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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2011-GS-32-1255
Appellate Case No. 2014-002288

The State of South Carolina,.................................... Respondent,

v.

Hank Eric Hawes,.. Appellant.

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Introduction

Appellant's primary brief challenged numerous errors of law that occurred during the prosecution and conviction of Hank Hawes. The State's responsive brief, filed on April 29, 2016, does little to dispel these concerns or to justify the errors committed by the trial court. This reply brief rebuts the State's arguments and clarifies the legal issues and governing authorities.

Argument

I. The Trial Court abused its discretion by admitting unnecessary and prejudicial photographs and video into evidence.

As explained in Mr. Hawes' primary brief, the Trial Court erred by admitting into evidence photographs of Ms. Wilson in happier times as well as graphic photos and video of her naked body at the crime scene and during autopsy. (*See* Brief of Appellant at 9–13.) None of this evidence was necessary to prove any fact in dispute but was instead used by the prosecution to arouse the emotions of the jury, including by displaying the photographs during an emotionally charged closing argument that reduced some jurors to tears. (*See* Tr. 1372–73.) As explained below, the State's sole responsive argument—that this evidence was necessary to prove malice—misses the mark.

A. Mr. Hawes has not abandoned his argument regarding photographs or video specifically discussed and described in his primary brief.

As an initial matter, the State is mistaken in its assertion that Mr. Hawes has abandoned any challenge to the Trial Court's erroneous admission of State's Exhibit 31 (a particular photo from the scene), the graphic autopsy photographs, and the video taken at the scene. (*See* Brief of Respondent at 13, 16 n.2, and 20). Contrary to the State's assertion, Mr. Hawes' primary brief makes clear in its outline headings and its argument text that the evidence he challenges on appeal includes *all* the still photographs from the scene admitted over trial counsel's objection,

the still photographs from the autopsy, and the video taken at the scene. (*See* Brief of Appellant at 10 ("The Trial Court wrongly allowed the introduction of unnecessary, gruesome photographs *and videos*.") (emphasis added); *id.* at 11 (discussing the admission of the video and the graphic autopsy photographs, all of which were objected to by trial counsel, and describing the "prejudicial effect of these many graphic photographs").

The fact that Mr. Hawes' brief lists several descriptive exemplars of the objectionable photographs (*id.* at 10–11) does not mean he has abandoned his argument as to the scores of other objectionable photographs discussed and described in his brief. Similarly, the fact that the prejudicial effect of this evidence was most clearly and egregiously demonstrated by the State's use of (and the jury's response to) specific photographs in its closing argument does not mean the prejudicial effect of the evidence was limited to those particular exhibits or that Mr. Hawes' argument on appeal is limited to those specific exhibits. Rather, his argument on appeal—like his objections at trial—challenges *all* of the unnecessary and unfairly prejudicial photographs and video to which his trial counsel objected.

B. The admission of the prejudicial photographs and videos was an abuse of discretion and a violation of Rule 403, SCRE.

As explained in Mr. Hawes' primary brief, the video and the scores of graphic photos of Ms. Wilson's body at the scene and during the autopsy were not necessary to prove material facts or conditions, and thus the failure to exclude them was reversible error. *See State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986). Similarly, the photos of Ms. Wilson smiling in happier times were not necessary (other than for the State's illicit purpose of drawing an emotional contrast between these photos and the gruesome images of her body) to prove any disputed fact, and thus the Trial Court's failure to exclude them was reversible error. *See, e.g.*,

State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999); *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997).

The State asserts only one substantive argument in response, namely that the photographs and video were "necessary" and "essential" to prove malice, and thus it was not an abuse of discretion to admit them into evidence. However, the information these Exhibits supposedly convey—the type, number, location, and nature of Ms. Wilson's injuries and the fact that she previously did not have cuts or bruises on her arms and shoulders[1]—was neither necessary nor essential because these facts were thoroughly established by the undisputed testimony of multiple witnesses and would have been equally well established without the shocking illustrative photographs. (*See*, *e.g.*, Tr. 213–14, 225–26, 955–60, 966–70.)

Indeed, the State grudgingly concedes in its fallback position that "[a]t worst, the photographs were cumulative to the other evidence, *i.e.* the testimony on the wounds, condition of the body, and crime scene." (*See* Brief of Respondent at 19.) Stated differently, the photographs and video are duplicative of other evidence, and because the jury already had all the information it needed to infer malice, the danger of unfair prejudice far outweighed the probative value, if any, of the photographs and video.[2] In short, these photographs and video present the quintessential example of photographs that should be excluded by the Supreme Court's rule articulated in *Middleton*. *See also State v. Johnson*, 293 S.C. 321, 325, 360 S.E.2d 317, 320 (1987) (noting that where the victim's cause of death was not contested at trial, the introduction

[1] The State argues "the value of the evidence is in *how* Ms. Wilson was stabbed, where and how many times, along with the evidence of cuts on extremities and bruising . . . [and a] bite mark." Brief of Respondent at 16–17 (emphasis in original).

[2] The cumulative and duplicative nature of this evidence does not render it harmless. Such a holding would vitiate the protection of Rule 403 and render it largely meaningless. Furthermore, as explained above and in Mr. Hawes' primary brief, the prejudicial effect of the objectionable photographs and video were demonstrably shown in the State's closing argument.

of a photograph of the victim's body was "irrelevant as introduced to show motive and intent, and their admission constituted error"); *State v. Jones*, 201 S.C. 403, 23 S.E.2d 387, 390 (1942) (holding "photographs of the body of the deceased showing his ghastly wounds" were erroneously admitted because it was "quite clear from reading the testimony of this doctor, who explained the location and nature of the fatal wounds, that the photographs had no probative value whatever, and really added nothing to the oral testimony, although their influence would naturally be prejudicial to the defendant").

The State's argument to the contrary relies on several South Carolina cases in which our appellate courts affirmed the admission of graphic photographs. (*See* Brief of Respondent at 15, 17–18.[3]) These cases, however, are distinguishable from the case at bar in that none of them involve the impermissible juxtaposition of gruesome photographs with smiling photos of the decedent in happier times. In contrast, the error in Mr. Hawes' trial was not solely the admission of the gruesome photos and video but also the admission and juxtaposition of photos of Ms. Wilson in happier times. The graphic photos and video are only half of Mr. Hawes' argument on appeal, and even assuming *arguendo* that such images are in some cases admissible,[4] the

[3] The relevant cases cited by the state are *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010); *State v. Martucci,* 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008); *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998); *State v. Kelley*, 319 S.C. 173, 460 S.E.2d 368 (1995); *State v. Edwards*, 194 S.C. 410, 10 S.E.2d 587 (1940). The other South Carolina cases cited in this section of the State's brief support only ancillary propositions such as the standard of review (*see* Brief of Respondent at 13), the harmless error rule (*id.* at 19–20), or the rule that malice may be inferred from facts (*id.* at 16). Others are distinguishable cases involving photographs directly rebutting opposing testimony (*id.* at 14–15), while others predate the adoption of the SCRE (*id.* at 16, 18).

[4] The fact that the use of graphic photographs has in some instances been affirmed does not absolve a reviewing court of the duty to evaluate the probative value and prejudicial effect in the context of *this* trial. *See State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) ("When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case."). Here, the photographs were unnecessary to make any fact at issue more or less probable and instead were exploited by the

admission of the photos of Ms. Wilson and the use of both types of photographs in the prosecution's closing argument compounds the unfair and prejudicial effect. Notably, the State's brief does not mention or discuss the cases upon which Mr. Hawes's argument relies—*State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) and *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997)—and thus fails to rebut his argument or respond to this weight of authority.

Finally, the State relies on numerous out-of-jurisdiction cases in support of its argument that a defendant can never object to photographs that depict "the work of [his] hands." (*See* Brief of Respondent at 15–16.) This argument would impose a condition on Rule 403, SCRE that is not found in that rule or in South Carolina case law, and which would render Rule 403 an almost entirely dead letter in criminal cases. In sum, the Trial Court erred by admitting and then allowing the prosecution to prejudicially use the photographs of Ms. Wilson in happier times as well as graphic photos and video of her body. These errors constitute an abuse of discretion and were not harmless and, accordingly, warrant reversal and remand for a new trial.

II. The Trial Court abused its discretion by admitting testimony of Mr. Hawes' past bad acts.

As explained in Mr. Hawes' primary brief, the Trial Court erred and abused its discretion in violation of Rule 404(b), SCRE by permitting the State to introduce testimony of Mr. Hawes' past bad acts under the guise of "impeachment" testimony. (*See* Brief of Appellant at 13–18.) Specifically, after the Trial Court reopened the cross-examination of Mr. Hawes, the prosecution asked questions of him (ostensibly to "lay the foundation") and Ms. Newsom (purportedly to impeach Mr. Hawes) that unquestionably implied Mr. Hawes' prior bad acts to the jury. This is impermissible under Rule 404(b), SCRE, which states evidence of a defendant's past bad acts is

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prosecution, particularly in closing, to stir the jury's emotions and suggest to them an improper basis for their verdict.

inadmissible. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. [] Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged.").

The State, however, argues the testimony was permissible *impeachment* and that "Rule 404(b) is inapplicable" because "a prior statement of bad intent is not a prior bad act." (*See* Brief of Respondent at 26–30.[5]) The State's argument, however, misses the thrust of Mr. Hawes' argument, which is focused not on whether Mr. Hawes once said he would turn the tables on Ms. Newsom (*i.e.*, impeachment) but on the fact that the prosecutor's subsequent colloquies with Mr. Hawes and Ms. Newsom indubitably revealed to the jurors facts from which they would infer Mr. Hawes' prior bad acts. As Mr. Hawes' counsel argued to the Trial Court, and as Mr. Hawes'

[5] The State seems to have some difficulty making up its mind whether Rule 404(b) is relevant or not. (*Compare* Brief of Respondent at 24 (conceding the Trial Court admitted the objectionable questions and testimony without conducting a Rule 404(b) analysis) and *id.* at 27 (("Rule 404(b) is inapplicable to the evidence at issue. . . . [A]t issue was impeachment by the statement, not evidence of intent under Rule 404(b), SCRE.") *with id.* at 28–29 (relying on cases interpreting Rule 404(b) to argue that the evidence of Mr. Hawes' past bad acts was admissible to show intent).)

Contrary to the State's tentative argument, however, Rule 404(b)'s exceptions do not justify the admission of this prejudicial testimony. The showing of motivation or intent refers to the motive or intent *to commit the crime*, not the motivation or intent to assert a particular defense afterward. *See, e.g.*, *Johnson*, 293 S.C. at 324–25, 360 S.E.2d at 319 (noting the exception permitted evidence of past bad acts that "establish some element, *i.e.*, intent or motive, *of the crime* charged.") (emphasis added). Similarly, this evidence was not admissible to show a "common scheme or plan" because it was so remote in time. *See State v. Pierce*, 326 S.C. 176, 179, 485 S.E.2d 913, 914 (1997) (holding evidence of prior bad act was inadmissible under the common scheme or plan exception where the acts were not sufficiently similar and where the acts occurred more than a year apart).

primary appellate brief explained, the jury heard questions and answers regarding Mr. Hawes' prior statement that were inseparable from the bad acts giving rise to them, and the jury undoubtedly "read between the lines" to deduce the violent context in which the statement was made.[6] This violated Rule 404(b), which prohibits testimony that even *implies* the defendant engaged in prior bad acts. (*See* Brief of Appellant at 16–18 (citing *State v. Traylor*, 360 S.C. 74, 84 n. 12, 600 S.E.2d 523, 528 n.12 (2004); *State v. Nelson*, 331 S.C. 1, 13, 501 S.E.2d 716, 722 (1998); *State v. Tate,* 288 S.C. 104, 105, 341 S.E.2d 380, 381 (1986); *United States v. Scott*, 677 F.3d 72 (2nd Cir. 2012).)

In short, the State's response argument on appeal fails to acknowledge, much less rebut, the Rule 404(b) implications and errors in the admission of the testimony of Mr. Hawes prior bad acts. Testimony from which a jury can infer a defendant's prior wrongs is prohibited and may not be smuggled into a case under the guise of impeachment or some other façade. *See State v. Fonseca*, 383 S.C. 640, 649, 681 S.E.2d 1, 5 (Ct. App. 2009) (holding the trial court erred by allowing testimony of a prior bad act, noting that the purported basis for doing so was but a "thin disguise for impermissible character evidence and would undermine the protections of Rule 404"); *State v. Nelson*, 331 S.C. 1, 12, 501 S.E.2d 716, 722 (1998) ("We find the State's argument this evidence was relevant to show motive or intent is merely a cleverly disguised way of asserting Petitioner committed the crimes because he has a propensity to commit sexual

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[6] There is no dispute that the underlying incidents giving rise to Mr. Hawes statement to Ms. Newsom that he would turn the tables on her involved domestic violence. *See* Tr. 1176–77 (noting during the proffer of Ms. Newsom's testimony that Mr. Hawes' statement was uttered in the course of "intense fights" involving threats of physical violence including throwing Ms. Newsom to the ground); *id.* at 1179 (noting during the proffer of Ms. Newsom's testimony that Mr. Hawes' statement "is connected to these physical episodes").

offenses."). Accordingly, the Trial Court's admission of this testimony was error and warrants reversal and remand for a new trial.

III. The Trial Court erred and abused its discretion by permitting Ms. Wilson's neighbor to testify of Mr. Hawes' purported prior bad acts.

As explained in Mr. Hawes' primary brief, the Trial Court erred by permitting Ms. Wilson's neighbor to testify about a prior argument he had overheard between Mr. Hawes and Ms. Wilson in which he "heard her screaming like he was hurting her and Jen saying 'no.'" (*See* Brief of Appellant at 18–21.) Such testimony of prior bad acts is forbidden by Rule 404(b), and Mr. Hawes did not "open the door" to the otherwise forbidden evidence. (*See id.*)

The State argues Mr. Hawes opened the door to this testimony when his counsel cross-examined the neighbor and asked questions about details in his courtroom testimony that were absent from the written statement he provided to police immediately after the incident. (*See* Brief of Respondent at 34–36.) Specifically, counsel asked him about his testimony that the sounds of the struggle emanated from specific rooms in Ms. Wilson's home since those details were omitted from his written statement. *See* Tr. 273:11 to 274:7. Counsel also asked the neighbor to confirm he had previously heard an argument between Mr. Hawes and Ms. Wilson on only one occasion. Tr. 275:19-25. Counsel did not challenge the neighbor's memory of that prior argument, dispute the veracity of his testimony regarding that prior argument, or question him regarding the description or intensity of that argument. Counsel also asked the neighbor, who had testified he though Mr. Hawes and Ms. Wilson were no longer dating, if he was aware they had been in regular contact with each other in the weeks leading up to her demise. *See* Tr. 276–77.

According to the State, these questions opened the door to the otherwise impermissible testimony of Mr. Hawes' past alleged violence. The State's argument goes too far. If these unremarkable questions, which never disputed anything regarding the neighbor's recollection of

a past argument, are sufficient to open the door to evidence otherwise barred by Rule 404(b), it is difficult to conceive what questions defense counsel *could* ask a witness on cross-examination that would not open the door to otherwise impermissible testimony. The Trial Court's ruling, if upheld, would hamstring criminal defendants' attorneys so utterly as to essentially deprive defendants of either the protection afforded by the Rules or of the right to cross-examine witnesses. This result cannot be correct, and the Trial Court's ruling should be reversed.

IV. The Trial Court erred by permitting a Solicitor's office to prosecute a case in which two fact witnesses were an assistant solicitor and her husband.

As explained in Mr. Hawes' primary brief, although South Carolina's courts have not previously confronted the question, other jurisdictions have held an entire solicitor's office should be recused from prosecuting a case in which a member of that office and/or his spouse were a witness to the alleged crime. (*See* Brief of Appellant at 21–27.) The State asserts two arguments in response: (1) the standard for recusal of an entire office should be actual prejudice, not merely the avoidance of the appearance of bias or prejudice, and (2) the wealth of cases from other jurisdictions holding otherwise are in slight ways distinguishable from the case at bar. (*See* Brief of Respondent at 37–45.)

As to the State's first argument, Mr. Hawes' primary brief has already explained how the South Carolina cases the State relies on are distinguishable and why a different result should obtain under the different facts raised in the case at bar. In essence, the State argues the *only* instance in which a solicitor's office should be recused from prosecuting a case is when a member of that office is found to have engaged in deliberate and significant misconduct in the prosecution of that case. (*See id.* at 40.) According to the State, the fact that a prosecutor's case relies on an "insider," thus giving rise to an appearance of partiality, is insufficiently worrisome

to warrant any corrective action. This argument imperils the public trust and confidence in an unbiased and impartial prosecutorial system.

As to the State's argument that the many out-of-jurisdiction cases upon which Mr. Hawes' relies are distinguishable, the State fails to discuss or distinguish the cases that are very nearly on all fours with the case at bar, namely *People v. Jenan*, 140 Cal. App. 4th 782 (Cal. Ct. App. 2006) (holding the trial court properly ordered the recusal of the entire district attorney's office because a district attorney's investigator would likely be a witness) and *Lewis v. Superior Court*, 53 Cal. App. 4th 1277 (Cal. Ct. App. 1997) (reversing trial court's refusal to recuse district attorney's office where the effect of the defendant's conduct on the district attorney and his staff gave rise to an appearance of impropriety).[7] As to the State's attempt to distinguish *People v. Conner*, 666 P.2d 5 (Cal. 1983), the State relies on the rather narrow difference between a prosecutor who witnessed the defendant's attempted escape from custody while in the courthouse (which in *Connor* was a sufficient basis to recuse the entire office from prosecuting that matter) as opposed to a prosecutor who observes the defendant's getaway from the scene (which the State argues here should *not* compel recusal of the solicitor's office from prosecuting the matter).[8]

[7] Our Supreme Court's ruling in *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011) which involved a prosecutor called as a defense witness, relied on California precedent, indicating the Court would likely find the California cases cited above to be persuasive in the different situation where a prosecutor and/or her spouse were fact witnesses called by the *prosecution*.

[8] Contra the State's argument that *Conner* does not support an "appearance of impropriety" standard, the *Conner* court expressly stated recusal was required "if the conflict either affects *or appears to affect* his ability faithfully to perform the discretionary function of his office," and that this conflict was imputable to the entire DA's office in light of its modest size ("about 25 attorneys") and the media coverage of the "dramatic and gripping nature" of the alleged crime. *Conner*, 666 P.2d at 6–7 and 9 (emphasis added).

In sum, because prosecutions in which an assistant solicitor and/or her spouse are witnesses are quite rare, the "cost" of recusing the office is minimal. The "benefit," however, is significant in terms of of maintaining the parties' confidence and the public's confidence in the judicial process by avoiding even the appearance of partiality or bias. Because a simple preventative measure was available, namely transferring the case to the Attorney General's office, the trial court erred by failing to recuse the Fifth Circuit Solicitor's office and transfer the case. This Court should reverse and remand for a new and fair trial.

CONCLUSION

For the foregoing reasons, Appellant requests this Court reverse and remand for new trial.

Respectfully submitted,

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June 2, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

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J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

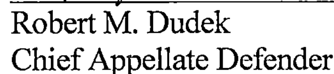
V.

HANK E. HAWES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Melody Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Hank E. Hawes, #361739, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 2nd day of June, 2016.



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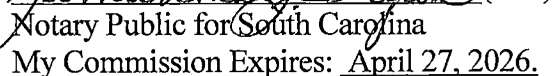
this 2nd day of June, 2016.

(L.S.)

Notary Public for South Carolina
My Commission Expires: April 27, 2026.