

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Edgar W. Dickson, Circuit Court Judge

RECEIVED

MAY 23 2013

S.C. Supreme Court

Opinion No. 2013-UP-001 (S.C. Ct. App. filed 1/2/2013)

10-GS-38-808-811.

THE STATE,

RESPONDENT,

v.

RALPH BERNARD COLEMAN,

PETITIONER

APPELLATE CASE NO. 2013-000616

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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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 2/22/2013.

QUESTION PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court's denial of Coleman's motion to sever his case from four co-defendants because the joint trial violated his right to due process and a fair trial because evidence not related to Coleman was entered against him when entered against other defendants; he lost right to present a defense that he was mistaken for his brother, Christian Coleman, who was also a co-defendant; he lost the right to present his closing argument last since another co-defendant admitted evidence; and he was unable to question co-defendant Harris about his interview with the police.
2. Whether the Court of Appeals erred in affirming the trial court's denial of Coleman's motion to suppress his identification by witness Ashley Parsley based on Rule 602, SCRE, because she lacked personal knowledge of his identity as she stated she did not really see him since she was lying face down on the floor and selected him from the photo line-up based on "instinct."
3. Whether the Court of Appeals erred in affirming the trial court's denial of Coleman's motion to suppress the photo of a rifle, which was not one of the murder weapons but was similar to the type gun used because the actual rifle was not found, which the state introduced to incite the jury because the rifle had a bayonet.

STATEMENT OF THE CASE

In May 2010, the Orangeburg County Grand Jury indicted Ralph Bernard Coleman on the charges of murder, armed robbery, and burglary first degree. On December 10 – 17, 2010, Coleman and four of his co-defendants: Christian Coleman, Walter Lee Harris, Danny Ryant, Jr., and Mario Montez Shivers, proceeded to trial before the Honorable Edgar Dickson and a jury in a joint trial. Ralph Coleman was represented by Jillian Ullman and Mark Wise; Christian Coleman was represented by Richard Lackey; Walter Harris was represented by Scott Palmer; Danny Ryant was represented by Douglas Mellard; and Mario Shivers was represented by Joshua Koger. The state was represented by Solicitor David Pascoe and Assistant Solicitor Donald Sorenson. R 1. The jury returned verdicts of guilty on the three charges as indicted. Coleman's attorney filed notice of appeal. The Court of Appeals affirmed Coleman's convictions and sentences on January 2, 2013. State v. Coleman, Op. No. 2013-UP-001 (Ct. App. filed January 2, 2013). App. 1-3. Appellate counsel filed a petition for rehearing which the Court of Appeals denied on February 22, 2013. App. 25. This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in affirming the trial court's denial of Coleman's motion to sever his case from four co-defendants because the joint trial violated his right to due process and a fair trial. Evidence not related to Coleman was entered against him when entered against other defendants; he lost right to present a defense that he was mistaken for his brother, Christian Coleman, who was also a co-defendant; he lost the right to present his closing argument last since another co-defendant admitted evidence; and he was unable to question co-defendant Harris about his interview with the police.

Ralph Coleman and five other young men were charged with entering the home of Charles Pringle, who was believed to be a drug dealer in marijuana, on March 12, 2010 and shooting him to death and attempting to rob him. R. 75, ll. 16 – 25; R. 76, ll. 1 – 25. Patrick Tyler, the sixteen year old co-defendant and the youngest one, testified against the others at the joint trial. His testimony was that they intended to just rob Pringle of his drugs and money, but something went wrong. R. 127, ll. 1 – 25; R. 129, ll. 1 – R. 131, ll. 22; R. 137, ll. 1 – 25; R. 138, ll. 1 – 24; R. 151, ll. 14 – 24.

According to Tyler's testimony, initially, just Tyler, Ralph Coleman, and Mario Shivers discussed the robbery. Then they got the others involved. R. 137, ll. 1 – R. 147, ll. 2. Tyler said four of the six had guns, but Mario provided three of the guns which included a nine millimeter pistol and two SKS rifles one of which had a knife on it. R. 135, ll. 1 – 25; R. 136, ll. 1 – 25. Walter Harris had the fourth gun, a pistol, which he gave to Ralph Coleman before they went into Pringle's house. R. 143, ll. 1 – 25; R. 147, ll. 1 – 25. The four with guns were: Ralph Coleman who had Harris' pistol; Christian Coleman who had the nine millimeter pistol; Ryant who had one of the SKS rifles; and Shivers who had one of the SKS rifles. R. 148, ll. 1 – 25.

Harris, who was also known as Pete, went into the house initially to buy some marijuana and to scope the place. R. 144, ll. 1 – 25. Then, Tyler said he and Ralph went into the house to buy marijuana. Then the others came in and began looking for the drugs and money. Harris taped Pringle's mouth with duct tape. Then a gun went off, and Tyler ran to the truck. He claimed he heard about twenty shots. Then everyone left and went their separate ways. R. 147, ll. 1 – R. 155, ll. 25.

Lieutenant James Shumpert of the Orangeburg Sheriff's Department, testified that he was the lead investigator into this case. He took statements from Ashley Parsley, a young woman who was at Pringle's apartment during this incident, and from Shannon Mitchell who was in the apartment when Harris made the initial visit, and whom Mitchell knew. After Mitchell told Lieutenant Shumpert of Harris, Shumpert then showed Ashley Parsley a photo lineup which included Harris. She did select Harris as the person who came just prior to the robbery to buy drugs. R. 232, ll. 1 – R. 238, ll. 9.

Lieutenant Shumpert learned that Andre Washington had a forty caliber pistol allegedly like the one used in Pringle's death. Shumpert paid an informant, Christopher Dwight, to buy the pistol from Washington which he did. R. 238, ll. 10 – 25; R. 239 – R. 240. Washington said he had bought the pistol from Harris. R. 200, ll. 1 – 25; R. 201, ll. 1 – 25; R. 202, ll. 1 – 10.

Walter Harris was arrested on March 17, 2010. Then Ryant and Tyler turned themselves in on March 18, 2010. R. 241, ll. 1 – R. 242, ll. 25. Tyler gave a statement to Lieutenant Shumpert describing the incident. R. 243, ll. 1 – R. 247, ll. 25.

Tyler testified that he told Lieutenant Shumpert the truth about the incident, and identified Ralph Coleman, Mario Shivers, and Christian Coleman as the other people involved. R. 156, ll. 12 – 25; R. 157, ll. 1 – R. 164, ll. 25; R. 248, ll. 1 – R. 262, ll. 25.

All were arrested and charged with murder, burglary first degree, and armed robbery. R. 261, ll. 1 – R. 262, ll. 25. At the time of their arrests, Ralph Coleman was twenty- two years old; Christian Coleman was twenty; Danny Ryant was twenty; Mario Shivers was twenty-one; and Walter Harris was twenty-one. R. 263, ll. 1 – 4.

Dr. Janice Ross, the forensic pathologist who performed the autopsy on Pringle, testified that Pringle had twenty-four gun shot wounds to his body. R. 203, ll. 1 – 25; R. 204, ll. 9 – R. 206, ll. 25. The cause of death was laceration of multiple organs due to multiple gun shots which she described as a homicide. R. 211, ll. 2 – 18.

The ballistics expert from SLED, James Green, reported that based on the shell casings found, four different weapons were used to shoot Pringle. R. 212, ll. 1 – 16; R. 220, ll. 1 – 8. Eight shell casings were fired by the forty caliber Smith and Wesson pistol that was recovered. R. 216, ll. 1 – 25.; R. 217, ll. 1 – 8. Five shell casings were fired by AK forty-seven or SKS rifles. No rifles were recovered. R. 217, ll. 9 – 25; R. 218, ll. 1 – 6; R. 218, ll. 7 – 25; R. 219, ll. 1 - 5. Four of the five rifle shell casings were fired by one rifle and one shell casing came from a different rifle. R. 219, ll. 6 – 22. Eleven shell casings were fired by one firearm, a nine millimeter pistol. R. 216, ll. 1 – 25; R. 223, ll. 1 – 19.

Lieutenant Gerald Carter of the Orangeburg County Sheriff's Office was the crime scene processor for the case. He did not collect any identifiable fingerprints nor DNA for this case. R. 181, ll. 1 – 25; R. 182, ll. 1 – 24; R. 194, ll. 1 – 25.

Patrick Tyler testified that the state had not offered him any sentence for his testimony. However, his murder charge was being reduced to voluntary manslaughter. R. 165, ll. 18 – 25; R. 166, ll. 1 – 25.

At the pretrial hearing on November 23, 2010, Ralph Coleman's attorney moved for a severance of Coleman's trial from the other co-defendants. She argued that Harris had given three statements to law enforcement, and although the state said they were not going to go into those statements, she would like to get into those statements in her defense of Coleman because the three statements were different. Two statements did not incriminate Coleman and one did. Ralph Coleman had a right to present a defense, and this right would be hampered by a joint trial. 2nd Supp. R. 2, ll. 1 - 2nd Supp. R. 3, ll. 25; R. 35, ll. 10 - R. 38, ll. 25.

Assistant Solicitor Sorenson argued in response that even if Ralph Coleman's trial were severed, his attorney could not get into Harris statement because they were hearsay. R. 39, ll. 1 - 25; R. 40, ll. 1 - 25; R. 41, ll. 1 - 7.

Defense counsel argued that the statements would not be hearsay because they would not be offered for the truth of the matter asserted but to show that there were inconsistencies because two of the co-defendants were naming different people who participated which would demonstrate reasonable doubt. If the trials were severed, she could call Harris as a witness. R. 41, ll. 9 - R. 42, ll. 25.

The judge denied her motion to sever but said her objection was preserved for the record. R. 43, ll. 1 - R. 44, ll. 19.

At the trial on December 20, 2010, in a pretrial motion, Coleman's defense counsel argued for the motion to sever again based on the fact that she received new evidence which was a statement from the driver of the car, Ronnie Washington which was inconsistent with the statements given by Tyler and Ashley Parsley. If she could question Harris about his statements, this would show that all of the eyewitnesses gave different stories. R. 57, ll. 9 - R. 59, ll. 23.

Defense counsel continued to argue that there were antagonistic views in that her defense was that Ralph Coleman was not present during this incident, and was identified because he looked like his brother, Christian Coleman, one of the co-defendants. R. 59, ll. 24 – R. 60, ll. 24.

Counsel argued that if character evidence against one of the co-defendants was admitted, then that would reflect against Ralph Coleman as well which would be another reason for severance. She explained that a twenty-two caliber pistol, which was not one of the murder weapons, was found at Harris' house in the execution of a search warrant. This would make her client, Coleman, look bad to the jury. The state argued that antagonistic views were not grounds for severance. The judge denied her motion for severance. R. 60, ll. 24 – R. 60, ll. 25; R. 62, ll. 1 – 25.

During the trial, Ralph Coleman's attorney, Ullman, made a motion to sever again which all of the defendants joined in. Her argument was that since Shivers' attorney introduced evidence which was a statement by one of the witnesses, all of the other defendants also lost the right to close last even though they did not introduce evidence. R. 170, ll. 1 – R. 174, ll. 25.

In response, the solicitor cited two cases which held that in a joint trial all of the defendants lost the right to last closing if any one of them introduced evidence. The cases were State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972), and State v. Smith, 387 S.C. 619, 693 S.E. 2d 415 (Ct. App. 2010). R. 175, ll. 1 – 25.

Attorney Ullman argued that forcing all of the other co-defendants to lose their right to close last violated their right to a fair and impartial trial under the United States Constitution because they were being forced to act as a team and had to decide together what evidence was being admitted and what was not. R. 176, ll. 1 – R. 178, ll. 25.

The judge ruled that he had to abide by the law; therefore, he had to rule that the solicitor had last closing. R. 179, ll. 1 – R. 180, ll. 25.

At the close of the state's case, Ralph Coleman's defense counsel renewed all of her objections and motions including her motion to sever. She argued that half of the twelve witnesses presented evidence not pertaining to Ralph Coleman, but it was entered in the trial against him. The judge ruled that he stood by his ruling not to sever this trial. R. 265, ll. 14 – 25; R. 266, ll. 22 – R. 270, ll. 14.

At that point, Ryant's defense counsel, Attorney Mellard, argued that the lack of severance violated Ryant's right to due process. He argued that losing the right to close last was not fair since he did not present any evidence, and cross-examination was affected because none of them could point fingers at any of the others. Ralph Coleman's attorney joined in the motion that Coleman's due process rights were violated. R. 270, ll. 15 – 25; R. 271, ll. 1 – 25; R. 272, ll. 1 – 6.

Shiver's counsel, Attorney Koger, joined in the due process argument because he said he did not know that he had to confer with the other four defendants before he could admit evidence. He argued that they were being forced to act as a team instead of being able to separately represent their clients. Attorneys Palmer and Lackey joined in the due process motion against the joint trials. R. 272, ll. 6 – 25; R. 273, ll. 1 – 25; R. 274, ll. 1 – 14. The solicitor argued that he would have presented all of the same witnesses and evidence against each defendant if the trials had been severed. He also argued that the attorneys did not have to confer with each other. R. 274, ll. 13 – 25; R. 275, ll. 1 – 9. The judge denied the motions to sever. R. 275, ll. 10 – 25; R. 276, ll. 1 – 22.

The Court of Appeals held that the trial court should grant a severance only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. Citing Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001). App. 2. The Court of Appeals misapprehended the issue.

A motion for severance is addressed to the sound discretion of the trial court. State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). A defendant who alleges that he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction. State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005).

A severance should be granted only when there is a serious risk that a joint trial would compromise a specific right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. Id. A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial. State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999). The trial judge must act cautiously in allowing a joint trial. State v. Walker, *supra*.

The South Carolina Supreme Court wrote in State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993):

We take this occasion to remind prosecutors of the pitfalls inherent in mass conspiracy trials. More than forty years ago, this court stated, "It is always cumbersome to try a great number of defendants at one time... with such a large number of defendants, there might be a danger of some of them being lost sight of by the jury, and their case considered by the jury in a vague way." Citing State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952).

The Court also wrote that separate indictments with separate trials, and a sharper focus on the alleged conspirators' agreement would have aided in the State's case. State v. Gunn, Id. In Gunn's case, ten co-defendants were tried in a joint trial on drug trafficking charges. The Court reversed the convictions of six of the defendants.

In State v. Crowe, 258 S.C. 258, 188 S.E. 2d 379 (1972), the Supreme Court held that in a joint trial of defendants, introduction of evidence by one defendant may operate to deprive a co-

defendant, who offers no evidence, of right to the last argument, to which such co-defendant would be entitled if tried separately, affords no ground to order separate trials.

In State v. Smith, 387 S.C. 619, 693 S.E.2d 415 (Ct. App. 2010), the Court of Appeals held that the defendant was not entitled to severance on the grounds that she lost her right to have last closing argument to the jury as result of being tried together with co-defendant who offered a photo lineup into evidence.

State v. Crowe, *supra*, and State v. Smith, *supra*, can be distinguished from Coleman's case because there were only two co-defendants in Crowe's case and three in Smith's case.

ARGUMENT

The Court of Appeals erred in affirming the trial court's denial of Coleman's motion to suppress his identification by witness Ashley Parsley based on Rule 602, SCRE, because she lacked personal knowledge of his identity as she stated she did not really see him since she was lying face down on the floor and selected him from the photo line-up based on instinct.

Ashley Parsley's testimony was that she met Pringle one week before this incident and came to stay with him at his apartment. She was helping him sell drugs and was present during the shooting incident. R. 89, ll. 1 – R. 91, ll. 25; R. 96, ll. 14 – 25; R. 97, ll. 1 – 2. After the first person came in, who wanted to buy "droe" (a special type marijuana) but did not and then left, the doorbell rang again. Pringle was asleep and Shannon had gone, so Ashley answered the door with Pringle's gun in her hand. She said the light in the room was dim, and had different colored lights. R. 99, ll. 1 – 25; R. 100, ll. 1 – 25; R. 103, ll. 1 – 25.

At door, she saw a dark skinned man wearing blue. R. 123, ll. 3 – 25; Defendant Shivers' Exhibit 1. He came in to buy marijuana. As she reached down to get the marijuana out of a jar next to her in the living room, the person took the gun she had from her and pulled another gun on her, and told her this was a stickup. R. 104, ll. 1 – 25.; R. 105, ll. 1 – 6.

The man with the gun told her to get on the floor and don't move or talk which she did. R. 105, ll. 7 – 25. She noticed another 'chubby' man come in also. She did not look up again after she got face down on the floor. She then heard several people in the apartment with a lot of yelling, and ripping up things as they were asking for the money and drugs. R. 106, ll. 1 – 25; R. 107, ll. 1- 4. She then heard a lot of gun shots. After the men left, she called 911, and waited for the police. R. 107, ll. 1 – 25.

She gave a statement to Lieutenant Shumpert that night where she described the man at the door as being dark skinned wearing blue. She did not mention the chubby man in her statement. Defendant Shivers' Exhibit 1; R. 124, ll. 1 – 25.

Lieutenant Shumpert showed her several photo lineups, and she selected three people from three different lineups R. 110, ll. 1 – 25. She selected Walter Harris from State's Exhibit Three as being the person who came into the apartment the first time about twenty minutes before the incident. R. 111, ll. 1 – 25; R. 112, ll. 1 – 25; R. 113, ll. 1 – 25; R. 12.

She selected Shivers from State's Exhibit Four as being the person who came into the apartment the second time and pointed a gun at her. She remembered him because he had "cold eyes." She thought he was wearing a mask that covered the bottom part of his face. R. 114, ll. 1 – 25; R. 115, ll. 1 – 25; R. 11, ll. 1 – R. 12, ll. 25.

She selected Ralph Coleman from State's Exhibit Five as being the chubby guy that she saw in the apartment. However, in the affidavit she wrote with the lineup where she selected Ralph Coleman, she wrote that "it was *possible* [emphasis added] he was one of the guys that entered the apartment, but I didn't completely see his face." She did not identify any others. R. 116, ll. 1 – 25; R. 117, ll. 1 – 25; R. 118, ll. 23 – 25; R. 119, ll. 1; R. 12, ll. 1 – 25.

Coleman's defense counsel objected at that point based on Neil v. Biggers,¹ grounds as well as lack of personal knowledge issues as previously raised. R. 117, ll. 1 – 8.

On cross-examination, she admitted that once he got down on the floor, she never turned either way and could not see what was going on. She could not even see people's shoes, and she did not know how many people were in the apartment. She admitted that after the first guy entered the apartment, she laid on the floor until everyone was gone. R. 120, ll. 1 – 25; R. 121, ll. 1 -25; R. 122,

ll. 1 – 2nd Supp. R. 5, ll. 25. She said the lights were dim in the apartment; she was nervous; and she was not sure that the person she picked out of the lineup (State’s Exhibit Five) was in the apartment that night. R. 124, ll. 1 – 25.

A hearing was held, pursuant to Neil v. Biggers, on November 23, 2010 prior to trial as Ralph Coleman’s counsel requested it based on the photo lineup identification by Ashley Parsley. R. 2, ll. 10 – 14. At the hearing, Ashley testified that after the man with the gun came in and made her get on the floor, she could not see other people as she was face down on the ground. R. 6, ll. 1 – 25.

She said that before she went down, she noticed the eyes of the man with the gun as his eyes were “so cold,” and she saw a stocky person but “she didn’t really see his face.” R. 7, ll. 1 – 25; R. 9, ll. 1 – 25. When asked on cross-examination why she selected number One from State’s Exhibit Five (Ralph Coleman), she responded: “It was just like instinct; I just pointed straight at it.” R. 18, ll. 1 – 25; R. 19, ll. 1 -2.

Defense counsel argued at the November hearing that any in-court identification by Ashley not be allowed pursuant to Neil v. Biggers because it would violate Coleman’s due process rights. Counsel also argued that any testimony of Ashley’s about her identification of Ralph Coleman not be admitted because she lacked personal knowledge of who was in Pringle’s living room during the incident. He argued that any witness’s testimony was only allowed if it were based on personal knowledge. He argued that Ashley said she was not sure if Coleman was in the apartment as she did not see the person. Her identification was based on “instinct.” R. 26, ll. 1 – R. 29, ll. 25.

The judge ruled there was nothing suggestive about the identifications; they were reliable; and he saw no likelihood of misidentification. The solicitor, however, said there would be no in-court identifications by Ashley Parsley. R. 30, ll. 19 – R. 34, ll. 25.

¹ Neil v. Biggers, 409 U.S. 188 (1972).

At the trial in a pretrial motion, Attorney Ullman moved that Ashley Parsley's identification of Ralph Coleman not be allowed based on Rule 602, SCRE, because she lacked personal knowledge of Coleman being in the apartment. Her selection from the lineup was based on instinct. If she were allowed, it would have to be as a lay witness opinion since she lacked personal knowledge, and she had no basis for an opinion. R. 64, ll. 1 – R. 65, ll. 25.

The solicitor argued that Attorney Ullman could cross-examine Ashley Parsley on those issues. The judge denied Attorney Ullman's motion. R. 66, ll. 1 – 25.

During the trial before the jury, Ashley Parsley identified Ralph Coleman from State's Exhibit Five (photo lineup) as "*possibly*" [emphasis added] being one of the guys that entered the apartment on March 12th. R. 116, ll. 1 – 25; R. 117, ll. 1 – 25. Coleman's attorney objected. R. 118, ll. 1 – 25.

Counsel renewed her motions and objections after the state rested and after the jury's verdict. R. 266, ll. 20 – 25; R. 394, ll. 1 – 25; R. 395, ll. 1 – 5.

Rule 602, SCRE, provides that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

The Court of Appeals held that the opinion or inference of a lay witness is admissible if it is (a) rationally based on the perception of the witness; (b) helpful to the determination of a fact in issue; (c) does not require special knowledge. Citing State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996).App. 2-3. The Court of Appeals misapprehended the issue.

State v. Frazier, 357 S.C. 161, 592 S.E.2d 621 (2004), reversed the trial court and remanded the case for a new trial where the Court held that a statement by one of Frazier's co-workers that he overheard Frazier say that someone should kill the victim, Brent Poole. The Court ruled that the statement was not admissible pursuant to Rule 602, SCRE, because the witness could not say when

the statement was made; he did not know to whom the statement was made; and he could not recall the exact content of the statement. The Court also ruled that the witness's testimony was not harmless because there was little direct evidence linking Frazier to the crime.

Coleman's case is similar in that Ashley Parsley's testimony was not certain, and was not harmless. She was the only neutral witness to somewhat identify Ralph Coleman. The main evidence was the testimony of Patrick Tyler which was based on the purported reduction of his charges of murder to voluntary manslaughter.²

² Department of Corrections website indicates that Tyler's sentence was fifteen years for armed robbery.

ARGUMENT

The Court of Appeals erred in affirming the trial court's denial of Coleman's motion to suppress the photo of a rifle, which was not one of the murder weapons but was similar to the type gun used because the actual rifle was not found, which the state introduced to incite the jury because the rifle had a bayoneted.

In a pretrial motion, Coleman's defense counsel moved that a picture of a rifle that the state intended to introduce to use should be suppressed because it was not one of the murder weapons. She argued that it was being introduced just to incite the jury, and that it had a bayonet on the end. The rifles and nine millimeter pistol were not recovered, but the state was not introducing pictures of a nine millimeter pistol. R. 67, ll. 1 – 25; R. 68, ll. 1 – 24; R. 70, ll. 1 – 25; R. 71, ll. 1 – 25.

The state argued that the picture was just to demonstrate to the jury what the rifles used in the incident were like. R. 68, ll. 15 – 25; R. 69, ll. 1 – 25.

The judge said that he would reserve his ruling until he heard the testimony. R. 71, ll. 12 – 25.

James Green, the ballistics expert from SLED, testified that no rifles or nine millimeter pistols were submitted in this case. The only weapon submitted was the forty caliber pistol. R. 212, ll. 1 – 25; R. 218, ll. 1 – 25; R. 219, ll. 1 – 25. Green's testimony was that a rifle like the one in the picture fired the five shell casings from an SKS rifle. Coleman's attorney objected when the picture was admitted into evidence. R. 215, ll. 1 – 25; R. 216, ll. 1 – 25; R. 217, ll. 1 – 25; R. 218, ll. 1 – 25; R. 219, ll. 1 – 25.

The judge ruled that the picture was admitted into evidence because he was not familiar with that type weapon, and he thought it would be helpful to the jury. R. 230, ll. 1 – 25; R. 231, ll. 1 – 7.

The Court of Appeals held that to warrant reversal based on the admission or exclusion of evidence, the appellant must prove both error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence of the lack thereof. Citing State v. Singleton, 395 S.C. 6, 716 S.E.2d 332 (Ct. App. 2011). App. 3. The Court misapprehended the issue.

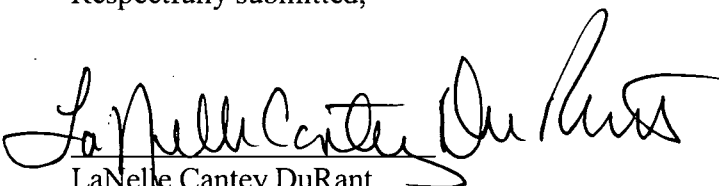
The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009). To constitute unfair prejudice, the photographs must create an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. Id.

The state did not recover the rifles used in the incident. Therefore, this was a weakness in the state's case, and they should not have been allowed to bolster their case with pictures of weapons not used in the murder. The fact that the state did not introduce pictures of a nine millimeter gun which was not recovered either, but allowed to introduce a military type Russian rifle was evidence that the rifle was introduced to incite the jury to decide an issue on an emotion.

CONCLUSION

Based on the above, certiorari should be granted, and the conviction and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 23rd day of May, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County

Edgar W. Dickson, Circuit Court Judge

Opinion No. 2013-UP-001 (S.C. Ct. App. filed 1/2/2013)
10-GS-38-808-811.

THE STATE,

RESPONDENT,

V.

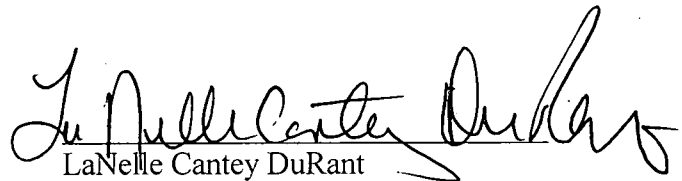
RALPH BERNARD COLEMAN,

PETITIONER

APPELLATE CASE NO. 2013-000616

CERTIFICATE OF SERVICE

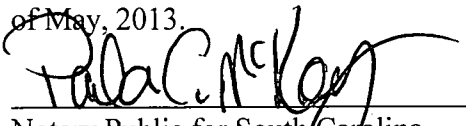
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Melody J. Brown, Esquire, and the S.C. Court of Appeals this 23rd ay of May, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of May, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.