the next step is to consider whether an investigation is warranted. In order for the duty to investigate to arise, the party contending there is misconduct must make an adequate showing to overcome the presumption in this state of jury impartiality. *At the very minimum, it must be shown that there is sufficient evidence to conclude that good cause exists to believe there was in fact an improper outside influence or extraneous prejudicial information.* The sufficiency of such evidence shall be determined by the trial court if a post-trial hearing is indeed warranted under these standards. In the absence of a threshold showing of external influences, an inquiry into the juror verdict is not required. When the threshold showing is made under the standards previously outlined, the court should conduct a post-trial hearing.” *Id.* at 418-20.

The *Gladney* court, citing *Gatewood v. Sampson*, 812 So.2d 212 (Miss.2002) considered the propriety of a juror’s testimony asserting another juror’s alleged misconduct. One juror reportedly told jurors he tested information received from one of the state’s witnesses and concluded the state’s witness was correct. The court concluded *this evidence did not constitute an extraneous influence and therefore was not enough to satisfy the threshold showing that ‘the jury was improperly exposed to extraneous prejudicial information or outside influence.’* *Id.* at 412.

B. The allegations of juror misconduct provided in Juror Usry’s affidavit did not constitute extraneous information.

The appellate courts have provided numerous examples of alleged juror misconduct that did not constitute an extraneous influence on the jury; many of these examples are provided in the authorities Edwards uses to support her brief.

In *United States v. Ortiz*, 942 F.2d 903 (Tex. 1991), the court considered facts similar to the case at bar. The *Ortiz* court ruled a juror’s affidavit could not be used to impeach the jury’s verdict. In *Ortiz*, the court considered the propriety of three juror affidavits claiming the verdict was not based on a unanimous vote contrary to the court’s instruction for the verdict to be based on a unanimous vote. All three affidavits asserted jury members did not reach a unanimous verdict

despite the court's instruction. The *Ortiz* court held the jurors' affidavits were expressly barred by the rule because the jurors' affidavits dealt with a juror's state of mind and/or the process of their deliberations.

In *Perkins v. Dauterive*, 882 So.2d 773 (Miss. 2004), the Court provided some clarity the type of juror conduct that introduces extraneous information to the jury. In *Perkins*, one juror reportedly told other jury members if they found the doctor liable he would lose his medical license or have his license suspended. *Id.* at 780. This was a medical malpractice case. Before concluding the juror's statement did not introduce extraneous information to the jury, the court provided instruction on the extraneous information. *Id.* at 782-83. The *Perkins* court cited to *Brake v. Speed*, 605 So.2d 28, 37 (Miss.1992), where the court stated that "it does not matter that information outside the record is provided by a fellow juror as opposed to some other person... *[i]f the [extraneous] information is outside the record of proceedings in open court, it is an outside influence under the rule.*"

The court continued with its explanation of extraneous information citing to *APAC-Miss. Inc. v. Goodman*, 803 So.2d 1177, 1186 (Miss.2002), where the jurors informed the court that they used the quotient verdict method for calculating damages. *Despite the fact that quotient verdicts are not permitted in Mississippi, the court held the jurors' use of the method was not an external influence.* The court also cited to *Payton v. State*, 897 So.2d 921 (2003), as yet another example of juror conduct that did not introduce extraneous information to the jury.

In *Payton*, the defendant requested the court admit two jurors' affidavits to support its motion for a new trial. One juror's affidavit asserted some of the jurors knew one of the key witnesses against the defendant and told other jurors that this witness would not lie. *Id.* 953. The other affidavit asserted the juror misunderstood the court's instruction believing the jury had to

return a unanimous verdict on each count. The trial court ordered the two affidavits inadmissible; the court affirmed its decision.

As to the first affidavit, the *Payton* court held '*there was no evidence that someone outside the twelve jurors did something to influence their deliberations.*' The court reasoned the defendant's proposed affidavit and other evidence related to 'things that some jurors told other jurors during the deliberative process; came from the jurors' own knowledge of the facts and witnesses; and in no way related to extraneous information supplied from outside the jury room.' Regarding the second affidavit, the *Payton* court reasoned that '*jurors' misconceptions regarding the voting process are a matter personal to those jurors and therefore improper evidence to impeach their verdict.*' *Id.* at 956.

Another example of how this court defines extraneous information is found in *Gavin v. State*, 767 So.2d 1072 (Miss. 2000). In *Gavin*, the defendant wanted to introduce testimony from a juror alleging three jurors were confused about the court's jury instructions because they thought they could not go home until the jury reached a unanimous verdict. The trial court would not allow the juror to testify regarding the matter. In affirming the trial court's decision, the Court implicitly found the jurors' alleged confusion over the jury instructions was not an extraneous influence stating that '*even if three jurors were confused by this very simple instruction, the trial court correctly refused to allow interrogation of the jurors in the absence of extraneous prejudicial information or outside influence.*'

Juror Anthony Usry's affidavit asserted the jury's verdict was reached by majority vote contrary to the court's instruction for the jury to reach a unanimous decision. Edwards' major contention is that such conduct by the jurors introduced extraneous prejudicial information to the jury since basing the decision on a majority vote was contrary to the instructions given by the court.

Her argument is without merit because information or testimony concerning how the jury reached its verdict during the deliberation process does not constitute an extraneous prejudicial influence on the jury. Therefore, the trial court was not required to conduct a post-trial hearing because Edwards, relying on Juror Usry's affidavit, did not make the threshold showing of external influence.

III. THERE WAS NO CUMULATIVE EFFECT OF ERRORS TO WARRANT A REVERSAL OF CONVICTION AND SENTENCE.

Edwards argues that the cumulative effect of errors by the trial court demonstrates that she was not afforded a fair trial. Inasmuch as there is no merit to Edwards' assignments of error, this issue has no merit either.

CONCLUSION


In conclusion, without Juror Anthony Usry's affidavit, which is excluded under the Mississippi Rules of Evidence 606(b), Edwards has no factual or legal basis to argue she should be awarded a new trial.

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's verdict and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 20th day of June, 2008.



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