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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

FINAL REPLY 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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1. Respondent's narrow focus on the lower court's effort to define "knowingly" and "willfully" does not address the impact on the jury charge's failure to explain the criminal intent required for conviction under S.C. Code Ann. § 43-35-85.

In its brief, the state has focused on the trial court's effort to define the terms "knowingly and willfully." Appellant concedes the trial court made an effort at defining those terms. The problem the trial court created was in failing to connect those definitions with the criminal intent element required for conviction under S.C. Code Ann. § 43-35-85 (2009 *as amended*). The legislature has mandated the criminal intent required under the statute, to be established beyond a reasonable doubt, is that the accused "knowingly and wilfully" abused or neglected a vulnerable adult. 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 issue with the charge in the present case was with the lack of connection between the knowing and willful language and the criminal intent required. This allowed the introduction of a lower level of criminal intent to enter the jury's deliberations. Guidance here can be provided by our Supreme Court's decision in McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). In McKnight, our Supreme Court noted that "the trial court's recitation of the general

criminal intent charge alone in response to the jury's inquiry only served to further confuse the jury by referencing mere negligence and otherwise failing to clarify the particular mental state required for a conviction of homicide by child abuse." Id. at 48, 661 S.E.2d at 361.

In the present case, the lack of a connection between the terms "knowingly and willfully" with the criminal intent required for conviction was in error and warrants a new trial with guidance on the proper charge language from this Court.

2. The photographs of appellant's deceased son were improperly admitted since they did not depict contested facts requiring corroboration of the testimony of the numerous witnesses.

Since the filing of appellant's initial brief, our Supreme Court has provided further guidance on the issues surrounding the admission of disturbing photographs. *See* State v. Heyward, No. 2021-000122 (S.C. Oct. 5, 2023). In Heyward, our Supreme Court noted that in "two recent cases—*Jones* and *Nelson*—we found the trial court erred in admitting gruesome photos because the inherent tendency of the photos to cause unfair prejudice substantially outweighed what we found was very little probative value." As our Supreme Court noted in Heyward, in Nelson the basis for admitting the photographs was eliminated by the admission by the accused as to what was depicted in the photographs. State v. Nelson, 440 S.C. 413, 424, 891 S.E.2d 508, 513 (2023) (holding "the autopsy photographs in question had little, if any, evidentiary value because the information depicted in the photos was not in dispute and the scant evidentiary value they did contain was negated by the forensic examiner's testimony."). In contrast, the accused in Heyward contested the very facts the graphic photographs displayed, increasing their "probative value" as corroboration of contested testimony. *See* Heyward, No. 2021-000122 ("If Heyward had accepted Dr. Durso's finding the head injuries did not occur

during a fall, or even if he had not specifically challenged the finding, her testimony might not have needed corroboration.").

In the present case, there was graphic testimony regarding the nature of the living conditions and appearance of appellant's son. None of that testimony was contested or needed corroboration from photographs which graphically showed that same testimony. Under Rule 403, the introduction of graphic photographs, like those involved here, turns on whether the evidentiary value was truly present and touched 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. *See* 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. 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.").

In the present case, the contested photographs were introduced to incite an emotional response and show the "character" of the accused than to establish contested facts. R. 132, ll. 6 – 11. As was the case with the autopsy photographs of the murder victims in Nelson, but notably not the case with the same type photographs in Heyward, the trial court in this case erred in admitting the challenged photographs since the danger of unfair prejudice outweighed any probative value they offered since the appellant never contested what or who the photographs

showed. Much like in Nelson, appellant's lawyers admitted what the photographs would show from opening statements:

> And the solicitor is gonna show evidence that *Candie's house was a mess. It was.* But the question isn't was here house a mess, but why? *As that evidence comes in,* I want to ask yourself was the house a mess because Candie was knowingly and willfully neglecting her child or was Candie trying her best based on what she knew to care for a child who had an incurable degenerative disease while the rest of the world fell apart around her. . . . The solicitor is also gonna show you evidence that *Mikey*[1] *had pressure sores when he died. He did.* The question isn't whether he had pressure sores, but why. Did Mikey get pressure sores because Candie knowingly and willfully neglected him or after twenty-five years of being mostly unable to move on his own was his skin weak and sensitive and did the sores persists even though she took him to the hospital and stayed with him there and got treatment with wound care specialists and plastic surgeons and did they get worse even though Candie got him a special bed where he slept in the living room feet away from her and her recliner and tried her best to clean and dress those wounds. *How about evidence showing how skinny Mikey was? Was Mikey so skinny because Candie was knowingly and willfully neglecting him by failing to feed him or after twenty-five years was his body finally giving out even though Candie fed him every day.*

R. 26, l. 8 - 27, l. 12 (emphasis added). There was little probative value to show the pressure sores or emaciated condition of appellant's son since his condition was admitted from opening statements. This lack of contested facts makes the probative value of the photographs "low" versus their inherent prejudicial nature. *See* State v. Heyward, No. 2021-000122 (S.C. Oct. 5, 2023) ("In every case in which the State seeks to introduce gruesome autopsy photographs, therefore, the trial court must acknowledge the significant danger that the photos will cause unfair prejudice.).

The state attempts to create disputed facts surrounding the photographs by arguing appellant's alternative causes for the conditions somehow makes the photographs of those condition more relevant and probative. To the contrary, since there is significant danger that the

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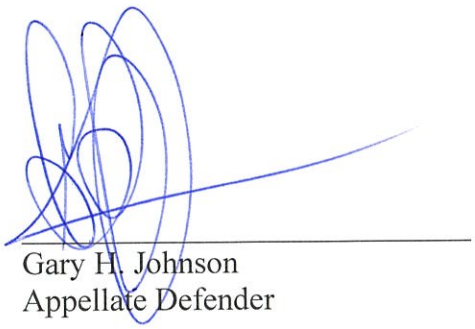
[1] Appellant's son, Michael Shearin, was referred to as "Mickey" at various times during trial.

photos will cause unfair prejudice, when alternative causes are the concern, the balancing favors suppression of the photographs rather than admission.

For the foregoing reasons and those argued in her Initial Brief, the lower court erred in admitting the graphic photographs.

CONCLUSION

For the reasons outlined herein and in appellant's Initial Brief, appellant's convictions 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 30th day of January, 2024.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant 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."

This 30th day of January, 2024.

Gary H. Johnson
Appellate Defender

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