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 REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I.

The trial court's instruction on the defense of insanity was not a substantially correct instruction that sufficiently covered the defense of involuntary intoxication as involuntary intoxication is a separate and distinct defense that was properly raised by Appellant during trial.

Respondent argues that the lower court did not commit error in failing to charge involuntary intoxication because the jury charges "adequately described that the jury should acquit if Funderburk lacked the capacity to distinguish right from wrong." Respectfully, this argument is without merit. Involuntary intoxication is a complete defense, separate and apart from that of insanity. The failure to charge the jury with Appellant's specific defense, which he pled from the moment of his arrest, was error.

In 2018, this Court considered whether a trial court had erred in failing to give an involuntary intoxication instruction to a jury. State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018). Shands was charged with attempted murder, kidnapping, burglary, two counts of assault and battery, and possession of a weapon during the commission of a violent crime. The charges arose from a domestic incident during which Shands had prevented his wife from leaving the home, stabbed her in the chest multiple times with a barbeque fork, chased her to a neighbor's house when she managed to escape, and then broke into the neighbor's house to continue the assault, which only ended once police arrived on scene. Id. at 115-16, 817 S.E.2d at 529.

At trial Shands admitted that he was responsible for the incident but claimed that he was involuntarily intoxicated due to the ingestion of moonshine which he believed was laced with drugs. He had gotten the moonshine from someone he worked with, but he did not know who

made the moonshine or what was in the moonshine. He believed it must have been something other than alcohol because he had no memory of the incident, and the moonshine had the effect of taking him "slap clean" out of his mind. Id. At the close of his case, Shands requested a jury charge on involuntary intoxication, which the circuit court denied. The circuit court granted the State's request to charge that voluntary intoxication was not a defense. On appeal, Shands argued it was error to refuse to charge the jury on involuntary intoxication because his testimony indicated that he drank moonshine that was unknowingly spiked with something other than alcohol. Id. at 124-125, 817 S.E.2d at 534.

In reviewing the matter this Court quoted State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997), for the longstanding principle[1] that "[t]he law to be charged is determined from the facts presented." Shands at 125, 817 S.E.2d at 534. This Court then recited the approved involuntary intoxication charge from the Ralph King Anderson, Jr., criminal request to charge book as follows:

> Involuntary intoxication may result from innocently consuming an intoxicant, through being tricked into it by another, or being forced to take it, or perhaps through unanticipated side effects of a prescription drug taken on orders of a physician. If [a jury] find[s] the defendant was given drugs or alcoholic beverages without his knowledge, and as a result, he lost his ability to exercise independent judgment and volition while committing the crimes alleged against him, then it would be [the jury's duty] to find the defendant not guilty. Id.

Recognizing the legitimacy of the defense of involuntary intoxication, this Court found that Shands was not entitled to the charge on the facts in his case because he had voluntarily consumed moonshine – an illegal intoxicant. "Shands knowingly consumed an illegal,

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1 As early as 1903, the Supreme Court of South Carolina set forth the principle that a jury charge is based on the evidence presented. State v. Hutto, 66 S.C. 449 (1903) (These requests to charge were not applicable to the case at bar. They, therefore, presented abstract questions of law. The circuit court did not err when he refused to charge these requests, being abstract questions of law).

unregulated liquor and had no right to assume the moonshine would cause a predictable intoxicating effect." Id. at 126, 817 S.E.2d at 534. Shands' voluntary consumption of an illegal substance meant that, under the law, he was not entitled to an involuntary intoxication charge because he willingly placed himself in a condition that posed a danger to others. See Also State v. Vaughn, 268 S.C. 119, 125-26, 232 S.E.2d 328, 330-31 (1977) (Reason requires that a man who voluntarily renders himself intoxicated be no less responsible for his acts while in such condition. To grant immunity for crimes committed while the perpetrator is in such a voluntary state would not only mean that many offenders would go unpunished but would also transgress the principle of personal accountability which is the bedrock of all law).

Appellant's case is inapposite to Shands. From the moment of his arrest Appellant averred that he was involuntarily under the influence of unknown narcotics when he harmed K.S. From his initial statements during his arrest to his police interviews and again at trial, Appellant maintained that K.S. drugged him without his knowledge. In contrast to Shands, Appellant did not voluntarily choose to consume an illegal substance, have a negative reaction, and then attempt to claim a defense. He maintained that his wholly involuntary consumption of narcotics caused him to lose his ability to exercise independent judgement and volition. Unlike Shands, *supra*, the facts in Appellant's case fully supported a charge on involuntary intoxication.

In the matter *sub* judice, the trial court improperly conflated the defenses of involuntary intoxication and insanity, believing one could not be raised independent of the other because they are judged by the same standard. Tr. 83, l. 12-Tr. 84, l. 4, Tr. 594, l. 16-Tr. 595, l. 7. This had the preclusive effect of casting aside Appellant's defense and removing it from the jury's consideration. It also in turn, impacted defense counsel's ability to fully argue the law of involuntary intoxication to the jury during closing arguments. See State v. Day, 341 S.C. 410,

535 S.E.2d 431 (2000) (failure of trial court to charge self-defense was held to be reversable error where facts in evidence supported the defense.) While insanity and involuntary intoxication both examine a defendant's mental state at the time of the offense, insanity is a broader, codified defense that requires a showing of a mental disease or defect. S.C. Code Ann. §17-24-10. As the trial court charged, for a jury to find insanity, "the evidence *must show* that at the time of the crime, *the Defendant had a mental disease or defect*, which made him unable to distinguish moral or legal right from wrong, or to recognize the crime as morally or legally wrong." Tr. 635, l. 23-Tr. 636, l. 1. There is no such requirement that a jury must find a mental disease or defect for involuntary intoxication to apply. The jury need only determine that 1) the defendant was given drugs or alcohol without his knowledge and 2) that as a result he lost his ability to exercise independent judgement and volition while committing the crimes. Should a jury determine those two facts to be in existence it would be "the [jury's duty] to find the defendant not guilty." Shands at 125, 817 S.E.2d at 534.

A charge on the defense of insanity is not a substantially correct instruction that sufficiently covers the applicable law of the defense of involuntary intoxication. A fair review of the record shows that the jury was never charged on the law as it related to Appellant's main defense of involuntary intoxication. The trial court's failure to charge Appellant's requested defense, for which there was evidentiary support, had the effect of throwing out the defense of involuntary intoxication by fully removing it from the jury's consideration. Appellant was entitled to the charge based on the evidence presented at trial. The jury was the only entity with the power to determine the validity and force of his claims of involuntary intoxication. The failure to charge Appellant's defense of involuntary intoxication was reversible error.

II.

The forty photographs did not provide evidence of any disputed fact in the case, nor did the photographs provide any insight into Appellant's state of mind which was the only issue at trial.

In State v. Nelson, 440 S.C. 413, 420, 891 S.E.2d 508, 511 (2023), our Supreme Court reversed the trial court's admission of graphic photographs because "the photos had little probative value *as to any disputed fact* in this case." (emphasis added). Our Supreme Court found limited probative value in the photographs at issue in Nelson for two reasons: First, in defense counsel's opening statement he admitted that the only disputed fact was who committed the murder, thus "the information gained from the autopsy photos was not in question," and the "facts evidenced by the autopsy photos" were "undisputed." Id. at 417, 891 S.E.2d at 510. Second, our Court found the "photos provide no insight as to who killed Victim." Id. 426, 891 S.E.2d at 514.

In analyzing the propriety of admitting the photographs during Nelson's trial, our Supreme Court recognized that most of our state's case law surrounding the admission of graphic photographs arose in the context of the *sentencing* phase of a capital murder trial. The Court then reiterated a long-standing principle of law in South Carolina: "In the *guilt* phase of a trial, photographs of the murder victims *should be excluded where the facts they are intended to show have been fully established by competent testimony.*" Id. at 420, 891 S.E.2d at 512 quoting State v. Kornahrens, 290 S.C. 281, 288-89, 350 S.E.2d 180, 185 (1986) (emphasis in original) (emphasis added); see also State v. Waitus, 224 S.C. 12, 27-28, 77 S.E.2d 256 (1953) (There was no dispute as to these facts. All of them were fully established both by uncontradicted medical and lay testimony. These pictures were calculated to inflame and arouse the passions of the jury

and their introduction was wholly unnecessary to establish the facts claimed. They should have been excluded.).

In defense counsel's opening statement to the jury, he conceded that K.S. was injured and stated this case was about the "why." He continued that K.S. had been intentionally drugging Appellant without his consent which caused Appellant to lose "the ability to use good judgment and control." He did not argue that K.S. did not suffer severe bodily injury. He did not argue that Appellant had not caused that injury. He argued that Appellant was not legally responsible for his actions because he was intoxicated against his will. Tr. 102-104. Much like in Nelson, the injuries in the pictures were not at issue. Further, the photographs of the injuries to K.S. do not provide any insight into the "why" that was at issue during trial – the nature and extent of the injuries does not inform whether the person who inflicted them was involuntarily intoxicated. Under the standard set forth in Nelson, the photographs should have been excluded as they had little probative value as to any disputed fact in the case.

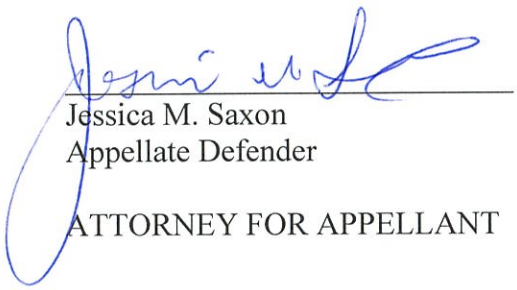
The photographs were extremely graphic, full color images of the injures to K.S., often documenting intimate portions of K.S.'s nude body. The photographs also repeatedly showed the same injuries from different angles. The inherently low probative value of the photographs, combined with their graphic and intimate nature, magnifies the prejudice Appellant suffered by the State's use of the forty pictures. For example, State's Exhibit 87 was entered to show the injuries to the left leg but also showed the base of the pubis and the right breast. Tr. 223, ll. 12-14. State's Exhibit 91, a photograph "to show both of her legs," also showed the labia major and pubis. Tr. 227, ll. 9-13. State's Exhibits 93 and 94, entered to show injuries to the right arm also showed her naked right breast and stomach. Tr. 229, ll. 11-17. In addition to those already mentioned, other photographs were entered specifically to show intimate areas of K.S. State's

Exhibit 88 is a picture of K.S.'s legs open to show her labia majora, labia minora, and pubis. State's Exhibit 89 depicts a "close up" of K.S.'s vagina, while State's 78, 79, and 99 depict various angles of K.S.'s breasts. In total, fourteen of the forty pictures entered show some intimate portion of K.S.'s breasts, buttocks, pubis, labia majora, and/or vagina.

It was not "the graphicness alone" on the photographs that drew the objection of defense counsel. Defense counsel objected because the photographs were extremely graphic, numerous, duplicative, and most importantly went to an undisputed fact. Further, the information in the photographs was testified to at length by numerous witnesses who gave highly descriptive and emotional testimony. When the information in graphic photographs is fully established by competent testimony and when the admission of the photographs would only support an undisputed fact in the guilt phase of trial, the photographs should be excluded because the extremely limited probative value they possess is substantially outweighed by unfair prejudice. See State v. Kornahrens, 290 S.C. 281, 288-89, 350 S.E.2d 180, 185 (1986) see also State v. Nelson, 440 S.C. 413, 420, 891 S.E.2d 508, 511 (2023) and State v. Waitus, 224 S.C. 12, 27-28, 77 S.E.2d 256 (1953).

CONCLUSION

Based on the foregoing argument, as well as the argument in the Brief of Appellant, 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.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of June, 2025.

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Jun 26 2025
SC Court of Appeals

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Reply Brief of Appellant in the above-referenced case has been served upon Andrew D. Powell, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 26th day of June, 2025.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

Leverett, Scott

From: Leverett, Scott
Sent: Thursday, June 26, 2025 2:11 PM
To: Andrew Powell
Cc: Grace Sommer; Saxon, Jessica
Subject: 2024-000172 - State v. Rico Funderburk - Initial Reply Brief of Appellant
Attachments: 2024-000172 - State v. Rico Funderburk - Initial Reply Brief of Appellant.pdf

Dear Mr. Powell,

Attached please find a copy of the Initial Reply Brief of Appellant in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Jessica Saxon
Appellate Defense