

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Williamsburg County

George C. James, Jr., Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ANDRE WALLACE

APPELLANT

APPELLATE CASE NO. 2012-212937

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ANDERS BRIEF OF APPELLANT

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OCT 30 2013

SC Court of Appeals

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### **STATEMENT OF ISSUE ON APPEAL**

Did the trial court err in admitting Exhibits 108 and 110 showing Prosser's decaying corpse and the shotgun wound to his face where the State claimed it only needed the photographs to relate to two matters not in dispute and where the pathologist testifying about the photographs specifically stated a completely different photograph would best illustrate her testimony?

## STATEMENT OF THE CASE

The Sumter County grand jury indicted Appellant Andre Wallace on one count of criminal conspiracy, one count of first degree burglary, one count of possession of a weapon during the commitment of a violent crime, and one count of murder. R. 914. On May 17, 2011, Appellant proceeded to trial before a jury and the Honorable George C. James, Jr. Charles David Barr represented Appellant and Kimberly Barr represented the State. Tr. i.

At the conclusion of the trial on May 20, 2011, the jury found Appellant guilty on the counts of conspiracy, burglary, and possession of a weapon. Due to a hung jury, the court declared a mistrial on the count of murder. Tr. 898, l. 11 – Tr. 899, l. 23. The court sentenced Appellant to thirty-five years imprisonment for burglary, five years for conspiracy, and five years for possession of a weapon, each to run consecutively. Tr. 909, 19 – Tr. 910, l. 6.

This appeal follows.

## ARGUMENT

**THE TRIAL COURT ERRED IN ADMITTING EXHIBITS 108 AND 110 SHOWING PROSSER'S DECAYING CORPSE AND THE SHOTGUN WOUND TO HIS FACE BECAUSE THEY WERE HIGHLY INFLAMMATORY PHOTOGRAPHS WITH MINIMAL PROBATIVE VALUE.**

## STATEMENT OF FACTS

Ernest Prosser was last known to authorities to be alive on October 27, 2009. Tr. 473, ll. 18-22. At the trial for his murder, the State presented testimony from Ronetta Miller and Tiffany Jones that around that time, the two women along with Appellant and a fourth individual named Cornelius McClary agreed to Jones's plan to drive to Ernest Prosser's house to rob him. Miller testified that she entered the house alone and struck a conversation with Prosser, whom she had known for some time, as a distraction. During the conversation, Prosser allegedly spotted through a window Appellant and Jones sneaking toward the back of the house. Miller stayed put while Prosser grabbed a firearm and walked toward a room near the back of the house. McClary ran inside toward Miller from the back door with a gun, but he never crossed paths with Prosser. Miller said she then heard a gunshot and ran out of the back door. The others left the house, and the group met back up at the car and drove away. Miller testified that Appellant admitted shooting Prosser. Tr. 188, l. 21 – Tr. 259, l. 4.

Jones testified that on the evening of October 27<sup>th</sup>, 2009, after Miller entered Prosser's house, Appellant grabbed a firearm from behind the backseat and gave McClary a handgun. Eventually, the three sneaked around the back of the house. Appellant allegedly entered the house with McClary behind him. At that time, Jones realized Prosser had seen them through the window. Jones said she ran back to the car and, once in the back seat,

heard two gunshots. She said Appellant made it back to the car first, and he told her shot Prosser after Prosser fired at him. Tr. 587, l. 20 – Tr. 650, l. 15.

During the trial Appellant never contested the day or manner of Prosser's death and even offered to stipulate to the cause of death. Tr. 451, l. 20 – 453, l. 1. Instead, Appellant's defense from the outset was that he only gave Miller, Jones, and McClary a ride to Prosser's house, and the State could not prove he had anything else to do with the murder. Tr. 145, l. 9 – Tr. 155, l. 1. Nevertheless, during the trial the State presented four witnesses beyond Miller and Jones to testified to the circumstances of Prosser's death. First, Prosser's son testified to finding Prosser's deceased and swollen body slumped on a couch in his blood-doused home on October 30, 2009. Tr. 155, l. 5 – Tr. 180, l. 12. Second, SLED agent Karl Kenley testified about his investigation of the crime scene on October 30, 2009, including findingshotgun pellets in the wall above the victim's body, a shotgun casing on the floor of Prosser's bedroom, and a shell wadding on the floor. Tr. 302, l. 15 – Tr. 314, l. 3. Third, Investigator Willie Brown with the Sheriff's Office testified to his investigation of the crime scene on the same day, including scattered shotgun pellets around the location of the body. Tr. 514, l. 2 – Tr. 525, l. 3.

Finally, the State produced Dr. Erin Presnell, a forensic pathologist who performed an autopsy on Prosser. She testified to the approximate day of Prosser's death and to the cause of his death as a shotgun wound resulting in perforations to the carotid artery and jugular vein. Tr. 449, l. 7 – Tr. 504, l. 14. The State then moved into evidence Dr. Presnell's diagrams of the gunshot wounds to Prosser. Tr. 431, ll. 13-21; Tr. 456, ll. 7-14. The State also wanted Dr. Presnell to refer to color autopsy photographs of Prosser's body, which it therefore sought to introduce into evidence. Tr. 477, ll. 14-25; Tr. 493, ll. 17-21. In

the photographs, decomposition and decay had bloated Prosser's face, discolored his skin green and brown, and caused it to begin sloughing off of his face. Tr. 472, ll. 12-24; Tr. 484, l. 15 – Tr. 485, l. 6; Tr. 487, ll. 1-3; Tr. 494, ll. 4-15. Appellant contemporaneously objected under Rule 403, SCRE that the photos would have no effect on the case other than to inflame the jury and prey upon its passions, that the photos were merely cumulative, and that the probative value of the photos was substantially outweighed by the danger of unfair prejudice. Tr. 465, l. 14-23; Tr. 468, l. 19 –Tr. 469, l. 22; Tr. 476, l. 24 – Tr. 477, l. 4; Tr. 487, ll. 13-20.

The State proffered Dr. Presnell's testimony about the photos outside the presence of the jury. She said that "[t]he photos [were not] necessarily illustrating the cause of death more so as the range of fire."<sup>1</sup> Tr. 455, ll. 17-20; Tr. 456, ll. 3-5; Tr. 458, ll. 19-21. The State claimed it needed to show, for purposes of establishing that a burglary occurred, that the shooter was close enough when shooting Prosser to be inside the house. Tr. 466, l. 19 – tr. 467, l. 8. Dr. Presnell said Exhibit 115 was preferable to the rest because it showed the spread of the pellets and the wadding mark. Tr. 460, ll. 2-22. The State also argued that showing the discoloration and decomposition of Prosser's body was necessary to corroborate the date of his death. Tr. 473, ll. 3-25; Tr. 494, l. 16 – Tr. 495, l. 14.

The dispute narrowed itself down to Exhibits 108, 109, 110, 114, and 115. Exhibits 108, 109, and 110 showed Prosser's bust angled from the right side, left side, and center, respectively. Tr. 475, l. 21 – Tr. 476, l. 2. Exhibit 14 showed a closer view of pellet entrances with the wadding mark. Tr. 460, ll. 5-14; Tr. 472, ll. 9-11.

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<sup>1</sup> Dr. Presnell testified she could infer the range based on the spread and wounds from the pellets connecting with Prosser. Tr. 461, l. 13 – Tr. 463, l. 11.

Dr. Prisnell specifically described Exhibit 108 as showing pellet wounds to the right side of Prosser's face and to his right shoulder, which was "the full extent of the spread of the shotgun pellets entering the body." It also showed leaking fluids from the ear, and some of his skin had begun softening and sloughing off. Tr. 492, l. 17 – Tr. 494, l. 15. She explained that Exhibit 109 showed from the left side the discoloration, pellet marks, and the wadding mark, though not so clearly. Tr. 488, l. 1 – Tr. 491, l. 14. Exhibit 110 was "the frontal photograph" and "demonstrat[ed] again the individual nature of the [pellet] entrances" to "the front of the face . . . ." Tr. 491, l. 20 – Tr. 492, l. 2. Exhibit 114 showed a closer view of the wadding contact mark. Tr. 491, ll. 15-19.

The court admitted State's Exhibits 108, 109, 110, and 114 into evidence. Tr. 493, ll. 17-21.

#### DISCUSSION

The trial court erred in admitting Exhibits 108 and 110 showing Prosser's decaying corpse and the shotgun wound to his face because they were highly inflammatory photographs with minimal probative value. Rule 403 of the South Carolina Rules of Evidence provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Photographs are unfairly prejudicial when they have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). "Although photographs may be used to corroborate other evidence, it 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) (citations omitted). The probative value of evidence is proportional to both its essentialness to prove the matter to which it relates as well as to the significance of the matter to the case overall. *State v. Collins*, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012).

In *State v. Collins*, this Court held that in a case charging owning a dangerous animal and involuntary manslaughter, autopsy photographs of the victim of a mauling by multiple dogs were not admissible under Rule 403. *Id.* at 215, 727 S.E.2d at 760. The Court noted that the photos were alleged to be admissible for only two issues—the cause of death and whether the dogs’ attack was unprovoked and caused by underfeeding by the defendant. *Id.* at 203-204, 727 S.E.2d at 755. The State argued the photos were necessary for its forensic pathologist to explain that the dogs consumed much of the victim’s flesh and to corroborate the testimony of its dog behavior expert. *Id.*

The Court performed its own balancing analysis under Rule 403. It first found that the probative value of the photos was minimal. *Id.* at 207, 727 S.E.2d at 756. While the photos did show that the dogs punctured the victim’s neck and ate a significant portion of his flesh, the State had already presented substantial and convincing testimony from the pathologist to the same things, including a specific description of the cause of death as a laceration to the jugular vein and reference to the pathologist’s autopsy report detailing the missing tissue. *Id.* at 204-206, 727 S.E.2d at 755-56. Thus, “the photos relate[d] to the expert’s opinion only to the extent they show[ed] the same fact testified to by the pathologist, that the dogs ate the boy.” *Id.* at 205, 727 S.E.2d at 755-56. Further, in point of fact, the dog behavior expert barely referred to the photos to establish the dogs were malnourished. *Id.* Thus, the photos were not necessary, nor were the issues to which they

related material, as the behavior of the dogs merely provided a tenuous, inferential basis from which discern the culpability of the criminal defendant. *Id.* at 206-207, 727 S.E.2d at 756.

The Court then found the danger of unfair prejudice from the photos was extreme. *Id.* at 208-209, 727 S.E. 2d at 757. Seven graphic, color photos were admitted, and they showed a boy's partially devoured face and body on an autopsy table. *Id.* The Court related that "seeing the photos draws an intense emotional response and a level of sympathy for the dead child that does not come from the testimony." *Id.*

Next, the Court balanced the probative value against the unfair prejudice. Its analysis depended on the capacity of the photos "to draw the jury's attention away from the elements of the crimes charged, which are framed to focus the jury primarily on the conduct of the defendant." *Id.* at 209, 727 S.E.2d at 758. Specifically, the photos had an "overwhelming capacity to lure the jury into declaring guilt on the emotion basis of sympathy for the boy and his mother and horror at the sight of the boy's body." *Id.* Further, while the photos did add a visual element not present in the witness testimony, they added relatively little probative value. *Id.* at 209, 727 S.E.2d at 758. Even though the photos corroborated witness testimony, they did so to a limited extent, and the evidence related to issues not significant in the case. *Id.* (citing *State v. Jarrell*, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002) (holding because autopsy photos of baby were relevant to motive, extent of abuse, and time of death, they were admissible to prove charges of homicide by child abuse and accessory after the fact even though pathologist testified to death from abuse and defendant offered to stipulate that child suffered sexual abuse)).

The Court then explained it properly performed its own analysis of the photos under Rule 403 because the trial court did not independently analyze the probative value of the photos. *Id.* at 213, 727 S.E.2d at 760. Instead, the trial court merely accepted the pathologists conclusory confirmation that he needed the photos for his testimony. *Id.* at 213-14, 727 S.E.2d at 760. Therefore, the trial court could not have actually properly exercised discretion, which in itself constituted an abuse of discretion. *Id.* at 213, 727 S.E.2d at 760.

Finally, the Court explained that based on the intense emotional reaction that viewing the photos caused, it could not conclude their improper admission was harmless beyond a reasonable doubt. *Id.* at 214-15, 727 S.E.2d at 760.

In this case, Exhibits 108 and 110 provided little to no probative value to the State's case. Like in *Collins*, the photos were not necessary, nor were the issues to which they related material. From the outset, Prosser's defense was that he never approached Prosser's house, and the State could not prove he had anything to do with the robbery. Nevertheless, the State produced Miller, Jones, and four other witnesses to testify to the circumstances of Prosser's death. Prosser's son, SLED agent Kenley, and Investigator Brown all testified to seeing Prosser's deceased body and the shotgun wound. Dr. Presnell testified that Prosser died specifically from perforations to vessels in his neck caused by the shotgun blast. That Prosser died from the shotgun wound was never in dispute, and Appellant even offered to stipulate as much. Indeed, Dr. Presnell testified that the photographs were not useful to show the cause of death.

The State claimed it needed the photographs to show that the shooter was close enough when shooting Prosser to be inside the house for purposes of establishing that a

Appellant even offered to stipulate as much. Indeed, Dr. Presnell testified that the photographs were not useful to show the cause of death.

The State claimed it needed the photographs to show that the shooter was close enough when shooting Prosser to be inside the house for purposes of establishing that a burglary occurred. However, the State had already presented testimony from Miller and Jones about the group's plan to enter the house. Further, Jones specifically testified to watching Appellant enter the back door with McClary behind him. Agent Kenley also testified to finding the shotgun shell inside Prosser's bedroom. And Appellant never contested that Prosser's killer was inside his house when the trigger was pulled.

The State also claimed it needed the photographs to corroborate testimony about the date of Prosser's death. This matter was similarly not in dispute. Not only was it not material to the charges against Appellant, but ample evidence already supported the time of Prosser's death. Dr. Presnell testified that Prosser was last known to authorities to be alive on October 27, 2009. Multiple witnesses testified to the robbery on the same night and the investigation of Prosser's dead body on October 30, 2009. Any conceivable potential probative value to the photographs for this purpose was also undermined by their cumulateness. Photographs 108 and 110 were cumulative to Exhibits 109, 114, and 115. In fact, Dr. Presnell specifically told the trial court Exhibit 115 was preferable to the rest because it showed the spread of the pellets and the wadding mark. Like in *Collins*, the photos related to Prosser's opinion only to the extent they showed the same facts that she and others expressly testified to.

Showing the jury Exhibits 108 and 110 also presented a severe risk of unfair prejudice. Exhibit 108 showed pellet wounds to the right side of Prosser's face. It also

showed leaking fluids from the ear, and some of his skin had begun softening and sloughing off. Exhibit 110 the individual nature of the pellet entrances to the front of Prosser's face. The color photographs showed the decomposition and decay Prosser's corpse, which had discolored his skin green and brown. It also bloated and distorted his face and caused his skin to begin sloughing off. These images would have been very disturbing. Like in *Collins*, the photographs also showed Prosser's body on an autopsy table. Seeing the photos would certainly draw an intense emotional response and a level of sympathy for the dead victim that would not come from testimony.

Thus, the photographs had a strong tendency to draw the jury's attention away from the true issue in the case—the credibility of Miller and Jones's testimony putting Appellant in Prosser's house. The photos evoked feelings of sympathy for Prosser and ire and disgust over his death. The jury would have been focused on excising a price for the destruction caused rather than objectively assessing the State's evidence in the testimony of Miller and Jones.

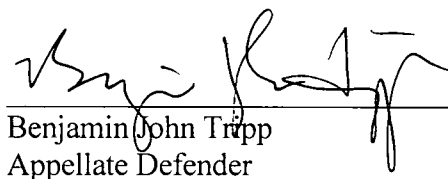
Not only did the trial court err in not determining that Exhibits 108 and 110 were unfairly prejudicial, but its analysis was itself an abuse of discretion for two reasons. First, Dr. Presnell herself told the trial court that Exhibit 115 was preferable to the rest because it best showed the spread of the pellets and the wadding mark. The trial court summarily disregarded her answer and allowed multiple photographs in evidence. Second, the trial court failed to analyze Dr. Presnell's diagrams in balancing the probative value against the danger of unfair prejudice. The State already moved into evidence Dr. Presnell's diagrams of the gunshot wounds to Prosser, which would have more clearly served Dr. Presnell's

purposes without the upsetting and dangerous photographic images. Accordingly, this Court is now in the proper position to make the determination of unfair prejudice.

**CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court's decision to admit the autopsy photographs and remand for a new trial.

Respectfully submitted,



Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of October, 2013.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Williamsburg County  
George C. James, Jr., Circuit Court Judge

THE STATE,

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APPELLATE CASE NO. 2012-212937

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Andre Wallace states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge George C. James, Jr., which was held on May 20, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Andre Wallace.

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of October, 2013.

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---

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Transcript of May 17 to 20, 2011;
- (3) State's Exhibit 108, photograph;
- (4) State's Exhibit 109, photograph;
- (5) State's Exhibit 110, photograph;
- (6) State's Exhibit 114, photograph.

I certify that this designation contains no matter which is irrelevant to this appeal.

October 28th, 2013

  
Benjamin John Tripp  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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Attorney for Appellant

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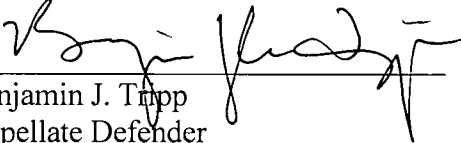
OCT 30 2013

SC COURT of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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 28, 2013

  
\_\_\_\_\_  
Benjamin J. Tripp  
Appellate Defender

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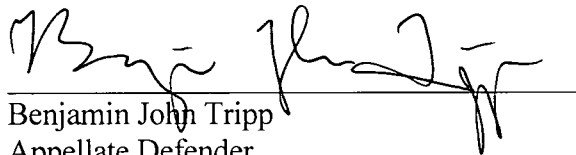
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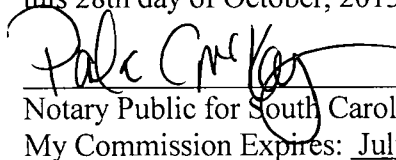
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Andre Wallace, #346096 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of October, 2013.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 28th day of October, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.

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OCT 30 2013  
SC Court of Appeals