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Cooper v. Commonwealth No. 0819-03-4, 2004 WL 1876416, at *1 (Va. Ct. App. Aug. 24, 2004)

Cooper v. Commonwealth
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I. Facts

After being indicted for the murders of his wife, daughter, and extra-marital lover, petitioner Zachary M. Cooper moved pretrial to prohibit family members of the victims from occupying the courtroom's first row of seats. The court granted Cooper's request and also ordered the jury to refrain from sharing the hallways and elevators with the public. However, the victims' family members arrived in court wearing badges with photographs of the victims. From the commencement of the trial onward, Cooper objected and moved to have the court prohibit the display of the pictures. The judge denied the motion, finding a lack of prejudice, because the badges did not identify the family members and because the jurors would later see photographs of the victims as evidence at trial. On the fifth day of the trial, Cooper again raised the same objection, citing an increase in the number of spectators displaying the badges within the courtroom and in the hallway. Once again, the judge denied the defense's motion based on a lack of prejudice. The judge stated that he had not noticed a significant number of the badges, that the jury had seen photographs of the victims during trial, and that the badges, which measured less than four inches in diameter, appeared to be the same photographs as those introduced in trial. The jury convicted Cooper on four counts of capital murder, and he appealed.[1]

II. Holding

The Court of Appeals of Virginia found no abuse of discretion in the trial judge's decision to allow court spectators to wear badges displaying photographs of the victims.[2] The court specifically found that Cooper failed to show that the

1. Cooper v. Commonwealth, No. 0819-03-4, 2004 WL 1876416, at *1–*2 (Va. Ct. App. Aug. 24, 2004) (opinion not selected for publication); *see* VA. CODE ANN. § 18.2-31 (Michie 2004) (describing the offenses that constitute capital murder); VA. CODE ANN. § 18.2-53.1 (Michie 2004) (describing a separate and distinct offense for the use of a firearm while committing or attempting to commit murder). Upon jury conviction, Cooper was sentenced to four terms of life imprisonment and an additional thirteen years for the use of a firearm in the commission of a murder. *Cooper*, 2002 WL 1876416, at *1.

2. *Cooper*, 2004 WL 1876416, at *4.

badges were inherently prejudicial.[3] Furthermore, the defense did not demonstrate that the petitioner suffered actual prejudice by the judge's decision.[4]

III. Analysis

A. Photographs Not Inherently Prejudicial

Although Cooper asserted that the trial court abused its discretion in allowing badge-wearing members of the audience to remain within the courtroom, he offered no case authority that such conduct was inherently prejudicial.[5] Instead, the defense relied upon a Virginia statute that permits the court to remove from the courtroom those who may impede the defendant's right to a fair trial.[6] The Court of Appeals of Virginia, however, found no inherent prejudice.[7] Citing *Lilly v. Commonwealth*,[8] the court stated that "the use of life photographs of the victims as evidence in the trial itself is not inherently prejudicial, especially in a case where the jury will also view crime scene photographs of the victims."[9] Because the prosecution admitted photographs of the victims at the crime scene as evidence for the jury to evaluate, the Court of Appeals of Virginia reasoned that the badge photographs of the victims paralleled the use of "life photographs" in *Lilly*.[10] The trial court's decision to allow badges in the courtroom was, therefore, not an abuse of discretion.[11]

B. No Evidence that Petitioner Suffered Actual Prejudice

Rather than assert that the petitioner suffered actual prejudice, the defense simply maintained that the badge-wearing spectators were within view of the jurors "as they exited the jury room to enter the jury box."[12] To counter Cooper's assertion that the presence of the badges prejudiced the jury, the court relied upon *Johnson v. Commonwealth*,[13] in which the defendant protested the presence of courtroom spectators wearing buttons with the victim's photo-

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3. *Id.*

4. *Id.*

5. *Id.* at *2.

6. *Id.*; *see* VA. CODE ANN. § 19.2-266 (Michie 2004) (allowing the court to "exclude from the trial any persons whose presence would impair the conduct of a fair trial").

7. *Cooper*, 2004 WL 1876416, at *2.

8. 499 S.E.2d 522 (Va. 1998).

9. *Cooper*, 2004 WL 1876416, at *2; *see* Lilly v. Commonwealth, 499 S.E.2d 522, 532 (Va. 1998) (holding that allowing the use of "in life" photograph of victim was not an abuse of the trial court's discretion).

10. *Cooper*, 2004 WL 1876416, at *2.

11. *Id.*

12. *Id.* at *3.

13. 529 S.E.2d 769 (Va. 2000).

graph.[14] Although there was no evidence in the case at hand to indicate that any jurors saw the badges, the record does reflect the trial court's attempts to limit any potentially unfair influence upon the jury.[15] The fact that Cooper failed to offer any evidence of actual prejudice, coupled with the trial court's efforts to mitigate the badges' prejudicial effect, led the Court of Appeals of Virginia to state that " '[i]f the defendant fails to show actual prejudice, the inquiry is over.' "[16] Although the trial court's decision did not amount to an abuse of discretion, the appellate court cautioned in a footnote that the case does not stand for the general proposition that courtroom audience members displaying photographs of the victim could never deprive a defendant of the right to a fair trial.[17]

IV. Application to Virginia Practice

The Court of Appeals of Virginia did not find that permitting badge-wearing spectators to remain in the courtroom audience deprived Cooper of his right to a fair trial.[18] However, because the court based its conclusion on the lack of inherent prejudice and the failure to show actual prejudice, the case does not suggest a rule that spectators displaying photographs in court will always be permissible.[19] Instead, defense counsel must make every effort to demonstrate that the badges unfairly prejudiced the jury.

Because the standard of review is abuse of discretion, an appellate court will only overturn a trial court's decision if the record does not fairly support the ruling.[20] For this reason, counsel should introduce as much evidence as possible to reflect a potential for prejudice. In Cooper's case, at trial and on appeal, defense counsel offered no evidence of prejudice.[21] The trial judge, however, offered several of her own inexact observations in denying the existence of

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14. *Cooper*, 2004 WL 1876416, at *3; *see* Johnson v. Commonwealth, 529 S.E.2d 769, 781–82 (Va. 2000) (stating that the court's decision not to exclude courtroom audience members was not an abuse of discretion because the record did not support the defense's assertion that any of the jurors saw the photographs on the spectators' buttons).

15. *Cooper*, 2004 WL 1876416, at *3. The trial court ordered the separation of "jurors from persons in the hallways and elevators" and the exclusion of "the victim's family members, many of whom were wearing the badges, from the front row of the gallery." *Id.* Some courtroom audience members always occupied the row in front of the badge-wearing spectators. *Id.* Lastly, the court stated "that there were 'not a large number of people' wearing the badges and that it was difficult to see whose photograph was on the badges." *Id.*

16. *Id.* (quoting Holbrook v. Flynn, 475 U.S. 560, 572 (1986)).

17. *Id.* at *3 n.1. "The holding in this opinion does not indicate that the wearing of buttons by spectators in a trial could never deprive a defendant of a fair trial." *Id.*

18. *Id.* at *4.

19. *Id.* at *3 n.1.

20. Beck v. Commonwealth, 484 S.E.2d 898, 906 (Va. 1997).

21. *Cooper*, 2004 WL 1876416, at *3.

prejudice.[22] These included the following: the lack of identifying language accompanying the photographs, the lack of "great numbers" of badges, the small size of the photographs, and the distance and obstructions between the jury and spectators wearing the badges.[23]

In the event that courtroom spectators wear buttons or badges displaying victim photographs in capital cases, defense attorneys should, at a minimum, address the judge's observations noted and relied upon in *Cooper*. Counsel should make efforts to obtain and enter one of the badges as evidence. An actual specimen would provide a reviewing appellate court with tangible evidence of the photograph's size and description. If this approach fails, photographs or testimony from witnesses other than defense counsel can accomplish the same objective.

Daily testimony of an exact census of button wearers would provide an appellate court with the correct number of spectators within the courtroom. The ratio of button wearers to other members of the courtroom audience may also support a claim that the photographs of the victims were prominent throughout the courtroom. In such a case, the buttons portraying pictures of the victims would undoubtably catch the attention of jury members.

A motion to take photographs of the courtroom throughout trial could also provide a means of obtaining evidentiary support on the record, or if the motion is denied, of demonstrating that every effort was made to provide a full record for appellate review. Views of the audience, especially from the perspective of the jury, would best illustrate the potential influence of badges displaying victim photographs on jurors. Such evidence would help to confirm or disprove claims of visual obstructions to the victim photographs in the audience. If the presiding judge denies counsel's request to photograph the courtroom, witness testimony may also provide descriptions of the courtroom. Although attorneys should call witnesses other than members of the defense team for this purpose, counsel should be wary of calling court employees who may be influenced by the very judge that made the decision in question.

To find actual prejudice, defense counsel must provide evidence to establish more than that the jury saw the badges on the spectators.[24] Although additions to the record may enhance the evidentiary support for possible or even probable prejudice, the defense must still show that observing the badges in the courtroom audience "affected their ability to be fair jurors."[25] The jury must have considered the badges as evidence external to that provided at trial.[26] However, once the record establishes that the badges remained visible to jurors throughout the

22. *Id.*
23. *Id.* at *1.
24. *Id.*
25. *Id.*
26. *Id.* at *3 n.1.

trial, United States Supreme Court precedent suggests that the continuing presence of the victim photographs in the audience creates "an unacceptable risk . . . of impermissible factors coming into play."[27] Moreover, the Court has found that a defendant has the right to "be tried in an atmosphere undisturbed by so huge a wave of public passion."[28] Therefore, the more evidence on record that demonstrates a noticeable presence of the badges over the duration of the trial, the greater the chance that the trial court will exclude victim photographs in the gallery or that an appellate court will find an abuse of the trial court's discretion in permitting such influences to remain within the courtroom.

V. Conclusion

The opinion of the Court of Appeals of Virginia demonstrates the necessity to develop fully the record in order to challenge a trial court's ruling. Because an appellate court applies an abuse of discretion standard, defense counsel must prove actual prejudice in a decision at trial. Bolstering the record in *Cooper* would have provided the appellate court with stronger evidence that the decision to permit courtroom spectators to wear badges displaying photographs of the victims amounted to prejudice. In this case, entering into evidence one of the disputed badges, testimony of the precise number of button wearers and ratio of button wearers in the audience, and photographs of the courtroom scenes would have helped reduce, if not eliminate, vague or inaccurate observations.

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27. Estelle v. Williams, 425 U.S. 501, 505 (1976) (finding that the defendant's appearance before the jury in prison attire could have affected the jurors' judgment).

28. Irvin v. Dowd, 366 U.S. 717, 728 (1961).

CASE NOTES:

Cases of Interest