STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Spartanburg County

The Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

v.

ROY GENE SUTHERLAND, III,

Appellant.

Appellate Case No. 2018-002148

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

Did the trial judge err in refusing to dismiss the jury panel when the prosecutor, prior to jury selection, allowed family members and friends of the deceased to introduce themselves to the jury and note their affiliation with the church when none of the family members or friends were potential witnesses for the trial?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

Whether the circuit court abused its discretion in denying appellant's motion to dismiss the entire jury pool when a friend of the victim's family, who was sitting in the courtroom with the family during jury selection, identified himself to the jury pool and mentioned his relationship to the family through membership in the same church.

STATEMENT OF THE CASE

In March 2018, a Spartanburg County Grand Jury returned an indictment against Roy Gene Sutherland, III[1] (appellant) for murder and possession of a weapon during the commission of a violent crime. (No. 18-GS-42-1409). The case proceeded to trial on November 26, 2018 before the Honorable J. Derham Cole. (Tr. 1). Solicitor Barry J. Barnette prosecuted the case. (Tr. 1). Attorneys Suzanne H. White and Paul K. Neely represented appellant. (Tr. 1).

After a four-day trial, the jury found appellant guilty as charged on both counts. (Tr. 383, l. 6-11). Due to appellant's prior criminal history, he was sentenced to a mandatory term of life imprisonment pursuant to S.C. Code Ann. § 17-25-45.[2] (Tr. 389, l. 15-17). This appeal follows.

[1] Appellant is also known as "Danny." (Indictment No. 18-GS-42-1409; Tr. 91, l. 3-13).

[2] Appellant had prior convictions for assault and battery of a high and aggravated nature and attempted armed robbery. (Tr. 386, l. 9-10).

STATEMENT OF FACTS

Investigation of Lanny Wood's Murder

On January 6, 2018, William Lanford sat down to watch a movie with his wife at their home in Spartanburg. (Tr. 103, l. 10-25). It was shortly after 5:00 pm. (Tr. 103, l. 22). Before the movie started, he heard a loud knock on his back door. (Tr. 104, l. 4). Lanford went to his back door to investigate and looked out the window. There was blood on his washing machine, storm door, and floor. (Tr. 104, l. 5-6). Lanford walked outside and saw Lanny Wood (victim) staggering away. (Tr. 104, l. 7-14). The two had been neighbors for over thirty years. (Tr. 103, l. 16; 104, l. 12-13).

Lanford called out to the victim, who turned around and walked back to the house. (Tr. 104, l. 16-17). The victim was bleeding from several parts of his body, including his abdomen and head. (Tr. 106, l. 2-5). He lifted up his shirt and said "I think they stabbed me." (Tr. 104, l. 22-23). According to Lanford, the wound to the abdomen "was very gruesome – it didn't look like just a stab. I mean, it was a cut like it was sawing." (Tr. 105, l. 14-15). Lanford's wife brought some towels to keep the victim warm while they waited on emergency responders. As they waited, the victim explained that he had gone "to get kerosene and got picked up by a man and a woman in a U-Haul and that they had done this to him." (Tr. 105, l. 2-5). The victim believed that the man and woman had taken his debit card. (Tr. 109, l. 10-11).

The victim would die at the hospital from his wounds. (Tr. 105, l. 9-10). An autopsy revealed he had been stabbed in the heart, in the kidney, and several times in the arm. (Tr. 145, l. 19-25; 146, l. 25; 147, l. 12-19). He also had multiple lacerations to his head. (Tr. 141, l. 1-14). The forensic pathologist assessed that two different weapons caused these injuries. (Tr. 150, l. 20-25). Whereas the stab wounds to the body were consistent with a knife, the lacerations to the head

were consistent with a blunt force object with a sharp edge, such as a 2x4 or some type of metal object. (Tr. 150, l. 23-25; 151, l. 1; 155, l. 11-22).

The official cause of death was internal and external bleeding arising from the stab wounds and blunt force injuries. (Tr. 156, l. 16-18). More precisely, the pathologist believed the stab wound to the victim's heart was fatal. (Tr. 150, l. 7). The stab wound to the kidney also contributed to the victim's death in that it created a significant amount of blood loss. (Tr. 150, l. 7-8). Additionally, the pathologist assessed the lacerations to the head were potentially fatal. (Tr. 150, l. 12). He explained that the blunt force trauma was so strong that it actually chipped the victim's skull. (Tr. 150, l. 14).

After the victim passed away, law enforcement sought help from the public in identifying the man and woman in the U-Haul. (Tr. 113, l. 2-8). One witness reported seeing a U-Haul pick up a man with a gas can at a Spinx gas station near the victim's home. (Tr. 113, l. 14-21). Surveillance footage from the gas station and an adjacent business confirmed the unidentified man was the victim. (Tr. 123, l. 7). The footage also revealed the U-Haul leaving the gas station at 5:00 pm and traveling towards the victim's house. (Tr. 130, l. 9-11).

After obtaining surveillance footage from the gas station, investigators discovered that a uniformed patrol deputy had stopped the same U-Haul early in the morning on the day of the murder.[3] (Tr. 133, l. 25). Because the deputy was wearing a body camera, the traffic stop was recorded. (Tr. 160, l. 5). Amy Berridge (co-defendant) was driving the U-Haul, and appellant was riding shotgun. (Tr. 165, l. 3-9). In the video of the stop, appellant appeared to be wearing a pair of gray tennis shoes. (Tr. 323, l. 21-23). Appellant had two knives in his possession, one of which

[3] Although the license plate was not visible on the surveillance footage, the U-Haul had a distinctive painting of a red panda on its side. (Tr. 135, l. 10; 164, l. 19-21; 326, l. 17-21).

was inside a sheath attached to his belt. (Tr. 163, 4-5; 168, l. 18-25). After writing the co-defendant a warning ticket, law enforcement returned both of appellant's knives. (Tr. 165, l. 5; 169, l. 2-4; St. Ex. 26). The two got back in the U-Haul and drove away. (St. Ex. 26).

Additionally, law enforcement tracked down the rental information for the U-Haul. A few days before the murder, the co-defendant's mother rented it from a storage facility. (Tr. 172, l. 15; 175, l. 21). According to an employee at the storage facility, the mother was renting the U-Haul for her daughter, the co-defendant. (Tr. 175, l. 14). The employee also remembered that appellant and the co-defendant were with the mother at the time she rented the vehicle. (Tr. 172, l. 21; 175, l. 11-25; 176, l. 15). Surveillance footage from the facility also confirmed the employee's recollection. (Tr. 178, l. 10-23).

Law enforcement subsequently advised units to be on the lookout (BOLO) for the U-Haul. (Tr. 180, l. 17-18). On January 9, 2018, a deputy spotted it and initiated a traffic stop. (Tr. 181, l. 10-11). Like the previous traffic stop, the co-defendant was driving and appellant was the passenger. (Tr. 182, l. 18; 189, l. 22-23). Also like the prior stop, deputies found a knife in the U-Haul. However, this knife was different from the ones appellant had in his possession during the prior stop. (Tr. 182, l. 18; 187, l. 1-20). Appellant stated that the co-defendant had just bought it for him. (St. Ex. 52). Law enforcement also observed what appeared to be blood on the passenger side door. (Tr. 226, l. 10-23; 286, l. 23). Subsequent DNA analysis confirmed the substance on the door was the victim's blood.[4] (Tr. 287, l. 1-4).

In addition to locating the U-Haul, investigators searched a trailer behind the co-defendant's grandmother's house. (Tr. 219, l. 6-20). The trailer lacked power and apparently was

[4] Additionally, law enforcement lifted a latent print from the U-Haul. (Tr. 227, l. 21-25). The State's fingerprint examiner matched it to appellant. (Tr. 269, l. 12).

only used for storage. (Tr. 220, l. 2-6). Inside, officers found a pair of gray, blood-stained tennis shoes. (Tr. 234, l. 10-16). Subsequent analysis confirmed the victim's blood was on the shoes. (Tr. 287, l. 15-19).

Appellant's Trial

The State based its case on the legal doctrine that "the hand of one is the hand of all."[5] (Tr. 329, l. 20-25; 330, l. 1-7). The solicitor noted that the forensic pathologist assessed that two different weapons caused the victim's injuries. (Tr. 322, l. 21-22). Additionally, the victim's statement to his neighbor indicated two people murdered him. (Tr. 326, l. 1-3). As noted above, the victim stated that a man and a woman in a U-Haul picked him up, and "they had done this to him." (Tr. at 105, l. 4-5).

The solicitor argued that appellant and the co-defendant were these two people. Simply put, the U-Haul they were driving before and after the murder had the victim's blood on it. (Tr. 328, l. 3-15). Furthermore, law enforcement found a pair of gray tennis shoes in a storage trailer behind the co-defendant's grandmother's house. The shoes were covered in the victim's blood. (Tr. 234, l.10-16; 287, l. 15-19). According to the solicitor, on the day of the murder appellant was wearing a pair of shoes that "look exactly like" the shoes stained with the victim's blood. (Tr. 329, l. 2). The jury deliberated for almost two hours before finding appellant guilty as charged. (Tr. 381, l. 9; 382, l. 12).

[5] See e.g. State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017)("Under the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.")(quoting State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007)).

STANDARD OF REVIEW

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013). Declaring "a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). South Carolina "courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case." State v. White, 371 S.C. 439, 444-45, 639 S.E.2d 160, 162 (Ct. App. 2006). The circuit court's "decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Dial, 405 S.C. at 257, 746 S.E.2d at 500.

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS THE ENTIRE JURY POOL BECAUSE THERE WAS NOTHING IMPROPER IN THE FRIEND OF THE FAMILY IDENTIFYING HIMSELF TO THE JURY POOL AND APPELLANT SUSTAINED NO PREJUDICE WARRANTING A MISTRIAL.

Relevant Facts

Prior to jury selection, the circuit court asked the victim's family to identify themselves to the jury pool. The court explained that it needed to determine whether any potential juror knew "anybody who is going to be involved in the trial of this case." (Tr. 15, l. 19-21). After the victim's aunt and sister identified themselves to the jury, a third person rose. (Tr. 17, l. 19-21). The individual gave his name and explained that he was "one of her [the aunt] Sunday school teachers, a deacon in the church." (Tr. 17, l. 21-22).

Appellant objected, and a bench conference ensued. (Tr. 17, l. 24; 18, l. 4). Appellant subsequently argued on the record that referencing the church membership of the victim's family bolstered the victim's credibility. (Tr. 45, l. 14-17). Although appellant acknowledged the remedy might not be "feasible," he asked the court to "throw out the whole jury panel." (Tr. 46, l. 12-15).

The circuit court denied the request. (Tr. 46, l. 16). It reasoned that:

> It's not uncommon that there are folks behind the prosecution and behind the defense table that aren't going to be witnesses in the case. And it's not uncommon that the jury goes back and during the course of the trial a juror asks about -- they'll say, well, I knew that person that wasn't introduced, which creates more problems than introducing someone in my view.
>
> So of course we had a sidebar about it. [The solicitor] did not intend to introduce anyone who was not actually a family member. And so that was just an accidental occurrence, but I don't see any harm and I don't see any prejudice to the defendant.

(Tr. 45, l. 19-25; 46, l. 1-5). The trial continued, resulting in appellant's conviction.

A. The Circuit Court Had A Duty To Ensure The Jury Was Impartial, Even If The Potential Bias Involved A Spectator At The Trial.

Every defendant has a Constitutional right to a trial by an impartial jury. U.S. Const. amends. VI, XIV. To that end, the circuit court "must conduct voir dire of the prospective jurors to determine whether the jurors are aware of any bias or prejudice against a party, as well as to 'elicit such facts as will enable [the parties] intelligently to exercise their right of peremptory challenge.'" State v. Coaxum, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014)(quoting State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)). Additionally, pursuant South Carolina Code Ann. § 14-7-1020, the circuit court may conduct an inquiry to determine whether a potential juror "is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein." See also State v. Royster, 181 S.C. 269, 278, 186 S.E. 921, 925 (1936) (holding that the trial court can conduct an inquiry under § 14-7-1020 even if neither party requests the court to do so). "The scope of voir dire and the manner in which it is conducted generally are left to the sound discretion of the trial judge." State v. Wise, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004).

Appellant argues that the friend of the victim's family should not have been permitted to identify himself during jury qualification because he was not a potential witness in the case. (App. Brief 7). This argument does not withstand scrutiny. The circuit court's duty to ensure an impartial jury is not limited to assessing bias towards potential witnesses. Rather, the court must ensure that the jury "render[s] its verdict free from outside influences *of whatever kind and nature*." State v. Bryant, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003)(quoting State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993)(emphasis added). That duty includes identifying any bias or favoritism towards an individual sitting in the courtroom with a victim's family member.

In this regard, State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014), is instructive. In Coaxum, a juror reported mid-trial that she recognized one of the defendant's family members, who was sitting in the courtroom. The juror previously worked with the family member and advised that the family member claimed to be a "distant cousin." Id. at 325, 764 S.E.2d at 244. The juror also informed the court that her relationship with the family member would not affect her decision. Nevertheless, the solicitor asked that the juror be removed because he would have used a peremptory strike had he known of the relationship. The trial court agreed and replaced the juror with an alternate. After being found guilty, the defendant argued on appeal that the trial court abused its discretion in replacing the juror.

The Supreme Court disagreed. It held that "[w]hile the trial court likely would have been justified in refusing to excuse [the juror] from the jury, its decision to remove her is not an abuse of discretion given the thorough inquiry it conducted into the solicitor's strategy in seating or striking the prospective jurors." Id. at 33, 764 S.E.2d at 247. Implicit in the decision is an acknowledgment that the circuit court had the power to address potential bias even though it related to a spectator sitting in court—not a potential witness. The same rationale would apply in this case to the friend of the victim's aunt who sat with her in court. See also State v. Cooper, 334 S.C. 540, 550-51, 514 S.E.2d 584, 589-90 (1999)(considering the actions of a courtroom spectator on a juror's impartiality).

By appellant's logic, the circuit court would have lacked that authority because the potential bias was towards a spectator related to one of the parties. Appellant's argument ignores the circuit court's Constitutional and statutory duty to ensure an impartial jury. Additionally, it ignores the court's duty to ensure both parties receive enough information to exercise its peremptory strikes. If a potential juror revealed a favorable prior relationship with the family

friend, appellant had a right to know prior to deciding whether to put that person on the jury. As such, the circuit court committed no error in allowing the friend of the family to identify himself to the jury pool.

B. The Family Friend's Isolated Comment Created No Prejudice Warranting a Mistrial.

The declaration of a mistrial is an "extreme measure." See e.g. State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). It is appropriate only "in cases of manifest necessity and with the greatest caution for *very plain and obvious reasons*." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999)(emphasis added). The moving party must demonstrate not only error, but also resulting prejudice. Id. The grounds must be "so grievous that the prejudicial effect can be removed in no other way." State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013)(quoting State v. Wiley, 387 S.C. 490, 495-96, 692 S.E.2d 560, 63 (Ct. App. 2010). In contrast, "[i]nsubstantial errors that do not impact the result of a case do not warrant a mistrial when guilt is conclusively proven by competent evidence." State v. White, 371 S.C. 439, 447-48 639 S.E.2d 160, 164 (Ct. App. 2006). As this Court has noted, a defendant is entitled to "a fair trial, not a perfect one." Id. at 449, 639 S.E.2d at 165 (quoting State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998)).

Appellant's convictions should be affirmed because he received a fair trial. There was no "plain and obvious reason" to declare a mistrial in this case. See Patterson, 337 S.C. at 227, 522 S.E.2d at 851. Even if one assumes that the circuit court erred in allowing the family friend to identify himself to the jury pool,[6] appellant suffered no prejudice justifying a mistrial. Neither the friend, nor any member of victim's family testified at trial. As such, their character and credibility

[6] As discussed above, the circuit court did not err in permitting the family friend to identify himself.

had no bearing on any fact presented to the jury. In other words, there was nothing for the reference to bolster.

Nevertheless, appellant claims the reference warranted a mistrial because it "suggested that the deceased was a good person." (App. Brief 7). But the connection between the aunt's church membership and the victim's character is too attenuated for this argument to carry any weight. It is certainly not "plain and obvious" that a juror would give the State bonus points or relieve it of its burden of proof because the victim was *related to* someone who belonged to a church. Nearly everyone in South Carolina is related to someone who attends a place of higher worship. Revealing that the victim had an aunt who was a member of a church bolsters his credibility about as much as stating he once filed his taxes on time.

Moreover, the victim's character was only tangentially related in the case. This was not a case of self-defense where the victim's conduct was relevant. Instead, the critical issue was establishing the identity of the man and woman in the U-Haul. The State proved its case with multiple videos putting appellant in the U-Haul, the victim's blood on the same U-Haul, and the victim's blood on a pair of shoes matching the ones appellant wore. Additionally, appellant had multiple knives in his possession that were consistent with the stab wounds on the victim. (Tr. 155, l. 10-17). Simply put, the reference during jury selection did not affect the trial.

Furthermore, this Court has consistently rejected arguments stronger than the one appellant presents in this case. For example, in State v. Wilson, 389 S.C. 578, 698 S.E.2d 862 (Ct. App. 2010), the parties agreed before trial that a victim of criminal domestic violence would not testify about a prior bad act involving the defendant. However, on direct exam the victim referenced a prior altercation in which the defendant grabbed her by the neck and caused bruises. The trial

court refused to grant a mistrial, and the jury found the defendant guilty. On appeal, the defendant argued that the circuit court abused its discretion in denying his motion for mistrial.

This Court disagreed, noting that "the determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." Id. at 586, S.E.2d at 865-66. Specifically, the Court noted that aside from the victim's comment, there was nothing else in the record to establish prejudice, such as whether additional witnesses or photographs were offered on the matter. In other words, the isolated comment of prior abuse was not enough to create prejudice warranting a mistrial. Id. at 586, 698 S.E.2d at 866.

Likewise, in State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012), the defendant was charged with two crimes: felony DUI and possession of a controlled substance. After the circuit court read both indictments to the jury, it granted a motion in limine to sever the two charges. The defendant subsequently requested a mistrial because the jury heard the allegation of the controlled substance. The trial court refused to grant a mistrial, and the defendant was convicted of felony DUI.

This Court again upheld the conviction. It found "the single reference to the schedule three drug charge in the indictments read at the beginning of trial does not constitute sufficient prejudice to justify a mistrial." Id. at 270, 734 S.E.2d at 320 (citing State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003)("[A] vague reference to a defendant's prior [crimes] is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."). The Court further noted that there was nothing in the record to suggest the jury considered the severed drug charge in reaching its verdict. Instead, the evidence in record supported the felony DUI conviction.

Similarly, this case involves an isolated comment made before the trial even began. It is even less prejudicial than the situations in Wilson and Manning because it concerned a spectator who was not involved in the case. The record contains no evidence that the jury considered the family friend's comment in reaching its verdict. Rather, the evidence in the record supports the jury's verdict that appellant murdered this victim. As such, the circuit court acted within its discretion in refusing to dismiss the jury in this case.

CONCLUSION

For all of the foregoing reasons, the judgement, convictions, and sentence of the circuit court should be affirmed.

Respectfully submitted,

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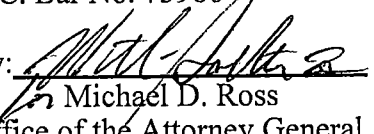
By: 
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March 16, 2020

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ATTORNEY GENERAL

March 16, 2020

The Honorable Jenny A. Kitchings
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Re: *The State v. Roy Gene Sutherland, III*
Appeal from Spartanburg County
Appellate Case No. 2018-002148

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Respondent and Designation of Matter, together with Proof of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

Michael D. Ross
Assistant Attorney General

MDR/bbr
Enclosures
cc: Kathrine H. Hudgins, Esquire (w/two copies of encls.)
The Honorable Barry J. Barnette, Solicitor 7th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2018-002148

THE STATE,

RESPONDENT.

V.

ROY GENE SUTHERLAND, III,

PETITIONER.

PROOF OF SERVICE

I, Michael D. Ross., counsel for the Respondent, certify that I have served the Initial Brief of Respondent on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Kathrine H. Hudgins, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 16th day of March, 2020.

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