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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
The Honorable Robert E. Hood, Circuit Court Judge
Appellate Case No. 2023-000591

THE STATE, RESPONDENT

v.

GENARI MCNEIL, APPELLANT

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On May 1, 2019, Velvet Dubose (Dubose) was returning home early from work. (T. p. 126 l. 19-20). At around 10:00 pm Dubose got to her door and heard something behind her. Once she put her key into the lock, two people came up behind her both wearing ski masks. (T. p. 126 l. 24 – p. 127 l. 1). They both looked at her, whispered something to each other and then left. (T. p. 127 l. 23-25). Dubose entered her apartment and ten minutes later she heard the car of victim Jahquan Peterson (Peterson) arrive. When Peterson got to his door, the same two people that approached Dubose, forced their way into his apartment.

A ring camera captured what happened at the door. Both of these individuals had firearms raised and pointed at Peterson. (T. p. 229 l. 2-4). They asked Peterson for items and he answered them telling them "Y'all can get the items." (T. p. 229 l. 6-7). As they entered the apartment one of the individuals hit Peterson in the head with a gun. (T. p. 229 l. 10-12). After they entered the sounds of gunshots could be heard on the video. (T. p. 229 l. 13-14). In the video it could be seen that one of the individuals had dark colored pants with a white stripe or an emblem on the side. (T. p. 232 l. 20-22).

Later Columbia Police Officer Ivan Birochak received a call to respond to an apartment complex due to the sound of gunfire. (T. p. 133 l. 15-17). Once he arrived, he found Peterson's brother crying knocking on the door. (T. p. 135 l. 15-23). Peterson's brother told Officer Birochak that something is wrong and that they needed to kick the door in. He informed Office Birochak that he looked through the window and saw his brother lying on the floor. (T. p. 136 l. 9-13). Peterson's brother kicked in the door. They saw a gun in the hallway, and lying on the kitchen floor was Peterson. At that time Officer Birocahak pushed his brother outside and called for backup. (T. p. 137 l. 20-22). Once other officers arrived, they went into the apartment and into the living room

and on the stairway they saw the other victim, Mary Carmichael (Carmichael) deceased. (T. p. 140 l. 1-4).

Sergeant George Simpson, of the Columbia Police Department, arrived at the scene and he was told there is an individual who arrived at Prisma Richland with gunshot wounds. According to Sergeant Simpson's notes the shooting occurred just after 10:00pm and the person arrived at the hospital around twenty minutes later. (T. p. 219 l. 17-20).

Sergeant Simpson arrived at the hospital the next day around 11:00am. (T. p. 81 l. 25 – p. 82 l. 1). When he arrived there was an officer present. (T. p. 86 l. 8-9). Sergeant Simpson got the name of the person in the hospital room; it was the Appellant. Sergeant Simpson then asked the Appellant how he got shot. Appellant told him that he was walking near the Obama gas station when he heard a car and gunfire, he was then hit. (T. p. 221 p. 18-19; p. 222 l. 15-18). The Appellant was hit in the head, wrist, and hip. (T. p. 222 l. 23 – p. 223 l. 2). Appellant informed Sergeant Simpson that a person drove by, picked him up, and took him to the hospital. (T. p. 223 l. 5-6). Sergeant Simpson later received the surveillance video from the hospital that night. It showed the Appellant being helped in by a person with a towel or t-shirt over his head to hide his face. That person took the Appellant to the elevator and when the door opened, he pushed the Appellant in and ran. (T. p. 223 l. 24 – p. 224 l. 4). There was a still photograph placed into evidence revealing the Appellant while being escorted to the hospital wearing black pants with a white stripe or emblem on the side. (T. p. 235 l. 1-5) identical to one of the individuals in the ring camera video.

While law enforcement officers were going through the apartment, they found three guns, one in the hallway, in the sofa, and in the kitchen. (T. p. 137 l. 20-22; T. p. 140 l. 1-4). Appellant was later arrested and charged with two counts of murder, burglary in the first degree (burglary 1st), armed robbery, and possession of a weapon during the commission of a violent crime. While

in the county detention center waiting for medical care, Appellant was sitting with correctional officer Sergeant Johnette Pinckney. (T. p. 316 l. 11-13). Something fell out of the Appellant's leg and Appellant immediately picked it up. (T. p. 316 l. 17-22). Sergeant Pinckney asked him to "give it up," Appellant complied and it was a small piece of metal that came out of Appellant's leg. (T. p. 316 l. 24 – p. 317 l. 2; p. 317 l. 15). Sergeant Pinckney took it to the nurse who told him that it looked like a piece of a bullet. (T. p. 317 l. 22-25). This piece of metal was then transported to the State Law Enforcement Division (SLED) for analysis.

Agent Chad Smith of SLED testified during the Appellant's trial. Agent Smith was found qualified as an expert in the field of firearms identification. (T. p. 320 l. 23-24). Agent Smith testified that he received four fired bullets, three recovered from the victims, and one recovered out of the Appellant. (T. p. 321 l. 11-12; l. 18-20). Agent Smith testified that the bullets found in the victims could have been fired from one gun or three separate guns that were found at the scene. (T. p. 327 l. 8-11). The bullet found in the Appellant could only have been fired from one gun, one type of gun found at the crime scene. The gun used to fire the bullet found in the victim was not the same gun used to shoot Appellant. (T. p. 329 l. 12-17).

Blood evidence was also found at the scene. There were stains found on the floor, door and walls. (T. p. 162 l. 14-15). There were also reddish stains found on the doorknob. (T. p. 165 l. 13). There were three reddish stains in the shape of a hand found in the apartment. (T. p. 178 l. 17-18; l. 22-24). Officer Rachel Grant of the Richland County Sheriff's Department testified during the Appellant's trial. Officer Grant was found qualified as an expert on DNA analysis. (T. p. 343 l. 23-24). Officer Grant testified that she examined a sample taken from the interior side of the front door, (T. p. 345 l. 206), from the interior door knob of the front door, (T. p. 346 l. 6-8), from the door frame of the closet near the front door, (T. p. 346 l. 12-13), from the hallway near the front

door, (T. p. 346 l. 15-16), and from the floor in the entryway near the front door. (T. p. 346 l. 17-18). All of the blood stains that were tested from the house matched the Appellant. (T. p. 348 l. 13-18; p. 349 l. 15-17; 349 l. 22 – p. 350 l. 4; 350 l. 14-19; 351 l. 16-24; 353 l. 7-11).

Dr. Darren Monroe, forensic pathologist, also testified. Dr. Monroe was found qualified as an expert in the field of forensic pathology. (T. p. 288 l. 24 – p. 289 l. 1). Dr. Monroe did the autopsy on Peterson on May 12, 2019. (T. p. 290 l. 16-18). His first observation was that Peterson had multiple gunshot wounds. (T. 290 l. 23-24). The first bullet entered the lower part of his chest going through the bowels and into the intestines. (T. p. 292 l. 3-8). That bullet exited though Peterson's lower back. (T. p. 292 l. 13). The second bullet entered the lower stomach going through the bowel and intestines and into the soft tissue in the back. This bullet was actually recovered. (T. p. 293 l. 21-25). The third bullet went into the left side of his left thigh going through the bowel and was recovered in his pelvis area. (T. p. 295 l. 14-18). The fourth bullet entered the inner part of the lower leg around the calf of the right leg. The bullet entered the inner part and exited out of the back. (T. p. 296 l. 24 – p. 297 l. 3; p. 297 l. 12-15). In Dr. Monroe's opinion Peterson's cause of death was multiple gunshot wounds to torso. (T. p. 298 l. 16-17). Dr. Monroe explained that the gunshots hit parts of the bowel, intestines, and mesentery which provides blood flow to the bowel. Dr. Monroe thought that Peterson bled extensively internally so the loss of blood led to his death. (T. p. 298 l. 20 – p. 299 l. 1).

Dr. Monroe performed the autopsy on Carmichael that same day. (T. p. 299 l. 12-14). His initial observation was the gunshot wound to the face. (T. p. 299 l. 17-18). Carmichael had a gunshot wound right below the left eye. (T. p. 299 l. 21). The bullet entered at the front and out the back. It was never recovered. (T. p. 300 l. 20-25). Dr. Monroe believed Carmichael's cause of death was a single gunshot wound penetrating the head. (T. p. 302 l. 24-25).

After three days of testimony, a jury of his peers found the Appellant guilty of murder, armed robbery, burglary 1st, and possession of a weapon during the commission of a violent crime. (T. p. 458 l. 5 – 18). After the reading of the verdict the Appellant appeared before the trial judge for sentencing. The trial court sentenced Appellant to a term of incarceration for the remainder of his natural life without the possibility for parole for two counts of murder, thirty years for armed robbery, thirty years for burglary 1st and five years for possession of a firearm during the commission of a violent crime. The trial court ordered that the two murder sentences must be served consecutively, the remaining sentences were to be served concurrently. (T. p. 470 l. 15-20).

ARGUMENTS

1. **The trial court did not err in allowing the statement of the Appellant into evidence when he was not in custody it was not a custodial interrogation, so *Miranda* was not necessary. The trial court considered all of the facts presented and made a determination that the statement was lawful and should be allowed into evidence.**

Relevant Facts

Prior to the beginning of trial, Appellant requested a hearing pursuant to *Jackson v. Denno*.[1] During this hearing Sergeant Simpson testified. During his testimony he stated that he received information that someone checked in at Prisma Health with a gunshot wound. (T. p. 80 l. 15-18). He knew that this was the only "shots fired" call they received that night. (T. p. 86 l. 11-12) So, he wanted to talk to this person and figure out what happened and to discover if he was involved. (T. p. 86 l. 14-17). Sergeant Simpson asked officers to remain at the scene until he could get to him. (T. p. 17-18). Sergeant Simpson did not get to the hospital until the next morning around 11:00am. (T. p. 81 l. 25 – p. 82 l. 1). When he spoke to Appellant he was not in custody, nor was he a suspect. Appellant was also not in restraints. This was not a custodial interrogation it was just questioning

[1] *See, Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1174 (1964).

to find out what happened. This is why the Appellant was not read his *Miranda* rights. During the trial the Appellant requested that the court not admit into evidence the statement Appellant. He did not want the statement admitted due to the fact he thought the interrogation was custodial. Also law enforcement did not read him his *Miranda* rights in violation of his Constitutional rights. At the conclusion of the *Jackson v. Denno* hearing the trial court made this decision:

> "I'm going to find that he was not in custody for the purposes of interrogation. He was in the hospital. I don't know how he got to the hospital. He didn't get to the hospital by police escort. And the fact that there were officers outside the room, I don't find makes a custodial interrogation to the point he wasn't free to stop the interrogation or free to stop answering questions or invoking of his rights."
>
> "There's also no medical evidence or testimony in the record as to that he was unable to understand – not able to understand what was going on or was under the influence of some drug or prescription drug or illegal drug or any other drug or alcohol to the extent to where his faculties were impaired and he didn't understand what was going on."

(T. p. 94 l. 2-16)

For this reason the trial court found that the *Miranda* rights were not required because this was not a custodial interrogation. Based upon the totality of the circumstances the trial court found that the statement made by the Appellant was admissible. (T. p. 94 l. 17-21)

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "The purpose of *Miranda* warnings is to apprise the defendant of her constitutional privilege to not incriminate herself while in custody of law enforcement." *Miranda v. Arizona,* 384 U.S. 436, 444 (1966). Law enforcement must state the *Miranda* warnings "after a person has been taken into custody or otherwise deprived of his freedom of action in any way" *Id.* Appellate review of whether a person is in custody is confined to a

determination of whether the ruling by the trial judge is supported by the record. *State v. Easler,* 322 S.C. 333, 342, 471 S.E.2d 745, 751 (Ct. App. 1996).

Discussion

Appellant argues that he was in custody when Sergeant Simpson spoke to him in the hospital. And since he was in custody he should have been read his *Miranda* rights prior to being questioned. To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances which include factors such as place, purpose, and length of the interrogation, as well as whether the suspect was free to leave the place of questioning. *State v. Evans,* 354 S.C. 579, 582, 582 S.E2d 407, 410 (2003). In reviewing the totality of the circumstance this court should see that the trial court made the correct ruling by making the statements of the Appellant admissible.

At the time of questioning, the Appellant was not a suspect, and Sergeant Simpson did not know how he was shot or why. During the *Denno* hearing Sergeant Simpson testified that getting calls from the hospital when someone comes in with a gunshot wound is routine. (T. p. 217 l. 4-7). And it is typical for a law enforcement officer to come to the hospital to speak with the victim to find out what happened. (T. p. 83 l. 2-4). At the time the Appellant was questioned he was not in custody and had no charges, he was not even a suspect. If Appellant was a suspect or was going to be placed into custody, Sergeant Simpson would not have waited until the next day to question him. Although there were officers there, there was no evidence presented stating Appellant was not free to leave, he only stayed because he was not yet discharged. Appellant was not in any restraints while in the bed, and there was no evidence presented that reveal that he was under the influence of drugs to the point he did not understand what was going on while being questioned.

He answered all questions asked by Sergeant Simpson in what seemed to be a short interview. Sergeant Simpson left after the interview ended.

A reasonable person would see that this was not a custodial interrogation. The Appellant was already in the hospital for gunshot wounds in which law enforcement did not know what occurred. Although the call regarding this incident being the only "shots fired" call that night, that did not mean it was the only incident of gunfire that night. Sergeant Simpson went to the hospital to find out the Appellant's story and to possibly find out if he was involved in the shooting. But he was never under arrest during this questioning, he was not even considered a suspect, so a reasonable person would see that he was not in custody. *Miranda* did not have to be read to him. The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody. *Bradley v. State,* 316 S.C. 255, 257, 449 S.E.2d 492, 493-494 (1994).

The trial court took everything into consideration, including purposes of the interrogation, how the Appellant got to the hospital, that the Appellant was free to stop the questioning if he wished, the Appellant's ability to understand what was going on, and that his faculties were not impaired. After looking at the totality of the circumstances, the trial court made the right and informed decision allowing the statement into evidence. On appeal, the trial court's findings as to custody must be upheld where they are supported by the record. *State v. Navy,* 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010).

2. **The trial court did not err in allowing surveillance footage from Prisma Health into evidence since all of the guidelines were followed pursuant to Section 19-5-520 of the South Carolina Code of Laws.**

Relevant Facts

A week prior to trial the State made Appellant aware that they would be introducing a video from the hospital showing when the Appellant was escorted in by his co-defendant. At that time, Appellant's trial counsel was willing to consent to the video coming in; however, during trial he raised an objection because he felt that the video had not been authenticated.

During his argument the Appellant cited the South Carolina case of *Watts v. Chastain,* 438 S.C. 597, 885 S.E.2d 398 (2022). Appellant objected to the admissibility of the hospital video through a certificate and not though testimony. The State argued that S.C. Code Ann. §19-5-520 allowed for the introduction of business records without a custodian, as long as you have a sworn affidavit from a representative of Prisma Health which they had and presented to opposing counsel.

The trial court ruled that *Watts* did not apply and that the video was something kept in the normal course of business. There is an affidavit to that effect and per the statute, this may be allowed into evidence without a custodian testifying. The trial court allowed the video into evidence and ordered that the affidavit be made a court's exhibit.

Standard of Review

The materiality, relevance, and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Rosemond,* 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law. *State v. Anderson,* 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009).

Discussion

Appellant argues that the trial court erred in allowing this video into evidence due to the fact there was only an affidavit and not a custodian of record testifying. Pursuant to Section 19-5-520(A) of the South Carolina Code of Laws:

> In addition to those matters provided by Rule 902, South Carolina rules of evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> The original or a copy of a domestic record that meets the requirements of 803(6), South Carolina Rules of Evidence, as shown by a certification of the custodian or another qualified person that complies with a state statute or a court rule. Before the trial or hearing, the proponent shall give an adverse party reasonable written notice of the intent to offer the record and shall make the record and certification available for inspection so that the party has a fair opportunity to challenge the record.

S.C. Code Ann. §19-5-520.

In order for the video to be allowed into evidence under this statute, it must be accompanied by a certification or by a custodian or another qualified person. A sworn affidavit from a representative of Prisma Health stated that this video was authentic and was part of the ordinary course of business. Under this statute the adverse party must be given reasonable written notice of the intent to offer the records and make the certification available for inspection. According to the Appellant's trial counsel, he was made aware of the video at least a week prior to trial. (T. p. 147 l. 15-17) So they had ample notice that this was going to be introduced into evidence, and actually at first were willing to consent, but then changed their mind. (T. p. 147 l. 14-22).

The Appellant cited the case of *Watts v. Chastain* as an authority regarding this matter. *Watts* is not on point with the present case. In *Watts* the defendant was attempting to offer into evidence the video of a car wreck from the surveillance video from a nearby business that was a copy and the custodian admitted that the video was altered. In the present case the video was the original and certified. There is no evidence that this video was changed or altered.

In the Appellant's initial brief they argue that the certification is vague because it states 3 videos were submitted when Exhibit #91 only contained 2 videos: it does not provide the dates and times the videos were provided; and, the video footage does not contain dates nor times so you cannot tell if the videos are from the night of the incident. Within the Section 19-5-520 it does not state what the certification must contain. It states that it must be signed by a custodian or another qualified person. As for the date stamp, it is a video of the Appellant being helped into the hospital after being shot. There is no evidence revealing there was another night other than the night when this incident occurred that the Appellant entered the hospital with gunshot wounds. The State followed the criteria listed in the statute so it should have been allowed to be introduced before the jury. The trial court did not err in determining this video was admissible pursuant to Section 19-5-520 of the South Carolina Code of Laws.

3. **The trial court was correct in not giving a jury charge on mere presence when the evidence submitted does not reveal he was merely present at the scene. Evidence revealed that Appellant was either there as an accessory or was not present at all.**

Relevant Facts

Later during custodial questioning, Sargeant Simpson tried to use a ruse to get him to confess by stating that maybe he acted in self-defense or maybe he was in the parking lot smoking marijuana with his buddies. Trial counsel tried to use this information to get the trial court to charge the jury on mere presence. However, this story was part of a ruse made up by Sargeant Simpson and it was never alleged by the Appellant. Only once during this seven-hour questioning the Appellant admitted that he was in the parking lot.

The trial court decided that this was not enough for a jury charge on mere presence. The trial court ruled that there is just not any evidence in the record for a charge on mere presence. "It's either him on the video in the ski mask or it's not." (T. p. 388 l. 15-18)

Standard of Review

The law to be charged must be determined from the evidence presented at trial. *State v. Knoten,* 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *State v. Burkhart,* 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. *State v. Pittman,* 373 S.C. 527, 647 S.E.2d 144 (2007). Mere presence at the crime scene is insufficient to convict one as a principal on the theory of aiding and abetting. *State v. Johnson,* 291 S.E. 127, 129, 353 S.E.2d 480, 482 (1987).

Discussion

The Appellant is of the belief that since he said once that he was in the parking lot of the crime he is entitled to a mere presence jury charge. In order to receive a mere presence jury charge, you have to admit that you were at the scene of the crime but did not participate. In *State v. Dennis* the South Carolina Court of Appeals determined:

> Mere presence is applicable in instances where there is some doubt over whether a person is guilty of a crime by virtue of accomplice liability, the trial court may be required to instruct the jury that a person must personally commit the crime or be **present at the scene of the crime intentionally**, or through a common design, aid, abet, or assist in the commission of the crime through some overt act.

State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 647, 678 (Ct. App. 1996)(emphasis added).

So, in order to receive a jury charge of mere presence you must have been actually present at the scene of the crime. There is no evidence that the Appellant was in the parking lot when this crime

occurred. He actually told law enforcement he was somewhere else when he got shot and not in the apartment at all.[2]

Since there exists no evidence that the Petitioner was merely present at the scene of the crime, the trial court was correct in not giving the requested charge. The evidence reveals that two men were involved, both entered the home unlawfully, and both occupants were murdered. No evidence reveals there was a third party involved. So, either the Appellant was present at the scene and assisted; therefore, meaning he is guilty, or he was not there at all meaning he was not involved, so he is innocent.

4. **The trial court did err in allowing the statement from Sergeant Simpson statement regarding being notified that an individual was in the hospital with gunshot wounds because it was not offered to prove Appellant was involved in this case but someone showed up at the hospital with gunshot wounds and needed to be questioned. So, it was not presented for the truth of the matter asserted.**

Relevant Facts

Sargent Simpson testified that he was informed by other deputies that there was a person that was in the hospital with a gunshot wound that was admitted not long after they got the call of "shots fired." (T. p. 217 l. 4-7). The trial court ruled that it was not being offered for the truth of the matter asserted so it was not considered hearsay.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. *State v. Vick,* 384 S.C. 189, 197, 682 S.E.2d 275, 279 (2009). The rule against hearsay

[2] Defendant was not entitled to "mere presence" instruction where he denied even being at the scene of the robbery or sexual assault. *Dennis,* 321 S.C. at 420, 468 S.E.2d at 678.

prohibits the admission of evidence of an out-of-court statement by someone other than the person testifying which is used to prove the truth of the matter asserted. *Watson v. State,* 370 S.C. 68, 71, 634 S.E.2d 642 (2006).

Discussion

The Appellant argues that the trial court allowed improper hearsay testimony when Sargent Simpson was allowed to testify that he received information that someone was at the hospital with gunshot wounds. This admission to the hospital was not long after the "shots fired" call was made on the radio. Hearsay is defined as, "a statement other than one made by declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." *Vick,* 384 S.C. at 199, 682 S.E.2d at 280, *quoting,* Rule 801(c), SCRE.

Respondent argues that the trial court made the proper decision in overruling the objection by the Appellant. Mentioning a person that was just shot right before the "shots fired" was radioed in was not given to prove that the Appellant was shot at the scene of the crime. At the time this was mentioned, no one knew who was shot or why. The identity of the Appellant was not made until later. Sergeant Simpson was informed because there was a person that was shot that he needed to talk to. No one knew at that time that this had anything to do with the present case. It could have been at another scene, or self-inflicted. All they knew was that someone reported to the hospital with a gunshot wound not long after the call was made about this event. This information given to Sergeant Simpson was not given to prove the matter asserted so it cannot be considered hearsay. The trial court made the proper decision overruling the Appellant's objection. It is well settled that evidence is not hearsay unless offered to prove the truth of the matter asserted. *State v. Brown,* 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994).

5. **The trial court did not err in admitting the crime scene photographs where it revealed the positioning of the body at the time of the murder which corroborated the State's theory; therefore, its probative value outweighed any prejudicial effect so no violation of Rule 403 SCRE.**

Relevant Facts

The trial court allowed into evidence photographs of victim Carmichael. The States argument was that the Appellant and his co-defendant were shooting Peterson when Carmichael returned fire from the upper level of the apartment hitting the Appellant. Appellant then returned fire hitting Carmichael, killing her, causing her to tumble down the stairs. The State argued that the photographs were used to help validate the States theory of the events, and to prove where the Appellant was shot and where he left all the blood evidence and DNA. The State believed that this photo would allow the jury to better understand the scene and how the events happened. (T. p. 74 l. 25 – p. 75 l. 1).

At the conclusion of the argument, the trial court decided to allow the crime scene photos into evidence. The trial court stated that it was a balancing act between prejudicial and probative value. However, in the trial court's opinion this evidence goes directly to the State's theory of how the incident progressed. So the trial judge decided to allow it into evidence. (T. p. 75 l. 8-13).

Standard of Review

The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Rosemond,* 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Collins,* 409 S.C. 524, 763 S.E.2d 22, 28 (2014). The relevancy, materiality, and admissibility of photographs as evidence are matter left to the sound discretion of the trial court. *State v. Nance,* 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). If the offered photograph

serves to corroborate testimony, it is not an abuse of discretion to admit it. *Id.* A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Lyles,* 379 S.C. 328, 388, 665 S.E.2d 201, 207 (Ct. App. 2008)(internal quotation marks omitted).

Discussion

Appellant contests three particular photographs of the deceased victim, alleging they were prejudicial and used to merely inflame the jury. Appellant essentially argues the photographs were not necessary to prove any fact in contest. The Appellant argues that the State had the testimony of the forensic pathologist, the crime scene investigator and lead investigator revealing how the crime occurred. The photographs had no probative value. However, the photographs were of probative value because they revealed the position of the body corroborating the theory of the State that Carmichael was shot upstairs by the Appellant and fell down the stairs. This reveals malice which the State was still tasked with proving in order to receive a conviction for murder. The State also remained tasked with proving their case beyond a reasonable doubt.

The murder was gruesome. But within that gruesomeness is evidence of the very element of malice the State must prove. "[T]he more essential the evidence, the greater its probative value." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014) (quoting *United States v. Stout,* 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted)).

"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.'" *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *State v. Alexander*, 303 S.C. 377, 377, 401 S.E.2d 146, 149 (1991))(emphasis added)."The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the

trial of each case." *Gray*, 408 S.C. at 610, 795 S.E.2d at 165. Here, the photographs were used to specifically demonstrate, explain, and corroborate the evidence of how the victim was murdered which, in turn, revealed evidence of malice. In discussing similar evidentiary rulings in their cases, the Pennsylvania courts have quoted:

> A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt. Further, the condition of the victim's body provides evidence of the assailant's intent, and, even where the body's condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs.

Com. v. Robinson, 864 A.2d 460, 502 (Pa. 2004) (quoting *Com. v. Rush*, 646 A.2d 557, 560 (Pa. 1994)).

The Georgia courts have concisely rejected an argument on unfair prejudice on the basis of its own paradox: "…a defendant cannot complain about photographs that simply 'portray the havoc wreaked by [his] own hand.'" *McKibbins v. State*, 750 S.E.2d 314, 322 (Ga. 2013) (quoting *Null v. State*, 402 S.E.2d 721 (Ga. 1991)). The Appellant's malice in the killing is aptly demonstrated as the work of appellant's hands in these photographs.

Further, the trial judge's charge instructed the level of brutality could be considered in the jury's consideration of the element of malice aforethought: "Malice, is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with intent to inflict an injury or under circumstances where the law will infer evil intent. (T. p. 446 l. 11-15). *See State v. Jones*, 86 S.C. 17, 19-20, 67 S.E. 160, 162 (1910) (approving charge

that "[m]alice ... may be implied from brutal conduct on the part of the person committing the crime...."). See also 40 C.J.S. Homicide § 46 (April 2016 Update) ("The fact that cruelty or brutality was manifested in the killing will raise an inference of malice….").

Further still, the photographs corroborated witness testimony on how the scene presented. It follows the State's theory that Carmichael shot Appellant from a high distance above and Appellant returned fire striking her in the head instantly killing her causing her to slide down the stairs where she was ultimately found by law enforcement. Consequently, there were discrete and necessary reasons to submit the photographs, namely the corroborative value. *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) ("'If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'") (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353); *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct.App. 2008) ("Admitting photographs which serve to corroborate testimony is not an abuse of discretion."). *See also State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution to corroborate testimony concerning condition of victim's body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim's mouth); *State v. Edwards*, 10 S.E.2d 587, 588 (1940) ("In our opinion the trial Judge did not abuse his discretion in admitting the photograph [depicting head, torso, neck wound, decomposition and maggots] as being relevant, nor can we attach any importance, in view of the facts of this case, to the contention that the photograph prejudiced the jury against the defendant. Everything depicted by the photograph was, subsequent to its introduction, testified to in detail by the witnesses."). At any rate, the proper question for determining relevance was whether the photographs had "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." Rule 401, SCRE. "[A] defendant cannot dictate the manner in which the prosecution tries its case by stipulating to certain facts or by not challenging an element of the offense" and "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *See Estelle v. McGuire*, 502 U.S. 62, 69 (1991); *Martucci*, 380 S.C. at 249, 669 S.E.2d at 607 (citing *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)) ("The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation.").

It has long been established that "[a] trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive." *Martucci*, 380 S.C. at 250, 669 S.E.2d at 607. *See also Farris v. State*, 328 So.2d 640, 641 (Ala.Crim.App. 1976) ("The colored photograph in question is clearly ghastly; but, gruesomeness is not grounds for excluding this type of evidence, if relevant. … This photograph was properly admitted into evidence notwithstanding the unpleasant subject matter. We cannot, and should not, gloss over the fact that violent death is itself loathsome."). Simply, gruesomeness alone does not render the photograph inadmissible. *Collins,* 409 S.C. at 535–36, 763 S.E.2d at 28.

Within his brief, Appellant mentions the South Carolina Supreme Court decision in *State v. Collins,* 409 S.C. 524, 763 S.E.2d 22 (2014). In the Concurring opinion members of this Court concluded that the photographs were introduced for the sole purpose of inflaming the passions of the jury. However, it was also stated in the concurring opinion,

> "I fully understand 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."

Collins, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge J. Concurring).

The one important feature that the present case has that *Collins* did not was the elements of the crime. In *Collins* the Appellant was indicted for involuntary manslaughter and three counts of owning a dangerous animal. *Id.,* 409 S.C. at 529, 763 S.E.2d at 25. Neither of those offenses has malice as an element, therefore, malice was not an element the State was obligated to prove. In murder the State must prove that the Petitioner acted maliciously in order for a jury to convict him of murder. In *State v. Torres,* 390 S.C. 618, 703 S.E.2d 226 (2010) a capital murder case in which this Court decided that "autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant." *Torres,* 390 S.C. at 623, 703 S.E.2d at 229, *citing, State v. Rosemond,* 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999). In order to prove this element of the crime these photos were relevant evidence. These photos were admissible to prove the State's theory that victim Carmichael was shot by the Appellant. This was done to prove how malicious he was in committing this heinous crime. The actions of the defendant is what is used to prove malice. These photographs were not introduced to inflame the jury's emotions but to prove the malice that was involved in committing this murder.

6. If an error occurred, it should be deemed harmless since there was overwhelming evidence revealing the Appellants' guilt and no error made by the trial court would have changed the results of this trial.

Relevant Facts

There is a mountain of evidence proving Appellant committed this crime. There is a witness that stated that two individuals came to her house initially and when they realized that she was the wrong person they let her go and then layed in wait for Peterson to arrive. She heard gunfire and both Peterson and Carmichael were later found dead from gunshot wounds. Appellant went to the hospital with numerous gunshot wounds. At the crime scene there was blood on the door frame of the front door, wall, front doorknob, and on the floor in the entryway. DNA analysis revealed all

of this blood belonged to the Appellant which proves that he was one present in the apartment. There is also video evidence of the ring camera revealing that two people committed this crime together so he was at least an accomplice. With all of this evidence even if there was error committed by the trial court, it should be considered harmless.

Standard of Review

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The trial court has considerable discretion on the admissibility of evidence. *State v. Sheldon,* 344 S.C. 340, 342, 543 S.E.2d 585 (2001). On appeal, the trial court ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law. *State v. Smicklevich,* 268 S.C. 411, 234 S.E.2d 230 (1977). Error is harmless where it could not reasonably have affected the trial's outcome. *State v. Mitchell,* 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Similarly in *State v. Easler* our supreme court intimated that any error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis. *State v. White,* 410 S.C. 56, 59, 762 S.E.2d 726, 728 (2014).

Discussion

The Respondent is not prepared to relinquish any argument relating to the decisions made by the trial court. However, if this Court finds that the trial court made their decision in error, due to the overwhelming evidence that exists proving the Appellant's guilt, any error should be considered harmless.

In *State v. Young,* 420 S.C. 608, 803 S.E.2d 888 (2017) this Court defined the harmless error doctrine. In *Young* this Court decided:

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underlying

> fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Young, 420 S.C. at 628, 803 S.E.2d at 899, *quoting, Delaware v. VanArsdall,* 475 U.S. 673, 106 S.Ct. 1431 (1986).

Error is harmless only when it could not reasonably have affected the results of trial. *State v. Charping,* 313 S.C. 147, 437 S.E.2d 88 (1993). The questioning of the Appellant by Sergeant Simpson, the video at the hospital, the photograph of the Appellant wearing the identical clothing as the person in the ring camera while committing this crime, the Appellant shortly after the shooting arriving at the hospital with gunshot wounds, the Appellant's DNA found all over the crime scene, all are indisputable evidence the Appellant committed this crime beyond a reasonable doubt.

There was sufficient testimony and forensics to find Appellant guilty of murder, burglary 1st, armed robbery and possession of a weapon during the commission of a crime. There is no error that would have affected the conclusion of this trial So, if there exists any error made by the trial court, it should be considered completely harmless. The Supreme Court recognized that error of even constitutional magnitude may be harmless if, considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Creech,* 314 S.C. 76, 86, 441 S.E.2d 635, 640 (1993)*, citing, Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967).

CONCLUSION

The Respondent argues that the decisions made by the trial court were lawful and should be affirmed by this court. Even if some were not lawful the decisions should be considered harmless.

Respectfully submitted,

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