

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dillon County
Paul M. Burch, Circuit Court Judge

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THE STATE

PETITIONER,

v

BENTLEY COLLINS

RESPONDENT.

Appellate Case No. 2012-211266

BRIEF OF RESPONDENT

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PETITIONER'S STATEMENT OF ISSUE ON APPEAL

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.

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The Court of Appeals correctly determined the trial judge erred in admitting into evidence seven photographs taken during the autopsy of the seven-year old victim graphically displaying his partially-devoured corpse.

STATEMENT OF THE CASE

A Dillon County Grand Jury indicted Respondent for involuntary manslaughter and three counts of permitting a dangerous dog to go unconfined on his premises in violation of Section 47-3-760. R. 426-431. On January 26 through 30, 2009, Respondent stood trial before the Honorable Paul M. Burch and a jury. Kernard Redmond, Shipp Daniel, and Lee Hayes represented the prosecution, and Robert E. Lee represented Respondent.

The jury found Collins guilty as charged. R. 404, l. 15 – R. 405, l. 7. Judge Burch observed:

I don't think anybody in the court room thinks Mr. Collins intentionally caused any of this tragedy. It's not a case of intention. It's a case of bad judgment. ... This was not the first time that that particular female had been in heat. This day in time, you do not let a dog in heat run at large. If you are a responsible dog owner and citizen, you confine them during that period.

R. 421, ll. 7-22. He then sentenced Respondent to five years for voluntary manslaughter and two concurrent three-year sentences for two counts of violations of the dangerous animal statute. Concerning the third violation of the dangerous animal statute, Judge Burch sentenced Respondent to a consecutive three-year sentence suspended upon five years of probation. R. 422, ll. 14

Respondent filed a timely appeal in the South Carolina Court of Appeals. After reviewing the briefs submitted by the parties and engaging in oral argument, the Court of Appeals reversed Respondent's convictions and sentences in a published opinion. State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct.App.2012); see also, App. 1-10. The state filed a Petition for Rehearing on March 1, 2012. App. 11-20. The Court of Appeals denied the petition on March 15, 2012. App. 21. On April 13, 2012, the state filed a petition for writ

of certiorari. On July 30, 2012, Respondent filed his return. On August 8, 2013, three justices of this Court, the Honorable Jean Hofer Toal, John W. Kittredge, and Kaye G. Hearn granted the state's petition. On November 20, 2013, the state filed its brief of Petitioner. Respondent now files his brief.

ARGUMENT

The Court of Appeals correctly determined the trial judge erred in admitting into evidence seven photographs taken during the autopsy of the seven-year old victim graphically displaying his partially-devoured corpse.

Relevant facts

The victim's mother testified that on November 3, 2006, she arrived home after a trip to Sanford, North Carolina and was unable to locate her son. R. 8, ll. 23-24; R. 9, ll. 12-25. She called the police who assisted her in looking for her son. R. 10, ll. 1-7. Their search led them to Respondent's home where they found the victim lying in the yard. R. 10, ll. 8-14.

In-camera hearing

Prior to the prosecution calling Dr. Edward Proctor, Jr., a pathologist, to testify concerning his autopsy of the victim, the judge presided over an in-camera hearing concerning the admissibility of a series of autopsy photographs offered by the state as exhibits. R. 43, ll. 10-12. The prosecution offered Exhibit 27, "a picture of the lower body," and claimed it would "be important both for Dr. Proctor's testimony based on his report and [the] animal trainer." R. 45, ll. 10-13. Exhibit 36, "a close picture from the autopsy of the victim's face," was offered by the state because it would "be important in Dr. Proctor's testimony as it relates to what occurred in his opinion at that time." R. 45, ll. 15-18. The prosecution offered Exhibit 35, "a further picture of the torso which show[ed] both arms being eaten away, shoulders exposed and frontal picture of the face." R. 45, ll. 19-21. The state claimed "Dr. Proctor did indicate [the photo] would assist in his recitation of his findings." R. 45, ll. 21-23. Next, the prosecutor offered Exhibit 34, which was "a picture of

the back of the neck which show[ed] what appear[ed] to be an ear eaten off and some other areas that [the prosecutor] assert[ed] had been actually eaten by dogs.” R. 45, l. 24 – R. 46, l. 2. Exhibit 33 – “a picture of the left side of the victim’s neck area where it shows again [the state] allege[d] the extent that it was eaten away” – was offered. R. 46, ll. 3-6. The prosecution offered Exhibit 32, which was described as “a picture of ... the left torso with [what] look[ed] like some ribs and tissue exposed, and shoulder down to the elbow exposed.” R. 46, ll. 7-10. Exhibit 31, which showed “the same thing that[was] represented in the previous exhibits” was offered as well. R. 46, ll. 11-12. The prosecutor offered Exhibit 30 – “a picture of the back of the leg reflecting what [the prosecution] allege[d] [was] bite marks from the dogs in the lower body.” R. 46, ll. 13-15. The next exhibit offered by the prosecution was Exhibit 28, which was believed to be the left leg showing “bite marks as well.” R. 46, ll. 16-20. Finally, the prosecutor offered Exhibit 29 showing the “leg with bite marks.” R. 46, ll. 21-22. According to the prosecutor “those exhibits would be for the purpose of Dr. Proctor’s testimony for the autopsy.” Tr. 46, ll. 23-24. Thus, the prosecutor claimed all of the proposed exhibits were intended for use during Dr. Proctor’s testimony and that Exhibit 27 would be used during Dr. Proctor’s and the animal trainer’s testimony.

Respondent objected to Exhibits “31, 32, 33, 34, 35, 36, 30, 29, 28, and 27.” R. 48, ll. 11-12. Thereafter, the prosecutor called Dr. Proctor to the stand concerning the Exhibits. The judge explained to Dr. Proctor that the prosecution was seeking to introduce a series of photographs and to support the submission, the prosecutor had informed the judge that the photographs “were necessary for [Dr. Proctor] to explain [his] findings.” R. 49, ll. 13-19. The judge asked Dr. Proctor to review the photographs “and confirm that on all of them”

and to let the court know if he felt he did not need any of them. R. 49, ll. 20-23. Dr. Proctor testified the photographs would enable him “to describe the degree of injury and show the extent of it.” Dr. Proctor conceded that Exhibits 28 and 29 were close-up photographs of other photographs, and therefore duplicative. Dr. Proctor agreed to the exclusion of those. R. 50 lines 2-15. The judge made a preliminary ruling that all of the others were admissible “based on his testimony and he needs it in his scientific explanation.” R. 51, ll. 13-15.

Thereafter, Respondent questioned Dr. Proctor concerning the photographs. Concerning Exhibit 31, Dr. Proctor testified he would testify that the photograph showed “the degree of injury with the loss of the soft tissues, the outline of the wound and just the degree of injury that[was] inflicted upon this child.” According to Dr. Proctor, the photograph showed bite marks and the ripping injuries to the right side. R. 51, l. 24 – R. 52, l. 9. He then testified that Exhibit 32 showed the same on the left side. R. 52, l. 9-12. Exhibit 33 “show[ed] a massive injury to the left side of the face to include virtual loss of the ears, exposure of the bones and complete loss of the neck musculature to include the vascular tissues of the neck.” R. 52, ll. 14-18. Dr. Proctor testified Exhibit 34 showed a view from the back of what Exhibit 33 showed. R. 52, ll. 19-22. Exhibit 35 presented “an overview showing both the ri[ght] and left side injuries as well as the extensive trauma to the face to show virtual complete loss of the nose, loss of all the tissue around the upper and lower jaw, exposure of the teeth, and loss of the left eye.” R. 52, l. 24 – R. 53, l. 3. Subsequently, he admitted that he could give the same testimony using 35 as he would give using 36. R. 53, ll. 4-10.

The prosecutor then questioned Dr. Proctor concerning Exhibits 35 and 36. Dr. Proctor testified that Exhibit 36 better illustrated the loss of the left ear because “[t]he blow

up certainly show[ed] a more direct view of the los[s] of those.” R. 53, l. 22 – R. 54, l. 14. The judge sustained Respondent’s objection to Exhibits 36 and 29. R. 54, l. 24 – R. 55, l. 8. Respondent then renewed his objection to exclude the remaining photographs as well. Respondent explained the photographs were “designed to stir the passion and prejudice of the jury” and unnecessary for the prosecution to prove its case. R. 55, ll. 20-25. Respondent argued the photographs were not necessary to establish any of the essential elements of the charged offenses. R. 56, l. 1 – R. 57, l. 20. The prosecutor argued the photographs showed “the fact that the nature of the attack was such that it was an attack out of hunger not out of provocation.” R. 58, ll. 1-4. In response, Respondent argued that the prejudicial effect of the photographs outweighed the probative value in light of the tender age of the victim and the gruesome contents of the photographs. R. 58, l. 21 – R. 59, l. 4.

The judge ruled as follows: “It is an unusual case, however, we’ve got to keep in mind that we’ve got involuntary manslaughter which involves death, cause of death. You’ve got Dr. Proctor here who is one of the best, and he’s informed the Court that he needs it.” The judge went on to overrule Respondent’s objections concerning the autopsy photographs. R. 59, ll. 5-13. Thus, the court admitted Exhibits 27, 30, 31, 32, 33, 34, and 35 into evidence. R. 59, ll. 16-20; R. 60, ll. 10-16.

Testimony of Dr. Edward Proctor, Jr.

The prosecution then presented Dr. Proctor to the jury. Dr. Proctor testified that he performed the autopsy on the victim on November 5, 2006. R. 91, ll. 1-77. He explained the autopsy revealed “the victim suffered 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.” R. 91, ll. 15-22. Dr. Proctor explained the boy’s skin and soft tissue was gone from

his shoulders to his elbows, leaving exposure of his left and right arms. R. 91, l. 23 – R. 92, l. 1. He went on to explain the injuries “exposed all of the soft tissue of the neck as well as lacerated, basically transected the jugular vein on the left side.” R. 92, ll. 4-6. Dr. Proctor opined that the victim “died as a result of extensive traumatic injury secondary to being severely mauled by dogs.” R. 92, ll. 7-10.

The prosecutor then admitted the autopsy report into evidence. R. 92, ll.11-24. In painstaking detail, the prosecutor and the pathologist reviewed the findings contained with the autopsy, including the victim’s loss of skin to his face, including his nose, ears, lips, and soft tissue around his jaw. R. 93, ll. 13-21. Dr. Proctor also explained that in his expert opinion, the flesh had been “eaten away.” R. 94, ll. 5-10. He explained that the victim was alive during the attack “until the injuries to the neck that transected the blood vessel in the neck allowing him to bleed enough until he either became unconscious or expired.” R. 94, ll. 14-17.

Dr. Proctor explained that he took photographs during this autopsy, which he normally did not do. He explained he left the autopsy, went to his home where he retrieved his camera, and returned to the autopsy to take photographs. When asked why he took photographs, he said the “autopsy showed tremendous traumatic injury This degree of injury was a[s] significant traumatic injury as [he had] seen. [He had] never seen an attack by animals of this type.” R. 96, ll. 1-6.

The prosecutor and Dr. Proctor then discussed the photographs. Exhibit 27 showed dirt and grime on the lower torso where the body was dragged and bite marks on the legs. R. 96, l. 19 – R. 97, l. 4. Exhibit 30 showed the bite marks on the backside of the legs. R. 97, ll. 5-11. Moving to Exhibit 31, Dr. Proctor testified the photograph depicted the right

side of the victim. The photograph showed loss of skin around the mouth, the loss of the right ear, loss of tissue in the neck, exposure of the shoulder bone to the elbow. R. 97, ll. 14-21. Exhibit 32 showed the victim's left side with "the same pattern of injury" as described in the prior exhibit concerning the right side. R. 97, l. 23 – R. 98, l. 7. Turning to Exhibit 33, Dr. Proctor explained that it was an "enlarged view" showing the loss of muscular tissue in the neck, "[a]nd in the midst of this, which is very hard to see in this picture, but at the time of autopsy the jugular vein was essentially transected, torn in half." R. 98, ll. 9-15 (emphasis added). This was the injury, Dr. Proctor opined, that severed the vascular tissues going to the head and resulted in massive hemorrhage. R. 98, ll. 16-22.

Exhibit 34 showed the back of the neck, including bite marks, and portions of the wound on the left neck, which were in Exhibit 33. R. 98, l. 24 – R. 99, l. 5. Finally, Exhibit 35 provided "an overview" of the body. As Dr. Proctor described: "Again, complete loss of all the skin about the upper and lower jaw, exposure of the mandible, the teeth, loss of the nose, loss of the left eye, loss of the right ear, maceration of the left ear as well as extensive injury to the shoulder with exposure of the bones." R. 99, ll. 8-14.

Testimony of Craig Thompson

Craig Thompson, who was qualified as "a dog behavior expert" testified on behalf of the prosecution as well. R. 143, l. 19; R. 145, l. 11-13. The prosecutor posed one question to Thompson concerning the autopsy photographs – what did he find significant in reviewing those particular photographs as it related to the level of aggression of the dogs. Thompson responded: "[I]n ten years going back on reports that I've noted on dog bites and dog attacks and deaths caused by dogs this is the wors[t] case I've ever seen. I worked for the Sheriff's Office for over a decade, and I have never seen something [s]o gruesome." R.

149, l. 25 – R. 150, l. 8.¹ Thompson testified that based on his review of the incident reports, it was significant and unusual that the dogs attacked and consumed a person. R. 146, l. 18 – R. 147, l. 3. Based on a hypothetical presented by the prosecutor, Thompson testified that dogs, guarding what they killed, would approach a person who neared the kill. R. 147, ll. 12-20. Thompson testified that the dogs were severely underweight based upon his review of the veterinarian’s report and the photographs of the dogs. R. 149, l. 2-19; R. 154, l. 16 – R. 155, l. 25. He also testified that the police reports indicated the officers saw no food on the premises, which led Thompson to conclude that the dogs were “starving and looking for food.” R. 150, ll. 9-14.

The state charged Respondent with owning a dangerous animal, which required the state to prove Respondent owned an animal he knew or reasonably should have known had a propensity, tendency, or disposition to attack unprovoked, cause injury, or otherwise endanger the safety of human beings; the animal made an unprovoked attack; the attack caused bodily injury to a human being and the attack occurred while the animal was unconfined on the owner’s premises. S.C. Code Ann. §§ 47-3-710(A)(1) – (2)(a); § 47-3-720.

Petitioner argued at trial that the autopsy photographs were probative of the third element of the “dangerous animal” statute – that the attack was unprovoked. Petitioner’s theory at trial was the dogs were underfed, hungry, and attacked the boy for food. In the Court of Appeals and petition for certiorari, the Petitioner presented two arguments to support its position that the photographs were admissible. The first was that the pathologist

¹ Mr. Thompson worked for the Lexington County Sheriff’s Department from 1989 until 2001. App. 141, ll. 2-24.

needed the photographs to explain that the dogs ate the boy, and the second was that the photographs corroborated the testimony of Petitioner's dog behavior expert. Cert. Pet. 5. Petitioner argued the photographs were not unduly prejudicial and not admitted solely to inflame the emotion of the jurors. Cert. Pet. 5.

In the brief of petitioner, the state argued the Court of Appeals "failed to give proper deference to the trial court's discretion," failed to balance properly 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." BOP 5. Petitioner's argument fails on all accounts.

Discussion

Petitioner admitted the photographs were unfairly prejudicial in its petition for writ of certiorari and brief of Petitioner. Cert. Pet. 5; BOP 5. Petitioner argued the Court of Appeals "erred by making a purely emotional decision based on the graphic nature of the photographs." Cert. Pet. 5; BOP 5. Recently, this Court reiterated its long-standing precedent that "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to substantiate material facts or conditions." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). Rule 403 of the South Carolina Rules of Evidence provides that even 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." Id. (citing State v. Franklin, 318

S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). According to the Petitioner, the photographs were so graphic in nature that a three-judge panel of distinguished jurists of the Court of Appeals decided the case on an improper basis – emotion. If experienced appellate court judges were so swayed by the gruesome nature of the photographs that they were unable to render a decision based upon an application of the law to the facts, then without question twelve members of the jury were rendered incapable of executing their duties to deliver a verdict free of passion and emotion.

Nevertheless, Respondent disputes Petitioner’s contention that the Court of Appeals’ opinion was “a purely emotional decision based on the graphic nature of the photographs.” Rather, the Court of Appeals issued a thoroughly researched, well-reasoned, and comprehensive opinion supported by substantial case law.

In Torres, 390 S.C. at 623, 703 S.E.2d at 229, the prosecution offered several autopsy photographs into evidence during the sentencing phase of a capital murder trial. The pathologist used the photographs to illustrate the number and location of the injuries, as well as the manner in which the injuries were inflicted. Id., 390 S.C. at 624, 703 S.E.2d at 229. The purpose of the close-up photographs was to help identify the nature of each particular injury. Id., 390 S.C. at 623, 703 S.E.2d at 229. As explained by this Court, “the scope of the probative value is much broader [in capital sentencing proceedings] than [in] the guilt phase.” Id. (citing State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986)). Thus, in capital cases, this Court has held autopsy photographs are admissible to show the circumstances of the crime and character of the defendant, which are considerations unique to the sentencing phase of a capital case. Id., 390 S.C. at 623-624, 703 S.E.2d at 229 (citing State v. Rosemond, 335 S.C. 593, 597, 518 S.E.2d 588, 590

(1999); State v. Burkhardt, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007)). In Torres, the trial judge also exercised his discretion by excluding three photographs offered by the prosecution as they were duplicative and unfairly prejudicial. Id. Nevertheless, this Court warned that the photographs at issue were “at the outer limits of what our law permits a jury to consider ... [and] strongly encouraged all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.” Id.

This Court held autopsy photographs were admissible in a homicide by child abuse case where the photographs corroborated the testimony of the pathologist and refuted statements by the accused. State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009). In Holder, 382 S.C. at 281-282, 676 S.E.2d at 692-693, the prosecution accused the victim’s mother and her live-in boyfriend of homicide by child abuse. Initially, Holder told hospital personnel the victim had been involved in an All-Terrain Vehicle (ATV) accident. Id., at 281, 676 S.E.2d at 692. Holder testified that she was not aware of any marks on her son prior to his death and thought he was suffering from food poisoning. Id., at 291, 676 S.E.2d at 697. During an in-camera hearing concerning the photographs, the pathologist testified the photographs would assist him in “demonstrating the anatomic relationships and the disruption of those anatomic relationships. There may be some lack of knowledge of internal anatomy [among the jurors].” Id., at 290, 676 S.E.2d at 697. The pathologist admitted he could explain the injuries without the photographs but was not sure he could “explain it to their understanding.” Id. The pathologist then used the photographs to explain to the jury that some of the victim’s internal injuries showed signs of healing, the

victim had external bruising to his abdomen, and the victim had extensive bruising over his body. Id.

This Court found the photographs demonstrated “the extent and nature of the injuries in a way that would not be as easily understood based on the testimony alone.” Id. This Court held the photographs in combination with the pathologist’s testimony was “particularly helpful to jurors who [were] unversed in medical matters.” Id., at 291, 676 S.E.2d at 697. In addition, the photographs refuted Holder’s testimony that she was not aware of any bruising on her son as the “photographs demonstrate[d] that the damage to the child would have been difficult to ignore” due to the extensive bruising in various stages of healing and torn internal organs. Id.

In the companion case to Holder, the Court of Appeals held the autopsy photographs of the internal organs and other injuries of the child were admissible during the trial of Holder’s live-in boyfriend, Martucci. State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008). The Court of Appeals held the photographs were admissible to corroborate the testimony of the pathologist and were relevant to prove the elements of the charged offense – homicide by child abuse. The photographs showed evidence of abuse, including injuries at various stages of healing, that the abuse was the cause of death, and that the abuse manifested an extreme indifference to human life, which were elements of homicide by child abuse. Id., at 250, 669 S.E.2d at 608.

In State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002), the Court of Appeals held the admission of several autopsy photographs of the victim in the homicide by child abuse and accessory after the fact of murder case was not error. The Court of Appeals held the photographs were necessary to corroborate the testimony presented. The

photograph of the anal injuries due to sexual abuse corroborated the testimony of the pathologist and of other witnesses concerning Jarrell's motive for planning to kill the baby due to the abuse being readily apparent. Id., at 106, 564 S.E.2d at 371. The Court of Appeals held the photographs corroborated the pathologist's time of death testimony, and testimony of others that the child was in a state of rigor mortis and the beginning stages of decomposition. Id. Finally, the Court of Appeals concluded the photographs assisted the jury in understanding the testimony of the pathologist. Id., at 106-107, 564 S.E.2d at 371.

In State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986), this Court held the trial court erred in admitting three color autopsy photographs of one of the victims in this capital murder trial. Although the photographs were used to corroborate other evidence, the trial judge erred in permitting their introduction because they were unfairly prejudicial. "[T]he information contained within the photographs was not really at issue." Additionally, "any arguable evidentiary value of the photographs" was negated by the forensic pathologist's testimony. Id.

Similarly, this Court held the trial judge erred in admitting a color photograph of an entry wound of a deceased during the penalty phase of a capital murder trial was error. The deceased was lying on an autopsy table with "a considerable amount of blood." This Court explained "[t]he photograph [did] not show the crime scene or any post-mortem abuse." Further, the prosecution "did not need to introduce the photograph to show material facts or conditions." Thus, this Court found the photograph was not substantially necessary and was highly prejudicial. State v. Patrick, 289 S.C. 301, 308-309, 345 S.E.2d 481, 485 (1986), overruled on other grounds by Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991).

The Court of Appeals recently held the admission of two photographs in the trial of Glenn R. Lee, who was charged with criminal sexual conduct with a minor in the first degree, lewd act, and unlawful neglect of a child, was error due to the unduly prejudicial nature of the photographs. State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). The photographs, which were found on a digital camera and were taken in a camper where officers arrested Lee's co-defendant,² were taken at least seven months after the last possible incident with the alleged victim. Id. at 529, 732 S.E.2d at 229. The Court explained that the defendant's "subsequent conduct is not necessarily indicative of any conduct before or during the time period of the alleged incident." Additionally, the officer who found the digital camera described them in detail. Admission of the photographs was cumulative, further lessening their probative value. Id. The Court agreed the photographs may have been relevant to the alleged victim's testimony about conduct in Lee's home during the time she lived there, but their prejudicial nature outweighed the probative value. "Both photographs portrayed nude adults in suggestive positions. In one of the photographs, Lee was lying on a bed with another nude female, his genitalia in full view. The other photograph showed two nude females from their chests to their faces." The photographs showed no children. The Court found "their primary purpose was to raise the emotions of the jury and to establish that Lee had a general sexual deviant disposition." The Court held the admission of the photographs was highly prejudicial in light of their sexually graphic nature. Id. at 529-530, 732 S.E.2d at 229-230.

² Lee was arrested in Sumter County on February 6, 2008. Lee's co-defendant was located in Clarendon County living in a camper. State v. Lee, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012).

In another recent case, the Court of Appeals held the admission of three autopsy photographs was not error in a homicide by child abuse case. State v. Dial, 405 S.C. 247, 259, 746 S.E.2d 495, 501 (Ct. App. 2013). During the testimony of a pathologist, the prosecution admitted three autopsy photos showing the injuries to the deceased's head. *Id.* At trial, Dial claimed the injuries to the deceased were accidental – the product of Dial falling while carrying the deceased. The photographs corroborated the testimony of the pathologist concerning the placement and severity of the injuries, which was inconsistent with accidental injury. *Id.* at 260-261, 746 S.E.2d at 502. The Court found the photographs were “highly probative to the issues of whether [the deceased] was abused and whether the abuse was the cause of his death, which are integral elements to the charge of homicide by child abuse.” The Court further found the danger of unfair prejudice did not outweigh the probative value. *Id.* at 261, 746 S.E.2d at 502.

In the instant case, the Court of Appeals reviewed the admissibility of the photographs using a four-step analysis. First, the Court examined the probative value of the photographs, including whether the photographs corroborated testimony. Next, the Court evaluated the danger of unfair prejudice resulting from the introduction of the photographs. Third, the Court balanced the probative value and unfair prejudice. Fourth, the Court reviewed the trial court's decision for an abuse of discretion.

As explained by the Court of Appeals, determining the probative value of the photographs required an understanding of the practical context of the trial, including the charged offenses. The prosecutor charged Respondent with owning a dangerous animal, which required the state to prove (1) Respondent owned or had custody or control of an animal; (2) Respondent knew or reasonably should have known the animal had a propensity

to attack unprovoked, cause injury or otherwise endanger the safety of humans; (3) the animal made an unprovoked attack; (4) the attack caused bodily injury to a human; and (5) the attack occurred while the animal was not confined. S.C. Code Ann. §§ 47-3-710(A)(1)-(2)(a); -720; -760(B). At trial, the prosecutor argued the photographs were probative of the element of lack of provocation. Petitioner argued in its petition for writ of certiorari that the photographs were probative of three elements of the dangerous animal statute: (1) Respondent knew or should have known of the dogs' propensity to attack unprovoked, cause injury, or otherwise endanger others; (2) the animals made an unprovoked attack, and (3) the attack caused bodily injury to a human. Cert. Pet. 10; BOP 6-7.

Petitioner's initial argument was the "photographs were used to fully corroborate and explain the pathologist's testimony," which made the photographs "highly probative." BOP 7. The Court of Appeals correctly held the state elicited ample testimony from the forensic pathologist concerning the victim's injuries and the cause of death prior to the introduction of the photographs. As explained by the Court of Appeals, the state produced the testimony of the pathologist and introduced the autopsy report to explain the injuries. Thus, "the photos added very little to the jury's ability to understand the pathologist's testimony on this point." App. 3. The nature of the injuries suffered by the victim did not require the jury to understand human anatomy because the skin and tissue was eaten away. Cf. Jarrell, supra (holding that the photographs assisted the jury in understanding human anatomy, which was necessary for the jurors to determine whether the infant died as a result of homicide by child abuse). The pathologist described the injuries in plain English, using terms such as face, nose, jaw, shoulder, ear, and eye. Although the pathologist testified concerning a transected jugular vein on the left side, which contributed to the child's death,

the pathologist admitted that injury was “very hard to see” in the photograph used to illustrate this point. Thus, the photographs were not probative of the only testimony of the pathologist that the jury may have required assistance in understanding – laceration of the jugular vein. Just as the testimony of the pathologist in Middleton negated the necessity of the photographs, so did the testimony of the pathologist in the instant case.

Petitioner’s second argument was that the photographs corroborated the testimony of the dog behavior expert regarding the nature of the attacks. Cert. Pet. 5; BOP 8. In fact, the prosecutor asked only one question about the photographs of the dog behavior expert. As indicated by the Court of Appeals, the expert’s “response to the question did not relate the photos to his opinion or how he arrived at it. Rather, the response highlight[ed] the unfair prejudice in the photos.” The dog behavior expert’s response to the question about the photographs was that this was the worst case he had ever seen, and in his over ten years of service with the sheriff’s office, he had “never seen something so gruesome.” App. 4. Thus, the photographs did not corroborate testimony presented by the dog behavior expert. As the Court of Appeals concluded, the probative value of the photographs was minimal. App. 5. Petitioner’s case was not a capital murder trial and these photographs were not offered during the sentencing phase of such a trial where the scope of probative value is broader. Capital sentencing jurors must consider the character of the defendant when making a life-or-death decision. However, the law prohibits jurors in non-capital cases from considering the character of the defendant unless offered by the defendant himself. See Rule 404(a)(1), SCRE.

“The danger of unfair prejudice of the admitted photos is extreme.” App. 6. The Court of Appeals explained that looking at each of the seven color photographs of the ten-

year old boy's partially devoured corpse on the autopsy table was "difficult," but the "combined effect of all seven is disturbing." Three photographs were close-up of the boy's face showing the exposed skull and jaw bone. Two of the close-up photographs showed the exposed arm, shoulder, and ribs where the flesh had been eaten away starting in the middle of the chest, across the shoulders and to his elbows. The Court of Appeals explained the photographs of the face were "chilling." App. 6.

Next, the Court of Appeals weighed the probative value of the photographs against the prejudicial effect. The Court properly recognized that the photographs prompted "an intense emotional response." App. 6. According to the Court, the "photos evoke sympathy for the boy and also for his mother for what she must have endured when she saw her son in this condition." App. 6. Thus, the photographs had an undue tendency to suggest a decision on an improper basis – emotion. The gruesome nature of the photographs had "an overwhelming capacity" to suggest the jury find Respondent guilty on the basis of sympathy for the boy and his mother. As a result, the photographs' prejudicial effect outweighed their minimal probative value.

Finally, the Court of Appeals examined the trial court's decision for an abuse of discretion. The Court of Appeals explained "[t]he trial judge must balance the prejudicial effect of graphic photographs against their probative value." Martucci, at 249-250, 669 S.E.2d at 607 (citing State v. Vang, 353 S.C. 78, 87, 577 S.E.2d 225, 229 (Ct. App. 2003))(emphasis added). Petitioner argued that because the trial "court excluded several photographs based on their duplicative nature" the court exercised discretion. The Court of Appeals rejected this argument based upon the clear record evidence to the contrary. During the in-camera hearing concerning the photographs, the trial judge abdicated his duty to

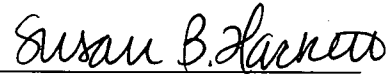
exercise discretion to the pathologist.³ The judge excluded photographs that were duplicative, or cumulative, not based upon any analysis under Rule 403. The Court of Appeals explained that the danger of unfair prejudice of the photographs was so high it required little analysis, but the evaluation of probative value required careful analysis. The trial record is devoid of any analysis by the trial judge in this regard.

³ Of note, Petitioner admitted the trial court “deferr[ed] to the pathologist” when ruling on the admissibility of the photographs. BOP 14.

CONCLUSION

Respondent respectfully requests this Court affirm the decision of the Court of Appeals.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 10th of January, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dillon County

Paul M. Burch, Judge

THE STATE

PETITIONER,

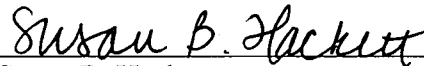
V.

BENTLEY COLLINS

RESPONDENT,

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon William M. Blich, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Bentley Collins, 1590 Fort Harrod Way, Crab Orchard, KY 40419, this 10th of January, 2014.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 10th day of January, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.