STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY ADAM HESTER, SR.,

APPELLANT

APPELLATE CASE NO 2017-000201

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to grant a mistrial based on the fact that the mother of the deceased had a photograph of her daughter next to her during the trial?

STATEMENT OF THE CASE

In April of 2015, the Pickens County Grand Jury indicted Appellant, Timothy Adam Hester, for felony driving under the influence [DUI] resulting in death, and driving under suspension [DUS], indictments #2015-GS-39-611, 612. In November of 2016, the Pickens County Grand Jury indicted Appellant for habitual traffic offender causing death, indictment #2016-GS-39-2635. On January 23, 2017, Appellant proceeded to jury trial before the Honorable Letitia H. Verdin. John DeJong represented Appellant at trial. Baker Cleveland and Graham Buckner prosecuted the case. The jury returned verdicts of guilty as charged. Judge Verdin sentenced Appellant to ten (10) years for felony DUI, six (6) years consecutive for habitual traffic offender and time served for DUS. A timely notice of intent to appeal was served on January 27, 2017. This appeal follows.

ARGUMENT

The trial judge erred in refusing to grant a mistrial based on the fact that the mother of the deceased had a photograph of her daughter next to her during the trial.

On the evening of January 30, 2015, Appellant Hester, Alanah Holcomb, Tiffany Forshee and James Moore were together at Moore's house drinking. (R. pp. 495-498). Sometime between 10:00 PM and 11:00 PM the four decided to drive to Adam's house, a mutual friend. (R. p. 498, lines 12-25). The group took two cars to Adam's house with Appellant driving one car, a Monte Carlo, with Holcomb as a passenger and Moore driving another car with Forshee as a passenger. (R. p. 498, line 23 – p. 499, lines 1-10). On the way to Adam's house the Monte Carlo hit a tree resulting in the death of Holcomb. Appellant admitted at trial that he started driving to Adam's house but became sick and Holcomb helped him into the passenger seat. (R. p. 691, line 12 – p. 692, lines 1-20). Appellant did not remember anything between the time that Holcomb helped him into the passenger seat and the time of the accident. (R. p. 691, lines 19-25). The forensic toxicologist from the South Carolina Law Enforcement Division [SLED] testified that Appellant had a blood alcohol level of 0.122 percent. (R. p. 278, lines 24-25). The medical examiner did not perform an autopsy on Holcomb and her blood alcohol was not introduced in evidence. (R. p. 308, lines 13-19).

Appellant told the paramedic that transported him to the hospital that Holcomb was driving the car. (R. p. 84, lines 1-5). At the hospital Appellant told Trooper Farris Marlow with the South Carolina Highway Patrol [SCHP] that Holcomb was driving. (R. p. 186, line 14 – p. 187, lines 1-10). Later at the hospital Appellant told Sergeant Aaron Duncan with SCHP that Holcomb was driving the car at the time of the crash. (R. p. 576, lines 1-5). In a later interview

with Trooper Jared Duncan with SCHP on February 6, 2015, at the Pickens County Detention Center Appellant again denied driving the car at the time of the crash. (R. p. 479, lines 18-23).

Late in the trial, after fifteen witnesses had been called by the State, a bench conference was held and then the jury was sent to the jury deliberation room. (R. p. 469, lines 16-23). Outside the presence of the jury the judge asked, "It's my understanding that there may be a picture of the deceased that is propped up on a pew. Ma'am, is that correct?" (R. p. 469, line 24 – p. 470, line 1). The father of the deceased answered, "Yes, ma'am." (R. p. 470, line 2). A prosecutor told the judge that the picture was laying on the bench with the face out. (R. p. 470, lines 9-10). The following exchange then took place:

The Court: Laying on the bench face up? How long has it been like that?

Victim's Mother: I just have her sitting beside me every day.

The Court: I understand. So it's been there for the balance of the trial like that?

Victim's Mother: Yes.

The Court: Has it been face up the entire time?

Victim's Mother: Yeah, she's just been sitting beside me.

(R. p. 470, lines 11-21). The judge then asked them to remove the picture and wondered if the jury had seen it. (R. p. 470, line 22 – p. 471, lines 1-4). Counsel for Appellant told the judge, "Well, I saw it actually propped up on the pew. It was not laying flat on the pew, Your Honor. As I shared with the Court and Mr. Buckner, I don't think all of the jurors could have seen it. Certainly the jurors as I'm facing the jury box on the left-hand, my left, could have seen it. They switched chairs. I didn't quite hear how long the picture had been there. I really don't know." (R. p. 471, lines 5-13). The judge reminded counsel that the picture had been there for the entire trial. (R. p. 471, lines 14-15). Counsel then moved for a mistrial stating, "But I am respectfully

asking for a mistrial at this point in time because I can not know. And even if Your Honor addresses the issue, as you have said, I don't know if that drives it deeper, makes it worse, makes it better. The cat's out of the box, Your Honor. I would therefore request – respectfully move for a mistrial." (R. p. 472, lines 15-22).

The judge denied the motion for a mistrial stating:

> I've had an opportunity to review the case law, and I've had a moment to think about it. I'm going to deny – respectfully deny your motion for a mistrial. Ma'am, please, please put the picture up. I find based on the button case – excuse me – Carey versus Musladin – maybe that's how you say it – Carey versus Muslandin, which is referred to as the button case, where someone was – where a group of folks were wearing a button that was not inherently prejudicial to the jury. As I noted, I do think the State would have had a right, whether they exercise it or not, to have shown a picture of the deceased before her death. Furthermore, I think some of the testimony in this case would have been probably more –would have invoked more sympathy than simply a picture. However, your – motion is certainly noted and your exception to my ruling is certainly noted as well.

(R. p. 476, line 20 – p. 477, lines 1-15). The judge gave no further instruction when the jury returned. (R. p. 477, lines 19-24).

Appellant renewed the mistrial motion at the close of the State's case. (R. p. 613, lines 3-13). Appellant also renewed the mistrial motion at the close of the defense case. (R. p. 724, lines 12-14). Both motions were denied. The trial judge erred in refusing to grant a mistrial.

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." Taylor v. Kentucky, 436 U.S. 478, 485, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468 (1978). In Carey v. Musladin, 549 U.S. 70, 72, 127 S. Ct. 649, 651, 166 L. Ed. 2d 482 (2006), the button case referred to by the trial judge, the Court distinguished government sponsored practices such as

requiring an accused to wear prisoner clothing at trial discussed in Estelle v. Williams, 425 U.S. 501, 503-506, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), and the placement of four uniformed state troopers behind the defendant discussed in Holbrook v. Flynn, 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), from spectator conduct addressed in Musladin and present in this case. In both Williams and Flynn the Court recognized that certain state sponsored practices were so inherently prejudicial that they deprive a defendant of a fair trial. In Musladin, a federal habeas case, the Court acknowledged never addressing a claim that spectator conduct was so inherently prejudicial that it deprived the defendant of a fair trial. As a result, Musladin could not show that the State court's finding that he did not meet the inherent prejudice test announced in Flynn was contrary to or an unreasonable application of clearly established federal law, as required for federal habeas relief.

In State v. Paige, 375 S.C. 643, 649 S.E.2d 300 (Ct. App. 2007), the trial judge denied the defense motion to require spectators in the courtroom to remove photograph buttons of the victim. In Paige the South Carolina Court of Appeals acknowledged that the effect of spectators wearing buttons on a defendant's fair trial rights was an open question in both the United States Supreme Court, citing Musladin, and in the South Carolina Appellate Courts. Finding the trial judge did not err in refusing to require the spectators to remove the buttons, the Court of Appeals wrote:

> In the case at hand, assuming arguendo that our state courts would apply the "actual or inherent prejudicial effect on the jury" test to this spectator, as opposed to state-sponsored conduct, we conclude Paige has failed to show any actual or inherent prejudice under the circumstances of this case. The record shows the only mention of the buttons was prior to jury selection, and out of the presence of the jury venire, at which time defense counsel had to inquire whether the buttons did in fact depict a picture of the victim. There is no evidence of the size of the buttons, or the number of spectators who wore the buttons. While the trial court stated he would not require the individuals to remove the buttons, he insured that these spectators would not be called as witnesses, nor would they be seated in the

> front row. He further instructed that these individuals would not be allowed to make gestures, point to the pictures, or do anything in an attempt to influence the jury. Because no other mention was made of the buttons, this court cannot even determine that these spectators remained in the courtroom for the remainder of the trial or, if they did, whether they continued to wear the buttons. Simply put, there is absolutely no evidence of record that the jurors in this matter were ever exposed to these button photos, and, if they were, whether they could perceive that they depicted the victim. Accordingly, we find no actual or inherent prejudice to Paige based on the record before us.

State v. Paige, 375 S.C. 643, 649, 654 S.E.2d 300, 303–04 (Ct. App. 2007). In contrast, in the present case, the photograph of the deceased propped next to the grieving mother during the course of almost the entire trial and in view of at least some of the jury was so inherently prejudicial as to deprive Appellant of a fair trial.

In State v. Gens, 107 S.C. 448, 93 S.E. 139 (1917), decided decades before Musladin, the South Carolina Supreme Court granted a new trial in a prosecution for bringing intoxicating liquors into the State because the jury could have been prejudiced when certain large posters condemning liquor traffic were held before the jurors by several ladies during the trial. In Gens the court wrote:

> The other exceptions complain of error on the part of his honor in not granting a new trial on the ground that certain large posters condemning liquor traffic were held before the jury by several ladies during the trial or part of it; that the women were in the courthouse and sat directly in front of the jury and on the left of the judge; that the jurors saw and read the posters. That such a state of facts could exist in a court of justice is almost inconceivable and be permitted to escape the attention of the officers of the court and the presiding judge. Generally nothing escapes the eyes of the court officials; if one officer fails to see anything improper during the progress of the case, another will see it, and either put a stop to it himself or call the court's attention to it. The action of the women was highly improper, in that it was an attempt to impede justice, however innocent on their part, and deny to the defendant a fair and impartial trial, guaranteed to him by the law of the land, an attempt to influence a sworn jury to arrive at a verdict improperly, and to be influenced by outside influence, trying the case by manufactured outside public opinion, and not by the facts of the case as developed in evidence and the law of the trial judge. The parties should have been summarily dealt with. There were in gross contempt of court and such conduct

should not for a moment be overlooked. At the hearing before this court it was stated that the presiding judge's attention was not called to this phase of the case until after conviction and motion for new trial was made. His honor inquired of the jury then if they were in any manner influenced by these posters. They answered in the negative. His honor should have set the verdict aside promptly when he found out how an attempt had been made to influence the jury.

107 S.C. 448, 93 S.E. at 139. The photograph in the present case, just as the posters in Gens, no matter how innocent on the part of the parents of the deceased, denied Appellant the right to a fair and impartial jury.

In State v. Paige, the South Carolina Court of Appeals wrote:

As to courtroom conduct, our courts have held that a defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influence. State v. Carrigan, 284 S.C. 610, 613-14, 328 S.E.2d 119, 121 (Ct.App.1985). In State v. Stewart, 278 S.C. 296, 295 S.E.2d 627 (1982),cert. denied, 459 U.S. 828, 103 S.Ct. 64, 74 L.Ed.2d 65 (1982), our supreme court stated as follows:

The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution. While this right does not require a "perfect" trial, the very heart of a "fair trial" embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment.

Ideal conditions, it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result. State v. Weldon, 91 S.C. 29, 74 S.E. 43 (1912).

It is the duty of the trial judge to see that the integrity of his court is not obstructed by any person or persons whatsoever. Shearer v. DeShon, 240 S.C. 472, 126 S.E.2d 514 (1962); 75 Am.Jur.2d Trial § 40 (1974). His exercise of this duty will not be disturbed absent an abuse of discretion.
Id. at 303-04, 295 S.E.2d at 630-31.

375 S.C.at 647–48, 654 S.E.2d at 302–03. The display of the deceased, propped beside her grieving parents, constitutes the type of extraneous influence prohibited. The trial judge erred in refusing to declare a mistrial.

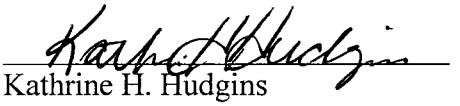
As noted by Justice Kennedy in his concurrence in Musladin:

> The instant case does present the issue whether as a preventative measure, or as a general rule to preserve the calm and dignity of a court, buttons proclaiming a message relevant to the case ought to be prohibited as a matter of course. That rule has not been clearly established by our cases to date. It may be that trial judges as a general practice already take careful measures to preserve the decorum of courtrooms, thereby accounting for the lack of guiding precedents on this subject.
>
> In all events, it seems to me the case as presented to us here does call for a new rule, perhaps justified as much as a preventative measure as by the urgent needs of the situation. That rule should be explored in the court system, and then established in this Court before it can be grounds for relief in the procedural posture of this case.

549 U.S. at 81, 127 S. Ct.at 657. This Court should take the opportunity to prohibit buttons and the display of photographs as in this case. The photograph was not part of the evidence presented by the State. Such displays deny defendants the right to a fair trial by improperly attempting to appeal to the sympathies of the jury.

CONCLUSION

Based on the argument above, this Court should reverse the convictions and sentences and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2018.

STATE OF SOUTH CAROLINA

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Appeal from Pickens County

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TIMOTHY ADAM HESTER, SR.,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Timothy Adam Hester states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Letitia H. Verdin, which was held on January 26, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Timothy Adam Hester.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

This 1st day of February, 2018.

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments and sentencing sheets:
(2) Entire trial transcript – Volumes 1-4.

I certify that this designation contains no matter which is irrelevant to this appeal.

February 1, 2018

Kathrine H. Hudgins
Appellate Defender

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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 1, 2018.

Kathrine H. Hudgins
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Ben Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Timothy Adam Hester, 371209, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 1st day of February, 2018.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.