STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Anderson County

Honorable J. Cordell Maddox, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHEN GRANT PARTEN,

APPELLANT

APPELLATE CASE NO 2019-000326

# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

### I.

Did the trial court err in denying Appellant's motion to sever the burglary and grand larceny charges from the murder, attempted murder, and kidnapping charges where the offenses did not arise from a single chain of events, were not of the same general nature, and were not supported by the same evidence?

### II.

Did the trial court err in admitting the 911 call made by Thomas Francis where Francis had no personal knowledge of the alleged crimes and the statements that he made on the 911 call did not fall under any recognized hearsay exception?

### III.

Did the trial court err in admitting a photograph of the deceased over counsel's objection under Rule 403, SCRE, without performing the requisite analysis on the record, where the photograph did not depict the deceased as Appellant allegedly left him, it was "staged" and was calculated to inflame the passions of the jury?

## STATEMENT OF THE CASE

On November 15, 2016 Appellant was indicted by an Anderson County grand jury for murder, possession of a weapon during the commission of a violent crime, attempted murder, grand larceny and first-degree burglary. R. 451. On January 22, 2019 Appellant was direct indicted for kidnapping. R. 451.

The state, represented by Stanford Lee Overby, Jr. and Catherine Huey, called the case to trial before the Honorable J. Cordell Maddox, Jr. and a jury on February 11, 2019. R. 1. Appellant was represented by A. Hadden Lucas and Victoria Gurney. R. 1. Prior to the start of trial, the state amended the burglary indictment to second-degree burglary. R. 3.

After a four-day trial, Appellant was found guilty of voluntary manslaughter, possession of a weapon during the commission of a violent crime, second-degree assault and battery, grand larceny and second-degree burglary. R. 429-431. Judge Maddox sentenced Appellant to imprisonment for thirty years, suspended upon the service of twenty-five years with probation to follow on the manslaughter charge, five years consecutive on the possession of a weapon charge, three years concurrent on the assault and battery charge, ten years concurrent on the burglary charge, and ten years concurrent on the grand larceny charge. Id. Appellant was acquitted of the kidnapping charge. Id.

This appeal follows.

## **ARGUMENT**

## **I.**

The trial court erred in denying Appellant's motion to sever the burglary and grand larceny charges from the murder, attempted murder, and kidnapping charges where the offenses did not arise from a single chain of events, were not of the same general nature and were not supported by the same evidence.

***Standard of Review***

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996) (citing State v. Tate, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (Ct.App.1985)). "A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." Id. (citing State v. Anderson, 318 S.C. 395, 398, 458 S.E.2d 56, 57–58 (Ct.App.1995)). A trial judge's decision to allow joinder of charges that do not arise from a single course of conduct, are not of the same general nature, are not proved by the same evidence, and prejudices a defendant's substantial rights is an abuse of discretion. State v. Beekman, 415 S.C. 632, 639, 785 S.E.2d 202, 206 (2016); State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (1985) (reversing prejudicial joinder because "nothing in this record shows these two forgeries are connected").

***Relevant Facts***

In the early morning hours of May 26, 2016, Appellant, Ahmed Fallous (the decedent), and Morgan Rhodes were together at the home Fallous and Rhodes shared.[1] Appellant spoke to both Fallous and Rhodes separately that evening, apparently about the possible physical abuse Rhodes was suffering from Fallous. R. 70, l. 15-R. 72, l. 6. After having the private conversations, the three left in Appellant's black SUV and headed to Appellant's house. R. 58, ll. 2-5; R. 59, ll. 13-16. While driving, Appellant and Fallous got into a verbal altercation, partly over the fact that Appellant had become sick and was throwing up, causing Appellant to stop the car on Centerville Road Bridge. R. 60, ll. 4-23; R. 72, ll. 7-9. The argument moved outside of the car and became physical. R. 61, ll. 5-22. The fight escalated until Fallous and Appellant were shooting at each other. R. 76, ll. 19-21; R. 83, ll. 5-12.

After the shooting Appellant put Rhodes in his SUV and they left the scene continuing to drive in the direction of Appellant's home. According to Rhodes Appellant was acting "psychotic" and "unhinged" and was driving erratically. R. 64, 16-19. Appellant struck a tree but continued to drive. Eventually the SUV became inoperable and ended up in a ditch. R. 63, l. 19-R. 65, l. 5. Rhodes stated that after the wreck Appellant got out of the SUV, came around to the passenger side where she was seated and punched, kicked, slapped, strangled, and pistol whipped her. R. 65, l. 13-R. 66, l. 9. Rhodes fought back, kicking Appellant "as hard as she could." R. 67, ll. 5-8. Appellant began throwing up again which allowed Rhodes to close the passenger side door and lock Appellant out of the SUV. R. 67, ll. 11-14. As Appellant ran into the woods Rhodes thought she heard gunshots and smelled burning. R. 67, ll. 24-R. 68, l. 12.

[1] Fallous and Rhodes were in a romantic relationship and had been together for just over a year. R. 55, 21-24.

After hiding in the car for roughly ten minutes Rhodes flagged down a passing vehicle for assistance. R. 68, ll. 13-20.

Early on June 1, 2016, Elizabeth McCarson and her boyfriend, Ashley Moore, were sitting in Moore's truck in McCarson's driveway when an unknown truck pulled up behind them. R. 266, ll. 13-14; R. 268, ll. 2-8; R. 276, ll. 1-3. The driver of the unknown truck was Appellant, and he was looking to speak to his longtime friend Moore. R. 268, ll. 19-20; R. 271, ll. 9-14. Appellant, who was "scruffy and disheveled" stated that he had been in the woods for the past week, naked, trying to find shelter. R. 269, l. 25-R. 270, l. 17. Appellant further stated that he had been hiding in barns and using various items, such as doormats, to keep warm. R. 273, ll. 15-25.

Appellant told Moore and McCarson he eventually found a home that he was able enter where he got some clothes. R. 274, ll. 1-4. While in that home Appellant also found a spare car key. R. 274, ll. 3-4; R. 285, l. 5-10. With the spare key Appellant was able to take a truck owned by Day Ray. R. 281, ll. 20-21. Appellant was driving Ray's truck when he arrived at McCarson's house. R. 274, ll. 3-7. When Moore and McCarson told Appellant that he was wanted, that the incident was all over the news, and that Fallous had died he was very surprised. R. 288, ll. 20-25; R. 271, ll. 15-18.

Moore placed a cellphone in the truck that Appellant was driving, and that device eventually led police to Appellant. R. 275, ll. 12-19. Appellant was arrested by the U.S. Marshal Service on June 1, 2016, in Knoxville, Tennessee. R. 241, ll. 2-5. At the time of his arrest Appellant was discovered to be in possession of a stolen 2014 F-150. R. 242, l. 9-R. 243, l. 13. The F-150 belonged to Dan Ray, who was unaware that his truck had been stolen until he received a phone call from Anderson County Deputy Jay Lindsey. R. 281, ll.11-21. Prior to that

phone call, Ray had last seen the truck around 9:00 PM on May 31, 2016. R. 281, ll. 22-24. Ray stated that a set of keys to the truck, which were kept inside his home by the garage door, were missing. R. 281 l. 25-R. 282, l. 8.

Prior to the start of trial, Counsel Lucas made a motion to sever the burglary and grand larceny charges from the murder, attempted murder and kidnapping charges. R. 6-8. Counsel Lucas argued that the burglary and grand larceny charges would not be proven by the same evidence, were not of the same general nature as the other charges and did not arise from the same event or series of events as the burglary and grand larceny had occurred five days after the other charges. Id. The state replied that Appellant took the truck in an effort to escape apprehension on the murder, attempted murder, and kidnapping charges, therefore the incidents were part of the same chain of events. R. 6, ll. 2-5; R. 10, ll. 5-6. The trial court denied the motion to sever ruling that both incidents were part of one continuous event even though they were separated by five days. R. 10, ll. 20-25

***Discussion***

Whether or not it is proper for a South Carolina trial court to allow joinder of charges is governed solely by case law. There is no rule in the South Carolina Rules of Criminal Procedure to offer a court guidance on this matter. Instead joinder is determined by a four-part test that has been developed through precedent. Joinder is proper when the charges sough to be joined for trial: (1) arise out of a single chain of circumstances, (2) are proved by the same facts, (3) are of the same general nature, *and* (4) no real right of the defendant has been prejudiced. State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985) (emphasis added). Importantly, *all four parts of the test must be satisfied* for joinder to be proper. See, Id. at 464, 344 S.E.2d. at 290; See also,

State v. Beekman, 415 S.C. 632, 785 S.E.2d 202 (2016) (Pleicones, C.J. dissenting in a separate opinion in which Beatty, J. concurs).

The trial court committed reversible error in Appellant's case when it refused to sever the grand larceny and burglary charges from the other indictments Appellant faced. The court ruled that the incidents were part of one continuous event, thus joinder was proper. This ruling was not only incorrect as to the "single chain" portion of the test but completely ignored the other three prongs that the court was required to consider. Reviewing the facts as they pertain to the four elements of the test reveal that the court should have granted Appellant's motion to sever.

First, the burglary and grand larceny charges did not arise from the same circumstances as the murder, attempted murder, and kidnapping charges. Setting aside the fact that these incidents were separated by five days, there was no connection between the crimes. The state theorized that Appellant broke into Ray's home and stole his truck to avoid apprehension from law enforcement but nothing in the record supported that contention. According to the state's witness McCarson, Appellant had broken into Ray's home for clothes and took the truck as an afterthought. Further, it was only *after* Appellant had taken the truck and arrived at McCarson's house that he learned he was wanted in connect to the events that had occurred five days prior. His surprise at being wanted, and of learning of the death of Fallous, indicated that his state of mind during the burglary and grand larceny was in no way related to the murder, attempted murder, and kidnapping.

Secondly, the evidence required to prove the burglary and grand larceny was completely separate and distinct from the evidence used to prove the murder, attempted murder, and kidnapping. The murder, attempted murder, and kidnapping charges arose from an incident between Fallous, Rhodes, and Appellant, five days before the alleged burglary and grand

larceny. The burglary and grand larceny occurred at a home unrelated to the parties or previous events. The state argued the burglary and grand larceny where properly joined to show flight as evidence of guilt. However, the state could, and did, show flight by proving Appellant was arrested in Tennessee.

Third, the charges were not of the same general nature. Murder, attempted murder, and kidnapping are classified as "offenses against the person." S.C. Code Title 16, Chapter 3. All three of the charges are violent offenses and require an actual victim to be present during the commission of the offense. By marked contrast, burglary is classified as an "offense against property," and larceny falls under the "forgery, larceny, embezzlement, false pretenses and cheats" section of the South Carolina Code. S.C. Code Title 16, Chapter 11 and 13. Both of these offenses are considered property crimes and do not require an actual victim to be present during the commission of the offense. Further, larceny is a non-violent offense and while burglary can be classified as a violent offense it was non-violent in this case. These sets of charges are completely different in terms of class and character.

Finally, trying all of the charges at the same time was inherently prejudicial to Appellant. At trial Appellant asserted self-defense. Considering Appellant was convicted of manslaughter instead of murder, it is likely that the jury strongly considered all of the evidence Appellant presented, including the claim of self-defense. However, this defense was significantly weakened when the burglary and grand larceny charges were presented to the jury at the same time. Appellant went from an individual involved in an isolated incident in which Appellant asserted he acted in self-defense to a "spree" criminal who was doing whatever he could to avoid capture.

Comparing the facts of Appellant's case to prior decisions of both this Court and the Supreme Court is highly instructive. In State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985), this Court reversed Tate's conviction where the trial court had improperly joined two forgery charges. The two forgeries happened at two different liquor stores approximately a month apart. Despite the fact that the offenses were the same this Court found that they did not arise out of a single chain of events and were not proven by the same evidence, therefore joinder was not proper.

Similarly, in State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996), the Supreme Court found that an assault and battery of a high and aggravated nature (ABHAN) charge and a homicide by child abuse charge were not properly joined. The ABHAN charge related to injuries suffered by Smith's girlfriend's son, while the homicide charge related to the death of Smith's girlfriend's baby daughter. Smith had admitted to beating the boy child but the case on the homicide was entirely circumstantial as there was no evidence, outside of the statement of the child's mother who had also admitted to beating her baby girl, that Smith ever touched the baby girl. The Court held that the denial of the motion to sever prejudiced Smith because the evidence presented in the ABHAN case would not have been admissible against Smith in a separate homicide trial. Importantly, in finding prejudice, the court did not comment on the other prongs of the test. It follows then that once one portion of the four-part test is not met, the cases cannot be joined.

In State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986), Middleton was tried together on indictments for murder, criminal sexual conduct, attempted armed robbery, aggravated assault, and aggravated assault and battery. At trial the state argued that consolidation was justified because even though the crimes occurred on separate days, they were all part of a crime

spree, were committed within a radius of a few miles, and the same knife was used throughout the crimes. The Court held however that the case clearly failed to meet the requirements for consolidation as the crimes did not arise out of a single chain of circumstances and required different evidence for proof. The Court further noted that the prejudice to Middleton was apparent.

In contrast, the facts of State v. Tucker, 342 S.C. 155, 478 S.E.2d 260 (1996), supported joinder. Tucker was convicted of murder, kidnapping, armed robbery, possession of a weapon during the commission of a crime (collectively known as the Oakley murder) along with first-degree burglary, third-degree burglary, and larceny. At both trial and on appeal, Tucker argued that the burglary charges were improperly joined with the Oakley murder charges. Critical to the Court's decision in this case was a statement Tucker had made that he was aware that police were actively searching for him and committed the burglaries to clean up and "hide out." Id. at 164, 478 S.E.2d 265. The Court found that the crimes arose out of a single chain of circumstances because Tucker *committed the subsequent burglaries solely to avoid capture by police for the Oakley crimes* and that the crimes would all be proven by the same evidence as the burglaries would have been admissible to prove flight and identity of the individual involved in the Oakley murder.

Likewise, in State v. Beekman, 415 S.C. 632, 785 S.E.2d 202 (2016), the Court held that joinder of Beekman's charges of criminal sexual conduct with a minor on his stepson and lewd act upon a child on his stepdaughter was proper. The facts supporting joinder showed that the children were abused by the same individual, in the same manner, in the same place, and in the same time frame. That penetration occurred only on the stepson was not enough to sever the charges. The court found all four-parts of the joinder test were met, particularly that the crimes

were from a single string of events because they were "closely related in kind, place and character," that the charges were proven by much of the same evidence, were of the same general nature and there was no prejudice to Beekman in the joint trial. Id. at 637, S.E.2d 205.

Applying the case law of this state to the facts of Appellant's case shows that Appellant was more similarly situated to the defendants in Tate, Smith, and Middleton, *supra*, where joinder was found to be improper, than he was to those if Tucker and Beekman, *supra*. Unlike Tucker, Appellant had no knowledge that police were looking for him and was surprised to learn that he was wanted. Further he allegedly committed the burglary and larceny before finding out that he was wanted. The logic that allowed joinder in Tucker fails in the present action as there was no proof that Appellant was committing the burglary and larceny solely to avoid capture.

Unlike Beekman, Appellant's crimes were not closely related in kind, place and character. Nor were they proven by the same evidence. Appellant finds himself most closely situated to the defendant in Middleton where the state alleged a crime spree that was unsupported by the evidence. There, as here, joinder was improper and the prejudice of introduction of the other crimes was apparent.

## II.

The trial court erred in admitting the 911 call made by Thomas Francis where Francis had no personal knowledge of the alleged crimes and the statements that he made on the 911 call did not fall under any recognized hearsay exception.

***Standard of Review***

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (19997); State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

The admissibility of evidence is within the sound discretion of the trial judge. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. app. 2000); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion of the commission of legal error which results in prejudice to the defendant. Mansfield, 343 S.C. at 77, 538 S.E.2d at 263.

***Relevant Facts***

At 2:14 AM John Gibby made a 911 call (Gibby call) to report a shooting. State's Ex. 1[2]; R. 121, ll. 21-23. Gibby reported he had been fishing off a dock located near the bridge when he heard a "pop, pop, pop," saw sparks and heard a girl "hollering." State's Ex. 1. Gibby drove from the dock up onto the bridge as a black SUV left the scene. State's Ex. 1. Gibby

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[2] State's Ex. 1 is on file with Court.

found Fallous in the wood line, shot, but alive and he asked him who shot him. State's Ex. 1. Gibby reported that Fallous said "C.J.", then "Stephen", and then "Parten or Barten." State's Ex. 1.

Roughly an hour late, at 3:06 AM, Thomas Francis made a 911 (Francis call) as he drove pasted a wrecked car and saw a lady that was hurt. State's Ex. 2[3]; R. 48, ll. 3-6. Francis, who had been on his way to work, was flagged down by Rhodes as he drove past the wrecked SUV. R. 49, ll. 6-22. Francis picked up Rhodes and drove to the Hopewell Baptist Church to wait for the police. R. 50, ll. 9-13. Francis stayed on the phone while until law enforcement and EMS arrived. The 911 call lasted thirteen minutes and twenty-eight seconds. State's Ex. 2. During the call Francis was questioning Rhodes, at the request of the 911 operator, and was reporting back what she told him, which included details about her injuries, attack, and the incident on the bridge. State's Ex. 2.

Prior to the start of trial Counsel Lucas made a motion to suppress the two 911 calls. R. 11-15. Counsel Lucas argued both calls were inadmissible hearsay and that no exception existed. R. 11 l. 19-R. 12 l. 2. The state replied that the tapes could be played under the business records exception and that the statements contained in the telephone calls fell under dying declarations, present sense impression and excited utterance exceptions. R. 12, ll. 3-19. The state also argued the 911 calls were non-testimonial pursuant to <u>Crawford v. Washington,</u>[4] therefore there was no confrontation clause violation. <u>Id.</u>

Counsel Lucas agreed that the calls were non-testimonial but argued that was not at issue. The focus of Counsel Lucas' objection was the multiple levels of hearsay contained within the

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[3] State's Ex. 2 is on file with this Court.

[4] 541 U.S. 36 (2004)

calls, particularly regarding the Francis call. R. 12, l. 20-R. 13, l. 23. Counsel Lucas relied, in part, on this Court's decision in State v. Hendricks.[5] The trial court ruled both the Gibby call and the Francis call admissible under the excited utterance exception to hearsay. R. 17-18.

***Discussion***

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Hearsay is not admissible unless an exception applies or "as provided by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. Hearsay included within hearsay is not excluded under the hearsay rule *if each part of the combined statements conforms with an exception* to the hearsay rule provided in these rules. Rule 805, SCRE (emphasis added).

The Francis 911 call was hearsay within hearsay and each level of hearsay failed to satisfy an exception to the hearsay rule, thus the 911 call should not have been admitted at Appellant's trial. As Counsel Lucas argued at trial, State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (2014), was directly on point. In Hendricks, the 911 call was made by the victim's mother creating two layers of hearsay: (1) the victim's statements to her mother reporting the details of the incident and identifying Hendricks at the perpetrator and (2) the mother's statement to the 911 operator, repeating the victim's statement, specifically that the victim's boyfriend, Hendricks, had beat, raped and sodomized the victim. The Court took looked at each level of hearsay to determine if both were admissible pursuant to any known hearsay exceptions. The Court held that while *the victim's statement* was admissible as an excited utterance (meeting the three-element test set forth in State v. Washington, 379 S.C. 120, 124, 665 S.E.2d. 602, 604 (2008)), *the mother's statement* to a 911 operator was inadmissible hearsay not covered by the

[5] 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014)

present sense impression exception because the mother did not perceive the rape contemporaneously while she made the statement.

Here, as in Hendricks, the 911 call contained two levels of hearsay that must be addressed. In ruling the call admissible the trial court declared that it fell under the excited utterance exception because there was a portion of the call, at the end, where one could hear Rhodes speaking. The court did not make any specific rulings on the various levels of hearsay or on the elements test needed to identify a statement as an excited utterance. R. 17-19. Upon examining the levels of hearsay in the call the statement from Rhodes to Francis could possibly qualify as an excited utterance. However, the statement from Francis to the 911 operator, like the statement in Hendricks, met no hearsay exception.

Rhodes statement to Francis was hearsay without a hearsay exception. It did not meet the elemental test for either excited utterance or present sense impression. For a statement to qualify as an excited utterance the trial court must consider whether the statement has the "spontaneous quality necessary for admission as an excited utterance." Washington, *supra*. The Supreme Court required that (1) the statement must relate to a startling event or condition, (2) the statement must be made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. Id. While Rhodes was certainly subjected to a startling event, by the time she made her statement to Francis she was no longer under the stress of that event. Almost an hour had pasted since the incident on the bridge and Rhodes stated it was at least ten minutes before Francis came across her in the wrecked SUV. Rhodes and Francis did not stay at the scene of the wreck and alleged pistol whipping but drove away to await law enforcement at a local church. Further, Rhodes statement was given in response to questioning and was not spontaneous. Removed from the scene of both incidents, no

longer under any threat, and responding to question Rhodes was no longer under the stress of the alleged crimes.

Rhodes statement to Francis also did not qualify for admission under the present sense impression exception. There are three principal requirements which must be met before hearsay evidence may be admitted as a present sense impression: (1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration; and (3) the declaration and the event described must be contemporaneous. United States v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998). Francis came across Rhodes at least ten minutes after Appellant allegedly ran into the woods and more than an hour after the bridge incident. Considering the amount of time that lapsed between the events and when Rhodes made a statement to Francis, it was impossible for Rhodes to be making the declaration to Francis at the same time the event was occurring.

As to Francis' statement to the 911 operator, it was neither an excited utterance nor a present sense impression. The key to each of these hearsay exceptions is that the declarant was an actual witness to the event, perceived it and had firsthand knowledge. State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006) ("statements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule"); Mitchell, *supra*, (evidence may be admitted as a present sense impression when the declarant personally perceived the event described). Francis was merely a good Samaritan who passed by the wrecked SUV, was waved down and returned to help. He saw neither the incident on the bridge nor what happened in the SUV after it crashed. The only thing that Francis perceived himself was the present condition of

the SUV and Rhodes. It logically follows then that everything he repeated from Rhodes to the 911 operator was hearsay.

The facts of the present action and those that occurred in Hendricks are nearly identical. The biggest differences in these cases is that in Hendricks the admission of the 911 call was found to be harmless error. The same cannot be said for the admission of the Francis call in Appellant's case. Notably both Rhodes and Francis testified at trial. There was no necessary reason to play the Francis call other than to present cumulative evidence, which improperly corroborated the testimony of the victim, and played on the emotions of the jury. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (holding improper corroboration testimony that is *merely cumulative to the victim's testimony* cannot be harmless because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration) (emphasis in original), *overruling recognized by* Thompson v. State, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018) (overruling Jolly and its progeny to the extent those cases impose a categorical or per se rule precluding a finding of harmless error). Not only was the Francis call admitted in violation of the rules against hearsay, it was extremely prejudicial to Appellant.

## III.

The trial court erred in admitting a photograph of the deceased over counsel's objection under Rule 403, SCRE, without performing the requisite analysis on the record, where the photograph did not depict the deceased as Appellant allegedly left him, it was "staged", and was calculated to inflame the passions of the jury.

***Standard of Review***

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). Evidence should be excluded when its probative value is outweighed by its prejudicial effect. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." Kelley, 319 S.C. at 173, 460 S.E.2d at 370; see also State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986), cert denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). The determination of relevancy and materiality of a photograph is left to the sound discretion of the trial judge. Kelley, 319 S.C. at 173, 460 S.E.2d at 370.

Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Under Rule 403, SCRE, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted).

***Relevant Facts***

At trial the state called Caleb Carroll, an investigator with the Anderson County Sheriff's Office, who was one of the first officer to respond to the bridge scene the night of the incident. R. 91, ll. 10-15; R. 93, ll. 13-17. When Carroll arrived on scene he was flagged down by an individual and pointed to the side of the road, past a guard rail, where Fallous was located laying in the wood line against a tree. R. 93, ll. 19-24. Fallous was alive when officers initially arrived on scene. As they approached Fallous he rolled towards them and a handgun was observed in his right hand. R. 96, ll. 11-14. Fallous was given commands by the officers to drop the gun and he let it fall out of his hand. R. 96, ll. 17-20. Carroll and another responding officer approached Fallous, attempted to locate his wound and asked him who had shot him, to which Fallous replied "Stephen." R.99-100. Carroll asked, "Stephen who?" and heard Fallous say either "Parten or Barton." R. 100, ll. 24-25.

Shortly after officers spoked with Fallous he lost consciousness and stopped breathing. R. 101, ll. 3-7. Carroll and another officer grabbed Fallous by his wrist and ankles and moved him to the road to perform CPR. R. 101, ll. 10-15. The officers continued performing CPR until EMS arrived on scene and took over. R. 102, ll. 8-25. Fallous died on scene. The state moved to admit a photograph of Fallous, deceased, laying spread eagle on the bridge. R. 17976, ll. 15-16. His hands were in paper bags, his shirt was cut open, his pants were partly down and there was blood coming from his right side. See State's Ex. 7E, on file with this Court.

Counsel Lucas objected to the photograph and asked to approach to place the objection on the record, outside the hearing of the jury. R. 97, ll. 17-19. A bench conference was held off the record. R. 97, ll. 22-25. After the bench conference the court admitted the photograph ruling that its probative value outweighed its "probability of inflaming the passions of the jury." R. 98,

ll. 7-10. The court overruled the objection to the photograph on "403 grounds" and that it was gruesome and intended to inflame the passions of the jury for the record. R. 97 l. 24-R. 98, l. 6.

***Discussion***

The photograph of Fallous, splayed out on the road, was unduly prejudicial and served no other purpose but to inflame the passions of the jury, particularly considering Appellant was asserting self-defense. Unlike the photographs admitted in State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) the photograph of Fallous was not relevant to establish the crime scene or show how the victim was found. In Kelley, the Supreme Court ruled that the photographs were properly admitted to establish the crime scene, establish malice, and corroborate testimony of the witnesses.

Here, by the officer's own testimony, Fallous was moved from the wood line where he was found onto the bridge so that the officers could perform CPR. Fallous was not found laying on his back, hands in paper bags, with his shirt cut open. He was found slumped against a tree with a gun in his hand. The photograph that was entered served none of the purposes relied upon in Kelley to render the admission proper.

The photograph of Fallous on the bridge, after law enforcement had moved him, after EMS had worked on him, and after law enforcement had secured his hands for evidence testing, did not show Fallous in substantially the same condition as the Appellant left him. See State v. Rosemond, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (photographs taken at the crime scene, showing victims in substantially the same condition as defendant left them and which corroborated the pathologist's testimony were admissible to the show the circumstances of the crime and defendant's character). Additionally, the photograph of Fallous did not corroborate the pathologist's testimony and was not relied upon by him during his testimony.

Considering the likely fact that the average jury does not have occasion to see photographs of dead bodies that have been manipulated by law enforcement on a regular basis, it would follow that being exposed to such a photograph would inflame their passion for the victim. Appellant was asserting that he acted in self-defense and the state sought to garner sympathy from the jury by inflaming their passion with the photograph. The admission of the photograph violated Rule 403, SCRE.

Unfortunately, the trial court failed to perform the *on the record* balancing test that is required in admitting or denying evidence under Rule 403, SCRE. The Supreme Court has held that failure of the trial court to conduct an on-the-record Rule 403 balancing test was error. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). In Spears a prior bad act of the defendant was admitted by the state under Rule 404(b), SCRE. In ruling on the admissibility, the trial court failed to conduct the requisite Rule 403, SCRE prejudice analysis. This Court held that this error was not harmless and required a remand to the trial court to conduct the proper analysis.

Similarly, in Hamrick v. State, 426 S.C. 638, 651, 828 S.E.2d 596, 602 (2019), the trial court's failure to conduct a full relevancy inquiry and the requisite Rule 403 balancing test was held improper. Hamrick attempted to offer a videotape re-creating the accident that led to his criminal charges. Id. The trial court failed to determine the relevancy of the evidence and only expressed concerns about the propriety of admitting the videotape. The court declined to allow the videotape into evidence ruling, in part, that it could mislead the jury. Id. The Supreme Court held that "if the trial court was concerned the video would mislead the jury, it was required to conduct an on-the-record Rule 403 analysis." While the Supreme Court overturned Hamrick's conviction on other grounds, it admonished the trial court to conduct the balancing test and analyze objections *under the proper legal framework*. Id. at 652.

Appellant finds himself similarly situated to the defendants in Spears and Hamrick. Appellant sought to bar irrelevant, prejudicial evidence from going before the jury and was ruled against without any specific findings on the record as to why the photograph was relevant or what the prejudicial effect versus the probative value of the photograph was in this case. Further the succinct ruling and brief mention of Rule 403, SCRE was not a "compressed Rule 403 analysis" with "some indicia of [the trial court's] consideration." State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002). The record merely reflects that the court thought that the photographs "probative value outweighs its probability of inflaming the passions of the jury." R. 98, ll. 7-10. There is nothing in the record, either explicitly or impliedly, that indicated the rationale for this ruling. This failure on the part of the trial judge constituted error. See Spears, *supra.*

## **CONCLUSION**

By reason of the foregoing arguments, Appellant's conviction should be reversed, and this case remanded to the Anderson County Court of General Sessions for a new trial.

s/Jessica M. Saxon___________
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of June, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 8, 2020

s/Jessica M. Saxon________

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