STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SAMUEL HAWKINS, JR.,

APPELLANT.

APPELLATE CASE NO. 2019-001645

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

ARGUMENT

The trial judge abused her discretion by denying Appellant's motion to quash the indictment for the offense of murder where the indictment was insufficient because it failed to allege, as required by S.C. Code Ann. § 17-19-30, "the manner in which the death of the deceased was caused," and by granting the state's motion to amend the indictment to include Appellant killed the decedent "through homicidal violence of unknown means" since such an amendment violated Appellant's constitutional and statutory right to presentment and changed the nature of the offense. 4

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Clair v. State, 324 S.C. 144, 478 S.E.2d 54 (1996) 14

Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003) 14

Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005) 8

Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994) 14

Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002) 5, 12, 13

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006) 3

State v. Evans, 216 S.C. 328, 57 S.E.2d 756 (1950) 8

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) 8, 14, 15

State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993) 8

State v. Jenkins, 48 S.C.L. 215 (Ct. App. 1867) 5

State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001) 14

State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006) 8, 9, 13, 15

State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987) 12

State v. Myers, 313 S.C. 391, 438 S.E.2d 236 (1993) 13

State v. Reddick, 348 S.C. 631, 560 S.E.2d 441 (Ct. App. 2002) 9

State v. Shoemaker, 376 S.C. 275 S.E.2d 878 (1981) 9

State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007) 3, 9

Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999) 14

Winns v. State, 363 S.C. 414, 611 S.E.2d 901 (2005) 5, 10, 11

Statutes

S.C. Code Ann. § 16-3-10 .... 9, 11

S.C. Code Ann. § 17-19-30 .... Passim

S.C. Code Ann. § 17-19-10 .... 7, 15

S.C. Code Ann. § 17-19-20 .... 8, 9

S.C. Code Ann. § 17-19-100 14

Constitutional Provisions

S.C. Const. Art. I, § 3 8

S.C. Const. Art. I, § 11 .... 7, 15

S.C. Const. Art. V, § 22 .... 7, 15

U.S. Const. Amend. V 8

STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse her discretion by denying Appellant's motion to quash the indictment for the offense of murder where the indictment was insufficient because it failed to allege, as required by S.C. Code Ann. § 17-19-30, "the manner in which the death of the deceased was caused," and by granting the state's motion to amend the indictment to include Appellant killed the decedent "through homicidal violence of unknown means" since such an amendment violated Appellant's constitutional and statutory right to presentment and changed the nature of the offense?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant on April 22, 2014 for murder and grand larceny. R. 690. Pretrial hearings were held on July 30, 2019 and August 28, 2019 before the Honorable Letitia H. Verdin. R. 1. Appellant's case was called to trial on September 9, 2019 before Judge Verdin, and a jury. R. 17. Assistant Solicitors Brandi Hilton and Doug Richardson represented the state, and Chris Scalzo and Chad Propst represented Appellant. R. 17.

On September 12, 2019, the jury found Appellant guilty as indicted. R. 681, l. 24 – 682, l. 10. He was sentenced to forty-five years for murder and five years concurrent for grand larceny. R. 686, ll. 4-7.

This appeal follows.

STANDARD OF REVIEW

"The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Tumbleston, 376 S.C. 90, 94, 654 S.E.2d 849, 851 (Ct. App. 2007) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support." Id. (citing Baccus, 367 S.C. at 48, 625 S.E.2d at 220). "Accordingly, an appellate court is bound by the trial court's factual findings when the findings are supported by the evidence and not controlled by error of law." Id. (citing Baccus, 367 S.C. at 48, 625 S.E.2d at 220).

ARGUMENT

The trial judge abused her discretion by denying Appellant's motion to quash the indictment for the offense of murder where the indictment was insufficient because it failed to allege, as required by S.C. Code Ann. § 17-19-30, "the manner in which the death of the deceased was caused," and by granting the state's motion to amend the indictment to include Appellant killed the decedent "through homicidal violence of unknown means" since such an amendment violated Appellant's constitutional and statutory right to presentment and changed the nature of the offense.

Relevant Facts

Misty Johnson disappeared on September 12, 2013. Her severely decomposed body was found at the end of Whispering Hollow Road on October 30, 2013. R. 75, l. 19 – 76, l. 10. She was naked and wrapped in the comforter from her bed. R. 79, ll. 2-12; R. 379, ll. 9-15. Because of the severity of the decomposition, the pathologist who conducted the autopsy could not determine a specific cause of death. He ultimately opined that Johnson died from "homicidal violence of unknown means." R. 381, ll. 16-25. The pathologist admitted he had no medical evidence to support his opinion on the cause and manner of death. R. 396, ll. 18 – 397, l. 1. Rather, he relied on the circumstances surrounding the death. He asserted, "So while my autopsy did not provide any concrete evidence, the examination of the scene and other factors, witness statements, indicate that this woman did not just die out there randomly, naked, wrapped in bed sheets, at the end of a dead end road." R. 382, ll. 16-23.

Appellant moved pretrial to quash the indictment for the offense of murder arguing the indictment was insufficient because it failed to allege, as required by S.C. Code Ann. § 17-19-30, "the manner in which the death of the deceased was caused." R. 687. During the pretrial hearing

held on August 28, 2019, defense counsel asserted, "This indictment does not refer to the manner or cause of death really in any way. It just states the . . . date and time and that there [was] a death." R. 4, ll. 8-16. Counsel cited to Winns v. State, 363 S.C. 414, 611 S.E.2d 901 (2005) in support of his argument. While recognizing the case was not directly on point, counsel argued our Supreme Court in Winns held the indictment was sufficient in part because it "explained that the blows to the head were the proximate cause of death." R. 4, l. 25 – 5, l. 12. Consequently, counsel maintained the case supported his argument that § 17-19-30 requires the manner or cause of death be specifically pled in the indictment. R. 5, ll. 14-19.

In response, the assistant solicitor argued that the intention of § 17-19-30 was not to eliminate the ability of the state to prosecute a murder where it cannot establish a cause of death because the body either cannot be found or, as in this case, is "so badly decomposed that the specific cause of death is undetermined." R. 6, ll. 14-18. The solicitor cited to Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002), where our Supreme Court held a murder indictment was sufficient despite failing to include the words "wilfully" and "feloniously," which are also required to be pled by § 17-19-30. The solicitor also cited to State v. Jenkins, 48 S.C.L. 215 (Ct. App. 1867), which she maintained held "that allegations may state in the alternative the manner and instrumentality of death or may state that the death was caused by means or instrumentality unknown." R. 6, ll. 19-23.

The solicitor asserted that if the judge were to quash the indictment, the state would have no new evidence to present to the grand jury concerning the manner or cause of death. R. 7, ll. 2-10. She recognized that the state's inability to determine the decedent's cause of death was a "hurdle" the state would have to overcome at trial but maintained that the cause of death was ultimately a "jury argument" and did not affect the "sufficiency of the indictment." R. 7, ll. 2-12.

The solicitor further argued that the primary purpose of an indictment is to put an accused on notice as to what he is called upon to answer, apprise him of the elements of the offense, and allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the accused is found guilty. She maintained the indictment in this case satisfied that purpose. R. 8, ll. 8-17.

Finally, if the judge found the indictment insufficient, the solicitor moved to amend the indictment by adding Appellant killed the decedent "through homicidal violence of unknown means." The solicitor maintained that this amendment would not change the nature of the charge. Instead, she claimed it would merely provide "more clarity." R. 7, l. 19 – 8, l. 23.

Appellant objected to the state's proposed amendment. Defense counsel argued the amendment "does go to the nature of the offense" as well as Appellant's "right to have the case properly presented to the grand jury and have the grand jury pass on it." R. 9, ll. 10-13. Counsel asserted the grand jury was not told the cause of death was "in question." He argued that part of the purpose of § 17-19-30 is to ensure the grand jury passes on the cause and manner of death. R. 9, ll. 14-22. Specifically, he argued, "[H]e's [Appellant is] entitled by the Constitution to have a properly pled indictment and have the grand jury pass on it. He's entitled by the statute to have the same, and . . . in a murder case, specifically plead the cause [of death] and let the grand jury pass on it." R. 10, ll. 16-20.

The trial judge acknowledged the plain language of § 17-19-30 requires the manner in which the death of the deceased was caused be stated in the indictment. R. 15, ll. 1-4. However, she found "it would strain the plain language of that statute to construe it here and say that someone could not be tried for a murder in which you [the state] cannot determine the exact cause of death

where the medical examiner has said that it's homicidal violence by unknown means." R. 15, ll. 5-10. Consequently, the judge denied the motion to quash the indictment.

In addition to denying Appellant's motion to quash, the judge granted the state's request to amend the indictment to include Appellant killed the decedent "through homicidal violence of unknown means." She found this amendment "does not change the indictment a whole lot" and that the defense was on notice of this allegation. R. 15, ll. 11-15.

Defense counsel noted his objection to the amendment asserting the amendment "is not simply a clerical error or a scrivener's error." R. 15, ll. 20-24. When Appellant's case was called to trial, defense counsel renewed his motion to quash the indictment and his objection to the amendment. R. 19, l. 20 – 20, l. 1.

Discussion

The trial judge abused her discretion by denying Appellant's motion to quash the indictment for the offense of murder where the indictment was insufficient because it failed to allege, as required by § 17-19-30, "the manner in which the death of the deceased was caused." The indictment was wholly void of any mention of the manner or cause of the decedent's death. The judge further abused her discretion by granting the state's motion to amend the indictment to include Appellant killed the decedent "through homicidal violence of unknown means" since such an amendment violated Appellant's constitutional and statutory right to have a grand jury pass on the manner and cause of death and changed the nature of the offense.

"No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury." S.C. Code Ann. § 17-19-10; <u>See</u> S.C. Const. Art. I, § 11 and Art. V, § 22. "A defendant has a constitutional and statutory right to demand that a grand jury

consider his case and decide whether to issue a sufficient indictment." State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353 (2006).

"The indictment is a notice document." State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). "The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." Means, 367 S.C. at 382, 626 S.E.2d at 353 (citing Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500 and S.C. Code Ann. § 17-19-20); See Evans v. State, 363 S.C. 495, 508-513, 611 S.E.2d 510, 517-519 (2005). "This required notice is a component of the due process that is accorded every criminal defendant." Id. (citing U.S. Const. Amend. V and S.C. Const. Art. I, § 3).

"A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17-19-90." Gentry, 363 S.C. at 102, 610 S.E.2d at 500. "In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances." Id. at 103, 610 S.E.2d at 500 (internal citation omitted). "All the surrounding circumstances must be weighed to make an accurate determination of whether the defendant was prejudiced by a lack of notice and an insufficient indictment." Means, 367 S.C. at 384, 626 S.E.2d at 354 (citing State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993) and State v. Evans, 216 S.C. 328, 57 S.E.2d 756 (1950)). "Further, whether the indictment could be more definite or certain is irrelevant." Gentry, 363 S.C. at 103, 610 S.E.2d at 500 (internal citation omitted).

"In South Carolina, an indictment 'shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime

substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.'" State v. Tumbleston, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007) (quoting S.C. Code Ann. § 17-19-20). "Therefore, an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." Id. (citing State v. Reddick, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct. App. 2002)); See Means, 367 S.C. at 384, 626 S.E.2d at 354 (citing State v. Shoemaker, 376 S.C. 86, 275 S.E.2d 878 (1981)).

"Every indictment for murder shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless phraseology, of *the manner in which the death of the deceased was caused*, charges that the defendant did feloniously, willfully and of his malice aforethought kill and murder the deceased." S.C. Code Ann. § 17-19-30 (emphasis added).

In this case, the indictment alleged, "That Samuel Hawkins, Jr. [Appellant] did in Greenville County, on or about the 12th day of September, 2013, unlawfully and with malice aforethought kill Misty Johnson, and that Misty Johnson died as a proximate result thereof. This is in violation of § 16-03-0010 of the South Carolina Code of Laws (1976) as amended." R. 692. The indictment was insufficient because it failed to allege, as required by § 17-19- 30, "the manner in which the death of the deceased was caused." Such failure prevented the grand jury from passing on the manner and cause of death in violation of Appellant's statutory and constitutional rights. It also failed to give Appellant sufficient notice.

In Winns v. State, 363 S.C. 414, 611 S.E.2d at 901 (2005), our Supreme Court found the indictment for the offense of murder sufficient where it alleged the time and place of the decedent's death as well as the proximate cause of death. On October 4, 1997, Winns spent most of the afternoon and evening at John Mouzon's apartment smoking crack cocaine. Id. at 416, 611 S.E.2d at 902. Winns eventually ran out of money and asked Mouzon if he would give him some crack cocaine anyway, and Mouzon did. Id. Later that night, Winns and Mouzon were sitting on the couch when Mouzon put his hand on Winns' thigh. Id. Because of this, Winns decided to leave. Id. Before leaving, Winns went to the bathroom, and when he came back out, he found Mouzon lying on the bed, naked, with a sheet pulled up to his waist. Id. Winns testified that, instead of leaving right away, he walked toward the bed to get more crack cocaine. Id. When Winns was by the bed, Mouzon grabbed Winns by the groin, pulled him onto the bed, and told him that he needed to pay him back for the crack he had given him. Id. at 416-417, 611 S.E.2d at 902. Winns reacted by hitting Mouzon on the head several times with an iron until Mouzon released his grip. Id. at 417, 611 S.E.2d at 902. Winns turned himself in hours later. Id. The central issue at trial was whether Winns acted in self-defense or whether his actions constituted murder or manslaughter. The jury convicted him of murder. Id.

The post-conviction relief (PCR) judge ultimately found the indictment charging Winns with murder was flawed because it did not state the time and place of the decedent's death. The indictment read as follows: "That Herman Winns did in Berkeley County on or about October 4, 1997 while at Apartment #5 at Belangia Apartments in the town of St. Stephen, South Carolina, with malice aforethought, strike John Arthur Mouzon several times in the head with a metal object, said blows to the head being the proximate cause of death of John Arthur Mouzon. This action

being in violation of § 16-3-10, South Carolina Code of Law (1976), as amended." Id. at 419, 611 S.E.2d at 903.

Our Supreme Court held that "although the indictment did not state Mouzon did 'then and there' die, the only logical reading of the indictment is that on October 4, 1997, Winns hit Mouzon in the head several times, at the Belangia Apartments, and Mouzon died either at the time he was attacked or soon thereafter." Id. at 419, 611 S.E.2d at 903-904. The Court emphasized that had the decedent "been found in a different location or on a different date, the indictment, as written, may have been insufficient." Id. at 419, 611 S.E.2d at 904. Finally, the Court concluded, "Because Mouzon was found dead in his bed, on the same day and in the same place where Winns struck him, and because the indictment explained that the blows to the head were the 'proximate cause of death,' . . . the indictment states the offense of murder with sufficient certainty and particularity such that Winns knew what he was being called upon to answer." Id. at 419-420, 611 S.E.2d at 904. Consequently, the Court held the indictment was not defective and reversed the decision of the PCR judge. Id. at 420, 611 S.E.2d at 904.

While it did not specifically address § 17-19-30, Winns supports Appellant's argument that his indictment for murder was insufficient because it failed to allege in any way the manner and cause of the decedent's death. The Court in Winns held the indictment was sufficient in part because it alleged that Winns struck Mouzon several times in the head with a metal object and "said blows to the head" were "the proximate cause of death." 363 S.C. at 419-420, 611 S.E.2d at 904. The indictment charging Appellant with murder wholly omitted any mention of the manner and cause of the decedent's death. Consequently, not only was it insufficient to apprise Appellant "of what he must be prepared to defend," it also violated his statutory and constitutional rights to have the grand jury pass upon the manner and cause of death. See State v. Munn, 292 S.C. 497,

499, 357 S.E.2d 461, 462 (1987), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), our Supreme Court held the indictment charging Joseph with murder was sufficient despite failing to specifically allege the crime was committed "wilfully" and "feloniously" as required by § 17-19-30. The indictment charged, "That one Marcus A. Joseph . . . did in Clarendon County on or about March 18, 1987, with malice aforethought, kill one Alfred Cole by means of shooting him with a Colt .357 Magnum Pistol, and that the said Alfred Cole did die in Clarendon County as a proximate result thereof on or about March 18, 1987." Id. at 560-561, 571 S.E.2d at 284. The Court held the indictment was sufficient because "[a]s mentioned in § 17-19-30, the indictment set forth the time ('on or about March 18, 1987') and place ('in Clarendon County') of the crime, and stated the manner in which the death of the deceased was caused ('kill one Alfred Cole by means of shooting him with a Colt .357 Magnum Pistol')." Id. at 561-562, 571 S.E.2d at 285.

The Court emphasized that while the indictment did not state Joseph "feloniously" and "wilfully" committed the murder, the indictment included the elements of murder by stating Joseph killed another with malice aforethought. Id. at 562, 571 S.E.2d at 285. Further, the Court asserted, "Here, the word 'feloniously' is encompassed in the word 'murder' because murder is a felony" and "the word 'wilfully' is encompassed in the word 'malice' because malice is 'the *intentional* doing of a wrongful act toward another without legal justification or excuse.'" Id. (emphasis in original). Thus, the Court held the indictment was sufficient. In so holding, the Court maintained that the "General Assembly did not intend to burden the writing of murder indictments by requiring

surplus words when their obvious intent in promulgating § 17-19-30 was to simplify indictments." Id.

Unlike the indictment in Joseph, the indictment in this case failed to set forth the manner in which the death of the deceased was caused as required by § 17-19-30. While the Court held the words "wilfully" and "feloniously" were "surplus words," the same certainly cannot be said about "the manner in which the death of the deceased was caused." See Joseph, 351 S.C. at 562, 571 S.E.2d at 285. Despite omitting the words "wilfully" and "feloniously," the indictment charging Joseph with murder was sufficient to apprise him of what he must be prepared to defend since, as our Supreme Court emphasized, "feloniously" was encompassed in the word "murder" and "wilfully" was encompassed in the word "malice." See Joseph, 351 S.C. at 562, 571 S.E.2d at 285. However, in this case, the indictment charging Appellant with murder was insufficient as it wholly omitted any mention of the manner or cause of the decedent's death, thereby failing to properly apprise Appellant of what he was called upon to answer. Moreover, the omission violated Appellant's statutory and constitutional rights to have a grand jury pass upon the manner and cause of the decedent's death. Consequently, this Court should hold the indictment was insufficient and that the trial judge abused her discretion by failing to quash the indictment.

In addition to abusing her discretion by failing to quash the indictment, the trial judge further erred by granting the state's motion to amend the indictment by adding that Appellant killed the decedent "through homicidal violence of unknown means." See R. 692. "Amendments to an indictment are permissible if: (1) they do not change the nature of the offense; (2) the charge is a lesser included offense of the crime charged in the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty." State v. Means, 367 S.C. 374, 385-286, 626 S.E.2d 348, 355 (2006) (citing State v. Myers, 313 S.C. 391, 438 S.E.2d 236 (1993); S.C. Code

Ann. § 17-19-100 (trial court "may amend the indictment ... if such amendment does not change the nature of the offense charged")).

The amendment in this case undoubtedly changed the nature of the offense. Without pleading the manner and cause of the decedent's death, it was uncertain what offense Appellant was charged with. See Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003) (reversing conviction for possession with intent to distribute marijuana within proximity of a school because substituting a school for the church named in the original indictment was not a scrivener's error, but changed the nature of the offense charged), *overruled on other grounds*, Gentry, 363 S.C. 93, 610 S.E.2d 494; State v. Lynch, 344 S.C. 635, 641, 545 S.E.2d 511, 514 (2001) (reversing conviction where trial court, with regard to first degree burglary indictment, allowed aggravating circumstance to be changed from entering during the darkness to causing physical injury; amendment changed the nature of the offense charged because proof required for each aggravating circumstance was materially different), *overruled on other grounds*, Gentry, 363 S.C. 93, 610 S.E.2d 494; Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999) (granting post-conviction relief where prosecutor verbally amended indictment for second-degree burglary to state that the burglary occurred at nighttime; amendment changed the nature of the offense charged by changing the classification from nonviolent to violent), *overruled on other grounds*, Gentry, 363 S.C. 93, 610 S.E.2d 494; Clair v. State, 324 S.C. 144, 478 S.E.2d 54 (1996) (affirming grant of post-conviction relief where defendant was indicted for trafficking in cocaine weighing more than 100 grams and less than 200 grams, and defense counsel consented to an amendment of the indictment to an amount more than 200 grams, which changed the nature of the offense charged by increasing the penalty); Hopkins v. State, 317 S.C. 7, 10, 451 S.E.2d 389 (1994) (granting post-conviction relief and new trial where original indictment for felony DUI causing great bodily injury was

amended to indictment for felony DUI causing death; amendment, which increased potential penalty from ten to twenty-five years, changed the nature of the offense charged), *overruled on other grounds*, Gentry, 363 S.C. 93, 610 S.E.2d 494.

"[A]mendments usually are permitted for purposes of correcting an error of form, such as a scrivener's or clerical error. Thus, a motion to amend an indictment should be granted when the proposed amendment does not change the nature of the offense or affect the sufficiency of the indictment." Means, 367 S.C. at 387, 626 S.E.2d at 356 (internal citation marks omitted). Certainly, amending an indictment to add the manner and cause of the decedent's death, as was done in this case, is not merely correcting a scrivener's or clerical error. The amendment to Appellant's indictment both affected the sufficiency of the indictment and changed the nature of the offense charged.

Moreover, the amendment deprived Appellant of his statutory and constitutional rights to presentment, *i.e.*, to have a "grand jury consider his case and decide whether to issue a sufficient indictment." Means, 367 S.C. at 383, 626 S.E.2d at 353; See S.C. Code Ann. § 17-19-10; S.C. Const. Art. I, § 11 and Art. V, § 22. By allowing the state to amend the indictment to include Appellant killed the decedent "through homicidal violence of unknown means," the trial judge denied Appellant his constitutional and statutory rights to have the grand jury pass upon the alleged manner and cause of death and decide whether to issue a sufficient indictment in compliance with § 17-19-30.

Respectfully, this Court should hold the trial judge abused her discretion by failing to quash the indictment and ultimately granting the state's motion to amend the indictment, reverse Appellant's conviction for murder, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence for murder and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy___________
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of December, 2020.

RECEIVED
Dec 04 2020
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

December 4, 2020.

s/ Lara M. Caudy________________

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

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THE STATE,

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency" dated March 20, 2020, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above referenced case has been served upon W. Joseph Maye, Esquire, at the primary e-mail addresses listed in the Attorney Information System (AIS), this 4th day of December, 2020.

s/ Lara M. Caudy____________
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT