STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM MARION COUNTY
Court of General Sessions

William H. Seals, Jr., Circuit Court Judge

Appellate Case No: **2022-000748**

The State of South Carolina,

Respondent,

v.

Stephen William Flood,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 9, 2019, the Marion County Grand Jury indicted Appellant Stephen William Flood for two counts of involuntary manslaughter and two counts of reckless homicide with death. (R. 5, line 15 – R. 6, line 2; R. 675 – 676).

On May 16, 2022, Appellant proceeded to trial before the Honorable William H. Seals, Jr., and a jury. (R. 1). Jared Bouchette and Marissa Drost represented Appellant, and Solicitors Edward Clements and John Jepertinger prosecuted the case on behalf of the State. The jury returned a verdict of guilty for all four indictments on May 19, 2022. The Trial Court sentenced Appellant to consecutive five (5) years imprisonment for each count of involuntary manslaughter and consecutive four (4) years imprisonment for each count of reckless homicide with death. (R. 630, lines 1-17; R. 645, lines 4-10).

On May 20, 2022, the Trial Court vacated the sentences for the involuntary manslaughter convictions and modified the reckless homicide sentences to consecutive terms of nine (9) years imprisonment for each conviction. (R. 663, lines 12-20; R. 664, lines 19-20).

STATEMENT OF THE FACTS

On September 18, 2018, Appellant reported for duty at his job as a transportation deputy with the Horry County Sheriff's Office (HCSO). He arrived at around 3:00 pm—later than usual due to the road conditions—as did his partner for the day, Deputy Stephen Bishop. Notably, two transport officers were assigned that day because of the river water surging down from North Carolina after Hurricane Florence. (R. 28, line 16; R. 92, lines 1-5; R. 94, lines 22-24; R. 104, lines 1-9; R. 114, 10-23; R. 132, lines 1-19; R. 142, lines 1-20; R. 169, lines 9-24; R. 175, lines 15-21; R. 202, lines 1-8).

Due to the surging river water, roads were opening and closing regularly throughout the day as conditions were changing as often as every five minutes. (R. 94, lines 23-24; R. 100, line 23–R. 101, line 19). Some transport officers informally discussed the routes and potential challenges in an impromptu discussion for about 10-to-15 minutes during shift change. (R. 95, lines 1-7; R. 115, 8-21; R. 132, lines 1-19; R. 133, lines 2-23; R. 135, lines 8-23; R. 139, lines 1-24; R. 141, lines 22-25; R. 143, line 5 – R. 144, line 1; R. 158, line 23 – R. 159, line 3; R. 176, lines 1-24). Remarkably, the officers were ordered to undertake their transport duties despite the changing road conditions and without any mandatory routes. (R. 98, line 8; R. 107, lines 2-17; R. 118, lines 11-19; R. 136, lines 16-20; R. 141, 5-16; R. 156, line 3 — R. 157, line 2).

Appellant and Deputy Bishop were assigned to transport two individuals: Nicolette Green and Wendy Newton. They were to transport one passenger from the previous shift, pick-up another passenger from the hospital in Loris, then take a passenger to McLeod Mental Health in Darlington, and the other passenger to Lancaster. The transport officer from the previous shift, Deputy Wright, arrived later than expected with one passenger in the caged area of the transport van. (R. 100, lines 14-18; R. 101, line 24 — R. 103, line 8). Appellant and Deputy Bishop then

drove to Loris where they picked-up the second passenger at 5:07 pm. (R. 91, lines 16-22; R. 133, lines 2-9; R. 141, lines 5-21; R. 495, lines 1-7).

Appellant then left for Darlington on Route 9, and as they approached the town of Nichols, they came upon a barricade at the intersection of Route 9 and Highway 76. Zachery Eskew; Deputy Eddie Page (Deputy Page) and Staff Sergeant Desmond Jenkins (SSgt. Jenkins) were stationed at the barricade with a large National Guard high-water vehicle. (R. 311, line 18–R. 313, line 20; R. 364, line 3–R. 368, line 19; R. 375, line 3 – R. 376, line 4).

At the barricade, Appellant spoke with Eskew while Deputy Page and SSgt. Jenkins remained in the air-conditioned truck and was ultimately allowed to drive-through and continue driving on Highway 76 to Nichols.[1] (R. 237, line 13 – R. 238, line 25; R. 243, lines 13-20; R. 312, line 3 – R. 314, line 19; R. 369, line 2 – R. 370, line 15; R. 376, line 1 – R. 377, line 23). Notably, the three individuals were instructed to allow only certain people through the barricade due to the road conditions, specifically: (1) residents going to get personal belongings; and (2) emergency personnel.

Less than a mile down the road, Appellant noticed about a half-inch of water on the road and continued driving. (R. 502, lines 2-25). He began driving slowly to avoid making any wake, as the rising water was up to the wheelrims of the van. (R. 503, lines 6-22). When they reached the other side of town, he continued at approximately five (5) to ten (10) miles per hour. Unfortunately, there were no road signs indicating a downward slope in the road, and Appellant believed he could not turn around or go backwards due to concerns of ending up stuck in a ditch.

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[1] Although there are inconsistencies in Eskew's testimony at trial about his conversation with Appellant with his prior statements during a deposition and interviews with SLED, it is undisputed that Appellant was permitted to pass beyond the barricade. (R. 328, line 4 – R. 330, line 24; R. 349, line 5 – R. 350, line 11).

Prior to reaching the river, Appellant could see dry road just beyond the guardrails and proceeded toward it. (R. 308, lines 4-6; R. 504, lines 1-18). The van began to float as Appellant drove in the direction of the dry road. (R. 505, lines 19-22). As the van drifted, the left side became pinned against the guardrail on Highway 76 near the Little Pee Dee Lodge. At 5:49 pm, Appellant and Deputy Bishop called for help, and Appellant gave Bishop the keys to the cage.

As the water steadily rose, the radio stopped working. Appellant rolled-down his window to get out, but it stopped after going down only half-way. He attempted to go out through the limited opening but became stuck. Meanwhile, Deputy Bishop had already exited through his passenger side door but could not get the side sliding door open to access the cage where Green and Newton were locked. Deputy Bishop then went to the back section of the cage, and shot off the locks; however, he was still unable to access the front compartment of the cage. (R. 290, line 1 – R. 292, line 6; R. 424, lines 2-11; R. 505, lines 1-9; R. 520, line 3–R. 526, line 4).

Deputy Bishop subsequently freed Appellant from the window, and they made calls on the cell phone for help. (R. 182, lines 21-25; R. 196, lines 1-13; R. 475, lines 2-25; R. 506, lines 6-20). Although they were able to get through to multiple personnel—including the HCSO transportation sergeant, Marion County Emergency Operations Center, and even another HCSO transport officer, Deputy Witherspoon—it still took too long for help to respond and locate them. (R. 426, lines 7-24; R. 506, lines 1-3). Meanwhile, Deputy Bishop had climbed to the top to the van, while Appellant—despite his fear of water and the fact that he cannot swim—remained in the water at the back of the van talking through the doors with Green and Newton as the water continued to rise. (R. 448, lines 1-11; R. 529, lines 4-11).

Horry County Fire and Rescue were informed of the area to search around 6:30 pm. David Doris was part of the two-man drone team that attempted to find the van. After launching the

drone near Nichols town hall, Doris found the van on the drone's camera around 6:50 pm. (R. 411, line 3 – R. 420, line 10). By the time first responders arrived by boat, the road conditions had rapidly changed where the water had risen to approximately the roof of the van. They rescued Deputy Bishop from the roof and pulled Appellant out of the water from the back of the van. (R. 261, lines 5-16; R. 291, lines 20-25; R. 446, line 11 – R. 448, line 11).

The swift water rescue team proceeded to cut a hole in the roof of the van but were unable to reach Green and Newton because of the steel cage inside. Since no voices were heard coming from within the van, emergency personnel declared the matter a recovery operation rather than a rescue. (R. 262, lines 12-24; R. 292, lines 1-6; R. 422, line 1 – R. 426, line 2; R. 449, line 1–R. 451, line 6; R. 455, line 13 – R. 458, line 25). A second boat operated by officer Dylan Oates of the Department of Natural Resources (DNR) and Agent Will Duncan of the South Carolina Law Enforcement Division (SLED) also arrived on scene during the rescue and were told over the phone to remain because the van may be a crime scene. Oates and Agent Duncan stayed as long as they could but were forced to leave due to deteriorating conditions. (R. 264, lines 1-17).

On September 24, 2018, the van was finally removed. (R. 463, lines 1-3). SLED Agent Melinda Worley processed the vehicle and found shell casings and shot-off padlocks confirming what occurred. Although cameras and other electronics were also recovered, no information could be recovered due to water damage. (R. 463, line 3 – R. 464, line 12; R. 468, line 3 – R. 469, line 25). Both Green and Newton were determined to have drowned, and the manner of death was deemed accidental. (R. 437, lines 9-11; R. 439, lines 10-14). Appellant and Deputy Bishop were later arrested and charged for their deaths.

At trial, the State sought admission of numerous photographs depicting the water conditions after 6:50 pm (even though Appellant called for help at 5:49 pm). Defense Counsel

objected to State's exhibits of photographs—depicting the rescue crew cutting open the van roof—on the basis that they were taken significantly after Appellant's decision to continue driving and the water level was substantially higher in the photographs than at the time he called for help). (R 654-656). Defense Counsel also argued that the photographs were more prejudicial than probative. In response, the Trial Court admitted the photographs over objection. Specifically, the Court explained its ruling as follows:

> That's the whole fact that's in dispute in this case, how deep the water was, how fast it was moving, and was it prudent or not in trying to go through it. [The State] has to prove [its] case, and I think it does assist [it] in trying to prove [its] case.

(R. 293, line 7 – R. 296, line 13; R. 654-656).

Agent Duncan testified that he stayed with the van, and everything was underwater as far as you could see. (R. 299, lines 1-25). Agent Duncan made the followings concessions as to the water conditions: (1) the water conditions changed dramatically in the area around Nichols throughout the day; (2) he did not know when the van became disabled; (3) the pictures were taken after the van became disabled; and (4) the water had to be lower when it became disabled. (R. 300, line 10 – R. 301, line 24).

The State also sought admission of the drone camera footage depicting the water conditions during the rescue after 6:50 pm. Defense Counsel objected, arguing that the video was not relevant to whether the water was life-threatening when Appellant encountered it at approximately 5:50 pm. Instead, the video showed a bird's-eye view of flooding in the entire region—a perspective that Appellant did not have—from 6:50 pm to approximately 7:32 pm. Specifically, Defense Counsel argued that the video was more prejudicial than probative, and duplicative of photos already admitted that were taken closer to the scene. Defense Counsel also argued that the video was misleading to the jury because it did not depict the water conditions at the relevant time when

Appellant encountered the rising water; but instead, showed the water conditions after the water level had rapidly increased over time. (R. 392, line 23 – R. 396, line 12; St. Ex. #10—Drone Video).

In response, the State maintained that the video was "the most relevant piece of evidence in trial" because it corroborated witness testimony and "puts everything in a box and holds it together." (R. 397, lines 5-13). Defense Counsel disagreed and argued that the relevant inquiry was the water conditions Appellant encountered prior to the van becoming disabled. Defense Counsel further noted that cross-examination would not cure the prejudice created by submitting the video to the jury for two reasons. First, the video did not depict accurate conditions at the time of the incident, and second, the recovery itself was not relevant to when, how, or why the incident happened. (R. 397, line 15–R. 398, line 23).

The Trial Court overruled Defense Counsel's objection, reasoning that the factual issues in the case included the changing water conditions, and whether it was life threatening. The Trial Court found it was critical to this case because of the judgment call made by Appellant to continue driving. Accordingly, the Trial Court allowed the video into evidence showing the van and massive flooding around it. (R. 398, lines 28 – R. 399, line 23; R. 407, lines 17-24).

During deliberations, the jury sent a note requesting definitions for both involuntary manslaughter and reckless homicide, and the Trial Court reinstructed the jury on those charges. (R. 625, line 5–R. 628, line 21). The jury returned a verdict of guilty for all four indictments. The Trial Court then sentenced Appellant to consecutive five (5) years imprisonment for each count of involuntary manslaughter and consecutive four (4) years imprisonment for each count of reckless homicide with death. (R. 630, lines 1-17; R. 645, lines 4-10).

The following day, it was brought to the Trial Court's attention that Appellant could not receive two homicide convictions and sentences for one decedent (one body/one crime rule). The State asserted that the Trial Court should vacate the lesser two charges of involuntary manslaughter and amend its sentences to reckless homicide with the previously imposed sentence. (R. 661, line 2 – R. 662, line 7). Defense Counsel argued that the Trial Court did not have "the authority to unilaterally pick which charge to vacate . . . the one with the lesser maximum sentence as opposed to the one with the higher maximum sentence." (R. 662, lines 20-24). Defense Counsel also argued that if the Trial Court vacated a particular conviction, the sentencing for the remaining charges should be modified. (R. 663, lines 3-11).

The Trial Court ultimately held:

> In order to comply with the *Green[e]* case, I'm going to vacate both involuntary manslaughter sentences and convictions. I'm going to modify both reckless homicide sentences to comply with my original intent, which was 18 years. Thus, I'm going to sentence on each reckless homicide conviction to nine years and run them both consecutive. In essence, there is no prejudice to the defendant because it's the exact same sentence. It's done a little different to comply with *Green[e]*.

(R. 663, lines 12-20). After the Trial Court indicated its ruling, Defense Counsel argued that, had the jury been properly instructed that it could find Appellant guilty of one homicide charge, or the other, but not both, then it would have been for the jury to decide which homicide charge Appellant was guilty of committing. The Trial Court disagreed and vacated the sentences for the involuntary manslaughter convictions and modified the reckless homicide sentences to consecutive terms of nine (9) years imprisonment for each conviction. (R. 663, lines 12-20; R. 664, lines 19-20).

This appeal follows.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS VIDEO EVIDENCE DEPICTING A BIRDS-EYE VIEW OF FLOODING IN THE AREA INCLUDING AND SURROUNDING THE INCIDENT LOCATION, AND PHOTOGRAPHS OF FLOODING OF THE VAN DURING APPELLANT'S RESCUE, WHERE THE IMAGES SHOWED ROAD AND WATER CONDITIONS OVER AN HOUR AFTER APPELLANT ENCOUNTED THEM, AND WHERE THE ROAD AND WATER CONDITIONS AT THE TIME APPELLANT ENCOUNTERED THOSE CONDITIONS WERE CRITICAL TO THE JURY'S DETERMINATION OF GUILT.

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.

"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). Notably, "[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).

Additionally, "the photographs must create a tendency to suggest a decision on an improper basis, commonly, although not necessarily, an emotional one" to constitute unfair prejudice. *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); *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."); Rule 403, SCRE.

Discussion

In this case, the Trial Court erroneously admitted a unduly prejudicial video recording and photographs into evidence depicting flood water conditions more than an hour after Appellant encountered them while driving the transport van. The video and photographs were not necessary to substantiate material facts or conditions because this evidence misled the jury as to the critical facts at issue—the condition of the flood water at the time Appellant made the decision to continue driving and subsequently called for help—and the probative value of this evidence was substantially outweighed by the danger of unfair prejudice because it created a tendency to suggest a decision on an improper basis (i.e., significantly higher flood waters at a later time).

Video Recording

At trial, the Trial Court erroneously allowed the State to admit a video recording taken from a drone flying above the area where Appellant and Deputy Bishop were rescued. The video showed not only the road where the transport van became disabled but also the surrounding area inundated with flood water well after Appellant made his decision to continue driving in far less water (i.e., significantly different depiction of the water level). Again, the video recording did not address the critical facts at issue: "how deep the water was, how fast it was moving, and was it prudent or not in trying to go through it." (R. 296, lines 3-4). *See* Rules 401 and 402, SCRE.

The unfair prejudice to Appellant is highlighted by the State's theory for his criminal liability: Appellant's decision to continue driving from Nichols to Mauldin was criminally negligent and reckless due to the life-threatening conditions at that time. The State presented testimony from witnesses consistently testified that the water and road conditions were rapidly changing during that day. Notably, the State presented no witnesses regarding the water level and road conditions at the time Appellant decided to continue driving in what he believed was a passable stretch of highway partially submerged by water where it was dry a little farther down the road (except for having Agent Stephen Howell read Appellant's statement to the jury).

The video recording—which began filming approximately an hour after the van became disabled—was not and could not be material to proving the *mens rea* for either involuntary manslaughter[2] or reckless homicide[3] because it did not accurately depict the road and water conditions at the time Appellant made that decision. Therefore, the video of the incident location recorded over one hour after the van became disabled could not substantiate a material fact or

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[2] The offense of involuntary manslaughter is defined as follows:

> With regard to the crime of involuntary manslaughter, criminal negligence is defined as the reckless disregard of the safety of others. A person charged with the crime of involuntary manslaughter may be convicted only upon a showing of criminal negligence as defined in this section.

S.C. Code Ann. § 16-3-60 (West, Westlaw current through 2022).

[3] The offense of reckless homicide is defined as follows:

> When the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others, the person operating the vehicle is guilty of reckless vehicular homicide.

S.C. Code Ann. § 56-5-2910(A) (West, Westlaw current through 2022).

condition of the actual offense. *See Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71; *see also Middleton*, 288 S.C. at 24, 339 S.E.2d at 693; *Torres*, 390 S.C. at 623, 703 S.E.2d at 228; Rules 401 and 402, SCRE.

Furthermore, any probative value of the video was substantially outweighed by the danger of its unfair prejudicial effect, confusion of the issues, and propensity to mislead the jury. *See* Rule 403, SCRE. The State enhanced the prejudice during its closing argument by repeatedly referring to the video, playing it for the jury, and even narrated moments while it played. (R. 569, lines 10-14; R. 582, lines 9-14; R. 584, lines 1-11; R. 588, lines 14-16; R. 593, line 5 – R. 594, line 17).

For example, after highlighting the video recording and improperly indicating that it depicted the water level and conditions at the time Appellant made his decision to continue driving, the State told the jury: "You saw what Mr. Flood saw. You encountered that visually what he saw, and that's direct—direct evidence." (R. 569, lines 10-14). The State also emphasized how much water was in the surrounding area based on the drone footage:

> He saw what he saw. You can tell on the drone footage what the overall view looked like. To me, it looked like it was water wherever you looked. Water as far as you could see. . . . Look through that camera, that footage, or look with your eyes without a camera, and what do you see looking towards Mullins? Water.
>
> And then a little bit to the North? Water. Little bit to the South? Water. As far as you can see, water.

(R. 584, lines 4-11). The State then imputed the images from the video depicting the entire area over an hour after the van become disabled as the same as what Appellant actually encountered at the time he decided to continue driving:

> "When I got there just before the river, I could see dry road just beyond the guardrails." I don't know what he's seeing unless he's seeing high ground on the other side of the river, on the Mullins side.

> Check out that drone footage. You can run it slow, you can run it fast, you can take it frame by frame, but you won't see dry land that he could get to.

(R. 588, lines 10-16).

In other words, the State intentionally utilized the video to mislead the jury as to the road and water conditions at the time Appellant encountered them and his van became disabled. The State also used the video to confuse the issue regarding the material element of recklessness: "I would submit to you there's no way on earth you would get into some situation like that unless you were reckless." (R. 574, lines 14-16). The State utilized the video in a manner that confused the issues, misled the jury, and aroused the sympathies and the prejudices of the jury. *See Middleton*, 288 S.C. at 24, 339 S.E.2d at 693. Therefore, any probative value of that evidence was substantially outweighed by its unfair prejudicial effect. *See Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71; *see also* Rule 403, SCRE.

Accordingly, the Trial Court erroneously admitted the video recording because the "unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." *See State v. Collins*, 398 S.C. 197, 207, 727 S.E.2d 751, 757 (Ct. App. 2012); *see also State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.").

Photographs

The Trial Court also erroneously admitted photographs of the rescue scene because it depicted water and road conditions far different and more dangerous than those encountered by Appellant when he made the decision to continue driving forward. Specifically, the State presented photographs taken by Agent Duncan of Appellant and Deputy Bishop's rescue when the water and road conditions had changed so rapidly between the time the van became disabled and

the time of the photographs that water was near the top of the van when first responders arrived. Thus, the photographs were irrelevant, and even if deemed relevant, the probative value was substantially outweighed by the danger of unfair prejudice. *See* Rules 401 and 403, SCRE; *See Middleton*, 288 S.C. at 24, 339 S.E.2d at 693 (finding "[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.") (internal citations omitted).

Despite multiple State witnesses readily admitting that road and water conditions were rapidly changing, the Trial Court allowed the admission of these photographs based on the following reasoning:

> [T]he whole fact that's in dispute in this case, how deep the water was, how fast it was moving, and was it prudent or not in trying to go through it.
>
> . . . . .
>
> [The State] has to prove [its] case, and I think it does assist [it] in trying to prove [its] case.

(R. 293, line 19–R. 295, line 15; R. 296, lines 27; R. 655 – 656). Thus, the Trial Court admitted the photographs specifically for the purpose of allowing the State to prove whether Appellant's decision to drive down the road was prudent based on road and water conditions at that time, even though the photographs depicted water and road conditions that were far different and more dangerous than what Appellant encountered approximately an hour prior to the photographs being taken. Therefore, the photographs were not only irrelevant, but any probative value was substantially outweighed by their prejudicial effect—especially as to the *mens rea* element of criminal negligence or recklessness. Rule 403, SCRE.

In sum, this is a case where the State alleged Appellant's choice to fulfill his transportation duties by driving on a road with water was not merely an accident but rose to the level of criminal

negligence or recklessness, and the Trial Court allowed the State to show the jury photographs of the same road but at a later time when conditions were universally accepted as being worse. By allowing admission of these photographs, the Trial Court permitted the State to impermissibly infer Appellant had acted recklessly—a position reiterated in the State's closing argument: "I would submit to you there's no way on earth you would get into some situation like that unless you were reckless." (R. 574, lines 14-16).

The State further misled the jury when referring to the photographs taken by Agent Duncan during the rescue" "Give you an accurate view of what's going on there." (R. 582, lines 8-14). Thus, any probative value was substantially outweighed by the danger of unfair prejudice, and Appellant was indeed prejudiced when the State used the photographs to arouse the sympathies and prejudices of the jury even though they were irrelevant and unnecessary to the factual issues at trial. *See Middleton*, 288 S.C. at 24, 339 S.E.2d at 693 (1986) (internal citations omitted).

Accordingly, the Trial Court erroneously admitted the photographs because the "unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." *See Collins*, 398 S.C. at 207, 727 S.E.2d at 757; *see also Wilson*, 345 S.C. at 7, 545 S.E.2d at 830 ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.").

II. THE TRIAL COURT ERRED BY INVADING THE PROVINCE OF THE JURY WHERE, AFTER THE JURY FOUND APPELLANT GUILTY OF INVOLUNTARY MANSLAUGHTER AND RECKLESS HOMICIDE FOR BOTH DECEDENTS, THE TRIAL COURT INITIALLY IMPOSED CONSECUTIVE SENTENCES TOTALING EIGHTEEN (18) YEARS, AND ONLY AFTER BEING INFORMED OF ONE HOMICIDE – ONE PUNISHMENT RULE, THE TRIAL COURT UNILATERALLY ELECTED THE HOMICIDE CHARGES FOR WHICH APPELLANT WOULD BE FOUND GUILTY SOLELY TO KEEP THE EIGHTEEN (18) YEAR PUNISMENT THE COURT ORIGINALLY IMPOSED.

"Multiple offenses, including multiple homicide offenses, may be prosecuted in a single trial, but principles inherent in double jeopardy and due process preclude multiple punishments for the same offense." *State v. Greene*, 423 S.C. 263, 279, 814 S.E.2d 496, 505 (2018) (citing State v. *Cavers*, 236 S.C. 305, 311-12, 114 S.E.2d 401, 404 (1960)). Under South Carolina law, the rule of "one homicide, one punishment" applies both to multiple convictions *and* sentences for the same homicide. *See Id.* 423 S.C. at 284-85, 814 S.E.2d 496 at 507.

Moreover, the decision on which homicide offense to impose upon the defendant, if found guilty, rests in the province of the jury. For example, in *State v. Cavers*, the defendant was tried for both involuntary manslaughter and reckless homicide, both of which arose from a traffic accident resulting in the death of one motorist. *Cavers*, 236 S.C. at 308-09, 114 S.E.2d at 402. At the end of trial, the jury was properly instructed that it could not find the defendant guilty of both charges. The defendant was found guilty of reckless homicide, and on appeal argued *inter alia* that the State should have been required to elect between the charges posed. The *Cavers* Court rejected this notion as follows:

> *It was within the province of the jury to find whether appellant's conduct was negligent or reckless, or neither*; if negligent, it would have supported a verdict of guilty of manslaughter, the court having eliminated murder and voluntary manslaughter; if reckless, it sustains the verdict of guilty of reckless homicide, and that finding by the jury is implicit in the verdict. The jury were instructed that they could not find appellant guilty on both counts. *To sustain this point of appellant would require the court, instead of the jury, to*

> *determine whether his conduct was negligent or reckless, if either, which, under the evidence in this case, would be an invasion by the court of the province of the jury.*

Cavers, 236 S.C. at 311–12, 114 S.E.2d at 404 (internal citations omitted) (emphasis added). In other words, the trial court cannot select the charge for which a defendant will be held accountable; to do so—regardless of whether it was upon motion of the defendant or *sua sponte*—is "an invasion by the court of the province of the jury." *Id.*

Discussion

In this case, the Trial Court reversibly erred by choosing which homicide charge to impose and sentence Appellant. The jury is assigned to be the judge of which homicide charge to impose where more than one is charged and tried for a single homicide. Thus, the Trial Court's unilateral decision violated Appellant's fundamental Due Process rights by invading the province of the jury. Appellant was further prejudiced by the Trial Court's decision to intentionally chose the two offenses—reckless homicide—with larger sentencing ranges to maintain a larger overall sentence than what would have been permissible under the involuntary manslaughter offenses.

Specifically, the Trial Court violated these fundamental principles of invading the province of the jury by unilaterally selecting which offense and concomitant sentence Appellant would incur. As in *Cavers*, Appellant was likewise tried for both involuntary manslaughter and reckless homicide for each decedent. However, unlike in *Cavers*, Appellant was convicted of all charges,[4] and the Trial Court sentenced Appellant to consecutive five (5) years imprisonment for each count of involuntary manslaughter and consecutive four (4) years imprisonment for each count of reckless homicide with death. (R. 630, lines 1-17; R. 645, lines 4-10).

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[4] The jury sent out a note to the trial court requesting definitions for both involuntary manslaughter and reckless homicide during deliberations, and the trial court simply read the instructions to them again. (R. 625, line 5 – R. 628, line 21).

The following day, it was brought to the Trial Court's attention that Appellant could not receive two homicide convictions and sentences for one decedent (one body/one crime rule). The State asserted that the Trial Court should vacate the lesser two charges of involuntary manslaughter and amend its sentences to reckless homicide with the previously imposed sentence. (R. 661, line 2 – R. 662, line 7). Defense Counsel argued that the Trial Court did not have "the authority to unilaterally pick which charge to vacate . . . the one with the lesser maximum sentence as opposed to the one with the higher maximum sentence." (R. 662, lines 20-24). Defense Counsel also argued that if the Trial Court vacated a particular conviction, the sentencing for the remaining charges should be modified. (R. 663, lines 3-11).

The Trial Court ultimately held:

> In order to comply with the *Green[e]* case, I'm going to vacate both involuntary manslaughter sentences and convictions. I'm going to modify both reckless homicide sentences to comply with my original intent, which was 18 years. Thus, I'm going to sentence on each reckless homicide conviction to nine years and run them both consecutive. In essence, there is no prejudice to the defendant because it's the exact same sentence. It's done a little different to comply with *Green[e]*.

(R. 663, lines 12-20). After the Trial Court indicated its ruling, Defense Counsel argued that, had the jury been properly instructed that it could find Appellant guilty of one homicide charge, or the other, but not both, then it would have been for the jury to decide which homicide charge Appellant was guilty of committing.

The Trial Court disagreed and vacated the sentences for the involuntary manslaughter convictions and modified the reckless homicide sentences to consecutive terms of nine (9) years imprisonment for each conviction. (R. 663, lines 12-20; R. 664, lines 19-20). In so doing, the Trial Court erroneously adopted the State's argument that it should *sua sponte* vacate the lesser

two charges of involuntary manslaughter and amend its sentences for reckless homicide to maintain the same overall sentence previously imposed. (R. 661, line 2 – R. 662, line 7).

As *Cavers* instructed, "It was within the province of the jury to find whether appellant's conduct was negligent or reckless, or neither." *Id.*, 236 S.C. at 311, 114 S.E.2d at 404. By following the State's request, the Trial Court's ruling effectively acted as a post-trial motion to elect by the State. As such, to sustain this point "would require the court, instead of the jury, to determine whether his conduct was negligent or reckless, if either, which, under the evidence in this case, would be an invasion by the court of the province of the jury." *Id.* 236 S.C. at 312, 114 S.E.2d at 404. Accordingly, Appellant's fundamental due process rights were violated by the Trial Court's ruling.

Additionally, Appellant was prejudiced by this error because it was not for the Trial Court to decide which offense should be imposed upon Appellant; as indicated above, it was solely the province of the jury to determine whether Appellant should suffer the consequences of a conviction for involuntary manslaughter or reckless homicide. Therefore, the Trial Court's imposition of any sentence without knowing specifically which charge the jury would have chosen in its domain as the sole judge of Appellant's guilt requires reversal and remand.

Furthermore, the Trial Court intentionally selected the two convictions with higher sentencing ranges in order to impose a harsher penalty than what would be available if Appellant was convicted of involuntary manslaughter[5] rather than reckless homicide.[6] In the worst-case-

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[5] "A person convicted of involuntary manslaughter must be imprisoned not more than five years." S.C. Code Ann. § 16-3-60 (West, Westlaw current through 2022).

[6] "A person who is convicted of . . . reckless vehicular homicide is guilty of a felony, and must be fined not less than one thousand dollars nor more than five thousand dollars or imprisoned not more than ten years, or both." S.C. Code Ann. § 56-5-2910(A) (West, Westlaw current through 2022).

scenario, Appellant could have been sentenced to ten (10) years imprisonment if the Trial Court imposed the five-year maximum punishment for each involuntary manslaughter conviction and ordered consecutive sentences. Instead, the Trial Court's unilateral election of convictions was guided not by principles of fundamental fairness and due process, but by its goal of imposing a sentence of eighteen (18) years. Accordingly, Appellant seeks a reversal and remand for new trial.

CONCLUSION

Based on the foregoing reasons, Appellant Stephen W. Flood respectfully requests that this Court to reverse his convictions and sentence and remand to the Marion County Court of General Sessions for a new trial.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of General Sessions

William H. Seals, Jr., Circuit Court Judge

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Appellate Case No: **2022-000748**

The State of South Carolina,

Respondent,

v.

Stephen William Flood,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned Counsel certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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