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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CANDIE M. SHEARIN,

APPELLANT

APPELLATE CASE NO. 2022-001594

INITIAL BRIEF OF APPELLANT

GARY H JOHNSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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II. Does a trial court commit reversible error in admitting death scene and autopsy photographs which show graphic and disturbing images to prove character of the accused rather than contested facts over Rule 403, SCRE, objection?

III. Does a trial court commit reversible error when it does not require the state to at least attempt to present a complete chain of custody for fungible evidence that naturally degrades over time?

STATEMENT OF THE CASE

Appellant Candie Shearin was indicted for abuse of a vulnerable adult causing death under S.C. Code Ann. § 43-35-85 (2010) by a Lexington County grand jury on February 11, 2019. R. *. She was tried before the Honorable Walter J. McLeod IV and a jury on November 7-10, 2022. At trial, appellant was represented by Anna Williams Yonge, Jason T. Yonge, and Robert T. Williams. Angela G. Martin and Rhonda W. Patterson represented the state.

On November 10, 2022, the jury convicted appellant of abuse of a vulnerable adult causing great bodily injury as a lesser included offense to the original charge. Tr. 583, ll. 11-23. Judge McLeod sentenced appellant to fourteen years. Tr. 594, ll. 15-19.

This appeal follows.

STATEMENT OF THE FACTS

Appellant Candie Shearin's son, Michael Shearin, suffered from Pelizaeus-Merzbacher disease (PMD), a rare genetic disorder that leads to muscle spasticity, contractures, and developmental limitations. Tr. 121, l. 13 - 122, l. 22. At the time of his death, it was uncontested that Michael Shearin was twenty-five years old, was a vulnerable adult, and that appellant had been his primary in home caregiver his entire life. Tr. 78, l. 21 – 79, l. 16; 84, l. 13 – 85, l. 15. Due to the severity of his PMD, he had "exceeded the average life expectancy of his underlying genetic condition" at the time of his death. Tr. 123, ll. 23-25. Michael Shearin's particular form of PMD caused severe contracture and immobility and he was non-verbal. Tr. 142, l. 6 – 143, l. 7. The state's abuse and neglect case centered on the condition of a decubitus ulcer over the sacral area of Michael Shearin's spine, his weight loss, lack of proper medication and nutrition, and general cleanliness and lack of personal care.

Prior to 2016, Michael Shearin experienced osteomyelitis, an infection of the bone, and a meticillin-sensitve staph (MSSA) infection from an internal Baclofen pump in 2014. Tr. 126, l. 7 – 122, l. 25. Osteomyelitis in the acute form was difficult to treat and can become chronic with active ulcers. Tr. 128, l. 1 – 129, l. 24. Michael Shearin's medication and nutrition were provided by a feeding tube, and his caloric intake was based upon a prescription. Tr. 125, ll. 6-13; 142, l. 2 – 144, l. 10.

In December of 2015, Michael Shearin weighed 138 pounds. Tr. 102, ll. 19-22. His caloric requirements would have been impacted by any infection, as the body would require additional calories to deal with the infection. Tr. 129, ll. 16-25; 143, l. 8 – 144, l. 10. On November 1, 2016, appellant took Michael Shearin to the doctor due to an open wound on his back which required hospitalization and IV antibiotics. Tr. 103, 103, ll. 5-15. This was identified as a stage 4 decubitus

ulcer over the sacral area of his spine just above the buttocks.[1] Tr. 107, ll. 14-24. Michael Shearin was seen again on February 14 and March 15, 2017 as follow up. Tr. 108, l. 8 – 111, .l. 7. While the sacral ulcer had not improved, there was no sign of active infection on March 15, 2017. Tr. 111, ll. 8-24. At this visit, Michael Shearin weighed 70 pounds, and *no concern* was noted about his weight or weight loss. Tr. 111, ll. 4-15. No change in his dietary needs was charted. Dr. Michael Talente, an expert in internal medicine who treated Michael Shearin during this time, indicated active infection would lead weight loss without additional caloric intake. Tr. 91, ll. 9 – 12; 96, l. 8 – 97, l. 9; 129, ll. 1 – 24. In a follow up visit on June 7, 2017, the sacral ulcer was improved but was still at stage 3, with some improvement noted on July 26, 2017. Tr. 112, l. 13 –24. The doctor noted at this visit that appellant was doing her best to "keep up with everything" and brought her son to all appointments. Tr. 141, l. 2 – 142, l. 1. On September 22, 2017, a nurse with All Caregivers, visited the Shearin home and noted no concerns about the home conditions or Michael Shearin's condition, and she was familiar with both have noted issues with the condition of the home earlier in the year. Tr. 237, 1 – 20.

Adult Protective Services visited the Shearin home several times during 2017. These included a surprise visit on February 3, 2017, shortly after appellant's husband had died, which showed the house was a mess but that Michael Shearin's condition was not a concern. . Tr. 262, l. 22 – 265, l. 23. An April 10, 2017, visit showed a cleaner household environment and the case was closed as unfounded. Tr. 267, ll. 4-19. A new case was opened in July of 2017, but again was closed as unfounded following a home visit on August 17, 2017. Tr. 267, l. 18 – 269, l. 3.

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[1] Dr. Talente identified a decubitus ulcer as commonly referred known as a bed sore. Tr. 104, ll. 5-7.

A special bed was ordered that would assist in preventing typical "bed sore" ulcers from forming but was not available until after the onset of the ulcer that formed on November 1, 2016. Tr. 110, ll. 2 – 22. The medically prescribed bed was needed since, due to Michael Shearin's genetic deformities, frequent positional changes by hand would be difficult and uncomfortable for him. Tr. 110, ll. 16 – 22. It was not installed in the home until between March of 2017 and July of 2017. Tr. 115, ll. 9-24.

On December 20, 2017, appellant called 911 indicating her son was unresponsive at 5:41 p.m. Tr. 273, ll. 2 -9; 285, ll. 3 – 11; 292, ll. 15 – 25. Emergency services arrived shortly thereafter. Tr. 273, ll. 2 -9; 285, ll. 3 – 11. Michael Shearin's body was in the home until after 9:00 p.m. that evening. Tr. 366, ll. 17 – 22; 369, ll. 17 – 23. The state failed to introduce any evidence on the removal of the body from the home or how it was stored overnight before transport to autopsy.

The following day, the Lexington County coroner's office transported Michael Shearin's body to Newberry County Medical Center. Tr. 482, ll. 5 – 25. Deputy Coroner Clardy attended the autopsy and transported the body, but the state did not present evidence concerning the body's removal from the home after 9:00 p.m. the evening of December 20, 2017, to its transport for autopsy the morning of December 21, 2017. The autopsy was begun at 8:30 a.m. Tr. 482, ll. 5 – 7. At the time of the autopsy, Dr. Janice Ross, the pathologist, did not have a scale but *estimated* Michael Shearin's weight at fifty pounds. Tr. 482, ll. 5-12; 489, ll. 8-12. Ross testified Michael Shearin died of sepsis from e-coli bacteria entering the bloodstream due to the decubitus ulcer. Tr. 494, l. 5 – 495, l. 10. She had never heard of Pelizaeus-Merzbacher disease (PMD). Tr. 497, ll. 15-16. She was not aware that Michael Shearin had a history of osteomyelitis and an active decubitus ulcer in the same location for over a year before his death. TR. 497, ll. 11-16; 499, ll. 8-21.

The state's chemist indicated the importance of refrigeration of blood samples to avoid microbial growth, among other concerns. Tr. 467, ll. 13 – 24. The state's toxicologist went to great lengths to explain the refrigeration of samples during testing. Tr. 428, l. 6 – 429, l. 2.

ARGUMENT

I. The trial court erred in failing to properly charge the jury on the criminal intent requirement for conviction of abuse of a vulnerable adult under S.C. Code Ann. § 43-35-85 (2010).

A. Standard of Review

> [T]he trial court is required to charge only the current and correct law of South Carolina. The law to be charged must be determined from the evidence presented at trial. An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. Moreover, '[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'

State v. Grier, 427 S.C. 107, 117, 828 S.E.2d 782, 787 (Ct. App. 2019) (internal citations omitted).

B. The trial court erred in defining the criminal intent required for conviction under S.C. Code Ann. § 43-35-85 (2010).

Appellant was charged with violating S.C. Code Ann. § 43-35-85(F): "A person who knowingly and wilfully abuses or neglects a vulnerable adult resulting in death is guilty of a felony and, upon conviction, must be imprisoned not more than thirty years." Ultimately, she was convicted under S.C. Code Ann. § 43-35-85(E): "A person who knowingly and wilfully abuses or neglects a vulnerable adult resulting in great bodily injury is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years." The trial court also submitted the lesser included offense of a violation of S.C. Code Ann. § 43-35-85(C) for "knowingly and wilfully" neglecting a vulnerable adult.

The trial court was obligated to explain the terms "knowingly" and "willfully" as they are the criminal intent mandated by the statute for all three offenses the jury considered. See State v. Miles, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017).

> The required *mens rea* for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence. At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This venerable distinction, however, has been the source of a good deal of confusion. Thus, the commentators and Model Penal Code have rejected the traditional dichotomy in favor of the hierarchical approach.

State v. Jefferies, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994).

In the present case, the Legislature has specifically determined the criminal intent element – knowledge and willfulness. This level of *mens rea* must be more than simple negligence or even recklessness, and the trial judge should have instructed the jury on the difference to avoid improperly lowering the *mens rea* element required for conviction. See State v. Jenkins, 278 S.C. 219, 222, 294 S.E.2d 44, 45–46 (1982) ("By failing to include 'knowingly' or other apt words to indicate criminal intent or motive, we think the legislature intended that one who simply, without knowledge or intent that his act is criminal, fails to provide proper care and attention for a child or helpless person of whom he has legal custody, so that the life, health, and comfort of that child or helpless person is endangered or is likely to be endangered, violates ... the Code.").

The pertinent portion of the charge in this case follows:

> To prove the defendant guilty of the crime, the State must also prove beyond a reasonable doubt the Defendant acted with criminal intent. *The criminal intent required in this case is that the Defendant must be proven to have acted knowingly and willfully. To act knowingly means to act with knowledge, to consciously, not accidentally. To act willfully, means to act voluntarily and intentionally. A willful act like a knowing act is not accident.*

Tr. 575, l. 25 – 577, l. 9 (emphasis added).

By contrast, the appellant requested clear and unambiguous language that would have assisted the jury in eliminating the reckless or negligent theories from consideration:

> [K]nowingly means that the defendant knew or firmly believed that her actions constituted neglect. Mere suspicion is not enough. See State v. Porterfield, 317 S.C 360, 363, 454 S.C.2d 351, 353, Court of Appeals, 1995. It is also not enough that the facts would be sufficient to put a reasonably prudent person on notice. See, State v. White, 211 S.C. 276, 279; 44 S.E.2d 741, 742, 1947. The question for you is not whether a reasonable person in the defendant's shoes would know that the defendant's actions constituted neglect, rather if you first find that the Defendant's actions constituted neglect, you must then determine if the defendant knew or firmly believed that her actions constituted neglect. Willful means intentional. Willful means it was not done by accident. See South Carolina Criminal Request to Charge Arson in the Third Degree. *A willful act is one done voluntarily and intentionally with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.*

Tr. 525, l. 19 – 526, l. 14 (emphasis added).

The limited nature of the charge provided by the trial court here was error. In ruling on the appellant's requested charge, the trial judge noted "I certainly think you can point out all of that about willful and knowingly in your arguments today, so your record is -- your objections are noted." Tr. 528, ll. 1-3. The charging error was compounded by the trial court's decision to omit the knowingly and willfully language from the verdict form. R. *(verdict form). The trial court's verdict form allowed the jury to consider conviction for abuse of a vulnerable adult causing death, or resulting in great bodily injury, or of neglect, or of not guilty. R. * (verdict form). Appellant objected to the omission of the willful and knowing language from the verdict form on the ground that "removing that language from the statute you're inadvertently drawing attention to the rest of it in putting it on the verdict form." Tr. 527, 18 - 21.

By failing to fully define the intent element and by omitting the statutory required intent from the verdict form, the trial court committed reversible error. This allowed a lower criminal intent consideration, such as negligence or recklessness, to be used by the jury. Since the trial

court was required to define the terms that establish the *mens rea* element for conviction under S.C. Code Ann. § 43-35-85 (2010), a new trial is warranted with clear instruction from this Court on the proper jury charge in this setting.[2]

[2] Defense counsel at trial was unable to find specific charge language in connection with S.C. Code Ann. § 43-35-85 (2010) and crafted one from other "knowing" and "willful" criminal intent areas of law. App. 526, ll. 18-21. This Court can now clarify the proper language to be used in similarly situated cases.

II. The trial court erred in admitting several photographs of Michael Shearin taken at the scene of his death and from his autopsy, over appellant's Rule 403, SCRE, objection, which showed the graphic nature of his underlying, genetic deformity.

A. Standard of Review.

"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. 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) (internal citations omitted). "[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of unfair prejudice that substantially outweighs the probative value of the evidence." State v. Benton, 435 S.C. 250, 266, 865 S.E.2d 919, 927 (Ct. App. 2021). "Moreover, '[I]t 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. Nelson, No. 2021-001356, 2023 WL 5075051, at 3 (S.C. Aug. 9, 2023)

B. The trial court erred in admitting graphic autopsy and death scene photographs that were unduly prejudicial.

In this case, appellant did not contest any of the state's allegations regarding the presence of a stage 4 decubitus ulcer at the time of Michael Shearin's death. Appellant did not contest Michael Shearin's weight loss. Appellant did not contest the presence of maggots on the wound. Appellant did not object to numerous photographs that depicted the condition of the residence, the specialized bed and its bedding, or numerous other photographs offered by the state. What appellant did object to were photographs depicting her deceased son, both from the scene of his

death and his autopsy. Specifically, the nature of Michael Shearin's underlying genetic disorder and long battle with a significant stage 4 decubitus ulcer make the images in question unduly prejudicial and are graphic enough to generate an emotional response rather than a decision based upon the evidence. During trial, this centered on state's exhibits 9, 10, 41, 42, 43, 44, 45, 48 and 60, as noted *infra*.[3] Appellant objected to the introduction of these photographs under Rule 403, SCRE, as they were calculated to inflame jury passions, were unduly prejudicial, and unnecessary due to the descriptions the witnesses would offer. Tr, 182, ll. 16-22; 186, ll. 16-24.

As noted, Michael Shearin suffered from Pelizaeus-Merzbacher disease (PMD), a rare genetic disorder that caused him significant and deforming muscle spasticity and contractures. Tr. 121, l. 13 - 122, l. 22. His body was contorted and deformed from the natural progression of his disease. It was so rare, the medical experts called at trial were either unaware of the condition or had seen it only in Michael Shearin or his brother.[4] For this reason alone, the photographs should have been excluded as they depict a body deformed by the natural progression of a genetic disorder that was so rare that the medical experts who testified at trial were not aware of the disease. These included the only medically qualified experts to testify at trial: Dr. Greg Michael Talente (Tr. 98, ll. 2 – 10; 212, ll. 17 - 23) and Dr. Janice Ross (Tr. 497, ll. 15 – 16). Appellant was not on trial for the underlying medical condition that radically altered and deformed Michael Shearin's body. By their very nature, these photographs generated an emotional response that encouraged the jury to make their decision, not on the evidence and testimony presented, but on that emotional response to the graphic images.

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[3] State's exhibits 9, 10, 41-45, 48, and 60 are on file with this Court for review.

[4] Appellant's other son also suffered from the same disorder. Tr. 121, ll. 17 – 19.

Appellant objected to the photographs and their graphic nature under Rule 403, SCRE. Tr. 186, ll. 16 – 24. During the argument over the admission of the various photographs, the solicitor referenced that "jurors are the factfinders, that these photos will aid them in that endeavor, and I think they prove the circumstances of the crime, the knowledge that the defendant should have had and what she willfully ignored. *It goes toward proving her character as well.*" Tr. 193, ll. 6 – 11 (emphasis added). That the state was motivated, in part, to use the photographs for character purposes is telling.

As to the any relevance the photographs may have provided regarding neglect, there was graphic and detailed testimony from witnesses regarding Michael Shearin's physical condition at the time of his death offered without objection. This included Lexington County EMS through Tanee Tedford[5] (Tr. 275, l. 4 – 176, l. 14); Lexington County coroner's office through Jessica Wade[6] (Tr. 310, l. 16 – 311, l. 20); and the Lexington County Sherriff's office through Lieutenant McCann[7] (Tr. 344, l. 9 – 23) and Deputy Lyons (Tr. 370, l. 21 – 371, l. 12). The pathologist testified about the condition of his body in graphic detail.[8] Tr. 483, l. 3 – 486, l. 15. There were extensive photographs of appellant's house and testimony about the living conditions within the

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[5] State's Exhibit 48, one of the photographs in issue here, was admitted through Tedford's testimony subject to appellant's objection. (Tr. 276, l. 15 – 277, l. 10).

[6] State's Exhibits 41, 42, 43. 44, 45 and 60, additional photographs in issue here, were admitted through Ms. Wade's testimony subject to appellant's objection (Tr. 313, ll. 4 – 11).

[7] State's Exhibits 11 – 39 were admitted without objection from the appellant showing the condition of the property, including the hospital bed after Michael Shearin's body had been removed. (Tr. 345, ll. 3 - 22).

[8] State's Exhibits 9 and 10, two additional photographs in issue here, were admitted through Dr. Ross over appellant's previous objection. Tr. 485, ll. 1 – 17.

house admitted into evidence without objection. Tr. 344, l. 9 – 345, l. 24. The photographs at issue here were simply not needed and designed, as noted by the solicitor, to show "character."

This evidence was being introduced during the "guilt phase."[9] In this case, the evidence the photographs were intended to corroborate was not in dispute. The appellant did not dispute Michael Shearin lost weight. She did not dispute there were maggots in the bed and wound which she cleaned out (her statement to law enforcement was admitted without objection). Tr. 386, l. 24 – 387, l. 5; 388, ll. 6 – 16. She did not dispute the condition of the home (numerous photographs were admitted without objection on the living conditions within the home). She did not dispute there was a significant decubitus ulcer over the sacral area of his spine. In fact, this issue had persisted with Michael Shearin over the course of year of medical treatment which was admitted into evidence without objection during trial.

Under Rule 403, the introduction of graphic photographs, like those involved here, turns in part on whether the evidentiary value is truly present and touches on a disputed fact. When the essential fact in question is not in dispute, there is no need to corroborate with graphic photos that tend to encourage the jury to base a verdict on emotional responses. *Compare* State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) ("[I]t 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. Appellant's counsel offered to stipulate to any relevant information contained in the photographs, and it is clear the information was not really at issue.

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[9] During sentencing, the trial course has broader discretion over material such as crime scene and autopsy photographs. *See* State v. Nelson, No. 2021-001356, 2023 WL 5075051, at 6 (S.C. Aug. 9, 2023) (noting "the trial court did not have broader discretion to allow evidence that would generally be inadmissible during the guilt phase of a trial.").

Furthermore, the testimony of the forensic pathologist negated any arguable evidentiary value of the photographs. The prejudice created by the photographs clearly outweighed any evidentiary value.") *with* State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 29 (2014) ("Since there was no one else present at the time of the event, the photos aided the jury in evaluating the testimony offered by both the State and the defendant, especially as to determining the dangerous propensities of the dogs and whether or not Collins's conduct was criminally reckless.").

The present case falls on the side of Middleton and Nelson, not Collins. These contested photographs were introduced, over appellant's objection under Rule 403, SCRE, more to incite an emotional response and show "character" than to establish contested facts. As was the case with the autopsy photographs of the murder victims in Nelson and Middleton, the trial court in this case was in error in admitting the challenged photographs since the danger of unfair prejudice outweighed any probative value they offered. As the case presented the jury with the option of finding simple neglect, as a lesser included offense, this error was not harmless, and appellant is entitled to a new trial.

III. The trial court committed reversible error in admitting evidence regarding blood test results due to a failure of the state to present a clear chain of custody of the decedent's body from the time of death until his autopsy.

A. Standard of Review

"[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." Id. at 7, 647 S.E.2d at 206. The state must present the chain of custody for fungible evidence as far as practicable in the first instance, and its omission of this step requires suppression of such evidence. Id. at 8, 647 S.E.2d at 206 ("The rules upon which the State relies require the State in the first instance to have established a complete chain of custody at least as far as practicable. As discussed above, in the absence of testimony from the confidential informant, the State's proof of chain of custody is incomplete because it fails to establish the identity of each custodian and the manner of handling of the evidence.").

B. Since the state relied upon the growth of bacteria in establishing cause of death, the trial court erred in excusing the state's failure to establish a proper chain of custody for Michael Shearin's body from its removal from the home to the autopsy.

In the present case, the state did not establish the individuals who removed Michael Shearin's body from the home. The state did not establish how his body was stored between the

time of removal and the autopsy performed by Dr. Ross. Appellant objected to testimony surrounding the testing performed by Dr. Ross and SLED concerning blood samples due to breaks in the chain of custody. Tr. 474, l. 19 – 477, l. 23. The objection was renewed during Ross' direct exam. Tr. 490, ll. 4 – 18; 493, ll. 18 – 494, l. 3. There simply was no effort by the state to establish who removed the body from the home and how it was stored over the next several hours. The state stated the witnesses it intended to call did not know anything about how the body was collected from scene before being transported to the autopsy. Tr. 452, ll. 9 – 23.

A dead body decays and the naturally occurring bacteria within the body plays a role in the process. *See* Mateusz Spredua *et al.*, *Microbial Traces and Their Role in Forensic Science*, Vol 132, Issue 4 J. of Applied Microbiology, 2547 – 2557 (April 2022) (discussing the occurrence of migration phenomena of post-mortem bacteria being low *if autopsy is within the first 24 hours after death and body was kept refrigerated*). Temperature plays a significant role in the speed of postmortem putrefaction, and the state's witnesses testified to the steps they took with biological samples to keep them in a cold, refrigerated environment. Tr. 431, l. 2 – 439, l. 5; Spredua, supra. As the body breaks down, bacteria grow and spread. Tr. 467, ll. 13 – 24; "The rate of microbiological changes in the body of a deceased individual may be additionally affected by the environmental factors in which the body was abandoned (temperature, humidity, oxygenation, weather). . ." Spredua, *supra* at 2549.

Here, since the state relied upon the testimony of Dr. Ross regarding cause of death (sepsis from e. coli that entered the blood stream from the lower back ulcer), the nature and spread of the bacteria was in issue. Tr. 494, ll. 5 – 21. It was incumbent upon the state to establish the chain of custody of decedent's body from its removal from the home until transport to the autopsy. It failed to do so. At most, the state indicated an unnamed "body removal company" had possession of the

remains during the twelve hours from removal (which was almost five hours after death) until the autopsy began. Tr. 452, ll. 9 – 23. By not even trying to provide a complete chain of custody of the storage and handling of the body, the state's evidence of postmortem bacteria growth should have been excluded.

Contrast this natural decaying process of bacterial growth with that of blood alcohol, which dissipates over time. *See* Hamrick v. State, 426 S.C. 638, 653, 828 S.E.2d 596, 604 (2019) ("It is not clear to us how the failure to draw Hamrick's blood within three hours of his arrest 'materially affected the accuracy or reliability of the test results or the fairness of the testing procedure.' There is no evidence the delay in drawing Hamrick's blood resulted in anything but a test result showing a lower blood alcohol concentration than would have been shown if the test were timely conducted."). In such a setting as blood alcohol, delays in obtaining samples would *benefit* the accused and thus delays do not create prejudice. In contrast, when relying on bacterial infection as a cause of death, as in the present case, this delay will simply allow the postmortem bacterial growth to adversely impact the cultures. In fact, Dr. Ross testified she obtained the bacteria growth in the samples she removed within 24 hours. Tr. 497, ll. 19 – 23.

While Michael Shearin's body was itself unique and did not require a complete chain of custody before *identification*, the blood within his body and the bacterial growth therein were fungible, requiring the state to make some effort to complete the chain of custody regarding storage and care of his body before autopsy. *Contrast* State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741–42 (2005) ("While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required: If the offered item possesses characteristics which are fairly unique and readily identifiable, *and if the substance*

of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a *substantially unchanged condition.*" (emphasis added)) *with* State v. Trapp, 420 S.C. 217, 231, 801 S.E.2d 742, 749 (Ct. App. 2017) ("Accordingly, if the identity of each person handling the [fungible] evidence is established, and the manner of handling is reasonably demonstrated, the circuit court does not abuse its discretion in admitting the evidence absent proof of tampering, bad faith, or ill-motive.").

Since the state made no attempt to provide a complete chain of custody that would verify the proper storage before autopsy to prevent the growth of bacteria in the blood, evidence concerning the testing of Michael Shearin's blood for bacteria growth should have been excluded as argued by defense counsel. Tr. 476, ll. 4-25. This error was prejudicial as it allowed the pathologist to identify the cause of death as homicide and connect a specific area of alleged neglect (the stage 4 decubitus ulcer) to death. Tr. 495, l. 25 – 496, l. 11. Since the jury considered three levels of neglect charges in reaching a verdict, the impact of this improper testimony on the final verdict could not have been harmless. In fact, the jury asked two questions, one on the meaning of reasonable doubt and one concerning the sentence recommendations for *each of the three* verdict options. Tr. 581, l. 12 – 582, l. 3.

CONCLUSION

By reasons of the foregoing arguments, appellant's conviction should be reversed, and the case remanded to the Lexington County Court of General Sessions for a new trial.

Gary H. Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of August, 2023.