STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH WAYNE CARLISLE,

APPELLANT

APPELLATE CASE NO 2019-001702

FINAL BRIEF OF APPELLANT

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2. Did the trial judge err in admitting autopsy photos when the probative value of the photograph was substantially outweighed by the danger of unfair prejudice?

3. Did the trial judge err in refusing to declare a mistrial when the jury viewed a video of Appellant wearing an ankle monitor but the judge earlier ruled that evidence of the ankle monitor was inadmissible as more prejudicial than probative?

STATEMENT OF THE CASE

In November of 2017, the Horry County Grand Jury indicted Appellant, Kenneth Wayne Carlisle, for two counts of murder, indictments #2017-GS-26-4254, 4255. (R. p. 784). Pre-trial hearings were held on August 9, 2019, and August 22, 2019 before the Honorable D. Craig Brown. Martin Spratlin represented Appellant. Ralph Wilson represented the co-defendant, Jordan Marie Hodge. George DeBusk and Seth Oskin represented the State. The case went to jury trial before Judge Brown on September 30, 2019. Martin Spratlin again represented Appellant. Ralph Wilson again represented the co-defendant. George DeBusk and Seth Oskin prosecuted the case. The jury found Appellant and the co-defendant guilty. The judge sentenced both to life in prison. A timely notice of intent to appeal was served on October 7, 2019. This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id. "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. State v. Collins, 409 S.C. 524, 529–30, 763 S.E.2d 22, 25 (2014).

ARGUMENTS

1. **The trial judge erred in admitting a photograph of decomposed skeletal remains when any probative value of the photograph was substantially outweighed by the danger of unfair prejudice.**

The jury found Appellant and the co-defendant guilty of the shooting death of Linda McAllister, the co-defendant's grandmother, and William "Chet" Clemmons, the grandmother's husband. Their bodies were discovered on July 15, 2017, in a wooded area in the Bucksville area of Horry County near the Brown's Chapel Landing. (R. p. 255, line 5 - p. 256, lines 1-16). During the trial the State moved to admit three photographs, marked State's exhibits #50, #51, #52, of the bodies where they were discovered. (R. p. 372, lines 9 – 18). Appellant and the co-defendant objected to one of the three photographs offered, State's exhibit #50. (R. p. 372, line 20 – p. 373, lines 1-5).

Counsel for the co-defendant argued:

> My objection, your Honor, is is that it, it shows a skeletal, a partial skeletal remain, and, and I think it's graphic, and I think if it were in black and white it wouldn't be as prejudicial, but I find it extremely prejudicial especially because it's in color, and it's more of a close-up than, than just a picture which would show where the, where the skeletal remains were. So I think that there is certainly a less, I won't say intrusive, but a way to, to present the same evidence without the extensive prejudicial effect that come from the way it, it is in that photograph.

(R. p. 374, lines 6-15). Counsel for Appellant additionally argued:

> Your Honor, all I would add and I would join in Mr. Wilson's objection here is that I do ask – the prejudicial effect would be the potential to inflame the passions of the jury by seeing this body in a decomposed state, in a decomposed manner in a photo that I believe has very limited probative value to what the State is seeking to prove, which is the location of where the bodies were found. I believe that are least restrictive, less prejudicial matter – manner in which the State could present that evidence. So I believe under State v. Collins it would be inappropriate to introduce that photo into evidence as it currently sits.

(R. p. 374, line 17 – p. 375, lines 1-2).

The State responded, "State's 50 shows the bodies uncovered, not, not covered as they were in the other two, show exactly how they were found. It shows their position relative to each other. It shows the position of the bodies which would allow us to argue how they were carried there, Your Honor. It's not shown in the other photos." (R. p. 375, lines 19-24). The trial judge, citing State v. Collins, S.C. 409 S.C. 524, 763 S.E.2d 22 (2014), overruled the objections and admitted the photograph. (R. p. 375, line 25 – p. 376, 377, lines 1-11). The trial judge erred.

The trial judge's reliance on the plurality opinion in Collins is misplaced. In the present case the photograph of the decomposed skeletal remains was not probative, corroborative or material in establishing an element of murder. In Collins the defendant was convicted of involuntary manslaughter and, pursuant to S.C. Code §47–3–710(A)(2)(a) and 760, of being the owner of a "dangerous animal" that attacked and injured a human being. In Collins the South Carolina Supreme Court wrote, "In order to support its assertions about the dangerous propensities of the dogs, the manner and extent of the attack, and Collins's criminal negligence, the State also offered a group of photos taken of the victim by Proctor, the forensic pathologist, before he began the autopsy." 409 S.C. at 532, 763 S.E.2d at 27. In finding no error in the admission of the pre-autopsy photos the Court wrote:

> These are not ordinary dog bites with which most jurors would ever be familiar. Even the pathologist stated he felt compelled to document the injuries prior to the start of the autopsy because he had never come across a situation this extreme. Since there was no one else present at the time of the event, the photos aided the jury in evaluating the testimony offered by both the State and the defendant, especially as to determining the dangerous propensities of the dogs and whether or not Collins's conduct was criminally reckless.

State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 29 (2014). In contrast, in the present case there was nothing particularly unusual about the uncovered skeletal remains depicted in State's exhibit

#50, especially in light of the fact that other photos, State's exhibits #51 and #52, of the location where the remains were found were admitted without objection. (R. p. 791-793).

In State v. Hawes, 423 S.C. 118, 129, 813 S.E.2d 513, 519 (Ct. App. 2018), the South Carolina Court of Appeals wrote:

> "The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). "However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." Id. "To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.' " State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

The photograph of the uncovered decomposed skeletal remains should have been excluded because it was calculated to arouse the sympathy of the jury, was not necessary to an issue at trial and tended to suggest a decision based on an improper emotional basis.

As noted in the concurring opinion in Collins:

> In my judgment, the admission of the autopsy photographs was clear error. The primary, if not sole, purpose of these horrific photographs was to inflame the passions of the jury. The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense. I agree with Justice Pleicones that these challenged photographs far exceed "the outer limits of what our law permits a jury to consider." State v. Torres, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). I fully understand that there are circumstances where autopsy photographs are relevant and that the relevance of the photographs is not substantially outweighed by the danger of unfair prejudice. See Rules 402, 403, SCRE. But this is not such a case. I nevertheless believe the error was harmless for the reasons set forth in the majority opinion. I note this case was tried in 2009, prior to our decision in Torres, where we expressed our concern over the State's seeming practice of seeking admission of highly prejudicial and inflammatory autopsy photographs.

409 S.C. at 539, 763 S.E.2d at 30.

The photograph of the uncovered decomposing skeletal remains was highly prejudicial and inflammatory. The photo had very little probative value. The photo did not help establish an element of murder or corroborate challenged testimony or assist a witness with their testimony. There was no question that the bodies were carried into the woods. Other unchallenged photos, State's exhibits #51 and #52, established the location of where the bodies were found. (R. p. 792, 793). Rule 403 provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The probative value of the photograph of the decomposed skeletal remains was substantially outweighed by the danger of unfair prejudice. The trial judge abused his discretion in admitting the photo. The error requires reversal.

2. The trial judge erred in admitting autopsy photos when the probative value of the photograph was substantially outweighed by the danger of unfair prejudice.

Dr. Cynthia Schandl was qualified, without objection, as an expert in forensic pathology. (R. p. 473, line 6 – p. 474, lines 1-5). Dr. Schandl performed the autopsies of both Linda McAllister and William "Chet" Clemmons. She testified that the cause of death for both was a single gunshot wound to the head. (R. p. 484, lines 6-11; p. 489, line 21 – p. 490, line 1). Although the cause of death was straight forward and not an issue at trial, the trial judge admitted, over objection, eight photographs from the autopsy, State's exhibits #58, #59, #61, #62, #63, #64, #66 and #128. (R. p. 480, lines 15-22; p. 482, lines 4-21; p. 485, lines 20-25; p. 487, lines 9-16; p. 505, lines 2-9; R. pp. 795, 796, 798-801, 803, 804). The judge explained his ruling but failed to

note why the pathologist's testimony, without the use of autopsy photographs, was not sufficient to allow the State to establish the elements of the offense.

In State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010), the South Carolina Supreme Court wrote:

> Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Under Rule 403, SCRE, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted). In the sentencing phase of a capital murder trial, the scope of the probative value is much broader than the guilt phase. See State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986).

In Torres the Court found that the trial judge did not abuse his discretion in admitting autopsy photos "to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed." The Court in Torres noted that due to the extent of the injuries neither body could be identified and noted that the crime was "particularly horrific." In contrast, each of the deceased in the present case died from a single gunshot wound to the head. The testimony of the pathologist fully explained the injury, the location and the manner of death. Reference to the autopsy photos was not necessary. There was nothing particularly unusual about the injuries in the present case that required admission of the autopsy photos. The Court in Torres additionally noted:

> Although we affirm the admission of the photographs, we take this opportunity to address an area of growing concern to this Court. The photographs at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. Moreover, the State also sought to introduce evidence in the form of an autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.

390 S.C. at 624, 703 S.E.2d at 229.

The solicitors in the present case pushed the envelope on admissibility in regard to the autopsy photos. State's exhibits #58 and #59 are photos of the entrance and exit wounds on Ms. McAllister's skull, from left to right. (R. p. 795, p. 796). State's exhibit #61 shows her skull with a rod going through it to show the trajectory of the bullet. (R. p. 798). State's exhibit #128 is an x-ray showing the bullet and a necklace worn by Ms. McAllister. (R. p. 804). The pathologist sufficiently testified as to the bullet, the entrance and exit wounds and the trajectory of the bullet. The photos were not necessary to her testimony or to establish an element of the State's case. State's exhibit #59 is particularly gruesome and prejudicial as the jaw is open and the skull appears to be screaming. (R. p. 796). The x-ray showing the bullet and the necklace worn by Ms. McAllister is also prejudicial as it personalizes the deceased. The pathologist did not need a photo of the bullet to establish that the deceased dies as a result of a single gunshot wound. State's exhibit #62 shows Mr. Clemmons' jaw with no teeth.[1] (R. p. 799). State's exhibits #63 and #64 are photos of the entrance and exit wounds on Mr. Clemmons' skull, from left to right. (R. p. 800, p. 801). State's exhibit #66 shows his skull with a rod going through it to show the trajectory of the bullet. (R. p. 803). As with the autopsy photos of Ms. McAllister, the pathologist sufficiently testified as to entrance and exit wounds and the trajectory of the bullet. The photos were not necessary to her testimony or to establish an element of the State's case. Instead, the autopsy photographs were calculated to arouse the sympathy of the jury and should have been excluded.

Rule 403 provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation

[1] The identity of both Ms. McAllister and Mr. Clemmons was confirmed at trial by DNA testing.

of cumulative evidence." In light of the forensic pathologist's expert testimony that did not require use of the autopsy photos, the probative value of the autopsy photos was substantially outweighed by the danger of unfair prejudice. The trial judge abused his discretion in admitting the photos. The error requires reversal.

3. The trial judge erred in refusing to declare a mistrial when the jury viewed a video of Appellant wearing an ankle monitor but the judge earlier ruled that evidence of the ankle monitor was inadmissible as more prejudicial than probative.

Prior to trial Appellant objected to any reference that at the time of the shootings he was on bond from charges in North Carolina and wearing a GPS ankle monitor. (R. p. 22, line 18 – p. 25, lines 1-9). The State conceded that at the time of the shootings the ankle monitor was not working and could not track Appellant's location. (R. p. 26, line 25 – p. 27, lines 1-7). The State theorized, however, that Appellant allowed the battery to die the day before the shootings and then recharged the battery after disposing of the bodies. (R. p. 26, line 25 – p. 27, lines 1-13). The State presented no evidence that the ankle monitor was not working as the result of an uncharged battery. The trial judge properly excluded reference to the GPS ankle monitor as more prejudicial than probative. (R. p. 28, line 13 – p. 29, lines 1-23).

During trial the State introduced, without objection, seven videos of the co-defendant and Appellant purchasing items at Wal-Mart using a debit card belonging to the deceased, Linda McAllister, the co-defendant's grandmother. (R. pp. 448-464; State's exhibits #105, #107, #110,

#113, #118, #120, and #125). In four of the videos, #105, #113, #118 and #125 Appellant is wearing long pants and the ankle monitor cannot be seen. In two of videos, #107 and #110, the State redacted the video with what can be described as a "blur box" to block the view of the ankle monitor. There was no objection to the manner in which the videos were redacted[2]. State's exhibit #120, however, was inadvertently not redacted and the ankle monitor was seen by the jury. The judge was made aware of the mistake after the video was played for the jury. (R. p. 509, lines 13-21). Appellant moved for a mistrial based the unredacted video showing Appellant wearing an ankle monitor. (R. p. 512, lines 5-7; p. 513, line 19 – p. 514, lines 1-2; p. 516, lines 3-24). Counsel for Appellant told the judge, "First off, I don't – I honestly do not believe the jury will be able to tell what it is. However, I am concerned that based upon its appearance on the video, as well as the redaction on the other ones, taken in conjunction it may carry more weight than, than it should for the jury. The jury might read into it in an improper manner and that gives me concern." (R. p. 510, line 23 – p. 511, lines 14). Counsel was concerned that the inconsistent redacting might lead the jury to speculate that Appellant was wearing a holster rather than an ankle monitor. (R. p. 511, lines 10-17).

The judge denied the motion for a mistrial. (R. p. 512, line 21 – p. 513, lines 1-2; p. 516, line 25 – p. 517, lines 1-8; lines 11-23). The judge noted, "I viewed the video that had the ankle monitor and I viewed one of the videos where the ankle monitor was redacted, and quite frankly, I had more questions about the redacted portion than I do the non-redacted, but that's neither here nor there. If the jury wishes to see the videos again I've instructed the or can instruct the State that 120 will not be one that will be shown to them again." (R. p. 517, lines 16-23). Appellant

[2] The failure to object to the manner in which the videos were redacted may need to be addressed in post-conviction relief.

renewed the motion for a mistrial at the close of the State's case. (R. p. 656, lines 10-18). Appellant again renewed the mistrial motion at the end of the trial. (R. p. 673, lines 23-25). The judge denied both renewed motions. The trial judge erred.

In State v. Jenkins, 408 S.C. 560, 574–75, 759 S.E.2d 759, 767 (Ct. App. 2014), the South Carolina Court of Appeals wrote:

> Further, "[t]he admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Tennant, 383 S.C. 245, 254, 678 S.E.2d 812, 816 (Ct.App.2009), *modified on other grounds,* 394 S.C. 5, 21, 714 S.E.2d 297, 305 (2011) (citation and quotation marks omitted). Likewise, "[t]he granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627–28 (2000) (citation omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Tennant, 383 S.C. at 254, 678 S.E.2d at 816 (citation and quotation marks omitted).
>
> To warrant either a mistrial or reversal based on an evidentiary ruling, the complaining party must prove both the error of the ruling and the resulting prejudice. Id. at 254, 678 S.E.2d at 816–17 (as to the admission or exclusion of evidence); Harris, 340 S.C. at 63, 530 S.E.2d at 628 (as to a mistrial). "To prove prejudice, the complaining party must show there is a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." Tennant, 383 S.C. at 254, 678 S.E.2d at 817 (citation and quotation marks omitted).

In the present case when State's exhibit #120, the unredacted video, was inadvertently played for the jury, the jury viewed Appellant wearing the ankle monitor, evidence the judge previously ruled inadmissible as more prejudicial than probative. Additionally, allowing the jury to view Appellant with an ankle monitor is the equivalent of improperly admitting propensity evidence in the form of a prior bad act. The jury could easily have concluded that Appellant was wearing an ankle monitor because he was a convicted felon. The judge erred in refusing to declare a mistrial.

Recently in State v. Perry, 430 S.C. 24, 29–30, 842 S.E.2d 654, 657 (2020), the South Carolina Supreme Court wrote:

> Rule 404(b) of the South Carolina Rules of Evidence provides:
>
> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.
> Rule 404(b), SCRE.
>
> The rule is often stated in terms of "propensity."
>
> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. ... The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.
>
> Michelson v. United States, 335 U.S. 469, 475, 69 S. Ct. 213, 218, 93 L. Ed. 168, 173-74 (1948); *see also* 3 Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 404:5 (8th ed. 2018) (stating "evidence of the commission of crimes, wrongs or other acts by [the defendant] is inadmissible for the purpose of showing a disposition or propensity to commit crimes"); James F. Dreher, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 35 (South Carolina Bar 1967) ("It is in criminal cases that the law must be the most sternly on guard against allowing the doing of an act to be proved by a propensity to do it."); State v. Fletcher, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008) (Toal, C.J., dissenting) (stating "evidence of other crimes, wrongs, or acts is not admissible for purposes of proving that the defendant possesses a criminal character or has a propensity to commit the charged crime"). Thus, Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial.

Allowing the jury to view Appellant wearing an ankle monitor was error the trial judge attempted to avoid by his previous ruling prohibiting reference to the ankle monitor as more prejudicial than probative. Appellant was prejudiced by the error because it allowed the State to introduce improper propensity evidence. Based on the facts of this case, a mistrial was the only remedy.

CONCLUSION

Based on the above arguments this Court should reverse the murder convictions and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of January, 2021.

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,

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This 28th day of January, 2021.