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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

ROY GENE SUTHERLAND, III

APPELLANT

APPELLATE CASE NO. 2018-002148

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Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

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Opinion No. 2021-UP-180

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PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, counsel for Roy Gene Sutherland, III, petitions the Court for rehearing and respectfully submits that this Court overlooked the fact that five friends or family members of the deceased, who were not called as witnesses at trial, were allowed to personally address the jury panel during jury selection. One person, William Lawrence Ashcroft, told the jury that he was the Sunday school teacher of one of the family members of the deceased and a deacon in their church. While the trial judge had the authority to question potential jurors about whether they knew family and friends of the deceased, it was improper for those family members and friends to personally address the jury panel. As the error took place during jury selection, a mistrial was

not required or requested. Instead, the judge should have simply dismissed the panel, as requested by Appellant, and called another panel from which to choose the jurors for Appellant's trial. Allowing friends and family members of the deceased to personally address the jury panel deprived Appellant of his right to a fair trial with impartial and indifferent jurors. The error requires reversal.

During jury selection the following took place:

> The Court: The person who is alleged to have been the victim of the murder is Lanham Joseph Wood. Obviously, Mr. Wood's not present. But we do have some family members who are. And, Mr. Barnette, if you can, introduce those family members.
>
> Mr. Barnette: If y'all would stand up and I will introduce you to the jury.
>
> The Court: These are family members that are being introduced to – perhaps you might not know Mr. Wood or didn't know Mr. Wood, but you might know a family member, so.
>
> Brenda Crenshaw: Brenda Crenshaw, his aunt.
>
> Tina Ford: Tina Ford, his sister.
>
> William Lawrence Ashcraft: William Lawrence Ashcraft, one of her Sunday school teachers, a deacon in the church.
>
> Betty Johnson: I'm Betty Johnson, his sister.
>
> Ms. White: Your Honor –
>
> Matthew Ashcraft: Matthew Ashcraft, friend of the family.
>
> Ms. White: May we approach briefly?
>
> The Court: Yes, ma'am.
>
> (Bench conference held off the record.)

(R. p. 15, line 7 – p. 16, lines 1-4).

After the jury was selected Appellant placed the objection on the record stating:

> Your Honor, the defense just wanted to place an objection on the record. When Your Honor was talking to the jury panel about the possible witnesses that they

> would know and be aware of, Your Honor indicated the state had present the victim's family members, had them stand up.
>
> In addition to that though the state presented two different people that they presented as family – as friends of family. They also raised issues having to do with their church membership, them being deacons and so on.
>
> And I think in this case we've talked about not allowing – or the State was trying to keep out certain evidence regarding drug use and things like that, out. And in this case it's simply kind of a way to run around to make this appear more of a true motive – excuse me – a murder compared to what our defense is or what even their own witness says, which was this was a result of a drug-deal situation.
>
> So we would just object to them being able to present these people and having them speak to the jury indicating that they're involved with the church and deacons.

(R. p. 17, line 16 – p. 18, lines 1-11). When asked about harm Appellant explained, "Well, Your Honor, I just think that it's an attempt to almost bolster the credibility of the victim in this situation and make this appear kind of more of a heinous crime perhaps." (R. p. 18, lines 14-17). When asked about remedy Appellant moved to dismiss the entire jury panel. (R. p. 19, lines 5-15). The judge denied the request and provided no curative instruction. The trial judge erred.

Allowing the family members and family friends with the church affiliation to introduce themselves to the jury was improper. By personally addressing the jury panel the friends and family members ingratiated themselves to the jury panel and improperly aroused sympathy for the deceased. The family members and friends were not witnesses and should not have been permitted to address the jury. The State, through these non-witnesses, made an improper personal appeal to the jurors. ("In arguing before a jury, no attorney shall address or refer to by name or otherwise any member of the jury he is addressing, or otherwise make any personal appeal to any or all members of the jury. Rule 22, SCRCrimP).

Additionally, the comments improperly suggested that the deceased was a good person. If the family members and friends had been called as witnesses, they would not have been able to

testify as to the good character of the deceased. Rule 404(a)(2), SCRE, provides that evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except that evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor. Here the State was not rebutting any evidence offered by the accused. The trial had not yet started.

In affirming Appellant's convictions this Court wrote:

> The circuit court did not abuse its discretion in refusing to excuse the entire jury pool because evidence supports the circuit court's determination that William Lawrence Ashcraft's statement did not harm or prejudice Sutherland. Ashcraft's statement that he was a church deacon and the victim's relative's Sunday school teacher could not have had any bearing on the impartiality of the jury in light of the fact that his statement did not concern the victim and the victim's relative did not testify at trial. See State v. Coaxum, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014) ("All criminal defendants have the right to a trial by an impartial jury." (quoting State v. Woods, 354 S.C. 583, 587, 550 S.E.2d 282, 284 (2001))); S.C. Code Ann. § 14-7-1020 (2017) (stating a court shall disqualify a juror "[i]f it appears to the court that the juror is not indifferent in the cause"); Abofreka v. Alston Tobacco Co., 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986) ("The decision [to disqualify a juror] is within the sound discretion of the [circuit court]."); State v. Spann, 279 S.C. 399, 402, 308 S.E.2d 518, 520 (1983) ("A juror's competence is within the [circuit court]'s sole discretion and is not reviewable on appeal unless wholly unsupported by the evidence."); Coaxum, 410 S.C. at 327, 764 S.E.2d at 245 ("To protect both parties' right to an impartial jury, the [circuit] court must conduct voir dire of the prospective jurors to determinate 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.'" (second alteration in original) (quoting Woods, 354 S.C. at 587, 550 S.E.2d at 284)).

State v. Sutherland, Op. No. 2021 -UP-180 (S.C. Ct. App. Filed May 19, 2021).

Counsel respectfully submits that the evidence supports a finding of prejudice resulting from an impartial jury panel. Appellant did not challenge the competency of or move to disqualify a specific juror. Instead, Appellant sought an impartial jury panel. Family members

and friends did not need to personally address the jury panel in order for the trial judge to determine whether the potential jurors were aware of any bias or prejudice against a party or to elicit such facts that would enable the parties to intelligently exercise their use of peremptory challenges. During jury selection the non-witness family members and friends of the deceased should have been treated in the same way as potential witnesses. The judge should simply have read out the names to determine if any of the potential jury members knew the friends and family members.

Appellant was prejudiced by the prosecutor and then the judge allowing friends and family members of the deceased to personally address the jury panel. The comments constituted an improper personal appeal to the jury panel, the comments improperly introduced good character evidence of the deceased by association with friends and family members involved with the church. By allowing the friends and family members of the deceased to personally address the jury panel they ingratiated themselves to the panel and aroused improper sympathy for the deceased. Allowing the non-witness friends and family members to personally address the jury panel and discuss church affiliation is analogous to allowing outside influences in the jury process. In State v. Kelly, 331 S.C. 132, 141-42, 502 S.E.2d 99, 104 (1998), a juror misconduct case, the South Carolina Supreme Court addressed outside influence in the form of a religious pamphlet about God's view of the death penalty and wrote:

> The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *see also* S.C. Const. art I, §§ 3 & 14. To safeguard these rights, "it is required that the jury render its verdict free from outside influences of whatever kind and nature." State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.App.1993).
>
> In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Unless the misconduct affects the jury's

> impartiality, it is not such misconduct as will affect the verdict. The trial court has broad discretion in assessing allegations of juror misconduct. Relevant factors to be considered in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice. Generally, the determination of whether extraneous material received by a juror during the course of the trial is prejudicial is a matter for determination by the trial court. 23A C.J.S. *Criminal Law* § 1365 (1989).

In the present case there was no juror misconduct. Instead, the prosecutor allowed non-witness friends and family members to personally address the jury panel. The comments made to the jury panel by the friends and family members are extraneous material received by the jury panel, like the extraneous pamphlet received by the jury in Kelly, that constitute improper outside influence in violation of the Sixth Amendment right to a fair trial by an impartial jury. The trial judge abused his discretion by not dismissing the tainted jury panel and summoning a new jury panel, free from outside influence.

In Kelly the Court found no prejudice from the introduction of the death penalty pamphlet during the guilt phase of the trial. The judge in Kelly dismissed the juror who brought the pamphlet into the jury room. Additionally, the judge conducted extensive voir dire about the incident before declining to declare a mistrial. In contrast, in the present case there was no curative instruction given or voir dire of the jury panel after the friends and family members improperly addressed the panel. Another important difference between the present case and Kelly is the fact that Appellant did not ask for a mistrial. Instead, Appellant asked for a non-tainted jury panel. Appellant was prejudiced by the trial judge's refusal to summon a non-tainted jury panel.

The present case is distinguished from State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014), where the South Carolina Supreme Court found that the trial judge did not abuse his discretion in removing a juror who unintentionally failed to disclose a relationship with the

defendant's family member during voir dire. The present case does not involve a failure to disclose by a jury member or the judge removing an already seated juror. The present case involves friends and family members improperly addressing the jury panel during jury selection. Coaxum does not stand for the proposition that family members and friends of either side should be able to personally address the jury panel during jury selection. This Court should not condone this improper practice. Appellant did not receive a fair trial because the jury panel was not free from outside influences in violation of the Sixth Amendment and Fourteenth Amendments of the United States Constitution as well as S.C. Const. art I, §§ 3 & 14. The error requires reversal.

Based on the above arguments, Appellant respectfully seeks rehearing.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 3rd day of June, 2021.

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CERTIFICATE OF SERVICE

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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 Petition for Rehearing in the above-entitled case has been served upon Michael D. Ross, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Roy Gene Sutherland, III, #323075, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 3rd day of June, 2021.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT