RECEIVED
Jul 25 2022
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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 October 18, 2021)

THE STATE,

RESPONDENT,

V.

JORDAN MARIE HODGE,

APPELLANT

APPELLATE CASE NO. 2019-001745

APPENDIX

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
(803)734-2508

ATTORNEYS FOR RESPONDENT

INDEX

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JORDAN MARIE HODGE,

APPELLANT

APPELLATE CASE NO 2019-001745

FINAL BRIEF OF APPELLANT

TAYLOR D. GILLIAM
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

4

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred by admitting 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. Whether the trial court erred in admitting 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 an 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.

This brief follows.

STANDARD OF REVIEW

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct.App.2012); see also State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)). In exercising its discretion on a Rule 403 objection to the admissibility of autopsy photographs, the trial court "must balance the [unfair prejudice] of graphic photos against their probative value." Dial, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted).

ARGUMENT

I. The trial court erred by admitting 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 persons 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 in particular, 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.

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).

"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, the South Carolina Supreme 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. The 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.

The 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," the Court held that the probative value of the photographs outweighed the potential prejudice. Undertaking a discussion in the "substantial" requirement from Rule 403, SCRE, the 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. The 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 delecti 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.

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 guilty. Defense counsel noted that only "substantial circumstantial evidence" of what transpired after the deaths occurred. R. 770, ll. 3 – 10.

II. The trial court erred in admitting 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.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse her convictions and remand for a new trial.

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of January, 2021.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 19, 2021

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JORDAN MARIE HODGE,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Final Brief of Appellan has been served upon opposing counsel this 19th day of January, 2021 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS).

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
The Honorable Craig D. Brown, Circuit Court Judge

Appellate Case No. 2019-001745

THE STATE, Respondent,

v.

JORDAN MARIE HODGE, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DON ZELENKA
Deputy Attorney General

MELODY BROWN
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit
Post Office Box 1276
Conway, SC 29526
(843) 915-5460

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

Photographic evidence should be admitted if it is corroborative of other evidence and does not suggest guilt on an improper basis. The State offered a photograph of the victims' skeletal remains as found in a wooded area and black-and-white photographs of the victims' skulls showing entrance and exit fractures caused by a bullet. This was the only documentary evidence tending to prove cause of death. Did the trial court err by admitting the photographs?

STATEMENT OF THE CASE

An Horry County grand jury indicted Appellant Jordan Hodge for the murder of her grandmother, Linda McAllister, and McAllister's husband, Chet Clemons. She was tried by jury along with her boyfriend and codefendant, Kenneth Carlisle, on September 30–October 3, 2019, before the Honorable Craig D. Brown. She was convicted on both counts and sentenced to life imprisonment. This direct appeal follows.

STATEMENT OF FACTS

Linda McAllister and Chet Clemons, a married couple from Conway, were reported missing on July 13, 2017. (R.p.168). Friends and family became concerned when McAllister did not show up for a Fourth of July party at a friend's house. (R.p.138). A work associate went to McAllister's house on July 8 and found it in disarray. (R.p.161). He called McAllister's friends, Andy and Robin Cole, who came to the house. McAllister's dogs had not been taken care of and were behaving strangely. (R.p.155). In the bedroom, Cole noticed that a wedding picture of Chet and Linda on the bedside table was turned face down. (R.p.144). McAllister's pickup truck was not at the home.

Cole had spoken to McAllister on July 3—the day she was last seen alive. (R.p.145). McAllister told Cole she was going to visit her granddaughter, Jordan Hodge, that afternoon. (R.p.147). Cole testified McAllister had a close relationship with Hodge and saw her several times per week. (R.p.149—50). Cole testified McAllister would occasionally help Hodge financially on the condition that Hodge help out with McAllister's home renovation business. (R.p.155). She also testified McAllister and Clemons did not let anyone borrow their truck. (R.p.155). One of McAllister's clients testified McAllister worked at her house on July 3. McAllister said she would be back the next day, but did not come. (R.p.165).

James Moran, McAllister's son and Hodge's uncle, called Hodge on July 8 looking for McAllister. (R.p.169—72). Hodge claimed she had heard from McAllister two days earlier. (R.p.171). She said McAllister was in Ohio for a family

emergency. (R.p.171). Hodge also claimed to be taking care of McAllister's dogs. (R.p.172).

McAllister's family filed a missing persons report on July 13. (R.p.172). Investigator Heath Watford with the Conway Police Department went to speak to Hodge and her boyfriend, Kenneth Carlisle, because he learned they could have been the last people to speak with McAllister and Clemons. (R.p.259). He discovered McAllister's truck in their yard. (R.p.260). He testified the truck was covered with mud and the interior was extremely messy. (R.p.260–61). Hodge and Carlisle arrived at the residence driving a Jeep Cherokee. (R.p.263).

They told Watford that McAllister and Clemons were in Ohio for a family emergency and McAllister was letting them borrow her truck. (R.p.262). When Watford asked why they weren't driving McAllister's truck, Hodge claimed it was because McAllister was very particular about keeping the truck really clean. (R.p.263). They told officers McAllister would not let anyone smoke in the truck, but officers observed a pack of cigarettes inside the cab. (R.p.267). Watford testified Hodge appeared nervous, "shaking and standoffish, kind of looking away from me as I would ask questions to her, but she was more than cooperative in answering anything." (R.p.264). Watford asked Hodge for the keys to the truck, and Hodge said she would retrieve them from inside the residence. However, she subsequently told investigators she lost the keys at her friend Don's house, but claimed she could not remember Don's last name or where he lived. (R.p.265; 317). Watford asked Carlisle for the keys and Carlisle "became extremely nervous,

shaking. He started sweating. Every time I would mention something with the truck he would turn and look at the truck. I noticed his pulse rate accelerate extensively. . . I could actually see the carotid artery in his neck start to actually start pulsing." (R.p.266). Carlisle claimed the truck keys were lost, and that he had also lost his cell phone. (R.p.301; 315–316; 320).

Hodge and Carlisle agreed to give a recorded statement to police. Hodge admitted she had "mixed feelings" about McAllister and Clemons' relationship, noting that Clemons was "about the same age as [her] dad." (State's Exhibit #5 around 2:30). Hodge continued to insist McAllister agreed to let her borrow her truck.

Officers impounded the truck and prepared search warrants for the truck and for Hodge and Carlisle's residence. (R.p.268). Inside the residence, officers discovered "lots of brand new items." (R.p.275; 350). In Carlisle and Hodge's bedroom, officers discovered McAllister's keys and debit card. (R.p.276). The truck keys were discovered in a money bag from Conway National Bank. In a handbag, police found Hodge's credit card along with one of Clemons' debit cards. (R.p.529). Behind the residence, officers located a burn pit that appeared "fresh." (R.p.346). Inside the pit there was a partially burned holster for a small pistol and a partially-burned smart phone. (R.p.346; State's Exhibits 25 and 26).

Officers searched McAllister's truck at the police station. When they opened the bed cover, officers noticed a strong smell of bleach. (R.p.286). Officers found a blood-stained camouflage hat in the truck bed. (R.p.286—89). Inside the truck,

officers found a paper towel stained with blood. (R.p.290). They swabbed the towel for DNA, along with floor mats which also appeared to be stained with blood. (R.p.293). SLED scientists found Clemons' and McAllister's blood on all of the items taken from the cab of the truck, and Clemons' blood was found on the hat and samples taken from the truck bed. (R.p.631-44).

When McAllister's family went to retrieve her truck from the police impound lot, they discovered the truck was full of trash and blood stains. (R.p.177). When McAllister's son moved the passenger's seat, a "shell casing fell out of the back of the seat . . . ." (R.p.177). He alerted police, who searched the truck again and found another shell casing. (R.p.179). Both casings were determined to be .25 caliber, but they could not be conclusively matched to the same gun. (R.p.568–71). SLED firearms expert testified .25 caliber bullets are "not particularly common." (R.p.569).

On the night of July 15, a witness named Britzi Waddell and two friends were swimming and camping near the landing at the end of Browns Chapel Avenue Road near Conway. (R.p.245–48). They noticed a foul smell they believed to be a dead animal. The next morning, they went to investigate the smell and discovered human skeletal remains in the woods. (R.p.248). Through DNA analysis, police determined they were the bodies of Linda McAllister and Chet Clemons. The local fire department searched the river for a gun, but did not find one. (R.p.382).

The skeletal remains were taken for an autopsy. A forensic pathologist testified that both Clemons' and McAllister's skulls had entrance and exit fractures

consistent with a bullet from a small caliber weapon. She testified "Ms. McAllister's pathway is slightly down, slightly forward and to the right, and Mr. Clemons' pathway is slightly down, slightly back and to the right." (R.p.488, lines 20–23). She testified both fractures were smaller than .35 of an inch. (R.p.488). Pictures were introduced showing the skull fractures. The pathologist found a bullet "embedded in Ms. McAllister's hair in the body bag with her. . ." (R.p.477).

A SLED scientist who examined the bullet testified it was from a .25 caliber cartridge. (R.p.569–70). Ernest Yost testified he sold Carlisle a .25 caliber pistol roughly two months before the murder. (R.p.325). He also sold Carlisle a .40 caliber pistol "three days before they got arrested." (R.p.325). He testified Carlisle and Hodge were both present for the transactions and they were driving a blue truck when he sold them the .40 caliber pistol. (R.p.326). Hodge and Carlisle had a housemate at the time, but he was out of town the week of July 1–8. (R.p.548). He testified Carlisle kept a .25 caliber pistol at the residence. (R.p.549). The gun was never recovered.

Police recovered a GPS device from McAllister's truck and the State presented the data extracted from the device. The data showed the truck's movements around Conway on July 3 and the surrounding dates, which coincided with testimony about McAllister's activities that day. Prior to the evening of July 3, the truck typically travelled along the primary roads around town. (R.p.591). However, beginning that evening, the truck began taking different, less travelled routes. (R.p.592). The GPS data showed the truck travelled around Conway on

July 3 and returned several times to McAllister's house. (R.p.592–94). The truck left McAllister's home at around 9:00 p.m. on July 3 and travelled towards Hodge's residence. (R.p.595). However, once the truck arrived on Pleasant Union Rd., the dirt road leading towards Hodge's home, it stopped in the road for around twelve minutes. (R.p.595). This spot was surrounded by woods and open fields. (R.p.595). After the twelve minute pause, the truck then continued on to Hodge's residence where it remained for about 40 minutes. (R.p.596).

Around 10:18 p.m., the truck left Hodge's residence and took a "circuitous" route around Conway before arriving at Brown's Chapel Rd., where the bodies were later found. (R.p.597). The truck remained there for about 30 minutes before leaving and travelling back to McAllister's home, where it remained for about nine minutes. (R.p.598). The truck then went back into Conway, where it stopped at a car wash for about ten minutes, shortly before 1 a.m. (R.p.598). The truck then went to Walmart. McAllister's truck left Walmart at 1:39 a.m. and arrived back at Hodge's residence around 2:16 a.m. (R.p.599). The following day, the truck travelled around town again, making stops at BB&T Bank, Advance Auto Parts, and other stores, including Walmart. (R.p.600–07).

Police obtained McAllister's bank records and discovered her card had been used for many purchases in the hours and days following her disappearance. Walmart transaction records and camera footage show Hodge and Carlisle spent more than $500 from McAllister's debit card at Walmart at 1:34 a.m. on July 4, along with a $100 cash withdrawal. (R.p.445). The bank records and surveillance

footage matched the GPS records showing McAllister's truck at Walmart on the night of the murders. Photographs from ATM machines around town showed Carlisle in McAllister's truck making numerous withdrawals from McAllister's account. (R.p.399–413). Earlier surveillance pictures from Conway National Bank showed Clemons withdrawing cash while wearing the camouflage hat recovered from the back of the truck. (R.p.289). The State also presented additional surveillance photographs from Walmart stores showing Hodge making numerous subsequent purchases (and getting cash back) in the days after the murders, including for home goods and video games. (R.p.445–61; 707; 719). $11,000 was spent on the card from July 3–13. (R.p.398–99).

Hodge and Carlisle did not testify.

STANDARD OF REVIEW

The determination of relevancy and materiality of a photograph is left to the sound discretion of the trial judge. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. The appellate court reviews a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and is obligated to give great deference to the trial court's judgment. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014).

ARGUMENT

Evidence supports the trial court's ruling admitting photographs of the victims' skeletal remains because the photographs were relevant to show manner of death and did not suggest guilt on an improper basis.

Evidence supports the trial court's ruling admitting photographs of the victims' skeletal remains. State's Exhibit #50 shows the position of the remains as they were found in the woods. It was directly relevant to show the circumstances of the crime, including whether both defendants participated in the disposal of the bodies. Likewise, the black-and-white autopsy photographs were the only pieces of documentary evidence tending to directly prove manner of death. The photographs did not contain images of blood or gore, were not calculated to inflame the passions of the jury, and did not suggest guilt on an improper basis. This Court should affirm.

A. Evidence supports the trial court's finding that the danger of unfair prejudice did not substantially outweigh the probative value of the photographs.

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. "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." Rule 403, SCRE.

If a photograph serves to corroborate oral testimony, it is not an abuse of discretion to admit it. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014). "Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder." Id. "Even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case, are useful to enable a witness to testify more effectively, or enable the jury to better understand [the] testimony. Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries, and the position in which the bodies were discovered." Id. "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). "[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." Id.

i. Crime scene photograph.

State's Exhibit # 50 shows the victims' skeletal remains as discovered in the woods near the landing on Brown's Chapel Road. It carried immense probative value. The prosecutor explained that the exhibit was "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." The trial court found the photo was "clearly relevant," noting the picture "simply mirrors the unfortunate reality of this case." (R.p.372). The Court cited State v. Collins, 409 S.C. 524, 763, S.E.2d 22 (2014), for the proposition that it is an "acceptable purpose" to "show the condition of the victims' bodies . . . and the position in which the bodies were recovered." (R.p.373).

The court could have cited several other cases which strongly support its ruling. In State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997), the Supreme Court upheld the introduction of photographs in a murder prosecution that showed "the crime scene and the position of [the victim's] body." Brazell, 325 S.C. 65, 78–79, 480 S.E.2d 64, 72 (1997). The court explained the "photographs supported the testimony of several witnesses and were relevant to the nature of the crime. The State used the photographs to establish that the murder was a deliberate and calculated act. These photographs corroborated [testimony] concerning the location of the body on the side of the road . . . ." State v. Brazell, 325 S.C. 65, 78–79, 480 S.E.2d 64, 72 (1997).

Likewise, the court in State v. Robinson, 201 S.C. 230, 22 S.E.2d 587 (1942), found no error in the admission of photographs in a murder prosecution of "the body at the location at which it was found." The court explained the photographs were "corroborative of the spoken word" and "showed material conditions which existed." State v. Robinson, 201 S.C. 230, 22 S.E.2d 587, 588–89 (1942). See also State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940) (finding no error in the admission of pictures of a dead body "found on the side of a public road"); State v. Thompson, 420

S.C. 192, 802 S.E.2d 623 (Ct. App. 2017) (finding no error in the admission of pictures of a dead body "as found at the crime scene").

The position of the bodies was particularly important in this case because the State relied on an accomplice liability theory to prosecute Hodge and Carlisle. The photographs were relevant to the jury's determination whether both defendants participated in the disposal of the bodies, which in turn could have affected its finding whether both defendants participated in the murders themselves. In his closing argument, the prosecutor implored the jury to "[s]ee how those bodies were. See if you can't figure out how they were taken there. Look at their condition, plenty of time for two people to take them there . . . ." (R.p.716). Likewise, Carlisle's lawyer noted that it would have taken two people to bury the bodies. He argued, "Jordan didn't bury those bodies herself. . . . I submit to you they very well may have shown you that he helped bury the bodies, but that doesn't make him guilty of murder . . . ." (R.p.739). The picture was directly relevant to the State's theory of the case—that Hodge and Carlisle acted in concert.

Furthermore, the picture corroborated other circumstantial evidence. GPS records showed McAllister's truck was present at the landing for 27 minutes on the night of the murders. (R.p.716). This is a fairly short amount of time to dispose of two bodies, but it is more manageable for two people than one. The bodies were found haphazardly placed in woods, and it was obvious that little time was taken to hide them. With the GPS records, this is strong evidence that Hodge and Carlisle hastily disposed of the bodies on the night of July 3.

Conversely, the picture was not gruesome or gory. The victims' bodies were so decomposed that they were essentially skeletons. This is a far cry from the gruesome photographs at issue in other reported cases. Cf. State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940) (finding no error in the admission of pictures of a dead body despite the fact that numerous witnesses "testified as to the gruesome condition of the body and of the presence of maggots in large numbers in and near the wound"); State v. Collins, 409 S.C. 524, 529, 763 S.E.2d 22, 25 (2014) (affirming conviction in dog bite case where child victim suffered "'extensive' loss of skin and soft tissue on his upper body and his face, including his ears and nose, which were 'completely eaten away' by the dogs. Areas of the boy's chest and his arm had also been eaten, exposing the bone"). While pictures of a human skeleton are somewhat disturbing, depictions of skeletons are ubiquitous in our culture and not particularly inflammatory. They simply do not compare to the type of gory photographs at issue in Collins or Edwards. See also Evans v. State, 306 Ga. 403, 411, 831 S.E.2d 818, 826 (2019) (explaining that while "photographs depicted the victim's skeletal remains and were, therefore, somewhat graphic, that does not alter their admissibility because each of the photographs 'was relevant to some point of the [medical examiner's] testimony'"). Evidence strongly supports the trial court's decision to admit the photograph.

ii. Autopsy photographs.

State's Exhibit's 58, 59, 61, 62, 63, 64, 66, and 128 were taken during the autopsies. They are closer depictions of the victims' skulls that show small

fractures caused by a gunshot wound. Another picture showed the bullet recovered from McAllister's hair. The forensic pathologist referenced these pictures to support her opinion testimony that both victims died of a gunshot wound to the head. She used the photographs to illustrate the size of the fractures and their position relative to each other. She also used the pictures to illustrate the difference between entrance and exit wounds, and the pathway of the bullet. (R.p.488). The pictures were the only documentary evidence tending to prove cause of death. Accordingly, they had obvious, immense probative value regarding this central fact.

Again, there is added significance due to the fact that this was a "hand of one, hand of all" prosecution. The pictures were highly relevant to the jury's determination whether the same weapon was used to shoot both victims, and by extension whether the same person did both shootings. This was naturally a crucial fact. Carlisle's defense lawyer spoke during his closing argument about the size of the bullet holes in the two skulls. (R.p.737). He argued both victims were killed by the same gun. The use of one gun or two could have played a pivotal role in the jurors' determination of the facts, and whether the case was decided on an accomplice liability theory. While the state did not argue two guns were used, the jury was entitled to view for itself the only documentary evidence capable of shedding light on this critical issue. The pictures corroborated the pathologist's testimony that the fractures were roughly the same size, and therefore likely were caused by the same caliber bullet. (R.p.487–89).

As with the crime scene photograph, the black-and-white autopsy pictures were not particularly gory or gruesome. They essentially showed a human skull. While unpleasant, they are nowhere near as difficult to view as the bloody, gory photographs at issue in other reported cases. Compare State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014); State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (concerning admittance of "color autopsy photographs . . . depict[ing] the victim's scalp pulled away from her skull. One showed her surgically opened vaginal cavity exposing a large amount of seminal fluid"); State v. Thompson, 420 S.C. 192, 215–16, 802 S.E.2d 623, 634–35 (Ct. App. 2017) (finding no error in the admission of autopsy photographs showing "deep lacerations on the inside of Victim's lower lip and bruising on Victim's shoulder, torso, back, buttocks, and legs" because they "helped the jury to understand the nature and extent of Victim's injuries"); State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 164–65 (Ct. App. 2014) (finding no error in the admission of autopsy pictures showing "exposed skull and brain" and "a side view of Mack's head that shows his inside-out scalp pulled down over his face" because the pictures were corroborative of pathologist's testimony). Their admittance was not "calculated to arouse the sympathy or prejudice of the jury . . . ." State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Evidence supports the finding that the photographs' probative value was not substantially outweighed by the danger of unfair prejudice. See State v. Oliveira-Coutinho, 291 Neb. 294, 318, 865 N.W.2d 740, 762 (2015) (finding no error in admission of photographs of

skeletal remains "including several close-ups of the skull taken from different angles").

Furthermore, the record shows the trial court exercised its discretion by excluding the photographs it felt carried the most substantial risk of unfair prejudice. The State originally offered a group of 11 photographs during the pathologist's testimony. Defense counsel requested a sidebar with the court, during which he objected to certain photographs outside the presence of the jury. (R.p.476). At the conclusion of the pathologist's testimony, the trial court held a hearing allowing defense counsel to place his objections on the record. (R.p.500). The Court explained that following defense counsel's objection, the State agreed to withdraw all of the color photographs. (R.p.502, lines 5–6). In addition, the court excluded three others; State's Exhibits 57, 60, 65. (R.p.500). These photographs showed "the frontal portion of each victim's skull" and "a photograph of the arm that had the metal rod in it." (R.p.500–01). The photographs that remained were State's Exhibits #58, 59, 61, 62, 63, 64, 66 and 128. (R.p.501).

The court explained that "each of the photographs that were admitted . . . were the least, so to speak, prejudicial photographs that could be admitted into evidence. I understand that these photographs do show skeletal remains. Again, that was . . . the condition that the bodies were found in." (R.p.503). Accordingly, the trial court exercised its discretion by admitting some of the photographs while excluding others. See State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (finding no abuse of discretion where "the record shows the trial court did

thoroughly consider the arguments of both the State and the defense, and it examined each photo while also conducting an examination of the forensic pathologist who took the photographs before making its decision"); State v. Torres, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010) (noting "the trial judge did exercise his discretion by excluding three of the State's photographs, ruling that they were duplicative and prejudicial"). The court explained the pictures showed "the nature and extent of each of the victim's injuries and provide evidence as to what happened on the date these individuals lost their lives, and therefore, pursuant to such I do not believe that the prejudicial effect outweighs any probative value . . . ." (R.p.505). Clearly, this is not a case where the trial court mechanically admitted the pictures without considering their potential for unfair prejudice, or refused to exercise its discretion.

Hodge argues admission of the pictures was not necessary because the pathologist's findings "were not in dispute." While it is true that all parties agreed the victims died from gunshot wounds, the photographs were highly probative because they corroborated the pathologist's oral testimony. Our system of evidence has always permitted physical and documentary evidence to be admitted at trial to "substantiate" oral testimony. State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). It would be extraordinary to require the State to prove two murders beyond a reasonable doubt but prevent it from introducing the only documentary evidence proving manner of death. One can easily imagine the suspicion it would provoke among jurors, especially skeptical jurors, who are instructed ad nauseum

about the stringent "beyond a reasonable doubt" standard, if the State did not produce any documentary evidence to substantiate oral testimony about such a central issue. Prosecutors must be prepared to encounter a "doubting Thomas" on every jury.[1] The State must be allowed to prove its allegations in its case and chief, for it may not get another chance in cases (such as this one) where the defendant does not testify. As long as the evidence is not "calculated to arouse the sympathy or prejudice of the jury," it is not error to admit it. State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010).

Evidence supports the trial court's ruling that the risk of unfair prejudice did not substantially outweigh the probative value of the pictures. Accordingly, Hodge has failed to show an abuse of discretion. Under the "highly deferential" standard of review in claims of error based on Rule 403, the Court is "obligated to give great deference to the trial court's judgment." Collins, 409 S.C. at 534, 763 S.E.2d at 28. This Court should affirm.

B. Harmless error.

Even if the trial court erred, the admission of the photographs did not affect the result of trial. The remaining evidence conclusively proved Hodge's guilt, rendering any error harmless. This Court should affirm.

The improper admission of evidence is reversible error only when the admission causes prejudice. State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976).

---

[1] John 20:24–29.

Error is harmless when it could not reasonably have affected the result of the trial. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150,151 (1985). Determining if an error is harmless is not subject to a definite rule, but is assessed in light of the circumstances of the case and if, in this light, the error was not unduly prejudicial and material. State v. Byers, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011).

The evidence in this case was overwhelming. Hodge and Carlisle were caught red-handed in possession of McAllister's blood-soaked vehicle, which scientists proved contained a mixture of McAllister and Clemons' blood. Police recovered two .25 caliber shell casings from the truck, the same caliber weapon that fired the bullet recovered from McAllister's hair. The State proved Carlisle owned a .25 caliber handgun. Police recovered McAllister's credit card from Hodge's bedroom, and was able to prove Hodge and Carlisle made numerous purchases with the card in the immediate aftermath of the murders. Through GPS records, the State showed McAllister's truck travelled to the road on which Hodge lived, where it stopped for 12 minutes despite there being no buildings in that area. Shortly after, the truck travelled to the location where the bodies were found, and Hodge was shown to be in possession of the truck just over an hour later.

The State also produced substantial "consciousness of guilt" evidence, including Hodge's false statements to her uncle and police that McAllister and Clemons were in Ohio for a family emergency. Hodge claimed to have lost the keys to the truck, despite the fact that they were discovered in her bedroom shortly thereafter. Police discovered a partially-burned smartphone and pistol holster in a

burn pit behind Hodge's residence. The State was even able to show that Hodge did not approve of McAllister and Clemons' relationship, which she admitted in her recorded statement, establishing motive. Finally, Hodge essentially admitted guilt during the sentencing hearing, stating she was glad the trial resulted in "justice for [her] grandma" and asking for mercy. (R.p.772, lines 19–21).

Hodge's guilt was conclusively proven. While the photographs were probative and properly admitted, their admission did not reasonably affect the result of trial because Hodge would have been convicted even without them. This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DON ZELENKA
Deputy Attorney General

MELODY BROWN
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

JIMMY A.RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

BY: _____
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 21, 2021

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions
The Honorable Craig D. Brown, Circuit Court Judge

Appellate Case No. 2019-001745

THE STATE,

Respondent,

v.

JORDAN MARIE HODGE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

ALAN WILSON
Attorney General

DON ZELENKA
Deputy Attorney General

MELODY BROWN
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

BY: _____
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 21, 2021

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions
The Honorable Craig D. Brown, Circuit Court Judge

Appellate Case No. 2019-001745

THE STATE, Respondent,

v.

JORDAN MARIE HODGE, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Taylor D. Gilliam, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 21st day of January, 2021.

Anne Mueller

Anne A. Mueller
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-372

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jordan Marie Hodge, Appellant.

Appellate Case No. 2019-001745

Appeal From Horry County
D. Craig Brown, Circuit Court Judge

Unpublished Opinion No. 2022-UP-189
Submitted March 1, 2022 – Filed May 11, 2022

AFFIRMED

Appellate Defender Taylor Davis Gilliam, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Joshua Abraham Edwards, all of Columbia, and Jimmy A. Richardson, II, of Conway, for Respondent.

PER CURIAM: Jordan Marie Hodge appeals her murder convictions and sentence to life in prison, arguing the trial court abused its discretion by admitting into evidence (1) a photograph of the victims' skeletal remains taken in the location where the remains were discovered and (2) an x-ray and photographs of the victims' skeletal remains taken during the autopsies. We affirm.

1. The trial court did not abuse its discretion by admitting into evidence Exhibit 50—a photograph of the victims' skeletal remains taken in the location where the remains were discovered—because the photograph corroborated trial testimony about the condition and location of the victims' remains upon discovery. *See State v. Washington*, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008) ("A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* at 124, 665 S.E.2d at 604 ("An abuse of discretion occurs when the trial court's ruling is based on an error of law."); *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) ("It is well settled in this state that '[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" (alteration in original) (quoting *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996))). Additionally, 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. *See* S.C. Code Ann § 16-3-10 (2015) ("'Murder' is the killing of any person with malice aforethought, either express or implied."); Rule 401, SCRE (providing evidence is "relevant" when it has "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence"); Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by [a rule, statute, or provision of law]."); *State v. Gray*, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014) ("'Probative' means '[t]ending to prove or disprove.'" (quoting *Probative*, *Black's Law Dictionary* (9th ed. 2009))); *State v. Cooper*, 212 S.C. 61, 66, 46 S.E.2d 545, 547 (1948) ("Malice aforethought" exists when "the combination of [wrongful] intent and [a wrongful] act produce[s] [a] fatal result." (quoting *State v. Milam*, 88 S.C. 127, 131, 70 S.E. 447, 449 (1911))). Moreover, any danger of unfair prejudice was low because Exhibit 50 did not suggest that the jury convict Hodge on an improper basis. *See State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis."). Thus, the probative value of Exhibit 50 was not substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE ("[R]elevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

2. The trial court did not abuse its discretion by admitting into evidence Exhibits 58, 59, 61, 62, 63, 64, 66, and 128—photographs and an x-ray of the victims' skeletal remains taken during the victims' autopsies. *See Washington*, 379 S.C. at 123-24, 665 S.E.2d at 604 ("A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* at 124, 665 S.E.2d at 604 ("An abuse of discretion occurs when the trial court's ruling is based on an error of law."). Exhibit 62—a photograph of victim 2's jawbone—was relevant to and probative of victim 2's identity. Exhibits 58, 59, 61, 63, 64, 66, and 128—photographs and an x-ray from the victims' autopsies—were relevant to and probative of the victims' causes of death. *See* Rule 401, SCRE (providing evidence is "relevant" when it has "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence"); Rule 402, SCRE ("All relevant evidence is admissible except as otherwise provided by [a rule, statute, or provision of law]."); *Gray*, 408 S.C. at 609, 759 S.E.2d at 165 ("'Probative" means '[t]ending to prove or disprove.'" (quoting *Probative*, *Black's Law Dictionary* (9th ed. 2009))). Additionally, any danger of unfair prejudice was low because the photographs and x-ray did not suggest that the jury convict Hodge on an improper basis. *See Wiles*, 383 S.C. at 158, 679 S.E.2d at 176 ("Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis."). Thus, the probative value of Exhibits 58, 59, 61, 62, 63, 64, 66, and 128 was not substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE ("[R]elevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

AFFIRMED.[1]

GEATHERS and HILL, JJ., and LOCKEMY, A.J., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JORDAN MARIE HODGE,

APPELLANT

APPELLATE CASE NO. 2019-001745

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

Opinion No. 2022-UP-189

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Jordan Marie Hodge respectfully petitions the Court for a rehearing of its Opinion No. 2022-UP-189 issued on May 11, 2022 based upon the following points overlooked or misapprehended by the Court:

As to whether the trial judge erred in admitting into evidence Exhibit 50, this Court 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, this Court held "Exhibit 50 was relevant to and probative of whether Hodge as guilty of murder because the photograph tended to

show whether Hodge acted with malice." Id. Regarding the unfair prejudice aspect of the gruesome photograph, this 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. Respectfully, these holdings were in error.

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, the South Carolina Supreme 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.

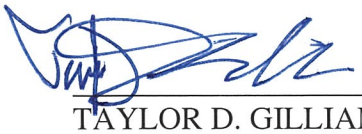
App. 2008) ("When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." (citing State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007))).

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). There is no evidence in the record that the trial judge was cognizant of Rule 403 and the accompanying prejudice.

Regarding the remaining improper 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.

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.

Respectfully Submitted,



TAYLOR D. GILLIAM
Appellate Defender

This 26th day of May, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

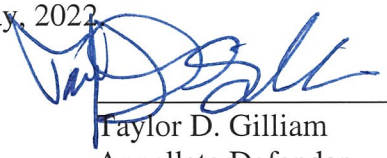
JORDAN MARIE HODGE,

APPELLANT

APPELLATE CASE NO. 2019-001745

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Joshua A. Edwards, Esquire, at the primary email address listed in the Attorney Information System (AIS); and Jordan Marie Hodge, #381543, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 26th day of May, 2022.



Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Jordan Marie Hodge, Appellant.

Appellate Case No. 2019-001745

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
Taylor Davis Gilliam, Esquire
Joshua Abraham Edwards, Esquire
Donald J. Zelenka, Esquire

Jimmy A. Richardson, II, Esquire

FILED
Jun 23 2022