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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTONIO LONG,

APPELLANT

APPELLATE CASE NO. 2023-001337

FINAL BRIEF OF APPELLANT

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II. Whether the trial court erred by denying the motion to sever the murders from the criminal sexual conduct and kidnapping, where the offenses failed to meet the requirements for consolidation?

STATEMENT OF THE CASE

On April 6, 2022, an Horry County Grand Jury indicted Appellant, Antonio Long, for two counts of murder, first-degree criminal sexual conduct, and kidnapping. R. 496-501; R. 33, l. 22 – 35, l. 7. Appellant was tried before the Honorable Maite Murphy and a jury, from August 7 – 9, 2023. L. Morgan Martin and M. O'Bryan Martin represented Appellant. Mary-Ellen Walter prosecuted the case. R. 1.

Appellant was acquitted of the murder of Marlene Haywood. As to the murder charge regarding Kevonta Hills, he was found guilty of the lesser-included offense of voluntary manslaughter. Appellant was convicted of first-degree criminal sexual conduct and kidnapping. R. 480, l. 6 – 481, l. 11. Appellant was sentenced to serve consecutive terms of imprisonment of thirty years for each offense. R. 489, l. 22 – 490, l. 5.

This appeal follows.

STANDARD OF REVIEW

The standard of review for both issues is abuse of discretion. "The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct.App.2012); *see also State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)). In exercising its discretion on a Rule 403 objection to the admissibility of autopsy photographs, the trial court "must balance the [unfair prejudice] of graphic photos against their probative value." *Dial*, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted).

A trial judge's decision to allow joinder of charges that do not arise from a single course of conduct, are not of the same general nature, are not proved by the same evidence, and prejudices a defendant's substantial rights is an abuse of discretion. *State v. Beekman*, 415 S.C. 632, 639, 785 S.E.2d 202, 206 (2016); *State v. Tate*, 286 S.C. 462, 334 S.E.2d 289 (1985) (reversing prejudicial joinder because "nothing in this record shows these two forgeries are connected").

STATEMENT OF FACTS

Deaths

On or about December 23 – 24, 2020, Marlene McLeod Haywood (Haywood) and her nineteen-year-old son, Kevonta Hills (Hills), were shot and killed during a struggle between Appellant and Hills. At the time, Haywood was dating Appellant. Haywood, Hills, and Haywood's seventeen-year-old daughter (Complainant) were living with Appellant at Appellant's home in Loris. Appellant was forty-seven years old and worked for the City of Loris in the Public Works Department. (The Mayor of Loris would subsequently come and testify about Appellant's good character at his trial.) R. 57, l. 23 – 59, l. 22; R. 97, ll. 6-23; R. 99, ll. 16-18; R. 360, l. 2 – 366, l. 20; R. 353, l. 16 – 356, l. 7.

On December 24, 2020, Complainant turned up at a gas station in Rocky Mount, North Carolina. Law enforcement was called. After speaking with Complainant at the gas station, Officer Juan Johnson, Jr., of the Rocky Mount Police Department, contacted the Horry County Police Department and asked for a welfare check at Complainant's home on Papas Bay Road in Loris. Officers went to the home and were unable to get anyone to come to the door. The officers went in the home through an unlocked door and saw the bodies of Hills and Haywood on the floor. Each of the bodies was covered with a blanket or sheet. R. 113, l. 14 – 116, l. 21; R. 133, l. 11 – 137, l. 5; R. 150, l. 7 – 151, l. 12.

There were signs of an obvious struggle in the otherwise neat and clean home. Items were shattered. Blood was splattered. The legs were broken off a table. One of the table legs looked like it had "teeth impressions" on it. Law enforcement found seven 9 mm spent cartridge casings in the home. On December 26, 2020, Appellant turned himself in at the Horry County jail. That same day, Appellant's sister contacted law enforcement and asked them to come get Appellant's

gun, a 9 mm pistol. A firearms identification expert from SLED would testify that Appellant's gun fired the bullets recovered from the autopsies of Haywood and Hills, and it fired the spent cartridge casings found at the scene. However, the gun was not working when law enforcement got it because a spring was damaged. R. 150, l. 4 – 160, l. 8; R. 167, l. 15 – 174, l. 15; R. 203, ll. 11-20; R. 285, ll. 18-22; R. 287, l. 22 – 295, l. 18; R. 310, ll. 9-12; R. 321, ll. 21-24.

According to the pathologist who performed their autopsies, both Hills and Haywood died from gunshot wounds. Dr. Riemer opined Haywood died instantly from a bullet wound to her head. Haywood also had a gunshot wound to her hand and her chest, and a blunt force injury to her head. The blunt force head injury pierced Haywood's skull and her brain was visible. Dr. Riemer was confident these injuries occurred after Haywood's death from the gunshot wound to the head—there was no bleeding from the later injuries. Haywood's son, Hills, had four gunshot wounds to his body; all were premortem. The fatal shot went through his abdominal aorta. In addition to gunshot wounds, Hills was badly beaten—he had blunt force injuries including fractured facial bones from being hit, and he also had cut marks. His teeth were broken. According to Dr. Riemer, all these wounds occurred within the "same time span." Dr. Riemer opined the fatal shot would have killed Hills in perhaps forty-five seconds to two minutes; less than five minutes. R. 306, ll. 20-24; R. 308, l. 6 – 314, l. 5; R. 317, l. 3 – 325, l. 13; R. 337, l. 7 – 368, l. 10; R. 343, ll. 2-8.

Appellant was tried for the murders of Haywood and Hills. Haywood's daughter, Complainant, testified that on December 23 or 24, Appellant "touched her butt" in the kitchen. Complainant claimed she went into Haywood's room and began to tell her what happened. According to Complainant, Appellant came into the room, touched Complainant's arm, and flashed his pistol. Complainant left the room and informed her brother, Hills, what transpired.

Complainant stated Hills ran out of his bedroom, and she heard two gunshots. Complainant alleged she did not hear any more shots—just two, and she did not hear a struggle. However, Complainant claimed Appellant then came into her bedroom and Complainant heard Hills "gurgling." According to Complainant, Appellant left the room a couple of times. She alleged once when he came back in her room, he had a gash on his hand and there was blood on the end of his gun. R. 60, l. 7 – 67, l. 22.

Appellant testified that he was out by the fire pit that night and had his pistol with him as usual, due to the neighbor's pit bull. When Appellant came in the house, he put the gun on the counter. Appellant stated he "tapped" Complainant with the back of his fingernails to tell her to go into the room and watch television. Once in front of the television, Appellant stated he and Complainant got to "fussing" about the movie and the remote control; they "snatched" the remote control back and forth. Complainant threw the remote control and hit Haywood in the head with it before leaving the room. "[O]n her way out the door she said I got something for you." Haywood wanted to ask Complainant what her problem was with Appellant. Haywood and Appellant walked out of the room. R. 367, l. 5 – 372, l. 1.

Appellant stated Hills was standing outside the room with his hands "bowed out." Appellant testified Hills stated, "[A]in't nobody gonna be beating on my sister." "[A]in't nobody gonna be feeling on her either." Hills accused Appellant of touching Complainant and Appellant denied it. However, Hills "kept bowing up." Appellant told Hills he needed to leave. Hills refused to leave and stated, "I'm gonna kill N-word for putting his hand on my sister."[1] Appellant testified he went and got his pistol, chambered a round, and told Hills to leave. Haywood, who was standing in between Appellant and Hills, told Hills: "you got to go." Instead

[1] Appellant and Hills were both African American.

of leaving, Appellant stated Hills rushed him. "[H]e rushed into me. He grabbed my wrist, and we started tussling." Haywood was hitting Hills with the remote control. Appellant tried to keep the gun away from Hills, but Hills kept pulling on Appellant's arm and trying to grab the gun. Appellant stated, "the gun went off and we went to fighting. While we was fighting, the gun went off a couple more times[.]" R. 372, l. 1 – 377, l. 4.

Appellant testified he did not know how Haywood got shot; it was unintentional. Haywood was in between Appellant and Hills. Appellant stated: "I was fighting for my life." Hills tried to bite him, so Appellant threw Hills into the table. Appellant testified Hills got back up and swung a table leg at Appellant, cutting Appellant's hand. Appellant grabbed the table leg from Hills; Hills grabbed another table leg. The fight continued. Appellant stated he lost his table leg and began shooting at Hills, but Hills did not fall. Appellant grabbed a table leg again, and he hit Hills and Hills fell. According to Appellant, that was the end of the fight. Appellant stated he covered the bodies with bedding afterwards. R. 377, l. 8 – 382, l. 3; R. 377, ll. 14-15; R. 405, ll. 6-11.

Defense counsel objected to the admission of two "gory" crime scene photographs based on Rule 403, SCRE—State's Exhibit #18 and State's Exhibit #22. "I object to the photographs as prejudicial unless there is a sufficient reason to use them." R. 101, l. 16 – 102, l. 5; R. 105, ll. 1-16. The State argued the photographs went to refute self-defense. According to the solicitor, the photographs showed how the injuries were inflicted—by beating Hills with a table leg and beating Haywood with a gun. The solicitor argued the photographs had a "probative connection" given anticipated testimony by the crime scene investigator that he noticed what appeared to be teeth marks on the table leg; anticipated testimony by the firearms examiner the gun was broken; and given Complainant's testimony she heard Hills gurgling, Appellant left the room, and she

saw blood on the end of Appellant's gun when he reentered the room. The solicitor argued Appellant could have gashed Haywood's head with the gun, breaking the spring and bloodying the gun. The State noted the photographs were black and white. R. 102, l. 9 – 104, l. 6. Defense counsel argued the pictures were unnecessary given the availability of testimony. R. 105, ll. 1-16.

State's Exhibit #18 and State's Exhibit #22 are on file with this Court. State's Exhibit #18 is an 8 x 10 close-up photograph of Hills' misshapen bloody face; skin missing and teeth are broken. (The beating had rendered Hills unrecognizable, as the solicitor stated in closing arguments.) State's Exhibit #22 is an 8 x 10 close-up photograph of Haywood's damaged face: a portion of her brain is showing. A packet of photographs relevant to the trial court's ruling on this matter was made Court's Exhibit #1 and is also on file with this Court. The court ruled the photographs admissible.

> I do find that they are necessary to substantiate material facts or conditions at issue in this case. The pictures will assist the trier of fact to determine the nature and location of the injuries in order to understand the witnesses' testimony as to the cause and manner of death. And they are also corroborative of [Complainant's] testimony that the gun malfunctioned, and the defendant returned to the room with blood on the gun, which is consistent with the photographs depicting the injuries caused by strikes to the head.
>
> Further, the nature of the injuries tends to establish the element of malice and are relevant and or corroborative to the nature and the extent of the injuries. The black-and-white photographs proposed by the state are much less graphic than the color photographs, and I find that the probative value of these photographs outweighs the prejudicial effect.

R. 110, l. 11 – 111, l. 4.

There was expert testimony the trigger of the gun had a mixture of DNA that could have contained the DNA of Appellant, Complainant, and Hills. The analyst found no conclusion could

be reached regarding Haywood as a possible contributor. It was unclear whether the DNA on the trigger was from blood. R. 259, l. 2 – 261, l. 21; R. 274, l. 24 – 277, l. 23; R. 231, ll. 5-13.

In her closing argument, the solicitor argued the killings were "savage." "Marlene was shot once in the head and killed. She was shot two more times and then clubbed to the point that you could see her brain. Kevonta Hills would not be recognizable to anyone who knew him. It's savage." R. 410, ll. 19-22. In his closing argument, defense counsel acknowledged the emotional impact of the photographs. "One thing I'll agree with the prosecutor, there have been some savage photographs in this case. For you to see and deal with, it's tough." R. 421, ll. 9-11.

The jury was charged, inter alia, on self-defense, accident, and voluntary manslaughter. The jury deliberated for about six hours and it acquitted Appellant of Haywood's murder. It also acquitted Appellant of Hills's murder, but it convicted him of the lesser offense of voluntary manslaughter. R. 460, l. 11 – 465, l. 6; R. 474, l. 7; R. 479, l. 15 – 481, l. 11.

Criminal sexual conduct and kidnapping

In addition to contacting Horry County law enforcement to ask for a welfare check at Appellant's home in Loris on December 24, 2020, Officer Juan Johnson, Jr., of the Rocky Mount Police Department, had Complainant taken from the North Carolina gas station to Nash General Hospital for a sexual assault examination. Complainant told the sexual assault nurse she was penetrated by her mother's boyfriend vaginally, rectally, and orally. Swabs were taken. Complainant's underwear was collected, and she received a vaginal examination. Vaginal bruising was observed. R. 116, l. 1 – 117, l. 4; R. 120, l. 25 – 128, l. 22.

Complainant testified that after she heard the gunshots, Appellant came into her room, put the gun to her head, and told her to take off her clothes. Complainant claimed Appellant raped her orally, vaginally, and anally. She alleged he used baby oil as lubricant. Complainant

alleged she heard her brother gurgling while she was being sexually assaulted, and Appellant left the room a couple of times, once coming back with blood on his gun and a gashed hand. According to Complainant, Appellant stated he was going to kill himself once he orgasmed. However, Complainant stated she guessed he did not kill himself after he finished assaulting her because the gun would not work. Complainant claimed Appellant put a towel over her head and led her to the front door. Complainant remembered tripping over her brother's shoes. She alleged he then took the towel off her head. R. 65, l. 3 – 70, l. 14.

According to Complainant, Appellant went back into the house briefly before he returned and told her to get in his car. Complainant claimed they drove to North Carolina and during the ride, Appellant told her he had previously been watching her through the blinds while she showered and changed. Complainant stated Appellant stopped twice for gas before he finally let her out of the car at the gas station in Rocky Mount. Complainant alleged Appellant told her to say she had been riding in a stolen car and the people who stole the car dropped her off. Complainant contacted 911 after she was dropped off. Initially, she stated she had been in a stolen car. Then she told law enforcement she had been sexually assaulted. R. 70, l. 13 – 73, l. 3; R. 119, l. 1 – 120, l. 1.

Law enforcement found a towel by the door when they entered the home. Forensic analysis showed Appellant's DNA on the vaginal and rectal swabs from Complainant's sexual assault kit. Appellant's DNA was also found on her underwear.[2] R. 149, l. 11; R. 263, l. 23 – 292, l. 12; R. 231, l. 14 – 234, l. 8. In addition, a crime scene investigator used a light to look for

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[2] Confusingly, the DNA recovered from the sexual assault kit samples was referred to by the expert as "sperm fraction." However, the expert stated that, "We have the non-sperm fraction and the sperm fraction. Now, referring to them that way does not indicate that we are confirming the presence of sperm, it just means that if sperm is present, that is where we are trying to isolate any DNA that may be present from it." R. 263, l. 23 – 264, l. 12.

bodily fluids on items from the house. That witness, Dennis Lewis, testified the light acted as a "presumptive test" for acid phosphatase, which is found in semen. However, to get a conclusive result, you would have to submit the items to a laboratory. Lewis testified the bathrobe, towel, and blanket collected from Complainant's bedroom were looked at with the light and the presumptive test was positive. There was a bottle of baby oil on the bed. R. 179 l. 3 – 182, l. 10; R. 166, ll. 10-13.

Appellant testified he went into Complainant's room after he killed Hills, and told her this was her fault. Appellant stated Complainant denied telling Hills that Appellant had touched her. Appellant stated Complaint began to touch him and they had sex. According to Appellant, Complainant ejaculated him with her hand, but he may have vaginally penetrated her. Appellant speculated his DNA might have gotten where it was from Complainant wiping herself with a towel. Appellant denied leaving the room during the sexual activity, and he denied kidnapping Complainant. Appellant testified Complainant came with him on her own and he let her out of the car when she asked. R. 386, l. 12 – 399, l. 16; R. 403, l. 12 – 404, l. 7.

During pretrial motions, defense counsel moved to separate the trial of the murder charges from the trial of the criminal sexual conduct and kidnapping charges. Defense counsel cited his written motion[3] listing the four elements required for joinder as discussed in *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). *Tucker* held joinder was proper where the crimes 1) arose out of a single chain of circumstances; 2) they would be proved by the same evidence; 3) they were of the same general nature; and 4) no right of the defendant was prejudiced. *Id.*, 324 S.C. at 164-65, 478 S.E.2d at 265. Counsel posited that evidence of the subsequent kidnapping

[3] The motion was not filed with the Clerk of Court, but the record reflects the judge stated she had a copy of the motion in her hand. R. 25, ll. 9-14. Undersigned counsel spoke with trial counsel and confirmed the motion contained in the Record on Appeal is what was before the trial court. *See* R. 492.

and sex crime was not necessary and relevant to prove the murder charges, and argued joinder would likely result in an unfair trial. Counsel argued "the rules of joinder in this case because there is, Judge, a failure to meet all four conditions, especially the last one that no real right of the defendant has been prejudiced as reported in *State v. Tucker*, requires that the Court grant separate trials." "[T]he two murder charges and the CSC and the kidnapping charges can be – can be tried clearly independent of each other." R. 16, l. 9 – 19, l. 9; R. 21, ll. 4-14.

The State cited *State v. Rice*, 368 S.C. 610, 629 S.E.2d 393 (Ct. App. 2006), and argued joinder was proper where the evidence "presents the full picture of the crime," and all four of these crimes were "part and parcel of the same fact situation[.]" The solicitor noted the crimes occurred in a short time period in the same place. The solicitor argued, "the inappropriate touching of [Complainant] is what led the defendant, quite frankly, to murder [Complainant's] mother and brother, it would simply be impractical and nonsensical for the jury to only hear about the murders and not what actually led up to that." R. 19, l. 12 – 21, l. 1.

The court denied the motion and found that the offenses arose out of a "single chain of circumstances beginning from the alleged inappropriate touching which led to the confrontation, and then that subsequently escalated for the [fight], and then the subsequent CSC and kidnapping which arose from leaving the scene of the alleged murder . . . a continuous course of conduct." The court found the offenses would be proven by the same evidence because the same victim would testify about them. The court further found the offenses were of the same general nature since they occurred during the same period of time and same course of conduct. The court also found that although a joint trial would be prejudicial, Appellant would not be unfairly prejudiced because the offenses arose in the course of continuous conduct. R. 21, l. 15 – 23, l. 12.

As seen, the jury deliberated for about six hours. It convicted Appellant of criminal sexual conduct in the first degree, kidnapping, and voluntary manslaughter. The court sentenced Appellant to consecutive terms of thirty years for voluntary manslaughter, thirty years for kidnapping, and thirty years for first-degree criminal sexual conduct. R. 474, l. 7; R. 479, l. 15 – 481, l. 11; R. 489, l. 22 – 490, l. 4.

ARGUMENT

I. The trial court erred by admitting gruesome crime scene photographs of the decedents' horrifically damaged faces, where the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, since the evidence should have been excluded pursuant to Rule 403, SCRE.

Under Rule 403, SCRE, "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." "The trial judge must balance the prejudicial effect of graphic photographs against their probative value." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008).

"In the *guilt* phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." *State v. Kornahrens*, 290 S.C. 281, 288-289, 350 S.E.2d 180, 185 (1986) (emphasis in original). *See State v. Nelson*, 440 S.C. 413, 424-25, 891 S.E.2d 508, 513-14 (2023) (autopsy photographs have little, if any, evidentiary value where the information they depict is not in dispute; their scant evidentiary value is negated by the forensic examiner's testimony). "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) (citing *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Martucci*, 380 S.C. at 250, 669 S.E.2d at 607 (quoting *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71

(1995)). "[P]otential for an emotional reaction is the essence of the danger of unfair prejudice." *State v. Heyward*, 441 S.C. 484, 501, 895 S.E.2d 658, 667 (2023).

The gory images of the damaged faces of the two decedents should have been excluded pursuant to Rule 403, SCRE. This was not a sentencing hearing; it was the trial on guilt or innocence. The images had no probative value since they were unnecessary to substantiate material facts. The State had the testimony of Dennis Lewis, the crime scene investigator, and Dr. Riemer, the forensic pathologist, to substantiate material facts. Dr. Riemer opined Haywood's skull was pierced because she was struck with an object. Dr. Riemer also testified about Haywood's gunshot wound to the face. Likewise, Dr. Riemer thoroughly testified about Hills's injuries including blunt force injuries to his jaw, teeth, and eye. Dr. Riemer testified Hills had stab and cutting wounds to the face. Investigator Lewis testified about the decedents' wounds, and he testified about Hills' broken teeth. *See State v. Jones*, 440 S.C. 214, 263, 891 S.E.2d 347, 373 (2023) (during punishment phase, photographs of children's bodies in advanced stages of decomposition were inadmissible under Rule 403; they had "no probative value"). *Compare State v. Dial*, 405 S.C. at 261, 746 S.E.2d at 502 (Ct. App. 2013) (autopsy photographs of minor victim's injuries "were highly probative to the issues of whether Victim was abused and whether the abuse was the cause of his death," where defendant claimed Victim's injuries were the result of accident); *State v. Holder*, 382 S.C. 278, 291, 676 S.E.2d 690, 697 (2009) (admission of autopsy photographs of two-year-old child's internal injuries was not error, where defendant claimed child was injured in ATV accident and pathologist used photographs to refute this explanation).

The likelihood of unfair prejudice was substantial as the images invited a decision on an improper basis. These were 8 x 10 closeups of the decedents' bloody faces with their lifeless

eyes open. The photographs were extremely graphic—Haywood's brain is visible in State's Exhibit #22 and there is a bullet hole in her face. Hills's face is distorted, with tissue missing. The photographs were unnecessary given the other evidence in the case—testimony about the injuries—that could have established the same facts without the risk of unfair prejudice. *See State v. Collins*, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring) (admission of autopsy photographs of child eaten by dogs was error since the primary purpose of the horrific photographs was to inflame the passions of the jury); *Torres*, 390 S.C. at 624, 703 S.E.2d at 229 (autopsy photographs were "at the outer limits of what our law permits a jury to consider"); *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (prejudice created by color autopsy photographs of victim's scalp pulled away from her skull and surgically opened vaginal cavity exposing seminal fluid clearly outweighed any evidentiary value); *State v. Haselden*, 353 S.C. 190, 201, 577 S.E.2d 445, 451 (2003) (autopsy photograph of child's dilated anus was simply irrelevant to any issues before the sentencing phase jury and served only to inflame the jury and leave them with impression that child may have been sexually abused). The admission of the unfairly prejudicial images was error. *Torres*, 390 S.C. at 623, 703 S.E.2d at 228; Rule 403, SCRE.

II. The trial court erred by denying the motion to sever the murders from the criminal sexual conduct and kidnapping, where the offenses failed to meet the requirements for consolidation.

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." *State v. Tucker*, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996) (citing *State v. Tate*, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985); *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986)). "Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." *State v. Rice*, 368 S.C. 610, 614, 629 S.E.2d 393, 395 (Ct. App. 2006). *See State v. Simmons*, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) (same).

Applying the four factors as discussed in *Tucker* supports severance. The offenses did not rise out of a single chain of circumstances. Although they occurred the same night, these were distinct offenses. Nor were they proved by the same evidence. Although Complainant testified about all of the offenses, evidence of the murders was not necessary to prove the elements of criminal sexual conduct or kidnapping. Similarly, evidence of kidnapping and criminal sexual conduct was not necessary to prove the elements of murder. Moreover, the crimes were not of the same general nature. They involved different victims and different types of offenses with different elements. They were not of the same kind or character. Appellant's right to a fair trial on the murders was prejudiced by the joinder because the sexual assault of Complainant, who was the seventeen-year-old daughter of Appellant's girlfriend, was likely to provoke an

emotional reaction. Similarly, the deaths of Haywood and Hills unfairly prejudiced Appellant in the sex crime and kidnapping trial because they were likely to provoke an emotional reaction. Joinder could also allow the jury to infer guilt based on propensity to commit violent crime.

The court should have granted Appellant's motion for separate trials. *See State v. Middleton*, 288 S.C. 21, 23, 339 S.E.2d 692, 693 (1986) (concluding where the appellant was tried for rapes, murders, and attempted armed robbery involving assaults, which all occurred over three-day period, "case clearly fails to meet the requirements for consolidation. The crimes did not arise out of a single chain of circumstances, and required different evidence for proof. Furthermore, the prejudice to appellant is apparent."); *State v. Heyward*, 441 S.C. 484, 501, 895 S.E.2d 658, 667 (2023) ("[P]otential for an emotional reaction is the essence of the danger of unfair prejudice."); *State v. Tate*, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (Ct. App. 1985) ("joinder would be prejudicial because it is likely the jury would infer criminal disposition based on evidence of one forgery and on that basis alone find Tate guilty of another forgery"); *Tyler v. State*, 437 S.C. 17, 34, 876 S.E.2d 132, 141 (Ct. App. 2022) (discussing danger of joinder "when the highly prejudicial photo supporting Tyler's sexual exploitation charge was admitted as evidence before the same jury considering his unrelated charges involving Child.").

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of September, 2024.

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SC Court of Appeals

CERTIFICATE OF COUNSEL

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

This 23rd day of September, 2024.

Joanna K. Delany
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APPELLANT

APPELLATE CASE NO. 2023-001337

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Brian H. Gibbs, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 23rd day of September, 2024.

Joanna K. Delany
Appellate Defender

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Subject: 2023-001337 The State v. Antonio Long
Date: Monday, September 23, 2024 9:43:00 AM
Attachments: 2023-001337 The State v. Antonio Long Final Brief of Appellant.pdf

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Good Morning,

Attached for service in the above-referenced case is the Final Brief of Appellant which will be filed today, September 23, 2024, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

Kaylynn Warren
Administrative Assistant
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