STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

RAY L. KELLY,

APPELLANT.

Appellate Case No. 2022-001449

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

W. JOSEPH MAYE
Assistant Attorney General
S.C. Bar No. 100851

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

HON. W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit
305 North Street, Suite #325
Greenville, South Carolina 29601-2185
(864) 467-8647

ATTORNEYS FOR RESPONDENT

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2. Whether the trial court erred in requiring Appellant to remain shackled throughout his trial for murdering a police officer, where shackling was not justified by the circumstances, since shackling must be case specific?
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4. Whether the trial court erred in admitting repeated depictions (video, audio, and photographic) of the fatal crash and its aftermath, where the probative value of the cumulative evidence was substantially outweighed by the danger of unfair prejudice, since the evidence should have been excluded pursuant to Rule 403, SCRE?
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STATEMENT OF THE CASE

The Crime

Ray L. Kelly (hereinafter "Appellant") was indicted for murder, trafficking cocaine (between 28 and 100 grams), possession of a weapon during commission of a violent crime, three counts of resisting arrest with assault of a police officer, providing false information, driving without a license, following too closely on a public highway, and speeding. (2020-GS-23-6551; 6536; 6552; 6541; 5006A; 6550; 6548; 6547; and 6557). Appellant proceeded to a jury trial before the Honorable Judge Edward W. Miller on September 26, 2022, through September 29, 2022. Appellant initially chose to proceed *pro se*. However, prior to cross examination of the State's first witness he changed his mind and previously assigned standby counsel, Mindy H. Lipinski, Esq., was appointed to represent Appellant. The State was represented by Solicitor W. Walter Wilkins, III, and Assistant Solicitor Grace B. Moroney of the 13th Judicial Circuit.

At the conclusion of the trial Appellant was found guilty on all charges except for following too closely and speeding. (Tr. p. 626-627). Judge Miller sentenced Appellant to a life sentence for the murder conviction, 10 years for each resisting arrest with assault conviction, 30 years for trafficking cocaine base 28-100 grams third offense, and 5 years for possession of a weapon during commission of a violent crime. (Tr. p. 637). This appeal now follows.

STATEMENT OF FACTS

On October 20, 2020, Officer Jesse Wasserman was in his patrol car monitoring I-85 as part of the criminal interdiction unit for Greenville County Sheriff's Office. That evening he was accompanied by team members Sergeant Conley Jumper[1] (hereinafter Victim Jumper), Officer

[1] Conley Jumper was a Master Deputy at the time of the crimes, but was posthumously promoted to Sergeant.

David Harrison, and Officer Nick Ledbetter; each officer had their own vehicle that afternoon. (Tr. p. 80-81). Officer Wasserman had just completed a stop on I-85 southbound and was in the process of returning to the northbound side of the interstate when he witnessed a vehicle clearly driving above the speed limit and following too closely behind another vehicle. Officer Wasserman turned on his blue lights (which triggers the recording of his body and car cameras), pursued the vehicle, and initiated a traffic stop of a blue Nissan Altima.[2] Officer Wasserman testified that prior to the stop the vehicle was traveling at a speed of 84 miles per hour and only two car lengths away from the vehicle in front of it. (Tr. p. 82-83; p. 84; p. 88-89).

Appellant complied with the stop by pulling to the right-side emergency lane, but as Officer Wasserman testified, he did so very shallowly, leaving very little room between oncoming traffic and the vehicle. Officer Wasserman conducted the stop on the passenger side of the car and immediately noticed an overwhelming smell of marijuana coming from the car. Appellant did not have a driver's license and was accompanied by a female passenger later determined to be Tornell Laureano. Officer Wasserman asked Appellant to step out of the vehicle to speak with him. Appellant did so but lied to officer Wasserman by giving him a fake name of "John Arthur Kelly." (Tr. p. 90-93). Officer Wasserman testified that he knew he would be conducting a search of the vehicle before the stop was over, with the smell of marijuana establishing probable cause. He also testified that he looked up the provided name by Appellant, but the physical traits from records associated with that name did not match Appellant's appearance. Officer Wasserman called for backup during this stop. (Tr. p. 94-95).

Officer Ledbetter responded as backup and maintained a conversation with Appellant while Officer Wasserman continued his investigative efforts in the patrol car. Victim Jumper also

[2] The vehicle was a rental.

responded to this call for backup shortly thereafter. When officer Wasserman returned he asked Appellant if he had let someone smoke weed in the car. Appellant denied doing so and denied that there was any weed in the car. Officer Wasserman then performed a pat-down of Appellant for weapons and explained that they would be searching the vehicle due to the presence of marijuana odor. Appellant began to walk back toward his vehicle, away from the officers, and Officer Wasserman responded by grabbing Appellant's forearm to prevent his departure and stating that Appellant was not going anywhere. Video evidence demonstrates that this effort was not violent in nature; however, Appellant immediately resisted, attempted to push the officer away, and flee to the driver's side of his vehicle. Officer Wasserman and Appellant engaged in a struggle. Officer Ledbetter and Victim Jumper came to assist in detaining Appellant who had reached the driver side of his vehicle, mere inches away from the active interstate traffic lane.[3] Appellant was also verbally made aware that he was under arrest at this time, but he continued to resist. (Tr. p. 97-103); (State's Exhibit 3, at 9:30-10:45).

The officers were unsuccessful in their efforts to subdue Appellant and he managed to get back into his driver seat with Victim Jumper on top of him still trying to detain him. With Victim Jumper standing on the emergency lane but leaning into the vehicle, Appellant got his vehicle into gear and pressed the gas petal causing the car to drive across oncoming traffic. A semi-truck in the middle lane then slammed into the driver's side of the Nissan while Victim Jumper was being partially drug across the roadway. Appellant then continued driving across the lanes of traffic into the third lane, where responding Officer Harrison was driving in an effort to respond to the call for

[3] Officer Wasserman testified that due to the location of the altercation, it was too dangerous to try and take Appellant to the ground to subdue him, as it might result in a fall into oncoming traffic. Officer Wasserman tore a tendon in his hand as a result of the altercation with Appellant. (Tr. p. 102-103). Officer Ledbetter testified that during the struggle Appellant had grabbed the collar of his shirt and was essentially strangling him in doing so. (Tr. p. 188; p. 190-191).

backup. Approximately nine seconds after the first collision, Appellant's actions caused a second collision with Officer Harrison's patrol car which led to Appellant being thrown from his vehicle.[4] Appellant continued to resist once the collisions were over, but he was ultimately apprehended and cuffed soon after. (Tr. p. 103-106; p. 192-194); (State's Exhibit 3, at 10:45-11:13); (State's Exhibit 8, at 00:57-1:23). While in the back of the patrol car, Appellant can be heard stating: "Shit, they're going to try me for trying to kill a cop." (Tr. p. 559; State's Exhibit 13, at 18:39-18:42).

Officer John James, deputy medic with the Greenville County Sheriff's Office, responded to Victim Jumper. He testified that Victim Jumper was alert and able to respond to questions, but was in severe pain. He accompanied Victim Jumper into the ambulance, but Victim Jumper ultimately went into traumatic cardiac arrest and died from his injuries. (Tr. p. 275-281). Dr. Michael Ward conducted Victim Jumper's autopsy. He testified that Victim Jumper suffered multiple blunt force injuries to his right hip, buttocks, pelvis, left hip, and lower back which caused fractures and extensive internal bleeding. Victim ultimately died from these injuries. Dr. Ward also opined that the injuries were sustained as a result of the first collision. He testified that Victim Jumper sustained no injuries that were above his belly button and the injuries sustained were consistent with an impact by the broad front of a truck, as opposed to the narrow front of Officer Harrison's sedan. (Tr. p. 287-291). Sargeant David Andis, of the Multidisciplinary Accident Investigation Team, performed an accident reconstruction. He testified that Victim Jumper appeared to fall from Appellant's vehicle just prior to the second collision, and he could find no evidence that Officer Harrison's vehicle struck Victim Jumper. (Tr. p. 296; p. 310; p. 319; p. 340).

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[4] Much of Appellant's defense attempted to challenge the proximate cause of Jumper's death by suggesting that it was Officer Harrison's vehicle that struck Victim Jumper, and that Officer Harrison was driving too fast under the circumstances. This also put considerable focus upon Jumper's location at the time of the second collision and Jumper's location after the accidents took place.

The investigation of the case also led to the following evidence. Appellant's passenger, Tornell Laureano, had a purse which contained Appellant's New York State identification card (not a driver's license), approximately $3,145 cash, a green leafy plant-like material, rolling papers, and a lighter. (Tr. p. 366-369; p. 426; p. 467). Law enforcement officers found inside the trunk of the vehicle a Springfield pistol firearm box containing a Glock 23 handgun containing Petitioner's DNA on the grip and slide, a magazine with unfired cartridges, and a box of ammunition with 25 unfired cartridges.[5] (Tr. p. 374; p. 466-467; p. 515-516). Police also found multiple cellphones, hashish marijuana, and 55.30 grams of crack cocaine. (Tr. p. 376-377; p. 379; p. 482-483; p. 491-492).

STANDARD OF REVIEW

The law "permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling of a defendant during trial." *Deck v. Missouri*, 544 U.S. 622, 633, 125 S. Ct. 2007, 2015, 161 L. Ed. 2d 953 (2005). Likewise, "[t]he admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions,

[5] The DNA testimony was presented by way of likelihood ratio of 28 Quadrillion in comparison to the known standard acquired from Appellant's dried blood swabs from clothing. (Tr. p. 513; p. 515-516).

is without evidentiary support. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007) (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

ARGUMENT

I. The trial court did not abuse its discretion in finding that the restraint chair was necessary given Appellant's behavior in court and his altercation with police officers following his refusal to leave his cell to attend trial.

Issue as it was presented at trial

The concern for Appellant's disruptive behavior was immediately apparent, as Appellant was disruptive and nonresponsive during the Honorable Letitia H. Verdin's pretrial hearing on February 16, 2021. The hearing was necessary because Appellant had refused to come before the video monitor on December 11, 2020, to receive his *Faretta* warnings. An in-person hearing during the covid pandemic had to be held just to effectively inform Appellant of his constitutional rights. (Feb 16, 2021, hearing Tr. p. 1; p. 3-7). Even for this limited purpose, Appellant was so bizarrely disruptive, nonsensical, and obstinate in refusing to answer the court's simple questions that it raised concerns of his competency to stand trial. The only point Appellant was effective in conveying was his desire not to have counsel appointed, which the court could not effectuate until competency was confirmed. Judge Verdin therein ordered that Appellant undergo a mental health examination. (Feb 16, 2021, hearing Tr. p. 7-10). The matter was reconvened following a motion from the Department of Mental Health, noting that they could not conduct their mental health examination without Appellant first having counsel assigned. (Mar 16, 2021, hearing Tr. p. 1; p. 4-5). Judge Verdin endeavored to assign counsel for the limited purpose of conducting a mental health evaluation. Appellant was addressed just once while the State and public defender addressed the legalities and logistics of the arrangement, and he was again nonresponsive. (Mar 16, 2021, hearing Tr. p. 5-13; p. 5-6).

A third hearing was convened on May 13, 2021. The record shows that Appellant cooperated with the evaluation, the court found Appellant to be competent to stand trial, and the court proceeded to readdress whether Appellant wished to have counsel assigned or proceed *pro se*. (May 13, 2021, Pretrial Tr. p. 1; p. 3). The public defender assigned to Appellant for the evaluation was relieved, but Appellant was again uncooperative with the court proceedings, repeatedly refusing and objecting to all proceedings while also asserting other nonsensical claims. The court warned Appellant that whatever purpose he had for his behavior, it would not slow down the legal process going forward. (May 13, 2021, hearing Tr. p. 4-6; p. 6).

A fourth hearing was convened before the Honorable Edward W. Miller on November 16, 2021, primarily to explain the pre-trial roster system to Appellant as a *pro se* defendant, ensure discovery had been received, and reissue Appellant's *Faretta* warnings given his bizarre behavior in prior proceedings. (Nov 16, 2021, Pretrial Tr. p. 1; p. 3). To proactively avoid unnecessary continuances, the Solicitor also informed the court that in speaking with New York state prosecutors, Appellant has a history of insisting on proceeding *pro se*, only to change his mind and demand an attorney in an effort to delay proceedings. The Solicitor suggested that the appointment of standby counsel may be needed to avoid such concerns. (Nov 16, 2021, Pretrial Tr. p. 4). Following the reissued *Faretta* warnings, Appellant again claimed to not understand the proceedings, was again uncooperative in his responses to the court's questioning, and asserted the same vacuous declarations. This particular exchange with the court was longer and even more confrontational than his previous efforts. (Nov 16, 2021, Pretrial Tr. p. 8-14; p. 17-20). Ultimately, Judge Miller chose to assign standby counsel (which Appellant objected to) and have Appellant informed of the approximate timeframe that his case would be called to trial.

On June 27, 2022, a fifth pretrial hearing was held. Ms. Gorton, asked to be substituted as standby counsel due to a scheduling conflict. She also articulated that Appellant had refused to meet with her and discuss the case. Appellant's response was to deny having any counsel and behave as he had in prior hearings. Judge Miller granted Ms. Gorton's request and substituted Ms. Lipinski as standby counsel for Appellant. (June 27, 2022 Pretrial Tr. p. 1; p. 3-10).

Appellant's jury trial commenced on September 26, 2022, before Judge Miller. Final pretrial matters were addressed, and Appellant began with his usual behavior. The trial court noted for the record that *Appellant had been offered access to regular clothing in lieu of prison attire but had refused such.* (Tr. p. 10-12). Ms. Lipinski addressed the court to note that she had made multiple efforts to meet with Appellant, and was minimally successful, but in her most recent efforts he again refused to speak with her or her investigator. (Tr. p. 13). Appellant continued his disruptive efforts via unnecessary objections and repetitive assertions. (Tr. p. 14-16). Thereafter, the trial court explicitly warned Appellant that there would be repercussions if he continued to interrupt and behave in his usual manner. (Tr. p. 16).

Appellant continued to interrupt with unnecessary objections.[6] (Tr. p. 17-27). The trial court then issued the following warning to Appellant:

> Mr. Kelly, as you are aware, if you misbehave in the court, the State has the capacity to implement a process that would – you probably don't want to get involved in. And I already – I understand that you have said that you're not going to cooperate with a stun belt, which at this juncture because you've offered no reasons to use it, we're not going to implement. But it is available. And should things get out of hand, we will ensure that the propriety of the courtroom is maintained. And if that includes putting a stun belt on you, that's what will happen.

[6] Appellant was read his *Faretta* warnings a third time during this portion of the trial.

(Tr. p. 28). After which, the State proactively raised concerns regarding Appellant's decision not change out of his prison attire, and that he was during pretrial matters still in handcuffs. The court noted that it would remove his handcuffs, provide him pen and paper, and that he would instruct the jury regarding the Appellant's clothing and leg shackles, in anticipation of Appellant addressing the jury for an opening statement. Appellant did not offer any proper substantive response to these arrangements; he instead only noted his objection to the trial and his intention not to participate. (Tr. p. 29). The trial court then took a break in anticipation of striking a jury.

When the parties returned, Appellant claimed that he had been physically assaulted by multiple people in the courtroom [7] and reiterated his various assertions and his lack of consent to the trial going forward. (Tr. p. 30). Though the officers did not address the court, the circumstances provided the court with an inferential first instance of physical confrontation and noncooperation by Appellant.

What followed next was five consecutive interruptions of the court by Appellant. (Tr. p. 30-31). In response, the trial court issued the following warning: "I want to tell you what could happen if you misbehave. The United States Supreme Court would allow you to be bound and gagged in the courtroom. So just keep that in mind. And there are other measures that could be taken, including a stun – stun bracelet or anklet." Appellant's behavior continued for another seven pages of transcribed dialogue. (Tr. p. 31-38).

The jury entered, the indictments were read, and the *vior dire* and selection process began. Appellant chose not to speak or introduce himself. (Tr. p. 38-42). When the opportunity to seat or strike individual potential jurors began, Appellant would briefly reiterate his usual nonresponsive

[7] The record is not clear, but it can be inferred that he was referencing law enforcement officers responsible for his transportation to and from the courtroom.

assertions, wherein he objects to the proceedings or challenges the jurisdiction of the court. (Tr. p. 52-63). Ultimately, a jury was selected, and the court then recessed for lunch.

Upon returning from lunch, though not responsive to the court's question regarding discovery, Appellant informed the court that he was not at trial willingly, that he was handcuffed, shackled, tied to a chair, and insulted. Thereafter, the court took official notice of the developments concerning Appellant's restraint chair. The following dialogue transpired:

> THE COURT: There's been a new development with Mr. Kelly. I see he's in a special chair; is that correct?
> THE SLED OFFICER: Yes, sir.
> THE COURT: All right. And for the record, the reason for that.
> THE SLED OFFICER: Your Honor, it was when – he refused to come out of his cell. And then when we went to assist him in standing, it was active resistance towards us at that point in time. So he was placed in the chair and brought to the courtroom.
> THE COURT: Okay.
> DEFENDANT KELLY: I object. That's a lie. I was physically assaulted.
> THE COURT: Okay.
> DEFENDANT KELLY: It's on camera.
> THE COURT: All right. Well, let me – Mr. Kelly, we're just doing our best to accommodate you.
> DEFENDANT KELLY: I don't want any accommodations.
> THE COURT: Okay.
> DEFENDANT KELLY: I don't want any participation in this circus.
> THE COURT: All right. Well, this is your day in court, so to speak.
>
> . . .
>
> Just for the record, I want to make a finding that the Defendant has been disruptive. And that because of that behavior, pursuant to the guidelines, as I understand them from the United States Supreme Court laid out in *Illinois vs. Allen*, I approve the use of this restraint chair.

(Tr. p. 72-75). The trial proceeded and the State completed its direct examination of Officer Wasserman. At Appellant's request, the court recessed to allow Appellant time to confer with standby counsel, after which he chose to allow Ms. Lipinski to take over his defense. In the process of reaching this decision Appellant was permitted to get out of the chair. Upon return the restraint

chair was removed and Appellant was granted a second chance to behave by way of reduced and nonvisible restraints. Appellant's left hand was freed for writing, while his right hand, belly, and legs remained in shackling not visible to the jury. (Tr. p. 106-108; p. 134)

Discussion

The trial court did not abuse its discretion in finding that the restraint chair was a necessary measure to ensure security and decorum in light of Appellant's prior behavior. Appellant's bizarre and disruptive verbal behavior over the course of multiple pretrial hearings, which ultimately escalated into physical confrontation and resistance to officers when it was time to proceed to court, was sufficient to support the trial court's decision. The trial court set forth on the record that pursuant to *Illinois v. Allen*, Appellant's behavior was the reason for the restraint chair's use at the outset of trial. As such, the court made a ruling based on the facts and circumstances that had been presented and its ruling was in keeping with the holdings of *Illinois v. Allen* and *Deck v. Missouri*.

The prohibitions against visible shackling are primarily set forth in two cases: *Illinois v. Allen* and *Deck v. Missouri*. The Supreme Court in *Illinois v. Allen* held that:

> [i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Illinois v. Allen, 397 U.S. 337, 343–44, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353 (1970). In 2005, the Supreme Court in *Deck v. Missouri* harkened back to its holding in *Allen* and elaborated that the State's use of visible shackles are only permissible if there is set forth some articulation of special need, such as physical security, escape prevention, or courtroom decorum. *Deck v. Missouri*, 544 U.S. 622, 626-28, 125 S. Ct. 2007, 2010 (2005). The determination of the special need is made at the discretion of the trial court. *Id.* at 629. *State v. Heyward*, 441 S.C. 484, 493, 895 S.E.2d 658, 663 (2023) (quoting *United States v. Samuel*, 431 F.2d 610 (4th Cir. 1970)) ("'Whenever unusual visible security measures in jury cases are to be employed, we will require the district judge to state for the record, out of the presence of the jury, the reasons therefor and give counsel an opportunity to comment thereon, as well as to persuade him that such measures are unnecessary.'"). Any error on the part of the trial court only requires reversal if the State cannot prove beyond a reasonable doubt that the shackling error complained of "did not contribute to the verdict obtained." *Id.*, 505–06.

As an initial matter, Respondent would argue that this claim is not preserved for appellate review. Under *Deck*, a court that permits the use of visible shackles *without* setting forth its reasoning and justification would likely constitute a *per se* violation of due process preserved for appellate review regardless of whether objection was raised. *Id.* However, once a court sets forth its reasoning for exercising discretion and permitting shackling, as the trial court did here, the finding must be objected to by the complaining party. Here, the record set forth Appellant's behavior and the trial court articulated its reasoning in reliance upon that behavior, but there was no subsequent objection by Appellant, nor any articulation by Appellant that he was concerned the jury would see him in the restraint chair. Thus, there is no basis for which the finding of the trial court was challenged. In the absence of an objection, this claim is not preserved for appellate

review. See *State v. Heyward*, 441 S.C. 484, 493, 895 S.E.2d 658, 663 (2023); *Ryals v. State*, 439 S.C. 230, 237, 886 S.E.2d 239, 243 (Ct. App. 2023).

In arguendo, if the claim is preserved, the record demonstrates that the trial court abided the requirements of controlling precedent under *Allen* and *Deck*. The record demonstrates the extensive and persistent poor behavior by Appellant in the form of verbal interruptions of the court and reiterated nonsensical objections. Though it chose not to seek further details at the time, by inference from Appellant's first claim of physical assault (Tr. p. 30), the trial court was also made aware that Appellant may not be entirely cooperative with the law enforcement officer's tasked with his transport. The court also issued two separate verbal warnings that continued misbehavior would lead to physical restraint consequences. Finally, and only after police officers had to utilize a restraint chair just to get Appellant into the courtroom, did Judge Miller exercise discretion in permitting visible shackling. Under the circumstances, the court's finding of the necessity of the restraint chair during trial comes from the very fact that police needed such measures just to subdue and transport Appellant.

In essence, the court bent over backwards to avoid such measures, but could not countenance physical resistance and further disruption. In accordance with *Deck* the court requested the SLED officer state for the record why the restraints were needed and then put its findings on the record that the restraint chair was warranted in light of the totality of Appellant's behavior to that point. There is no abuse of discretion in the court's decision, and moreover, it is clear from the record that the trial court ***continued*** to exercise discretion by permitting the restraining chair to be later removed in favor of less restrictive measures once standby counsel took over his defense.

Appellant's arguments to the contrary ring hollow and fail to fully respect the fact that Appellant's lack of cooperation turned into physical resistance of law enforcement personnel shortly before court was set to reconvene. In transporting such a defendant into court, *and in needing a restraint chair to do so*, it is axiomatic that the defendant had created a potential security risk. Appellant's disruptive behavior was purposeful, persistent, abhorrent, and ultimately physically confrontational in the context of courtroom decorum. Contrary to Appellant's arguments, disruptive circumstances need not match the precise vile or abusive language that defendant Allen displayed in order for *Allen* remedies to be appropriately implemented. It is, as articulated by *Deck*, a matter of the court's discretion and Appellant has failed to identify an abuse of that discretion during his trial.

Instead, Appellant has suggested that the trial court should have exercised its discretion *differently* by exploring other alternatives. Appellant even suggests that gagging or overriding Appellant's constitutional right to self-representation by proceeding with a trial in absentia would have been more appropriate – such forms of relief would almost certainly have *also* been challenged on appeal by Appellant. Appellant then argues that a stun belt would have been a less prejudicial means of restraint. However, the record demonstrates Appellant had already made it clear that he would not cooperate with the use of such a device. (Tr. p. 28). The fact that Appellant capitulates to the consideration of other options at all is a demonstration of the weakness of its argument that the court was not within its discretion to act upon Appellant's behavior. Appellant presented the court with repeated disruptions and legitimate concern over physical resistance and the court found physical restraint an appropriate measure.

Appellant's claims of prejudice likewise strain the bounds of reason. The concern for unfair prejudice that arises from unnecessary visible shackling is that the jury would find it an

"unmistakable indication[] of the need to separate a defendant from the community at large" such that the jury may perceive the defendant as "particularly dangerous or culpable". *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 1346, 89 L. Ed. 2d 525 (1986). However, that is the same exact concern that arises from wearing prison attire in the presence of the jury. *Id.* Here, however, Appellant had already voluntarily subjected himself to such risks by refusing to change out of his prison attire in the presence of the jury, and he chose to do so *throughout his entire trial.* (Tr. p. 406). In the context of prejudice, since the jury had already seen Appellant in his prison clothing, *also* seeing him in shackling would be ultimately unimpactful. Such would not have contributed to the verdict, especially in light of the evidence presented in this case. Collectively, the lack of prejudice demonstrates that, *even if* error were to be found in the trial court's decision, such error would be harmless.

II. The trial court did not abuse its discretion in denying Appellant's motion to remove all remaining shackling due to a concern that such might be audible to the jury.

Issue as it was presented at trial

After Ms. Lipinski took over Appellant's defense at trial, she made numerous motions on his behalf before testimony resumed. One such motion was to request that Appellant's remaining right wrist handcuff be removed during trial. The motion evolved into a request to remove all forms of restraints that Appellant was subject to based upon her assertion that the shackles can be heard when Appellant moved around. Her argument appears to concede that the shackles in question are not visible, due to "picnic screens and whatnot", but that "you can nonetheless hear the metal, the belly chain that he's in, the handcuffs that he's in, the leg restraints that he's in." [8] (Tr. p. 133-134).

[8] Appellant sets forth in brief that "Appellant was shackled at the wrists and ankles and chained around his body. See Court's Exhibits # 9 – 10. It was undisputed the shackles were audible to the

The trial court's response to the motion was that he would monitor Appellant's behavior as the trial proceeded, but that his restraints were based upon his own conduct during court and reiterated the reliance upon *Illinois v. Allen*. The court went on to note that it believed it has been "very indulgent with Mr. Kelly" in that regard. (Tr. p. 134-135).

Discussion

Appellant's second issue on appeal is similarly grounded to his first and likewise without merit. Just as the trial court was within its discretion, under the circumstances presented, to permit the restraint chair during trial. The court was likewise within its discretion to deny Appellant's motion to remove his right-handcuff and other restraints after the restraint chair was taken away. The court explicitly noted that Appellant was in restraints as a result of his own conduct. Moreover, careful review of the record demonstrates that Appellant's argument is not based upon his shackles being visible, but based upon the assertion that the shackles can be heard when Appellant moves. *Deck* does not apply to such a circumstance.

Allen and *Deck* are again the closest authorities for consideration of Appellant's argument. However, *Deck* is not applicable here, as it only applies to shackles that are visible to the jury. There is no controlling authority that requires a court to make a finding as to special circumstances before requiring "audible" shackling, and the record demonstrates that in light of the "picnic

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jury." Respondent would seek to clarify a number of matters. First, Court's Exhibits #9 and #10 were not offered into the record until near the end of trial and were therefore not considered at the time of the rulings regarding restraints. Second, Court's Exhibits #9 and#10 in no way establish that Appellant's restraints were visible to the jury. Nor do they establish that these restraints were audible to the jury. Third, Respondent would clarify that counsel argued that the restraints were audible, but there is nothing to demonstrate that such were actually audible to the jury. The issue of whether the shackles could be heard was not discussed further. The court simply noted that restraints were necessary in light Appellant's behavior, as he had previously ruled, and he therefore denied the motion and moved on from the issue.

screens and whatnot" (Tr. p. 134) defense counsel never argued that Appellant's restraints were visible to the jury.

The ruling of the trial court was proper, and Appellant's arguments to the contrary fail for multiple reasons. First, by the time Appellant makes a motion to remove his remaining nonvisible shackling the trial court had already articulated a basis for permitting visible shackling due to Appellant's conduct. Apparently with SLED's approval and Ms. Lipinski taking over the defense, the court exercised its discretion again in allowing the trial to proceed without continued use of the restraint chair (Tr. p. 107), and therein allowed Appellant to have his left hand remain free for writing and be subject to only *nonvisible* shackling. Here, Appellant essentially received a second chance at some leniency from the trial court. Nevertheless, the trial court explicitly noted that Appellant's remaining shackles were still a result of his behavior and conduct during the trial. Visible, audible, or both, the trial court exercised proper discretion in finding the restraints necessary. As such, the subsequent ruling is essentially a continuation of its prior ruling. The trial court was therefore *again* completely compliant with the holdings set forth by *Allen* and *Deck.*

Appellant's subsequent motion requests the removal of all shackles, regardless of whether they are visible to the jury, on the basis that the chains can be heard when Appellant moves them. While defense counsel failed to demonstrate that *the jury* could hear them, as opposed to being able to personally hear them while presumably sitting next to her client, the issue is ultimately irrelevant as there is no prohibition for "audible" shackling. There is therefore no basis in which to prescribe legal error to the decision of the court. Moreover, there is also little basis to argue that the jury would be prejudicially swayed by hearing the chains of an inmate that they had already seen be subject to visible physical restraints earlier in the trial. Much like defense counsel's own

concession at trial regarding the futility of correcting Appellant's choice to wear prison attire, "the cat is out of the bag". (Tr. p. 134).

Consequently there is neither a sound legal basis to assert an abuse of discretion by the trial court, nor is there a reasonable practical argument that prejudice might arise from Appellant's remaining nonvisible shackling.

III. The trial court did not err when it denied Appellant's motion to either remove the law enforcement officers to another room to watch the trial virtually or insist that the officers not wear their uniforms or gear while attending the trial.

The issue as it was presented at trial

One of defense counsel's initial motions upon stepping into her representation of Appellant was to address the number of law enforcement officers in the courtroom. In her initial argument she cited that there were four SLED officers in plain clothing surrounding her in addition to two security officers, and that she also witnessed a nonspecific number of other officers in the courtroom. Appellant raised this issue as one being a risk of unfair prejudice that would convey to the jury that Appellant is an extremely violent person that requires "top-level security". (Tr. p. 123). She commented that she appreciated the "plain clothes" of some of the officers and sought to have all non-witness officers only attend in plain clothing as well. (Tr. p. 124). The court responded by noting that SLED has been asked to participate as a disinterested security team because the principal victims of Appellant's charged crimes were Greenville County Sheriff's Office deputies. The court denied the motion for requiring plain clothing of officers, again noting that the simple fact that the victims in this case are law enforcement officers, and he would not ask those present and supporting their fellow officers to go change their clothing. (Tr. p. 124-126).

The motion was later renewed with the added request that the attending officer be removed from the courtroom to instead watch the trial via virtual courtroom. Appellant's brief argument demonstrates essentially the same level of security detail, but that the spectators in the back of the

court had increased the total to 20 or 25. The State argued against the motion, noting again the high profile and public interest in the trial, and the fact that the victims were law enforcement officers. The State argued that as a result the number of officer spectators was a proportionate showing under the circumstances. The motion was again denied. (Tr. p. 540-541). Prior to closing arguments, Appellant renewed the motion again, claiming the number of officer in the courtroom had reached 35 to 40. The court noted the objection and did not alter its ruling. (Tr. p. 574).

Discussion

The trial court did not abuse its discretion in denying Appellant's motion to have the attending officer removed from the courtroom to watch the trial via virtual courtroom, nor did it err in not requiring the attending officers to change clothing in order to attend the trial. The court exercised sound discretion in denying the motion while setting forth its understanding that the trial was a high-profile murder trial involving 3 victim officers of the Greenville County Sheriff's Office. This fact makes it obvious and inevitable that there would be both officers tasked with security and officers attending in solidarity and support for their fellow victim officers. Such a fact would not be lost on the jury either, as they were fully aware of who the harmed victims were and would understand that the presence of a large number of law enforcement officers would have nothing to do with Appellant's inherent level of dangerousness.

The Supreme Court's decision in *Holbrook v. Flynn* is the controlling law on this matter. Therein, the Court held:

> While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence

> of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.

Holbrook v. Flynn, 475 U.S. 560, 569, 106 S. Ct. 1340, 1346, 89 L. Ed. 2d 525 (1986). The issue was briefly addressed in *Deck*, wherein the Court again noted that the deployment of security personnel during trial is not "the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." *Deck*, 544 U.S. 622, at 628 (citing *Holbrook*, 475 U.S., at 568–569, 106 S.Ct. 1340).

As such there is no affirmative duty upon the court to reach special findings to permit security personnel arrangements, nor is there a standard for which the court must evaluate the composition of the spectators in attendance. As the case was here, Appellant is not complaining about the security arrangements, for which there were approximately four nonuniformed officers and two uniformed security guards. Instead, Appellant is claiming a risk of prejudice arising from the number and type of spectators in attendance, and their clothing. That is not the type of circumstance for which *Holbrook* applies, and even if it were, the circumstances of the trial clearly demonstrate that officers sitting in the back of the courtroom are not being tasked with security.

Appellant murdered a cop by intentionally and recklessly dragging him from a moving vehicle into oncoming interstate traffic. The fact that numerous officers chose to attend the trial, and chose to attend in increasing numbers as the trial grew closer to a verdict, is not a prejudicial

matter for which Appellant may be construed by the jury as excessively dangerous.[9] The jury members are human beings and would clearly recognize the reason for such an audience.

Moreover, the high number of law enforcement belies Appellant's own argument. It might be a palatable argument if Appellant had been able to show ten or more uniformed and tactically attired officers were perpetually in the immediate vicinity of Appellant throughout trial. But to suggest that the jury would presume 40 officers all seated in attendance in the courtroom benches was a means of security, when such had not previously been necessary, simply weakens the underlying argument. Contrary to Appellant's reliance on out-of-state federal court citations, there was no "feeling of terror of impending doom" weighing upon the jury if they chose to acquit Appellant, nor did the circumstances present anything more than a show of support for the fallen member of the community's police force. The presence of officers in the courtroom is not inherently a risk of unfair prejudice to the defendant. In a case like Appellant's, where the victims of the crime are all police officers, it is entirely expected, reasonable, and appreciated that the attendees of the trial would be largely fellow police officers. Appellant's argument to overturn his conviction on this ground is baseless, and neither *Holbrook* nor any other controlling authority dictates that the court's decision was an abuse of discretion.

IV. The trial court did not err under Rule 403 in admitting the various body camera and car camera exhibits from the responding officers, as each exhibit contained no uncomfortable gore, presented a different point of view, and chronicled each officers' actions prior to, during, and after the collisions.

The trial court did not err in admitting State's Exhibits #7, #8, and #9. Each exhibit provides the points of view and interactions of officers in the timeline of events leading up to, during, and after the collision took place. The disputed evidence, for which Appellant argues

[9] This is especially so in light of the fact that the jury witnessed Appellant receive *a reduction in physical restraints* following an end to his disruptive behavior at the outset of trial.

should not have been admitted under Rule 403 limitations against cumulative evidence, does not even present cumulative evidence of the same events of the crime scene. The court correctly found each exhibit's probative value was not substantially outweighed by the danger of unfair prejudice and the court was within its discretion to admit the exhibits.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Spears*, 403 S.C. 247, 252–53, 742 S.E.2d 878, 881 (Ct. App. 2013). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App.2003). Here, the trial court was well within its discretion to admit the evidence in question.

State's Exhibit #7 is the dash-cam footage of Officer Harrison's vehicle in the moments before, during, and after the second collision that occurred that afternoon. This exhibit demonstrates the *second collision,* for which neither Officer Wasserman nor Officer Ledbetter had a clear view at the time the collision occurred. Exhibit #7 is essentially the first offered and admitted evidence of an unobstructed angle of the second collision. Inexplicably, Appellant objected to the introduction of this exhibit on the basis of cumulative evidence, despite no other evidence of the second collisions vantage point having been previously offered and admitted. (Tr. p. 221). Such cannot be considered cumulative. Even if video evidence from other officers or

onlookers had been previously admitted, the unique vantage point of Officer Harrison, who was driving the car at the time of the collision, would still not constitute cumulative evidence.

State's Exhibit #8 was objected to on the basis that it was a split-screen exhibit of two videos, not on the basis of cumulative evidence. (Tr. p. 222). As such, the issue raised on appeal was not preserved via a specific and contemporaneous objection at trial. Nevertheless, even if the admission of exhibit 8 were to be evaluated for cumulative evidence, it is merely a split-screen combination of previously admitted State's Exhibit 2 which displays the first collision, and State's Exhibit 7 which displays the second collisions.[10] Neither is cumulative under Rule 403.

Exhibit 8 does provide a slowed down version of the moment just before impact. However, the video does not actually show Victim Jumper being struck by Officer Harrison's police car, and the State explicitly argued that no such collision took place. Exhibit 8 has no gruesome or gory depictions at all, and this evidence was critical in further explaining the conclusions reached by the MAIT accident reconstruction expert. This was especially so given that Appellant made the proximate cause of Officer Jumper's death a key argument in its defense. (Tr. p. 233-236; p. 282; p. 296-343).

State's Exhibit 9 is the audio recording of Officer Richards interactions with Appellant after the collisions had taken place. Appellant argued that it was cumulative to such being captured by other officer cameras. Respondent would reiterate that each officer was at different locations at different times, and undertaking different obligations. Exhibit 9 provides the jury with numerous statements made by the Appellant, the communications made to Appellant by Officer Richards,

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[10] Exhibit #7 was not published to the jury in open court. Instead, the State moved on to the introduction of Exhibit #8, which was the contents of Exhibit #7 in a split screen view with State's Exhibit #2. This allowed the State to better demonstrate the collisions simultaneously so that the jury could perceive the time and spatial connections between the two collisions.

and such content has no correlation to inflammatory cumulative evidence depicting the collisions – which is the foundation of Appellant's arguments on appeal .

The State had every right to establish the nature of both crashes, the corresponding timing of both crashes between Officer Wasserman's and Officer Harrison's in-car cameras, the dangerous and ultimately deadly position that Appellant's actions put Victim Jumper into by attempting to drive off, and his subsequent comments and statements made after the collisions occurred. The disputed exhibits accomplish these endeavors while also addressing Appellant's defense that Officer Harrison was the proximate cause of Victim Jumper's death. The trial court's decision to admit these exhibits over Appellant's objections was entirely proper.

V. The trial court did not err in admitting the trauma blood taken by medical personnel despite the specific hospital employee who personally drew the blood being unidentified.

The trial court did not err in admitting the trauma blood taken by emergency medical personnel at the hospital, which was then transferred to law enforcement. Though the particular nurse in question who took the blood was not identified, the chain of custody was sufficiently established. Appellant's identity as the perpetrator was not in question, and the known standard for Appellant's DNA comparisons did not rely upon the trauma blood.

"A complete chain of evidence must be established as far as practicable, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed." *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." *State v. Hatcher*, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011). "Generally, we will uphold the chain of custody if the safeguards instituted ensure the integrity of the evidence, even if every person associated with the procedure is not personally

identified." *Id.* In examining issues regarding the chain of custody, a mere suggestion that substitution could possibly have occurred is not enough to establish a break in the chain of custody. *Id.* "'It is unnecessary ... that the police account for 'every hand-to-hand transfer' of the item; it is sufficient if the evidence demonstrates a reasonable assurance the condition of the item remains the same from the time it was obtained until its introduction at trial.'" *Id.* (citing *State v. Price*, 731 S.W.2d 287, 290 (Mo.Ct.App.1987).

Appellant was transported to the Greenville Memorial Hospital to receive medical care. At the time he had still refused to provide his real name to officers or medical personnel. As such, during his care, as is customary, one of the various attending medical staff employees drew trauma blood from Appellant and labeled it Montana 220 - a unique code given to Appellant as an unidentified patient. Law enforcement investigated the matter, learned of Appellant's code name with medical staff, obtained a warrant for the specified blood, and the medical staff surrendered the corresponding blood.

All that Appellant claims is missing is the name of the individual who physically drew and labeled the blood with the code name. The State established the chain of custody for the trauma blood as far as was practicable. The Solicitor indicated that the identification of the specific nurse who drew the blood was unknown; the State only knew the location where the blood was drawn – Trauma Unit A – and the correctly corresponding code that was given to Appellant during admission. (Trp. P. 405-414). Appellant is simply arguing for an inflexible application of the law. Appellant has no facts or circumstances to suggest that the trauma blood that was specifically sought and obtained via warrant is anything other than what it purports to be. Appellant during objection did not even suggest that some sort of substitution or tampering could have taken place, or that there was some substantive basis for which testimony from the unidentified nurse was

necessary. He simply wanted to exclude the evidence for technical reasons. The applicable law is not so onerous.

In practical terms, the circumstances of this case also demonstrate the lack of merit to the underlying dispute. *First, the record demonstrates that the known standard for Appellant was derived from a dried blood swab, not the trauma blood.* (Tr. p. 513). That standard was used to reach an 88 quadrillion likelihood comparison DNA match to Appellant on the gun. (Tr. p. 513-514). As such, the admission of the trauma blood is not critical to the state's evidence. However, even if it were – Appellant's argument is essentially suggesting that blood was taken from some other occupant of the hospital that day, mislabeled, provided to police for testing, and that that unknown hospital occupant randomly (and practical conclusively) happened to lay hands on a gun found in Appellant's trunk despite the fact that he was traveling from Atlanta to New York and did not reside in South Carolina. The notion is entirely unreasonable. As our Supreme Court has held, "'It is unnecessary ... that the police account for 'every hand-to-hand transfer' of the item; it is sufficient if the evidence demonstrates a reasonable assurance the condition of the item remains the same from the time it was obtained until its introduction at trial.'" *Id.* (citing State v. Price, 731 S.W.2d 287, 290 (Mo.Ct.App.1987).

Admission of the evidence in light of challenges to the chain of custody is a matter of discretion for the trial court. Under the circumstances of this case, the efforts of law enforcement, and the procedures used for acquiring and transferring the trauma blood in question, the court was within its discretion to admit the evidence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

W. JOSEPH MAYE
Assistant Attorney General
S.C. Bar No. 100851

HON. W. Walter Wilkins, III
Thirteenth Circuit Solicitor's Office
305 E. North St. Ste. 325
Greenville, SC 29601

BY: *s/ W. Joseph Maye*
W. Joseph Maye

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-6305

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