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SC COURT of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HENRY GRAY,

APPELLANT

APPELLATE CASE NO. 2012-209426

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred in admitting gruesome autopsy photographs that were unnecessary to prove any contested fact and which unduly prejudiced appellant?

2.

Whether the trial court erred in refusing to give an involuntary manslaughter charge because evidence showed that the decedent's death could have been the result of a trivial fight?

STATEMENT OF THE CASE

On March 10, 2010, appellant Henry Gray (“Gray”) was indicted in Richland County for lynching, first degree. On October 5, 2011, he was also indicted for murder. On February 28 – March 2, 2012, Gray was tried before the Honorable Thomas G. Cooper, Jr. and a jury. R. 1.

Gray was tried together with his sister, Robin Gray Reese (“Reese”). R. 1. Appellant Gray was represented by Mathias Chaplin. R. 1. Reese was represented by Andrew Farley. R. 1. Luck Campbell, April Sampson, and Nicole Simpson represented the State. R. 1. The jury convicted Gray and Reese on both counts. R. 909 1, l. 17 – 910, l. 12. The trial judge sentenced Gray to thirty years’ imprisonment on both charges, to run concurrently. R. 918, ll. 11 – 17. On March 5, 2012, Gray served his notice of appeal. This appeal follows.

ARGUMENT

1.

The trial court erred in admitting gruesome autopsy photographs that were unnecessary to prove any contested fact and which unduly prejudiced appellant.

Relevant Facts

Introduction

On February 13, 2010, Kenneth Mack (“Mack”) died at the Gonzales Gardens apartments in Columbia. Multiple purported eyewitnesses testified about the events preceding Mack’s death. Two eyewitnesses who had no connection to Gonzales Gardens testified that Mack was severely beaten by a group of men near a convenience store at the edge of the apartment complex. Marcellius Brooks, a resident of Gonzales Gardens whose nickname is “Bloom,” admitting attacking Mack and was charged with his murder. R. 392, ll. 13 – 18; R. 398, ll. 4 – 19; R. 414, ll. 6 – 14. No evidence showed Gray or co-defendant Robin Reese participated in this beating. Several women who lived in Gonzales Gardens and were connected to Bloom testified they saw a second beating of Mack in between two buildings in Gonzales Gardens that involved Gray and Reese. Bloom was not tried with Gray and Reese and his charges were pending during their trial. R. 414, ll. 12 – 14. A summary of this testimony follows.

The Disinterested Witnesses

Amber Hardy (“Hardy”) managed a pharmacy near Gonzales Gardens. R. 313, l. 23 – 314, l. 14. She was in her car following a shoplifter when she witnessed a fight near a convenience store on McDuffie Street. R. 314, ll. 20 – 315, l. 13. Hardy saw four or five males and one female attacking another male, who turned out to be Mack. R.

315, l. 23 – 316, ll. 7. The mob took turns beating Mack. R. 316, ll. 8 – 10. The beating was “brutal.” R.319, ll. 20 – 22. The men “were just taking turns and he would fall and they would kick him and punch him and like karate kicks like you a break a board in half.” R. 322, ll. 11 – 16. Mack was “kicked everywhere,” including his head. R. 328, ll. 4 – 6. Hardy saw Mack get up after the beating and dizzily stagger away. R. 328, l. 22 – 329, l. 7.

Kiki Burns (“Burns”) worked at the gas station across from Gonzales Gardens. R. 768, l. 25 – 829, l. 5. She witnessed the beating that took place near McDuffie Street. R. 830, l. 24 – 831, l. 10. Burns saw four or five people chasing Mack. R. 831, ll. 2 - 10. Mack tripped over something and fell. R. 831, ll. 17 – 21. The people chasing him then began to beat him. R. 831, ll. 22 – 24. In response to a question whether or not the men were “kicking and stomping” Mack, Burns said, “I just seen [them] all just getting on him.” R. 832, l. 2. She also saw a female participating in the beating. R. 832, ll. 6 – 12.

After the mob left, Mack “tried to stand up and he stumbled back down.” R. 832, ll. 20 – 23. Burns called 911 as a result of the incident. R. 839, ll. 10 – 21.

Testimony of Melquanna S.

Melquanna S. is Reese’s daughter. R. 757, ll. 5 – 13. On the afternoon of February 13, 2010, Melquanna S. was going to a manicurist. R. 758, ll. 15 – 17. The manicurist was very close to a convenience store where her mother was playing video poker. R. 758, l. 23 – 759, l. 10. She was thirteen years old at the time. R. 759, ll. 18 – 20.

The manicurist was closed, and as she was knocking, Melquanna S. heard Mack, who was say to her, “You can come in my house.” R. 760, ll. 14 – 23. Melquanna S.

did not know Mack.¹ R. 760, ll. 24 – 25. Mack was over thirty years old. R. 421; ll. 9 – 13. She went into the convenience store and bought some potato chips. R. 761, ll. 12 – 15. As she was walking home Mack again approached this young girl unbidden and asked for some chips. R. 761, ll. 17 – 19. Melquanna S. told him to leave her alone. R. 761, ll. 19 – 20. She tried to walk away from him but Mack continued to hinder her progress and then threw a snowball at her. R. 761, l. 17 – 762, l. 4. Melquanna S. told Mack that she was going to go get her mother and Mack grabbed her. R. 762, ll. 3 – 7. She hit Mack. He picked her up, threw her into the bushes, and they began to fight. R. 762, ll. 8 – 13.

With Mack on top of her, Melquanna S. saw Bloom tackle Mack and “hit him a couple of times.” R. 762, ll. 14 – 15. Other men came “and jumped on” Mack. R. 762, ll. 14 – 16. Melquanna S. hit Mack “a couple of times.” R. 762, ll. 20 – 25. Bloom took Melquanna S. back to the store and they told her mother what happened. R. 763, l. 8 – 764, l. 13. Reese took Melquanna S. back to their apartment in Gonzales Gardens. R. 764, ll. 14 – 17. Melquanna S. said that her mother went back to the store and played video poker the rest of the afternoon. R. 769, ll. 3 – 11.

¹ The medical testimony revealed Mack had been using marijuana and Ativan. R. 687, l. 1 – 688, l. 1.

Bloom's Testimony

Bloom lived next door to Reese and Melquanna S. for a couple of years in Gonzales Gardens. R. 393, l. 11 – 394, l. 4. He did not know Gray personally. R. 394, ll. 5 – 6. Bloom had never seen Mack before the day of the beating. R. 396, ll. 17 – 23.

Bloom claimed that he saw Mack “pick [Melquanna S.] up and slam her to the ground.” R. 396, ll. 11 – 16. Bloom claimed that he tackled Mack to get him off of Melquanna S. R. 398, ll. 4 – 13. Bloom was on top of Mack and hit him twice with a closed fist. R. 398, ll. 16 – 19. At this point, Bloom claimed that he was pulled off of Mack by Angelo “Little Ricky” Boyd (“Boyd”). R. 399, ll. 3 – 9. Bloom claimed that Mack then “got up and ran off.” R. 399, ll. 3 – 9. Bloom denied kicking Mack. R. 400, ll. 20 – 21. He also denied that anyone other than Melquanna S. joined in the fight. R. 400, ll. 12 – 16.

Bloom said that he took Melquanna S. into the convenience store to talk to Reese. R. 402, ll. 7 – 16. They told Reese what happened. R. 402, l. 24 – 403, l. 5. He claimed Reese was upset. R. 404, ll. 1 – 6. Bloom claimed that after Reese walked outside the store he saw her talking on her phone, but did not know who she called. R. 404, ll. 19 – 25.

Later that day, Bloom got a phone call from his brother telling him the police were looking for him. R. 409, l. 22 – 410, l. 7. The police called Bloom the next day and he went to the police station. R. 410, ll. 10 – 13. The police told Bloom they were investigating him for Mack's murder. R. 411, ll. 11 – 12. He was arrested.² R. 414, ll. 8

² In addition to the murder and lynching charges related to Mack's death, Bloom had pending charges for criminal domestic violence, malicious injury to property, possession of marijuana, and possession of marijuana with intent to distribute. R. 415, ll. 4 – 15.

– 9. After being arrested for murder, Bloom told police there had been a second attack on Mack. R. 430, ll. 18 – 22. He gave the police names of witnesses who saw the alleged second attack. R. 430, ll. 23 – 25. The names of those witnesses were Donetti Perry (“Perry”), Kara Chase (“Chase”), and Sanovia Thompson (“Thompson”). R. 433, ll. 4 – 15.

The Gonzales Gardens Witnesses

Bloom’s witnesses—Perry, Chase, and Thompson—did not approach police until after Bloom was arrested. R. 655, ll. 5 – 23. They were all interviewed within an hour of each other. R. 655, ll. 13 – 24.

Perry, who was twenty-eight years old at the time of the trial, testified that she was upset and scared to be in court. R. 117, ll. 22 – 23. She lived in Gonzales Gardens. R. 113, ll. 22 – 24. Perry was a friend of Bloom’s brother, Lamar a/k/a “Big Baby.” R. 144, l. 23 – 145, l. 2; R. 160, ll. 5 - 7. She also knew Bloom. R. 154, ll. 16 – 155, l. 16. She knew appellant Gray because his father’s apartment was across from her’s. R. 116, ll. 9 – 23.

Perry claimed she saw Mack and Gray having a conversation near her apartment. R. 115, ll. 19 – 23. Mack “looked like he’d been beat up or something.” R. 118, ll. 1 – 2. Gray supposedly asked Mack, “Man what happened to you?” R. 118, ll. 5 – 10. Perry claimed that Gray’s phone rang. R. 119, l. 21 – 120, l. 4. Perry then claimed that Gray swept Mack’s feet out from under him. R. 118, l. 14 – 119, l. 7. She said Mack fell and hit his head. R. 119, ll. 10 – 12. Gray supposedly began kicking Mack. R. 120, ll. 16 – 21. Perry also claimed that Reese arrived and joined in kicking Mack and also hit Mack repeatedly with a metal chair. R. 123, l. 17 – 124, l. 9; R. 125, ll. 9 – 13.

Thompson had been living in Gonzales Gardens for almost five years. R. 471, ll. 18 – 21. She was thirty-three years old. R. 471, ll. 16 – 17. She claimed that she saw Mack walking down the sidewalk while she was sweeping her steps. R. 473, l. 18 – 474, ll. 16. She did not know Mack. R. 474, ll. 22 – 23. She described him as having “a knot on his head” and that he was bleeding. She stated that Mack “was kind of like staggering like he might have been intoxicated.” R. 475, ll. 2 – 5. She said that Gray asked Mack “What happened to you?” and then Gray “went on about his business.” R. 475, ll. 18 – 20.

Thompson claimed Gray went into his father’s apartment because the phone was ringing. R. 477, ll. 16 – 20. Gray supposedly then came outside, grabbed Mack by the collar, and told him, “You put your hand on my niece. We’re going to talk to my sister.” R. 477, ll. 21 – 25. Thompson walked behind her building. R. 479, ll. 19 – 25. When she came around the other side, she saw Mack on the ground and Reese coming down the sidewalk. R. 480, ll. 22 – 25. Thompson claimed that Reese said “Why did you put your hand on my baby?” and then kicked Mack “on the leg one or two times.” R. 481, ll. 13 – 18. According to Thompson, Gray and Reese then walked away. R. 481, ll. 14 – 20. Thompson never saw anyone use a chair to hit Mack. R. 487, ll. 11 – 13.

Chase, who was blind by the time of trial, was homeless and living temporarily with Thompson on the day of Mack’s death. R. 473, ll. 7 – 13; R. 240, ll. 22 – 23; R. 233, ll. 2 – 5. She was thirty-two years old at the time of trial. R. 232, ll. 23 – 24. Chase did not approach the police until after the incident “because a friend of mine’s brother was being accused of a murder that I know he didn’t commit.” R. 253, l. 22 – 254, l. 2. That friend was Bloom. R. 254, ll. 3 – 4.

Chase testified that Mack was walking away with Gray when Gray tried to hit Mack and “pretty much almost missed. R. 238, l. 11 – 239 – 13. Chase said that Gray “did not kick the man down.” R. 239, ll. 16 – 18. She claimed that Mack “lost his balance” and then fell. R. 239, ll. 18 – 22. She saw Mack move around as if to defend himself. R. 240, ll. 1 – 5. The solicitor, using a prior statement, attempted to get Chase to admit that Mack never got up after his initial fall, but Chase rebuffed her. R. 244, l. 21 – 245, l. 3. Chase testified “He did get up after that. I told the police that. I told investigators that. He did get up from that spot and move, he never stayed right there on that sidewalk.” R. 244, l. 25 – 245, l. 3. Chase said that Gray “walked off” after Mack fell. R. 240, ll. 11 – 18. Chase denied the contents of a written statement that she gave the police which described a further assault by Gray and Reese on Mack. R. 245, l. 4 – 253, l. 2.

Several other witnesses from Gonzales Gardens testified. Isaac Weathers saw the fight that occurred near the convenience store. R. 493, ll. 18 – 19. He saw Mack and Melquanna S. arguing. R. 493, ll. 20 – 22. They both fell to the ground. R. 493, ll. 20 – 22. At this point “a few guys” jumped on Mack. R. 494, ll. 9 – 14. Weathers saw a bunch of people kicking Mack. R. 496, ll. 10 – 11. Weathers said that the people who were kicking Mack were people he knew by their nicknames. R. 505, ll. 9 – 11. The people he saw the beating Mack were: Trigger, Little Ricky, Juve, and Bloom. R. 505, ll. 13 – 21. After the beating, he saw all of them go into the store. R. 506, ll. 7 – 9. Weathers never saw Gray. R. 507, ll. 9 – 11.

Mary Anderson knew Mack from a barber shop where he worked. R. 190, ll. 3 – 7. Anderson knew Bloom because he was friends with her brother. R. 210, ll. 13 – 23.

She was convicted of fraud in 2009. R. 200, ll. 2 – 4. She claimed that she witnessed a second assault during which Gray and Reese kicked and stomped Mack. R. 189, ll. 8 – 13.

Boyd, Bloom's friend, testified that he saw Bloom tackle Mack. R. 85, ll. 19 – 25. Boyd went to Bloom's aid. R. 85, ll. 20 – 25. Boyd and Bloom told Melquanna S. to hit Mack, which she did. R. 85, l. 19 – 247, l. 25. Boyd, who was wearing Timberland boots, **kicked Mack in the head.** R. 99, l. 21 – 100, l. 5. Boyd claimed that Mack walked away from the fight. R. 88, ll. 8 – 15.

The Medical Testimony

Three pathologists all agreed that the cause of Mack's death was blunt force trauma to the head. R. 534, ll. 14 – 20; R. 685, ll. 3 – 7; R. 749, l. 8 – 750, l. 25. Gray's pathologist, Dr. Adel Shaker, testified that the blunt force trauma could not have been caused by a metal chair because it would have caused extensive lacerations of the scalp. R. 692, ll. 6 – 23. Dr. Shaker also explained that even after a severe brain injury, a person can have a "lucid interval," during which that person can walk, talk, or do other activities for up to one hour after the injury. R. 694, ll. 8 – 14. The lucid interval occurs because it takes time for blood to accumulate and create pressure on the brain stem. R. 694, ll. 15 – 22. Pressure on Mack's brain stem led to herniation in the brain which stopped his respiratory or cardiac activity. R. 694, ll. 15 – 25. Dr. Shaker confirmed the State's pathologist's finding that marijuana and Ativan were present in Mack's system. R. 687, l. 1 – 688, l. 1. Dr. Shaker testified that the combination of these two drugs depresses the central nervous system and can affect a person's balance. R. 688, ll. 12 – 22.

The State's pathologist, Dr. Bradley Marcus, performed the autopsy on Mack. R. 517, l. 16 – 518, l. 9. Marcus began describing his findings using two diagrams depicting Mack's injuries. R. 518, l. 10 – 519, l. 6; (Exhibits 86, 87). These diagrams were entered into evidence without any objection. R. 518, l. 10 – 519, l. 6; (Exhibits 86, 87). Exhibit 86 depicts front and rear views of the human body with notations describing various injuries that Mack received. (Exhibit 86).

Dr. Marcus explained what is depicted in Exhibit 87. R. 522, l. 1 – 524, l. 9. Exhibit 87 shows what, at first glance, appears to be a mask over a person's face. (Exhibit 87). Dr. Marcus explained it is not a mask:

We concentrate on the head. The way we do the head is, to preserve the body for the funeral, we make an incision along the back of the scalp here. We very carefully reflect the scalp. We pull the scalp over this way. You just literally just pull it over and that's what you're actually seeing here. That's a side view of the head just pull it over and pull it back here. We can actually put it all right back together and you can't tell in the funeral home.

It actually makes it very nice so that you can see trauma. What we have is we have the scalp and it is reflected. This skull is here, the scalp is here. We can see here, we've got some pretty good – and this is just my markings – scamp [sic]. We call it reflective. The skull is here. The scalp is here. We can see here [we've got] some pretty good – these are just my markings showing hemorrhage along the scalp here. Think of it being the right side here, where that bruise I explained to you was – right here. Underneath the skin there is corresponding hemorrhage there, confirming my findings from the outside underneath there. Confirming what I saw. That all confirms that.

There is also some hemorrhage back here on the skull area here. I call ... this pericranial. Peri means surrounding the skull, "peri" surrounding the skull. It's back here.

Now there's also some hemorrhage on the back here of the skull, also on the back of the scalp back here.

Also there some more hemorrhage, not a lot, on the other side of the head – on the left side. So, again, he had some sort of traumatic event

that occurred right here. You can't see anything on the outside that he had some traumatic injury over here. Okay?

R. 522, ll. 7 – 523, l. 19. The solicitor then attempted to introduce autopsy photographs into evidence. R. 524, ll. 2 – 3. Counsel for Gray asked to see them and then objected. R. 525, ll. 4 – 5; R. 525, ll. 7 – 9. Reese's counsel joined in the objection, stating that the photographs were "highly prejudicial to our clients," and that the pathologist could illustrate the autopsy through his own testimony. R. 525, ll. 12 – 17. Gray's attorney attempted to add to this objection when Judge Cooper sent the jury out of the courtroom. R. 525, ll. 18 – 25.

The solicitor then proffered Dr. Marcus's testimony regarding the autopsy photographs. R. 526, l. 2 – 532, l. 5. Among these photographs were Exhibits 80 to 83. R. 529, ll. 6 – 14. Exhibits 80 through 83 are gruesome photographs of the autopsy of Mack's head. (Exhibits 80 – 83). Exhibits 80 and 83 show a hand holding the top of Mack's sawed-off, bloody skull with his brain completely exposed. (Exhibits 80, 83). Mack's brain protrudes from his open skull like a red tip from a tube of lipstick. (Exhibit 83). Exhibit 81 shows Mack's scalp pulled down over his face and the back part of his scalp pulled away from his skull. (Exhibit 81). What is depicted in Exhibit 81 is barely recognizable as human. (Exhibit 81).

Dr. Marcus told the court these photographs were necessary because they depicted the cause of death and he could not diagram them. R. 529, ll. 12 – 14. During the proffer, Gray's attorney asked the following:

MR. CHAPLIN: As far as those photographs are concerned, what they show is the trauma that you just discussed, correct?

THE WITNESS: Yes, sir.

MR. CHAPLIN: All right. But you can't testify as to the cause of that trauma?

THE WITNESS: I can testify that blunt trauma caused the trauma.

MR. CHAPLIN: Okay.

THE WITNESS: Blunt trauma.

MR. CHAPLIN: But you couldn't say specifically when the trauma occurred?

THE WITNESS: No. I can't say when it occurred.

MR. CHAPLIN: You can't say the location that it occurred?

THE WITNESS: I can't say the location, no.

MR. CHAPLIN: You just know that it is blunt force trauma?

THE WITNESS: Yes, blunt force trauma.

MR. CHAPLIN: And that would be the extent of your presentation?

THE WITNESS: I believe so, yes.

R. 531, ll. 1 – 25. Without hearing any further argument, Judge Cooper overruled the defendant's objection to the admission of these photographs. R. 532, ll. 2 – 3.

When the jury returned, Dr. Marcus then used Exhibit 87 – the diagram of Mack's head – to explain the location of a skull fracture and a brain hemorrhage. R. 535, l. 20 – 536, l. 9. Still referring to the diagram, Dr. Marcus opined that a significant amount of force would be necessary to cause this kind of skull fracture. R. 536, ll. 10 – 12. Without referring to the photographs, Dr. Marcus then explained that once he looked inside Mack's skull at his brain he saw subdural hemorrhages and cerebral contusions. R. 536, l. 21 – 537, l. 15. Dr. Marcus said that blunt trauma causes these injuries "when the brain bangs up against the skull itself." R. 537, ll. 16 – 24.

It was only after this testimony explaining Mack's injuries that the solicitor introduced Exhibits 80 – 83 over the defendants' objection. When she introduced the exhibits, the solicitor proclaimed, "**These are graphic.**" R. 538, l. 25 (emphasis added). After Dr. Marcus merely repeated his testimony concerning subdural hemorrhages and cerebral contusions, the solicitor published the photographs to the jury. R. 539, l. 1 – 541, l. 9. The witness then again opined, exactly as he did before, that the cause of Mack's death was a closed head injury due to blunt trauma. R. 542, ll. 1 – 7.

Discussion

The trial court abused its discretion by admitting these horrific autopsy photographs. These photographs were inadmissible under Rule 403. See SCRE 403. "[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986); see also State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010).

The Supreme Court's analysis of prejudicial photographs in Middleton is instructive. In Middleton, the State sought the introduction of autopsy photographs, including a photograph of a surgically opened vagina. See Middleton at 24, 339 S.E.2d at 693. The Supreme Court found the information contained in the photographs was "not really at issue." See id. The Supreme Court held that "the prejudice created by the photographs clearly outweighed *any* evidentiary value." Id. (emphasis in original).

Just as in Middleton, the photographs of Mack's autopsy had limited probative value because the cause of death—blunt force trauma to the head—was not contested at trial. Furthermore, the pathologist used diagrams to explain Mack's injuries to the jury

before resorting to the photographs. His testimony, coupled with his diagrams, more than adequately explained to the jury the uncontested nature of Mack's death. The photographs, which the solicitor telegraphed to the jury as "graphic," were used to inflame the passions of the jurors and engender sympathy for Mack.

This Court's thorough Rule 403 analysis of unfairly prejudicial photographs in State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (2012) provides the correct rubric for deciding this case. In Collins, the Court of Appeals reversed because of the improper admission of photographs of a boy's half-eaten corpse. The boy had been attacked by dogs. The Collins court's analysis followed several steps. First, it examined the reasons why the State sought the photographs' admission. Next, it determined whether the State's reasons matched any of the elements of the crime charged. Third, it evaluated the prejudicial impact of the photographs. Finally, the court determined whether the photographs corroborated other testimony.

In this case, the only real issues at trial were whether the State's witnesses credibly described Gray as being involved in an attack on Mack, and whether the beating administered by Bloom and others caused Mack's death. The State argued it needed the photographs "to show malice" and because "cause of death is definitely an issue." None of these reasons matched the evidence by Dr. Marcus. The State's pathologist admitted that he could not tell whether all of the injuries were received from Bloom's attack. R. 548, ll. 7 – 11. When asked whether he could tell whether the injuries to Mack's head were from the first or second attack, the pathologist responded, "No, I can't tell that. Absolutely not." R. 555, ll. 8 – 12. He candidly admitted that Mack's injuries could

have been caused by “four to five men kicking, stomping, and beating the victim.” R. 557, l. 25 – 558, l. 7.

The State failed to show how the autopsy photographs of Mack’s sawed-off skull and bloody brain were relevant to malice. These graphic photographs all depicted Mack’s body after it had been severely altered by the autopsy. Cf. State v. Powers, 331 S.C. 37, 47, 501 S.E.2d 116, 120 (1998) (holding that unpleasant autopsy photographs which depicted the victim’s body “in substantially the same condition” as left by the defendant were admissible). They were not probative of whether Gray acted with malice, especially when the pathologist could not tell the jury when the injuries were sustained. Therefore, the State’s admission of the photographs did not relate to any of the elements of the offense or any contested fact.

“Photographs pose a danger of unfair prejudice when they have an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Lee, 399 S.C. 521, 529, 732 S.E.2d 225, 239 (Ct. App 2012). The emotional impact of the photographs cannot be contested. Mack’s head has been cut in half and he was scalped both front and back. Mack’s face wears his inside-out scalp like a mask. The outline of his face is visible underneath his bloody scalp. The Court only need look at the horrific images of Exhibits 80 – 83 to understand their prejudicial impact on the jury. To use the solicitor’s word, the “graphic” nature of these photographs renders them unduly prejudicial.

Nor can the State argue that the photographs are admissible because they tend to have a corroborating effect on the pathologist’s testimony. Normally, if photographs serve to corroborate the testimony of a witness, it is not an abuse of discretion to admit them. See

State v. Jarrell, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002). But the mere existence of a photograph's tendency to corroborate a witness's testimony is not enough to overcome exclusion on Rule 403 grounds. As in Collins, "the photos relate to the expert's opinion only to the extent they show the same fact testified to by the [expert]. . . ." Collins, at 205, 727 S.E.2d at 755.

The photographs of Mack's brain and skull only corroborated a fact already testified to by the pathologist: that Mack died from blunt force trauma to the head. The defendants' pathologists said the same thing. "[T]he limited extent to which these photos corroborate the testimony of the witnesses does not significantly increase the minimal probative value of the photos." Collins, at 211, 727 S.E.2d at 759. The minimal corroborative effect of these photographs cannot overcome their exclusion under Rule 403. Because the trial court improperly admitted these photographs, this Court should reverse and remand for a new trial.

2.

The trial court erred in refusing to give an involuntary manslaughter charge because evidence showed that the decedent's death could have been the result of a trivial fight.

The record contains evidence that supported an involuntary manslaughter charge. Gray asked for an involuntary manslaughter charge and Judge Cooper denied his motion. R. 883, ll. 2 – 15. "Involuntary manslaughter is defined as (1) the unintentional killing of another without malice but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice but while engaged in a lawful activity with reckless disregard for the safety of others." State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). "A trial court

should refuse to charge the lesser-included offense of involuntary manslaughter only where there is no evidence the defendant committed the lesser offense.” Id.; see also State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999).

“The law to be charged must be determined from the evidence presented at trial.” State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). “A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence” Id. “In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant.” Id. Viewing the facts in Gray’s favor, the court erred in refusing an involuntary manslaughter charge.

In examining these facts, it is important to remember that it was undisputed at trial that Mack suffered a severe beating at the hands of people other than the defendants. The evidence showed that after this beating, Mack was dizzy and staggering. R. 328, l. 22 – 329, l. 7. Chase testified that Mack was walking away with Gray when Gray tried to hit Mack and “pretty much almost missed.” R. 238, l. 11 – 239 – 13. Chase said that Gray “did not kick the man down.” R. 239, ll. 16 – 18. She claimed that Mack “lost his balance” and then fell. R. 239, ll. 18 – 22. Chase that said that Mack got up after this incident. R. 244, l. 25 – 245, l. 3.

The “unlawful activity” as defined in involuntary manslaughter cannot amount to a felony. See State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). Gray’s conduct, at worst, constituted the misdemeanors of either assault and battery of a high and aggravated nature or simple assault and battery. See State v. Fennell, 340 S.C. 266, 274-75 & n.1, 531 S.E.2d 512, 516-17 & n.1 (2000) (describing ABHAN and simple

assault and battery as misdemeanors. If Chase's testimony is to be believed, as it must for purposes of this analysis, Gray only attempted to swing at Mack and Mack fell down. This type of assault would not normally cause great bodily injury.

In State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999), the Supreme Court reversed for failing to give an involuntary manslaughter charge when the defendant's conduct was only an assault and battery that did not tend to cause death or great bodily harm. In Chatman, the defendant and the victim engaged in a fight. The victim grabbed the defendant's testicles while appellant applied a "choke hold." Id. at 151, 519 S.E.2d at 101. The victim died of asphyxiation due to manual strangulation. Id. the Chatman court stated:

This is not the traditional strangulation type situation. Appellant was not attempting to strangle victim by placing his hands around victim's neck. As such, we think appellant's actions were not the kind which would naturally tend to cause serious bodily injury or death. Under the facts of this case, we think appellant was entitled to a charge on involuntary manslaughter.

Id. at 153, 519 S.E.2d at 102.

Just as in Chatman, Chase's testimony shows that Gray and Mack got into a trivial fight. Viewing this evidence in the light most favorable to Gray, great bodily injury or death was unlikely to occur. Because the facts of this case were contested and the witnesses who testified against Gray were biased and unreliable, the trial court's failure to give this charge prejudiced Gray. Therefore, he is entitled to a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse Gray's conviction and remand this case for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

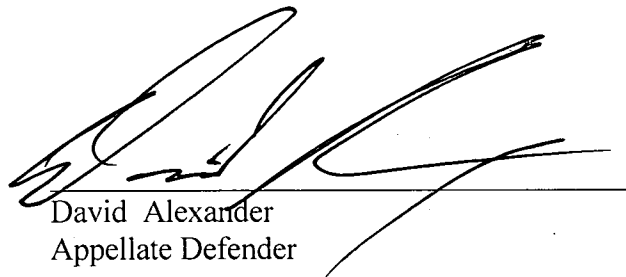
HENRY GRAY,

APPELLANT

APPELLATE CASE NO. 2012-209426

CERTIFICATE OF SERVICE

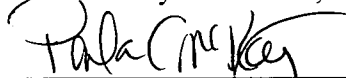
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of October, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of October, 2013.

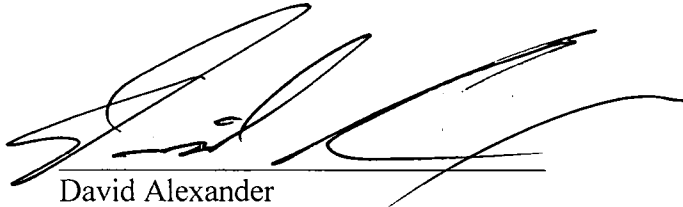
 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 21st, 2013

A handwritten signature in black ink, appearing to read "David Alexander", written over a horizontal line.

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