

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Lexington County
Clifton Newman, Circuit Court PCR Judge
William P. Keesley, Circuit Court Trial Judge

Appellate Case No. 2013-000455

THE STATE,

Respondent,

vs.

Jeffery T. Lucas,

Petitioner.

**BRIEF OF RESPONDENT
PURSUANT TO WHITE V. STATE**

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STATEMENT OF ISSUE ON APPEAL

I.

Whether the Trial Judge's rejection of Petitioner's arguments to suppress **State's Exhibit's 2 and 5** pursuant to Rule 403, SCRE, was rendered within the vast ambit of discretion traditionally reserved to the province of the Trial Bench in determining the admissibility of evidence?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. He was indicted at the March 2009 term of the Lexington County Grand Jury for infliction of great bodily injury upon a child (2009-GS-32-0536). He was represented by Wayne Floyd, Esq. The State was represented by Larry Wedekind, Esq., Sara McMahon, Esq. and Michael Ross, Esq. On March 16, 2009, the State called its case to trial before the Honorable William P. Keesley. Petitioner was found guilty as indicted. Judge Keesley sentenced him to a term of twenty (20) years imprisonment. Petitioner did not appeal his sentence or conviction.

Petitioner however filed a timely Application for post-conviction relief (PCR) on February 19, 2010 (2010-CP-32-0803). The State filed its responsive pleadings on June 8, 2010. A hearing was held at the Lexington County Courthouse on concerning Petitioner's civil case on April 25, 2012, before the Honorable Clifton Newman. Petitioner was represented by Tommy A. Thomas, Esq. The State was represented by Kaelon May, Esq., of the Office of the Attorney General. Judge Newman denied and dismissed Petitioner's Application pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), providing the discretionary grant for appellate review of direct appeals issues. This appeal follows.

ARGUMENT

The Trial Judge acted appropriately within his discretion in allowing the State to introduce State's Exhibit's 2 and 5, photographs of the child victim's injuries, through its medical experts to illustrate the causation and extent of child abuse attributed to Petitioner's conduct where the photographs held immense probative value weighed against the phantom prospect of unfair prejudice.

Petitioner maintains that the Trial Judge erred in allowing the State to introduce **State's Exhibits 2 and 5**, two photographs that depicted photographs of the child victim's injuries because they showed images of external injuries purportedly irrelevant to the serious internal injuries at issue. Petitioner opines that the inconsequential probative value of the photographs was substantially outweighed by the danger of unfair prejudice through a conclusory assertion that the photographs were unseemly because it showed graphic images of a hospitalized child. Respondent submits **State's Exhibit's 2 and 5** held critical probative value because the photographs corroborated expert testimony concerning the causation and the extent of Petitioner's injuries, matters that Petitioner chose to make issues in the case. The Trial Judge made appropriate discretionary decisions in allowing the State to utilize the photographs to prove the elements of its case based upon his Rule 403, SCRE, analysis where the photographs held immense probative value that eclipsed danger of unfair prejudice.

A. State's Exhibit 2

How the issue developed at trial

Prior to trial, the Trial Judge noted the defense's motion to suppress six photographs

of the child victim's injuries pursuant to Rule 403, SCRE. Trial Counsel asserted **States Exhibit's 1 and 2**¹ were unfairly prejudicial because they depicted the child victim's genitals.

Trial Counsel stated:

About a week to ten days before this incident, the child had to have the surgery to make the -- they pull the testicles out of the body, you know, his testicles are not descended, so they performed this surgery on him. So he was in postrecovery stage from that surgery and we think it would be misleading to show this a result of something the [Petitioner] did when he was recovering at the time.

In fact, according to the notes in the hospital records, the mother said that he picked at where the surgery was. He'd been picking at it. And the doctor had told them it might open up again, which is what it did.

App.p.44, ln, 4-18. In response, the State explained that it was offering the photographs to corroborate its experts' intended testimonies and findings concerning elements of the offense that child abuse caused the injury to the scrotum². Pursuant to the Trial Judge's Rule 403, SCRE, analysis, he ruled the photographs to individually be admissible but collectively duplicative and unfairly prejudicial. Furthermore, the Trial Judge made the *sua sponte* pronouncement, "I would say that you use **Exhibit 2**. I may exclude **Exhibit 1** if there is a

¹ **State's Exhibit 2** depicts a concentric line that extends from the child victim's belly button down through each of his thighs. The child victim's entire abdominal cavity from the belly button down is protruded and significantly raised. The lower abdominal cavity contains the child's genitals where the scrotum had suffered a complete rupture.

² In pertinent part, The State asserted that its experts intended to testify that "there's no way that child could have picked at that and caused that kind of injury to himself. So because that's precisely a point in dispute, that's why we wanted those photographs to depict the injury to the child that's going to tie in directly with medical evidence testimony from the doctor describing how violent this was. There's additional allegations by [Petitioner] that he was administering badly performed C.P.R. to the child and that caused it. So to counteract that, our anticipation is we're going to need to show those photographs to show that pressing on the child's chest in an attempt to administer CPR, whether it was good or bad... that's not consistent with any attempt to do C.P.R." **App.p.45, ln. 14—p.46, ln.7.**

403 analysis.” **App.p.46, ln.16-18**. The State consented to not presenting **State’s Exhibit 1**.

Dr. Cartie, an expert in pediatric critical care, testified to his treatment of the child victim upon hospitalization. **App.pp.229-40**. Dr. Cartie testified that the child victim suffered a constellation of injuries that acted in aggregate to cause respiratory failure. **App.p.231**. He testified that the child victim suffered an intestinal transection, a spinal hematoma, and a ruptured scrotum that were all most probably caused by a severe blunt force blow to the abdomen. He stated, “abdominal injuries are typically the result of some sharp force from a relatively pointed or – or not large surface area object such as a fist or foot that would strike the abdomen with a large amount of force.” **App.p.237, ln. 4-8**. Among numerous other photographs presented, the State introduced **State’s Exhibit 2** through Dr. Cartie and over Petitioner’s renewed objection to illustrate his findings on the causation and extent of injury to the child victim’s scrotum. Petitioner complains Dr. Cartie’s utilization of **State’s Exhibit 2** to explain his findings to the jury denied Petitioner a fair trial.

Rule 403, SCRE

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. “ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE. “[T]he more essential the evidence, the greater its probative value.” State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014) (citing United States v. Stout, 509

F.3d 796, 804 (6th Cir.2007)). “The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation.” State v. Martucci, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008) (citing State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. “To constitute unfair prejudice, the photographs must create a ‘tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.’” State v. Kelley, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995).

Standard of Review

“The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.” State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001). Further, “[i]f the offered photograph[s] serve[] to corroborate testimony, it is not an abuse of discretion to admit [them].” State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) (quoting Nance, 320 S.C. at 508, 466 S.E.2d at 353).

Discussion

Relief is not warranted where the Trial Judge made a routine admissibility ruling in rejecting Petitioner’s Rule 403, SCRE, suppression argument to **State’s Exhibit 2** and allowing the State to introduce the photograph that held heightened probative value for

alternatively compelling reasons. First, the State explicitly introduced **State's Exhibit 2**, to corroborate critical expert testimony on the elements of the offense: that a violent blunt force blow to the child victim's abdomen, that the State alleged Petitioner had committed on the toddler, caused the injury to the scrotum. See S.C. Code Ann. § 16-3-95 (A) ("It is unlawful to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years."). Simply, the State exercised its right to present the photograph to prove the child victim's injuries were caused by severe physical abuse attributed to Petitioner's criminal conduct. See Martucci, 380 S.C. at 249, 669 S.E.2d at 607.

Despite Petitioner's conclusory hyperbole that **State's Exhibit 2** showed irrelevant external injury offered for the sole purpose of inflaming the passions of the jury, the photograph was presented in Dr. Cartie's clinical, scientific, and almost educational discussion of his findings. The Court of Appeals' pronouncement that "medical testimony related to [the victim's] brain injuries and the severity of these injuries, which we do not consider to be a matter readily understood by most jurors, who are typically unversed in medical matter" applies to the present case. Gray, 408 S.C. at 612, 759 S.E.2d at 166.

Here, Dr. Cartie utilized **State's Exhibit 2** to illustrate the mechanics of how the transfer of force from the blunt force blow to the child victim's abdomen transferred downwards and most probably ruptured his scrotum. **App.p.243, ln.11-15**. He further explained that the dispersion of force from one's abdomen causes protrusion in the affected local areas. The photograph depicted a concentric line of bruising that extended from the

child victim's belly button to the inside of both of his thighs. It showed the lower abdominal cavity, located immediately under the line of bruising, was noticeably swollen and protruded compared to the surrounding muscles. Dr. Luberoff, a separate physician and State expert, likened the degree of force that traveled from the abdomen to the scrotum as a "hydraulic shockwave." **App.p.195**. Thus, the photograph was presented in a manner that illustrated Dr. Cartie's findings to aid the jury in understanding the testimony.

Second, the probative value of State's Exhibit 2 was further enhanced because Petitioner chose to make the cause of the injury to the scrotum an issue in the case. Petitioner even presumed alternative causations explained the injury, other than physical abuse, when he argued the photograph lacked relevance at the pre-trial hearing. State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013), is instructive here. Dial introduced the defense theory of accident that contradicted the pathologist's testimony, thereby creating a critical issue of fact concerning the elements of the offense. The Dial Court announced, "[w]e find the photographs were highly probative to the issues of whether Victim was abused and whether the abuse was the cause of his death, which are integral elements to the charge of homicide by child abuse." Id. at 261, 746 S.E.2d 495 (2013).

Here, **State's Exhibit 2** depicted the image of the rupture that enveloped the majority of the scrotum; thus, serving to corroborate Dr. Cartie's finding that scratching would have caused significant pain and deterred the toddler from causing the injury. Dr. Luberoff also testified that "I think it's actually quite uncommon for the incision to open back up despite it being common for a child to scratch the sutures... it would have been unreasonable to

explain that injury as a self-inflicted picking injury.” **App.p.210, ln.2-4; p.214, ln.7-9.**

The probative value of the photograph was similarly enhanced by Petitioner’s decision to assert a defense theory of accident³ in the statement he gave to police. The photograph additionally illustrated the dispersive effects of the same tremendous force necessary to have caused the spinal epidural hematoma, and to have caused the complete tear to the child victim’s upper intestine. **App.pp.236-37; p.245, ln.8-15; p.193.** The State maintained that a violent blunt force blow to the abdomen caused these injuries, not complications from prior procedures or incidental clumsiness from a toddler. **App.pp.239-40; p.173, ln.14-22; p.174, ln.7-14.** Therefore, **State’s Exhibit 2** deserves an assignment of significant probative weight that dispositively supports the Trial Judge’s admissibility finding.

Yet, Petitioner sounds the alarm of unfair prejudice that was utterly unrealized in light of the nature of the offense, facts in dispute, and the professorial manner the State presented **State’s Exhibit 2** to illustrate Dr. Cartie’s testimony. Given the manner in which the photograph was presented, it did not create a “tendency to suggest a decision on the improper basis, commonly, though not necessarily, an emotional one.” Kelly, 319 S.C. at 178, 460 S.E.2d at 370-71. Particularly in this day and age, where forensic matters are graphically shown in popular prime time television programs like C.S.I. and its progeny, the

³ In Petitioner’s version of facts, he abandoned the child victim at the trailer’s porch and went to visit his father. **App.p.140.** Purportedly, Petitioner returned fifteen minutes later to discover the child disabled on the porch and not breathing. **App.pp.140-41.** In Petitioner’s version, he frantically administrated C.P.R. to the child while he waited on help to arrive. **App.p.141.**

jurors simply would not be so shocked by these photographs that they would have rendered a verdict based on an emotional basis. Rather, they would have understood that a timely photograph taken soon after the incident occurred was a necessary and indispensable process to determine the cause of the ruptured scrotum and its relationship to interrelated injuries. In other words, the photographs were relevant and necessary, and they were not introduced with the intent to inflame, elicit the sympathy of, or prejudice the jury. In contrast, Dr. Cartie provided a full academic explanation as to how the child victim's prior surgery affected his assessment. Id.

Additionally, the photograph complained of here was not beyond "the outer limits of what our law permits a jury to consider." Torres, 390 S.C. at 624, 703 S.E.2d at 229. The photograph depicted an injury that the State alleged was caused by Petitioner's conduct. The State presented its case that the child victim incurred great bodily injury from the infliction of substantial physical abuse during a brief window of time where Petitioner was his sole caretaker. **App.p.255**. Also, the photograph was not inflammatory simply because it showed a hospitalized child. To the contrary, this Court has upheld the introduction of autopsy photographs or graphic crime scene photographs that pass a Rule 403 analysis. See State v. Holder, 382 S.C. 278, 290–91, 676 S.E.2d 690, 697 (2009) (stating "[a]lthough the photos were graphic, the facts in this case were graphic" and holding the trial court properly exercised its discretion in admitting autopsy photos of the child victim as they corroborated the pathologist's testimony and aided the jury in understanding that testimony.). Even upon the scrutiny of *post hoc* review, the Trial Judge's Rule 403, SCRE, analysis and ruling to

allow the State to introduce **State's Exhibit 2** remains sound.

Finally, any error in the introduction of the photograph must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since its introduction could not reasonably have affected the result of the trial. See State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"). At worst, this photograph was cumulative to other expert testimony concerning the victim's injuries. Dr. Luberoff thoroughly testified to her examination and assessment of the child victim's injury to his scrotum. **App.pp.169-75**. See State v. Brazell, 325 S.C. 65, 79, 480 S.E.2d 64, 72 (1997) ("Even if the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage").

B. State's Exhibit 5

How the Issue was developed at trial

At the pre-trial hearing, trial counsel separately moved to suppress **State's Exhibit's 3⁴, 4⁵, and 5⁶** pursuant to Rule 403, SCRE. **App.p.47**. Trial Counsel asserted the three photographs "show the child in various tubal configurations... we think that's highly

4 **State's Exhibit 3** depicts a photograph taken several feet above the child victim's body and depicts the naked child victim's body in totality showing seven tubes connected to his body: a tube protruding from the lower left side of his chest cavity; a tube protruding from the right side of his abdomen; I.V. tubes attached to each wrist; the two intubation tubes attached to the respiratory machine that is also fully pictured.

5 **State's Exhibit 4** is similar to **State's Exhibit 3** in that the photograph child's entire body. However, this picture was taken from a lateral vantage point.

6 **State's Exhibit 5** depicts the child victim's shoulders, face, and the neck. It only shows the two intubation tubes connected to his mouth and nose. However, unlike **State's Exhibits 3 and 4**, this photograph does not show the large respiratory machine next to the child victim's bed, nor does it depict the child victim's midsection or lower body that shows the five other tubes seen in **State's Exhibit 3 and 4**.

prejudicial. And this child had cerebral palsy so the child had serious breathing issues before this incident. And it's our position that those photographs exaggerate the extent of any injuries the victim received in this alleged incident." **App.p.47, ln. 3-11.**

In response, the State explained State's **Exhibit's 3 and 4**, photographs of the child victim's entire body, were offered to corroborate its experts' intended testimonies concerning the global extent of the child abuse. **App.pp.47-49.** The State then explained that **State's Exhibit 5**, a photograph that depicted bruising along the child victim's face, neck, and shoulder blades, was offered to corroborate its intended expert testimony concerning evidence of strangulation. **App.pp.49-50.** Furthermore, the Trial Judge conducted a Rule 403, SCRE, analysis and compared the three photographs in dispute with numerous other photographs the parties previously stipulated to as admissible. The Trial Judge ruled **State's Exhibit's 3 and 4** to be inadmissible because "they seem to show things that are shown in other photographs in a less emotional context." **App.p.51, ln.20-22.** In contrast, the Trial Judge ruled **State's Exhibit 5** to be admissible and commented that ruling otherwise would have constituted error on the part of the Court. **App.p.51.**

Dr. Luberoff, an expert in child abuse, testified to her examination of the child victim and her findings concerning the extent of the injuries. **App.pp.159-62.** **State's Exhibit 5** was introduced through Dr. Luberoff, over trial counsel's renewed objection in addition to **Exhibits 7-11, and 15-19**, which were admitted without objection. **App.pp.176-77.** Dr. Luberoff detailed injuries to the child victim's head and gave her opinion on the source of the bruising. She utilized **State's Exhibit 5**, in addition to a host of similar yet unique

photographs to illustrate the extent of bruising to Petitioner's face, neck, shoulders, and chest⁷. Petitioner complains that he was denied a fair trial because **State's Exhibit 5** also showed an image of two intubation tubes that were connected the child victim's mouth and nose.

Discussion

The Trial Judge acted soundly within his discretion in allowing the State to introduce **State's Exhibit 5**, to corroborate expert findings of other injuries most likely attributed to child abuse. Dr. Luberoff utilized the photograph and other photographs to illustrate aggregate bruising consistent with strangulation. Dr. Cartie also offered testimony that the extent of bruising present signified strangulation at the hands of an adult. **App.p.250**.

As already discussed, **State's Exhibit 2** held enhanced probative value that dispositively validates the Trial Judge's discretionary admissibility ruling because Petitioner chose to make the causation of the bruising to the child victim's neck and upper body an issue in the case in stating his version of the facts. Petitioner detailed purportedly discovering the non-responsive child victim in his statement to police. He stated "I started down the porch and saw [child victim] with his head between the porch rails. I then ran and picked him up. He was like a wet dish rag. He was not breathing." **App.p.117, ln.18-22**. See Dial, at 261, 746 S.E.2d 495 (2013). **State's Exhibit 5** further illustrated Dr. Luberoff's finding that the extent of bruising to the shoulders dispelled any theory that the child victim self-inflicted

⁷ The State admitted **State's Exhibit 5** in addition to ten other exhibits at a single occasion. **App.p.177**. Dr. Luberoff selectively explained certain photographs in an apparent slideshow presentation. **App.p.179**. However, she does not explicitly specify exhibit numbers of the photographs during her this juncture of her

the bruising. **App.pp.184-85.**

An extended exposition on the soundness on the admissibility of **State's Exhibit 5** is unnecessary where any possible error here constituted *per se* harmless error. "The admission of improper evidence is harmless where it is merely cumulative to other evidence." State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989). Petitioner argued that "various tubal configurations" images shown in the photograph constituted unfair prejudice because it "exaggerated the extent of any injuries that victim received in this alleged incident." **App.p.47, ln.4; ln.10-11.** Yet, Petitioner stipulated to the admission of the **State's Exhibit's 11⁸ and 17⁹**, photographs that depicted the same image of the intubation tubes connected the child victim's mouth and nose but some unannounced reason the visual was only at issue in **State's Exhibit 5**. For instance, Petitioner did not present any type of argument to the Trial Judge that the intubation tubes were somehow shown in an unfairly prejudicial way in **State's Exhibit 5** that was not at issue in **State's Exhibit's 11 and 17**. Nor did Petitioner argue that **State's Exhibit 5** was somehow prejudicially duplicative of **State's Exhibit's 11 and 17**. Therefore, Petitioner's argument that the Trial Judge erred in allowing the admission of **State's Exhibit 5** simply cannot survive a harmless error analysis.

testimony. Notably, the presentation of the State's case here did not elicit an on objection. **App.pp.179-86.**
8 **State's Exhibit 11** depicts a close-up visual of the child victim's chin and mouth area that shows the intubation tube fully inserted into the his mouth along with the tube connected to his nose. The photograph was taken immediately above the child victim's chin from an angled vantage point.
9 **State's Exhibit 17** depicts the child victim resting the right side of his head on the pillow and shows intubation tube inserted into the mouth along with the portion of the tube connected to the nose. The photograph shows the entire left side of the child victim's face.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
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Certiorari to Lexington County
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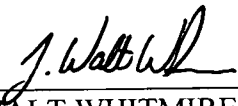
Petitioner.

PROOF OF SERVICE

I, Walt Whitmire, certify that I have served the within Brief of Respondent Pursuant to White v. State by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, SC 29063

I further certify that all parties required by Rule to be served have been served.
This 8th day of October, 2014.



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ALAN WILSON
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S.C. Supreme Court

October 8, 2014

The Honorable Daniel E. Shearouse
Clerk, SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: State v. Jeffery T. Lucas
Appellate Case No. 2013-000455

Dear Mr. Shearouse,

Enclosed is the Brief of Respondent Pursuant to White v. State, along with the Return to Petition for Writ of Certiorari in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

Walt Whitmire
Assistant Attorney General

cc: Tommy A. Thomas, Esquire (enclosure)
Victim Services (enclosure)