

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

RECEIVED

Dec 07 2020

SC Court of Appeals

The State,Respondent,

v.

James Heyward,Appellant.

REPLY TO RETURN TO PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant James Heyward hereby replies to the Respondent’s Return to Petition for Rehearing (“Return”). Appellant maintains that this Court overlooked or misapprehended several points and should therefore grant rehearing and reverse Mr. Heyward’s convictions.

ARGUMENT

I. This Court erred in affirming the trial court’s admission of evidence and testimony regarding (a) an out-of-court photograph lineup where the victim did not make a positive identification and (b) the subsequent positive identification made by the victim at trial.

In its Return, Respondent argues that the photograph lineup was not presented in an unduly suggestive manner and that the circumstances surrounding the photographic lineup would not have swayed Granddaughter toward a selection. However, Granddaughter’s age and the

recent trauma she experienced before being presented with the lineup must not be overlooked. As an eight-year old child, Granddaughter was unable to appreciate the nuance and importance of Investigator Clarke's use of the word "if" to suggest that she did not have to choose someone from the lineup. Investigator Clarke asking such a young child to be "brave" and help him, coupled with his request to "see if you can see the bad man," clearly suggested to Granddaughter that she should pick one of the photographs and thereby created an unduly suggestive lineup procedure.

Moreover, Respondent and the Court overlooked or misapprehended Appellant's argument that the overall identification process was unduly suggestive as evidenced by Granddaughter's evolving level of certainty at each stage of the process. Respondent characterizes Granddaughter's identification of Appellant as "confident." However, the only clear indication Granddaughter gave when presented with Appellant's picture in the photograph lineup was that she was *not* confident in her identification. Granddaughter's confidence only evolved after seeing the photograph lineup picture again, along with Appellant in person, at the pre-trial *Neil v. Biggers* hearing (where she merely identified Appellant in the courtroom as being the same person she saw in the photograph lineup) and seeing Appellant again at trial (when she testified that she was sure Appellant was her assailant). As such, the entire identification process was unduly suggestive which inevitably caused her certainty to evolve and increase over time with each subsequent exposure to Appellant.

Respondent argues in the Return that *Foster v. California* is factually inapplicable to Appellant's case and, therefore, this Court's Opinion was correct in failing to address this binding precedent. 394 U.S. 440, 89 S.Ct. 1127 (1969). However, Respondent is in error and this Court should have addressed *Foster v. California*, upon which the majority of Appellant's

argument is based. This case and *Foster v. California* involve almost identical factual circumstances. *Id.* In both cases, the only witness was presented with an initial lineup of alleged perpetrators, the witness expressed doubt about identifying the correct perpetrator in the initial lineup, and only after subsequent exposures to one individual present in the initial lineup, did the witness become “certain” that the one individual who had been repeatedly exposed to the witness committed the crime. *Id.* at 441–42, 89 S. Ct. at 1128. As such, *Foster* is directly applicable to Appellant’s case and should not have been disregarded by this Court. For these reasons, this Court should grant rehearing and reverse Mr. Heyward’s convictions.

II. This Court erred in affirming the trial court’s admission of a fingerprint card obtained from a New Jersey database and testimony based on the New Jersey fingerprint card.

Respondent argues that this Court properly relied upon *State v. Anderson* and South Carolina Rule of Evidence 901(b)(3) in determining the admissibility of the New Jersey fingerprint card. However, the Court and Respondent overlooked the requirements for fingerprint authentication set forth in *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009), in favor of a novel authentication method for fingerprints that is inconsistent with South Carolina law and the requirements set forth in *Anderson*.

Respondent argues that the South Carolina Supreme Court in *Anderson* explicitly acknowledged that expert testimony could be used to authenticate fingerprint cards and is, therefore, acceptable in this case. However, while expert testimony may be used to authenticate fingerprint cards, *Anderson* provides certain requirements to ensure that the expert has sufficient knowledge to authenticate the fingerprint cards. *Id.* at 128, 687 S.E.2d at 39 (“[A]uthentication . . . requires evidence as to *when and by whom* the [fingerprint] card was made and that the prints on the card were in fact those of this defendant.”) (emphasis added by the Court) (internal citations omitted). The State admittedly failed to meet the requirements of *Anderson* because it

failed to establish when and where the New Jersey Fingerprints were taken. *Heyward*, Op. No. 5776, at 41 (“[W]e agree the State failed to establish when and where the N.J. Fingerprints were taken . . .”). Accordingly, this Court overlooked the State’s admitted failure to meet the requirements of *Anderson* when finding that the New Jersey fingerprint card was nevertheless authenticated. This Court’s novel reliance on Rule 901(b)(3) instead is inconsistent with governing South Carolina law and Respondent offers no binding authority to support authentication and admission of fingerprints under Rule 901(b)(3). The trial court erred in holding that the New Jersey fingerprint card was properly authenticated, the error was not harmless, and this Court should grant rehearing and reverse Mr. Heyward’s convictions.

III. This Court erred in finding the trial court’s erroneous allowance of expert opinion testimony about the operational capabilities of the recovered firearm was harmless.

Respondent argues that Appellant failed to demonstrate that he was actually prejudiced by the trial court’s erroneous admission of expert opinion testimony regarding the operational capabilities of the firearm recovered from Appellant’s home. The admission of this testimony was not harmless. The wrongful admission of Investigator Collins’ testimony about the operational capabilities of the firearm allowed the State to hammer yet again on the fact that a gun was found in Appellant’s residence, unduly prejudicing the jury against him. Respondent argues that the State could have hammered on the fact that the recovered gun matched the Granddaughter’s description in closing without the expert testimony. However, the State relied *solely* on this testimony that should never have been admitted in an effort to paint Appellant in a bad light and tie him to the crime scene, clearly prejudicing Appellant. (*See R.* p. 419, lines 6–23.) Because this testimony should never have been admitted and caused Appellant significant prejudice, this Court should grant rehearing and reverse Appellant’s convictions.

IV. This Court erred in affirming the trial court’s allowance of Appellant’s alias “Abdul Muslim” for use in the indictments and at trial.

Respondent argues that Appellant’s alias “Adbul Muslim” was pertinent to both the DNA evidence, as that was the name the DNA evidence was labeled under, and key witness testimony. However, Respondent and the Court overlooked that the DNA from the crime scene matched to a national identification number 220688PA, (R. p. 378, line 2–p. 379, line 9), and the jury also heard testimony that Appellant’s national identification number was 220688PA. (R. p. 255, lines 10–13.) As such, there was no probative value in using Appellant’s alias in connection with this DNA match because the State could have simply used the national identification number instead. Moreover, the State never elicited any testimony that Appellant was known as “Abdul Muslim,” only that he was also known to one witness as “Abdul,” indicating that there was no probative value in the “Muslim” reference at all. (R. p. 321, line 23–p. 322, line 3.)

Respondent also argues that the record is devoid of any evidence or prejudice stemming from the alias due to religious bias. However, trial counsel presented substantial uncontroverted evidence at the pre-trial hearing on Appellant’s motion to strike demonstrating the prejudice associated with the State’s use of Appellant’s “Abdul Muslim” alias. (*See* R. p. 12, line 5–p. 14, line 15.) Moreover, the State contrasted the Islamic connotation of Appellant’s alias with repeated testimony regarding the victim’s Christian beliefs during trial (R. p. 139, lines 13-23; R. 193, Line 17-p.194, line 11; p. 195, line 8-p. 196, line 7; p. 355, line 23). The use of the alias was unnecessary, prejudicial, in violation of Appellant’s rights to due process, and should not have been allowed.

V. This Court erred in affirming the trial court’s admission of gruesome autopsy dissection photographs of the victim’s internal head injuries.

Respondent argues that the gruesome autopsy photographs are admissible to establish malice and corroborate Dr. Durso’s testimony regarding the nature of the victim’s injuries.

However, “[p]hotographs 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. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (emphasis added). Respondent fails to address Appellant’s argument that these gruesome autopsy photographs were not necessary to substantiate malice here or corroborate Dr. Durso’s testimony, as Dr. Durso’s extensive testimony regarding the violent nature of the strangulation and severity of the injuries to Ms. Tollison was sufficient on the issue of malice, rendering the photographs “superfluous.” *See State v. Collins*, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring) (“The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense.”). The photographs were unnecessary and should not have been admitted. Furthermore, the prejudice caused by the admission of these gruesome autopsy photographs outweighed any evidentiary value, and this Court erred in affirming their admission by the trial court.

VI. This Court erred in finding the trial court’s erroneous denial of Appellant’s request to remove his shackles during jury selection was harmless.

Respondent first argues that Appellant cannot rely on the language of the United States Supreme Court in *Holbrook v. Flynn*, 475 U.S. 560, 568–69, 106 S.Ct. 1340, 1345–46 (1986), which states that shackling is “inherently prejudicial,” simply because this language was used by comparison to the facts of the *Holbrook* case. However, this Court noted in its Opinion that in *Deck vs. Missouri*, 544 U.S. 622 (2005), the State of Missouri’s “argument failed to take into account the Supreme Court’s statement in *Holbrook v. Flynn* that shackling is ‘inherently prejudicial.’” *Heyward*, Op. No. 5776, at 50 (citations omitted). In his Petition for Rehearing, Appellant is doing exactly that—urging this Court to take into account the United States Supreme Court’s statement that shackling is inherently prejudicial. Appellant’s due process

rights were violated by the trial court's admitted abuse of discretion in refusing to grant Appellant's request to remove his shackles, and this error is inherently prejudicial to Appellant. This error is, therefore, not harmless.

Respondent next argues that Appellant's restraints were not visible to the jury and that Appellant failed to present any evidence that a juror saw or became aware of the restraints during the course of jury selection. However, it is obvious from the record in this case that Appellant's shackles were visible. As Respondent notes, in *Deck*, it was established that the jury had seen the defendant's shackles based entirely on the defense counsel's objection. *Deck*, 544 U.S. at 634, 125 S.Ct. at 2015 (emphasis added by court). Likewise, the record here establishes that Appellant's shackles were visible because Appellant's trial counsel's objected to the shackling on that very basis. Accordingly, this Court overlooked that the record here establishes just what the record in *Deck* established—that Appellant's shackles worn during jury selection were visible.

Respondent also argues that Appellant failed to satisfy the requisite standard required for *Deck* burden-shifting to apply. However, again, Respondent and this Court have overlooked that the objections to the shackles worn in *Deck* were, just as the objections here, made during the jury selection phase of the proceeding. Accordingly, this Court overlooked that this is not a proper basis upon which to refuse to apply the burden-shifting required by *Deck*. Accordingly, because Appellant was forced to wear shackles, admittedly without adequate justification, which the record establishes were visible during jury selection, Appellant "need not demonstrate actual prejudice to make out a due process violation" here. *Deck*, 544 U.S. at 635, 125 S.Ct. at 2015 (citing *Holbrook*, 475 U.S. at 568, 106 S.Ct. at 1340).

Respondent also argues that this Court's reliance on *State v. Johnson* in reaching its conclusion that the heightened standard in *Deck* does not apply to Appellant's case is appropriate. However, the factual scenario in *State v. Johnson*, 422 S.C. 439, 812 S.E.2d 739, where the defendant was being brought from the police car outside into the courthouse in handcuffs is completely different from Appellant's situation where the record clearly establishes that he was shackled while inside the courtroom directly in front of the rows of his potential jurors. This Court overlooked this significant distinction from the *Johnson* case and should not have relied thereon. The trial court wrongly refused to remove Appellant's shackles, and this error was not harmless.

CONCLUSION

For the foregoing reasons, Appellant James Heyward respectfully requests that this Court grant rehearing, reconsider its ruling on each of the above issues, and reverse Mr. Heyward's convictions.

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Respectfully submitted,

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December 7, 2020

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CERTIFICATE OF SERVICE

I certify that a true copy of Appellant’s Reply to Return to Petition for Rehearing in the above referenced case has been served upon W. Joseph Maye, Assistant Attorney General, South Carolina Attorney General’s Office, Post Office Box 11549, Columbia, South Carolina 29211-1549, this 7th day of December, 2020.

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