

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Dillon County
Hon. Paul M. Burch, Circuit Court Judge
Appellate Case Tracking No. 2012-211266

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S.C. Supreme Court

The State,

Petitioner,

v.

Bentley Collins,

Respondent.

Opinion No. 4941 (S.C. Ct. App. filed February 15, 2012)

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON CERTIORARI

- I. The Court of Appeals erred in reversing Respondent's conviction and sentence and in finding error in the admission of necessary, relevant, and not unfairly prejudicial autopsy photographs of the minor victim.

STATEMENT OF THE CASE

Procedural History

Respondent was indicted on charges of involuntary manslaughter and three counts under section 47-3-760(B)(1) of the South Carolina Code for owning a dangerous animal that attacks and injures a human in violation of Section 47-3-710(A)(2)(a) of the South Carolina Code. Respondent proceeded to trial from January 26 through January 30, 2009, in front of the Honorable Paul M. Burch and a jury. The jury found him guilty as charged and Judge Burch sentenced him to five years for involuntary manslaughter; two concurrent terms of three years for two dangerous animal counts; and three years consecutive, suspended on five years' probation, for the final dangerous animal conviction.

The Court of Appeals reversed his conviction and sentence. See State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012). The State filed a Petition for Rehearing on March 1, 2012, which was denied by Order filed March 15, 2012. This Court granted the State's Petition for Writ of Certiorari on August 8, 2013. This Brief of Petitioner follows.

Factual Background

Respondent, living in Dillon County, allowed his dogs to roam unconfined—no fence, no pen, and no tether. The child victim was only 10 years old at the time he was eaten alive by Respondent's dogs.

On several occasions neighbors were chased and harassed by the dogs. A boy from the area and friends rode their four-wheelers down the road in front of Respondent's house. The dogs came into the road to "try to attack the four wheelers and all." (T.108;

R.16). The boy and his mom walked in the area for exercise, but they had to stop walking around Respondent's house because his dogs "would come out in the road and try to bite our legs and stuff." (T.109; R.17).

Respondent's dogs also chased Jerry McAlpine, who lives near Respondent. The dogs would come into the road and chase him while he was on a bicycle. (T.282; R.132). On one occasion, the dogs forced McAlpine off his bike. He positioned the bike between himself and the dogs to keep them from attacking. According to McAlpine, Respondent was aware the dogs chased people and were aggressive to people on the road. During one of the times the dogs chased McAlpine down the road, Respondent was outside and called the dogs back onto Respondent's property. (T.283; R.133).

On November, 3, 2006, the child victim was staying with his Great Aunt and Uncle. His mother returned home on November 3, but the child victim did not return home for supper. (T.100-101; R.8-9). She began looking for the child victim and called law enforcement. (T.101-102; R.9-10).

Another child from the area heard barking and thought maybe his dog had gotten out. He went to Respondent's property and saw three dogs eating what he thought was raw meat. (T.132-133; R.24-25). He indicated he was attacked by another dog and he and his friend ran from Respondent's property and returned home. (T.134-135; R.26-27).

The child victim's mother was riding around the area with law enforcement. They pulled up to Respondent's yard and she immediately saw the child victim lying in the yard. She attempted to get to him, but had to be pulled back by law enforcement because of the dogs. (T.102-104; R.10-12). When she arrived, her son was "tore to pieces." (T.104; R.12).

Chief Deputy Pernell of the Dillon County Sheriff's Office arrived with the child victim's mother. When they arrived and she attempted to go to the child's body, he had to drive back the dogs by swinging his flashlight and yelling at them. (T.207; R.79). Any time someone went near the body, the dogs would come at them and had to be driven away by making noise and shining the flashlights. (T.208; R.80).

Agent Hallman of SLED arrived at the scene to find Dillon County deputies had covered the body with a sheet. She called in animal control to take possession of the dogs, who were acting aggressive. (T.163-164; R.35-36). Agent Hallman indicated she searched the premises and was unable to locate any food left for the dogs. (T.164-165; R.36-37). Agent Hallman took pictures of the scene which indicated the child victim had been killed in one location and dragged around the yard by the dogs. (T.168-170; R.40-42).

Forensic Pathologist Dr. Edward Proctor performed the autopsy of the child victim. He found there "were extensive traumatic injuries consisting of loss of skin and soft tissue in a tearing fashion about the face, the ears, the eyes, the neck, the chest." (T.237; R. 91). He further found loss of skin and tissue in the shoulders and upper arms, as well as extensive bite marks on the back of the neck, the upper torso, and lower legs. (T.237-238; R.91-92). He indicated significant portions of the child had been "eaten away." (T.239-240; State's Exhibit 10; R.93-94). He opined the child victim died "as a result of [extensive] traumatic injury secondary to being severely mauled by dogs." (T.238; R.92).

ARGUMENT

I. The Court of Appeals erred in reversing Respondent's conviction and sentence and in finding error in the admission of necessary, relevant, and not unfairly prejudicial autopsy photographs of the minor victim.

The Court of Appeals erred in finding the autopsy photographs of the minor victim were improperly admitted into evidence. The Court failed to give proper deference to the trial court's discretion in admitting some of the photographs while excluding others, failed to properly balance the photographs probative value against their prejudicial nature, erred in finding the photos were not necessary and corroborative of several experts' testimony, and erred by making a purely emotional decision based on the graphic nature of the photographs.

The photographs were necessary for a full explanation of the child victim's injuries by the forensic pathologist. Further, the State's dog training expert testified to the nature of the attacks and the photographic evidence corroborated his testimony. The photographs were highly probative of several of the elements of the crimes for which Respondent was charged. Finally, the photographs, while graphic, were not unduly prejudicial and were not admitted solely to inflame the sympathy, prejudice, or emotion of the jurors.

"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. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (emphasis added). Further, "[t]his Court reviews 403 rulings pursuant to the abuse of discretion standard, and gives great deference to the trial judge's decision." State v. Myers, 359 S.C. 40, 48,

596 S.E.2d 488, 492 (2004); see also State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) (“A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.”) (emphasis added).

“The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.” State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). “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.” State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995) (emphasis added). Admitting photographs which serve to corroborate testimony is not an abuse of discretion. State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008). Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). “To constitute unfair prejudice, the photographs must create ‘an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.’” State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

The photographs in the instant case were highly probative, notwithstanding the Court of Appeals labeling them “hardly material.” The photographs serve to demonstrate three of the elements of the crime of owning a dangerous animal and further corroborate testimony from the pathologist and the dog expert regarding the three elements. They

demonstrate: 1) Respondent knew or reasonable should have known the animals had a propensity, tendency, or disposition to attack unprovoked, cause injury, or otherwise endanger the safety of human beings; 2) the animals made an unprovoked attack; and 3) the attack caused bodily injury to a human being.

The fact the photographs were used to fully corroborate and explain the pathologist's testimony makes them highly probative. The photographs in this case were admitted to assist the forensic pathologist, Dr. Proctor, in his testimony and explanation of how the child victim died. The trial court, *in camera*, specifically questioned Dr. Proctor regarding the various photographs and his reason for needing the photographs during his testimony. (T.176-179; R.48-51). Dr. Proctor testified: "Your Honor, these would certainly enable me to describe the degree of injury and show the extent of it. . . . But these I think would be very beneficial to explain exactly what happened to this young man." (T.178; R.50). The parties then questioned the doctor in regards to the photographs and their use in his testimony. (T.179-182; R.51-54). The trial court excluded some photographs because Dr. Proctor admitted they were not necessary for his testimony. However, those photographs Dr. Proctor sought to use to explain his findings were properly included and admitted into evidence. (T.182-188; R.54-60).

During Dr. Proctor's testimony, he indicated significant amounts of the child victim's soft tissue were removed or "eaten away" by the dogs. (T.239-240; R.93-94). The forensic pathologist then detailed the significance of the autopsy photographs. (T.242-245; State's Exhibits 27, 30, 32, 33, 34, 35; R. 96-97). As to exhibit 27, he noted: "most importantly you can see actual bite marks all over the lower legs up to the knees." Dr. Proctor testified Exhibit 30 showed a different angle of the bites of the lower legs.

(R.96-97). As will be discussed later, the photos of the lower legs were used by the dog expert to discuss how the animals worked in a pack to bring down the child to be able to consume him. (R.154).

Dr. Proctor testified Exhibits 31-35 demonstrated the extent of the injuries suffered. He specifically noted in each the significant removal of soft tissue or muscular tissue, which corroborated his finding that the child was “eaten” by the dogs. In referencing Exhibit 33, Dr. Proctor noted the photograph demonstrated the cause of death showing the transection of the jugular vein in the boy’s neck. (R.97-99).

The photographs significantly corroborated Dr. Proctor’s findings as detailed in his autopsy report. (T.238; State’s Exhibit 10; R.92; Supp ROA. 1-7). Defense counsel further explored the injuries to the child victim, and Dr. Proctor again referenced the pictures showing the bite marks on the legs and the damage to the neck and shoulders. (T.249-250; State’s Exhibits 27, 33, 35; R.103-104). Dr. Proctor explained based on the pictures, the dogs likely bit the child in the legs to bring him to the ground. He further detailed the injuries as being from just above his knees to his ankles. Finally, in referencing the pictures, he again described the injuries as being to the arms, shoulder, and neck. (R.104).

In addition, the extent of the injuries served to demonstrate the nature of the attack by the dogs and corroborated the State’s expert witness’ testimony that the dogs attacked out of hunger. The pictures corroborated the State’s expert witness who testified these dogs were aggressive and not merely protective. (T.302-303; 314-315; R.146-147; 158-159). The State maintained the dogs were not attacking solely because they were protecting a female dog in heat, but attacked because they were malnourished and had

been mistreated. The extent of the attack was demonstrated in the amount of devastation done to the body of the child victim, and the fact the dogs attacked out of hunger was further exemplified by the areas of the body the dogs consumed. (T.306-307; 309; 328; R.150-151; 153; 172).

Finally, the dog expert testified to several significant facts which were highlighted by the pictures. He testified that the dogs were acting as a pack and consumed the child as a pack. (R.151; 153). He explained that given the significant loss of tissue, it was clear more than one dog had consumed the child. (R.153). The jury needed the pictures to corroborate this testimony. The dog expert also explained based on the pictures it appeared the dogs brought the child down to consume him by first biting his legs. (R.154). This fact was corroborated by Exhibits 27 and 30 as discussed also by the pathologist.

Both this Court and the Court of Appeals have discussed numerous cases related to the admission of photographs, including several cases in which graphic photographs were properly admitted into evidence. In Kelley, this Court found two photographs of the victim's nude body lying on the living room floor with her face and body visibly swollen from the beating by the defendant, as well as photographs showing blood smeared on the walls and floor were admissible to demonstrate the crime scene and the "excess nature of the killing." Kelley, 319 S.C. at 178, 460 S.E.2d at 370-371. In the instant case, just like in Kelley, the photographs are admittedly graphic, but so was the attack. The jury needed to see the "excess nature of the killing" by the dogs in this case to truly understand the pathologist's testimony, and the fact the child was eaten and not just attacked to be driven away as if the dogs were provoked. The excessive nature of the attacks also supported

the dog handling expert's testimony that these dogs consumed the child out of hunger, and attacked and brought down the child specifically for the purpose of feeding, which demonstrated the element of the crime that the owner knew or should have known these animals would have the disposition to attack unprovoked and were a danger to the safety of people.

In State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986), the defendant maintained a photograph of the victim with her breast exposed was inflammatory and unfairly prejudicial because he was on trial for assault with intent to commit criminal sexual conduct in addition to murder. Id. at 213, 349 S.E.2d at 340. This Court explained: "The photograph at issue here corroborated the pathologist's testimony regarding the location of the bullet wound. The Respondent was not prejudiced by its introduction because there was explicit testimony that the victim's blouse and brassiere had been removed by medical personnel when they arrived at the scene in order to administer medical aid." The Court found it was the corroborative effect, as well as the fact other testimony explained what was in the photographs, which allowed the photographs to be admissible without constituting unfair prejudice. The same corroborative effect is clearly demonstrated in this case. The doctor testified regarding the wounds and the cause of death for the child. He was able to utilize the pictures so the jury could clearly understand the significant trauma to the child's soft tissue as a result of being eaten by the dogs and the reason for the blood loss which ultimately killed the minor victim. Further, the dog expert and pathologist testified the pictures demonstrate the child was brought down by the pack of dogs through bites on his legs so that he could be consumed for food.

The Court of Appeals relied on the recent case of State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010), for the correct holding that “[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.” Id. at 623, 703 S.E.2d at 228. The Court, however, overlooked the remainder of the opinion in Torres. As a matter of fact, the basis for admitting the photographs in this case, as well as the fact the trial court excluded some as duplicative, are very similar to the facts of Torres.

In Torres, this Court specifically held: “[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.” Id. at 623, 703 S.E.2d at 229. The Court continued: “autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant.” Id. This Court explained:

The doctor who performed the autopsy used the introduced photographs during his testimony to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed. We do not suggest that these autopsy photographs are mild and easy to view; some of the photographs are close ups of the victims’ injuries and are graphic in nature. However, the purpose of the close ups was to help identify the nature of each particular injury. The net effect of the photographs was to show what Torres did to the Emerys, which goes straight to circumstances of the crime.

Id. at 624, 703 S.E.2d at 229.

As in Torres, the photographs in this particular case were not mild and were definitely graphic depictions of the injuries to this child. The photographs, however, were used to show the nature of the attack by the dogs, as well as the extent of damage done by starving dogs that used the child as a meal. They depict each of the injuries described by the forensic pathologist as well as the bite marks and injuries discussed by

the dog handling expert. The photographs clearly showed the jury the dogs did not merely bite, or even attack out of provocation to protect a female, but instead attacked as a pack in order to consume the flesh and soft tissue of the child as food. These material facts were necessary to demonstrate to the jury Respondent starved the dogs and kept the dogs in such a condition that they had to attack, bring down, and consume a ten year old boy for food. All of this evidence goes to show that Respondent knew or should have known of the dangerousness of his dogs and the fact he kept the dogs loose and starving demonstrated the reckless disregard he held for the safety of others.

Another similarity between this case and Torres is further explicated by this Court: “Moreover, the trial judge did exercise his discretion by excluding three of the State’s photographs, ruling that they were duplicative and prejudicial. While the admitted photographs graphically depict the injuries of the victim, this was a particularly horrific crime, and the admission of the photographs did not unduly prejudice the jury.” Id. at 624, 703 S.E.2d at 229 (emphasis added). The trial judge in the instant case took the exact action as in Torres. He excluded some photographs as duplicative and prejudicial. He admitted graphic photographs depicting the injuries to the victim, and he did so because they assisted the jury in reaching their verdict and assisted two experts in their testimony.

The Court of Appeals also relied on its previous opinion of State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). The Court misapprehended or overlooked the significance of Jarrell. In Jarrell, the Court specifically stated: “A test to determine whether the trial court abused its discretion is whether the photographic evidence serves to corroborate the testimony of witnesses offered at trial. ‘If the photograph serves to

corroborate testimony, it is not abuse of discretion to admit it.” Id. at 106, 564 S.E.2d at 371 (quoting State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 90 (1999)).

In Jarrell, the pathologist clearly testified to the extent of the baby’s anal sexual trauma. Other witnesses testified the anal trauma from the sexual abuse was readily apparent. The Court found the photographs of the same anal trauma described by a pathologist and other witnesses were admissible because they sought to corroborate that testimony. Id. The photographs in that case were graphic and emotional, just as the photographs in this case. The photographs, just as in this case, demonstrate the extent of the injuries testified to by the pathologist and make it clear for the jury the type and extent of injury involved. The graphic nature of the photographs, while clearly present to anyone who viewed them, was not sufficient to prevent their admissibility in Jarrell, and it should not be sufficient to prevent admissibility in this case because the underlying facts and circumstances were very graphic, emotional, and disturbing. See, State v. Holder, 382 S.C. 278, 291, 676 S.E.2d 690, 697 (2009) (finding photographs graphically displaying the beaten and abused body of a child corroborated testimony and were properly admitted: “Although the photographs were graphic, the facts in this case were graphic, and there is no suggestion that their admission had an undue tendency to suggest a decision on an improper basis.”).

Finally, the Court further erred in failing to give proper deference to the trial court, and in finding the trial court failed to properly exercise discretion in the admission of the photographs. As noted above, the trial court’s discretion is considerable in the admission of photographs. See Kelley, 319 S.C. at 177, 460 S.E.2d at 370. The trial court in the instant case exercised his discretion in the exact same way this Court commended

the trial court for exercising discretion in Torres, 390 S.C. at 624, 703 S.E.2d at 229. The trial court allowed explanation of the photographs and how they were to be used to assist the pathologist, along with argument by counsel regarding their probative value and prejudicial impact, prior to making a final ruling. (R.49-59). Additionally, the court excluded several photographs based on their duplicative nature. (R. 51; 53-54).

Respondent's counsel was able to fully argue the prejudicial nature of the photographs outweighed their probative value. Counsel for the State provided argument in support of admitting the photographs. The trial court, in deferring to the pathologist, in considering all the arguments of counsel (He specifically stated prior to ruling: "I appreciate y'all very able argument."), and in removing those that were unnecessary or duplicative clearly exercised his discretion in allowing the photographs. The trial court, in ruling in favor of the State, clearly considered both sides of the argument and found the photographs probative and not unduly prejudicial. As a result, this is certainly not a case where the trial court abused his discretion by failing to exercise his discretion as the Court of Appeals erroneously held.

The trial court properly used his discretion finding the photographs, while graphic, were highly probative, corroborative of the experts' testimony, and not unduly prejudicial. The Court of Appeals erred in substituting its judgment for that of the trial court. The Court erred in finding the photographs should have been excluded because other testimony existed explaining what was in the photographs, when this corroborative effect is one significant reason the photographs were properly admitted.

This Court should reverse the Court of Appeals decision, find the photographs properly admitted, and reinstate Respondent's conviction and sentence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be reversed, the trial court's decision admitting the photographs affirmed, and Respondent's conviction and sentence reinstated.

Respectfully submitted,

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PROOF OF SERVICE

I, SALLY ELLISON, certify that I have served the within Brief of Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 20th day of November, 2013.



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