STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
Honorable H. Steven DeBerry IV, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

SAMUEL LEE MCNEIL,

Appellant.

Appellate Case No. 2022-000093

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in allowing the victim to remove her prosthetic eye to show the injury Appellant inflicted, because it is proof that the victim suffered serious bodily injury, specifically the protracted loss of a bodily member or organ. This is proper demonstrative evidence to prove the crime. Appellant failed to make any showing of unfair prejudice at trial and only makes a conclusory argument as to prejudice in his brief.

II.

Defense counsel only objected to one photograph, not two, and the trial court did not abuse its discretion in finding one additional photograph was not needlessly cumulative. The probative value of the photograph was not substantially outweighed by the danger from its purported cumulative effect. Further, Appellant was not prejudiced by the additional photograph and any error was harmless.

STATEMENT OF THE CASE

Appellant was indicted for domestic violence of a high and aggravated nature (DV-HAN) and attempted murder. However, the State proceeded to trial on DV-HAN only (R. p. 8) and the jury found Appellant guilty of the charge following trial on January 10-12, 2022. The presiding judge, the Honorable H. Steven DeBerry, IV, sentenced Appellant to twenty years' imprisonment.

STATEMENT OF FACTS

Thomas Mattis with the Florence County EMS testified he responded to a "sick person" call and he met Appellant at Appellant's residence. The call was for Victim. Appellant claimed Victim's injuries were self-inflicted. Following Appellant into a bedroom, Mattis saw Victim's clothes were bloody and he saw blood all over the bedroom. Dried blood and lacerations were above Victim's left eye and the top of her forehead. Blood was on the floor, the walls, the television, and the pillows of the bedroom. R. pp. 40-42. Mattis moved Victim to the ambulance, Mattis already realized this should not have been a sick person call, but a trauma related call because of the open wounds. R. p. 41.

The 911 custodian, testified Appellant called 911 at 7:11 a.m. Based on what Appellant relayed to the 911 operator, the call was classified as "a generic sick person call" and only EMS was dispatched to the residence. Later, law enforcement was dispatched. R. pp. 33-35.

Victim likewise told Mattis her injuries were self-inflicted, claiming she injured herself the previous night at 9 p.m. and refused to let Appellant call 911. She also said she had alcohol in the recent hours. R. pp. 43-44. Despite Appellant's and Victim's claims that Victim's injuries were self-inflicted, Mattis decided to call law enforcement. R. p. 44

Florence Police Officer Buxton responded to a call of possible suicide, arriving at 7:23 a.m. R. p. 46; p. 49. When he arrived, he observed blood on the ground in front of the residence. He

spoke with Appellant, who claimed Victim attempted suicide by hitting herself with a bottle. R. pp. 48-49. Blood led from the outside, up the steps. Blood was in the hallway and on the furniture in the hallway. Continuing into the bedroom, Officer Buxton saw "blood everywhere, blood all over the bed sheets, on her. The primary focus was all over the bed. It was just, like I said, a large amount of blood on the bed around where she was at." R. p. 49, lines 9-18. The blood on the bed appeared to be dried, but there was fresh blood on her face. R. p. 49, lines 20-23. Victim was not talkative and she was upset. R. p. 51. Officer Buxton testified Appellant was in the house the whole time Officer Buxton was there. R. p. 52.

Appellant told Officer Buxton that Victim came over to the house at 9 p.m. intoxicated. They were outside the house when Victim hit herself with a beer bottle. Officer Buxton noted blood on Appellant's right hand. R. pp. 52-53. Appellant claimed he did not realize the extent of Victim's injuries until the next morning. Appellant also claimed he cut himself trying to stop Victim from hitting herself with the bottle. R. p. 60. Officer Buxton has responded to reports of suicide attempts before, but he has never responded to a report of a suicide attempt with a beer bottle. R. pp. 49-50.

After being advised that Victim reported being assaulted, Officer Buxton left for McLeod Hospital where Victim was a patient. Officer Buxton found Victim reluctant to talk at first and she changed her story a few times. She wanted to list her name in the hospital records under an alias. She explained she was afraid and then admitted she wanted protection from Appellant. R. pp. 54-55. Victim disclosed she argued with Appellant inside the car, and then he asked her for a beer. Later, as they got out of the car, Appellant hit Victim with the beer bottle in the face. R. pp. 54-55.

Officer Buxton agreed the first story Victim provided was her injuries were from her hitting her head with a bottle: "[H]er story changed numerous times. That was one of her stories." R. p. 60, lines 20-24. Officer Buxton agreed he made a note that he was unsure if Victim was having

difficulty remembering things. On redirect, he explained he made the note because he was concerned about the trauma to Victim's face and head and whether the damage extended to internal damage affecting her brain and her memory. R. p. 61. However, Victim seemed to understand his questions and she did not appear to be intoxicated. R. pp. 61-62.

Officer Buxton notified the Crime Scene Unit to go to Appellant's residence. Appellant consented to a search of his residence. Officer Buxton and Investigator Shelley spoke with Appellant. Afterwards, they decided to take Appellant into custody and Officer Buxton transported him to the jail. However, the jail noticed a laceration on Appellant's hand and as a result, Officer Buxton took Appellant to McCleod. Once Appellant was discharged from the hospital, Officer Buxton brought Appellant to the jail a second time. R. pp. 57-58.

Officer Buxton was later briefly recalled to identify State's Exhibit 18, which shows the severity of Victim's injuries and the blood on the bed and on the items on the bed. R. pp. 85-86; State's Exhibit 18.

Corporal Shannon Hill testified he processed the crime scene. There were blood stains in the front yard and a busted bottle with droplets of blood on it. Inside the house, there were blood stains in the hallway on the left side wall. There was blood on the linens in the bedroom. R. pp. 63-66.

Dr. Howard Farrell at McCleod Hospital is an ear, nose and throat doctor who was qualified at trial as an expert in facial trauma. R. pp. 88-90. Dr. Farrell saw Victim under an alias of Tanisha Walker. R. p. 91. Dr. Farrell testified the CT Scan showed no facial fractures, but the globe (the eye) was damaged. There were complex lacerations on the face. R. pp. 91-92. He identified State's Exhibit 29, which shows the lacerations after they were closed. R. p. 94. Dr. Farrell testified the cumulative length of the lacerations was thirty-three centimeters. R. p. 97.

Dr. Farrell testified he never saw a patient that could have self-inflicted the sort of injury

Victim suffered. Dr. Farrell opined it would take severe force to self-inflict that injury. R. p. 95. Victim was referred to MUSC in Charleston for further treatment of the globe injury. R. p. 96. Victim denied drinking. R. p. 99.

Dr. George McGrath treated Victim at MUSC nine days after she received treatment at McLeod for a follow up appointment. Dr. McGrath explained when the left globe is ruptured, it will deflate much like a basketball if it were punctured. Dr. McGrath noted there was a repair to the rupture and Victim was present for a follow up visit nine days later. The doctors tried to find a way for Victim to regain her vision, but the doctors were unable to find a way. Meanwhile, her eye was becoming painful. The decision was made to replace her eye with a prosthetic eye. R. pp. 136-38.

Sergeant Sheldon Shelley, the supervisor and investigator, responded to McLeod and saw Victim's injuries. Sergeant Shelley agreed State's Exhibit 21 showed how Victim appeared when he saw her at the hospital. Sergeant Shelley explained that Victim first claimed her injuries were self-inflicted. But then she asked to be admitted under an alias because she was afraid. The natural next question (afraid of who?) led to Victim explaining Appellant assaulted her. R. pp. 101-06.

Sergeant Shelley and Officer Buxton went to Appellant's house. Sergeant Shelley provided Appellant Miranda[1] warnings and interviewed him, which was recorded and admitted as State's Exhibit 33. R. pp. 113-14; p. 122. Sergeant Shelley noticed a broken cell phone in the front yard and secured it in his vehicle. R. p. 126.

Victim testified she drove to Appellant's house, arrived at around 9 p.m., and went inside Appellant's house. Appellant and Victim started arguing. Appellant accused Victim of cheating on him and became angry and upset. Victim left the house and made it outside before Appellant started following her and cussing at her. Victim was inside her car when she told him she did not want to be

bothered with him anymore. Appellant entered the car on the passenger side. R. pp. 141-43. He slapped her, tore her wig off, then took her phone and stomped on it on the ground. Then Appellant returned to the car and asked Victim for a beer. Shortly afterwards, he snatched Victim out of the car and argued with her beside the car. R. pp. 144-46; State's Exhibit 17 (stomped-on cell phone).

Appellant hit Victim with a beer bottle "upside the head" and beer came out all over her clothes and her eyes. R. p. 146. Appellant then led Victim into his house and his bedroom. EMS visiting her the next morning was the next event Victim testified about, suggesting this was her next memory. R. pp. 146-47. EMS took Victim to McLeod Hospital. R. p. 151. Victim explained the reason she told various stories at the hospital was for her safety. R. p. 161.

Victim testified she lost her left eye and it was replaced with a prosthetic eye. She removed her prosthetic eye for the jury over Appellant's objection. R. pp. 151-52.

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[1] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

STANDARD OF REVIEW

Both of Appellant's issues concern the trial court's discretion in balancing the probative and prejudicial value of evidence. "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). Thus a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

"A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

ARGUMENT

I.

The trial court did not err in allowing the victim to remove her prosthetic eye to show the injury Appellant inflicted, because it is proof that the victim suffered serious bodily injury, specifically the protracted loss of a bodily member or organ. This is proper demonstrative evidence to prove the crime. Appellant failed to make any showing of unfair prejudice and only makes a conclusory argument as to prejudice in his brief.

Appellant argues the trial court erred in allowing Victim to remove her prosthetic eye which allowed the jury to view her injury. This was proof of the protracted loss of a bodily member or organ to prove the serious bodily injury element of DV-HAN. Considering this was the only contemporaneous physical evidence of the injury to prove the serious bodily injury element of DV-HAN, the probative value was especially high. On the other hand, the record is silent as to any particular danger of unfair prejudice and Appellant only musters conclusory arguments as to prejudice in his brief. The trial court did not abuse its discretion in applying the balancing test under Rule 403, SCRE.

How the issue arose

The prosecutor asked Victim to remove her prosthetic eye. Before Victim complied with the request, defense counsel objected and the trial court sent the jury out. Defense counsel claimed the question was inappropriate and "has nothing to do with the offense, ..." Although the record fails to indicate that Victim had yet removed her prosthetic eye, counsel moved for a mistrial and claimed it could not be cured. R. p. 152.

The prosecutor explained:

> Your Honor, the State has the burden of proving great bodily injury. The only way that we can prove that is to show that she no longer has the – has lost her eye. That's a member. Your Honor, we can't meet

> that burden without her showing the jury that she has lost that eye. It's an element of the offense.

R. p. 153, lines 2-7.

In response, defense counsel argued it was sufficient for two doctors to testify she lost her eye. R. p. 153, lines 8-11. The prosecutor countered: "Judge, again, they have not seen her eye that she lost, and they are . . . the factfinders and so, Your Honor, we have this high burden of proving great bodily injury and so the State believes it's necessary to meet that burden." R. p. 153, lines 13-17.

The trial court noted the State's burden of proving great bodily injury including the loss or impairment of a bodily member or organ clause. In response to defense counsel's argument, the trial court observed the jury could disbelieve the doctors based on the jury charge on credibility. Finally, the trial court found the line of questioning and the request of Victim was reasonable in light of the portion of the definition for great bodily injury that includes the protracted loss or impairment of the function of a bodily member or organ. R. p. 154, lines 4-25.

The trial court denied the motion for mistrial. The jury returned to the courtroom and the prosecutor asked Victim to remove her prosthetic eye. Defense counsel renewed her objection. Below that, the transcript reports: "(WHEREUPON witness complied.)." R. p. 155, line 6 – p. 156, line 2. Victim identified Appellant as the person who "did this" to her for the jury. R. p. 156.

Statutory elements of DV-HAN.

Domestic violence is enhanced to domestic violence of a high and aggravated nature by proof of one of three elements under S.C. Code §16-25-65(A). The operative element in this case is proof the defendant: "(1) commits the offense under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results." "Great bodily injury" is

defined as "bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." S.C. Code § 16-25-10. In the instant case, the prosecution asserted the loss of Victim's eye was serious bodily injury as defined by statute because it constituted the protracted loss or impairment of the function of a bodily member or organ, and therefore, the prosecution was required to prove the protracted loss of the eye to the jury beyond a reasonable doubt.

This is an evidentiary issue, not a mistrial issue

Appellant misapprehends the issue at hand. At trial, Appellant objected to evidence – the demonstrative removal of the prosthetic eye so that the jury could observe the injury Appellant inflicted. The objection was overruled. The only question is whether the admission of the demonstrative evidence was an abuse of discretion amounting to reversible error. So a mistrial motion was unnecessary and the denial of the mistrial was not an abuse of discretion.

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

"The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way." State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000). "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error **and resulting prejudice** in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted) (emphasis added).

Appellant fails to show resulting prejudice even assuming error. Appellant made a perfunctory objection, but did not describe Victim's removal of the prosthetic eye or explain why it was actually prejudicial. On appeal, because Appellant lacks a record to show prejudice, he essentially asks this Court to use its imagination and find prejudice. See United States v. Ford, 548 F.3d 1, 7 (1st Cir. 2008) (finding one could draw different inferences from the defendant's gesture. On the cold record, the Court of Appeals could not recreate the gesture demonstrated to the district court. "Instead, this type of inquiry recommends our deferential review of the lower court's factual findings."). Appellant simply fails to show prejudice, and as discussed below, the trial court did not err in allowing the demonstrative evidence.

The demonstrative evidence in which Appellant removed her prosthetic eye to show the injury she incurred is relevant and probative evidence, and Appellant fails to show any danger of unfair prejudice.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. 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. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App.2004).

Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73,

81, 606 S.E.2d 215, 219 (Ct. App.2004). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. Sweat, 362 S.C. at 127, 606 S.E.2d at 513.

The display of physical characteristics of a person to the jury constitutes evidence. State v. Pinkard, 365 S.C. 541, 543, 617 S.E.2d 397, 398 (Ct. App. 2005) (finding defendant's display of a tattoo constituted the presentation of evidence sufficient for the defendant to lose his right to last closing argument). Such demonstrative evidence of parts of a body invokes the same legal safeguards as other evidence such as the requirement of relevance. State v. Stokes, 339 S.C. 154, 159, 528 S.E.2d 430, 432 (Ct. App. 2000) (finding trial court erred in admission of child into evidence in which prosecutor admitted the display did not demonstrate any evidentiary purpose).

Appellant misapprehends the meaning of relevance and possibly misapprehends that the demonstrative evidence provided to the jury is actual evidence. Victim demonstrated the loss of her bodily member or organ by removing the prosthetic eye, merely a cosmetic article, to show that she did suffer the protracted loss of her eye. This was proof of an element of the offense, and whether or not other evidence demonstrated the same proof does not affect the "relevance" of the evidence. Rule 401, SCRE (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."). This is where Appellant's analysis gets off track. To say the demonstrative evidence showing the absence of a bodily member or organ is not relevant is frivolous. Appellant does not cite authority to support this startling argument.

Naturally, evidence showing the extent of injuries is generally going to be both relevant and probative, especially when proof of the extent of injuries is a required element of the offense. For instance, the display of scars by the victim of a crime is admissible to show the extent of injury for

crimes requiring some showing of aggravation. See State v. Robinson, 563 So.2d 477, 481 (La. Ct. App. 1990) (finding demonstrative display of stab wounds relevant to show extent of injuries to establish defendant used force and violence upon victim in stabbing the victim, in order to prove aggravated battery).

The Missouri Court of Appeals found the victim's scars from the gunshot wounds inflicted by the defendant were relevant to prove the "disfigurement" requirement to show "serious physical injury" for first degree assault. State v. Fuller, 837 S.W.2d 304, 307 (Mo. Ct. App. 1992). Further, the court rejected the defendant's argument that the display of the scar was not needed because hospital records and testimony sufficiently established the serious physical injury element of the offense. The court further noted the prosecution was not required to accept the defendant's offer to stipulate but could present "relevant, probative evidence" to the jury. Id. at 307-08.

In State v. Scotchel, 285 S.E.2d 384, 390 (W.V. 1981), the West Virginia Supreme Court rejected a comparison of the display of a scar to gruesome photographs: "In the first place, a scar is not necessarily gruesome in appearance. A scar represents the present actual condition which is relevant to the issue of intent to cause permanent disability or disfigurement, while a gruesome photograph depicts the initial and temporary extent of the wound. In the latter, the shock effect often outweighs the probative value of the evidence."

There is at least once case on point: The Indiana Court of Appeals found the removal of a prosthetic eye admissible in Bowman v. State, 73 N.E.2d 731 (Ind. Ct. App. 2017). In that case, the trial court required the prosecution proffer the victim's removal of the prosthetic eye in camera so the trial court could assess its prejudicial impact. Afterwards, the trial court ruled it would allow the victim to remove her prosthetic eye before the jury and made the observation that the impact was limited, comparing victim's removal of the prosthetic eye to removal of a contact, "although with a

little more effort." The trial court noted the victim handled the removal in an appropriate way: "[T]he way she did it, to me does not look like it would inflame the jury." Id. at 733.

As in the present case, the defendant argued the removal of the prosthetic eye was unfairly prejudicial. The defendant pointed to the photographic evidence documenting the injury to argue the demonstration was unnecessary. Also like the instant case, the battery offense for which the defendant was being tried required a showing the battery caused the "protracted loss or impairment of the function of a bodily member or organ." Id. at 735. The Indiana court noted that while photographs depicted the injury on the day of the crime, the prosecution was required to prove a "protracted" loss of the eye and "not merely an injury on the day of the incident." Id. at 736. "Even though a 'conventional alternative' was already in front of the jury, the State still **needed** the live demonstration to carry its burden of proof." Id. (emphasis added). Finding the trial court properly balanced the probative effect against the danger of prejudice, the Indiana court found the trial court did not err. Id.

As in Bowman, the removal of the prosthetic eye, to reveal Victim's permanent disfigurement, could not be more relevant as it proved the existence of the protracted injury still existed on the day of the trial. It was especially probative, and unlike the testimony of the two doctors, it was physical evidence. As in Bowman, the evidence was probative of an element of the offense.

Appellant offers only conclusory arguments to claim Appellant was prejudiced. "'Unfair prejudice means an undue tendency to suggest a decision on an improper basis.'" State v. Stephens, 398 S.C. 314, 728 S.E.2d 68, 71-72 (Ct. App. 2012) (*quoting* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 206 [Ct.App.2008]). "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. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). "**All** evidence is meant to be prejudicial; it is only **unfair** prejudice which must be [scrutinized under Rule 403]." State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424, 429 (Ct.App.1998) (emphasis in the original) (*quoting* United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989)).

Lacking in the instant case is any attempt by defense counsel to describe the removal of the prosthetic eye or to articulate any action by the Victim to inflame the jury. Defense counsel failed to explain for the cold record why it was prejudicial. See Calderon v. California, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." (citations omitted)); Von Moltke v. Fillies, 332 U.S. 708, 740 (1948) ("The aid to the ascertainment of the truth to be derived from the trial court's impartial observation of the witnesses should not be dissipated in the process of review. His appraisal of the living record is entitled to proportionately more, rather than less, reliance the further the reviewing court is removed from the scene of the trial."). Bowman shows the removal of the prosthetic eye may be done in an appropriate and in a less than graphic fashion. Appellant fails to show anything more happened than described in Bowman. Instead Appellant counts on this Court to cast aside its necessary reliance on the trial court's discretion and to use its own imagination to find Victim's removal of her prosthetic eye would inflame the jury. However, the record fails to demonstrate prejudice or an abuse of discretion by the trial court.

II.

Defense counsel only objected to one photograph, not two, and the trial court did not abuse its discretion in finding one additional photograph was not needlessly cumulative. The probative value of the photograph was not outweighed by the danger from its purported cumulative effect. Further, Appellant was not prejudiced by the additional photograph and any error was harmless.

Appellant's brief is factually inaccurate because it depicts the arguments and rulings over the admissibility of both State's Exhibit 18 and State's Exhibit 21. However, defense counsel only objected to one photograph (Exhibit 21) as being needlessly cumulative and the trial court ruled one additional photograph was not needlessly cumulative. Defense counsel did not argue that the two photographs were cumulative to State's Exhibit 29. The photographs are not identical as claimed by Appellant but are probative for different reasons and not needlessly cumulative to each other. The trial court did not abuse its discretion in its Rule 403, SCRE, ruling, and Appellant was not prejudiced by the challenged photograph's admission.

The challenge below was over whether to admit one extra photograph.

Prior to trial, defense counsel notified the trial court she had the opportunity to look at the State's photographs the State intended to introduce "today" and had a problem with only one photograph. R. 14. p. 43, lines 11-15. Defense counsel explained the State was attempting to introduce three photographs of Victim's face. Defense counsel explained that one would be introduced through the doctor [State's Exhibit 29], and defense counsel was not challenging that photograph.

Defense counsel then explained her challenge:

> One of the ones that I am challenging, there is picture No. 18, State's Exhibit 18, and State's 21. They are both pictures of the victim's face in the exact same angle, Your Honor. I just believe **that one**

> **extra photo** of the exact same angle would be cumulative and prejudicial, Your Honor.

R. p. 15, lines 7-13.

The prosecutor noted the State's high burden of proving great bodily injury and explained one picture was at the crime scene before Victim was treated and one picture shows the course of treatment at the hospital. The prosecutor explained each picture depicted "a little bit different injuries . . . ." R. p. 15, line 19 – p. 16, line 5.

Defense counsel argued the second picture at the hospital (State's Exhibit 21) shows untreated wounds and argued that Exhibits 18 and 21 were the same and cumulative to eachother. R. p. 16, lines 11-14. The trial court found the pictures were from a different distance and did not think **a single** additional photograph was cumulative. R. p. 16, lines 17-21. The trial court added the photographs were "in a little bit different light." R. p. 16, lines 22-23. The trial court did not think the additional photograph was prejudicial. R. p. 17.

State's Exhibit 18 was admitted at trial through Officer Buxton. Officer Buxton viewed the photograph and confirmed it showed the way Victim looked when Officer Buxton arrived at Appellant's residence. R. p. 85. The only objection was to foundation on the basis that Officer Buxton did not take the picture. R. p. 85. The picture was admitted because Officer Buxton provided a sufficient foundation by confirming that the picture showed the way Victim looked when Officer Buxton arrived at Appellant's house. R. p. 86. Officer Buxton noted the picture not only depicted the severity of Victim's injuries, but also showed "the amount of blood that was all over the bed and on the different items that were on the bed." R. p. 86, lines 14-18.

Exhibit 29 was admitted without objection after being identified by Dr. Farrell. Dr. Farrell explained that the picture depicted Victim after Dr. Farrell closed all Victim's lacerations. R. p. 94.

Exhibit 21, the challenged photograph, was admitted through Sergeant Shelley. Sergeant Shelley did not respond to the crime scene, but instead responded to McLeod Hospital where Victim was already admitted. R. p. 102. The prosecution asked Sergeant Shelley his initial impressions of Victim's injuries and defense counsel objected "because he's not a doctor." R. p. 103. The prosecution instead showed Sergeant Shelley State's Exhibit 21, which Sergeant Shelley identified as showing how Victim appeared when Sergeant Shelley responded to the hospital. Defense counsel asked the trial court to note counsel's prior objection and the photograph was admitted into evidence. R. pp. 103-04. Sergeant Shelley testified that after observing the injuries, he asked her how she attained them and she claimed they were self-inflicted. R. p. 105. That story changed after she asked to be admitted under an alias and then needed to explain why. R. pp. 105-06. Therefore, Exhibit 21 was probative because the jury could see what Victim looked like when Sergeant Shelley spoke with Victim at the hospital. Sergeant Shelley did not see Victim at the crime scene, so he would not be able to authenticate State's Exhibit 18.

State's Exhibit 21 is not needlessly cumulative to State's Exhibit 18.

State's Exhibits 18 and 21 both depict Victim when her injuries were relatively fresh, but the similarity mostly ends there. In Exhibit 18, Victim is looking downward, and so the injury to her eye is not readily visible. In Exhibit 21, the eye socket is visible, which is important since the State was proving the protracted loss of Victim's eye to prove serious bodily injury. Exhibit 21 provides a closer view of Victim's injuries. Exhibit 18 is probative because it shows Victim at the bloody crime scene before being treated at the hospital.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. 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. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006). Further, evidence may be excluded under Rule 403 on the basis that the evidence confuses the issues, misleads the jury, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, SCRE.

A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004). The relevance, materiality, and admissibility of photographic evidence, like other evidence, is within the sound discretion of the trial court. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The trial court does not abuse its discretion if the photographs serve to corroborate testimony. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997); State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.").

Appellant misstates the issue raised below. Appellant did not object to both Exhibits 18 and 21, but merely wanted the trial court to force the State to choose only one of those two exhibits in addition to State's Exhibit 29. Note counsel only made a weak foundation objection to State's Exhibit 18 and did not renew any prior objection. Appellant did renew the objection to State's Exhibit 21.

Appellant, in his brief, compares the two exhibits to State's Exhibit 29. The trial court and the attorneys never compared Exhibits 18 and 21 to Exhibit 29 because defense counsel already

indicated she would not object to Exhibit 29.

Appellant argues, "The court determined that the photographs showed [Victim's] facial injury from different distances and because there were **only two additional photographs,** . . ." Br. of App. p. 11. This is misleading, the trial court's actual ruling noted, "You know, **it being one additional photograph,** you know, as long as there's a proper foundation laid, I don't think it's cumulative." R. p. 16, lines 19-21. That is because the motion was to keep out Exhibit 21 as cumulative to Exhibit 18. Defense counsel was not moving to exclude both State's Exhibits 18 and 21.

The only authority McNeil relies on is State v. Stephens, 398 S.C. 314, 728 S.E.2d 68, 71-72 (Ct. App. 2012). This Court found a second photographic array was not needlessly cumulative to the first array chiefly because Stephens' defense was to discredit the eyewitness identifications. A review of the opinion in Stephens does not suggest a reason why the trial court in the instant case erred, and therefore is not useful authority to support Appellant's argument for reversal.

Appellant points out that his defense was the incredible claim that Victim inflicted these injuries on herself. The photographs themselves discredit Appellant's story precisely because of the severity and extent of injuries. As Dr. Farrell opined, those injuries were not self-inflicted, and the jury using its common sense and looking at State's Exhibits 18 and 21, were more likely to reach that conclusion, so the photographs were probative. Therefore, State's 21 (the only objection preserved for review) was probative and not unduly prejudicial because it showed the eye injury (unlike Exhibit 18) before treatment (unlike Exhibit 29).

Even if the trial court abused its discretion, the error was harmless. The additional photograph, in addition to all the other the pictures showing the injuries and the blood, is unlikely to have affected the verdict. See State's Exhibits 5-10; 12-16; 19-20; 22-28. Especially in light of the

overwhelming evidence of guilt and Appellant's absurd claim that those injuries were self-inflicted.

"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." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)). The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)).

In the instant case, State's Exhibit 21 is not the straw that broke the camel's back. This case had bloody pictures, several of them showing Victim (not just the three designated by Appellant). See State's Exhibits 5-17; 19-20; and 22-29. Evidence was overwhelming with Appellant insisting on a story that no one would ever believe. This single additional picture simply did not affect the outcome of trial.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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July 28, 2023

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
Honorable H. Steven DeBerry IV, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

SAMUEL LEE MCNEIL,

Appellant.

Appellate Case No. 2022-000093

CERTIFICATE OF COUNSEL

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

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