STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VALENTINO MARTEL HAYWARD,

APPELLANT

APPELLATE CASE NO 2015-002663

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

On May 12, 2014, a Charleston County grand jury indicted Appellant for murder (2014-GS-10-3322). R. 1065-1066. Appellant was also indicted for possession of a firearm during the commission of a violent crime (2014-GS-10-3323). R. 14, ll. 15-20. The state, represented by Chad Simpson and Lauren Mulkey, called the case to trial before the Honorable Deadra L. Jefferson and a jury on November 9-17, 2015. R. 1-2. Aaron Mayer represented Appellant. R. 2. The jury found Appellant guilty of murder. R. 1046, l. 23 – R. 1047, l. 3. However, the jury found Appellant not guilty of possession of a firearm during the commission of a violent crime. R. 1047, ll. 10-15. Judge Jefferson sentenced Appellant to thirty-eight years' imprisonment. R. 1063, ll. 9-14; R. 1067.

Appellant filed a notice of appeal. On May 5, 2017, undersigned counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), in this matter. The brief raised whether the trial judge erred in admitting (1) a photograph of a gun found on Appellant's phone and (2) an enhancement of that photograph because the probative value of the photograph and its enhancement were substantially outweighed by the danger of unfair prejudice. On April 9, 2018, this Court denied the motion to relieve counsel and directed the parties to brief whether the trial court abused its discretion in admitting two images of a gun found on Hayward's cell phone. This brief follows.

STATEMENT OF THE FACTS

The shooting

Charles Rodwell lived with his mother, three brothers, and his girlfriend in the Ardmore neighborhood in the West Ashley area of Charleston. R. 148, ll. 6-8. The Ardmore community was called "The Hole" by law enforcement and the people living there. R. 167, ll. 7-13; R. 240, ll. 2-7. According to one law enforcement officer, "[i]t's an area where [the police] generally have a lot of crime, there's a lot of foot pursuit[s] there." R. 173, ll. 4-9; see also, R. 239, l. 24 – R. 240, l. 1. It was an area where the police commonly stopped and frisked the people in the area – if a person was "acting suspicious, walking away from the police car." R. 251, ll. 9-24. The sound of gunshots was commonplace. R. 150, ll. 19-23; R. 161, ll. 7-11.

On December 11, 2013, Rodwell's mother was doing laundry while he was watching television in the living room. R. 149, ll. 11-14; R. 150, l. 11 – R. 151, ll. 13. The laundry area was just outside the backdoor of their apartment. R. 150, l. 25 – R. 151, l. 13. Rodwell "heard some shots, but [] thought it was firecrackers." R. 150, ll. 21-22. Rodwell heard someone screaming, and his mother said there was a woman screaming as well. R. 151, ll. 15-20. According to Rodwell, the woman "was saying her boyfriend got shot." R. 151, ll. 19-20. Rodwell ran outside to help. R. 151, ll. 21-22. There, he found a man lying on the ground. R. 152, ll. 21-23. Rodwell checked for a pulse, but found none. R. 154, ll. 2-3.

Rodwell's mother provided a phone to the woman who had been screaming for her to call for help. R. 154, ll. 8-17. The police and emergency medical personnel arrived shortly thereafter. R. 154, ll. 18-25.

Although Rodwell, his mother, and the woman were the first individuals to approach the deceased gentleman, a crowd soon gathered in the area. R. 155, l. 25 – R. 156, l. 2; R. 167, ll. 14-20.

The police investigation

Christopher Malinowski was the first officer on the scene. R. 166, ll. 11-22. He was dispatched at 8:50 p.m., and arrived approximately seven minutes later. R. 166, ll. 23-24; R. 172, ll. 9-18. According to Malinowski, he saw no signs of injury on the man lying on the ground. R. 170, ll. 10-13.

The subsequent police investigation revealed the man lying on the ground was Deontre "Chucky" Miles.[1] On December 11, 2013, Miles contacted his friend, Latoya Carson, for some prescription pain medicine.[2] R. 182, ll. 4-7; R. 185, l. 15 – R. 186, l. 7. When Miles picked up the pills, he invited Carson to join him in riding to West Ashley. R. 186, ll. 16-21. Carson readily agreed. R. 187, l. 22 – R. 188, l. 1. Although Carson stated her presence was to keep Miles company, she indicated that she spent the entire car ride from North Charleston to West Ashley engaged in conversations with other people using an app, Zello, on her phone. R. 188, ll. 5-6; R. 188, l. 20 – R. 189, l. 17.

In light of her preoccupation with talking to her friend on her phone, Carson "wasn't paying attention" to what was going on. R. 190, ll. 6-7; R. 200, ll. 2-4. However, she claimed Miles was uncertain where he was going and that he called someone for directions. R. 190, ll. 1-

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[1] The pathologist determined Dontre Miles suffered a single gunshot wound to his upper right back. R. 490, ll. 4-12. He died as a result of "cervical spinal cord disruption from C2 to C4, due to penetrating gunshot wound to the upper right back." R. 492, ll. 1-3. The wound was not apparent when viewing Miles' body from the front/top. R. 502, ll. 17-22.

[2] At the time of Appellant's trial, Latoya Carson was in jail awaiting trial for murder of another man. R. 210, ll. 13-16.

9. She claimed Miles called for directions two or three times, and that during the last call for directions he stayed on the phone until he reached what she assumed was the desired destination. R. 190, l. 17 – R. 191, l. 1.

As Miles got out of the car, he hung up his phone. R. 195, ll. 2-4. While sitting in the passenger seat, Carson saw someone standing outside the car near the passenger side. R. 195, ll. 4-15. The person was "in the process of turning and leaving the car" so she did not get a good look at the person's face. R. 195, ll. 16-18. As a result, she was unable to identify the person. R. 195, ll. 19-23. She described the person as 5'9" tall with "short dreads" that were approximately "neck length." R. 196, ll. 10-22. She also described the person as slim and wearing a dark-colored thermal shirt. R. 196, ll. 23-24; R. 197, ll. 10-18.

Carson told the police that the person touched the top of the car over the passenger door with his *left* hand. R. 198, ll. 13-20; R. 199, ll. 3-14; R. 215, ll. 5-11; R. 230, l. 20 – R. 231, l. 1; R. 934, ll. 3-12.[3] When Miles got out of the car, he and the person walked off together. R. 200, ll. 18-21. Carson remained in the car, chatting on her phone. R. 201, ll. 2-5. "[A] couple of minutes after they moved from the car," she heard a gunshot. R. 201, ll. 8-14. The gunshot "wasn't close," but she could hear it even wearing headphones with the passenger side car window down. R. 201, ll. 15-18; R. 216, ll. 10-13.

A "minute or two" later, Carson stopped talking to her friend on the phone. R. 202, ll. 4-10. She called Miles and could hear his phone ringing. R. 202, ll. 11-15. Scared of the dark, Carson did not get out of the car to investigate. R. 202, ll. 17-19. However, when she saw a lady leaving out of a back doorway, Carson got out of the car and called Miles' phone again. R. 202, l. 24 – R. 203, l. 1. She could hear the phone ringing louder and looked in the direction of the

[3] The police found a palm print on the exterior of the front passenger door that was identified to Appellant's *right* palm. R. 457, l. 1 – R. 458, l. 13.

ringing. R. 203, ll. 2-6. Carson saw Miles on the ground. R. 203, ll. 5-6. She screamed for help, and the lady she had seen earlier walked over to her. R. 203, ll. 7-11. Carson thought Miles had been shot. R. 203, ll. 12-13. She lifted his head, called his name, and held his hand. R. 203, ll. 16-22. She also called 911. R. 204, ll. 4-17. The investigation would show gunshot residue on the hands of Miles and Carson. R. 628, l. 21 – R. 629, l. 7; R. 629, ll. 12-20.

Based on Carson telling the police that Miles was "speaking on his phone prior to" his death and that the person was "giving him turn-by-turn directions to a location [where] he would end up being shot and killed," the lead detective focused on trying "to identify the number, then the person that" Miles "was speaking to just prior to his death." R. 237, ll. 7-18. The police recovered Miles' phone from his hand. R. 237, ll. 19-23; R. 241, ll. 6-16; R. 242, l. 19 – R. 243, l. 3. The digital evidence unit was unable to download the phone. R. 237, l. 23 – R. 238, l. 3. Therefore, the lead detective "manually went through the phone" "and copied down every single number that was in the call log that day." R. 238, ll. 4-9. The detective "was interested in identifying the last phone number or the last person" to whom Miles spoke. R. 242, ll. 12-18.

According to the detective's inspection, the last call on the phone "lasted over 11 minutes" and this was "consistent" with what Carson said. R. 243, ll. 15-21. The phone identified the contact name for the caller as "Tino." R. 243, l. 22 – R. 244, l. 1. The detective immediately suspected Appellant because he went by the name of "Tino," lived near where Miles' body was found, and, in the detective's opinion, was of "the same general description" provided by Carson. R. 244, l. 2 – R. 245, l. 11. Additionally, the detective ran the number "through a phone number database" and "it came back to" Appellant. R. 245, ll. 20-24.

The police also obtained the phone records for Appellant and Miles. According to the records, there was a phone call between Miles and Appellant that was initiated at 8:24 p.m. and

lasted for over eleven minutes. R. 565, ll. 4-14; R. 567, ll. 13-20. The records also showed the phones were using the same cell phone tower at that time. R. 567, ll. 21-24.

An expert in firearms identification examined the fired bullet that was recovered during the autopsy. R. 582, ll. 4-17. Due to the bullet's damage, the examiner could only give an approximate caliber of the bullet. R. 583, ll. 9-23. He opined it was "a nominal 38 caliber, 38 family." R. 584, ll. 14-16. He also claimed that "a nominal 38 caliber [is] more times than not consistent with a revolver." R. 585, ll. 6-9.

Appellant's detention and arrest

Marian Campbell and Appellant had been friends for about six months in December 2013. R. 285, ll. 1-10. On December 11, 2013, she and Appellant communicated by text messaging several times during the day. R. 287, ll. 6-10; R. 288, ll. 11-15. She claimed Appellant sent her a text message stating "he was talking to somebody" about robbing. R. 289, ll. 7-12; R. 664, ll. 2-3. Around 11 p.m., Appellant called her and she went to North Charleston to pick him up. R. 290, ll. 2-25. She and Appellant went to her house in downtown Charleston, arriving around 11:30 p.m. R. 291, ll. 7-16. Appellant stayed with her that night. R. 291, ll. 17-19.

The following day, she and Appellant left her house in her car. R. 292, ll. 14-22. The police stopped them and detained Appellant. R. 286, ll. 7-8; R. 292, ll. 14-22.

After Appellant was "detained" pursuant to the lead detective's instructions, the detective assigned Richard Holmes to interrogate Appellant. R. 246, l. 9 – R. 247, l. 13. Appellant told the police that he was at the Saint Andrews Gardens apartments on the night of the shooting, and went to North Charleston with Anisha Pearson when he heard there was a shooting in Ardmore. R. 335, ll. 22-24. He explained he was visiting with his cousin Wallace Bishop earlier that

evening. R. 341, ll. 9-23. Appellant also admitted he knew Miles and that he had spoken to Miles on the evening of his death. R. 337, l. 24 – R. 340, l. 4.

When the police interrogated Pearson, she confirmed that she took Appellant to North Charleston on December 11, 2013.[4] At first, Pearson denied any knowledge of a gun when she spoke with the police. R. 407, ll. 19-24; R. 408, ll. 14-17. However, she ultimately insisted to the police that she had been with Appellant earlier in the evening as well. According to Pearson, Appellant called her at 8 p.m., asking her to watch the daughters of his friend, Wallace. R. 387, ll. 10 – R. 389, l. 22. Appellant and Wallace were at her doorstep when he made the call. R. 390, l. 4-8; R. 412, ll. 13-15. When she agreed, Appellant left the children with her. R. 390, ll. 12-15. Between ten and twenty minutes later, Appellant called asking her to go to his mother's house. R. 391, ll. 6-22; R. 420, ll. 17-20. When she arrived at his mother's house, Appellant handed her a gun and told her to take it to her house, which she did. R. 394, l. 15 – R. 395, l. 5; R. 397, ll. 6-17.

"A couple of minutes" later, Appellant called Pearson again requesting she take the gun to him. R. 397, ll. 17-25. Pearson returned to Appellant's mother's house, but he called her to tell her to go to another place. R. 398, ll. 2-10. Appellant told her to give the gun to someone at that place, which she did. R. 398, ll. 16-19. Pearson did not know this person. R. 398, ll. 20-21.

Thereafter, Pearson was stopped by the police because she was speeding. R. 399, ll. 2-9. The police searched her car and released her. R. 399, ll. 14-19. Pearson drove around for some time, and received another call from Appellant. R. 400, l. 1-4. Appellant asked her to return to the place where she had left the gun. R. 400, ll. 4-614. When she arrived, Appellant got into her

[4] The prosecutor also charged Pearson with criminal activity for what she claimed she did to assist Appellant. R. 383, ll. 19-21.

car and the two left. R. 400, l. 23 – R. 401, l. 1. She took Appellant to a relative's house near Leeds Avenue in North Charleston. R. 401, ll. 8-21; R. 413, ll. 14-22.

Appellant's defense

On December 11, 2013, at 7:25 p.m., Officer Ryan Gerten stopped while he was running in the Ardmore area. R. 361, ll. 1-9; R. 361, l. 23 – R. 362, l. 8. Officer Gerten explained he stopped Appellant because he "was seen running down the street and at that time it was unusual, out of place. He was not wearing athletic clothing, he seemed to be in a really big hurry." R. 364, ll. 10-19. Officer Gerten "had never seen" Appellant "running or in a hurry at any point during the time [he] was working there." R. 364, ll. 19-21. Officer Gerten claimed he had reasonable suspicion for the stop and frisk of Appellant because "he was running and it was out of place for him," "he was wearing clothing that did not match running in that area," and Gerten had "never seen him in particular running in that area of the neighborhood before." R. 365, ll. 5-12. Because this was "unusual," Gerten "wanted to make sure everything was okay" "to make sure that he wasn't being chased by someone and that he was okay." R. 365, ll. 13-18. During the frisk, Gerten found no weapons on Appellant. R. 371, ll. 13-14.

Wallace Bishop was Appellant's friend and lived in the same neighborhood as Appellant – Ardmore. R. 809, ll. 5-11. On December 11, 2013, Appellant visited Bishop in his home after work around 7 p.m. or 7:30 p.m. R. 809, l. 12-14; R. 810, ll. 2-6; R. 812, ll. 7-12. The two were trying to find some marijuana and had called around looking for some. R. 812, ll. 13-12. After hanging out at Bishop's home for some time, Bishop and Appellant decided to "go around the corner," which meant "the hood." R. 812, ll. 19-21. First, they took Bishop's two daughters to stay with one of Appellant's friends. R. 813, ll. 7-19. Then, Bishop and Appellant "waited for the weed man" at Appellant's house, which was nearby. R. 814, ll. 3-6; R. 817, ll. 18-22. They

purchased some marijuana and hung out on Appellant's porch. R. 817, ll. 18-22; R. 818, ll. 1-16. Appellant indicated that he was going to flirt with some women so Bishop returned home after picking up his daughters. R. 818, l. 17 – R. 819, l. 9. Although Bishop was unsure of the exact time the two parted company, he recalled "it was late at night, not too late, before 12. It was way before that." R. 819, ll. 10-16. Bishop insisted that Appellant did not hurt anyone on December 11, 2013, when the two men were together. R. 819, ll. 17-19.

ARGUMENT

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

Relevant facts

The police obtained Appellant's phone subsequent to his arrest and analyzed the data on his phone. During the trial, the state sought to admit a photograph from the phone. R. 671, l. 9 – R. 674, l. 20; State's Exhibit #32. The photograph from the phone was "an image of a gun." R. 725, ll. 12-17; State's Exhibit #32. According to the police, the image was taken by the phone's camera on November 22, 2013, at 9:58 p.m. R. 671, ll. 10-25; R. 672, l. 21 – R. 673, l. 8. The solicitor asked the police to "enhance" the detail on the image. R. 674, ll. 1-6. The state sought to introduce the enhanced photograph as well. R. 672, ll. 4-19; State's Exhibit #33. Defense counsel objected, and there was a bench conference. R. 672, ll. 11-16. The judge stated the objection was under advisement during the testimony of the officer. R. 672, ll. 17-19.

Defense counsel argued "the prejudicial effect would be - - would substantially outweigh the probative value" of the photographs. R. 725, ll. 23-25. He explained the photograph was of a "random gun" and there was no evidence "suggesting that that gun was used in this crime." R. 726, ll. 1-3. The photograph was "very convenient" for the state to use to suggest to the jury that it was the murder weapon. R. 726, ll. 4-8. He argued the "probative value [was] very, very low because the image depicted there of this weapon [was] not [] tied in through any fingerprints, through any DNA, through any ballistics, through anything" to Appellant or the crime scene. R. 727, ll. 4-12.

The state argued that the police found no shell casings at the crime scene, which indicated either someone picked them up or "most likely" the murder weapon was a revolver. R. 727, ll.

17-23. The firearms expert examined the bullet recovered at the autopsy and testified the makeup of the bullet led him "to believe that it was more likely that this was a .38 caliber revolver." R. 728, ll. 1-8. Thus, the state contended, it was a reasonable conclusion to draw that the murder weapon in the case was a .38 caliber revolver. R. 728, ll. 9-12. Further, the state argued, the metadata on the phone indicated the photograph was taken within two weeks of the shooting. R. 728, ll. 13-18. According to the state, the date of the photograph was "at least strong circumstantial evidence" that the gun in the photograph "was the actual gun that fired the bullet in this case." R. 728, ll. 19-21.

Judge Jefferson ruled there was "no question regarding the authenticity of these pictures" and that "[t]o some extent" photographs were "self-authenticating." R. 730, l. 23 – R. 731, l. 1. She determined there was "no question" the photographs were part of the "data dump" performed by the police. R. 731, ll. 1-7. She found "no question regarding the authenticity of the information downloaded from his phone and that these photos were, in fact, downloaded from the data which was stored on his phone." R. 731, ll. 8-12. She noted the enhanced photograph showed the caliber of the gun on the barrel. R. 731, l. 21 – R. 732, l. 2.

The judge found the photographs were "relevant" because they made "a fact of consequence in the case more or less probable, that being the ownership or possession of a weapon of similar caliber by the defendant." R. 732, ll. 10-13. Further, she found the photographs "probative to the extent that he took a picture of the weapon and stored it on his telephone." R. 732, ll. 13-15. She also found the photographs were "corroborated by the testimony of the SLED firearms expert" that it was "more likely than not a revolver, a .38 caliber or a 9 millimeter." R. 732, ll. 16-20.

She was also convinced of the photographs' probative value because the "picture was taken on November 22nd of 2013," which was twenty days prior to the shooting. R. 733, ll. 15-20. The enhanced photograph showed the caliber of the weapon, which the judge found probative. R. 733, ll. 21-23.

Judge Jefferson summed up her ruling:

> So the Court would find that the testimony is relevant, that it makes initial consequence in this litigation, that being the contention of whether the defendant was in possession or owned a firearm more or less probable, that it is more probative than prejudicial in that it indicates the caliber of the weapon, which corroborates the testimony of ... the SLED firearms expert, that it is authentic and that it was downloaded from the metadata that was taken from [Appellant]'s camera - - was taken by the camera on [Appellant]'s cell phone and was downloaded as part of the data dump from his telephone, that a picture was taken on 11/22 of 2013.
>
> And I find that the evidence is more probative than prejudicial, especially when you're dealing with a factual issue such as possession or ownership of a weapon in close proximity to an alleged event.

R. 733, l. 24 – R. 734, l. 18. Therefore, she admitted the photographs into evidence. R. 734, l. 23 – R. 735, l. 8.

Discussion

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible; however, even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 402, SCRE; Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)).

Probative value

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

Danger of unfair prejudice

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be

based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011)(citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

Balancing act

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Only after balancing the probative value and the

danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Analysis

Applying this analytical framework to the present case reveals that balancing of the low probative value of the impeachment evidence offered by the state, the extreme danger of unfair prejudice posed by the evidence necessitated the exclusion of the images of the guns. The starting point for determining the relevancy, probative value, and danger of unfair prejudice is with the ultimate issue before the jury. The question before the jury was – did the state prove beyond a reasonable doubt that Appellant killed took the life of Miles with malice aforethought on December 11, 2013? The fact that Appellant had taken a photograph of a gun on his phone on November 22, 2013, failed to prove or disprove anything related to the shooting death of Miles. The state could not prove the exact caliber of the bullet that killed Miles due to the damage to the bullet. The state's expert could only give a family for the bullet. Also, due to the damage, the expert could not give a list of potential guns. The expert's testimony was that the possible caliber of the bullet was more likely connected to a revolver. Thus, the state could not say that the gun in the photograph was consistent with the type of gun that fired the fatal bullet. The only thing the state could say was that a gun like the one in the photograph or a gun not like the one in the photograph could have fired the fatal bullet.

The danger of unfair prejudice from the image of the gun on Appellant's phone was exponentially high. Essentially, the state put a gun in Appellant's hand just weeks before the murder. This was a gun the state could not tie to the shooting, but it was still a gun that was in Appellant's possession shortly before the shooting death of Miles. In fact, the state argued to they had "a pretty solid evidentiary basis to know what shot Dontre Miles; it's a 38-caliber revolver." R.

995, ll. 7-9. Then, the state remarked that there were "[l]ots of different types of guns out there," but that Appellant was in possession of a "38-caliber Smith and Wesson revolver" "within weeks of this murder." R. 995, ll. 9-16. The danger of unfair prejudice from the admission of the photograph from Appellant's phone and the police-enhanced image was apparent from the state's closing argument to the jury that the gun in the photograph found on Appellant's phone was the murder weapon.

The admission of the photographs into evidence allowed the state to argue that Appellant was the shooter. In closing, the solicitor wanted to "talk about the gun" with the jurors. R. 993, l. 23. The solicitor relied upon the testimony of Jennifer Wooley to claim there were no shell casings where the shooting occurred. R. 993, l. 23 – R. 994, l. 3. Inferentially, the solicitor argued the lack of shell casings meant a revolver was used:

> What does that mean? It means that either a person in the heat of the moment of killing someone bent down and went through the grass and picked up the shelling casings - - it's unlikely, but possible - - or more likely, it means it's a revolver that just killed this person, a revolver.

R. 994, ll. 8-14. Next, the solicitor talked about "the ballistics expert." R. 994, ll. 15-16. According to the solicitor, the ballistics expert weighed the bullet and found it "[m]ost consistent with a 38." R. 994, ll. 16-18. The solicitor claimed nobody was "trying to BS" the jury by noting the ballistics expert also explained "a 38 caliber is very close to a 9 millimeter." R. 994, ll. 19-20. Additionally, the expert claimed the "bullet was an all lead bullet," which meant "most of the time" "it's a 38 revolver because 9 millimeter ammunition tends to be lead jacketed or lead core." R. 994, l. 24 – R. 995, l. 6.

Based upon the testimony of Wooley and the ballistics expert, the solicitor claimed there was "a pretty solid evidentiary basis to know what shot Deontre Miles; it's a 38-caliber revolver." R. 995, ll. 7-9. Then, the solicitor quickly transitioned to the photos on Appellant's phone.

According to the solicitor Appellant's "phone within weeks of this murder" had a photograph of "clearly a revolver." R. 995, ll. 12-13. It was a "38-caliber Smith and Wesson revolver." R. 995, ll. 15-16. In short, the solicitor was arguing the murder weapon was the one in the photograph on Appellant's phone without one shred of evidence to support the contention.

Only one conclusion may be drawn from balancing the extreme danger of unfair prejudice resulting from the admission of the images against their low probative value - - any probative value of the images was substantially outweighed by the danger of unfair prejudice. Examining the record as a whole revealed the state's circumstantial evidence case against Appellant. The only evidence against Appellant was that he was on the phone with Miles shortly before Miles died. However, an abundance of evidence existed that someone else, namely Carson, had likely killed Miles or participated in his death. Not only did Carson have gunshot residue on her hands, but she did not immediately call for help despite the fact that she was an avid user of her cell phone. Carson claimed she was in the car with the window down when the gunshot rang out only a stone's throw from the car. Yet, she failed to react until minutes later. She only reacted when she was forced to react – a woman walked out of her home. Instead of following the evidence, the police rounded up one of their "usual suspects" in the Ardmore area – Appellant – and charged him with murder. The photograph of a gun on Appellant's phone allowed the solicitor to do what the solicitor was unable to do otherwise – place a gun in Appellant's hand close in time to the murder. The solicitor capitalized on this evidence in order to do just that as evinced by the closing argument. The danger of unfair prejudice substantially outweighed any probative value of the gun images in this case.

CONCLUSION

Appellant respectfully requests this Court reverse the trial court's ruling regarding admissibility of the photographs and remand for a new trial.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of April, 2018.