

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County

Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERALD LEWIS,

APPELLANT

APPELLATE CASE NO 2016-002166

ANDERS BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The trial court abused its discretion in admitting an animation purporting to show how the fatal accident involving Appellant's truck and a scooter occurred where the animation was irrelevant to the accusations against Appellant and, assuming arguendo that the animation may have been at all relevant, the danger of unfair prejudice substantially outweighed the probative value of the animation.

STATEMENT OF THE CASE

On May 27, 2015, the Georgetown County Grand Jury indicted Appellant Gerald Lewis for leaving the scene of an accident and felony driving under the influence resulting in death. R. 119 - 122.

On September 19-21, 2016, Appellant proceeded to trial before the Honorable William H. Seals and a jury. John Hilliard represented Appellant. Assistant Solicitor Austin Thomas represented the State.

The jury found Appellant guilty as charged. R. 309, ll. 1-8. The trial court sentenced Appellant to fifteen years imprisonment. R. 117, ll. 12-17.

ARGUMENT

The trial court abused its discretion in admitting an animation purporting to show how the fatal accident involving Appellant's truck and a scooter occurred where the animation was irrelevant to the accusations against Appellant and, assuming *arguendo* that the animation may have been at all relevant, the danger of unfair prejudice substantially outweighed the probative value of the animation.

Relevant Facts

Appellant's charges arose out of a car accident on Hicks Drive in Georgetown County on February 21, 2015. The accident occurred between 6:30 – 6:45 p.m. when Appellant's white Ford F-150 struck the back of a scooter ridden by Donald Sumpter. R. 66, ll. 1-9; R. 119, l. 6 – 125, l. 3. Sumpter was almost certainly killed instantly. Appellant's truck did not stop. There were no witnesses.

Whether Appellant's truck was involved in the accident was not an issue at trial. Whether Appellant was intoxicated at the time of the collision was not in dispute. The sole issue was whether Appellant was driving the truck at the time of the collision. This issue was intensely contested.

Appellant's Day Prior to the Accident

On the day of the accident, Appellant went fishing at a canal in a rural portion of Georgetown County from 8:00 a.m. until around 4:00 p.m with his friend, Jobie Aklin, and Aklin's son, Rashad. R. 233, l. 14 – 236, l. 5. Several of the friends and other people that interacted with Appellant prior to the accident testified at trial. As the group finished fishing, Appellant's truck became stuck in the mud surrounding the canal at around 3:30 p.m. *Id.*

Appellant's brother had to come and help pull Appellant's truck out of the mud. *Id.* After getting Appellant's truck free, Appellant and the Aklins followed Appellant's brother to a nearby

service station and then on to the brother's house. R. 243, l. 14 – 244, l. 10. Appellant's brother last saw him around 5 p.m. *Id.*

After leaving his brother's house, Appellant and the Aklins decided to go to their friend Will Sumter's house. When three arrived, Sumter was hosting a cookout at his barn. Sumter would recall at trial that the three men stayed for about an hour and that Appellant was highly intoxicated. R. 237, l. 12 – 240, l. 5.

Sumter stated that the three men left in Appellant's truck with Rashad driving at sometime between 5 p.m. and 6 p.m. *Id.* Sumter's wife also testified during the defense's case. She stated that Appellant's truck arrived at her house covered in mud. R. 247, l. 13 – 249, l. 1. Appellant and the Aklins stayed at her house for approximately forty-five minutes to one hour. *Id.* She further testified that Appellant "was really drunk. They put him on the passenger's side in the back and Rashad got into the driver's wheel, and they left." R. 248, ll. 1-4.

Jobie Aklin testified for the State as a rebuttal witness. Corroborating the defense witnesses' account of the day, Aklin stated that he, Appellant, and Rashad spent most of the day fishing. R. 259, l. 2 – 262, l. 23. Aklin admitted that Rashad was driving Appellant's truck when the three left Sumter's house. *Id.* He initially claimed that Appellant's son's wife met the group at a church and "took us on home." *Id.* He then immediately contradicted himself and alleged that he and Rashad got dropped off at the church and that Appellant then drove his truck away at around 6 p.m. *Id.*

On cross-examination, Aklin clarified that they ran into "my girlfriend's friend" after leaving Sumter's house and that this unidentified woman drove he and Rashad home. R. 263, l. 12 – 265, l. 24. Aklin said that he and Rashad left a highly intoxicated alone with truck. In his final version of events, the woman the two men received a ride from was Rashad's girlfriend. *Id.*

Aklin was adamant that Rashad only drove Appellant's truck from Sumter's house until the group ran into whichever woman gave him and Rashad a ride. Aklin also could not identify the church where he, Appellant, and Rashad ran into the woman that gave them a ride. Aklin admitted on cross-examination that Rashad had recently left the area as had Rashad's girlfriend. *Id.*

The Accident and Appellant's Arrest

Georgetown County Firefighter Deborah Johnson was among the emergency medical personnel dispatched to the accident. R. 83, l. 1 – 88, l. 23. As she was driving down State Road 701 road towards the collision scene, the emergency dispatch was cancelled due to Sumpter's death. *Id.* Approximately eighteen miles from the accident, Johnson pulled off the road to turn around. She was forced to wait as a line of slow moving vehicles passed her. *Id.*

Appellant's car was leading the line, traveling around thirty miles per hour. *Id.* Johnson pulled into the end of line and eventually was the only car left behind Appellant. She watched Appellant, despite traveling at a slow rate of speed, struggle to keep his truck on the road. Johnson, recalling the accident that occurred forty minutes earlier, called 911 to report Appellant as a possible drunk driver.

After several miles, Appellant pulled into a Dollar General parking lot. Johnson followed and parked behind him. *Id.* Appellant got out of his car and approached Johnson demanding to know why she was following him. Johnson did not answer and instead asked Appellant about the mud and damage to the front of his truck. According to Johnson, Appellant seemed genuinely surprised by the damage to his truck and did not know how his grill and head light were damaged. Appellant was able to explain that, earlier in the day his truck was stuck in the mud outside of a canal. Appellant was unsteady on his feet and his responses were slow. *Id.*

Highway Patrol Trooper Timothy Jacobs arrived at the Dollar Store parking lot a few minutes after Appellant pulled in. R. 101, l. 1 – 108, l. 24. Following field sobriety tests, Jacobs arrested Appellant. Jacobs would testify that the mud and damage to Appellant's truck "appeared fresh." Blood alcohol concentration tests recorded that Appellant had a .235 BAC. R. 226, ll. 8-25.

MAIT Team's Accident Reconstruction and Demonstrative Animation

How the fatal accident occurred was not in dispute. The MAIT established that Appellant's truck struck the back of Sumpter's scooter while traveling between 44 and 56 mph. R. 175, l. 1 – 176, l. 22. The scooter's headlight was on, however the taillights were too damaged for the MAIT team to determine if they were on at the time of the accident. R. 120, l. 15 – 126, l. 22.

Critically, the MAIT team reached no conclusions regarding how fast Sumpter's scooter was traveling at the time of the accident. As there were no witnesses. There was no testimony as to how far Sumpter was thrown from the Scooter and whether or not Sumpter went over the hood of Appellant's truck.

At trial, the State sought to enter a demonstrative animation showing how the accident allegedly occurred. R. * (State's Exhibit No.: 140). This animation showed several different angles of an accident where a white truck, traveling at an unknown speed, strikes the back of a scooter with a brightly colored crash-dummy like figure riding it, also traveling at an unknown speed. *Id.* During the impact the figure was thrown off of the scooter, landed briefly on the hood and windshield of the truck before falling off to the side of the road. The animation assumed that the scooter's taillights were on. *Id.*

As noted, the vehicles respective speeds were not stated. Nor did the animation state whether it was being played in “real-time” or slow-motion. *Id.* There were no trees, mailboxes or other roadside impediments. The animation showed what appeared to be a series of driveway entrances on either side of the road, but the animation does not provide any distance measurements or scale. *Id.* The animation assumes a high level of visibility from the truck’s headlights, from the figure’s clothing, from the scooter’s headlights, and from the nighttime conditions of the accident. The animation also assumes that the scooter was not stationary at the time of impact and that it did not suddenly pull in front of the white truck.

Defense counsel objected to the animation on the grounds that it was irrelevant and prejudicial. R. 44, l. 22 – 46, l. 19. Following brief arguments, the trial court denied the defense’s motion to suppress admitted the animation into evidence. *Id.*

A. Relevance and Probative Value

“Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy.” *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (*citing* Rule 401, SCRE (providing the definition of relevant evidence). “An animation may be relevant when it relates to other admissible, material evidence and it will aid the trier of fact in understanding the related evidence.” *Clark v. Cantrell*, 339 S.C. 369, 386, 529 S.E.2d 528, 537 (2000) (finding demonstrative animation was not admissible).

There was no fact in controversy in Appellant’s case that was made more or less probable by the introduction of the animation. The defense agreed that Appellant’s truck was involved in the accident. The defense agreed that Appellant was drunk. The defense agreed that the truck struck the back of the scooter and that Sumpter was ejected from the scooter during the accident.

The sole issue at trial was whether or not Appellant was driving his vehicle at the time of the accident.

Nothing in the animation addresses who was driving the white truck at the time of the accident. In fact, the white truck in the animation has no driver or passengers. Thus, the animation was completely irrelevant and had no bearing on any matter in controversy; Rule 402, SCRE. It should have been excluded.

B. Danger of Unfair Prejudice

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, SCRE. “[A] court analyzing probative value considers the importance of the E.2d 751, 754 (Ct. App. 2012). “Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case.” *Collins*, 398 S.C. at 207, 727 S.E.2d at 757; *see also State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

“Prejudice that is ‘unfair’ is distinguished from the legitimate impact all evidence has on the outcome of a case.” *Id.* “ ‘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.’ ” *Id.* (quoting *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)). “ ‘All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403].’ ” *Id.* (quoting *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429).

In the context of demonstrative animations, trial courts must be especially careful to balance the probative value of the animation against the danger of unfair prejudice. With respect to animations purporting to reconstruct car accidents, our Supreme Court has held:

[T]he animation must be a fair and accurate representation of the evidence to which it relates. It need not be exact in every detail, but the important elements must be identical or very similar to the scene as described in other testimony and evidence presented by the animation's proponent in order to constitute a fair and accurate representation. In an animation reconstructing a vehicle accident, for instance, **the animation must be technically correct on details such as distance, terrain, relative speed, path of travel, and surroundings.**

Cantrell, 339 S.C. at 386, 529 S.E.2d at 537. Failure to satisfy these requirements mandates that the animation be ruled inadmissible under Rule 403, SCRE. *Id.* at 387, 529 S.E.2d at 538.

To the extent that the animation had any probative value, that minimal value was substantially outweighed by the danger of unfair prejudice. The animation's depiction of a collision between a white truck and a scooter is visually arresting and chilling. R. * (State's Exhibit No.: 140). Key aspects of the animation were unsupported by the evidence presented at trial. *Sommervold v. Grevlos*, 518 N.W.2d 733, 738 (S.D.1994) (upholding trial court's refusal to admit animation of colliding bicycles because speed of bicycles, street lights, and location of accident did not match witnesses' testimony).

Unlike the road where Appellant's truck collided with Sumpter's scooter, the road in the animation contains no trees, mailboxes, or other impediments. The animation assumes that the headlights of each vehicle were bright. It assumes the taillights of the scooter were operable and that Sumpter was wearing bright – highly reflective – clothing. Critically, the animation assumes a level of atmospheric lighting that is entirely unrealistic for a rural road at night. *Cantrell*, 339 S.C. at 386, 529 S.E.2d at 537.

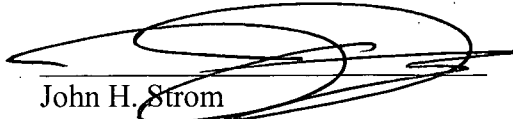
With respect to the risk that the animation would unduly inflame jurors, the animation assumes that the scooter is traveling down the road at what appears to be a reasonable speed. By contrast, there was simply no evidence as to what speed the scooter was going or whether the scooter was standing still. Even more inflammatorily, the animation presupposes that Sumpter, once ejected from the scooter, rolled on to the hood of the vehicle before falling off the passenger side and being run over. There is absolutely nothing in the record that supports the animation's contention that Sumpter landed on Appellant's hood in this manner.

The risk of misleading the jury and unfairly prejudicing the Appellant was substantial as the animation was effectively the only "witness" to the accident that the jury could rely on during their deliberations. R. 106, ll. 21 – 111, ll. 7; *State v. Wiles*, 383 S.C. 151, 679 S.E.2d 172 (2009) (evidence admitted under the other-acts rule must be logically relevant to establish a material element of the crime with which the defendant has been charged); *see also State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982) (allowing jury to have transcript of deceased police officer's radio call was an abuse of discretion as it unduly emphasized that evidence).

Accordingly, the trial court abused its discretion in admitting the animation because it was irrelevant to Appellant's case and any marginal relevance was outweighed by the substantial risk of unfair prejudice and of misleading the jury.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence and remand the matter for a new trial.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of September, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

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GERALD LEWIS,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gerald Lewis states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge William H. Seals, which was held on September 19 - 21, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Gerald Lewis.

Respectfully Submitted,



John H. Strom

Appellate Defender
ATTORNEY FOR APPELLANT

This 5th day of September, 2017.

STATE OF SOUTH CAROLINA
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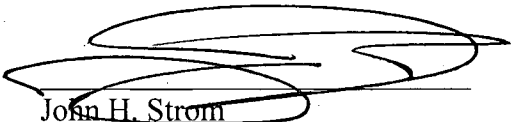
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Transcript of trial held September 19-21, 2016; and
- (3) State's Exhibit No.: 140.

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

September 5, 2017


John H. Strom
Appellate Defender

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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."

September 5, 2017.



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