

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Sep 08 2020

SC Court of Appeals

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JORDAN MARIE HODGE,

APPELLANT

APPELLATE CASE NO 2019-001745

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred by admitting a gruesome and graphic photograph of skeletal remains in a murder case, where the prejudicial effect substantially outweighed the minor probative value, and where the photograph was designed to inflame the passion of the jury?

II. Whether the trial court erred in admitting multiple autopsy photographs that depicted close-up views of skeletal remains, where the prejudicial effect substantially outweighed any probative value?

STATEMENT OF THE CASE

Appellant and her co-defendant and ex-boyfriend, Kenneth Carlisle, were indicted by an Horry County grand jury in November 2017 for two counts of murder. R. __ (Indictments). They proceeded to trial before the Honorable D. Craig Brown on September 30, 2019. Tr. 1. Ralph J. Wilson, Sr. represented Appellant; Martin D. Spratlin represented Carlisle. George H. DeBusk, Jr. and Seth A. Oskin appeared on behalf of the state. After a four-day trial, the jury found Appellant and Carlisle guilty as indicted. Tr. 763, ll. 12 – 25. Both defendants received life sentences. Tr. 778, l. 22 – 779, l. 1.

This brief follows.

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). “A trial court has particularly wide discretion in ruling on Rule 403 objections.” State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct.App.2012); see also State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) (“A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances.” (citation omitted)). In exercising its discretion on a Rule 403 objection to the admissibility of autopsy photographs, the trial court “must balance the [unfair prejudice] of graphic photos against their probative value.” Dial, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted).

ARGUMENT

I. The trial court erred by admitting a gruesome and graphic photograph of skeletal remains in a murder case, where the prejudicial effect substantially outweighed the minor probative value, and where the photograph was designed to inflame the passion of the jury.

Relevant facts

Appellant was on trial following the death of her grandparents. On July 13, 2017, her family filed a missing persons report for Linda McAllister, Appellant's grandmother. Tr. 169, ll. 17 – 19; Tr. 173, ll. 19 – 21. Shell casings were discovered in McAllister's truck which was in the possession of Appellant and her co-defendant. Tr. 178, l. 1 – 180, l. 5. The bodies were found in Horry County on July 15, 2017. Tr. 252, l. 5. – 254, l. 5. John Caulder, a former officer with the Horry County Police Department, testified that the bodies were “[h]ighly decomposed” and were “mostly skeleton.” Tr. 369, ll. 9 – 16. At trial the prosecution sought to admit state's exhibit 50, a graphic depiction of the skeletal remains. Tr. 369, l. 17 – 374, l. 11.

Defense counsel objected:

My objection, Your Honor, is [] that it, it shows a skeletal, a partial skeletal remain, and, and I think it's, it's graphic, and I think that if it were in black and white it wouldn't be as prejudicial, but I find it **extremely prejudicial** especially because it's in color, and it's more of a close-up than, than just a picture which would show where the, where the skeletal remains were. So I think that there is certainly a less, I won't say intrusive, but a way to, to present that same evidence without the **extensive prejudicial effect** that comes from the way it, it is in that photograph.

Tr. 371, ll. 6 – 15 (emphasis added). Counsel for Carlisle joined in the objection and cited to State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). Tr. 371, l. 17 – 372, l. 2.

The state averred that probative value existed in the photograph:

We feel that there is probative value in State's 50 that is not in the other two photos. Those two photos show the bodies as they were found as they were partially covered. It's the only photo that shows them in the position they were found. It shows their proximity to each other, shows their position when they were found that, that can be argued as to how they were carried there, Your Honor. That's not shown in the other photos.

Tr. 372, ll. 4 – 11. The state posited that the photographs showed the position of the bodies such that they would be able to argue how they were carried there. Tr. 372, ll. 19 – 24.

The trial court, citing Collins, ruled that the photograph was relevant, corroborated testimony, and was introduced to show the unaltered condition of the victims. Tr. 372, l. 25 – 374, l. 11. No balancing test was conducted, and there was no mention of prejudice.

The prosecution questioned Caulder about the photograph. Tr. 376, l. 18 – 377, l. 20. Regarding state's exhibit 50 in particular, he indicated that the photograph depicted the bodies after brush had been removed. Id. He also testified that there was a strong smell at the scene where the bodies were discovered. Tr. 377, ll. 11 – 13.

Discussion

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).

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353

(1996). “If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.” Id. “When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008).

In State v. Collins, the South Carolina Supreme Court considered the issue of seven graphic photographs in a case involving dog bites to a minor. 409 S.C. 524, 763 S.E.2d 22 (2014). The defendant in that case was charged with being the owner of a dangerous animal and involuntary manslaughter. The Court explored the elements of both offenses and noted what the state was required to prove. Id. at 530-31, 763 S.E.2d at 25-6. The state sought to admit a group of photographs taken prior to the autopsy “[i]n order to support its assertions about the dangerous propensities of the dogs, the manner and extent of the attack, and Collins’s criminal negligence.” Id. at 532, 763 S.E.2d at 27.

The Court concluded that the trial court did not abuse its discretion in admitting the pre-autopsy photographs. Id. at 534, 763 S.E.2d at 28. Holding that “[t]he evidence was highly probative, corroborative, and material in establishing the elements of the offenses charged,” the Court held that the probative value of the photographs outweighed the potential prejudice. Undertaking a discussion in the “substantial” requirement from Rule 403, SCRE, the Court held:

Where the State had the burden of proving the elements of the offenses charged and there were no eyewitnesses to the incident resulting in the victim’s death, the photos here provided concrete evidence as to that transpired on that fateful day.

Id. at 536, 763 S.E.2d at 28. The Court reasoned that “[s]ince there was no one else present at the time of the event, the photos aided the jury in evaluating the testimony offered by both the State and the defendant, especially as to determining the dangerous propensities of the dogs and whether or not Collins’s conduct was criminally reckless.” Id. at 536, 763 S.E.2d at 29.

That rationale is inapplicable in the matter at hand. There was no need to show any dangerous propensities or whether the actions of either defendant were criminally reckless. Murder “is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10. In a murder case, the corpus delicti consists of two elements: the death of a human being and the criminal act of another in causing that death. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). The positioning of the bodies had no bearing on any of the elements of the crime of murder, did not corroborate witness testimony, and did not have any relevance to the alleged murders. There was no contention that human remains had been desecrated; the indictment was for murder.

Both the dissent and concurrence in Collins referenced State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010). In Torres, the state offered several autopsy photographs into evidence during the sentencing phase of a capital murder trial. Id. at 623, 703 S.E.2d at 229. Similar to the explanation in Collins, the prosecution contended that the photographs were properly admitted “because they corroborated witness testimony and were introduced to illustrate the circumstances of the crime and the character of the defendant.” Id. The Court held that the “net effects of the photographs was to show what Torres did to [the victims], which goes straight to the circumstances of the crime. Id. at 624, 703 S.E.2d at 229. Also relevant to this case was this admonition:

Although we affirm the admission of the photographs, we take this opportunity to address an area of growing concern to this Court. The photographs at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. Moreover, the State also sought to introduce evidence in the form of an autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.

Id.

The state's contention that the photograph showed a different perspective from the others is not a sufficient justification for admitting the photograph; the same could be said of any two photographs that are not identical. Further, there was no overwhelming evidence of guilty. Defense counsel noted that only "substantial circumstantial evidence" of what transpired after the deaths occurred. Tr. 771, ll. 3 – 10.

II. The trial court erred in admitting multiple autopsy photographs that depicted close-up views of skeletal remains, where the prejudicial effect substantially outweighed any probative value.

Relevant facts

Dr. Cynthia Schandl, a forensic pathologist at the Medical University of South Carolina, was qualified as an expert witness in her field. Tr. 467, l. 21 – 471, l. 5. She performed the autopsies of both decedents. Tr. 471, l. 25 – 472, l. 2. She declared that a gunshot wound to the head was the cause of death for both individuals. Tr. 481, ll. 6 – 11; Tr. 486, l. 21 – 487, l. 1. Photographs from the autopsies were authenticated by Dr. Schandl and offered by the state, prompting objections by defense counsel. Tr. 477, l. 4 – 22; Tr. 479, ll. 4 – 21; Tr. 482, l. 20 – 483, l. 2; Tr. 484, ll. 9 – 16; Tr. 485, ll. 13 – 18. The photographs were admitted over the objections.

Referencing a sidebar, a discussion regarding the photographs took place on the record with the jury outside the courtroom. Tr. 501, l. 8 – 506, l. 5. Echoing prior objections regarding prejudicial photographs, counsel for Appellant noted that the photographs were "unduly prejudicial" and created substantial prejudice. Tr. 502, ll. 12 – 18.

The trial court again cited Collins, supra, and ruled that the photographs which were admitted were the least prejudicial ones offered. Tr. 504, l. 8 – 506, l. 5. The trial judge went through and discussed what each photograph shows and then remarked that they “show the nature and extent of each of the victim’s injuries and provide evidence as to what happened on the date that these individuals lost their lives.” Id.

Discussion

Rule 403, SCRE provides that, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” “Probative” means “[t]ending to prove or disprove.” *Black’s Law Dictionary* 1323 (9th ed.2009). “Probative value” is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. “[T]he more essential the evidence, the greater its probative value.” United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates. As our supreme court stated in State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010), “[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are ... not *necessary* to substantiate *material* facts or conditions.” 390 S.C. at 623, 703 S.E.2d at 228 (emphasis added). The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case. See State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008) (“When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” (citing State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007))).

The probative value of the photos must be balanced against “the danger of unfair prejudice.” Prejudice that is “unfair” is distinguished from the legitimate impact all evidence has on the outcome of a case. “ ‘Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.’ ” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)). “ ‘All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be [scrutinized under Rule 403].’ ” Id. (quoting United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989)); see also United States v. Mohr, 318 F.3d 613, 619–20 (4th Cir.2003) (“Rule 403 only requires suppression of evidence that results in unfair prejudice—prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion....”).

Photos pose a danger of unfair prejudice when they have “an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (internal quotation marks omitted). Regarding this definition, the Supreme Court of the United States stated: “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574, 587–88 (1997). Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case. See State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (“The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.”).

Eight of the photographs—state’s exhibits 58, 59, 61, 62, 63, 64, 66, and 128—were substantially more prejudicial than probative. Each shows a skull and/or partial skeletal remains. Dr. Schandl’s findings were not in dispute; the cause of death for both decedents was a bullet wound to the head. The photographs were unnecessary to prove anything in dispute; Dr. Schandl’s testimony was sufficient to establish her procedures and the cause of death. The depictions of the decedents’ skulls exceeded what the state was required to prove. Thus, the probative value was low.

On the other hand, the unfair prejudice was remarkably high. The photographs showed human skulls in graphic detail and served to inflame the passions of the jury. Designed to stir an emotional response, the introduction of the photographs provided a visual representation which mirrored Dr. Schandl’s testimony. The photographs were of minor probative value, whereas the prejudicial effect they had on Appellant’s trial was high. The trial court erred in admitting the photographs.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse her convictions and remand for a new trial.

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of September, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter has been served upon opposing counsel this 8th day of September, 2020 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jordan Marie Hodge, #381543, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649.

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT