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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Lexington County

William P. Keesley, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

V.

JEFFERY T. LUCAS,

APPELLANT

APPELLATE CASE NO. 2013-000455

ANDERS BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

DAVID ALEXANDER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting gruesome photographs of injuries to a child?

STATEMENT OF THE CASE

Petitioner was originally indicted for assault and battery with intent to kill, but in March 2009, he was indicted in Lexington County for the same factual circumstances for infliction of great bodily injury upon a child. App. 505. App. 435, ll. 15 – 22. On March 16 – 18, 2009, petitioner was tried before the Honorable William P. Keesley and a jury. App. 1. Lawrence G. Wedekind, Sara McMahon, and Michael D. Ross represented the State. App. 1. H. Wayne Floyd represented petitioner. App. 1. The jury convicted petitioner. App. 334, ll. 19 – 24. Petitioner did not appeal.

On February 19, 2010, petitioner filed a PCR application. App. 375. On April 25, 2012, a hearing was held before the Honorable Clifton Newman. App. 432. Tommy A. Thomas represented petitioner. App. 432. Kaelon E. May represented the State. App. 432. On February 15, 2013, Judge Newman granted petitioner a belated appeal. App. 492. Judge Newman denied petitioner's remaining PCR allegations. App. 492. This belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) follows.

ARGUMENT

The trial court erred in admitting gruesome photographs of injuries to a child.

Relevant Facts

Petitioner was child's mother's boyfriend. On the day of the incident, petitioner was taking care of child by himself. The child had cerebral palsy. App. 111, ll. 8 – 19. They were on the front porch. App. 110, ll. 18 – 24. The child could not walk on its own and could only move around the front porch by supporting itself with chairs or the railing. Petitioner left child on the front porch and went to get the mail. App. 117, ll. 14 – 22. He then walked to his father's house. App. 140, ll. 16 – 23. He was gone approximately fifteen minutes. App. 140, ll. 16 – 23.

When petitioner returned, he saw the child on the porch. App. 140, ll. 24 – 25. The child's head was stuck between the railings of the porch. App. 117, ll. 14 – 22. He ran to the child. App. 140, l. 25. The child was limp and not breathing. App. 117, ll. 14 – 22. Petitioner picked the child up and took him inside and began administering CPR. App. 140, l. 24 – 141, l. 14. Petitioner told police that he administered CPR "with my fist hitting him in the chest and stomach for a long period of time." App. 140, l. 16 – 141, l. 14. He was able to restore the child's breathing by blowing into his mouth. App. 141, ll. for – 7. Petitioner then left the child to go across the street to call the child's mother. App. 141, ll. 9 – 14. Child's mother called 911.

The State's expert witnesses testified that the child's injuries could not have been received in the manner described by petitioner. Even though the child had had surgery ten days before the incident for an undescended testicle, the State's doctors opined that the child's injuries were caused by "a tremendous amount of force... applied suddenly to

the abdomen." App. 172, l. 7 – 173, l. 8. The child had a severed small intestine, a ruptured scrotum, and other bruises. App. 170, l. 1 – 171, l. 22. The doctors testified they would not expect to see these injuries from a failed attempt to administer CPR. App. 187, ll. 11 – 15. However, one of the doctors admitted that the area of the bruising to the chest and abdomen were all "kind of in one line." App. 201, ll. 1 – 5.

Petitioner moved in limine to exclude photographs of the child that were taken at the hospital. App. 43, ll. 19 – 23. The photographs were gruesome and depicted the child in the hospital and also showed close-up photographs of the child's genitalia. The trial court admitted the photographs over petitioner's objection. App. 175, l. 1 – 179, l. 5.

Discussion

Because the serious injuries to the child were internal and no photographs existed for these injuries, the photographs of the child's external injuries were unnecessary. The State's doctors explained the child's internal injuries without using the photographs. Therefore these gruesome photographs were only admitted to inflame the jury and arouse sympathy for the child.

"[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, these photographs included close up photographs of the child's genitalia which enhances their unfair prejudice.

The court of appeals conducted a thorough Rule 403 analysis of inflammatory photographs in State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (2012). 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. The Collins court concluded the photographs were unnecessary. This analysis compels the same result in this case.

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]. . . ." Id.

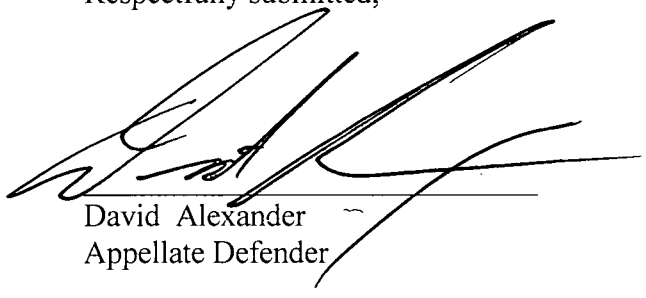
In this case, the serious injuries to the child were internal. The State's experts explained multiple times the mechanism by which they believed the severance of the child's intestine was achieved. They explained this without resort to the photographs. App. 193, l. 4 – 195, l. 17. Since the experts could explain the serious internal injuries without the

photographs, the highly inflammatory photographs of the child's external injuries were superfluous and it was error to admit them under Rule 403.

CONCLUSION

For the foregoing reasons, petitioner's conviction should be reversed and this case remanded for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of November, 2013.

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Appeal from Lexington County
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APPELLATE CASE NO. 2013-000455

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeffery T. Lucas states:

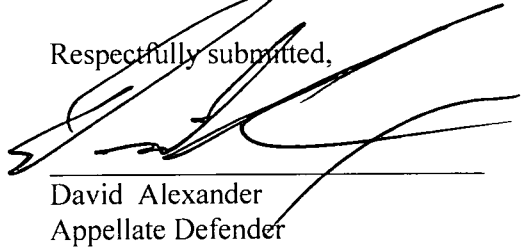
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge William P. Keesley, which was held on March 16-18, 2009, 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 Jeffery T. Lucas.

Respectfully submitted,



David Alexander
Appellate Defender

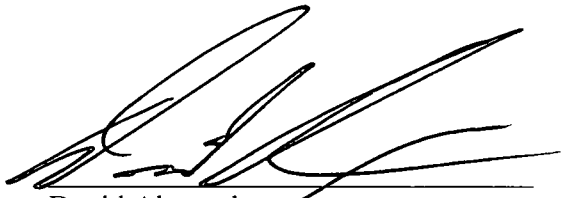
ATTORNEY FOR APPELLANT

This 1st day of November, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant Pursuant to White v. State 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."

November 1, 2013



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant Pursuant to White v. State in the above referenced case has been served upon John Walt Whitmire, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Jeffery T. Lucas, #333799 at McCormick Correctional Institution, this 1st day of November, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of November, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023 .