STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dillon County

Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EARL GENE JOHNSON, JR.,

APPELLANT

APPELLATE CASE NO. 2022-001045

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting State's Exhibit #43, a photo of the decedent laying dead on the ground with his chest and undergarments exposed, since even if this photograph was relevant pursuant to Rule 401, SCRE, its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE, especially since this photograph did not corroborate any trial testimony, and therefore was gratuitous?

STATEMENT OF THE CASE

Appellant was indicted at the December 16, 2017, term of the Dillon County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. R. 540. Appellant's case was called to trial on July 11, 2022, before the Honorable Paul Burch and a jury. Assistant attorneys general Heather Weiss and Jason Bridges were the prosecutors. John M. Ervin, III, represented appellant. R. 1.

At the conclusion of the trial on July 14, 2022, the jury found appellant guilty on both counts. R. 527, ll. 8-14. Judge Burch sentenced appellant to life imprisonment for murder, and he imposed a five-year concurrent term for possession of a weapon during the commission of a violent crime. R. 537, ll. 11-17.

ARGUMENT

The court erred by admitting State's Exhibit #43, a photo of the decedent laying dead on the ground with his chest and undergarments exposed, since even if this photograph was relevant pursuant to Rule 401, SCRE, its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE, especially since this photograph did not corroborate any trial testimony, and therefore was gratuitous

Relevant Facts

Prior to trial, the state indicated its intention to introduce various photographs through the first trial witness. Defense counsel objected to State's Exhibit #43, a photograph of the dead decedent laying in the yard with his chest and undergarments exposed, and some unknown object nearby. R. 47, l. 4-48, l. 11.

Counsel argued the photograph was not relevant under Rule 401, SCRE, and even if it was relevant, under Rule 403, SCRE, it should be excluded because its unduly prejudicial effect far exceeded its probative value, and it was simply a gory unnecessary photograph. The solicitor argued the probative value of the photograph, State's Exhibit #43, outweighed its prejudicial effect. R. 47, l. 4-48, l. 11.

The following occurred:

> MS. WEISS: [I] think this picture is very sterile in the situation at hand. It is not gory. In fact, it is simply the body as it was laying outside of the home in 2017. I believe it is probative, and its probative value outweighs the prejudicial value. It is anticipated that Ms. Miles will be testifying that she came out the door after the shooting stopped and saw her son laying out in the yard. She went over and approached the body, and that her son was talking to her, communicating with her, when she approached the body. I think it is important for the jury to understand how close he was to the house, the body she approached, and the person that she talked to. He is still dressed. The difference is that -- and she would say -- that his shirt was tucked in when she first went out; but other than

that, the body was laying basically in that position in the backyard to the best of her memory in 2017. I think it is important as a probative issue for the jury. It outweighs any prejudice. There are lots of pictures that we may have to talk about at a later time, but at this point, I tried to find the most sterile picture for Ms. Miles to testify to describe what she encountered that evening when she walked outside. In order to do that -- and that is a picture that was taken after markers were put down and other things. But I wanted to get a more distant picture to make it as sterile and non-gory as possible so she could talk about it and look at it.

THE COURT: Anything else?

MR. ERVIN: Judge, I would add it is accumulative [cumulative] and unnecessary. It would be prejudicial. I don't see the probative value. I don't see anything probative.

THE COURT: This is one of many?

MS. WEISS: Yes, sir.

THE COURT: I'll let it in and overrule, but I want a Court exhibit made out of all the other similar pictures because of State v. Collins. So those are all admitted.

(State's Exhibits 1-9, 25, 27, 30, 33-35, 37-41, 43, 46 and 75 admitted.)

MS. WEISS: We also showed the defense the photos we intend to introduce with two other witnesses this afternoon. There are four witnesses this afternoon. We may get into more, but that is our goal at this point. The defense has seen these proposed pictures, and it is my understanding they have no objection, but I wanted to put that on the record: State's 44 and 45. And then State's 73, 74, 26, 28, and 29.

(State's Exhibits 26, 28, 29, 44-45, 73-74 admitted.)

MR. ERVIN: No objection.

THE COURT: Also, on No. 43, I find it probative more than prejudicial. From our pretrial discussion, the information that both Counsel gave to me about the folding up of the leg and how the shots were received by the victim, that also gives me more

information to where I could say it is more probative than prejudicial.[1]

R. 48, l. 12- 50, l. 22.

Teresa Miles was the state's first witness. She testified she lived on Melon Drive in Dillon. R. 60, l. 21-61, l. 12. She testified her son, Philip, was forty-five-years-old and that she was sixty-nine-years-old at the time of the fatal incident. R. 62, l. 23-63, l. 4. Miles then identified a series of photographs that were "an overview of where you live." R. 64, l. 2-66, l. 1.

When the solicitor went to introduce these photographs into evidence, defense counsel Ervin renewed his pre-trial objection to State's Exhibit #43 being admitted into evidence. The judge overruled the objection. R. 66, ll. 2-11. State's Exhibit #43 is before this Court for review. State's Exhibit #43 is a photograph of the decedent laying on the ground with his bloody chest exposed and his undergarments showing. It is a grotesque photograph, as defense counsel correctly argued.

Further, the photograph was also confusing since there was a patch on the decedent's side, seemingly indicating subsequent medical attention following the shooting. In addition, an unknown device was laying next to the decedent. The state's theory of the case was that appellant shot the decedent as he came outside his house after fighting inside over a gun with appellant's accomplices, Tylik Johnson and Malik Johnson, who were eighteen-year-old, identical twins.

Miles remembered that on the afternoon of August 19, 2017, she heard a knock on her door. R. 73, l. 24-79, l. 5. Miles said, "'come in,' and nobody came in." R. 79, ll. 23-25. Miles

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[1] These additional photographs, State's exhibits 1-9, 25-29 27, 30, 33-35, 37-41, 43-45 46 and 73-75 are on file with this Court, as are "the "packet" of Court's Exhibit 1 photographs. Tr. 117, l. 8 – 118, l .2. It is unclear how any of these photographs make the admissibility of State's Exhibit 43 more understandable pursuant to Rule 401, SCRE and Rule 403, SCRE.

recalled "the twins," Malik and Tylik Johnson, then "rushed in." R. 80, ll. 2-7. She remembered the twins both had dreadlocks and were young -- "around about eighteen." R. 80, l. 6-81, l. 20.

The twins were hollering "give me your money, give me your money." R. 81, ll. 21-23. Miles offered that Philip responded: "Man, I don't have no money, like that." Then, "the one [twin] that came in my room, he had a gun on me, held a gun on me. And he say, 'give me your money.' I told him—I said, 'I don't have any money, like that.' I heard Philip telling him, 'if you want money, I don't have none, but I can tell you—I will help you, you know, to learn how to get money, you know.' He said 'because I—I am a welder and I will tell you —teach you how to learn to get money.'" R. 81, l. 22-82, l. 7.

Miles then observed "a tussle" between Philip and the twins "and I heard a shot go off." R. 82, ll. 17-20. The next thing Miles knew, one of the twins ran out the front door, and the other one ran out the back door of her house. She then heard five shots, and she picked up the phone to call EMS. Miles was confused and she called her daughter Tracey. She told Tracey that somebody had just killed both of her sons, Philip and Gaven. R. 83, l. 8-84, l. 3.

Miles testified that she went outside and saw Philip laying on the ground. Miles said she kneeled beside Philip and talked to him. She said Philip was not dead at the time and she shook him, asking him "do you know who done this?" R. 84, l. 4-85, l. 8.

Miles also offered that she knew appellant "because me and him's (sic) mother is kin." However, Miles testified she did not see appellant at her house on the day of the shooting. R. 91, l. 16-92, l. 3.

Reginald Burton lived next door to Teresa Miles and the decedent, Philip. Burton had been a supervisor for a company in Mullins for about the last twenty-five years, and he had

played football for Clemson while in college. He then went into the Army after college. R. 101, l. 18-102, l. 3.

Burton remembered on August 19, 2017 when he pulled into his driveway, he saw two men run into the Miles house. "I reached for my cigarettes, and I seen them run back out. I heard like five shots. Then they got in a car—well they got in a car and took off, sped by my house. I got a little confused on what is going on, I went in my house and got my weapon. When I came back to the front door, the car came back again. So the car came back again, and I left out the back door and started walking towards the Miles's house, and he [Philip] was laying down in the ground." R. 103, ll. 5-14. Burton described the men he saw running in and out of the Miles house that day as "young." He did not identify appellant as being present. R. 110, l. 23-111, l. 2.

Erikka McQueen was dating appellant at the time of the robbery attempt in Dillon. She was a social worker working at the Scotland Correctional Facility in Laurinburg, North Carolina. R. 121, l. 14-123, l. 25. McQueen was renting a vehicle at that time because she had been in an automobile accident. She let appellant borrow her car often. She said he usually took it to the car wash before he would bring it back. He took good care of her car. R. 126, l. 1-127, l. 11.

McQueen remembered on August 19, 2017, in the late morning, appellant again asked to borrow her car. McQueen remembered, "I was like, no, Earl. He was like, girl, I'm coming right back with the car. So he left with the car. As time went on, I kept calling and calling and could never get no answer. He finally brought the car back; it was dark. So when he brought the car—the keys to the door, I took the keys and closed the door." McQueen said she was angry with appellant for having kept her car for most of the day, and she slammed the door in his face when he returned the keys. R. 127, l. 17-129, l. 7.

McQueen testified appellant called her the next morning and told her something was wrong with the car. McQueen thought appellant had been involved in an accident. McQueen did find a bag inside her car that she had not seen before. She said appellant told her "'just throw that out.' So that is what I did, I threw it out." R. 131, l. 21-132, l. 2. A short time later, McQueen said while she was inspecting the inside of her car, she noticed a spot of blood and became very frightened. R. 133, l. 9-134, l. 20.

McQueen admitted on cross-examination that she did not know what, if anything, happened with her car on August 19, 2017. She only knew that appellant borrowed the car from her that day. R. 146, ll. 4-17.

Earnest Chaplin testified at appellant's trial that he was in federal custody on a probation violation in Charleston. Chaplin was forty-three years old. R. 240, ll. 11-25.

Chaplin claimed while he was in jail with appellant, appellant told him he was in trouble in a case but the state's evidence against him was "real weak." Chaplin maintained appellant talked about a crime committed by twins in which one or both of the twins ended up getting hurt. Chaplin maintained appellant was worried that blood left at the scene or in a car could implicate him in the crime. R. 248, l. 5-249, l. 25.

Chaplin also asserted that appellant told him they were going to rob Gaven, Philip's brother, who was a drug dealer, but that "something went wrong." R. 252, ll. 5-20. Instead, appellant ended up shooting Philip "in the back to stop him from shooting or hurting the twins." R. 253, ll. 4-14.

Chaplin readily admitted he was hoping to get a substantial "time cut" pursuant to his plea agreement or under Federal Rule 35(b) for his substantial assistance to the government in helping convict appellant during his murder trial. R. 257, l. 20-270, l. 15.

Tylik and Malik Johnson, the identical twins, both pleaded guilty to lesser charges in this case, and they both testified against appellant. Tylik testified that appellant came by his house in Laurinburg, North Carolina on August 19, 2017. Appellant asked him "if I wanted to make some money." Tylik offered that he had dropped out of school after the eleventh grade, and that he was not working at the time. R. 366, l. 13-367, l. 22.

Tylik claimed he went with appellant and that when they got to the Miles home in Dillon, appellant gave his brother Malik a gun and that Malik went into the house. Tylik became worried about how long his brother stayed in the house, and he went into the house to investigate. When he went into the house, he saw Malik wrestling with "some big guy." Tylik said he was scared, but before he could help his brother, he was shot in the arm as Malik and Philip wrestled over the gun. Tylik ran out the front door to get away. R. 376, ll. 9-22.

Tylik acknowledged he pleaded guilty to attempted robbery and conspiracy to commit armed robbery for his role in the crime. He was awaiting sentencing when he testified against appellant. R. 383, ll. 2-21.

Malik Johnson testified he had gone through the ninth grade in school, and that appellant told him he had a "job" for him. Malik said a "job" could mean "selling drugs" or "cutting grass" or "robbing someone." A job simply meant getting money. R. 410, l. 15-411, l. 23.

Malik said while he rode with his twin brother and appellant to Dillon to get money, they smoked marijuana. R. 412, l. 3-414, l. 6. Malik recalled when they arrived at the Miles household, appellant gave him a large gun from the glove compartment. Malik said, without objection, that he thought appellant was on drugs at that the time, and the drug was not just marijuana. Tylik had made the same odd claim about appellant being on drugs. There were also

gratuitous references during the trial to appellant being in and out of jail. Regardless, Malik claimed that appellant told him to take the gun and go knock on the front door. R. 415, ll. 10-21.

Malik said that when he knocked on the door, Philip immediately saw the gun and grabbed it. R. 417, ll. 2-24. As they fought over the gun, Malik heard the gun go off. Malik maintained he was trying to get away during this struggle. R. 418, l. 4-421, l. 3. When Philip looked like he was falling to the ground, Malik offered: "I could see Earl coming this way with the gun like this," R. 421, ll. 2-9. Malik testified that he was positive he saw appellant shooting at the decedent with what he could only describe as a "big pistol." R. 427, ll. 5-20.

Significantly, on cross-examination, Malik admitted he was able to go through all of "the evidence" and "paperwork" in this case before he made his statement to the Attorney General's Office about what allegedly happened. R. 442, ll. 5-19.

In her closing argument, the assistant attorney general told the jury that they could infer malice from the use of a deadly weapon. R. 492, ll. 1-11. The judge also charged the jury that "malice may be inferred from the willful, deliberate, and intentional doing of a wrongful act without just cause or legal excuse. In other words, in its general significance, malice means the doing of a wrongful act without justification or legal excuse." R. 519, ll. 4-19.

Discussion

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d. 519, 523 (2000). Nonetheless, photographs calculated to arouse sympathy or prejudice from the jury should be excluded if they are irrelevant or unnecessary to the issues at trial. *Id.* To be classified as unfairly prejudicial, photographs must tend to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. State v. Torres, 390 S.C. 618, 623, 703

S.E.2d. 226, 228-29 (2010) (*quoting* State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d. 357, 361 (1995). "We review a trial court's decision regarding Rule 403 pursuant to an abuse of discretion standard and are obligated to give great deference to the trial court's judgment." State v. Hawes, 423 S.C. 118, 129, 813 S.E.2d. 513, 520 (2018) (*citing* State v. Adams, 354 S.C. 361, 378, 580 S.E.2d. 785, 794 (Ct. App. 2003).

In State v. Collins, 409 S.C. 524, 463 S.E.2d. 22 (2014), our Supreme Court found that arguably very gruesome photographs in a dog mauling of a child case were "highly probative, corroborative, and material in establishing the elements of the offense charged; [their] probative value outweighed [their] potential prejudice; and the appellate court should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented." *Id.* at 534-35, 463 S.E.2d. at 28. The criminal charges in Collins were involuntary manslaughter and owning a dangerous animal causing injury to a person.

In this case, the charge was murder.[2] State's Exhibit #43 was not probative, corroborative, or material in establishing malice aforethought. The photograph was one of the decedent laying on the ground with his bloody chest exposed and his undergarments showing. The photograph had miniscule, if any, probative value. It was frankly corroborative of nothing that was arguably material. The eyewitnesses to what actually happened, to the extent there were any, saw two people come into the house, they heard gunshots, and they saw the same young men run out of the house, jump into a car, and speed away. The twins claimed they were afraid when they discovered the robbery was actually violent, and they thought appellant shot the decedent since they both denied being the shooter. This photograph was simply not corroborative of the trial evidence. It was not even admissible under Rule 401, SCRE.

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2 "Murder' is the killing of any person with malice aforethought, either express or implied." See S.C.Code Ann. § 16–3–10 (1985).

The photograph, as defense counsel argued, was still inadmissible under Rule 403, SCRE, even if deemed marginally relevant because its probative value was substantially outweighed by its unduly prejudicial effect. To constitute undue prejudice, the photographs must create a tendency to suggest a decision on an improper basis, commonly though not necessarily, an emotional one. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

Since the photograph was not corroborative of any testimony offered at trial, its admissibility was highly suspect. The photograph also left the jury to speculate whether the patch on the decedent's side came after EMS had treated him, of which there was also no trial testimony. In addition, the object laying near the decedent was unknown. This left the jury wondering when the photograph was taken, and what it was meant to depict that was significant since it did not corroborate any trial testimony. State's Exhibit 43 was erroneously admitted.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to Dillon County Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of June, 2023.

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APPELLATE CASE NO. 2022-001045

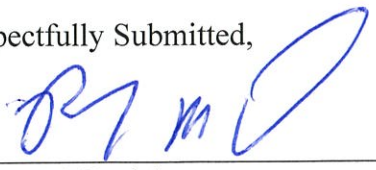
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Earl Gene Johnson states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Paul M. Burch, which was held on July 11 - 14, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Earl Gene Johnson.

Respectfully Submitted,



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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments and Sentencing Sheets
(2) Trial Transcript dated July 11-14, 2022
(3) State's Exhibits #1-9, #25-30, #33-35, #37-41, #43-46, and #73-75 (photographs), and Court's Exhibit 1 (photographs).

I certify that this designation contains no matter which is irrelevant to this appeal.

Robert M. Dudek
Chief Appellate Defender

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(803) 734-1330

ATTORNEY FOR APPELLANT

This 1st day of June, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Robert M. Dudek
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APPELLATE CASE NO. 2022-001045

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders 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); and on Earl Gene Johnson, #256792, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 1st day of June, 2023.

Robert M. Dudek
Chief Appellate Defender

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