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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Bamberg County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KELCIE RALPH GILBERT,

APPELLANT

APPELLATE CASE NO. 2022-000307

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing state's witness Victor Middleton to stand facing the jury and lift his shirt to show the bodily scars that resulted from gunshots allegedly fired at him from appellant's weapon because this was an inflammatory and prejudicial showing that was wholly inappropriate for the jurors to view.

STATEMENT OF THE CASE

Appellant Kelcie Ralph Gilbert was convicted of attempted murder and possession of a weapon during the commission of a violent crime per jury trial held during the March 2022 term of the Bamberg County General Sessions Court before Judge Courtney Clyburn-Pope, who sentenced appellant to imprisonment for a period of twenty-two years. Assistant Solicitors David W. Miller and Leigh Staggs appeared on behalf of the state, and Public Defenders David Hayes and Wallis Alves represented appellant at trial. Appellant appealed. This brief follows.

STANDARD OF REVIEW

In criminal cases, the appellant court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Woud, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2006). The admissibility of evidence is within the sound discretion of the trial judge. State v. Mansfield, 343 S.C.66, 538 S.E.2d 257 (S.C. Ct. App. 2000); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (S.C. Ct. App. 999). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion of the commission of legal error which results in prejudice to the defendant Mansfield, 343 S.C. at 77, 538 S.E.2d at 263.

ARGUMENT

The trial judge erred in allowing state's witness Victor Middleton to stand facing the jury and lift his shirt to show the bodily scars that resulted from gunshots allegedly fired at him from appellant's weapon because this was an inflammatory and prejudicial showing that was wholly inappropriate for the jurors to view.

At trial, Iyonna Childs and Victor Middleton both testified that they were driving on Highway 64 in South Carolina on July 8, 2020. Childs was driving her vehicle, and Middleton rode on his dirt bike along beside her vehicle. At some point during their travels, they saw appellant, who was driving a vehicle in the opposite direction, make a U-turn and follow them. Childs and Middleton explained that shortly thereafter, appellant drove his vehicle to the right, cut off Middleton in his path, and fired gunshots at Middleton. Tr. 59, l. 10 – p.67, l. 1; Tr. 107, l. 24 – p. 119, l.7.

Appellant testified at trial and claimed self-defense. Appellant explained that he saw a gun pass from Childs' car window to Middleton as he rode on his dirt bike on the highway, and that when he took an exit to escape, surmising danger, he fired his weapon after seeing Middleton holding a firearm that was "cocked" and pointed at him. Appellant stated that he believed he would have been killed had he not fired his weapon. Tr. 149, l.10-p. 155 l.20.

Victor Middleton was shot seven times including hits to his arm, head, and back. Tr. 115, l.3-p. 116, l.25. On direct examination of Middleton, the following colloquy occurred:

Solicitor: Can you lift up your shirt?

Middleton: Yes. All the way up.

Solicitor: Are those bullet holes in your back?

Middleton: Yes, Sir.

Solicitor: Can you turn around and show the jury the front of you?

Middleton: (witness complies)

Solicitor: What is that big, long scar that goes from your waist line up to about the bottom of your sternum?

Middleton: Well, I had internal bleeding, so they had to cut me open

Defense Counsel: objection

Solicitor: There's how he knows what happened to him your Honor, he's got that scar.

Defense Counsel: He doesn't know about anything that they did. He knows he had surgery.

The Court: Overruled Tr. 118, 1.6-21.

The solicitor informed the jury at opening argument that Middleton had been shot seven times.¹ Middleton testified that he was “gunned down seven times...multiple times in his back” Tr. 115, 1.2-10. At closing, the solicitor reminded the jury that “there were seven shell casings collected and there were seven holes in Victor Middleton’s body” Tr.180 1.21-23. Therefore, it was inflammatory and prejudicial to add undue emphasis to the fact that Middleton was shot seven times by allowing the jury to view the actual in-person bullet holes and surgery scars located up close and personal on Middleton’s back after he lifted up his shirt per the solicitor’s instructions to him. The jury had been apprised repeatedly that Middleton was shot seven times. Prior to viewing Middleton’s back, the jury viewed Middleton’s head where he had been shot, and the jury viewed his arm where he had been shot also.² Thus, an up close and personal jury

¹ “Out there where the shooting occurred, you’re going to find out the sheriff’s office collected seven shell casings,” and that they would see “WIN 9mm Luger...on the bottom of all seven of the shell casings” Tr.54, lines 5-14.

² Tr. 117, lines 9-21.

view of Middleton's back was overkill, unnecessary, and placed prejudicial and undue emphasis on a fact that was not in controversy at trial. This was an inflammatory tactic used by the state.

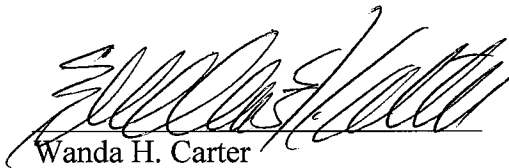
In State v. Hart, 304 S.C. 99, 403 S.E.2d 144 S.C. Ct. App. (1991), there was a question as to whether the trial court erred in denying the defendant's request to present his physical characteristics to the jury because there was a debatable conflict between the state's witnesses' description of the perpetrator and the defendant's actual characteristics. The South Carolina Court of Appeals held in Hart that the exhibition of the defendant's physical characteristics would have been cumulative to other evidence and would have had limited importance relative to other evidence supporting the conviction. The case was reversed on other grounds subsequently in State v. Hart, 306 S.C. 344, 412 S.E.2d 380 (1991). Note that jury views of crime scenes have been disallowed also. City of Columbia v. Jennings, 288 S.C. 79, 339 S.E.2d 534 (1986); State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997). Moreover, this issue is akin to the prohibition of admitting inflammatory and prejudicial photographs into evidence if to do so would arouse sympathy or prejudice, and result in a tendency to suggest a decision on an unfair basis. State v. Elders, 386 S.C. 474, 688 S.E.2d 857 (2010); State v. Heyward, 432 S.C. 296, 852 S.E.2d 452 (2020); State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) and State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997). In Langley, the Court held that the photograph of the murder victim was not relevant to prove the defendant's guilt because it was introduced solely to distance the victim from drug dealing that occurred near the murder scene and to neutralize testimony by the state's witness regarding the victim's drug use. In Livingston, the Court held that a photograph of the DUI victim taken shortly before death was irrelevant to any matter at issue in the case.

The trial judge erred in allowing state's witness Victor Middleton to stand facing the jury and lift his shirt to show the scars that resulted from gunfire because this was an inflammatory

and prejudicial exhibition that was wholly inappropriate for the jury to view. This violated appellant's right to a fair trial under the Fourteenth Amendment.

CONCLUSION

Based on the foregoing argument, counsel for appellant requests that the Court reverse the lower court convictions and remand the case for a new trial.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of July, 2022.

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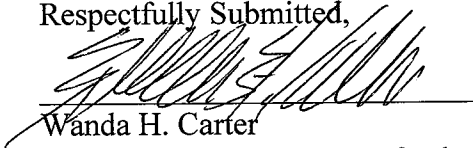
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kelcie Ralph Gilbert states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Courtney Clyburn-Pope, which was held on March 1-3, 2022, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Kelcie Ralph Gilbert.

Respectfully Submitted,


Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of July, 2022.

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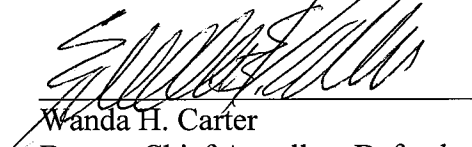
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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Trial Transcript dated March 1-3, 2022;
- (2) True-billed indictments

I certify that this designation contains no matter which is irrelevant to this appeal.



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This 15th day of July, 2022.

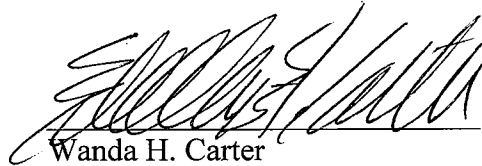
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CERTIFICATE OF COUNSEL

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



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This 15th day of July, 2022.