THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward, ...Appellant.

INITIAL REPLY BRIEF OF APPELLANT

K&L GATES LLP
Tara C. Sullivan
J. Whitney McGreevy
134 Meeting Street, Suite 500
Charleston, SC 29401
(843) 579-5600

Chief Appellate Defender
Robert M. Dudek
South Carolina Commission on Indigent Defense, Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201-3332
(803) 734-1330

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

ARGUMENT

I. The trial court erred in admitting evidence and testimony regarding (a) an out-of-court photograph lineup where the victim did not make a positive identification and (b) the subsequent positive identification made by the victim at trial.

As set forth in the Appellant's Brief, the United States Supreme Court established a two-pronged inquiry a court must undertake to evaluate the admissibility of an out-of-court identification in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 1127 (1972). Although the State acknowledges this two-pronged inquiry, the State failed to separately address the first prong regarding whether the identification procedure was unduly suggestive, apparently conceding that issue.[1] Instead, the State focused only on the second prong—the factors to be used in assessing the reliability of an otherwise unduly suggestive identification procedure. (Resp't's Br. 8–16.) The State seems to suggest in its reliability analysis, however, that the identification procedure was not unduly suggestive because Investigator Clarke directed G.F. as follows: "I want you to help me and see **if you can see** the bad man who did this to your grandmama." (Resp't's Br. 13–14 (emphasis added by the State).) The State seems to suggest the use of the word "if" would somehow imply to an eight-year-old child that she need not choose any particular picture or that the perpetrator may not be included in the lineup.

The photograph lineup, however, was unduly suggestive in the manner in which it was conducted. (State Ex. 31; R. __.) First, Investigator Clarke's instructions to G.F. actually imply the opposite of what the State contends. His exhortation that G.F. needed to "help" him would certainly encourage a child to take some form of action—here, choosing one of the six pictures presented to her. Moreover, his instruction for her to "see if [she] can see" is more of a test of her ability rather than an indication that the perpetrator might not be included in the photograph

1. The first prong in Neil v. Biggers was the basis for the trial court's ruling in admitting the so-called identification in this matter. (Tr. pp. 233:18–234:2; R __.)

lineup. For example, a child's homework may say "see if you can find the match" or "see if you can fill in the blanks" or a parent may tell a child they want to "see if you can clean your plate" or "see if you can shoot this basket." The use of "see if you can" in those instances urges taking the desired action rather than indicating that taking no action is a possibility.

Investigator Clarke's own testimony about the lineup during the Biggers hearing supports this interpretation. He testified that, "I went into the room, just spoke with her briefly, told her she was a brave little girl, and I needed her to be brave for us again, and I asked her to pick out the man that had done something to her and her great-grandmother." (Tr. p. 132:6–7; R.__.) It is evident from his own words that Investigator Clarke believed he was asking G.F. to pick a photograph, and he gave G.F. no indication that she should only pick a photograph that she was confident was the perpetrator, much less any indication that not picking a photograph was an option.

The photograph lineup was also unduly suggestive because Investigator Clarke hurriedly accepted G.F.'s non-identification as though it were a certain identification and even interrupted her as she was expressing doubt about the choice. G.F. stated that "Number three looks **kind of** like him." (State Ex. 31; R __.) (emphasis added). She subsequently pointed out another photograph and said it "kind of looks like my janitor," causing Investigator Clarke to quickly turn over the page so G.F. could no longer see or comment on any of the photographs. (State Ex. 31; R __.) Investigator Clarke also interrupted G.F. as she was asking if Investigator Clarke would "try to catch someone who looks like that . . . because that isn't exactly . . . ." (State Ex. 31; R __.) G.F. **never** indicated that Appellant was actually the perpetrator and seemed to indicate that Appellant was **not** the assailant at the photograph lineup. As acknowledged by the State, Appellant was already a suspect at the time of the lineup, which would explain

Investigator Clarke's willingness to pounce on the less-than-positive statement made by G.F. and attempt to prevent her from any further explication. (Resp't's Br. 9.) For these reasons, the photograph lineup procedure was unduly suggestive, and the so-called identification made as a result should not have been admitted.

Moreover, the overall identification process, which evolved from G.F.'s non-identification at the photograph lineup, to confirming that Appellant was the person in the photograph at the pre-trial hearing, to G.F.'s certain identification of Appellant as the perpetrator at trial, was unduly suggestive. The State argues that Appellant's reliance on Foster v. California, 394 U.S. 440 (1969), regarding an evolving identification is misplaced. (Resp't's Br. 15.) Specifically, the State argues that the in-court identification in Foster was doomed because of the precariousness of the out-of-court identification but that, here, G.F. positively and confidently identified Appellant at the photograph lineup. (Resp't's Br. 15.) The State completely ignores that G.F. did not make a positive and confident identification at the photograph lineup. To the contrary, G.F. said only that the photograph of Appellant looked "kind of" like the perpetrator but that it wasn't "exactly" him. (State Ex. 31; R. __.) Again, G.F. **never** actually identified Appellant as the perpetrator and seemed to indicate that Appellant was **not** the assailant at the photograph lineup. It was only at trial, after she had been repeatedly exposed to Appellant's photograph and where Appellant was the only one from the photograph lineup and the only one on trial, that G.F. finally made a positive and confident identification of Appellant as the perpetrator. This identification process violated Appellant's rights to due process and should not have been allowed.

With respect to the second prong of the Biggers analysis, G.F.'s so-called "identification" of Appellant was not sufficiently reliable to rescue the State's unduly suggestive identification

procedure. To evaluate reliability, courts must consider the following factors under the totality of the circumstances: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Biggers, 409 U.S. at 199–200, 93 S.Ct. at 382.

G.F.'s inconsistent prior descriptions of the perpetrator, her uncertainty at the photograph lineup, and the length of time between the crime and confrontation created a substantial likelihood of misidentification such that the trial court should not have admitted the out-of-court "identification" or the subsequent in-court identification.

The State argues that the third factor—the accuracy of the witness' prior description of the criminal—supports the admission of the so-called identification because G.F. described the athletic suit worn by Appellant. (Resp't's Br. 13.) If she had, that description would be consistent with the State's theory at trial that the perpetrator wore a track suit that was brown with orange stripes. (Tr. p. 873:3-4; R ___.) However, the State's portrayal of G.F.'s prior description is not reflective of the record. G.F. was asked to describe the assailant for the first time in a 911 call and responded that "he's black, that's it." (State Ex. 42; R __.) Later in the same call, she again states that the assailant was "black, that's all I know." (State Ex. 42; R __.) In response to questions from an officer at the scene that can be heard in the 911 recording, G.F. stated that the assailant was wearing an orange jersey and that she didn't see his hair. (State Ex. 42; R __.) After hearing G.F.'s description, the officer at the scene reported that the suspect was a "black male, orange jersey." (State Ex. 42; R __.)

One day later, G.F. was interviewed at the Assessment Resource Center by ____. At the conclusion of that interview, Investigator Clarke came in and presented her with the photo lineup. G.F. told the interviewer at the outset, "I do not remember every single thing, like I told the police officers, because I went to bed; I actually went to bed." (State Ex. 31, R__.) Later in the ARC interview, G.F. reported that the assailant was wearing a hoodie but did not have the hood on. (State Ex. 31; R. __.) G.F.'s change in description may well have been the result of discussions she had with the officers responding at the scene not captured on the 911 call or the result of discussions she had with the officers or doctors in the hospital. There is no evidence in the record documenting those discussions or any descriptions she made therein. Because the officers had begun developing Appellant as a suspect by that point, it is possible they provided additional information to G.F. about Appellant in the interim in an effort to jog her memory. Regardless, G.F.'s second description of a hoodie is markedly different than her initial statement that he was wearing an orange jersey, and is also significantly different than the brown tracksuit with stripes the State claimed the perpetrator was wearing at trial. Importantly, G.F. never described any of the assailant's facial features, tattoos (or lack thereof), or any other defining features in any of her descriptions. See State v. Moore, 343 S.C. 282, 289–90, 540 S.E.2d 445, 449 (2000) (finding an unreliable identification where an eyewitness' description was limited to the suspect's race, clothing, and height, rather than any facial or other distinguishing features). G.F.'s contradictory statements regarding her assailant's appearance indicate that her so-called "identification" was not reliable.

The State also asserts that the fourth factor—certainty demonstrated by the witness at the photograph lineup—supports the admission of the so-called identification. (Resp't's Br. 13–14.) However, as detailed above, G.F. did not make a certain identification at the photograph lineup

and even indicated that Appellant was not her assailant. Therefore, her "identification" was not certain and was not so reliable as to overcome any undue suggestiveness.

Finally, the State asserts that the fifth factor—length of time between the confrontation and the identification—supports admission of G.F.'s "identification" because it took place only one day after the incident. (Resp't's Br. 13.) Although G.F.'s so-called identification was made fairly close in time to the incident, this factor is less weighty here due to the contradictions of her more contemporaneous descriptions. G.F.'s prior descriptions, made even closer to the time of the crime, did not ultimately match the State's theory at trial regarding Appellant's clothing on the day of the murder. Under the totality of the circumstances, G.F's so-called identification was not sufficiently reliable to rescue the State's unduly suggestive identification procedure, and it should not have been admitted.

In summary, Investigator Clarke told G.F. to "see if you can see the bad man" in much the same way a parent might tell a child to "see if you can finish your supper." Under those highly suggestive circumstances, G.F. was presented with no other choice than to pick one of the men out of the photograph lineup. Thus, she chose the photo of the person she thought looked most like the assailant. Unsurprisingly, she chose the same photo as 37 percent of the participants in Appellant's identification expert's survey. (Tr. p. 169:11–14; R __.) There is no faulting an eight-year-old child for failing to accurately remember details about her assailant; the very same child understandably stated that she did not remember everything and that she wanted to brainwash herself. (State Ex. 31; R. __.) However, to conclude that the child's purported identification was so sufficiently reliable as to outweigh the suggestive nature of the identification procedure would require the court to ignore the significant indicia of unreliability set forth above. The trial court's admission of the identification, as well as G.F.'s subsequent in-

court identification, violated Appellant's right to a fair trial and he is accordingly entitled to a new trial.

II. The trial court erred in admitting a fingerprint card obtained from a New Jersey database and testimony based on the New Jersey fingerprint card because the New Jersey fingerprint card was not properly authenticated by the State.

In response to Appellant's argument that the New Jersey fingerprint card was not properly authenticated and therefore the trial judge should not have admitted it, the State contends that it only has to show that Investigator Odom (the State's fingerprint expert) could identify the distinctive characteristics of Appellant's fingerprints; that Odom recognized the fingerprint card as originating from the Automated Fingerprint Identification System ("AFIS") database where other fingerprints of that nature are kept; and that the fingerprint card was an accurate reflection of Heyward's prints. The State's three authentication arguments fail, and even assuming the State could show those things, it would still not be sufficient to authenticate the New Jersey fingerprint card under the standard established by State v. Anderson, 386 S.C. 120, 687 S.E.2d 35 (2009).

As an initial matter, it is critical that Investigator Odom did not delineate in her report between the New Jersey fingerprint card she obtained through AFIS and the South Carolina card obtained when Appellant's prints were taken in Richland County. (Tr. pp. 616:1-14, 617:8-17; R ___.) She may not have had a doubt that the prints were the same, but she admitted that she never did a detailed comparison between the New Jersey prints and the South Carolina prints. (Tr. pp. 616:1-14, 617:8-17; R ___.) Because she could not delineate between which set of prints she used in her report, the report was itself inadmissible because there is no way to extricate the unauthenticated evidence therein (the New Jersey fingerprints) from the authenticated evidence (the South Carolina fingerprints). As for the reports being admissible

pursuant to South Carolina Rule of Evidence 1006, under that rule a summary is only admissible if the underlying data is admissible under state law. That was not the case here because a portion of the underlying data was not authenticated.

It is telling that the State focuses on non-South Carolina precedent interpreting the Federal Rules of Evidence in its response, rather than on the authentication requirements set forth in State v. Rich and State v. Anderson. To meet the authentication requirements under Rule 901 of the South Carolina Rules of Evidence, the South Carolina Supreme Court requires testimony regarding how a person's fingerprints were taken, including testimony that a known fingerprint card was taken at a correctional facility on a certain date. Anderson, 386 S.C. at 128–29, 131–32, 687 S.E.2d at 39–40, 41. Because the State did not introduce any testimony as to how Appellant's fingerprints were taken for the New Jersey card, including testimony about where and how those prints were taken and what day they were taken on, the State cannot authenticate the New Jersey fingerprints as a matter of South Carolina law under Anderson. In its effort to get around Anderson, the State also ignores the comment to Rule 901(b)(7), which provides "[a]s to the authentication of police fingerprint records, see State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987)." Both that comment and Anderson clearly indicate how to authenticate fingerprint evidence **in South Carolina**, and any reference to other authority is an attempt to circumvent South Carolina's requirements.

To be clear, Appellant does not contend that the State is required to introduce testimony from the actual person who took the New Jersey fingerprints, or even necessarily a person from New Jersey. However, where the State fails to present evidence establishing where, when and by whom the New Jersey fingerprint card was made, how those fingerprints were submitted to the

AFIS, and how an accurate record of them was maintained in the AFIS, the State has simply not met its burden of authenticating that fingerprint card under Anderson.

Rather than arguing that they satisfied Anderson's standard, the State contends it properly authenticated the New Jersey fingerprints under Rule 901(b)(4), Rule 901(b)(7), and State v. Brown, 424 S.C. 479, 818 S.E.2d 735 (2018). With regard to its Rule 901(b)(4) argument, the State cites United States v. Patterson, 277 F.3d 709, 713–14 (4th Cir. 2002), and United States v. Lauder, 409 F.3d 1254, 1265–66 (10th Cir. 2005). Those two cases pre-date Anderson and applied federal law and the Federal Rules of Evidence. More importantly, however, the authentication question presented in Patterson was whether the Tenprinter fingerprint image reliably imaged the defendant's fingerprints in much the same way as a party might challenge whether a photograph reliably depicts a crime scene. 277 F.3d 709, 713. That question is completely different than the question presented here—whether the New Jersey fingerprint card can be authenticated as a fingerprint card taken on a certain date, at a certain time, by a certain person. In other words, is the New Jersey fingerprint card what it purports to be; is it authentic? Appellant does not challenge whether the machine accurately imaged Appellant's finger. Rather, Appellant challenges the admissibility of the card because the State provided no evidence about where and when the card was made, who made it, and whether it meets the New Jersey criteria for its making. It is that evidence that the State cannot authenticate, not whether the prints rendered by the New Jersey machine match Appellant's actual fingerprint.

In Patterson, there was no witness that examined the defendant's fingers to verify that they were accurately rendered on a Tenprinter fingerprint image, and the deputy who operated the Tenprinter lacked knowledge as to how the Tenprinter worked and as to the accuracy of the images it produced. Id. Because those ordinary testimonial methods of authentication were

unavailable, the court looked to the internal patterns method discussed in Federal Rule of Evidence 901(b)(4). Id. In Patterson, a print was recovered from a bag containing cocaine base that the police discovered during their investigation of the defendant. Id. at 712. Subsequently, an expert witness testified that the print matched one of the defendant's prints from the Tenprinter image. Id. at 712–13. The court ultimately found that the internal patterns or other distinctive characteristics of the Tenprinter image, taken in conjunction with the circumstances, provided an adequate foundation to admit the Tenprinter image because of expert testimony that the Tenprinter print matched the print found on the container discovered during the police's investigation.

In United States v. Lauder, the Tenth Circuit was confronted with similar facts to Patterson. 409 F.3d at 1265–66. Applying Patterson, the Tenth Circuit concluded that the "live-skin" fingerprint cards the government sought to admit were sufficiently authenticated under the circumstances where there was testimony that the defendant's known fingerprint was properly recorded, that the machine functioned properly when it recorded the defendant's fingerprint, and that the chain of custody was maintained. Id. at 1266. The State did not present any such testimony at Appellant's trial, and thus even under Patterson and Lauder the New Jersey fingerprint card was still not properly authenticated.

Like the State's argument as to South Carolina Rule of Evidence 901(b)(4), its Rule 901(b)(7) argument also primarily relies on a case interpreting federal law and the Federal Rules of Evidence. In an unpublished decision issued three years before Anderson, the Fourth Circuit held that the district judge did not abuse his discretion in admitting fingerprint cards at trial, finding that the cards were admissible as either business records or public records. United States. v. Thornton, 209 F. App'x 297, 299 (4th Cir. 2006). **Those methods are both**

exceptions to hearsay, rather than authentication methods. See id. The Fourth Circuit's sparse opinion in Thornton does not even discuss the basis for the challenge to the admissibility of those fingerprint cards. See id. The State, without citation, asserts that all that is required to authenticate the fingerprint card under this exception is for the witness to show that the card was actually from the database where fingerprint cards of that nature are kept. (Resp't Br. at 23.) It is not clear where the State's proposed standard comes from, but it is certainly not found in Thornton.

The other case the State cites in support of this argument is State v. Carruth, a Missouri Court of Appeals case that also predates Anderson and that **deals with hearsay rules rather than authentication**. In Carruth, the court held that an AFIS fingerprint card was admissible under the business records exception to the hearsay rule where a witness established the standard procedures used by the jurisdiction to collect arrestees' fingerprints. 166 S.W.3d 589, 591 (Mo. Ct. App. 2005). To the extent Carruth applies outside of the hearsay context, it supports Appellant's contention that there must be a witness to testify about New Jersey's fingerprinting and storage procedures in order to authenticate the New Jersey fingerprint card in this case. There was no such witness here, and thus the State cannot show that it properly authenticated the New Jersey fingerprint card under the business records method set forth in Rule 901(b)(7).

Finally, the State cites State v. Brown as support for its argument that the fingerprint card was authenticated under Rule 901(b)(9) of the South Carolina Rules of Evidence. To the extent it applies, Brown simply illustrates Appellant's argument. In Brown, the South Carolina Supreme Court held that although authentication is a low standard and that the witness need not be an expert, a witness testifying about a GPS monitoring system should have experience with the system and provide testimony describing the system, the process the system uses, and how

the system presents accurate results for the particular data at issue. Id. at 492, 818 S.E.2d at 742. Because the officer who testified about the GPS system in Brown did not provide such testimony, the court concluded that the State had failed to authenticate the accuracy of the GPS records. Id.

If the Court is inclined to apply the Brown standard here, Appellant should win. Investigator Odom was admittedly not familiar with the New Jersey system, much less the procedures and standards used in New Jersey, or when, where, and by whom the prints were taken. She therefore could not opine on whether the card was authentic. As stated above, Appellant does not argue that the State needed to call an expert on the New Jersey system, merely someone who could attest that the fingerprint card is what it says it is, and was familiar with New Jersey's fingerprinting system, the process that system uses to get fingerprints, and that the process for fingerprinting was properly completed in this instance. Because the State failed to produce such testimony, the trial court erred in concluding that the New Jersey fingerprint card had been properly authenticated.

The trial court's admission of the fingerprint evidence substantially prejudiced Appellant at trial and is alone a sufficient basis for reversal. See State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987) (reversing and remanding for a new trial where the trial court improperly admitted unauthenticated fingerprint evidence). However, taken in conjunction with the inappropriate admission of the various identifications and the other errors discussed below, the cumulative error is too great to constitute harmless error.

III. The trial court erred by allowing expert opinion testimony about the operational capabilities of the recovered firearm where such testimony was not relevant to the charges against Appellant and was needlessly cumulative and unduly prejudicial.

On this issue, the State notes in its response that Appellant did not argue at trial that the testimony about the operational capabilities of the recovered firearm was prejudicial under Rule 403 of the South Carolina Rules of Evidence. That is true, but Appellant is not arguing that the evidence was unduly prejudicial under Rule 403 on appeal. Instead, Appellant is arguing that the trial court's decision to allow that testimony was improper on relevancy and cumulativeness grounds and that the trial court's decision accordingly prejudiced Appellant at trial.

As established in Appellant's initial brief, the operability of the firearm is not a necessary statutory or common law element that must be proven beyond a reasonable doubt for either armed robbery or pointing and presenting a firearm. See State v. Heck, 304 S.C. 345, 346, 404 S.E.2d 514, 515 (Ct. App. 1991) (holding that "when a person commits robbery while armed with a pistol or gun, such an instrument is considered a deadly weapon regardless of its operability"); State v. Burton, 356 S.C. 259, 263, 589 S.E.2d 6, 8 (2003) (noting that "[t]he elements of pointing and presenting a firearm are (1) pointing or presenting; (2) a loaded **or unloaded** firearm; (3) at another"). As established in State v. Heck, which the State conveniently ignores, the operability of a firearm is irrelevant because it makes no difference for armed robbery. Id. at 346, 404 S.E.2d at 515. As for pointing and presenting, the fact that an unloaded firearm still satisfies the elements of that offense demonstrates that operability is not required for that offense either. Burton, 356 S.C. at 263, 589 S.E.2d at 8. Accordingly, the trial court committed legal error in concluding that the expert's testimony about the operability of the firearm was relevant because operability was a necessary element of those offenses.

Importantly, the trial court made no finding as to whether that testimony was relevant for purposes of showing the premeditation element of murder, ruling only that the expert testimony was relevant for purposes of meeting the elements of armed robbery and pointing and presenting.

(Tr. pp. 888:18–889:22; R __.) In any event, the expert's testimony as to the operability of the firearm was cumulative with regard to the State's purported purpose of showing malice because it is the presence of the gun, not its operation, that shows premeditation. The State had already introduced evidence that the gun was present, so there was no need for further testimony about its operability other than to inflame the passions of the jury. The trial court's error of law substantially prejudiced Appellant.

IV. The trial court erred in allowing Appellant's alias "Abdul Muslim" to be used in the indictments and at trial because the alias invited undue religious prejudice from the jury.

The State argues that its inclusion of Appellant's alias in the indictment and its DNA expert's testimony about that alias was necessary to identify Appellant in connection with the DNA profile match the DNA database returned. However, in the State's brief, they acknowledge that in addition to Appellant's alias, the DNA profile match also included a state identification number, a birthday, and a national identification number. (Resp't Br. 33; R __.) Either of those identification numbers could have been used in lieu of the prejudicial alias, but the State insisted on using the alias in an attempt to inflame the passion of the jury. At trial, the Solicitor contrasted Appellant's alias with the victim's Christian beliefs. Here, because the inclusion of Appellant's alias was **not necessary** to identify him in connection with the acts charged in the indictment as in United States v. Clark, 541 F.2d 1016, 1018 (4th Cir. 1976), the trial court should have granted Appellant's motion to strike the alias from the indictment and should have sustained Appellant's objection to the DNA expert's use of Appellant's alias in her testimony.

As for any argument that Appellant created this issue by failing to agree not to challenge the DNA evidence, the State cannot force a defendant to choose between challenging evidence or being subjected to improper religious bias. Moreover, at trial the Solicitor repeatedly brought up

the victim's Christian beliefs in an apparent effort to improperly contrast the victim's religious beliefs with Appellant's Muslim beliefs. The trial court's decision to allow the State to introduce Appellant's alias where other identifying information could have been used instead prejudiced Appellant and should result in a new trial.

V. The trial court erred in admitting gruesome autopsy dissection photographs of the victim's internal head injuries because the photographs lacked probative value and were calculated to inflame the passions of the jury.

The State argues in response that it introduced the autopsy photographs as relevant evidence of malice. However, Dr. Durso's testimony itself regarding the victim's wounds went to this element and the gruesome photographs were cumulative of her testimony and simply piling on. Rather than being introduced for corroboration or proving malice, the photographs were introduced to inflame the passions of the jury.

Dr. Durso may have testified that the head trauma was a contributing factor to Ms. Tollison's cause of death, but she ultimately testified that the cause of death was strangulation. (Tr. p. 742:2; R __.) That cause of death is consistent with G.F.'s testimony, and there is no testimony other than Dr. Durso's that the assailant struck Ms. Tollison in the head. Dr. Durso further testified that "you can't date a contusion." (Tr. p. 732:25–733:1; R __.) Thus, the only corroboration the photos might be used for is corroboration of Dr. Durso's own testimony, which was sufficiently detailed and graphic by itself to allow the State to establish malice. Accordingly, the photographs were needlessly cumulative and should not have been admitted. See State v. Collins, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014). For those reasons, the danger of unfair prejudice from those photographs' admission substantially outweighed their probative value under Rule 403 of the South Carolina Rules of Evidence. Their admission prejudiced Appellant's right to a fair trial and constituted reversible error.

VI. The trial court erred in denying Appellant's request to remove his shackles during jury selection.

The State notes that a criminal defendant generally has the right to appear in court free from shackles. Here, however, the trial court denied Appellant's request to remove his shackles during jury selection. The State asserts that it is Appellant's burden to show that a juror saw the shackles during jury selection and that the presence of shackles prejudiced him in some way. As set forth in the State's brief, "[a] defendant's appearance in shackles may reduce the presumption of innocence by causing jury prejudice thereby denying him due process." (Resp't Br. 41 (quoting Jones v. Meyer, 899 F.2d 883, 883 (9th Cir. 1990)).)

The prejudice to Appellant was not mitigated here like it was in the cases cited by the State. In United States v. Mayes, the defendant's leg restraints were hidden from the jury's view by tablecloths and railings, the jury never saw the defendant enter or leave the courtroom, and the defendant's leg irons were muffled to avoid any sounds. 158 F.3d 1215, 1226–27 (11th Cir. 1998). Similarly, in Castillo v. Stainer, the defendant's restraint was a waist chain that could not be seen by the jury. 983 F.2d 145, 147 (9th Cir. 1992). Finally, in State v. Williams, the trial court put up a panel at the defense table and ensured that the jurors entered from a place where they could not see the defendant's shackles. 485 A.2d 570, 574–75 (Conn. 1985).

As for the State's position that Appellant must make an offer of proof that the jury could or did see the restraints, there is no South Carolina precedent that so requires. The trial court denied Appellant's request to remove the shackles before jury selection without engaging in any analysis whatsoever as required by State v. Tucker. 320 S.C. 206, 209, 404 S.E.2d 105, 107 (1995) ("The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security."); (Tr. 39:23; R __.) When making that request, Appellant's counsel stated on the record that "[i]f you are within any of the first two rows of the gallery . . .

directly behind Mr. Heyward, you can see that shackling." (Tr. p. 39:13–14; R __.) Shackles are not invisible. They were readily observable by the potential jurors seated closest to Appellant, and the only evidence in the record is that the shackles could be seen.

The State contends that Appellant should have renewed his objection, made an offer of proof that one or more jurors saw the shackles, and/or requested an instruction from the trial court admonishing the jury to disregard the shackles and not to draw any inferences from them. First, the State does not suggest how such an offer of proof could be made, nor is it obvious. The most natural method for such a proffer would be additional *voir dire* of the jury. Doing so and asking whether the juror saw Appellant's shackles, however, would only reinforce that Appellant was in shackles and would simply prejudice him further. As for requesting an instruction from the trial court, such an instruction would only draw further attention to the restraints. Because the damage had been done, and there was no reasonable method of proffering additional evidence, there was no reason for Appellant to renew his objection to the shackles at the conclusion of jury selection.

There was no evidence in the record to suggest that Appellant needed to be shackled during jury selection, as the only evidence in the record was that Appellant had never been "discourteous to the staff, the Richland County Sheriff's Department, the bailiffs or this Court." (Tr. p. 39:19–20; R. __.) Then, Appellant was not even shackled during trial. That effective self-reversal by the trial court further undermines any rationale the trial court might have had for leaving him shackled without any explanation during jury selection. The trial court's complete failure to conduct any balancing analysis was a significant reversible error that substantially prejudiced Appellant's right to a fair trial.

VII. The cumulative errors committed by the trial court had the effect of preventing Appellant from receiving a fair trial entitling Appellant to a new trial.

The State, without citation, contends that Appellant has failed to preserve his cumulative error doctrine argument by not raising it at trial. That is an incorrect statement of law not reflected in any of the cumulative error decisions cited by the State in its response brief. Moreover, Appellant's arguments are all based on specific, preserved issues that were presented to and ruled on by the trial court. It does not follow that an appellate court not be allowed to consider the cumulative effect of properly preserved objections in the absence of an additional cumulative objection at trial.

The trial court erred in this case by: (1) allowing unreliable identification testimony that violated Appellant's right to due process; (2) admitting fingerprint evidence which has not been properly authenticated; (3) allowing irrelevant, needlessly cumulative, and unduly prejudicial testimony regarding the gun recovered from Appellant's residence; (4) allowing mention of Appellant's alias "Abdul Muslim" in the indictments and during trial, inviting religious prejudice against him; (5) admitting unduly prejudicial autopsy dissection photographs of the victim's internal head injuries; and (6) wrongly refusing to remove Appellant's shackles during jury selection. Each of those errors alone prejudiced Appellant, but taken together their cumulative prejudicial effect cannot stand uncorrected. As set forth in Appellant's initial brief, the only remaining evidence after correcting these errors is the DNA evidence, about which Appellant introduced substantial doubt at trial.

CONCLUSION

Appellant may not be entitled to a perfect trial, but he is at least entitled to a fair one. For the reasons set forth above and in Appellant's initial brief, he did not get one. We ask the Court to reverse and remand for a new trial.

<signature block next page>

Respectfully submitted,

K&L GATES, LLP

By: _____

Tara C. Sullivan
J. Whitney McGreevy
134 Meeting Street, Suite 500
Charleston, SC 29401
tara.sullivan@klgates.com
whit.mcgreevy@klgates.com
Telephone: (843) 579-5600
Facsimile: (843) 579-5601

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201-3332
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Attorneys for Appellant James Heyward

January 2, 2019

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward, ...Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the Appellant's Initial Reply Brief and Designation of Matter to be Included in Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on January 2, 2019, addressed to its attorney of record, Susannah R. Cole, Assistant Attorney General, South Carolina Attorney General's Office, 1000 Assembly Street, Columbia, South Carolina 29201, and Mr. James Heyward #373035 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899.

<signature block next page>

K&L GATES, LLP

By: [signature]

Tara C. Sullivan
134 Meeting Street, Suite 500
Charleston, SC 29401
tara.sullivan@klgates.com
Telephone: (843) 579-5600
Facsimile: (843) 579-5601

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201-3332
Telephone: (803) 734-1330
Facsimile: (803) 253-6283

Attorneys for Appellant James Heyward

SUBSCRIBED AND SWORN TO before me
This 2nd day of January, 2019.

[signature]
Notary Public for South Carolina
My Commission Expires: July 5, 2027

January 2, 2019