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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAUNTE MAURICE JOHNSON,

APPELLANT

APPELLATE CASE NO. 2022-000931

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court reversibly erred by failing to suppress (a) a photograph depicting a five-year old's partial skeletal remains that decayed in the Richland County landfill for over ten weeks, and (b) another pair of photographs of a kitchen knife purportedly in Appellant's possession well after the incident, and where the knife was not related to either of the two homicides?

II. Whether the trial court reversibly erred by failing to suppress testimony regarding the kitchen knife, and admitting it into evidence, where Appellant was accused of stabbing the two victims to death, yet the kitchen knife in question was not related to either of the homicides?

III. Whether the trial court imposed an illegal sentence upon Appellant by imposing consecutive five (5) year sentences for each of the two charges of possession of a weapon during the commission of a violent crime when he was already sentenced to LWOP for the two charges of murder?

STATEMENT OF THE CASE

On October 3, 2019, the Sumter County Grand Jury true-billed a four-count indictment against Appellant Daunte M. Johnson for two counts of murder, and two counts of possession of a deadly weapon during the commission of a violent offense. Tr. I 3; Tr. * (Indictment). Appellant's case proceeded to trial from June 20, 2022 to June 24, 2022, before the Honorable R. Ferrell Cothran, Jr., and a jury. Appellant was represented by Elizabeth H. Neyle and Emily Crayton, while the State was represented by Ernest A. Finney, Jr. Tr. I 1; Tr. II 1. The jury found Appellant guilty on all four counts. Tr. II. 589, lines 7-25. The trial court imposed consecutive sentences Appellant to life without parole (LWOP) for each count of murder, followed by consecutive sentences of five years for each count of possession of a weapon during the commission of a violent crime. Tr. II 600, lines 12-22; Tr. * (Sentence Sheets).

STATEMENT OF THE FACTS

Appellant was in a relationship with Sharee Bradley (Bradley), and frequently stayed with her and her three minor children[1] at the Lantana Apartments[2] in Sumter, South Carolina for two to three months in the Summer of 2019. Tr. II. 8, lines 7-21; Tr. 26, lines 5-13. Prior to that, Appellant lived with Winona Cody (Winona) and her family—Winona's adult daughter Courtney Daney (Courtney), her adult son Cody Daney (Cody), her friend Quinton Commander, and her uncle Mike James (Uncle Mike)—on Susie Rembert Street in Sumter for approximately one year. Tr. II 167, lines 19-24; Tr, II 170, line 12—Tr. II 171, line 4; Tr. II 141, line 7-22.

On August 3, 2019, at around 10:00 pm Cermon James (James)—the father of Minor 2—met with Appellant at the apartment complex to confront him. Specifically, James was apparently upset regarding Appellant's disapproval and handling of Minor 2's conduct of staying up late playing video games. James told Appellant he had to leave, and he did. Tr. II 92, line 7—Tr. II 96, line 10. When James returned the next morning between 9:00 am to 10:00 am, he saw Appellant walking around the apartments and confronted him again. This time, James told Appellant in no uncertain terms "if you don't leave, I'm gonna, I'm gonna beat your A." James then left the apartments. Tr. 97, line 2—Tr. II 98, line 12.

Either August 3rd or 4th, Appellant went to Winona's house, spoke with Uncle Mike, and told him he was in fear for his life because of James. Uncle Mike told Appellant he did not have a gun, but instead obtained the knife of his nephew Cody from inside and gave it to Appellant. Tr. II 129, line 24—Tr. II 131, line 10. Further, the night of August 4th, Appellant was

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[1] At the time of the incident, Minor 1 was five years old, Minor 2 was 12 years old, and Minor 3 was approximately three years old. Tr. 45, line 21—Tr. II 46, line 15; Tr. II 65, lines 21-25.

[2] The Lantana Apartments were known as the Gamecock Apartments at the time of the incident. Tr. I 76, lines 8-23; Tr. II 44, line 24—Tr. II 45, line 7.

purportedly overheard by Bradly's neighbor telling Uncle Mike he would give the knife back directly to Cody.[3] Tr. 114, lines 5-21.

The night of August 4th and into the morning of August 5th, Bradley was downstairs in her living room, Minor 1 was in Bradley's bedroom, while Minor 2 played videogames in his upstairs bedroom, and Minor 3 was with his father in Columbia, South Carolina. Tr. I 80, lines 22-24; Tr. II 50, line 5—Tr. II 55, line 11. At some point during the night, Appellant came to Minor 3's room and asked for the mop, which Minor 2 provided. Tr. II 55, lines 13-24. When Minor 2 awoke in the afternoon of August 5th, he went downstairs and saw Bradly wrapped inside of a rug. He immediately went outside to the parking lot and found the apartment complex manager who was about to leave since it was the end of her shift after 5:00 pm. The manager went to the apartment, looked inside, and called 911. Police arrived shortly after. Tr. 25, lines 7-21; Tr. 31, line 11—Tr. II 34, line 3; Tr. II 41, line 12—Tr. II 42, line 15; Tr. II 57, line 5—Tr. II 58, line 22. Appellant was seen outside near the apartments shortly after and went to Winona's home. Tr. II 59, lines 6-7; Tr. II 62, lines 10-16.

August 5th was also Cody's birthday. Tr. II 151, lines 20-25. Late that afternoon, he was about to take a shower at Winona's home when he saw Appellant in the kitchen; Appellant allegedly cleaned Cody's folding collector's knife and gave it back to him. Tr. II 154, line 17—Tr. II 155, line 15. Cody put the knife in his room, started to shower, and "heard a lot of ruckus." Tr. II 155, lines 23-24; Tr. II 166, lines 5-10. He got out, and saw Appellant come inside through the front door while Winona ran outside, leaving only he and Appellant in the home. As police arrived at the door, Appellant allegedly went to the kitchen and obtained a

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[3] Cody's recollection places the event of Appellant obtaining his knife, and his own subsequent questioning of Appellant about its return, at "maybe a few days before the incident happened." Tr. II 144, line16—Tr. II 146, line 5; Tr. II 155, lines 6-7

kitchen knife saying, "I can't let them take me." Tr. II 156, lines 2-20; Tr. II 157, line 12-22. Appellant subsequently exited Winona's home with his hands up. He was unarmed and apparently did not resist arrest. Tr. II 81, line 24—Tr. II, line 6; Tr. II 86, lines 20-24. He was arrested and taken to the police station.

Appellant purportedly gave several statements to police over the course of several days.[4] In one statement, he indicated the father of Minor 1, Dupray Adams (Adams) contacted him weeks prior to the incident and said he would kill Bradley if Appellant would remove her body, destroy the remains, and be compensated $5000 for his efforts. Tr. I 129, lines 3-18; Tr. II 296, lines 1-15. Appellant allegedly changed his statement shortly after to say that James, Minor 2's father, contacted him and offered $20,000 to Appellant if he killed both Bradley and Minor 1. Appellant then purportedly admitted to stabbing both Bradly and Minor 1 to death, wrapped Minor 1 in a rug, and put Minor 1's remains in the dumpster behind the apartment. Police further indicated that Appellant "talked about that he had, you know, gotten a knife from Cody Daney essentially." Tr. I 130, line 1—Tr. I 131, line 18; Tr. II 297, line 4—Tr. II 299, line 1; Tr. II 313, line 9—Tr. II 314, line 5.

After an extensive search, some of Minor 1's remains were located in the Richland County Landfill on October 18, 2019. Specifically, bones from the lower half of her body, and portions of her skull were recovered and identified. Tr. II 400, line 25—Tr. II 401, line 19; Tr. II 405, lines 18-25.

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[4] During Appellant's recorded statement on August 8th, 2019, law enforcement asked what happened to Sharee and Minor 1, to which Appellant responded, "it was demons, you hear me." Tr. II 360, line 3—Tr. II 361, line 15; Tr. II 371, line 16—Tr. II 372, line 1. The Court previously found Appellant both competent to stand trial, and criminally responsible for his actions after his brief <u>Blair</u> and <u>M'Naughten</u> hearing. Tr. I 54, line 13—Tr. I 56, line 4.

Appellant's case proceeded to trial from June 20th to 24th. 2022. During pre-trial motions, Appellant's trial counsel (Counsel) objected to admission of the photographs depicting the kitchen knife Appellant briefly obtained after the alleged incident but prior to his arrest, asserting it was not the murder weapon, and the pictures were not relevant to the actual case. The trial court withheld his ruling pending testimony elicited during the trial itself. Tr. I 191, line 21, 19. During trial testimony regarding Appellant getting the kitchen knife was allowed over objection. Tr. II 156, lines 9-17. Further testimony from Cody confirmed the kitchen knife "was a different knife" than his collector's knife that Uncle Mike previously allowed Appellant to use. Tr. II 158, lines 4-20. Additionally, during a break in trial, Counsel preserved her objection to admission of the two photographs—State's Exhibits #37 and #38—as follows:

> Counsel: Back at Cody Daney's testimony, the State admitted No. 37 and 38 and we went up to your Honor. I objected to that. Your Honor noted my objection for the record. I just want to put my objection on the record that I was objecting under Rule 403 that those pictures were more prejudicial than probative---
>
> The Court: Right.
>
> Counsel: --and weren't relevant in the case.
>
> The Court: Okay. And you, and you had objected to being relevant and, and I overruled your objection finding at the time the police were at the door, I think evidence of, of the suspect either fleeing or doing anything to allude the police or even resisting arrest is relevant in this case. And so I allowed it in over your objection.

Tr. II 159, line 23—Tr. II 23, line 23; Tr. II 247, line 8—Tr. II 248, line 2; Tr. * (State's Exhibit #37; State's Exhibit #38). Counsel likewise objected to admission of the actual kitchen knife itself into evidence. The basis was again pursuant to Rules 403 and 401, SCRE, and the trial

court overruled Counsel's objections. Tr. II 269, line 2—Tr. II 270, line 3; Tr. * (State's Exhibit #53).

Finally, during Dr. William Stevens' (Dr. Stevens) testimony, Counsel objected to admission of the photograph depicting Minor 1's remains recovered from the landfill over five weeks after the incident. Tr. II 408, line 5—Tr. II 409, line 20. Specifically, Dr. Stevens had already testified as to what remains were recovered, where they were recovered, and the condition in which they were found. Further, Dr. Stevens prepared two drawings—State's Exhibits #65 and #66—illustrating not only what bones of Minor 1 were found, but also where samples were taken from them for purposes of identification. Tr. II 400, line 6—Tr. II 408, line 4; Tr. * (State's Exhibit #65; State's Exhibit #66). After admission of this testimony and two drawings, the State sought admission of a photograph of Minor 1's actual remains, which was admitted over objection. Counsel later proffered her arguments on the record pursuant to Rule 403, and State v. Kornahrens. The trial court ultimately ruled that the photograph showed "material facts that the solicitor needed to, to prove in this case and the conditions. And so I think that the probative value outweighs the prejudice effect." Tr. II 413, line 3—Tr. II 414, line 16; Tr. * (State's Exhibit #64).

Appellant was found guilty on all four counts. Tr. II. 589, lines 7-25. The trial court imposed consecutive sentences of life without parole (LWOP) for each count of murder, followed by consecutive sentences of five years for each count of possession of a weapon during the commission of a violent crime. Tr. II 600, lines 12-22; Tr. * (Sentence Sheets).

This appeal follows.

ARGUMENT

I. The trial court reversibly erred by failing to suppress (a) a photograph depicting a five-year old's partial skeletal remains that decayed in the Richland County landfill for over ten weeks, and (b) another pair of photographs of a kitchen knife purportedly in Appellant's possession well after the incident, and where the knife was not related to either of the two homicides.

The trial court erroneously admitted three highly prejudicial photographs into evidence: one depicting the partial skeletal remains of a five-year old victim that had decayed in the Richland County Landfill for approximately ten weeks prior to recovery, and the other two showing a kitchen knife purportedly in Appellant's possession at one point, yet completely unlinked to the stabbing deaths in the present case. Counsel timely objected, and was overruled by the trial court. This was error as the photographs were not necessary to substantiate material facts or conditions, and their probative value was substantially outweighed by the danger of unfair prejudice by creating a tendency to suggest a decision on an improper basis.

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180 (1986). "The relevancy and materiality of a photograph is left to the sound discretion of the trial judge." State v. Edwards, 194 S.C. 410, 10 S.E.2d 587, 588 (1940).

"Although photographs may be used to corroborate other evidence, it is well established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Middleton, 288 S.C.

21, 24, 339 S.E.2d 692, 693 (1986) (internal citations omitted) (reversing and remanding where the information contained in the photographs was not really at issue, and other testimony negated any arguable evidentiary value of the photographs); see State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (agreeing with the same evidentiary principles, but factually different); State v. Waitus, 224 S.C. 12, 77 S.E.2d 256, 263 (1953); State v. Elders, 386 S.C. 474, 483, 688 S.E.2d 857, 862 (Ct. App. 2010) (agreeing with the same evidentiary principles, but factually different); see also Rule 401, SCRE (defining relevant evidence); Rule 402, SCRE (prohibiting admission of irrelevant evidence). Stated differently, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded *if they are irrelevant or not necessary to substantiate material facts or conditions*." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (emphasis added). Moreover, "[i]n the *guilt* phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." Kornahrens, 290 S.C. 281, 288-89, 350 S.E.2d 180, 185 (1986) (emphasis in original) (citing Waitus, 224 S.C. at 12, 77 S.E.2d at 256).

Additionally, Rule 403 of the South Carolina Rules of Evidence allows for even relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."). In order to constitute unfair prejudice, "the photographs must create a tendency to suggest a decision on an improper basis, commonly, although not necessarily, an emotional one." Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting Alexander, 303 S.C. at 382, 401 S.E.2d at 149).

(a) Photograph of Minor 1's Remains

In the present case, the State was allowed to admit a picture of Minor 1's partial skeletal remains that decayed at the Richland County Landfill for approximately ten weeks. The State initially elicited testimony from Dr. Stevens, who first testified as to what remains were collected, as well as where samples from each section of bone were taken for purposes of DNA identification. In fact, Dr. Stevens prepared not one but two sketches of Minor 1's skeletal remains clearly depicting what was recovered and what was used to identify them—both of which were entered without objection due to their emotionally benign, yet important nature. Tr. II 403, line 20—Tr. II 408, line 4; Tr. * (State's Exhibit 65); Tr. * (State's Exhibit 66).

Furthermore, despite the State's effort to suggest the decayed soft tissue aided in DNA identification of the remains, Dr. Stevens wholly refuted this notion by saying, "[t]he soft tissue I think was degraded/contaminated, you know, bacteria and things that prevented it from being useful for DNA.... But the identification was made with the kneecap bone, yeah." T. II. 408, lines 12-20. In other words, any facts the State intended to show through the photograph of Minor 1's remains were already fully established by Dr. Stevens' competent testimony and through his two other drawings. Thus, admission of the photograph of Minor 1's remains was error because, "[i]n the *guilt* phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." Kornahrens, 290 S.C. 281, 288-89, 350 S.E.2d 180, 185 (1986) (emphasis in original) (citing Waitus, 224 S.C. at 12, 77 S.E.2d at 256).

Additionally, the photograph was not needed to prove the elements of murder.[5] The cause of Minor 1's death was ostensibly established by circumstantial evidence pertaining to the crime scene as well as Appellant's statements to police, not by Dr. Stevens. In fact, Dr. Stevens admitted as much on cross examination by acknowledging there was no evidence of perimortem injuries from the limited remains examined. Tr. II 410, line 12—Tr. II 411, line 14. As such, the photograph of Minor 1's partial skeletal remains was not necessary to substantiate a material fact or condition of the actual offense, and any minimal probative value it may have held was substantially outweighed by its unfair prejudice. See Id.; see also Rule 403, SCRE.

Moreover, admission of Minor 1's skeletal remains suggested a decision on an emotional basis. The State spent considerable time in witness testimony highlighting how long and arduous of an ordeal it was for law enforcement and community members to search the landfill for Minor 1's remains. Tr. II 374, line 18—398, line 400, line 24; Tr. II 558, lines 4-22. Further, the State not only had Dr. Stevens identify each bone in his direct testimony to the jury, but also emphasized the photograph in its closing argument: "State's Exhibit 64. They found what they could. They got most of her leg bones and a, up at the top, there's a piece of her forehead and they tested it." Tr. II 558, lines 17-19. In this way, the photograph of Minor 1's remains was utilized to arouse the sympathies and the prejudices of the jury. Middleton, 288 S.C. at 24, 339 S.E.2d at 693. In short, the State highlighted the photograph to enhance the emotional pressure of the long search for Minor 1's remains culminating in a photograph of an amalgamation of decayed bones. Thus, Appellant was unfairly prejudiced by the trial court's erroneous admission of the photograph, as it was both unnecessary and "create[d] a tendency to suggest a decision on

[5] Murder is defined as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (West, Westlaw current through end of 2022 Act. No. 268); see also State v Dickerson, 395 S.C. 101, 119 n.5, 716 S.E.2d 895, 905 n.5 (2011).

an improper basis, . . . an emotional one." Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)) (alteration added); see also Rule 403, SCRE.

Accordingly, the trial court erred in admitting the photograph of Minor 1's remains, and Appellant was prejudiced by the erroneous admission as "[t]he prejudice created by the photographs clearly outweighed *any* evidentiary value." Middleton, 288 S.C. at 24, 339 S.E.2d at 693 (emphasis in original) (citing Waitus, 224 S.C. 12, 77 S.E.2d 256, and Edwards, 194 S.C. 410, 10 S.E.2d 587); see also Kornahrens, 290 S.C. 281, 288-89, 350 S.E.2d 180, 185 (1986) (emphasis in original) (citations omitted); see also Rule 403, SCRE. Appellant therefore seeks reversal of his conviction, and remand of his case.

(b) Photographs of Kitchen Knife

The trial court also erred by admitting photographs of a kitchen knife wholly unrelated to either of the homicides or weapons offenses involved with the alleged stabbings in the present case. These photographs were irrelevant, and even if there was some minor relevant value to them it was substantially outweighed by the danger of unfair prejudice.

Evidence is relevant if it "ha[s] 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. All relevant evidence is admissible, unless constitutionally, statutorily, or otherwise provided. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Further, as indicated above, "[a]lthough photographs may be used to corroborate other evidence, it is well established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to

the issues at trial." Middleton, 288 S.C. at 24, 339 S.E.2d at 693 (1986) (internal citations omitted).

In the case at bar, the state was erroneously permitted to show the jury two photographs of a kitchen knife on a couch in Winona's house on Susie Rembert Street where Appellant was later found and arrested on August 5, 2019. In fact, the State acknowledged that this kitchen knife was not the item used to kill either Bradley or Minor 1, and that Appellant only acquired it well *after* the incident—he purportedly grabbed it from Winona's kitchen when police arrived at her home. In other words, the photographs of the kitchen knife in State's Exhibits #37 and #38 were not relevant to whether Appellant stabbed Bradley or Minor 1 to death with a different knife used at a different location at a different time. As such, the kitchen knife did not have "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.

Moreover, even if there was some relevancy value in showing the jury a knife that had absolutely nothing to do with the charged offenses, it still should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. In a case where the State alleged Appellant used a knife to stab two people to death, the State was permitted to show the jury photographs of a different knife recently in his possession before arrest. In this way, the trial court permitted the State to impermissibly infer Appellant had a propensity to use knives in general when under stress—a position confirmed in closing argument: "Daunte sees them [police] and he runs into that house as quick as he can, and what does he do when he gets in the house? He gets *another* knife out of the kitchen. I'm not going out of here. That's what he tells Cody." State's Exhibit No. 38." Tr. II 555, lines 14-19 (emphasis added). Thus, any probative value was substantially outweighed by unfair prejudice, and Appellant was indeed prejudiced

when the State used the photographs of the knife to arouse the sympathies and prejudices of the jury even though they were irrelevant and unnecessary to the issues at trial. Middleton, 288 S.C. at 24, 339 S.E.2d at 693 (1986) (internal citations omitted). Appellant therefore seeks reversal of his conviction, and remand of his case.

II. The trial court reversibly erred by failing to suppress testimony regarding the kitchen knife, and admitting it into evidence, where Appellant was accused of stabbing the two victims to death, yet the kitchen knife in question was not related to either of the homicides.

The kitchen knife from Winona's home was irrelevant. Even if the kitchen knife held some probative evidentiary value in the case, it was significantly outweighed by the danger of unfair prejudice. As such, the trial court erred by allowing testimony regarding the kitchen knife, and admitting it into evidence.

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." Kornahrens, 290 S.C. at 288, 350 S.E.2d 180 .

Evidence is relevant if it "ha[s] 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. All relevant evidence is admissible, unless constitutionally, statutorily, or otherwise provided. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

Additionally, Rule 403 of the South Carolina Rules of Evidence allows for even relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."). "Unfair prejudice means an undue tendency to suggest a

decision on an improper basis." State v. Huckabee, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct. App. 2017) (quoting State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)).

In the present case, the trial court erred by allowing testimony regarding the kitchen knife Appellant allegedly took from Winona's kitchen shortly before his arrest and admitting into evidence, as it was neither the knife purportedly used to commit the homicides with which Appellant was charged. The State's theory throughout trial was that Appellant utilized Cody's large folding collector's knife to kill Bradley and Minor 1, not the kitchen knife from Winona's home. In fact, the State even elicited testimony that Appellant admitted he used Cody's knife: "he talked about that he had, you know, gotten a knife from Cody Daney essentially." Tr. II 313, lines 9-13. Thus, the kitchen knife from Winona's house was wholly irrelevant to proving any of the elements of Appellant's charges, and it was never presented to police in an effort to escape; to the contrary, despite Appellants frantic words allegedly spoken to Cody inside Winona's home, he nonetheless came out of the home—unarmed and with his hands up. Tr. II 81, line 24—Tr. II, line 6; Tr. II 86, lines 20-24. In other words, the kitchen knife from Winona's did not have "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. Accordingly, it was irrelevant to the facts material to Appellant's case.

Further, even if deemed relevant, any probative value the kitchen knife may have held was substantially outweighed by unfair prejudice. Appellant was on trial for using a specific knife—Cody's folding collector's knife—to stab Bradley and Minor 1. Under these circumstances, the State was permitted elicit testimony regarding Appellant's possession of a different knife (kitchen knife) from a different person (Winona) and put it into evidence before the jury, intimating Appellant had a propensity to reach for a knife when under emotional stress. This was highlighted

when the State discussed Appellant's possession of "another knife" in its closing argument to the jury. Tr. II 555, lines 14-19. Thus, any probative value was substantially outweighed by unfair prejudice, and Appellant was prejudiced when the State discussed Appellant's purported use of the kitchen knife to arouse the sympathies and prejudices of the jury even though it was irrelevant and unnecessary to the issues at trial. Rule 403, SCRE. Appellant therefore seeks reversal of his conviction, and remand of his case.

III. The trial court imposed an illegal sentence upon Appellant by imposing consecutive five (5) year sentences for each of the two charges of possession of a weapon during the commission of a violent crime when he was already sentenced to LWOP for the two charges of murder.

The consecutive five year sentences for both charges of possession of a weapon during the commission of a violent crime were statutorily impermissible pursuant to Section 16-23-490(A) of the South Carolina Code when, as here, LWOP is imposed for the underlying violent crimes.[6]

"In criminal cases, the appellate court sits to review errors of law only. State v. Davis-Kocsis, 436 S.C. 468, 488; 872 S.E.2d 415, 425 (Ct. App. 2022).

Although the Court does not normally address illegal sentencing issues unless counsel timely objects, South Carolina courts have, in the past, summarily vacated sentences that are precluded by statute. See State v. Vick, 384 S.C. 189, 202-03, 682 S.E.2d 275, 281 (Ct. App. 2009) (vacating sentence of kidnapping, when it was statutorily precluded, in the interest of judicial economy); see also State v. Bonner, 400 S.C. 561, 565-66, 735 S.E.2d 525, 527-28 (Ct. App. 2012); Davis-Kocsis, 436 S.C. at 487-90; 872 S.E.2d at 425-26. Appellant submits that, as in Vick, it is likewise in the interest of judicial economy to vacate his sentences for possession of a weapon during the commission of a violent crime, as they are statutorily impermissible pursuant to Section 16-23-490(A).

At the sentencing phase of Appellant's trial, the court imposed two consecutive LWOP sentences upon Appellant for the two murder convictions. Immediately after, the trial court

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[6] Section 16-23-490(A) provides as follows:

If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence *does not apply* in cases *where* the death penalty *or a life sentence without parole is imposed for the violent crime*. S.C. Code Ann. § 16-23-490(A) (West, Westlaw current through 2022 Act. No. 268) (emphasis added).

sentenced Appellant to consecutive five year terms of imprisonment for each of the two convictions of possession of a weapon during the commission of a violent crime. Tr. II 600, lines 12-22; Tr. * (Sentence Sheets). This was impermissible pursuant to Section 16-23-490(A) ("This five-year sentence *does not apply* in cases *where* the death penalty or *a life sentence without parole is imposed for the violent crime*.") (emphasis added). Accordingly, Appellant respectfully requests his two consecutive five year sentences for possession of a weapon during the commission of a violent crime to be vacated in the interest of judicial economy.

CONCLUSION

For the foregoing reasons, Appellant Daunte M. Johnson respectfully requests this Court to reverse his convictions and grant him a new trial.

Breen Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of January, 2023.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

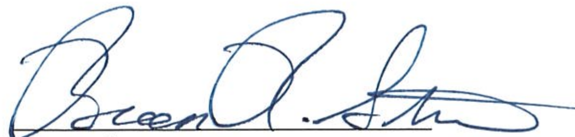
DAUNTE MAURICE JOHNSON,

APPELLANT

APPELLATE CASE NO. 2022-000931

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 4th day of January, 2023.



Breen Stevens
Appellate Defender

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ATTORNEY FOR APPELLANT

From:	Stock, Chris
To:	SC - BROWN MELODY; Angela Brown
Cc:	Stevens, Breen
Subject:	Johnson, Duante - Initial Brief of Appellant - 2022-000931
Date:	Wednesday, January 4, 2023 11:47:00 AM
Attachments:	Johnson, Duante - Initial Brief of Appellant - 2022-000931.pdf Johnson, Duante - Initial Brief of Appellant - 2022-000931 - AG Cover Letter.pdf

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Ms. Brown,

Please find attached for service the Initial Brief of Appellant and Designation of Matter for Daunte Maurice Johnson's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
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