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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROGER WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2012-213388

INITIAL BRIEF OF APPELLANT

SUSAN B. HACKETT
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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in admitting a photograph of the deceased's body encased in cement where the danger of unfair prejudice clearly outweighed any probative value of the photograph in light of its obvious graphic nature and lack of any probative value to the elements of the offenses charged.

STATEMENT OF THE CASE

On September 8, 2010, the Berkeley County Grand Jury indicted Appellant for homicide by child abuse (2010-GS-08-1519) and unlawful conduct toward a child (2010-GS-08-1521). R. * (Indictments). Prior to the trial on these charges, the Honorable R. Markley Dennis, Jr. presided over pretrial hearings on September 18, 2012. Debi Herring-Lash and Anne Williams represented the state, and James K. Falk represented Appellant. Hrg. 1. During the pretrial hearing, Appellant entered a guilty plea to the charge of destruction or desecration of human remains. Hrg. 61, line 2 – Hrg. 67, line 6. Sentencing on this charge was deferred until after Appellant's trial on the other two charges. Hrg. Tr. 65, lines 8-19. Appellant was convicted by the jury of homicide by child abuse and unlawful conduct toward a child. Tr. 724, line 22 – Tr. 725, line 14. Judge Dennis sentenced Appellant to ten years' imprisonment for unlawful conduct toward a child, life imprisonment without the possibility of parole for homicide by child abuse, and ten years' imprisonment for desecration of human remains. He ordered all sentences to run concurrently. Hrg. 69, lines 16-24; Tr. 736, line 22 – Tr. 737, line 21; R. * (sentence sheets).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

Grace Trotman and Appellant were romantically involved from 2006 through 2010. Tr. 189, lines 20-21; Tr. 190, lines 1-11; Tr. 281, lines 13-21. Trotman and Appellant had their first child, Ya'jura W., together in September 2007. Tr. 192, lines 10-11; Tr. 193, lines 3-5. They had their second child, Ya'King W., on September 22, 2009. Tr. 195, lines 13-20. During this time, Trotman and Appellant discovered Appellant had fathered a son, hereinafter identified as Minor or deceased, by another woman in 2007. Tr. 199, lines 18-22. Minor began visiting with Trotman and Appellant in their home shortly after this discovery. Tr. 200, lines 12-15; Tr. 326, line 23 – Tr. 327, line 4; Tr. 327, lines 12-14. When Trotman inquired about disciplining Minor, Appellant told her "not to beat him," only "pop him." Tr. 204, lines 2-9. In May 2010, Appellant and Minor's mother arranged for Minor to spend the summer with Appellant and Trotman while Minor's mother relocated to Columbia. Tr. 332, line 23 – Tr. 333, line 19.

Trotman, the state's key witness, described the relationship between Appellant and Minor as "really good in the beginning." Tr. 208, line 22 – Tr. 209, line 2.[1] Trotman claimed that Appellant would encourage Ya'jura W. to "slap [Minor,] scratch [Minor], and drag [Minor] to get him to toughen up." Tr. 209, lines 11-16. Further, Trotman claimed Appellant believed Minor acted effeminately and was slow mentally, which bothered Appellant. Tr. 210, lines 6-13; Tr. 211, line 6 – Tr. 212, line 16. Trotman claimed Appellant started hitting Minor, which left bruises. Tr. 212, line 19 – Tr. 213, line 2. Upon direct questioning by the prosecutor, Trotman testified that she saw Appellant beat Minor less than ten times. In the beginning, Appellant "would just kinda paddle and like pop him

[1] Trotman pled guilty and agreed to testify against Appellant. Tr. 266, lines 2-20.

on his arm." Then, she claimed he began using his closed fist to Minor's back or chest or would "slap his head to the floor." Tr. 228, line 20 – Tr. 229, line 9.[2] Trotman claimed she was too scared to help Minor. Tr. 213, lines 7-8.

According to Trotman, Minor had a "seizure" after Appellant "boxed him in his back." Tr. 214, lines 5-8.[3] She described the "seizure" as Minor "grunting," something "weird" going on with his eyes, and a loss of consciousness. Tr. 214, line 22 – Tr. 215, line 2; Tr. 261, lines 7-15. When they gave Minor some water, he "snapped out of it." Tr. 215, lines 11-15. The following day, Minor woke only after Trotman shook him. She considered this the second "seizure" episode because Minor usually woke very easily. Tr. 21 6, lines 1-20. Minor was "okay" afterward and acted normally. Tr. 216, lines 21-23; Tr. 217, lines 8-10.

On Sunday, June 6, 2010, Minor "had poop on the back of his pants" and on the floor of his bedroom. Tr. 218, lines 10-19. Trotman claimed that Appellant took Minor into his bedroom and she "just heard him kind of bumping and hitting him against the wall." Trotman did not seek to intervene – she stayed on the couch. Tr. 222, line 20 – Tr. 223, line 4. Eventually, Trotman entered the bedroom where she saw Minor "sitting on the wall like he was in a daze." Tr. 223, lines 5-12. Initially, Trotman claimed Appellant stayed in the

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[2] Trotman also claimed that Appellant physically abused her during the relationship, which would result in her living with other people at various times. Tr. 195, line 21 – Tr. 196, line 9.

[3] This allegedly occurred within a week of Minor's death. Tr. 228, lines 11-16; Tr. 284, line 12 – Tr. 285, line 8.

home all night on Sunday until he left for work on Monday; however, she admitted that she was unsure whether that was true. Tr. 223, line 23 – Tr. 224, line 14.[4]

Trotman gave numerous conflicting accounts of what occurred the following morning, Monday, June 7, 2010. At various times, she claimed Minor fell down a flight of stairs or was beaten by Ya'jura W., his two-year old sister. Tr. 255, line 6 – Tr. 257, line 6; Tr. 258, lines 14-24; Tr. 282, line 23 – Tr. 284, line 11; R. * (State's Exhibit 71); R. * (State's Exhibit 72); R. * (State's Exhibit 73).

At the trial, Trotman testified she was feeding Ya'King W. when Minor and Ya'jura W. started fighting. When the two did not stop at her verbal command, she popped them on their arms. Tr. 224, lines 15-25. Minor "fell to his bottom, lost balance and hit his head on the wall." Tr. 225, lines 1-3; Tr. 304, lines 6-25.[5] Trotman claimed Minor "started acting different, like the other days where he was having trouble breathing, like gasping for air." Tr. 227, lines 8-12; Tr. 305, lines 15-17. She claimed she performed CPR on Minor, which she learned from a television program. Tr. 227, lines 13-20; Tr. 305, lines 18-21. After performing CPR, Trotman claimed Minor was breathing and his heart was beating. She

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[4] Kelly Garrett testified that she received a telephone call from Appellant around 5 a.m. on Monday morning asking for a ride from the Economy Inn, where he was staying, to the home he shared with Trotman, and then to his place of work. Tr. 570, lines 3-23. Garrett picked Appellant up from his hotel room in Summerville shortly after 6 a.m. Tr. 573, lines 1-20. She then took him to his home where Trotman was waiting. Tr. 573, lines 21-25. She waited while Appellant retrieved his work items and took him to work. Tr. 574, line 8 – Tr. 575, line 4. Ron Patel, the owner of the Economy Inn in Summerville, testified that according to his daily report, an individual named "T. Williams" checked into room 305 for one day on June 6, 2010. Tr. 594, line 12 – Tr. 597, line 1; R. * (Defendant's #1).

[5] On cross-examination, Trotman admitted she told police that she snapped and hit Minor on Monday morning while Appellant was working. Tr. 297, line 4 – Tr. 300, line 18. Whilden Baggett testified that Trotman demonstrated striking Minor after she "snapped" under the pressure. Tr. 604, line 1 – Tr. 606, line 12.

then ran outside to use a neighbor's phone. Tr. 229, line 13 – Tr. 230, line 8; Tr. 305, lines 22-23. Instead of calling for an ambulance, Trotman called Appellant who was at work. Appellant told her he was on his way home, but had to wait for a ride. Trotman did not tell the neighbor's about Minor's condition. Tr. 230, line 10 – Tr. 231, line 19. Trotman used another neighbor's phone to call Appellant again. Tr. 231, line 20 - Tr. 232, line 22. Trotman did not return to Minor; instead, she waited outside for Appellant to arrive. Tr. 232, line 23 – Tr. 233, line 4; Tr. 306, line 25 – Tr. 307, line 3.

Appellant discovered Minor's lifeless body when he arrived home from work. Tr. 233, lines 7-10. The two then devised a plan to dispose of Minor's body – placing the body in a trash can and then covering the body with cement. Tr. 234, line 1 – Tr. 235, line 23. Trotman rented a truck, which the two used to transport Minor's body to Orangeburg County, where they placed the body in an isolated area. Tr. 235, line 25 – Tr. 236, line 9; Tr. 236, line 24 – Tr. 241, line 3.

During the week of July 4th, Minor's mother wanted to visit with Minor. Tr. 244, line 22 – Tr. 245, line 12; Tr. 335, lines 10-21. Trotman drove with her two children to The Battery in Charleston where she pretended Minor had gone missing. The police arrived and assisted in the search for Minor. Tr. 248, lines 16-22; Tr. 253, line 13 – Tr. 254, line 1; Tr. 339, line 11 – Tr. 340, line 16; Tr. 340, line 23 – Tr. 341, line 5. Eventually, the police transported Trotman to the police station where she was questioned for hours by various members of law enforcement over several days during which she told numerous lies. Tr. 255, line 6 – Tr. 257, line 6; Tr. 258, lines 14-24; R. * (State's Exhibit 71); R. * (State's Exhibit 72); R. * (State's Exhibit 73). During the interrogation, Trotman told police where

to find Minor's body. Tr. 257, line 8 –Tr. 258, line 10. At the end of the police interviews, Trotman confessed to hitting Minor. Tr. 261, lines 16-18.

The state's pathologist, Nicholas Batalis, opined the cause of death was "homicidal violence, including probable blunt head trauma" because of the condition in which the body was found and his finding of two contusions on the scalp. Tr. 460, lines 1-25. Dr. Batalis determined there were no skull fractures followed by bleeding around the brain. Tr. 466, line 8 – Tr. 467, line 1. Thus, he concluded Minor suffered "a concussive type phenomenon" or what is called an axonal injury. This occurs when the brain is hit back and forth in the skull resulting in a shearing injury. Tr. 467, lines 2-12. According to Dr. Batalis, axonal injury could occur when the brain is exposed to an injury after an initial injury when the brain has not completely healed from the initial impact. This second injury may occur within a relatively short period of time to the first injury. Tr. 468, lines 15-21. Dr. Batalis admitted that axonal injury was only "one way in which head trauma could have caused [Minor] to die." Additionally, he could not rule out "second impact" injury. Tr. 472, line 24 – Tr. 473, line 11.

Appellant's expert pathologist, Kimberly Collins, explained that while the state's pathologist certified death as homicidal violence including blunt head trauma, other forms of homicidal violence were not ruled out. Tr. 487, line 20 – Tr. 488, line 14. Dr. Collins explained Minor may have died from asphyxia, commotio cordis, or a violent push causing Minor's neck to wrench to the side. Tr. 488, line 15 – Tr. 489, line 17. Importantly, Dr. Collins explained the contusions to the scalp were not fatal. Tr. 490, lines 16 – Tr. 491, line 1. Although axonal injury was a possible cause of death, Dr. Collins determined it was not any more likely to have caused Minor's death than asphyxiation. Tr. 491, lines 2-16.

Dr. Carol Jenny, who testified on behalf of the prosecution, opined that Minor "died because of repeated head injuries which led to his eventual collapse." Tr. 505, lines 13-19. In her opinion, Minor suffered from a diffuse axonal injury, meaning the brain cells were concussed and stopped functioning, over the weeks leading to his death. Tr. 507, line 22 – Tr. 508, line 2. This opinion was based entirely upon reports that Minor suffered from seizures and decreased levels of consciousness. Tr. 508, lines 3-14; Tr. 511, line 6 – Tr. 512, line 12; Tr. 521, line 20 – Tr. 522, line 4. Further, Dr. Jenny concluded Minor had "multiple episodes of head injury, of concussion" based upon the witness statements she received from the prosecutor. Tr. 512, line 13 – Tr. 513, line 10. Being hit multiple times makes a child more vulnerable to a repeat episode, which Dr. Jenny characterized as "second impact syndrome." Tr. 513, lines 11-21. On cross-examination, Dr. Jenny was forced to admit that because she based her opinion upon reports of Minor's behavior and not upon a physical examination, that her opinion would be incorrect if the reports were inaccurate. Tr. 522, lines 5-10; Tr. 529, lines 9-14; Tr. 529, line 21 –Tr. 530, line 5. Dr. Jenny also explained that a concussion could not result from a blow to the chest or the back, which were the types of hits Trotman claimed were perpetrated by Appellant. Tr. 522, lines 17 -23. She was also forced to admit that the site of the contusions was a common place for bruises to develop on new walkers. Tr. 524, line 13 – Tr. 525, line 2.

ARGUMENT

The trial judge erred in admitting a photograph of the deceased's body encased in cement where the danger of unfair prejudice clearly outweighed any probative value of the photograph in light of its obvious graphic nature and lack of any probative value to the elements of the offenses charged.

Relevant facts

Dean Kokinda, a lieutenant in the forensic services division of the Berkeley County Sheriff's Office responded to a call in Orangeburg County on July 7, 2010. Tr. 360, line 22 – Tr. 361, line 24. He was directed to an area behind an abandoned single-wide trailer approximately twenty-five feet into a wooded area. At the location, he found a blue plastic thirty-five gallon trash can full of cement. The area appeared to be a dumping site for household trash. Tr. 362, lines 16-25. The trash can had a split on the side from which cement protruded. Kokinda could see what he thought was "decomposing flesh," insect activity, and maggots. Tr. 364, lines 1-10. When the prosecution sought to introduce six photographs from the scene, Appellant objected to the introduction of two of those – state's exhibits #28 and #29 - based upon Rule 403 of the South Carolina Rules of Evidence. The judge sustained the objection as to #29, but overruled the objection as to #28. Tr. 365, lines 4-17. Kokinda described the photograph as showing the trash can with the recliner, which had been resting atop the trash can removed. Additionally, the photograph showed the cement protruding from the top and a split in the plastic "towards the bottom and on the side." This was the area where Kokinda saw insect activity. Tr. 368, lines 5-17.

Important for the analysis of whether the trial judge erred in allowing the state to introduce the photograph of the deceased, State's # 28, is how the trial judge ruled

concerning photographs from the autopsy. During a pretrial hearing on September 18, 2012 appellant moved to exclude photographs from the autopsy. The prosecutor intended to use seven photographs of the fifty taken during the autopsy. The prosecutor admitted there was "very little probative value to the pictures of the body" and as a result, the prosecutor was not seeking to admit those. However, the prosecutor wanted the seven photographs, showing the deceased's body in a barrel, to "show the manner in which and the extent to which the defendants went to conceal the body" and for the pathologist "to explain the impact of that type of concealment on his examination of the body." Hrg. 12, line 23 – Hrg. 13, line 19; Hrg. 55, line 3 – Hrg. 56, line 17; Hrg. 57, lines 7-16.[6] The judge explained that his inclination was to exclude the photographs because they were not probative and the danger of unfair prejudice substantially outweighed any probative value. Hrg. 56, line 18 – Hrg. 57, line 3; Hrg. 57, lines 19-25.

Appellant explained that number seven even showed the body parts. Hrg. 58, lines 4-7. The judge surmised that the prosecution would present evidence that the body was "encased in cement" and all that was necessary to show that "somebody took the time to put a body, put it in cement." However, the photograph did not "do anything" or "add to that." According to the trial judge, the "only other reason is the inflammatory aspect of it." He determined the photograph was "inflammatory." Hrg. 58, lines 14-25.

The prosecution used the photograph again during his closing argument to the jury. After placing the photograph on a screen, the prosecutor explained it was "a picture of the

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[6] Although the parties referred to these items as "pre-marked" and "marked," it does not appear from the transcript that these photographs were filed with the Clerk of Court because the court reporter did not include a page for the exhibit list, and the transcript for the trial does not show these photographs as exhibits.

trash can with little [Minor]'s body in it, filled with concrete and a couch over it." Tr. 674, lines 1-5. He then applauds Trotman for leading the police to the body, which he speculated would have never been found without her assistance. Tr. 674, lines 5-15. At the end of his closing, the prosecutor presented a photograph of Minor to the jury as well while asking the jury to think about Minor during deliberations:

> You know, this is what this case is about. You heard my voice, you heard this (indicating Ms. Herring-Lash) voice, the other attorney's voice, but no one is ever going to hear his (displaying picture of [Minor]) voice again. Think about this little boy when you go back there. Think about what his life was like in those last days. Think about justice. I am asking you to have the courage of your convictions when you think about that child. Don't cave in because you know he did this. Hold him accountable. This is about the truth and it's about justice and it's about time for justice in this case.

Tr. 696, line 19 – Tr. 697, line 8.

Discussion

"Photographs 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)).

Recently, this Court reviewed the admissibility of the photographs using a four-step analysis in State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012). The first step required an examination of the probative value of the photographs, including whether the

photographs corroborated testimony. Next, an evaluation the danger of unfair prejudice resulting from the introduction of the photographs was conducted. Third, this Court balanced the probative value and unfair prejudice. Fourth, the Court reviewed the trial court's decision for an abuse of discretion. Id.

Determining the probative value of the photographs required an understanding of the practical context of the trial, including the charged offenses. Id. at 203, 727 S.E.2d at 754. Where the prosecutor elicited ample testimony from the forensic pathologist concerning the victim's injuries and the cause of death prior to the introduction of the photographs, "the photos added very little to the jury's ability to understand the pathologist's testimony on this point." Id. at 204, 727 S.E.2d at 756. Additionally, this Court held "the danger of unfair prejudice of the admitted photos is extreme" because 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." This Court explained the photographs were "chilling." Id. at 208, 727 S.E.2d at 757.

In State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986), the 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.

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 the 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, the 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. Burkhart, 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, the 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.

Our Supreme 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.

The 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. The 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, this Court 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). This Court 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), this Court 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. This Court 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 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, this Court concluded the photographs assisted the jury in understanding the testimony of the pathologist. Id., at 106-107, 564 S.E.2d at 371.

The admission of three photographs of the victim's face in a murder case was not erroneous because the photographs corroborated the experts' testimony of the angle and distance from which the victim was shot and to show the residue on the victim's eyelids suggesting his eyes were closed when he was shot according to our state supreme court. Thus, the photographs were relevant and probative of a material issue in the case. Additionally, the photographs were not unduly gruesome in light of the insignificant amount of blood. State v. Nichols, 325 S.C. 111, 121-122, 481 S.E.2d 118, 123-124 (1997).

The trial judge erred in admitting the photographs of the cement-filled trash can showing the split in the can and cement and evidence of insect activity because the danger of unfair prejudice to Appellant outweighed any probative value. The prosecutor used the photograph with only one witness – a police officer who described where the body had been found. The only other time the prosecutor used the photograph was during his closing argument when he was arousing the passions of the jury during his plea for justice for Minor. The photograph was not used by the prosecutor to identify the victim or by the pathologist to describe the manner of death.

Petitioner was charged with homicide by child abuse pursuant to section 16-3-85 of the South Carolina Code. The state was required to prove Appellant caused "the death of a child under the age of eleven while committing child abuse or neglect, and the death occur[ed] under circumstances manifesting an extreme indifference to human life" or that Appellant knowingly aided and abetted another person to commit child abuse or neglect, and the child abuse or neglect resulted in the death of a child under the age of eleven. S.C. Code Ann. § 16-3-85(A). The statute further defined child abuse or neglect as an act or omission which caused harm to the child's physical health or welfare. Still further, the statute defined harm as resulting from infliction or allowing to be inflicted physical injury, from the failure to supply essential care that results in death, or resulting from abandonment causing death. Additionally, the prosecution had charged Appellant with violating section 63-5-70 of the South Carolina Code, which makes it unlawful for a parent to "place a child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety," to "do or cause to be done unlawfully or maliciously any bodily harm to the child so that the

life or health of the child is endangered or likely to be endangered," or to willfully abandon the child. S.C. Code Ann. § 63-5-70(A).

For purposes of both of the statutory provisions, the issue before the jury was who inflicted harm upon the child. The photograph of Minor's body encased in cement in a trash can where insect activity had begun the process of decomposition failed to provide any probative evidence concerning the identity of the perpetrator of the injuries to the child. The more distant photographs, to which Appellant did not object, clearly showed the trash can in the isolated area. The only purpose served by showing the graphic photograph to the jury was to inflame the jurors' passions resulting in a verdict not based upon evidence, but upon passions and prejudices.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of February, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROGER WILLIAMS,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Transcript dated September 18, 2012 pages: 1, 12-13; 54-69.
(2) Transcript dated October 8-11, 2012 pages: 1, 110-140; 174-266; 278-346; 360 – 369; 373-377; 454 – 476; 483-533; 566-588; 594-597; 601-610; 639-719; 724-725; 736-737;
(3) State's Exhibit #4;
(4) State's Exhibit #24;
(5) State's Exhibit #25;
(6) State's Exhibit #26;
(7) State's Exhibit #27;
(8) State's Exhibit #28;
(9) State's Exhibit #29;
(10) State's Exhibit #66;
(11) State's Exhibit #71;
(12) State's Exhibit #72;
(13) State's Exhibit #73;
(14) Defendant's Exhibit #1;
(15) True–billed indictments;
(16) Sentence sheets;

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

February 19th, 2014

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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THE STATE,

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ROGER WILLIAMS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial 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 Mr. Roger Williams #303509 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 19th day of February, 2014.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of February, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .