

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2015-001293

THE STATE,

Respondent,

vs.

FILIBERTO GARCIA CAMPOS,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

205 E. Main Street
Lexington Judicial Center
Lexington, SC 29072
(803) 785-8352

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse his broad discretion by admitting a limited number of photographs depicting the thirteen-month-old victim's profoundly emaciated condition at the time of her death because those photographs were highly probative towards establishing the victim was fatally deprived of food and health care by her parents, which had to be established in order to prove Appellant's guilt for the elements of homicide by child abuse, and their high probative value greatly outweighed any potential undue prejudice that could have resulted from their admission.

STATEMENT OF THE CASE

In September of 2013, Appellant Filiberto Garcia Campos was arrested following an investigation into the death of his thirteen-month-old daughter. In May of 2014, the Lexington County Grand Jury indicted Appellant for one count of homicide by child abuse. On June 1, 2015, a jury trial was commenced in the Lexington County Court of General Sessions with the Honorable Thomas A. Russo, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to life imprisonment without the possibility of parole. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

Around 9:30 p.m. on September 2, 2013, Appellant Filiberto Garcia Campos called 911 from a telephone located at a store near his home in West Columbia, South Carolina, and reported his thirteen-month-old daughter (“Victim”) had died because she was “very sick.”¹ (R. pp. 104-105; p. 212; pp. 530-531). In response, Hunter Reed, a paramedic with Lexington County Emergency Medical Services, quickly responded to Appellant’s home along with other emergency personnel. (R. pp. 102-106; pp. 124-125). When he arrived a short time later, he encountered Appellant, who was holding Victim, along with Tracy Roach, Victim’s mother. (R. pp. 105-106; p. 121; pp. 31-132). Appellant then quickly handed Victim to Reed, and Reed immediately noticed Victim, who was not breathing and had no pulse, appeared to be very small, was underweight, and did not look or feel like a typical infant of the same age. (R. pp. 106-110). At that point, Reed moved Victim to his ambulance, began resuscitation efforts, took off her clothing for treatment purposes, and noticed she was “profoundly emaciated.”² (R. pp. 107-109). As he provided her with treatment, Reed further noticed Victim had a “complete lack” of fatty tissue on her body, appeared “skeletal,” had “very sunken in” eyes, was dirty, and was wearing a degraded diaper that was stained with urine and nearly falling apart. (R. pp. 109-110). Reed then rapidly transported Victim to Lexington Medical Center, but he and other medical personnel were never able to revive her. (R. p. 110; pp. 144-145).

As a result of Victim’s death, Detective Michael Gooding responded to the Lexington Medical Center to conduct an investigation into the matter, and he went to see Victim in the emergency room. (R. p. 142; pp. 144-145). Upon seeing her, Detective Gooding was shocked

¹ During the call, Appellant also noted Victim was not breathing and was dry. (R. p. 531).

² While attempting to treat Victim, Reed obtained a medical history from Roach, who reported Victim was behaving normally earlier that afternoon and had been checked on multiple times by Appellant prior to her death. (R. p. 113).

by Victim's appearance and noticed she was extremely thin, her eyes appeared sunken in, her mouth was very dry, all of her ribs were "cleanly and clearly" visible, her shoulder blades were protruding, she had seeping open sores on her body, she was covered in what appeared to be crystalized urine, and she smelled of urine. (R. p. 147). Moreover, Detective Gooding was unable to detect any features commonly associated with Down Syndrome due to Victim's condition despite the fact Victim had been diagnosed with that genetic disorder. (R. p. 147; p. 412). After viewing Victim's condition, Detective Gooding spoke with Roach, who was still at the hospital, and then went to Appellant's residence to speak with him there. (R. p. 149; pp. 151-154). During his ensuing conversation with Appellant, Appellant stated he had been off from his job for a three-day holiday weekend at the time of Victim's death, woke up around 1:00 p.m. earlier that day, made something to eat in the kitchen, went back to sleep, woke up later, checked on Victim, and found her unresponsive in her crib. (R. pp. 155-158). Additionally, Appellant stated he did not check on Victim when he had woken up earlier because her room was on the other side of his residence, which was a single-wide trailer. (R. p. 156). Appellant further stated Victim had been sick all day but claimed nothing had been different in the last day or so of her life. (R. pp. 159-160). Furthermore, Appellant asserted Roach, whom he reported had been sick and was sleeping on a couch, usually fed Victim and had not told him anything about Victim on the day of her death. (R. pp. 153-156; pp. 159-160).

Subsequently, in the early morning hours of September 3, 2013, Detective Gooding executed a search warrant at Appellant's trailer. (R. p. 165). When he did so, Detective Gooding immediately detected the odor of urine and discovered the smell grew stronger as he walked to Victim's bedroom. (R. p. 166). During his ensuing search of the residence, Detective Gooding located a baby bottle containing crusty and curdled milk in the floor of the living room,

two or three more baby bottles containing crusty and curdled milk on the kitchen counter, a highchair that appeared to be used solely for storage in the corner of the kitchen, dusty and unopened bottles of baby food and formula buried underneath other items in the kitchen, a baby bathtub that appeared unused in the master bathroom, and multiple empty beer packages throughout the kitchen. (R. pp. 166-168; pp. 173-174; pp. 176-182; pp. 184-186). Notably, Detective Gooding did not locate any open containers of baby food or any fresh milk or formula anywhere inside the trailer, including in the refrigerator, which only contained food for adults, and he was unable to locate any implements used to clean baby bottles anywhere in the residence. (R. p. 168; p. 173; p. 176; pp. 185-186; p. 233).

Thereafter, at approximately 10:00 a.m. later that morning, Dr. Jeffrey Welch, a pathologist at Lexington Medical Center and an expert in clinical and anatomic pathology, conducted an autopsy of Victim. (R. p. 148; pp. 356-359). During the autopsy, Dr. Welch discovered Victim, who was thirteen months old, weighed just nine pounds and two ounces, which was a weight significantly below the weight expected of a child her age.³ (R. p. 360). He further noticed she was extremely thin and her eyes and cheeks were sunken in, which was indicative of chronic malnutrition. (R. pp. 361-362; p. 364). As the autopsy continued, Dr. Welch noted Victim's ribs and spine were protruding, her scapulas were visible, her hip bones were protruding, her skin was wrinkled, she had pressure sores on her body, and the crown of her head was sunken in, which was a sign of malnutrition and dehydration. (R. pp. 364-366; p. 372; p. 374). Additionally, he discovered Victim's stomach was empty at the time of her death. (R. p. 381). Furthermore, he noted she had no fatty tissue on her body and her liver, thymus, and adrenal glands were exhibiting changes caused by chronic malnutrition and starvation. (R. 366-

³ According to the medical testimony presented during trial, Victim should have weighed between eighteen and twenty pounds at the time of her death. (R. p. 432).

369; pp. 373-374). Based on his discoveries during the autopsy, Dr. Welch concluded Victim's death resulted from lethal neglect. (R. p. 375).

Following the determination regarding the cause of Victim's death, Detective Gooding continued his investigation into the matter. (R. pp. 187-189). While doing so, he obtained medical records associated with Victim, and the last record he was able to locate was from November 12, 2012. (R. pp. 194-195). However, he ascertained thirty-seven different medical appointments for Victim were missed, cancelled, or otherwise not kept during her short lifetime. (R. p. 197). Additionally, he discovered Victim received in-home visits from medical personnel through the Easter Seals program but no in-home visits occurred after 2012.⁴ (R. p. 195). He further discovered Victim received full medical insurance coverage through Medicaid, vouchers for formula and food through the Women, Infants, and Children Program, and \$698 per month in Social Security benefits while her family received an additional \$526 per month in food stamps. (R. pp. 196-197; pp. 217-219; p. 321). Furthermore, he spoke with Appellant, Roach, and their neighbors and determined everyone, including Appellant, was home the majority of the time in the days leading up to Victim's death. (R. pp. 192-193; p. 210).

Based on his discoveries, Detective Gooding arrested Appellant and Roach in connection to Victim's death on September 12, 2013, and executed a second search warrant at the residence.⁵ (R. pp. 199-201). During the second search, Detective Gooding discovered the trailer had been cleaned, the highchair had been uncluttered, and the dusty baby food he had seen during his earlier search had been polished off and stacked neatly on the counter. (R. pp. 201-

⁴ Regarding those in-home visits, Melissa Juergens, an early intervention specialist with Easter Seals of South Carolina, testified during trial she visited Appellant's home six times between September and December of 2012 to provide developmental training to Victim's family and only stopped doing so when Roach terminated her services. (R. pp. 254-256). Juergens further testified she weighed Victim during a visit on December 5, 2012, and determined Victim weighed nine pounds and five ounces at that time. (R. pp. 257-258).

⁵ At the time of his arrest, Appellant had \$484 in cash in his wallet and a reported income of \$38,193 per year. (R. p. 206; p. 280).

202). Additionally, he located a bag in the living room containing multiple medications prescribed to Roach along with a pill crusher. (R. pp. 215-216; p. 222). Furthermore, he located some unused vouchers for baby food and formula along with numerous receipts indicating fast food, beer, and other food items were purchased in the days and weeks leading up to Victim's death, but none of the receipts indicated any baby food or formula had been purchased during that time span. (R. pp. 211-212; p. 217; p. 219).

Subsequently, Appellant was indicted for homicide by child abuse, and he elected to proceed to trial. (R. pp. 9-11; pp. 629-630). At the outset of trial, the solicitor indicated she wished to introduce some of the photographs taken of Victim after her death during the course of the trial, and defense counsel responded she objected to some of the pictures the solicitor intended to introduce.⁶ (R. pp. 12-13; pp. 35-38). In support of her objection, defense counsel indicated she wished to introduce a transcript of remarks made by Judge J. Cordell Maddox, Jr., the South Carolina circuit court judge who accepted Roach's guilty plea prior to Appellant's trial, because Judge Maddox purportedly stated during the guilty plea proceedings he could not remain impartial after viewing the photographs from the case. (R. pp. 38-39). In response, the trial judge inquired as to how Judge Maddox's purported views on the photographs would be relevant to Appellant's case in light of the fact he might have a differing view of the evidence presented to him, and, at that point, defense counsel withdrew her request to make Judge Maddox's remarks a part of the trial record.⁷ (R. pp. 39-40). Defense counsel then contended

⁶ In arguing for the admission of some of the post-mortem photographs, the solicitor noted over one-hundred photographs had been taken in Appellant's case and the majority were not being offered into evidence. (R. pp. 35-36; p. 76).

⁷ Before defense counsel abandoned her request to make Judge Maddox's purported remarks a part of the trial record, the solicitor indicated she had not seen the transcript of those remarks and asked to see them. (R. p. 39). Defense counsel then informed the solicitor she would find the remarks for her, but it is unclear if she ever did so because she promptly withdrew her request to admit the transcript of those remarks directly after calling them to the solicitor and the trial judge's attention. (R. pp. 39-40).

she objected to some of the photographs because Victim's stomach was "all sunk down" in the post-mortem photographs the solicitor wished to introduce while maintaining Victim's stomach appeared different in photographs taken closer in time to her death. (R. pp. 36-38; p. 41). In rebuttal, the solicitor asserted the photographs were highly probative because they were necessary for the medical testimony to be understood and because defense counsel intended to challenge the cause of Victim's death along with argue Appellant was not aware of Victim's condition. (R. pp. 42-44).

Upon considering the arguments of counsel and reviewing the evidence overnight, the trial judge ruled one of the photographs the solicitor wished to introduce would not be admissible due to the fact it was cumulative to another of the photographs but overruled defense counsel's objection as to five of the post-mortem photographs upon finding their probative value was not substantially outweighed by their potential for unfair prejudice. (R. p. 62; pp. 73-75). Furthermore, the trial judge determined Victim's condition appeared to be the same in both the earlier post-mortem photographs and the photographs taken several hours later at the time of the autopsy. (R. p. 44; p. 73).

Thereafter, as trial proceeded forward, Reed testified about his response to Victim's death and his observations of Victim's alarming condition when he arrived at Appellant's home while noting Victim's concerning features were readily apparent, and one of the photographs taken of Victim's body – State's Exhibit # 9 – was admitted into evidence over defense counsel's objection after Reed confirmed it accurately reflected Victim's condition at the time he placed her into his ambulance. (R. pp. 102-103). Likewise, Detective Gooding testified about the details of his investigation into Victim's death, and he recounted his observations of Victim's

shocking condition when he saw her in the emergency room at the Lexington Medical Center.⁸ (R. pp. 142-238). Additionally, Becky Kelly, one of Appellant's neighbors, noted Appellant was home every day between June and September of 2013 after he got off work, and Brenda McLain, an accountant and bookkeeper at Appellant's place of employment, confirmed Appellant typically got off work around 2:30 p.m., did not ordinarily work on weekends, and last got off work at 2:31 p.m. on August 30, 2013, prior to Victim's death several days later. (R. p. 131; p. 135; pp. 239-250).

As the trial continued forward, defense counsel asserted a "juror with . . . shoulder length blond hair" was "crying" and "had visible tears" when State's Exhibit # 9 was published to the jury, and the trial judge noted defense counsel's assertion for the record. (R. pp. 270-271). Following that occurrence, Mary Kayse, a pediatric nurse practitioner who saw Victim for wellness checks after her birth, testified about her interactions with Victim and her family. (R. pp. 283-286). During her testimony, Kayse recounted she weighed Victim, who was born in July of 2012, several times between August and November of 2012 and Victim's weight gain was concerning at that time. (R. pp. 286-289). In response, Kayse indicated she spoke to Roach, personally fed Victim, who "greedily" drank two ounces of formula, and recommended Roach increase Victim's calorie intake. (R. pp. 289-293). After that, Kayse stated Appellant and Roach brought Victim back for one more appointment on November 12, 2012, she weighed Victim and discovered Victim had gained eight ounces in three days, and then Appellant and Roach left with Victim before the appointment could be conducted. (R. pp. 297-298).

In addition to that testimony, Dr. Welsh testified about Victim's cause of death along with his observations during Victim's autopsy, which he found to be "striking," and several more

⁸ During his testimony, Detective Gooding noted the only change in Victim's appearance between when he saw her in the emergency room and saw her at the time of the autopsy was the medical equipment used in the efforts made to save her life had been removed by the time of the autopsy. (R. p. 187).

photographs of Victim's condition after her death – State's Exhibits # 3, # 11, # 12, and # 13 – were admitted into evidence.⁹ (R. pp. 356-383). Regarding Victim's cause of death, Dr. Welsh explained she died of lethal neglect while noting her death was not caused by drug interaction or a heart condition.^{10 11} (R. p. 375; p. 377; pp. 381-382). He further stated Victim's life could have been saved if she had received medical attention when her symptoms were readily apparent. (R. p. 376). Likewise, Dr. Susan Luberoff, a child abuse pediatrician and expert in forensic pediatrics, testified about her evaluation of the medical records, autopsy findings, photographs, and data related to Victim's death. (R. pp. 396-402). During her testimony, Dr. Luberoff noted Victim was "profoundly emaciated" in a "striking" and "startling" fashion and referred to the various photographs taken after Victim's death to explain the significance of the features depicted in those photographs.¹² (R. pp. 409-414). In order for Victim to have reached the condition she was in, Dr. Luberoff stated she would have had to have been starved for a period of months.¹³ (R. p. 414). Dr. Luberoff further noted the physical features of Victim's chronic starvation, which were depicted in the photographs admitted into evidence, would have been

⁹ When those photographs were offered into evidence, defense counsel did not object to the admission of State's Exhibit # 3 but objected to the admission of the other three photographs. (R. p. 370).

¹⁰ Although drug interaction was ruled out as a cause of Victim's death, three different antidepressants were determined to have been present in Victim's body at the time of her death, and those drugs had been ingested within the last twelve hours of her life. (R. pp. 344-345; pp. 381-382).

¹¹ Earlier during her opening statement, defense counsel had called the jury's attention to the fact Victim had been diagnosed with a heart condition. (R. p. 101). However, Victim's heart condition had healed by the time of her death. (R. pp. 295-296; p. 377; pp. 401-403).

¹² During her testimony, Dr. Luberoff referred to State's Exhibit #2 without objection despite the fact that photograph does not appear to have been admitted into evidence during trial. (R. pp. 413-414).

¹³ Specifically, Dr. Luberoff indicated Victim could have reached the degree of starvation she was experiencing in as little as two months. (R. p. 421).

readily apparent to any reasonable caregiver along with a loss of motor skills and strength, which Victim would have been exhibiting in the last days or weeks of her life.¹⁴ (R. pp. 416-418).

Following the presentation of that testimony, the State rested, and Appellant elected to testify in his own defense.¹⁵ (R. p. 513). During his testimony, Appellant stated Roach, whom he began living with in 2005, became pregnant with Victim during the course of their relationship, and he claimed Roach wanted to have an abortion when they discovered Victim had “problems.” (R. pp. 518-521). However, Appellant stated Victim was born anyway and was hospitalized for approximately one month afterwards, and he claimed he visited her in the hospital daily during that time period and was taught to feed her by her doctors. (R. pp. 521-522). Additionally, Appellant stated Victim was small after she was born and claimed he was concerned by her lack of weight gain during her lifetime. (R. p. 523). However, Appellant insisted it was Roach’s role to take care of Victim while claiming he held Victim every time he saw her up until her death, changed her diapers on some occasions, played with her, and was never not allowed to see her. (R. pp. 527-528). Appellant further and inconsistently claimed Roach, whom he stated was sick and sleeping on a couch at the time, would not let him see Victim on the weekend of Victim’s death while insisting he last saw Victim three days before her death at a time when she was clothed. (R. pp. 532-535; p. 537). When he saw her at that time,

¹⁴ During Dr. Luberoff’s testimony, the solicitor introduced a photograph – State’s Exhibit # 73 – depicting Victim at an earlier point in her life before she was chronically starved, and that photograph allowed the jury to observe the changes in Victim’s appearance that were depicted in the other photographs discussed by Dr. Luberoff after Victim had been chronically starved by her parents. (R. pp. 414-416; p. 433).

¹⁵ In addition to Appellant’s testimony, defense counsel offered the testimony of several different witnesses in Appellant’s defense. (R. p. 456; p. 465; p. 470; p. 480; p. 488; p. 508). Through those witnesses, it was established Appellant was a “[v]ery good worker” at his job, Appellant understood English, a volunteer for a mentor program made several in-home visits between January and May of 2013 due to a report of neglect involving Appellant’s son, and Roach had previously claimed to be Victim’s primary caregiver while also falsely claiming she was so because Appellant lived outside of the area. (R. p. 457; p. 466; pp. 472-474; pp. 476-678; p. 485). Furthermore, through those witnesses, it was established a computer recovered from Appellant’s home contained nearly a thousand pictures on it, including pictures of Appellant and Victim. (R. pp. 500-501). However, it was further established the computer contained no pictures of Victim taken after April of 2013. (R. p. 501).

Appellant claimed Victim did not look sick. (R. p. 534). Furthermore, as his testimony continued, Appellant acknowledged he was capable of feeding Victim but insisted it was not his responsibility or job to feed Victim. (R. pp. 539-542). Instead, he explained that responsibility fell to Roach, whom he characterized as “crazy.” (R. p. 541; p. 553). Appellant further conceded he was off every weekend during August of 2013 at the time when Victim was starving to death. (R. pp. 539-542).

After Appellant concluded his testimony, the defense rested, and defense counsel renewed her objection to the admission of the photographs that had been admitted during trial while noting jurors allegedly reacted to them. (R. p. 557; pp. 563-564). Thereafter, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 567-605). As part of his jury instructions, the trial judge explained to the jurors their verdict could not be based on “sympathy, compassion, prejudice, or emotion or some other consideration that’s not found in the evidence.” (R. p. 603). Subsequently, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 608). Following the verdict, the trial judge sentenced Appellant to life imprisonment without the possibility of parole. (R. p. 627).

ARGUMENT

The trial judge did not abuse his broad discretion by admitting a limited number of photographs depicting the thirteen-month-old victim's profoundly emaciated condition at the time of her death because those photographs were highly probative towards establishing the victim was fatally deprived of food and health care by her parents, which had to be established in order to prove Appellant's guilt for the elements of homicide by child abuse, and their high probative value greatly outweighed any potential undue prejudice that could have resulted from their admission.

Appellant contends that the trial judge abused his broad discretion over evidentiary matters by admitting a number of photographs depicting Victim's condition at the time of her death. In support of that contention, Appellant maintains the photographs' "overwhelming" potential for undue prejudice substantially outweighed their undisputed probative value in light of their graphic nature. To the contrary, the photographs depicting Victim's starved and emaciated condition were critical towards establishing her death resulted from chronic neglect, which the State was required to establish in order to prove Appellant was guilty of the charged offense of homicide by child abuse beyond a reasonable doubt. Moreover, although undeniably graphic and disturbing, those photographs were not so gruesome, gory, or extreme that their potential for undue prejudice substantially outweighed their exceedingly high probative value under the circumstances of Appellant's case. As a result, the trial judge did not abuse his broad discretion by admitting the photographic evidence during trial. Appellant's conviction should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the

defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (“The appellate court reviews a trial judge’s ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.”); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.”); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) (“[D]eference is due to the trial court’s admission of the evidence.”). Significantly, “[a]n abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ANALYSIS

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.”). “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, 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.’ ”).

However, even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE (“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.”). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence’s tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev’d on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); see Old Chief v. United States, 519 U.S. 172, 181 (1997) (“The 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.”). However, unfair prejudice does **not** mean damage to a defendant’s case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have “particularly wide discretion[.]” Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge’s ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, “[a] trial judge’s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.” State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). “If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” Id. at 358, 543 S.E.2d at 594.

In the case sub judice, the trial judge did not abuse his broad discretion by admitting a limited number of photographs depicting Victim’s physical condition at the time of her death. That is true because, although unquestionably unpleasant and disturbing, the photographs of Victim’s body were exceptionally probative in Appellant’s case as they bluntly established Victim was fatally deprived of food and health care, which was a fact the State was required to establish beyond a reasonable doubt in order to prove Appellant was guilty of homicide by child abuse by not providing Victim, his thirteen-month-old biological daughter who resided in the his home, with the basic necessities she needed to survive in a manner evidencing an extreme indifference towards human life. See S.C. Code Ann. § 16-3-85(B)(2)(b) (explaining harm to a child’s health or welfare for purposes of the offense of homicide by child abuse occurs when a person “fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death”); see also State v.

Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 608 (Ct. App. 2008) (“The photographs were relevant to prove Child was abused, that the abuse was the cause of his death, and that the abuse manifested an extreme indifference to human life, all of which support the charge of homicide by child abuse.”); cf. State v. Dial, 405 S.C. 247, 261, 746 S.E.2d 495, 502 (Ct. App. 2013) (“We find the [autopsy] 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.” (citation omitted)), cert. dismissed as improvidently granted, 412 S.C. 121, 770 S.E.2d 767 (2015). Additionally, the photographs of Victim’s condition served to corroborate the testimony of the different witnesses and experts who testified during Appellant’s trial in regard to Victim’s cause of death, and they visually conveyed the severity of the neglect inflicted upon Victim while allowing the experts to identify to the jury with support the various symptoms of chronic starvation that Victim was exhibiting at the time of her death.¹⁶ See State v. Jarrell, 350 S.C. 90, 106-107, 564 S.E.2d 362, 371 (Ct. App. 2002) (finding the trial judge did not abuse his discretion by admitting autopsy photographs depicting the ten-month-old victim’s body because, even though the photographs were “graphic,” they corroborated testimony presented during trial by depicting the victim’s readily-apparent injuries and by showing the victim’s condition); see also State v. Holder, 382 S.C. 278, 291, 676 S.E.2d 690, 697 (2009) (“There photographs demonstrate that the damage to the child would have been difficult to ignore.”); State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) (“The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. If the offered photograph serves to corroborate testimony, it is not an abuse of

¹⁶ Specifically, Dr. Luberoff went through each of the photographs that depicted Victim’s condition at the time of her death and explained the significance of the different physical characteristics shown in those photographs, which included Victim’s wrinkled skin, protruding ribs, loss of fatty tissue, protruding hip bones, protruding scapulas, protruding spine, and pressure sores, while noting those physical characteristics would have required months of starvation in order to be present. (R. pp. 412-414).

discretion to admit it.”); see generally State v. Allen, 839 P.2d 291, 302 (Utah 1992) (“Photographs of victims are always sobering and graphic, and indeed, they fit within the adage ‘a picture speaks a thousand words.’ ”). Moreover, the photographs – although disturbing based on the fact they depicted the body of a thirteen-month-old child who had been starved to death – simply accurately showed the Victim’s emaciated features prior to the beginning of the autopsy and were not so extreme, unusually gruesome, or gory that they would have been inflammatory in a sense that went beyond the natural inflammation attendant to post-mortem photographs of a young child who died as a result of parental neglect. See State v. Lopez, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (Ariz. 1992) (“We do not find the photographs to be inflammatory beyond whatever natural inflammation is attendant to autopsy photographs of a one-year-old child. One photograph shows Anthony’s body attached to resuscitation equipment. The others show the bruising on Anthony’s body. Such photographs cannot be deemed sufficiently gruesome to inflame the jurors because ‘the crime committed was so atrocious that photographs could add little to the repugnance felt by anyone who heard the testimony.’ ” (citation omitted)); see also Torres, 390 S.C. at 624, 703 S.E.2d at 229 (“While the admitted photographs graphically depict the injuries of the victim, this was a particularly horrific crime, and the admission of the photographs did not unduly prejudice the jury.”); Holder, 382 S.C. at 291, 676 S.E.2d at 697 (“Although the photographs were graphic, the facts in the case were graphic, and there is no suggestion that their admission had an undue tendency to suggest a decision on an improper basis. We hold the trial court properly exercised its discretion in admitting the autopsy photographs in this case.”); cf. State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 164 (Ct. App. 2014) (“It was important for the jury to see the nature and location of these injuries in order to understand the witnesses’ testimony about the fights and the pathologists’ testimony about the

injuries. The eight photographs contain no blood or gory anatomical details, and thus pose little, if any, danger of unfair prejudice. . . . [I]t was clearly within the trial court's discretion to admit them."'). Accordingly, even though the photographs were unpleasant and disturbing, their potential for undue prejudice did not substantially outweigh their probative value, and the trial judge committed no error by exercising his discretion and admitting into evidence a limited number of the over one-hundred photographs taken of the Victim's body after her death. See State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) (recognizing determinations in regard to the relevancy and materiality of photographic evidence are generally left to the sound discretion of a trial judge); see also Jarrell, 350 S.C. at 106, 564 S.E.2d at 106 ("We find the trial court's exclusion of photographs demonstrates it exercised its discretion."').

In arguing the trial judge erred in admitting the photographs, Appellant focuses on Judge Maddox's purported remarks made during Roach's guilty plea hearing while contending there was no way the jurors who decided his case could have remained fair and impartial after viewing the photographs if an experienced trial judge like Judge Maddox could not. Importantly though, no evidence of any kind was presented during Appellant's trial to support a conclusion Judge Maddox made any such remarks in regard to the photographic evidence. See McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This Court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); cf. Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 302, 551 S.E.2d 588, 590 (Ct. App. 2001) ("Although the League's attorney argued that there was an injury in fact, **arguments of counsel are not evidence.**" (emphasis added)); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986) (instructing the circuit court judge properly rejected claims made by counsel that were not supported by evidence appearing in the record). Instead, after orally raising an

assertion about Judge Maddox's purported remarks during trial, defense counsel expressly abandoned her attempt to present evidence of those purported remarks when the trial judge questioned her about their relevancy, and, therefore, no actual evidence was ever introduced to the trial judge to establish what Judge Maddox did or did not say about the post-mortem photographs of Victim. As a result, Judge Maddox's purported remarks cannot properly be considered on appeal when evaluating the trial judge's discretionary ruling on the admissibility of the photographic evidence. See State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (instructing an appellant cannot complain on appeal about a particular ruling if the appellant acquiesces to that ruling during trial); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding a party cannot acquiesce to a ruling on an issue during trial and then complain of an error with the issue on appeal). Moreover though, even assuming Judge Maddox actually stated he could not remain fair and impartial after viewing the photographs that were taken of Victim in Appellant's case, his remarks in that regard are entirely irrelevant to Appellant's appeal as it is unclear from the record which of the over one-hundred photographs taken of Victim following her death were viewed by Judge Maddox coupled with the fact the trial judge did not believe the photographs admitted during Appellant's trial were unduly prejudicial after personally conducting his own review of that evidence. Thus, Judge Maddox's remarks do not support a conclusion the trial judge abused his broad discretion in admitting a limited number of photographs that visually demonstrated to the jury Victim's death was the result of chronic starvation, which was a fact critical towards establishing Appellant's guilt for the indicted offense.

Beyond focusing on Judge Maddox's purported remarks, Appellant admits the photographs depicting Victim's condition were probative to the issues involved in his case but

appears to maintain their probative value was outweighed by their potential for undue prejudice in light of the fact the witnesses for the prosecution testified about Victim's readily apparent and starved condition. Importantly though, the photographs of Victim's body depicted the symptoms of chronic starvation and neglect, which was the cause of her death, in a way words simply could not while visually establishing Victim's horrific condition would have been readily apparent to any person who came into contact with her during the weeks and months in which she was wasting away and dying. See Commonwealth v. Pestnikas, 421 Pa. Super. 371, 385-386, 617 A.2d 1339, 1346-1347 (Pa. Super. Ct. 1992) ("The photograph in question showed what happened to the decedent and, therefore, served as an aid to the jury in understanding the crime committed. . . . Although medical testimony was presented at trial, the degree of starvation and the readily observable severity of emaciation could only be demonstrated to the jury by the use of the photograph in question. The availability of alternate evidence of a verbal nature does not obviate the admissibility of the photographs."). Likewise, the photographs were critical towards refuting Appellant's claim he was unaware of Victim's appalling condition at the time she died, which, significantly, the State would have been required to refute solely with its witnesses' testimony offered up against Appellant's testimony absent the photographic evidence. See State v. Stephens, 398 S.C. 314, 321, 728 S.E.2d 68, 72 (Ct. App. 2012) ("Throughout the trial, Stephens consistently attacked the reliability of Bates's identification of him in the lineup. By doing so, he made the photographic lineup far more important than it might otherwise have been, thereby increasing its probative value. Only by viewing the actual lineup could the jury determine for itself whether the allegedly poor picture quality or the six-photograph format likely influence Bates's identification."); cf. People v. Dickerson, 42 A.D.3d 228, 237, 837 N.Y.S.2d 101, 108 (N.Y. App. Div. 2007) ("In the instant case, the defendant claimed that he thought that

Nadine was thin and wiry, but in no danger of starvation. Thus, the autopsy photos were relevant to the disputed issue of Nadine's condition both at her death and prior thereto, as well as clearly probative of defendant's awareness of the grave risk her condition presented. The photos served to corroborate and illuminate the testimony of the medical examiner. The photo of Nadine's vagina and rectal area highlighted the absolute wasting of fatty tissue and muscles and illustrated the medical examiner's finding of the ravaging toll that terminal starvation had taken on her body."'). Accordingly, the photographic evidence possessed enhanced probative value in light of the defense Appellant attempted to present during his trial, and its high probative value was not substantially outweighed by its potential for undue prejudice due simply to the fact the photographs would be considered disturbing and unpleasant to a normal person. See Martucci, 380 S.C. at 250, 669 S.E.2d at 607 ("A trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive."); see also Old Chief, 519 U.S. at 183, n. 7 ("On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon."').

Finally, Appellant appears to suggest the short length of the jury's deliberations coupled with the fact one of the jurors was reported to have cried after seeing a photograph depicting Victim's condition demonstrated the photographs overwhelmed the jury's ability to rationally decide his case. Importantly though, the fact the jury deliberated for a short period of time in Appellant's case in no way demonstrated the jury reached a decision on an improper basis in light of the fact there is no set amount of time in which a jury must deliberate, and no evidence exists to suggest the brief nature of the jury's deliberations resulted from anything more than the strength of the State's case against Appellant. See State v. Dewitt, 254 S.C. 527, 534, 176

S.E.2d 143, 147 (1970) (“There is no prescribed length of time for a jury to reach a verdict. Such must of necessity be left to the judgment of the jury. Something more must appear, therefore, to warrant interference with a jury’s verdict than the mere brevity of their deliberations. We find nothing in the record to indicate that the verdict in this case was the result of bias or prejudice.” (citation omitted)); see also State v. Chandler, 126 S.C. 149, 154, 119 S.E. 774, 776 (1923) (“We are emphatically of the opinion that the defendant had a fair and impartial trial before a humane, just, learned, and upright Judge, and a fair and impartial jury, and we see no reason why we should grant a new trial. Even if the jury did not take more than 19 minutes to arrive at a verdict, the record discloses a case of murder, unless the defendant was insane, and the jury by their verdict found that it was more a case of satanity, and it was not a case of insanity.”). Similarly, the fact a single juror was alleged to have become tearful in response to seeing a photograph of Victim’s condition in no way suggested that juror – or any of the other jurors – was incapable of fairly and rationally deciding Appellant’s case based on the evidence presented, and a tearful or emotional response to what occurred to the minor victim in Appellant’s case was in no way an inappropriate or unexpected reaction under the circumstances. See State v. Brown, 546 So. 2d 1265, 1270-1271 (La. Ct. App. 1989) (holding the trial judge’s properly denied Brown’s mistrial motion that was made after one of the jurors began to cry in response to the victim’s testimony about what had occurred and noting “[i]t is not uncommon for jurors to react to emotional testimony”); see also Bass v. State, 35 So. 3d 43, 44 (Fla. Dist. Ct. App. 2010) (“[J]urors are human beings and, therefore, subject to a range of emotions, especially in difficult cases.”); Commonwealth v. Kater, 432 Mass. 404, 423, 734 N.E.2d 1164, 1181 (Mass. 2000) (finding no error on the part of the trial judge, who refused to grant a mistrial when jurors began crying in response to the solicitor’s closing argument and explained “a certain level of emotion

on the part of the jurors could be expected from [a kidnapping and murder] trial [involving a juvenile victim]”); State v. Grice, 109 N.J. 379, 386, 537 A.2d 683, 687 (N.J. 1988) (finding no reversible error in “the failure of the trial court to examine or excuse a juror who was observed crying during the victim’s testimony”); cf. United States v. Gumbs, 562 F. App’x 110, 115-116 (3rd Cir. 2014) (recognizing emotional reactions provoked from jurors by graphic images do not necessarily render those jurors unfair or impartial and finding no error on the part of the district court judge in refusing to remove a juror who cried while viewing a video of Gumbs engaged in sexual activity with the eight-year-old victim). Moreover, prior to the jurors beginning their deliberations in Appellant’s case, the trial judge instructed them they were not permitted to reach a verdict based on sympathy, compassion, prejudice, or emotion, which helped ensure the jurors were not improperly impacted by the photographs of Victim following her untimely death. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) (“The jury was instructed to determine petitioner’s guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice.” (citations omitted)); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (“[J]urors are presumed to follow the law as instructed to them.”); cf. State v. Arther, 290 S.C. 291, 295, 350 S.E.2d 187, 189 (1986) (“The trial judge did charge the jury not to consider anything heard outside the courtroom. This charge was adequate under the circumstances to ensure the jury would render a verdict based upon the evidence presented.”). Therefore, the admission of the challenged photographs in Appellant’s case did not render the jury unfair or impartial in any way.

In conclusion, the photographs depicting Victim’s emaciated and starved body at the time of her death were highly probative of and critical towards establishing Appellant’s guilt for the

charged offense of homicide by child abuse, and any potential for undue prejudice they could have had based on their disturbing and unpleasant nature did not substantially outweigh their high probative value. See S.C. Code Ann. § 16-3-85(A)(1) (instructing a person is guilty of homicide by child abuse if that person “causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life”); see also Nichols v. State, 267 Ala. 217, 224, 100 So. 2d 750, 756 (Ala. 1958) (“ ‘Courts and juries cannot be too squeamish about looking at unpleasant things, objects or circumstances in proceedings to enforce the law and especially if truth is on trial. The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.’ ” (citation omitted)). Under those circumstances, the trial judge did not abuse his broad discretion by admitting a limited number of those photographs during Appellant’s trial, and no exceptional circumstances exist that would warrant a reversal of that discretionary decision on appeal.¹⁷ See State v. Collins, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (“Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing

¹⁷ Significantly, even assuming the trial judge somehow erred by admitted the photographs depicting Victim’s condition at the time of her death, any error resulting from the admission of those photographs was nonetheless entirely harmless because, even without consideration of the photographic evidence, the other evidence of Appellant’s guilt presented during trial, which included Appellant’s own testimony indicating it was not his responsibility to feed his thirteen-month-old daughter, Appellant’s claim he saw Victim within three days of her death and did not believe she looked sick at that time, testimony from multiple witnesses who saw Victim shortly after her death indicating her starved condition was readily apparent, and testimony establishing it would have taken Victim at least two months to starve to death, conclusively established Appellant’s guilt such that no rational juror could have reached any other verdict aside from guilty. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (“[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result.”); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (“When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.”); see also Collins, 409 S.C. at 538-539, 763 S.E.2d at 29-30 (concluding any error in the admission of the photographic evidence in Collins’s case was entirely harmless in light of the fact the other evidence presented during trial was such that no jury could rationally conclude anything other than Collins was criminally negligent in his victim’s death); cf. State v. Jenkins, 412 S.C. 643, 652, 773 S.E.2d 906, 910 (2015) (“Notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found [Jenkins] guilty.”).

essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder.”); see also State v. Williams, 405 S.C. 263, 281, 747 S.E.2d 194, 203 (Ct. App. 2013) (recognizing decisions regarding the comparative probative value and prejudicial effect of graphic photographs should only be reversed on appeal in “exceptional circumstances”); cf. Dial, 405 S.C. at 259-260, 746 S.E.2d at 501 (finding the trial judge did not abuse his discretion by admitting photographs from the five-month-old victim’s autopsy that depicted the victim’s exposed brain and scalp in a homicide by child abuse case despite the fact the photographs were “shocking and gross”). Appellant’s conviction should be affirmed.

CONCLUSION

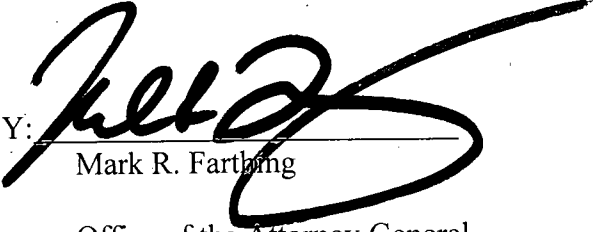
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY: 

Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 9, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2015-001293

THE STATE,

Respondent,

vs.

FILIBERTO GARCIA CAMPOS,

Appellant.

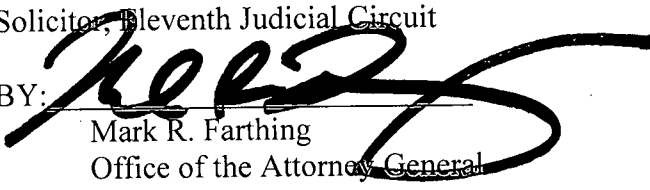
CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent 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."

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY: 

Mark R. Farthing
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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SC Court of Appeals

ATTORNEYS FOR RESPONDENT

February 9, 2017