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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County

The Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

Respondent,

v.

JAYLEN WESTLY BELL,

Appellant.

Appellate Case No. 2022-001541

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Appellant is procedurally barred from raising a Rule 608(b) issue on appeal because counsel did not object to the State's questions under Rule 608(b) but only on grounds of prejudice and mischaracterization of the evidence in the question. Alternatively, Appellant cannot show reversible error where the photographs referenced in the questions were not admitted, and the State did not go beyond the bounds of proper cross-examination by questioning Appellant based on Appellant's own admissions of having had guns in the past, and that he had posted photographs on social media posing with what appeared to be a silver and black handgun similar to the one he described he used to kill the victim. 18

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court reversibly erred in admitting into evidence an autopsy photograph depicting the decedent's foot with a rod shoved through the gunshot wound where the cause of death was neither caused by the wound to decedent's foot, nor was the cause of death at issue, and where the wound was illustrated by other evidence?

II. Whether the trial court reversibly erred by permitting the State to impeach Appellant with photos from social media posts depicting Appellant with guns where the photos were never entered into evidence, yet where the State orally published the extrinsic evidence to the jury by describing and mischaracterizing the gun in the photo as the "exact same gun" used by Appellant in the present case?

(BOA, p. 1).

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the trial court properly admitted into evidence a photograph of the bottom of the victim's foot that showed a small trajectory rod depicting the entry and exit path of the bullet because the path contradicted Appellant's testimony that he shot and killed the victim in self-defense while the Victim was standing?

II. Whether Appellant is procedurally barred from raising a Rule 608(b) issue on appeal because counsel did not object to the State's questions under Rule 608(b) but only on grounds of prejudice and mischaracterization of the evidence in the question. Alternatively, whether Appellant may show reversible error where the photographs referenced in the questions were not admitted, and the State did not go beyond the bounds of proper cross-examination by questioning Appellant based on Appellant's admissions of having had guns in the past, and that he had posted photographs on social media posing with what appeared to be a silver and black handgun similar to the one he described he used to kill the victim?

STATEMENT OF THE CASE

A Richland County grand jury indicted Appellant Jaylen Westly Bell in April of 2022 on the charges of murder and possession of a weapon during a violent crime. (R. * Indictments). On February 18, 2022, an immunity hearing was held before the Honorable Allison Renee Lee, and Bell was denied immunity in a written order dated June 23, 2022. (R. * Order Denying Immunity). Zoe Bruck and Kathleen Warthen of the Richland County Public Defender's Office represented Appellant on the charges.

A jury trial was held September 6th through September 9th of 2022, before the Honorable Robert E. Hood. (Tr. p. 1.)[1] Christopher D. Scott and John Walter Whitmire of the Richland County Solicitor's Office prosecuted the case. (Tr. p. 1.) The jury found Appellant guilty as charged. (Tr. p. 625 – 626). Judge Hood sentenced him to concurrent sentences of thirty (35) years imprisonment for murder, and five (5) years for possession of a weapon during the commission of a violent crime. (Tr. p. 625, l. 18 – Tr. p. 626, l. 4; Tr. p. 641, l. 19 – Tr. p. 642, l. 2.) (Sentencing sheets).

Defense counsel filed a Motion for a New Trial which was denied by the Honorable Robert E. Hood on October 20, 2022. (R. * Order Denying Motion for a New Trial).

This appeal follows.

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1 A mistrial was declared in the first attempt to try Appellant's case due to Appellant's complications with COVID. (Tr. p. 9, l. 17 – Tr. p. 10, l. 10.)

RESPONDENT'S STATEMENT OF THE FACTS

Events Leading Up to the Shooting

On the evening of November 24, 2019, at approximately 9:00 p.m., Appellant Jaylen Westly Bell along with his then girlfriend Stephanie Jackson (Stephanie), Stephanie's infant child, and Bell's cousin Jaquala Scipio (Jaquala), arrived at the home of Bell's cousin Neco Millhouse (Neco)[2] in Columbia, South Carolina. (Tr. p. 212, ll. 4-18; Tr. p. 450, ll. 4-7). Neco and her boyfriend Melzie Hammond, often referred to as "Black," live in the home on Dubard Boyle Road. (Tr. p. 202 l. 23 – Tr. p. 203, l. 3). Jaquala and her then boyfriend Demetrius Floyd ("victim")[3], stayed at Neco's house regularly and shared a room. (Tr. p. 203, l. 4-11; Tr. p. 205, ll. 16-19; Tr. p. 256, l. 13 – Tr. p. 257 l. 3; Tr. p. 265 l. 10 – Tr. p. 266, l. 14). It was on that evening that Appellant shot and killed the Victim.

Prior to their final arrival at Neco's home, Bell and Stephanie, along with Stephanie's infant child, initially arrive at Neco's around 5 or 6 p.m. (Tr. p. 204, ll. 4-5; Tr. p. 443 l. 23 – Tr. p. 444 l. 8). Bell exited the vehicle and stood around the burn barrel with victim, and a few other family members while Stephanie stayed in the car and spoke with Jaquala, who entered the vehicle upon their arrival. (Tr. p. 204 l. 22 – Tr. p. 206, l. 1; Tr. p. 444, ll. 10-22). Bell testified that he received a phone call from another cousin who wanted him to come to his house on Colonial. (Tr. p. 444, ll. 22-25). Shortly after the call ends, Bell, Stephanie, her infant child, and Jaquala leave Neco's home to go to Bell's cousin's home on Colonial. (Tr. p. 206, l. 17 – Tr. p. 206, l. 5. Tr. p. 447, ll. 14-20). Bell, along with Stephanie's infant child, stayed at the residence on Colonial Drive

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2 Neco is Bell's cousin and Jaquala is Neco's daughter. Jacquala and Neco are referred to as cousins in relation to Bell throughout the trial.

3 Victim is often referred to as "Meatball" throughout the trial. Appellant refers to the Victim as "Meatball" throughout his brief.

while Stephanie and Jaquala returned to Neco's house to get something to eat. (Tr. p. 208, ll. 1-25; Tr. p. 448, ll. 10-16). Stephanie and Jaquala eat, then return to Colonial to pick up Bell and Stephanie's child. (Tr. p. 209, ll. 2-24; Tr. p. 448, l. 21 – Tr. p. 449 l. 4). Stephanie decided to stay in the vehicle when they arrived to avoid being involved with whatever was happening inside. (Tr. p. 210 ll. 6-25). She testified that Bell came out of the residence with her child, and Jaquala went inside. (Tr. p. 210, ll. 2-5; Tr. p. 211, ll. 1-21). Bell testified that after Jaquala returns, the four go to Beltline, in efforts of buying ecstasy for Jaquala.[4] (Tr. p. 471, l. 18 – Tr. p. 473, l. 14).

Stephanie testified that the four returned to Nico's home. (Tr. p. 212, ll. 5-10). Upon Bell's arrival at Neco's, Bell went to smoke a cigarette outside by the burn barrel while Stephanie, her child, and Jaquala went into Neco's home. (Tr. p. 213, ll. 4-8; Tr. p. 450, ll. 8-14). Stephanie was washing baby bottles in the kitchen when she heard victim and Jaquala arguing, emerging from the back room of the house where they stayed. (Tr. p. 213, 11. 12 – Tr. p. 215, l. 2; Tr. p. 450, ll. 8-14). Though Stephanie testified that she did not see what happened, she heard "a pop" which indicated to her "[s]omebody got smacked." (Tr. p. 215, ll. 3-11). Jaquala testified that victim had shoved Jaquala's face with his hand, knocked her head into the refrigerator, and choked her during this argument.[5] (Tr. p. 278, ll. 9-18). Jaquala's 13-year-old daughter (Minor) was present at the home during this time and witnessed the altercation. (Tr. p. 215, ll. 6-7; Tr. p. 278, l. 19 – Tr. p. 279, l. 17). Minor decided she wanted to go to her father's home due to the altercation and Stephanie agreed to take the Minor. (Tr. p. 216, ll. 6-18). Stephanie, her infant child, and Minor get into the car to leave Neco's residence. (Tr. p. 216, ll. 19-24).

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4 Testimony from trial suggests that Jaquala had taken ecstasy on the night of the incident. She told investigators she and Bell were "tweaking" on ecstasy when she was initially questioned. (Tr. p. 284, l. 2 – Tr. p. 286, l. 1).

5 Jaquala agrees that Floyd has physically assaulted her at least six times in the past over the course of their eight-month relationship. (Tr. p. 286, ll. 6-10).

Bell testified that he was still outside when he saw Stephanie, her infant child, and Minor exit the home and get in the car, seemingly upset. (Tr. p. 451, l. 9 – Tr. p. 452 l. 3). Bell testified that Stephanie told him about the altercation between Jaquala and victim, and that Minor told Bell that victim "put his hands" on her mother. (Tr. p. 452 l. 11). Stephanie testified that Bell told Minor she could stay with Bell and Stephanie instead of going to her father's home and she accepted the offer. (Tr. p. 220, ll.19-21). Stephanie turned the car around to return to Neco's so Minor could retrieve some clothes. (Tr. p. 221, ll. 4-9; Tr. p. 455, ll. 20-24). Both Minor and Bell went back into the home. While the Minor went in for clothes, Stephanie testified that Bell went in for lasagna as he had not eaten before but stayed at Colonial. (Tr. 222, lines 7-16). Bell testified that he was upset victim "put his hands" on Jaquala in the presence of Minor and was curious as to why he did so. (Tr. p. 455, ll. 4-9).

Appellant's Testimony at Trial Regarding the Shooting

Bell testified that, while Minor went to retrieve her clothes, Bell saw Jaquala standing in the kitchen looking visibly upset with her face appearing red. (Tr. p. 456, ll. 13-16). Bell asked her what was going on and what happened, but she did not respond to him. (Tr. p. 456, ll. 17-20). Bell testified that he then went to check on Minor, saw victim in the room and asked him what was going on and why he "put hands" on Jaquala in front of Minor. (Tr. p. 456, l. 22 – Tr. p. l. 8).

According to Bell, victim was sitting at the head of the bed and began "talking about Jaquala's husband and her other kids" while evading Bell's question. (Tr. p. 457, ll. 9-19). Bell asked victim again what was going on between him and Jaquala. Bell testifies that Victim responded by threatening to "beat his ass." (Tr. p. 458, l. 5 – Tr. p. 459, l. 21). Bell testified that victim eventually stood up and reached into his pockets like he was searching for something. (Tr. p. 459, l. 24 – Tr. p. 460, l. 1) Bell believed it was a knife at the time, but victim did not take

anything out of his pockets. (Tr. p. 460, l. 11. 2-10). Bell testified that the interaction led to victim shoving Bell, and in return Bell shoved him back. (Tr. p. 460, ll. 12-13). victim shoved Bell again, and Bell once again shoved him back. (Tr. p. 460, ll. 13-14). Bell testified that victim stumbled back onto the bed, reached over between the mattress and the wall with his left hand and pulled out a gun. (Tr. p. 460, l. 14 – Tr. p. 461 l. 4). According to Bell, victim, while still seated, pointed the gun at Bell then stood up with the gun pointed at Bell's chest/neck area. (Tr. p. 461, ll. 5-14). Bell testified that he told victim he could "pump fake" all he wanted to, but he wasn't scared. (Tr. p. 461, ll. 24-25). Victim then became distracted and looked past Bell in the direction of the hallway. (Tr. p. 463, ll. 10-15). Bell testified that he took the opportunity to try and get the gun. (Tr. p. 463, l. 12 – Tr. p. 465, l. 3). Bell pushed victim's left hand – the one with the gun – to the wall with his right hand and jammed his finger behind the trigger so victim could not shoot. (Tr. p. 465, ll. 4-22). Bell testified that he then pushed victim with his left hand and snatched the gun away. (Tr. p. 465, ll. 19-22). According to Bell, victim recovered from being pushed down, and "came at" Bell with a closed fist. (Tr. p. 465 ll. 13-14). At that point, again according to Bell, he then closed his eyes and fired eight shots at victim. (Tr. p. 466, ll. 17 -25). Bell then exited Neco's home, tossing the gun on the couch on his way out. (Tr. p. 467, ll. 15-18).

Events after the Shooting

Stephanie remained in the car with her infant and played music to soothe him for approximately five to seven minutes. (Tr. p. 223, ll. 1-15). Stephanie observed Minor walk out of Neco's house, pause for a moment by the steps, and then continued toward the car. (Tr. p. 223, ll. 4-7). Bell soon followed, and the four drove back to Stephanie's home in Ridgeville, South Carolina. (Tr. p. 224, ll. 2-24). Bell did not tell Stephanie what had occurred and maintained a calm demeanor throughout the car ride back to Stephanie's home. (Tr. p. 225, l. 3 – Tr. p. 226, l.

5). Bell testified that he is generally "a quiet person on the street," and agreed that he did not say anything about the killing. (Tr. p. 507, l. 9 – p. 508, line 16). Rather, he selected music from his playlist. (Tr. 508, l. 20 – p. 509, l. 14).

Stephanie received a phone call during the drive telling her what had happened to victim; however, Bell still did not recount the shooting to Stephanie. (Tr. p. 228, ll. 1-12; Tr. p. 509, ll. 17-20). After arriving at Stephanie's home, Stephanie told Bell she had to talk to him, and told Bell could not stay there. (Tr. p. 509, ll. 20-22). At Bell's request, Stephanie took him to Colonial Drive to stay with his cousin. (Tr. p. 228, ll. 18-23; Tr. p. 509, ll. 23-25; 514, ll. 15-21). Bell testified he called from different phones over the next few days and did not deny that he asked Stephanie whether she had spoken with police officers. (Tr. p. 510, l. 1-Tr. p. 511, line 9).

Bell was eventually located and arrested by the fugitive task force on November 27, 2019. (Tr. p. 511, ll. 10-12). Bell gave a statement to the investigating officers admitting the killing but claiming self-defense. (*See* Tr. 516, ll. 24-Tr. p. 518, l. 13).

Cause of Death and Injuries

Victim's cause of death was "multiple gunshot wounds to the torso." (Tr. p. 367, ll. 17-19). The pathologist described eight shot wounds, with two (labeled A and B for reference) that "hit a number of critical parts of the body" and "caused death...." (Tr. p. 348, ll. 14-23). The exit wound for one, and a recovered bullet for another, allowed the pathologist to opine: "The trajectories for both A and B is front to back, downward...." (Tr. p. 349, ll. 4-24). One of the eight was a shot to the foot. The pathologist determined the shot entered at the bottom of the foot in the heel area and exited the top of the foot. (Tr. 358, l. 16- p. 359, l.7). If standing, the shot would "have to come through the floor" given the trajectory. (Tr. 359, ll. 15-19). The pathologist also noted "an incision of the left ear and scalp" which he described as a "stab wound." (Tr. 360, ll. 1-12).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 199 S.E.2d 61, 65 (1973)). Appellate courts "are bound by the lower court's factual findings unless they are clearly erroneous." *Id*, (citing *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000)). " 'The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way.' " *State v. Commander*, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting *State v. Bridges*, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982) (citations omitted)).

Review of Evidence Rulings

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *Commander*, 396 S.C. at 262–63, 721 S.E.2d at 417 (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citing *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

ARGUMENT

I. The trial court did not err in admitting into evidence a photograph of the bottom of the victim's foot that showed a small rod depicting the entry and exit path of the bullet because the path contradicted Appellant's testimony that he shot and killed the victim in self-defense.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance,* 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). Even if admissible, a trial judge may decline to admit such evidence "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." Rule 403, SCRE. In reviewing the trial judge's Rule 403, SCRE analysis, appellate courts "are obligated to give great deference to the decision of the trial judge in this matter and should only reverse in exceptional circumstances when there is a clear abuse of discretion." *State v. Lyles*, 379 S.C. 328, 340, 665 S.E.2d 201, 208 (Ct. App. 2008).

Here, according to the trial testimony, there were only two witnesses to the shooting, and one did not survive. Appellant contended he was facing the victim, with the victim "charging" at him, when Appellant filed eight shots. (Tr. p. 466, l. 14-p. 467, l. 12; p. 519, ll. 9-25). The fatal shots entered at a downward angle. (Tr. 349, ll. 4-24). The State presented information on all the wounds but offered only one photograph – one reflecting the shot to the foot. The pathologist determined the shot entered at the bottom of the foot in the heel area and exited the top of the foot. (Tr. 358, l. 16- p. 359, l.7). If standing, the shot would "have to come through the floor" given the trajectory. (Tr. 359, ll. 15-19). Only that photograph, which was cropped to delete other injuries and blood, was admitted. Appellant cannot show an abuse of discretion in admitting the one photograph in these circumstances.

Relevant Testimony from Trial

During pre-trial motions, defense counsel advised Judge Hood that she had "a couple of objections under 403" regarding "graphic video and graphic photos" of the victim the State might offer. (Tr. p. 88, ll. 17-25). The first showed the condition in which the victim was found – two stills from an officer's body camera. (Tr. p. 90, ll. 12-20). The Court observed the photographs were not overly bloody or gory. The State agreed and further argued that Appellant had provided "a rather detailed account of what happened in that very small room" going "to great lengths to describe the victim charging and attacking him" and the State intended to rely on, in part, "the positioning of the decedent and the state of that particular room" in disproving that self-defense narrative. (Tr. p. 92, ll. 17-23). (*See* State's Exhibits 16 and 17). Those were conditionally found admissible, and later admitted during trial over the defense objection. (Tr. p. 131, ll. 13-20).

Defense counsel then expressed concern of the potential use of an autopsy photograph showing the foot wound. (Tr. 93, ll. 3-8). Counsel argued, "the State has pointed out to us [one] in particular that they intend to introduce" which defense counsel asserted was "especially gory" and questioned "why they couldn't use ... another less gory photo of the same thing" to convey the information. (Tr. p. 93, ll. 4-8). Counsel requested "that, if they choose that photo instead of" another, "that it be redacted because it almost appears in that photo as though he's bleeding from the crotch" and shows "a lot of blood and gore....." (Tr. 93, lines 9-14). The State confirmed to the Court that the photographs would demonstrate that shot was inflicted from the bottom of the foot. (Tr. p. 93, ll. 18-18).

The trial court ruled the one photograph referenced by the defense with the gore would be inadmissible. (Tr. p. 93, lines 19-22). However, the court allowed redaction to show only the foot area acknowledging that "the angle matters to" the State's presentation, and that such

redaction would allow the State to show the angle but omit excessive amounts of blood. (Tr. p. 94, ll. 6-20).

The matter was revisited again outside the presence of the jury just prior to direct examination of forensic pathologist Dr. Darren Monroe, who had conducted the autopsy and would explain his findings as to the bullet wounds. The State presented the cropped photograph to the trial court. (Tr. p. 341, ll. 6-11); (State's Exhibit 12). Defense counsel again asserted a 403 objection, and argued there were "better and more accurate ways" to show the foot injury.[6] (Tr. p. 341, ll. 13-15). The trial court's ruling stated:

> I find the picture's been moved into a more appropriate form that doesn't show as much of the blood - - coming from the crotch area. They've clearly made an attempt to make it a little bit more presentable. So, the picture will be admitted subject to the proper foundation over the defense's objection.

(Tr. p. 341, ll. 17-22).

Dr. Monroe's testimony followed. The prosecution introduced two diagrams generated by Dr. Monroe when he was examining the victim's body. (State's Exhibit 13); (State's Exhibit 14). There was no objection on behalf of the defense. (Tr. p. 346, ll. 1-3). The solicitor presented Dr. Monroe with an image of the victim's left foot and asked him to describe the wound. Dr. Monroe testified:

> Yes, he had a gunshot wound to the left foot. It basically went in the bottom of the heel and came out on the medial aspect of the left foot. Again, just on the heel.

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[6] Part of the argument is reflected in the transcript as "indiscernible." (*See* Tr. p. 341, lines 14-16). Bell asserts in his appellate brief that counsel argued the information could be shown "without resorting to the autopsy photograph." (BOA, p. 10). He cites to this later argument. However, the prior passage from defense counsel's argument on Tr. p. 92 as reference above simply suggests another photograph could be used.

(Tr. p. 357, ll. 19-25). The solicitor then showed Dr. Monroe a photograph of State's Exhibit 12, and asked Dr. Monroe to describe the image. Dr. Monroe testified, "This is a photograph from the autopsy with a probe through this particular gunshot wound through the heel." (Tr. p. 358, ll. 5-6). The solicitor continued to inquire about the purpose of the probe and Dr. Monroe testified, "The probe demonstrates the trajectory of it." (Tr. p. 358, ll. 7-10). The prosecution then offered State's Exhibit 12 for admission into evidence. Defense counsel objected pursuant to Rule 403. The Court admitted the photograph over defense counsel's objection. (Tr. p. 358, ll. 11-17). After discussing the remaining wound sites, the solicitor requested Dr. Monroe be able to show the jury the wound sites on a mannequin for demonstrative purposes, which was allowed. (Tr. p. 361, l. 13 – Tr. p. 362, l. 10).

Discussion

On appeal, Appellant argues the court erred in admitting the cropped photograph as the "photograph was not necessary to substantiated material facts or conditions, and its probative value was substantially outweighed by the danger of unfair prejudice…." (BOA, p. 10). Appellant, though, does not point to any fact that the trial court misapprehended or any law that misapplied. In short, he fails to argue a basis for finding an abuse of discretion. His arguments on admissibility generally fare no better.

First, Appellant argues the photo was "not necessary to establish any material facts or circumstance." (BOA, p. 11). However, the trial court properly considered that the angle of this particular shot was important to the presentation of the State's case. This is supported by the record and the applicable burden. *See, e.g., State v. Williams*, 427 S.C. 246, 250, 830 S.E.2d 904, 906 (2019) ("if there is some evidence to support each element of self-defense—whether found in the State's presentation of evidence or produced by the defendant—it becomes the State's burden

to persuade the jury beyond a reasonable doubt that at least one element of the defense does not exist."). The only evidence of self-defense came from Appellant's testimony. If the State shows that testimony was not credible, the State may carry its burden of disproving self-defense. *Williams, supra.* It is not unreasonable to determine a heightened probative value on these facts. Indeed, the defense admitted, though the context of a question posed to Dr. Monroe that the shot to the foot would "seem[] hard to explain" from standing. (Tr. p. 371, ll. 1-21).

Second, the defense did not concede the fact that the shot was not indicative of self-defense. Notably, in cross-examination of Dr. Monroe the defense elicited that the body has flexibility and ability for movement that would not be captured by the demonstration on the mannequin or the diagram. (Tr. p. 369, ll.4-22; *see also* State's Exhibit 13 and 14). Appellant's argument that the mannequin and diagrams should be deemed sufficient with the necessity of the photograph, (BOA, p. 11), rings rather hollow in light of the defense's own attempts to encourage the jury to treat with with skepticism. Moreover, the photograph corroborated and helped to focus on the specifics of the shot and trajectory that may not be otherwise sufficiently described or discerned. *See State v. Collins*, 409 S.C. 534, 763 S.E.2d 27 (2014) (quoting *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) (holding that if the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it).

Third, Appellant argues that "Dr. Monroe's testimony on cross-examination confirmed that he could neither determine the order in which the multiple gunshots occurred" or the "position" of the victim when Appellant shot him. (BOA, p. 12). He argues that does not prove anything as to murder. (BOA, p. 12). In this argument, appellant attempts to graft a requirement on admissibility that does not exist. The photograph alone does have to prove *everything* that happened. The State had presented crime scene photos that demonstrated the victim was found with the feet on the

floor, face up with his upper body on the bed. (State's Exhibits 16 and 17). That evidence enhances the probative value of the foot photograph because if the jury believed the shot came from underneath up, it does not follow the shot occurred as Appellant testified. Therefore, the evidence was probative as to contested facts.

Fourth, Appellant argues essentially that admissibility resulted in unfair prejudice because it is a real picture of the victim's foot and it shows "a rod shoved through a hole" along the bullet path. (BOA, p. 12). Respondent submits Appellant overstates the danger and the description. The photograph shows a sterile presentation of the foot and a small rod that does not appear to stretch or distort the wound at all. (State's Exhibit 12). There is no blood or gore or incision, no peeling back of skin, or exposure of muscle or cavity. The body cam stills properly admitted (and not contested on appeal) show the victim lying on his back bleeding from what appears to be the site of a gunshot wound to the groin area. (*See* State's Exhibit 16 and 17). State's Exhibit 12 cannot be compared to those that show the midsection with blood. But it need not be compared. A simple review leads to the proper conclusion: This is not a gory picture. Factually, Appellant cannot show an abuse of discretion or unfair prejudice.

Appellant relies on the general caution attached to admission of "autopsy" photographs and *State v. Nelson*, 440 S.C. 413, 891 S.E.2d 508 (2023), (BOA, at 12-13), but that reliance is misplaced.

"The law is well settled that the mere fact that a photograph is gruesome is not a reason for its non admission." *State v. Collins*, 409 S.C. 536, 763 S.E.2d 28 (2014) (quoting *State v. Ernst*, 150 Me. 449, 114 A.2d 369, 373 (1955)). However, our Supreme Court has cautioned "that gruesome autopsy photographs carry the inherent tendency to cause an emotional reaction on the part of the jury." *State v. Heyward*, 441 S.C. 484, 501, 895 S.E.2d 658, 667 (2023). As

demonstrated above (and by the picture itself), this is neither a photograph of pulled back skin or cavity and is not bloody or otherwise gory. The "inherent tendency" to spark "an emotional reaction is lessened. Further, the photo shows only the foot, not the face or other wounds. And critically, this evidence, along with evidence from the other seven shots, was important to clearly show that the shooting could not have occurred as Appellant testified. The State argued that the evidence shows the victim was sitting on the bed and was shot, noting the downward trajectory of the bullets actually hitting the mattress, and, among other things, the photograph of the dimensions of the rooms (very small) but with an exit available had Appellant truly wanted to leave. (Tr. p. 564, l. 2 – p. 566, l. 19). The State argued of the eight, "none of them are straight through.... Trajectories that tell a story." (Tr. p. 566, lines 1-12). The photograph of the bottom of the foot is consistent and supports the argument but is neither emphasized nor used in any way to suggest an emotional response. There is no abuse of discretion in allow the State to present it case.

Moreover, *Nelson* is inapposite as there, a key factor in the decision to revers was that "the information gained from the autopsy photos was not in question." 440 S.C. at 424, 891 S.E.2d at 513. It was a matter identity, not malice. *Id.* Here, there were two stories – murder or self-defense. The trajectories supported a man shot while on the bed, not a man shot while lunging forward on his feet. The trial judge, exercising his discretion and balancing interests, admitted the cropped photograph. The photograph was properly used to corroborate the testimony of Dr. Monroe, and the purpose of the photograph was to illustrate the importance of the angles of the entry and exit wounds on the victim and show the forensic evidence does not align with Appellant's description of the shooting. Because "evidence in the record ... logically supports the trial court's finding, the appropriate "standard of review requires that" that the trial court ruling be upheld. *State v. Heyward*, 441 S.C. at 503, 895 S.E.2d at 668 (2023). Even so, considering the overwhelming

evidence disproving self-defense, the photograph itself was not so prejudicial as to have reasonably affected the outcome of the trial nor did it deprive Appellant of a fair trial.

Harmless Error

"In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct.App.1996) (emphasis added) (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). "To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial...." *Collins*, 409 S.C.at 538, 763 S.E.2d at 29 (quoting *Arnold v. State*, 309 S.C. 166, 420 S.E.2d 838 (1992)). Rather, "[t]o say that an error did not contribute to the verdict is ... to find that error unimportant *in relation to everything else the jury considered on the issue in question*, as revealed in the record." *Id.* (quoting *Arnold,* at 166, 420 S.E.2d at 839 (emphasis in original). "Another description frequently cited is that error 'is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" *Collins,* at 29-30, 763 S.E.2d at 538 (quoting *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)).

Even if error (which it is not), the error, a reasonable jury could evaluate the evidence presented and come to the conclusion of guilt. Again, there is no basis to find the photo was gory as to raise emotion, and the trajectory of the other bullets, including the bullets begin found in the mattress, (Tr. p. 317, l. 9 – 323, l. 7),[7] supporting the trajectory of bullets higher on the body. Further still, there is Applicant's calm demeanor after the shooting, (Tr. p. 507, l. 9 – p. 508, line 16), and his flight, checking back with his girlfriend as to whether she spoke with police, (Tr. p.

[7] A photograph of same was admitted, showing both blood and the rods, without objection. (Tr. p. 323, ll. 7-15, 326, ll. 13-25; State Exhibit 4, 9 and 10).

509, l. 23 – p. 514, l. 21). *See State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) ("Flight evidence is relevant when there is a nexus between the flight and the offense charged.").

What the jury heard and saw without State's Exhibit 12, was sufficient to carry the State's burden. The photograph alone did not unfairly prejudice Appellant. Error, if any, could only be harmless.

However, the State maintains no error occurred, Applicant has failed to show an abuse of discretion in the trial court's careful ruling. The ruling should be affirmed.

II. Appellant is procedurally barred from raising a Rule 608(b) issue on appeal because counsel did not object to the State's questions under Rule 608(b) but only on grounds of prejudice and mischaracterization of the evidence in the question. Alternatively, Appellant cannot show reversible error where the photographs referenced in the questions were not admitted, and the State did not go beyond the bounds of proper cross-examination by questioning Appellant based on Appellant's admissions of having had guns, and that he had posted photographs on social media posing with what appeared to be a silver and black handgun similar to the one he described he used to kill the victim.

Rule 608(b), SCRE allows cross-examination by questioning on specific conduct that may shed light on the truthfulness of the witness's testimony. However, extrinsic evidence may not be presented to prove that conduct. *Id.* "Appellate courts 'will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion.'" *State v. Hawes*, 423 S.C. 118, 135, 813 S.E.2d 513, 522 (Ct. App. 2018) (quoting *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012)). However, "[i]n order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (citing *Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001)).

Appellant claims the trial court erred in allowing certain questions on cross-examination as the facts show a Rule 608(b) error. (BOA, pp. 14-18). Appellant's issue was not properly preserved to review and review on the merits is barred. However, had the issue been preserved, it would still afford no relief as the argument presented lacks merits.

Relevant Facts

Bell testified at trial that he took the victim's gun away from him and shot him eight times.

The gun was never found. Appellant testified that he left the gun on the couch as he left the home. Bell then exited Neco's home, tossing the gun on the couch on his way out. (Tr. p. 467, ll. 15-18). The gun was not found by responding officers.

Neco testified that she did not allow guns in the residence and that she would have called the police and kicked Mr. Floyd, the victim, out if she had found out he had a firearm in the home. (Tr. p. 140, ll. 2-10).

Jaquala often shared a room with victim in Neco's home. She testified that she had told Investigator Hinson that victim did not have a gun in Neco's house on the night of the shooting, but he did carry a pocketknife. (Tr. p. 267, ll. 15-18; Tr. p. 294. l. – p. 295, l.7). Jaquala also testified that she did not know what happened to the gun used to kill victim that night and that there was no gun left on the couch[8]. (Tr. p. 296 l. 22 – p. 297, l. 2).

On direct examination, homicide Investigator Ronnie Hinson of the Richland County Sheriff's Department, testified that the casings found at the scene were 9-millimeter casings, and in fact, Appellant had told investigators that the gun he took from the victim during a struggle was "a Smith & Wesson, chrome and black, ... 9-millimeter" firearm. (Tr. p. 196, ll. 8-12). Investigator Hinson testified that Appellant's identification of the firearm surprised him considering that in his experience, somebody struggling in a life and death situation usually could only identify the color and size of the firearm. (Tr. p. 196, ll. 1-12). Crime scene Investigator Robert Oates of the Richland County Sheriff's Department testified that the gun used in the

[8] Jaquala called 911 a few minutes after the incident. She testified that she realized the victim had been shot after hearing gunshots and finding him in the back room lying on the bed. She testified that she saw Appellant leave the room and exit through the door. She did not mention anything about Appellant throwing the gun on the couch. (Tr. p. 271 l. 13 – p. 272. l. 13). On cross examination, Jaquala testified that she did not go looking for a gun. (Tr. p. 288. ll. 14-15).

shooting was never recovered, and ultimately a total of seven (7) 9-millimeter casings were found at the scene. (Tr. p. 311, l.19 – p. 312, l. 1, Tr. p. 330 ll. 4-13).

Stephanie, Appellant's girlfriend, testified that Appellant would normally carry a gun in his waistband and kept it hidden under his shirt so no one would see it. (Tr. p. 252, l. 21 – p. 254, l. 2).

The following discussion with the court took place outside the presence of the jury prior to Appellant taking the stand:

Ms. Bruck: Your Honor, Mr. Scott also, just during the break showed me a number of photos that he's printed off of social media that I guess he intends to introduce. They're highly prejudicial. Some of them don't identify Mr. Bell [Appellant] but many of them do.

The Court: What, what are the photos?

Solicitor Scott: They're from his Facebook account and they show him with various weaponry. One is almost identical to the one he describes used in this incident and I do not intend to introduce them. I intend to show him on the stand, again depending on the line of questioning, you know. I think it's relevant here based on the facts of this case.

The Court: All right. We'll have to take them up as they come up.

(Tr. p. 438 ll. 7-22).

On cross examination, Appellant was asked if he had ever owned a black and chrome gun before. Appellant replied that he had a lot of guns but that he did not recall a black and chrome one. The prosecutor asked Appellant if he had ever posed in pictures with a chrome and black gun.

Q. Haven't you – Jaylen, haven't you had a chrome and black gun before?

A. I had lots of guns. But, you know, I don't really recall a chrome and black one.

Q. You don't remember ever having a chrome and black gun?

A. Nah, I had a few but I don't –

Q. Have you ever posed in pictures with a chrome and black gun?

A. Nah, you know, I got a few homeboys that be rapping, you know, and stuff like that. You know, we be doing music videos and stuff like that. So, you know, we have a lot of props if I'm not mistaken if that's what they called.

Q. Okay. And you – all right. So if I – if you posed with a chrome and black gun in the past, that was like maybe a toy gun or a prop or something?

A. That's very possible. Yeah.

Q. But probable it was an actual gun.

A. No, I, I don't know.

Q. What?

A. I – the pictures that, you know, I post and stuff like that, it's like maybe from like music videos and stuff like that.

Q. Okay.

A. You know, maybe they'll take a picture from like the, you know, the scene of the music videos to got - - I mean, excuse me, excuse my language, to promote, you know, a music video and a song, stuff like that. I don't rap but, you know, I have homeboys that rap. You know they do stuff like that.

Q. You borrow their guns?

A. No, I don't borrow their guns, you know. We using props for the videos and stuff like that.

Q. But I'm telling you - - when you take pictures with the guns-

A.	The props.
Q.	The props. Okay. Do you remember posing with a prop gun that was chrome and black like the one you described?
A.	Not really but that's very possible though.
Ms. Bruck:	Your Honor, he said it's possible.
The Court:	I heard him.

(Tr. p. 500 – 501, l. 18).

The State then showed Appellant a picture from social media where Appellant was posing with a chrome and black gun, and asked:

Q.	Is that a prop gun?
A.	Oh yeah that's a prop gun. That was - - actually that occurred in Lincolnshire. My homeboy was about to do a music video on Calgary Drive. What they call 300 block.
Q.	That's a chrome and black gun though?
A.	Yeah, *it kinda look like it* if I'm not mistaken.
Q.	Okay. And then that one you're posing with, is that a prop gun too?
A.	Oh no. Actually in - - you can see it in there if you look pretty close. Those are BB guns. The ones that in his hand is a HBG BB gun. You get those from Wal-mart. And the one that's in my hand, the bottom of it's peeling but you can't really see it in that video. But they're plastic BB gun. They don't even blow back or nothing but this one does though - -

(Tr. p. 501, l. 19 – 502, l. 8) (emphasis added).

As Appellant notes in his brief, on recross examination the prosecutor asks:

Q.	And we are to believe that you did not have a gun on this particular night?
A.	Correct.
Q.	Even though we got a picture of you posing with the exact same gun?
Ms. Bruck:	Objection.
A:	Nah.
Ms. Bruck:	That's mischaracterizing –
A.	Nah, that's props.
Ms. Bruck:	the evidence
A.	- - And just BB guns
Ms. Bruck:	Your Honor, it's mischaracterizing the evidence.
The Court:	Overruled. He answered.

(Tr. p. 535, l. 17- 536, l. 5).

The solicitor continued to question Appellant on his familiarity with guns and how he was able to identify the gun used in the shooting, asking:

Q.	But isn't it extraordinary that the casings found on the bed were 9-millimeter casings? So you were right.
A.	Yeah.
Q.	Maybe it's cause it was your gun?
A.	Nah, not at all.
Q.	Okay. Same kind you posed with in the picture, a chrome and black Smith & Wesson? That's what it was?
A.	Nah, the pictures you got are just props and BB guns.
Q.	But you're saying that day in question it was a chrome and black 9-millimeter Smith & Wesson.

A. Correct.

(Tr. p. 537 ll. 5-18).

Appellant admitted to having "owned a lot of guns," having carried weapons, and that he would put his gun in his waistband and use his shirt to cover the gun, but testified that he eventually "gave away" all his real ones. (Tr. p. 480, l. 18 – Tr. p. 481, l.16).

In closing arguments, the State argued the evidence disproved self-defense. The solicitor emphasized Stephanie's testimony about Appellant regularly carrying a gun in his waist band and beneath his shirt, Appellant owning "more guns than he can count," the trajectory of the bullets conflicting with Appellant's version of events, and testimony stating the victim did not have a gun in the room at the time of the shooting. (Tr. p. 558, ll. 4-6; Tr. p. 560 ll. 21-24; Tr. p. 565, l.7 – p. 566, l. 12). He also argued:

> There's four things required for a valid self-defense. You can't be without fault in bringing on the difficulty. I submit to you he fails right there. I submit to you when you are a man armed with a gun, chrome and black 9-millimeter, Smith & Wesson, had just completed elicit drug transactions with a one year old, and then you go to confront somebody in their own bedroom, I submit to you he fails, number one because he is most certainly at fault in engaging in what ended up being a fatal encounter.

(Tr. p. 566, l. 21 – p. 567, l. 4).

Discussion

Appellant is procedurally barred from raising this issue on appeal as the issue was not properly preserved for appellate review. Defense counsel objected to the photographs on the grounds of prejudice and mischaracterization, not Rule 608(b). Additionally, even if a Rule 608(b) objection was properly raised, there exists sufficient evidence to support the trial court permitting the prosecution to show the photographs to Appellant on the stand. An abuse of discretion occurs

when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). The trial record shows no error either in fact or law in allowing the questions and impeachment.

Procedural Bar

Appellant's objection that the photos were "prejudicial" does not reference Rule 608(b) and proper scope of questioning. (*See* Tr. p. 438 ll. 7-11). Because trial counsel only objected to the prejudicial effect of the photographs and did not include a sufficiently specific reason for an objection related to Rule 608(b), Appellant's issue is not preserved. *Dunbar, supra.*

Additionally, Appellant's counsel did not object to the line of questioning which Appellant himself conceded to posing in photographs with prop and BB guns in efforts of denying owning a gun identical to the weapon used in the shooting. (Tr. p. 500 – 501, ll. 1-16). Counsel also did not object at the time the photographs were presented to Appellant to review, nor when Appellant further discussed the use of props in the photographs. (Tr. p. 501, l. 19 – 504, l. 6). Again, no part of the issue was preserved for appeal. *Id. See also State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (defendant may not argue one ground below and another on appeal).

Further, Appellant had already described the photographs later shown to him on cross examination, without interruption or objection, and insisted the photos showed a "prop" rather than a gun. In other words, the objection was fruitless, and the point had already been made to the jury. The late objection would not have been sufficient to preserve a "prejudice" argument. *See State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 448–49 (2003) (stating the admission of improper evidence is harmless where the evidence is merely cumulative to other unobjected-to evidence). At any rate, Appellant cannot show error, much less reversible error.

Alternatively, the Issue Lacks Merit

Even if defense counsel would have raised a Rule 608(b) objection, such grounds would not survive the trial court's scrutiny because Appellant identified the missing gun that was used in the shooting and the photographs show him holding an almost identical gun to the one which *he himself described to investigators*. (Tr. p 438, ll. 7-19).

Appellant argues that "the State's oral descriptions mischaracterizing the photographs crossed over the inquiry" allowed by Rule 608(b) "and into proof of the past conduct." (BOA, p. 16). However, questions cannot be deemed evidence. *State v. Washington*, 431 S.C. 394, 408, 848 S.E.2d 779, 786 (2020) ("counsel's questions and accusations were not evidence"). Moreover, the defense was on notice that the State perceived the gun was "almost identical" to the murder weapon. (Tr. p. 438, ll. 7-19). There was no attempt to "correct" or contest that observation by the State, and it appears not at all unreasonable since Appellant admitted the guns appeared similar. (Tr. p. 501, l. 19 – 502, l. 8).

Appellant also argues that credibility is essential to this case, and an unfair challenge to credibility would not be harmless. (BOA, p. 17). For all the reasons argued above, the challenge was not unfair, but even so, that credibility was "essential" is precisely why cross-examination is especially necessary on matters of credibility.

But again, because the photographs were not published to the jury, there was not violation of Rule 608(b) shown. Appellant simply denied that the chrome and black gun in the photograph was a legitimate firearm, while the prosecution insinuated it was identical to the gun he described to shoot the victim. The prosecution's use of the phrase the "exact same gun" does not vouch for the authenticity of the gun in the photograph, but logically ties the line of questioning to the credibility of the testimony.

Notably, defense counsel raised the issue in a new trial motion; however, the trial court found no error in the impeachment and also that the information on gun possession was cumulative to Stephanie Jackson's testimony. (R. * Order denying motion for new trial, pp. 3-4). The court also confirmed that "the photographs were not shown to the jury at any point in trial." (R. * Order denying motion for new trial, p. 4). Appellant does not challenge either of this additional fact finding or the conclusion.

However, the State maintains the issue is procedurally barred from review on the merits.

CONCLUSION

For the foregoing reasons, Respondent submits Appellant's convictions should be affirmed.

Respectfully submitted,

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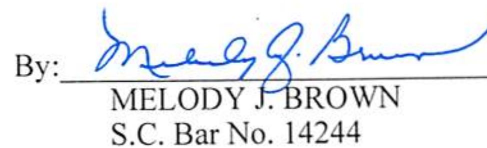
By: 
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