

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Lexington County

RECEIVED

Honorable Thomas A. Russo, Circuit Court Judge FEB 16 2017

THE STATE,

SC Court of Appeals

RESPONDENT,

V.

FILIBERTO CAMPOS,

APPELLANT

APPELLATE CASE NO. 2015-001293

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether, pursuant to Rule 403, because the overwhelming prejudice drastically outweighed their probative value, the trial court erred in admitting photographs of an infant's corpse that caused one of the most seasoned trial judges in this state to declare he could not be impartial after viewing them and caused jurors to cry upon their publication by the State?

STATEMENT OF THE CASE

During its May 2014, term, the Lexington County grand jury indicted appellant for homicide by child abuse. R. 630. On June 1, 2015, appellant was tried before the Honorable Thomas A. Russo and a jury. R. 1. Suzanne Mayes and Robert McNair represented the State. R. 1. Aimee Zmroczek represented appellant. R. 1. The jury convicted appellant. R. 608, ll. 10 – 22. Judge Russo sentenced appellant to life imprisonment. R. 627, ll. 16 – 20. This appeal follows.

ARGUMENT

Pursuant to Rule 403, because the overwhelming prejudice drastically outweighed their probative value, the trial court erred in admitting photographs of an infant's corpse that caused one of the most seasoned trial judges in this state to declare he could not be impartial after viewing them and caused jurors to cry upon their publication by the State.

Factual and Procedural Background

The State indicted appellant and Tracey Roach ("Roach") for the death of their thirteen-month old daughter ("Infant"). R. 630; R. 468, l. 25 – 469, l. 6. Appellant is originally from Mexico and a translator was used in this trial. R. 1. R. 513, l. 24 – 514, l. 3. Appellant and Roach lived together since 2005 and had two children together. R. 518, ll. 7 – 23. They had a son in 2006 and Infant was born in July 2012. R. 518, ll. 15 – 23. R. 286, ll. 7 – 11.

During Roach's pregnancy with Infant, the couple learned that Infant had Down's Syndrome. R. 520, ll. 20 – 25. R. 294, l. 14 – 295, l. 5. Roach wanted to have an abortion. R. 521, ll. 3 – 10. Appellant wanted to keep Infant. R. 521, ll. 1 – 10. Infant was born with Down's Syndrome and heart problems. R. 294, l. 14 – 296, l. 25. Infant spent several days in the neonatal intensive care unit. R. 307, ll. 12 – 19.

Appellant worked and Roach took care of the children. R. 524, ll. 11 – 25. Appellant believed Roach was taking care of Infant and feeding her. R. 523, l. 13 – 524, l. 23. About two months before Infant's death, Roach "started to be kind of weird." R. 525, l. 21 – 526, l. 13. Appellant still believed that Roach could take care of the children. R. 526, ll. 14 – 16. On September 2, 2013, appellant found Infant dead in her crib. R. 529, ll. 6 – 9. Appellant ran to a store and called 911. R. 529, l. 23 – 530, l. 6.

The State's expert witnesses testified that Infant starved to death. R. 405, ll. 21 – 25. R. 372, l. 24 – 377, l. 3. SLED's toxicologist testified that Infant had antidepressants in her system. R. 346, ll. 5 – 25. The toxicologist characterized one of the antidepressants as "strong" and said it was used to treat bipolar disorder. R. 351, ll. 10 – 16. The antidepressants in Infant's system caused drowsiness and lethargy. R. 349, ll. 2 – 8. They were ingested within twelve hours of infant's death. R. 353, ll. 21 – 24. Roach's prescription medicines as well as a pill crusher were found next to the couch where Roach slept. R. 215, ll. 9 – 24. R. 221, l. 14 – 222, l. 13.

One of the drugs found in the pill crusher matched the drugs found in Infant's system. R. 354, ll. 10 – 16. The State's expert pediatrician described these drugs as having a "synergistic" quality that amplified their effect. R. 422, l. 22 – 423, l. 6. She also agreed that it was common for children who are drugged to experience rapid weight loss. R. 433, l. 24 – 434, l. 1.

Roach pled guilty and received a life sentence. R. 468, l. 25 – 469, l. 12. R. 471, ll. 9 – 18. R. 484, l. 21 – 486, l. 9. Roach exercised her Fifth Amendment privilege and refused to testify at appellant's trial. R. 468, l. 10 – 469, l. 12. Appellant testified that he did not know Roach was hurting Infant and that he thought, in retrospect, that Roach "was crazy." R. 553, l. 21 – 554, l. 3. R. 535, ll. 16 – 21.

Prior to trial, Judge Russo heard argument on appellant's motion in limine to prevent the State from introducing horrific photographs of Infant's corpse. R. 35, l. 17 – 46, l. 16. R. 58, l. 1 – 77, l. 11. State's Ex. 2, 9, 10, 11, 12, 13. R.628. Trial counsel argued that the probative value of the photographs was greatly outweighed by their prejudicial effect and cited State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014) . R. 72, l. 14 – 73, l. 2. R. 40, l. 17 – 41, l. 21. Many of the photographs were taken after Infant was "stored in a cooler." R. 40, l. 17 – 41, l. 21.

In support of her argument, trial counsel quoted the Honorable J. Cordell Maddox Jr.'s comments about the photographs when he sentenced Roach to life imprisonment. R. 38, ll. 9 – 18. Trial counsel quoted Judge Maddox as saying: “I have been a judge for 16 years. I know I’m supposed to be impartial. **I cannot be impartial after looking at these pictures.**” R. 38, ll. 9 – 18 (emphasis added). Referring to Nazi concentration camps, Judge Maddox also said, “If you took this picture in 1945 in Germany, it wouldn’t be surprising.” R. 38, ll. 9 – 18. Trial counsel argued that if an experienced trial judge could not be impartial after looking at these photographs, that it would be impossible for jurors to be impartial. R. 39, ll. 3 – 7. Trial counsel did not make the transcript of Roach’s sentencing a court’s exhibit, but the solicitor asked to see the transcript and never disputed trial counsel’s account of Judge Maddox’s comments. R. 39, ll. 22 – 25. R. 40, ll. 17 – 20. The trial judge did not believe that Judge Maddox’s reaction was relevant to how jurors would react to the photographs. R. 38, l. 19 – 40, l. 16.

The State argued that the photographs were relevant because the defense was challenging the cause of death. R. 42, l. 22 – 43, l. 3. The State also asserted the photographs were necessary to prove that appellant would have been “aware that the child needed medical attention.” R. 43, ll. 4 – 9. Finally, the State argued that the photographs were needed to “illustrate the findings of the physicians in this case.” R. 43, l. 11 – 44, l. 2. The State pared the photographs it sought to introduce, but appellant still objected to all of the photos and argued they were cumulative. R. 72, l. 5 – 74, l. 7.

The trial judge sustained appellant’s objection to one photograph (State’s Ex. 10), but admitted five photographs (State’s Ex. 2, 9, 11, 12, 13). R. 74, l. 8 – 75, l. 6. Judge Russo ruled “as far as the objection that the prejudicial effect is outweighed by any probative value I’m going to overrule as to those.” R. 74, l. 23 – 75, l. 6. Trial counsel made contemporaneous objections

when the State sought to admit the photographs during the trial. R. 112, ll. 3 – 10. R. 370, ll. 7 – 17.

Discussion

The trial judge erred in allowing the jury to see these horrific photographs. The photographs have been transported for the Court's viewing. (State's Ex. 2, 9, 11, 12, 13). The photographs of Infant's purple, withered corpse exceed "the outer limits of what our law permits a jury to consider." State v. Torres, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). While appellant readily concedes that the photographs did have some probative value, their grotesque nature tips the scales of Rule 403 so heavily toward unfair prejudice that the trial judge abused his discretion when he admitted them. Rule 403, SCRE. See also State v. Gray, 408 S.C. 601, 616-17, 759 S.E.2d 160, 168-69 (Ct. App. 2014) (discussing definition of unfair prejudice and noting that evidence that is "concededly relevant" must still be evaluated for its ability to "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.") quoting Old Chief v. United States, 519 U.S. 172, 180 (1997). Trial counsel correctly argued that if an experienced trial judge could not be impartial after looking at these photographs, then the law could not ask jurors to decide a case based on the facts and the law instead of passion and prejudice.

In the fractured opinion of State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014), three justices of the Supreme Court found that admission of photographs of a child's corpse that had been eaten by dogs was error. Collins at 539-40, 763 S.E.2d at 30-31 (opinions of Kittredge, J. and Hearn, J., concurring and Pleicones, J., dissenting). Justice Kittredge wrote that the State's purpose of admitting the "horrific" photographs was "to inflame the passions of the jury." Id. In

dissent, then-Justice Pleicones wrote that the photographs far exceeded what the law allowed.

Id.

“Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.” Torres, at 623, 703 S.E.2d at 228. Photographs are unfairly prejudicial if they have a tendency to suggest a decision on an improper or emotional basis. Id. The impossibility of the jury maintaining objectivity is manifestly clear from the record. Jurors cried when they were shown photograph’s of Infant’s body. R. 270, l. 11 – 271, l. 6. R. 563, l. 18 – 564, l. 9. Many of the photographic exhibits were shown to the jury with an overhead projector. R. 615, ll. 6 – 11. By defense counsel’s count, the jury only deliberated for fourteen minutes before convicting appellant. R. 614, ll. 1 – 9.

In assessing the unfair prejudice of these photographs, the Court should keep in mind that these are not photographs of an adult, but of an infant. The photographs in Torres were autopsy photographs of adults. While still a child, the victim in Collins was ten years old. Here, the victim was a special needs baby. Her face is visible. Judge Maddox correctly compared the photographs to Nazi concentration camps.

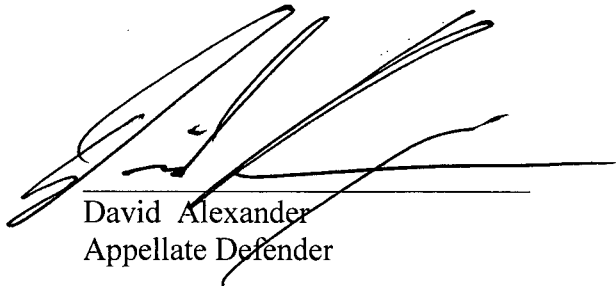
Appellant admits that the photographs do have some probative on the issue of whether appellant should have known that Roach was starving Infant to death. However, the State’s witnesses testified that Infant’s condition was readily apparent. R. 107, l. 19 – 108, l. 25 (EMT Hunter Reed). The pathologist and pediatrician experts described Infant’s condition and that her appearance related to starvation. R. 361, l. 21 – 378, l. 11 (pathologist Jeffery Welsh). R. 405, l. 21 – 420, l. 1. Even though the photographs do add some measure of probative value to the

experts' descriptions, it was simply beyond the pale to expect jurors to decide the case on anything but emotion after seeing this evidence.

Especially considering the fourteen-minute deliberation, it seems unlikely that the jurors gave serious consideration to appellant's defense or Roach's responsibility. The drugs in Infant's system belonged to Roach. Appellant testified that Roach was responsible for feeding Infant and that he believed Roach was feeding her. The State's expert admitted that the drugs given Infant by Roach could have caused rapid weight loss, so the State's argument that it would have taken months for Infant to die and therefore appellant had to have known her condition was far from conclusive. When photographs like these are admitted, a court asks too much of jurors to put aside their emotions and decide the case on the evidence and the law. The photographs overwhelmed the jurors' capacity to assess the evidence rationally. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand this case for a new trial.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and somewhat cursive.

David Alexander
Appellate Defender

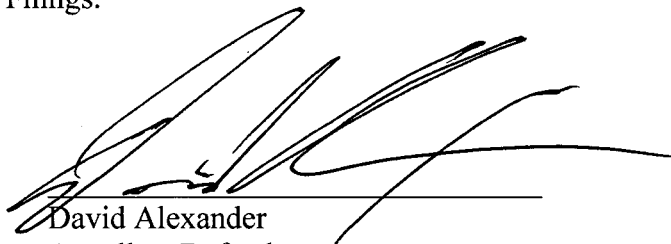
ATTORNEY FOR APPELLANT

This 16th day of February, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 16, 2017



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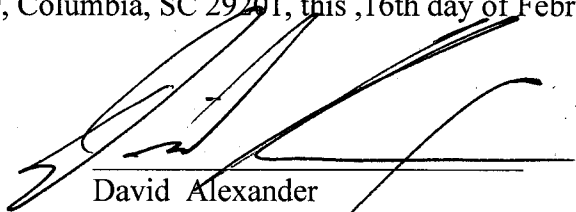
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of February, 2017.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of February, 2017.

Marie Kumbach (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

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