THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Jun 27 2022
S.C. SUPREME COURT

APPEAL FROM PICKENS COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2022-000661
Case No. 2017-CP-39-0428

John M. Burgess,.. Petitioner,

v.

Katherine Hunter,... Respondent.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Andrew F. Lindemann
Lindemann & Davis, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Respondent

STATEMENT OF THE CASE

This case involves a vehicular accident occurring on December 10, 2013, in Greenville County. The Petitioner John Burgess alleges that the Respondent Katherine Hunter was negligent in the operation of her motor vehicle thereby causing a collision with the moped that he was operating on Blue Ridge Highway. The liability of the parties was hotly contested. Both sides presented the testimony of accident reconstruction expert witnesses who presented differing theories on the mechanics and cause of the accident.

The case was tried before Circuit Court Judge Edward W. Miller and a jury beginning on June 25, 2018, in Pickens County. The trial lasted five days. The jury heard testimony from the parties, lay witnesses, and expert witnesses, including medical providers and the accident reconstruction experts. The jury ultimately returned a verdict finding both parties to be negligent and allocated 51 percent of the fault to the Petitioner, thereby barring his recovery. (R. 4-5).

As discussed in greater detail below, at the commencement of the second day of trial, the Petitioner's counsel raised an issue with the trial judge regarding his conduct during the preceding day of trial, specifically the judge's "facial expressions" while counsel was conducting his examinations of the Respondent and then the Petitioner. (R. 200). At that time, the Petitioner's counsel advised the court that "I'm not necessarily asking for any recusal or anything along those lines." (R. 200). The Petitioner did not at that point nor at any later time during the five-day trial make a request or motion, formal or informal, orally or in writing, for a curative instruction, for the recusal of the trial judge, or for a mistrial. There were also no other objections, contemporaneous or otherwise, made regarding the verbal or non-verbal conduct of the trial judge during the remainder of the trial.

On the fifth day of trial, the trial judge charged the jury, similar to the instruction given at the start of the trial, to the effect that the jury should not take anything the judge says or does to suggest that he has an opinion as to the facts of the case or the ultimate resolution. (R. 591). The Petitioner did not object to that instruction nor request any further instructions be given. (R. 609).

After the verdict was returned and the jury was discharged with the consent of the parties, the Petitioner made a motion for a new trial "based on the impropriety that was alleged or, essentially, put on the record early Tuesday morning and the same grounds -- same grounds for that motion." (R. 612). That was the extent of the motion made. After the Respondent's counsel briefly responded, the motion for new trial was denied. (R. 612).

The denial of that new trial motion was made on June 29, 2018. Thereafter, on July 10, 2018, which was more than ten days after the jury was discharged, the Petitioner filed an Amended Motion for New Trial raising the same ground as before and this time accompanied by an affidavit of Christopher Lee, who was one of the trial jurors. The Lee affidavit incorporated a letter that was purportedly written by the juror on July 1, 2018, after he had made contact with the Petitioner's counsel. (R. 8-9). That letter describes what the Petitioner challenges as the trial judge's "facial expressions, gestures, and lack of attention" given to his attorney while he presented the case. The letter also describes comments allegedly made by other jurors before and during jury deliberations and suggests how the trial judge's alleged conduct impacted other jurors and their decision-making. (R. 15-17).

On July 19, 2018, Judge Miller issued a Memorandum Opinion concluding that the Amended Motion for New Trial was not timely. In addition, Judge Miller ruled that the Lee affidavit was inadmissible under Rule 606(b), SCRE, and that there was no basis for granting a new trial. (R. 28-31).

The Petitioner thereupon filed an appeal to the South Carolina Court of Appeals. On February 2, 2022, the Court of Appeals issued an unpublished *per curiam* decision affirming the Circuit Court's order dismissing this action. *See*, *Burgess v. Hunter*, Op. No. 2022-UP-036 (S.C. Ct. App. filed February 2, 2022). The Petitioner filed a petition for rehearing which was denied by order filed April 21, 2022.

The Petitioner has now filed a petition for writ of certiorari with this Court.

ARGUMENTS

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues warrant review on a writ of certiorari. The Respondent submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion.

Second, the opinion of the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value.

Third, the decision of the Court of Appeals does not conflict with any existing decisions of this Court. In fact, the Court of Appeals cited to and correctly applied this Court's precedent in *Parks v. Morris Homes Corp.*, 245 S.C. 461, 141 S.E.2d 129 (1965).

Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to or bearing on other cases.

Based upon these considerations, there is no need for this Court to review the decision of the Court of Appeals.

II. The Petitioner failed to show that he was denied a fair trial based upon the alleged facial expressions, gestures, and "lack of attention" by the trial judge.

The Petitioner contends on appeal that he was denied a fair trial based upon the trial judge's alleged "facial expressions, gestures, and lack of attention" given to his attorney while he

presented the case. The Court of Appeals was correct, however, in concluding that the Petitioner "failed to preserve the issue regarding the trial court's facial expressions and gestures for appellate review." (Slip Op., p. 2).

A. Basic Principles of Law

From the outset, there are several elementary principles of law that establish the framework for this discussion. It is well settled that "[l]itigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials." *Aakjer v. Spagnoli*, 291 S.C. 165, 352 S.E.2d 503, 511 (Ct. App. 1987). "If a new trial was required every time a flaw or mere possibility of prejudice occurred, litigation would be unduly prolonged." *Id.* Moreover, "[p]erfection in human behavior is an unrealistic expectation. This principle applies as well to trial judges as it does to lesser mortals." *Id.* (Citation omitted).

Nonetheless, it is also true that a "trial judge must act with absolute impartiality in the performance of judicial duties." *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186, 187 (1994). Accordingly, a trial judge should refrain from remarks that "impugn the credibility of counsel" and "diminish him … in the eyes of the jury." *Id.* "Reference by a trial judge to an attorney's age, gender, or competence [is] improper." *Id.*

At the same time, a trial judge has the "inherent authority to manage and conduct a trial." *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5, 26 (2010). The Supreme Court has long recognized that "[a] trial judge is vested with a wide discretion in the conduct of a trial. He has the duty to see that the trial proceeds in an orderly fashion and should prevent unnecessary repetition, working to the end that the time of the court be preserved." *State v. DeBerry*, 250 S.C. 314, 157 S.E.2d 637, 641 (1967). As to the presentation of evidence, Rule 611(a) of the South Carolina Rules of Evidence dictates that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the

interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." *See*, Rule 611(a), SCRE.

Therefore, while needing to demonstrate impartiality, the trial judge must nonetheless manage the trial, and with that comes the need to admonish parties, witnesses, and counsel. In addressing the related issue of a judge's recusal based on partiality, the United States Supreme Court recognized that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994). An exception to that standard occurs where the judicial remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* The U.S. Supreme Court distinguished, however, "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Id.*

In sum, the standard for showing judicial bias or misconduct by the trial judge to vacate a jury's decision and require a new trial is necessarily a high one. It should and does present a strenuous burden to meet. That high burden has not been met by the Petitioner in this case.

B. Issue Preservation

The Court of Appeals has held that "[g]enerally, where bias and prejudice of a trial judge is claimed, the issue must be raised when the facts first become known and, in any event, before the matter is submitted for decision." *State v. Thomason*, 355 S.C. 278, 584 S.E.2d 143, 148 (Ct. App. 2003). Similarly, this Court has ruled that "[i]t is the general rule that prejudicial remarks in the course of a trial made by the court must be seasonably objected to and an exception noted, in the absence of which the question will not be ordinarily reviewed on appeal. In general, the

exceptions must be taken at the time the remarks are made." *Lipscomb v. Poole*, 247 S.C. 425, 147 S.E.2d 692, 697 (1966). This Court relied on its earlier decision in *Parks v. Morris Homes Corp.*, 245 S.C. 461, 141 S.E.2d 129 (1965), holding as follows:

> If the defendant considered the remarks of the trial judge prejudicial, it was its duty to call the matter to the attention of the court at that time by proper objection or motion. There is no sound reason to place matters of this nature upon a different basis from other occurrences during the trial of a case, in which the duty has been placed upon litigants to make timely objection in order to preserve the right of review. The fact that counsel may have some hesitancy in making objection during the trial to remarks or conduct of the court, which are considered prejudicial, does not excuse the failure to do so. An objection timely made to improper remarks or conduct of the court during the trial will afford in many instances an opportunity for correction of the error at that time or the granting of a mistrial as the particular situation requires. The interest of the trial court is only to see that a fair trial is had and objections to improper remarks or conduct on its part will be received in that spirit.

141 S.E.2d at 134.

A recent decision of the California Court of Appeals is also instructive. In *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 Cal. App. 5th 525, 228 Cal. Rptr. 3d 120 (2018), the appellant complained that the trial judge denied him a fair trial by making "inappropriate facial expressions and gestures … such as rolling its eyes, grimacing, shaking its head, pursuing its lips, sighing and making looks of disgust." 228 Cal. Rptr. 3d at 133. The court recognized that "[i]t is obviously difficult on the paper record we receive on appeal to assess accusations that a trial court made inappropriate gestures in front of a jury." *Id*. The court found it to be "critical for a litigant who believes a trial court is engaging in such misconduct to object immediately, thereby putting the court on notice of the need to correct its behavior and creating a record of the problem for appellate review." *Id*. Most critically, the court held that "[i]n cases where the litigant believes the conduct indicates judicial bias or threatens the fairness of a trial proceeding, the appropriate response is a prompt motion for disqualification." *Id.*

The Appellate Court of Connecticut is in accord. In *Schnabel v. Tyler*, 32 Conn. App. 704, 630 A.2d 1361 (1993), the appellant claimed that the trial judge showed bias in several ways including by his hand gestures. The court explained "as a general rule, even in cases alleging judicial bias, this court will not consider the issue on appeal where the party failed to make the proper motion for disqualification at trial." 630 A.2d at 1367. Most importantly, "[f]ailure to request recusal or move for a mistrial represents the plaintiff's acquiescence to the judge presiding over the trial." *Id.*

In the case at bar, the Petitioner alleges that the offending conduct by the trial judge occurred during the first day of trial while his counsel was conducting examinations of the Respondent and then the Petitioner. Indisputably, there was no objection, contemporaneous or otherwise, raised during that day of trial. There was no mention on the record of any issues or concerns with the judge's conduct, including facial expressions or gestures. At the beginning of the second day of trial, there was apparently a discussion in chambers, for which there is no record. In footnote 16 of his petition, the Petitioner attempts to present his counsel's account of what occurred in chambers, but that is unsupported in the record and should be disregarded.[1] When the trial began on the record that day, the Petitioner's counsel raised the issue of "facial expressions" of the trial judge while he was conducting witness examinations the previous day. Importantly, the Petitioner made no motion for recusal nor a motion for mistrial. His counsel, in fact, advised the court that "I'm not necessarily asking for any recusal or anything along those

[1] It is well settled that discussions or objections made in chambers or off-the-record at a side bar have no substantive effect. In the case of *Benton v. Davis*, 248 S.C. 402, 150 S.E.2d 235 (1966), this Court rejected a party's claim that an objection to jury charges made in a chambers conference is sufficient. This Court explained that "[t]he duty to make timely objection to portions of the charge considered erroneous is not discharged by an objection made at an informal conference in the judge's chambers which is not recorded as a part of the record." 150 S.E.2d at 239. The holding from *Benton* has subsequently been reaffirmed in *York v. Conway Ford, Inc.*, 325 S.C. 170, 480 S.E.2d 726 (1997), where this Court wrote: "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." 480 S.E.2d at 728.

lines." (R. 200). He also did not request any curative instruction. Critically, there was no request for *any action* which would serve as a basis for the new trial that he now seeks.

The Petitioner claims that the trial judge did not allow him to make his objection and further argues he was denied an opportunity to seek any corrective action. That is simply not the case. The Petitioner had four additional days of trial; yet, he never again raised any objection, contemporaneous or otherwise, to the judge's alleged conduct. He had four days to seek some corrective action if he believed that the judge's facial expressions or gestures were deriving him of a fair trial. He took no such action. Not a single contemporaneous objection was made throughout five days of trial. Moreover, to the extent he claims that the trial judge would not permit an oral objection to be made, that is not supported by the record. But most importantly, if the Petitioner's counsel was not comfortable making an oral objection or an oral motion for recusal or an oral motion for a mistrial or an oral motion for a curative instruction, there was nothing stopping him from filing a written objection or written motion. Again, the trial lasted five days. He was given many opportunities – for instance, each evening between the days of trial presented an opportunity to e-file a written objection or written motion. Nothing was filed.

In *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996), this Court noted that the appellant failed to move for a corrective instruction or request a mistrial where objectionable evidence was presented and received before the judge was able to sustain the objection. This Court found that the appellant "got what it asked for at trial and cannot now be heard to complain." 479 S.E.2d at 79. The same principle is at play here. The Petitioner had many opportunities -- orally on the record or by written motion -- to seek the judge's recusal or a mistrial if he truly believed that the judge's conduct rose to the level of depriving him of a fair trial. He took no action -- that is, not until he received an adverse verdict from the jury. At that point, it should be deemed too late. It was only after the Petitioner lost that he now deems the

trial judge's conduct as warranting a new trial (or what is in essence a belated mistrial). That, however, is not how our judicial system functions. A litigant cannot sit on his rights and then cry foul and seek *actual relief* only once he has lost. That is what the Petitioner has done here. He raised an issue, sought no actual relief on that issue, sat on his rights for four days of trial, and waited until he lost to try to gain the advantage of a new trial. Accordingly, as the Court of Appeals correctly ruled, the Petitioner did not properly or timely object to the judge's alleged conduct, and the issue was not properly preserved for appellate review.[2]

C. Evidence of Bias or Impartiality by the Trial Judge

During the trial itself, the Petitioner made no effort to present any record of the alleged misconduct by the trial judge. He did not provide a record, orally or in writing, giving a description of any facial expressions or gestures that he now contends were so prejudicial that he was denied a fair trial. The Petitioner claims that he was prevented by the trial judge from making a record; however, with the exception of him raising the issue at the beginning of day two of the trial, there is no other mention, let alone an objection, during the remainder of the trial. As the Court of Appeals recognized, the Petitioner made no attempt, and was clearly not

---

[2] The Petitioner's reliance on the case of *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994), is misplaced. There is not a "stark resemblance" between the two cases, as the Petitioner claims. The cases differ in many respects. The non-verbal facial expressions, gestures, and "lack of attention" towards Petitioner's counsel by the trial judge, as alleged in the case at bar, pales in comparison to the derogatory, condescending, and sexist comments by the trial judge in *Pace* which were made directly to the jury. The alleged judicial conduct in the two cases is significantly different. There is no gender or racial component in the present case. There is no challenge to counsel's competence as there was in *Pace*. And, quite frankly, there is the difference between substantiated verbal statements made directly to the jury about the defense counsel in *Pace* versus the unsubstantiated, non-verbal conduct alleged in this case. In short, there is no fair comparison of the cases. In addition, while this Court recognized a "futility" exception to the contemporaneous objection requirement based upon the egregious scenario in *Pace*, this Court by no means suggested that such an exception would be applicable in lesser scenarios where an aggrieved litigant is still required to make a contemporaneous objection, and if merited, to make a motion for corrective action -- be it for a curative instruction, a recusal, or a mistrial.

precluded, from offering at the very least a written submission that described the offending conduct for the record.

At any rate, the trial judge adamantly denies such conduct. That is clear from his reaction when the Petitioner's counsel first raised the point. (R. 201). Additionally, in his Memorandum Opinion, the trial judge writes: "the Court notes that it strongly disagrees with Mr. Garcia's improper and extraordinary exaggerations as to the Court's conduct at trial." (R. 29). The only "evidence" supporting the Petitioner's position is the after-trial affidavit from juror Christopher Lee.

According to the Petitioner, Juror Lee sent his counsel an email within a few hours after the jury was discharged. (R. 8, 15). That email is not in the record, and its contents are unknown.[3] Thereafter, Juror Lee prepared a "to whom it may concern" letter dated July 1, 2018. (R. 16-17). That letter, which is incorporated by reference in the Lee affidavit, presents the only "evidence" of the alleged judicial misconduct and thus would merit a close examination in the event the affidavit was properly admissible. However, in his adjudication of the Amended Motion for New Trial, the trial judge ruled the Lee affidavit inadmissible under Rule 606(b) of the South Carolina Rules of Evidence. That ruling *has not been appealed*, and thus constitutes the law of the case. *See*, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case").

But, even if the exclusion of the Lee affidavit had been appealed, the ruling was a correct one. "As a general rule, juror testimony is inadmissible to impeach a jury verdict." *State v. Ziegler*, 364 S.C. 94, 610 S.E.2d 859, 867 (Ct. App. 2005). However, Rule 606(b), SCRE, creates a very narrow exception to that general rule and allows a juror to offer testimony as to

---

[3] Supposedly, Juror Lee sent the Petitioner's counsel an email within a few hours after the jury was discharged. (R. 8, 15). That email was never produced and is not in the record. Thus, its contents are unknown. The Petitioner's counsel has offered no explanation for why that email was not made a part of the record.

"whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Rule 606(b), SCRE. Rule 606(b) further provides:

> Upon an inquiry into the validity of a verdict ..., a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, ... [n]or may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id. As the Court of Appeals has explained, "juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence." *Ziegler*, 610 S.E.2d at 867. "External influence on a jury involves situations where jurors receive information during deliberations from some outside source." *Id.*

In the case at bar, the Petitioner does not present the Lee affidavit to show that the jurors received extraneous or external information from an outside source during their deliberations. Instead, the Lee affidavit is presented in an attempt to describe the alleged facial expressions, gestures, and "lack of attention" by the trial judge during the trial itself. That is not a proper use of a juror affidavit per Rule 606(b). A juror affidavit cannot be used, in essence, to supplement the trial record to describe what the juror saw take place in the courtroom during the trial.

Moreover, the Lee affidavit is also used to describe juror comments allegedly made before and during deliberations in the juror room as well as to give Juror Lee's opinions on the impact of the judge's alleged conduct on other jurors. Rule 606 "draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter." *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369, 371 (2008).

Likewise, Juror Lee cannot speculate as to the decision-making process for other jurors.[4] Thus, for these additional reasons, the Lee affidavit was correctly ruled inadmissible in accordance with Rule 606(b).

Moreover, even if the affidavit were admissible, its accuracy is highly questionable when compared to what can be gleaned from the official record of the trial. As far as the description of the trial judge's conduct, Juror Lee claims that judge appeared disinterested because he would "glance at the clock" and "was always on his laptop." (R. 16). Of course, that is not abnormal or prejudicial conduct. Judges will look at the clock to determine how long testimony has proceeded and to assess when breaks should be taken. Judges will also use a laptop computer to keep abreast of other legal matters, review applicable rules, case law, or statutes as the case proceeds, prepare or review jury charges, and numerous other absolutely proper behaviors.

Juror Lee suggests that the judge was "distracted" and did not pay attention so that he needed questions repeated to rule on objections. (R. 16). A review of the record shows that occurred one time during a five-day trial. (R. 187). Juror Lee alleges that the trial judge told the Petitioner's counsel to "get to the point" and not to be "talking in circles." (R. 16). There is no

---

[4] In this respect, this Court's observation in *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008), is most pertinent:

> We think it is plain that the portion of the affidavit pertaining to what may have confused other jurors or influenced their votes is pure speculation presented without any specific factual support, and the juror's testimony about his own deliberative process is similarly flawed. The generic assertion that a juror would vote the opposite way if given another opportunity too closely resembles a case of buyer's remorse from a guilty verdict to be given much credence. Moreover, although the juror avers that if he had the preliminary vote to do over again, he would cast an initial vote to acquit, this testimony does not relate to the juror's ultimate vote of guilty. The jury returned a unanimous verdict, and the trial court polled the jury after it returned a verdict.

661 S.E.2d at 372.

such quote in the record. Juror Lee claims that the trial judge told the Petitioner's counsel to "make it brief." (R. 16). In actuality, that occurred when the Petitioner's counsel rose to make his rebuttal closing argument, and the judge said, "All right, briefly." (R. 579). Of course, the trial judge has a responsibility to manage a trial, including encouraging counsel to be direct and to the point and not to be repetitive or cumulative and to move the trial along so as not waste the court's and jurors' time. That is not inappropriate or prejudicial conduct by a trial judge. Thus, the Court of Appeals correctly ruled that there is no competent evidence of the alleged prejudicial facial expressions and gestures. In fact, the Court of Appeals found the record did not contain "an inkling of evidence describing the facial expressions being objected to or showing the expressions or gestures were made." (Slip Op., p. 2).

Furthermore, as for the overall fairness of the trial, any suggestion by the Petitioner that his counsel was not treated fairly in the trial judge's rulings on evidence is unsupported in the record. The Petitioner prevailed on many evidentiary objections, particularly the critical ones. As one prime example, in the Petitioner's case-in-chief, the trial judge allowed the admission of a 911 call from an unidentified person who allegedly was at the accident scene despite that call being both hearsay and not subject to cross examination because the speaker is unknown. (R. 135). Moreover, it is worth noting that the Petitioner has not appealed from a single trial ruling, evidentiary or otherwise. So clearly, he is not claiming prejudice from the trial court's evidentiary rulings.

D. Lack of Prejudice

The Petitioner insists that the facial expressions, gestures, and "lack of interest" by the trial judge were prejudicial to his case. There is frankly no evidence to support that. The Petitioner's suggestion that the allocation of fault under the comparative negligence analysis could have been different had the trial judge conducted himself differently is pure speculation.

There is no evidence that the jury's ultimate verdict was affected by the judge's conduct. The jury deliberated for over two hours on a Friday afternoon after a five-day trial. (R. 609). It is clear from the response to the polling of the jury following the reading of the verdict that all jurors agreed with the result. (R. 610). The Petitioner could have requested the individual polling of the jurors but did not do so. Likewise, if the Petitioner believed that the jury was impacted by the trial judge's conduct, he could have requested a post-verdict evidentiary hearing, but he did not do so. In short, without a showing of prejudice from the alleged improper conduct of the judge, there is no basis for overturning the jury's verdict. *See*, *State v. Galbreath*, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004).

E. Curative Instructions

At the commencement of the trial, the trial judge gave the jury the following instruction:

> So, I will tell you that you are the sole judges of the facts in this case. And the trial judge is not by law allowed to have an opinion about the facts in the case. It is up to you to decide what to believe, what not to believe, what you think is true and correct and what you think is not true and correct. *So, don't think by anything I say or do throughout the course of the trial that I have an opinion, I do not.* You all are the sole judges of the facts.

(R. 55). (Emphasis added). Later, as part of his jury charge, the trial judge again told the jury as follows:

> I also remind you that in every case tried in this courtroom before a jury, the jury is the sole and exclusive judge of the facts and the trial judge is not allowed by law to have an opinion about the facts. *So, don't think by anything I've said or done throughout the course of the trial that I have such an opinion. It is up to you all to determine what the facts are.*

(R. 591). (Emphasis added). Under South Carolina law, "[j]uries are presumed and bound to follow the instructions of the trial judge." *Buff v. South Carolina Dept. of Transportation*, 342 S.C. 416, 537 S.E.2d 279, 284, n.4 (2000).

The Petitioner did not object to the charge as given by the trial judge. He also did not request any additional curative instruction to address what he is arguing as misconduct. (R. 609). Based on the instructions given to the jury, there is a presumption that the jury understood and followed those instructions, including the admonition that the judge's comments and actions during the trial do not reflect that he has an opinion as to the resolution of the case.

This very issue arose in the case of *Commonwealth v. Medina*, 64 Mass. App. Ct. 708, 835 N.E.2d 300 (2005), where the defendant alleged that the trial judge denied him a fair trial "by making gestures, such as rolling her eyes during the defense's closing argument." 835 N.E.2d at 311. The court noted that "[i]t must be presumed that the jurors followed the judge's instructions" and thus concluded: "the trial judge's pointed instructions to the jury, directing them to disregard any notion of an opinion held by her respecting any aspect of the case or position taken by either party, were more than sufficient to cure any prejudice to the defendant." 835 N.E.2d at 312.

Similarly, in the present case, the trial judge's instructions cured any claimed prejudice resulting from the alleged facial expressions or gestures by the trial judge. The judge instructed the jury that he had no opinions on the facts or the ultimate resolution of the case and to disregard anything he said or did during the trial as suggesting he had such an opinion. There is no reason to believe that the jurors did not follow those instructions as they are presumed by law to do. For this additional reason, Petitioner has not demonstrated prejudice to overturn a jury verdict following a contested five-day trial.

III. The trial court correctly ruled that the Petitioner's Amended Motion for New Trial was untimely, and as a result, the trial court lacked jurisdiction to hear and adjudicate that motion.

As a threshold issue, the trial court ruled that the Amended Motion for New Trial filed by

the Petitioner on July 10, 2018, was untimely, and as a result, the trial court was divested of jurisdiction to even consider that amended motion and the supporting affidavit of Christopher Lee filed therewith. (R. 28-29).[5] *See*, *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722, 730, n. 10 (2006) ("[j]urisdiction refers to the trial court's authority to retain jurisdiction over the case, not the court's subject matter jurisdiction"). As the trial court pointed out, the Petitioner made an oral motion for a new trial on June 29, 2018, immediately after the jury was discharged. (R. 612). That motion was denied on the record at that time. (R. 612). Rule 59(b), SCRCP, provides that "[t]he motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court, not later than 10 days thereafter." Rule 59(b), SCRCP. Rule 59(b) does not provide for a successive or amended motion for new trial. In other words, Rule 59(b) does not authorize a litigant to make an oral motion for new trial immediately after the jury is discharged and then a second or successive or amended motion within the next ten days. *See*, *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894, 896 (1989) ("Rule 59 does not provide any procedure by which a party can amend a motion for new trial or add new grounds after the expiration of the ten-day period").

Of course, even where a new trial motion is filed within ten days, that requires the trial judge's permission. Importantly, as the trial court also recognized, the ten-day deadline is absolute and not subject to extension under any circumstances. Rule 6(b), SCRCP, grants a trial court limited authority to extend certain deadlines but expressly excludes Rule 59 from that authority. *See*, *Overland, Inc. v. Nance*, 423 S.C. 253, 815 S.E.2d 431 (2018). Here, the Petitioner made his motion for new trial on June 29, 2018, and never made any request that the trial judge grant him ten days to make that motion. Certainly, there was no request for the trial judge to allow him the opportunity to file a second or amended motion.

---

[5] The Court of Appeals did not find it necessary to reach this issue.

Nonetheless, it is undisputed that the Amended Motion for New Trial was filed on July 10, 2018, which was beyond the ten-day limit allowed by Rule 59(b) anyways. Therefore, even if the Petitioner had been granted leave of court to file a second or amended motion within ten days, that deadline would have expired on July 9, 2018. Thus, under either scenario, the Amended Motion for New Trial was untimely, and the trial court lacked jurisdiction to hear and adjudicate that motion. *See, In re Beard*, 359 S.C. 351, 597 S.E.2d 835, 838 (Ct. App. 2004) *("*[t]he established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motion has elapsed").

In an attempt to argue that his Amended Motion for New Trial was timely filed, the Petitioner cites to the case of *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989), in which this Court held that "Rules 59 and 60(b) must be read together" and allowed the appellant to file a motion to amend his original motion to amend (which was still pending) where it was filed beyond the ten days for filing a motion to amend. 379 S.E.2d at 287. This Court relied on Rule 60(b)(2) and concluded that the newly discovered evidence -- consisting of a letter written to a newspaper by a juror on the same day the verdict was returned but not published until two weeks later -- "could not have been discovered in time to move for a new trial under Rule 59(b)." *Id*. Accordingly, this Court ruled that "appellant moved to amend his motion within a reasonable time after discovery of evidence of [the juror's] bias and prejudice and, in fact, before the trial court had ruled on the original motion." *Id*.

The Petitioner's reliance on *Gray*, however, is misplaced. Unlike the plaintiff in *Gray*, the Petitioner never filed a motion to amend his original motion to amend. The Petitioner never sought leave of the trial court to take any action. Moreover, the Petitioner's original motion for new trial had already been decided by the time that he filed his amended motion. And most importantly, unlike the plaintiff in *Gray*, the Petitioner could not rely on Rule 60(b)(2) because

the newly discovered evidence was indeed discovered and known within the ten-day period after the jury was discharged. The affidavit of Christopher Lee attests that the juror communicated with the Petitioner's counsel on June 29, 2018, just hours after the trial ended. (R. 15). In addition, the affidavit was signed on July 3, 2018, which was well within the ten-day period following the jury's discharge. (R. 15). By its express terms, Rule 60(b)(2) is not applicable where the newly discovered evidence could have been and indeed was discovered through the exercise of due diligence "in time to move for a new trial under Rule 59(b)," meaning within ten days of the date the jury was discharged. Rule 60(b)(2), SCRCP.

Thus, the circumstances in the case at bar are very different than those in *Gray*, and the Petitioner cannot rely on the analysis in that case to argue that his Amended Motion for New Trial was timely filed. In short, the trial court was correct in ruling that it lacked jurisdiction to hear the Amended Motion for New Trial. The jury's verdict should be affirmed and a writ of certiorari denied on that additional basis.

CONCLUSION

Based on the foregoing discussion, the Respondent Katherine Hunter respectfully requests that this Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

LINDEMANN & DAVIS P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Respondent Katherine Hunter

June 27, 2022