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Jun 25 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
The Honorable Kristi F. Curtis, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DERRICK A. MCILWAIN,

APPELLANT.

Appellate Case No. 2022-001425

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

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

COUNTER-STATEMENT OF ISSUE ON APPEAL

Whether Judge Curtis abused her discretion under Rule 403, SCRE's, highly deferential standard of review, in admitting the 8 crime scene photographs *objected to* where they were relevant and probative to issues not conceded in the State's case, and the close-up crime scene, morgue, and autopsy photographs were not objected to below so any objection now is not preserved for appellate review; regardless, the admission of the 8 crime scene photographs objected to was harmless given the overwhelming evidence of McIlwain's guilt, and the photos were cumulative to other crime scene photographs, including close-ups, the morgue photos, and the autopsy photos admitted without objection?

STATEMENT OF THE CASE

During the late-night hours/early morning hours of May 26/27, 2019, appellant Derrick McIlwain murdered Kimberly Alger in Lancaster County. On May 28, 2019, Alger's body was found in Lancaster County. On November 26, 2019, in Rock Hill, S.C., McIlwain was arrested for the murder. On September 23, 2021, a Lancaster County Grand Jury indicted McIlwain for Alger's murder (Indictment # 2021-GS-29-1079). Assistant Solicitors Luck Campbell and Nicole Workman prosecuted the case. McIlwain was represented on the charge by Mark Grier, Esquire. McIlwain proceeded to a jury trial from March 21-25, 2022, before Circuit Court Judge Kristi F. Curtis. At the conclusion of the trial, McIlwain was found guilty of murder, and he was sentenced to life imprisonment without the possibility of parole (LWOP) based on his prior record.[1] On March 31, 2022, McIlwain made a motion for a new trial. On September 1, 2022, Judge Curtis issued an order denying the motion. This appeal followed raising 1 issue-the admissibility of certain crime-scene and morgue[2] photographs of Alger's body. This is the Initial Brief of Respondent. (R. 702 (indictment); R. 1; R. 691, l. 21 - 692, l. 1; R. 695, l. 25 - 696, l. 22. R. 698, R. 700 (motion for new trial; order denying motion for new trial)).

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[1] McIlwain had 2 prior armed robbery convictions, so the sentence was a mandatory LWOP pursuant to S.C. Code Ann. Section 17-25-45.

[2] In his brief, McIlwain asserts "autopsy" photographs should not have been admitted. (IBOA). As will be shown, the photographs he challenges are not autopsy photos, but pictures of the victim's body taken by a detective at the morgue the day her body was found under better lighting to document her condition, injuries, and clothing. In contrast, the autopsy photographs were admitted much later in the trial and are not actually challenged in McIlwain's brief. (IBOA).

RESPONDENT'S STATEMENT OF FACTS

On *Tuesday*, May 28, 2019, about 3:00 p.m., the clothed but deceased body of Kimberly Alger ("Alger") was accidentally discovered lying in tall grass behind a vacant home on Spirit Drive in Lancaster County. The body was in the early stages of decomposition. The body was located close to the back wall of the home and the back porch steps, so it was not visible from Spirit Drive. A potential tenant had stopped to look at the home. On the front left side of the home, the potential tenant found a portion of the privacy fence to the back yard broken down. The potential tenant walked around the home into the back yard, saw Alger's body, and called 911. The temperature that day was hot: 102 degrees. Alger's body was in the direct sun, and because of that and/or decomposition changes, Alger's skin, which was white, had darkened slightly and turned black in places. Because of this, the potential tenant and first responders initially thought Alger's body might be that of an African-American female.[3] However, upon further inspection, police were able to identify the body because they had been to Alger's home several times earlier on police calls and Alger also had identifying tattoos on her body including appellant Derrick McIlwain's first name: "Derrick" on her upper left chest-shoulder area. Officers also discovered a tire-track on the portion of the privacy fence that was on the ground. (R. 65-73; 75-76; 79-97; 113-14; 127-33; 207-12; 478-86; State's Ex. #s 2, 4, 10, 12-14, 16-27, 30, 33).

The actual date and time of Alger's death, the location of Alger's death, and the cause of her death were unknown at this time.[4] Alger was a known drug addict who was also involved in an abusive relationship with appellant Derrick McIlwain ("McIlwain"). Police officers who

[3] The photographs taken at the scene show that because of the early decomposition changes Alger's body appeared to be that of a very light skinned African-American female.

[4] Out of an abundance of caution, police first obtained a search warrant for the locked and vacant home on Spirit Drive, searched it, and determined it had no relation to Alger's death.

responded to the scene noticed evidence of decomposition and insect activity on the body, especially around the neck area, where there appeared heavy darkening of the skin which could have been bruising. Officers estimated Alger had been dead for a day and ½ to 2 days. Alger was still wearing jewelry on her body in several places, i.e. her fingers, wrists, and ears indicating robbery was not the motive in her death if she was murdered, and she was barefoot indicating if she was killed it was probably elsewhere such as at her home. Photographs of the crime scene[5] were taken documenting both the location and condition of Alger's body, jewelry she was wearing, identifying tattoos, what appeared to be visible injuries, and the clothing she was wearing, some of which [her pants] was the same or similar to what she was wearing on *Sunday night*, May 26, 2019, when police responded to her home on a wellness check, except for a different hooded sweat shirt. An overall crime-scene diagram was also completed later. The police investigator who responded to the discovery of her body on *Tuesday* May 28, 2019, noted possible injuries to be what appeared to be injury or bruising under her chin and down and around her neck, a bruise to the sternum, an injury to the hip, and a small nick or cut to her hand between her fingers. Alger was not shot or stabbed. After the scene was processed, Alger's body was moved to the Lancaster County morgue. (R. 65-73; 75-76; 79-97; 113-14; 127-33; 207-12; 478-86; State's Ex. #s 2, 4, 10, 12-14, 16-27, 30, 33).

Prior to her death, Alger and McIlwain had been romantically involved for several years and lived together at a residence on Dickens Road in Lancaster. Their Dickens Road home and the vacant Spirit Drive residence were roughly 1 mile and a 1/2 apart. Both Alger and McIlwain

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[5] When Respondent refers to "the crime-scene" and "crime-scene photos," it is referring to the location where the victim Kimberly Alger's body was found on Spirit Drive. As stated, at the time police processed the scene on Spirit Drive they did not know the cause, location, or time of death of Alger. As will be shown, McIlwain later admitted to 1 witness that he finished killing Alger behind the home on Spirit Drive. However, McIlwain and his attorney disputed this.

had severe drug addiction problems, and they had a turbulent relationship. Police had been called to their home numerous times, and McIlwain had received a CDV charge for assault on Alger on a prior occasion.[6] Alger and McIlwain had also previously visited the Spirit Drive residence, where Alger's body was found, in the past and considered moving there, so McIlwain was familiar with the location. (R. 97-98; 207-12; 478-86; 517-20; 535-37; 510; 546-47; 570-71).

Two nights before Alger's body was found, on *Sunday night*, May 26, 2019, Alger phoned her mother crying, hysterical, raspy, and gasping for breath. In the phone call, Alger told her mother that McIlwain had strangled her, and he threatened to kill her if she called the police. Alger's mother hung up the phone and called the Sheriff's Department, and a deputy went to Alger's home to check on her. The deputy's body camera was working and, although dark, captured the exchange between the deputy and Alger. At the door, Alger told the deputy there was no problem, and she sent the deputy away as McIlwain stood behind her in the home in the background. The deputy could only make out the silhouette of a man standing behind Alger. McIlwain admitted at trial it was he who was standing behind Alger when the deputy was speaking to her. At the time of this conversation on Sunday night, Alger was wearing the same or similar clothes [pants] to what she was wearing when her body was discovered on Tuesday afternoon, except on Sunday night she was wearing a different sweat jacket with a hood on it. Alger's mother testified Alger called her again, after law enforcement left Alger's home on Sunday night; Alger was again crying and hysterical. Alger called another friend later that Sunday night asking if she [Alger] could come over and stay with the friend. The friend told

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[6] The record shows police had been called to the couple's Dickens Road home 6 or 7 times previous to Alger's death mostly for McIlwain assaulting the victim in some way. During the State's case, most of these prior assaults were kept from the jury by agreement. However, when the defendant chose to testify, these prior assaults on the victim came into evidence. (R. 571-75).

Alger she could. Alger never arrived at the friend's home. The phone call to the friend was the last anyone heard from Alger. These phone calls to her mother and to the friend were corroborated by phone records. Based on this evidence, and other evidence found later at Alger and McIlwain's home, police believed Alger's approximate time of death was *late Sunday night*, May 26th, or in the *early morning hours of Monday*, May 27th, not long after midnight. McIlwain disappeared before Alger's body was found on *Tuesday* afternoon. (R. 160-166; 207-212; 176-77; 295-97; 337-62; 541-42).

A neighbor of Alger and McIlwain saw Alger's car, a gray *Nissan Altima*, parked strangely in the victim's yard on early Monday morning, May 27th. She then saw the *victim's car* drive up the road away from McIlwain's and Alger's home on Monday, the 27th, about 8:30 a.m. and the vehicle never returned. The neighbor could not tell who was driving the car. (R. 152-157; 178-194; 199). McIlwain had to be driving the car because the victim was already dead.

On that same Monday, May 27, 2019, McIlwain saw his cousin, Donald Ray Anthony ("Anthony"). This was 1 day before Alger's body was found. McIlwain and Anthony had grown up together and were best friends and were like brothers to each other. Anthony testified that on Monday the 27th McIlwain came to Anthony's home alone driving the *victim's car, a gray Nissan Altima*, and told Anthony that he, McIlwain, had killed Alger. He did not claim it was self-defense. He just said he killed her. Anthony testified McIlwain did not have any visible injuries. McIlwain did not tell Anthony how he killed Alger, but he did tell Anthony that he, McIlwain, killed her and she was dead. Anthony also testified that on Monday McIlwain gave Anthony a necklace McIlwain wore around his neck, and McIlwain stated he was going to kill himself and

this was probably the last time Anthony would see him.[7] He told Anthony he was not going *back* to prison.[8] Anthony also testified that on *Saturday* before Alger's death, *May 25th*, McIlwain and Alger came over to Anthony's home. While there, McIlwain told Anthony privately that he and Alger were having problems and Alger was leaving him, and she had packed her things to leave. (R. 177-99; See also 174-75; 491-92).

Anthony's wife, Aretha, also corroborated Anthony's testimony. She testified that on *Saturday* McIlwain and Alger came to Anthony's home. While she and Alger were in one room, McIlwain and Anthony were in another room together. Aretha testified that on what she thought was a Tuesday, McIlwain came back to Anthony's home alone. McIlwain was there at her home with her husband, Anthony, when Aretha arrived home from work. Eventually, McIlwain left their home, and she never saw McIlwain again until the trial. (R. 232-238).

On *Tuesday evening*, May 28th, after police found Alger's body, police executed a search warrant at the home of McIlwain and Alger. There they found the home in disarray with holes in the walls, which they could not date, and a couch moved in the living room and a rug rolled up. In the washing machine, police found a washed women's gray hooded sweat jacket similar to what was seen on Alger by the deputy who responded on *Sunday* night. In the home and in the master bedroom, police found no blood drops or blood spatter, but after pulling back the covers on the bed, on a sheet they found a stain that contained unidentifiable blood, which contained a mixture of the DNA of both Alger and McIlwain. Alger's blood *was* found on a bed spread in the closet. When police executed the search warrant, McIlwain was not at his home; he had

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[7]McIlwain also posted on Facebook a long rant in which he stated the relationship between he and the victim had gone bad, they should have broken up long ago, and he was not going to prison for life but implied he would take his own life. (R. 492-94; State's Ex. 133).

[8] By agreement, the jury did not hear the word "back" but only that McIlwain told Anthony he was not going *to prison.* (R. 174-75).

already fled the state. McIlwain had also not filed a missing person's report with regard to Alger before fleeing the State. (R. 97-102; 142-43; 213-32; 250-52; 478-86).

On that same *Tuesday* evening, the chief crime-scene investigator then went to the Coroner's Office morgue to photograph the victim's body in more detail in a controlled environment under better and different lighting conditions. (R. 97, 102-106; 111; State's 32, 34-37, 39, 40, 42-46). These photographs showed the victim had injuries or bruising to her neck and sternum, and she also had bleeding out of 1 ear. The photos also showed the clothes the victim was wearing and her bare feet. (Id). (R. 111-113; State's 32, 34-37, 39, 40, 42-46).[9]

On May 30, 2019, police received information McIlwain might be in the area of Dover Lane in Lancaster. Police did not find McIlwain, but they did find and processed a Nissan Sentra which belonged to Aretha Anthony. Inside the same, police found 2 cellphones. One of the cellphones belonged to McIlwain. McIlwain had abandoned his cellphone to keep police from tracking him. (R. 107-111; 133; 487-89).

McIlwain fled from Lancaster S.C. to Charlotte, N.C. in Alger's vehicle, the *Nissan Altima*. McIlwain abandoned Alger's vehicle in a church parking lot in the City of Charlotte, close to a bus station. McIlwain was captured on a surveillance camera abandoning Alger's vehicle at the church in Charlotte and walking toward the bus station. Once he arrived at the bus station, he purchased a ticket to Atlanta and took a bus to Atlanta, Georgia. McIlwain abandoned Alger's cellphone in Georgia so police could not track him through her phone. Police were called to the church in Charlotte and searched the victim's abandoned *Nissan Altima*. In the trunk, they found a lady's handbag and a suitcase. The suitcase was packed, and it contained

[9] The investigator also did a diagram [State's Ex. 63] documenting what appeared to be bruises to the victim's neck and sternum, blood coming from her ear, cuts to her hands between her fingers, insect bites to the back of her hand and face, skin slippage on her arms, face, and neck, tattoos on her body, and jewelry on both hands, wrists, and ears.

women's clothes. The license plate had been removed from the car and a dealer tag was also found in the trunk. After going to Atlanta, McIlwain eventually came back to Charlotte, stayed with a cousin and his cousin's girlfriend, and then went back to Lancaster briefly to see Anthony and then eventually fled to Rock Hill, S.C. where he hid out in a motel room with a friend. (R. 115-123; 136-42;162-165; 208-211; 238-42; 248-50; 252-57; 495-504; 603).

Witness Brandi Walton, who also knew McIlwain, testified McIlwain told her he killed Alger because "she kept F'ing with him." McIlwain was staying with Walton and McIlwain's cousin Alvin Fletcher in Charlotte between September and November of 2019 while McIlwain was on the run from Lancaster police for Alger's murder. McIlwain would not leave Walton and Fletcher's home during this time. Walton found out that McIlwain was wanted for the victim's murder. McIlwain eventually told Walton that he kept telling Alger if she kept "f'ing" with him he was going to kill her and he did. He killed her. McIlwain did not tell Walton how he killed Alger only that he killed her. (R. 257-66).

Witness Brittany Oneppo, who knew McIlwain from high school, testified to sharing a motel room with McIlwain for about 4 days in Rock Hill while McIlwain hid from police for the murder of Alger. McIlwain started to talk to Oneppo about Alger's murder even though Oneppo did not want to hear about it. McIlwain told Oneppo, as she covered her ears, that he "couldn't handle [Alger's] foul ass mouth anymore." After McIlwain admitted to this, Oneppo had no doubts that McIlwain had killed Alger. On November 26, 2019, McIlwain was arrested in the motel room in Rock Hill hiding from police. Though he admitted to Oneppo that he killed Alger, McIlwain did not admit to how he killed the victim. (R. 212–20; 322-24; 504-06).

Robert Chapman, a former cellmate of McIlwain's, testified McIlwain confessed to him not only to murdering Alger but also to details of the murder. McIlwain told Chapman he had

warned Alger not to call the police, and McIlwain said he "snapped" and "choked her out." McIlwain said it "took forever" and he had to kill Alger "twice." McIlwain told Chapman it was horrible, and that Alger's bowels released while he choked her. McIlwain admitted to Chapman he killed Alger, and he took her body and hid it behind a vacant home. McIlwain told Chapman when he dumped the body behind the vacant home, he realized Alger was not dead, so he had to finish her off this time, i.e. kill her a 2nd time where he dumped her. Chapman was the only witness McIlwain told how he killed the victim. (R. 421-37; 444). Defense counsel attacked Chapman's testimony as that of a jailhouse snitch facing numerous years in prison who wanted a deal from the State who had access to McIlwain's discovery. (R. 437-44; See also 562-63).[10] At no time, did McIlwain tell any witness that he killed Alger in self-defense.

After the recovery of Alger's body, DNA samples were taken from different areas of Alger's body including her throat, wrists, ankles, and fingernails. (R. 65-67; 70 -73; 96; 133-36). DNA analysis at SLED's forensic laboratory revealed that McIlwain's DNA was found under the victim Alger's fingernails. McIlwain's DNA was also found in other locations on her, including one wrist sleeve, and an ankle legging, consistent with McIlwain being her killer and being the person who disposed of her body. (R. 133-36; 374-414; 506-07).

While there was no issue who was responsible for Kimberly Alger's death, the proximate cause, the manner, and time of her death were issues in the State's case in chief and remained so until after the State rested, overcame a motion for a directed verdict, and the defendant took the stand and was cross-examined. Defense counsel did not concede any element of the crime of murder pre-trial or in his opening statement. (R. 1-36; 59-64).

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[10] When McIlwain testified in the defense case, he admitted witnesses Anthony, Onnepo, and Walton testified truthfully about what he told them about killing Alger. McIlwain claimed only Chapman was lying about what he told him about killing Alger. (R. 534-614).

A first autopsy of Alger's body was conducted on May 30, 2019 at the Medical University of South Carolina (MUSC) in Charleston, S.C., and the pathologist *could not determine a cause of death* because of several factors including the decomposition of the body, especially around the neck, the decomposition to the neck muscles looked similar to trauma to the same, the lack of petechiae around the eyes, the hyoid bone was intact, the narcotic drugs in the victim's blood stream, including fentanyl, and heroin, and the inexperience of the pathologist. This pathologist *opined* the cause of death could be strangulation, possible drug overdose, or from natural causes. On her autopsy report, she listed the cause of death as undetermined; however, she did not rule out strangulation. On cross-examination, defense counsel emphasized that many of the normal signs of strangulation were not present in this case. Defense counsel also did not stipulate to the cause or manner of death in his opening statement or during the State's case. (R. 270-94; 133-36; 1-36; 59-64;65-529).

To support strangulation as the cause of death and the victim's death was a homicide as opposed to an overdose or natural causes, the State introduced crime-scene photos, morgue photos taken the day of the discovery of the body under different lighting, and autopsy photos showing the various injuries to the victim's body including around the throat, to the sternum, at the top of the buttocks, and to the thigh. (R. 65-125; 127-33; 270-293; 450-472; State's Ex. #s 2, 4, 10, 12-14, 16-27, 30, 33, 32, 34-37, 39, 40, 42-46, 224-236; 242-66). Two distant crime-scene photos, the close-ups taken at the crime scene, the morgue photos taken the day of the body's discovery, and the autopsy photos were introduced without objection. (State's Ex. #s 2, 4, [distant] 20-27, 30, 33 **[R. 90-91/ close-ups]**, 32, 34, 35, 37, 39, 40, 42, 43, 44, 45, 46, **[R. 102-03, morgue photos]**; 224-236; 242-266 **[R. 284-85, 456-57 autopsy photos]**). Only *a group of 8*

crime-scene photographs were objected to, and these were generally more distant than the previously mentioned close-ups. (State's Ex. #s 10, 12, 13, 14, 16, 17, 18, & 19).

In a further attempt to prove the cause and manner of death, the State called the Coroner who testified she spoke directly with the pathologist who performed the 1st autopsy. Upon speaking with her, she learned the strap muscles of the victim's neck had not been resected during the 1st autopsy and a more careful examination had not been done to determine whether strangulation caused the victim's death. As a result, the Coroner testified before the jury, she ordered a 2nd autopsy be conducted by more experienced pathologists to determine the exact cause of death. The Coroner also ran a prescription pill report on the victim Kimberly Alger, which would list all narcotic prescription medications Alger was prescribed, and forwarded the same to Doctor Demi Garvin, the toxicologist at S.L.E.D. (R. 445-49).

The second (2nd) autopsy was conducted by 2 other more experienced pathologists on June 1, 2019. These pathologists, Dr. Kimberly Collins and Dr. Kelly Rose from Newberry Pathological Associates, re-examined Alger's body and after completing the 2nd autopsy *opined* the cause of death was strangulation, but this was only after eliminating all other possible causes of death, including possible natural causes and overdose based on the narcotic drugs on board such as fentanyl, heroin, and other drugs, and microscopic examination of tissue samples taken from the resection of the strap muscles around the victim's neck which revealed hemorrhage, not decomposition, consistent with strangulation.[11] In an attempt to establish the cause of death as strangulation, the State had Dr. Collins review the autopsy photographs taken at this autopsy before the jury and explain each injury to the victim, including those around the throat, the

[11] These 2 pathologists also resected other possible injuries noted by police and determined they were actual bruises not decomposition changes. These resections were photographed and admitted before the jury without objection along with testimony about the same.

sternum, the small of the back, and to the thigh. Dr. Collins also created 2 body diagrams [front and back] approximating the victim's injuries. The State did not go over the same photos with Dr. Rose but she reached the same *opinion* for the same reasons. (R. 450, l. 22 - 472, l. 6.; See also 445-49; State's Ex. #s 242-266 [actual 2nd autopsy photos]).

In a further attempt to establish the cause and manner of death was strangulation and not an overdose, intentional or unintentional, the State called a S.L.E.D. toxicologist who examined the drugs in the victim's blood stream at the time of death. The toxicologist *opined* the victim had several narcotic drugs in her system, including fentanyl and heroin, but *in her opinion*, they were not of a sufficient amount to cause the victim's death, especially in light of the fact the victim was a known drug addict and would have developed a tolerance to the drugs in her system. The toxicologist did opine that the drugs in the victim's system were such that would have made the victim more docile and easy to victimize. (R. 514-29).

At the close of the State's case, McIlwain moved for a directed verdict. Based on all of the evidence in the record viewed in the light most favorable to the State, Judge Curtis denied the motion for a directed verdict finding all of the elements of murder had been proven by the State. (R. 530-31).

After the close of the State's case and after the State overcame the motion for a directed verdict, McIlwain decided to testify in his own defense.[12] McIlwain testified he and Alger were arguing the night of May 26th at their home. McIlwain said he called Alger offensive names and Alger slapped him. McIlwain admitted the police came to their residence because Alger's

[12] There was no way for the State to have known McIlwain was going to take the stand and testify or what he would testify to. Defense counsel did not tell or promise the jury in his opening statement that McIlwain was going to testify. Based on the record, McIlwain did not give any statements to police regarding the killing of Alger. In fact, pre-trial, to the court, McIlwain's attorney indicated McIlwain had not decided whether he would testify or not and could not do so until after hearing the State's evidence. (R. 59-64; 21).

mother called them. After the police had come and gone, McIlwain claimed he went to sleep, and he woke up to Alger trying to stab him with a knife. McIlwain testified Alger cut him once and stabbed him once in the back. However, forensic evidence showed there was no blood on the bedroom floor or on top of the comforter on the bed where McIlwain claimed he was sleeping.[13] McIlwain admitted he grabbed the victim by her neck with one hand while grabbing her hand with the knife with his other hand. Then McIlwain claimed he "blacked out." When he "came to," McIlwain said Alger was not breathing. He was standing over Alger, who was on the floor near the bed. Only on cross-examination, did McIlwain admit he put both hands around the victim's neck and strangled *or* must have strangled the victim.[14] McIlwain claimed he "panicked," and he started weighing [his] odds" "as far as me being a black man and her being a white woman." McIlwain admitted he loaded Alger's body in the car, drove to the vacant residence on Spirit Drive, and abandoned Alger's body there. He admitted he took Alger's car and drove to Charlotte and abandoned her car. He then took a bus to Atlanta, but then changed his mind and returned to Charlotte, and he was eventually arrested in Rock Hill. (R. 534-614)

[13] McIlwain testified he fell asleep on top of the comforter on the bed, not underneath the covers where the stain containing his and victim's DNA was found. (R. 581-82).

[14] The first time McIlwain actually conceded the cause of death was strangulation was when McIlwain took the stand in the defense case and admitted *on cross-examination* the victim was strangled, and he strangled her to death. (R. 583-588).

ARGUMENT

Judge Curtis did not abuse her discretion under Rule 403, SCRE's, highly deferential standard of review in admitting the crime scene photographs *objected to* because they were relevant to issues not conceded in the State's case, and the close-up crime scene, morgue, and autopsy photographs were not objected to below so any objection now is not preserved for appellate review; regardless, the admission of the crime scene photographs objected to was harmless given the overwhelming evidence of McIlwain's guilt, and the photos were cumulative to other crime scene photographs, including close-ups, the morgue photos, and autopsy photos admitted without objection.

The Issue Raised on Appeal

In his brief, McIlwain alleges Judge Curtis erred in admitting *8 crime-scene photographs* **(State's Ex. 10, 12, 13, 14, 16, 17, 18, & 19)** and *12 so-called "autopsy" photos* [actually morgue photos taken by the chief investigator under better lighting of the victim's body the day it was found] **(State's Ex. 32, 34, 35, 37, 39, 40, 42, 43, 44, 45 & 46). (IBOA, pp. 1-12).** McIlwain did not object to, nor does he argue in his brief, that Judge Curtis erred in admitting other crime scene photographs, including actual close-ups of the body, when they were admitted **(R. 90-91; State's Ex. 2, 4, 20, 21, 22, 23, 24, 25, 26, 27, 30, & 33 [close-ups]; IBOA, pp.1-12).** McIlwain did not object to, nor does he argue in his brief that Judge Curtis erred in admitting the actual autopsy photographs which were admitted through the 1st and 2nd autopsy pathologists **(R. 284-85; State's Ex. 224-236; 242-266; IBOA pp. 1-12).** In fact, McIlwain did not object to the admission of *the morgue photographs* when they were admitted. **(R. 102-03; State's Ex. 32, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46).** As a result, the only preserved issue before this Court is the admissibility of **State's Ex. 10, 12, 13, 14, 16, 17, 18, & 19 [8 of the crime-scene photographs]** which McIlwain alleges Judge Curtis erred in admitting under Rule 403, SCRE, and which he alleges were not harmless. McIlwain is wrong on both points. Judge Curtis did not abuse her discretion in admitting these photos, and even assuming *arguendo* she

erred in some fashion, the admission of these photos was harmless in light of the overwhelming evidence of McIlwain's guilt and the other crime scene photos, morgue photos, and autopsy photos admitted without objection, which were admitted after the 8 challenged photos.

What occurred below relevant to this issue

Prior to any objection to any crime-scene photographs, one (1) crime-scene photograph, State's Ex. 2, had already been admitted without objection. This photograph showed the victim's body behind the vacant home from a distance. Further, through the first responding deputy the State introduced the body cam footage of the deputy discovering Alger's body. (State's Ex. 4; R. 75-76). The footage was similar to State's Ex. 2. Prior to Investigator Ken Taylor testifying, while the jury was excused, the following took place:

> THE COURT: Okay. We're back on the record.
>
> MS CAMPBELL; Thank you, Your Honor. I believe he's had the opportunity to review the next set of photos were getting ready to put in and I think he has an objection.
>
> MR. GRIER: Judge, you know, there's repetition over and over of the same images that don't prove anything different as far as Ms. Alger's person, you know, I would ask the Court to review. I understand we've already - - this one is already in, I mean, one photo, yeah basically the same photo. I mean, I think the representation of how she was found is well documented by that photo. And then there's just a multitude of closeups of several of Ms. Alger's face that are kind of distorted and, you know, I think they are more prejudicial than probative. I understand they're going to get at least one in, but I think the repetition –
>
> MS. CAMBELL: So your argument is cumulative.
>
> MR. GRIER: Yes.
>
> (Break in proceedings)
>
> MS. CAMBELL: Your Honor, I would hand them up. I have pulled four that I believe we could withdraw, and I could hand up the rest of them. We can withdraw State's Exhibits #29, 28, 11, and 15. Your Honor specifically the ones of the head and neck area are important as far as the cause of death. I withdraw these as cumulative.
>
> (Break in proceedings).

> THE COURT: I've reviewed the remaining - - I understand the State had pulled four of the exhibits, I've reviewed the remaining ones. You know, obviously there are several photos obviously, but I do think they are probative of the condition in which she was found and possibly cause of death so I'm going to allow them.
>
> MS CAMBELL: Thank you, Your Honor.
>
> THE COURT: Anything else before we bring the jury in?
>
> MR. GRIER: No, Your Honor.

(R. 77, 11. 8-24; 87, 11. 17-20). Defense counsel was referring to State's Exhibit #2 as 1 photo already in evidence. In response, the Solicitor stated she would withdraw 4 of the photographs as cumulative. The Solicitor removed State's Ex. 29, 28, 11, and 15. These were never admitted. The Solicitor gave reasons for the admission of the remaining crime scene photographs:

> Your Honor, specifically the ones of the head and neck area are important as to the cause of death. I withdraw these [4] as cumulative.

(R. 78, ll. 4-7). Judge Curtis, considering the Rule 403 objection raised by McIlwain ruled the remaining photographs were admissible over the Rule 403, SCRE, objection as they were "probative of the condition in which she [the victim] was found and possibly cause of death, so I'm going to allow them." (R. 78). Judge Curtis, knowing the law and the Rules of Evidence, including Rule 403, found the probative value of these photographs was not substantially outweighed by the danger of unfair prejudice or concerns with the needless presentation of cumulative evidence. In fact, Judge Curtis noted that the State had removed 4 photographs and even though there were several photographs, 8 in all, their probative value was not substantially outweighed by the danger of unfair prejudice or concerns with the needless presentation of cumulative evidence in this particular case. McIlwain did not argue the crime-scene photos were not relevant to an issue in the case, but argued the photographs were inadmissible under Rule 403, SCRE, because their probative value was substantially outweighed by the danger of unfair prejudice, and they were cumulative. (IBOA). Judge Curtis in her wide discretion disagreed.

The jury returned to the courtroom and Investigator Ken Taylor was called to the stand. (R. 78). During Taylor's examination, photographs of the crime scene were admitted without objection (R. 83-84; State's Ex. #s 3 [already admitted], 5, 6, 7, 8, 9, & 82). These photographs were of the front of the vacant home and side of the home leading to the victim's body, including the broken-down privacy fence with tire tracks on it. (R. 83-87). McIlwain did not object to any of these photographs. As Taylor's examination continued, the State offered **State's Ex. 10, 12, 13, 14, 16, 17, 18, & 19,** the photos at issue here. These were photographs depicting Alger's body prior to any manipulation by personnel on the scene and depicting specific things on her body at the crime-scene when found. (R. 87, 1-5). Prior to their admission into evidence, McIlwain objected to the admission of these crime scene photos, **State's Exhibit Nos. 10, 12, 13, 14, 16, 17, 18, & 19** based on his previous objection:

> MR GRIER: Judge, you ruled outside the presence of the jury, but I objected to the cumulative nature of them. I didn't see the probative value in repeating the same image over and over, that objection stands.
>
> THE COURT: Thank you, sir, that objection is overruled.

(R. 87, ln. 17-22). Essentially, counsel argued the probative value of these photographs was lessened by their cumulative nature and substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. This is the same objection raised on appeal by McIlwain. (See IBOA 1-12). Again, knowing what the objection was, Judge Curtis overruled the 403 objection.

With the Court's permission the State then published these photographs like the last unobjected to photographs, and Investigator Taylor explained the photographs depicted. The photographs showed: the location of the body in relation to the vacant home's privacy fence and the vacant home; the discoloration or blackening of the body due to decomposition which caused the 911 caller and officers on scene to believe the victim was African-American when she was Caucasian; the proximity of the body to the stairwell of the vacant home; the type of shirt and

jacket Alger was wearing when found; the type of pants she was wearing; that she was not wearing any socks, hose or shoes; the darkening of her feet; and the victim was wearing her jewelry on her fingers, ears, and wrists. All of these photos related to specific facts of the case which will be discussed herein, including **the cause and time of death which was not conceded until long after the State rested and overcame a directed verdict motion.** (R. 87-90).[15]

As the examination of Investigator Taylor continued, the State then offered in evidence **close-up photographs** of the victim's body as found at the crime scene. **(R. 90, State's Ex. #s 20, 21, 22, 23, 24, 25, 26, 27, 30, & 33).** The following took place on the record:

> Q. And once you took the initial photos of how the body appeared when you got there, did you then take some close-up photos of certain areas of the body you thought might be significant there at the scene?
>
> A. Yes.
>
> Q. And, I show you State's Exhibits 20, 21, 22, 23, 24, 25, 26, 27, 30, and 33. First, I ask do you recognize those?
>
> A. Yes. They're photos that I took at the scene.
>
> Q. Do those fairly and accurately depict certain areas you were focusing on that day?
>
> A. Yes, they do.
>
> MS. CAMPBELL: Your Honor, at this time we offer those into evidence.
>
> MR. GRIER: Just need to look at them again to make sure.
>
> (Break in proceedings.)
>
> **MR. GRIER: No objection**
>
> THE COURT: Thank you.
>
> MS. CAMPBELL: Your Honor, is it okay if I publish after?

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[15] In his opening statement to the jury, defense counsel did not concede any issue or any element of the offense of murder. (R. 59-64). In fact, defense counsel simply asked the jury to carefully consider the evidence and judge the credibility of the witnesses and whether the State met its burden of proof. (R. 59-64). Defense counsel did not claim the crime was voluntary manslaughter, or the victim was killed in self-defense, or claim the victim was killed by another. (R. 59-64). Defense counsel did not tell the jury the defendant would testify either. (R. 59-64).

THE COURT: They're admitted.

(State's 20-27, 30 and 33 were received).

(R. 90, ln. 7 – 91, ln. 3)(emphasis added).

Thereafter, the Solicitor went through these photographs with Investigator Taylor, and he described for the jury what these photographs showed: Victim had an identifying tattoo on her back [identifying her body]; victim had defecated on herself during or after the murder [this would become important later regarding an admission by McIlwain to a witness]; Victim had jewelry on her right and left hand [she was not robbed] and some injury or insect activity [she had died previous to that day]; Victim had "Derrick" tattooed on her shoulder [McIlwain's first name]; a close up of her neck showing darkening or an injury under her chin and down the neck [possible strangulation]; and her bare feet [indicating she was most probably killed somewhere else, such as at home]. (R. 91-95). Again, these **close-up photos** of the victim *at the scene* were **not objected to** at trial when offered into evidence. (R. 90-91). These close ups are **not raised or challenged in the Brief of Appellant** either.[16] **(IBOA, pp. 1-12).**

Later, Investigator Taylor testified that after discovering the victim' body, the police went and searched the victim's home. Inv. Taylor testified after he searched the victim's home, located on another road, he then *went to the morgue* to take additional photographs of the victim as she was found but with more controlled lighting. (R. 97, ll. 10-18; 102, ln. 7- 106, ln 25).

In his brief, McIlwain claims he also objected when the State later offered 12 "autopsy photographs" State's Exhibit Nos. 32, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46. (IBOA). This is actually incorrect on two different levels. These photographs, **State's #s 32, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, & 46** are: **(1) not autopsy photographs,** and **(2) they were not objected to.**

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[16] These close-ups of the victim were not included in McIlwain's Designation of Matter. Respondent has included them in its Designation of Matter.

These photographs are the photographs taken by Investigator Taylor **the same day the body was found** after he finished searching the victim's home. **(R. 102-03).** They are **not autopsy photos**, but **pictures taken at the morgue** by Investigator Taylor upon return from searching McIlwain's and Alger's home. (R. 102-03). The 2 autopsies were performed at MUSC on later dates than when these photographs were taken. The record shows that when these photos were offered, **counsel did not object**, but stated he had made some notes on the prosecutor's file about the cumulative nature of the photos. The Solicitor then asked which photos counsel objected to. There was then a hearing off the record. When the parties went back on the record, the Solicitor stated she was *withdrawing State's Ex. 38 and State's Ex. 41*. The Court then stated with the exception of those 2 photographs, State's 32 through 46 were admitted. **There was no objection to State's #s 32, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, & 46** (R. 103, 11. 1-11). To emphasize this point, the record was as follows:

> Q: I'm going to show you what's been marked as 32 through 46, and ask if you recognize those first.
>
> A. Yes. Those are photographs that I took at the coroner's office/morgue here in Lancaster.
>
> Q. And do those fairly and accurately depict the body as it was there at the morgue that day?
>
> A. Yes.
>
> MS. CAMPBELL: Your Honor, at this time we offer those into evidence.
>
> MR. GRIER: Your Honor, I made some notes on her file on the cumulative nature.
>
> MS. CAMPBELL: Which ones are you objecting to?
>
> (Break in proceedings).
>
> MS. CAMBELL: You Honor, we'll be glad to withdraw State's Ex. 38. And I withdraw State's Exhibit Number 41. We would offer the rest into evidence.
>
> THE COURT: Okay. 32 through 46 with the exception of 38 and 41 are admitted.
>
> MS. CAMPBELL: Thank you, Your Honor.

(State's exhibits received).

(R. 102-03).

Like the close-up photographs at the crime scene, any objection now raised to these photos is not preserved for appeal because counsel acquiesced or conceded to the admission of the rest of the photographs after the State agreed to remove 2 of the photos. Further, there never really was an objection, just a statement by counsel about a notation on the prosecutor's file about some of the photos being cumulative, which was cured by the colloquy between the parties where the State agreed to remove 2 of the photos. (Id.)

As to the **actual autopsy photographs** taken at MUSC in Charleston, those were offered and entered **without objection** *later in the trial* when the 1st autopsy pathologist and the 2nd autopsy pathologist testified. (R. 284-85; 456-457). In fact, this is how it occurred:

> Q. Okay, I'm going to show you a series of photographs, State's Exhibits 224-236 and first ask you if you recognize them?
>
> A. Yes. These are photographs taken at the time of autopsy.
>
> Q. And do these fairly and accurately depict how she presented in the morgue that day, or the autopsy room?
>
> A. Yes.
>
> Q. Got it.
>
> MS. CAMPBELL: Your Honor, at this time we would offer State's Exhibits 224 through 236.
>
> **MR GRIER: Judge, I believe they are admissible.**
>
> THE COURT: They're admitted.
>
> (State's 224-236 were received).
>
> MS. CAMBELL: Thank you, Your Honor. Permission to publish?

THE COURT: Yes, ma'am.

(R. 284, ln. 21 - 285, ln. 13)(emphasis added). The Solicitor proceeds to go through the autopsy photographs with the pathologist who explains to the jury what the photos show or what is significant to the case. (R. 285, ln. 14 - 290, ln. 16). There is no objection during this process either. During this examination, a blow up of the 1st pathologist's diagram [State's Ex 238], was also admitted without objection, "kind of" depicting what is seen in the photographs. (R. 285-290). There was also no objection when Dr. Collins, the 2nd autopsy pathologist reviewed the actual autopsy photos taken at the 2nd autopsy with the jury.

Q. I'm going to show you some photographs that were taken during this autopsy, which is State's Exhibits 242 through 266, and first ask you to look at those.

A. Yes. These were the photographs that were taken during the autopsy. They say FA for forensic autopsy, 19 for 2019, and 382 for case 382 of that year.

Q. And do those fairly and accurately depict the process of your autopsy that day?

A. Yes.

Q. And the body as it appeared?

A. Yes.

MS. Campbell: Your Honor, at this time we would offer them into evidence. I believe he has reviewed them.

MR. GRIER: **No objection.**

THE COURT: And can you tell me the numbers again please?

MS. CAMPBELL: Its 242-266.

(State's 242-66 were received).

(R. 456, ln. 22 – 457, ln. 14)(emphasis added). McIlwain does not challenge these photos on appeal either. **(IBOA, pp. 1-12).**[17]

Lack of Preservation

As a result of the above the trial record, any current objections to admission of the close-up photos at the crime scene, the morgue photographs taken the day the body was recovered, and to the actual autopsy photographs are not preserved for appeal because no objection was raised at the time of trial to the admission of these photographs. **(R. 90–91; 102-03; 284-290; 456-57).** Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992)(failure to object to evidence at the time it is offered results in waiver of issue on appeal); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)(an issue conceded in the trial court cannot be argued on appeal; State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998)(a party may not raise an objection on appeal that was not raised to the trial court). The **only objection preserved for appeal** is the Rule 403, SCRE, objection **to State's Ex. #s 10, 12, 13, 14, 16, 17, 18, & 19** raised below. (R. 77 & 87).[18]

Standard of Review

On appeal, this Court's review extends only to corrections of errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This Court reviews evidentiary rulings for an abuse of discretion. State v. Benton, ___ S.C. ___, ___S.E.2d ___ (2024), 2024 WL 174332 (January 17, 2024), citing State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475 (2004). "In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586

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[17] The actual autopsy photos were not included in McIlwain's Designation of Matter. Respondent has included the actual autopsy photos in its Designation of Matter.

[18] In addition to the issue preserved for appeal, in his brief, McIlwain does challenge the admission of the *morgue* photographs taken the day the body was discovered, which he calls "autopsy photographs." However, as shown, these were not objected to. **(See IBOA 1-12).**

(2007)(citing Baccus, 367 S.C. at 48, 625 S.E.2d at 220). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011)(quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." Id.; *see also* State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180 (1986). "The relevancy and materiality of a photograph is left to the sound discretion of the trial judge." State v. Edwards, 194 S.C. 410, 10 S.E.2d 587, 588 (1940).

Further, a trial judge's decision regarding the comparative probative value and prejudicial effect of relevant 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)); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004). When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" State v. Collins, 398 S.C. 197, 209, 727 S.E.2d 751, 757 (Ct. App. 2012), *reversed on other grounds* Collins, 409 S.C. at 534, 763 S.E.2d at 28. As a result, a trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v.

Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Hamilton, 344 S.C. at 358, 543 S.E.2d at 594. *See also* Holmes v. Goldsmith, 147 U.S. 150, 164 (1893) ("[G]reat latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required; and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be.").

ANALYSIS

McIlwain argues *the 8 photos taken at the crime scene that he objected to* ***State's Exhibit Nos. 10, 12, 13, 14, 16, 17, 18, & 19*** should not have been admitted under Rule 403, SCRE. McIlwain cannot show an abuse of discretion under Rule 403, which is the only issue he raises. In his brief, McIlwain also argues against the admission of the *morgue* photographs; however, there was no objection to the admission of the 12 morgue photographs offered and admitted, so it is impossible for Judge Curtis to have erred under Rule 403 as to those 12 photographs.

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. Rule 402, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); *see* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"). However, even if relevant, evidence must be excluded from trial if its probative value is *substantially outweighed* by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151,

158, 679 S.E.2d 172, 176 (2009); *see* Rule 403, SCRE ("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."); *see also* New Oxford American Dictionary 1736 (3rd ed. 2010) (defining "substantially" as "to a great or significant extent"). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. Collins, 398 S.C. at 202, 727 S.E.2d at 754, *rev'd on other grounds*, 409 S.C. 524, 763 S.E.2d 22. Meanwhile, unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); *see* Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). However, unfair prejudice does *not* mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

"The relevancy and materiality of a photograph is left to the sound discretion of the trial judge." Edwards, 194 S.C. 410, 10 S.E.2d at 588. "Although photographs may be used to corroborate other evidence, it is well established that *photographs calculated to arouse the*

sympathies and prejudices of the jury are to be excluded *if* they are irrelevant or unnecessary to the issues at trial." State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986)(emphasis added)(internal citations omitted). "Photographs *calculated to arouse the sympathy or prejudice of the jury* should be excluded *if* they are irrelevant or not necessary to substantiate material facts or conditions." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (emphasis added).

Additionally, Rule 403, SCRE, provides even relevant evidence is to be excluded "if its probative value is **substantially outweighed** by the danger of **unfair** prejudice." Rule 403, SCRE (emphasis added). In order to constitute **unfair prejudice,** "the photographs must create a tendency to suggest a decision on *an improper basis*, commonly, although not necessarily, an emotional one." State v. Kelley, 319 S.C. 173, 178, 460 SE.2d 370, 370-71 (1995)(quoting Alexander, 303 S.C. at 382, 401 S.E. at 149.

This Court recently set forth again the applicable standard for the admissibility of photos in State v. Heyward, 432 S.C. 296, 321-22, 852 S.E.2d 452, 464-65 (Ct. App. 2020), *affirmed as modified* State v. Heward, 441 S.C. 484, 895 SE.2d 658 (2023).

> 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). A trial court'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)). In balancing the danger of unfair prejudice with the probative value of a piece of evidence, "the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008).
>
> To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

> "[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). However, "[i]t is well settled in this state that '[i]f the [...] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" Torres, 390 S.C. at 623, 703 S.E.2d at 229 (first alteration in original) (quoting Nance, 320 S.C. at 508, 466 S.E.2d at 353). Our courts have found autopsy photographs may be admitted "in an effort to show the circumstances of the crime and character of the defendant." Id. "'The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.'" Collins, 409 S.C. at 535, 763 S.E.2d at 28 (quoting Nichols v. State, 267 Ala. 217, 100 So. 2d 750, 756 (1958)).

Heyward, 432 S.C. at 321-22, 852 S.E.2d at 464-65, *affirmed as modified* Heyward, 441 S.C. 484, 895 S.E.2d 658. Under the appropriate standard of review, Judge Curtis did not abuse her discretion under Rule 403, SCRE, in admitting the 8 crime scene photographs at issue here, and McIlwain has not shown any prejudice.

There is no better way to illustrate a crime scene [or a victim's injuries upon death] to a jury than by a photograph. State v. Kelly, 46 S.C. 55, 24 S.E. 60 (1896). And, the admissibility of a photograph into evidence is within the sound discretion of a trial judge. State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988). *See* Collins, *supra* (court's admission of pre-autopsy photographs of the victim, who had been mauled by dogs, was not an abuse of discretion). If a photo serves to corroborate oral testimony about a crime-scene, it is not an abuse of discretion to admit it. Collins, 409 S.C. at 534, 763 S.E.2d at 27. "Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder." Id.

> Even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case, are useful to

> enable a witness to testify more effectively, or enable the jury to better understand [the] testimony. Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries, and the position in which the bodies were discovered.

Id. All of these are present in this case with regard to **State's #s 10, 12, 13, 14, 16, 17, 18, & 19.** "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis." Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429. "[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." Id.

Recently, the South Carolina Supreme Court made clear when photographs are admissible over a challenge to their admission pursuant to Rule 403, SCRE, and clarified what it meant when it excluded photographs in State v. Nelson, 440 S.C. 413, 891 S.E.2d 508 (2023). Benton, ___ S.C. ___, ___ S.E.2d ___, 2024 WL 174332, at *3. In Benton, in upholding this Court's previous opinion, a unanimous Supreme Court held as follows:

IV. Admissibility of Crime Scene Photographs

> Next, we agree with the court of appeals that the trial court did not abuse its discretion in admitting the graphic crime scene photographs of Victim's burned body. (State's Ex. 54-55). It is inescapable that the photographs were gruesome and revolting. We have long warned the State not to overplay its hand in criminal trials by seeking to admit shockingly graphic photographs that have scant probative value in violation of Rule 403, SCRE, just to inflame the passions of the jury. We recently reversed a conviction the State had secured by doing just such a thing. *See* State v. Nelson, 440 S.C. 413, 891 S.E.2d 508 (2023) (Howard Adv. Sh. No. 31 at 25) (reversing murder conviction due to the prejudice caused by erroneous admission of gruesome autopsy photographs).
>
> This case differs from Nelson in several ways. The photographs at issue in Nelson were autopsy pictures of the victim's decomposing and disfigured body. Id. at 28–29. They could corroborate nothing but the prosecutor's overreach. Id. at 35. By contrast, the pictures here were relevant as they depicted the crime scene. They drew

> probative force from their unique power to make Benton's accomplices' testimony more believable. The pictures gave important context to the testimony and other evidence about who did what at the scene. Under the specific circumstances of this case, the pictures assisted the jury in their task to understand other key evidence.
>
> In our review of the trial court's admission of the photographs, we note the trial court again did not place its Rule 403 analysis on the record. Instead, after an off-the-record bench conference, the trial court simply admitted the three photographs, commenting they were a "proper representation of the scene." As we have expressed in the past, "we stress the importance of placing on the record arguments and rulings that took place off the record, whether during a bench conference, in emails, or in chambers." State v. Washington, 431 S.C. 394, 405 n.4, 848 S.E.2d 779, 785 n.4 (2020). We emphasize that on-the-record arguments and rulings enable judicial review and allow the parties and the public to better understand the rulings.
>
> At any rate, any error during the process of admitting the pictures was harmless, as their introduction did not affect the result of the trial. *See* State v. Byers, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." (quoting State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006))); *id.* ("Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless." (quoting Pagan, 369 S.C. at 212, 631 S.E.2d at 267)). The record is loaded with compelling evidence incriminating Benton of each of the crimes in this violent spree. We conclude the photographs did not contribute to the verdict in any significant way.

Benton, ___ S.C. ___, ___ S.E.2d ___, 2024 WL 174332, at *3.[19]

In State v. Kelsey, 331 S.C. 50 502 S.E.2d 63 (1998), where the victim's body was found 45 days after her murder, the Court rejected the argument the crime scene may have been disturbed by nature or altered by other forces and held the photos of fragments of the victim's

[19] Justice Few, wrote a dissent in Benton, but it was on a different issue in the case. He concurred on the admissibility of the photographs.

bones and bomb fragments were admissible as being accurate depictions of the crime scene as found by law enforcement and corroborated testimony. In Kelley, 319 S.C. 173, 460 S.E.2d 368, photos of the crime scene which included 2 photos of the victim's nude body with her face and body visibly swollen from the beating she received, were relevant to establish the crime scene and prove malice were held admissible. In Heyward, *supra*, this Court stated as follows:

> In State v. Gray, this court found the trial court did not abuse its discretion when it admitted three photographs, which were taken during an autopsy and showed the victim's exposed skull and brain. 408 S.C. 601, 609, 619, 759 S.E.2d 160, 165, 170 (Ct. App. 2014). This court found the photographs had probative value because they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and cause of death and were important to the State's ability to prove malice. Id. at 612–16, 759 S.E.2d at 166–68.

Heyward, 432 S.C. at 321–22, 852 S.E.2d at 465, *affirmed as modified* Heyward, 441 S.C. 484, 895 S.E.2d 658. In Heyward, this Court admitted **autopsy photos** that it found were admissible for several reasons: they were probative on malice, they corroborated the pathologist's testimony, and after viewing them, they were not unduly prejudicial. Id. at 322-23; 852 S.E.2d at 465-66.

The South Carolina Supreme Court affirmed as modified. Heyward, 441 S.C. 484, 895 S.E.2d 658, *distinguishing* Nelson, 440 S.C. 413, 891 S.E.2d 508 and State v. Jones, 440 S.C. 214, 891 S.E.2d 347 (2023). The Supreme Court specifically found, the case was distinguishable from Nelson because in Nelson the defense stipulated to every fact except that the defendant committed the crime and the **autopsy photos** proved nothing about who committed the crime. Id. 441 S.C. at 502, 895 S.E.2d at 668. In contrast, in Heyward, the Supreme Court noted, ***the defense conceded nothing***. Id. The Court found that where the defense conceded nothing and even challenged the pathologist testimony on head injuries, the gruesome autopsy photographs

where the scalp was pulled back were admissible because they did corroborate the pathologist testimony that the victim was not just strangled but beaten about the head before or during strangulation. Id.

In State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997), the Supreme Court upheld the introduction of photos in a murder prosecution that showed "the crime scene and the position of [the victim's] body." Brazell, 325 S.C. at 78–79, 480 S.E.2d at 72. The Court explained the "photographs supported the testimony of several witnesses and were relevant to the nature of the crime. The State used the photographs to establish that the murder was a deliberate and calculated act. These photographs corroborated [testimony] concerning the location of the body on the side of the road . . . ." Brazell, 325 S.C. at 78–79, 480 S.E.2d at 72.

Likewise, the Court in State v. Robinson, 201 S.C. 230, 22 S.E.2d 587 (1942), found no error in the admission of photos in a murder prosecution of "the body at the location at which it was found." The Court explained the photos were "corroborative of the spoken word" and "showed material conditions which existed." Robinson, 201 S.C. 230, 22 S.E.2d at 588–89. *See also* Edwards, 194 S.C. 410, 10 S.E.2d 587 (no error in the admission of pictures of a dead body "found on the side of a public road"); State v. Thompson, 420 S.C. 192, 802 S.E.2d 623 (Ct. App. 2017) (finding no error in the admission of pictures of a dead body "as found at the crime scene"); *Cf.* Lackey v. State, 271 S.E.2d 478, 484 (Ga. 1980) (rejecting the contention the trial judge erred by admitting 12 enlarged color photos depicting the juvenile victim's body after her death along with 3 color photographs depicting a fractured rib surgically removed from the victim's body during an autopsy because the photos refuted the possibility the victim's injuries were accidental or self-inflicted); People v. Dickerson, 837 N.Y.S.2d 101, 108 (N.Y. App. Div. 2007) (finding autopsy photos were relevant and probative in light of claims made by the

defendant); *Cf.* State v. Bennett, 369 S.C. 219, 229, 632 S.E.2d 281, 287 (2006) (concluding the trial judge did not err by admitting hospital photos depicting 2 victims even though they "were certain to elicit an emotional response from the jury" because they were "highly probative" since they provided the "clearest picture of the aggravated nature of the assault and battery"). *See* State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (recognizing photos can be important to demonstrate the nature and extent of a victim's injuries "in a way that would not be as easily understood based on the testimony alone"); *cf.* Gray, 408 S.C. at 614, 759 S.E.2d at 167 ("[T]he photos were important to the State's ability to establish that Gray and Reese acted with malice."); State v. Dial, 405 S.C. 247, 261, 746 S.E.2d 495, 502 (Ct. App. 2013)("We find the [autopsy] photographs were highly probative to the issues of whether Victim was abused and whether the abuse was the cause of his death, which are integral elements to the charge of homicide by child abuse." (citation omitted); State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 608 (Ct. App. 2008) ("The photographs were relevant to prove Child was abused, that the abuse was the cause of his death, and that the abuse manifested an extreme indifference to human life, all of which support the charge of homicide by child abuse."). And, the importance of the photos was increased by the fact the nature of victim's injuries was a medical matter not "readily understood by most jurors," who ordinarily would not be expected to be knowledgeable about such things. Gray, 408 S.C. at 612, 759 S.E.2d at 166. *See* Nance, 320 S.C. at 508, 466 S.E.2d a 353. ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.") *Cf.* State v. Jarrell, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002) (concluding the trial judge's decision to exclude some autopsy photographs depicting the infant victim's injuries demonstrated he exercised his discretion in admitting the photographs admitted).

Here, the 8 photos challenged, were only *crime scene photos*. Benton, *supra* (recognizing the deference between crime-scene and autopsy photographs). The Solicitor withdrew some of these photos as cumulative. There was no copious amount of blood, or any gaping wounds. The scalp was not pulled back on any of these photos. There were no wounds caused by a pathologist. These photos in no way compare to other gruesome photographs that have troubled our courts. *Cf.* Jones, *supra* (finding error in admitting photos of 5 mummified and heavily decomposed victims with their faces taken at autopsy where the pre-mortem injuries in all but 1 were not visible, and no evidence defendant damaged their faces, but finding admission was harmless); Edwards, *supra* (finding no error in the admission of pictures of a dead body despite the fact that numerous witnesses "testified as to the gruesome condition of the body and of the presence of maggots in large numbers in and near the wound"); Collins, 409 S.C. at 529, 763 S.E.2d at 25 (affirming conviction in dog bite case where child victim suffered "'extensive' loss of skin and soft tissue on his upper body and his face, including his ears and nose, which were 'completely eaten away' by the dogs. Areas of the boy's chest and his arm had also been eaten, exposing the bone"). The 8 photos challenged here simply do not compare to the type of gory photographs at issue in Jones, Collins or Edwards. *See also* Evans v. State, 306 Ga. 403, 411, 831 S.E.2d 818, 826 (2019)(explaining that while "photographs depicted the victim's skeletal remains and were, therefore, somewhat graphic, that does not alter their admissibility because each of the photographs 'was relevant to some point of the [medical examiner's] testimony'"). Evidence strongly supports Judge Curtis' decision to admit these photographs in this case where the cause and manner of death and the time and place of death was in question and not conceded until after the State rested, and only in the defendant's cross-examination testimony.

Judge Curtis did not abuse her discretion because the 8 photos were relevant and admissible because they corroborated the testimony of the crime scene investigator and experts about the condition of the victim's body when found, its' location in relation to the abandoned home and the fact it was hidden from view, the approximate state of decay of 1 and ½ to 2 days indicating the actual time of death, the injuries to the victim's body including to the throat, the fact she was barefoot indicating she was killed elsewhere, the clothes she was wearing when discovered some of which were the same or similar to what she was wearing on *Sunday* night, and she was wearing all of her jewelry indicating the motive was not robbery. Benton, *supra* (crime-scene photos were admissible); *See* Torres, 390 SC. at 623, 703 S.E.2d at 229 ("It is well settled in this state that "[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." (alteration in original)(*quoting* Nance, 320 SC. at 508, 466 S.E.2d at 353). These photos also corroborated McIlwain's confession to others, including Chapman, who he told he dumped the victim's body behind a vacant home, and it took a long time to kill the victim by strangulation.[20] Defense counsel challenged Chapman's credibility as simply a jail house informant lying to help himself. *Compare* Middleton, 288 S.C. 21, 339 S.E.2d 692.

McIlwain argues admission of the pictures was not necessary and cumulative because the pathologist's findings were not in dispute. This statement is inaccurate when considering the entire trial record. McIlwain's counsel did not concede anything in his opening statement. He would not stipulate to the cause of death and even pointed out on cross-examination of the 1st pathologist, that many things consistent with strangulation were not present on the victim's body.

[20] McIlwain also told Chapman, whose credibility was repeatedly challenged by the defense, that the victim defecated on herself during the strangulation which was corroborated by another photograph of the victim not objected to.

He also did not inform the trial court McIlwain was going to testify until the State rested its' case because the defendant had not even decided whether he needed to testify or not until he heard all of the State's evidence. There was no way for the State to know whether McIlwain was going to testify or not. The State *not only* had to convince Judge Curtis of the cause and manner of death of the victim to overcome a directed verdict motion on these peculiar facts, *but it also* had to convince the jury of the same beyond a reasonable doubt where the victim's body was decomposed, she was a known drug addict, and she had potentially lethal drugs such as heroin and fentanyl in her blood stream. The objected to crime-scene photos were highly probative because they corroborated officers', and investigator's, and the pathologists' oral testimony and the cause and manner of death and the time and location of death were issues in this case. *Compare* Middleton, *supra*, cited in Jones, *supra*. Our system of evidence has always permitted physical and documentary evidence to be admitted at trial to "substantiate" oral testimony when a matter is in issue. Torres, 390 S.C. at 623, 703 S.E.2d at 228. It would be extraordinary to require the State to prove a murder beyond a reasonable doubt, including one in which the victim had been dead for several days and had dangerous drugs on board, but prevent the State from introducing the only or best *documentary* evidence proving critical facts surrounding her death beyond question. One can easily imagine the suspicion it would provoke among jurors, especially skeptical jurors, who are instructed ad nauseum about the stringent "beyond a reasonable doubt" standard, if the State did not produce any documentary evidence to prove a death and to substantiate oral testimony about such central issues as the cause and manner of death and when and where the victim died. Prosecutors must be prepared to encounter a "doubting Thomas" on every jury.[21] At this point in our society, large segments of this country

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[21] John 20:24–29.

distrust state and/or federal police. The State must be allowed to prove its allegations in its case in chief, for it may not get another chance in cases (such as this one) where it does not know if the defendant is going to testify or not and it does not know what the defendant is going to say if he testifies. As long as the evidence is not "calculated to arouse the sympathy or prejudice of the jury," it is not error to admit it. Torres, 390 S.C. at 623, 703 S.E.2d at 228. The State must be allowed to prove with the best evidence it has the proximate cause and manner of death, the time and location of the victim's death, and to corroborate critical testimony by multiple witnesses, including but not limited to the pathologists, investigators, and witnesses to whom the defendant confessed or made admissions of guilt. Evidence supports Judge Curtis' ruling that the risk of unfair prejudice or needless presentation of cumulative evidence did not substantially outweigh the probative value of these 8 photographs. Rule 403, SCRE. The close-up crime scene photos, the morgue photos, and the autopsy photos, not objected to, were not offered until after these 8 photographs were admitted. Accordingly, McIlwain has failed to show an abuse of discretion. Under the "highly deferential" standard of review in claims of error based on Rule 403, SCRE, the Court is "obligated to give great deference to the trial court's judgment." Collins, 409 S.C. at 534, 763 S.E.2d at 28.

As pointed out in the Standard of Review section of this brief, it is photos calculated to arouse the prejudices or sympathy of the jury that must be removed, and only when they are unnecessary to prove some fact. Middleton, 288 S.C. at 24, 339 S.E.2d at 693 ("Although photographs may be used to corroborate other evidence, it is well established that *photographs calculated to arouse the sympathies and prejudices of the jury* are to be excluded *if* they are irrelevant or unnecessary to the issues at trial." (emphasis added)(internal citations omitted)); Torres, *supra* ("Photographs *calculated to arouse the sympathy or prejudice of the jury* should be

excluded *if* they are irrelevant or not necessary to substantiate material facts or conditions.") (emphasis added). McIlwain has not shown that these 8 photos were calculated to arouse the sympathies or prejudices of the jury. In fact, they were not offered for that purpose but were *necessary to show and substantiate material facts*: in what condition the victim was found, her location out of view of the public, what clothes she was wearing and not wearing to establish the time and location of her murder and identity of her killer, the fact she had not been robbed of her jewelry, and the injuries to her body especially to the neck area to establish the proximate cause and manner of death. *See* State v. Hawes, 423 S.C. 118, 130-31, 813 S.E.2d 513, 519-20 (Ct. App. 2018) (trial court did not abuse its discretion when it admitted crime scene photos that established the circumstances of the crime scene, corroborated the testimony of a witness and a responding officer, and were relevant to the issue of malice); People v. Garceau, 862 P.2d 664, 667 (CA 1993) (photo of mummified victims hidden within a dresser was highly probative because it corroborated testimony relating to concealment of the bodies); *See* State v. Oliveira-Coutinho, 865 N.W.2d 740, 762 (Neb. 2015)(finding no error in admission of photos of skeletal remains "including several close-ups of the skull taken from different angles").[22]

Further, any danger of prejudice was low because these 8 photographs did not suggest that the jury convict McIlwain on an improper basis. *See* Wiles, 383 S.C. at 158, 679 S.E.2d at

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[22] In fact, in one case, State v. Spodnick, 292 S.C. 68, 354 S.E.2d 904 (1987), where a victim had been beaten to death, and then hacked-up and buried, a piece of bone fragment and tissue was admitted into evidence, despite an offer by the defense to stipulate to any matter the evidence as introduced would prove. Here the photos are no different than blood or hair of a victim introduced to show the situs of the crime. State v. Fields, 264 S.C. 260, 214 S.E.2d 320 (1975); State v. Brown, 101 S.C. 404, 85 S.E. 957 (1915). Much more graphic photos have been admitted when their probative value is not substantially outweighed by the danger of unfair prejudice. *See* Williams v. State, 301 S.W.3d 675, 693 (Tex. Crim. App. 2009) (close-up photos of injuries were gruesome but they portrayed no more than the gruesomeness of the injuries inflicted by the defendant); Narvaiz v. State, 840 S.W.2d 415, 430 (Tex. Crim. App. 1992) (although photos were gruesome, they merely depicted the gruesomeness of the crime scene as found by the police).

176; Rule 403, SCRE (relevant evidence is to be excluded "if its probative value is substantially outweighed by the danger of **unfair** prejudice."; Rule 403, SCRE (emphasis added). In order to constitute **unfair prejudice**, "the photographs must create a tendency to suggest a decision on an *improper basis*, commonly, although not necessarily, an emotional one." Kelley, 319 S.C. at 178, 460 SE.2d at 370-71 (quoting Alexander, 303 S.C. at 382, 401 S.E. at 149); *See* United States v. Gartmon, 146 F.3d 1015, 1021 (D.C. Cir. 1998) ("Rule 403 does not provide a shield for defendants who engage in outrageous acts, permitting only the crimes of Caspar Milquetoasts to be described fully to a jury. It does not generally require the government to sanitize its case, to deflate its witnesses' testimony, or to tell its story in a monotone."). These 8 photos were admitted to establish medical facts, and other facts, on a slightly decomposed body, which the jury might not be able to understand or believe from simple witness testimony. Heyward, *supra.* Further, they established facts that a diagram, by whomever created it, could not establish in a case where the cause, time, manner, and location of death was in dispute until the defendant took the stand. See Benton; Heyward (distinguishing Nelson).

Further, a trial judge's weighing of probative value verses prejudicial effect under Rule 403, SCRE, is reviewed under an abuse of discretion standard and should be reversed **only in exceptional circumstances**. State v. Gadson, 439 S.C. 278, 886 S.E.2d 719 (Ct. App. 2023)(referencing State v. Brooks, 428 S.C. 618, 635, 837 S.E.2d 236, 245 (Ct App. 2019)(quoting Collins, 409 S.C. at 534, 763 S.E.2d at 28). Under this standard, in this case, Judge Curtis must be affirmed. The 8 photos were relevant to establish several important facts and to corroborate other witnesses' testimony, and they were not needlessly cumulative when offered and where McIlwain did not concede or stipulate to the cause, manner, time, or location

of the victim's murder until after the State rested and overcame a motion for a directed verdict and only after he took the stand.

As shown, the photographs were relevant and probative because they assisted in proving the cause of death [strangulation] of the victim, whose body was decomposing and that cause of death was difficult to determine, and the victim's body contained dangerous narcotic drugs, and that cause of death was not conceded or admitted by McIlwain during the State's case, and that cause of death had to be proved to the jury beyond a reasonable doubt or McIlwain would be acquitted. Here, the State introduced the 8 crime-scene photos because they assisted in proving: the cause of death of the victim where the first pathologist could not even determine a cause of death and the victim's blood contained numerous narcotic and dangerous drugs such as fentanyl and heroin that could cause an overdose death. The photos also assisted in proving the time and location of the death, which was not conceded. The photos also assisted in showing the progression of the investigation from the initial noting of what appeared to be injuries to the victim at the crime scene, to more careful examination at the morgue, to the actual scientific determination by resecting of the same injuries at the 2nd autopsy. Further, it must be remembered that both the initial pathologist and the 2nd autopsy pathologists are experts who gave *opinions* that the jury is instructed they do not have to accept and can give whatever weight they wish. Additionally, during its case in chief, the State had no idea the defendant was going to take the stand and claim self-defense and admit on cross-examination that he put his hands around the victim's neck; the defendant could have rested at the end of the State's case. The State had to prove first to the trial court and then to the jury that the victim died at McIlwain's hands and that she did not die because of some illness or a drug overdose. The crime scene photographs assisted in establishing this.

The 8 crime scene photos showed why the cause of death was difficult to determine because the victim's body was in a decomposed state. However, and importantly, the photos showed the area around the victim's neck's strap muscles was in an advanced state of decay and there was insect activity there as well. A pathologist testified during the trial that this advanced area of decomposition is an indication of an injury in that location of the body. (R. 457-60; 470). This proved to be true as discovered at the 2nd autopsy after microscopic examination. Again, the jury does not have to accept the pathologists' expert *opinions* and they certainly do not have to accept their *opinions* if they are unsupported by any corroborating evidence, and the jury does not have to accept the testimony of officers at the scene who claimed they saw bruising in this area of a decomposed body. As has been said numerous times, "a picture is worth a thousand words." Further, the crime scene photographs proved where the 2nd autopsy experts eventually took their samples, **and why**, to view under a microscope with the determination there was actual bruising under the skin in the area of the strap muscles surrounding the victim's neck.

Here in this case, where McIlwain did not admit the cause of death, the time of death, or the manner of death before trial or during the State's case, where the State had to overcome a motion for a directed verdict, and the State had to prove to the jury beyond a reasonable doubt the victim's death was caused by McIlwain, where there was no petechia around the eyes and the hyoid bone was intact, and the 2nd pathologists had to examine tissue under a microscope to render *their opinions* on the cause of death, and the jury did not have to accept those opinions, the crime scene photos were relevant and admissible, which appellant concedes, and their probative value was not substantially outweighed by the danger of unfair prejudice or presentation of needless cumulative evidence. Benton, *supra*; Rule 403, SCRE (relevant

evidence may be excluded it its' probative value is substantially outweighed by the danger of unfair prejudice).

Beyond that, each of the corroborative photographs challenged here was presented to the jury in such a way as helped ensure the photos were introduced in a manner "detached from the emotions of the case" as opposed to in an unnecessarily or unduly prejudicial manner. Gray, 408 S.C. at 616, 759 S.E.2d at 169. Moreover, the 8 photos accurately reflected what occurred to Alger and were not so extreme, unusually gruesome, or gory that they would have been inflammatory in a sense that went beyond the natural inflammation attendant to any post-mortem photo of someone who died of an unnatural and violent cause. Id.; *see* Collins, 409 S.C. at 535, 763 S.E.2d at 28 (plurality opinion) ("Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder."); *cf.* Holder, 382 S.C. at 291, 676 S.E.2d at 697 ("Although the photographs were graphic, the facts in the case were graphic, and there is no suggestion that their admission had an undue tendency to suggest a decision on an improper basis. We hold the trial court properly exercised its discretion in admitting the autopsy photographs in this case.").

Accordingly, even though the 8 challenged photos were inherently unpleasant, their potential for undue prejudice or concerns about the needless presentation of cumulative evidence, did not *substantially* outweigh their probative value under the circumstances involved in this case. Judge Curtis did not abuse her broad discretion under Rule 403 or otherwise err by admitting these 8 limited photos, and there are no proper grounds warranting a reversal of that sound discretionary ruling on appeal. *See* Sweat, 362 S.C. at 129, 606 S.E.2d at 515 ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant

evidence should be reversed only in exceptional circumstances."); *see also* State v. Robinson, 426 S.C. 579, 607, 828 S.E.2d 203, 217 (2019) (recognizing it is conceivable the discretionary rulings of two different trial judges who reached opposite conclusions from the same set of circumstances will both be affirmed on appeal due to the deferential nature of the abuse of discretion standard of review).

Harmless Error

Even assuming *arguendo* error in the admission of any or all of the challenged photographs, the error was harmless in this case as it did not affect the result of the trial. Benton, *supra*; *See* State v. Byers, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011) ("appellate courts will not set aside convictions due to insubstantial errors not affecting the result." (quoting Pagan, 369 S.C. at 212, 631 S.E.2d at 267); Id. ("Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless." (quoting Pagan, *supra*); "Whether an error is harmless depends on the circumstances of the particular case." State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). As the Supreme Court recently found in Benton, *supra*: "The record is loaded with compelling evidence incriminating Benton of each of the crimes in this violent spree. We conclude the photographs did not contribute to the verdict in any significant way." Id. The same is true in the present case.

On the night of her death, the 26th/27th, the victim called her mother and was hysterical, crying, and rasping and told her mother that McIlwain had strangled her. She told her mother he threatened to kill her if she called police. Her mother called the police instead, but because the victim was afraid, she told the responding officer, who also testified, that she was alright. The officer saw McIlwain's silhouette behind the victim in their home. McIlwain admitted at trial he

was the person standing behind the victim when the police came after the victim's mother called police. After the officer left, the victim then called her mother back and told her the same thing again, that McIlwain had strangled her, and she did not tell the police because she was afraid.

The victim disappeared that night. Her last contact with any human other than McIlwain was late Sunday night or, the early morning hours of Monday when she phoned a friend and asked her if she could come over and stay. The friend said she could come over, but the victim never arrived. On Tuesday afternoon, the victim's decomposing body was found behind a residence she and McIlwain were looking at as a possible future home. The home where her body was located was just 1 ½ miles from the victim and McIlwain's home. The home where the body was found was abandoned, and the grass had not been cut in the back yard. Alger's body had been discarded in the tall grass of the backyard of the vacant home after whoever drove her body there ran over the privacy fence and dumped her body so it would not be seen from the road or found. The victim was still wearing her jewelry on her fingers, wrist, and ears, indicating robbery was not the motive. The victim had what appeared to be visible bruising or darkening of the skin around her neck. She also had an injury to her sternum area, her lower back, and to her thigh. The victim was also wearing some of the same or similar clothing to what she was seen wearing on Sunday night, the 26th, by the deputy who responded to her home after Alger's mother called police. When Alger's body was found, the victim was not wearing any shoes, socks, or stockings, indicating she was probably first assaulted or killed at home indoors and not at the disposal site. Police identified her body almost immediately because they had responded to her home several times on police calls. It came out on cross-examination of the defendant that police had responded to McIlwain and Algers' home approximately 6-7 times when McIlwain

was assaulting Alger. Alger also had identifying tattoos on her body, including McIlwains' first name tattooed on her chest/shoulder area.

Almost immediately after discovery of the body, police searched McIlwain's and Alger's home. When they arrived at the home, McIlwain was not there. They found a hooded sweat jacket washed in the washing machine. There were holes in the walls, but no blood spatter or blood drops anywhere in the house, only a stain under the covers containing both the victim's and McIlwain's DNA. The victim's blood was on a bed spread in the closet. There was no blood on top of the comforter on the fully made bed in the master bedroom where McIlwain claimed he was sleeping when allegedly attacked by the victim. The victim's car was not at the home. A witness had seen the car leave the neighborhood on Monday and not return.

On Monday, McIlwain told his own cousin and best friend, Donald Anthony, that he had killed the victim and that she was leaving him. He also told Anthony that he was going to kill himself, and he was not going to prison for killing Alger. Anthony's wife testified she was present and saw McIlwain and Anthony together after Sunday night. McIlwain also posted a long rant on the Internet in which he stated he and the victim should have broken up long ago and he implied he was going to kill himself. McIlwain then abandoned his own cell phone in Anthony's wife's car so he could not be tracked.

After murdering the victim, McIlwain fled to Charlotte, North Carolina in the victim's car. He abandoned her car in a church parking lot in downtown Charlotte where he was captured on surveillance video. He then walked to a bus station and purchased a bus ticket to Atlanta and fled there. He abandoned the victim's phone there so he could not be tracked. He then returned to North Carolina and hid out with a cousin. While there, he told another witness that he had killed the victim. The cousin died and McIlwain left that home. He eventually fled to Rock Hill.

Under South Carolina law, flight and attempts to evade arrest have always been admissible as evidence of guilt so long as the flight or attempt to evade arrest is tied in some fashion to the crime for which the defendant is on trial. Pagan, 369 S.C. at 208–09, 631 S.E.2d at 266; State v. Turnage, 107 S.C. 478, 93 S.E. 182 (1917); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982)(evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Robinson, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct. App. 2004).

While he was hiding out in a motel room, McIlwain told still another witness, who he had gone to high school with, that he had killed the victim. He was arrested in Rock Hill with this person who also testified at this trial. In his testimony at trial, McIlwain admitted each of these 3 witnesses testified truthfully about what he said to them, i.e. he killed Alger.

And, McIlwain told a cellmate Robert Chapman that he strangled the victim multiple times causing her to defecate on herself, which is consistent with what police found at the crime scene. He also told his cellmate that he dumped her body behind a vacant home and had to finish choking her to death there. McIlwain told no witness he confessed to that he killed the victim in self-defense.

D.N.A. also tied McIlwain to the murder of the victim as his DNA was found under her fingernails, and his DNA was also found on locations of her body that identified him as her killer and the person who disposed of her body.

Finally, McIlwain finally admitted on cross-examination he strangled and killed the victim, he disposed of her body, and fled to Charlotte, N.C. His self-defense and voluntary manslaughter claims did not match the evidence or his actions. The jury did not accept his self-defense or voluntary manslaughter claims. The 8 challenged crime scene photographs did not

influence or change the verdict because of the overwhelming evidence of guilt. Benton, *supra* (finding admission of photos harmless given the other evidence of defendant's guilt); Jones, 440 S.C. at 264, 891 S.E.2d at 373 (after weighing the horrific facts of this case against the improper admission of the photographs, we hold the photographs did not contribute to the jury's sentence of death and were harmless); State v. Wells, 336 S.C. 223, 426 S.E.2d 814 (Ct. App. 1992)(photo of victim admitted to accurately show crime scene was harmless in light of the overwhelming evidence of guilt); State v. Brown, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018)(when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, an insubstantial error not affecting the result is harmless)(quoting Byers, 392 S.C. at 447, 710 S.E.2d at 60).

Further, the crime scene photographs objected to are harmless given ***the close-up photographs*** **[State's Ex. 20-27, 30 & 33]** not objected to, ***the morgue photographs*** **[State's Ex. 32, 34-37, 39, 40, 42-46]** not objected to, and ***the autopsy photographs*** **[State's Ex. 224-36; 242-66]** admitted without objection. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless); State v. Broaddus, 361 S.C. 534. 542, 605 S.E.2d 579, 583–84 (Ct. App. 2004)(same); *see also* State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (Ct. App. 2001)(any error in admitting evidence was harmless as properly admitted evidence proved the same thing); State v. Brewer, 411 S.C. 401, 409-410, 768 S.E.2d 656, 660 (2015); State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008)(the admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003). *See also e.g.* State v. Brazell, 325 S.C. 65, 79, 480 S.E.2d 64, 72 (1997)("Even if

the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage").

CONCLUSION

For all of the above stated reasons, McIlwain's conviction for the murder of Kimberly Alger must be affirmed, and this appeal dismissed.

Respectfully Submitted,

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June 25, 2024.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
The Honorable Kristi F. Curtis, Circuit Court Judge

THE STATE,

RESPONDENT,

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DERRICK A. MCILWAIN,

APPELLANT.

Appellate Case No. 2022-001425

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 25th day of June, 2024.

s/ J. Anthony Mabry
J. ANTHONY MABRY
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

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CERTIFICATE OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to J. Anthony Mabry, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent, and Certificate of Compliance has been forwarded to Appellant's counsel, Joanna K. Delany, Esq., via email today, June 25, 2024 to jdelany@sccid.sc.gov and to her assistant at kwarren@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 25th day of June, 2024.

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