STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Gary E. Clary, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY DUBOSE TERRY,

APPELLANT.

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

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2.

Whether the judge erred by ordering disclosure of appellant's Charter Rivers Behavioral Health Hospital records to the solicitor, since these records were confidential by statute, by this Court's precedents, and were effectively used by the state as evidence to have appellant executed?

3.

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Whether the judge erred by admitting a gruesome photograph of the victim, State's Exhibit #55, since it was calculated to inflame the jury, and its probative value was substantially outweighed by its prejudicial effect?

STATEMENT OF THE CASE

Appellant Gary Dubose Terry was indicted at the July 10, 1995, term of the Lexington County grand jury for the offenses of murder, burglary in the first degree, criminal sexual conduct in the first degree, and malicious injury to a telephone system. R. p. 2197. His case came on for trial on September 15, 1997, before the Honorable Gary E. Clary, and a jury.

Elizabeth C. Fullwood and I. McDuffie Stone represented appellant. The prosecuting solicitor was Francis A. Humphries, Jr. On September 18, 1997, the jury found appellant guilty on each count. R. 1588, ll. 15-25.

The penalty stage of the trial convened at 6:00 p.m. on September 19, 1997. R. 1602, ll. 5-6. At the conclusion of the penalty stage, on September 21, 1997, the jury recommended a death sentence. R. 2124, ll. 4-9.

Judge Clary then sentenced appellant to death for murder, life imprisonment for burglary in the first degree, thirty years imprisonment for criminal sexual conduct in the first degree, and ten years imprisonment for malicious injury to a telephone system. R. 2128, l. 19 - 2130, l. 13.

This appeal follows.

1.

The judge denied appellant's Fourteenth Amendment due process right to present a complete defense by ruling his statement against penal interest was not admissible. Appellant was unavailable since he exercised his Fifth Amendment right against self-incrimination, and his statement was admissible pursuant to Rule 804(3), SCRE. The judge erred by reasoning appellant had to waive his right against self-incrimination in order for his confession to be admitted.

Introduction

Deputy Edward Rivers was dispatched to the victim's home on Buckeye Drive in Lexington on May 31, 1994. R. 1284, l. 22 - 1285, l. 21. The victim's daughter, Samantha Jackson, had become concerned when her mother did not answer her telephone. She went to her mother's house, and found her dead inside that morning. She called the police. R. 1285, l. 18 - 1287, l. 10.

Jackson told Deputy Rivers that she found the carport door open. In addition, one of the "window panes had been busted out." Jackson "found her mother lying on the floor." R. 1287, ll. 18-23. Deputy Charles Cato testified the victim's phone wires had been severed. R. 1331, ll. 11-14.

Appellant was once the victim's neighbor. He also knew Samantha Jackson.

Relevant facts

Prior to trial, defense counsel moved to suppress appellant's January 17, 1995, and March 24, 1995 statements to the police. R. 1139, ll. 11-14. Appellant was arrested on March 24, 1995, and he admitted in a statement given to Investigator Scottie Frier that he

killed the victim. Appellant told the police that he hit the victim with a bat-like object. Appellant acknowledged he had "a bad temper," and beat the victim to death in a rage, after being assaulted by her.

In his March 24, 1995, confession appellant elaborated that he came to his former neighbor's home, and that they had sex in her bedroom. When appellant went to leave immediately afterwards, the victim became angry and assaulted him. Enraged, appellant struck her back with some available object. R. p. 2196.

Investigator Scottie Frier testified in camera that appellant became a suspect in "the homicide of Uria Jackson." R. 1143, ll. 8-17. On January 17, 1995, Frier traveled to appellant's residence in Winnsboro. R. 1144, l. 23 - 1145, l. 13. Frier testified appellant cooperated with the police by giving a statement, blood, hair, and pubic hair samples. R. 1145, l. 14 - 1150, l. 23.

Appellant told Frier he was living with his girlfriend, Dianne Gibson, in Ballentine at the time the victim was killed. At one point in the past, the couple had lived across the street from the victim. In fact, Dianne was the best friend of the victim's daughter. The victim's daughter introduced Dianne to appellant. R. 1529, ll. 6-15.

Appellant acknowledged that he returned to Buckeye Drive, where the victim lived, with Dianne the weekend of the homicide. However, he denied ever being alone with the victim. R. 1150, ll. 12-23.

Frier testified that appellant was arrested on May 24, 1995, for the victim's murder. R. 1156, ll. 4-17. Appellant was given Miranda[1] warnings and interrogated. R. 1156, l. 22 - 1157, l. 10. Frier opined appellant was "very coherent and he seemed to understand

everything we discussed." R. 1168, l. 16 - 1169, l. 24. The interrogation was videotaped, and then appellant's statement was reduced to writing. R. 1158, l. 19 - 1159, l. 24; 2194-2196.

Appellant offered the testimony of his wife. Mrs. Terry said that appellant was ill at the time he gave Frier the March 24, 1995, statement. Lillian Bonds, a teacher of appellant's oldest child, testified she spoke with appellant in the Bi-Lo in Winnsboro that weekend. She said appellant appeared to be sick. R. 1179, l. 23- 1191, l. 4.

Defense counsel then argued that appellant's statement of March 24, 1995, should be suppressed because appellant was too ill to voluntarily waive his rights. R. 1191, l. 20 - 1192, l. 8. Assistant solicitor Humphries argued appellant's testimony that he was sick "[c]learly does not ring absolutely true at least to Investigator Frier. He does recall him being a bit despondent, which is absolutely consistent with one having been arrested for murder." R. 1192, l. 22 - 1193, l. 1.

The judge ruled appellant was given appropriate Miranda warnings, and that his statement of March 24, 1995, was admissible.[2] R. 1193, l. 15 - 1195, l. 17.

The trial begins

After the judge ruled appellant's statement was admissible, defense counsel Stone told the jurors in his opening statement: "Ladies and gentlemen, Gary Terry over here told the police he did it. He told the police that he had sexual intercourse with Uria Jackson. He told the police that he killed her, okay. **It's called a confession and he made one."** R. 1281, ll. 16-20. (emphasis added).

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

The state then called Scottie Frier to the stand. R. 1372, ll. 10-11. Assistant solicitor Humphries informed the court that the state had now decided **not** to introduce appellant's statement. R. 1374, l. 19 - 1375, l. 1. He argued the state would prove appellant's guilt without his statement.[3] R. 1373, l. 7 - 1375, l. 1. Humphries told the judge:

> Now, that was the statement, Your Honor, they wished not to publish. Perhaps, Your Honor needs to review the contents of that statement in order to rule on this issue.

R. 1375, ll. 6-17.

Humphries said appellant's statement concerned him "as to aggravating circumstances and actually attempts to move the charge of murder to voluntary manslaughter and no criminal sexual conduct or burglary." R. 1375, ll. 10-15.

Defense counsel argued appellant's statement was admissible under Rule 804(B)(3) "as a statement against interest. Specifically against his penal interest." Defense counsel also argued the statement should be allowed because appellant had the right to present a complete defense under the Fourteenth Amendment, Chambers v. Mississippi and Green v. Georgia.[4] Counsel argued:

> I'd point out to the court the court has already ruled that that statement was voluntarily made. It was made after a knowing and intelligent waiver of Fifth Amendment rights and I just point out to the court that it was also made in response to police interrogation. I certainly think that that statement contains sufficient indicia of reliability to take it outside of the hearsay exception and I think the court would certainly have the discretion, if it found his statement to be

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[3] The state would later introduce evidence that appellant's fingerprint was matched to one found on telephone box that had been damaged. R. 1430, l. 11 - 1437, l. 23. The state also presented testimony that appellant's DNA matched that found on the victim. R. 1497, l. 23 - 1498, l. 7.

[4] Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973); Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150 (1979).

> reliable, to allow us to put it into evidence under the circumstances of this case.

R. 1379, ll. 1-11.

After a further colloquy about whether the statement was admissible under Rule 804(B)(3), SCRE, the judge stated he would dismiss the jury for the evening, and ponder the admissibility of appellant's statement. R. 1380, l. 3 - 1382, l. 14.

The following morning, the judge noted that the state did not intend to offer appellant's statement, and that the defense argued it was admissible under Rule 804(B)(3), SCRE, because appellant was unavailable, since he was exercising his Fifth Amendment right not to take the stand. R. 1386, ll. 5-19. The judge then ruled, "I think that the fact that a defendant **has a right and invokes a right not to testify does not allow him to introduce a statement** that the state does not put in in its case-in-chief in order to get around the issue of him not taking the stand. So as a result of that, that statement will not come in on cross-examination [sic]." R. 1387, ll. 5-10. (emphasis added).

Defense counsel then asked if it could "elicit the fact that Mr. Terry made a statement? Not the contents, but the fact that he did, in fact, make a statement." R. 1387, ll. 16-20. Humphries argued, "I think that question would be contrary to your ruling." R. 1387, ll. 23-24. The judge then ruled, "There will be no mention of the statement." R. 1388, ll. 6-17.

Appellant's statement the jury was not allowed to hear

Appellant's March 24, 1995, statement revealed that he went to his former neighbor's house, and knocked on the door. When there was no answer, appellant told the

police that he entered the house. He met the victim inside. They had consensual sex. However, the victim became angry when appellant decided to leave immediately afterwards.

Appellant told the police the victim "grabbed me by the hair. I turned around and swung to get her off of me. I think I hit her and she went down to her knee." R. p. 2195. Appellant said when the victim grabbed him again, "I then lost my temper. I swung back at her again. I then got something in my hand. It was just there in the hall. She could have brought it with her. I started hitting her." Appellant said he did not remember what object he used to beat the victim, or having pulling her phone wires afterwards. R. p. 2196.

Other evidence

Samantha Jackson testified appellant was dating her best friend, Diane Gibson, in 1986-1987. R. 1529, ll. 6-15. Jackson said that appellant lived with Diane across the street from her mother's house at some time prior to the homicide. R. 1529, ll. 20-23.

Jackson recalled that her mother kept various items, including a pool cue and sticks near her bed for protection. R. 1534, ll. 5-9. Jackson said while looking through the house following her mother's death, she was unable to locate the bottom half of the pool cue. R. 1535, ll. 10-13.

The jury was charged on the law of murder, but not voluntary manslaughter. R. 1562, l. 21 - 1584, l. 13.

Discussion

The state argued that appellant's confession was voluntarily tendered and admissible. The judge ruled with the state that the confession was admissible. Defense counsel then told the jury in his opening statement that appellant had confessed.

The assistant solicitor notified the judge prior to Investigator Frier's testimony that the state had now decided it would not introduce the statement. It was apparent once defense counsel told the jurors appellant had confessed, that the solicitor did not want the details of that confession to be heard by the jury. Clearly, the solicitor knew the admission of appellant's statement wherein he said the victim grabbed him by the hair before he retaliated would entitle appellant to a voluntary manslaughter instruction. See State v. Gallman, 79 S.C. 229, 240, 60 S.E. 682, 687 (1908); State v. Petit, 144 S.C. 452, 472, 142 S.E. 725, 733 (1928).

The solicitor admitted the appellant's confession made voluntary manslaughter an issue. The solicitor also was worried about the effect appellant's confession could have on his need to prove an aggravating circumstance. However, those aggravating circumstances were not relevant during the guilt stage of the trial. Appellant was entitled to a fair determination of his criminal culpability during the guilt stage without regard to the penalty stage. In fact, each potential juror had to promise during voir dire that he or she would fairly consider the guilt phase evidence without regard to the penalty stage.

Once the solicitor secured his murder conviction, he introduced appellant's March 24, 1995 statement during the penalty stage of the trial. R. 1813, l. 24 - 1816, l. 23. The solicitor was introducing appellant's statement against interest during the penalty stage. He surely was not introducing self-serving hearsay. The practical distinction was that consideration of voluntary manslaughter was then no longer a threat to the state, and the solicitor wanted to the jury to know appellant had confessed to allay any residual doubt.

Rule 804(B)(3) governs when a statement is admissible as a statement against interest. "The following are not excluded by the hearsay rule if the declarant is unavailable

as a witness: 'a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interests, or so far **tended to subject the declarant to** civil or **criminal liability**, or to render invalid a claim by the declarant against another, **that a reasonable person in the declarant's position would not have made the statement unless believing it to be true**. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.'" (emphasis added).

Appellant's invocation of his Fifth Amendment right not to testify made him unavailable within the meaning of Rule 804(B)(3). See, State v. Doctor, 306 S. C. 527, 413 S.E.2d 36, 37 (1992). Appellant's confession of March 24, 1995, was an inculpatory statement because he admitted either murdering the victim or killing her in a heat of passion.

Voluntary manslaughter was punishable by up to thirty years imprisonment. See S. C. Code §16-3-50. Appellant's statement admitting that he killed the victim under these circumstances was clearly inculpatory since it subjected him to extremely serious punishments.

Conversely, in Ross v. State, 268 Ga. 122, 485 S.E.2d 780, 782 (1997), the Court found a defendant's statement was not against penal interest because the defendant characterized the shooting there as **accidental**. In contrast, appellant's statement in this case was an admission he beat the victim to death in anger. Accident or self-defense were not possible options given appellant's confession. He was either guilty of murder or voluntary manslaughter.

The judge ruled appellant could not have his own confession admitted. However, it is **not** the fact that a statement is tendered by a defendant rather than the state at trial that

governs its admissibility under Rule 804(B)(3). It admissibility turns "[o]n the unlikelihood, given the potentially serious consequences to the declarant of his revelation, that he would have admitted the crime were it not true. In short, it was the inherent trustworthiness of the statement itself that [is] crucial to its admission."[5] See, People v. Maerling, 46 N.Y.2nd, 289, 297, 385 N.E.2d 1245, 1249 (1978). [emphasis added].

The solicitor argued that although appellant admitted killing the victim in his statement, he denied committing burglary and criminal sexual conduct. In State v. Wilson, 322 N. C. 117, 367 S.E.2d 589, 598-599 (1988), the North Carolina Supreme Court held the fact that other matters in the statement do not inculpate the defendant does not mean the statement is not "admissible even though they are themselves neutral as to the declarant's interests if they are integral to the larger statement which is against the declarant's interest." See, also, People v. Maerling, supra, 46 N.Y.2nd, 289, 298-299 385 N.E.2d 1245, 1250 (1978).

Further, appellant's confession about the manner in which the victim was killed bore other indicia of reliability. The pathologist, Dr. John B. Carter, testified the victim did not suffer any sexual trauma. R. 1479, ll, 20-23. Dr. Carter also testified the victim had a blood/alcohol level of .05, indicative of some loosening of rational behavior. R. 1482, ll. 1-5.

Moreover, the victim's daughter testified that her mother kept a pool cue in the house that could not later be located. Appellant told the police in his statement, "I don't remember what I did with the object that I used to hit Ms. Jackson. I can't remember what it

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[5] The inherent trustworthiness of the statement suffices in lieu of cross-examination. That is why the hearsay exception applies.

was. I remember that I could hold it in one hand, and it wasn't as big as a baseball bat." R. p. 2196.

The judge's ruling that appellant's statement could not be admitted under Rule 804(B)(3) unless appellant waived his Fifth Amendment right against self-incrimination and testified was unfair, and denied appellant his Fourteenth Amendment right to due process. See State v. Outlaw, 306 S.C. 344, 412 S.E.2d 380 (1991). The ability of the adverse party to cross-examine is irrelevant where evidence is admissible pursuant to Rule 804(B)(3). See State v. Owens, 103 N.M. 121, 703 P.2d 898, 903-904 (1985). The judge's ruling, implicitly, that appellant must waive his Fifth Amendment right against self-incrimination in order to have evidence admitted that was admissible under Rule 804(B)(3), SCRE, without appellant waiving his constitutional rights, denied appellant his right to present a complete defense. The judge's interpretation that Rule 804(B)(3). SCRE, allowed appellant's statement against interest to be used against him, but that he could not introduce it also violated appellant's right to present a complete defense. See, Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973).

The judge allowed the state to manipulate the trial process by successfully excluding an admissible statement it had fought to have admitted prior to trial. It is obvious that after defense counsel acknowledged in opening that appellant had confessed the state did not want to jury to consider evidence it knew was relevant, and admissible as a statement against interest. The state vouched for the fact the confession was voluntarily and intelligently tendered during the suppression hearing. Further, the state later introduced the statement against interest during the penalty stage. R. 1814, ll.1-10.

Denying the jury appellant's admissible statement pursuant to Rule 804(B)(3) during the guilt stage violated the essential demands of fairness. The defense had accepted the judge's ruling that the jury would hear appellant's confession. It sought to prepare the jury during its opening statement. Its reliance on the judge's ruling was cynically exploited by the solicitor. Cf. State v. McWee, 322 S.C. 387, 472 S.E.2d 235, 240 (1996)(Finney, C.J., dissenting); Knox v. Collins, 928 F.2d 657, 662 (5th Cir. 1991); Since the jury was not instructed on voluntary manslaughter because admissible evidence of that lesser-included offense was excluded, appellant should be granted a new trial.

2.

The judge erred by ordering appellant's records from Charter Rivers Behavioral Health Hospital disclosed to the state since these records were confidential under applicable statutes and precedent. The state effectively used statements made for purposes of treatment to Charter Rivers personnel to obtain a death sentence.

Appellant's Charter Rivers Behavioral Hospital Records

On August 22, 1997, the state moved for an order mandating disclosure of appellant's mental health records from Charter Rivers Hospital. R. 2133, l. 1 - 2134, l. 4. The state had learned from "a citizen witness" that appellant was admitted for "some anger management or anger control and a substance abuse problem." R. 2134, ll. 5-11. The solicitor argued that appellant's admission in his confession that he had "a real bad temper" when he explained how he continued to strike the victim made disclosure of these records relevant. R. 2135, l. 20 - 2136, l. 4.

Defense counsel argued the Charter Rivers Behavioral Health records were privileged pursuant to S. C. Code §19-11-95. R. 2136, ll. 10-17. Defense counsel explained that this statute "[s]ays that mental health case providers can't reveal confidences of patients that are treated for mental illnesses or emotional conditions." R. 2136, ll. 13-17. Defense counsel argued the state wanted to "go on a fishing expedition...and what they're trying to do is circumvent Rule 5 and obtain material that wasn't discoverable under the rules of criminal procedure." R. 2137, ll. 10-18.

Defense counsel noted that this Court held in State v. Parker [6] that the "defense wasn't entitled to a witness' psychiatric records. The witnesses state hospital records." R. 2137, ll. 19-25.

Counsel also stressed that in McMakin v. Bruce Hospital System[7] this Court held that it was not sufficient that the party seeking disclosure wanted to obtain information **helpful** to it. "That's not enough. That's not good cause enough to grant disclosure. Its got to be the **only means** of obtaining relevant evidence."[8] R. 2138, l. 1-11. (emphasis added). Counsel argued the state had other means of obtaining this evidence, and noted the assistant solicitor had already talked to "citizen witnesses." R. 2138, ll. 12-20.

Defense counsel emphasized that S. C. Code §16-3-20, the death penalty statute, mandated that the statute was not to be construed "to let in evidence obtained in violation of the constitution of the state or federal constitution or the applicable laws of either." R. 2139, ll. 1-9.

The judge then ruled, "[w]hile I understand the argument that is being made by the defense, I feel that this information, given the nature of this case, is relevant, that it is probative, and that it is discoverable." R. 2141, ll. 9-12.

The trial judge issued an order that same day requiring the medical records director at Charter Rivers Behavioral Health Hospital to release to the Lexington County solicitor's office "any and all records related to any admission, treatment, and-or diagnosis of Gary Terry..." R. p. 2145.

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[6] 294 S.C. 465, 366 S.E.2d 10 (1988).
[7] 318 S.C. 15, 455 S.E.2d 693 (1995).

[8] McMakin concerned an admission to Bruce Hall Hospital for prescription drugs, and confidentiality of records pursuant to S.C. Code §44-22-100 (Supp.1993).

The state's use of the Charter Rivers records during the penalty stage

During the penalty stage of the trial, appellant's wife, Lou Ann Terry, testified about her life with appellant. Lou Ann was a 1987 graduate of the University of South Carolina, and worked for various school districts in this state. R. 1925, ll. 15-25. She had four children with appellant. Mrs. Terry said appellant loved the children, although he had not always "been there for them." R. 1926, ll. 4-24.

Mrs. Terry explained that appellant left her to live with Diane Gibson. Later, however, she and appellant "attempted to put our marriage back together." R. 1929, ll.5-24.

On cross-examination of Mrs. Terry, the solicitor asked her the following:

Q. Do you recall providing to the folks at Charter Rivers a psychosocial summary of Gary Dubose Terry?

A. I recall that Gary and I went in the evening after he was released from Lexington County and were asked numerous questions together.

Q. Okay. He was in your presence when the questions were asked---

A. Yes.

Q. ---is that correct?

A. Yes.

Q. You stated even at that time you knew he ran with other women?

A. Yes.

Q. That he did use drugs?

A. Yes. That's why he was there.

R. 1936, l. 16 - 1937, l. 5.

Mrs. Terry admitted that they told the Charter Rivers interviewer that appellant's admission "was conditional. I asked the judge if she would reduce his bond to an affordable amount so that I could get him treatment and -- because I knew he would not get it within the prison system." R. 1937, ll. 12-22.

Appellant's wife also acknowledged appellant did not "go to any follow-up meetings. He still denied that he had a problem as many addicts do until they hit rock bottom." R. 1939, ll. 10-16. Mrs. Terry was also forced to admit that the Charter Rivers professionals were told appellant had a violent temper, was spoiled, immature, dependent, and did not consider himself an addict or an alcoholic.[9] R. 1938, ll. 11-23.

DISCUSSION

S.C. Code §19-11-95 is one of the confidentiality statutes governing Charter Rivers Behavioral Health Hospital. Appellant was admitted to Charter Rivers for counseling regarding his emotional problems, and his substance abuse. Appellant was therefore protected by the confidentiality provisions of S. C. Code §19-11-95(A)(2). That statute mandates a duty of confidentiality from the hospital to all patients who are admitted for treatment of an emotional or mental problem.

In State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988), this Court held that a criminal defendant was not entitled to access to a witness' psychiatric records, even though Parker claimed that witness actually committed the murder. This Court noted that S. C.

Code §44-23-1090 provided when disclosure of Department of Mental Health records could legally occur. This Court held that none of the six statutory exceptions applied to Parker's defense in his murder trial. State v. Parker, 294 S.C. 465-468, 366 S.E.2d 10, 11.

Here, similarly, none of the seven exceptions contained in S. C. Code §19-11-95(C)(1)-(7) allowed Charter Rivers to disclose appellant's confidences.

In McMakin v. Bruce Hospital System, 318 S.C. 15, 455 S.E.2d 693 (1995), also cited by defense counsel to the trial judge, this Court considered the case of a patient admitted to Bruce Hall Hospital for treatment of her addiction to prescription drugs. This Court held that a party seeking disclosure of these records must show they are necessary to the conduct of the proceedings. See S.C. Code §44-22-100 (Supp 1993). This Court held "necessity does not hinge on whether the information is shown to be helpful to the party seeking disclosure; rather the inquiry is whether disclosure is the only means of obtaining information relevant to the proceeding before the court." McMakin v. Bruce Hospital System, 318 S.C. at 19, 455 S.E.2d at 685.

This Court further held in McMakin that the only information disclosed was the identification of the patients to the incident in question "**and not their medical records or any confidential communication.**"[10] McMakin v. Bruce Hospital System, 318 S.C. at 20, 455 S.E.2d at 696. (emphasis added). Here, the solicitor sought appellant's medical records and his confidential communications with Charter Rivers professionals.

In South Carolina State Board of Medical Examiners v. Hedgepath, 325 S.C. 166, 480 S.E.2d 724, 726 (1997), this Court emphasized that the terms "privilege" and

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[9] See, Charter Rivers Records, R. p. 2153; 2155-2171; 2183.

[10] Further, this Court noted the parties already knew the identification of the patients.

"confidences" are not synonymous. However, this Court held that regardless of whether a communication is privileged by statute, or confidential by reason of ethical rules, a professional still has a duty to maintain his patient's confidences.

This Court noted that the Hippocratic Oath, the ethical guide for physicians, states: "All that may come to my knowledge in the exercise of my profession...which ought not to be spread abroad, I will keep secret and will never reveal.'" This Court also cited the Oath subscribed to by all persons admitted to the South Carolina Bar: " I will respect the confidences and preserve inviolate the secrets of my client..." South Carolina State Board of Medical Examiners v. Hedgepath 480 S.E.2d at 726, n.2; See also, McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (1997).

The state has an interest in seeing that people with emotional, mental, and substance abuse problems seek treatment. That treatment can only be effective where patients know that what they reveal to treatment professionals will remain confidential, and will not be used against them in the future. The General Assembly passed these confidentiality statutes to ensure that persons seeking treatment for emotional and substance abuse problems do so confident their secrets will not be disclosed to harm them.

In Williams v. Commonwealth of Kentucky, 829 S.W.2d 942 (Ct. App. 1992), the Court held that a defendant was not entitled to the victim's privileged psychiatric records, even though the victim was dead when disclosure was sought. The Court stressed that the confidential relationship prohibited disclosure even after the patient's death. Thus, the duty of confidentiality does not just exist for the protection of the individual patient, it

exists so the public will remain confident that their privileged disclosures will never be revealed.

In this case, State v. Parker, McMakin v. Bruce Hospital Systems, and the applicable statutes cited above mandate that disclosures made to Charter Rivers professionals remain confidential. As seen, the solicitor effectively destroyed appellant character through the cross-examination of his wife with his use of the Charter Rivers Behavior Health records.

Charter Rivers records revealed confidential disclosures made for purpose of treating appellant's problems. These records stated appellant had a violent temper, was spoiled, immature, and dependent. They also noted appellant did not consider himself an addict or an alcoholic. R. p. 2153; 2155-2171.

Appellant was treated at Charter Rivers for emotional and substance abuse problems. Statutory confidentiality under these circumstances was rendered meaningless when the solicitor acquired appellant's privileged records to obtain a death sentence against him. Finally, appellant respectfully submits that it would be an odd result to hold that a criminal defendant charged with murder could **not** obtain the psychological records of a witness suspected of committing the murder to aid his defense, and then hold that the state **could** acquire a defendant's confidential treatment records to further the cause of sentencing him to death. See State v. Parker, supra. Appellant should be granted a new sentencing hearing.

3.

The judge improperly limited the scope of appellant's cross-examination by refusing to allow defense counsel to elicit the fact appellant gave the police a statement. The judge's ruling left the jury with the erroneous impression appellant refused to cooperate with the police once he was arrested.

As seen, the judge ruled appellant's statement could not be admitted as a statement against interest pursuant to Rule 804(B)(3), SCRE. Defense counsel then requested permission to elicit on cross-examination the mere fact that appellant made a statement. R. 1387, ll. 16-20.

The judge ruled that because the state did not intend to introduce appellant's statement into evidence, "there will be no mention of the statement." R. 1388, l. 6 - 1389, l. 3. Defense counsel against repeated her position that eliciting the fact appellant gave the police a statement was not hearsay. R. 1389, ll. 10-16.

Discussion

In State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991), this Court held the judge committed reversible error by refusing to allow defense counsel to elicit from an adverse witness the maximum sentence for trafficking in cocaine. The witness in Brown reached an agreement with the solicitor wherein she would face a maximum sentence of seven and one-half years, where the potential penalty was a minimum mandatory sentence of twenty-five years imprisonment. This Court held this cross-examination was permissible because it concerned the witness' potential bias.

Here, similarly, appellant was greatly prejudiced by the judge's refusal to allow him to elicit relevant evidence during cross-examination. Defense counsel, in his opening statement, told the jury appellant had given the police a confession.

Surely the jury was mystified about why it never heard any evidence about that statement. The judge's refusal to allow the defense to cross-examine Investigator Frier about the simple fact that appellant gave a statement (without going into its context) left the jury with the erroneous belief that appellant did not give a statement, that he did not cooperate. The jurors were not aware of the extent of the "sucker punching" that the assistant solicitor was engaging in outside of their presence. The judge's refusal to allow appellant to elicit on cross-examination that he gave a statement unfairly prejudiced appellant, and was reversible error. See, State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983).

Appellant was entitled to ask the witness whether he gave the police a statement because this matter was relevant to the case. State v. Howard, 35 S.C. 197, 14 S.E. 481 (1892). The confrontation clause guarantees a defendant the opportunity to meaningful cross-examination of a witness. See, Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974). See, also, Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991); Collins, South Carolina Evidence, §4.6 at p. 59 (1995 ed.).

The fact appellant gave the police a statement was relevant, especially where defense counsel told the jury in his opening statement that appellant, indeed, had given the police a statement. Defense counsel told the jury this fact in reliance upon the state's obvious intention to introduce the statement. It was fundamentally unfair to not allow appellant to prove that he gave a statement on cross-examination. Davis v. Alaska, supra. Appellant should be granted a new trial.

4.

The photograph of the victim's beaten face was revolting. It was also gratuitous and inflammatory. The judge erred by admitting this photograph since its probative value was substantially outweighed by its prejudicial effect.

Relevant Facts

Dr. John Carter, the pathologist, described the victim's injuries in great detail during the penalty stage. R. 1838, l. 23 - 1848, l. 1. The close-up photo of the victim's face was sickening and inflammatory. The photograph, state's exhibit 55, is now on file with this Court. Defense counsel correctly argued it was not only inflammatory, but also that any probative value it had was outweighed by its prejudicial effect. R. 1796, l. 13 - 1799, l. 23.

Discussion

Photographs should be excluded if they are calculated to arouse the sympathies or prejudices of the jury or where they are irrelevant or unnecessary to substantiate facts. State v. Todd, 290 S. C. 212, 349 S.E.2d 339 (1996); State v. Thorne, 239 S.C. 164, 121 S.E.2d 623 (1961). State's Exhibit #55 was clearly an inflammatory photograph. The pathologist testified at length about the victim's injuries, and the photograph was gratuitous. Thus, the prejudice created by the photograph outweighed any evidentiary value it had. See State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986).

Even if relevant given the pathologist's detailed testimony, this photograph should have been excluded because its probative value was substantially outweighed by its danger of unfair prejudice. See, Rule 403, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d

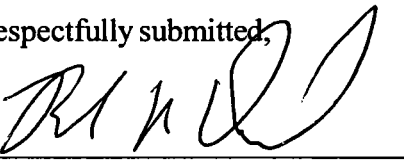
146, 149 (1991). This gruesome and inflammatory photograph impermissibly furthered the likelihood of a death sentence based upon caprice and emotion rather than reason. See, Gardner v. Florida, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204 (1977); Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1976).

Finally, this Court recently held in State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998), that a close-up photograph of the victim's phase was admissible. Gardner was a physical torture case, and the jury had to determine whether that aggravating circumstance existed. Here, there was no allegation appellant tortured the victim, and the gruesome photographs should not have been admitted. Appellant should be granted a new sentencing hearing.

CONCLUSION

By reason of arguments 1 and 3, appellant's conviction should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial. In the alternative, by reason of arguments 2 and 4, appellant should be granted a new sentencing hearing.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

This 4th day of May, 1999.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR.

ROBERT M. DUDEK
Assistant Appellate Defender

1122 Lady Street, Suite 940
Columbia, SC 29201
(803) 734-1330

Attorney for Appellant.

May 4, 1999

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Gary E. Clary, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY DUBOSE TERRY,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, this 4th day of May, 1999.

Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 4th day of May, 1999.

Sandra R. Wise (L.S.)
Notary Public for South Carolina
My Commission Expires: February 3, 2005 .