

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Certiorari to the Court of Appeals
Appeal from Horry County
Honorable D. Craig Brown, Circuit Court Judge

Opinion No. 2022-UP-189 (S.C. Ct. App. Filed May 5, 2022)

Lower Court Case No. 2017-GS-26-04446, 2017-GS-26-04447

THE STATE,

RESPONDENT,

V.

JORDAN MARIE HODGE,

PETITIONER

APPELLATE CASE NO. 2019-001745

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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S.C. SUPREME COURT

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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 June 23, 2022.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming Petitioner's convictions, where the trial court admitted a gruesome and graphic photograph of skeletal remains in a murder case, where the prejudicial effect substantially outweighed the minor probative value, and where the photograph was designed to inflame the passion of the jury?

II. Did the Court of Appeals err in affirming Petitioner's convictions, where the trial court admitted multiple autopsy photographs that depicted close-up views of skeletal remains, where the prejudicial effect substantially outweighed any probative value?

STATEMENT OF THE CASE

Appellant and her co-defendant and ex-boyfriend, Kenneth Carlisle, were indicted by the Horry County grand jury in November 2017 for two counts of murder. R. 780. They proceeded to trial before the Honorable D. Craig Brown on September 30, 2019. R. 1. Ralph J. Wilson, Sr. represented Appellant; Martin D. Spratlin represented Carlisle. George H. DeBusk, Jr. and Seth A. Oskin appeared on behalf of the state. After a four-day trial, the jury found Appellant and Carlisle guilty as indicted. R. 762, ll. 12 – 25. Both defendants received life sentences. R. 777, l. 22 – 778, l. 1.

After a Notice of Appeal was filed with the South Carolina Court of Appeals, the parties briefed the two issues described herein. No oral argument was held. The Court of Appeals issued its unpublished opinion on May 11, 2022. State v. Hodge, Op. No. 2022-UP-189 (S.C. Ct. App. dated May 11, 2022).

ARGUMENT

I. The Court of Appeals erred in affirming Petitioner’s conviction, where the trial court admitted a gruesome and graphic photograph of skeletal remains in a murder case, where the prejudicial effect substantially outweighed the minor probative value, and where the photograph was designed to inflame the passion of the jury.

Relevant facts

Appellant was on trial following the death of her grandparents. On July 13, 2017, her family filed a missing person’s report for Linda McAllister, Appellant’s grandmother. R. 168, ll. 17 – 19; R. 172, ll. 19 – 21. Shell casings were discovered in McAllister’s truck which was in the possession of Appellant and her co-defendant. R. 177, l.1 – 179, l. 5. The bodies were found in Horry County on July 15, 2017. R. 251, l. 5. – 253, l. 5. John Caulder, a former officer with the Horry County Police Department, testified that the bodies were “[h]ighly decomposed” and were “mostly skeleton.” R. 368, ll. 9 – 16. At trial the prosecution sought to admit state’s exhibit 50, a graphic depiction of the skeletal remains. R. 368, l. 17 – 373, l. 11.

Defense counsel objected:

My objection, Your Honor, is [] that it, it shows a skeletal, a partial skeletal remain, and, and I think it’s, it’s graphic, and I think that 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 that same evidence without the **extensive prejudicial effect** that comes from the way it, it is in that photograph.

R. 370, ll. 6 – 15 (emphasis added). Counsel for Carlisle joined in the objection and cited to State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). R. 370, l. 17 – 371, l. 2.

The state averred that probative value existed in the photograph:

We feel that there is probative value in State's 50 that is not in the other two photos. Those two photos show the bodies as they were found as they were partially covered. It's the only photo that shows them in the position they were found. It shows their proximity to each other, shows their position when they were found that, that can be argued as to how they were carried there, Your Honor. That's not shown in the other photos.

R. 371, ll. 4 – 11. The state posited that the photographs showed the position of the bodies such that they would be able to argue how they were carried there. R. 371, ll. 19 – 24.

The trial court, citing Collins, ruled that the photograph was relevant, corroborated testimony, and was introduced to show the unaltered condition of the victims. R. 371, l. 25 – 373, l. 11. No balancing test was conducted, and there was no mention of prejudice.

The prosecution questioned Caulder about the photograph. R. 375, l. 18 – 376, l. 20. Regarding state's exhibit 50, he indicated that the photograph depicted the bodies after brush had been removed. Id. He also testified that there was a strong smell at the scene where the bodies were discovered. R. 376, ll. 11 – 13.

The Court of Appeals held the trial judge did not abuse its discretion "because the photograph corroborated trial testimony about the condition and location of the victims' remains upon discovery." State v. Hodge, Op. No. 2022-UP-189 (S.C. Ct. App. dated May 11, 2022). Further, the Court of Appeals held "Exhibit 50 was relevant to and probative of whether Hodge was guilty of murder because the photograph tended to show whether Hodge acted with malice." Id. Regarding the unfair prejudice aspect of the gruesome photograph, the Court held "any danger of unfair prejudice was low because Exhibit 50 did not suggest that the jury convict Hodge on an improper basis." Id. These holdings were in error.

Discussion

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). “Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)).

“The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.” State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). “If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.” Id. “When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008).

In State v. Collins, this Court considered the issue of seven graphic photographs in a case involving dog bites to a minor. 409 S.C. 524, 763 S.E.2d 22 (2014). The defendant in that case was charged with being the owner of a dangerous animal and involuntary manslaughter. This Court explored the elements of both offenses and noted what the state was required to prove. Id. at 530-31, 763 S.E.2d at 25-6. The state sought to admit a group of photographs taken prior to

the autopsy “[i]n order to support its assertions about the dangerous propensities of the dogs, the manner and extent of the attack, and Collins’s criminal negligence.” Id. at 532, 763 S.E.2d at 27.

This Court concluded that the trial court did not abuse its discretion in admitting the pre-autopsy photographs. Id. at 534, 763 S.E.2d at 28. Holding that “[t]he evidence was highly probative, corroborative, and material in establishing the elements of the offenses charged,” this Court held that the probative value of the photographs outweighed the potential prejudice. Undertaking a discussion in the “substantial” requirement from Rule 403, SCRE, this Court held:

Where the State had the burden of proving the elements of the offenses charged and there were no eyewitnesses to the incident resulting in the victim’s death, the photos here provided concrete evidence as to that transpired on that fateful day.

Id. at 536, 763 S.E.2d at 28. This Court reasoned that “[s]ince 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.” Id. at 536, 763 S.E.2d at 29.

That rationale is inapplicable in the matter at hand. There was no need to show any dangerous propensities or whether the actions of either defendant were criminally reckless. Murder “is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10. In a murder case, the corpus delicti consists of two elements: the death of a human being and the criminal act of another in causing that death. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). The positioning of the bodies had no bearing on any of the elements of the crime of murder, did not corroborate witness testimony, and did not have any relevance to the alleged murders. There was no contention that human remains had

been desecrated; the indictment was for murder. As such, there was an overriding lack of probative value—the photographs did not show the jury anything they did not already know, and they did not establish any of the elements the state was required to prove.

Both the dissent and concurrence in Collins referenced State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010). In Torres, the state offered several autopsy photographs into evidence during the sentencing phase of a capital murder trial. Id. at 623, 703 S.E.2d at 229. Similar to the explanation in Collins, the prosecution contended that the photographs were properly admitted “because they corroborated witness testimony and were introduced to illustrate the circumstances of the crime and the character of the defendant.” Id. The Court held that the “net effects of the photographs was to show what Torres did to [the victims], which goes straight to the circumstances of the crime. Id. at 624, 703 S.E.2d at 229. Also relevant to this case was this admonition:

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.

Id.

The state’s contention that the photograph showed a different perspective from the others is not a sufficient justification for admitting the photograph; the same could be said of any two photographs that are not identical. Further, there was no overwhelming evidence of guilt. Defense counsel noted that only “substantial circumstantial evidence” of what transpired after the deaths occurred. R. 770, ll. 3 – 10.

In a 2015 opinion, the Supreme Court of Kentucky held that the trial court erred in admitting twenty-eight crime scene and autopsy photographs. Hall v. Commonwealth, 468 S.E.3d 814 (Ky. 2015). The Kentucky Supreme Court noted “[i]t is true that prior decisions of this Court have generally approved of the admission of graphic photos.” Id. at 822, citing Brown v. Commonwealth, 934 S.W.2d 242, 248 (Ky. 1996) (applying, without elaboration, a previous holding that “where a defendant has ple[aded] not guilty, it is indispensable to the Commonwealth’s case to establish that a crime has in fact been committed ... [and] the selected photographs offered into evidence ... constituted relevant and probative evidence of the circumstances of the crime” (second alteration and omissions in original) (quoting Sanders v. Commonwealth, 801 S.E.2d 665, 676 (Ky. 1990)) (internal quotation marks omitted).

As a result, case law in this jurisdiction “has been interpreted as laying out a bright line rule that gruesome victim photos are per se admissible subject only to clearly delineated exceptions, such as when the body had been mutilated or decomposed.” Hall, supra, at 822-23 (internal citation omitted). However, the Court cautioned practitioners in Kentucky about the exact scenario in the matter *sub judice*:

In light of the aforementioned principles, it is clear that graphic evidence of a gruesome crime will typically be relevant and have probative value that is not substantially outweighed by the inflammatory effects of the evidence. **But this will be true only up to a point.** Not only will the probative worth of each additional gruesome photograph be incrementally discounted as the facts to be proven become ever more certain, but admission of additional photos will also correspondingly increase the danger of undue prejudice. That is, as the jury is confronted with gory image after gory image, the inflammatory and prejudicial effect of the images as a whole increases, while the marginal probativeness of each new image is less than the one before. The two concepts are inversely related, and at some point, the marginal probative worth of an additional photo will certainly be substantially outweighed by the risk that the jury's decision-making will be improperly influenced by bias, sympathy, or animosity engendered by the additional inflammatory evidence. In the present case, that point was far exceeded.

Hall at 825-26 (emphasis added).

The Kentucky Supreme Court elaborated, explaining how the state “gilds the lily” by putting in more photographs than necessary:

Some of the photographs in question were admissible to allow the Commonwealth to prove the *corpus delicti*, as they showed both the crime scene and the devastating wounds suffered by the victims. But admission of the entire proffer of 28 photos went well beyond that. While a few photos necessary to show the commission of the crimes and the nature of the victims' injuries were properly admitted, the numerous photos introduced thereafter were cumulative and added little, if any, persuasive force to the other evidence proving the crime and the circumstances surrounding its commission. At the same time, the corresponding danger of inflaming the passions of the jury to the prejudice of Hall's affirmative defenses skyrocketed from the admission of these voluminous and incredibly gruesome images.

Simply by way of example, Exhibit 20, while graphic and gruesome, depicted the full extent of the injuries suffered by Alan Tackett. Were it the only photo offered of those injuries, it would likely fit within the general rule for gruesome photos and thus be admissible. But rather than resting with this photo, the Commonwealth then introduced Exhibits 21 and 22, which showed the same injuries close up and in greater detail. The prejudice was further amplified by the fact that the Commonwealth showed the photos blown up on a television screen and left Exhibit 21 up for more than two minutes while eliciting testimony from the investigating detective concerning details not actually shown by that photograph. By admitting these additional photographs, which had substantially lower marginal probative value and substantially more prejudicial effect, the trial court allowed the Commonwealth to cross the line into arousing the sympathies and inflaming the passions of the jury. And after these photos were admitted, still others were introduced— in particular, the photos of soft tissue spatter and the multiple autopsy photos—likely further upending the 403 balance toward undue prejudice. And all of this evidence was admitted despite the primary issue in the case being Hall's state of mind, not whether or how the crime was committed.

This is not to say that any given photo was inadmissible solely because of its gruesome nature. Such a conclusion would go against the general rule and overall inclusionary thrust of the Rules of Evidence. But the photographs in this case were not addressed one by one or even in comparison to each other; rather, their admissibility was determined all at once as a group, with no emphasis on their relative or incremental probative value. That is where the trouble lies in this case.

We acknowledge that the balancing required by Rule 403 is “a task properly reserved for the sound discretion of the trial judge” and is thus reviewed only for abuse of discretion. But the trial court’s authority, while “substantial,” is “not unlimited.”

In a few instances, this Court has held that gruesome photographs were inadmissible, though more often than not we have concluded that such “photographs, though indeed gruesome, do not approach instances where this Court has overturned a lower court’s ruling on admission.” This is the rare case that does approach—and indeed joins—those instances. Several of the photos fall in the upper echelon of gruesome photos that this Court has confronted in recent years. On top of that is the sheer number of gruesome photographs admitted. Indeed, in light of their needlessly cumulative and often duplicative nature, it is difficult for us to surmise any reason for introducing all 28 photos other than to elicit unduly prejudicial emotional responses from the jurors. This is the prototypical case where Rule 403 required the trial judge to comb through and exclude many of the offered photographs; it required the judge to recognize and safeguard against the enormous risk that emotional reactions to the inflammatory photos would obstruct the jury’s careful judgment and improperly influence its decision, and the judge failed to do so.

In the absence of specific findings in the record explaining the trial court’s reasons for its decision, we cannot conclude that the admission of all 28 graphic crime scene and autopsy photos proffered by the Commonwealth was anything but “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” The simple fact is that the probative value of admitting all 28 photographs was substantially outweighed by the undue prejudice created by the photographs. Moreover, the admission of all 28 photographs, many of which depicted the same scene or subject merely from different vantage points, was needlessly cumulative. This Court, therefore, concludes that this case presents the rare instance of an abuse of the trial court’s discretion under Rule 403 in admitting gruesome photographs.

Hall v. Commonwealth, 468 S.W.3d 814, 825–27 (Ky. 2015) (internal citations and footnote omitted).

A footnote from the Hall opinion speaks to gruesome photographs such as the ones improperly admitted in Appellant’s case:

The autopsy photos present another example of how probative value was fa[r] outweighed by prejudicial effect here. As noted above, these photos were admitted *after* the medical examiner had testified about the nature of the injuries and the causes of death. They were then used to revisit that testimony. At that

point, they added little to the discussion, were cumulative, and bordered on being completely unnecessary.

That is not to say, though, that autopsy photos are necessarily inadmissible under Rule 403. Rather, the probative value of such evidence will often be more than sufficient to justify its admission when its presentation in conjunction with a medical examiner's testimony will truly assist the jury in determining, e.g., the cause or mechanism of a victim's death. In this case, however, that the medical examiners were able to first testify about the wounds without the photographs demonstrates their low probative value.

Hall v. Commonwealth, 468 S.W.3d 814, 827 n.14 (Ky. 2015) (emphasis in original).

Hall is an apt reminder of the prejudicial effect gruesome photographs can have on a jury.

Further, this Court's warning from State v. Torres, 390 S.C. 618, 703, S.E.2d 226 (2010)

seemingly has not been heeded by the state in the matter at hand:

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. 618, 624, 703 S.E.2d at 229.

In addition, the lack of an on-the-record Rule 403, SCRE balancing test requires reversal.

See State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). The evaluation of probative value cannot be made in the abstract but should be made in the practical context of the issues at stake in the trial of each case. See State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) ("When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." (citing State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007))).

Regarding Exhibit 50, the trial judge mostly discussed relevancy at the outset of his ruling. R. 371, l. 25 – R. 373, l.9. Later, he referenced State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). However, no part of the ruling indicated that he conducted a balancing test of any sort. Under State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002), reversal is not required “if the trial judge’s comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence.” According to State v. Gray, a trial judge “must balance the [unfair prejudice] of graphic photos against their probative value.” 408 S.C. 601, 608-09, 759 S.E.2d 160, 164 (Ct. App. 2014) citing State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). The Court of Appeals opinion in State v. Collins pointed out how the trial court in that case “did not independently analyze the probative value of the photos. Therefore, the trial court did not properly exercise its discretion.” 398 S.C. 197, 213, 727 S.E.2d 751, 760 (Ct. App. 2012). “The failure to exercise discretion, however, is itself an abuse of discretion.” State v. Mansfield, 343 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000). There is no evidence in the record that the trial judge was cognizant of Rule 403 and the accompanying prejudice.

II. The Court of Appeals erred in affirming Petitioner’s conviction, where the trial court admitted multiple autopsy photographs that depicted close-up views of skeletal remains, where the prejudicial effect substantially outweighed any probative value.

Relevant facts

Dr. Cynthia Schandl, a forensic pathologist at the Medical University of South Carolina, was qualified as an expert witness in her field. R. 466, l. 21 – 470, l. 5. She performed the autopsies of both decedents. R. 470, l. 25 – 471, l. 2. She declared that a gunshot wound to the head was the cause of death for both individuals. R. 480, ll. 6 – 11; R. 485, l. 21 – 486, l. 1. Photographs from the autopsies were authenticated by Dr. Schandl and offered by the state, prompting objections by defense counsel. R. 476, l. 4 – 22; R. 478, ll. 4 – 21; R. 481, l. 20 – 482, l. 2; R. 483, ll. 9 – 16; R. 484, ll. 13 – 18. The photographs were admitted over the objections.

Referencing a sidebar, a discussion regarding the photographs took place on the record with the jury outside the courtroom. R. 500, l. 8 – 505, l. 5. Echoing prior objections regarding prejudicial photographs, counsel for Appellant noted that the photographs were “unduly prejudicial” and created substantial prejudice. R. 501, ll. 12 – 18.

The trial court again cited Collins, supra, and ruled that the photographs which were admitted were the least prejudicial ones offered. R. 503, l. 8 – 505, l. 5. The trial judge went through and discussed what each photograph shows and then remarked that they “show the nature and extent of each of the victim’s injuries and provide evidence as to what happened on the date that these individuals lost their lives.” Id.

Discussion

Rule 403, SCRE provides that, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” “Probative” means “[t]ending to prove or disprove.” *Black's Law Dictionary* 1323 (9th ed.2009). “Probative value” is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. “[T]he more essential the evidence, the greater its probative value.” United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates. As our supreme court stated in State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010), “[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are ... not *necessary* to substantiate *material* facts or conditions.” 390 S.C. at 623, 703 S.E.2d at 228 (emphasis added). The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case. See State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008) (“When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” (citing State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007))).

The probative value of the photos must be balanced against “the danger of unfair prejudice.” Prejudice that is “unfair” is distinguished from the legitimate impact all evidence has on the outcome of a case. “ ‘Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.’ ” State v. Gilchrist, 329 S.C. 621, 630, 496

S.E.2d 424, 429 (Ct.App.1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)). “All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be [scrutinized under Rule 403].” Id. (quoting United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989)); see also United States v. Mohr, 318 F.3d 613, 619–20 (4th Cir.2003) (“Rule 403 only requires suppression of evidence that results in unfair prejudice—prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion....”).

Photos pose a danger of unfair prejudice when they have “an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (internal quotation marks omitted). Regarding this definition, the Supreme Court of the United States stated: “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574, 587–88 (1997). Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case. See State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (“The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.”).

Eight of the photographs—state’s exhibits 58, 59, 61, 62, 63, 64, 66, and 128—were substantially more prejudicial than probative. Each shows a skull and/or partial skeletal remains. Dr. Schandl’s findings were not in dispute; the cause of death for both decedents was a bullet wound to the head. The photographs were unnecessary to prove anything in dispute; Dr. Schandl’s testimony was sufficient to establish her procedures and the cause of death. The

depictions of the decedents' skulls exceeded what the state was required to prove. Thus, the probative value was low.

On the other hand, the unfair prejudice was remarkably high. The photographs showed human skulls in graphic detail and served to inflame the passions of the jury. Designed to stir an emotional response, the introduction of the photographs provided a visual representation which mirrored Dr. Schandl's testimony. The photographs were of minor probative value, whereas the prejudicial effect they had on Appellant's trial was high. The trial court erred in admitting the photographs.

The unfair prejudice vastly outweighed the probative value of the duplicative photographs. These photographs depicted bodies in a state of decomposition and were inflammatory and unduly prejudicial. In Commonwealth v. Walters, the Supreme Judicial Court of Massachusetts found error following the admission of an autopsy photograph showing the bulging left eye of the victim. 485 Mass. 271, 282, 149 S.E.3d 725, 738 (2020). This photograph in particular was held to be "particularly inflammatory, and had little probative value." Id. at 283, 149 N.E.2d at 739 (footnote omitted). The Massachusetts Court analyzed how the photograph did not answer matters that were seriously in dispute. Id.

In the instant case, the Court of Appeals held Exhibit 62—a photograph of victim 2's jawbone—was relevant to and probative of victim's identity. Additional Exhibits, 58, 59, 61, 63, 65, 66, and 128 were relevant to and probative of the victims' causes of death, according to the Court of Appeals. As a result, the Court of Appeals concluded "the probative value of Exhibits 58, 59, 61, 62, 63, 64, 66, and 128 was not substantially outweighed by the danger of unfair prejudice." This was error.

The Court of Appeals held Exhibit 62 was relevant and probative of victim 2's identity. At trial, Dr. Schandl was asked if she could identify the male victim through dental records. R. 4800, ll. 22 – 23. Replying in the negative, Dr. Schandl testified that the male victim did not have any teeth:

So in, in his case, although we had both of his jaws, he didn't have any teeth, and since the jaws were nice and healed, so they were - - they're nice and smooth now after the teeth had been gone for a long time. So he hadn't had teeth in, in sometime, long enough for, for his jaws to have healed over. So I couldn't identify him using the same methods that I did for Ms. McAllister because he didn't have any teeth. So, so in his case we sent some materials, and, and with her too, in case they needed to do further testing for identification, but we sent some materials with the investigator for molecular testing, so either DNA from his cells or DNA from the mitochondria in his cells, something that they would be able to match up with either his family or something of his.

R. 480, l. 24 – R. 481, l. 12.

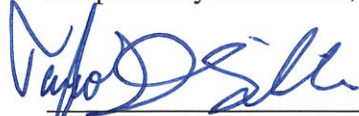
Immediately thereafter, Exhibit 62 was entered subject to the previous defense objection. R. 481, ll. 13 – 25. Contrary to the Court of Appeals opinion, the photograph was unnecessary to show identity. Dr. Schandl's testimony was that alternative methods—molecular testing—were used to establish identity. As such, the danger of unfair prejudice vastly outweighed the nearly nonexistent probative value of the photograph. The remaining challenged photographs were introduced in order to arouse the emotions of the jury. Similar to Exhibit 62, they were designed in order to achieve a desired verdict based on improper means.

Similar to Exhibit 50, there was no on-the-record balancing test for all of these photographs, which showed human skulls in graphic detail and served to inflame the passions of the jury. Designed to stir an emotional response, the introduction of the photographs provided a visual representation which mirrored Dr. Schandl's testimony. The photographs were of minor probative value, whereas the prejudicial effect they had on Appellant's trial was high. The trial court erred in admitting the photographs, and the Court of Appeals erred in affirming.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to the Court of Appeals to allow full briefing on the issues presented.

Respectfully Submitted,



Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of July, 2022.