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Sep 30 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LARRY E. KING,

APPELLANT

APPELLATE CASE NO. 2023-001445

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Did the trial judge err in admitting four photographs of the deceased child from the crime scene when any probative value of the photographs was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

In August of 2020, the Colleton County Grand Jury indicted Appellant, Larry King, for murder, indictment #2019-GS-15-00780. (R. p. **). In October of 2022, the Colleton County Grand Jury indicted Appellant for great bodily injury on a child, indictment #2022-GS-15-00709. (R. p. **). In November of 2022, the Colleton County Grand Jury indicted Appellant for criminal conspiracy. Appellant's former girlfriend and co-defendant, Rita M. Pangalangan, was indicted on the same charges. On August 28, 2023, Appellant and the co-defendant proceeded to jury trial before the Honorable Clifton Newman. Gil Gatch and John Loy represented Appellant at trial. Dayne Phillips represented the co-defendant. Duffie Stone and Sean Thorton prosecuted the case. The jury found both defendants not guilty of criminal conspiracy. The jury found both defendants guilty of murder and great bodily injury on a child. Judge Newman sentenced Appellant to thirty-two (32) years for murder and twenty (20) years concurrent for great bodily injury. (R. p. **). Judge Newman sentenced the co-defendant to thirty-seven (37) years for murder and twenty (20) years concurrent for great bodily injury. A timely notice of intent to appeal was served on September 11, 2023. This appeal follows.

STATEMENT OF FACTS

On August 5, 2019, the Appellant, Larry King, called 911 after his girlfriend Rita's thirteen-year-old daughter with cerebral palsy was unresponsive after being removed from her mother's car. (Tr. p. 269, lines 20-25; p. 273, lines 22-25; p. 293, lines 2-10; p. 577, lines 7-13). She was pronounced dead at the scene. (Tr. p. 293, line 7 – p. 294, lines 1-15). The child had been in the car for five hours and forty-three minutes. (Tr. p. 441, lines 8-11). The cause of death was hyperthermia. (Tr. p. 502, lines 18-19). The car was parked in front of Appellant's house. Surveillance cameras at the house captured the events of the day and the video was introduced in evidence at trial as State's Exhibit #40. (Tr. p. 429, lines 2-8).

Rita and her daughter spent the night at Appellant's house the night before the death. (Tr. p. 563, lines 23-25). The next morning Rita admitted to Appellant that she had been unfaithful. (Tr. p. 564, lines 8-20). Appellant was hurt by the revelation, asked Rita to leave and told her he would call her later. (Tr. p. 565, lines 3-24). Appellant testified that Rita had some health problems that made it difficult for her to carry her disabled daughter, so she asked Appellant to carry her daughter to the car. (Tr. P. 566, lines 2-10). Appellant carried the child out of the house and placed her in the backseat of Rita's car, as can be seen on the surveillance video. (Tr. p. 566, line 1 – p. 567, lines 1-10; Video 11:16). Appellant testified that the car was running when he placed the child in the car. (Tr. P. 567, lines 7-10).

After the child was placed in the car Rita did not leave. The video shows that Rita and Appellant continued to talk in the front yard and on the front porch and then the two went back into the house. (Video 11:43). Several hours later when Rita returned to the car she realized that she had locked the keys inside. (Tr. p. 570, line 24 – p. 571, lines 1-9). Appellant took Rita to her house to get a spare key fob but the fob would not unlock the door. (Tr. p. 574, line 3 – p.

575, lines 1-9). Appellant called a locksmith and was eventually able to unlock the door. (Tr. p. 575, line 13 – p. 576, 577, lines 1-13).

Appellant admitted that on the day the child died he and Rita were using methamphetamine. (Tr. p. 587, line 3 – p. 588, lines 1-17). The State presented expert testimony about the potential temperatures inside the car on the day the child died. (Tr. pp. 384-412). Counsel for Appellant argued at the directed verdict stage and during the closing argument that the State failed to prove malice.

ARGUMENTS

1. **The trial judge erred in admitting four photographs of the deceased child from the crime scene when any probative value of the photographs was substantially outweighed by the danger of unfair prejudice.**

Standard of Review

" 'In criminal cases, the appellate court sits to review errors of law only.' State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). 'This Court is bound by the trial court's factual findings unless they are clearly erroneous.' Id. 'The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.' State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). 'An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.' Id." State v. Collins, 409 S.C. 524, 529–30, 763 S.E.2d 22, 25 (2014).

Discussion

At trial the State sought to introduce four photographs of the deceased child at the scene after she had been removed from the car, State's exhibits #1, #2, #3,and #4. (Tr. pp. 278-281; p. 284, lines 1-7). Appellant and the co-defendant objected to the admission of all four of the photos. (Tr. p. 276, line 21 – p. 277, 278, lines 1-12; p. 281, line 22 – p. 282 – 283, lines 1-23). The judge first addressed State's exhibits #2 and #4. State's exhibits #2 and #4 show the child, face down in the grass, wearing a diaper. State's exhibit #2 shows the car and the child while State's exhibit #4 shows only the child but from a different angle with a closer view of her soiled diaper. Appellant argued that the photographs were not probative. (Tr. p. 277, lines 14-18). Counsel for Appellant also argued:

> We have conceded what the Solicitor said, this child was in the car, it got so hot she basically baked to death, she was pulled out. The pictures don't demonstrate

> that any more than the words themselves do, plus, these pictures have other prejudicial effect, and that this is a disabled child, and that's not the fault of either one of these Defendants, but they are even more pathetic or emotional and that the child looks emaciated.
>
> The child is wearing a diaper. I mean the child – and those have nothing to do with this, and they don't make it any more or less likely that there was malice involved. The actions are pretty much what we have conceded they were. The State [sic] this happened, we said this happened. What do these prove, and what do they go to show, and that is being contested, and I believe the answer is nothing.

(Tr. p. 277, line 19 – p. 278, lines 1-12). The judge overruled the objection stating, "Exhibits Number 2 and 4 are admitted over objection, that depict the scene at the time the officers arrived, and being further described through testimony, and that the pictures are not of such a nature the prejudice exceeds the probative value." (Tr. p. 279, line 25 – p. 280, lines 1-5). The judge erred. The officer was able to adequately describe the crime scene and there was nothing in dispute about the crime scene or the condition of the child when officers arrived on scene. Any probative value of the photographs was substantially outweighed by the danger of unfair prejudice.

The judge then asked about State's exhibits #1 and #3. (Tr. p. 280, lines 6- 7). The State explained that these exhibits were the same photo showing the same injuries. (Tr. p. 280, lines 6-17). State's exhibit #1 shows the child in a diaper on a white tarp with a coroner's tag around her toe. State's exhibit #3 is a close up of the child's legs. The State told the judge, "They do, the only difference is you can see the child's face, which I believe both King and Pangalangan would have been able to see if they looked in the care. And there is -- there's no way for me to tell you, other than to tell you on the video they are looking in the car at various times, sometimes to look at – supposedly, looking to see how to get the car unlocked; but there were various times in the video in which they're looking in. This is how – this is what they

would see with that child." (Tr. p. 280, line 18 – p. 281, lines 1-5). Appellant responded, "The windows are tinted. No one's testified you can look through that car, when the door's closed, and see what's in it, so there's no foundation based on that." (Tr. p. 284, lines 13-16).

Appellant objected to the admission of State's exhibits #1 and #3 arguing that like in State v. Nelson, 231 S.C. 655, 661, 99 S.E.2d 672, 675 (1957), the manner of death was not in question. (Tr. p. 282, line 25 – p. 282, lines 1-20). Appellant additionally argued, "At this point, I think it's also cumulative, and inflammatory as well as cumulative." (Tr. p. 283, lines 21-23). The judge ruled, "These two photographs 1 and 2[1] are admitted, over objection, to show the bruising on the child, and it further shows the condition at the time." (Tr. p. 284, lines 17-20). The judge erred. State's exhibits #1 and #3 are the same photo, with one being a close-up. The fact that in these photographs the child is now on a white tarp with a coroner tag on her toe indicates that this is not how the child was initially found at the crime scene. There was no dispute about the injuries or the condition of the child at the time.

All four photographs were then admitted over objection. (Tr. p. 285, lines 17-24). The photographs were cumulative and lacked probative value as the photographs did not show any issue in dispute. The judge erred in admitting each of these photographs because any probative value of the photographs was substantially outweighed by the danger of unfair prejudice.

The State proceeded on a theory of Mouzon malice. See State v. Mouzon, 231 S.C. 655, 661, 99 S.E.2d 672, 675 (1957). In closing argument the State argued, "This case is about implied malice. What is implied malice? Implied malice is that you can take your facts and circumstances of the case, what you have seen, what you have heard, what you know about the case. That someone is so extremely reckless that they had a wanton disregard for human life.

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[1] This appears to be a mistake as State's exhibit #2 was already admitted. It appears the judge is referring to State exhibits #1 and #3.

They may not even have direct, ill feelings toward that one individual, but their attitude, their actions. All of the things that they chose to do. All the way they chose to act all lead back to a conscious disregard for the lives of others." (Tr. p. 690, lines 6-18). Under the State's theory of implied malice, the extreme recklessness was leaving the child in the car, not the resulting injuries or condition of the child shown in the photographs. There was no dispute about how the child died. The sole issue to be determined by the jury was if Appellant's actions were sufficient to show extreme recklessness. The photographs did not assist the jury in determining if Appellant's actions were sufficient to show extreme recklessness. Instead, the admission of the photographs of the deceased disabled child in a soiled diaper, with a coroner tag on her toe, laying in the grass or on a white tarp with injuries sustained as a result of being left in the car was calculated to arouse the sympathies and prejudices of the jury. The photographs were not necessary to an issue at trial.

"Under Rule 403, SCRE, relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Moreover, '[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial.' State v. Jones, 440 S.C. 214, 259, 891 S.E.2d 347, 371 (2023) (quoting State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986))." State v. Nelson, 440 S.C. 413, 420, 891 S.E.2d 508, 511 (2023). The four photos of the deceased child at the crime scene had little probative value as the officer who was at the crime scene and the pathologist were able to testify as to their observations and the manner of death was not in dispute. The photographs were calculated to arouse the sympathies and prejudices of the jury and were unnecessary. Any possible probative value was substantially outweighed by the danger of unfair prejudice.

In Nelson, the South Carolina Supreme Court wrote:

> If this were a case such as Collins where the nature of the victim's injuries was in dispute or a case where there was no other convincing evidence of malice or the manner in which the victim died, then the photos may have had sufficient probative value to warrant their admission. In that scenario, while undeniably gruesome, the probative value of the photos may not have been substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. Nevertheless, here, there was minimal probative value in the photos because the issues of malice and how Victim was killed were not in dispute. Other convincing evidence established malice and how Victim was killed, thereby eliminating the photos' probative value. Thus, we believe the danger of unfair prejudice substantially outweighed any minimal probative value of the autopsy photos in this case. *See* Rule 403, SCRE. Accordingly, we believe the trial court erred in admitting the photos, and the court of appeals erred in affirming that decision.

440 S.C. at 426–27, 891 S.E.2d at 514–15.

The Nelson case involved autopsy photos rather than crime scene photos as in this case. The crime scene photos in this case, however, like the autopsy photos in Nelson, lacked probative value. Like Nelson, in the present case the nature of the victim's injuries and the manner of death were not in dispute. The jury had to determine if Appellant's actions of leaving the child in the car constituted extreme recklessness. The hours leading up to the death when the child was left in the car were captured on video surveillance that was admitted in evidence and viewed by the jury. The disturbing photographs of the child and resulting injuries do not assist the jury in determining extreme recklessness.

In State v. Collins, S.C. 409 S.C. 524, 763 S.E.2d 22 (2014), the defendant was convicted of involuntary manslaughter and, pursuant to S.C. Code §47–3–710(A)(2)(a) and 760, of being the owner of a "dangerous animal" that attacked and injured a human being. In Collins the South Carolina Supreme Court wrote, "In order to support its assertions about the dangerous propensities of the dogs, the manner and extent of the attack, and Collins's criminal negligence, the State also offered a group of photos taken of the victim by Proctor, the forensic pathologist,

before he began the autopsy." 409 S.C. at 532, 763 S.E.2d at 27. In finding no error in the admission of the pre-autopsy photos the Court wrote:

> These are not ordinary dog bites with which most jurors would ever be familiar. Even the pathologist stated he felt compelled to document the injuries prior to the start of the autopsy because he had never come across a situation this extreme. Since there was no one else present at the time of the event, the photos aided the jury in evaluating the testimony offered by both the State and the defendant, especially as to determining the dangerous propensities of the dogs and whether or not Collins's conduct was criminally reckless.

State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 29 (2014). In contrast, the four unnecessary and prejudicial photographs of the disabled child deceased at the scene did not aid the jury in evaluating testimony to determine extreme recklessness. Most jurors are familiar with the dangers of leaving a child in a hot car. The question for the jury was whether Appellant acted with extreme recklessness when he testified that he believed the car was running.

The crime scene photographs in the present case are distinguished from the crime scene photographs in State v. Hawes, 423 S.C. 118, 813 S.E.2d 520 (Ct. App. 2018). In Hawes, the crime scene photographs went to malice as the photographs 'illustrated the extreme nature of this killing as they show multiple wounds and abrasions on Victim's extremities, contusions all over her body, and a bite mark." 423 S.C. at 131, 813 S.E.2d at 520. In the present case the State's theory of malice was based on extreme recklessness in leaving the child in the car, not the degree of injury that followed.

In State v. Benton, 443 S.C. 1, 9, 901 S.E.2d 701, 705 (2024), the South Carolina Supreme Court wrote:

> 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.

The crime scene photos in the present case are analogous to the autopsy photos in Nelson with regard to their lack of probative value. Unlike the crime scene photos in Benton, the crime scene photos in the present case did not make testimony more believable and did not give context about who did what at the crime scene. As noted, the hours leading up to the death were captured on video surveillance and played for the jury. The jury knew who did what from the video, not the prejudicial photographs.

As noted in the concurring opinion in Collins:

> In my judgment, the admission of the autopsy photographs was clear error. The primary, if not sole, purpose of these horrific photographs was to inflame the passions of the jury. The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense. I agree with Justice Pleicones that these challenged photographs far exceed "the outer limits of what our law permits a jury to consider." State v. Torres, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). I fully understand that there are circumstances where autopsy photographs are relevant and that the relevance of the photographs is not substantially outweighed by the danger of unfair prejudice. See Rules 402, 403, SCRE. But this is not such a case. I nevertheless believe the error was harmless for the reasons set forth in the majority opinion. I note this case was tried in 2009, prior to our decision in Torres, where we expressed our concern over the State's seeming practice of seeking admission of highly prejudicial and inflammatory autopsy photographs.

409 S.C. at 539, 763 S.E.2d at 30.

The admission of the four photographs of the deceased disabled child in a soiled diaper, with a coroner tag on her toe, laying in the grass or on a white tarp with injuries sustained as a result of being left in the car was error. "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." State v. Benton, 443 S.C. 1, 8, 901 S.E.2d 701, 705 (2024). The State, once again, overplayed

its hand in this case. Pursuant to Rule 403, SCRE, any possible probative value was substantially outweighed by the danger of unfair prejudice. The photographs were unnecessary to an issue at trial. The admission of these highly prejudicial photographs was not harmless when the jury had to decide what actions constituted extreme recklessness.

CONCLUSION

Based on the above argument, this Court should reverse the conviction and remand for a new trial.

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ATTORNEY FOR APPELLANT

This 30th day of September, 2024.