

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Dec 21 2020

SC Court of Appeals

Appeal from Pickens County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON RILEY GALLOWAY,

APPELLANT

APPELLATE CASE NO. 2020-000382

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err when he permitted the jury to view two photographs of the exterior of Appellant's home, which showed the home in significant disrepair, that were irrelevant to the material facts of the case, and if relevant, the danger of unfair prejudice substantially outweighed the probative value?

STATEMENT OF THE CASE

On November 21, 2017, a Pickens County grand jury indicted Appellant for three counts of criminal sexual conduct with a minor in the first degree (2017-GS-39-3060, 2017-GS-39-3061, 2017-GS-39-3062). R. 269 – R. 270; R. 272 – R. 273. The state, represented by Britni M. McCall and J. Durham Hill, called the case for trial on February 18-19, 2020, before the Honorable Edward W. Miller and a jury. R. 33. David D. Cantrell, Jr., represented Appellant. R. 33. The jury found Appellant guilty of two counts and acquitted him of the third count. R. 260, l. 11 – R. 261, l. 7. Judge Miller sentenced Appellant to forty-five years on each count. R. 267, l. 10; R. 271; R. 274.

Appellant served his notice of appeal on February 27, 2020. This brief follows.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (“quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The trial judge erred when he permitted the jury to view two photographs of the exterior of Appellant's home, which showed the home in significant disrepair, that were irrelevant to the material facts of the case, and if relevant, the danger of unfair prejudice substantially outweighed the probative value.

Relevant facts

Appellant lived in a mobile home with his girlfriend, Jennifer "Gina" Raines, and his three daughters, Minor 1, Minor 2, and Minor 3. R. 68, l. 7 – R. 69, l. 16. At one point, Appellant's sister, Sara Galloway, her boyfriend, and the sister's three kids lived in the mobile home along with Appellant and his family. R. 69, ll. 11-16. During Raines' testimony, the solicitor had Raines identify two photographs, State's Exhibits #7 and #8. R. 71, ll. 8-20. Raines explained that the photographs showed the exterior of the mobile home she shared with Appellant. R. 71, ll. 11-20. When the state moved to introduce the photographs, defense counsel objected. R. 72, l. 16-17. Counsel argued the photographs were irrelevant and if relevant, then the danger of unfair prejudice substantially outweighed the probative value. R. 87, ll. 2-16. As counsel explained, the photographs showed the exterior of the residence, but the allegations concerned activity "exclusively" within the residence. R. 87, ll. 2-16. Further, defense counsel noted the "outside of the residence is admittedly - - appears to be in an inappropriate condition or just bad condition." R. 87, ll. 2-16. Nevertheless, the trial judge overruled the objection and allowed the jurors to view the irrelevant and unfairly prejudicial photographs. R. 72, ll. 22-25; R. 87, ll. 17-19. The judge remarked, "It's the location of the offense." R. 87, l. 17.

Minor 1 told the jurors that State's Exhibit #7 "look[ed] kind of like where [she] used to live." R. 97, ll. 9-12. Minor 2 identified State's Exhibit #7 as a photograph of a house, but she

did not remember if she had ever seen the house previously. R. 112, ll. 16-21. Although Sergeant Michael Hendricks indicated he took photographs of the home where Appellant lived, he was never asked to identify State's Exhibits #7 and #8 as those photographs. R. 155, ll. 22-24.

State's Exhibit #7 showed the front of a single-wide trailer in a dilapidated state. State's Exhibit #7. The front entryway included a porch that appears to be barely standing. State's Exhibit #7. Clutter packed the front yard. State's Exhibit #7. The scene got worse from the rear. State's Exhibit #8. Old, discarded tires appeared prominently in the photograph. State's Exhibit #8. More clutter littered the backyard, including what was once a playhouse for children, but its condition was not safe. State's Exhibit #8. Generally, the home looked inhabitable.

Discussion

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible." *Id.* Even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or

indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved.” State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004).

The two photographs of Appellant’s home were not relevant to any issue in the case. The state alleged Appellant committed a sexual battery against his daughters. While the children claimed the offenses occurred inside the home, the appearance of the exterior of the home was of no consequence. The trial judge erred in finding the photographs – State’s Exhibits #7 and #8 – were relevant merely because they showed the exterior of the home where the offenses allegedly occurred.

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. “‘Probative’ means ‘[t]ending to prove or disprove.’” State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). “‘Probative value’ is the measure of the importance of that tendency to the outcome of a case.” Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. “The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.” State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). “‘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 [a] 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)). According to the United States Supreme Court, “[t]he 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 (1997). “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.” United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Applying this analytical framework to the present case reveals that balancing of the low probative value of the impeachment evidence offered by the state and the extreme danger of unfair prejudice posed by the evidence necessitated the exclusion of the photographs showing Appellant’s derelict home. The photographs of the exterior of Appellant’s home had no tendency to prove or disprove any matter in the case. While the photographs were identified as Appellant’s home, which was where the alleged offenses occurred, the photographs were not used to corroborate any

testimony by a witness. Minor 1 identified one photograph as showing where she used to live, but Minor 2 could not identify the home in the photograph at all. The danger of unfair prejudice arising from the photographs was high. The photographs depicted a home in disrepair. In light of the photographs only showing the exterior, the jurors were left to wonder about the interior. Judging the interior by the exterior, the jurors could think only that the interior was equally rundown. By all appearances, the home appears unsafe and dangerous, especially for young children. The danger presented by these photographs was that the jury would decide the case based on the conditions of the home and the poverty the family endured. This was “a naked attempt by the state to appeal to the jurors’ emotions and cloud their ability to impartially weigh the evidence.” See Matter of Campbell, 427 S.C. 183, 195, 830 S.E.2d 14, 20 (2019). The trial judge erred in finding the probative value – of which there was very little – was not outweighed substantially by the danger of unfair prejudice arising from these photographs.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of December, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason Riley Galloway states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial before the Honorable Edward W. Miller, which was held on February 18-19, 2020, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Jason Riley Galloway.

Respectfully Submitted,

s/Susan B. Hackett

Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Transcript of jury selection dated February 18, 2020;
- (2) Trial transcript dated February 18-19, 2020;
- (3) State's Exhibit #7 (photo);
- (4) State's Exhibit #8 (photo);
- (5) True-billed indictments; and
- (6) Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

December 21, 2020

s/Susan B. Hackett

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

December 21, 2020.

s/Susan B. Hackett

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