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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant is currently serving a sentence of life in prison without the possibility of parole plus seventy years following his convictions for murder, burglary in the first degree, armed robbery, two counts of kidnapping, assault and battery in the first degree, pointing and presenting a firearm, and possession by a person of an unlawful weapon having been convicted of a crime of violence. The Richland County Grand Jury indicted Appellant on these charges.

Prior to the commencement of trial, the Honorable R. Knox McMahon conducted evidentiary hearings on a number of issues. The case was called for trial on June 27, 2017, before Judge McMahon. On July 3, 2017, the jury returned a verdict of guilty as to all charges. (R. p. 420, line 2-p. 421, line 6.) The trial court sentenced Appellant to life in prison without the possibility of parole, plus seventy years to be served consecutively and ten years to be served concurrently. (R. p. 422, line 3-p. 423, line 14.) Appellant timely filed his notice of appeal on July 11, 2017.

STATEMENT OF THE FACTS

On October 11, 2015, Alice Tollison was found strangled to death in her home. (R. p. 147, line 18-p. 148, line 2.) Her eight-year old great-granddaughter, G.F., was also found at the scene, after being tied up and left by the assailant. (R. p. 147, line 18-p. 148, line 2, p. 150, lines 6-18, p. 154, lines 15-21, p. 159, lines 22-24.)

G.F. met with Investigator Joe Clarke at the hospital that evening and gave him a description of her assailant. (R. p. 369, line 22-p. 370, line 5.) The next day, G.F. met with Investigator Clarke again at the Assessment and Resource Center, wherein she was provided a photograph lineup in which Appellant was depicted along with five other African-American

men. (R. p. 371, lines 3-8, State Ex. 30.) Their interaction was recorded by video. (R. p. 27, lines 17-24, State Ex. 31.)

The video recording reflects that when presenting the photograph lineup to G.F., Investigator Clarke told her that "I'm going to show you some pictures, okay. . . . I want you to help me and see if you can see the bad man who did this to your grandmomma." (State Ex. 31.) G.F. referenced the photograph of Appellant by stating, "Number three looks kind of like him." (State Ex. 31.) She then commented that she "couldn't really remember if he had facial hair or not." (State Ex. 31.) Investigator Clarke then asked, "Okay, and you feel pretty confident about that?" (State Ex. 31.) While G.F. responded "yes," it is unclear whether she was affirmatively responding to the facial hair comment or the initial remarks about photograph number three. (State Ex. 31.) G.F. subsequently pointed to a photograph and said, "That one kind of looks like my janitor." (State Ex. 31.) Investigator Clarke then turned over the page of photographs so G.F. could no longer see them. (State Ex. 31.) As Investigator Clarke left the room, G.F. asked him, "You're going to try to catch someone who looks like that? But it's probably not exactly because that isn't exactly . . . ." (State Ex. 31.) She appeared to be mid-sentence when Investigator Clarke interrupted her, and she was not given a chance to finish her statement.

Prior to trial, the court conducted a hearing pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972), to determine whether G.F.'s photograph lineup identification of Appellant would be admitted and also whether G.F. would be permitted at trial to identify Appellant to the jury as the assailant. (R. p. 17, lines 13-18, p. 117, lines 12-17.) After watching the video recording of the lineup identification procedure, Judge McMahon ruled that these identifications would be allowed. (R. p. 27, lines 17-24, State Ex. 31.) At trial, G.F.'s photograph lineup identification was admitted. (R. p. 165, line 23-p. 169, line 18, p. 372, line 15-p. 372, line 2,

State Ex. 30.) G.F. explained that during the lineup she was asked to "point out the person who [she] -- who looked most like him," and that she tried to choose "which one scare[d her] and which one look[ed] like him." (R. p. 168, line 21-p. 169, line 1.) G.F. also identified Appellant as the assailant in the courtroom during her testimony. (R. p. 169, line 20-p. 170, line 12.)

The same day G.F. participated in the photograph lineup identification, the Richland County Police matched certain fingerprints from the crime scene to a fingerprint card which was attributed to Appellant from the State of New Jersey's Automated Fingerprint Identification System ("AFIS") database. (R. p. 371, lines 6-19, p. 204, lines 11-19, p. 208, lines 1-10.) After his arrest, the police fingerprinted Appellant through Livescan software. (R. p. 225, lines 8-17.) At trial, the State presented testimony from latent print analysis expert Investigator Trisha Odom, who conducted fingerprint analyses comparing the latent prints collected from the crime scene and the New Jersey fingerprint card. (R. p. 197, line 25- p. 196, line 5, p. 202, lines 10-21, p. 224 lines, 1-14.) Defense counsel objected to the introduction of all fingerprint evidence because the fingerprint card from the New Jersey database was never authenticated in accordance with South Carolina law. (R. p. 203, line 18-p. 205, line 2.) During an in camera session, Investigator Odom admitted that she did not know the minimum compliance thresholds for every state in order to place prints into their respective databases. (R. p. 220, line 21-p. 221, line 22.) Nevertheless, the court overruled defense counsel's argument that the New Jersey prints had not been authenticated and ultimately admitted the fingerprint evidence. (R. p. 243, lines 12-17.)

A search warrant was obtained following Appellant's arrest, and a gun was found in the home where Appellant was residing. (R. p. 314, lines 11-13, p. 314, line 25-p. 316, line 5.) At trial, G.F. testified that the assailant had a pistol that was "gold and rusty." (R. p. 146, line 24-p. 147, line 14.) The State elicited detailed testimony about the recovered gun as well. Investigator

Michael Beeler testified that the recovered gun was an unloaded ".32 caliber Smith & Wesson handgun." (R. p. 351, line 24-p. 352, line 3.) During his testimony, the court admitted "the handgun . . . as well as six unfired cartridges" into evidence. (R. p. 352, lines 19-25.)

After the entry of the recovered gun into evidence and the testimony describing the gun, Defense counsel objected to the subsequent testimony of Investigator David Collins, who was offered by the State to opine on the operational capabilities of the recovered firearm. (R. p. 357, line 23- p. 358, line 5.) The court overruled the objection, finding that whether the firearm was "capable of expelling a projectile through explosion. . . . is an essential element of pointing and presenting." (R. p. 360, lines 16-22.) The court further stated that such testimony would also be relevant to finding whether Appellant was armed with a deadly weapon during the robbery. (R. p. 359, line 21-p. 360, line 4.) In addition to testifying about the operational capabilities of the recovered firearm, Investigator Collins testified it was "somewhat worn and the finish [was] in bad condition." (R. p. 357, lines 9-11.)

Defense counsel also objected to the use of the alias "Abdul Muslin" in the indictments and at trial. (R. p. 426, line 2-p. 437, line 14, p. 441, line 11-p. 443, line 19, p. 444, lines 4-10, p. 446, lines 7-20, p. 447, lines 8-16, p. 3, lines 5-10, Motion to Strike, Ex. 1.) The alias was read to the jury pool as part of the indictments and referenced during jury voir dire. (R. p. 4, line 19-p. 16, line 7.) During the trial, the State presented testimony that DNA from the crime scene matched to an "Abdul Muslim" with the national identification number 220688PA. (R. p. 378, line 2-p. 379, line 9.) Previous testimony indicated that Appellant's national identification number was 220688PA, and another State witness testified she knew Appellant as "Abdul." (R. p. 225, lines 10-13, p. 321, line 23-p. 322, line 3.)

Although the State presented DNA evidence at trial, defense counsel presented testimony from Dr. Michael Spence, an expert in forensic DNA analysis, during rebuttal. (R. p. 415, lines 20-23.) Dr. Spence criticized the way in which the State's experts amplified the DNA samples for comparison, testifying that there was "an enormous risk . . . of cross-contamination from defendant or victim into any of the[] evidence samples." (R. p. 416, lines 1-21.) In other words, because of the way the DNA samples were amplified, "there [was] no way of telling whether that mixture [identifying Appellant's DNA] came from the original sample [from the crime scene] and from that place on that item or if the mixture came from a cross-contamination event." (R. p. 416, lines 8-15.)

STANDARD OF REVIEW

"The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." State v. Sheppard, 391 S.C. 415, 420, 706 S.E.2d 16, 18 (2011) (citation omitted); see also State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) ("The admission or 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.") (citations omitted); State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) ("Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or . . . prejudicial legal error.") (citation omitted); State v. Torres, 390 S.C. 618, 622-23, 703 S.E.2d 226, 228 (2010) ("The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion.") (quoting State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003)) (internal quotation marks omitted); and

State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995) ("Whether a defendant is restrained during trial is within the trial judge's discretion.").

"An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citation omitted). Moreover, "[a] failure to exercise discretion amounts to an abuse of that discretion." State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (internal quotation marks omitted) (quoting Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)).

The appellate standard of review for questions of law, however, is de novo. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("We are free to decide a question of law with no particular deference to the circuit court.") (citation omitted); see, e.g., Moore, 343 S.C. at 288, 540 S.E.2d at 448 ("However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law.") (citations omitted).

When a combination of errors, while individually failing to rise to the level of being sufficiently prejudicial to warrant a new trial,[1] has the effect of preventing a party from receiving a fair trial, then the party is entitled to a new trial. State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999); see also State v. Peterson, 287 S.C. 244, 245, 335 S.E.2d 800, 801 (reversing and remanding criminal case for a new trial "[d]ue to the collective impact of numerous errors committed by the trial court") overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (overruling State v. Peterson to the extent it "require[d] *in favorem vitae* review").

[1] Appellant contends that each argument here is sufficient to reverse; there is no insignificant error in this record. However, if the Court feels that any issue alone does not equal reversible error, then certainly the issues combined demonstrate prejudice and mandate a new trial.

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.

The trial court committed reversible error and violated Appellant's rights to due process by admitting evidence and testimony regarding G.F.'s so-called "identification" of Appellant during a photograph lineup and G.F's subsequent identification of Appellant at trial. G.F. was presented with three opportunities to make an identification of her assailant: (1) during the initial photograph lineup, (2) at the pre-trial hearing regarding the admissibility of the initial photograph lineup, and (3) at the trial itself. When presented with six pictures during the initial photograph lineup, G.F. indicated that the photograph of Appellant looked "kind of" like her assailant but advised that it was "not exactly" him. (State Ex. 31.) At the pre-trial hearing, G.F. identified Appellant in the courtroom as the person she saw in the photograph lineup, but she did not identify Appellant as the assailant. (R. p. 46, lines 10-25.) Finally, during the trial, G.F. testified that she was sure Appellant was her assailant. (R. p. 165, line 9-p. 170, line 25.) This succession of events caused the final identification at trial to be virtually inevitable. Because the identification procedure was so unduly suggestive, unreliable, and conducive to irreparable misidentification, the initial "identification" and the subsequent identification at trial should not have been admitted.

The Supreme Court of the United States has warned that misidentification is the "primary evil to be avoided" in identification procedures and that it is "the likelihood of misidentification which violates a defendant's right to due process." Neil, 409 U.S. at 198, 93 S.Ct. at 381-82 (citation omitted). As the South Carolina Supreme Court explained in State v. Moore, Neil v.

Biggers sets out a two-pronged inquiry to guard against the likelihood of misidentification during out-of-court identifications: "First, '[a] court must determine whether the identification process was unduly suggestive . . . . It next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." 343 S.C. at 287, 540 S.E.2d at 447 (citation omitted) (internal quotation marks omitted). Reliability is determined by a totality of the circumstances test, in which the court considers the following factors: "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." Neil, 409 U.S. at 199-200, 93 S.Ct. at 382.

Where a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, a subsequent in-court identification of an accused is inadmissible. State v. Brown, 356 S.C. 496, 502-03, 589 S.E.2d 781, 784 (Ct. App. 2003) (citations omitted). Admission of the in-court identification under such circumstances is a constitutional error. See Thompson v. Leeke, 756 F.2d 314, 317 (4th Cir. 1985) (issuing writ of habeas corpus after finding admission of witness's in-court identification was constitutional error where witness's in-court identification was tainted by a pre-trial photograph display and the witness's in-court identification "might have" at least contributed to petitioner's conviction for armed robbery).

In the present case, the trial court conducted a pre-trial hearing pursuant to Neil v. Biggers in which it found G.F.'s so-called "identification" admissible. (R. p. 17, line 14-p. 115, line 4, p. 116, line 16-p. 123, line 4, State Ex. 30, State Ex. 31.) The trial court found that the so-called initial "identification" was not the result of an unduly suggestive identification process

and, therefore, it did not need to evaluate the second prong of reliability. (R. p. 122, line 18-p. 123, line 2.) In its analysis regarding whether the identification process was unduly suggestive, the trial court disregarded the lack of an actual identification in the initial photograph lineup, holding that whether a definite identification had been made was an issue for the jury rather than one of initial admissibility for the court. (R. p. 121, lines 17-18.) The definitiveness of G.F's initial "identification," however, was an issue for the court to determine before allowing it into evidence. See Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969).

In Foster, a victim was given three opportunities to identify his assailant prior to the trial. 394 U.S. at 441-43, 89 S.Ct. at 1128-29. First, he viewed a physical line-up of three men. Id. at 441, 89 S.Ct. at 1128. "After seeing this lineup, [the victim] could not positively identify [the defendant] as the robber. He 'thought' he was the man, but he was not sure." Id. Next, the victim had a one-to-one sit-down with the defendant but he "still was uncertain whether [the defendant] was one of the robbers." Id. Finally, the victim later viewed a physical lineup of five men, and the defendant was the only person in this second lineup that had been included in the original lineup. Id. at 441-42, 89 S.Ct. at 1128. At this point, the victim "was 'convinced' [the defendant] was the man." Id. at 442, 89 S.Ct. at 1128. The victim later positively identified the defendant at trial. Id.

The Foster Court held that this identification procedure "made it all but inevitable that [the victim] would identify [the defendant] whether or not he was in fact 'the man.'" Id. at 443, 89 S.Ct. at 1129. The victim began by being unable to make any identification, changed to a tentative identification, and ultimately came to a definite identification as a result of the police effectively repeatedly telling the witness that the defendant was the assailant. Id. at 441-43, 89

S.Ct. at 1128-29. The Foster Court found that this was a compelling example of unfair lineup procedures and held that the procedures violated the defendant's right to due process. Id.

Likewise, here, as the video recording reflects, G.F. did not make any identification during the initial photograph lineup. (State Ex. 31.) When showing the initial photograph lineup to G.F., Investigator Clarke encouraged G.F. to be brave and to help him. (State Ex. 31.) He told her that "I'm going to show you some pictures, okay. . . . I want you to help me and see if you can see the bad man who did this to your grandmomma." (State Ex. 31.) He did not, however, tell her that she need not identify anyone if she did not see the "bad man," indicating that the "bad man" would be included in the pictures he would show her and that it was her task to determine which one of the six pictures was the "bad man." (State Ex. 31.) In response, G.F. stated that the photograph of Appellant "looks kind of like" the assailant. (State Ex. 31.) She asked Investigator Clarke, "You're going to try to catch someone who looks like that? But it's probably not exactly because that isn't exactly . . . ." (State Ex. 31.) Like the victim in Foster, she was unable to make a positive identification from the initial lineup, and she even seemed to indicate that the photograph of Appellant was not the assailant.

Although G.F. did not participate in any subsequent lineups, G.F. was later asked during a pre-trial hearing if the Appellant in the courtroom was the same man from the photograph lineup. (R. p. 46, lines 10-25.) At trial, G.F. described the initial photograph lineup and positively identified Appellant, now stating that she had "no doubt" Appellant was the assailant. (R. p. 165, line 9-p. 170, line 25.) Like the evolving identification in Foster, G.F.'s positive identification at trial was surely influenced by the suggestive nature of the initial photograph lineup, her repeated exposure to Appellant's photograph, and the fact that Appellant was the only one from the photograph lineup who was before her when she made her definite identification in

court after Appellant had been charged and was on trial for the crimes. The identification ultimately came about as a result of the State effectively repeatedly telling G.F., only eight years old at the time of the incident, that the Appellant was the "bad man." The identification procedure was, therefore, unduly suggestive, resulting in an inherently unreliable identification. The resulting likelihood of misidentification violates Appellant's right to due process because "there is a reasonable possibility that the [improper identification] might have contributed to the conviction." Thompson, 756 F.2d at 316 (citing Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 230-231 (1963)). As a result, the trial court committed reversible error in admitting the testimony and evidence regarding the initial photograph lineup and G.F.'s in-court identification of Appellant at 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.

The trial court abused its discretion in admitting fingerprint evidence without the proper authentication required by Rule 901, SCRE. Specifically, the trial court admitted a fingerprint card received from a New Jersey database attributed to Appellant as well as testimony and a summary of findings of the State's fingerprint analysis expert Trisha Odom regarding a fingerprint match from the crime scene to the New Jersey fingerprint card. (R. p. 202, line 16-p. 214, line 6, p. 236, line 20-p. 243, line 19, p. 253, line 1-p. 277, line 7, State Exs. 214, 215, 216, 217, and 316.) Defense counsel argued that the New Jersey fingerprint card had not been properly authenticated and, therefore, it and the related testimony regarding any conclusions drawn therefrom should be excluded. (R. p. 203, line 9-p. 214, line 3, p. 233, line 16-p.236, line 17.) The trial court improperly allowed evidence regarding the fingerprint match despite the State's failure to establish when and where the New Jersey fingerprint card had been made.

In accordance with the South Carolina Rules of Evidence and South Carolina case law, fingerprint evidence must be authenticated in order to be admissible at trial. See, e.g., State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987) (reversing conviction based on trial court's failure to authenticate fingerprint comparison prior to its admission); Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). Such authentication requires "evidence as to when and by whom the [fingerprint] card was made and that the prints on the card were in fact those of this defendant." Rich, 293 S.C. at 174, 359 S.E.2d at 282 (citation omitted). In State v. Anderson, which clarified the Rich decision following the adoption of the South Carolina Rules of Evidence, the Supreme Court continued to require testimony regarding how one's fingerprints were taken, including testimony that a known fingerprint card was taken at a correctional facility on a certain date, in order to meet the authentication requirement of Rule 901, SCRE. 386 S.C. 120, 128-29, 131-32, 687 S.E.2d 35, 39-40, 41 (2009). Thus, in order for a fingerprint card to be admissible under South Carolina law, the State must elicit testimony regarding when and by whom the prints on the card were made.

Here, the State failed to meet its burden of authentication with respect to the fingerprint card received on October 12, 2015, by the Richland County Sheriff's Department from New Jersey's AFIS database. The State did not present any evidence establishing when and by whom this fingerprint card from New Jersey was made. To the contrary, the State's fingerprint analysis expert Trisha Odom testified regarding her lack of knowledge regarding the thresholds in place in New Jersey for admission of such prints into its AFIS database. (R. p. 220, line 21-p. 221, line 22.) Because the State never presented evidence of when and by whom the New Jersey

fingerprint card was made, it failed to properly authenticate this evidence.[2] Accordingly, the trial court committed reversible error by admitting the evidence regarding the fingerprint match from the crime scene to the fingerprint card from New Jersey.

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.

The trial court erred in allowing expert opinion testimony about the operational capabilities of the firearm found in the home where Appellant was residing because such testimony was irrelevant, needlessly cumulative, and unduly prejudicial. At trial, the State offered Investigator David Collins as an expert in firearms and tool marks examination and identification and elicited testimony from him regarding whether the firearm recovered from Appellant's residence was operational. (R. p. 356, line 24-p. 365, line 11.) Defense counsel objected to Investigator Collins' testimony because the operational capabilities of the recovered firearm were not relevant to the offenses with which Appellant was charged, and the testimony was needlessly cumulative considering the other evidence introduced by the State, including the firearm itself. (R. p. 357, line 23-p. 359, line 7.) The trial court overruled the objection. (R. p. 359, line 18-p. 361, line 4.) Although the trial court acknowledged previous testimony already established that it was, in fact, a firearm, the trial court ruled that the operational capability of the firearm was relevant to the charges of armed robbery and pointing and presenting. (Id.) First, the trial court held such testimony was relevant to finding whether Appellant was armed with a deadly weapon during the robbery. (R. p. 359, line 18-p. 360, line 4.) The trial court also found

[2] Although Investigator Odom also included in her analysis the "Livescan" fingerprints taken from Appellant following his arrest in this matter, she admitted that she never relied solely on the Livescan prints in making her comparisons and, therefore, her conclusions regarding any possible fingerprint match cannot be extricated from the unauthenticated New Jersey fingerprint card and should not have been admitted. (R. p. 224, lines 1-14, p. 225, lines 8-17.)

that whether the firearm was "capable of expelling a projectile through explosion. . . . [was] an essential element of pointing and presenting." (R. p. 360, lines 5-22.) The trial court's statements of law, however, are incorrect and the testimony was irrelevant and should have been excluded.

First, evidence regarding the operational capabilities of a firearm is not required to establish the offense of armed robbery in South Carolina. South Carolina Code Ann. § 16-11-330, defines armed robbery as "robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor or other deadly weapon . . . ." S.C. Code Ann. § 16-11-330(A). "A 'deadly weapon' is generally defined as 'any article, instrument or substance which is likely to produce death or great bodily harm.'" State v. Campbell, 287 S.C. 377, 379, 339 S.E.2d 109, 109 (1985) (quoting State v. Sturdivant, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)). "When a person commits a robbery while armed with a pistol or gun, such an instrument is considered a deadly weapon regardless of its inoperability." State v. Heck, 304 S.C. 345, 346, 404 S.E.2d 514, 515 (Ct. App. 1991) (citing State v. Henderson, 286 S.C. 465, 334 S.E.2d 519 (Ct. App. 1985)) (emphasis added). Testimony regarding the operability of the firearm, therefore, was not necessary to establish the offense of armed robbery under South Carolina law.

Next, testimony regarding the operational capabilities of a firearm is also not required to establish the offense of pointing and presenting a firearm in South Carolina. The elements of pointing and presenting under S.C. Code Ann. § 16-23-410 are: (1) pointing or presenting; (2) a loaded or unloaded firearm; (3) at another. State v. Burton, 356 S.C. 259, 264, 589 S.E.2d 6, 8 (2003); see, e.g., In re Spencer R., 387 S.C. 517, 523, 692 S.E.2d 569, 573 (Ct. App. 2010). There is no South Carolina case law that requires proof that the firearm at issue was actually operational in order to establish the offense of pointing and presenting a firearm. To the

contrary, the fact that an unloaded firearm is sufficient to establish the offense reflects that the firearm's operational capability is irrelevant. Again, testimony regarding the operability of the firearm was not necessary to establish the crime of pointing and presenting. Because the trial court incorrectly held that the operational capabilities of the firearm were relevant to establish the armed robbery and pointing and presenting offenses, the trial court committed reversible error by admitting Investigator Collins' testimony.

This error is particularly prejudicial because it allowed needlessly cumulative testimony which the State used in an effort to paint Appellant in a bad light and tie him to the crime scene. As the trial court acknowledged, there was prior testimony that a gun was recovered from Appellant's residence. (R. p. 360, lines 16-18.) Specifically, Chief Stan Smith testified that investigators found a gun in Appellant's residence. (R. p. 314, lines 19-24.) Shortly after, Investigator Michael Beeler provided detailed testimony about the recovered gun, including that it was an unloaded ".32 caliber Smith & Wesson handgun." (R. p. 351, line 24-p. 352, line 3.) During his testimony, the court admitted "the handgun . . . as well as six unfired cartridges" into evidence. (R. p. 352, lines 19-25.) With this testimony and the admission of the gun itself into evidence, there was no need for any additional testimony from Investigator Collins regarding the firearm and its operational capabilities.

However, the wrongful admission of Investigator Collins' testimony allowed the State to hammer yet again on the fact that a gun was found in Appellant's residence, unduly prejudicing the jury against him. Moreover, during the State's closing argument, it relied on Investigator Collins' testimony in an effort to connect the gun recovered from Appellant's residence to the gun used at the scene of the crime. G.F. testified that her assailant had a "gold and rusty" pistol. (R. p. 146, line 24-p. 147, line 9.) During Investigator Collins' testimony regarding the

recovered firearm's operational capabilities, he described it as "somewhat worn" with the finish "in bad condition." (R. p. 367, lines 9-11.) He noted it "is a rather interesting firearm" and stated that "each cartridge has a brass-colored cartridge casing." (R. p. 366, lines 22-23, p. 367, line 24.) In its closing argument, the State relied solely on Investigator Collins' testimony to connect the gun found at Appellant's residence to the one described by G.F.:

> He took out the pistol, it was gold and rusty with two pistol shots, pointed it and put it on the table. . . . [Y]ou have the actual gun before you, you'll have it back there with you, but the pistol shots she was referring to, you can see the gold cartridges that she describes that would be facing her from the revolver. Maybe this is them. This is the part that would be facing her. That's what she saw outside the revolver. And she got it pretty right. You heard testimony from David Collins. It's kind of a unique firearm. It's old and rusty, but it's operable. And it's pretty distinct. It's not like your nine millimeter Glock or a handgun, just a black handgun that she saw on that table, but she's able to see it. And where's that gun found? In his room in his drawers.

(R. p. 419, lines 6-23.) The State used Investigator Collins' testimony in an effort to paint Appellant in a bad light and tie him to the crime scene, clearly prejudicing Appellant. Because this testimony should never have been admitted, the trial court's error should result in a reversal of Appellant's convictions.

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 trial court violated Appellant's constitutional rights and abused its discretion under Rule 403, SCRE, in allowing Appellant's alias "Abdul Muslim" to be used in the indictments and at trial. Defense counsel argued that the use of Appellant's alias invited undue religious prejudice from the jury and, therefore, should not be allowed. (R. p. 426, line 2-p. 437, line 14, p. 441, line 11-p. 443, line 19, p. 444, lines 4-10, p. 446, lines 7-20, p. 447, lines 8-16, p. 3, lines 5-10, Motion to Strike, Ex. 1.) The trial court improperly refused to exclude the alias, ruling that the potential prejudice it may invite would be handled by jury voir dire instead. (R. p. 443, line

20-p. 444, line 3, p. 444 line 11-p. 446, line 6, p. 446, line 21-p. 447, line 7, p. 447, line 17-p. 448, line 6, p. 3, lines 18-19.)

Courts in this state and in the Fourth Circuit recognize that the mention of religion can invite prejudice and that such evidence can be inadmissible. See Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010) (finding that a Muslim defendant's due process rights had been violated where the solicitor referred to him as a domestic terrorist and referenced the terror attacks of September 11th where the defendant was not on trial for terrorism and the statements served only to improperly evoke religious prejudice and inflame the passions and prejudice of the jury); United States v. Ham, 998 F.2d 1247, 1252-53 (4th Cir. 1993) ("[W]e are especially sensitive to prejudice in a trial where defendants are members of an unpopular religion."); see also United States v. Vue, 13 F.3d 1206, 1213 (8th Cir. 1994) (concluding that a constitutional error occurs when the government "invite[s] the jury to put [a defendant's] racial and cultural background into the balance in determining their guilt"). As recently stated by Judge Davis of the Fourth Circuit Court of Appeals, "appeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial." United States v. Garcia-Lagunas, 835 F.3d 479, 501 (4th Cir. 2016) (Davis, J., dissenting) (citation omitted). Further, under Rule 403, SCRE, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

The reference to Appellant's alias "Abdul Muslim" invited undue prejudice from the jury. The State contrasted this Islamic connotation with repeated testimony regarding the victim's Christian beliefs during trial. For example, G.F. testified that she and Ms. Tollison would go to church together every other Sunday. (R. p. 139, lines 13-23.) Another of the State's witness testified she knew Ms. Tollison from church and that they would go to church together

every Sunday. (R. p. 193, line 17-p. 194, line 11, p. 195, line 8-p. 196, line 7.) Another witness mentioned that Ms. Tollison hosted a Bible study. (R. p. 355, line 23.) The use of the "Abdul Muslim" alias here, particularly in light of the repeated references to Ms. Tollison's Christian beliefs, was unduly prejudicial.

The religious prejudice substantially outweighed any probative value of the alias. The only testimony related to the alias "Abdul Muslim" was testimony that DNA from the crime scene matched to "Abdul Muslim" in a national database. However, this match also included the national identification number 220688PA. (R. p. 378, line 2-p. 379, line 9.) The jury also heard testimony that Appellant's national identification number was 220688PA. (R. p. 255, lines 10-13.) Thus, there was no probative value in using his alias in connection with this DNA match. Moreover, the State never elicited any testimony that Appellant was known as "Abdul Muslim," only that he was known to one witness as "Abdul," indicating that there was no probative value in the "Muslim" reference at all. (R. p. 321, line 23-p. 322, line 3.) Instead, the jury repeatedly heard Appellant referred to in the indictments and the introduction of the case as "Abdul Muslim," inviting undue religious prejudice against him which substantially outweighed any probative value of the alias and violating his constitutional rights. Accordingly, the trial court erred in failing to strike the alias from the indictments and for allowing mention of the alias at 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 trial court abused its discretion in admitting unduly prejudicial photographs of Ms. Tollison's internal head injuries. At trial, the State introduced two color photographs taken during Ms. Tollison's autopsy that depicted the front and back of her dissected scalp pulled away from her skull to reveal bruising underneath. (R. p. 292, lines 4-10, p. 294, line 22-p. 295, line

11, State Exs. 14 and 15.) Defense counsel objected to the introduction of these photographs under Rule 403, SCRE, because Ms. Tollison's cause of death was strangulation, and the photographs therefore lacked any probative value. (R. p. 292, line 13-p. 293, line 10, p. 295, line 20-p. 296, line 9.) In addition, they risked undue prejudice based on the gruesome nature of the photographs. (Id.) The trial court committed reversible error by admitting these autopsy photographs because the unfair prejudice they would cause substantially outweighed their probative value. (R. p. 292, line 4-p. 301, line 17.)

The trial court based its decision to admit the photographs on State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). (R. p. 296, line 18-p. 300, line 5.) However, Collins is distinguishable from the present case for several important reasons. Collins involved the admission of pre-autopsy photographs showing the nature and extent of the victim's injuries, an issue which had been placed into contention by the defense. 409 S.C. 524, 763 S.E.2d 22. There were no eyewitnesses to the incident in Collins so the photographs were necessary to establish what had occurred to the victim. Id. Here, in contrast, G.F. was an eyewitness to Ms. Tollison's death, and she testified as to exactly what had occurred to Ms. Tollison. The nature and extent of the victim's injuries was not in contention, and there was no need to admit graphic photographs taken during Ms. Tollison's autopsy showing her scalp being manipulated away from her skull. The trial court's reliance on Collins was, therefore, error.

Moreover, in admitting the photographs, the trial court incorrectly indicated that the photographs were corroborative of the eyewitness testimony from G.F. (R. p. 298, lines 15-17.) However, G.F. testified only as to the strangulation and never mentioned any injuries to Ms. Tollison's head in her testimony. (R. p. 136, line 8-p. 186, line 7.) This finding of the trial court, therefore, lacks evidentiary support and is error.

The trial court also relied on the testimony of Dr. Amy Durso, who performed the autopsy and took the photographs, indicating that the photographs were corroborative of her testimony and relevant to establish the malice aforethought element of murder. (R. p. 298, lines 6-18.) Although Dr. Durso did testify as to the bruising of the head depicted in the photographs, she testified that Ms. Tollison's cause of death was strangulation and admitted she could not date the bruising of the head. (R. p. 303, line 20-p. 304, line 1, p. 312, line 25-p. 313, line 2.) Moreover, Dr. Durso provided extensive testimony regarding the violent nature of the strangulation and the severity of the injuries to Ms. Tollison resulting from the strangulation. (R. p. 283, line 10-p. 290, line 8, p. 305, line 11-p. 310, line 20.) Thus, the photographs of the bruising to the head were superfluous. See Collins, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge, J., concurring) ("The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense."). The trial court's reliance on Dr. Durso's testimony to support admission of the photographs is, therefore, error.

The Supreme Court of South Carolina has expressed "growing concern" over the admission of gruesome autopsy photographs. Torres, 390 S.C. at 624, 703 S.E.2d at 229. "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." Id. at 623, 703 S.E.2d at 228 (citing State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). For example, in Torres, the court noted that the trial judge "wisely excluded" "an autopsy dissection photo." Torres, 390 S.C. at 624, 703 S.E.2d at 229. Similarly, in State v. Middleton, the Supreme Court of South Carolina found that color autopsy photographs of the victim, including three that depicted the victim's scalp pulled away from her skull, should be excluded because "[t]he prejudice created by the photographs clearly outweighed any evidentiary value." 288 S.C. 21,

24, 339 S.E.2d 692, 693 (1986) (citations omitted); see also State v. Haselden, 353 S.C. 190, 201, 577 S.E.2d 445, 451 (2003) (holding that pictures of victim's anus in capital case were introduced to inflame the passions and prejudices of jurors and to give impression that victim was possibly sexually assaulted). Like the "wisely excluded" autopsy dissection photograph in Torres and the autopsy dissection photographs which should have been excluded in Middleton, the two photographs of Ms. Tollison's internal head injuries should have been excluded because they are irrelevant, not necessary to substantiate any material facts or conditions, and were merely introduced to inflame the passions of the jury. Accordingly, the trial court committed reversible error in admitting these two autopsy photographs.

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

The trial court abused its discretion in refusing to allow Appellant to appear in court without shackles. Prior to jury selection, defense counsel requested that Appellant's shackles be removed to prevent any prejudice from the jury. (R. p. 2, lines 8-22.) Defense counsel noted that Appellant had been well-behaved on his three prior court appearances in relation to the case, and he noted that any potential jurors in the first two rows of the gallery would certainly see Appellant's shackling. (Id.) The court denied this request without any explanation. (R. p. 2, line 23.)

While the trial judge has discretion to decide whether to shackle a defendant, this discretion requires a balancing of "the prejudicial effect of shackling with the considerations of courtroom decorum and security." Tucker, 320 S.C. at 209, 464 S.E.2d at 107 (citing Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057 (1970)). Because the trial judge failed to engage in any verbal analysis when denying the request to temporarily remove Appellant's shackles, there is nothing in the record to suggest that he properly balanced the considerations at issue or that he

conducted any balancing at all. There was no reference to any concern regarding courtroom decorum and security to counterbalance the obvious prejudice that shackles would impart to potential jurors. Accordingly, the trial judge abused his discretion by either failing to exercise it in the first instance by refusing to conduct the required balancing or because his decision lacks evidentiary support in that there was no evidence of any security concern which would outweigh the prejudice to the Appellant of appearing before potential jurors in shackles. See Hawes, 411 S.C. at 191, 767 S.E.2d at 708 ("A failure to exercise discretion amounts to an abuse of that discretion.") (citation omitted) (internal quotation marks omitted); Pagan, 369 S.C. at 208, 631 S.E.2d at 265 ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.") (citation omitted). The trial judge's refusal to remove Appellant's shackles during jury selection constitutes reversible error.

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 cumulative error doctrine allows that, even if each error raised alone is insufficient to warrant a new trial, the cumulative effect of those errors is enough to require a new trial. State v. Freeman, 319 S.C. 110, 123, 459 S.E.2d 867, 875 (Ct. App. 1995). The doctrine recognizes that "the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal." Id. As previously demonstrated, the trial court committed numerous errors, each sufficiently prejudicial to warrant reversal individually. Specifically, the trial court: (1) allowed unreliable identification testimony that violated Appellant's right to due process; (2) admitted fingerprint evidence which had not been properly authenticated; (3) allowed irrelevant, needlessly cumulative, and unduly prejudicial testimony regarding the gun recovered from Appellant's residence; (4) allowed mention of Appellant's alias "Abdul Muslim" in the indictments and during trial, inviting religious prejudice against

him; (5) admitted unduly prejudicial autopsy dissection photographs of the victim's internal head injuries; and (6) wrongly refused to remove Appellant's shackles during jury selection.

Each error prejudiced Appellant, and the cumulative prejudicial effect of the errors to Appellant is overwhelming. Without the evidence disputed in this brief, the only direct evidence connecting Appellant to the crimes is evidence that his DNA was at the crime scene. At trial, Appellant presented expert opinion testimony which disputed the DNA evidence. (R. p. 415, lines 20-23.) Thus, the jury could have found reason to believe the DNA evidence was tainted and could not be relied on to place Appellant at the scene of the crime. Thus, without the evidence disputed in this brief, and with the only other evidence disputed by Appellant's expert at trial, a jury could find a lack of direct evidence connecting Appellant to the crimes.

Accordingly, Appellant is entitled to a new trial. See State v. Peterson, 287 S.C. 244, 246, 335 S.E.2d 800, 801 (1985) (holding that "numerous errors committed by the trial court in this death penalty case compels us to reverse and remand for a new trial"), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests this Court to reverse his convictions and remand this case to the Richland County Court of General Sessions for further proceedings.

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Respectfully submitted,

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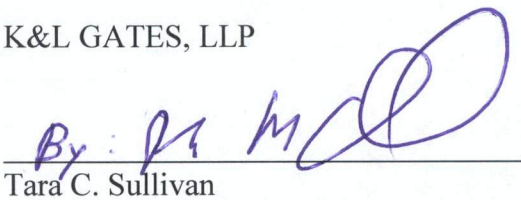

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February 21, 2019

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.

APPELLANT'S CERTIFICATION OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Susannah R. Cole, Esq., at the Rembert Dennis Building, 1000 Assembly Street, Columbia, South Carolina 29201, this 21st day of February, 2019.

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SUBSCRIBED AND SWORN TO before me
This 21st day of February, 2019.

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