

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON MORRIS GOURDINE,

APPELLANT

APPELLATE CASE NO. 2016-000640

ANDERS BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Violating Appellant's constitutional rights to a fair trial and an impartial jury, did the trial judge err in admitting a gruesome photograph where the danger of unfair prejudice substantially outweighed the probative value of the photograph, particularly in light of the lay and medical testimony regarding the injury depicted in the photograph?

STATEMENT OF THE CASE

On November 4, 2014, a Berkeley County grand jury indicted Appellant for three counts of attempted murder (2014-GS-08-1719, -1720, -1721) and criminal conspiracy (2014-GS-08-1722). R. 1023-1024; R. 1026-1027; R. 1029-1030; R. 1032-1033. On January 26, 2016, the Honorable Perry M. Buckner, III, entertained Appellant's motion for prosecutorial immunity pursuant to the Protection of Persons and Property Act. R. 1. At this hearing, the state was represented by Bryan A. Alfaro and Wilton H. McNeely. R. 1. Kevin Kears represented Appellant's co-defendant, Steven Moses. R. 1. Steve Davis represented Appellant. R. 1. At the conclusion of the hearing, Judge Buckner denied Appellant immunity from prosecution. R. 133, ll. 14-23.

The state, represented by Alfaro and McNeely, called the case to trial on March 14, 2016, before the Honorable Kristi Lee Harrington and a jury. R. 137. Appellant was tried jointly with Moses. R. 137. Davis again represented Appellant, and Kears represented Moses. R. 137. Ultimately, the jury found Appellant and Moses guilty has charged. R. 983, ll. 13-25; R. 988, ll. 4-16. Judge Harrington sentenced Appellant to life imprisonment without the possibility of parole (LWOP) pursuant to the state's notice of intent to seek LWOP. R. 1019, ll. 2-10. On the conspiracy conviction, she sentenced him to five years' imprisonment. R. 1019, ll. 11-14. The judge ordered the sentences to be served concurrently. R. 1025; R. 1028; R. 1031; R. 1034. She sentenced Moses to twenty years' imprisonment on each count of attempted murder and five years' imprisonment for criminal conspiracy. The judge ordered the sentences be served concurrently. R. 1020, ll. 13-19.

On March 22, 2016, Appellant served his notice of appeal. This brief follows.

STATEMENT OF THE FACTS

On July 28, 2013, Appellant and Steven Moses stopped by the Nowhere Bar and Grill for a drink. R. 445, ll. 11-18; R. 495, ll. 14-22; R. 608, ll. 11-13. The men arrived at the bar around 1:50 a.m. R. 420, l. 24 – R. 421, l. 9; R. 447, ll. 18-22; R. 496, l. 20 – R. 497, l. 1; State's Exhibit #1. Moses asked for a drink, but the bartender refused to serve him, claiming it was after last call. R. 342, ll. 12-16; R. 421, ll. 15-19; R. 448, ll. 12-14; R. 497, ll. 8-12. Feeling slighted, Moses accused the bartender of racism. R. 342, ll. 16-17; R. 422, ll. 5-6; R. 448, ll. 15-17; R. 497, ll. 13-16; R. 609, ll. 1-3. Offended and angry, the bartender began cursing and shouting at Moses. R. 342, ll. 17-20; R. 448, ll. 18-20; R. 470, ll. 7-8; R. 497, ll. 14-18; R. 530, ll. 16-23; R. 531, ll. 17-20; R. 609, ll. 4-5. The bartender even pointed at an African-American man sitting at the bar, James Bryant, claiming she had served him all night. R. 448, ll. 20-22; R. 471, ll. 5-8; R. 609, ll. 6-7. Another bartender screamed for Appellant and Moses "to get the F out of the bar." R. 449, ll. 5-12; R. 498, l. 1; R. 519, ll. 16-18; R. 610, ll. 5-10.

Appellant and Moses walked toward the door to leave. R. 342, l. 24 – R. 343, l. 2; R. 422, ll. 6-8; R. 479, ll. 18-20; R. 609, ll. 12-15. However, Enrique "Rick" Maron approached the pair and took a swing at Moses. R. 366, l. 13 – R. 367, l. 1; R. 378, ll. 11-23; R. 422, ll. 13-17; R. 449, ll. 18-19; R. 450, ll. 15-18; R. 498, ll. 16-25; R. 544, ll. 23-25; R. 609, ll. 15-20; State's Exhibit #1. Bryant, who was 6'4" and weighed over three hundred pounds, interceded on his friend's behalf, hitting Appellant. R. 480, ll. 14-17; R. 545, ll. 1-2; R. 555, ll. 15-19. Bryant shoved Appellant by the neck out of the door, while others shoved Moses out. R. 382, l. 23 – R. 383, l. 7; R. 450, ll. 11-24; R. 481, ll. 20-23; R. 498, ll. 20-23; R. 567, ll. 9-16; R. 576, ll. 3-20; R. 609, ll. 21-23; R. 610, ll. 15-17; State's Exhibit # 1.

About ten minutes later, Rick, Bryant, Stacy Bohannon, her husband, David Bohannon, and several other patrons left the bar. R. 546, ll. 9-11; R. 806, l. 17 – R. 807, l. 7; State's Exhibit #1. The Bohannans were helping Bryant to the car. R. 547, ll. 5-6; R. 613, ll. 10-13. Moses walked up to Bryant and the Bohannans in the parking lot, asking about the individual who had punched him earlier in the bar. R. 547, ll. 17-19; R. 590, l. 23 – R. 591, l. 1; R. 613, ll. 14-17; R. 614, ll. 11-16; State's Exhibit #1. Moses, who was unarmed, retreated toward Appellant's car. R. 548, ll. 13-15; R. 590, ll. 8-22; R. 613, l. 18; R. 614, ll. 17-20. Rick, Bryant, who was ready to fight, and the Bohannans, charged after Moses. R. 548, ll. 16-17; R. 558, l. 5; R. 591, ll. 16-18; R. 599, ll. 15-18; R. 613, ll. 18-19; R. 615, ll. 2-4. As the group closed in on Moses and Appellant, who was still in his car, Appellant stepped out and fired three shots from a shotgun. R. 548, ll. 20-25; R. 615, ll. 4-6; R. 807, l. 16 – 570, l. 19; State's Exhibit # 1. David Bohannon, who was charging so hard after Moses that his momentum would not allow him to slow down or turn in a different direction, slammed the car door into Appellant. R. 615, ll. 10-12.

Bryant and David Bohannon both suffered arm injuries. R. 457, ll. 1-4; R. 549, ll. 1-2; Tr. 430, ll. 1-3; Tr. 454, ll. 9-12. One of the bartenders described the injury to David's arm: "It looked like raw hamburger meat hanging from his arm." R. 457, ll. 7-9. Another bartender said David's arm "looked like ground beef." R. 505, ll. 14-17. Immediately after being shot, David saw "a hole in [his] arm, [his] tattoo was gone." R. 618, ll. 15-16. Stacy Bohannon suffered a wound to the back of her head and had to have pellets removed from her scalp. R. 457, ll. 5-6; R. 689, ll. 8-12. An ambulance transported David to the Medical University of South Carolina (MUSC), where he had "a couple of surgeries," a "skin graft," and "some tendon transfers." R. 619, ll. 8-21.

ARGUMENT

Violating Appellant's constitutional rights to a fair trial and an impartial jury, the trial judge erred in admitting a gruesome photograph where the danger of unfair prejudice substantially outweighed the probative value of the photograph, particularly in light of the lay and medical testimony regarding the injury depicted in the photograph.

Relevant facts

The state called Joseph Sakran, M.D. to testify regarding his treatment of David at MUSC. R. 688, ll. 6-7; R. 692, ll. 6-8. According to Dr. Sakran, David "presented ... with a gunshot wound to the elbow and had quite a large open wound that required immediate operative exploration." R. 692, ll. 9-12. In preparation for the operative exploration, photographs and scans were taken of David's arm. R. 692, ll. 15-17. The state introduced one of the scans without objection. R. 692, l. 20 – R. 693, l. 13; State's Exhibit #27. According to Dr. Sakran, the photograph "demonstrate[d] a significant soft-tissue injury, as well as multiple pellets that [were] surrounding the elbow and upper arm." R. 693, ll. 1-4. He went on to describe to the jury that the scan showed "a frontal picture of the arm." R. 693, l. 20. He explained how the image showed the elbow, upper arm, and the multiple pellets surrounding the area." R. 693, ll. 20-22. There was "a significant soft-tissue defect" causing "significant injury of the elbow and upper arm." R. 693, ll. 23-25.

Dr. Sakran explained that a soft-tissue defect meant "part of the skin and muscle has been violated or avulsed," which meant torn off. R. 694, ll. 1-6. He told the jurors that a "significant amount of skin, muscle" was "gone" exposing bone and tendon. R. 694, ll. 15-19. During the operative exploration, he took a photograph of the area. R. 695, ll. 20-21.

When the state attempted to admit the photograph, Appellant objected. R. 695, ll. 22-23. The judge overruled the objection. R. 695, ll. 5-7; State's Exhibit #28. The judge allowed the state to introduce a black and white photograph, instead of color. R. 727, ll. 8-22. Appellant objected that the photograph was "highly prejudicial and that the total value [was] not outweighed in reference to its prejudicial value." R. 728, ll. 3-5. The photograph would serve only to "inflame the jury." R. 728, ll. 6-7; R. 728, ll. 10-14. Appellant continued that there had been ample testimony from the doctor regarding the extent and type of injury. R. 728, ll. 8-10. The judge ruled the photograph corroborated the testimony. R. 728, ll. 20-22. She further stated she had "weigh[ed] the probative value of admitting the photograph over any unfair prejudice" and "admitted the ... black-and-white photo over" objection. R. 728, l. 24 – R. 729, l. 3.

According to Dr. Sakran, the photo showed "a significant avulsion injury to the upper arm with soft tissue, some muscle, skin" and exposed tendon and bone. R. 695, ll. 18-22. The photograph showed David's arm "draped out on the operating table" because it had been "prepped out and sterile." R. 696, ll. 7-10.

Discussion

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...." U.S. Const. Am. VI. The Fourteenth Amendment forbids states to "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Am. XIV; see also Estelle v. Williams, 425 U.S. 501 (1976); Irvin v. Dowd, 366 U.S. 717 (1961). Pursuant to this Due Process Clause, the United States Supreme Court held an individual's right to a jury trial pursuant to Sixth Amendment is applicable to the states. Duncan v. Louisiana, 391 U.S. 145, 149-150 (1968); see also State v. Warren, 273 S.C. 159,

255 S.E.2d 668 (1979). Additionally, South Carolina's Constitution provides that "Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury." S.C. Const. Art. I, § 14.

The Fifth, Sixth, and Fourteenth Amendments require that the state must prove each element of a crime beyond a reasonable doubt. See State v. Brown, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004) ("[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment's due process clause and the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt.")(internal quotations omitted); see also In re Winship, 397 U.S. 358 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Jackson v. Virginia, 443 U.S. 307, 314 (1979) ("A meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused.").

The Rules of Evidence serve to safeguard an individual's rights to due process of law and an impartial jury. One of the most important of those rules is the rule requiring exclusion of evidence where the probative value is substantially outweighed by the danger of unfair prejudice arising from that evidence. Generally, 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. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301,

303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). However, even relevant evidence must “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). Thus, consideration of whether evidence is relevant and admissible requires consideration of the evidence’s probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. “‘Probative’ means ‘[t]ending to prove or disprove.’” State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, “[p]robative value” is the measure of the importance of that tendency to the outcome of a case.” Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. “The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.” State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). “‘Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.’” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, “[t]he term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the

factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180 (1997). “Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion.” United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one”).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE. “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.” State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008).

The South Carolina Supreme 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)). 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)); see also State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009); State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986); 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); State v. Dial, 405 S.C. 247, 259, 746 S.E.2d 495, 501 (Ct. App. 2013); State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008); State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). 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.” Torres, 390 S.C. at 623-624, 703 S.E.2d at 229.

The Supreme Court recently addressed the danger of unfair prejudice in the introduction of gruesome autopsy photographs in State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). A majority of this Court held the admission of the photographs was erroneous. Collins, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge, J. and Hearn, J., concurring); Id., at 540, 763 S.E.2d at 30-31 (Pleicones, J., dissenting). However, four members of this Court determined the erroneous admission was harmless. Id., at 536, 763 S.E.2d at 28-29 (majority opinion); Id., at 539, 763 S.E.2d at 30 (Kittredge, J. and Hearn, J., concurring).¹ Despite the split among this Court, the point of the opinion is clear – evidence must be probative of some fact at issue in the case and the danger of unfair prejudice resulting from gruesome photographs must be guarded against at all times.

¹ Justice John Cannon Few wrote the opinion for a unanimous panel of the Court of Appeals finding the introduction of the photographs erroneous and not harmless. State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012).

Determining the probative value of the photograph presented to the jury in the case requires an examination of the charge against Appellant. The state charged him with attempted murder, which is defined as follows: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either express or implied." See S.C. Code Ann. § 16-3-29. The photograph held little probative value in that it did little to prove the elements of the offense. Rather, the photograph showed an injury to an arm – not a place normally viewed as life-threatening – after being prepped for operative exploration. Additionally, the nature of the injury was clearly communicated by the doctor to the jury in terms very easily understood. Further, the witnesses, including David, had described the injury as "ground meat" and a "hole."

The prejudicial effect of the photograph cannot be overstated. The photograph was gruesome. State's Exhibit #28. It showed the arm spread on an operating table during an operation. State's Exhibit #28. The flesh is splayed showing bone and tendon. State's Exhibit #28. One cannot help but to have an emotional reaction to the display.

The danger of unfair prejudice from the gruesome photograph substantially outweighed the limited probative value of the photograph. The testimony in the record made the type and extent of injury clear – in lay terms and in medical terms. The jury would have no problem understanding the injury. Looking at the photograph would serve no purpose in proving an element of the offense; rather, it would only force the jurors to react emotionally and decide the case based on that emotion instead of properly admitted evidence. The judge erred in her analysis.

CONCLUSION

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

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of January, 2017.

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THE STATE,

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JASON MORRIS GOURDINE,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason Gourdine states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's pretrial hearing on January 26, 2016 before the Honorable Perry M. Buckner, III, and his trial before Judge Kristi Lea Harrington, which was held on March 14-17, 2016. In her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738, (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Jason Gourdine.

Respectfully Submitted,

Susan B. Hackett

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Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of January, 2017.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Entire January 26, 2016 Pretrial Transcript (PPP Tr.);
- (2) Entire March 14, 2016 Pretrial Transcript (3/14 Tr.);
- (3) Entire March 15-17, 2016 Trial Transcript (Tr.);
- (4) State's Exhibit No. 1 (DVD of Security Footage at Nowhere Bar);
- (5) State's Exhibit #27 (photograph);
- (6) State's Exhibit #28 (black & white photograph);
- (7) Court's Exhibit #4 (color photograph);
- (8) True-Billed Indictments (2014-GS-08-1719, -1720, -1721, -1722);
- (9) Sentence sheets;

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

January 27, 2017

Susan B. Hackett

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 27, 2017.

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Jason Gourdine, #199055, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 27th day of January, 2017.

Susan B. Hackett

Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of January, 2017.

[Signature] (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.