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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICO A. FUNDERBURK,

APPELLANT

APPELLATE CASE NO. 2024-000172

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was indicted during the October 2021 term of the Horry County grand jury for one count of criminal sexual conduct first degree (CSC), one count of kidnapping, and one count of domestic violence high and aggravated (DVHAN).[1] In October 2023 the Horry County grand jury indicted Appellant for assault and battery of a high and aggravated nature (ABHAN). R.-___(Indictments). On January 29, 2024, the State represented by Leigh A. Waller and George Henry Martin, III, called the case to trial before the Honorable Benjamin H. Culbertson and a jury. Appellant was represented by Jonathan M. Hiller and J. Eric Fox. Tr. 1. After a weeklong trial the jury found Appellant guilty as indicted. Tr. 643, l. 13-Tr. 644, l. 3. Judge Culbertson sentenced Appellant to twenty years imprisonment on the ABHAN, thirty years imprisonment on the CSC, and thirty years imprisonment on the kidnapping, all sentences to run consecutively. Tr. 652 l. 12-Tr. 653, l. 2; R.___(Sentencing Sheets).

1 During trial, the issue of whether the State could proceed on both the DVHAN and ABHAN indictments without violating the prohibition against double jeopardy was discussed. Eventually, the State elected to proceed solely on the ABHAN indictment and dismissed the DVHAN to avoid any potential confusion or error. Tr. 496-504; Tr. 557-565; Tr. 590-593.

ARGUMENT

I.

The circuit court erred when it refused to charge the jury on involuntary intoxication where there was evidence presented at trial that Appellant was drugged without his knowledge and where involuntary intoxication was the center of Appellant's defense.

Standard of Review

"In criminal cases, appellate courts sit to review only errors of law." State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007). 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. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) (internal citations omitted).

Relevant Facts

Appellant met K.S. through the dating application Tinder. The pair met in person for the first time around July 11, 2021. Tr. 453, l. 19-Tr. 454, l. 12; Tr. 514, ll. 2-18. Appellant was between houses at the time the pair met and was primarily staying in his vehicle while sometimes staying in hotels. After meeting K.S. he would sometimes stay the night at her apartment. Tr. 513, ll. 5-13; Tr. 515, ll.-16. K.S. was ultimately evicted from her apartment in early August and began staying with Appellant in his car or in hotels. Tr. 456, ll. 12-22. The pair lived out of Appellant's car from approximately August 9 until August 28, 2021. Tr. 464, ll. 19-25. On August 28, 2021, K.S. ran into a local Walmart severely beaten and screaming for help. Tr. 136,

l. 16-Tr. 137, l. 24. K.S. was transported to Grand Strand Medical, a level one trauma center, due to the extent of her visible injuries. Tr. 173, l. 3-Tr. 174, l. 4. Prior to being transported to the hospital, K.S. identified her assailant as Appellant. State's Ex. 9 – body cam at 1:38. Appellant was arrested approximately two days later through the assistance of the U.S. Marshal Service. Tr. 328, l. 3-Tr. 329, l. 8.

Prior to the start of trial, defense counsel indicated that the defense was withdrawing it notice of insanity defense. Tr. 54, l. 8-Tr. 55, l. 5. Defense counsel clarified that the defense was "a twist on insanity" because Appellant was asserting that he was involuntarily under the influence of narcotics and the defense would be requesting the Ralph King Anderson involuntary intoxication charge at the proper time. He argued, and the court agreed, that involuntary intoxication and insanity are two different things. Tr. 55, l. 23-Tr. 57, l. 7. The State argued that a claim of purely involuntary intoxication was a diminished capacity argument which South Carolina did not recognize as a defense. The State continued that involuntary intoxication was only a defense when it caused symptoms of insanity which implicated the insanity defense. Tr. 57, l. 17-Tr. 58, l. 8. After discussing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) and the M'Naghten standard, defense counsel informed the court that he believed involuntary intoxication was a defense separate and apart from insanity. Tr. 62, l. 4-Tr. 69, l. 23. The following morning when the parties reconvened the court stated that it did not think there was a separate charge on involuntary intoxication, that the M'Naghten test was controlling and that involuntary intoxication affected whether a defendant had criminal intent. Tr. 83, l. 12-Tr. 84, l. 4. Based on the court's statements, defense counsel decided not to withdraw the insanity defense notification. Tr. 84, ll. 7-18.

During trial the defense asserted the defense of involuntary intoxication. Upon his arrest, Appellant stated "any action that I did possibly commit, I was under the influence of a substance that I knew nothing about." Tr. 404, ll. 17-22. During Appellant's almost four-hour long interview with police, he "indicated on numerous occasions that [K.S.] had provided him with illicit or narcotic-type substances" against his will. Tr. 337, ll. 15-19. He made "reference to several suspected drugs that he thought that he had seen in the vehicle" and he stated that K.S. had admitted on numerous occasions to drugging him without his knowledge. Appellant informed officers that K.S. put drugs in his mouth while he was sleeping, put drugs on his clothing and in his food. Tr. 407, l. 11-Tr. 408, l. 23. The State entered text messages recovered from Appellant's cellphone wherein Appellant asserted he was being drugged by K.S. without his knowledge. Tr. 384, l. 13-Tr. 385, l. 16; State's Ex. 59; State's Ex. 60.

K.S. testified that Appellant said he was assaulting her because she gave him drugs. She maintained that she did not give him drugs and she did not have access to drugs. Tr. 465, ll. 7-Tr. 466, l. 1. She stated that in the videos recorded by Appellant she had admitted to drugging him without his knowledge, but she maintained she had not drugged him. She stated she lied, telling him what he wanted to hear, to avoid being further assault by Appellant. Tr. 479, l. 18-Tr. 480, l. 21. On cross-examination K.S. admitted that she had a history of drug use involving "molly, Xanax, and acid" however she maintained that her drug use occurred prior to her meeting Appellant. She testified that the only drug they consumed together was marijuana. Tr. 489, l. 9-Tr. 490, l. 14.

Appellant took the stand in his own defense at trial and testified extensively about being drugged by K.S. against his will. He testified that once they were living in his car K.S.'s behavior changed, which he attributed to drug use. He stated he believed it was drug use

because he had grown up around people abusing drugs and recognized similar behaviors in K.S. such as being awake for days at a time and mood swings. He testified that he found drugs on K.S.'s person and in his car. Tr. 521, l. 2-Tr. 523, l. 14. He testified that because of being drugged against his will he experienced a racing heartbeat, profuse sweating, nauseousness, nervousness, and paranoia. He also experienced being in what he described as a "manic state." Tr. 527, ll. 7-Tr. 528, l. 6.

Appellant described a time when K.S. was preparing their food and he noticed her sprinkling something onto the food. He then saw her toss a small bag to the floor which he retrieved. He described the bag as a small plastic bag with a knot at the top that was mostly empty with only a small amount of what he believed to be drugs left in the bag. He accused K.S. of giving him drugs but she denied it. Tr. 529, l. 3-Tr. 530, l. 20. Appellant also described a time when he woke up with a weird chemical taste in his mouth. He grabbed her by the neck, asked what she had given him, and she replied that it was meth. He admitted the "situation escalated quite quickly[,] and she ended up being hurry." Tr. 530, l. 24-Tr. 531, l. 9. Appellant continued,

> At that time, I -- I couldn't really -- I couldn't really distinguish right from wrong. But looking back on it now, I was wrong in the situation. And if I could have helped my reaction or mentally confirmed my reaction, it would've been different. But as we sit here today, in a clear mindset, I would like to apologize.

Tr. 531, ll. 10-15. At the end of his direct testimony Appellant admitted causing the injuries to K.S. because he was under the influence of a substance that he was given involuntarily and not under his own free will. Tr. 536, ll. 8-13; Tr. 537, ll. 9-14.

The State called Dr. Emily Gottfried, the doctor who performed the criminal responsibility evaluation on Appellant, to rebut Appellant's testimony. Tr. 566, ll. 10-17; Tr. 569, l. 25-Tr. 570, l. 3. In her opinion Appellant did not meet the criteria for not guilty by reason of insanity, or not guilty by reasons of insanity due to involuntary intoxication. She opined that

Appellant had the ability to distinguish moral and legal right from wrong at the time of the offense, and he had the ability to conform his behavior to the law. Dr. Gottfried stated that mental illness or involuntary intoxication was not the cause of the criminal offenses. Tr. 586, ll. 7-24. On cross-examination she conceded that another doctor might reach different conclusions based on the data that she reviewed. Tr. 588, l. 25-Tr. 589, l. 9.

During the charge conference defense counsel argued that the jury charges were to be determined from the evidence presented and requested that the court charge involuntary intoxication by stating,

> There are two types of intoxication, voluntary and in involuntary. Involuntary intoxication may result from innocently consuming an intoxicated through being tricked into it by another or being forced to take it, or perhaps through unanticipated side effects from a prescription drug taken on order of a physician.
>
> If you find that the defendant was given drugs or alcoholic beverages without his knowledge, and as a result he lost the ability to exercise independent judgment and volition while committing the crimes alleged against him, then it would be to your duty to find the defendant not guilty.

Court's Ex. 3; Tr. 593, l. 7-Tr. 594, l. 15. The circuit court requested "any legal authority" for the charge because Pittman, *supra*, "says that it is the same standard as M'Naghten." Tr. 594, ll. 16-17. Defense counsel argued that Pittman did not stand for that proposition and requested the court make Defendant's Request to Charge a Court's Exhibit. The circuit court agreed to make the request an exhibit but stated "I'm not going to charge that." Tr. 594, l. 18-Tr. 595, l. 7. After the court charged the jury, defense counsel renewed the objection to the court's decision to not charge involuntary intoxication. Tr. 640, ll. 22-25

Discussion

"[T]he purpose of jury instructions is to enlighten the jury as to what law is applicable to a certain state of facts in order that a just, fair and proper verdict can be reached." State v. Peer,

320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996). "The trial court is required to charge only the current and correct law of South Carolina." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "The *evidence presented at trial determines the law to be charged* to the jury." State v. Gilliland, 402 S.C. 389, 400, 741 S.E.2d 521, 527 (Ct. App. 2012) (emphasis added). If there is *any evidence to support a jury charge*, the trial judge should grant the request. State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001) (emphasis added).

"Involuntary intoxication is generally recognized as a defense, and in M'Naghten type insanity jurisdictions, *is judged by a similar standard*: that is, as a result of involuntary intoxication, was the accused unable to know the nature and quality of his act or that it was wrong?" McAninch, Fairey & Coggiola, The Criminal Law of South Carolina (6th ed. 2013) Chapter 6, Section I. 2 (emphasis added). In Pittman, *supra*, our Supreme Court found that the circuit court properly refused an instruction based on the Model Penal Code standard of inability to conform one's conduct to the requirements of the law. The circuit court instead charged the M'Naghten standard along with instructing the jury to find the defendant not guilty if they found involuntary intoxication applied in the case. Ultimately, our Supreme Court approved of the jury charge as given. Id. at 576-577, 647 S.E.2d at 170.

In the matter *sub judice* the record is replete with evidence both supporting and rebutting Appellant's defense of involuntary intoxication. This evidence creates a quintessential jury question, for only the jury can determine the truth and credibility of the witnesses. However, without a full instruction on the law of involuntary intoxication, the jury could not make that key determination. Under the any evidence standard, the trial court was required to charge the jury on involuntary intoxication. The failure to do so was error. This Court should find the circuit court erred in refusing the charge and remand Appellant's case for a new trial.

II.

The circuit court erred in admitting forty pictures of the injuries sustained by K.S. where the probative value of the photographs was substantially outweighed by the danger of unfair prejudice and where any probative value was negated by both the extensive, descriptive lay and expert witness medical testimony elicited during the trial and the videographic evidence that was admitted.

Standard of Review

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

Relevant Facts

Byron Ross, the assistant manager at Walmart on the night that K.S. entered the store, was the first witness to testify regarding K.S.'s injuries. He described her as "beat brutally." He testified that he could not recognize whether she was male or female, that it was a "horrific scene to see her face beat up like that" and that her injuries "was really bad more than ever. I mean, stuff I hadn't even seen in a movie. Really bad." Tr. 105, l. 16-Tr. 107, l. 12. Ross stated that the bruises he saw were fresh and that K.S. was bleeding. Tr. 107, ll. 13-18.

The next witness to describe K.S.'s injuries was Kelly Bonome, another Walmart employee who intervened to assist K.S. when she came into the Walmart on August 28, 2021. Bonome described K.S.'s physical appearance stating,

> She had smeared blood all over her. She had bruises all over her. She was currently bleeding. Her eyes were swollen, pretty much shut. She had marks all up and down her arms. You could see the signs. I could see that there were what appeared to be older bruises because they were yellowed and not fresh. There were fresh bruises and that they were dark and purple. There were red marks on her arms. Her whole body and her whole, you know, clothing and everything was -- was covered in blood, whether it be fresh or smeared or -- or whatever.

Tr. 137, ll. 11-24. A third Walmart employee, Katherine Andrade, testified that K.S. "was literally covered in blood. Her face was bruised, eyes swollen, her whole body seemed to be swollen." Tr. 143, ll. 20-22.

Sergeant Jackie Witherspoon testified that he was the first to arrive on scene at the Walmart. He stated, "as soon as I walked in, I could see her face and her face was badly beaten and bruised, swollen, blood all over her face and her hair." Tr. 146, ll. 13-18; Tr. 148, l. 25-Tr. 149, l. 3. Sean Stickle, a firefighter paramedic, was the first witness to give any medically testimony regarding K.S.'s injuries. Tr. 156, ll. 6-25. He testified that K.S.,

> Had multiple contusions and different levels of healing all over her body, markings all over her body from what appeared to be some type of a tool. Her head was – her whole facial structure and her skull was extremely deformed due to what appeared to be blunt-force object, you know blunt force trauma to her face – face and skull.

Tr. 171, ll. 23-Tr. 172, l. 3. He repeated his testimony that K.S. had blunt force trauma all over her body as well as tool markings all over her body, including injuries to her genitalia and anus. Tr. 172, ll. 9-19. He testified that due to the amount of injuries and trauma to her head, along with "the mechanism of injury of being struck by some type of blunt object, with great force" that K.S. needed to go to a level one trauma center for a neurological evaluation. He stated that

her burnt genitalia was also considered a severe injury. Tr. 173, l. 17-Tr. 174, l. 4. At the end of his direct testimony he stated,

> The reason I remember this case specifically, I remember very much how deformed her head was and the amount of injuries throughout the entire body as a whole. And the cases that I've been on prior to that -- that presented in the same manner were usually homicides. That's why I remembered it. I remember her standing there going, I can't believe she's standing here.

Tr. 175, ll. 6-14.

Prior to the testimony of the treating physician, defense counsel objected to the photographs of K.S. from the hospital under Rule 403, SCRE, arguing that the prejudicial effect of the photographs substantially outweighed any probative value. He referred to the photographs as a group but clarified that he was objecting to each photograph individually. Tr. 181, ll. 12-17. Relying on State v. Nelson, 440 S.C. 413, 891 S.E.2d 508 (2023), he argued that even prior to the physician's testimony the jury had already heard very detailed descriptions of K.S. injuries and that the photographs were not necessary for the State to prove its case. He continued that the photographs were "gruesome" and "hard to look at," and the concern was that the passions of the jury would be inflamed causing them to render a verdict on emotion instead of factual evidence. Defense counsel further argued that, along with the "voluminous testimony that we already have or will have regarding the injuries" that many of the photographs were duplicative, showing the same injuries but from different angles. He concluded his argument by stating that there was not a dispute as to the fact that K.S. was injured. Tr. 181, l. 12-Tr. 187, l. 25.

The State argued the photographs were "absolutely essential" to the State's case and that Nelson dealt with autopsy photographs, so it was "a completely different situation" in this case where the victim was alive and able to testify to her injuries in the photographs. The State continued that the physician would use the photographs to explain to the jury what she thought

caused the injuries and that testimony was needed to prove the great bodily injury element. Of the seventy pictures taken of K.S. the state "narrowed it down to thirty-eight photos" to avoid overwhelming everyone. Regarding the pictures of K.S.'s genitalia, the State argued they were necessary to show evidence of a penetrating injury of sexual assault, which was critical to the CSC charge. The State concluded that K.S. would be able to match various tools to the injuries in the pictures and those were the reasons for putting the photographs in. Tr. 188, l. 7- Tr. 190, l. 10.

Defense counsel reiterated that the witnesses would be able to testify in detail about the injuries to K.S. and the photographs did not add to that testimony. He stated his argument was not that there was no probative value to the photographs, but that any probative value was substantially outweighed by the prejudicial effect of the photographs. Tr. 190, ll. 12-20. The court overruled the Rule 403 objection finding that the probative value outweighed the prejudicial effect. Tr. 190, ll. 21-25.

Dr. Rachel Cobos was qualified as an expert in general surgery and surgical critical care. Tr. 203, ll. 7-9. She was the on-call trauma surgeon when K.S. arrived in the emergency room. She testified that when EMS brought K.S. to the ER they "were met with, quite honestly, a shocking number of external injuries." She continued,

> This was -- I've seen a lot of terrible things. I've seen a lot of horrible things, and the amount of bruises impacted each person that left that room. The amount of trauma that she had sustained on her body was shocking to everyone in that room, which we see a lot of terrible things. And we examined. We saw the extent of both old and new fresh injuries, which, again, was extensive. Her entire – there was not a single portion of her body that was not impacted with signs of blunt and penetrating trauma.

Tr. 207, ll. 1-10. In reviewing State's Ex. 72-99, the photographs of K.S. in the ER, she said "I honestly don't have to look very far because I did – I just had to remember this case because

these images are imprinted in my mind. How horrific they were." Tr. 207, ll. 14-23. She confirmed the pictures were accurate representations of how K.S. looked in the hospital by stating "[i]t's worse in real life, but yes." Tr. 207, l. 24-Tr. 208, l. 2.

Dr. Cobos testified broadly, before discussing the photographs, that there were old and new healing wounds that were consistent with repeated assaults over a period of time stating,

> So she told us that she had been beaten with a number of different things, that she had been burned, and we saw the signs of it across her body. There were bruises. Her face was particularly disfigured and swollen. She had had hair torn out of her scalp, she had bruises across, she had burns. This was, I think the quite horrifying part, was seeing burns across her breast and across her genitalia, indicating that someone had taken the time to play [sic] something hot and burn her specifically in those areas. And they were at various stages of healing with erythema or redness around them indicating possible irritation and inflammation.

Tr. 209, ll. 2-23. She continued,

> The -- the amount -- this was -- the amount of trauma inflicted on a single person over a prolonged period of time demonstrated a level -- it was horrific. I don't – it -- everyone who walked out of that room was changed. I think everyone who walked out of the room, if you asked them, they would remember [K.S.] because of the amount that you - - you were -- it was horrific to see what another human could do to someone.

Tr. 210, ll. 7-14.

Dr. Cobos testified to various injuries she observed on K.S. including bruising consistent with strangulation, traumatic alopecia, significant bruising and swelling to the extremities, third degree burns, lacerations, and significant levels of blunt-force trauma across her entire body. Tr. 214, ll. 14-18; Tr. 215, ll. 21-24; Tr. 216, ll. 4-Tr. 217, l. 4; Tr. 218, ll. 21-22.; Tr. 222, ll. 17-18; Tr. 223, ll. 15-23; Tr. 227, ll. 15-24; Tr. 229, ll. 21-24. She described the pooling bruising all over K.S. as similar to what is seen when someone is hit by car at high rates of speed. Tr. 218, ll. 15-22. She opined that the prick type marks on K.S. were due to significant blunt force trauma causing the skin to rupture and blood to come up through micro-lacerations to the skin. Tr. 221,

ll. 10-Tr. 222, l. 1. Dr. Cobos testified that K.S. had an orbital fracture and nasal bone fractures that required surgical repair. She opined that even with surgical repair, K.S. would have lasting impacts from the injuries including double vision and problems breathing. Tr. 236, l. 1-Tr. 241, l. 18. Regarding the injuries to K.S.'s genitalia, Dr. Cobos testified there was significant bruising across the pubic bone and both thighs, along with swelling to the area. Tr. 224, ll. 11-18. She described burns located on the inner thigh of K.S. that were in various stages of healing. Tr. 255, ll. 10-25. She testified that there was erythema and edema along the labia minora. Tr. 226, ll. 6-24. Throughout her testimony, Dr. Cobos and the jury reviewed the thirty-eight photographs that defense counsel had objected to.

Two more witnesses discussed the injuries to K.S. The first was lead investigator Christian Fletcher. He testified that through the investigation he had learned K.S. had substantial blunt force trauma injuries to the entirety of her body with a focus on her face and head. Tr. 316, ll. 22-25. He described K.S. as "grotesquely injured" stating "it was the most extensive blunt force trauma injuries I've ever seen that didn't result in death." Tr. 317. ll. 19-22. He informed the jury that K.S. indicated that a "lighter was heated to a temperature high enough to cause burning and then pressed to her vagina and breast." Tr. 322, ll. 13-15. During his testimony the State entered videos recovered from Appellant's cellphone[2] into evidence that "showed the injury progression, her mental progression, her inability to have free thought or will, the progression of her physical injuries to the gross manner that they were in the end." Tr. 379, ll. 2-6. He described her overall condition stating

> It looks as though she has fallen down a mountain. Every piece of her body is battered and bruised. You have large chunks of hair missing. The swelling and just discoloration to her face is astonishing. Also in this video, which you can see and notice is her hands, the hands are very, very swollen, and bruised, and

2 State's Ex. 57 A-P

> discolored. And in my experience, those are consistent with what we would consider defensive markings. The blocking or attempt to stop of some sort of physical assault thus striking your hands or your forearms, I would say that this is absolutely what I would consider some sort of life-threatening blunt force injury to this person.

Tr. 379, l. 25-380, l. 11. The State moved to enter three more photographs of K.S. that were recovered from Appellant's phone to which defense counsel objected under Rule 403, SCRE. One picture was a K.S. sitting in a chair completely naked with bruising over her body, picture showed her face as it was on the night she went to the hospital, and one showed her naked legs. The court overruled the objection and admitted State's 54, 55, and 56 into evidence. Tr. 381, ll. 3-10.

The final witness to testify regarding injuries was K.S. herself. She gave descriptive testimony regarding the injuries she received. She discussed how Appellant would repeatedly hit her in the face, pinch and push her nose, place sharp tools in her ear and dig into them until they bled, strangle her, hit her with various tools on her knees, feet and hands, hit her with a bat, and jab her with plyers. Tr. 459, l. 5-Tr. 464, l. 15. She testified that Appellant took a lighter, held it lit for two minutes, held her down, spread her legs and burned her clitoris and other parts of her inner thigh area. She also recalled that he attempted to place pliers in her anus and spread them open. Tr. 477, l. 5-Tr. 479, l. 2. She also discussed her orbital fracture and continued double vision. Tr. 485, ll. 20-25.

Discussion

All relevant evidence is generally admissible. Rule 402, SCRE. To be relevant, the evidence must have a "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. However, relevant evidence "may be excluded if its probative

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

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. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d. 201, 206 (Ct. App. 2008).

The appellate courts of our State have had numerous opportunities to review a trial court's admission of gruesome photographs. In State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997), the appellant was charged with armed robbery and murder. He argued that the photographs admitted into evidence by the trial court were highly prejudicial and served no purpose other than to arouse passion and prejudice in the jury. Appellant asserted other graphic testimony of how the victim was killed had already been given by the forensic pathologist and law enforcement officers. Therefore, the pictures were unnecessary, and their prejudicial effect outweighed their probative value. Id. at 78, 480 S.E.2d at 71-72. Our Supreme Court held that the photographs of victim's body at the crime scene were properly admitted because the photographs showed the crime scene and position of the victim's body, supported the testimony of several witnesses, and were relevant to the nature of the crime. Id.

In State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), the defendant was convicted of homicide by child abuse for the death of her minor child. Id. at 281, 676 S.E.2d at 692. On appeal, Holder argued the trial court erred in admitting autopsy photographs showing the child's internal injuries. Id. at 290, 676 S.E.2d at 697. Holder's unconscious child was taken to the hospital and hospital staff was told that he had fallen off an All-Terrain Vehicle (ATV) earlier in the week. Id. at 281, 676 S.E.2d at 692. The child was pronounced dead at the hospital after unsuccessful efforts to resuscitate him. Id. At, trial the pathologist testified that the contested autopsy photographs would help him in "demonstrating the anatomic relationships and the disruption of those anatomic relationships" because the jury might not have knowledge of internal anatomy. Id. at 290, 676 S.E.2d at 697. The Court upheld the admission of the photograph because they "clearly demonstrate the extent and nature of the injuries in a way that would not be easily understood based on the testimony alone" and aided the pathologist testimony. Id. at 290-291, 676 S.E.2d at 697.

In State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014), autopsy photographs of a child who had been killed by defendant's dog were admitted. In that case the Supreme Court found that the trial court did not abuse its discretion in admitting the photographs because the photographs were highly probative, corroborative, and material in establishing the elements of the offenses charged." Collins, 409 at 535, 763 at 28.

In State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986), the Court held the trial court erred in admitting three color autopsy photographs of one of the victims in a capital murder trial. Although the photographs were used to corroborate other evidence, the trial judge erred in permitting their introduction because they were unfairly prejudicial. The Court held that because it was clear the facts were not in dispute and because the testimony of a forensic

pathologist "negated any arguable evidentiary value of the photographs[,]" the "prejudice created by the photographs clearly outweighed any evidentiary value." Id. at 23-24, 339 S.E.2d at 693.

The testimony surrounding the injuries to K.S. came from numerous witnesses and was detailed and graphic. The repeated descriptions of K.S.'s injuries by both lay and expert witnesses along with the videographic evidence was more than adequate to portray the level and extent of K.S.'s injuries. There was no need for forty full color, graphic photographs of K.S.'s nude, battered body to be entered before the jury. While there was some probative value of the photographs, it was substantially outweighed by the unfair prejudiced the admission the photographs caused to Appellant. The circuit court erred in allowing the photographs into evidence.

The State was well aware that Appellant's defense was involuntary intoxication and that he had, to some extent, admitted to causing the injuries to K.S. during his police interrogation. The injuries themselves were not at issue at trial, nor was the cause of the injuries – Appellant admitted on the stand he was the cause of the injuries. Much like State v. Middleton, *supra*, the information gained from the photographs, that K.S. was repeatedly and extensively injured, was not in question.

In State v. Torres, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010), our Supreme Court stated,

> Although we affirm the admission of the photographs, we take this opportunity *to address an area of growing concern to this Court*. The photographs at issue in this case, while admissible, *are at the outer limits of what our law permits a jury to consider*. Moreover, the State also sought to introduce evidence in the form of an autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.

Once again, the State has gone too far in its search for a conviction. The photographs in this case were numerous, graphic, and unnecessary. There was substantial evidence of the injuries to K.S. through the testimony and videographic evidence that was presented during the trial. The admission of the photographs went beyond what the outer limit of the law allows into error and prejudice. This Court should find the admission of the forty photographs error and reverse for a new trial.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests that this Court reverse his convictions and remand his case to the General Sessions Court of Horry County for a new trial.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of February, 2025.