STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARIEL ROBINSON,

APPELLANT

APPELLATE CASE NO. 2022-000716

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in admitting six pictures of the external injuries V.S. sustained and one autopsy photograph of the internal injuries V.S. sustained where the probative value of the photographs was substantially outweighed by the danger of unfair prejudice and where any probative value was negated by the extensive descriptive medical testimony elicited during the trial?

STATEMENT OF THE CASE

Appellant was indicted during the October 2021 term of the Greenville County grand jury for one count of homicide by child abuse in the death of her foster daughter, V.S. R. (indictment). A pre-trial hearing to determine the admissibility of body camera footage containing statements made by Appellant and photographs of the injuries V.S. sustained was held on April 14, 2022, before the Honorable Letitia H. Verdin. Pretrial Tr. 1. The State was represented by Christine Sustakovitch and Alexa Holloway. Appellant was represented by William Bouton. Pretrial Tr. 1. At the conclusion of the hearing, the circuit court determined that most of the photographs would be admissible. Pretrial Tr. 56, l. 22-Pretrial Tr. 57, l. 23. The court reserved ruling on the admissibility of the body camera footage until it could review the unedited footage in chambers. Pretrial Tr. 48, ll. 3-9.

On May 9, 2022, the State called the case to trial before Judge Verdin and a jury. The State was again represented by Christine Sustakovitch and Alexa Holloway, and Appellant was again represented by William Bouton. Tr. 1. At the start of the trial, prior to jury selection, the court ruled that the body camera footage containing Appellant's statements was admissible because Appellant was not in custody at the time the statements were made. Tr. 10, l. 15-Tr. 11, l. 21. After a four-day trial, the jury convicted Appellant as indicted. Tr. 605, ll. 20-25. Appellant was sentence to life imprisonment. Tr. 613, ll. 6-16; R. (sentencing sheet).

STANDARD OF REVIEW

"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). "The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

ARGUMENT

The circuit court erred in admitting six pictures of the external injuries V.S. sustained and one autopsy photograph of the internal injuries V.S. sustained where the probative value of the photographs was substantially outweighed by the danger of unfair prejudice and where any probative value was negated by the extensive descriptive medical testimony elicited during the trial.

Relevant Facts

On January 14, 2021, emergency personnel responded to the home of Ariel (Appellant) and Austin Robinson to treat their three-year-old foster[1] daughter, V.S. Austin had called 911 to report that V.S. was choking on water and had become unresponsive. State's Ex. 40 and 41[2] (911 Call). Members of the Simpsonville Fire Department were the first on scene and discovered that V.S. was in cardiac arrest. Tr. 137, l. 9-Tr. 138, l. 7; Tr. 143, ll. 1-9. When they removed her shirt to place defibrillator pads onto her chest, they noticed bruising on her lower abdomen. Once EMS arrived on scene the paramedics took over treatment. Tr. 143, ll. 14-23. When paramedics removed V.S.'s pants to start an IO (intraosseous) line for medication and fluid, they noticed extensive bruising to her legs. Tr. 145, l. 16-Tr. 146, l. 14. Appellant informed first responders that she had caused the bruising to V.S.'s abdomen when she was attempting life saving measures prior to their arrival. Tr. 144, ll. 11-17. She also stated that V.S.'s seven-year-old brother, J.E., had anger issues and would harm V.S. which caused the bruising to V.S.'s legs. Tr. 146, ll. 15-21. V.S. was transported to Greenville Memorial Hospital

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1 The Robinson's were fostering to adopt V.S. and her two older brothers C.E. and J.E. The adoption was set to be finalized the following week.

2 A copy of these exhibits is on file with this Court.

for treatment. Tr. 181, ll. 8-15; Tr. 316, ll. 5-6; Tr. 319, ll. 1-2. Later that evening V.S. succumbed to her injuries and passed away. Tr. 334, ll. 22-25.

The following day an autopsy was performed by Dr. Michael Ward on V.S. to determine the cause and manner of death. Tr. 390, ll. 13-21. The autopsy revealed that V.S. died from multiple blunt force injuries that caused severe internal bleeding and the death was classified as a homicide. Tr. 408, l. 21-Tr. 409, l. 4; Tr. 406, ll. 22-23. Both Appellant and Austin were charged with homicide by child abuse. Tr. 224, l. 23-Tr. 225, l. 2. A few weeks after their arrest, Austin, along with his lawyer, gave a statement to law enforcement implicating Appellant in the death of V.S. Tr. 374, l. 13-Tr. 375, l. 24; Tr. 368, ll. 9-15. Based on the statement and Austin's agreement to testify against Appellant, the State allowed Austin to plead guilty to aiding and abetting homicide by child abuse with sentencing[3] deferred until after Appellant's trial. Tr. 225, ll. 3-9

On April 14, 2022, the parties convened for a pretrial motions hearing. One of the matters addressed was the State's motion to admit photographs taken of V.S. Nine photographs were submitted to the court for consideration at the hearing. Seven photographs were of the V.S. in the hospital documenting the bruising on her back, abdomen, and legs. One photograph was from the autopsy and showed the internal injuries to V.S.'s legs. While the State sought to admit an edited photograph, it provided the court with the unedited autopsy photograph for comparison. Pretrial Tr. 4, ll. 7-17; Pretrial Tr. 56, ll. 5-19.

The State argued that the photographs were not intended to inflame the jury but to prove the "extreme indifference to human life" element of the crime. The State also argued that the photographs were admissible pursuant to Rule 404(b), SCRE, because Appellant had claimed she

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3 Austin was ultimately sentenced to twenty years incarceration.

accidentally caused the bruising on V.S.'s abdomen when she attempted life saving measures and the State was entitled to put in evidence that was contrary to the claim of accident. Additionally, the State argued because Appellant had "introduced third-party guilt" by stating that J.E. had caused the bruising to V.S.'s legs that the photographs were necessary to show that a seven-year-old could not administer the degree of force that would cause the injuries. The State cited State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008), to support the admission of the autopsy photograph. Pretrial Tr. 48, l. 13- Pretrial Tr. 54, l. 11.

Defense counsel argued that the photographs were prejudicial because they created a tendency to suggest a decision on an improper basis, mainly an emotional one. He stated the photographs would "certainly inflame the passions of the jury" and argued that it was not necessary for the State to admit the photographs to prove its case. He argued that the photographs did not go to a substantial material fact and that the condition of V.S. could be shown in other ways, such as the diagram of the injuries prepared by the medical examiner. He argued the photographs were not necessary to aid the medical examiner in his testimony, particularly the autopsy photograph, and that the probative value of the photographs was outweighed by the prejudicial effect that they would have on Appellant. Pre-Trial Tr. 48, l. 15- Pretrial Tr. 56, l. 4.

The circuit court ultimately ruled that six of the photographs were admissible. The court excluded[4] a close-up photograph of the side of V.S.'s face and ear as prejudicial and a photograph that showed the bruising along V.S.'s body as cumulative. The court found that the

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4 The excluded photographs and the unedited autopsy photograph were admitted as Court's Exhibits 1-3. The six photographs that the court deemed admissible were admitted as State's Exhibits 1-6. The photographs were placed under seal on the court's motion. The sealed exhibits are on file with this Court.

diagrams by the medical examiner did "not fully depict the injuries and the absence of any mistake or certainly the ability of a child to do this type of thing." The court found the autopsy photograph relevant and necessary for the State to prove its case. Pretrial Tr. 56, l. 22-Pretrial Tr. 57, l. 23

At trial, the State elicited extensive medical testimony from numerous witnesses. Throughout the testimony of the witnesses, the State used the photographs deemed admissible during the pre-trial hearing and admitted over objection during the testimony of Investigator Jason Weibel. Tr. 104, l. 18- Tr. 105, l. 15. Specifically, State's Exhibits 2-5[5] were repeatedly presented to the jury throughout the trial.

Firefighter Osmine Givens testified that V.S. was "really cold" to the touch, wet, and did not have a heartbeat when he began chest compressions. She was in cardiac arrest which essentially meant she was dead. Tr. 143, l. 1-Tr. 144, l. 2. He stated that when they cut off V.S.'s shirt they saw the bruising on her abdomen and Appellant stated she had caused that by improperly performing CPR. However, in his experience and training he had never seen similar abdominal bruising from the administration of CPR. Firefighter Givens testified that EMS established an IO line on V.S. by drilling into her shin bone down to the marrow and that V.S. did not react to the procedure. When the bruising on V.S.'s legs was seen, he testified that Appellant stated V.S.'s brother J.E. had caused the injuries. He did not think a child could cause that kind of injury. Tr. 144, l. 8-Tr.147, l. 6. After meeting J.E., he thought to himself "I don't care if you gave that kid a ball bat, he's can't – he's not going to be able to do this much damage to that little girl." Tr. 148, l. 14-Tr. 149, l. 17.

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5 A copy of these exhibits is on file with this Court.

Firefighter Jeffery Jennings similarly testified that V.S. was "very cold, soaking wet, hair was wet, clothes were wet" and that she was in cardiac arrest with no pulse when he arrived, so she was "essentially dead." He stated that in his ten years as a firefighter he had not seen similar bruising on the abdomen from the administration of CPR. Tr. 159, l. 21-Tr. 161, l. 25. He stated that even when ribs are broken during the administration of CPR, he had not seen bruising like he saw on V.S. Tr. 162, ll. 15-18.

Paramedic Ken Koehler testified that the call came into EMS as a pediatric cardiac arrest which meant that the child's heart had stopped, they were not breathing, not responsive, and were technically dead. Tr. 168, l. 11-Tr. 170, l. 10. He testified that V.S. was unresponsive, cool to the touch, and cyanotic, which meant there was bluish coloring around her lips from a lack of circulation. He immediately noticed extensive, "real purplish" bruising on V.S.'s abdomen. Tr. 171, l. 19-Tr. 172, l. 11. V.S.'s heart was asystole, which meant there was no electrical or muscular activity occurring in the heart. Koehler testified that V.S. was administered epinephrine in an attempt to re-start her heart. Tr. 173, l. 17-Tr. 175, l. 23. Koehler noted extensive bruising on V.S.'s legs. Based on Appellant's statements, he believed that V.S.'s older brother would have been in his late teens as he thought the bruising had to have been caused by an adult. Tr. 176, l. 3-4; Tr. 177, l. 15-Tr. 178, l. 25. Koehler administered six doses of epinephrine but V.S.'s heartbeat never returned, and she never began breathing unassisted. He was not "overly optimistic" that V.S. would survive. Tr. 180, l. 11-Tr. 181, l. 10.

Dr. Jacqueline Granger testified as an expert in pediatric emergency medicine. Tr. 318, ll. 3-21. She was the treating physician when V.S. came into the emergency room on January 14. Tr. 318, l. 24-Tr. 319, l. 2. Dr. Granger testified that V.S. came in unresponsive in cardiac arrest and "immediately we noticed that there was extensive bruising that wasn't consistent with the

report which we had received." Tr. 319, ll. 3-18. She stated the general consensus of the treatment team was astonishment at the "extent of bruising and trauma that was obvious" when V.S. arrived at the hospital. Tr. 319, l. 25-Tr. 320, l. 4. In her opinion, the injuries to V.S. were inflicted, not accidental. Tr. 321, ll. 10-13. During her testimony, the State entered State's Exhibit 61[6] into evidence over the objection of defense counsel. Tr. 320, ll. 5-25.

Dr. Granger testified that V.S. had a brief period of PEA, which is pulseless electrical activity, but that it was not enough electrical activity to beat her heart. In total, V.S. received eleven rounds of epinephrine which she testified was a lot. They were able to get V.S.'s heart to beat again but it was not "a very adequate heartbeat" and they were having a difficult time keeping V.S.'s blood pressure up. Dr. Granger did not believe V.S. would survive based on the amount of time she had been unresponsive and without a heartbeat. Because her heart was not beating, and she was not breathing it was presumed that she had no oxygenation to her brain for approximately forty minutes. Dr. Granger stated that the bruising on V.S. was "significantly greater than what most of us had ever seen before." Tr. 322, l. 22-Tr. 325, l. 17.

According to Dr. Granger, V.S.'s body temperature was ninety degrees when she arrived in the emergency room and her PH level was less than 6.79 which meant she was extremely acidotic. Dr. Granger explained that any PH level below seven is considered critically ill. V.S.'s CO2 levels were greater than 100 which was not compatible with life. V.S. pupils were fixed and dilated indicating no brain activity and her abdomen was distended. Tr. 327, l. 13-Tr. 329, l. 12.

Dr. Granger immediately noticed that V.S. had linear patterns in the bruising on her legs and what appeared to be a loop pattern which indicated that an object was used to hit V.S. She

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6 A copy of this exhibit is on file with this Court.

stated that after being hit V.S. would have been bleeding into the soft tissues of her body and the deep, dark, coloring and convalescing of the bruising indicated that it was deep tissue bleeding. She stated the injuries to V.S. would have been "excruciatingly painful." In her medical opinion, a seven-year-old child could not have injured V.S. because a child would not be able to produce the amount of force necessary to cause the injuries to V.S. and would not have been able to control V.S. long enough to cause such extensive injuries. Dr. Granger further stated that she had never seen abdominal bruising like what V.S. had caused by the administration of CPR or the Heimlich maneuver. She testified that the extensive bruising on V.S.'s body was "by far more severe than any bruising" that she had treated. Tr. 329, l. 22-Tr. 333, l. 25. In her medical opinion the injuries on V.S. resulted from multiple blows that appeared to happen around the same time. She stated after the blows V.S. would have been in excruciating pain, would have slowly become altered and then unresponsive. Tr. 334, ll. 4-16; Tr. 335, ll. 16-23.

Prior to the testimony of the medical examiner Dr. Ward, the circuit court addressed the courtroom gallery stating,

> There is going to be testimony and evidence presented today of an incredibly graphic nature...I say that because if there is anyone is this courtroom who feels that they cannot handle that and sit here, for lack of a better word, stoically while this jury considers this testimony and evidence, then I encourage you to leave now. And I say that because I might have – in all candor, if this were someone – a loved one of mine, I might have a very difficult time keeping my emotions in check with regard to it.

Tr. 359, l. 15-Tr. 360, l. 1. Dr. Ward testified that V.S. was 38 inches in length and weighed 40 pounds at the time of her death. Upon his initial examination of V.S., he observed "virtually innumerable bruises present about [V.S.] on her stomach, on her back, and extending down to her lower legs." He stated State's Exhibit 2 accurately reflected the bruising on V.S. Tr. 391, ll. 3-17. Referencing State's Exhibit 4, he explained that there were scratching or abrasions to the

skin of the abdomen where the bruising was and that the bruising on her legs was confluent, meaning the bruises overlapped each other and appeared almost solid. Tr. 393, ll. 12-24. In his medical opinion, the bruises on V.S. were caused by blunt force injuries which he described as multiple blows to the skin and the tissue of V.S. Tr. 393, l. 25-Tr. 394, l. 6.

Turning to State's Exhibit 5, Dr. Ward again pointed out the various bruises that were merging as well as abrasions and scratching to the back of V.S. He testified that in his opinion the bruising to V.S.'s stomach and back was not consistent with incorrect hand placement during CPR. He stated the injures were "distinct areas of blows to the skin of the abdomen and separate blows to the skin of the back." Tr. 394, l. 7-Tr. 396, l. 22. He also opined that the Heimlich maneuver would not cause the injuries seen on V.S.'s abdomen. Tr. 398, ll. 9-23. Consistent with the witness testimony that had come before him, Dr. Ward also stated that he had never seen similar bruising on individuals who had CPR performed on them. Tr. 398, l. 24-Tr. 399, 2.

Dr. Ward explained that V.S. had pattern bruising which meant that she was struck with a non-anatomical object. He stated that at least some of the injuries were inflicted with a foreign object. He agreed that the injuries could have been caused by a belt based on the patterns in the bruising. Using State's Exhibit 2, he pointed out various pattern injuries that he had observed. Tr. 399, l. 20-Tr. 401, l. 6. Dr. Ward testified that the force used to injury V.S. not only caused bruising to the skin but disrupted "virtually all of the superficial blood vessels of the skin" which meant that not only was there bruising but also bleeding into the fat and muscle layer. The blows were made with enough force to cause the upper layer to separate from the lower muscle layer and blood collected between the two areas. He testified "this isn't what we think of as a traditional bruise of the skin. This is a severe deep injury that's tearing tissue from tissue and allowing blood to collect within the tissues underneath the skin." Tr. 401, l. 18-Tr. 402, l. 16.

Over objection, the State moved State's Exhibit 42,[7] a photograph from the autopsy of the internal damage to V.S.'s legs, into evidence. Tr. 402, l. 20-Tr. 403, l. 23. Dr. Ward explained that the photograph showed the back of V.S.'s legs from the thighs extending down to mid-calf. He stated there were some areas of relatively normal tissue, but the darker areas were where blood had bled into the fatty tissue of the skin. He pointed out an "avulsion pocket" which is where the tissue has been torn away from the underlying tissue and blood had pooled in the pocket. He stated the injuries were present on both legs. Tr. 404, l. 6-Tr. 405, l. 15. When asked about the force necessary to cause such injuries Dr. Ward testified

> Well, force is – is hard to describe. But this is – these are very forceful strong blows that can disrupt the tissue underneath. The classic description of an avulsion pocket is someone who's been hit by a car. So the back of their legs, it basically, emulsifies or liquifies the fat and tears that tissue plane. So this, certainly, isn't the force of a car, but I'm just saying it is a very strong force that would – multiple blows – very – multiple strong blows that would disrupt that tissue plane allowing blood to entire into those phases.

Tr. 405, l. 16-Tr. 406, l. 4.

Dr. Ward opined that based on the colorization and lack of healing that the injuries occurred to V.S. within the same reasonable time period of minutes to hours. He testified that V.S. died because she bled to death into the tissues of her abdomen and legs. Tr. 406, ll. 5-23. He further testified that a seven-year-old child could not inflicted that type of injury on V.S. and that the injuries V.S. suffered would have been painful. Tr. 407, l. 15-Tr. 408, l. 20. The official cause of death was multiple blunt force trauma injuries. Tr. 408, ll. 21-24. After Dr. Ward concluded his testimony, the court again addressed the gallery stating it knew that the testimony was difficult for everyone and that the court appreciated the demeanor of everyone throughout the testimony. Tr. 412, ll. 17-21.

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[7] A copy of this exhibit is on file with this Court.

The sixth and final witness to offer medical testimony was Dr. Christina Goben, the treating physician from the pediatric ICU unit at Greenville Memorial Hospital. Tr. 474, l. 23-25. Dr. Goben described V.S. as "the sickest of the sick" stating she barely had a pulse, that her blood pressure was about 80 over 40 to 50, her body temperature was 87 degrees, and that she was on a ventilator that was keeping her alive. She explained that a Glasgow Coma Score or GCS is an indicator of what a person can do in response to pain, verbal stimuli, and eye opening. When she examined V.S.. she determined her GCS was a three which mean she was not doing anything. V.S. could not respond to pain, could not move, could not talk, and never opened her eyes. She testified that a deceased person has a GCS of three. Tr. 47, ll. 4-22.

In discussing the bruising to V.S. the State presented Dr. Goben with State's Exhibits 2-5 but did not republish the photographs to the jury as the jury had already seen the pictures "lots of times." Tr. 478, ll. 5-11. In addition to the bruising on V.S.'s abdomen and legs, Dr. Goben had documented bruising to her ear. She opined that the bruising was non-accidental and described it as "extensive bruising on a child's body that was inflicted repetitively by blunt force trauma, which is the worst I've seen." Tr. 478, l. 16-Tr. 479, l. 4. She also testified that a seven-year-old child would not be able to inflict the types of injuries seen on V.S. Tr. 479, ll. 13-21. According to Dr. Goben, after V.S. had been injured she would not have been moving and would not have been able to eat or drink normally. Tr. 479, l. 22-Tr. 480, l. 7.

Both Appellant and Austin testified during trial. Austin testified that he met Appellant when she was fourteen years old and started dating her when she was sixteen or seventeen years old. At that time, he was around twenty-one years old. They were married in 2010 and had two biological sons K.R., who was fourteen at the time of trial, and A.R., who was eleven. He stated that the idea to adopt was originally Appellants but they both wanted to go through the process

despite the challenges of becoming parents to five children. Tr. 223, l. 6-Tr. 224, l. 16; Tr. 225, ll. 20-23; Tr. 230, ll. 8-20. He testified that Appellant handled the discipline of V.S. and that they both would discipline J.E. and C.E. Austin claimed he had a great relationship with V.S., stating she never gave him any trouble. He testified that Appellant's main problem with V.S. was her taking too long to eat. Tr. 232, l. 3-Tr. 233, l. 9. He further stated that Appellant had "issues with [V.S.] not listening or – and just not, you know, I guess abiding by the rules, being defiant, or anything like that." Tr. 239, ll. 7-10.

When V.S. was taking too long to eat Appellant would place her on a timer. When the timer went off V.S. would get a warning and another timer would be set. When the second timer went off V.S. either got a time out or a spanking from Appellant. Austin testified that Appellant would spank V.S. with her hand, a belt, or a little wooden paddle. He could hear V.S. being spanked and sometimes watched it happened but did not think it was bad enough that he needed to intervene. Tr. 234, l. 4-Tr. 235, l. 23. Austin stated that Appellant typically spanked V.S. in her room but sometimes would spank her in the kitchen. He could hear the spankings from the other side of the door when they occurred in V.S.'s room. Tr. 245, ll. 4-13.

Austin testified that the evening before V.S.'s death the family went to church and V.S. ate a snack on the way there. When they arrived at church V.S. had thrown up on herself which upset Appellant. He testified Appellant went inside to clean up V.S. and because they did not have a change of clothes or their debit card, they borrowed clothes from Appellant's sister for V.S. to change into. Tr. 240, l. 2-Tr. 241, l. 20. When they returned home, he gave V.S. a bath while Appellant went to the grocery store. During the bath, he noticed a light bruise on V.S.'s lower back. He testified that the bruise he saw was not the same as the bruising on V.S.'s back and legs that was shown while he was testifying. Tr. 243, l. 4-Tr. 244, l. 17.

According to Austin, he, Appellant, and V.S. were at home the morning of January 14. Austin was outside waiting for the family van to get towed and doing "little stuff in the yard." He testified that when he went outside V.S. was okay. While outside he could hear "a little fussing back and forth" about V.S. needing to eat her food before she got placed on a timer. He next heard a few minutes of crying which stopped before he heard Appellant start "fussing" again. He went inside, observed everything was fine and then returned outside. Tr. 246, l. 9-Tr. 248, l. 25. When he was back outside, he again heard Appellant fussing and V.S. crying. He stated he could not hear V.S. being hit but knew she was getting hit from her crying. Tr. 249, ll. 12-22.

Austin testified that after coming back inside he could hear Appellant getting louder with V.S. about eating her food and could hear V.S. being hit. He went upstairs and saw the bruising on V.S. and saw Appellant with a belt standing over V.S. He stated the bruising he saw was not as dark and defined as it was in the photographs. He testified he told Appellant "You've gone too far this time," and stated they gave V.S. an Epsom salt bath. He estimated the incident occurred over the course of about an hour and he never intervened. Tr. 250, l. 2-Tr. 253, l. 4. After the bath, V.S. was wrapped up in a heating blanket because she was cold. Austin went to CVS to get some children's Tylenol and stated he still was not inclined to call 911 at that point because V.S. was still coherent. Tr. 255, l. 4-21. He testified that V.S. then requested water and that she drank four or five cups of water before saying she felt like she was going to throw up and then going limp. Tr. 257, ll. 17-Tr. 258, l. 15. According to Austin, V.S. was naked wrapped up in the blanket and Appellant dressed her after 911 was called. Tr. 289, ll. 21-25.

Austin stated that he did not immediately call 911 or tell police what had happened because he was scared about getting into trouble and the kids being taken away. Tr. 228, l. 14-

Tr. 229, l. 23-16; Tr. 253, ll. 5-12. He also testified that he was trying to protect Appellant and so he did not interject when Appellant was blaming J.E. for the injuries to V.S. While looking at the photographs of V.S.'s injuries, he testified that J.E. did not cause the injuries to V.S. Tr. 229, l. 12-Tr. 230, l. 4. During cross-examination Austin admitted to chronically lying to Appellant throughout the marriage about numerous things as well as pawning family items to get money. Tr. 264, ll. 1-4; Tr. 276, l. 13-Tr. 279, l. 12. He confirmed that he disciplined the other children but stated he never disciplined V.S. Tr. 275, ll. 23-25. He also testified that he never used a belt on any of the children. Tr. 274, ll. 11-16.

Appellant testified that she was twelve years old when she first met Austin and that he was four or five years older than her. She confirmed they started dating when she was sixteen, were married in 2010, and had two biological sons. She also confirmed that it was her idea to adopt because she wanted a little girl but there was health risk with having more biological children. Tr. 506, l. 23-Tr. 507, l. 24. Appellant testified that V.S. was a perfect child that did not have a lot of behavioral issues and was really easy to get along with. She spoiled V.S. as the baby girl and showed her favoritism. Tr. 509, ll. 6-14. She stated that she and V.S. had a good relationship, that V.S. was her "mini-me" and wanted to do everything she did. Tr. 528, ll. 70-15.

Her testimony mirrored Austin's that the evening before V.S. died the family had gone to church and V.S. had thrown up on herself in the van. She stated V.S. had a ton of chips in her mouth and was trying to drink her water which caused her to throw up. She admitted to being frustrated, but stated she was frustrated with everyone, not just V.S. Appellant testified that she did not see any bruising on V.S. that evening while cleaning her up in the church bathroom. Tr. 510, l. 9-Tr. 514, l. 5. Appellant testified that after church she went to the grocery store and was

gone for an hour and a half to two hours while Austin was home with the children. When she returned home the children were all asleep. Tr. 515, ll. 1-25.

Appellant testified that on the morning of V.S.'s death she took the boys to school and was gone from the home for about forty-five minutes. When she returned V.S. was still sleeping so she began to make pancakes for V.S. to eat when she woke up. When she went to get V.S. up at around 10 that morning she found V.S. awake but still in her bed. She told her to come downstairs and eat her breakfast which she did. She testified it took V.S. about an hour to eat her breakfast but that she was not paying that much attention to her because she was on her computer with her headphones in. During that time, Austin was doing laundry and working on stuff downstairs. After V.S. finished eating, she went to her room and played by herself for about thirty minutes. V.S. came out of her room to tell Appellant that she had peed on herself, and Austin offered to clean her up. She stated Austin but her in leggings, a t-shirt, and a Pull-up. She testified that V.S. next asked for a popsicle but could not finish it because she got cold. Because V.S. was cold she offered to sit with her in a heated blanket and watch her shows. Tr. 516, l. 10-Tr. 520, l. 19.

While they were sitting together, V.S. ate some gummies and asked for water. She drank four or five cups of water before stating that her stomach hurt. Appellant testified her stomach felt full and she thought that V.S. had had too much between the food and water. Because V.S.'s stomach was hurting, and she had thrown up the previous night Appellant asked Austin to get some children's Tylenol. About thirty minutes to an hour later, V.S. started to throw up a little bit. Appellant could tell that V.S. still needed to throw up so she stood up and began the Heimlich maneuver on her. V.S. then went limp so she laid her on the stool to the rocking chair and began pressing on her stomach and trying to see if there was anything inside V.S.'s mouth.

Appellant stated that every time she pressed on V.S.'s stomach fluid and throw up would come out of her mouth. She thought it sounded like V.S. had fluid in her lungs and was possibly choking. She instructed Austin to call 911. Tr. 520, l. 25-Tr. 523, l. 22.

Appellant testified that she was in shock. As she watched the firefighters perform CPR on V.S. she realized she had been doing CPR wrong. She told police she had caused the bruising on V.S.'s stomach because she had been pushing on V.S. and had done it wrong so she just assumed she made the bruise. When she heard EMS state that V.S. had bruising on her legs she stated that J.E. had bruised her before and maybe he had put bruises on her again because he had some anger issues. Appellant maintained that she did not see the extent of the bruising to V.S. until after she was arrested. Once she saw the photographs, she did not think J.E. had caused the injuries. She testified that after hearing the medical testimony she did not think it was possible that J.E. could have caused the bruises on V.S. or that she could have caused the bruising to V.S.'s abdomen. Tr. 524, l. 13-Tr. 527, l. 7.

When she watched Austin's interview with police she immediately said, "He's lying." She testified that their marriage was very shaky, and she had planned to leave with the children once the adoption was finalized. She confirmed that Austin regularly lied to her throughout the course of the marriage about various things and that he had "one of the scariest type [sic] of anger issues. Because he holds everything in and doesn't let it out. And then when it does come out, it's too much." Appellant testified that she knew something terrible happened to V.S. and that she did not think J.E. harmed V.S. because he had never left bruising on her like the bruises that were discovered that day. Tr. 528, l. 16-Tr. 531, l. 13.

On cross-examination, Appellant testified that corporal punishment was not legally wrong and that she had been spanked by her father growing up. She maintained that if she used

a belt when discipling the children, she would have used it within the bounds of the law, however she did not like to use belts when she spanked the children. Tr. 540, l. 12-Tr. 541, l. 24. Appellant adamantly denied hitting V.S. with a belt that morning and testified that Austin did not see her with a belt in her hand. Tr. 551, ll. 10-15. She testified that she did not lie about J.E. because he had a history of lying and abusing V.S. which she had reported to DSS, his school counselor, his guardian ad litem and the children's doctor. Tr. 557, ll. 7-13. Appellant maintained she did not see V.S.'s legs prior to stating that J.E. had caused the bruises and she had not thought that the bruising was significant. She testified if she had seen the bruising and how significant it was, she would have never thought J.E. was capable of injury V.S. in that manner. Tr. 557, l. 20- Tr. 560, l. 5. Appellant agreed that J.E. was not responsible for the injuries to V.S., that V.S. had been beaten to a pulp, and it had to have been by her or Austin. Tr. 562, ll. 18-25.

Discussion

The medical testimony in Appellant's case was extensive, detailed, and graphic. The numerous descriptions of the injuries to V.S. from the various medical professionals adequately portrayed the abuse that V.S. suffered before she died. The graphic, full color photographs were not necessary for the State to prove its case. The State's repeated and gratuitous use of the photographs throughout the trial only enhanced the prejudicial impact on Appellant. The probative value of the photographs was substantially outweighed by the unfair prejudiced the admission the photographs caused to Appellant and the circuit court erred in allowing the photographs into evidence.

All relevant evidence is generally admissible. Rule 402, SCRE. To be relevant, the evidence must have a "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. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

Photographs 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. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d. 201, 206 (Ct. App. 2008).

The appellate courts of our State have had numerous opportunities to review a trial court's admission of gruesome photographs. In State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997), the appellant was charged with armed robbery and murder. He argued that the photographs admitted into evidence by the trial court were highly prejudicial and served no purpose other than to arouse passion and prejudice in the jury. Appellant asserted other graphic testimony of how the victim was killed had already been given by the forensic pathologist and law enforcement officers. Therefore, the pictures were unnecessary, and their prejudicial effect outweighed their probative value. Id. at 78, 480 S.E.2d at 71-72. Our Supreme Court held that the photographs of victim's body at the crime scene were properly admitted because the

photographs showed the crime scene and position of the victim's body, supported the testimony of several witnesses, and were relevant to the nature of the crime. Id.

In State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), the defendant was convicted of homicide by child abuse for the death of her minor child. Id. at 281, 676 S.E.2d at 692. On appeal, Holder argued the trial court erred in admitting autopsy photographs showing the child's internal injuries. Id. at 290, 676 S.E.2d at 697. Holder's unconscious child was taken to the hospital and personnel was told that he had fallen off an All-Terrain Vehicle (ATV) earlier in the week. Id. at 281, 676 S.E.2d at 692. The child was pronounced dead at the hospital after unsuccessful efforts to resuscitate. Id. At, trial the pathologist testified that the contested autopsy photographs would help him in "demonstrating the anatomic relationships and the disruption of those anatomic relationships" because the jury might not have knowledge of internal anatomy. Id. at 290, 676 S.E.2d at 697. The Court upheld the admission of the photograph because they "clearly demonstrate the extent and nature of the injuries in a way that would not be easily understood based on the testimony alone" and aided the pathologist testimony. Id. at 290-291, 676 S.E.2d at 697.

In State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014), autopsy photographs of a child who had been killed by defendant's dog were admitted. In that case the Supreme Court found that the trial court did not abuse its discretion in admitting the photographs because the photographs were highly probative, corroborative, and material in establishing the elements of the offenses charged." Collins, 409 at 535, 763 at 28.

In State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986), the Court held the trial court erred in admitting three color autopsy photographs of one of the victims in a capital murder trial. Although the photographs were used to corroborate other evidence, the trial judge erred in

permitting their introduction because they were unfairly prejudicial. The Court held that because it was clear the facts were not in dispute and because the testimony of a forensic pathologist "negated any arguable evidentiary value of the photographs[,]" the "prejudice created by the photographs clearly outweighed any evidentiary value." Id. at 23-24, 339 S.E.2d at 693.

Appellant's case can be distinguished from cases such as Brazell, Holder, and Collins, *supra*. There was no testimony in the record that the medical examiner or other various medical personnel needed the photographs to aid the jury in understanding the injuries that V.S. suffered. The photographs did not show V.S. at the crime scene, nor were the necessary to establish the elements of the offense charged. Much like the photographs in Middleton, the information contained within the photographs presented during Appellant's trial was not at issue. The case was a question of who had beaten V.S., not how or if she had been beaten. Further, the extensive and descriptive medical testimony by not only the forensic pathologist but the treating ER physician, the treating ICU physician, and the various first responders negated any probative value the photographs may have had.

Not only were the photographs graphic but they were gratuitously used by the State. After being introduced through Investigator Weibel, various photographs at issue were repeatedly shown to the jury during the testimony of Givens, Jennings, Koehler, Dr. Granger, Dr. Ward, and Austin Robinson. The pictures were before the jury so often that the State, during the questioning of its final witness Dr. Goben, chose not to republish them for the eight time and admitted that the jury had already seen the photographs "lots of times" by that point in the trial. Notably, even the circuit court admonished those in the gallery that the testimony and photographs would be graphic and upsetting, further highlighting the prejudicial nature of the images.

The State originally argued that the photographs were necessary to show that the injuries were not caused by an accident, that the injuries were not caused by a seven-year-old child, and that the autopsy photograph in particular showed the force used to injury V.S. However, at trial Appellant admitted that the injuries to V.S. were not caused by an accident and were not caused by a J.E., negating the State's first two reasons for the photographs. Regarding force, the medical examiner testified the injuries were similar to when a person is struck by a car, a vivid description that certainly put into perspective the amount of force used to cause V.S.'s injuries.

The witnesses that provided medical testimony stated that the bruising on V.S. was not like anything they had ever seen before, many describing the injuries as the worst they had seen. The bruises were accurately and vividly described, including size, color, and location. The damage to the internal structure of V.S.'s legs was also described in painstaking detail. The photographs were corroborative of this testimony but wholly unnecessary for the State to prove its case. The graphic and disturbing color photographs of V.S., shown over and over to the jury, served no other purpose than to inflame the passions of the jurors. The extensive amount of testimony in the case adequately portrayed the injuries suffered by V.S. Based on the entire record and the facts of the case, the admission of the photographs in this matter was an abuse of discretion by the trial court as any probative value was substantially outweighed by the unfair prejudice caused to Appellant.

Criminal prosecutions occurred prior to the advent of photographic technology and juries returned verdicts without being subjected to graphic and gruesome photographs of victims. The State has continued to push the envelope of what is proper in criminal prosecutions. As our Supreme Court stated in State v. Torres, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010),

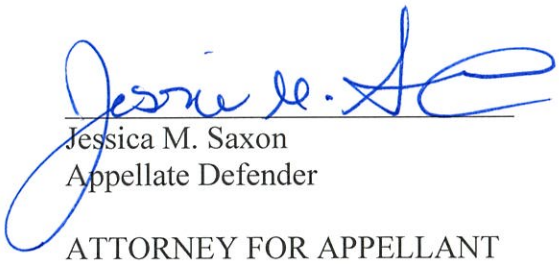
> Although we affirm the admission of the photographs, we take this opportunity to address an area of growing concern to this Court. The photographs

> at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. Moreover, the State also sought to introduce evidence in the form of an autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.

This Court should hold that the photographs admitted in this matter went beyond the outer limits of what the law allows based on the facts and issues in this case. The State pushed too far by admitting and repeatedly publishing the photographs of V.S. and Appellant's conviction should be reversed on this ground.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests that this Court hold that the photographs were improperly admitted, and Appellant's case should be reversed and remanded to the General Sessions Court of Greenville County for a new trial.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of July, 2023.