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Date: October 1, 2024

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089469

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from an Order of
	:	the Superior Court of New
v.	:	Jersey, Appellate Division
	:	
EBENEZER BYRD,	:	
	:	
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Michael J. Haas, J.A.D.
	:	Hon. Greta Gooden Brown, J.A.D.
	:	

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

For this supplemental brief, defendant Ebenezer Byrd relies on the Procedural History in his principal Appellate Division brief, with the addition of two events subsequent to the filing of that brief. On May 20, 2024, the Appellate Division affirmed all of defendant's convictions but remanded the matter for resentencing. (Pa 1 to 114)[1]. Then, on September 20, 2024, this Court entered an order granting defendant's petition for certification on one issue: "the challenge to the adequacy of the trial court's response" to allegations of misconduct by Juror 8. (DSa 1 to 2)

STATEMENT OF FACTS

For this supplemental brief, defendant notes that the Statement of Facts in his principal Appellate Division brief addresses the facts of the underlying homicide/robbery matter for which defendant was convicted. Because those facts do not bear on the juror-misconduct/voir-dire issue at hand, they are not repeated here, and the facts pertaining to that issue are discussed in the Legal Argument that follows.

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[1] Da – appendix to defendant's Appellate Division brief
Db – defendant's Appellate Division brief
Pa – appendix to defendant's petition for certification
DSa – appendix to this supplemental brief

LEGAL ARGUMENT

POINT I

DEFENDANT BYRD'S RIGHTS TO DUE PROCESS AND AN IMPARTIAL JURY WERE VIOLATED WHEN THE TRIAL JUDGE CONDUCTED AN INADEQUATE VOIR-DIRE PROCEDURE REGARDING MID-TRIAL ALLEGATIONS OF JUROR MISCONDUCT.

The issue before the Court relates to the trial judge's handling of a report that a juror was engaging in misconduct and had predecided the case. The issue arose as follows. Mid-trial, on February 19, 2019, in a sidebar conversation in open court, with the entire jury in the courtroom, the judge stated that "information. . . has been brought to certainly the Court's and counsel's attention with regard to Juror 8." (15T 123-9 to 130-1) No one stated on the record at the time what the "information" was, but the judge then conducted a cursory voir dire of that juror, at sidebar, that consisted only of the following questions about her actions: (1) whether any of her answers to the original jury voir dire questions had changed (answer: "No"); (2) whether she had "been in contact" with "any posting or newspaper articles" about the case (answer: No"); (3) again whether any of her answers to voir dire questions had changed (answer: "No"); (4) whether she could still be fair and impartial (answer: "I can"). (15T 125-19 to 126-20) Defense counsel objected that the judge failed to: (1) conduct individualized voir dire with each of the jurors to "see if they have talked to her"

about the allegations (15T 123-23 to 124-4); (2) "inquire about some of the specific allegations," (15T 124-10 to 12); (3) "inquire as to whether she discussed this case at work" (15T 127-20 to 22); and (4) excuse the juror for cause. (15T 128-8 to 14) Defense counsel renewed their objections at the end of the day, to no avail. (15T 199-21 to 200-7)

Because the record was unclear as to what the allegation of misconduct was, on appeal undersigned counsel for defendant Byrd moved for a limited remand, and the Appellate Division granted the motion and ordered the trial judge to make factual findings on the issue. At that remand hearing, defendant's trial attorney recalled that the allegation was that the juror discussed the case with someone at work and not only said the jury was "going to teach those three [defendants] a lesson," but also used a racial slur (the "N" word) against the defendants. (29T 10-16 to 21) The prosecutor insisted that there was no allegation of a racial slur, but that the claim was that the juror "had spoken with someone else about the case outside of. . . the courtroom." (29T 12-23 to 13-3) The judge resolved that factual dispute by first finding that the allegation of misconduct had "absolutely nothing to do with race or any type of derogatory term at all" (29T 17-2 to 5), and, second, by reading into the record the exact allegations that he had received, recounted in emails and text messages. (29T 20-20 to 22-21)

First, the judge read an email from "Rachel" -- secretary to defendant Byrd's trial attorney -- to the judge's secretary, "Melissa," which stated that Rachel had

received a call from the Monmouth County Public Defender's office telling her that "Stephanie" from that office had received a call "from an unidentified woman" who said she would call back and who said that a juror on the case had "been Googling and texting Ebenezer [Byrd] and all his friends." (29T 20-20 to 21-10) Then the judge read back-and-forth texts between Melissa and "Cynthia" -- the judge's court clerk -- in which Cynthia told Melissa that she had called the Public Defender, spoken to Stephanie, and gotten "more detailed information" that might cause the judge's "head . . . to explode." (29T 21-11 to 25)

Those text messages from Cynthia to Melissa indicated that Stephanie had told Cynthia that she received a call from a "Ms. Worthy" who told her that Juror 8,[2] Lynn Tallman, who works at Monmouth Medical Center with a friend of Ms. Worthy, "has been Googling the case, showing articles to and talking about it with other people, and has already decided she's going to find them all guilty and going to burn their asses." (29T 22-7 to 17) (emphasis added) The judge then reiterated that there was "absolutely nothing" to indicate a racial angle to the allegations. (29T 22-22 to 23-7)

Because, in light of the findings on remand, it is clear that the judge

[2] Cynthia reported in her text to Melissa that she believed Tallman "is juror number 15" but the judge determined, and counsel does not dispute, that Tallman was Juror 8. (29T 22-12 to 13) Indeed, one of the few details in the original transcript from trial was that trial counsel agreed with the judge that the matter involved Juror 8, not Juror 15. (15T 127-12 to 18)

unreasonably refused both to conduct a proper voir dire of Juror 8 that would directly and specifically address the allegations and to individual conduct a voir dire of the entire jury to determine what those jurors had heard from Juror 8 along the same lines, defendant urged to the Appellate Division on appeal that his Sixth Amendment right to an impartial jury, his Fourteenth Amendment right to due process, and his corresponding state-constitutional rights were all violated. However, the Appellate Division disagreed. In a decision that is discussed in more detail, infra, in this point, that court held that the vague questioning of Juror 8 by the trial judge was sufficient to pass appellate review. (Pa 90 to 104) Because that ruling was completely out-of-step with New Jersey precedent on the need for fact-specific voir dire in such a circumstance and also on the need to determine, through voir dire, whether the rest of the jury was tainted by this matter, defendant's aforementioned state and federal constitutional rights were violated and his convictions should be reversed and the matter remanded for retrial.

Both the State and Federal Constitutions guarantee a defendant the right to an impartial jury. U.S. Const. amend. VI, XIV; N.J. Const. art. I, ¶ 10. Those "similarly worded provisions ensure that everyone charged with a crime has an absolute constitutional right to a fair trial in an atmosphere of judicial calm, before an impartial judge and an unprejudiced jury." State v. Tyler, 176 N.J. 171, 181 (2003) (internal quotations and citation omitted). A "trial is poisoned at its inception if the jurors deciding the case cannot review the evidence

dispassionately, though the light of reason." State v. Fortin, 178 N.J. 540, 575 (2004). For these reasons, a "defendant's right to be tried before an impartial jury is one of the most basic guarantees of a fair trial." State v. Loftin, 191 N.J. 172, 187 (2007).

Because of the importance of this constitutional right, trial judges "in their gatekeeping role have a duty to 'take all appropriate measures to ensure the fair and proper administration of a criminal trial.'" Tyler, 176 N.J. at 181 (quoting State v. Williams, 93 N.J. 39, 62 (1983)). The "trial court's duty is to give life to that constitutional principle by impaneling a jury that 'is as nearly impartial as the lot of humanity will admit.'" Loftin, 191 N.J. at 187 (quoting State v. Jackson, 43 N.J. 148, 157-58 (1964), cert. denied, 379 U.S. 982 (1965)). This "high responsibility is placed on trial judges because the jury selection process is an integral part of the fair trial procedures to which every defendant charged with criminal wrongdoing is guaranteed by both the federal and state constitutions." Tyler, 176 N.J. at 181. The trial court thus "has an independent duty to act swiftly and decisively to overcome" potential juror bias. Williams, 93 N.J. at 62-63; see also State v. Morgan, 217 N.J. 1, 11 (2013).

When there is "the possibility of actual juror taint or exposure to extraneous influences (including jury misconduct and 'comments made to jurors by outside sources'), the judge must voir dire that juror and, in appropriate circumstances, the remaining jurors." State v. Bisaccia, 319 N.J. Super. 1, 13

(App. Div. 1999) , quoting State v. Scherzer, 301 N.J. Super. 363, 486-491 (App. Div.), certif. denied, 151 N.J. 466 (1997); see also State v. Bey, 112 N.J. 45, 89-90 (1988) (same). That voir dire procedure is well-settled:

> An appropriate voir dire of a juror allegedly in possession of extraneous information mid-trial should inquire into the specific nature of the extraneous information, and whether the juror intentionally or inadvertently has imparted any of that information to other jurors. Depending on the juror's answers to searching questions by the court, the court must then determine whether it is necessary to voir dire individually other jurors to ensure the impartiality of the jury. This determination should be explained on the record to facilitate appellate review under the abuse of discretion standard.

State v. R.D., 169 N.J. 551, 560-61 (2001) (emphasis added). "The trial court must act swiftly" via voir dire "to overcome any potential bias and to expose factors impinging on the juror's impartiality." Id. at 557-558, citing Bey, 112 N.J. at 83-84; see also State v. Brown, 442 N.J. Super. 154, 182 (2015) (same).

If the alleged improper influence has the capacity to prejudice the defendant, "the judge must conduct voir dire, preferably individually in camera, to determine whether any jurors were exposed to the information." Scherzer, 301 N.J. Super. at 487. In doing so, "the judge must make a probing inquiry into the possible prejudice caused by any jury irregularity, relying on his or her own objective evaluation of the potential for prejudice rather than on the jurors' subjective evaluation of their own impartiality." Id. at 488 (emphasis added).

Appellate review of a trial judge's actions when confronted with an

allegation such as here is measured on an "abuse of discretion" standard. R.D., 169 N.J. at 561; State v. Wakefield, 190 N.J. 397, 496-497 (2007). But it is important to note that the timing of the objection -- i.e., whether it comes during trial when the juror can easily be questioned, or only after trial -- is of critical importance. State v. Griffin, 449 N.J. Super. 13, 25 (App. Div. 2017). When, as here, the information regarding the juror was imparted to the judge during trial and counsel made timely objections, the judge's obligations, under R.D., Bey, Bisaccia, and other cases, regarding specific voir dire of the juror are immediate and significant, id.; conversely, when the judge learns of the alleged impropriety only after trial, the standard for recalling a juror for questioning is much higher. Id. at 21. Obviously, the R.D./Bey/Bisaccia standards apply here.

When this Court reviews the judge's questioning of the juror, it is important to note again what information was actually before the judge based on a direct conversation that the judge's court clerk had with Stephanie at the Monmouth County Public Defender. The first email -- from Rachel, defendant's attorney's secretary -- obviously contained some information that turned out not to be accurate: that the juror was texting defendant and his friends (29T 20-20 to 21-10), but the later text from the judge's own court clerk, Cynthia, to the judge's secretary, Melissa, made clear what the actual information, conveyed from Stephanie to Cynthia, was: that a woman named Worthy had alleged that Juror 8, whom she named, "has been Googling the case, showing articles and talking about

it with other people" and that Juror 8 "has already decided she's going to find them all guilty and [is] going to burn their asses." (29T 22-14 to 17)

That allegation -- particularly the latter portion about the juror's having predecided the matter and the juror's intent to "burn their asses" -- was appalling. (29T 22-14 to 17) Even the additional allegations that Juror 8 was talking to "other people" about the case and "Googling" information about it were significant. (29T 22-14 to 17) Yet the judge only asked three vague, generalized questions (one of them twice) of that juror: (1) whether any of her answers to the original jury voir dire questions had changed (asked twice, both answers: "No"); (2) whether she had "been in contact" with "any posting or newspaper articles" about the case (answer: No"); and (3) whether she could still be fair and impartial (answer: "I can"). (15T 125-19 to 126-20) None of those questions directly (or even indirectly) confronted the juror with the most serious of the allegations -- the predecided/"burn their asses" one -- and nothing about that voir dire, or the judge's refusal to individually voir dire the other jurors, came close to meeting the Bey/R.D./Bisaccia standard of "specific" inquiry into the allegations, particularly the most serious one.

Despite the shocking nature of the allegations, the voir dire of Juror 8 barely touched one of those topics: whether the juror had "been in contact" with "any posting or newspaper articles" about the case. Otherwise, the questions were so vague that one would have no idea what the judge is talking about were

it not for the existence of the remand transcript.[3] Moreover, the judge did nothing to ascertain whether the juror's alleged misconduct had affected the rest of the jury.

Bisaccia makes it clear that when it appears that a juror's impartiality is at issue, failing to address allegations of misconduct through a specific voir dire will necessarily be reversible error. 319 N.J. Super. at 11-15, citing Bey, 112 N.J. at 89-90, and Scherzer, 301 N.J. Super. at 486-491; see also State v. Weiler, 211 N.J. Super. 602, 609-612 (App. Div.), certif. denied, 107 N.J. 37 (1986) (reversing for inadequate voir dire); State v. Phillips, 322 N.J. Super. 429, 436-442 (1999), certif. denied, 182 N.J. 428 (2005) (same).[4] There could be no clearer indication of a juror's potential loss of impartiality than learning that the juror "has already decided she's going to find them all guilty and [is] going to burn their asses." (29T 22-15 to 17) Nothing about the judge's vague voir-dire reference to still being able to be "fair" did a thing to specifically address that issue.

In fact, the judge seemed, even at the remand hearing, not to understand

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[3] Indeed, as noted, the vague nature of the discussion with counsel and with the juror in the original transcript is what led undersigned counsel to move for a remand in the first place.

[4] In contrast, courts in New Jersey have also praised trial judges for: their "careful voir dire" that took place to dispel any notion of juror taint in a given case, State v. McGuire, 419 N.J. Super. 88, 154 (App. Div. 2011), and their specific questioning regarding a possibly tainted juror. Wakefield, 190 N.J. at 496.

that the most serious allegation was the predetermination/"burn their asses" one. At that hearing, he stated, unbelievably, "The allegation simply was that [Juror 8] had been texting and talking about the case." (29T 24-15 to 17) (emphasis added) Obviously, the allegation was much more than that, but the judge's statement in that regard provides this Court with an insight into why the judge did not ask a single question of Juror 8 that directly referenced the predetermination/"burn their asses" issue: he apparently did not think it was an important issue. He seems to have been focused only on "talking and texting about the case" -- and did not even ask any direct questions about that. All he asked about, in a roundabout way, was the "Googling" allegation, a voir dire that falls far short of the specificity required by the case law.

Moreover, because Juror #8 could have influenced the other jurors, if she had told anyone anything further about her views, the judge was required to voir dire the jurors to determine if Juror 8 had spoken to any of them regarding her views. R.D., 169 N.J. at 558; State v. Wormley, 305 N.J. Super. 57, 70 (App. Div. 1997). Without such voir dire, the State cannot affirmatively establish that Juror 8 did not have an impact on the jury; the alleged impropriety is thus presumed to be prejudicial, requiring reversal. Tyler, 176 N.J. at 181-183 (reversing convictions for improperly allowing a tainted juror merely to hear the case with other jurors even though she did not ultimately deliberate on it; because her presence may have influenced other jurors, prejudice was

presumed); State v. Sachs, 69 N.J. Super. 566, 588 (App. Div. 1961) ("If the record fails to show whether or not the irregularity was prejudicial, it is presumed to be so anyhow and to be cause for reversal."). Only individual voir dire of the panel was likely to uncover such influence. Bey, 112 N.J. at 86 n.26 (noting "that a practice of polling the jurors individually, in camera,[5] is likely to be more effective in uncovering any exposure than is questioning the jury en banc, in open court"). And though the remaining jurors did not volunteer that anything occurred that could have impacted their ability to be fair and impartial, that fact does not end the court's responsibility. Scherzer, supra, 301 N.J. Super. at 487.

So how did the Appellate Division go so wrong in its decision? That court seemed fixated on the lack of credibility regarding one part of the original message from Rachel, secretary to defendant's attorney, to the judge's secretary, Melissa: that Rachel's information, supposedly originating from Stephanie at the Monmouth Public Defender, was that the juror in question had been "texting Ebenezer [Byrd] and all of his friends" (29T 21-6 to 7) when, obviously, defendant was in custody at the time and unable to receive a text. (Pa 101) But,

[5] The fact that the voir dire of this juror took place at sidebar, in full view of the entire jury, rather than in camera, is nowhere near the top of the list of errors made, in terms of importance, but this Court's opinion in this case could give significant guidance to judges handling future issues of this type by noting that an in camera voir dire procedure is the best practice in the future for dealing with this type of issue.

as noted, that piece of information immediately turned out to be wrong, a misstatement made by Rachel. When Cynthia, the court clerk, went to the source of that tip -- Stephanie from the Monmouth Public Defender -- it turned out that the message from Ms. Worthy to Stephanie said nothing about texting defendant or anyone else. It said that the juror had been "Googling" and discussing the case with others, to whom she was showing articles, and that the juror had "decided she's going to find them all guilty and going to burn their asses." (29T 22-14 to 17)

The Appellate Division's fixation on that one red herring had an unfortunate domino effect on the analysis contained in the rest of that part of the opinion. The court spent several pages thereafter discussing what it declared to be a novel proposition in New Jersey law: that a judge has the discretion not to conduct a voir dire if an allegation of juror misconduct is wholly implausible. (Da 101 to 103) Then the court stated that because the "texting Ebenezer [Byrd] and all of his friends" statement was utterly implausible, the entire issue of Juror 8's potential misconduct was so worthy of a judge's skepticism that the judge was well within his discretion not to explore the actual allegation that Juror 8 had predetermined the outcome and declared she was going to "burn their asses" remark. (Da 103 to 104)

The problems with that approach are multi-faceted. First of all, there is absolutely nothing novel about the notion that a New Jersey judge could ignore

a wildly implausible allegation of juror misconduct. This Court said so in Bey in 1988 when it specified that the first thing the judge should do is assess the "capacity" that the allegation has to prejudice the outcome -- what the Court called the "realistic possibility" of such an effect. 112 N.J. at 84, 86. Obviously, if the court receives a call that a juror is communicating with Martians who are pushing her toward a particular verdict, the judge would be well within his or her right under Bey to dismiss such an allegation as preposterous and move on without conducting a voir dire of that juror. Such an allegation has no "realistic possibility" of being true and thus no "capacity" to affect the verdict, to use the language of Bey. But an allegation that a juror has predetermined the outcome, has such hostility toward the defendants that she is going "to burn their asses," and has been Googling the case and discussing it with others is a very different matter than Martians. Secondly, as noted, the "texting" claim was immediately proven to have been a misstatement by Rachel when recounting her conversation about the matter. Even if that claim were utterly implausible, it simply was not actually part of what Ms. Worthy had said to Stephanie, according to Stephanie herself! Thus, contrary to the Appellate Division, the judge was not actually facing "conflicting claims of misconduct" (Pa 104) of which one was wholly implausible; rather, he was faced with serious, specific charges that a juror had predetermined the case, and he did nothing to investigate that claim via the very route prescribed in the case law -- voir dire of the juror herself that addresses

the specific allegation. Indeed, as noted elsewhere in this brief, the actual nature of the allegations -- once confirmed by a phone call from Cynthia, the judge's court clerk, to Stephanie at the Monmouth Public Defender -- were so serious that Cynthia wondered in a text to the judge's secretary if they would make it "look like [the judge's] head is going to explode." (29T 21-23 to 25) The Appellate Division's analysis of the issue -- and, for that matter, the trial judge's minimalistic, overly-generalized approach to the voir dire of Juror 8 -- is so significantly in conflict with the well-established approach of R.D., Bey, and Bisaccia that it should not stand.

Here the trial judge failed badly in his role as "gatekeeper" of the impartiality of the jury and the fairness of the trial. Tyler, 176 N.J. at 181. The voir dire of Juror 8 was far too vague and failed to specifically address the substantial allegations of her bias and misconduct. Moreover, no effort was made to determine if other jurors had been tainted by the views or conduct of Juror 8. In each instance, defense counsel objected strenuously to the court's inaction.

Consequently, defendant was denied his right to an impartial jury and due process, as guaranteed to him by the state and federal constitutions. The decision under review and defendant's convictions should be reversed and the matter remanded for retrial.

CONCLUSION

For all of the reasons set forth in this brief, the Appellate Division decision and the defendant's convictions should be reversed, and the matter remanded for retrial.

Respectfully submitted,

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