STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Daniel D. Hall, Circuit Court Judge
Appellate Case No. 2024-000473

THE STATE,

Respondent,

vs.

XAVIER LAMAR HOLBROOKS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

"Whether the court erred by admitting a photograph of the live alleged victim, State's Exhibit 2, since the photograph was without probative value, irrelevant, particularly since the non-testifying alleged victim had been identified as being disabled and being in special needs classes to the jury and the photograph was prejudicial because it was meant to impermissibly garner sympathy for the alleged victim?"

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the trial judge somehow abuse his broad discretion by admitting a single photograph depicting Appellant's minor victim in an unremarkable and innocuous manner when: (1) that lone photograph was relevant, probative, and corroborative of testimony presented since it visually showed the victim's small size, which—based even on the arguments raised by Appellant's own defense counsel—was a fact that was potentially important to the proper resolution of Appellant's case; and (2) the photograph's probative value was not and could not have been substantially outweighed by any minimal potential for undue prejudice it possessed since it merely showed in an unprovocative fashion an individual who had an express constitutional right to be—and, for at least some period of time, was—present in the courtroom during the trial proceedings?

STATEMENT OF THE CASE

In March of 2022, Appellant Xavier Lamar Holbrooks was arrested following an investigation into a report he sexually abused a developmentally-delayed thirteen-year-old girl inside her home. In August of 2022, the York County Grand Jury indicted Appellant for second-degree criminal sexual conduct with a minor. On March 12, 2024, a jury trial was commenced in the York County Court of General Sessions with the Honorable Daniel D. Hall, circuit court judge, presiding. At the conclusion of the two-day trial, Appellant was convicted, and the trial judge sentenced him to twenty-year term of imprisonment. Appellant then timely filed a notice of appeal.

ARGUMENT

The trial judge did not abuse his broad discretion by admitting a single photograph depicting Appellant's minor victim in an unremarkable and innocuous manner because: (1) that lone photograph was relevant, probative, and corroborative of testimony presented since it visually showed the victim's small size, which—based even on the arguments raised by Appellant's own defense counsel—was a fact that was potentially important to the proper resolution of Appellant's case; and (2) the photograph's probative value was not and could not have been substantially outweighed by any minimal potential for undue prejudice it possessed since it merely showed in an unprovocative fashion an individual who had an express constitutional right to be—and, for at least some period of time, was—present in the courtroom during the trial proceedings.

Relevant Facts

On June 3, 2021, Christina Tabron went to Rock Hill, South Carolina, to visit with and check in on her aunt, Kenika White, and her aunt's thirteen-year-old daughter ("Victim"). (Tr. pp. 55-56; pp. 58-60). Significantly, Tabron's visits with her aunt and niece occurred on a regular basis because both White and Victim needed assistance from caregivers, including state-provided ones for each of them.[1] (Tr. pp. 56-57; pp. 59-60). As to why her caregiver support was needed, Victim had a "severe intellectual disability" that resulted in her being developmentally delayed. (Tr. pp. 56-57; pp. 59-60; p. 222). More specifically, Victim—contrary to her actual age—was described as functioning at the intellectual level of someone who was just five to seven years old or so, and she also appeared to be substantially smaller in size than a typical thirteen-year-old girl.[2] (Tr. pp. 93-94; pp. 224-225).

A few hours into Tabron's visit that day, Tabron went outside to her vehicle and began socializing with a friend while White and Victim remained inside the residence. (Tr. pp. 61-62;

[1] By the time of trial, White and Victim had moved into Tabron's home, and Tabron was serving as their primary caretaker. (Tr. pp. 56-58).

[2] Based on her disability, Victim was enrolled in "special needs" classes in school, and she had always been enrolled in such classes throughout her schooling. (Tr. p. 57).

p. 68). By Tabron's own admission, her and her friend also smoked marijuana together while sitting in the vehicle. (Tr. pp. 68-69).

At some point later that evening while Tabron was still outside, Appellant arrived at the scene, parked his vehicle behind Tabron's, and entered White and Victim's residence. (Tr. p. 61). Previously, Appellant had been in a relationship with White, and Tabron knew him as a family friend. (Tr. p. 61; p. 72). In light of that, Tabron was not concerned by Appellant's arrival, and she remained outside with her friend. (Tr. pp. 61-62).

Some time after that, Nevaeh Nejaka, who was Tabron's and Victim's cousin and White's niece, stopped by after walking over from her nearby home.[3] (Tr. pp. 74-75). Upon arriving there, Nejaka briefly chatted with Tabron, who was still outside. (Tr. p. 77). By then, Tabron was ready to head home, but Appellant's vehicle was parked behind hers and was blocking it in. (Tr. p. 63). Based on that, Tabron asked Nejaka to go inside, get Appellant to come move his vehicle so she could leave, and also—according to Nejaka—check on Victim. (Tr. p. 63; p. 77).

Nejaka did as requested, went inside White and Victim's residence, and ended up heading to White's bedroom in her effort to speak with Appellant. (Tr. p. 75). However, the bedroom's door was closed and locked. (Tr. p. 75). Nejaka did not hear any sounds emanating from that room, but she proceeded to knock on the bedroom's door anyway. (Tr. p. 76; p. 78). Roughly sixty seconds later, both Victim and Appellant emerged from inside, and Appellant left the scene shortly after that.[4] (Tr. p. 65; pp. 75-76; pp. 77-78).

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[3] Nejaka was roughly the same age as Victim. (Tr. p. 58; p. 73).

[4] Later on, defense counsel claimed during the opening statement Appellant had simply been reading a book to Victim at Victim's request. (Tr. p. 54). Ultimately though, no evidence or testimony was ever presented to support defense counsel's claim in that regard. (Tr. p. 241).

Once Appellant was gone, Tabron went inside to find out what had been going on. (Tr. p. 65). Based on what she learned, she quickly made a report of a sexual assault upon a minor, and Detective Brooks Felmet[5] from the Rock Hill Police Department responded to the scene. (Tr. p. 65; p. 219; p. 212). Upon arriving, Detective Felmet spoke with the individuals there, including Victim. (Tr. p. 65; pp. 221-225). Ultimately, based on what he was told, he asked for Victim to be taken to the hospital so she could be examined. (Tr. pp. 65-66; p. 222).

At the hospital, Deborah Davis, a registered nurse and certified sexual assault nurse examiner, conducted a sexual assault examination of Victim. (Tr. pp. 81-82; p. 84; p. 92). During the examination, Davis noticed Victim—who did not have any signs of physical injuries aside from an unrelated scrape on her knee—seemed to be nervous, shy, scared, and skittish, and Victim also appeared to behave in a manner more appropriate for a child much younger than her actual age. (Tr. pp. 93-95; p. 107). Nevertheless, Davis was able to obtain some details about what was reported to have occurred, and, based on what she learned, she collected internal swabs from Victim's vagina and anus and external swabs from Victim's vaginal area. (Tr. pp. 96-99; p. 108). In addition to that, Davis collected Victim's clothing, including her underwear. (Tr. p. 104).

Thereafter, the collected evidence was sent to and analyzed by personnel at the South Carolina State Law Enforcement Division ("SLED") along with buccal swabs collected from both Victim and Appellant. (Tr. p. 97; p. 113; p. 116). As part of the analysis, DNA profiles were developed from a number of the collected items, including from a hair found on Victim's underwear, and compared to Victim's and Appellant's DNA profile standards. (Tr. pp. 155-156; p. 161; pp. 180-184; pp. 205-208). Ultimately, the results of the analysis concluded: (1) the

[5] In the transcript from Appellant's trial, Detective Felmet's last name has been incorrectly identified as "Felman." (Tr. p. 219; Arrest Warrant).

DNA profile developed from the found hair was a mixture originating from two individuals, and it was approximately 200 sextillion times more likely if Appellant and an unidentified unrelated individual contributed to the mixture than if two unidentified unrelated individuals did so; and (2) the DNA profile developed from the rectal swabs similarly was a mixture originating from two individuals, and it was approximately 1.1 quintillion times more likely if Victim and Appellant contributed to the mixture than if Victim and an unrelated unidentified individual did so. (Tr. pp. 205-208; State's Ex. # 6 (Forensic Report)).

Based on the results of SLED's forensic analysis, Appellant was arrested for second-degree criminal sexual conduct with a minor. (Tr. pp. 222-223). Subsequently, Appellant was indicted for the same offense, and he elected to proceed forward to trial. (Tr. pp. 30-31; Indictment).

Toward the outset of the trial proceedings, the solicitor noted the trial judge needed to make a preliminary determination regarding Victim's competency, and she proceeded to proffer testimony from Victim—who, at least at that time, was present in the courtroom—during a hearing on the matter. (Tr. p. 9; pp. 14-21). At the conclusion of that proffer, the trial judge—with agreement from the solicitor—found Victim was not a competent witness because she did not appear to be capable of relating a true version of the facts independently and did not appear to fully understand the difference between the truth and a lie.[6] (Tr. pp. 24-25). The trial judge

[6] At one point during the solicitor's questioning of the developmentally-delayed minor victim, Victim appeared to confirm something happened when she was in the bedroom with Appellant on the date of the incident. (Tr. p. 17). However, when the solicitor asked Victim to tell her what happened, Victim—who had already confirmed she *could* do so—refused, responding: "No, ma'am." (Tr. p. 17). Victim then appeared to suggest no one had touched her body in the areas the nurse examined before confirming she was scared, nervous, and did not want to be there. (Tr. p. 18). Not long after that, Victim indicated she did not want to answer any more questions. (Tr. p. 19).

further noted Victim appeared to be "very reserved" and seemed largely unable to provide more than one-word answers to questioning. (Tr. p. 26).

Following that, the trial proceeded forward, and Tabron recounted what occurred on the date of the incident. (Tr. pp. 55-72). As part of her testimony, she discussed Victim's age, developmentally-delayed intellectual functioning, and enrollment in "special needs" classes at school. (Tr. pp. 56-58). The solicitor then presented Tabron with a single photograph depicting Victim, and Tabron confirmed: (1) the photograph reflected what Victim—who was sixteen years old by the time of the trial—currently looked like at that time; and (2) Victim had also looked the same as she looked in the photograph at the time of the incident. (Tr. pp. 58-59). After that foundational testimony was presented, the solicitor moved to admit the photograph into evidence, and defense counsel swiftly objected, arguing in total: "I don't see any probative value in the -- in the photograph." (Tr. p. 59). Ultimately though, the trial judge overruled that objection, and the photograph—which merely depicted a smiling child in a normal and uncontroversial pose—was admitted into evidence. (Tr. p. 59; State's Ex. # 2 (Photograph)).

As the trial continued on, multiple witnesses involved in the response to and investigation of the incident testified about what had occurred leading up to Appellant's arrest for second-degree criminal sexual conduct with a minor. (Tr. pp. 60-78; pp. 81-109; pp. 112-116; pp. 140-167; pp. 169-184; pp. 196-210; pp. 219-230). Notably, as part of the evidence and testimony introduced, multiple witnesses discussed Victim's small size, several testified—in response primarily to questioning from defense counsel—they did not hear any sounds of screaming or struggling coming from the bedroom prior to Appellant and Victim emerging from it, Davis confirmed she did not find any signs of physical injury in her examination of Victim after the incident, and Detective Felmet verified he did not find any blood or others signs of a struggle at

the crime scene. (Tr. p. 70; p. 76; p. 78; pp. 93-95; p. 107; p. 224; pp. 229-230). In addition to that, the DNA analysis results were introduced, and the likelihood ratios involved in those results constituted "very strong support" for the proposition Appellant's genetic material was present on both a hair found in Victim's underwear and on swabs collected from Victim's anus. (Tr. pp. 205-210).

Following the presentation of all that testimony and evidence, the State rested its case, and the defense rested, too, without introducing anything else. (Tr. p. 230; p. 241). Thereafter, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (Tr. pp. 245-283). Notably, as part of the State's closing argument remarks, the solicitor noted Victim was "very small" and suggested Victim's specific characteristics explained why no screaming was reported and no signs of struggle were found. (Tr. p. 249; pp. 257-258). Additionally, the solicitor focused heavily on the fact there was no logical innocent explanation for Appellant's DNA to be present in Victim's rectum. (Tr. p. 258; p. 261). Contrastingly, as part of the defense's closing argument, defense counsel—while referring to Victim as "this tiny girl" and specifically noting her small size—contended the absence of any signs of physical injuries should be viewed by the jurors as a particularly significant fact since a sexual battery—at least in his view—surely would have resulted in injury to a girl as small as the minor victim if one truly had been perpetrated.[7] (Tr. p. 269). Furthermore, in asking the jury to find Appellant not guilty, defense counsel called the jury's attention to the fact no one heard any screaming when Appellant and Victim were alone in the bedroom and no one observed any physical signs of a struggle after the incident. (Tr. p. 271).

[7] Earlier, Davis, a sexual assault nurse examiner and expert in the field of nursing and examination, testified most sexual assaults did not leave behind any physical evidence of violence. (Tr. p. 84; pp. 87-88; p. 108).

Subsequent to that, the trial judge submitted the case to the jury, and the jurors began their deliberations. (Tr. p. 283). Ultimately, at the conclusion of those deliberations, the jury unanimously convicted Appellant. (Tr. pp. 287-288).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing a trial judge's evidentiary ruling on appeal, an appellate court will not—due to the considerable discretion afforded to trial judges in ruling on the admission or exclusion of evidence—reverse such a ruling absent a clear abuse of the trial judge's discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006); see United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's evidentiary ruling constituted an abuse of discretion unless it was arbitrary and irrational).

Analysis

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' ").

However, even if relevant, evidence must be excluded from trial if its probative value is *substantially* outweighed by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); see also New Oxford American Dictionary 1736 (3rd ed. 2010) (defining "substantially" as "to a great or significant extent"). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); see Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). However, unfair prejudice does *not* mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); see Old Chief, 519 U.S. at 183 n. 7 ("On appellate review of

a Rule 403 decision, a defendant must establish abuse of discretion, a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon."). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Hamilton, 344 S.C. at 358, 543 S.E.2d at 594.

In the case sub judice, Appellant contends the trial judge reversibly erred by admitting a photograph of Victim, who was alive at the time at the time of trial and present for at least some of the trial proceedings. As support for that contention, Appellant maintains—while relying primarily on our Supreme Court's decisions in State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), and State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), two cases in which in-life photographs of now-deceased victims were introduced despite not being relevant to any issue in dispute—the photograph of Victim was not probative and irrelevant in his case because it purportedly "added nothing of value in the jury's determination of whether [he] molested the alleged victim[.]" (App. Br. p. 8). Furthermore, Appellant maintains the photograph was "meant to impermissibly garner sympathy for the victim" by "portray[ing] a happy victim from a happier occasion" and, thus, was purportedly improper. (App. Br. pp. 8-9). For those reasons, Appellant asserts his conviction must now be reversed.

Generally speaking, photographic evidence is admissible when it tends to corroborate testimony, constitutes proof of some element of the offense, or could assist the jury in understanding the evidence presented or properly resolving the case. See State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) ("The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it."); see also

State v. McWilliams, 698 S.W.3d 783, 790-791 (Mo. Ct. App. 2024) (explaining a photograph is relevant if it shows the scene of the crime, depicts the identity of the victim, constitutes proof of some element of the charged offense, or could assist the jury in understanding the testimony and instructing a photograph is not rendered inadmissible merely because other evidence may have described what it showed); State v. Mayes, 825 P.2d 1196, 1205 (Mont. 1992) ("Photographs are admissible if they are relevant to describe a person, place, or thing involved in the case."); State v. Mayette, 223 N.Y.S.3d 730, 737 (N.Y. App. Div. 2024) ("Accurate photographs of the victim are admissible, despite their potential inflammatory effect, if they tend to prove or disprove a disputed material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered[.]" (citations, internal quotations, and brackets omitted)). Importantly, so long as the photographic evidence serves some proper purpose and its probative value is not *substantially* outweighed by any potential for undue prejudice, it can properly be admitted, and a trial judge does not commit an abuse of discretion by doing just that. Rule 403, SCRE; see Nance, 320 S.C. at 508, 466 S.E.2d at 353 ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.").

Here, contrary to Appellant's contentions both at trial and on appeal, the lone photograph of Victim admitted into evidence was indeed relevant and probative in Appellant's case. Initially, the photograph, which showed the *minor* victim and was confirmed to have accurately reflected how she appeared at the time of the crime despite being taken at a later point, had some relevancy and probative value by confirming Victim was actually a minor, which was an essential factor in a criminal sexual conduct with a minor prosecution. S.C. Code Ann. § 16-3-655(B)(1); see People v. Herrera, 272 P.3d 1158, 1165 (Colo. Ct. App. 2012) ("[T]he appearance of a sexual assault victim when the alleged sexual abuse began is relevant to illustrate the child's

age at that time, a material element of the crime of sexual assault of a child, and to show the jury more clearly how the child appeared at the time of the alleged sexual assaults."). However, even more significantly, the photograph was also probative and relevant because it visually showed and corroborated the testimony about the minor victim's small size. Critically, based on the testimony presented, Victim was small in size and seemed much younger than her actual age from both an intellectual and *physical* standpoint. And, from the State's perspective, Victim's small size was an important detail because it may have contributed to her *not* screaming or crying out due to her potential fear of what her adult abuser might do if she did, which was something that was particularly important in light of the defense's suggestion the absence of any sounds of screaming or struggling coming from the bedroom should have been construed by the jury as evidence no sexual assault actually occurred. See State v. Klein, 593 N.W.2d 325, 327 (N.D. 1999) (concluding a photograph of a juvenile victim of sexual abuse was relevant and properly admitted because it showed the victim's small size, which was relevant to the issue of whether the victim may not have revealed the abuse due to fear of being physically harmed by the larger adult defendant); cf. State v. Davis-Kocsis, 443 S.C. 127, 136, 903 S.E.2d 491, 495 (2024) ("The probative value of this corroboration is significant, considering Davis-Kocsis's defense relied heavily on discrediting the State's witnesses."). At the same time, Victim's small size was an important detail from the defense's perspective, too, because someone of her "tiny" size would supposedly have been injured if she had truly been sexually assaulted, and the photograph served to corroborate the testimony presented concerning Victim's size. See Nance, 320 S.C. at 508, 466 S.E.2d at 353 (recognizing it is not an abuse of discretion to admit a photograph that serves to corroborate the testimony presented); cf. People v. Brooks, 396 P.3d 480, 522 (Cal. 2017) ("Here, the photograph [of the victim] was relevant because it permitted the

witnesses to identify [the victim] as the person about whom they were testifying." (citation and internal quotations omitted)). Under such circumstances, the photograph of Victim—which visually depicted something both the State and the defense believed was significant to the jury's determination of whether Appellant truly molested the minor victim—constituted relevant and probative evidence that could have plainly assisted the jurors in properly resolving Appellant's case. See State v. Salley, 398 S.C. 160, 170, 727 S.E.2d 740, 745 (2012) (concluding a photograph of a minor victim that corroborated testimony about her appearance was properly admitted because it "had a purpose independent of arousing sympathy"); cf. United States v. White Calf, 634 F.3d 453, 460 (8th Cir. 2011) (concluding a photograph depicting a juvenile victim of sexual abuse "plainly was relevant"). Therefore, the trial judge did not abuse his broad discretion or otherwise err by overruling defense counsel's argument solely challenging the photograph's probative value.

Meanwhile, contrary to Appellant's newly-advanced appellate claim the photograph purportedly was unduly prejudicial due to its supposed potential to garner undue sympathy for the minor victim, the photograph's probative value was not outweighed—substantially or otherwise—by any potential for undue prejudice it possessed.[8] That is true because the relevant photograph, which merely showed the minor victim in a seated pose smiling toward the camera, was nothing more than a typical snapshot of a child that was not remarkable or inflammatory in anyway. See State v. Rush, 11 N.W.3d 394, 434 (Neb. 2024) ("[A]n otherwise relevant

[8] Notably, because defense counsel solely challenged the probative value of the photograph during trial and did not raise any other arguments in support of its exclusion, Appellant's newly-advanced argument about the photograph's potential for undue prejudice was not properly preserved for appellate review since it was neither raised to nor ruled upon by the trial judge. See In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

photograph of the victim in life need not be excluded despite the possibility it could elicit a sympathetic response from the jury."), modified on other grounds on denial of reh'g, 12 N.W.3d 787 (Neb. 2024); cf. Valladares v. State, 360 So. 3d 753, 755 (Fla. Dist. Ct. App. 2023) ("[W]e see nothing in the photo itself [of the minor sexual abuse victim] which would have garnered the jury's sympathy."); Mayes, 825 P.2d at 1205 (affirming the admission of a several photographs depicting two juvenile incest victims "in normal poses smiling for the camera" because—even if the photographs' relevancy "may be somewhat questionable"—the photographs did "not depict anything out of the ordinary which would normally serve to arouse a jury's passion"). Under such circumstances, the photograph was not something that would or could have reasonably been expected to have aroused the passions or prejudices of the jury or caused the jurors to render a decision on an improper basis, and that was particularly true in light of the fact jurors in many if not most criminal sexual conduct with a minor cases actually see *and hear from* the minor victim, who typically testifies during the trial. Cf. Thompson v. State, 955 A.2d 802, 816 (Md. Ct. Spec. App. 2008) (concluding the admission of a photograph of a juvenile victim of sexual abuse "did not pose any danger of unfair prejudice" because the admission of the photograph depicting the victim was not any more prejudicial than having a minor victim testify against the defendant in person), aff'd, 988 A.2d 1011 (Md. 2010); State v. Hagen, 512 N.W.2d 180, 184 (Wis. Ct. App. 1994) ("Here, the trial court determined that the photograph [of the victim] was not inflammatory. The court said, 'In reality the photograph is [a] very normal photograph of a person, in this case a person with his dog.' We agree. While the presentation of any evidence recalling or identifying the victim in a homicide case will likely evoke a degree of sympathy with a jury, we agree with the trial court that this ordinary photograph did not work any *undue* sympathy."). Beyond that, Victim—like all victims in South Carolina—possessed a

constitutional right to be present throughout the trial proceedings, so it remains unclear how the jury seeing a normal photograph of the minor victim—who, unlike the victims in Langley and Livingston, was alive and present in person for at least some of the trial proceedings—could be construed as being impermissibly prejudicial. See S.C. Const. art. I, § 24(A) (mandating a crime victim has a constitutional right to "be informed of and *present at* any criminal proceedings which are dispositive of the charges where the defendant has the right to be present" (emphasis added)); S.C. Code Ann. § 16-3-1550(B) ("A person must *not* be sequestered from a proceeding adjudicating an offense of which he was a victim." (emphasis added)); see also S.C. Code Ann. § 16-3-1550(E) ("The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate. The prosecuting agency or defense attorney must notify the court when a victim or witness deserves special consideration."). Therefore, even if defense counsel had objected to the photograph as being unduly sympathetic, the trial judge could not have reasonably or rationally found the evidence's probative value was substantially outweighed by any minimal potential for unfair prejudice it may have possessed.

Accordingly, since the mine-run photograph of Victim—who personally had a constitutional right to be present in the courtroom throughout the trial—was relevant and probative in Appellant's case and its minimal potential for undue prejudice did not *substantially* outweigh its probative value under the circumstances involved, the trial judge did not abuse his broad discretion or otherwise err by admitting that lone photograph, and there are no proper grounds warranting a reversal of that sound discretionary ruling on appeal. See State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) (recognizing determinations concerning the relevancy and materiality of photographic evidence are generally left to the sound discretion of a

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

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

April 25, 2025

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Apr 25 2025
SC Court of Appeals

Appeal from York County
Honorable Daniel D. Hall, Circuit Court Judge
Appellate Case No. 2024-000473

THE STATE,

Respondent,

vs.

XAVIER LAMAR HOLBROOKS,

Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following to be included in the Record on Appeal:

(1) March 2024 Trial Transcript, Pages 1, 6-26, 30-31, 45-78, 81-109, 112-127, 137-217, 219-236, 241, and 245-293;

(2) Indictment (# 2022-GS-46-01685);

(3) Arrest Warrant (# 2022A4620300777);

(4) Sentencing Sheet;

(5) State's Exhibits # 2 (Photograph) and # 6 (Forensic Report).

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY:_____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

April 25, 2025

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Appellant.

PROOF OF SERVICE

I, Grace Sommer, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by rule to be served have been served.
This 25th day of April, 2025.

Grace Sommer

GRACE SOMMER
Legal Assistant
Office of the Attorney General