STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Kristi F. Curtis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK A. MCILWAIN,

APPELLANT

APPELLATE CASE NO. 2022-001425

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting crime scene and autopsy photographs which contained detailed and repetitive depictions of the decedent's decomposing body, since the photographs had no probative value but the danger of unfair prejudice and considerations of needless presentation of cumulative evidence weighed against admission under Rule 403, SCRE?

STATEMENT OF THE CASE

On September 23, 2021, a Lancaster County Grand Jury indicted Appellant, Derrick McIlwain, for murder. Appellant was tried before the Honorable Kristi Curtis and a jury, from March 21 – 25, 2022. Appellant was represented by Mark Grier. Luck Campbell and Nicole Workman prosecuted the case. Appellant was convicted as indicted, and he was sentenced to life imprisonment without the possibility of parole.[1]

On March 31, 2022, Appellant submitted a motion for a new trial. On September 1, 2022, the court issued an order denying the motion.[2]

This appeal follows.

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[1] R. *(indictment); Tr. 1; Tr. 723, l. 21 – 724, l. 1; Tr. 727, l. 25 – 728, l. 22.

[2] R. *(motion for new trial; order denying motion for new trial).

STANDARD OF REVIEW

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *see also State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)). In exercising its discretion on a Rule 403 objection to the admissibility of autopsy photographs, the trial court "must balance the [unfair prejudice] of graphic photos against their probative value." *Dial*, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted).

ARGUMENT

The trial court erred in admitting crime scene and autopsy photographs which contained detailed and repetitive depictions of the decedent's decomposing body, since the photographs had no probative value but the danger of unfair prejudice and considerations of needless presentation of cumulative evidence weighed against admission under Rule 403, SCRE.

Introduction

The trial court abused its discretion when it admitted twenty crime scene and autopsy photographs of the body over objection. The court did not exclude any of the photographs. Any evidentiary value the photographs may have once possessed was negated by extensive testimony from law enforcement officers and forensic pathologists. The photographs of the body were unwarranted, repetitious, and they were unfairly prejudicial due to their detailed depictions of the decedent's "rotting" body. Rule 403, SCRE.

Relevant facts

On May 28, 2019, the body of Kimberly Alger (Decedent) was found behind a vacant trailer on Spirit Drive in Lancaster County. A potential tenant had stopped by to look at the empty home. The potential tenant walked around into the back yard, saw the body, and called 911. The temperature that day was hot: one hundred and two degrees. The body was in the direct sun. Police officers who responded to the scene noticed evidence of decomposition and insect activity in the body.[3]

Decedent's cause of death was eventually determined to be asphyxia due to strangulation. A first autopsy by an inexperienced pathologist did not determine a cause of death. A second autopsy by two other experienced pathologists determined the cause of death was strangulation.

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[3] Tr. 97, l. 7 – 99, l. 13; Tr. 102, l. 14 – 105, l. 19; Tr. 128, ll. 7-24.

Microscopic examination of tissue samples taken from the neck during the second autopsy assisted in this determination.[4]

Prior to her death, Decedent and Appellant were romantically involved, and they lived together at a residence on Dickens Road. Their Dickens Road home and the vacant Spirit Drive residence were roughly a mile and a half apart. Decedent and Appellant had severe drug addiction problems, and they had a turbulent relationship.[5]

Two nights before the decedent's body was found, on May 26, 2019, Decedent's mother (Mother) said Decedent had called her. Mother stated Decedent was crying and hysterical. According to Mother, Decedent claimed Appellant had strangled her, and she said he threatened to kill her if she called the police. Mother hung up and called the Sheriff's Department, and a deputy went by to check on Decedent. However, Decedent said there was no problem and she sent the deputy away. Mother said Decedent called her again, after law enforcement left; she was again crying and hysterical.[6]

Appellant disappeared before Decedent's body was found. Four witnesses testified at trial that Appellant made admissions about Decedent's death. On May 27, 2019, Appellant saw his cousin, Donald Ray Anthony, shortly before he left town. Anthony testified that Appellant said he had killed Decedent. Anthony claimed Appellant did not have any visible injuries. At the time

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[4] Tr. 303, l. 6 – 315, l. 17; Tr. 477, l. 13 – 481, l. 3; Tr. 482, l. 22 – 504, l. 6.

[5] Tr. 549, l. 8 – 552, l. 25; Tr. 567, l. 18 – 569, l. 25; Tr. 542, ll. 20-22.

[6] Tr. 194, l. 10 – 197, l. 22; Tr. 240, l. 6 – 243, l. 1.

of his testimony, Anthony faced eighty-nine years in prison in Lancaster County alone for charges which included accessory after the fact to this murder.[7]

Witness Brittany Oneppo claimed that after Decedent's death, Appellant told her he "couldn't handle [Decedent's] foul mouth[.]" Oneppo faced seventy years in prison at the time of her testimony for charges including accessory after the fact to this murder. Robert Chapman, a former cellmate of Appellant's, claimed that Appellant told him he had warned Decedent not to call the police, and Appellant said he "snapped" and "choked her out." Chapman claimed Appellant said it "took forever" and he had to kill Decedent "twice." Chapman alleged Appellant told him Decedent's bowels released while he choked her. Chapman faced forty-five years in prison for unrelated charges at the time of his testimony. Finally, witness Brandi Walton said Appellant told her he killed Decedent because "she kept F'ing with him."[8]

Appellant was tried for murder, and his testimony was sufficient to support verdicts of self-defense or voluntary manslaughter, as evidenced by the jury being instructed on both. Appellant testified he and Decedent were arguing the night of May 26. Appellant said he called Decedent offensive names and Decedent slapped him. After the police had come and gone, Appellant went to sleep, and he woke up to Decedent trying to stab him with a knife. Appellant testified Decedent cut him once and stabbed him once. Appellant said he grabbed Decedent by her neck. Then Appellant "blacked out." When he "came to," Appellant said Decedent was not breathing. Appellant "panicked" and he "started weighing [his] odds" "as far as me being a black

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[7] Tr. 210, l. 16 – 226, l. 7; Tr. 231, ll. 4-7.

[8] Tr. 295, ll. 1-10; Tr. 348, l. 15 – 352, l. 12; Tr. 454, l. 4 – 462, l. 7; Tr. 466, l. 10 – 468, l. 11.

man and her being a white woman." Appellant loaded Decedent's body in the car, drove to the vacant residence on Spirit Drive, and abandoned the body.[9]

Appellant objected to the admission of twenty crime scene and autopsy photographs of the body: State's Exhibit Nos. 10, 12, 13, 14, 16, 17, 18, 19 (crime scene photographs of the body), and State's Exhibit Nos. 32, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46 (autopsy photographs of the body). These photographs are on file with this Court. Appellant argued the photographs were inadmissible under Rule 403, SCRE. As to the crime scene photographs, which were admitted first, Appellant argued,

> Judge, you know, there's repetition over and over of the same images that don't prove anything different as far as Ms. Alger's person . . . this one is already in . . . the representation of how she was found is well documented by that photo. And then there's just a multitude of closeups of several of Ms. Alger's face that are kind of distorted and, you know, I think they are more prejudicial than probative.[10]

In response, the solicitor stated she would withdraw four of the photographs. The court ruled the remaining photographs were "probative of the condition in which she was found and possibly cause of death, so I'm going to allow them." As to the autopsy photographs, which were offered subsequently, Appellant objected to their cumulative nature. The Court did not exclude any of the crime scene or autopsy photographs.[11]

The photographs of the body were gratuitous. Testimony by law enforcement officers was sufficient to impart the circumstances in which the body was found. For example, Officer

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[9] Tr. 717, l. 20 – 721, l. 25; Tr. 571, l. 5 – 578, l. 22; Tr. 612, l. 18 – 616, l. 7.

[10] Tr. 109, ll. 8-24; Tr. 119, ll. 17-20. Defense counsel was referring to State's Exhibit #2, which is on file with this Court.

[11] Tr. 110, ll. 1-13; Tr. 135, ll. 1-11.

Taylor, a crime scene investigator with the Sheriff's Office, testified about the apparent decomposition of the body, and the presence of insect activity. Another crime scene investigator, Officer Steele, also testified about the condition of the body in situ. Likewise, expert medical testimony was sufficient to explain the cause of death and attendant circumstances. Three pathologists testified about the condition of the body at autopsy, and two of these experts concurred on the cause of death and explained it in detail.[12]

Solicitor Campbell highlighted the decomposition in closing argument: "[Th]e flies and maggots and the ants, and even Kim's own body rotting would destroy any evidence left." "[S]he sat out in the sun for two days rotting and having ants and flies eat her . . ."[13]

Discussion

The court did not exclude any of these gruesome photographs. It found the photographs had probative value, and it did not take their prejudicial effect into account. This was error. Under Rule 403, SCRE, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "The trial judge must balance the prejudicial effect of graphic photographs against their probative value." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008).

"In the *guilt* phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." *State v. Kornahrens*, 290 S.C. 281, 288-289, 350 S.E.2d 180, 185 (1986) (emphasis in original). *See*

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[12] Tr. 111, ll. 2-5; Tr. 120, l. 20 – 127, l. 4; Tr. 163, ll. 3-18; Tr. 301, l. 17 – 316, l. 4; Tr. 482, l. 22 – 504, l. 6.

[13] Tr. 689, ll. 9-10; Tr. 691, ll. 5-7.

State v. Nelson, Op. No. 28171 (S.C. Sup. Ct. filed August 9, 2023) (Howard Adv. Sh. No. 31 at 25, 33) (autopsy photographs have little, if any, evidentiary value where the information they depict is not in dispute; their scant evidentiary value is negated by the forensic examiner's testimony).

"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) (citing *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Martucci*, 380 S.C. at 250, 669 S.E.2d at 607 (quoting *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995)).

In *State v. Kornahrens*, 290 S.C. at 289, 350 S.E.2d at 186, the Supreme Court found the admission of autopsy photographs was not error during the sentencing phase of a trial, and it specifically noted that a lack of decomposition informed admissibility: "The appearance of the bodies as the defendant left them has not been altered by decomposition or by any outside force. While these photographs and slides most likely would have been inadmissible in the guilt phase, under the facts of this case, they were relevant in the sentencing phase to show the circumstances of the crime and the character of the defendant." Unlike *Kornahrens*, this was not a bifurcated trial. The photographs were admitted for guilt, not punishment, and they depicted decomposition in merciless detail.

The photographs had no probative value. There was extensive expert testimony from three pathologists about the state of the body. Two testified about their determination Decedent was strangled to death based on damage to the neck. The coroner testified about the body. There

was testimony from multiple police officers about the location and appearance of the body. Appellant admitted he choked the decedent and discarded her body. The photographs were unnecessary to substantiate material facts. *See State v. Jones*, Op. No. 28145 (S.C. Sup. Ct. refiled July 19, 2023) (Howard Adv. Sh. No. 28 at 15, 50) (during punishment phase, photographs of children's bodies in advanced stages of decomposition were inadmissible under Rule 403; they had "no probative value"). *See also State v. Dial*, 405 S.C. at 261, 746 S.E.2d at 502 (Ct. App. 2013) (autopsy photographs of minor victim's injuries "were highly probative to the issues of whether Victim was abused and whether the abuse was the cause of his death," where defendant claimed Victim's injuries were the result of accident); *State v. Holder*, 382 S.C. 278, 291, 676 S.E.2d 690, 697 (2009) (admission of autopsy photographs of two-year-old child's internal injuries was not error, where defendant claimed child was injured in ATV accident and pathologist used photographs to refute this explanation). *Cf. State v. Hess*, 279 S.C. 14, 18, 301 S.E.2d 547, 549-50 (1983) (upholding limitation of defense testimony where it was merely cumulative to other testimony).

The likelihood of prejudice was substantial as the photographs invited a decision on an improper basis. These were 8 x 10 color photographs; many were closeups. The body was putrescent and stiff. The skin was sloughing off in patches and the eyes were gluey. Insects were in the flesh. The photographs were shocking, and their entry was improper. *See State v. Collins*, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring) (admission of autopsy photographs of child eaten by dogs was error since the primary purpose of the horrific photographs was to inflame the passions of the jury); *Torres*, 390 S.C. at 624, 703 S.E.2d at 229 (autopsy photographs were "at the outer limits of what our law permits a jury to consider"); *Brazell*, 325 S.C. at 78, 480 S.E.2d at 72 ("Although [the autopsy photographs] are in color, the

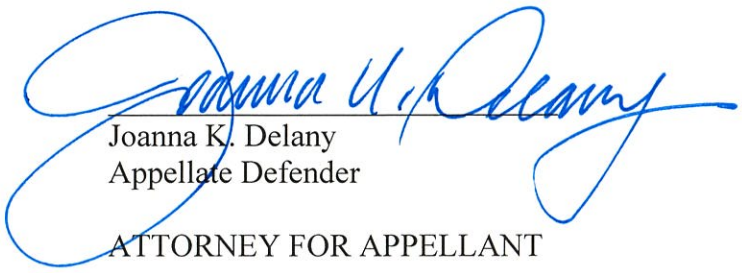
pictures are not close-ups."); *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (prejudice created by color autopsy photographs of victim's scalp pulled away from her skull and surgically opened vaginal cavity exposing seminal fluid clearly outweighed any evidentiary value); *State v. Haselden*, 353 S.C. 190, 201, 577 S.E.2d 445, 451 (2003) (autopsy photograph of child's dilated anus was simply irrelevant to any issues before the sentencing phase jury and served only to inflame the jury and leave them with impression that child may have been sexually abused). The admission of the unfairly prejudicial and cumulative photographs was error. *Torres*, 390 S.C. at 623, 703 S.E.2d at 228; Rule 403, SCRE.

Error is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. *See State v. Collins*, 409 S.C. at 538, 763 S.E.2d at 29-30. The error in this case was not harmless given the dispute at trial over whether the decedent was killed in self-defense, in an act of voluntary manslaughter, or in an act of malice. This was not a case like *State v. Jones*, Op. No. 28145 (S.C. Sup. Ct. refiled July 19, 2023) (Howard Adv. Sh. No. 28 at 15, 51), where the Supreme Court found gruesome photographs were harmless because the underlying crimes were so utterly indefensible: "There is no question the murders perpetrated by Jones were horrific—perhaps the most horrific imaginable."

Appellant testified that he acted in self-defense. There was also evidence to support voluntary manslaughter. This jury needed to evaluate Appellant's credibility, but its impartiality had been impaired by the inexcusable photographs. That the solicitor homed in on the photographs during her closing argument further favors a finding of reversible error. *State v. Nelson*, Op. No. 28171 (S.C. Sup. Ct. filed August 9, 2023) (Howard Adv. Sh. No. 31 at 25, 34).

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



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This 24th day of August, 2023.