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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 2021-UP-180 (S.C. Ct. App. Filed May 19, 2021)

Lower Court Case No. 2018-GS-42-1409

THE STATE,

RESPONDENT,

V.

ROY GENE SUTHERLAND, III

PETITIONER

APPELLATE CASE NO. 2018-002148

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on July 14, 2021.

QUESTION PRESENTED

In this murder trial, did the Court of Appeals err in affirming the trial judge's refusal to dismiss the first jury panel and bring in a new 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?

STATEMENT OF THE CASE

In March of 2018, the Spartanburg County Grand Jury indicted Petitioner, Roy Gene Sutherland, III, for murder and possession of a weapon during the commission of a violent crime, indictment #18-GS-42-1409. On November 26, 2018, Petitioner proceeded to jury trial before the Honorable J. Derham Cole. Suzanne H. White and Paul K. Neely represented Petitioner at trial. Solicitor Barry Joe Barnett prosecuted the case. The jury found Petitioner guilty and, pursuant to S.C. Code §17-25-45, Judge Cole sentenced Petitioner to life in prison. A timely notice of intent to appeal was served on December 4, 2018, and the direct appeal perfected. On May 19, 2021, the South Carolina Court of Appeals, in an unpublished opinion, affirmed the convictions and sentence. A timely petition for rehearing was filed on June 3, 2021, and then denied on July 14, 2021. This petition for writ of certiorari follows.

ARGUMENT

In this murder trial the Court of Appeals erred in affirming the trial judge's refusal to dismiss the first jury panel and bring in a new 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.

The jury found Petitioner guilty in the fatal stabbing of Lanham Wood. A neighbor of Wood, William Lanford, testified that on January 6, 2018, around 5:00 PM there was a loud knock on his back door. (R. p. 66, line 19 – p. 67, lines 1-14). When Lanford opened the door he saw Wood walking down the sidewalk. When Lanford called his name Wood turned around and asked for help. (R. p. 67, lines 16-18). Lanford saw blood and testified that Wood said, "I think they stabbed me." (R. p. 67, lines 19-25). According to Lanford, when he asked what happened Wood said that when he went to get kerosene a man and a woman in a U-Haul truck picked him up and they did this to him. (R. p. 68, lines 2-5). Lanford's wife called 911. (R. p. 74, lines 11-12). An ambulance took Wood to the hospital where he died. (R. p. 68, lines 8-10). Lanford admitted that on the night of the incident when he gave a statement to the police he did not tell the police that Wood told him a man and a woman picked him up. (R. p. 73, lines 2-6).

After seeing a news report about the incident, Aaron Price called the Spartanburg Sheriff's Office and told them he saw a man with a gas can get into a U-Haul at the Spinx gas station near Wood's home. (R. p. 76, line 2 – p. 77, lines 1-2). An investigator gathered surveillance videos from the Spinx and other businesses showing Wood getting into the U-Haul. (R. pp. 83-97). The investigator learned that earlier, at 2:00 AM on the morning of January 6, 2018, officers stopped a U-Haul truck driven by co-defendant, Amy Berridge. (R. p. 96, line 17-p. 97, lines 1-5; pp. 122 - 128. Petitioner was a passenger in the U-Haul when it was stopped at 2:00 AM. (R. p. 97, lines 3-5). At that time Petitioner had two knives. (R. pp. 131-133). The

officer issued a warning ticket to Amy Berridge, the co-defendant driver. (R. p. 128, lines 3-11). Both officers at the stop wore body cameras and images from the cameras were introduced in evidence at trial. (R. p. 123, lines 6-14; p. 132, lines 9-17, State's Exhibits #26, #28).

Investigators learned that Rhonda Loftis, the co-defendant's mother, rented the U-Haul for her daughter on January 4, 2018. (R. pp. 135-139). Investigators searched a vacant mobile home on the co-defendant's grandmother's property where they found shoes that appeared to have blood on them. (R. p. 182, line 6 – p. 183, lines 1-20; p. 197, line 10 – p. 198, lines 1-5). The blood matched a sample from the deceased. (R. p. 250, lines 10-22).

On January 9, 2018, officers stopped the U-Haul truck. (R. p. 143, line 14 – p. 144, lines 1-11). One of the officers wore a body camera and images from the camera were introduced in evidence at trial. (R. p. 144, lines 12-25, State's Exhibit #52). Amy Berridge, the co-defendant, was driving the truck and Petitioner was a passenger. (R. p. 152, lines 22-24). A swab from the passenger door matched a blood sample from the deceased. (R. p. 249, line 22 – p. 250, lines 1-9).

Prior to trial the State moved to exclude a toxicology report showing that the deceased had methamphetamine in his system. (R. p. 22, line 7 – p. 23, 24, 25, 26, 27, lines 1-14). Petitioner agreed that the toxicology report was not admissible[1] but argued that drug use was important to establish the relationship between the deceased and the co-defendant. (R. pp. 38 – 40). Neither testimony about drug use nor the toxicology report were admitted in evidence.

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

[1] General case law was referenced in both arguments by the State and Petitioner but no specific citations were provided for this proposition.

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 Petitioner 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 Petitioner 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). The judge responded:

> Well, let me say this. It's not uncommon that there are folks seated 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 that introducing someone does in my view. So of course we had a sidebar about it. Mr. Barnette 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.

(R. p. 18, line 18 – p. 19, lines 1-5). The prosecutor, Mr. Barnette, however, did not introduce the friends and family members of the deceased. Instead, they were allowed to personally address the jury panel. To address the judge's concern, he or the prosecutor simply could have read the names of the friends and family members and asked the jury panel if they knew them. The judge could have asked the friends and family members to stand as he read their names to the panel. The friends and family members, however, should not have been allowed to personally address the jury panel.

When asked about remedy, Petitioner 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. Petitioner was prejudiced by the trial judge's refusal to excuse the jury panel that had been personally addressed by friends and family members of the deceased. The remedy was to simply bring in a new jury panel.

The judge erred in allowing friends and family members of the deceased to personally address the jury prior to jury selection. Petitioner was prejudiced by the error. By personally addressing the jury panel the friends and family members ingratiated themselves to the jury panel and improperly aroused sympathy for the deceased. By allowing the friends and family to personally address the jury and discuss their affiliation with the church, the State was able to make 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 interaction with the jury panel improperly suggested that the deceased was a good person. If the friends and family members 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. In the present case the State was not rebutting evidence offered by the accused. The trial had not yet started.

In affirming Petitioner's convictions the Court of Appeals 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).

The Court of Appeals overlooked the fact that five friends or family members of the deceased were allowed to personally address the jury panel prior to 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 friends and family of the deceased, it was improper for those friends and family members 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 Petitioner, and called another panel from which to choose the jurors for Petitioner's trial. Petitioner was prejudiced by the judge allowing friends and family members of the deceased to personally address the jury panel because the error deprived Petitioner of his right to a fair trial with impartial and indifferent jurors. The error requires reversal.

Friends and family members of the deceased 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 friends and family members 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.

Petitioner was deprived of the right to an impartial jury panel. Allowing friends and family members of the deceased to personally address the jury panel constituted an improper personal appeal to the jury panel. Allowing friends and family members of the deceased to personally address the jury panel 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 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 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 Petitioner did not ask for a mistrial. Instead, Petitioner asked for a non-tainted jury panel. Petitioner was prejudiced by the trial judge's refusal to summon a non-tainted jury panel.

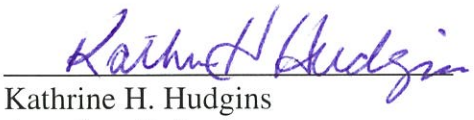
The present case is distinguished from State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014), where the South Carolina Supreme Court found that the trial judge did not abuse his discretion in removing a juror who unintentionally failed to disclose a relationship with the defendant's family member during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

CONCLUSION

Based on the argument above, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,



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This 13th day of August, 2021.