

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APR 09 2018

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndra G. Benjamin, Circuit Court Judge  
J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-002288

The State, ..... Respondent,

v.

Hank Eric Hawes, ..... Appellant.

APPELLANT’S RETURN TO RESPONDENT’S PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240(e) of the South Carolina Appellate Court Rules, Appellant Hank Eric Hawes submits his return to the petition for rehearing filed by the State. In *State v. Hawes*, Op. No. 5543 (S.C. Ct. App. filed March 14, 2018) (Shearouse Adv. Sh. No. 11, at 63), this court correctly held the trial court erred in admitting two photographs of the decedent at a birthday party the night she was killed. This court did not overlook or misapprehend any point of law or fact in ruling that the photographs were inadmissible. Therefore, this court should deny the State’s petition for rehearing.

ARGUMENT

The State argues State’s Exhibits 322 and 325—photographs of the decedent at a birthday party the night she was killed—were properly admitted as evidence of malice. This court expressly

considered and rejected that argument in its opinion. Op. No. 5543, at 72. The court therefore did not overlook or misapprehend any point in its analysis of the birthday party photographs.

The State argues the purpose of admitting the birthday party photographs at trial was to support its showing that Mr. Hawes killed the decedent with malice. Contrary to the State's appellate argument, the State never used the photographs to show malice at trial nor suggested that the purpose of the photographs was to prove malice. The State entered the birthday party photographs into evidence via the following colloquy:

Q. Mr. Harrod, I'm going to show you what's been marked as State's Exhibits 322 and 325. Do you recognize those pictures?

A. Yes.

Q. What are those pictures of?

A. These are pictures -- the first picture that I'm holding is a picture taken of Jen and I at Cowboys. The second picture is a picture of us sitting down at the table, Jen and myself and Alicia English.

Q. And this is the night in question, August 27th?

A. Yes, sir.

Q. Did you provide these pictures to us?

A. Yes, I did.

(R. 146). The State then offered the photographs into evidence, and the trial court admitted them.

(R. 146-47). The State asked no further questions about the photographs. In fact, the State never mentioned the photographs again until its closing argument. During its closing argument, the State never suggested the photographs were evidence of malice. Instead, the State used the birthday party photographs for one reason: to arouse the sympathy of the jurors immediately before showing

the gruesome, inflammatory crime scene photographs. *See* (R. 1105–06). Such inflammatory use of the photographs is improper.

This court properly relied upon *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), and *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), in its analysis of the birthday party photographs. Like the photographs at issue in those cases, the birthday party photographs in this case are irrelevant to the issue of Mr. Hawes' guilt. *Langley*, 334 S.C. at 648, 515 S.E.2d at 100 (“We find . . . the victim’s photograph w[as] not relevant to proving the guilt of appellant.”); *Livingston*, 327 S.C. at 20, 488 S.E.2d at 314 (“The photograph of the victim taken shortly before her death also is of no consequence to the determination of this action. In addition, a photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts.”). This case is also consistent with the court’s holding in the recent *State v. Johnson* opinion pointed out by the State in its petition for rehearing. Op. No. 5533 (S.C. Ct. App. filed March 28, 2018) (Shearouse Adv. Sh. No. 13, at 25). In *Johnson*, this court found pre-death photographs of two alleged murder victims were inadmissible because, “As in *Langley*, the identification of the victims was not at issue in this case and nothing in the photographs served to make any fact in issue more or less likely.” (emphasis added). *Id.* at 30–31. The State asks this court to narrowly construe the holdings in these cases and restrict them to situations in which the identification of the victims is at issue. Although this court made reference to identification in all three cases, the holding in each case was more broad—the photographs were inadmissible because identification was not at issue and the photographs were not relevant to any fact at issue in those cases.

The birthday photographs in this case are similarly irrelevant. The State’s suggestion that the photographs were necessary to prove the absence of bruises and a bite mark on the decedent’s

arms earlier in the night is revisionist history. The State never elicited any testimony nor made any argument to the jury that the birthday photographs should be used to compare the condition of the decedent's arms before and after her death. The first time the State raised the pre- and post-death comparison as an explanation for its use of the birthday party photographs was in its respondent's brief in this appeal. Moreover, as Mr. Hawes' counsel explained at oral argument, the portion of the decedent's arm that later contained a bite mark is not even visible in one of the photographs. Therefore, the purpose of admitting the photographs could not have been to show the absence of a bite mark earlier in the night.

Courts must weigh the probative value of evidence against the danger of unfair prejudice. Rule 403, SCRE. The birthday party photographs have no probative value. In contrast, the photographs present a substantial danger of unfair prejudice, demonstrated by the State's use of the photographs to inflame the passion of the jury. This court properly found the trial court erred in admitting the birthday party photographs.<sup>1</sup>

### CONCLUSION

For the foregoing reasons, Appellant Hank Hawes requests that this court deny the State's petition for rehearing.

*(signature page attached)*

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<sup>1</sup> The State suggests Mr. Hawes failed to preserve his argument related to the birthday party photographs. *See* (State's Pet. for Rehearing p. 3 n.3). This court's opinion included a thorough description of the objections and arguments Mr. Hawes raised at trial and the trial court's rulings. Op. 5543, at 67-68, 71 n.4. As the court noted, this issue was raised by Mr. Hawes and ruled upon by the trial court, *see id.*, and the issue was properly before this court.

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April 9, 2018

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of General Session

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

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Appellate Case No. 2011-002288  
Case No. 2011-GS-40-05012

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**PROOF OF SERVICE**

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I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for the Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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April 9, 2018

**Hand Delivered**

The Honorable Jenny Abbott Kitchings  
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SC Court of Appeals

RE: The State of South Carolina v. Hank Eric Hawes  
Appellate Case No. 2014-002288  
Case No. 2011-GS-40-05012  
Our File No. 38769/01526

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Return to Respondent's Petition for Rehearing in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

Thank you.

Very truly yours,

Nicholas A. Charles

NAC:jlt

Enclosure

cc: Robert Dudek, Esq.  
Don Zelenka, Esq.  
Melody J. Brown, Esq.  
Dan Johnson, Esq.