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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DAUNTE MAURICE JOHNSON,

APPELLANT.

Appellate Case No. 2022-000931

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

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

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

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

STATEMENT OF THE CASE

On the night of August 4th and into the early morning hours of August 5th, 2019, appellant Daunte M. Johnson murdered Sharee Bradley and her minor daughter Navaeh [last name omitted] in Sumter County. Johnson was arrested on August 5, 2019, for Sharee Bradley's murder.[1] On October 3, 2019, the Sumter County Grand Jury true-billed a 4-count indictment against Johnson for 2 counts of murder, and 2 counts of possession of a weapon during a violent crime (Ind. # 2019-GS-43-0916). Johnson proceeded to a jury trial from June 20-24, 2022, before Circuit Court Judge R. Ferrell Cothran, Jr. Johnson was represented by Elizabeth H. Neyle and Emily Crayton. The State was represented by Solicitor Ernest A. Finney, Jr. (Pretrial Tr. 1; Tr. 1). At the trial's conclusion, the jury found Johnson guilty on all 4 counts. (Tr. 589). Judge Cothran sentenced Johnson to life without parole (LWOP) for each count of murder, followed by consecutive

[1] Sharee Bradley's body was discovered the same day Johnson was arrested. Her minor daughter's partial skeletal remains were not discovered until weeks later. The minor daughter's blood was found in a dumpster and at the back door of Sharee's apartment, and DNA confirmed the blood at the door was Naveah's and Johnson was arrested for her murder that day, August 26, 2018.

sentences of 5 years for each count of possession of a weapon during the commission of a violent crime. (Tr. 600, ll. 12-22; Tr. * (Sentence Sheets)).

RESPONDENT'S STATEMENT OF FACTS

Brief Statement of the Crimes

On Sunday night August 4th into the early morning house of Monday, August 5th, 2019, appellant Daunte Johnson ("Johnson") murdered his former girlfriend Sharee Bradley ("Sharee") and her 5-year-old daughter Navaeh, by stabbing them both to death. Johnson obtained the knife used in the murder from a friend whose home Johnson had previously stayed in about a year earlier. After murdering Sharee and the child, Johnson wrapped Sharee's bloody body in a rug/carpet and left it in the den area of Sharee's home where the crimes occurred and carried the minor child's body to a garbage dumpster where he placed it. A garbage truck picked up the contents of the dumpster and unknowingly carried the child's body to a landfill where the dumpster's contents were emptied. After a series of deceptive statements, Johnson eventually confessed to the murders and identified the dumpster in which he had placed the child's body. Police found blood in the dumpster. Police were able to determine through investigation where the garbage truck dumped its contents in the landfill. As a result, a massive search was conducted of that area of the landfill and each layer of garbage looking for the child's body. After weeks of searching for what was compared to attempting to locate a needle in a haystack, partial skeletal remains of the child were found under layers of garbage. (Tr. 24-123; 125-38; 265-341; 346-449; State's Ex. #s 55, 59, 60 [statements of Johnson), 64 [photo of recovered bones and bone fragments]).

The evidence against Johnson

The victims, Sharee and her minor daughter Navaeh, lived in Lantana Apartments, formerly known as Gamecock Apartments, in Sumter, S.C. Sharee had 2 other children, both

boys, by 2 other men. Sharee's sons also lived with her and their half-sister Naveah. Sharee had just moved to Lantana Apartments a few months before her and her daughter's deaths. (Tr. 25-42; 43-63; 64-71; 87-102; 103-23).

Appellant Johnson had lived with Sharee and her 3 children approximately a month and a ½ prior to the murders. The relationship between Johnson and Sharee was toxic, and residents of Lantana Apartments complained to the apartment manager about overhearing arguments or fights between Johnson and Sharee. In the week before the victims' deaths, the apartment manager had already confronted Johnson about the difficulties between Johnson and Sharee and told Johnson that he was going to have to move out or the arguments would have to stop. The Friday before the victims' deaths, Johnson asked the apartment manager for her help in getting his clothes out of Sharee's apartment. Another neighbor, Patsy Moore ("Patsy"), testified Johnson slept on her couch on the Friday and Saturday nights before the murders; there was an altercation between Johnson and Sharee on Sunday night, August 4th, and Patsy made Johnson leave her apartment Sunday night because he would not apologize to Sharee for calling her profane names during that altercation. (Tr. 24-42; 43-63; 64-71; 73-86; 87-102; 346-73).[2]

One (1) of the things Johnson and Sharee disagreed about was Sharee allowing 1 of her sons, "C.J.", to stay up late playing video games. A couple of days before the murders, the father of C.J. confronted Johnson about how Johnson had disciplined C.J. C.J.'s father told Johnson to leave Sharee's apartment, and Johnson left. However, the next day, C.J.'s father again saw Johnson in the apartment complex and threatened to beat-up Johnson if he did not leave. Johnson told C.J.'s father that he had nowhere to go. (Tr. 24-42; 43-63; 64-71; 73-86; 87-102).

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[2] Johnson later admitted to police he called Sharee "bitches and whores" on Sunday night during that argument. Sharee was seeing another man, which will be discussed later herein. (Tr. 290-91).

Around the same time, Johnson went to a friend, Mike James (called "Uncle Mike"), and asked him if he could borrow a gun. Uncle Mike lived with Winona Cody, her daughter Courtney, and her son Cody Daney ("Daney") in a duplex apartment on Susie Rembert Street in Sumter near Lantana Apartments. Johnson had lived with this family previously but moved out when he met Sharee. Uncle Mike told Johnson he did not have a gun but gave Johnson a large custom collectible folding knife belonging to Uncle Mike's nephew Daney.[3] The custom collectible knife was kept in Daney's bedroom. Johnson told Uncle Mike he would return the knife directly to Daney. The obtaining of the knife occurred on or about August 3rd or 4th, 2019. The same neighbor who allowed Johnson to sleep on her couch, Patsy, overheard a conversation between Johnson and Uncle Mike a day or 2 before the murders. Uncle Mike wanted the knife back from Johnson, but Johnson told Uncle Mike he would return the knife to its owner, Daney, later. On Sunday, Daney asked Johnson for the knife back, and Johnson denied having it. Daney told Johnson that he knew Johnson had his knife *and* he wanted it back. Johnson then promised to return the knife but did not until after the murders. (Tr. 103-23; 125-38; 139-66).

The night of Sunday, August 4th, 2019, Sharee's son C.J. was upstairs in Sharee's apartment in his bedroom playing video games with his headphones on with his baby sister Naveah lying beside him. Sharee and Johnson were downstairs in the den/living room. At some point, C.J. picked up his sister Naveah and placed her in his mother's bed. C.J. went back to playing video games with his headphones on. During the night, after C.J. finally went to sleep, Johnson came upstairs into C.J.'s room and asked C.J. for a mop, which C.J. gave him. Johnson then went back downstairs with the mop. C.J. went back to sleep. Sharee's neighbor, Patsy, testified that at about

[3] While the knife is a folding knife, it is a huge knife. It is not a pocketknife. It is the size of a hunting knife.

3:00 a.m. on August 5th, Johnson came in her apartment and took a shower. Around 4:00 a.m., Patsy looked out her window and saw Sharee's chair outside the front door of Sharee's apartment, where Johnson would normally sit and use the WiFi. When Sharee's son C.J. woke up late the next day, August 5th, he went downstairs and found his mother deceased, bloody, and wrapped in a rug. He immediately went to the apartment manager, and the manager came and saw Sharee dead and wrapped inside the rug. The apartment manager called 911. Police arrived shortly. C.J. spotted Johnson outside near the apartments and pointed him out to police. Johnson fled on foot to Winona's duplex apartment where the murder weapon came from and where Johnson had previously lived. Police pursued Johnson on foot. (Tr. 43-63; 103-23).

August 5th was Daney's birthday. In the late afternoon of August 5th, Daney was at home in his mother's duplex apartment on Susie Rembert Street and about to take a shower when he saw Johnson in the kitchen. Daney saw Johnson cleaning Daney's collectable knife, which Uncle Mike had previously given Johnson. Johnson was cleaning the knife at the kitchen sink. After cleaning the knife 2 times, Johnson then gave Daney his knife back. When Daney closed the knife, it felt like it was not completely clean. Daney returned the knife to his bedroom but was completely unaware of what Johnson had previously done with the knife. Daney then started taking a shower and heard a ruckus outside, which was the police pursuing Johnson after C.J. pointed him out. Daney got out of the shower and saw Johnson coming through the front door while Winona ran outside, leaving only Daney and Johnson in the home. Winona testified police were outside her home attempting to arrest Johnson, and as she exited her home, Johnson went in the front door and locked the front door behind him. Daney testified that as police arrived at the door, Johnson went in the kitchen and armed himself with a kitchen knife saying: "I can't let them take me." Daney asked Johnson what police were there for, and Johnson stated police were after him because they

believed he injured a woman next door. Daney told Johnson in no uncertain terms that he should go outside and face the police for what he had done and not resist or try to evade arrest. Daney then left his mother's duplex apartment. Daney and police were eventually able to talk Johnson out of the home and Johnson surrendered. Before leaving Winona's home, Johnson stuck the large [butcher type] kitchen knife he armed himself with into the living room couch. Upon police entering the home, police searched and discovered the large kitchen knife stuck in the couch and photographed it and took it into evidence. They also took into evidence the murder weapon, Daney's large collectible knife located in Daney's bedroom. (Tr. 139-66; 167-89; 72-86; 265-71; State's Ex. 37 & 38). That knife was sent to SLED and tested positive for blood. (Tr. 521-25).

Upon his arrest, on Johnson's person, police found Sharee's driver's license and the Social Security cards of Sharee and Naveah. (Tr. 72-86). Police recovered Sharee's body from her den/living room floor, but Naveah was missing from the home. C.J.'s brother was out of town at the time of the crimes. The autopsy of Sharee determined Sharee had been stabbed 14 times with a sharp object consistent with Daney's collectible knife, which Johnson had in his possession at the time of the crimes. Sharee had also been severely beaten. She had several teeth knocked out. (Tr. 446-60).

After his arrest, Johnson was questioned at the police department in Sumter. In his first statement to police, Johnson claimed Dupray Adams, the father of 1 of Sharee's children, told Johnson he was going to kill Sharee and hired Johnson to removed Sharee's body and destroy the remains for $5,000. Johnson then changed his statement shortly after that to say that another father of 1 of Sharee's children, C.J.'s father, contacted him and offered him $20,000 if he killed Sharee and Naveah. Johnson then changed his statement again and admitted he stabbed Sharee and the minor child to death, wrapped the minor in a black and pink rug, and put the minor's remains in

the dumpster behind the apartment complex. Johnson admitted to police he had gotten the knife used in the murder from Daney. (Tr. 271-84; 286-374; State's Ex. 55, 59, 60 [Johnson's statements]). Johnson also confessed on the way to jail to Officer Tabitha Adams a patrol officer and another officer, Officer Austin. Johnson told Officers Adams and Austin he had murdered 2 people. (Tr. 341-45).[4] Johnson stated he did not kill the 2 victims on purpose but felt he had to kill the 2 victims. (Tr. 341-45).

Sharee was romantically involved with another man, Darryl Spann. Spann last talked to Sharee on Sunday night, August 4, 2019, at 9:30 to 10:00 p.m. Sharee was alive and well at that time, but she kept having to stop and start the conversation, including going to the front door once. During the call, or the night before, Sharee texted Spann a picture of herself. Spann talked to Sharee for about 20 minutes on that Sunday night, and Sharee was fine when Spann and Sharee ended the call with "goodnight." Spann testified that on the morning of Monday, August 5, 2019, at approximately 6:28 a.m., while he was at work, he received a text from Sharee's phone. It was just a photograph of Sharee, the same photo she had texted him before. Sharee's phone was never recovered by police. Johnson disposed of it somewhere after the murders. (Tr. 190-20).

Police found Naveah's blood just at or outside the back door of Sharee's apartment. Police also discovered blood in the bottom of the dumpster Johnson pointed out. Police then tracked the dumpster's contents to a vast landfill in Richland County. Police were able to narrow down the area of the landfill to a certain area based on the garbage truck, the dumpster, and the landfill's

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[4] Johnson was also returned to the police station multiple times from prison in the weeks that followed and gave recorded statements assisting police in locating Naveah's body. In some of these statements, Johnson refused to admit he killed the victims as he stated in his earlier statement. He claimed on at least 1 occasion that he blacked out and woke up finding the 2 bodies. But, he admitted he had placed Neveah in a certain dumpster, and had tried to move Sharee's body but was unable to or just couldn't do it. In one statement, when asked about killing the victims, Johnson claimed it was demons that cause the murder. (Tr. 371-72).

records. Police then conducted a vast grid search of this area of the landfill and carefully removed layer upon layer of garbage. After an extensive search, lasting weeks, with numerous volunteers involved, police located only partial skeletal remains of the minor child on October 18, 2019. Specifically, some bones from the lower half of the body, and only fragments of the skull were recovered along with some decayed muscle or soft tissue. These remains were photographed at the Coroner's Office. Based on these skeletal remains, a forensic anthropologist determined the remains were those of a small child. Also, DNA analysis of the skeletal remains confirmed the remains were those of Naveah. Because of the particular bones and fragments found, it was clear that the minor child was deceased. (Tr. 324-41; 374-449; State's Ex. 64 [skeletal remains]). However, because of the limited bones and fragments recovered it was impossible for the pathologist and the anthropologist to tell how she died from the bones and fragments alone. The other circumstantial evidence at the crime scene and Johnson's statements led to the conclusion Naveah, like her mother, was stabbed to death. (Tr. 324-41; 374-449; State's Ex. 64 [photograph of bones and bone fragments).

Police also processed the crime scene in the den/living room of Sharee's home. There they found cast off blood on the walls and ceiling and blood on the floor. There was cast off blood and blood on the floor where Sharee was killed. And, there was cast off blood in the area where it appeared Naveah had come down the stairs to the den and Johnson killed her. Sharee's DNA was found in the blood at the crime scene and Navaeh's DNA was also found. One (1) sample, State's Ex. 24, taken at the crime-scene contained DNA consistent with Sharee's, the minor victim's, and Johnson's as a mixture. There was also evidence someone had attempted to clean up the crime scene with a mop. That mop's handle contained the DNA consistent with Sharee, Naveah, and Johnson. (Tr. 206-23; 228-46; 501-21).

The State also introduced jail calls between Johnson and his mother and aunt. In those calls, Johnson admitted he told police that he alone killed Sharee and Naveah. Johnson also admitted in another call that he placed Naveah's body in the garbage dumpster after the murders. (State's Ex. 56).

Appellate Issue I.

> Did the trial court err under Rule 403, SCRE in admitting (a) a photo of partial skeletal remains recovered under layers of garbage at a vast landfill which Johnson pointed police in the direction of, which corroborated Johnson's confessions, corroborated police testimony of finding the skeletal remains, demonstrated the reality the missing victim was in fact deceased; explained why no expert could determine the exact cause of death to the child victim, depicted the bones the anthropologist used to determine the remains were human and those of a child; and, depicted the bones used to obtain a DNA sample linking the bones to the minor victim, and (b) another pair of photographs of the kitchen knife Johnson armed himself with when he fled from police when being pursued for the murders and stated: "I can't let them take me" showing consciousness of guilt for the crimes and an attempt to evade arrest, and which he stuck in a couch after agreeing to surrender.

What occurred below as to State's Ex. 64

During the testimony of the State's forensic anthropologist, William Stevens, the State marked for identification and later moved to admit State's Ex. 64. State's Ex. 64 is *a single black and white* photo of the limited skeletal remains of the minor child recovered from the landfill after a 10-week search, which shows leg bones, a foot, and fragments of the skull, along with some decayed soft tissue. (State's Ex. 64). The limited remains are lain out separately on a clean metal table in the approximate location they would be anatomically. (State's Ex. 64). The photo was taken at the Coroner's Office. (Tr. 374-409). The photo is not a photograph of a body, gruesome wounds, or the face of the child while deceased or in life. (State's Ex. 64). There is no blood. (State's Ex. 64). It is a scientific or anthropological type of photograph. (State's Ex. 64). It is a photo of the bones the anthropologist used to determine these were not animal bones but human

bones; they were the remains of a child, and the same bones used to obtain a DNA sample that was used to identify the remains as those of Naveah. (Tr. 398-412; See also 413-14).

Johnson objected to the admission of the photo (Tr. 374-409; State's Ex. #64; 409, 413).[5] Johnson objected below and objects now only on Rule 403, SCRE, grounds. (IBOR; Tr. 409; 413-14). Johnson does not object on relevance grounds, but only that the prejudice from the admission of the photo substantially outweighed its probative value and it was needlessly cumulative. (IBOR; Tr. 409; 413-14). Johnson is wrong.

The State introduced the photo because: (1) it proved the minor victim's partial skeletal remains were actually found under layer upon layer of garbage in a vast landfill which corroborated appellant's confession that he placed the minor victim in a specific dumpster after murdering the child and her mother; (2) the photos corroborated the testimony of police that the minor victim's partial remains were discovered and where they were discovered; (3) the photo shows the bones from which DNA was obtained to identify the victim; (4) the photo shows the actual bones the anthropologist used first to determine these were not animal but human bones and this victim was in fact a child; (5) the photo demonstrated that the minor victim was in fact deceased based on the bones and fragments recovered; and, (6) the photo demonstrated why a specific cause of death to the child could not be determined by autopsy. Judge Cothran admitted the 1 photo over Johnson's objection finding it was relevant to prove a material fact in issue and to corroborate the anthropologist's testimony and its probative value outweighed any prejudicial effect. (Tr. 413-14).

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[5] Johnson did not object to this photo pre-trial as he did the 2 photos of the kitchen knife discussed below. (See Pre-trial Tr.). He raised a general objection at the time this photo was offered in evidence and then stated his actual objection was under Rule 403, SCRE after the witness testified. (Tr. 409; 413-14). The State did not proffer its reasons for offering the photo into evidence at the time it was moved into evidence or when Johnson stated his objection. Judge Cothran simply admitted the photo over Johnson's objection. (Tr. 409, 413-14).

What occurred below as to State's Ex. 37 & 38

Johnson also objected to the admission of 2 photographs of the large kitchen knife he armed himself with when police were pursuing him shortly after C.J. spotted him on the street and which he was holding when he stated to Daney that he, Johnson, was not going to allow police to take him. (Pre-trial Tr. 191-92; Tr. 158-59; 247-48; State's 37 & 38). One (1) of the photos shows the location of the knife from a distance showing its placement in relation to the couch and room. The other photo is a close-up showing the size of the knife and how it was stuck into the couch and where. (State's 37 & 38). Johnson argued the 2 photos were irrelevant and their prejudicial effect outweighed their probative value. (Pre-trial Tr. 191-92; Tr. 158-59; 247-48).

The State sought to admit these photos because they were relevant and admissible because they depicted the large knife Johnson armed himself with during his flight from police and when he stated his intent to resist or attempt to evade arrest and demonstrated his seriousness to do so. They also corroborated Daney's and his mother's testimony regarding Johnson's statement and actions after the crimes when fleeing and attempting to evade arrest showing a consciousness of guilt. (Pre-trial Tr. 191-92; Tr. 158-59; 247-48). Additionally, there was no prejudice to Johnson regarding the admissibility of the photos of the knife as the knife was admittedly not the murder weapon, but only a weapon Johnson admittedly armed himself with to evade capture or arrest and then put in the couch cushions after he changed his mind and decided to surrender. (Pre-trial Tr. 191-92; Tr. 158-59; 247-48). Further, the State admitted the large kitchen knife in evidence, which Johnson does not challenge on appeal in this issue. (IBOR, Appellate Issue I.). Judge Cothran admitted the photos of the kitchen knife over Johnson's objection finding based on Johnson's actions at the time, the photos of the kitchen knife were relevant and admissible as evidence of

flight or an attempt to evade arrest from which the jury could infer guilt and their probative value outweighed any prejudicial effect. (Tr. 158-59; 247-48)

ARGUMENT I.

Judge Cothran did not abuse his discretion under Rule 403, SCRE, in admitting: (1) a photo of partial skeletal remains of the missing victim recovered under layers of garbage at a vast landfill which Johnson pointed police in the direction of, which corroborated Johnson's confessions, corroborated police testimony of finding the skeletal remains, were the bones used to determine the remains were those of human child, were used for DNA identification, demonstrated why a cause of death could not be determined from an autopsy, and demonstrated the reality of and proved the missing victim was in fact deceased; or (2) another pair of photos of *a large kitchen knife* Johnson armed himself with when he fled from police while being pursued for the murders and stated: "I can't let them take me" indicating an intent to attempt to evade arrest for the murders and which he stuck in a couch after agreeing to surrender, which showed consciousness of guilt for the crimes and corroborated the testimony of Daney and his mother about Johnson's actions after the crimes; regardless, the admission of any of the above photos was harmless because the evidence was cumulative to other evidence and because of the overwhelming evidence of guilt including multiple confessions, physical evidence including DNA, and eyewitness' testimony.

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)(citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011)(quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." Id.; *see also* State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed

absent a showing of probable prejudice." State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180 (1986).

"The relevancy and materiality of a photograph is left to the sound discretion of the trial judge." State v. Edwards, 194 S.C. 410, 10 S.E.2d 587, 588 (1940). "Although photographs may be used to corroborate other evidence, it is well established that *photographs calculated to arouse the sympathies and prejudices of the jury* are to be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986)(emphasis added)(internal citations omitted). "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. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (emphasis added).

Additionally, Rule 403, SCRE, provides even relevant evidence is to be excluded "if its probative value is **substantially outweighed** by the danger of **unfair** prejudice." Rule 403, SCRE (emphasis added). In order to constitute **unfair prejudice**, "the photographs must create a tendency to suggest a decision on *an improper basis*, commonly, although not necessarily, an emotional one." State v. Kelley, 319 S.C. 173, 178, 460 SE.2d 370, 370-71 (1995)(quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E. 146, 149 (1991)). Further, a trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004).

ANALYSIS

Johnson cannot show an abuse of discretion under Rule 403, which is the only issue he raises. Generally, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means evidence having 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. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." or is needlessly cumulative. Rule 403, SCRE. This Court recently set forth again the applicable standard for the admissibility of photos in State v. Heyward, 432 S.C. 296, 321-22, 852 S.E.2d 452, 464-65 (Ct. App. 2020), *cert. granted*, November 23, 2022.

> "The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). A trial court's "decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). In balancing the danger of unfair prejudice with the probative value of a piece of evidence, "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).
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> "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. 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)). "[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). However, "[i]t is well settled in this state that '[i]f the [...] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" Torres, 390 S.C. at 623, 703 S.E.2d at 229 (first alteration in original) (quoting Nance, 320 S.C. at 508, 466 S.E.2d at 353). Our courts have found autopsy photographs may be admitted "in an effort to show the circumstances of the crime and character of the defendant." Id. "'The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.'" Collins, 409 S.C. at 535, 763 S.E.2d at 28 (quoting Nichols v. State, 267 Ala. 217, 100 So. 2d 750, 756 (1958)).

Heyward, 432 S.C. at 321-22, 852 S.E.2d at 464-65. Under this standard of review, Judge Cothran did not abuse his discretion under Rule 403, SCRE, and Johnson has not shown any prejudice.

There is no better way to illustrate a crime scene [or the recovery of a victim's remains or the circumstances of defendant's capture] to a jury than by a photograph. State v. Kelly, 46 S.C. 55, 24 S.E. 60 (1896). And, the admissibility of a photograph into evidence is within the sound discretion of a trial judge. Matthews, 296 S.C. 379, 373 S.E.2d 587. *See* Collins, *supra* (court's admission of pre-autopsy photographs of the victim, who had been mauled by dogs, was not an abuse of discretion). If a photograph serves to corroborate oral testimony, it is not an abuse of discretion to admit it. Collins, 409 S.C. at 534, 763 S.E.2d at 27. "Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder." Id.

> Even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case, are useful to enable a witness to testify more effectively, or enable the jury to better understand [the] testimony. Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries, and the position in which the bodies were discovered."

Id. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). "[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." Id.

(1) Judge Cothran did not abuse his discretion under Rule 403, SCRE, in admitting State's Ex. 64

In State v. Kelsey, 331 S.C. 50 502 S.E.2d 63 (1998), where the victim's body was found 45 days after her murder, the Court rejected the argument the crime scene may have been disturbed by nature or altered by other forces and held the photos of fragments of the victim's bones and bomb fragments were admissible as being accurate depictions of the crime scene as found by law

enforcement and corroborated testimony. In State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995), photos of the crime scene which included 2 photos of the victim's nude body with her face and body visibly swollen from the beating she received, were relevant to establish the crime scene and prove malice were held admissible. In Heyward, *supra*, the Court stated as follows:

> In State v. Gray, this court found the trial court did not abuse its discretion when it admitted three photographs, which were taken during an autopsy and showed the victim's exposed skull and brain. 408 S.C. 601, 609, 619, 759 S.E.2d 160, 165, 170 (Ct. App. 2014). This court found the photographs had probative value because they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and cause of death and were important to the State's ability to prove malice. Id. at 612–16, 759 S.E.2d at 166–68.

Heyward, 432 S.C. at 321–22, 852 S.E.2d at 465. In Heyward, this Court admitted autopsy photos that it found were admissible for several reasons: they were probative on malice, they corroborated the pathologist's testimony, and after viewing them, they were not unduly prejudicial. Id. at 322-23; 852 S.E.2d at 465-66.

In State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997), the Court upheld the introduction of photos in a murder prosecution that showed "the crime scene and the position of [the victim's] body." Brazell, 325 S.C. at 78–79, 480 S.E.2d at 72. The Court explained the "photographs supported the testimony of several witnesses and were relevant to the nature of the crime. The State used the photographs to establish that the murder was a deliberate and calculated act. These photographs corroborated [testimony] concerning the location of the body on the side of the road . . . ." Brazell, 325 S.C. at 78–79, 480 S.E.2d at 72.

Likewise, the Court in State v. Robinson, 201 S.C. 230, 22 S.E.2d 587 (1942), found no error in the admission of photos in a murder prosecution of "the body at the location at which it was found." The court explained the photos were "corroborative of the spoken word" and "showed material conditions which existed." Robinson, 201 S.C. 230, 22 S.E.2d at 588–89. *See also*

Edwards, 194 S.C. 410, 10 S.E.2d 587 (no error in the admission of pictures of a dead body "found on the side of a public road"); State v. Thompson, 420 S.C. 192, 802 S.E.2d 623 (Ct. App. 2017) (finding no error in the admission of pictures of a dead body "as found at the crime scene").

Here the State introduced only 1 photo of the skeletal remains; it was a black and white photo; and, it contained only partial remains, i.e. leg bones, a foot, pieces or fragments of the skull, and decayed soft tissue that appears as dark matter in the photo, that were recovered at the landfill after an extensive search. (Tr. 374-409). There was no blood, or any wounds, just partial remains on a clean table showing what was found at the landfill and proving victim had to be deceased. (Tr. 374-409; State's Ex. 64). The photo showed all that remained of the minor victim because of Petitioner placing her in a dumpster instead of leaving her body at the crime scene like her mother. (Tr. 374-409; State's Ex. 64). This photo in no way compares to other gruesome photographs that have troubled our courts. *Cf.* State v. Timothy Ray Jones Jr., No. 2019-001008, 2023 WL 4611943, at *20 (S.C. July 19, 2023), reh'g granted (July 19, 2023), republished July 19, 2023 (finding error in admitting photos of 5 mummified and decayed victims with their faces taken at autopsy but finding admission was harmless)[6]; Edwards, *supra* (finding no error in the admission of pictures of a dead body despite the fact that numerous witnesses "testified as to the gruesome condition of the body and of the presence of maggots in large numbers in and near the wound"); Collins, 409 S.C. at 529, 763 S.E.2d at 25 (affirming conviction in dog bite case where child victim suffered "'extensive' loss of skin and soft tissue on his upper body and his face, including his ears and nose, which were 'completely eaten away' by the dogs. Areas of the boy's chest and his arm had also been eaten, exposing the bone"). While pictures of an entire human skeleton, with the face, could possibly be disturbing, depictions of separate bones or pieces of bone are ubiquitous in our culture

[6] Jones, was obviously decided well after the trial of this case.

and not inflammatory. The photo admitted is a scientific or anthropological type of picture, and not inflammatory. The photo was taken at the Coroner's Office. The limited remains, including bones and bone fragments, are lain out on a clean metal table, and the picture is in black and white. The photo simply does not compare to the type of gory photographs at issue in Jones, Collins or Edwards. *See also* Evans v. State, 306 Ga. 403, 411, 831 S.E.2d 818, 826 (2019)(explaining that while "photographs depicted the victim's skeletal remains and were, therefore, somewhat graphic, that does not alter their admissibility because each of the photographs 'was relevant to some point of the [medical examiner's] testimony'"). Evidence strongly supports Judge Cothran's decision to admit this 1 black and white photo.

Judge Cothran did not abuse his discretion because the photo was relevant and admissible because it corroborated the testimony of the officers and experts about the condition of the victim's partial skeletal remains upon discovery. *See* Torres, 390 SC. at 623, 703 S.E.2d at 229 ("It is well settled in this state that "[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." (alteration in original)(*quoting* Nance, 320 SC. at 508, 466 S.E.2d at 353. This 1 black and white photo also corroborated Johnson's confession that he killed Sharee and Naveah, because Johnson pointed out to police which dumpster he placed Naveah's body in and her limited skeletal remains were recovered under layers and layers of garbage in a vast landfill after weeks of searching, in the exact area where that dumpster was emptied by the waste company who picked up the dumpster in question.

Additionally, State's Ex. # 64, was relevant and probative of whether minor victim was in fact dead. The photograph proves without question she is dead as no human being could walk around alive with these skeletal remains missing from that person's body. The probative value of this photograph was enhanced by the cross-examination of Detective John Melton where defense

counsel questioned the detective on the fact that he received information during the investigation [whether believed or not] that Naveah was seen alive the day of August 5th playing with other children **and** also getting into a green truck. **(Tr. 334-35).** The 1 black and white photo of these particular bones and fragments demonstrated to the jury the missing child could not be alive but is deceased, and her partial skeletal remains were found in the exact location where Johnson pointed police. (Tr. 374-409; State's Ex. 64). This photo defeated the suggestion by defense counsel that Naveah might be alive. *Compare* State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986).

The photo also demonstrates the exact bones the forensic anthropologist used to determine the bones were in fact human, and they came from a child. **(Tr. 402-04).** This led to the taking of DNA samples from the bones and the decayed soft tissue and the eventual confirmation that the skeletal remains belonged to the minor victim. **(Tr. 399-409).** The bones and fragments also demonstrate why it was impossible from the skeletal remains alone to determine the exact cause of death of Naveah, because they were mostly from the lower part of the body and showed no sign of pre-mortem injury. **(Tr. 398-412).** This photograph explains to the jury why the pathologist did not testify about Naveah's cause of death or her partial remains at all. (Tr. 398-412; 446-61). *Compare* Middleton, 288 S.C. at 24-25, 339 S.E.2d at 693 (cited in Jones). The State had to rely on other evidence to prove how Naveah died such Sharee's autopsy findings, circumstantial evidence at the crime-scene, and Johnson's statements to others including police.

Johnson argues admission of the pictures was not necessary and cumulative because the pathologist's findings "were not in dispute." While it is true that Sharee died from stab wounds, based on Sharee's autopsy, to determine the minor child was dead and how she died, the jury had to rely on other evidence such as the crime scene, Sharee's autopsy findings, and other circumstantial evidence, and Johnson's statements, in combination with reference to this

photograph. Further, Johnson attempted to withdraw his confessions in his later statements and claimed he only discarded the child's remains but did not kill Sharee or the child. The photograph was highly probative because it corroborated the anthropologist's oral testimony and there was no testimony from the pathologist on the cause of death to Naveah. *Compare* Middleton, *supra*, cited in Jones, *supra*. Our system of evidence has always permitted physical and documentary evidence to be admitted at trial to "substantiate" oral testimony. Torres, 390 S.C. at 623, 703 S.E.2d at 228. It would be extraordinary to require the State to prove 2 murders beyond a reasonable doubt, including 1 in which the victim is missing, but prevent the State from introducing the only and best documentary evidence proving the death of the missing victim. One can easily imagine the suspicion it would provoke among jurors, especially skeptical jurors, who are instructed ad nauseum about the stringent "beyond a reasonable doubt" standard, if the State did not produce any documentary evidence to prove a death and to substantiate oral testimony about such a central issue. Especially, since defense counsel suggested on cross-examination that the child was seen alive on *the day of* Monday, August 5th and was seen getting into a green truck with another man. **(Tr. 364-65)**. Prosecutors must be prepared to encounter a "doubting Thomas" on every jury.[7] At this point in our society, large segments of this country distrust both state and federal police. The State must be allowed to prove its allegations in its case in chief, for it may not get another chance in cases (such as this one) where the defendant does not testify. As long as the evidence is not "calculated to arouse the sympathy or prejudice of the jury," it is not error to admit it. Torres, 390 S.C. at 623, 703 S.E.2d at 228. The State must be allowed to prove the victim is in fact deceased, and her limited remains were in a location where Johnson pointed police. Evidence supports Judge

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[7] John 20:24–29.

Cothran's ruling that the risk of unfair prejudice did not substantially outweigh the probative value of the black and white picture of the limited skeletal remains. Rule 403, SCRE. Accordingly, Johnson has failed to show an abuse of discretion. Under the "highly deferential" standard of review in claims of error based on Rule 403, SCRE, the Court is "obligated to give great deference to the trial court's judgment." Collins, 409 S.C. at 534, 763 S.E.2d at 28.

As pointed out in the Standard of Review section of this brief, it is photographs that are calculated to arouse the prejudices or sympathy of the jury that must be removed, and only when they are unnecessary to prove some fact. Middleton, 288 S.C. at 24, 339 S.E.2d at 693 ("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." (emphasis added)(internal citations omitted); Torres, *supra* ("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.") (emphasis added). Johnson has not shown that this 1 photo was calculated to arouse the sympathies or prejudices of the jury. In fact, it was not offered for that purpose but to show the exact fragments and bones found, their limited nature. they corroborated Johnson's confession, what was used to determine the remains were that of a human child, what was used to do DNA testing identifying the bones to Naveah, why her exact cause of death could not be determined by medical examiners, and that this missing victim cannot be alive. *See* State v. Hawes, 423 S.C. 118, 130-31, 813 S.E.2d 513, 519-20 (Ct. App. 2018) (trial court did not abuse its discretion when it admitted crime scene photos that established the circumstances of the crime scene, corroborated the testimony of a witness and a responding officer, and were relevant to the issue of malice); People v. Garceau, 862 P.2d 664, 667 (CA 1993) (photo of mummified victims hidden within a dresser was highly

probative because it corroborated testimony relating to concealment of the bodies); *See* State v. Oliveira-Coutinho, 865 N.W.2d 740, 762 (Neb. 2015)(finding no error in admission of photos of skeletal remains "including several close-ups of the skull taken from different angles"). There is no merit to this appellate ground.[8]

Further, any danger of prejudice was low because State's Ex. 64 did not suggest that the jury convict Johnson on an improper basis. *See* State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009)("unfair prejudice means an undue tendency to suggest [a] decision on an improper basis."); Rule 403, SCRE (relevant evidence is to be excluded "if its probative value is substantially outweighed by the danger of **unfair** prejudice." Rule 403, SCRE (emphasis added). In order to constitute **unfair prejudice**, "the photographs must create a tendency to suggest a decision on an *improper basis*, commonly, although not necessarily, an emotional one." Kelley, 319 S.C. at 178, 460 SE.2d at 370-71 (quoting Alexander, 303 S.C. at 382, 401 S.E. at 149).

This 1 photo is of bone fragments and leg bones, and some soft tissue, not a child's intact body or any gross injuries or wounds to the child. (State's Ex. #64). In State's Ex. 64, there is no picture of the child's face or blood. It is a picture of what was able to be recovered after such a lengthy time and lengthy search. It is a picture establishing that Naveah is dead and what was used to identify her. It proves that Johnson did in fact place Naveah in that particular garbage dumpster

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[8] In fact, in one case, State v. Spodnick, 292 S.C. 68, 354 S.E.2d 904 (1987), where a victim had been beaten to death, and then hacked-up and buried, a piece of bone fragment and tissue was admitted into evidence, despite an offer by the defense to stipulate to any matter the evidence as introduced would prove. Here the photos are no different than blood or hair of a victim introduced to show the situs of the crime. State v. Fields, 264 S.C. 260, 214 S.E.2d 320 (1975); State v. Brown, 101 S.C. 404, 85 S.E. 957 (1915). Much more graphic photos have been admitted when their probative value is not substantially outweighed by the danger of unfair prejudice. *See* Williams v. State, 301 S.W.3d 675, 693 (Tex. Crim. App. 2009) (close-up photos of injuries were gruesome but they portrayed no more than the gruesomeness of the injuries inflicted by the defendant); Narvaiz v. State, 840 S.W.2d 415, 430 (Tex. Crim. App. 1992) (although photos were gruesome, they merely depicted the gruesomeness of the crime scene as found by the police).

as he told police. This photo was not calculated to arouse the sympathies or prejudices of the jury or to suggest a decision on an improper basis, such as an emotional one. The State introduced only a black and white photo. Thus, the probative value of State's Ex. # 64 was not substantially outweighed by the danger of unfair prejudice, nor was it needlessly cumulative, as it was **the only actual photo of the limited skeletal remains offered and admitted**. *See* Rule 403, SCRE ("[R]elevant evidence may be excluded if its probative value **is substantially outweighed** by the danger of unfair prejudice...")(emphasis added); *See* United States v. Gartmon, 146 F.3d 1015, 1021 (D.C. Cir. 1998) ("Rule 403 does not provide a shield for defendants who engage in outrageous acts, permitting only the crimes of Caspar Milquetoasts to be described fully to a jury. It does not generally require the government to sanitize its case, to deflate its witnesses' testimony, or to tell its story in a monotone.").

Further, a trial judge's weighing of probative value verses prejudicial effect under Rule 403, SCRE, is reviewed under an abuse of discretion standard and should be reversed **only in exceptional circumstances**. State v. Gadson, Opinion No. 5979, Howard Advance Sheets (Ct. App. filed April 19, 2023)(referencing State v. Brooks, 428 S.C. 618, 635, 837 S.E.2d 236, 245 (Ct App. 2019)(quoting Collins, 409 S.C. at 534, 763 S.E.2d at 28); Sweat, 362 S.C. 117, 606 S.E.2d 508. Under this standard, in this case, Judge Cothran must be affirmed. The black and white photo, State's Ex. 64, was relevant to establish several important facts and to corroborate other witnesses' testimony, and it was not needlessly cumulative as it was the only photo of the actual limited skeletal remains offered and admitted.

(2) **Judge Cothran did not err in admitting State's Ex. 37 and 38**

Johnson also argues Judge Cothran abused his discretion in admitting 2 photos of the large kitchen knife Johnson armed himself with during his flight from police and attempt to avoid arrest.

One (1) photo is distant shot showing the location of the knife in relation to the whole room where it was left. The 2nd photo is a close-up view showing the relative size of the knife and how it was stuck into the couch by Johnson after he decided not to resist or evade arrest and to surrender. Johnson argues these photos are irrelevant because they were admittedly not the murder weapon and their prejudicial effect substantially outweighed their probative value. Johnson is wrong.

The photos of the kitchen knife were relevant, admissible, and probative of guilt because Johnson's arming himself with the large kitchen knife occurred during Johnson's flight from police when they were attempting to arrest or capture him for these murders; his arming himself was part of his attempt to evade arrest or capture for these murders, and his arming himself with the large knife demonstrated a consciousness of guilt where Johnson was not going to allow himself to be arrested for the 2 murders he committed, including the murder of a child. (Tr. 24-42; 43-63; 64-71; 73-86; 87-102; 265-71).

Under South Carolina law, flight and attempts to evade arrest have always been admissible as evidence of guilt so long as the flight or attempt to evade arrest is tied in some fashion to the crime for which the defendant is on trial. State v. Pagan, 369 S.C. 201, 208–09, 631 S.E.2d 262, 266 (2006); State v. Turnage, 107 S.C. 478, 93 S.E. 182 (1917)(flight and attempts to evade arrest are for the jury to consider); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916)(the flight of one charged with a crime has always been held to be some evidence tending to prove guilt); State v. Williams, 350 S.C. 172, 176, 564 S.E.2d 688, 691 (Ct.App. 2002) (citing 29 Am.Jur.2d *Evidence* § 532 (1994)(flight, when unexplained, is admissible as indicating consciousness of guilt); State v. Robinson, 360 S.C. 187,

195, 600 S.E.2d 100, 104 (Ct. App. 2004). "In South Carolina, we recognize that evidence of flight [is] proper. We also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight." State v. Byers, 277 S.C. 176, 177–78, 284 S.E.2d 360, 361 (1981) (internal quotations omitted); *see* State v. Grant, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980)(while a jury charge on flight is improper, admission of evidence and argument by counsel concerning it are allowed).

The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. State v. Walker, 366 S.C. 643, 655, 623 S.E.2d 122, 128 (Ct. App. 2005); State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999), *abrogated on other grounds* State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011). It is sufficient that circumstances justify an inference that the defendant's actions in fleeing or attempting to avoid arrest were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Id. (citation omitted). This evidence is relevant when there is a nexus between the conduct and the offense charged. State v. Middleton, 2023 WL 2591442, at *2 (S.C. Mar. 22, 2023); State v. Cartwright, 425 S.C. 81, 92, 819 S.E.2d 756, 762 (2018)(holding there must be "an unmistakable nexus ... by clear and convincing evidence linking the [conduct] to a guilty conscience derivative of the offense for which the defendant is on trial."); State v. Martin, 403 S.C. 19, 28, 742 S.E.2d 42, 47 (Ct. App. 2013) (requiring "a nexus between the [conduct] and the offense charged"). *See* Robinson, 360 S.C. at 195, 600 S.E.2d at 104 (citing United States v. Beahm, 664 F.2d 414, 419–20 (4th Cir.1981)).

Similarly, the defendant's conduct after the crime of murder, including evidence that he intended to resist arrest, is competent and admissible as evidence of guilt. State v. Marks, et. al,

70 S.C. 448, 50 S.E. 14, 16 (1905) ("The testimony related to the conduct of the defendant after the homicide, and tended to show an intention on his part to resist arrest. The testimony was therefore competent"); State v. Cheeks, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013). ("For example, it is well-settled that while evidence that a criminal defendant evaded arrest or absconded from the jurisdiction may be admissible as evidence of guilt, and may be argued to the jury as such, it is improper to charge the jury on this evidentiary inference because such a charge places "undue emphasis" on that piece of circumstantial evidence)(citing as *e.g.*, State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980).

Other states and federal circuits recognize this principle as well. Wangerin v. State, 243 N.W.2d 448, 453 (Wis. 1976)("It is well established in this state that evidence of flight and resistance to arrest has probative value to guilt.")(citing Gauthier v. State, 137 N.W.2d 101 (Wis. 1965); United States v. Crisp, 435 F.2d 354 (7th Cir. 1970)); United States v. Wright, 392 F.3d 1269, 1276 (11th Cir.2004); State v. Peltier, 116 A.3d 150, **155-56** (R.I. 2015); State v. Williams, 919 A.2d 90, 91-97 (N.J. 2007)(concluding conduct occurring after the charged offense can circumstantially support inferences about the defendant's consciousness of guilt. And defendant's post-shooting conduct was admissible to demonstrate his consciousness of guilt.)(citing 2 John H. Wigmore, *Evidence in Trials at Common Law,* § 276 at 122 (Chadbourn rev. 1979)); *see also* State v. Palmer, 962 A.2d 758, 769 (R.I. 2009) ("It is universally conceded today that the fact of an accused's flight * * *, *resistance to arrest,* concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.")(quoting 2 Wigmore, § 276 at 122 (emphasis added)); People v. Sustak, 15 Ill.2d 115, 153 N.E.2d 849, 854 (1958)(concluding evidence of resisting arrest was properly admitted as probative of guilt); Howard v. State, 417 So. 2d 599, 602 (Ala. Crim. App. 1982)(evidence indicating a defendant's

consciousness of guilt is admissible without regard to its being part of the res gestae); Stewart v. State, 398 So.2d 376 (Ala.1981); Sparks v. State, 376 So.2d 834 (Ala.Cr.App.1979)(An accused's actions at the time of his apprehension, if introduced to show his attempt to avoid capture, are relevant to prove his consciousness of guilt). This is the general rule followed in the criminal law. 29 Am.Jur.2d *Evidence* secs. 278-80 (1967). *See also* United States v. Kennard, 471 F.3d 851, 855 (11th Cir. 2006)("People, including jurors, realize that while '[t]he wicked flee when no man pursueth.' Proverbs 28:1 (KJV), they really flee when law enforcement is looking for them. That is why evidence of flight is admissible and probative").

Here there is no question there is a *nexus* between the murders of Sharee and Naveah and Johnson's flight and arming himself with the knife set forth in State's Ex. 37 & 38. Police had just responded to the apartment manager finding Sharee's bloody body wrapped in a rug in her apartment. (Tr. 58-59, 61-62; 72-86). Sharee's son, C.J., spotted Johnson across the street from the apartment complex while police were interviewing witnesses and processing the crime scene. (Tr. 58-59, 61-62; 72-86). C.J. pointed Johnson out to police, and Johnson fled on foot to Winona's apartment. (Tr. 58-59, 61-62; 72-86). Police pursued Johnson. Upon entering Winona's apartment, Johnson shut the door and locked it. He almost immediately armed himself with the large kitchen knife and told Daney that he, Johnson, was not going to let police take him. He also stated police were looking for him for something they believed he did to the lady next door. Initially, Petitioner would not surrender, but eventually he changed his mind about attempting to evade, resist, or avoid arrest and put the knife in the couch and surrendered. (Tr. 139-66; 167-89; 72-76; 265-71). The 2 photos of the knife stuck in the couch, from different distances, were relevant and admissible as evidence of flight and an attempt to avoid arrest showing a consciousness of guilt. (Tr. 58-59, 61-62; 72-86;139-66; 167-89; 72-26; 265-71; State's Ex. 37 & 38). They also substantiate and

corroborate the testimony of eyewitnesses and police officers and prove what the witnesses said is true by clear and convincing evidence. (Tr. 139-66; 167-89; 72-26; 265-71; State's Ex. 37 & 38). Torres, *supra.* The actual knife was introduced by the State to show this was a real intention to resist and evade arrest as the knife was a large, sharp, kitchen knife, such as a butcher knife.

Missouri dealt with the very same challenge raised here to the photos of the kitchen knife in State v. Turner, 713 S.W.2d 877, 879 (Mo. 1986). In Turner, police approached the defendant to arrest him, and he stuck his hand in his pocket where he had a small gun unrelated to the shooting for which he was being arrested. The Turner Court pointed out that circumstances surrounding the arrest of a defendant are generally admissible where they tend to establish an attempt by the defendant to resist, evade, escape, or avoid arrest. Id. at 879 (citing State v. Jones, 583 S.W.2d 212, 215 (Mo. App. 1979)(citing State v. Campbell, 533 S.W. 2d 671, 675 (Mo. App. 1976)). The Court held: "[t]he State may introduce evidence that the defendant had a gun in his possession when arrested, although the gun is unconnected with the crime for which he is arrested." Turner, 713 S.W.2d at 879, *citing* Jones, 583 S.W.2d at 214. "Arms tend to show that the defendant may have contemplated resistance and resistance to arrest is relevant to show consciousness of guilt." Id., at 879, *quoting* Jones, *supra.* The Court held: "Defendant's act of reaching for the gun [when the officer attempted to arrest him] was an act of resisting arrest. Evidence that defendant resisted arrest was relevant because it evidenced his consciousness of guilt." Turner, 713 S.W.2d at 879, *referencing* State v. Valentine, 646 S.W.2d 279, 732 (Mo. 1983). The Court further held "[t]he gun was sufficiently connected with the defendant, if not the crime for which he was charged. *Compare* State v. Perry, 689 S.W.2d 123,125 (Mo. App. 1985). The trial court properly admitted the gun into evidence." Id. at 879. *See also* State v. Starks, 459 S.W.2d 249, 250-51(Mo. 1970)(guns in defendant's possession upon arrest were admissible as they showed circumstances

attendant defendant's arrest and he contemplated resisting arrest); State v. Hart, 274 S.W. 385, 388 (Mo. 1925)(same).

Johnson's actions in arming himself with a large kitchen knife occurred shortly after he cleaned and returned the murder weapon to Daney; Johnson returned to the crime scene where he was spotted by C.J. and pointed out to police; Johnson fled on foot and was pursued by police to Winona's duplex apartment; he was seen by Daney and Winona fleeing into Winona's apartment and locking the door; police began banging on the door to the apartment of Winona in pursuit of Johnson; Johnson stated out loud that police were pursuing him for what they believed he had done to a woman next door, and Johnson stated he was not going to let police arrest him. When Winona fled her home, Johnson ran in the home and locked the front door. He then armed himself with a large kitchen knife. This was witnessed by Daney. Daney confronted Johnson about why he had the knife and what he was doing, and Johnson related it to the injury of a woman nearby. Johnson only put the knife down when he changed his mind and decided to surrender. Johnson's actions and statements at the time combined with arming himself with the knife shows a consciousness of guilt and an intent to evade arrest and was part of his flight from police. (Tr. 58-59, 61-62; 72-86;139-66; 167-89; 72-26; 265-71; State's Ex. 36 & 37). As a result, the testimony was relevant, probative, and admissible and the photos of the knife where Johnson placed it (State's 37 & 38) were admissible as well. Judge Cothran did not abuse his discretion in admitting this testimony.

Further, the 2 photos of the knife corroborate the testimony of lay witnesses, Daney and Winona, which the jury did not have to believe. They substantiate Daney's testimony that Johnson armed himself with a real kitchen knife and stated he was not going to allow police to take him. And, the photo's corroborate Daney's testimony *Johnson changed his mind* about resisting the arrest and surrendered. The knife in the photos was also identified by Winona as coming from her

kitchen, but she did not place it there in the couch. Admitting photos that corroborate testimony is not an abuse of discretion. Torres. (Tr. 139-66; 167-89; 72-26; 265-71; State's Ex. 37 & 38)

Further, this evidence is admissible as "res gestae of the crime evidence." Evidence of other acts of the defendant or even crimes may be admitted under the res gestae of the crime theory:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996)(quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980)), *overruled on other grounds,* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). *Res gestae of the crime* recognizes evidence of other acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001), *overruled on other grounds* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Under this theory, it is important that the temporal proximity of the other act be closely related to the charged crime. State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997). Even if the evidence is relevant under this theory, prior to admission the trial judge should determine whether its probative value clearly outweighs any unfair prejudice. Rule 403, SCRE; State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990).

The evidence of Johnson's actions after he was spotted by C.J. and identified for police was properly admitted under the res gestae theory. *See* Adams, 322 S.C. at 122, 470 S.E.2d at 370–71. Admission of the testimony was necessary and relevant to a full presentation of the evidence in this case. What occurred in Winona's apartment provided context for the crimes at issue. The testimony regarding what occurred when Johnson fled was relevant to show the complete, whole, unfragmented story regarding the crimes. *See* State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). Furthermore, the act of fleeing and attempting to evade arrest were temporally related. Police had just responded to the discovery of Sharee's body by C.J. and the apartment manager. C.J. pointed out Johnson to police and Johnson fled. Johnson had previously entered Winona's duplex apartment and washed the murder weapon off and returned it to Daney. He then went outside and back to the crime scene, where he was spotted by C.J. and police. He fled back to and into the duplex and locked the front door as Winona fled the apartment, and Johnson then armed himself with the large kitchen knife when police came to arrest him. Johnson's actions in fleeing and then hiding in Winona's apartment and arming himself comprise part of the same episode as the discovery of Sharee's body by C.J. and authorities. The acts are so related as to be inextricably intertwined. *See* Adams, 322 S.C. at 122, 470 S.E.2d at 371 ("The use of the cocaine here was inextricably intertwined with the robbery and murder. Under these circumstances, such evidence was properly admitted as part of the *res gestae* of the crime."). Indubitably, Johnson's resisting and attempting to evade arrest was part of the entire scenario regarding the victims' murders. State v. Johnson, Howard Advance Sheets, Opinion No. 28150 (Filed April 19, 2023)(defendant's acts in Dillon and Marlboro Counties most definitely provides context to the Marion County domestic violence case); State v. Wood, 362 S.C. 520, 528, 608 S.E.2d 435, 439 (Ct. App. 2004)(defendant's murder of trooper 2 hours earlier was res gestae of failure to stop for a blue light and AWIK trial

in another county); Hough, 325 S.C. 88, 480 S.E.2d 77 (defendant's act after the crime of purchasing crack cocaine with money from the armed robbery for which he was on trial was part of the res gestae of the crime). Moreover, the probative value of the evidence outweighed its prejudicial effect. *See* Owens, 346 S.C. at 653, 552 S.E.2d at 753; Wood, 362 S.C. at 527–29, 608 S.E.2d at 439–40.

Johnson was seen standing across the street from the apartment complex by C.J. when police were there immediately after the apartment manager discovered Sharee's body. C.J. told police that Johnson was standing nearby and pointed him out. Johnson fled on foot to Winona's apartment. Police pursued Johnson to Winona's apartment where they saw Johnson flee. Johnson went in the apartment and shut the door. When Winona went out the door, Johnson locked the door. When police knocked on the door, Johnson armed himself with the large kitchen knife and told Daney that he [Johnson] was not going to let them take him. Johnson stated police were pursuing him for the injury of a girl who lived nearby. Johnson then changed his mind or was talked out of the apartment and placed the knife in the couch and surrendered himself to police. He was then transported to the police station and questioned and eventually confessed. Johnson's actions inside Winona's apartment are all part of the res gestae of the crime. (Tr. 58-59, 61-62; 72-86;139-66; 167-89; 72-26; 265-71; State's Ex. 36 & 37). United States v. Wright, 392 F.3d 1269, 1276 (11th Cir.2004)("[E]vidence of [defendant's resistance to arrest] prior to the discovery of the firearm gives the jury the body of the story, not just the ending. Such evidence was 'inextricably intertwined' with the charged offense."); State v. Peltier, 136 A.3d 150, 155-56 (R.I. 2015) (Simply because the challenged testimony occurred moments after Peltier assaulted Thurber does not change the fact that the acts were related "closely in both time and place" and were "intricately interwoven" with the crime on trial).

Petitioner also claims this evidence was unfairly prejudicial under Rule 403. A trial judge's weighing of probative value verses prejudicial effect under Rule 403, SCRE, is reviewed under and abuse of discretion standard and should be reversed only in exceptional circumstances. Gadson, *supra* (referencing Brooks, 428 S.C. at 635, 837 S.E.2d at 245 (quoting Collins, 409 S.C. at 534, 763 S.E.2d at 28); Sweat, *supra*. Only exceptional circumstances justify reversing the circuit court's decision on 403 grounds. State v. Huckabee, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (2017). There are no exceptional circumstances here.

Both parties conceded the kitchen knife which was testified about was not the murder weapon, but a weapon that Johnson armed himself with while attempting to evade police and avoid arrest for the murders. (Tr. 58-59, 61-62; 72-86;139-89; 265-71; State's Ex. 37 & 38). There was no blood on the knife. The murder weapon had been returned to Daney before Johnson armed himself with this knife. Johnson changed his mind about not being taken by police, stuck the knife in the couch, and surrendered to police after being talked out of the house. The 2 photos of the kitchen knife are mild, to say the least. (Tr. 265-71; State's Ex. 37 & 38). One (1) photo is from a distance and shows where the knife was left in relation to the whole room and the whole couch. The other photo shows the knife up close and where exactly the knife was stuck in the couch. (Tr. 265-71; State's Ex. 37 & 38). The photo is not needlessly cumulative because it corroborates the testimony of Daney, Winnona, and the police officers who discovered the knife Rule 403, SCRE. As a result, there was no unfair prejudice to Johnson. *See* Hart, 274 S.W. at 388 (it could not have been prejudicial to introduce weapon defendant armed himself with during arrest **which was not the murder weapon** as it was not of a character to excite either passion or prejudice). Judge Cothran's determination must be affirmed.

Harmless Error

Finally, and to the extent the Court finds Judge Cothran erroneously allowed the prosecution to introduce any of the challenged photos, their admission could not reasonably have affected the result of the trial. *See* State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). "Whether an error is harmless depends on the circumstances of the particular case." State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). The admission of any photograph discussed above was harmless because it was: (1) cumulative to other evidence properly admitted, and (2) because of the overwhelming evidence of Johnson's guilt.

The admission of the 1 black and white photo of limited skeletal remains was harmless where several witnesses testified to locating the same remains of Naveah under layers of garbage in a vast landfill after several weeks of searching. (Tr. 403-408; 374 ln. 18-398; 400, ln. 24; 558, ll. 4-22.). State v. Brewer, 411 S.C. 401, 409-410, 768 S.E.2d 656, 660 (2015)(*numerous citations omitted*); State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008)(the admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)(same); State v. Weaverling, 337 S.C. 460, 471, 523 S.E.2d 787, 793 (Ct. App. 1999); *see also* State v. Williams, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996)(error in admission of evidence is harmless where it is cumulative to other evidence properly admitted). The same testimony was also testified to during the trial using 2 diagrams and that Naveah's bones were used to draw DNA from to identify her remains by DNA

testing. (Tr. 403, ln. 20-408, ln. 4; 558; State's Ex. #s 65 & 66). Finally, blood was found in the dumpster Johnson admitted he had placed Naveah in, and Johnson admitted he killed Naveah and disposed of her body by placing it in the dumpster traced to the area of the landfill where the bones were found. (Tr. 346-74). The 1 black and white photo was cumulative to other evidence. State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003). *See also* State v. Brazell, 325 S.C. 65, 79, 480 S.E.2d 64, 72 (1997) ("Even if the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage")(citing State v. Robinson, 201 S.C. 230, 22 S.E.2d 587 (1942)(finding the photos unnecessary but harmless because they were not prejudicial or inflammatory).

Additionally, the admission of the photos of the kitchen knife (State's Exhibits #37 and #38) were harmless where there was testimony from other witnesses regarding the same. Both Daney and Winona testified to the kitchen knife. (Tr. 156, ll. 2-20; 157, ll. 12-22). Police officers testified to the recovery of the kitchen knife and where it was recovered. (Tr. 265-71). The State also introduced the knife itself, which shows how large the knife was and Johnson's intent to resist or evade arrest was serious, at least until he changed his mind. As a result, the photos were merely cumulative to other evidence properly admitted. Haselden, 353 S.C. 190, 577 S.E.2d 445; State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless); State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989)(same); State v. Broaddus, 361 S.C. 534. 542, 605 S.E.2d 579, 583–84 (Ct. App. 2004)(same); Kirton, 381 S.C. at 38, 671 S.E.2d at 122–23; State v. Richardson, 358 S.C. 586, 596–97, 595 S.E.2d 858, 863 (Ct. App. 2004)(even if the challenged testimony was improper any error in its admission was harmless where it was cumulative to other similar testimony admitted

without objection); *see also* State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (Ct. App. 2001)(any error in admitting evidence was harmless as properly admitted evidence proved the same thing)

The admission of the photos of the kitchen knife was also harmless where the State and the defense agreed the knife was not the murder weapon, it contained no blood or extraneous matter, and 1 of the photos was some distance away and showed where the knife was located on the couch in relation to the whole room. The photos simply depicted *a kitchen knife* Johnson armed himself with and stated his intent not to be taken and then changed his mind and stuck in the couch. (Tr. 58-59, 61-62; 72-86;139-89; 257-71; 72-26; State's Ex. 37 & 38).

The admission of the photo of the skeletal remains and the photos of the kitchen knife were also harmless because of the overwhelming evidence of Johnson's guilt. State v. Wells, 336 S.C. 223, 426 S.E.2d 814 (Ct. App. 1992)(photo of victim admitted to accurately show crime scene was harmless in light of the overwhelming evidence of guilt). The apartment manager testified to the prior difficulties between Johnson and Sharee before her murder. The manager testified to the complaints by neighbors hearing Johnson and Sharee arguing, which the manager spoke with Johnson about. She also testified to her conversations with Johnson the day before and the day of the murders placing him in the area of the crime scene. Johnson actually asked the apartment manager to help him get his things out of Sharee's apartment before the murders. (Tr. 22-42). Patsy testified Johnson slept in her apartment on Friday and Saturday night and there was an altercation between Johnson and Sharee on Sunday night in which Johnson cursed Sharee and would not apologize. At approximately 3:00 a.m. on early Monday morning, Johnson came to her apartment and took a shower; she then saw a chair in front of Sharee's front door at 4:00 a.m. where Johnson usually sat to use the WiFi. Patsy also overheard a discussion in which Uncle Mike

asked Uncle Mike for Daney's knife before the murders. (Tr. 103-23). Sharee's son, C.J., identified Johnson as the person in Sharee's home the night of August 4th/5th when Sharee and C.J.'s sister Naveah were murdered. C.J. testified to telling his mother goodnight and putting his sister to bed on the same night. C.J. testified to Johnson coming into his bedroom later during the night and requesting a mop, which C.J. provided to Johnson. C.J. testified to discovering his mother the next day and finding her deceased and rolled up in a rug or carpet and then notifying the apartment manager. C.J. also pointed out Johnson standing across the street to police, and Johnson fled on foot to Winona Cody's home. (Tr. 43-63). Uncle Mike testified to loaning Johnson his nephew's collectable knife a day or 2 before the murders. Another witness overheard Uncle Mike trying to get the knife back from Johnson but Johnson would not return the knife (Tr. 125-38; 103-23). Daney then tried to get the knife back from Johnson before the murders but Johnson only promised to return it. Then, Cody Daney testified that on the afternoon after the murders, he saw Johnson washing the murder weapon off in Daney's mother's kitchen sink. Daney testified Johnson then returned the cleaned knife to Daney, and Daney put the knife up. Daney then testified to police coming to his mother's front door and Johnson grabbing a kitchen knife out of a kitchen drawer, arming himself with it, and stating: "I'm not going to let them take me." Johnson also told Daney or Daney's mother, the police were there about something he did to the woman next door, an admission of guilt. Johnson then changed his mind and decided to give up and stuck the knife in the couch cushions. Daney told police about the knife, and they found it stuck in the couch seat cushions. Daney also testified he had asked for the knife back from Johnson before the murders, but Johnson claimed he did not have it and then when confronted admitted he did have the knife and promised he would return it later. (Tr. 139-66). Police arrested Johnson after the murders and took him to the police station for questioning. Found on Johnson's person

were Sharee's driver's license and the Social Security cards for Sharee and Naveah. (Tr. 72-86). Johnson first attempted to blame 1 parent of 1 of Sharee's children for the murders and then another. (Tr. 271-84; 286-341; 346-74). Johnson eventually dropped these claims and admitted to killing Sharee and Naveah. (Tr. 271-84; 286-341; 346-74). He admitted he killed Sharee and Naveah with the knife he obtained from Uncle Mike. (Tr. 271-84; 286-341; 346-74). Johnson eventually admitted he placed Naveah in a rug and into a garbage dumpster and pointed out to police which dumpster Naveah was placed in.[9] (Tr. 271-84; 286-341; 346-74). Johnson also admitted during 2 different police transports that he murdered the 2 victims. Johnson also told family members he had told police he killed the victims and placed Naveah's body in the garbage dumpster. Police discovered blood at the back door of Sharee's apartment and in the dumpster and tracked that dumpster's contents to the Richland County landfill. (Tr. 324-41; 346-74). After a vast grid search under multiple layers of garbage, police found limited skeletal remains of Naveah that demonstrated she was in fact dead. (Tr. 374-409). The crime scene showed Johnson had wrapped Sharee in a rug or carpet after killing her with a knife, and that he stabbed Naveah near the bottom of the staircase. Sharee's body was recovered at the scene, and her DNA, Naveah's DNA, and DNA consistent with Johnson's was found at the crime scene as well. The crime scene also revealed someone had attempted to mop up the blood at the crime scene corroborating C.J.'s testimony of providing Johnson with a mop during the middle of the night. (Tr. 206-03; 228-46; 501-21). As a result of the overwhelming evidence of Johnson's guilt, any error in the admission of any photographs was harmless beyond a reasonable doubt on this record. State v. Brown, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018)("Where 'guilt has been conclusively proven by

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[9] Johnson also returned multiple times from prison and gave multiple recorded statements about where he placed Neveah after she was murdered. This occurred over several days in August immediately after the murders. (Tr. 271-84;286-306; 307-23;).

competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless.'")(quoting State v. Byers, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011)).

Appellate Issue II.

> Did Judge Cothran err in permitting testimony Johnson armed himself with a knife and stated he was not going to be taken when police came to arrest him for the murders?

Johnson now challenges not only the admission of the 2 photos of the kitchen knife but also the admission of any testimony regarding him arming himself with a knife when police were pursuing him **and** his statement that he was not going to let police take him. Johnson argues this testimony was irrelevant and unfairly prejudicial. As just discussed in detail above, Johnson's actions in fleeing police and attempting to evade arrest, including arming himself to do the same, and stating he was not going allow police to arrest him, are admissible under South Carolina law and not unduly or unfairly prejudicial. However, part of the issue raised on appeal is not even preserved for appellate review.

What occurred below with regard to this issue

When Daney testified to Johnson arming himself with the kitchen knife while fleeing from arrest, Johnson objected only on the basis that this testimony was not relevant. (Tr. 156). Judge Cothran overruled the objection. (Tr. 156). Johnson did not object to the testimony of Johnson fleeing and arming himself with the knife on Rule 403, SCRE, grounds, i.e. the prejudice of this testimony substantially outweighed its probative value. (Tr. 156).

Further, when Daney was asked what Johnson said when Daney questioned Johnson about why he armed himself with a knife, there was no objection. Daney testified without objection that Johnson stated: "I can't let them take me." (Tr. 157, ll. 19-20).

ARGUMENT II.

Portions of Appellate Issue II. are not preserved for appeal, regardless; Judge Cothran did not abuse his discretion in permitting testimony Johnson armed himself with a knife and stated he was not going to allow police to arrest him as the evidence was relevant and admissible, and its probative value was not substantially outweighed by the danger of unfair prejudice; regardless, its' admission was harmless because it was cumulative to the evidence admitted and the evidence of Johnson's guilt was overwhelming.

Lack of Preservation

Two (2) parts of Appellate Issue II. are not preserved for appeal. For an issue to be preserved for appeal, a contemporaneous objection must be raised. Wilder Corp. v. Wilke, 330 S.C. 71; 497 S.E.2d 731 (1998); Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995). State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998); State v. Varvil, 338 S.C. 335, 526 SE.2d 248 (Ct. app. 2000). And the objection raised on appeal must be the same as the one raised below. State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998); Hanahan v. Simpson, 326 S.C. 140, 485 S.E2d 903 (1997); State v. Myers, 344 S.C. 532, 544 S.E.2d 851 (Ct. App. 2001). There was no objection on Rule 403, SCRE, grounds to *the testimony* about Johnson arming himself with a kitchen knife to resist or evade arrest, and there was no objection at all when Daney was asked what did Johnson say in response to Daney asking Johnson what he was going to do with the kitchen knife. (Tr. 156-57).[10] As a result, these portions of Appellate Issue II. are not preserved for appeal. Wilder Corp; Smith; McCray, 332 S.C. 536, 5006 S.E.2d 301; Myers, 344 S.C. 532, 544 S.E.2d 851. The only issue preserved for appeal from Appellate Issue II. is the relevance objection to the testimony of

[10] Johnson did object to State's Ex. 37 and 38, the 2 photos of the kitchen knife, on both relevance and Rule 403 grounds [Appellate Issue I.]. (Tr. 158-59; 247). He only made a relevance objection to *the testimony* about the kitchen knife and no objection was raised as to Johnson's statements to Daney about what he had the knife for. (Tr. 156-57).

Johnson arming himself with the kitchen knife while fleeing from arrest. Regardless, there is no merit to any of Appellate Issue II. for the reasons set forth above under Appellate Issue I.

Standard of Review

"The admission or exclusion of evidence is within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice." Thompson v. Swicegood, 430 S.C. 648, 661, 845 S.E.2d 920, 926-27 (Ct. App. 2020)(citation omitted).

ANALYSIS

Petitioner now objects to the admission of any testimony of Petitioner arming himself with the kitchen knife **and** his stating: "I can't let them take me." Petitioner now claims all of this testimony was irrelevant and unduly prejudicial. Petitioner is wrong.

This testimony was relevant, admissible, and probative of guilt because it occurred during Johnson's flight from police when they were attempting to arrest or capture him for the murder of Sharee, was part of the attempt to evade arrest, and demonstrated a consciousness of guilt where Johnson was not going to allow himself to be arrested for the murders he committed, including the murder of a child. (Tr. 58-59, 61-62; 72-86;139-66; 167-89; 72-26; 265-71; State's Ex. 37 & 38).

Relevant evidence is evidence "having 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; State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). "Flight or evasion of arrest is an issue for the jury to consider." Walker, 366 S.C. at 655, 623 S.E.2d at 128 (Ct. App. 2005); *see* Beckham, 334 S.C. at 315, 513 S.E.2d at 612; Turnage, 107 S.C. 478, 93 S.E. 182. "Flight from prosecution is admissible as evidence of guilt." Robinson, 360 S.C. at 194–95, 600 S.E.2d at 104; State v. Al-Amin, 353 S.C. 405, 413, 578 S.E.2d 32, 36-

37 (Ct.App.2003)), *overruled on other grounds* State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015). *See also* Beckham, 334 S.C. at 315, 513 S.E.2d at 612 (evidence of flight has been held to constitute evidence of guilty knowledge and intent); Grant, 275 S.C. at 407, 272 S.E.2d at 171 ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent.") (internal quotation marks omitted); State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) (noting that flight is "at least some evidence" of defendant's guilt); Thompson, 278 S.C. 1, 10-11, 292 S.E.2d 581, 587 (1982), *overruled on other grounds by* Torrence, 305 S.C. 45, 406 S.E.2d 315 (finding evidence of flight admissible to show guilty knowledge, intent, and that **defendant sought to avoid apprehension**); Freely, 105 S.C. 243, 89 S.E. 643 (declaring flight of one charged with a crime has always been held to be some evidence tending to prove guilt); Williams, 350 S.C. at 176, 564 S.E.2d at 691(citing 29 Am.Jur.2d *Evidence* § 532 (1994))(flight, when unexplained, is admissible as indicating consciousness of guilt). Flight evidence is premised on **a nexus** between the flight *and the offense charged. See, e.g.,* United States v. Beahm, 664 F.2d 414, 419-20 (4th Cir.1981). Here it was.

Similarly, a defendant's conduct after the crime of murder, including evidence he intended to resist arrest, is competent and admissible as evidence of guilt. Marks, et. al, 70 S.E. 448, 50 S.E. at 16 ("The testimony related to the conduct of the defendant after the homicide, and tended to show an intention on his part to resist arrest. The testimony was therefore competent"); *See* Cheeks, 401 S.C. at 328, 737 S.E.2d 484 ("For example, it is well-settled that while evidence that a criminal defendant evaded arrest or absconded from the jurisdiction may be admissible as evidence of guilt, and may be argued to the jury as such, it is improper to charge the jury on this evidentiary inference because such a charge places "undue emphasis" on that piece of circumstantial evidence)(citing as *e.g.,* Grant, *supra*). Petitioner's statement to Daney evidenced

his intent to avoid or resist arrest for the murder of Sharee and his arming himself also showed his intent to avoid or resist arrest, and the knife itself shows he was serious about his intent.

Johnson attempted to avoid and evade arrest and capture by fleeing to Winona's apartment when he was spotted by C.J. outside the crime scene, while police were processing the crime scene. C.J. pointed Johnson out to police. Another witness pointed out Johnson to police. Johnson fled on foot to Winona's apartment and entered her apartment, shut the door, locked the door, and armed himself with a knife stating to Daney he was not going to let police arrest him. He also indicated police were after him for what they believed he did to a lady nearby, i.e. injuring her. (Tr. 58-59, 61-62; 72-86; 139-66; 167-89; 265-71; State's Ex. 37 & 38). The arming of himself with a knife and his statements show he had decided to evade arrest by resisting capture with a deadly weapon. The knife is a large kitchen knife. This is circumstantial evidence of guilt tied directly to the murder of Sharee and Naveah. The fact he changed his mind and put the knife in the couch does not change the fact he initially determined to attempt to evade arrest and avoid capture by fleeing and resisting when trapped in Winona's apartment. The testimony regarding his arming himself and his statements in the apartment were relevant and admissible. Id.

As previously discussed above, Missouri dealt with the very same challenge raised here to the knife. Turner, 713 S.W.2d at 879. In Turner, police approached the defendant to arrest him, and he stuck his hand in his pocket where he had a small gun unrelated to the shooting for which he was being arrested. The Turner Court pointed out that circumstances surrounding the arrest of a defendant are generally admissible where they tend to establish an attempt by the defendant to resist, evade, escape, or avoid arrest. Id. at 879 (citing Jones, 583 S.W.2d at 215) (citing Campbell, 533 S.W. 2d at 675). The Court held: "[t]he State may introduce evidence that the defendant had a gun in his possession when arrested, although the gun is unconnected with the crime for which

he is arrested." Turner, 713 S.W.2d at 879, *citing* Jones, 583 S.W.2d at 214. "Arms tend to show that the defendant may have contemplated resistance and resistance to arrest is relevant to show consciousness of guilt." Id., at 879, *quoting* Jones, *supra*. The Court held: "Defendant's act of reaching for the gun [when the officer attempted to arrest him] was an act of resisting arrest. Evidence that defendant resisted arrest was relevant because it evidenced his consciousness of guilt." Turner, 713 S.W.2d at 879, *referencing* Valentine, 646 S.W.2d at 732. The Court further held "[t]he gun was sufficiently connected with the defendant, if not the crime for which he was charged. *Compare* Perry, 689 S.W.2d at 125. The trial court properly admitted the gun into evidence." Id. at 879. *See also* Starks, 459 S.W.2d at 250-51(1970)(guns in defendant's possession upon arrest were admissible as they showed circumstances attendant defendant's arrest and he contemplated resisting arrest); Hart, 274 S.W. at 388 (same). Johnson's actions in arming himself with a large kitchen knife occurred at approximately the same time he returned the murder weapon to Daney; Johnson briefly left the apartment and went to the area of the crime scene and then fled back inside the apartment when spotted by police; police pursued Johnson from the area of the crime scene; Johnson locked the front door; police began banging on the door to the apartment in pursuit of Johnson; Johnson stated out loud that police were pursuing him for what they believed he had done to a woman next door, and Johnson stated he was not going to let police arrest him. Johnson's actions combined with arming himself with the knife shows a consciousness of guilt and admission by conduct. (Tr. 58-59, 61-62; 72-86;139-66; 167-89; 265-71; State's Ex. 37 & 38). As a result, the testimony challenged here was relevant, probative, and admissible. Judge Cothran did not abuse his discretion in admitting this testimony.

Further, as discussed under the previous ground, this evidence is admissible as "res gestae of the crime" evidence Johnson was seen standing across the street from the apartment complex

by C.J. when police were there immediately after the apartment manager discovered Sharee's body. C.J. told police that Johnson was standing nearby and pointed him out. Johnson fled on foot to Winona's apartment. Police spotted Johnson based on C.J.'s pointing him out and another witness pointing Johnson out. Police pursued Johnson to Winona's apartment where they saw Johnson flee. Johnson fled in the apartment and shut the door and locked it. When police knocked on the door, Johnson armed himself with the large, sharp, kitchen knife and told Daney that he [Johnson] was not going to let them [police] take him. (Tr. 58-59, 61-62; 72-86;139-66; 167-89; 265-71; State's Ex. 37 & 38). This is all part of the "res gestae of the crime." Hough, 325 S.C. 88, 480 S.E.2d 77; State v. Martin, 94 S.C. 92, 77 S.E.721 (1913)(where witness testified to the behavior of the defendant 5 to 20 minutes after the shooting and killing of the deceased, the language and behavior of the defendant at the time of the shooting, or immediately afterwards, showing his attitude of aggression or of regret, clearly tended to enlighten the jury on the issue of whether the crime was with malice, heat of passion, or self-defense); State v. Gagum, 328 S.C 560, 492 S.E.2d 822 (Ct. App. 1997)(defendant's actions in trying to bribe officer after a robbery were admissible as *res gestae* of the crime because the 2 crimes were related and intertwined and 1 occurred shortly after the other).

Lack of Prejudice

Although not preserved, Petitioner also now claims all of this testimony was unfairly prejudicial under Rule 403, SCRE, including his statements to Daney. A trial judge's weighing of probative value verses prejudicial effect under Rule 403, SCRE, is reviewed under and abuse of discretion standard and should be reversed only in exceptional circumstances. Gadson, *supra* (referencing Brooks, 428 S.C. at 635, 837 S.E.2d at 245 (quoting Collins, 409 S.C. at 534, 763 S.E.2d at 28); Sweat. Only exceptional circumstances justify reversing the circuit court's decision

on 403 grounds. Huckabee, 419 S.C. at 423, 798 S.E.2d at 589. There are no exceptional circumstances here.

Both parties conceded the kitchen knife was not the murder weapon, but a weapon Johnson armed himself with while attempting to evade police and avoid arrest for the murders. There was no blood on the knife. The murder weapon had been returned before Johnson armed himself with this knife. Further, Johnson's statements were made by Johnson and related directly to the case. He stated police were hunting him for hurting a woman who lived next door *and* he was not going to let police arrest him. The statements were probative as to his consciousness of guilt and why he armed himself with the knife and would not surrender, and their probative value was not substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

Johnson complains that the testimony and evidence regarding the knife was also needlessly cumulative. Johnson is wrong again. The testimony regarding the kitchen knife was relevant and probative as to consciousness of guilt and gave context to why Johnson changed his mind about evading arrest. Johnson armed himself with the kitchen knife at the same time he locked the front door to Winona's apartment, stated he was not going to be taken by police, and told Daney he was being pursued for the injury of a woman nearby. Daney, in response, told Johnson to be a man and face whatever consequences he deserved if he injured someone and to not resist arrest. As a result, Johnson then changed his mind about not being taken by police, stuck the knife in the couch, and surrendered to police. Winona identified the knife as her kitchen knife and that she did not put it on the couch. Daney also testified he did not put the knife in the couch, but Johnson was armed with it when Daney left the duplex. Daney also identified the knife in the photos, and the officers who recovered it identified the knife in the photos and the large, sharp, knife itself. As a result, there was no unfair prejudice to Johnson and the testimony was not needlessly cumulative. *See*

Hart, 274 S.W. at 388 (it could not have been prejudicial to introduce weapon defendant armed himself with during arrest which was not the murder weapon as it was not of a character to excite either passion or prejudice). Further, Johnson's statements he was not going to let police take him were probative as to his consciousness of guilt and their probative value was not substantially outweighed by any unfair prejudice. Judge Cothran's determination of this issue must be affirmed.

Harmless Error

The admission of testimony about the kitchen knife and Johnson's statements was also harmless because of the overwhelming evidence of Johnson's guilt. Wells, 336 S.C. 223, 426 S.E.2d 814 (evidence was harmless in light of the overwhelming evidence of guilt). The apartment manager testified to the prior difficulties between Johnson and Sharee before her murder and to the complaints by neighbors hearing Johnson and Sharee arguing, which the manager spoke to Johnson about. She also placed Johnson in the area of the crime scene on the day of the crime. C.J. identified Johnson as the person in Sharee's home the night of August 4th/5th when Sharee and Naveah were murdered. C.J. testified to telling his mother goodnight and putting his sister to bed and to Johnson coming in his bedroom later during the night and requesting a mop, which C.J. provided. C.J. testified to discovering his mother's dead and bloody body rolled up in a rug and notifying the apartment manager. C.J. also pointed out Johnson to police, and Johnson fled on foot to Winona's home. Uncle Mike testified to loaning Johnson Daney's collectable knife a day or 2 before the murders. Patsy overheard Uncle Mike trying to get the knife back from Johnson, but Johnson would not return it. Daney testified that on the afternoon after the murders, he saw Johnson washing the murder weapon off in Daney's mother's kitchen sink. Johnson then returned the cleaned knife to Daney, and Daney put the knife up, but the knife was not clean. The knife tested positive for blood. Daney testified to police coming to his mother's front door and Johnson

stating: "I'm not going to let them take me." Johnson also told Daney the police were there because they believed he had injured the woman next door. Johnson then armed himself with a large kitchen knife intending to resist or evade arrest. Johnson then changed his mind and surrendered to police. Police then arrested Johnson and took him to the police station for questioning. On Johnson's person was Sharee's driver's license and both victim's Social Security cards. Johnson first attempted to blame 1 parent of 1 of Sharee's children for the murders and then another. Johnson eventually dropped these claims and admitted to killing Sharee and Naveah. He admitted the murder weapon was the knife belonging to Daney, which Uncle Mike had given Johnson. Johnson admitted he placed Naveah in a garbage dumpster and pointed out to police which dumpster. Police discovered blood in the dumpster and tracked that dumpster's contents to the landfill. After a vast grid search under multiple layers of garbage, police found pieces of skeletal remains of Naveah that demonstrated she was in fact dead. The crime scene showed Johnson had wrapped Sharee in a rug after killing her with a knife, and that he stabbed Naveah near the bottom of the staircase. Sharee's body was recovered at the scene, and her DNA, Naveah's DNA, and DNA consistent with Johnson's was found at the crime scene. The crime scene also revealed someone had attempted to mop up the blood corroborating C.J.'s testimony of providing Johnson with a mop during the night. Johnson also admitted to transport officers he had killed 2 people and he killed the victims because he felt he had to. While police were searching for Naveah's remains, Johnson returned from prison several times and gave recorded statements attempting to help police locate Naveah's body. As a result of the overwhelming evidence of guilt, any error in the testimony regarding the kitchen knife or even its' admission was harmless beyond a reasonable doubt on this record. Brown, 424 S.C. at 493, 818 S.E.2d at 743 ("Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,'

an insubstantial error that does not affect the result of the trial is considered harmless.'")(quoting Byers, 392 S.C. at 447, 710 S.E.2d at 60.

Appellate Issue III.

The trial court imposed an illegal sentence by sentencing Johnson to 5 years consecutive on each weapon charge where Johnson was sentenced to life without parole on the 2 murders.

This Court has summarily vacated sentences that are precluded by statute where there was no objection below. *See* State v. Vick, 384 S.C. 189, 202-03, 682 S.E.2d 275, 281 (Ct. App. 2009); State v. Bonner, 400 S.C. 561, 565-66, 735 S.E.2d 525, 527-28 (Ct. App. 2012). S.C. Code Ann. Section 16-23-490(A) prohibits a sentence of 5 years for the weapon charge if a sentence of life without parole (LWOP) is imposed for the violent crime. Johnson was convicted of 2 counts of murder and 2 counts of possession of a weapon during a violent crime. After sentencing Petitioner on the 2 murder counts to life without parole (LWOP) for each murder, the trial court sentenced Petitioner to 5 years consecutive to each murder sentence consecutive for each weapon count. (Tr. 600). There was no objection to the sentences on the weapon counts. (Tr. 600). As a result, this Court could vacate each of the 2 sentences of 5 years for the weapon charges in the interest of judicial economy, or remand to the trial court to do the same. State v. Plummer, Opinion No. 28152, Howard Advance Sheets (S.C. Supreme Court filed April 26, 2023)(where weapon sentence was admittedly illegal, but not preserved with an objection below, appellate court can vacate the illegal sentence or remand to the trial court to do the same).

CONCLUSION

For the above stated reasons, Johnson's convictions for the murders of Sharee Bradley and her daughter Naveah and the weapon charges should be affirmed. This Court may vacate the sentence on the weapon convictions or remand the case to the trial court to do the same.

Respectfully Submitted,

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By: *s/J. Anthony Mabry*
J. ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

July 24, 2023

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DAUNTE MAURICE JOHNSON,

APPELLANT.

Appellate Case No. 2022-000931

PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to J. Anthony Mabry, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent, and Designation of Matter has been forwarded to Appellant's counsel, Breen R. Stevens, Esq., via email today, July 24, 2023 to bstevens@sccid.sc.gov and to his assistant at sleverett@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 24th day of July, 2023.

s/ Donna D'Alessio
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