STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD ISAIAH NELSON,

APPELLANT

APPELLATE CASE NO. 2018-000980

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by admitting six gruesome autopsy photographs of the deceased where the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, and as a waste of time due to the needless presentation of cumulative evidence in violation of Appellant's right to a fair trial by an impartial jury?

STATEMENT OF THE CASE

On December 13, 2016, a Berkeley County grand jury indicted Appellant for murder (2016-GS-08-2777). R. *(indictment). The state, represented by Anne Williams and Wilton McNeely, called the case to trial before the Honorable Kristi Lea Harrington and a jury on May 14-16, 2018. Tr. 1-2. Julie Shivers and David Schwacke represented Appellant. Tr. 2. Ultimately, the jury found Appellant guilty of murder. Tr. 463, ll. 9-13. Judge Harrington sentenced Appellant to life imprisonment without the possibility of parole. Tr. 483, ll. 1-2; R. *(sentence sheet).

On May 22, 2018, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Collins, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014) (quoting State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). The appellate court "'is bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Baccus, supra). "'The admission of exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.'" Id. (quoting State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004)). "'An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.'" Id. (quoting Wise, supra).

ARGUMENT

Violating Appellant's right to a fair trial by an impartial jury, the trial judge erred by admitting six gruesome autopsy photographs where the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, and as a waste of time due to the needless presentation of cumulative evidence.

Introduction

Shonda Davis worked at the local library in Moncks Corner. Tr. 219, ll. 14-20. While visiting the library, Appellant met Davis. Tr. 219, ll. 21-25. The two developed a friendship that blossomed into romance. Tr. 126, ll. 8-13; Tr. 130, ll. 16-18; Tr. 219, ll. 21-23. On October 15, 2016, Davis and Appellant exchanged text messages throughout the day, discussing their relationship and the purchase of a tool from Lowe's for Appellant to use on his job. Tr. 369, l. 24 – Tr. 373, l. 24.

Later that evening, Davis went out to dinner with friends in Charleston. Tr. 127, ll. 14-24; Tr. 131, ll. 3-4. Appellant tried to contact Davis multiple times by phone, but Davis did not respond. Tr. 225, ll. 5-11; Tr. 340, ll. 6-8; Tr. 340, ll. 19-22; Tr. 373, ll. 12-24. On her way home from dinner, she called her ex-boyfriend, who was the father of her son, to invite him over to her house that evening. Tr. 218, ll. 13-14; Tr. 221, l. 25 – Tr. 222, l. 2; Tr. 342, ll. 2-11; Tr. 404, ll. 18-21; Tr. 406, l. 21 – Tr. 407, l. 18. When she arrived home, Davis was still on the phone with her ex-boyfriend discussing their evening plans. Tr. 407, ll. 19-21. As Davis got out of her car to enter her home, Appellant confronted her. Tr. 408, ll. 2-9. Appellant then used a knife to kill Davis. Tr. 139, ll. 20-24. The following day, the police arrested Appellant. Tr. 290, ll. 6-14. Appellant immediately admitted to police that he had killed Davis. Tr. 374, ll. 4-20; State's Exhibit #71.

Thus, there was never a question that Appellant killed Davis. Tr. 120, ll. 10-11; Tr. 120, ll. 20-21; Tr. 439, ll. 6-8. The only matter in dispute was Appellant's intent at the time. At trial, defense counsel argued the state failed to prove malice; rather, defense counsel posited that Appellant's actions were the result of heat of passion based upon sufficient legal provocation based upon Davis's refusal to respond to Appellant, Davis's communications with her ex-boyfriend, and Davis's invitation to her ex-boyfriend to spend the night with her. Tr. 121, ll. 19-23; Tr. 123, ll. 4-7; Tr. 439, ll. 14-16; Tr. 443, ll. 4-6; Tr. 444, ll. 13-19; Tr. 445, ll. 4-6. Nevertheless, the judge refused to instruct the jury on voluntary manslaughter. Tr. 427, l. 4 – Tr. 428, l. 19. Thus, the jury, knowing it was undisputed that Appellant killed the deceased, was left with only two options – guilty or not guilty of murder. Tr. 458, ll. 4-10.

Even though there was no dispute as to the identity of the perpetrator or the cause of death, the state insisted upon introducing six gruesome autopsy photographs. Even though numerous witnesses testified to the nature of the injuries suffered by Davis in graphic detail, the state insisted upon introducing six gruesome autopsy photographs. Even though the nature of the injuries was easily explained by the pathologist and did not require any specialized knowledge to understand, the state insisted upon introducing six gruesome autopsy photographs. Even though the pathologist used two demonstrative aids to explain the injuries suffered by Davis, the state insisted upon introducing six gruesome autopsy photographs. Admission of those photographs was error.

Relevant facts

Prior to trial, the lawyers informed the judge that although they were able to agree on the admissibility of most of the exhibits, defense counsel objected to six photographs from the autopsy. Tr. 89, l. 22 – Tr. 90, l. 21; State's Exhibits #61, 62, 63, 88, 89, 90. Defense counsel

argued the probative value of the photographs was substantially outweighed by their danger of unfair prejudice, confusion of the issues, misleading of the jury, waste of time, and needles presentation of cumulative evidence. Tr. 92, ll. 2-5; Tr. 92, ll. 18-20; Tr. 93, ll. 3-5. Defense counsel explained "the manner in which the victim died, and the perpetrator of the crimes [were] not in question." Tr. 92, ll. 8-9; Tr. 95, ll. 16-17. According to defense counsel, the "only issue" before the jury was "the intent behind the crime." Tr. 92, ll. 6-7. According to defense counsel, the photographs would not "assist the jury in determining whether or not what the intent was at the time of the actual killing." Tr. 92, l. 25 – Tr. 93, l. 2; Tr. 93, ll. 11-20; Tr. 95, l. 25 – Tr. 96, l. 1. Defense counsel argued that "the fact that the injuries [were] so gruesome" did not "show malice," and that the "gruesome nature of the injuries" were not in dispute. Tr. 95, ll. 16-21. Additionally, "[t]he medical examiner, the emergency medical technicians, and the responding law enforcement [would] be testifying to the manner of death and extent of the injuries" rendering the photographs "unnecessary." Tr. 93, ll. 5-10. Thus, the sole purpose of the photographs was to "inflame the emotions of the jury." Tr. 92, ll. 10-11. Further, defense counsel explained that due to the danger of unfair prejudice posed by the photographs, their admission would deny Appellant his right to a fair trial before an impartial jury. Tr. 92, ll. 12-17.

The state argued the photographs "illustrate malice very, very vividly." Tr. 94, ll. 3-10. According to the state, the photos were "horrific." Tr. 95, l. 8. In light of the police not recovering a weapon, the state argued the photographs showed "the manner of death and the way that the defendant killed the victim." Tr. 94, ll. 11-13.

Judge Harrington determined the photographs were admissible. Tr. 96, ll. 2-18. According to the judge "the photographs [were] necessary to substantiate material facts

regarding the nature of the crime and show evidence of malice." Tr. 96, ll. 8-10. Further, she found "the photos contained information that [made] them more probative than prejudicial." Tr. 96, ll. 11-13. Finally, she found "the photographs [would not] inflame the emotions of the jury to draw sympathy of the jury, to draw sympathy for the victim's manner of death." Tr. 96, ll. 13-16.

In its opening statement, the state explained the injuries the deceased suffered: "this defendant appears and begins plunging a knife into her head and face so many times that she's not just cut, her skull is crushed in. Her brain matter is exposed to the naked eye. You can see it without having any medical expertise." Tr. 117, ll. 17-23. Later, the solicitor promised the jurors "photos of the crime scene and limited photos of the victim because ... it's not something you want to see more than you have to." Tr. 118, l. 25 – Tr. 119, l. 2. In response, defense counsel explained she had tried to ensure the jurors would not have to view the photographs because the manner of death was not in dispute. Tr. 121, l. 23 – Tr. 122, l. 1.

During the state's case-in-chief, the first officer on the scene, Ashley Spurgeon, described the deceased's injuries in detail. Spurgeon told the jury the deceased had "numerous deep lacerations to her face, her head and her arms and her hands." Tr. 160, ll. 9-12. Spurgeon recalled the cuts exposed bone and that "one of the fingers was missing." Tr. 160, ll. 12-14. Spurgeon had never "seen anyone injured that bad in [her] experience as an officer." Tr. 160, ll. 15-17. Next, the paramedic who tended to the deceased testified for the state and provided graphic details of the injuries she suffered. Specifically, he stated she had

> Lacerations to the head and face too numerous to count and too overlapped to guess sizes, exposure of skull and possible brain matter found in opening above her right eye, smaller lacerations noted to the lips, a large laceration was noted under right eye approximately three inches, base of throat, sternal notch and chest had a laceration ... approximately two inches with fact exposure. ... Left arm had a large laceration to the wrist and partial amputation of the index finger, ring

> finger, and pinkie finger. ... [L]arge laceration to the right wrist about approximately three inches and right forearm approximately three inches.

Tr. 173, l. 21 – Tr. 175, l. 7. Thereafter, the solicitor asked the paramedic to describe these injuries in greater detail and by using layman's terms. Tr. 175, l. 8 – Tr. 176, l. 12. Another officer also described the deceased's injuries: "multiple cuts on her arms, face and head, some deep enough that you could see bone. ... [T]here was a large pool of blood around the victim." Tr. 186, l. 21 – Tr. 187, l. 2.

Through its pathologist, the state introduced the photographs at issue. Tr. 386, ll. 19-22; Tr. 387, ll. 10-15. However, prior to her testimony, the state ensured that anyone who wanted to leave the courtroom would have an opportunity to do so due to the nature of the testimony and the gruesome nature of the photographs. Tr. 375, l. 25 – Tr. 376, l. 14. Additionally, the state decided to have the pathologist display the photographs directly in front of the jury "rather than [] projecting them onto the large screen." Tr. 377, ll. 17-23. Dr. Riemer explained that Davis died as a result of multiple sharp-force injuries. Tr. 384, ll. 6-12. She explained that "sharp-force injuries were like cuts or chops." Tr. 384, l. 22 – Tr. 385, l. 1. There was one stab wound and "dozens of sharp-force injuries overlapping on each other." Tr. 385, ll. 4-8. When presented with the gruesome autopsy photographs, the pathologist claimed they would assist her with explaining the injuries. Tr. 387, ll. 17-21.

Dr. Riemer told the jurors that a "picture is worth a thousand words," "[s]o [she] took multiple photographs of the injuries" and those on display were "some of them." Tr. 388, ll. 5-10. When describing the "first picture," she told the jurors it showed "her right arm" with "multiple cuts from a sharp force instrument" that went "through the skin and the subcutaneous tissue or the fatty tissue on her arm." Tr. 388, ll. 11-18. Dr. Riemer showed the jurors photographs of the deceased's right hand with fingers that had been practically amputated. Tr.

389, ll. 3-8. She opined that when the deceased "was aware that the sharp force object, this knife, was coming at her, it's most likely that she held the hand up to her head to try to protect herself from the impact. ... [T]hey're basically types of injuries sustained while she was trying to defend herself." Tr. 389, ll. 9-16; Tr. 392, ll. 1-4.

Next, she showed the jurors a photograph of her face, which she said was "almost unrecognizable as a face because there [were] so many intersecting cuts on it." Tr. 389, ll. 23-25. "There [were] multiple sharp-force injuries, cuts, all over her face. On her forehead, her nose, her cheeks, which actually went through into the sinus of the face. So they were very deep and damaged structures of the face." Tr. 390, l. 23 -Tr. 391, l. 2. According to Dr. Riemer, her right eye was collapsed, but the jurors could not "actually appreciate it in that photograph." Tr. 391, ll. 3-5. The photograph showed the cuts were "very deep" and "actually went through the scalp and skull in order to cause brain matter to be exposed." Tr. 391, ll. 11-17.

Dr. Riemer said this was "extreme" compared to the many other autopsies she had performed. Tr. 390, ll. 9-11. Noting that several photographs were in black and white, instead of color, Dr. Riemer told the jurors that the "actual photo" she took "was in color," but she guessed it had been changed to black and white "to make it less offensive." Tr. 390, ll. 11-14.

In addition to the photographs, Dr. Riemer used two demonstrative aids. Tr. 393, ll. 8-16; State's Exhibit #92; State's Exhibit #93. One demonstrative aid showed a model of a head – "the outer layer, the skull," "a periosteal layer and meningeal layer," "dura matter," the "arachnoid membrane," and the brain. Tr. 394, ll. 2-12. Using this aid, Dr. Riemer explained the deceased had bleeding into the subdural space and the subarachnoid space, as well as disruption of the brain tissue itself. Tr. 394, ll. 13-24. Using the second diagram, Dr. Riemer showed the jurors the injuries the deceased suffered to her head, explaining "the scalp was more

cut through and the bone of the skull was actually cut through as well, and pieces of it were just, like, breaking off." Tr. 395, ll. 1-9. She could only describe the injuries as "multiple fractures of the skull with exposure of the brain tissue beneath the skull and damage and bleeding to the actual brain tissue." Tr. 395, ll. 10-14.

In closing, the state acknowledged the "shocking" and "terrible" evidence the jury had to see. Tr. 430, ll. 20-21. In fact, the solicitor actually apologized for having to show the jurors some of that evidence. Tr. 430, ll. 18-24. When discussing Dr. Riemer's testimony, the solicitor recognized the testimony was "very hard for you-all." Tr. 436, ll. 14-15. The solicitor asked the jurors to recall the testimony of the paramedic who described "horrific injuries," including "deep lacerations to the head and face too numerous to count and too overlapping to guess the size." Tr. 435, ll. 19-23.

Discussion

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...." U.S. Const. Am. VI. The Fourteenth Amendment forbids states to "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Am. XIV; see also Estelle v. Williams, 425 U.S. 501 (1976); Irvin v. Dowd, 366 U.S. 717 (1961). Pursuant to this Due Process Clause, the United States Supreme Court held an individual's right to a jury trial pursuant to Sixth Amendment is applicable to the states. Duncan v. Louisiana, 391 U.S. 145, 149-150 (1968); see also State v. Warren, 273 S.C. 159, 255 S.E.2d 668 (1979). Additionally, South Carolina's Constitution provides that "Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury." S.C. Const. Art. I, § 14.

The Rules of Evidence serve to safeguard an individual's rights to due process of law and an impartial jury. One of the most important of those rules is the rule requiring exclusion of evidence where the probative value is substantially outweighed by the danger of unfair prejudice arising from that evidence. Generally, all relevant evidence is admissible. Rule 402, 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. Rule 401, SCRE. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). However, even relevant evidence must "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011).

Thus, the first step requires a determination of the probative value of the evidence. The second step requires an evaluation of the danger of unfair prejudice, the danger of confusion of the issues, the danger of misleading the jury, and considerations of waste of time and needless presentation of cumulative evidence resulting from the introduction of the evidence. The third step requires balancing of the probative value and dangers and considerations posed by the introduction of the evidence.

Probative value

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value'

is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

Danger of unfair prejudice

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he 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." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (providing that "[e]vidence is unfairly

prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

The Supreme Court reiterated its long-standing precedent that "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to substantiate material facts or conditions." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). Photographs are unfairly prejudicial when they have a "'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" Id. (citing State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)); see also State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009); State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986); State v. Patrick, 289 S.C. 301, 308-309, 345 S.E.2d 481, 485 (1986), *overruled on other grounds by* Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); State v. Dial, 405 S.C. 247, 259, 746 S.E.2d 495, 501 (Ct. App. 2013); State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008); State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). The Court warned that the photographs at issue were "at the outer limits of what our law permits a jury to consider ... [and] strongly encouraged all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case." Torres, 390 S.C. at 623-624, 703 S.E.2d at 229.

The Court also addressed the danger of unfair prejudice in the introduction of gruesome autopsy photographs in State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). A majority of the Court held the introduction of the photographs was erroneous. Collins, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge, J. and Hearn, J., concurring); Id., at 540, 763 S.E.2d at 30-31 (Pleicones,

J., dissenting).[1] However, four members of the Court determined the erroneous admission was harmless. Id., at 536, 763 S.E.2d at 28-29 (majority opinion); Id., at 539, 763 S.E.2d at 30 (Kittredge, J. and Hearn, J., concurring).[2] Despite the split among the Court, the point of the opinion is clear – evidence must be probative of some fact at issue in the case and the danger of unfair prejudice resulting from gruesome photographs must be guarded against at all times.

Danger of confusion of the issues and misleading of the jury

Additionally, the court must evaluate the danger of confusion of the issues or of misleading the jury by presenting the evidence. Very little case law exists in South Carolina regarding these aspects of Rule 403, SCRE. In Wilson v. Rivers, 357 S.C. 447, 453-454, 593 S.E.2d 603, 606 (2004), the Supreme Court held it was error to exclude the testimony of a biomechanics expert based on a contention that the testimony would be confusing. The case involved an automobile accident and the question before the jury was whether the plaintiff's back problems were caused by the accident. Id. at 449, 593 S.E.2d at 603-604. The defendant sought to introduce the testimony of an expert in the field of biomechanics to refute the plaintiff's claims. Id. at 450, 593 S.E.2d at 604. The Court held the testimony would not have been confusing to the jury because the expert considered the "damage to the car," "depositions, medical records, photographs, impact tests, and the accident report in reaching his conclusion." Id. at 453, 593 S.E.2d at 606. The expert discussed

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[1] At the trial, the state argued State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014), supported admission of the photographs in the case sub judice. Tr. 94, l. 18 – Tr. 95, l. 1. According to the state, the Supreme Court found "it was not an abuse of discretion for the court to admit the photographs." Tr. 94, l. 23 – Tr. 95, l. 1. Even a cursory reading of Collins shows the falsity of the state's argument. As explained, the majority of the Court held it was error to admit the photographs at issue in Collins.

[2] Justice John Cannon Few wrote the opinion for a unanimous panel of the Court of Appeals finding the introduction of the photographs erroneous and not harmless. State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012).

"fully explained the method he used to reach his conclusion and did not contradict himself." Id. at 453-454, 593 S.E.2d at 606.

In State v. Lyles, 379 S.C. 328, 340, 665 S.E.2d 201, 207 (Ct. App. 2008), this Court explained that evidence "potentially insinuating a key witness for the state is a drug dealer and drugs were present next to the victim" could "cloud the issues." The proffered testimony "would have established drugs were offered for sale outside of the apartment several months before the shooting by an individual known only as C.C." Id. This Court held "evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury" in a case asking the jury to decide whether the plaintiff, who was involved in an automobile accident and had marijuana in his system, was entitled to recover damages from the other driver. Kennedy v. Griffin, 358 S.C. 122, 128-129, 595 S.E.2d 248, 251 (Ct. App. 2004). The blood test performed that detected the marijuana in his system "did not measure the quantity of marijuana" or "how recently [he] had been exposed to marijuana." Id. at 128, 595 S.E.2d at 251. Additionally, there was no marijuana found in or near the plaintiff's truck and there was no testimony that he smelled of marijuana. Id.

Considerations of waste of time due to needless presentation of cumulative evidence

Few cases examine the portion of Rule 403, SCRE, that requires an evaluation of the cumulative nature of the proffered evidence. This Court's decision in Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006), provides some guidance for considering the waste of time produced through the needless presentation of cumulative evidence. The case involved a suit brought by a buyer of a wrecked and repaired pickup truck against the truck dealer. Wright, 372 S.C. at 14-16, 640 S.E.2d at 494. On appeal, the truck dealer argued the trial judge erred in refusing to admit the actual truck into evidence. Id. at 33, 640 S.E.2d at 503. This Court held "[a]dmitting the actual Truck itself into evidence would have been cumulative, causing needless waste of time"

because "[t]he trial court admitted a number of photographs of the Truck into evidence" and "the jurors heard testimony regarding the condition of the Truck, both after the accident and at the time of trial." Id.

Balancing act

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE. In general, "[w]hen juxtaposing the prejudicial effect 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).

Analysis

The probative value of the six gruesome photographs was very low. The photographs did little to assist the jury in rendering a verdict – except one based upon emotion. At trial, there was no dispute that Appellant killed Davis. Also, there was no dispute that Davis died as a result of multiple cutting wounds. The only issue in the case was Appellant's intent. The photographs provided no evidence of Appellant's intent; therefore, they were not important to the issue presented in the case.

However, the photographs posed significant danger of unfair prejudice. The state and the defense agreed the six autopsy photographs were gruesome, even horrific. Pursuant to the state's request, the members of the gallery were permitted to exit the courtroom prior to their presentation. Additionally, pursuant to the state's request, the photographs were not displayed on the projector, but were presented to the jurors only due to their inflammatory nature. While

viewing only one of the autopsy photographs is disturbing, viewing the six graphic photographs in succession is chilling, even disturbing. The solicitor admitted as much in her closing argument when she apologized to the jurors for the photographs. The photos show Davis on an autopsy table. The least disturbing photograph shows Davis's arm sliced open in multiple spots. Two photographs show Davis's mangled hands. These photographs are ghastly in their depiction of amputated fingers. The final three photographs show different angles of Davis's head. When the pathologist described the photographs, she stated that it was hard to make out that they showed a human head due to the injuries. A review of these photographs leaves little doubt of the pathologist's accuracy in this regard. The photos show Davis's head split open at the top, exposing skull and brain matter. The horrifying photographs leave one not just emotional, but emotionally depleted. In light of the sole issue before the jury – Appellant's intent – the six ghastly autopsy photographs could only be admitted to arouse the sympathy and prejudice of the jury. The danger of unfair prejudiced posed by the photographs is overwhelming.

Furthermore, the photographs posed a serious danger of confusing the issues and misleading the jury. The jury was tasked with determining whether Appellant killed Davis with malice aforethought, but the photographs provided little, if any, assistance to the jury in making this determination. Rather, the photographs risked confusing the jury and misleading the jury on that very issue. Due to the horrifying nature of the photographs, there was a significant risk the jury would be confused and misled regarding the issue before it – Appellant's intent.

Finally, the photographs were a needless presentation of cumulative evidence because the jury was well aware of the nature of the injuries Davis suffered due to the other evidence presented by the state. The first officer on the scene described the wounds that she saw on Davis. The paramedic provided graphic details of the injuries that he observed and treated.

Finally, and most importantly for the state's case, the pathologist testified about Davis's injuries. The pathologist described the injuries with significant details and the nature of the injuries were not of the kind that required photographs for the jury to understand. The wounds, while awful, were easily understood as slashes into Davis's flesh, amputated fingers, and sharp incisions penetrating into her skull. There was no need to use the photographs to explain difficult anatomy to the jurors. To the extent the pathologist need any type of assistance in describing the wounds, the state used two demonstrative aids. The horrible photographs were needlessly cumulative to the evidence already before the jury.

Balancing the low probative value of the photographs against the danger posed by the photographs in terms of unfair prejudice, confusion of the issues, and misleading of the jury, it is clear the danger substantially outweighed any probative value offered by the photographs. The waste of time due to the needless presentation of cumulative evidence tips the scale even further in favor of exclusion. The trial judge erred in admitting the six disturbing and chilling autopsy photographs.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial based upon the trial judge's erroneous admission of gruesome photographs.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD ISAIAH NELSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Edward Isaiah Nelson, #344379, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 28th day of January, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of January, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.