

ORIGINAL

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from Charleston County
The Honorable Deadra L. Jefferson, III, Circuit Court Judge

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SC Court of Appeals

THE STATE,

Respondent,

v.

VALENTINO MARTEL HAYWARD,

Appellant.

Appellate Case No. 2015-002663

BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

The trial court abused its discretion in admitting two images of a gun found on Hayward's cell phone.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

The trial court properly admitted two images of a gun on Appellant's cell phone because the images were relevant and probative of Appellant's possession of the murder weapon and were not unfairly prejudicial.

STATEMENT OF THE CASE

In May of 2014, a Charleston County Grand Jury indicted Appellant, Valentino Hayward, for murder. (R. p. 1066.) Appellant proceeded to a jury trial on November 9, 2015, before the Honorable Deadra Jefferson. Appellant was represented by Aaron Mayer, Esquire. (R. p. 2.) Assistant Solicitor Chad Simpson, of the Ninth Circuit Solicitor's Office, represented the State. (R. p. 2.)

The jury found Appellant guilty of murder and not guilty of a weapons charge. (R. p. 1046, line 23 – p. 1047, line 15.) Judge Jefferson sentenced Appellant to thirty-eight years' imprisonment for murder. (R. p. 1063, lines 9-14.)

Appellant filed a notice of Appeal, and appellate counsel submitted a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). By order dated April 9, 2018, the Court of Appeals directed the parties to brief the issue of admissibility of the two photographs from Appellant's cell phone. Appellant filed his Brief on April 23, 2018. This Brief of Respondent follows.

STATEMENT OF FACTS

Charles Rodwell was home watching television the evening of December 11, 2013, when he heard gunshots outside his apartment. (R. p. 148, line 6 – p. 151, line 13.) His mother, who was doing laundry nearby, heard a woman screaming and asking for help because her boyfriend was shot. (R. p. 151, lines 15-20.) Rodwell looked outside and saw the woman, and then he followed her to the street where he saw a man lying on the ground. (R. p. 152, lines 2-23.) Rodwell checked for a pulse and could not find one. (R. p. 153, line 20 – p. 154, line 3.) Rodwell's mother handed the woman a phone and she called 911. (R. p. 154, lines 12-17.) Rodwell saw no other guns or shell casings anywhere. (R. p. 155, lines 1-9.)

Officer Christopher Malinowsky arrived on the scene in the area known as "The Hole." (R. p. 166, line 11- 167, line 12.) The area is known as a high crime area with "a lot of foot pursuit there." (R. p. 173, lines 6-9.) The police have a special unit assigned to the neighborhood and its officers are frequently in the community. (R. p. 173, lines 13-17.) Malinowsky moved the crowd gathering around the body back and talked to Rodwell about what he saw that evening. (R. p. 167, line 16 – p. 170, line 25.)

The screaming woman was Latoya Carson. She had been friends with the victim, Deontre Miles, for about seven months before his murder and described him as nice and funny, and also trying to turn his life around and stop selling drugs. (R. p. 180, line 20 – p. 185, line 2.) On the night of his death, the victim, known as Chucky to his friends, called Carson and asked if she had any pain pills. (R. p. 185, line 9 – p. 186, line 4.) Carson told him she did, and the two arranged to meet and then both ride to West Ashley. (R. p. 186, line 9 – p. 187, line 6.) The victim picked Carson up, and he drove while she talked on her phone. (R. p. 188, lines 7-17.) Carson said Chucky appeared to be lost and called someone twice to ask for directions. During one of the

calls, Chucky stayed on the phone with the caller as he navigated the route to the back of an apartment complex. (R. p. 189, line 14 – p. 191, line 8.) Carson asked Chucky why he was parking in the back where it was dark, and he responded, “I’ll only be a minute.” (R. p. 191, lines 11-13.) Chucky hung up the phone as he was getting out of the car. (R. p. 195, lines 6-9.) Carson looked over her shoulder and saw someone turning and walking away from the car, but she did not get a good look at the person. (R. p. 195, lines 6-18.) Carson was able to approximate his height at five feet, nine inches, and describe his hair as in short dreadlocks and his build as slim. (R. p. 196, lines 10-24.) Carson also told police the man was wearing a dark colored, long sleeve thermal shirt. (R. p. 197, lines 6-21.) Carson also remembered the man touched the top of the car near the passenger side door. (R. p. 198, line 18 – p. 199, line 10.) Hayward’s palm print would later be identified on the exterior of the front passenger door. (R. p. 457, line 24 – p. 458, line 3.) Carson did not pay attention to the men after they walked off, but she soon heard a shot. (R. p. 200, line 8 – p. 201, line 18.)

At first, Carson did not think much of the sound, but after a few minutes, she decided to call Chucky’s phone because he had not returned. (R. p. 201, line 19 – p. 202, line 10.) After Carson dialed Chucky’s number, she could hear his phone ringing, but she was afraid to get out of the car. (R. p. 202, lines 4-19.) Carson noticed a woman exiting her apartment, so she ventured out of the car and called Chucky again. This time, she heard the phone louder and looked across the street and saw Chucky lying on the ground. (R. p. 202, line 20 – p. 203, line 8.) Carson began screaming for help and ran to hold Chucky’s hand. (R. p. 203, line 10 – p. 204, line 3.) Carson called 911 and stayed until the police arrived. (R. p. 204, line 4 - p. 207, line 13.) Chucky had been shot in the back of his neck, through his spinal cord. (R. p. 491, line 23 – p. 492, line 3.) A firearms expert opined the bullet was probably a .38 caliber. (R. p. 584, line 13

– p. 585, line 9.) Police searched the crime scene area extensively for shell casings and found none, indicating the weapon used was likely a revolver. (R. p. 300, line 2 – p. 302, line 23.)

David Osborne was the detective sergeant in charge of homicide at the time of the murder. (R. p. 235, line 11 – p. 236, line 11.) Det. Osborne was called to the scene and his main focus after arriving and learning of Carson’s statement was to locate the telephone number of the person the victim was speaking to as he navigated the turns to the apartment complex. (R. p. 237, lines 3 - 18.) Det. Osborne retrieved the phone, which was in the victim’s hand, and wrote down every number in the call log. (R. p. 237, line 21 - p. 238, line 9.) The last phone call on the log lasted eleven minutes, and the number was assigned to “Tino” as the contact name. (R. p. 243, line 16 – p. 244, line 1.) Det. Osborne recognized the name as belonging to someone he knew lived in the area. (R. p. 244, lines 6-9.) Det. Osborne tracked the number assigned to “Tino” through their phone number database and it was registered to Valentino Hayward, the same person Det. Osborne knew as “Tino.” (R. p. 245, lines 21-24.) Osborne also thought Carson’s description of the suspect matched Hayward’s physical description. (R. p. 246, lines 3-8.) Osborne asked the Charleston Police Department’s SWAT unit to locate Hayward, and he was located later that night, or, early the next morning. (R. p. 246, line 17 – p. 247, line 5.)

Lt. Jason Bruder supervised the Charleston Police Department’s SWAT team and participated in the apprehension of Hayward. (R. p. 259, line 16 – p. 263, line 21.) The SWAT team monitored Hayward’s position via the city surveillance cameras and stopped him once he was in a vehicle and away from any residences. (R. p. 278, line 21 – p. 280, line 13.) Hayward was taken to CPD headquarters and his car was towed. (R. p. 280, lines 14-24.) Bruder confirmed Hayward’s vehicle was parked at the crime scene the night before at the time of the shooting. (R. p. 281, lines 8-18.) Hayward’s cell phone location data revealed he was on the

phone with the victim at approximately 8:24 pm that evening and the call lasted eleven minutes. Hayward's cell phone and the victim's cell phone both pinged off a cell tower in West Ashley near the crime scene. (R. p. 565, line 4 – p. 569, line 19.)

Marian Campbell had a relationship with Hayward at the time of the murder and was texting with him the day of the shooting while she was working. (R. p. 282, line 17 – p. 287, line 10.) Campbell received several texts from Hayward indicating he was planning to rob someone later that day. (R. p. 289, lines 1 – 12.) Hayward called Campbell later that evening and asked her to pick him up, and he spent the night with her. (R. p. 290, line 2 – p. 292, line 10.) Campbell was in the car with Hayward when the SWAT team pulled them over the day after the shooting. (R. p. 292, lines 14-22.) Police retrieved a cell phone from the center console of the car. (R. p. 306, lines 11-19.)

Investigator Richard Holmes conducted the interview with Hayward over approximately three hours. (R. p. 325, line 4- p. 327, line 17.) Hayward told Holmes the night of the murder he was hanging out at the Saint Andrews Gardens Apartments (the area where the crime occurred), heard about the shooting, but a friend gave him a ride to North Charleston. (R. p. 335, line 6 – p. 336, line 16.) Hayward changed his story a few times about who gave him the ride, and initially claimed not to know the victim. (R. p. 337, lines 1-23.)

Anisha Pearson was another female friend of Hayward's, and on the night of the murder, Hayward called her and asked her to watch his friend's children. Hayward later called Pearson, asked her to meet him at his mother's house, and then handed her a gun to take to her house. (R. p. 393, line 25 – p. 394, line 20.) Pearson said Hayward was nervous, pacing around her car. (R. p. 395, lines 6-16.) Hayward called Pearson a few minutes later and instructed her to bring the gun and hand it over to another woman. (R. p. 397, line 7 – p. 398, line 21.) On her way back

from handing over the gun, Pearson was stopped by police who were responding to the shooting. Pearson denied hearing anything. (R. p. 398, line 23 – p. 399, line 23.) Hayward called Pearson again a few minutes later and instructed her to return. (R. p. 400, lines 2-19.) Hayward met her at the car and told Pearson to take him to his aunt's house. (R. p. 401, lines 3-21.)

Following Hayward's arrest, he made several phone calls from prison in which he seems to discuss intimidating potential witnesses against him. (State's Exhibit 47; *see also* R. p. 1001, line 13 – p. 1006, line 21.) The State introduced those recordings at Hayward's trial. (R. p. 860.)

How the Issue Was Presented Below

The State called Corporal Rodney Van Horn, with the Charleston Police Department, to testify about the information obtained from the extraction of Hayward's cell phone. (R. p. 635, line 23.) Van Horn was qualified as an expert in digital forensics, without objection. (Tp. 635, line 23 – p. 640, line 4.) Van Horn performed the data extraction from Hayward's cell phone. (R. p. 644, lines 6-19.) Per his instructions from the solicitor, Van Horn focused on specific text conversations between Hayward and Marion Campbell. (R. p. 645, line 16 – p. 650, line 5.) Before Van Horn testified to the contents of the messages, and when the State offered Van Horn's report into evidence, counsel for Hayward objected. (R. p. 649, line 23 – p. 650, line 3.) Counsel first argued the report was demonstrative, and then argued the responses from the recipient of the texts from Hayward were hearsay. (R. p. 651, line 1 – p. 653, line 4.) The trial court admitted the text conversation, finding the responses from Campbell hearsay, but admissible to provide context to the statements made by Hayward and cumulative to her earlier testimony and could not prejudice Hayward. (R. p. 661, line 10.) In the messages, Hayward tells Campbell he is going to talk to someone about committing a robbery because he is short on money. (R. p. 664, lines 2-3.) Hayward's phone calls to Anisha Pearson were consistent with her

testimony about the times he called her to watch the children, hide the gun, and bring the gun back to him. (R. p. 668, line 7 – p. 869, line 15.) Next, Van Horn testified he was able to extract images and their metadata from Hayward’s phone. (R. p. 669, line 24 – p. 671, line 4.) On one particular image, Van Horn was able to discern the photo¹ was taken with Hayward’s phone on November 22, 2013, at 9:58 pm. (R. p. 671, lines 20-25.) When the State attempted to move the image into evidence, counsel objected, and after a bench conference, the court took the objection under advisement. (R. p. 672, lines 11-19.) Van Horn also testified he was asked to enhance the detail in one area of the photo to “be able to read something a little clearer.” (R. p. 673, line 19 – p. 674, line 6.) Van Horn said to clean up the image to make it more legible, he adjusted the contrast, sharpness, light, and filters applied to the image, but the underlying data remained unchanged. (R. p. 674, lines 7-20.)

Following argument over the admission of jail house recordings, counsel renewed his objection to the image of the gun, as well as the enhanced image of the gun, on the basis the prejudicial effect outweighed the probative value. Counsel also argued the enhanced image was “manipulated.” (R. p. 725, line 6- p. 726, line 13.) When the court pointed out the enhanced image was actually just a close up of the initial image, counsel then argued the second image was duplicative of the first image. (R. p. 726, line 20 – p. 727, line 12.)

The State responded that the lack of shell casings at the scene and the testimony of the firearms examiner on the caliber of bullet gave rise to an inference the murder weapon was a .38 caliber revolver. (R. p. 727, line 15 – p. 728, line 12.) The State then noted the image on the cell phone was taken within approximately two weeks of the murder. The State sought to introduce

¹ During Van Horn’s initial discussion of the data retrieved from the cell phone, the court had not ruled on the admissibility of the images of the gun. The parties were careful to not discuss the content of the images until the court made its ruling.

the image as probative circumstantial evidence of Hayward's possession of the murder weapon.

(R. p. 728, lines 13-21.)

The court ruled the evidence was relevant, with the following:

It does make a fact of consequence in the case more or less probable, that being the ownership or possession of a weapon of similar caliber by the defendant, is probative- to the - extent that he took a picture of the weapon and stored it on his telephone.

It is relevant and it is corroborated by the testimony of the SLED firearms expert, James W. Green, who testified that it is and I believe his exact words, it is more likely than not a revolver, a .38 caliber or a 9 millimeter. -

And he testified regarding the differences in those weapons. There was not even a point off. One was .355 and one was .3577 when he was testifying about them and said they were very much alike.

He also testified that the bullets still had some rifling present even though it was pretty much destroyed. Was not — destroyed was not his words, my words. His words were too damaged to say what caliber it is unless he had a gun to match it to, but he said that the bullets still had most of its rifling present and he was able to say more likely than not, which would be the standard for an expert.

He doesn't have to say to a reasonable degree of certainty most likely, but he certainly, by testifying that it was more likely than not, meets that standard that it was a .38 or 9 millimeter.

The other thing that convinces this court of the probative nature of this evidence is the fact that this picture was taken on November 22nd of 2013, which was in close proximity, less than a month — to be exact, 20 days prior to this incident.

What else is probative is the caliber of the weapon that is displayed in State's 33 on the barrel of the weapon.

So the Court would find that the testimony is relevant, that it makes initial consequence in this litigation, that being the contention of whether the defendant was in possession or owned a firearm more or less probable, that it is more probative than prejudicial in that it indicates the caliber of the weapon, which corroborates the testimony of James Green who was the SLED firearms expert, that it is authentic and that it was downloaded from the metadata that was taken from Mr. Hayward's camera — was taken by the camera on Mr. Hayward's cell phone and was downloaded as a part of the data dump from his telephone, that a picture was taken on 11/22 of 2013.

And I find that the evidence is more probative than prejudicial, especially when you're dealing with a factual issue such as possession or ownership of a weapon in close proximity to an alleged event.

Now, the arguments that Mr. Mayer had made really goes to the weight and any inferences to be accorded to that testimony, but not its admissibility.

State's 32 and 33 will be admitted and I find they're also not cumulative, that they have not been hypothecated in any way, as corroborated by the

testimony of Corporal Van Horn, in that 32 is the picture originally downloaded and 33 is an enhancement which shows the barrel which displays the caliber of the weapon. Both are marked and admitted subject to the defense's objections.

(R. p. 732, line 10 - p. 735, line 6.)

STANDARD OF REVIEW

“The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.” *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). 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. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The standard of review is limited to determining whether the trial court’s ruling is supported by any evidence. *State v. Breeze*, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (emphasis added).

“The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.” *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). “If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.” *Id.* “When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008). “A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App.2003). The appellate court must review a trial court's decision regarding Rule

403 pursuant to the abuse of discretion standard and is obligated to give great deference to the trial court's judgment. *See id.*

ARGUMENT

The trial court properly admitted two images of a gun on Appellant's cell phone because the images were relevant and probative of Appellant's possession of the murder weapon and were not unfairly prejudicial.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Stated another way, "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. Salley*, 398 S.C. 160, 169, 727 S.E.2d 740, 744 (2012) (citing Rule 401, SCRE); *State v. Bixby* 388 S.C. 528, 544, 698 S.E.2d 572, 581 (2010). The photographs at issue were offered by the State to prove Hayward possessed a gun consistent with the purported murder weapon. Investigators never found the murder weapon, but there was testimony from the firearms expert and crime scene investigators that the weapon was likely a .38 caliber revolver. The State was able to circumstantially prove Hayward possessed the weapon from the photograph on his cell phone and the testimony of Pearson. The images were clearly relevant to Hayward's guilt.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Tynes*, 402 S.C.211 740 S.E.2d 512 (Ct. App. 2013); *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009).

“All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403].” *State v. Lee*, 399 S.C. 521, at 529, 732 S.E.2d 225, at 229 (Ct. App. 2012) (quotation marks and citations omitted). Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one. *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001).

South Carolina case law allows the introduction of photographs, even graphic crime scene and autopsy photos, as long as the photographs are central to corroborate an element of the State’s case. In *State v. Collins*, the State sought to introduce photos of the body of a ten-year-old boy who had been mauled to death by his neighbor’s dogs. *State v. Collins*, 398 S.C. 197, 727 S.E.2d 751 (2012.) Collins was charged with involuntary manslaughter and three counts of owning a dangerous animal. *Id.* at 529, 763 S.E.2d at 25. Because there were no witnesses to the crime, the State had to piece together a theory of the crime based on the bite marks to the child. *Id.* at 531, 763 S.E. 2d at 26. The Court noted, “Since there was no one else present at the time of the event, the photos aided the jury in evaluating the testimony offered by both the State and the defendant, especially as to determining the dangerous propensities of the dogs and whether or not Collins's conduct was criminally reckless.” *Id.* at 536, 763 S.E.2d at 29. The court found no error in the admission of the gruesome photos because the images aided the jury in understanding what transpired the day the boy was killed. *Id.*

Recently, in *State v. Hawes*, the Court of Appeals found no abuse of discretion by the trial court in admitting photographs of stab wounds and other injuries to the victim’s body. *State v. Hawes*, No. 2014-002288, 2018 WL 1309539, at *1 (S.C. Ct. App. Mar. 14, 2018). The victim was killed during a violent physical altercation in her home by her boyfriend after she attended several parties without him in the hours leading up to her death. *Hawes*, 2018 WL 1309539, at

*1. The Court found the crime scene photographs and autopsy photographs admissible because they “established the circumstances of the crime scene and corroborated the testimony” of a neighbor and the crime scene investigator. *Hawes*, 2018 WL 1309539, at *4 (citing *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370 (1995) (finding photographs of the murder victim's nude body lying on the floor, with her face and body visibly swollen from being beaten, and of the blood-smearred walls and floor were relevant to establish the crime scene)).

In contrast, in instances in which photographic evidence has been deemed inadmissible, the photographs have no relation to the crime itself. For example, in *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), the Supreme Court reversed a conviction for felony driving under the influence (DUI) of marijuana where the defendant had caused a car accident, killing a woman in the other car. The woman's husband testified at trial, and a photograph of the two in happier times was admitted. The South Carolina Supreme Court held that the photograph was not relevant to the trial because the DUI was the only charge in dispute. The Court stated that “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.*” *Id.* at 20, 488 S.E.2d at 314 (emphasis added). The Supreme Court found the testimony and photograph were irrelevant to any matter at issue and not harmless.

Similarly, in *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), the Court found the introduction of a photograph of the victim in his high school graduation regalia, in addition to his sister's testimony about the family history of the victim and how he received a particular nickname in high school, was irrelevant to proving the identity of the perpetrator of a drug-related shooting years later. The Court said that because the evidence of the guilt was not

overwhelming, it could not find the improperly admitted evidence did not affect the outcome of the trial under a harmless error analysis. *Langley*, 334 S.C. at 648, 515 S.E.2d at 100.

The Court of Appeals has also cautioned against the admission of photographs that cast aspersions on the character of the defendant, unrelated to the crime itself. In *State v. Lee*, the Court of Appeals found it improper to introduce sexually graphic photographs taken several months after a sexual assault of a minor as probative of the sexual assault of the child when the photographs depicted adult nudes in suggestive positions. *State v. Lee*, 399 S.C. 521, 530, 732 S.E.2d 225, 229 (Ct. App. 2012). The Court found the “primary purpose was to raise the emotions of the jury and to establish that [defendant] had a general sexually deviant disposition.” *Lee*, at 530, 732 S.E.2d at 229. Similarly, but in the case of non-photographic evidence, the Supreme Court of South Carolina has found the admission of a jail phone recording improper, even though the State offered the call to prove the defendant owned a cell phone in question, because 1) ownership of the phone could be proven through other evidence, and 2) the profanity, slurs, and references to **other** bad acts in the telephone call were unduly prejudicial to the defendant. *See State v. King*, 422 S.C. 47, 69, 810 S.E.2d 18, 30 (2017).

Taking the prevailing case law together, it is clear the courts disfavor evidence that arouses the emotions of the jury, such as sentimental photographs of the victim in happier times, or unnecessarily gruesome or bloody crime scene photos which have no bearing on a matter before the court. Evidence that portrays the defendant in a negative light concerning unrelated matters may also be deemed inadmissible. However, evidence that is directly related to proving an element of a crime, and that cannot be proven by other available means, is not unfairly prejudicial to the defendant and is properly admissible into evidence.

In the instant case, the photograph of the gun and the enhanced photograph were innocuous. There are no victims or blood depicted anywhere in the images. The photos do not arouse the sympathy of the jury for the victim because the victim is not pictured. The images are devoid of any graphic or offensive material and cannot be said to portray Hayward in a negative light about an unrelated matter. On their face, the photographs have limited, if any, prejudicial impact. Both State's Exhibit 32 and 33 are images of a hand holding a revolver, apparently taken in someone's bathroom. State's Exhibit 32 is a color photograph. On the barrel of the gun appears to be a stamp or engraving reading "38 S&W." State's Exhibit 33 is a black and white, cropped version of Exhibit 32, with higher contrast between the darker and lighter colors. Corporal Van Horn described his adjustment of the image with the following:

What we do is we apply layers to the image. We don't change the content of the image. We simply — we would add or we would use contrast, we would use sharpness, different filters to try to maybe change the color, maybe change the temp, maybe change the contrast or the lightness or the darkness so that you could see detail more vividly.

(R. p. 674, lines 9-15.) On Exhibit 33, the stamp on the barrel of the gun is slightly more distinct than on the color version of the photograph.

Although Hayward challenged the admissibility of Exhibit 33 as being a "manipulated" image, he did not argue or elaborate on why that alone would make the image inadmissible, such as challenging the reliability of the software used to make the enhancements² or challenging the

² See, e.g., *United States v. Seifert*, 351 F. Supp. 2d 926, 928 (D. Minn. 2005), aff'd, 445 F.3d 1043 (8th Cir. 2006) ("the Court finds that adjustments to brightness or contrast, or enlargement of the image, while arguably a manipulation, are in fact no more manipulative than the recording process itself."); *United States v. Beeler*, 62 F. Supp. 2d 136, 148 (D. Me. 1999) (re-recordings that are enhanced so that the images are clearer to depict are also 'duplicates' so long as the tapes accurately reproduce the original images on the tape."); *Fountain v. United States*, 384 F.2d 624, 631 (5th Cir. 1967) (applying best evidence rule to enhanced audio recording and allowing admission).

expertise of Van Horn to adjust the image. (R. p. 726, lines 10-13.) Hayward continued with his objection, arguing the probative value of the evidence was low because the State could not tie the weapon to him through fingerprints or DNA. (R. p. 727, lines 4-12.)

However, as Hayward notes in his brief to this Court, the question before the jury was whether the State proved beyond a reasonable doubt Hayward took the life of the victim with malice aforethought. (*See* Brief of Appellant at p. 16.) Contrary to his assertions at trial, the probative value of the photos in meeting that burden of proof far outweighs any negligible prejudicial impact. The images were offered to prove the crime charged – that Hayward maliciously shot the victim. The State’s evidence placed Hayward on the phone with the victim in the minutes before his death in the Ardmore neighborhood. (R. p. 243, line 16 – p. 244, line 9.) Testimony from a State’s witness revealed the motive for the shooting was a robbery because Hayward was short on cash. (R. p. 664, lines 2-5.) Hayward even told the witness he planned to discuss robbing someone later that night. (R. p. 289, lines 7-19.) The State could prove the identity of the killer, the opportunity to commit the crime, and provide a motive for the victim’s death. The photographs of the possible murder weapon in Hayward’s possession corroborated other testimony in the State’s case against Hayward by connecting him with the means to commit the crime two weeks before the day of the shooting. Even though the weapon was never found, the State was entitled to link Hayward circumstantially to the gun, and then let the jury decide the weight afforded to the images. Respondent also notes this Court has allowed the admission of an actual gun into evidence, finding the probative value of the gun substantially outweighed its prejudicial impact. *State v. Garris*, 394 S.C. 336, 348, 714 S.E.2d 888, 895 (Ct. App. 2011); *State v. Spears*, 393 S.C. 466, 479, 713 S.E.2d 324, 331 (Ct. App. 2011). If a gun

can be properly admissible into evidence, then mere photographs of a gun are certainly less prejudicial.

Moreover, in his closing argument, the solicitor properly characterized the evidence giving rise to the inference Hayward possessed the murder weapon. (R. p. 993, line 23.) The solicitor reminded the jury of the crime scene investigator's inability to find shell casings at the scene and the implication that the weapon was probably a revolver. (R. p. 993, line 23 – p. 994, line 14.) The solicitor then pointed out that the ballistics expert said the bullet was "consistent with a .38" caliber or "very close to a nine millimeter," but because the bullet was lead, it is more likely to be a .38. (R. p. 994, line 15 – p. 995, line 9.) The solicitor then said, "So we're left after this testimony with a pretty solid evidentiary basis to know what shot Deontre Miles; it's a 38-caliber revolver." (T. p. 995, lines 7-9.) Then the solicitor turned to the images on Hayward's phone, arguing the image is clearly of a revolver, and the markings indicate the revolver is a .38 caliber Smith and Wesson. (R. p. 995, lines 12-20.) The solicitor did not argue the experts identified the murder weapon conclusively as a .38 caliber revolver; instead, he argued the experts said it was likely given their observations of the evidence. Similarly, the solicitor did not argue Hayward possessed the murder weapon; instead, he pointed out Hayward had an image of .38 Smith and Wesson on his phone within two weeks of the murder. These arguments were accurate representations of the evidence before the jury and in no way misled the jury or suggested an improper basis for their conclusion about Hayward's guilt.

In sum, the Court's review is limited to finding an abuse of discretion by the trial court. The trial court specifically found the photograph was relevant to show "the ownership or possession of a weapon of similar caliber [to the murder weapon] by the defendant" (R. p. 732, lines 11-13), and the court specifically found the probative value outweighed the prejudicial

impact (R. p. 734, lines 4-5) Given the record on appeal, Hayward has not and cannot present this Court with any sound reason to find the trial court abused its discretion in finding the photographs admissible under the facts of this case.

Harmless Error

Lastly, even if the trial court erred in admitting the photographs because the unfair prejudice outweighed their probative value, any error would be harmless beyond a reasonable doubt. The photograph of the weapon corroborated the testimony of Anisha Pearson, who testified Hayward gave her a gun to hide that night and then asked her to return it and drive him out of the neighborhood. (R. pp. 393-401.) The State had even more compelling evidence against Hayward as the perpetrator of the crime, even if it could not connect him to the weapon. Hayward's cell phone records proved he was on the phone with the victim immediately before he was shot, and Carson testified whoever the victim was talking to on the phone was leading them directly to the scene of the crime. (R. pp. 188-191; 565-569.) Hayward's palm print was found on the passenger side of the victim's car, where Carson said she thought the man touched the car as he leaned down toward it. (R. pp. 457-458.) Hayward's own texts to another woman earlier in the day revealed he was planning to rob someone later that evening, and his jail phone calls exposed his plan to influence witnesses against him in his upcoming trial. (R. pp. 282-289, State's Ex. 47.) Thus, even though the images on Hayward's cell phone connected him to the suspected murder weapon used in the crime, there was overwhelming proof of his guilt beyond a reasonable doubt from the remainder of the State's case. Hayward's claim is without merit.

CONCLUSION

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

Respectfully submitted,

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May 23, 2018.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
The Honorable Deadra L. Jefferson, III, Circuit Court Judge

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SC Court of Appeals

THE STATE,

Respondent,

v.

VALENTINO MARTEL HAYWARD,

Appellant.

Appellate Case No. 2015-002663

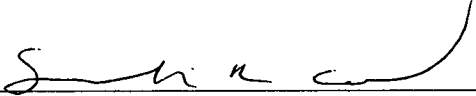
PROOF OF SERVICE

I, Susannah Cole, counsel for Respondent, certify that I have served the within Brief of Respondent on Appellant by depositing two (2) copies of the same via inter-agency mail, addressed to his attorney of record at:

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I further certify that all parties required by Rule to be served have been served.

This 23rd day of May, 2018.



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