

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1888-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERVWAKINE B. PRYOR, a/k/a
ERR SMITH, ERUWAKINE
PRYOR, ERUNAKIN SMITH,
ERVWAKIN SMITH,
ERV SMITH, and
ERVWAKINE SMITH,

Defendant-Appellant.

Submitted October 11, 2023 – Decided October 18, 2023

Before Judges Haas and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 17-09-2451
and 17-09-2452.

Joseph E. Krakora, Public Defender, attorney for
appellant (Dillon J. McGuire, Designated Counsel, on
the briefs).

Theodore Stephens, II, Acting Essex County Prosecutor, attorney for respondent (Emily M. M. Pirro, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a multi-day trial, a jury convicted defendant Ervwakine B. Pryor of murder, possession of a weapon for an unlawful purpose, disturbing human remains, animal cruelty, and certain persons not to have weapons. The trial court sentenced defendant to an aggregate term of seventy-five years in prison, subject to fifty years of parole ineligibility.

On appeal, defendant raises the following contentions:

POINT I

THE TRIAL COURT'S DISCHARGE OF JUROR NO. 7 WHILE THE JURY WAS DELIBERATING, UNDER CIRCUMSTANCES DEMONSTRATING THAT THE REMOVAL WAS INDISPUTABLY RELATED TO THE DELIBERATIVE PROCESS, WAS AN EGREGIOUSLY PREJUDICIAL ERROR AND MANDATES A NEW TRIAL.

POINT II

THE ADMISSION OF TESTIMONY BY DEFENDANT'S DAUGHTER THAT DEFENDANT HAD HIT HER ON THE HEAD WITH A HAMMER VIOLATED N.J.R.E. 404(b); THAT EVIDENCE WAS IRRELEVANT TO ANY MATERIAL ISSUE IN THE CASE AND WAS FAR MORE PREJUDICIAL THAN PROBATIVE.

POINT III

THE SENTENCE IMPOSED ON DEFENDANT WAS MANIFESTLY EXCESSIVE.

For the reasons that follow, we reverse and remand for a new trial because the trial court misapplied its discretion by discharging one of the jurors and substituting an alternate juror after the jury had begun deliberations.

I.

At the conclusion of the trial, the jury began its deliberations and conferenced for approximately three hours. The next day, the jury asked for a read-back of some testimony. However, the jury advised the court shortly before the lunch break that it no longer wanted to listen to a read-back.

About an hour after resuming deliberations, the jury sent a note to the trial court that stated, "[w]e need advice from the [court] as at the moment we're at an impasse." In response, the court instructed the jury as follows:

This is far too early to even think about an impasse. I would suggest that you go over the evidence all together as a jury does, listen to each other's views, don't change your minds if you feel there's no reason to change them but try to view the evidence towards drawing a conclusion.

Now, I know from this note, I don't know if impasse means you're in impasse on everything or you're in impasse on some things, I don't know, I'm not going to ask. I'm not going to draw an interpretation of it

because there may be some things you all agree on and some things you don't agree on, I don't know, but perhaps because this has been such a disjointed day maybe you just need to go home and come back tomorrow and then just have a full normal day of just deliberations and see where you go from there because for the length of time this case came forward you really -- you've only really been deliberating for about five and a half hours and the case was tried over a period of, even taking out, you're talking about four or five days.

The next day, the jury returned to court and resumed its deliberations. At 2:51 p.m., the jury sent the court another note. This one stated: "Juror No. 7 has just accused the rest of the jury of racism and is refusing to consider the evidence in the case."

The court conferenced the matter with the attorneys. The prosecutor asked the court

to voir dire the jurors one by one and see if each juror thinks this is the case, that Juror No. 7 did, in fact, accuse the rest of the panel of being racist and then also ask Juror No. 7 if he, in fact, made that accusation and whether or not it's, in fact, true that he is refusing to consider the evidence and take it from there.

Defense counsel replied that based on "the conversation regarding any racism, . . . the jury is tainted . . . in their deliberations" and she asked for a mistrial.

The court agreed to voir dire all the jurors, starting with Juror No. 7.

When Juror No. 7 entered the courtroom, the court had the following colloquy with him:

THE COURT: Okay. Hello, Mr. -- please be seated. Juror No. 7, I've received a note. Did you call the rest of -- are you refusing to participate in considering the evidence in this case?

JUROR NO. 7: Not at all, Your Honor.

THE COURT: Okay. Have you accused the rest of the jury of anything?

JUROR NO. 7: Yes, I have, Your Honor.

THE COURT: Okay, and could you state what you have accused them of?

JUROR NO. 7: I --

THE COURT: Have you called -- have you accused them of racism? Let me just ask the question.

JUROR NO. 7: No, I haven't, Your Honor.

The court asked Juror No. 7 no further questions about the allegation that he had accused any of the other jurors of racism. The court made no credibility findings concerning the juror's blanket denial of this accusation.

Instead, the court proceeded to ask Juror No. 7 for more information about what was transpiring in the jury room. The juror made clear that he had a

problem with the way in which the jurors were conducting their deliberations.

Juror No. 7 explained:

What I stated to the jury back there is immediately after we walked out of here and walked in there they -- one person bulldogged the situation and said whoever feel[s] he's guilty, raise your hand. Immediately, without even saying a word about anything. Now, I don't -- you know, it's my part -- guilty or not guilty, that's not the way you do it because you created a division in the group. Nine -- well, anyway, it created a division in the group and I feel that that was unfair to do.

The court then told Juror No. 7, "Okay. So, you feel the way deliberations took place, that's not the way you would do them?" Juror No. 7 replied, "I don't feel that -- no, no."

The court next asked the juror, "Okay, and is it fair to say that you do not think, at this point, that you could fairly and impartially review the evidence in this case?" The juror began to respond, but the court told him, "It's a yes or no question." The following colloquy then occurred:

JUROR NO. 7: Excuse me, I'm sorry.

THE COURT: Okay. Do you feel at this point that from what has taken place you do not believe that you could fairly review the evidence fairly and impartially with the other jurors?

JUROR NO. 7: Yes, Your Honor.

THE COURT: Okay. No, that's the question. That's what I'm asking.

The court then asked counsel if they had any follow-up questions. The prosecutor did not. However, defense counsel said that Juror No. 7's response was not clear and she "wasn't sure" the juror said whether he could "continue to deliberate or not." The court interjected that the juror "said he couldn't." Defense counsel disputed that interpretation of the colloquy, and Juror No. 7 asked for a chance to speak, stating "No, what -- I would prefer, I mean, do I have a prefer in it, because --" The colloquy continued as follows:

THE COURT: No, you don't, that's --

JUROR NO. 7: -- I don't feel that they --

THE COURT: No, you don't. That's why I'm just asking. With what has gone on in the jury room, I don't need to know anything else, do you feel that you could continue with deliberations?

JUROR NO. 7: I feel that there would be a hinderance.

THE COURT: Okay, and that's --

JUROR NO. 7: Not on my behalf.

THE COURT: Right, on everyone else's behalf.

JUROR NO. 7: Perhaps, yes.

[(emphasis added).]

Although Juror No. 7's responses plainly demonstrated that any problem in the jury room were a product of the jurors' deliberations, and not any circumstances exclusively personal to Juror No. 7, the court immediately ended the colloquy:

THE COURT: Okay. All right, thank you. So, I am going to excuse you and ask -- and thank you, thank you very much for your service.

JUROR NO. 7: No problem.

The trial court then brought the remaining jurors into the courtroom one by one. The court read each juror the jury's earlier note to the court and told each juror that Juror No. 7 had been removed from the case. The court asked if the juror could fairly and impartially deliberate with the remaining jurors and one of the alternate jurors. Each juror stated they could do so. The court did not ask any of the remaining jurors whether they heard Juror No. 7 accuse anyone of racism. Therefore, the court made no credibility findings concerning any of the remaining jurors.

At the conclusion of this voir dire, defense counsel again moved for a mistrial. Defense counsel asserted that

[i]t seem[ed] like the jury usurped the [c]ourt in making a decision to ostracize one juror to get what the other jurors potentially wanted in the verdict one way or the other So, based upon that, . . . I most respectfully

renew my motion for a mistrial . . . as the jurors are taking the place of the [c]ourt in deciding who should stay and who should go.

The court denied defendant's motion, stating that each of the jurors "said that they could judge this case fairly and impartially with the understanding that [Juror No.] 7 has been removed and they must start their deliberations anew."

The court then called all the jurors back into the courtroom and selected one of the alternates to join the jury. Addressing the new jury panel, the court stated:

So, as you know, Juror No. 7 was excused from the jury. . . . [A]n alternate has been selected to take his place. The reason he was excused was, we're all clear about, and -- okay. . . . The reason that he was excused was entirely . . . because of a disruption in, I suppose -- because of what he accused others of. It has nothing to do with his relationship with the other members of the deliberating panel - - well, what was thought to be.

[(emphasis added).]

The court then excused the jury for the day. The next day, the jury returned its verdict after two hours of deliberation.

II.

On appeal, defendant argues that the record clearly shows that the trial court improperly dismissed Juror No. 7 solely because of issues he and the other jurors were having during their deliberations, rather than because of any

personal concern that prevented Juror No. 7 from functioning as a member of the jury. As a result, defendant argues that he is entitled to a new trial. The State concedes in its brief that an error occurred, but asserts that the appropriate remedy would be to remand the matter "so that the trial court can clarify its findings as to the dismissal of Juror [No.] 7."

We review, for an abuse of discretion, a trial court's decision under Rule 1:8-2(d)(1) to remove and replace a deliberating juror "because of illness or other inability to continue." State v. Musa, 222 N.J. 554, 565 (2015). To protect the right to fair jury trial, our Supreme Court has restricted "inability to continue" to matters that are personal to the juror, and unrelated to his or her interaction with other jurors. State v. Jenkins, 182 N.J. 112, 124-25 (2004); See also State v. Williams, 171 N.J. 151, 163 793 (2002). "[A]fter deliberations have begun, juror substitution 'should be invoked only as a last resort.'" State v. Jenkins, 182 N.J. 112, 126 (2004) (quoting State v. Hightower, 146 N.J. 239, 254 (1996)).

A court may not discharge a juror because he or she disagrees with other jurors. In State v. Valenzuela, 136 N.J. 458, 462-465 (1994), the trial court erred in removing a juror after she stated that fellow jurors were "ganging up" on her, they had a "different opinion" of the case, they were communicating to her that

she was a "hindrance," and the jury complained to the trial court that she was "very confused." See also State v. Paige, 256 N.J. Super. 362, 380-81 (App. Div. 1992) (stating that the trial court cannot replace a "disgruntled" juror "whose position is at odds with the rest of the jury").

However, a court may excuse a juror whose "emotional condition renders him or her unable to render a fair verdict." Williams, 171 N.J. at 164. For example, a trial court appropriately discharged a juror who complained she pictured her son as the defendant, and reported she was nervous, had a headache, "want[ed] to spit up," was "too emotional," and could not render a fair and just decision. State v. Trent, 157 N.J. Super. 231, 235-36 (App. Div. 1978), rev'd on other grounds, 79 N.J. 251 (1979).

In Jenkins, a juror had children the defendant's age. She said, "I just can't make a decision to put him in jail." 182 N.J. at 119. Although she said she was not "the emotional type," and stated in voir dire that she could be fair, she realized that, emotionally, she could not decide the case on the facts. Id. at 120-21. The Court held that the trial court appropriately discharged her. Id. at 127-28.

A juror who would decide a case based solely on a defendant's race violates her oath. A juror who would decide a case based solely on a personal identification or revulsion with a defendant, without regard to the

evidence, also violates her oath. A juror, as in this case, who announces that she cannot obey her oath, follow the law, and render fair and impartial justice cannot remain on the jury. . . . [A] juror who expressly states that she cannot be impartial or that she is controlled by an irrepressible bias, and therefore will not be controlled by the law, is unable to continue as a juror for purposes of Rule 1:8-2(d)(1), and must be removed from a jury.

[Id. at 128.]

The record must "adequately establish[]" the juror's inability to continue. Valenzuela, 136 N.J. at 472-73. At the same time, in ascertaining the reason why a juror wants to be excused, a court must avoid improperly intruding into the jury's deliberations. Musa, 222 N.J. at 569 (noting that the "questioning was limited to assessing circumstances personal to the jurors and not delving into the deliberative process"). The trial court must assess the juror's demeanor and interpret the juror's statement in context. See Williams, 171 N.J. at 169. The trial court is in the best position to assess the juror's "stress and concern." Id. at 170.

Applying these principles, we are convinced that the trial court should not have removed Juror No. 7 from the jury based upon the meager evidence developed during the short voir dire the court conducted. The jury sent the court a note stating that "Juror No. 7 has just accused the rest of the jury of racism and

is refusing to consider the evidence in the case." However, when the court questioned Juror No. 7, he denied ever making that accusation. The court asked no follow up questions on the subject, and never questioned any of the other jurors about it. The court made no credibility finding on the issue of whether Juror No. 7 made the accusation.

Instead, the court's further questioning revealed that the real reason, at least according to Juror No. 7, for the other jurors' concerns about him was the fact that he had objected to the manner in which the jury was conducting its deliberations. In this regard, the juror stated that another member of the jury had attempted to "bulldog[] the situation" by insisting on a quick vote without reviewing any of the evidence. Juror No. 7 told the court that he felt "that was unfair to do."

The court then asked Juror No. 7 a question about whether he believed he could be impartial. When the juror attempted to explain his answer, the court abruptly cut him off. The juror eventually told the court "there would be a hindrance" to continuing deliberations, but that that hindrance would not be on "[his] behalf." The court then stated it would be "on everyone else's behalf." With that, the court dismissed the juror from the panel.

The situation presented by the jury's note and the trial court's handling of it is clearly more akin to those of the jurors in Valenzuela than in Trent and Jenkins. The problem Juror No. 7 identified was not personal; instead, he was concerned that other jurors were immediately voting on the questions presented to them and not properly deliberating on the evidence before doing so. He denied making any comments about the other jurors. The juror also indicated that he would not have a problem continuing as a juror, although the other jurors might have one with him. Accordingly, we conclude that the court misapplied its discretion by discharging Juror No. 7 "under circumstances that bring into question the integrity of the jury's deliberative function." Valenzuela, 136 N.J. at 473.

The State contends that we should remand the matter "to allow the trial court to properly articulate why the juror was discharged, which would then allow this [c]ourt to assess whether those reasons were improper or not." We disagree.

The trial court in this case failed to create the record needed to "adequately establish[]" that Juror No. 7 "suffered from an inability to function that is personal and unrelated to the juror's interaction with the other jury members." Valenzuela, 136 N.J. at 472-73. Instead, Juror No. 7's responses to the trial

court's inquiries established that he had no personal problems with other jury members and that the issue was the manner in which the jury was conducting its deliberations. Thus, as in Valenzuela, the only appropriate remedy is a reversal of defendant's conviction and sentence and a remand for a new trial. Id. at 461.

In view of our decision, we need not address the other issues defendant has raised on appeal, specifically, his contention that the trial court improperly permitted defendant's daughter to testify about a prior bad act and his assertion that his sentence was excessive.

Reversed and remanded to the trial court for a new trial in accordance with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION