ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Dorchester County
Maité Murphy, Circuit Court Judge

THE STATE,

Respondent,

v.

THOMAS SHEWTZUK,

Appellant.

Appellate Case No. 2016-001957

FINAL BRIEF OF RESPONDENT

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The trial court properly admitted partially smoked cigarettes and DNA evidence obtained from them where the State established a chain of custody for the non-fungible evidence because the manner of handling was reasonably demonstrated and the witnesses involved in the chain testified the evidence was in a substantially unchanged condition. Moreover, any error admitting the evidence was harmless beyond a reasonable doubt given the other evidence of appellant's guilt considered by the jury, including surveillance video of the murder and witnesses who testified appellant told them he shot victim.

STATEMENT OF THE CASE

A Dorchester County grand jury indicted appellant, Thomas Shewtzuk, for murder, three counts of kidnapping, and possession of a weapon during the commission of a deadly crime. (R.pp.411-25). Appellant proceeded to a jury trial on September 6, 2016, before the Honorable Maité Murphy, and was represented by Leslie Sarji. (R.p.1). Glenn Justis and Kyle Ward of the First Circuit Solicitor's Office represented the State. (R.p.1).

On September 8, 2016, the jury found appellant guilty of all charges. (R.p.287, line 19-p.288, line 6). Judge Murphy sentenced appellant to life imprisonment for murder, terms of thirty years for two of the kidnapping charges, and five years for the weapons charge. (R.p.315, line 21-p.316, line 6). The judge did not impose sentence on the third kidnapping charge given the concurrent sentence for murder. (R.p.316, lines 6-9).

Following the filing of the notice of appeal and receipt of the trial transcript, appellate counsel discovered the bench conferences were not transcribed. (R.p.2). Appellate counsel moved to reconstruct the record of the bench conferences to raise appellate issues presented during those conferences, and the State consented. This Court granted the motion. Judge Murphy convened a reconstruction hearing on July 17, 2017. (R.p.317). The judge issued an order with respect to her findings concerning reconstruction of the bench conferences on August 31, 2017. (R.pp.404-10).

This appeal follows.

STATEMENT OF FACTS

A surveillance video inside a Dorchester County gas station captured the final moments of Travis Gordon's life and showed appellant shoot him twice in the head—once in the cheek and once in the forehead.[1] (R.p.88, line 18-p.90, line 16; p.181, line 17-p.182, line 10; p.219, line 7-p.220, line 12). Mary Jane Miller (Miller) was inside the store on June 13, 2015, to pay for gas to fill her lawn mower when she heard a man say, "I'll teach you to mess with me," heard two gunshots, and saw another man drop to the floor. (R.p.66, line 12-p.67, line 3). Miller testified she put her hands up and begged the gunman not to shoot her too. (R.p.67, lines 3-7). Appellant took off. (R.p.67, lines 8-19).

Johdie Lee (Lee) testified she saw a van pull up outside the gas station with two men inside and the driver "looked terrified" and his "eyes were as big as saucers." (R.p.80, line 20-p.81, line 5). Lee later learned the driver was the shooting victim. (R.p.81, lines 6-25). Lee testified she was inside the store getting a drink when she heard gunshots, heard a woman scream, and heard the shooter yell at the woman, "I'll come back and kill you if you say anything you – cussword." (R.p.78, line 17-p.79, line 7; p.80, lines 13-19).

Detective Adam Smith (Smith) arrived at the scene, watched the surveillance video, and saw numerous visible and identifying tattoos on the shooter's body. (R.p.218, lines 10-22; p.219, line 7-p.220, line 12). Smith later got a call from a woman who had information about the suspect and he met with Katelynn Dubois (Dubois) who identified appellant as the possible shooter, and Smith found photos of appellant on Facebook. (R.p.221, line 23-p.223, line 8). The

[1] The pathologist testified the shot to the cheek shattered the victim's jaw, and fragments of bone and teeth were embedded in his mouth. (R.p.177, lines 7-13; p.181, line 17-p.182, line 8). The gun may have been in "loose contact" with the victim's forehead when appellant fired the second shot given the amount of soot on his skin surrounding the wound. (R.p.182, lines 9-17). The pathologist testified further the shot to the forehead was not survivable and almost immediately fatal. (R.p.183, lines 10-13).

photos appeared to match images from the surveillance video. (R.p.223, lines 8-14). Smith spoke with appellant's father and others who knew appellant and, based on information from them, obtained arrest warrants for appellant. (R.p.226, lines 2-17). Appellant turned himself in on June 18, 2015. (R.p.226, lines 18-24).

At trial, Dubois testified she previously dated both appellant and the victim. (R.p.37, lines 7-16). Dubois was at a pool party at the home of appellant's mother on the day before the murder and saw appellant there with a black handgun. (R.p.38, lines 4-15). Dubois testified she was also texting the victim off and on that day. (R.p.38, line 23-p.39, line 4). Two other women appellant was dating at the time of the deadly shooting also testified at trial. One told the jury she also saw appellant with a black pistol the day before the murder, while another testified appellant told her he planned to rob the victim, but things "got out of hand." (R.p.18, line 8-p.19, line 3; p.215, line 19-p.216, line 20).

Alex Shewtzuk (Alex), one of appellant's cousins, testified appellant texted him about buying a gun, but Alex told him he did not have the money. (R.p.195, lines 5-20). Alex stated appellant told him "he was gonna fight this kid" and appellant told Alex he probably would not want to buy the gun anyway because "it's about to have a body on it." (R.p.195, lines 20-25; p.196, lines 8-16). Alex told investigators appellant called him after the murder, admitted he shot someone, and Alex told him that "was stupid." (R.p.199, line 22-p.200, line 8). Appellant's father, David Shewtzuk (David), testified he talked to his son the day of the murder when appellant called him to tell him he had done "something bad." (R.p.207, lines 10-12; p.208, lines 2-13). Specifically, appellant told his father he shot a boy twice and needed to get away. (R.p.208, lines 14-16; p.212, lines 13-14). David told his son to go to North Carolina, but appellant did not flee the state. (R.p.208, lines 17-18; p.213, lines 8-11). David testified his son

later stopped by the house to shower, cut his hair, and change. (R.p.209, line 20-p.210, line 9). David stated he subsequently texted appellant to tell him he needed to turn himself in to police. (R.p.213, lines 12-18).

In addition to the surveillance video that showed appellant shooting the victim, the State introduced other evidence that linked appellant to the deadly crime. A crime scene investigator collected partially smoked cigarettes from outside the gas station and sent them to SLED for analysis. (R.p.99, line 23-p.100, line 2; p.101, lines 6-10; p.102, lines 13-21; p.107, lines 12-16; p.113, lines 8-12; p.113, lines 17-25). DNA from the cigarette butts matched appellant's and SLED's expert testified "the probability of randomly selecting an unrelated individual having a DNA profile matching this item is [approximately] one in 960 quadrillion." (R.p.128, lines 20-24; p.128, line 25-p.130, line 18; p.134, line 5-p.135, line 5; p.137, line 7-p.139, line 20). In addition, an expert testified prints found inside the passenger doors of the victim's van matched appellant's. (R.p.142, lines 16-22; p.155, lines 8-19; p.158, line 13-p.160, line 21; p.167, line 9-p.168, line 2). Finally, Smith testified about the text messages and phone calls between appellant and the victim which indicated the two were together on the morning of the murder. (R.p.230, line 4-p.235, line 19).

The jury found appellant guilty of murder, three counts of kidnapping, and possession of a weapon. (R.p.287, line 19-p.288, line 6). As will be discussed in more detail below, the trial court denied defense counsel's motion both pre-trial and again following the verdict to defer sentencing for an individualized sentencing hearing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), finding the case did not apply because appellant was over the age of eighteen at the time of the crime. (R.p.10, lines 9-20; p.292, line 25-p.293, line 22). The court sentenced appellant to life imprisonment for murder, terms of thirty years for two of the

kidnapping charges, and five years for the weapons charge. (R.p.315, line 21-p.316, line 6). The court did not impose sentence on the third kidnapping charge given the concurrent sentence for murder. (R.p.316, lines 6-9).

I.

> The trial court properly sentenced appellant—an adult homicide offender over the age of eighteen—to life imprisonment without the possibility of parole, and the court exercised its discretion in sentencing after consideration of all information provided following the guilty verdict to decide the appropriate sentence for appellant within the statutory range for murder.

The trial court did not err in denying the request for an individualized sentencing hearing because appellant was over the age of eighteen—an adult—when he committed his crime and was not entitled to a bifurcated trial. Defense counsel conceded to the court *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), did not apply to appellant given his age. By their plain language, *Aiken* and the case on which its holding relies, *Miller v. Alabama*, 567 U.S. 460 (2012), specifically state the relief granted is for juveniles, or those homicide offenders under the age of eighteen. Appellant's discretionary sentence of life without the possibility of parole is not excessive and disproportionate and does not violate the Eighth Amendment because it was properly determined after the trial court considered all the relevant information presented following the guilty verdict.

The record reveals the trial court took into account all the information available during sentencing, including statements from the victim's family and appellant's father, as well as details about appellant's home and family life which appellant argues demonstrates a diminished level of culpability. The trial court exercised its discretion in sentencing after consideration of all information presented at trial and prior to sentencing to decide the appropriate sentence for appellant within the statutory range for murder.

Accordingly, appellant's sentence of life without parole is not disproportionate under the Eighth Amendment, the trial court did not err in making its determination, and the sentence should be affirmed.

How the Issue Was Raised

Prior to trial, defense counsel moved for a continuance or to bifurcate the proceeding pursuant to *Aiken* because appellant was eighteen-and-a-half years old at the time he committed the crime. (R.p.3, lines 10-23). Counsel conceded the "black letter law" of the case did not apply to appellant because it "specifically enumerates" that juveniles under the age of eighteen were entitled to an individualized sentencing hearing, but counsel argued appellant was a similarly situated person given his age and equal protection required he receive the benefit of a hearing. (R.p.3, line 23-p.4, line 8). Counsel maintained the science behind the *Aiken* and *Miller* decisions was applicable to appellant and counsel requested the court bifurcate the proceeding to take into account the *Miller* factors during sentencing like the court would be required to do if appellant were younger than eighteen.[2] (R.p.4, lines 8-20; p.5, line 7-p.6, line 17). In the alternative, counsel asked for a continuance so that she could hire a psychologist to evaluate appellant given the mitigation she had uncovered, including evidence appellant was sexually abused as a child, his father was absent having been in prison, appellant's mother engaged in prostitution, and appellant's previous adjudications as a juvenile. (R.p.6, line 18-p.8, line 15).

The State maintained neither *Aiken* nor *Miller* applied because the cases granted relief only to those under the age of eighteen. (R.p.8, line 17-p.9, line 7). The State asserted the United States Supreme Court or our Supreme Court could have increased the age to twenty-one or twenty-five, but instead made the age of a juvenile anyone under the age of eighteen and people older were not entitled to an individualized sentencing hearing. (R.p.9, lines 7-13). The State explained appellant could still present mitigation during sentencing like any other

[2] The *Miller* factors are: (1) the age of the offender and the hallmark features of youth; (2) his family and home environment; (3) the circumstances of the homicide offense, including the extent of the offender's participation; (4) the offender's ability to deal with legal process; and, (5) the possibility of rehabilitation. *Miller*, 567 U.S. 477-78.

defendant. (R.p.9, lines 13-15).

The trial court denied the motion for a continuance and to bifurcate the trial, ruling "as [defense counsel] stated, the black letter law is very clear" and appellant was not entitled to an individualized sentencing hearing given his age. (R.p.10, lines 9-20). However, the court noted counsel could present whatever mitigation she deemed necessary at the appropriate time, if appellant was convicted. (R.p.10, line 21-p.11, line 4).

After the guilty verdict, defense counsel renewed the motion for a bifurcated proceeding because appellant was subject to a life without parole sentence. (R.p.289, line 6-p.292, line 1). The State reiterated its argument made pre-trial that appellant was over the age of eighteen when he committed the murder, so *Aiken* and *Miller* did not apply. (R.p.292, lines 3-24). The trial court again denied the motion, finding appellant was not entitled to relief because "the law in this state is very clear" that only juvenile homicide offenders under the age of eighteen received individualized sentencing hearings pursuant to *Aiken* and *Miller*, but reminded counsel she could present mitigation prior to sentencing. (R.p.292, line 25-p.293, line 22).

Mary Jane Miller, one of the kidnapping victims, spoke first and asked the trial court to give appellant a life sentence because what he "did was not called for." (R.p.295, line 24-p.296, line 7). Christian Gordon (Christian), the murder victim's brother, read a statement written by his mother in which she stated the whole family remained affected by appellant's lack of respect for life and his decision to kill Travis Gordon. (R.p.296, line 9-p.299, line 15). Further, Christian stated his brother tried to please everyone and it was hard to believe an act of violence took him away. (R.p.299, line 17-p.302, line 7).

The State asked for a life sentence, noting appellant's disciplinary record since being incarcerated, including breaking windows at the jail, "ripping tables off the wall," and being

placed in lockdown. (R.p.303, lines 17-23; p.304, lines 3-7).

Next, defense counsel presented mitigation. Counsel told the trial court appellant's father went to prison about the time appellant was four-years-old for killing someone, appellant's mother drank, used drugs, and engaged in prostitution, appellant was sometimes seen wandering down the street by himself and was often not fed, and appellant was abused. (R.p.304, line 11-p.305, line 20). Appellant was also placed in at least two group homes and had "anger issues." (R.p.305, line 20-p.306, line 21; p.307, line 1-p.308, line 3). Counsel maintained appellant "didn't have a chance" given his home life and lack of parental supervision, and asked the court for a thirty-year sentence. (R.p.308, line 21-p.310, line 1).

Appellant's father, David Shewtzuk (David), acknowledged he was in prison from the time appellant was four-years-old, stated appellant's mother did not take care of him either, and appellant was abused while living with her. (R.p.310, lines 3-17). David told the trial court appellant would have pled guilty if the State made a "decent" offer because appellant wanted to take responsibility for his actions. (R.p.310, lines 19-22). Finally, David stated appellant had been through a lot and should not spend the rest of his life in prison. (R.p.310, line 23-p.311, line 21).

Appellant also spoke, apologized to the victim's family, and told the trial court, whatever the sentence was, he was ready to take responsibility for his actions. (R.p.313, line 19-p.314, line 9).

The trial court explained she weighed and considered information from all parties in reaching the sentencing decision:

> [T]his is one of those cases that's tragic for all sides. It's tragic, obviously, in ways that the victim's family has expressed very eloquently. For them and for society to lose the victim in such a callous and heinous and violent manner, and for the witnesses to

> have to witness somebody being murdered in front of them, being shot in the head, thinking that they could be next; to have to live that terror is not something that should happen in our society. And I certainly understand that you've had and dealt with a difficult hand in life. Your parents completely failed you. There's no question about that. However, that failure does not give you a free license to kill people. It just doesn't. I understand that you are 18 years old at the time. And since then, since your – just like [the solicitor] said, since you've been incarcerated, you're telling me that you pray every day for forgiveness, yet with that praying you're destroying things at the jail and being disruptive. Your actions don't match what you're telling me. Your past as far as behavioral issues, a light sentence doesn't fix that in any way, shape, or form. If anything, society needs to be protected.

(R.p.314, line 14-p.315, line 10). The court stated she was "empathetic" to appellant's past, but he had free will and choices to make, and one of them was a "terrible choice." (R.p.315, lines 17-20). The court sentenced appellant to life imprisonment for murder, terms of thirty years for two of the kidnapping charges, and five years for the weapons charge. (R.pp.315-16). The court did not impose sentence on the third kidnapping charge given the sentence for murder. (R.p.316).

Analysis

Standard of Review

It is well settled that an appellate court has no jurisdiction to disturb, because of alleged excessiveness, a sentence within the statutory limits unless the statute itself violates the prohibition against cruel and unusual punishment or the sentence is the result of prejudice or partiality. *Wood v. State*, 257 S.C. 179, 182, 184 S.E.2d 702, 703 (1971). A trial court has broad discretion in sentencing within statutory limits. *Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). A sentence is not excessive if it is within the statutory limits and there are no facts supporting an allegation of prejudice. *Garrett v. State*, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995).

The Trial Court Did Not Abuse Its Discretion in Sentencing Appellant

The trial court was well within its discretion to sentence appellant—an adult—to life after the jury's guilty verdict. The sentence appellant received was within the statutory range for murder and properly determined after the court considered all the relevant information presented at sentencing.

"A person who is convicted of or pleads guilty to murder must be punished by death, or a mandatory minimum term of imprisonment for thirty years to life." S.C. Code Ann. § 16-3-20(A). If sentenced to life, it means without the possibility of parole. *Id.* When exercising discretion to determine a sentence within a given designated statutory range, a trial court must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant. *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citing *Wasman v. United States*, 468 U.S. 559 (1984)); *see also State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (holding, in exercising discretion, a sentencing court "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come") (citations omitted). Moreover, it is presumed a court has considered the information presented during the sentencing proceeding before imposing a punishment. *State v. Cantrell*, 250 S.C. 376, 379, 158 S.E.2d 189, 191 (1967).

The trial court did not abuse its discretion when the record reveals it considered all the information presented, including the memorandum prepared by defense counsel, statements made at the hearing, and evidence presented at trial. The memorandum detailed counsel's argument that appellant was entitled to an individualized sentencing hearing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), given his age. (R.pp.3-6). Counsel also presented

an affidavit from a mitigation specialist and other information about the family and home life of appellant, all of which appellant argued at the sentencing hearing, and continues to argue on appeal, demonstrates a diminished level of culpability. Counsel told the court appellant was abused as a child, his father was absent after being convicted of killing someone, appellant's mother drank alcohol, used drugs, and engaged in prostitution, and appellant was often not fed. (R.pp.6-8; pp.304-05). Appellant was also placed in at least two group homes and had "anger issues." (R.pp.305-08). Counsel maintained appellant "didn't have a chance" given his home life and lack of parental supervision. (R.pp.308-10). Moreover, appellant's father spoke to the court and explained the tough life his son had lived, and appellant expressed remorse and told the court he was ready to take responsibility for his actions. (R.pp.310-11; pp.313-14). There is no indication in the record the court ignored the information or did not give it any weight. Prior to sentencing, the trial court noted for the record it considered everything that had been presented, the case was a tragedy for everyone involved, and the court was empathetic to appellant's past, indicating it took into account the very information appellant wished her to examine. (R.pp.314-15); *see also Cantrell*, 250 S.C. at 379, 158 S.E.2d at 191 (holding it is presumed a court has considered the information presented during the sentencing proceeding before imposing a punishment); *Hicks*, 377 S.C. at 325, 659 S.E.2d at 500 (noting a sentencing judge's discretion includes consideration of any and all information that reasonably might bear on the proper statutory sentence of a particular defendant).

However, the trial court also weighed and considered information from the State. The court heard a statement from the murder victim's mother and brother and one of the kidnapping victims about their experiences following the crime. (R.pp.295-302). The court also heard the facts of the case during trial and appellant's disciplinary record since being incarcerated.

(R.p.303). The State argued a life sentence was appropriate given all the information before the court. (R.p.304). While appellant and others who spoke on his behalf hoped for a sentence of something less than life, there was no agreement between the parties as to a sentence and it remained in the trial court's discretion. *See Franklin*, 267 S.C. at 246, 226 S.E.2d at 898 (holding, in exercising discretion, a sentencing court "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come").

Accordingly, the record demonstrates the trial court did not abuse its discretion in sentencing appellant to a term within the statutorily permitted range for murder and this Court should affirm its determination.

Appellant's Sentence Not Excessive, Cruel and Unusual, or Disproportionate

The sentence appellant received for shooting a man twice in the head on surveillance video and in front of witnesses who feared they could be shot next did not violate the Eighth Amendment. It was not excessive, cruel and unusual, or disproportionate to the crime appellant committed. Appellant's argument is an attempt to impermissibly expand the holdings of *Aiken* and *Miller v. Alabama*, 567 U.S. 460 (2012), and declare unconstitutional a discretionary sentencing determination by a trial court for an adult offender.

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. However, the Eighth Amendment only forbids extreme sentences that are grossly disproportionate to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). What constitutes cruel and unusual punishment is an evolving standard and involves looking at how society presently views a particular punishment. *State v. Wilson*, 306 S.C. 498, 509-10, 413 S.E.2d 19, 26 (1992). The clearest and most reliable expression of a society's contemporary

values is derived from laws enacted by this country's legislatures. *State v. Pittman*, 373 S.C. 527, 563, 647 S.E.2d 144, 162 (2007). To establish evolving standards of decency preclude a particular punishment, the appellant bears the heavy burden of showing our culture and laws have emphatically and virtually universally rejected a particular sentencing practice. *Id.* at 565, 647 S.E.2d at 164. "It is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it." *State v. Williams*, 380 S.C. 336, 347, 669 S.E.2d 640, 646 (Ct. App. 2008).

Appellant is not entitled to an individualized sentencing hearing despite his argument at trial and on appeal that mandatory life without parole sentences for juvenile homicide offenders violates the Eighth Amendment. There is no requirement for individualized sentencing in a trial for an *adult offender* outside a capital context. Appellant presented mitigation evidence at the discretion of the trial court which considered it prior to sentencing, but it was not required. *See Franklin*, 267 S.C. at 246, 226 S.E.2d at 898 (holding, in exercising discretion in sentencing, a judge may conduct a broad inquiry, largely unlimited, as to the kind of information considered or the source from which it may come). The United States Supreme Court has expressly rejected the need for mitigation in any context other than its death penalty jurisprudence, and has only recently expanded that to include proceedings involving juveniles facing life without parole sentences for homicide. *See Harmelin*, 501 U.S. at 995-96 (holding a claim that it is cruel and unusual to impose a severe, mandatory sentence without consideration of mitigating factors has some support in the "individualized capital-sentencing doctrine" of the Court's death penalty jurisprudence, but the doctrine may not be extended outside the capital context because of the qualitative differences between death and all other penalties); *see also Miller*, 567 U.S. 460, 479-

80 (2012) (holding the Eighth Amendment prohibits sentencing juvenile homicide offenders to mandatory life without parole without first considering the hallmark features of youth). Similarly, our state has only codified the requirement for individualized sentencing in the capital trial context. *See generally* S.C. Code Ann. §§ 16-3-20(B)-(C) (providing for the sentencing proceeding in a death penalty eligible trial or plea). Our Supreme Court also provides for such sentencing proceedings for juveniles. *See Aiken*, 410 S.C. at 545, 765 S.E.2d at 578 (explaining juvenile homicide offenders could still receive life without parole sentences, but only after "an individualized hearing where the mitigating hallmark features of youth are fully explored"). However, because appellant was an adult offender not subject to the death penalty, he was not entitled to an individualized sentencing hearing.[3] The trial court followed the proper procedure and used its discretion to allow family members and others to speak on appellant's behalf prior to sentencing.

In *Miller*, the United States Supreme Court drew a line and held only juvenile homicide offenders were entitled to relief. *Miller*, 567 U.S. at 470. In the cases upon which *Miller* drew, the Supreme Court consistently has drawn the line at eighteen in announcing Eighth Amendment limitations based on the defendant's age and in defining the term "juveniles." Most notably, in *Roper v. Simmons*, 543 U.S. 574 (2005), the Court held, "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper*, 543 U.S. at 578. Explaining that bright line, the Court stated:

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[3] In addition, neither *Miller* nor *Aiken* foreclosed a court's ability to impose a life without parole sentence on a juvenile. *Miller*, 567 U.S. at 479-80; *Aiken*, 410 S.C. at 545, 765 S.E.2d at 577-78. Neither opinion supports the argument the trial court in appellant's case was prohibited from sentencing him to life imprisonment, as neither opinion references the applicability of life without parole for an adult offender who was convicted by a jury of multiple crimes, including murder and three counts of kidnapping.

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. . . . [H]owever, a line must be drawn. . . . The age of 18 is the point where society draws the line of many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Id. at 574. Federal appeals courts have refused to extend *Miller* or *Roper* to defendants, such as appellant, who commit crimes after they turn eighteen. *See United States v. Dock*, 541 F. App'x 242, 245 (4th Cir. 2013) (noting because the defendant was twenty years old, *Miller* "is of no help" to him); *see also Melton v. Fla. Dep't of Corr.*, 778 F.3d 1234, 1235 (11th Cir. 2015) ("*Roper*" prohibits only the imposition of the death penalty on a defendant who committed the capital crime when he was younger than 18 years old," whereas "Melton was 18 years, 25 days old when he committed the crime"); *Doyle v. Stephens*, 535 F. App'x 391, 395 (5th Cir. 2013) ("Doyle was over eighteen, so he cannot use [*Roper*] as a shield"). Appellant does not cite to any cases extending *Miller* or *Aiken* to people such as appellant who were adults at the time of their offense.

Accordingly, the sentence was not disproportionate to the crime committed, fit the offender given the information available and reviewed by the trial court, and should be affirmed by this Court.

II.

> The trial court properly admitted the partially smoked cigarettes and DNA evidence subsequently obtained from them because the State established a chain of custody for the non-fungible evidence where the manner of handling was reasonably demonstrated and the witnesses involved in the chain testified the evidence was in a substantially unchanged condition.

The trial court properly admitted the partially smoked cigarettes found outside the gas station and the subsequent DNA evidence obtained from them. To the extent necessary, the State established a chain of custody for the non-fungible evidence where the handling was reasonably demonstrated by the witnesses involved in the chain, including the crime scene technician who collected the cigarettes and the SLED DNA analyst. Further, the SLED expert specifically testified the evidence was in a substantially unchanged condition when she received it. The establishment of a strict chain of custody was not required and the trial court did not err in admitting the non-fungible evidence. Moreover, any error was harmless beyond a reasonable doubt given the other evidence considered by the jury, including surveillance video which showed appellant shoot the victim twice in the head, texts and calls between appellant and the victim which indicated they were together on the day of the murder, and multiple witnesses who testified appellant told them he shot the victim.

How the Issue Was Raised

Detective Jeff Scott (Scott) testified he found and collected partially smoked cigarettes outside the gas station. (R.p.99, line 23-p.100, line 2; p.101, lines 6-10; p.102, lines 13-21; p.107, lines 12-16; p.113, lines 8-12). Scott explained once the evidence was collected:

> [I]t's placed into a dry chamber and it's allowed to dry. And then it's placed into an envelope and it'[s] sealed, initialed and dated. And once it gets placed into the paper envelope, again placed into a plastic bag which is then heat sealed, and my initials and the date that I can see were placed on that bag. And then it is sent to SLED

for further processing.

(R.p.113, lines 17-25). After Scott collected the cigarettes and placed them in sealed envelopes, the non-fungible evidence was stored in a locker, a log was kept of all evidence in the locker, and only crime scene personnel had access to it. (R.p.114, lines 1-17). Scott also testified he executed a search warrant for appellant's DNA and obtained buccal swabs which were sent to SLED for comparison. (R.p.120, line 13-p.121, line 17).

Lillian Gallman (Gallman), a DNA analyst for SLED, explained the process for any evidence brought to the agency:

> Whenever evidence is brought to SLED, it doesn't come in a heat sealed pouch like this. What we would receive is what you see as this envelope that's on the inside, would come to SLED. The envelope is then placed inside this heat sealed pouch. And it is sealed and then initialed by the submitting agent at the time.

(R.p.128, lines 20-24; p.128, line 25-p.130, line 18; p.132, line 18-p.133, line 1). Gallman testified the pouch containing the cigarette was sealed properly when she received it and specifically noted for the trial court:

> [T]he first thing is that I check – there was only one seal on the pouch at all. And that was the one at the top that was sealed by Stephanie Spellbourne. Because that's listed on our chain as the person that sealed it. And then the next time when it was opened, it was opened by me. And then I sealed it and dated it and initialed it.

(R.p.136, line 17-p.137, line 6). If an evidence pouch was not sealed properly, Gallman testified the procedure in place at SLED required her to "backtrack; go back to the login area and find out why this was not sealed" before proceeding with testing. (R.p.133, lines 13-17). Gallman also stated the envelope containing appellant's buccal swabs was not tampered with when she received it. (R.p.132, line 13-p.133, line 20).

Defense counsel objected to the introduction of the DNA evidence, arguing the State

failed to establish a complete chain of custody because the State had not explained "who took it from Dorchester County to SLED." (R.p.131, line 24-p.132, line 6; p.135, lines 19-23; p.141, lines 16-19). The State countered a full chain of custody was not required "as long as we can show, you know, the majority of the chain and they can identify it and say it was secured." (R.p.132, lines 7-10). The parties also held a bench conference regarding the issue. (R.p.135, line 16-p.136, line 9; p.331, line 18-p.332, line 22; p.355 line 19-p.358, line 10). The trial court overruled the objection and admitted the evidence, finding the chain established. (R.p.132, line 11; p.136, lines 11-13; pp.408-09).

Analysis

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the trial court's rulings either lack evidentiary support or are controlled by an error of law. *Id.* at 208, 631 S.E.2d at 265.

Chain of Custody was Established for Non-Fungible Evidence

"The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence." *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982). A party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). However, testimony from each custodian of fungible evidence is not a prerequisite to establishing a chain of custody sufficient for admissibility. *Id.* at

7, 647 S.E.2d at 206.

"While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required." *State v. Frieburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

> If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged position.

Id. at 134, 620 S.E.2d at 741-42.

Importantly, our Supreme Court has held, even where fungible evidence is at issue, it "will uphold the chain of custody if the safeguards instituted ensure the integrity of the evidence, even if every person associated with the procedure is not personally identified." *South Carolina Dep't of Soc. Serv. v. Cochran*, 364 S.C. 621, 629, 614 S.E.2d 642, 646 (2005). The Court explained:

> Courts have abandoned inflexible rules regarding the chain of custody and admissibility of evidence in favor of a rule granting discretion to the trial courts. "The trial judge's exercise of discretion must be reviewed in the light of the following factors: . . . 'the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence."

State v. Hatcher, 392 S.C. 86, 94-95, 708 S.E.2d 750, 754-55 (2011) (internal citations omitted). "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." *Id.* at 95, 708 S.E.2d at 755.

This Court has noted, "[W]here the handling of evidence is reasonably demonstrated, a weakness in the chain implicates credibility, but does not render the evidence inadmissible." *State v. Taylor*, 360 S.C. 18, 24-25, 598 S.E.2d 735, 738 (Ct. App. 2004) (citation omitted). In *Taylor*, this Court found the chain was established because the State could show the drugs were secure in evidence bags and not tampered with, even without the testimony of an evidence custodian. *Id.* at 21, 25, 598 S.E.2d at 736, 738. *Cf. State v. Pulley*, Op. No. 27811 (S.C. Sup. Ct. filed June 6, 2018) (Shearouse Adv. Sh. No. 23) (explaining the chain of custody was not established for the drugs because too much was left to conjecture given, in part, the "express denial of handling the cocaine" by an officer, a failure to determine how another officer obtained possession of the drugs, and an indication the drugs were left unsecured on the hood of an officer's cruiser).

Appellant contends the State did not present a complete chain of custody because the person who transported the cigarettes and appellant's buccal swab from the sheriff's office to SLED did not testify. However, the State was not required to present the testimony of every individual in the chain of custody because the cigarettes and buccal swab were non-fungible evidence, the method of handling the evidence was sufficiently established, witnesses in the chain testified the evidence was not tampered with, and other factors demonstrated the evidence was what it was purported to be. The trial court did not abuse its discretion in admitting the DNA evidence.

Scott testified once he collected the partially smoked cigarettes, the evidence was placed in an envelope, sealed, initialed, dated, and stored in an evidence locker where only crime scene personnel had access to it before it was sent to SLED for processing. (R.pp.113-14). Similarly, the buccal swabs were obtained, securely held, and sent to SLED. (R.pp.120-21). Scott's

testimony indicated the evidence was not manipulated or tampered with in any way while in the custody of the sheriff's office.

Gallman testified the pouches containing the evidence were properly sealed and not tampered with when she received them and specifically noted the names listed in the chain before her, and that she was the next one to open them, date them, and initial them. (R.pp.132-33; pp.136-37). In addition, Gallman stated if it appeared the envelopes had been tampered with prior to the time she received them, she would not have proceeded with testing. (R.p.133). Pursuant to her testimony, there were steps in place to ensure the evidence was secure while in SLED's custody.

The State need not eliminate all possibility of tampering. *See State v. Rogers*, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004) ("South Carolina law does not require testimony as to the exclusion of any possibility of tampering."). Instead, the State need only demonstrate a "reasonable probability the article has not been changed in important respects." *Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55. The testimony of both witnesses established the evidence in question—non-fungible items—had not changed and they verified the items were what they were purported to be. *See Frieburger*, 366 S.C. at 134, 620 S.E.2d at 741-42 (holding a strict chain of custody for non-fungible evidence is not required, and the trial court has discretion to admit items merely on the basis of testimony that the item is the one in question and is in a substantially unchanged position). The jury was presented with the partially smoked cigarette, the buccal swab, and the DNA results, and could see they were the same as the day they were obtained. Scott and Gallman also testified to the safeguards in place at both agencies to limit access to the evidence and ensure its integrity. *See Cochran*, 364 S.C. at 629, 614 S.E.2d at 646 (explaining courts will uphold chains of custody if the safeguards instituted ensure the integrity

of the evidence, even if every person associated with the procedure is not personally identified). Their testimony demonstrated no one tampered with the evidence and established the chain of custody. The trial court properly exercised its broad discretion in admitting the DNA evidence. *See Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55 (holding a trial court must review several factors to determine if a chain of custody is established and if the court is satisfied with a "reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence" in his discretion). Accordingly, the trial court did not err in concluding the State sufficiently established the chain of custody to authenticate the evidence.

Harmless Error

Any possible error in admitting the evidence was harmless beyond a reasonable doubt. Whether an error is harmless depends on the circumstances of the particular case. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). No definite rule of law governs the finding of harmless error; rather, the error's materiality and prejudicial character must be determined from its relationship to the entire case. *Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151; *see also State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (listing the factors of a harmless error analysis, including the importance of the witness's testimony, whether the testimony was cumulative, the extent of cross-examination, and the overall strength of the State's case) (citation omitted).

The partially smoked cigarettes found outside the gas station and subsequent DNA match to appellant were cumulative to other evidence that established appellant's presence at the scene of the deadly shooting, including surveillance video that showed appellant shoot the victim twice in the head and showed appellant's numerous identifying tattoos. (R.pp.88-90; pp.181-82; pp.218-20). Appellant's cousin and father confirmed to investigators and during trial appellant

called them and admitted he killed someone. (R.pp.199-200; pp.207-08; p.212). Appellant also told his cousin he was going to commit the murder shortly before the shooting. (R.pp.195-96). In addition, a former girlfriend identified appellant as the possible shooter prior to his arrest and testified she saw him with a black handgun the day before the murder. (R.p.38; pp.221-23). Finally, prints found inside the victim's van matched appellant's and text messages and phone calls between appellant and the victim indicated the two were together the morning of the murder. (R.p.142; p.155; pp.158-60; pp.167-68; pp.230-35).

In light of the other evidence establishing appellant's guilt, it is clear the jury would have convicted appellant even if the DNA evidence had not been admitted at trial. Therefore, while respondent submits the trial court's ruling was not an abuse of discretion, any alleged error was harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted this Court should affirm appellant's convictions and sentences, and let stand the decisions of the trial court as to both issues.

Respectfully submitted,

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August 28, 2018.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Dorchester County
Maité Murphy, Circuit Court Judge

THE STATE,

Respondent,

v.

THOMAS SHEWTZUK,

Appellant.

Appellate Case No. 2016-001957

CERTIFICATE OF COMPLIANCE

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

This 28th day of August, 2018.

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