STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROY GENE SUTHERLAND, III

APPELLANT

APPELLATE CASE NO 2018-002148

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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

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STATEMENT OF ISSUE 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?

STATEMENT OF THE CASE

In March of 2018, the Spartanburg County Grand Jury indicted Appellant, 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, Appellant proceeded to jury trial before the Honorable J. Derham Cole. Suzanne H. White and Paul K. Neely represented Appellant at trial. Barry Joe Barnett prosecuted the case. The jury found Appellant guilty and, pursuant to S.C. Code §17-25-45, Judge Cole sentenced Appellant to life in prison. A timely notice of intent to appeal was served on December 4, 2018. This appeal follows.

STANDARD OF REVIEW

"The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011).

ARGUMENT

The trial judge erred 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.

The jury found Appellant 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. Appellant was a passenger in the U-Haul when it was stopped at 2:00 AM. (R. p. 97, lines 3-5). At that time Appellant 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 Appellant 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). Appellant 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 Appellant 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 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. 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 introductions 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 State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012), at the beginning of trial the judge told potential jurors that Manning was being tried for felony DUI and possession of a schedule three substance. After the jury was selected, Manning moved to sever the two charges. The judge granted the motion to sever. Manning then moved for a mistrial based on the fact that the jury heard that Manning was charged with both felony DUI and possession of a schedule three substance. The judge denied the mistrial motion. The Court of Appeals affirmed finding that Manning waived the issue on appeal by not objecting and not moving to sever prior to jury selection. The Court of Appeals then wrote, "We find the single reference to the schedule three drug charge contained in the indictments read at the beginning of trial does not constitute sufficient prejudice to justify a mistrial. See 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.")."

In contrast, in the present case Appellant objected when the family members and friends introduced themselves to the jury. Immediately following jury selection Appellant placed the objection on the record. Unlike in Manning, the issue is not waived. Another distinction between the present case and Manning is that the error did not involve a vague reference to another or prior crime. Instead, the error in the present case involved an improper personal appeal to the jurors and the equivalent of improper good character evidence. The error in the present case was made worse by the fact that evidence of drug use by the deceased, his relationship with the co-defendant and the toxicology report showing that the deceased tested positive for methamphetamine were not admitted in evidence.

In State v. Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Ct. App. 1992), the clerk of court arraigned Wilkins in the presence of the venire. As in Manning, the Court of Appeals found that any objection to arraignment in the presence of the venire was either waived or not prejudicial. As discussed above, the issue in the present case is not waived and is prejudicial. In the present case the failure to dismiss the jury panel and start jury selection with a new panel requires a new trial.

CONCLUSION

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

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 5th day of May, 2020.