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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
The Honorable Steven H. John, Circuit Court Judge

THE STATE,……………………………………………………………………………RESPONDENT

v.

TOMMY LEE BENTON,………………………………………………………………PETITIONER

BRIEF OF RESPONDENT
Appellate Case No. 2021-001498
Opinion No. 5868

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TABLE OF CONTENTS

Table of Authorities…..………………………………………………………………………..ii

Petitioner's questions presented……………………………………………………………..iv

Respondent's counter questions presented…………………………………………………...v

Statement of the case…………………………………………………………………………1

Arguments

1. The Court of Appeals did not err in finding that the trial court exercised sound discretion when granting a mistrial due to the failure of the Petitioner to respond to Rule 5(e)(1) SCRCrimP. The Trial court recognized other alternatives and came to a conclusion that the only possible way to reach a fair outcome was to declare a mistrial………………………7

2. The Court of Appeals did not err in making a decision that was not argued by the solicitor nor the Respondent. According to Rule 220(c) SCACR the Court of Appeals is allowed to affirm an order upon any ground(s) appearing in the record, there exists no violation of the Petitioner's due process rights……………………………………………………………15

3. The Court of Appeals did not err in affirming the decision of the trial court in allowing into evidence crime scene photographs of the charred remains of the victim, because the probative value of these photographs outweighed any prejudice it might have caused, because these photographs proved malice and corroborated the testimony of a co-defendant……………………………………………………………………………………22

Conclusion……………………………………………………………………………………30

TABLE OF AUTHORITIES

CASES

Accord State v. Pierce, 263 S.C. 23, 207 S.E.2d 414(1974)........ 11
Arizona v. Washington, 434 U.S. 497 (1978)........ 10, 11, 14
Com. v. Koch, 39 A.3d 996 (Pa. 2011)........ 21
Com. v. Robinson, 864 A.2d 460 (Pa. 2004)........ 24
Com. v. Rush, 646 A.2d 557 (Pa. 1994)........ 24
Crist v. Bretz, 437 U.S. 28(1978)........ 9
Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015)20
Estelle v. McGuire, 502 U.S. 62 (1991)........ 26, 29
Farris v. State, 328 So.2d 640 (Ala.Crim.App. 1976)........ 27
Gilliam v. Foster, 75 F.3d 881, 903 (4th Cir. 1996)........ 9
I'on L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)........ 17
McKibbins v. State, 750 S.E.2d 314 (Ga. 2013)........ 25
Null v. State, 402 S.E.2d 721 (Ga. 1991)........ 25
Richardson v. United States, 468 U.S. 317(1984)........ 10
State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991)........ 24
State v. Anderson, 386 S.C. 120, 687 S.E.2d 35 (2009)........ 23
State v. Bailey, 298 S.C. 1, 377 S.E.2d 581(1989)........ 18
State v. Baum, 355 S.C. 209, 215, 584 S.E.2d 419(Ct. App. 2003)……………………9, 10,12,13
State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000)........ 17, 19
State v. Benton, 435 S.C. 250, 865 S.E.2d 919 (2021)…………………………..6, 15,16,17,19,29
State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978)........ 18
State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007)........ 16
State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997)........ 18
State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014)........ 23, 27
State v. Doig, 2 Rich. 179 (Ct. App. 1845)........ 28
State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003)........ 19
State v. Edwards, 10 S.E.2d 587 (1940)........ 25
State v. Evans, 378 S.C. 296, 662 S.E.2d 489 (Ct. App. 2008)........ 21
State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014)........ 24
State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000)........ 17
State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003)........ 21
State v. Holder, 382 S.C. 278, 676 S.E.2d 690........ 28
State v. Humphries, 354 S.C. 87, 579 S.E.2d 613 (2003)........ 17
State v. Jones, 86 S.C. 17, 67 S.E. 160 (1910)........ 25
State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995)........ 24
State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998)........ 25
State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct.App.2008)........ 23
State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct.App. 2008)……………………..25,26,27,29
State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996)........ 23, 28

State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980)... 19, 21
State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471(1983)……………………………………9,14
State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999)... 23, 28
State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717(Ct.App. 2000) 9
State v. Simmons, 423 S.C. 552, 816 S.E.2d 566 (2018) 16
State v. Smith, 316 S.C. 53 447 S.E.2d 175 (1993) 17
State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010).. 27, 28
State v. Washington, 379 S.C. 120, 665 S.E.2d 602 16
State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001)……………………………………………9
Timmons v. South Carolina Tricentennial Commission, 254 S.C. 378, 175 S.E.2d 805 (1970). . 15
United States v. Barnes, 803 F.3d 209 (5th Cir. 2015)... 20
United States v. Dinitz, 424 U.S. 600, 608 (1976)... 11
United States v. Hassan, 742 F.3d 104 (4th Cir. 2014) 20
United States v. Jimenez Lopez, 873 F.2d 769 (5th Cir.1989).. 20
United States v. Stout, 509 F.3d 796 (6th Cir.2007) 24
Wade v. Hunter, 336 U.S. 684 (1949).. 10,12,13
Williams v. Fla., 399 U.S. 78, 81-82 (1970) 12

U.S. CONSTITUTION

U.S. Const. Amend. V……………………………………………………………………9

RULES

Rule 220(c) SCACR……………………………………………………………………...17
Rule 5(e)(1) and (2) SCRCrimP…………………………………………………….....12
Rule 5(e)(4) SCRCrimP………………………………………………………………7, 13
Rule 901(a), SCRE…………………………………………………………………………19

OTHER AUTHORITIES

40 C.J.S. Homicide §46 (April 2016 Update)……………………………………………….25

PETITIONER'S QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the circuit court exercised sound discretion when granting a mistrial for Benton's failure to formally respond to a Rule 5(e)(1), SCRCrimP, alibi request, where the State did not provide the information required for Benton to respond, he otherwise disclosed his alibi to the State, and the circuit court failed to consider less drastic alternatives to a mistrial?

2. Did the Court of Appeals exceed Rule 220(c), SCACR and violate Mr. Benton's due process rights by affirming the admission of text of Facebook messages under an additional sustaining ground without notice to Mr. Benton and which was not raised to or ruled upon by the circuit court, not argued by the State in its brief, not referenced during oral argument, and not developed in or supported by the record?

3. Did the Court of Appeals err in holding the circuit court was within its discretion to admit victim body photographs solely to corroborate substantial undisputed evidence of malice, where such photographs are inadmissible when they show facts which otherwise have been established by competent evidence and the State only used them to inflame the jury?

RESPONDENT COUNTER QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the decision of the circuit court stating that the court exercised sound discretion in the granting of a mistrial when the Petitioner failed to abide to Rule 5(e)(1) SCRCrimP by failing to formally respond to the State's alibi request, and manifest necessity exists to justify the circuit court's decision granting a mistrial in order to promote fairness for both sides?

2. Did the Court of Appeals err in affirming the admission of text messages and finding that the admission of Facebook messages was admitted in error, however, this error was harmless, even though that matter was not raised before the circuit court nor argued before the Court of Appeals by the Respondent, but the Court of Appeals lawfully decided this issue pursuant to Rule 220(c) of the SCACR? Did the Court of Appeals err in determining that text messages sent from Petitioner's phone were sufficiently authenticated by circumstantial evidence?

3. Did the Court of Appeals err in affirming the decision of the circuit court in the admission of crime scene photographs because the circuit court found that these photographs probative value outweighed the prejudicial effect by revealing malice and corroborating the testimony of a co-defendant?

STATEMENT OF THE CASE

Mr. Charles Bryant Smith (victim) owned a group of trailers located in a mobile home park, various businesses, and other rental properties located in Horry County South Carolina. The rent for these trailers ranged from $300.00 to $1100 per month and he collected rent monthly, with most tenants paying him in cash. (R. p. 95 l. 23 – p. 96 l. 15). The victim was known to carry his money in a case because he did not believe in banks, he also had "a bad habit of wanting to flash money…" (R. p. 68 l. 22-25; p. 99 l. 13-15).

Lorraine Rose and her son Garland worked for the victim. (R. p. 97 l. 1-7). The victim paid his employees daily in cash and would always count the money on the table. (R. p. 69 l. 17-25; p. 97 l. 6-11). Lorraine also rented from the victim and paid him cash each month for her rent at his produce stand. Whenever Lorraine paid her rent, the victim would show his cash, then put the rent money with the large sum of money he was already carrying. (R. p. 211 l. 17 – p. 212 l. 17). Petitioner had seen Lorraine pay her rent in cash to the victim and knew he kept a significant amount of cash on him at all times. (R. p. 212 l. 5-17).

Lisa Rose had been married to one of the co-defendant's Garland Rose, who died on November 8, 2014. Lisa had been friends with the Petitioner since fifth grade. (R. p. 210 l. 4-5; p. 210 l. 7-12). Lisa introduced Garland to the Petitioner, and they became friends. (R. p. 213 l. 21 – p. 214 l. 8). Garland Rose told Petitioner and co-defendant Mitchell Cheatham about the victim having a lot of cash, so they made plans to rob him. (R. p. 222 l. 5 – p. 223 l. 22). Petitioner and Garland Rose planned the first burglary. (R. p.228 l. 15-16).

On April 18, 2014, Petitioner, Cheatham, and Garland Rose met at Garland Rose's house. At this time, they started planning the robbery. Petitioner and Cheatham stole a shotgun and brought it with them. (R. p. 224 l. 5-9). The defendants then got into Petitioner's girlfriend's black

Ford Focus and drove to a road near the victim's trailer. (R. p. 229 l. 9-12). Petitioner and Garland got into the house by climbing through a window on the side of the home. A few minutes later they came out a back door, jumped back into the car and drove off. While inside the house they stole a gun, crowbar, and a grocery bag with twenty-seven thousand ($27,000.00) Dollars in cash. (R. p. 224 l. 13 – p. 228 l. 2; p. 229 l. 15-18).

At the time of the burglary the victim's son Sammy Charles Smith was living with the victim. (R. p. 95 l. 12-15). Over his son's objection the victim decided not to call the police. The victim did not believe in getting the police involved. He thought it would not do any good. (R. p. 99 l. 18-25).

On April 25, a man named J.T. introduced Petitioner and Cheatham to a Douglas Thomas. The group met at a Walmart parking lot for the sole purpose to discuss robbing the victim. Petitioner, Cheatham, and J.T. went to a Holiday Inn in Whiteville, North Carolina. There they discussed plans to rob the victim's outlet store. (R. p. 230 l. 10 – p. 232 l. 15; p. 220 l. 18 – p. 221 l. 8). Petitioner informed the rest of his co-defendants that the victim had one hundred thousand ($100,000) dollars in cash in the store that was ripe for the taking. (R. p. 73 l. 18-25). That night the four men drove to Mullins in the black Ford Focus to steal a truck from someone the Petitioner's stepfather knew.[1] (R. p. 233 l. 16 – p. 234 l. 15; p. 70 l. 1 – p. 71 l. 1). Around 3:00am, Petitioner, J.T. and Thomas drove to the victim's store in the stolen truck. The plan was to go into the store and hide there until the victim arrived for work. They believed the victim kept more money in the store than in his house. (R. p. 235 l. 13 – p. 238 l. 19). Petitioner and Thomas went through the side bathroom window into a back area of the store and started looking for money,

[1] The owner of the stolen truck knew Petitioner because his sister was once married to the Petitioner's stepfather.

having found none, they went to the front of the store to wait for the victim's arrival. (R. p. 73 l. 9-14). Eventually they realized that no one was coming because it was Saturday, and the store would be closed. They decided to set the store on fire as they exited the same way they came in. They eventually parted ways after they returned to North Carolina. Once again the victim did not wish for the Horry County Sheriff's Department to investigate the fire.

On the night of April 28th, Petitioner, Thomas, and Cheatham met at a motel where the Petitioner and Cheatham were staying. They planned the final crime that they were going to commit against the victim. They planned to go to his home and take the $100,000.00 that they did not find in the store.[2] (R. p. 76 l. 15-25; p. 239 l. 10-17). Benton drove Thomas and Cheatham to the stolen truck in the same black Ford Focus they were driving previously. Petitioner popped the back door open with a crowbar and entered first. (R. p. 243 l. 5-7). Each of the men were armed when they entered the house, (R. p. 243 l. 16-18), Petitioner jumped on the victim while he was sleeping on the couch, and Cheatham handcuffed him. (R. p. 245 l. 5-6; p. 249 l. 7-9). The men took turns interrogating him while the others looked for the money. (R. p. 248 l. 8-13). While the Petitioner was watching the victim, he beat him with a crowbar and threw vodka on his bleeding face. (R. p. 248 l. 14-17; p. 249 l. 15-16). Eventually, they only found a few thousand dollars. (R. p. 250 l. 13-15). Petitioner then exited and walked to the truck and returned with a can of gasoline. (R. p. 264 l. 5-6). He poured it on the victim, who was still alive and also poured it around the trailer. (R. p. 264 l. 14 – p. 265 l. 1). Cheatham lit a shirt on fire and dropped it on the floor, it did not catch on fire, so the Petitioner poured gas on the flaming shirt. (R. p. 266 l. 21 – p. 267 l. 3). Petitioner, Chatham, and Thomas then fled the scene leaving the victim bound on the floor, alive,

[2] Investigators later found a safe in the victim's home with $120,000.00 in cash. (R. p. 134 l. 1 – p. 135 l. 12).

as his trailer burned down around him. (R. p. 267 They later burned the truck before they returned to the motel to count the money. (R. p. 255 l. 17-19; R. p. 256 l. 12-19) Cheatham later testified that they had what he described as a "crime bag." This bag contained gloves, masks, extra ammunition, handcuffs, and a rope. (R. p. 253 l. 5-15). This bag was found inside the burned home during the investigation. (R. p. 112 l. 10-13).

When the first responders arrived they found the victim, body badly burned, and the handcuffs still attached to his left hand. (R. p. 104 l. 24-25). The victim's body was so badly burned that his abdominal organs were exposed. There were also fractured ribs on the right side of his body with significant hemorrhaging surrounding the remaining soft tissue, this indicated blunt force trauma. (R. p., 160 l. 2-21). The toxicology report showed black particulate matter indicating carbon monoxide was present, proving that the victim was still breathing at the time of the fire. (R. p. 161 l. 4-15).

On May 2nd, law enforcement got a call from Petitioner's stepfather, Gregory Hudson. Mr. Hudson found Petitioner's black Motorola ZTE cell phone and turned it over to the police. (R. p. 188 l. 2 – p. 189 l. 1). Law enforcement also received a Moto G. Motorola cell phone from the Cheatham family that same day. (R. p. 189 l. 10 – p. 190 l. 9). Law enforcement used a program called Cellebrite on both phones to extract data maintained on those mobile devices. (R. p. 151 l. 17-20). Law enforcement also used a program called CellHawk that takes cell tower information and combine it with phone records to make a visual representation of what phone records revealed. (R. p. 208 l. 1-6). Law enforcement was able to plot cell phone locations on the dates in question and identified that both phones were connected to a tower closest to where the victim lived on the day of his murder and first robbery. (R. p. 194 l. 21 – p. 195 l. 17; p. 196 l. 22 – p. 200 l. 16; p. 200 l. 18 – p. 204 l. 8; p. 206 l. 7-23). Specifically, the phones were connected to the Charleston

Switch Tower 1531 which is located off Pine Oaks Road in the Conway area, this was 1.33 miles from the incident location. (R. p. 191 l. 4-8; p. 194 l. 21 – p. 201 l. 8).

In April of 2016, the Petitioner was indicted by the Horry County Grand Jury for the offenses of murder; two counts of burglary in the first degree (burglary 1st); arson in the first degree (arson 1st); and arson in the third degree (arson 3rd)(indictment Nos: 2016-GS-26-1719, 5008, 5009, 5010, 5011)(R. p. 363-372).

The case was originally called for trial before Circuit Court Judge, the Honorable Steven H. John on July 17, 2017. Present before the trial court was Petitioner represented by his counsel Thomas C. Brittain. Assigned to prosecute this case was Assistant Solicitor Lauree Richardson Ortiz of the Fifteenth Circuit Solicitor's Office.

After a day of motions, the selecting and swearing of the jury, the trial began on July 18, 2017. During the defense's opening statement, he alluded to the fact alibi witnesses were going to testify. At that time the State immediately objected due to the fact the State never received notice pursuant to Rule 5 SCRCrimP. Both sides then argued their positions outside the presence of the jury. The trial judge acknowledged that it would be unfair to the defense to not allow the alibi into evidence; however, it would be equally unfair not to allow the State to have an adequate amount of time to conduct a proper investigation of these witnesses. Therefore, the trial court determined that manifest necessity existed and decided to declare a mistrial. The next day the trial court called all parties back before him to make sure everyone received proper notices. He ordered that if notice is not given the evidence would not be allowed to be entered.

The case was re-called for trial on December 4, 2018, once again the Honorable Steven H. John presided over the trial. Again, representing the Petitioner was his counsel Thomas C. Brittain, and representing the State of South Carolina was Assistant Solicitor Lauree Richardson Ortiz of

the Fifteenth Circuit Solicitor's Office. Prior to the beginning of trial, the Petitioner made a motion for dismissal due to Double Jeopardy. It was his position that manifest necessity did not exist for a mistrial so this case should be subject to dismissal. This motion was immediately denied by the trial court and the case proceeded as scheduled. After five days of testimony a jury of his peers found the Petitioner guilty of all charges. After the reading of the verdict Petitioner appeared before the trial court for sentencing. The trial court proceeded to sentence the Petitioner to a term of incarceration for the remainder of his natural life for the offense of murder; thirty years for arson 1st; and, fifteen years for arson 3rd. The trial judge ordered that these sentences were to be served concurrently.

During his incarceration Petitioner filed a timely notice of appeal before the South Carolina Court of Appeals. All parties appeared before Judges McDonald, Lockemy, and Kondurous on October 14, 2020. On October 13, 2021, the Court of Appeals issued a published opinion. They determined unanimously that: (1) double jeopardy did not bar a second trial after declaration of mistrial as a matter of manifest necessity; (2) text messages sent from and received by defendant's phone were sufficiently authenticated by circumstantial evidence; (3) any error in admission of social networking website messages were harmless; and (4) probative value of photographs of victim's burned body at the crime scene was outweighed by their prejudicial effect. *State v. Benton,* 435 S.C. 250, 865 S.E.2d 919 (2021).

A petition for rehearing was filed by the Petitioner on November 4, 2021, and denied by the Court of Appeals on November 18, 2021. Petition for writ of certiorari was filed on December 20, 2021. The Respondent filed their return on January 19, 2021. This Court decided to grant certiorari on September 7, 2022. The brief of the Respondent supporting their arguments follows.

ARGUMENTS

1. **The Court of Appeals did not err in finding that the trial court exercised sound discretion when granting a mistrial due to the failure of the Petitioner to respond to Rule 5(e)(1) SCRCrimP. The Trial court recognized other alternatives and came to a conclusion that the only possible way to reach a fair outcome is to declare a mistrial.**

Relevant Facts

On July 18, 2017, the first trial began with opening statements. During the defense's opening statement, defense counsel began to reference an alibi and specific alibi witnesses and alibi specifics. (R. p. 30, line 21 – p. 31, line 1; p. 35, line 7 – p. 37, line 6). The State made an objection during Petitioner's opening statements. The State then asked to speak on a legal matter outside the presence of the jury. (R. p. 37, lines 9-17). The State argued: "It's becoming clear through this opening … that the defense is going to rely essentially on alibi witnesses … We have been provided no notice of alibi and … don't believe that defense is proper at this point…." (R. p. 37, line 22 – p. 38, line 1). The defense contended alibi was always the defense. However, the State contended some names they knew from discovery, but some they had not heard, and that there was no notice given pursuant to Rule 5. (R. p. 38, line 20 – p. 39, line 1). The Court reviewed the Rule 5 provisions, including the provision that a failure to disclose could result in exclusion.[3] (R. p. 39, line 13 – p. 40, line 13). The Court asked defense counsel if written notice had been served upon the State. Defense counsel responded: "… we can't find a written notice … So, we must not have done it." (R. p. 40, lines 16-19). Defense counsel asserted he believed the defense was alibi, and thought notice had previously been given, though he conceded he did not send any addresses, and further believed the defense did not "completely compl[y] with the rule." (R. p. 40, line 21 – p. 41, line 2). After a break and an off the record discussion in chambers, (R. p. 41, lines

[3] If either party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by either party. Rule 5(e)(4) SCRCrimP.

3-5), Judge John announced he would grant a mistrial rather than exclude the defense evidence or require the prosecution to continue without proper notice and time to investigate, and he set out strict requirements on disclosure while giving a warning that failure to disclose would result in exclusion of testimony. (R. p. 41, line 12 – p. 45, line 14). At the conclusion of the ruling, Judge John asked for "comments or further statements from the defense," and defense counsel replied, "Nothing, Your Honor." (R. p. 45, lines 19-21). The following day, defense counsel asked the Judge to direct the State to give more specific information on time of the crimes; however, Judge John found that the State had given notice of the specific times through discovery and had specifically requested notice of alibi. (R. p. 49, line 13 – p. 52, line 11). The trial judge also affirmed his prior finding that the defense did not comply with the notice requirements after having received sufficient notice of the time, date and place as required by the rule. (R. p. 55, line 11 – p. 56, line18). Judge John also issued a written order on July 26, 2017. (R. pp. 4-5).

Additional trial proceedings began on December 4, 2017. After selection of a jury and presentation of various pretrial matters, defense counsel sought to place on the record that the State failed "to make a specific request of the particulars" such that the defense duty was triggered. (R. p. 62, line 18 – p. 63, line 1). The defense noted within the presentation that it was "not trying to reprove anything today," but argued "there was no justification for the mistrial" so the "trial shouldn't proceed and the charges … should be dismissed." (R. p. 63, lines 6-24). The State responded that the request gave sufficient notice and made a sufficient request regarding any notification of an alibi defense. (R. p. 64, lines 1-7). Judge John affirmed his prior reasoning and rulings, noting the basis for his findings as found throughout the State's discovery notice was properly given to the defense, and the trial court also "noted the defense counsel conceded failure to comply with notice requirements of Rule 5, that they did not inform the state where the

defendant claims to have been at the time of the offenses, nor the names and addresses of the witnesses upon whom he would rely on to establish such claim." The trial court also affirmed again that he did not choose the remedy of exclusion that was available to him, or forced trial by surprise on the state, which was also available to him, but opted to set the trial for December 4, 2017. (R. p. 64, line 8 – p. 65, line 23).

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "A trial judge's decision to grant a mistrial will not be overturned absent an abuse of discretion amounting to an error of law." *State v. Baum,* 355 S.C. 209, 215, 584 S.E.2d 419, 422 (Ct. App. 2003) (citing *State v. Rowlands,* 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct.App. 2000). *See also Gilliam v. Foster,* 75 F.3d 881, 903 (4th Cir. 1996) ("the Supreme Court has directed reviewing courts to examine the ruling of the trial judge to determine whether sound discretion was exercised in granting the mistrial."). "The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is 'whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment.'" *Id.,* 355 S.C. at 214, 584 S.E.2d at 422 (quoting *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983)).

Discussion

The Fifth Amendment contains the Double Jeopardy Clause. U.S. Const. Amend. V. Among other provisions in the amendment, the relevant clause declares: "…nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Id. "[J]eopardy attaches when the jury is empaneled and sworn…." *Crist v. Bretz,* 437 U.S. 28, 38 (1978). "[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an

acquittal, which terminates the original jeopardy." *Richardson v. United States,* 468 U.S. 317, 325 (1984). The Supreme Court has never adopted the view that "every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade v. Hunter,* 336 U.S. 684, 688 (1949). Rather, the Court has cautioned "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id,.* at 689.

The Court requires "in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar." *Arizona v. Washington,* 434 U.S. 497, 505 (1978). It is the prosecutor's burden to show '"manifest necessity' for any mistrial declared over the objection of the defendant." *Id.* "[T]hose words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge" and "the key word 'necessity' cannot be interpreted literally," but only to "require a 'high degree' before concluding that a mistrial is appropriate." *Id.,* at 506. It "is not a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Baum*, 584 S.E.2d at 422. "Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Washington*, 434 U.S. at 505.

There is a "spectrum of trial problems which may warrant a mistrial, and which vary in their amenability to appellate scrutiny" with the highest degree of deference allowed mistrial due

to a deadlocked jury, and the strictest scrutiny applied where there is an "unavailability of critical prosecution evidence…." *Id.,* at 508-510.

The facts here do not warrant the rather undefined, but stringent "strict scrutiny," because it was the defense counsel's failings that brought about the mistrial. *See, Washington*, 434 U.S. at 508 ("the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using superior resources of the State to harass or to achieve a tactical advantage over the accused"). In fact, defense counsel did not object to the mistrial. His interaction with the trial court appeared to convey consent or acquiescence by the lack of objection or alternatives offered to cure the error caused by his own failure to abide by notice rules. *See United States v. Dinitz,* 424 U.S. 600, 608 (1976) ("The distinction between mistrials declared by the court *sua sponte,* and mistrials granted at the defendant's request *or with his consent* is wholly consistent with the protections of the Double Jeopardy Clause.") (emphasis added).

Moreover, the trial judge did not act rashly, but considered two alternatives though he resolved neither would produce a reliable proceeding or fair result.

Here, there was a notice deficiency – a deficiency solely in control of the defendant, about which defense counsel confessed error. Moreover, the choice dealt with probable investigation of witnesses and/or facts that clearly were not known to the prosecution at the time of the mistrial. The choices for alternatives to mistrials were slim. The first was to disallow the alibi evidence; the second was to force the prosecution forward without adequate time to prepare. The judge found neither a palatable nor viable alternative for a fair resolution of the charges. *Accord State v. Pierce,* 263 S.C. 23, 28, 207 S.E.2d 414, 416 (1974) (if amendment to the indictment should change the date alleged in the indictment, "it is proper for the trial judge, after allowing amendment

of the indictment, to declare a mistrial and allow defendant time to attempt to establish an alibi defense for the different date."). *See also Hunter,* 336 U.S. at 689 ("a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."). "[G] iving the jury the benefit of the fully developed facts when deciding the matter" is a sound reason to weigh in considering whether a mistrial should be granted. *Baum*, 355 S.C. at 215, 584 S.E.2d at 422. This is the path carefully chosen by the trial judge in a reasonable and logical exercise of discretion based on the facts presented. Of note, the judge carefully directed full disclosure and avoided undue delay in ordering a date certain. *See generally* Rule 5(e) (1) and (2), SCRCrimP (requiring reciprocal discovery of alibi witness information including names and addresses); *see also Williams v. Fla.,* 399 U.S. 78, 81-82 (1970) (finding no cause to strike state "notice-of-alibi rule" noting "Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate" and finding the notice rule at issue was "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.").

Appellant argues that the trial judge misinterpreted Rule 5 because the reciprocal disclosure request did not include the time, and place where the crime occurred. Petitioner did not seek clarification prior to trial so that he could sufficiently prepare an alibi defense. It is because he had already had the time and place where the crime occurred. It is inconsistent to argue the defense was prepared to present a complete alibi yet did not have sufficient notice of the time date and place to disclose his alibi. Further, there is inconsistency in appellant's argument that arrest warrants and other discovery reflected narrow time frames, but that was not enough because there

is "no source" cited, or dispatch time was not close enough. Again, this is not a matter where the defense claims it could not develop an alibi defense, but a matter where the defense, having admitted non-compliance, (R. p. 40, line 21 – p. 41, line 2), seeks to present remedial arguments as to their own non-compliance. It is a fatal variance in position. Moreover, there is no argument as to why the defense did not give notice of their known alibi witness and their addresses as required by the plain language of the rule. The Petitioner argues that the State had notice of alibis because of prior discussions with Petitioner's counsel. Although the State was made known that the Petitioner would raise an alibi defense there were witnesses Petitioner intended to call to testify of which the State had no knowledge. In accordance with Rule 5 the trial court could have excluded the testimony of all the alibi witnesses due to the Petitioner admitting the failure to provide written notice to the State. However, in order to be fair to both sides the trial court decided to declare a mistrial.

Appellant further argues that the trial judge erred in not considering alternatives to the two suggested courses of action – suppression or surprise. Exclusion of testimony is expressly provided for in the rule. Rule 5 (e)(4). At the heart of his argument is the premise that his alibi witnesses were critical. Rather than detract from the reasoned decision of the trial judge, this position supports the decision. His argument the trial judge noted he would have declared a mistrial if the provision were to be waived fares little better as it embraces that which the Supreme Court has stated: "… a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Hunter,* 336 U.S. at 689. *See also Baum,* 355 S.C. at 214, 584 S.E.2d at 419 ("The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is 'whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter

being defined as the public's interest in a fair trial designated to end in just judgment.'") (quoting *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983)).

Lastly, appellant suggests that there was no discussion of a possible "brief" continuance. As a first point, it would be difficult to discuss that which was not known to the State. The State would have little input as to what time would be necessary for investigation. Secondly, the suggestion the mistrial trial was made without input from defense counsel is contradicted by the record. The judge did not assume a notice failure but discussed the failure with the parties. Further, before ruling, the record reflects a conference was held with the parties off the record. (R. p. 41, lines 3-5). But, and as a third point, the absence of manifest necessity is not shown by creating of possible other scenarios. As the United States Supreme Court clearly stated, "it is manifest that the key word 'necessity' cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity, and we require a 'high degree' before concluding that a mistrial is appropriate." *Washington,* 434 U.S. at 506. At bottom, the decision to grant a mistrial is still a discretion decision which implicitly indicates that judges may differ in their treatment of the facts and circumstances before them. *Id.,* at 511. The record here, though, shows a thoughtful consideration of the clearly available alternatives, and a deliberate thoughtful decision on the rights of the defendant and the duty to ensure fair proceedings. Again, appellant does not show an abuse of discretion. This record supports the trial judge's decision. Moreover, the judge took specific steps to order disclosures and set a date certain so that the matter could be fairly concluded quickly. This again shows deliberate and thoughtful consideration of the rights of the parties and fairness in resolution, particularly in ensuring that appellant would not have a long delay in resolving the charges, even though the delay was attributed to his non-disclosure.

In sum, not only did the defense acquiesce to the mistrial based on its own failure to disclose names and addressed of its alibi witnesses, but there was also manifest necessity in this specific circumstance such that retrial was not barred. The deliberate consideration of the necessity of the mistrial, available alternatives, and duty to ensure fair proceedings are more than adequately reflected.

The Respondent would also argue that the brief delay due to this mistrial (due to the Petitioner's lack of alibi notice), caused the Petitioner no prejudice. This case was delayed for only five months and during trial the Petitioner was allowed to present all of his alibi witnesses for testimony before the jury.[4]

2. The Court of Appeals did not err in making a decision that was not argued by the solicitor nor the Respondent. According to Rule 220(c) SCACR the Court of Appeals is allowed to affirm an order upon any ground(s) appearing in the record, there exists no violation of the Petitioner's due process rights. The Court of Appeals also did not err in determining that the text messages sent from the Petitioner's phone were sufficiently authenticated by circumstantial evidence.

During trial there were text and Facebook messages allowed into evidence. These messages revealed the planning between Petitioner and his co-defendants. Within their opinion the Court of Appeals decided,

> "The timing and distinctive characteristics of the text messages here – in addition to Cheatham's identification of certain messages during his testimony – provided the circumstantial evidence necessary for authentication."

Benton, 865 S.E.2d at 926.

In *Benton,* the Court of Appeals also decided,

[4] In order for this court to reverse a case based on the erroneous admission or erroneous exclusion of evidence the plaintiff must show error and prejudice. *Timmons v. South Carolina Tricentennial Commission,* 254 S.C. 378, 406, 175 S.E.2d 805, 819 (1970).

> "The authentication of the "Tommy Lee Kruspe" Facebook messages is more problematic. State's Exhibit 76 is a collection of Facebook message, some of which Cheatham identified as an April 9 conversation he had with Benton about robbing the victim. Cheatham testified they had 'just spoken on the phone about it,' and he messaged Benton because he was unsure about the plan. Others include speculating as to Garland's involvement and location, with noncommittal responses from 'Kruspe.' The contents of the Facebook messages were obtained through a Cellebrite extraction of Benton's phone. Like Cheatham, Katlin Rose testified as to her belief that she was communicating with Benton through the Tommy Lee Kruspe account, but there is no other evidence to necessarily tie Benton to her messages or the possession of his phone on April 9."

Id., 435 S.C. at 265, 865 S.E.2d at 926-27.

The Court of Appeals finally concluded,

> "To the extent the admission of the Facebook messages was erroneous, we find it harmless because the messages were cumulative to Cheatham's testimony that he began to plan the burglaries with Benton in late March and early April."

Id.

Standard of Review

A ruling on admissibility of evidence is within the sound discretion of the trial court and will not be reversed without an abuse is discretion. *State v. Washington,* 379 S.C. 120, 123-124, 665 S.E.2d 602, 604. An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *State v. Bryant,* 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). Error is harmless when it could not reasonably have affected the result of the trial. *State v. Simmons,* 423 S.C. 552, 566, 816 S.E.2d 566, 574 (2018).

Discussion

Rule 220(c)

Petitioner argues that the Court of Appeals correctly decided that the trial court erred in authenticating Facebook messages. Although the Court of Appeals did conclude that, "the

admission of the Facebook messages was erroneous." *Benton,* 865 S.E.2d at 927. The Court of Appeals, however, found that the inclusion of the text messages was not done in error. There was sufficient evidence presented to authenticate the text messages through circumstantial evidence. The Petitioner argues that the decision that the messages being authenticated by their content was not raised by the State, so it was not preserved for appeal. It is the opinion of the Petitioner that this ruling creates a novel question of law. However, the authority of the Court of Appeals to make this decision can be found in the rules of the Appellant Law Court which specifically state:

> The Appellant court may affirm any ruling order, decision or judgment upon any ground(s) appearing in the Record on Appeal.

Rule 220(c) SCACR.

This matter has been previously addressed and ruled on by this Court. *State v. Smith,* 316 S.C. 53, 447 S.E.2d 175 (1993)(Appellate court can affirm criminal conviction for any reason appearing in the record.); *I'on L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716 (2000)(Appellate Court may affirm for any reason appearing in the record.), *also see, State v. Beck,* 342 S.C. 129, 536 S.E.2d 679 (2000) n.4; *State v. Humphries,* 354 S.C. 87, 579 S.E.2d 613 (2003) n. 2; and, *State v. Griffin,* 339 S.C. 74, 528 S.E.2d 668 (2000) n. 2.

It is clear that under Rule 220(c) of the Appellant Court Rules the Court of Appeals is allowed to affirm a decision of the trial court based on information presented in the record. It is clear in their opinion the Rules allow this decision, and the legal and factual basis exists in the record to justify this decision.

<u>Harmless Error</u>

Petitioner argues that the Court of Appeals erred in determining that the error of allowing the Facebook posts into evidence was harmless. The Court of Appeals determined that since these posts were cumulative to the testimony of co-defendant Mitchell Cheatham, any error in allowing

these posts into evidence was harmless. Error is harmless where it could not reasonably have affected the result of the trial. *State v. Burton,* 326 S.C. 605, 610, 486 S.E.2d 762, 764 (Ct. App. 1997). The evidence in the Facebook posts was related to the planning that Mitchell Cheatham testified to, so it was cumulative. The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. *State v. Blackburn,* 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

Without the Facebook posts there was sufficient evidence for a conviction. The Petitioner's cell phone was connected to the tower closest to the incident location on the day of the murder, and first robbery. (R. p. 194 line 21 – p. 195 line 17; p. 196 line 22 – p. 200 line 16; p. 200 line 18 – p. 204 line 8). Co-defendant's Douglas Thomas and Mitchell Cheatam without promise of leniency both testified for the state. They both presented identical versions as to how the crime occurred. Text messages Petitioner sent to his girlfriend at 11:28pm on the date of the incident stated, "About to try get $100 g" (R. p. 393). A text from the co-defendant Cheatam to the Petitioner asking if another co-defendant "would be down, and "Tell him we pay big." (R. p. 373). On April 26, the day the store was burned to the ground, Petitioner texted a co-defendant to, "meet us at 501, tell us when you're close to C.B Furniture Outlet." (R. p. 377). This was the victim's store that they burned down.

Since there was ample evidence to prove Petitioner guilty beyond a reasonable doubt the error should be considered harmless. An insubstantial error not affecting the result of the trial is harmless when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. *State v. Bailey,* 298 S.C. 1, 377 S.E.2d 581, 584 (1989). Court of Appeals rightfully decided that the admission of the Facebook messages was harmless because

they were cumulative to Cheatham's testimony, that they began to plan the burglaries with Petitioner in late March and early April. *Benton,* 435 S.C. at 265, 865 S.E.2d at 927.

Text and Facebook Messages

"As a general rule, statements or declarations made by one accused of a crime are admissible against him." *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) (quoting *State v. Plyler*, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980)). The texts were admissible under Rule 801(d)(2)(A) because the communication reflected statements by appellant offered in his trial. Appellant contends that the error in admission rests with a lack of authentication – specifically without evidence he and Cheatham "actually sent or received them." [5]

However, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. The party offering the evidence at issue is tasked with showing "evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. '"[T]he burden to authenticate ... is not high' and requires only that the proponent 'offer a satisfactory foundation from which the jury could reasonably find that the

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[5] The issue of authentication is not clearly raised in the discussions before the trial judge, and there is some question as to waiver of the issue as defense counsel argued that some of the messages were clearly admissible when parties identified the message. (R. p. 341, lines 1-16). Further, defense counsel conceded that at some point Benton had the phone identified as Benton's phone. (R. p. 342, lines 18-20). However, the Court continued with individual analysis as offered by the defense and the prosecution and found that the messages were probative especially considering the suggestion by some of the defense testimony that the phone was not with (or shown to be with) Benton. Though not exceedingly clear, by the time of argument on the record, the basic objection appeared to rest more on more prejudicial than probative rather than lack of authentication. (R. p. 343, line 1 – p. 356, line 15). Thus, is questionable that the argument on authentication is properly before the Court. *See, e.g, State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon…").

evidence is authentic.'" *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64–65, 773 S.E.2d 607, 610 (Ct. App. 2015) (alternations in original) (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)).

Appellant's argument fails to consider the totality of the evidence. Appellant concedes that the State presented evidence authenticating three specific text threads – two before the murder and one after. (R. p. 256, line 25- p. 262, line 12). This shows a line of communication between two co-conspirators at the relevant time of their concerted action against the victim. *See United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015) (finding authentication sufficient where witness testified she recognized account and manner of speaking noting "Although she was not certain that Hall authored the messages, conclusive proof of authenticity is not required for the admission of disputed evidence.") (citing *United States v. Jimenez Lopez,* 873 F.2d 769, 772 (5th Cir.1989)).

Further, appellant's argument that evidence suggested that "others" had control and use of "Benton's phone on various other occasions," an argument that appears at one point to be conceded away in a statement that admitted his possession of the phone, (R. p. 342, lines 18-20), simply misconstrues the testimony. Petitioner cites to testimony from Cheatham, but again, there is a brief handling of a phone, for a couple of minutes, but him not taking the phone. (R. p. 273, lines 9-20). Moreover, there is no mention of the fact that investigators gained possession of the phone from Benton's family, specifically his stepfather Gregory Hudson, who contacted police to turn the phone over. (R. p. 188, line 2 through p. 189, line 5). This is yet another portion of evidence that indicates authentication.

Of a particular note is that Cheatham's cellphone, and Benton's cellphone, are identified as the conversations they had with each other. (R. p. 257, line 4 – p. 262, line 6). The cellphone he identified as Benton's was the one Hudson gave to investigators. (R. p. 257, lines 16-18; p.

188, lines 11-19). Further still, the testimony at trial was that Benton used his cellphone for its light function during the crime. (R. p. 249, lines 13-25). Additionally, there were extracted messages from the phone which contained information connecting Benton and Cheatham to the messages, (R. p. 167, line 6 – p. 171, line 11), and specifics of planning the crime including references to meetings, a 9mm, and ammunition, (R. p. 171, line 16 – p. 176, line 17). There were similarly connected information and identifications regarding messages posted through the phone, (R. p. 177, line 19 – p. 187, line 3). There was sufficient evidence to meet the low authentication standard apart from Cheatham's basic testimony. *See generally Com. v. Koch,* 39 A.3d 996, 1005 (Pa. 2011) (rejecting "mere confirmation of number or address" finding "[c]ircumstantial evidence, which tends to corroborate the identity of the sender, is required" suggesting error where "No testimony was presented from persons who sent or received the text messages.").

At any rate, it is without question that Cheatham testified that he was participating in conversations with Benton outside of specific text messages – he testified Benton was part of the murder. (R. p. 239, lines 10- p. 267, line 13; see also p. 77, line 4 – p. 91, line 19). Text exchanges, if entered in error, could only be cumulative and harmless in light of these remaining testimony and that of co-defendant Thomas. *State v. Haselden,* 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 378 S.C. 296, 299, 662 S.E.2d 489, 491 (Ct. App. 2008) (evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless).

3. **The Court of Appeals did not err in affirming the decision of the trial court in allowing into evidence crime scene photographs of the charred remains of the victim, because the probative value of these photographs outweighed any prejudice it might have cause, these photographs proved malice and corroborated the testimony of a co-defendant.**

Relevant Facts

Petitioner contested three photographs that were placed into evidence, one showed the victim with the handcuff remaining on one arm. The other two revealed the victim's full body as it was found by the fire department and law enforcement at the scene of the crime. The Petitioner argues that the Court of Appeals erred in affirming the decision of the trial court allowing these photographs into evidence. Petitioner argues that the photographs were not necessary to prove any fact in contest because the fact of the death was not contested. The Petitioner also argues that these photographs had no probative value, there were other witnesses that testified about what occurred at the scene like the fact that the victim was handcuffed and burned. Petitioner argues the photographs were only put into evidence to arouse the emotions of the jury.

The State argued that malice is an essential element of murder that must be proven by the State beyond a reasonable doubt. Although the Petitioner would argue that the manner of death was not disputed or that he died, it is still the duty of the State to prove their case and to put up relevant evidence in order to accomplish this responsibility. The State would further argue that placing these photographs into evidence corroborated the testimony of Mitchell Chatham who testified that the victim was handcuffed by the Petitioner before the trailer was set on fire. Since Chatham and the Petitioner were the only two in the house at the time this occurred, the State was obligated to introduce some evidence that would corroborate his testimony. The State argues that these photographs had more probative value than any prejudicial effect, so the Court of Appeals was correct in affirming the trial court decision.

Standard of Review

The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Rosemond,* 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law. *State v. Anderson,* 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Collins,* 409 S.C. 524, 763 S.E.2d 22, 28 (2014). "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.* "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Lyles,* 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct.App.2008) (internal quotation marks omitted).

Discussion

Appellant contests three particular photographs, all three showing the victim as he was left with one particularly showing the handcuff remaining on his arm. (Exhibits 54, 55 and 56; R. p. 107, line 1 – p. 111, line 11). Petitioner essentially argues the photographs were not necessary to prove any fact in contest because the facts of the death were not contested, though the record supports he did not confess malice on his part, or agree that he was guilty of murder, or agree he participated in any portion of the crimes. Appellant argues that because of his concession the crime occurred as the crime occurred, the photographs were of no probative value. However, the State was still tasked with carrying its burden proof.

The murder was gruesome. But within that gruesomeness is evidence of the very element of malice the State must prove. "[T]he more essential the evidence, the greater its probative value." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014) (quoting *United States v. Stout,* 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted)).

"To constitute *unfair* prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *State v. Alexander*, 303 S.C. 377, 377, 401 S.E.2d 146, 149 (1991))(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." *Gray*, 408 S.C. at 610, 795 S.E.2d at 165. Here, the photographs were used to specifically demonstrate, explain, and corroborate the evidence of how the victim was murdered which, in turn, revealed evidence of malice. In discussing similar evidentiary rulings in their cases, the Pennsylvania courts have often quoted:

> A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt. Further, the condition of the victim's body provides evidence of the assailant's intent, and, even where the body's condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs.

Com. v. Robinson, 864 A.2d 460, 502 (Pa. 2004) (quoting *Com. v. Rush*, 646 A.2d 557, 560 (Pa. 1994)).

The Georgia courts have concisely rejected an argument on unfair prejudice on the basis of its own paradox: "…a defendant cannot complain about photographs that simply 'portray the havoc wreaked by [his] own hand.'" *McKibbins v. State*, 750 S.E.2d 314, 322 (Ga. 2013) (quoting *Null v. State*, 402 S.E.2d 721 (Ga. 1991)). Appellant's malice in the killing is aptly demonstrated by the work of appellant's hands.

Further, the trial judge's charge instructed the level of brutality could be considered in the jury's consideration of the element of malice aforethought: "Malice, that's hatred, ill will, hostility towards another person… an intent to inflict an injury or under circumstances that the law will infer an evil intent … Malice can be inferred from conduct showing a total disregard for human life." (R. p. 283, line 9 – p. 284, line 3). *See State v. Jones*, 86 S.C. 17, 19-20, 67 S.E. 160, 162 (1910) (approving charge that "[m]alice ... may be implied from brutal conduct on the part of the person committing the crime...."). See also 40 C.J.S. Homicide § 46 (April 2016 Update) ("The fact that cruelty or brutality was manifested in the killing will raise an inference of malice….").

Further still, the photographs corroborated witness testimony on how the scene presented, including handcuffing the victim and the fact he was alive when they set him on fire, and the autopsy findings. (See, for example, R. p. 161, lines 4-15; p. 103, line 13 – p. 106, line 15; p. 247, line 7 – p. 249, line 9; see also R. p. 13, line 5 – p. 22, line 6). Consequently, there were discrete and necessary reasons to submit the photographs, namely the corroborative value. *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) ("'If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'") (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353); *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct.App. 2008) ("Admitting photographs which serve to corroborate testimony is not an abuse of discretion."). *See also State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and

bomb fragments and clothing found at crime scene were admissible in murder prosecution to corroborate testimony concerning condition of victim's body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim's mouth); *State v. Edwards*, 10 S.E.2d 587, 588 (1940) ("In our opinion the trial Judge did not abuse his discretion in admitting the photograph [depicting head, torso, neck wound, decomposition and maggots] as being relevant, nor can we attach any importance, in view of the facts of this case, to the contention that the photograph prejudiced the jury against the defendant. Everything depicted by the photograph was, subsequent to its introduction, testified to in detail by the witnesses."). The fact that Petitioner argued credibility concerns of Cheatham, however, simply underscores the value, indeed heightens the value of definitive evidence supporting the details of the testimony. [6] At any rate, the proper question for determining relevance was whether the photographs had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "[A] defendant cannot dictate the manner in which the prosecution tries its case by stipulating to certain facts or by not challenging an element of the offense" and "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *See Estelle v. McGuire*, 502 U.S. 62, 69 (1991); *Martucci*, 380 S.C. at 249, 669 S.E.2d at 607 (citing *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)) ("The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation.").

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[6] Appellant makes an unclear assertion the photographs of the body were not merely used to corroborate evidence because the state showed the photograph and asked Cheatham whether the murder was "worth $1500." That goes to the shared malice (he responded "Me and Tommy did" killed Smith for money). Id. Again, malice is a necessary element of murder that the State had to prove beyond a reasonable doubt.

It has long been established that "[a] trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive." *Martucci*, 380 S.C. at 250, 669 S.E.2d at 607. *See also Farris v. State*, 328 So.2d 640, 641 (Ala.Crim.App. 1976) ("The colored photograph in question is clearly ghastly; but, gruesomeness is not grounds for excluding this type of evidence, if relevant. … This photograph was properly admitted into evidence notwithstanding the unpleasant subject matter. We cannot, and should not, gloss over the fact that violent death is itself loathsome."). Simply, gruesomeness alone does not render the photograph inadmissible. *Collins,* 409 S.C. at 535–36, 763 S.E.2d at 28.

Petitioner within his petition stated that this Court in *State v. Collins,* 409 S.C. 524, 763 S.E.2d 22 (2014) ruled by majority that the photographs were inadmissible. The Petitioner failed to state as to why this Court ruled as such. In the Concurring opinion members of this Court concluded that the photographs were introduced for the sole purpose of inflaming the passions of the jury. However, it was also stated in the concurring opinion,

> "I fully understand there are circumstances where autopsy photographs are relevant, and that the relevance of the photographs is not substantially outweighed by the danger of unfair prejudice."

Collins, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge J. Concurring).

The one important feature that the present case has that *Collins* did not was the elements of the crime. In *Collins* the Appellant was indicted for involuntary manslaughter and three counts of owning a dangerous animal. *Id.,* 409 S.C. at 529, 763 S.E.2d at 25. Neither of those offenses has malice as an element, therefore, malice was not an element the State was obligated to prove. In murder the State must prove that the Petitioner acted maliciously in order for a jury to convict him of murder. In *State v. Torres,* 390 S.C. 618, 703 S.E.2d 226 (2010) a capital murder case this Court decided that "autopsy photographs may be presented to the jury in an effort to show the

circumstances of the crime and character of the defendant." *Torres,* 390 S.C. at 623, 703 S.E.2d at 229, *citing, State v. Rosemond,* 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999). In order to prove this element of the crime these photos were relevant evidence. These photos were admissible to prove that the victim was handcuffed and left in a burning building.[7] The State just put forth evidence of the victim as the Petitioner left him. This was done to prove how malicious he was in committing this heinous crime. The actions of the defendant is what is used to prove malice. These photographs were not introduced to inflame the jury's emotions but to prove the malice that was involved in committing this murder.

The State also was obligated to place these photographs into evidence in order to corroborate the testimony of Mitchell Cheatham's. In *State v. Holder,* 382 S.C. 278, 676 S.E.2d 690 this Court held, "if the offered photograph serves to corroborate testimony it is not an abuse of discretion to admit it." *Id.,* 382 S.C. at 290, 676 S.E.2d at 697, *quoting, Nance,* 320 S.C. at 508, 466 S.E.2d at 353. The testimony of the co-defendant was going to be questioned by the Petitioner. That is because they were the only two people present when the victim was handcuffed, and his house was set on fire. It was essential that these photographs were allowed to be introduced in order to corroborate his testimony.

In *Benton,* the Court of Appeals concluded,

> "The photographs corroborated Cheatham's testimony that the victim was restrained with handcuffs when the house was set on fire and the assailants left him handcuffed there. Benton stipulation that

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[7] As is well known, the legal sense of malice differs from its sense in common speech. In law malice is a term of art, importing wickedness and excluding a just cause or excuse. It is implied from an unlawful act willfully done, until the contrary be proved. The rule is the same in cases of homicide, and those of slander, malicious prosecution, **arson**, malicious mischief, and other cases where malice is averred and proved. He who kills a stranger to obtain goods acts maliciously; he who slanders, or without probable cause prosecutes to extort hush money, acts maliciously; he who **burns a house to make gain, acts maliciously.** *State v. Doig,* 2 Rich. 179, 182 (Ct. App. 1845)(emphasis added).

> the victim was murdered and his argument that he was not challenging the manner of death did not relieve the State of its burden to prove its case beyond a reasonable doubt. *See Estelle v. McGuire,* 502 U.S. 62, 69, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)('[T]he prosecution's burden to prove every element of the crime is not relieved by the defendant's tactical decision not to contest an essential element of the offense.'); *Martucci,* 380 S.C. at 249, 669 S.E.2d at 607 ('The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation.') Accordingly, we find the circuit court acted within its discretion in admitting these photographs into evidence.

Benton, 865 S.E.2d at 928.

The Court of Appeals was correct in affirming the trial court in allowing these photographs into evidence. These photographs were introduced by the State not to cause any emotions by the jury, but to prove an essential element of the crime and to corroborate testimony. These are reasons this Court has ruled are lawful in order to place crime scene photographs into evidence. Therefore, the Petitioner has not revealed any error made by the Court of Appeals, this petition should be subject to dismissal.

CONCLUSION

Based on the foregoing reasons, the State submits the Court of Appeals was correct in affirming the decision of the trial court. The Respondent respectfully request the decision of the Court of Appeals be affirmed by this Court.

Respectfully submitted,

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