

ORIGINAL

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Charleston County
J. C. Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2011-203951**

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

GREGORY QUINN GATHERS,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

Whether the trial court reversibly erred by admitting photographs from the decedent's autopsy depicting her bruised and cut face and body where the State already obtained evidence of the same through the pathologist's testimony and use of diagrams from his examination of decedent?

COUNTER STATEMENT OF ISSUE ON APPEAL

Whether the trial judge abused his discretion by allowing the State to introduce **State's Exhibits 10-12** - photographs of the victim taken at autopsy accurately depicting the various wounds that Gathers inflicted to her head and face - because the probative value of these photographs was not substantially outweighed by the danger of unfair prejudice, where the photographs corroborated the pathologist's testimony; they also corroborated testimony about the condition of the victim when found at the crime scene; they more vividly and accurately demonstrated the savage nature of the beating that Gathers delivered; Gathers admitted beating her; and the question for the jury to resolve was whether or not he did so with malice, and the injuries depicted in these photographs support a conclusion of malice?

STATEMENT OF THE CASE

Appellant, Gregory Quinn Gathers (Gathers), is currently serving a life sentence in the Lieber Correctional Institution, of the South Carolina Department of Corrections, as the result of his Charleston County murder conviction. The Charleston County Grand Jury indicted Gathers on September 8, 2010 for murder (2010-GS-10-6287). **R. pp. 437-438.** This charge stemmed from the June 7, 2010 beating death of Ms. Renee Nevarez. Assistant Charleston County Public Defenders Martha Kent Runey and Ted Smith represented Gathers in the trial court. Assistant Ninth Circuit Solicitors E. Culver Kidd and Adam D. Young prosecuted the case.

On November 14-17, 2009, Gathers received a jury trial, before the Honorable J. C. Nicholson, Jr. The jury convicted him of murder (**R. p. 417, line 23 - p. 418, line 8**) and Judge Nicholson sentenced him to life imprisonment. **R. p. 435, lines 19-22.**

Gathers timely served and filed a notice of appeal.

STATEMENT OF FACTS

The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the prosecution, is a tragic reminder of just how much misery crack cocaine has caused the American society, ruining and /or destroying the lives of those who use it. The State's evidence was that Harry Gathers, Jr., Gathers' eighty year old father, testified that he has lived in Charleston, South Carolina, on and off his entire life. On the morning of June 7, 2010, his son Ronald came to his residence¹ and told him about a telephone call from Gathers. What Gathers had told Ronald shook up the elderly Mr. Gathers and, at Mr. Gathers suggestion, he and Ronald went to Gathers' residence.

R. pp. 81-85.

When they reached the apartment, Ronald went in and got his brother. Gathers came out and his father asked him what he had done. Gathers, who had already told Ronald what he had done, "crumbled down ... on the side of the car and said he was sorry." At that point, Mr. Gathers and Ronald went to the victim's apartment. Ronald walked up to the apartment and opened the door. Immediately, he returned and told Mr. Gathers, "somebody's stretched out on the floor in there ... and I can't stand too much of it." **R. pp. 85-86; 88-89.**

So, Mr. Gathers looked into the apartment and saw the body. He then called his daughter, who is a Colleton County police officer living in Walterboro. She told him to call the police and he called the North Charleston Police Department. As he was leaving the victim's residence, officers arrived and he showed them where the apartment was. **R. pp. 86-89.**

Officer Lewis Bazzle, Officer with the North Charleston Police Department, responded to

¹ Ronald came down to North Charleston from his residence in Walterboro.

Gathers' apartment on Gumwood Avenue on the morning of June 7, 2010. Upon arriving with officer Fred Houtz,² the officers spotted Gathers on the top floor of the apartments. As the officers approached him and announced themselves, Gathers started down the stairs and said, "I'm the one you're looking for. And, ... I F'd up." Officer Bazzle then arrested Gathers, whom he described as cooperative but "a little upset, a little shaken." **R. pp. 90-94.**³

Inv. Justin Holt was a property crimes detective with the North Charleston Police Department at the time of the murder and he responded to the victim's residence on June 7, 2010.⁴ When Inv. Holt entered the apartment, he saw a black female laying face down on the floor, with a large pool of blood on the floor. He then cleared the rest of the residence to ensure no one was there, got other officers out of the residence and secured the area. After he had secured the crime scene, only the on-duty crime scene supervisor (who collected evidence) and the on-duty EMS entered the scene. **R. pp. 97-100.**

Around 10:45 a.m. on June 7th, Inv. Holt advised Gathers of his *Miranda*⁵ rights and secured a written waiver of those rights using a printed form that was introduced as **State's Exhibit 1.**⁶ Gathers then gave a written statement, **State's Exhibit 2**, which Inv. Holt typed at his request and

² Officer Houtz was deployed to Afghanistan at time of trial. **R. p. 92.**

³ Neither officer threatened him or said anything to cause him to make the statement. Also, Gathers' eyes were red and he began to cry around the officers. **R. p. 96.**

⁴ Mr. Henry Gathers had shown Inv. Holt where the victim's residence was located. **R. p. 99.**

⁵ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁶ Det. Sean Bauer was a witness. **R. p. 112, line 25.** Also, Inv. Holt testified that, although Gathers was upset and asked if the victim was dead or not before being advised of his rights, "[i]t was clear that he understood" his rights. **R. p. 142, lines 13-25.** Inv. Holt did not remember asking Gathers about how much crack he had used, he was speaking very clearly. **R. p. 144, line 18 - p. 145, line 1.** The State would also note that Det. Sean Bauer obtained a buccal swab from Gathers with Gathers consent. **R. pp. 149-50.**

that Gathers signed. Initially, Gathers said that “we was (sic) smoking crack cocaine and it was about four or five times. She stole \$400 from me. And all I did was beat her up. Oh, Lord, I am so sorry. We were smoking and having sex and she stole my money, and that [is] why.” **R. pp. 101-05.**

Inv. Holt began questioning him at that point and the remainder of his signed statement reads as follows:

Question: what time did all this begin.

Mr. Gathers's answer: about 12:00 last night. I didn't mean. I am sorry.

Question: do you know the female's name.

Answer: she told me. I forgot.

Question: was this the first time you had met her.

Answer: yes, sir.

Question: how did you meet her.

Answer: at one of the bus stops. I was walking up and she stopped me.

Question: what bus stop.

Answer: the one ... on Montague and Gainer Avenue.

Question: was there anyone else with you and her?

Answer: no, sir. I am sorry. I am sorry. I didn't mean to kill her.

Question: did you go back to her house on Gainer Avenue.

Answer: yes, sir.

Question: have you ever been at that residence before.

Answer: no, sir.

Question: when you got to her house, what happened.

Answer: we started getting high and having sex. She knew a fellow that lived ... by the corner store in Liberty Hill and -- and I bought some more dope from him. We went through that routine four to five times and then when we were laying there in the bed. The alarm went off at 4:15 a.m. and I started putting my clothes on and that's when I noticed my money missing. I asked her where it was and we began arguing about that. And I hit her a couple of times and pulled out some of her hair and walked out the door. I am sorry, I am sorry, I am sorry. I didn't mean to kill her.

Question: where did you hit her at.

Answer: I boxed her in the face four to five times. I pulled her by her hair down the hall and hit her three or four more times.

Question: did you use any type of weapon.

Answer: she grabbed a knife when we was in the kitchen and I grabbed it from her and broke off the handle.

Question: where is the knife handle.

Answer: it should be in the house somewhere behind the bed or sofa. It's in the house.

Question: did you stab her with the knife.

Answer: if I did, I don't remember doing it.

Question: did you drag her at any point of the altercation.

Answer: I pulled her from the room to the living room.

Question: where did you go when you left.

Answer: I was going home, and I decided not to go home and went to my girlfriend's house on Gumwood Boulevard.

Question: does your girlfriend know what happened.

Answer: no. I called her and told her I was in a fight.

Question: did you call anyone and tell them about what happened.

Answer: I called my brother and told him that I was in a fight with his girl and I told him that I think I did too much. He told me to run.

Question: did you go home at any point after the incident.

Answer: I walked to the corner of Lilac and Hassel and didn't see my father's car and then that's when I walked to Gumwood.

Question: where are the clothes that you were wearing during the incident.

Answer: these are the clothes. Subject indicating that the clothes that he's currently wearing are the clothes.

Question: are you responsible for the death of the female that you know as Renee.

Answer: I didn't mean to kill Renee. I was just trying to get my money back. I didn't mean to, but I guess I am responsible. I just beat her up and if she died from it –

Question: which door did you leave from.

Answer: the front door. I took a left onto Gainer and then took a left on Montague to Nesbitt and took a right on Nesbitt and then cut behind a church to Lilac and to Hassel, but I didn't see my dad's car so I turned around and went back to the same way. I crossed over the tracks and went through Ferndale to Rivers and then to Gumwood.

Question: did you tell your brother that you killed her.

Answer: I told him that I hurt her and told her [phonetic] to check on her, because she was lying on the floor when I walked out.

Question: how and where was she laying when you walked out.

Answer: she was lying on her stomach between the living room and the kitchen in the doorway.

Question: what happened to Renee's cell phone.

Answer: I took it and threw it towards the railroad tracks -- towards the

railroad tracks. She called the little crack boy like four or five times.

Question: do you remember ... what it looked like.

Answer: small black cell phone.

Question: do you know the drug dealer's name, the one who you called the little crack boy.

Answer: I think they call him Little D. He rides a blue Moped.

Question: can you tell me anything ... else about him.

Answer: he lives past Liberty Hill Corner Store on Luella on the left, ... in the apartments on Luella. He's five one, about 120, 125 pounds, brown skin, short hair.

Question: did Renee fight back.

Answer: yeah, she was fighting back.

Question: when you say boxed her in her face, ... when you say you boxed her in her face, does that mean you struck her with an open hand or closed fist.

Answer: closed fist.

Question: what else can you remember about the incident.

Answer: the knife handle broke off in my hand and she still had the blade part and I was pulling her hair to get her to drop the knife handle.

Question: Do you know what color the knife handle was.

Answer: the knife handle was black and the blade was stainless-steel color.

Gathers is showing me his hands, that the knife was approximately eight to ten inches long.

Question: Do you know what Renee's cell phone number is.

Answer: no. Today was the first time that I met her.

Question: did you call your girlfriend about this incident.

Answer: I called her. I woke her up.

Question: is there anything else you would like to tell me at this point in time.

Answer: I am sorry. I didn't mean it. I am very, very sorry. I am sorry for her family, I am sorry for my son. I didn't mean to kill her. I didn't even mean to beat her up that bad. I am sorry.

R. p. 105, line 23 - p. 111, line 20. When given copies of **State's Exhibits 1-2**, Gathers "crumpled them up and threw them in the trash can. **R. p. 114, lines 12-16.**

Sgt. John Reynolds is the supervisor of the crime scene investigation unit of the City of North Charleston Police Department. He photographed and processed the crime scene, the victim's apartment, on June 7, 2010. **R. p. 154, line 3 - p. 155, line 4.** In the apartment, he found the victim laying face down on the floor. "The upper half of her body was in the kitchen area and the lower half of her body was protruding into the living room. **R. pp. 160-62; State's Exhibits 4-5.**

In the living room, Sgt. Reynolds found a couch with suspected blood stains on it, as well as a hair extension consistent with the victim's hair (see **State's Exhibit 26**). There was also a knife blade on one of the couch's cushions that appeared to have blood stains on it. (See **State's Exhibits 19 and 22-24; State's Exhibit 42**). Another hair extension was found in the living room. **R. pp. 162-70; 184.**

In the kitchen, he found a butcher block knife holder that had been knocked over, as well as suspected blood stains on the counter top. Another hair extension was in the sink area, while others were found in chairs and on the floor. (See **State's Exhibits 27-31**). A used condom (see **State's Exhibit 43**) was found in a trash bag in the kitchen and, after a search warrant was obtained, this and other items of potential evidentiary value were seized. Two more hair extensions and suspected

blood stains (on the walls) were found in the hallway, as was a cell phone battery. Other than the obvious signs of a struggle, the apartment was neat. **R. pp. 170-77; 183; 186-87.**

On the door frame of the back bedroom, Sgt. Reynolds found a suspected blood stain (*see State's Exhibits 33-34*). In the bedroom itself, he found a number of hair extensions on the bed; two Pepsi cans that appeared to have been transformed into makeshift crack pipes; and the telephone cord and more hair extensions on the floor. Although Sgt. Reynolds' search was very thorough, he did not recall finding any money in the residence. **R. pp. 177-81; 188.**

Sgt. Reynolds gave the following description of the victim's injuries that he had seen:

She appeared to have injuries around her head. And was -- she was lying on the floor. There was an amount of suspected blood under her upper body. And after we had photographed and the coroner arrived on the scene, once we turned her over she appeared to have some facial injuries, also. ... She appeared to have cuts on her face, and her face was kind of puffy and appeared to be bruised [and swollen].

R. p. 210, lines 8-22.

He explained that there were two cuts on her face. It was difficult to determine the other injuries on her face because her face and head were so bloody. However, he saw that "[s]he had cuts on her hands that appeared to be, in my opinion and experience, defensive wounds from a knife attack." These were deep cuts that appeared to go down to the muscle. **R. p. 210, line 23- p. 211, line 204.** Further, "[s]he had areas of shaved skin underneath both kneecaps on the front of her legs."

R. p. 212, lines 6-7.⁷

After leaving the victim's residence, Sgt. Reynolds went to the residence where Gathers was

⁷ Inv. Sam Riedel was the case agent for this case. He testified that the victim's appearance in her driver's license photograph (*State's Exhibit 64*) was much different than her appearance at the crime scene. The upper portion of the victim's facial area was extremely swollen and bruised and while there were definite alterations to her appearance, she was recognizable when compared to other undamaged features. **R. p. 218, line 1 - p. 219, line 2; p. 224, line 17 - p. 225, line 24.**

arrested “in reference to the investigations unit executing a search warrant.” In the bedroom area of that residence, he found a washcloth on the floor that appeared to have blood on it (*see State’s Exhibit 46*); a pillow case with suspected blood stains on it; a pair of brown pants that had suspected blood stains on them; and a towel that had suspected blood stains on it (*see State’s Exhibit 46*). Sgt. Reynolds performed the presumptive phenolphthalein test on the washcloth and the pillow case. **R. pp. 189-95.** Later that day, he went to an area near railroad tracks across the street from the victim’s apartment (*see State’s Exhibits 51-53*), where he found the knife handle and a cell phone. **R. pp. 195-201.**

Still later in the afternoon of June 7th, Inv. Cook and Inv. Bauer contacted Sgt. Reynolds and asked him to collect items from Gathers, who was now in custody, and to photograph blood and cuts on Gathers’ hands. Thereafter, Sgt. Reynolds went to the police station and took a photograph of Gathers sitting in the interview room. (*See State’s Exhibit 56*). Gathers did not have any visible injuries to his head or face. However, he did have slight cuts on his right hand, which Sgt. Reynolds photographed (*see State’s Exhibit 57*), and a small cut on the second finger of his left hand, which was also photographed. (*See State’s Exhibits 58-60*). This was the most substantial visible injury. **R. pp. 201-07.**

Sgt. Reynolds likewise collected swabs of Gathers’s hands to test for blood. Sgt. Reynolds thereafter collected the money that Gathers had on his person, which was slightly over \$ 11.00. **R. pp. 207; 210.**

Adrienne Hefney is a forensic DNA analyst with SLED, where her duties include analyzing biological evidence that may have been left behind at a crime scene and making comparisons. She

testified that SLED now performs PCR DNA analysis, as well as YSTR testing.⁸ **R. pp. 234-38.** In connection with this case, Agent Hefney received a buccal swab from Gathers; a swab from Gathers' right hand; a swab from Gathers' left hand; a swab from the outside and a swab from the inside of the condom;⁹ a swab from a knife handle; a blood standard from Renee Nevarez; and right and left fingernail clippings of Renee Nevarez. **R. pp. 238-39.**

Agent Hefney developed DNA profiles for the victim and for Gathers, using the blood standard and buccal swabs, respectively. Also, on the swab from Gathers' left hand, she did a phenolphthalein test and it indicated that blood was present. DNA tests showed that the DNA profile developed from this swab was "a mixture of at least two individuals." Gathers and the victim "could not be excluded as possible contributors to this mixture. The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in two million people." **R. pp. 241-48.**

The swab from the outside of the condom had the victim's DNA on it, while the swab from the inside of the condom was a mixture. The victim's DNA was the major contributor to this mixture and "the partial DNA profile of the minor contributor matched" Gathers' DNA. "The probability of randomly selecting an unrelated individual having a DNA profile matching the minor contributor to this mixture is approximately one in 17,000." Likewise, the DNA profile from the knife handle was a partial DNA profile from at least two individuals, with the victim's DNA being the major

⁸ The YSTR testing is "specifically designed to only examine male DNA."

⁹ She also received "debris from the condom, but I did not do any analysis." Also, she "received swabs from a Cherry Pepsi can that I did not perform analysis on." Nor did she analyze known head hairs that were submitted. **R. p. 239.**

contributor.¹⁰ **R. pp. 248-55.**

While a DNA profile of the minor contributor to this mixture is insufficient for reliable interpretation by PCR DNA analysis, Agent Hefney performed YSTR testing, looking exclusively at the male DNA. "The partial YSTR profile developed ... matches the YSTR profile of Gregory Gathers. Paternal male relatives of Gregory Gathers may not be excluded as a contributor of this profile. This profile is found nine times in a population data base of [11,064] males." **R. pp. 255-58.**

Dr. Nicholas Batalis is employed as a forensic pathologist at the Medical University of South Carolina, in Charleston. He performed an autopsy on the victim, on June 8, 2010. She was 5'3" tall and weighed 139 pounds. **R. p. 265, line 18 - p. 271, line 5.**

The cause of death in this case was blunt force trauma to the victim's head. On external examination, Dr. Batalis found that the victim had a "couple of ... scattered scar," which were from prior injuries or surgeries. One of the major findings was that the victim's face was bruised from "just about the mid part of the nose ... all the way up to the forehead ... to the hairline." While there was a small triangular area without bruising, on "both sides of the face all the way from the nose to the forehead were entirely bruised. You couldn't even tell them apart. Just one confluent bruise." **R. p. 271, line 6 - p. 274, line 21.**

Dr. Batalis also found three different abrasions, or scrapes, on the left side of the victim's face, which measured up to "about an inch in size off to the ... left side of the eye." There was a "superficial laceration just over ... the right eye." He found a "larger laceration just above and to the left of the left eye" that "was through the full thickness of the skin." **R. p. 274, line 22 - p. 275, line**

¹⁰The probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to this item is approximately one in 460 million." **R. p. 255.**

17.

Utilizing a chart, Dr. Batalis detailed a number of his findings on internal examination. There were several large bruises in the scalp. One was at the top of the victim's head and another corresponded with the bruise above her forehead. She had another bruise on the back of her head, and he found five more distinct bruises on the left side of the head in her scalp. Dr. Batalis opined that the victim had been struck "[a]t least five to ten times" but she could have been hit twenty times. Because the bruising on the victim's "face was just continuous," he could not determine the precise number of times that she had been struck. **R. p. 275, line 23 - p. 278, line 1.**

Further, she had a "very superficial incised wound[]" above each eyelid. The one over the right eyelid was slightly over 1" in length, while the one over the left eyelid was slightly less than 1." **R. p. 280, line 11 - p. 281, line 10.**

The victim also had "three other incise[d] wounds or cuts on her hands." One of these was on the palm of her left hand. "[T]hen on the right hand, on the inner surface of the second and third fingers she also had cuts ... near where that crease is in your finger." Dr. Batalis opined that "all three of these injuries were partial thickness." Although superficial, these wounds could have caused a lot of bleeding, and the same was true with the incised wounds on her face. **R. p. 283, line 22 - p. 285, line 24.**

All of these findings indicated definite severe trauma with multiple impact sites, but none of the previously detailed injuries were fatal. However, when Dr. Batalis removed the skull and looked at the victim's brain, he found that "there was bleeding in two different areas." First, he found

a subdural hemorrhage¹¹ and a subarachnoid hemorrhage.¹² Also, “her brain was markedly swollen.”

R. p. 278, line 11 - p. 279, line 7.

Dr. Batalis then explained that:

basically to die of blunt-force trauma, you're talking about just a massive insult on the brain from the repeated trauma, and, again, that [shearing] episode that would cause the brain to dysfunction. And it may tell the lungs to stop breathing, it may tell the heart to stop beating. But you get a dysfunction of the brain because of the blunt-force trauma.

R. p. 279, lines 8-14. These are the injuries that caused the victim’s death. **R. p. 280, lines 7-10.**

Using photographs introduced over Gathers’ objection as **State’s Exhibits 10-15** (*see Argument, infra*), Dr. Batalis again described the external injuries that he had found. **State’s Exhibit 10** showed the generalized bruising from the victim’s “nose all the way to the scalp.” Additionally, it showed the laceration or “tear from the blunt-force injury over the right eye,” well as the incised wounds above each eye. **State’s Exhibit 11** depicted the left side of the victim’s face, showing the laceration to her left forehead and the slit above her left eye, as well as “scattered abrasions or scrapes off to the left side of her face.” **R. p. 286, line 10 - p. 288, line 25.**

State’s Exhibit Number 12 depicts the right side of the victim’s face, and it shows the incised wound there over her right eye and the “generalized bruising over most of the face.” **State’s Exhibit Number 13**, shows the fresh scrape on the victim’s right knee. Dr. Batalis also found “two others on the left knee that looked similar to this one.” **State’s Exhibit Number 14** shows the

¹¹ This was bleeding between the membrane covering the brain, the dura, and the brain itself. **Tr. p. 394, lines 15-21.**

¹² This was bleeding in the arachnoid layer, which sits on top of the brain. **R. p. 278, lines 22-24.** The tearing of the small blood vessels connecting the dura and the brain causes the subdural hemorrhaging. Likewise, the tearing of the small blood vessels in the arachnoid layer causes subarachnoid hemorrhaging. **R. p. 279, line 21- p. 280, line 10.**

incised wound on the victim's left hand, and it shows "a large contusion on the left forearm." **State's Exhibit Number 15** depicts the two incised wounds to the second and third fingers of the victim's right hand. **R. p. 289, line 1 - p. 290, line 13.**

Again using a chart, Dr. Batalis further described some of the injuries that he had found on external examination. Specifically, he found two contusions on the victim's right forearm. One was roughly 9" long and 3" wide, and both were up to 3." The back side of the victim's left forearm "was pretty much just one large bruise," similar to the bruising on the face. Dr. Batalis explained that "what's significant here is the number of bruises and the fact that they're over widespread areas." **R. p. 290, line 15 - p. 291, line 12.** Finally, the toxicology report on the victim reflected the presence of "a fairly large amount of cocaine and ... a breakdown product of cocaine;" a prescription pain reliever called Tramadol; and caffeine and nicotine, as well as "a breakdown product of nicotine." **R. p. 293, line 20 - p. 294, line 25.**

ARGUMENT

The trial judge did not abuse his discretion by allowing the State to introduce State's Exhibits 10-12 - photographs of the victim taken at autopsy accurately depicting the various wounds that Gathers inflicted to her head and face - because the probative value of these photographs was not substantially outweighed by the danger of unfair prejudice, where the photographs corroborated the pathologist's testimony; they also corroborated testimony about the condition of the victim when found at the crime scene; they more vividly and accurately demonstrated the savage nature of the beating that Gathers delivered; Gathers admitted beating her; and the question for the jury to resolve was whether or not he did so with malice, and the injuries depicted in these photographs support a conclusion of malice.

Gathers contends that the trial judge erred by allowing the State to introduce State's Exhibits 10-12, photographs of the victim taken at autopsy accurately depicting the various wounds that Gathers inflicted to her head and face, on direct examination of the pathologist. He asserts that the photographs were highly prejudicial, that they could only serve to "arouse the sympathies and the prejudices of the jury," and that they were unnecessary to "substantiate material facts or conditions in the case because the pathologist had testified to these injuries and they were depicted on a chart. The State disagrees and submits that there was no abuse of discretion because the probative value of these photographs was not substantially outweighed by the danger of unfair prejudice, where the photographs corroborated the pathologist's testimony; they corroborated testimony about the condition of the victim when found at the crime scene; they more vividly and accurately demonstrated the savage nature of the beating that Gathers delivered; Gathers admitted beating her; and the question for the jury to resolve was whether or not he did so with malice, and the injuries depicted in these photographs support a conclusion of malice.

A. How the issue developed at trial.

After the State had concluded its direct examination of Inv. Holt and both he and the jury had

been sent home for the evening, the Assistant Solicitor noted that he had the photographs on which the parties disagreed as to admissibility. He proffered these photographs for the trial judge to review and the trial judge indicated that he would look at them. **R. p. 115, lines 21-25.** The following morning, the trial judge addressed whether the various contested photographs were admissible. Of importance to the present issue, the Assistant Solicitor argued that the contested autopsy photographs¹³ were admissible because the case came down to malice and the photographs demonstrated that the victim was fighting for her life. **R. p. 126, line 2 - p. 129, line 14.**

When asked to state his objection, Gathers noted his objection to the photographs then referred to as **State's Exhibits 33 and 34** was that "the blood makes it highly prejudicial. The fact that, you know, they're pulling the hands out of the body bag is highly prejudicial, as well." He further argued that both the officer and the pathologist could both testify to the injuries depicted.¹⁴ Although Gathers offered to stipulate to the location of the wounds, the Assistant Solicitor correctly noted that "the severity of the wounds is what's important." The State indicated that the pathologist would testify to the wounds, but the trial judge took the question of whether these photographs were admissible under advisement. **R. p. 129, line 15 - p. 130, line 20.**

Next, Gathers argued that the photograph marked as Number 32, was emotional. He conceded that the photograph was relevant when the trial judge asked if it did not show what the blows had done, but he argued that "the blood and the body bag on those are going to prejudice the jury and ... affect their decision, based on emotions." The Assistant Solicitor observed that the

¹³ The autopsy photographs were identified at that time as **State's Exhibits 31-34** but, as made clear, *infra*, they were subsequently proffered and/or introduced with different numbers assigned to them. Also, the State withdrew **State's Exhibit 31.**

¹⁴ Apparently, one of the two photographs to which Gathers was referring at that point was **State's Exhibit 14**, but it is not entirely clear.

photograph was important because it showed the two lacerations over her eyes, which the pathologist would testify are knife wounds. He planned to contrast this photograph with a DMV photograph of the victim before her injuries, “which actually shows her having a very sharp nose-ridge line which kind of shows that one slash of the knife really couldn’t get both those spots on her eyes.” The trial judge noted that he was inclined to admit it but took it under advisement until the pathologist testified. **R. p. 130, line 22 - p. 132, line 25.**

The trial judge suggested that the State use autopsy photographs in which the victim’s body had been cleaned to demonstrate many of the injuries because those photographs would not have the blood present. The Assistant Solicitor stated that he usually did not use autopsy photographs because the body had been altered, but Gathers indicated that he did not object to such alteration. Again, the trial judge took the question of admissibility under advisement until the pathologist testified. He made the same decision with respect to an autopsy photograph showing injuries to the victim’s right knee. **R. p. 133, line 1 - p. 137, line 25.**

The State then noted it had marked all of the contested photographs as **State’s 7 for ID through 15 for ID**. Gathers also stated that he did not have any objection relating to authentication of the photographs. **R. p. 140, line 23 - p. 141, line 21.**

The prosecution thereafter offered **State’s Exhibits 10-15** during the subsequent testimony of Dr. Nicholas Batalis, the forensic pathologist who performed the autopsy on Renee Nevarez.¹⁵ Gathers renewed his previous objection but the trial judge overruled it and the photographs were admitted. **R. p. 286, line 8 - p. 287, line 10.** As discussed in the Statement of Facts, Dr. Batalis used these photographs to illustrate some of the injuries that he observed on his external examination of

¹⁵ See Statement of Facts, *supra*.

the victim. **R. p. 287, line 11 - p. 290, line 13.**

After Dr. Batalis' testimony, the trial judge allowed Gathers to place his objections on the record *in camera*. Of importance to the present argument, he renewed his motion to suppress **State's Exhibits 10-12**, arguing that Dr. Batalis did testify to the victim's "injuries and was able to do so through diagrams." Also, the autopsy photographs were prejudicial and would arouse the emotions of the jury and cause them to make a decision based on those pictures versus what they heard from the witness stand. **R. p. 305, lines 2-18.**

The trial judge overruled Gathers' objection to these photographs. He observed that he had sustained Gathers' objections to **State's Exhibits 7 for I.D. through 9 for I.D.** because he found that the probative value of those photographs was substantially outweighed by their prejudicial effect. **R. p. 305, line 19 - p. 306, line 2.** However, he found that:

it's very clear from the wounds in the pictures that the Court allowed. Basically, the same pictures were allowed in from the autopsy after the blood had been removed. I think the prejudicial value of State's Exhibits 7, 8 and 9 outweighs the probative value, especially since the same pictures are shown in the autopsy pictures less the blood and the gore.

R. p. 306, lines 3-10.

B. Discussion.

Notwithstanding Gathers' argument to the contrary, there was no error in permitting the State to introduce **State's Exhibits 10-12**. "The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." *Peterson v. National R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005); *Gambell v. Int'l. Paper Realty Corp.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). All relevant evidence is admissible. Rule 402, SCRE. To warrant reversal,

an appellant “must show both the error of the ruling and resulting prejudice.” *Recco Paper & Label Co. v. Barfield*, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994); *State v. Hamilton*, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001). Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE.

“The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.” *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). “To constitute unfair prejudice, the photographs must create a ‘tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.’” *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *Alexander*, 303 S.C. at 377, 401 S.E.2d at 149). However, “[i]f the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.” *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353).

Here, the photographs corroborated the pathologist’s testimony as to some of the injuries that the victim had suffered to her head and face. **State’s Exhibit 10** showed the generalized bruising from the victim’s “nose all the way to the scalp.” Additionally, it showed the laceration or “tear from the blunt-force injury over the right eye,” as well as the incised wounds above each eye. Also, and contrary to Gathers’ argument, it appears that the victim's face was cleaned before this picture was taken. **R. p. 286, line 10 - p. 288, line 5.**

State's Exhibit 11 depicted the left side of the victim's face, showing the laceration to her left forehead and the slit above her left eye, as well as "scattered abrasions or scrapes off to the left side of her face." **R. p. 288, lines 6-25.** **State's Exhibit Number 12** depicts the right side of the victim's face, and it shows the incised wound there over her right eye and the "generalized bruising over most of the face." **R. p. 289, lines 1-4.**

Moreover and unlike the photographs in *State v. Collins*, 398 S.C. 197, 201-14, 727 S.E.2d 751, 754-60 (Ct.App. 2012), **State's Exhibits 10-12** were not "calculated to arouse the sympathy or prejudice of the jury." See *Torres*, 390 S.C. at 623, 703 S.E.2d at 228.¹⁶ Further, because "the offered photograph[s] serve[d] to corroborate [the pathologist's and the crime scene witness'] testimony, it [was] not an abuse of discretion to admit [them]." *Torres*, 390 S.C. at 623, 703 S.E.2d at 229; *Nance*, 320 S.C. at 508, 466 S.E.2d at 353. See also *Todd*, 290 S.C. at 214, 349 S.E.2d at 340 (black and white photograph of the victim's right upper chest with the breast exposed showing the location of the bullet wound was admissible to corroborate pathologist's testimony regarding location of wound, and did not prejudice defendant, since there was explicit testimony that victim's blouse and brassiere had been removed by medical personnel when they arrived at scene in order to administer medical assistance); *State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were

¹⁶ Gathers refers to the victim's "swollen and mangled face." He also contends that the photographs are prejudicial because they depict blood. However, no such arguments were raised below and Gathers is barred from raising them for the first time on direct appeal. See *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Torrence*, 305 S.C. 45, 60-71, 406 S.E.2d 315, 324-29 (1991) (Toal, J., concurring in result and joining Justice Chandler's concurrence in result).

admissible in murder prosecution, despite claim that, because victim's body was found in woods 46 days after crime was committed, weather or local fauna could have altered crime scene during that period; photographs corroborated other testimony concerning condition of victim's body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim's mouth); *State v. Martucci*, 380 S.C. 232, 249-51, 669 S.E.2d 598, 607-08 (Ct.App. 2008) (autopsy photographs of child's internal organs and other injuries admissible in prosecution for homicide by child abuse, where they were introduced to corroborate testimony of doctor who performed autopsy regarding various injuries inflicted on child, various stages of healing or freshness, and the internal trauma which caused child's death; photographs were relevant to prove that child was abused and abuse caused his death, that abuse manifested an extreme indifference to human life, and that severity of bruises and resulting trauma were inconsistent with accidental injury or play; and photographs were not introduced with the intent to inflame, elicit sympathy of, or prejudice the jury).

There is also no merit to Gathers' contention that **State's Exhibits 10-12** were not needed to prove the elements of murder, in light of the pathologist's testimony and the fact that the location of some wounds were depicted on a chart. This is not the appropriate inquiry. Rather, the appropriate question for determining relevance was whether each of these photographs had "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. Also, "a defendant cannot dictate the manner in which the prosecution tries its case by stipulating to certain facts or by not challenging an element of the offense" and "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential

element of the offense.” See *Estelle v. McGuire*, 502 U.S. 62, 69 (1991); *Mathews v. United States*, 485 U.S. 58, 64-65 (1988).¹⁷

Moreover, the chart was apparently only used as a demonstrative aid and it apparently was not introduced into evidence; only some of the myriad of wounds suffered by the victim were detailed on the chart; a number of the wounds depicted in **State’s Exhibits 10-12** were not depicted on the chart; and the chart only referenced the location of those wounds. It did not and could not accurately depict the wounds. As the old adage says, “[a] picture is worth a thousand words.”¹⁸ The contested photographs more vividly and accurately depict the severity of the external injuries inflicted on the victim’s face and head than the chart or even the pathologist’s testimony could possibly do.

Nor was the probative value of **State’s Exhibits 10-12** substantially outweighed by their prejudicial effect, under Rule 403. As this Court recognized in *Collins*, 398 S.C. at 201-02, 727 S.E.2d at 753-54, “[w]hen [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App. 2008) (citing *State v. Gillian*, 373 S.C. 601,

¹⁷ As the Supreme Court noted in *Old Chief v. United States*, 519 U.S. 172, 189-190 (1997), “the accepted rule that the prosecution is entitled to prove its case free from any defendant’s option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.”

¹⁸ The adage “refers to the notion that a complex idea can be conveyed with just a single still image.” Also, “[i]t is believed by some that the modern use of the phrase stems from an article by Fred R. Barnard in the advertising trade journal *Printers’ Ink*, promoting the use of images in advertisements that appeared on the sides of streetcars. The December 8, 1921 issue carries an ad entitled, ‘One Look is Worth A Thousand Words.’” See http://en.wikipedia.org/wiki/A_picture_is_worth_a_thousand_words. (Footnote omitted).

609, 646 S.E.2d 872, 876 (2007)).

Here, the blood and gore was, for the most part, removed from the victim's face before the photographs were taken and the State did not introduce autopsy photographs that depicted a great deal of blood and gore, in an effort to accommodate Gathers' objection. *See R. p. 133, line 1 - p. 137, line 25*. Further, the Assistant Solicitor correctly noted that this case was not a "who done it" because there was no question about the identity of the perpetrator. Rather, the question was whether or not Gathers beat the victim with malice aforethought. *R. p. 126, line 2 - p. 129, line 14*. In this regard, the State notes that Gathers testified in his own defense at trial. Although his testimony might support a finding that the beating was malicious (*see R. pp. 317-19; 326-29*), the challenged photographs completely refute his contention that the beating was not malicious.

Thus, the disputed photographs were highly probative of malice, vividly and accurately depicting the savage nature of Gathers' attack on his victim. *See Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (the probative value, on the issue of malice, of charts, photographs, and video depicting the excessive nature of the killing "was great enough to negate the risk of the jury's basing its decision on an improper passion"); *State v. Brazell*, 325 S.C. 65, 78-79, 480 S.E.2d 64, 71-72 (1997) (three photographs of victim's body at crime scene were properly admitted in murder prosecution, where trial judge excluded other photographs for potential prejudicial effect, photographs supported testimony of several witnesses and were relevant to nature of crime; and, even if descriptive testimony of prosecution witnesses adequately conveyed brutality of crime, photographs were harmless surplusage); *Kelsey*, 331 S.C. at 76, 502 S.E.2d at 76 (upholding introduction of several photographs and a diagram). Moreover, the photographs complained of here were not beyond "**the outer limits of what our law permits a jury to consider.**" *See Collins*, 398

S.C. at 210, 727 S.E.2d at 758 (citing *Torres*, 390 S.C. at 624, 703 S.E.2d at 229) (emphasis in original). Unlike the photographs in *Collins*, **State's Exhibits 10-12** depicted what Gathers, personally, did to the victim.

Further, because the victim's face had been cleaned, these photographs were not nearly as prejudicial as the color autopsy photographs of one of the victims, which the Supreme Court concluded were improperly admitted in the sentencing phase in *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986).¹⁹ Likewise, the challenged photographs did not depict a child victim's partially eaten face and body. Thus, they did not have "the overwhelming capacity to lure the jury into declaring guilt on the emotional basis of sympathy for the [victim] and horror at the sight of the [victim's] body," as did the ten photographs that this Court found unduly prejudicial in *Collins*. 398 S.C. at 210, 727 S.E.2d at 758.

To more fully understand how brutally Gathers beat the victim and how reasonable the trial judge was in his ruling, one need only review the photographs that were excluded, such as **State's Exhibits for ID 7-9**. The excluded photographs more graphically depict how bloody and battered Gathers left his victim's body. However, these more graphic photographs were excluded, apparently because of their prejudicial effect. *Accord Brazell*, 325 S.C. at 78-79, 480 S.E.2d at 72 ("The judge selected three of the offered photographs because he found they were not unduly prejudicial or inflammatory and they accurately reflected the scene. The trial judge excluded other photographs of the crime scene and autopsy because he found the probative value to be outweighed by the unfair prejudice"). Thus, the trial judge properly allowed the State to admit **State's Exhibits 10-12**, since

¹⁹ In *Middleton*, three photographs "depicted the victim's scalp pulled away from her skull" and another photograph "showed her surgically opened vaginal cavity exposing a large amount of seminal fluid." *Id.*

their introduction withstands a Rule 403, SCRE, analysis.

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) (“Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial”); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (“When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result”).

Specifically, the State notes that Gathers contends that the photographs were cumulative to the testimony of the pathologist and the chart detailing the location of the wounds. To the extent he is correct, any error in introducing the photographs was harmless because “[i]t is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence.” *State v. McFarlane*, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983). *See also State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (noting the admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence); *Brazell*, 325 S.C. at 79, 480 S.E.2d at 72 (“Even if the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage”) (citing *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587 (1942) (finding the photographs unnecessary but harmless because they were not prejudicial or inflammatory)).

Finally, there was overwhelming evidence of guilt, and even Gathers’ testimony supports a finding that he beat the victim maliciously. As a result, any error in allowing the State to introduce **State’s Exhibits 10-12** must be viewed as harmless beyond a reasonable doubt, in light of the

overwhelming evidence of guilt.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court must be affirmed.

Respectfully submitted,

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July 17, 2013.

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Charleston County
J. C. Buddy Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2011-203951**

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

GREGORY QUINN GATHERS,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 17th day of July, 2013.

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

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By: 

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JUL 17 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA
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THE STATE OF SOUTH CAROLINA,

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APPELLANT.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served three (3) copies of the within Final Brief of Respondent on counsel for the Appellant by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

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SC Court of Appeals