

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Judge Eugene C. Griffith

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SC Court of Appeals

Lower Court Case No. 2014GS3203246
Court of Appeals Case No. 2018-001556

THE STATE,

Respondent,

v.

MARION C. WILKES,

Appellant.

Final Brief of Appellant

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West Columbia, South Carolina

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in analyzing the admissibility of a DVD copy of the film Where the Lilies Bloom (1974) when the court failed to screen the film, either in whole or in part, prior to ruling on the film's admissibility?
- II. Did the trial court err in excluding a DVD copy of the film Where the Lilies Bloom (1974) when testimony reflected the alleged victim told Appellant she wished to be buried in a manner consistent with the film and for her death to be concealed from the public?
- III. Did the trial court err in charging the jury that malice may be inferred from the use of a deadly weapon when the trial court substantially deviated from the charge set forth in Elmore by omitting the charge's permissive inference instruction?

STATEMENT OF THE CASE

On November 3, 2014, grand jurors in Lexington County indicted Appellant for one count of murder. (R. p. 235). The State, represented by Rhonda Patterson and Gill Bell, called the case to trial before the Honorable Eugene C. Griffith and a jury on February 26, 2018. (R. p. 1.) Trial of this case concluded on March 2, 2018, when jurors returned a guilty verdict on the sole charge of murder. (R. p. 233, lines 13-19.) Judge Griffith sentenced Appellant to forty-five (45) years imprisonment. (R. p. 234, lines 6-7.) On August 16, 2018, Judge Griffith entered an Order denying Appellant's Motion for a New Trial and for Reconsideration of his Sentence.

On August 23, 2018 Appellant served his notice of appeal. This brief follows.

STATEMENT OF THE FACTS

Appellant and Susan Wilkes (hereinafter “Decedent”) married on December 6, 1979. (R. p. 132, lines 23-25.) The couple remained married until Decedent’s passing in early June 2014. (R. p. 133, lines 6-7.) During the marriage Appellant worked in retail grocery and Decedent worked office-jobs, including thirty-three (33) years at SCE&G. (R. p. 130, lines 23-24, p. 143, lines 14-25, p. 144, lines 1-2.) The couple bore no marital children, however, they adopted Decedent’s grandson, Joseph Wilkes, when Joseph was an infant.¹ (R. p. 149, lines 25, p. 150, lines 1-25.) The family relocated from Winnsboro, South Carolina to 106 Linnet Drive, West Columbia in 1999, where they lived until Decedent’s passing. (R. p. 149, lines 14-19.)

At trial, Appellant testified he and Decedent enjoyed a “quiet and peaceful” relationship. (R. p. 133, lines 9-10.) Outside of their respective careers, Appellant and Decedent spent a great deal of time outdoors, hiking, exploring, and hunting. (R. p. 133, lines 19-25, p. 134, 1-11, p. 143, lines 1-6.) Decedent was of Native American heritage and along with Appellant, often searched for artifacts left behind by tribe’s native to South Carolina. (R. p. 135, lines 11-16, p. 415, lines 1-4.) Artifacts recovered by Decedent included several dozen arrowheads from around South Carolina. (R. p. 135, lines 11-15.) Additionally, Appellant and Decedent traveled throughout the country during their marriage, where Decedent purchased additional artifacts and memorabilia relating to Native American culture. (R. p. 139, lines 21-25.) Photographs of many of these items were entered at trial, with jurors being shown the actual arrowheads and other memorabilia during Appellant’s testimony. (R. p. 135 – 141.)

¹ Appellant testified that Joseph is the biological son of Decedent’s daughter, of whom he is not the father. (R. p. 150, lines 9-10.)

In March 2013 Decedent lost her job at SCE&G. (R. p. 144, lines 3-8.) Appellant testified that in months following Decedent's termination, she applied to numerous jobs but was unable to secure employment. (R. p. 144, lines 9-19.) Appellant testified Decedent's unemployment caused her to become depressed; this depression worsened when her unemployment benefit was stopped and their son's dream of entering the military was stifled by a freeze in recruitment. (R. p. 144, lines 9-25.) Appellant testified he believes he spoke with their family doctor, Dr. Karen Greenfield, about Decedent's depression and believed that Decedent was prescribed antidepressants prior to her death. (R. p. 168, lines 3-25, p. 169, lines 1-2.)

On the date of her death, Decedent was at home with Appellant.² (R. p. 425, lines 21-25, p. 426, lines 1-7.) Appellant testified Decedent fell at around 9 o'clock in the morning. (R. p. 425, lines 21-25, p. 426, lines 1-7.) Later that same day, Appellant testified Decedent was using a stepstool to reach into a cabinet in the home's kitchen. (R. p. 151, lines 21-25, p. 152, lines 1-7.) While reaching into the cabinet, she lost her balance and fell, striking her head on the seat of a kitchen chair. (R. p. 151, lines 21-25, p. 152, lines 1-7.) Appellant testified he rushed to Decedent's aid and tried to stop the bleeding. (R. p. 152, lines 8-14.) After controlling the bleeding, Appellant went to move his vehicle so he could easily carry Decedent outside and drive her to Lexington Medical Center.³ (R. p. 152, lines 8-14.)

When Appellant came back inside the home, he was shocked to find Decedent suffering from a stab wound to her chest. (R. p. 152, lines 15-25, p. 153, lines 1-3.) Appellant testified he found Decedent lying on the kitchen floor along with a kitchen paring knife lying beside her. (R.

² Dr. Janice Ross, a medical examiner called by the State, testified that no date of death could be established in this case for numerous reasons. Tr. 247, ll. 19-25, Tr. 248, ll. 1-14.

³ Law enforcement estimated the family home at 106 Linnet Drive was at most a half-mile from Lexington Medical Center. Tr. 383, ll. 2-11.

p. 152, lines 15-25, p. 153, lines 1-3.) This knife, Appellant testified, was a “special” knife that Decedent kept in a certain cabinet to ensure other family members would not use it. (R. p. 152, lines 23-25, p. 153, lines 1-3.)

Appellant testified he held Decedent in his arms until she passed away. (R. p. 153, lines 4-8.) In her final moments, Decedent told Appellant to make sure their son attended college. (R. p. 153, lines 4-8.)

Immediately after Decedent passed, Appellant testified he moved her body into the garage and wrapped her body in a tarp and duct tape that she set aside prior to her death. (R. p. 154, lines 17-25, p. 155, lines 16-19.) The following morning, Appellant informed Joseph Wilkes of Decedent’s passing.

Q: Tell us what happened the next day.

A: I just left her there till the next morning. Joseph got up. I told him exactly what she said to tell him, that she had been -- I guess the word would be euthanized because she had cancer, which that wasn't true. She said let him get over it and then later on, tell him what happened and tell him why I want to be buried up there.

Q: And so, did you tell Joseph the story that she told you?

A: Sir?

Q: Did you tell Joseph the story that she told you?

A: Yes, I did.

(R. p. 156, lines 5-16.)

Appellant testified that same day, along with the help of Joseph Wilkes, he moved Decedent into the trunk of the family’s Ford Taurus. (R. p. 157, 17-24.) Appellant and Joseph Wilkes then drove to a location in Little Mountain, South Carolina.⁴ (R. p. 157, lines 3-5.)

⁴ Testimony indicated the location was 127 Gardenia Court in Little Mountain, South Carolina. (R. p. 029, lines 21-23.)

Prior to her death, Decedent and Appellant visited this location in hopes of one day purchasing it and subdividing the land. (R. p. 153, lines 14-20, p. 154, lines 10-16.) Appellant testified during these visits Decedent marveled at the wonder of nature and told Appellant she wished to be buried in a specific spot underneath her favorite hickory tree. (R. p. 431, lines 13-21.)

Appellant testified he and Joseph Wilkes located the hickory tree previously selected by Decedent and dug a grave. (R. p. 157, lines 22-25, p. 158, lines 1-7.) They then placed Decedent's body in the grave along with a cinderblock to mark the spot, covering the body with soil from the property. (R. p. 157, 1-20.) Appellant took care to place Decedent's body in the grave on her side, the same position she slept in. (R. p. 257, lines 8-13.)

Appellant testified at length regarding why he chose to bury Decedent in a remote area and conceal the death.

Q: And did she talk about whether she wanted to go through a funeral home and that type of thing?

A: Oh no, that was out. No. She wanted to be – she knew the Bible as much as I did. She wanted to be dust to dust. She wanted to go back to where she came from and she wanted to be where only God knew where she was. I heard that since probably Renee died. Probably around '97, '98, '99, somewhere in there. After that, she made that statement behind the funeral home up there at Winnsboro.

(R. p. 142, lines 14-23.)

Appellant testified that he and Decedent often watched a film titled Where the Lilies Bloom (1974) where the main character, a single father, informed his family he wished to be buried outside, in nature, with specific instructions to not tell anyone about his passing; when he passed, the family followed his instructions. (R. p. 146, lines 8-25, p. 147, lines 1-4.) Appellant testified that after watching the film, Decedent relayed her desire to be buried like the character in the film. (R. p. 147, lines 5-20.)

Q: Now, what was Susan's thoughts about -- what did she tell you about that movie after she watched it?

A: That's what she wanted. She wanted to be somewhere quiet where nobody was at. She was a loner, one-hundred percent a loner. Quiet. She never got on the phone. You couldn't get her on a conversation on the phone. She wouldn't talk on the phone.

Q: Now, in that particular movie, okay, do they get an undertaker involved and embalming and all that?

A: No. Natural. Natural burial.

Q: Natural burial. And that's what Susan wanted?

A: That's what's all over up there in the woods in Fairfield County. Even white people and black people there.

Q: And this was a movie y'all would watch often?

A: Oh, yeah.

(R. p. 147, lines 5-20.)

At trial, Appellant offered into evidence a DVD copy of Where the Lilies Bloom, however, upon objection by the State, the Court excluded the film.⁵ (R. p. 148, lines 9-13.)

After burying Decedent, Appellant testified he and his son returned to their home in West Columbia, determined to follow Decedent's wish that her death be concealed. (R. p. 158, lines 21-25, p. 159 p. 160, lines 1-4.) When individuals became suspicious of Decedent's whereabouts, Appellant reported to law enforcement she had gone missing along a walking route near their home. (R. p. 159, lines 9-20.)

On June 15, 2014, Appellant agreed to a voluntary interview with Investigator Bruce Wade of the West Columbia Police Department. (R. p. 332, lines 1-5.) During this interview, Appellant continued to conceal the story of Decedent's suicide, stating Decedent had gone for a walk and not returned. (R. p. 094, lines 2-5.)

⁵ Prior to Appellant's testimony, the State objected to entry of the film under Rule 403; the trial court took this matter under advisement. During Appellant's testimony, Appellant offered the film and requested to publish the first thirty-five (35) minutes to the jury. The State renewed its objection under Rule 403; the trial court sustained this objection.

In the face of increasing suspicion, Appellant agreed to another meeting with law enforcement at the South Carolina Law Enforcement Division Headquarters on June 16, 2014. (R. p. 095, lines 19-24.) On June 18, 2014 law enforcement interviewed Appellant's son; immediately following this interview, Decedent's body was recovered from the location in Little Mountain. (R. p. 099, lines 5-25, (R. p. 100, lines 1-25, p. 101, lines 1-14.)

On June 18, 2014, after recovering Decedent's body, law enforcement again interviewed Appellant. (R. p. 121, lines 13-16.) Investigator Wade testified that during this interview Appellant relayed that his wife, after falling and injuring her head, took a knife and committed suicide. (R. p. 120, lines 7-20.) Investigator Wade also testified that Appellant told him Decedent instructed Appellant to conceal her suicide and desired a natural burial in Little Mountain. (R. p. 120, lines 21-25, p. 121, lines 1-12.)

On June 19, 2014, Appellant was again interviewed by Investigator Wade. (R. p. 103, lines 3-5.) During this interview, Investigator Wade told Appellant that Appellant's son, Joseph Wilkes, was charged with murdering Decedent. (R. p. 435, lines 5-13.) At this point Appellant tried to shift the blame onto himself, stating he killed Decedent. (R. p. 106, lines 9-16, p. 119, lines 18-25, p. 120, lines 1-4, p. 161, lines 5-16.) At trial, Appellant explained why he confessed to killing Decedent.

Q: Now, was there a point in time when you were speaking with Investigator Wade where he gave you some information that caused you to change the story?

A: Oh, yeah.

Q: What was that information that he told you?

A: That they were charging Joseph for something he didn't do.

Q: What were they charging Joseph with?

A: Charging him with murder.

Q: And once you heard him say they had charged Joseph with murder, what did you do at that point?

A: Well, I just said it was me.

Q: Now, when you told them it was you, were you being truthful? When you told him that you were the one that murdered her, were you being truthful?

A: No.

Q: So why did you tell them that lie?

A: Cover up for Susan and Joe.

Q: And --

A: I done lived my life. He needed to live a life.

Q: So when you told them that you murdered Susan, you were not being truthful?

A: That's correct.

(R. p. 161, lines 5-25, p. 436, lines 1-2.)

Appellant further testified he did not kill Decedent.

Q: Marion, I want you to look at the jury. Marion Wilkes, did you murder Susan Wilkes?

A: No, I did not.

Q: Are you sure of that?

A: I'm very positive.

(R. p. 162, lines 5-9.)

Appellant was taken into custody following the June 18, 2018 interview; he remained in custody until trial of this matter.

The parties differed on many facts at trial, none more important than the cause of Decedent's injuries. The State called Dr. Janice Ross, a forensic pathologist who performed an autopsy on Decedent. Dr. Ross testified that during the autopsy she found blunt force injuries, including a skull fracture and lacerations to Decedent's head, and a single stab wound to Decedent's chest. (R. p. 051, lines 19-22, p. 053, lines 1-4.) Dr. Ross testified on direct examination that she could not determine which injury occurred first. (R. p. 051, lines 23-25.) On cross examination Dr. Ross admitted she determined Decedent's death to be caused by exsanguination due to an incised wound of the heart. (R. p. 060, lines 21-25, p. 061, lines 1-4.) Dr. Ross testified that the exact location of the wound revealed it may have been self-inflicted, as there is no bone to stop a knife from penetrating all the way to the heart. (R. p. 064, lines 20-25,

p. 065, lines 1-13.) She also admitted it would not take a lot of pressure for a person to inflict the type of wound Decedent suffered. (R. p. 065, lines 8-11.)

Further, Dr. Ross acknowledged that a cement block could have caused the skull fractures she found during her autopsy. (R. p. 063, lines 6-9.) She admitted that law enforcement did not make her aware that a cement block was found in the grave. (R. p. 063, lines 6-9.) Dr. Ross also acknowledged that a laceration to the head could be caused by someone falling and hitting their head on a table. (R. p. 064, lines 9-12.)

ARGUMENT

- I. The trial court erred in analyzing the admissibility of a DVD copy of the film *Where the Lilies Bloom* (1974), when the court failed to screen the film, either in whole or in part, prior to ruling on the film's admissibility.

RELEVANT FACTS

Appellant testified that he and Decedent watched the film *Where the Lilies Bloom* numerous times throughout their marriage. (R. p. 145, lines 12-17.) Appellant further testified that Decedent informed him she wanted to be buried like the main character: out in nature, where "only God knew where she was." (R. p. 147, lines 5-20, p. 142, lines 14- 23.)

In anticipation of Appellant offering the film, the State objected to the film's entry prior to Appellant taking the stand. (R. p. 126, lines 7-25, p. 127, p. 128, p. 129, lines 1-15.) The crux of the State's argument was that the film should be excluded under South Carolina Rule of Evidence 403. (R. p. 126, lines 21-22.) After hearing only from the State, the trial court took the matter under advisement. (R. p. 129, lines 16-17.)

Appellant took the stand and testified about the plot of the film and its characters. (R. p. 146, lines 8-25, p. 421, lines 1-4.) Appellant then identified and offered a DVD copy of the film, informing the court he wished to enter the DVD and publish the first thirty-five (35) minutes of

the film to the jury.⁶ (R. p. 147, lines 21-25, p. 148, lines 1-3.) At this point the State renewed its objection under Rule 403, arguing “Your Honor, we stand on the same objection. We think this is cumulative. We think it's a waste of time. We think it's prejudicial, Your Honor. He has summarized what the movie is about. I think that is sufficient for the jury's benefit.” (R. p. 148, lines 4-8.)

After hearing argument again from only the State, the trial court excluded the film, noting “Since it's a favorite movie of the family, but it's not directly probative of the events, I'm going to not allow it. But you can crave reference to it, the story line or whatever, just as you've done. I'm not going to allow it. Number 7 will not be admitted.” (R. p. 148, lines 4-13.)

During cross examination, the State vigorously questioned Appellant about specific scenes, characters, and statements made in the film. (R. p. 190, lines 7-23.) Following cross-examination, Appellant re-offered the film, arguing that because the State went into specific statements made in the film, the film should be admitted in order to give jurors the opportunity to evaluate the film as a whole. (R. p. 191, lines 5-8.) The trial court again excluded the film, noting “I don't think that movie needs to come in, so I'm sticking -- I'm not going to allow the movie. Nothing in the movie is relevant to what happened in 2014. It's a story, it's been testified to and I'm going to leave it there.” (R. p. 191, lines 9-13.)

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), (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). “The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse

⁶ At trial, the film was marked as Defense Exhibit 7.

of discretion accompanied by probable prejudice.” State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) (citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 92 (2002)). “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.

DISCUSSION

This issue raises concern not with the trial court’s ultimate decision on the admissibility of the film, but rather on the analysis the trial court employed in reaching its decision. After the State raised its objection to the film under Rule 403, the trial court was tasked with determining the both the probative value of the film and the danger of unfair prejudice it presented. Instead of screening the film to reach a conclusion on these issues, the court summarily ruled the film was not probative of the events in this case.

The question in this case is this: Could the court meaningfully evaluate the film’s probative value without first discerning the film’s contents, either by screening the film in whole or in part? Respectfully, Appellant asserts the answer to this question is no.

Here, the trial court did not and could not properly analyze the admissibility of the film without first screening it. Without actually looking at the piece of evidence, a trial court is in no position to determine its probative value or assess the danger of unfair prejudice it presents. The analysis employed by the trial court here is analogous to a judge ruling on the admissibility of photograph without even looking at the photograph itself. Unfortunately, this type of analysis is precisely what occurred in this case.

There is no bright-line rule in this State as to how much analysis a trial court must undertake before ruling on an objection brought under Rule 403. However, starting from the

presumption of admissibility set forth in Rule 402, it is clear the court must, at the very least, undertake *some* analysis of the contested evidence before excluding it at trial.⁷

Our Supreme Court's holding in Goss v. State is instructive here. Goss v. State, 425 S.C. 101, 820 S.E.2d 373 (2018). In Goss, a judge ruling on a PCR application chose not to hear testimony from alibi witnesses; rather the judge, along with consent of both parties, took judicial notice of the witness's testimony. Goss at 106, 375. The judge went on to rule these witnesses were not credible despite never actually hearing their testimony or performing any type of analysis into their credibility. Id. The Goss court found this analysis to be erroneous, noting: "When a factfinder evaluates the credibility of witnesses, the mental process employed often requires the credibility evaluations to be based upon a consideration of all the evidence, not simply the parts the factfinder choose to hear firsthand." Goss at 108, 376.

In this case, the trial court's decision to rule on the probative value of the film without even making a cursory attempt to evaluate its contents is clear error. Appellant contends that in light of Goss, when a court is makes credibility determinations or rules on the admissibility of evidence, the court must make decisions based on *all* the evidence, and cannot fail to examine the piece of evidence or its contents prior to ruling.

⁷ "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402.

- II. The trial court erred in excluding a DVD copy of Where the Lilies Bloom (1974) when testimony reflected the alleged victim told Appellant she wished to be buried in a manner consistent with the film and for her death to be concealed from the public.

RELEVANT FACTS

Appellant openly admitted at trial he did not contact authorities after his wife passed. (R. p. 155, lines 16-25, p. 156, lines 1-25, p. 157, lines 1-12.) Appellant attributed his actions, the burial, the coverup, the concealment, to his wife's wishes. He testified that the film played a major role in her decision to pursue a natural burial. (R. p. 147, lines 5-20.)

At trial, the State argued that Appellant's use of non-traditional means to bury his wife was probative of his guilt and merely an attempt to coverup his involvement with the alleged crime. Photographs of the gravesite were entered. State Ex. 108, 109, 110, 112. The effects of natural burial and decomposition on the body were discussed. (R. p. 050, lines 24-25, p. 191, lines 5-8.) Even the dimensions of the grave were discussed at length. (R. p. 169, lines 12-25.) Despite all of the negative comments and hysteria involving the method of burial, Appellant remained steadfast in his testimony that his wife wished to be buried in accordance with the film- to be buried in nature, where only God knew where she was. (R. p. 142, lines 14- 23, p. 147, lines 5-20.)

Despite testimony as to the importance of the film in Decedent's life and bearing on the actions Appellant took following Decedent's death, the trial court still excluded the film.

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). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Wise,

359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). “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.

DISCUSSION

If this court is inclined to find the trial court’s decision to rule on the admissibility of the film without first undertaking to discern its contents was proper, Appellant asserts in the alternative the decision to exclude the film was an abuse of discretion. Here, the probative value of the film was not substantially outweighed by the danger of unfair prejudice. The reasons why the film is probative of facts of consequence in this case are numerous. The danger of unfair prejudice posed by the film is non-existent.

The film is probative of the manner in which Appellant chose to bury Decedent. At trial, the State offered significant evidence of the manner in which Decedent was buried and argued the specific burial method, in the woods, without formal ceremony, was probative of Appellant’s guilt and was an attempt for Appellant to conceal his involvement with the alleged crime. As early as the State’s opening statement, the State presented the manner and method of burial as indicative of Appellant’s guilt.

It was the 18th of June, 2014, and as it tends to go in the summer months in South Carolina, it's hot as a blaze. And that sun wasn't showing a bit of mercy as it cooked at 98 degrees while it beat down on Little Mountain, South Carolina. For those of you unfamiliar, Little Mountain is a place right north of Chapin, up towards the Newberry County line. And as that sun penetrated down through the trees in Little Mountain, it was reflecting off the minerals in a series of stones. Stones that had been intricately and purposely laid out to form a rectangle in the sand. A crucifix fastened together by two limbs laid down the center of the rectangle. Around the head, pictures, mementos. Mementos that would tell you that lying beneath that soil, a loved one. And, in fact, there was a loved one there. But beneath the sands of that crucifix laid no human, but a family dog some time passed. But, all the while, less than 10 feet away lie the body of Susan Wilkes

face down in the dirt in a two-foot red clay hole wrapped in a tarp with duct tape fastened around it. *A burial as malicious as the killing that put her there.*

(R. p. 002, lines 2-22.) (*emphasis added*).

The State argued the burial method was indicative of guilt throughout their closing, arguing: “[She said] Bury me in the tarp. I already got it. It's in the garage. And take me to the place in Little Mountain so nobody will know. *Don't let them insult intelligence. That just did not happen.*” (R. p. 199, lines 16-19.) (*emphasis added*). “Because this is not the way she wanted to go. This is not the way she wanted to be buried.” (R. p. 204, lines 273-275.) She was “stuffed in a cold, shallow grave.” (R. p. 194, lines 1-2.)

Had the film been admitted, jurors would have been able to determine whether the burial method was truly indicative of guilt, or whether it was Appellant attempting to carry out Decedent's last wish, to be buried out in nature, in a manner consistent with the film. Exclusion of the film forced jurors to confront two very important questions with no guidance: Was Appellant accurately testifying about the storyline of the film, its characters, and the burial method shown? Was the manner of burial Appellant undertook consistent with that shown in the film? By excluding the film, jurors were without the crucial piece of evidence needed to answer these questions, to evaluate the defense theory of the case, and weigh the credibility of Appellant's testimony.

Here, the court sustained an objection brought under Rule 403 and excluded the film; it is unclear, however, which type of unfair prejudice the court perceived as substantially outweighing any probative value.⁸ In her renewed objection, the Solicitor noted the film was cumulative, a waste of time, and prejudicial.

⁸ The trial court noted “Since it's a favorite movie of the family, but it's not directly probative of the events, I'm not going to allow it.” (R. p. at 148, lines 9-11.)

Cases are scant in South Carolina addressing Rule 403 in the context of waste of time or presentation of cumulative evidence. Wright v. Craft, a 2006 civil case which reached the Court of Appeals, presented an issue of this nature. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). In Wright, the complained of conduct involved the sale of a previously wrecked truck. Wright at 15, 494. The plaintiff alleged the seller was liable for not disclosing the truck's prior collision history and the fact the warranty may not cover future damage. At trial, jurors heard testimony about the truck from numerous witnesses. Wright at 34, 504. Photographs of the truck were also admitted. Id. When the truck itself was offered, the trial court excluded it under Rule 403, noting its probative value was substantially outweighed by the danger of unfair prejudice, specifically, being cumulative and a waste of time. Id. The Court of Appeals affirmed, noting that the combination of photographs and witness testimony negated the need for the actual truck to be entered, and its entry would indeed waste time and needlessly present cumulative evidence. Id.

In this case, other than Appellant's testimony as to the plot of the film, there was no other evidence of the film's content. Further, in the interest of judicial economy, Appellant did not wish to publish the entire film during the trial, rather, the record shows he wished to only play the first thirty-five (35) minutes. In light of the minimum *thirty (30) year sentence* Appellant was facing, it is beyond comprehension that *thirty-five (35) minutes* could be called a waste of time so substantial it outweighed the film's significant probative value.

As for the State's objection that the film was "prejudicial," Appellant notes prejudicial evidence is not what Rule 403 is designed to exclude; the rule deals only with evidence which presents a danger of unfair prejudice that *substantially outweighs* its probative value. In the same vein, all evidence presented at trial is prejudicial to the other side, this does not mean such

evidence must be excluded. As noted in Stokes, “Unfair prejudice means an undue tendency to suggest a decision on an improper basis.” Stokes v. State 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009), (citing State v. Dickerson 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000)).

The State stood to suffer no unfair prejudice if the film was admitted. Allowing jurors to watch the film would only provide them with a basis for evaluating Appellant’s actions and testimony. The film does not evoke emotion or sympathy for Appellant. It is not designed to elicit an emotional decision from the jury. Therefore, no framework set forth in our case law or Rule 403 supports a finding that the probative value of the film was substantially outweighed by the danger of unfair prejudice. The film was certainly probative of the actions Appellant took following Decedent’s death and it certainly meets the definition set forth in Rule 401 for relevant evidence, as it made Appellant’s testimony, that he was following the manner of burial set forth in the film, more likely.⁹

Given the film’s materiality and relevancy to the facts at issue in the case, it should have been admitted; exclusion of the film under Rule 403 was an abuse of discretion.

III. The trial court erred in charging the jury that malice may be inferred from the use of a deadly weapon when the trial court substantially deviated from the charge set forth in Elmore by omitting the charge’s permissive inference instruction.

RELEVANT FACTS

At the close of evidence, a charge conference took place off the record. (R. p. 193, lines 3-4.) Following each side’s closing argument, the jury was charged on the law of the case. When charging the jury on malice, the trial court stated the following:

Malice may also be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

⁹ “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 (internal quotations omitted).

A deadly weapon is any article, instrument which would likely cause death or great bodily harm. Several examples of instruments which may be deadly weapons is a pistol, rifle, dagger, a knife, razor, fire bomb, things of that sort.

(R. p. 225, lines 4-11.)

After excusing the jury to deliberate, each side was given the opportunity to note any objections to the charges. Appellant objected to two charges; as relevant here, Appellant noted an objection to the charge dealing with the inference of malice. “We also object to a portion of your malice instruction which deals with the inference of malice can be implied. That is our position that that is a burden-ship.”¹⁰ (R. p. 232 lines 3-6.)

STANDARD OF REVIEW

“In reviewing jury charges for error, this Court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial.” State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36.(Ct. App. 2009). When reviewing the trial judge’s jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. State v. Jackson, 297 S.C. 523, 527, 377 S.E.2d 570, 572 (1989). A jury charge is appropriate if correctly and adequately states the correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472-473 (2004), (citing State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002)).

DISCUSSION

The trial court erred in charging the jury that malice may be inferred from the use of deadly weapon without including in the charge the permissive inference language set forth in

¹⁰ From the context, it appears the wording “burden-ship” is a transcription error. Appellant’s position is that “burden-shift” is the appropriate wording.

Elmore. In 1983, our Supreme Court set forth the standard charge for the permissive inference of malice as follows:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), (overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

The Elmore court went on to note “We caution the bench, that hereafter only slight deviations from this charge will be tolerated.” Elmore at 421, 781.

In 2009, the Supreme Court was called on to analyze the Elmore charge in Belcher. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Court in Belcher noted two distinct and important components within the Elmore charge: The first, the standard implied malice charge, and the second, the permissive inference instruction. Belcher at 612, 810. In a footnote, the Belcher Court recognized “[t]he standard implied malice charge remains valid, as does the general permissive inference instruction.” Belcher at 612, 810 n.9.

Here, the trial court significantly and substantially deviated from the Elmore charge. While the court properly gave the first component of the charge set forth in Elmore, “Inferred malice may also arise when the deed is done with a deadly weapon” the trial court omitted the second component, referred to in Belcher as the general permissive inference instruction, and did not charge jurors on the meaning of a permissive inference.

A similar jury charge was analyzed by our Supreme Court in Gibson v. State, wherein the Supreme Court granted certiorari following the denial of Gibson’s PCR application. Gibson v.

State, 416 S.C. 260, 786 S.E.2d 121 (2016). In Gibson, the defendant was convicted of murder and unlawful possession of a pistol. The trial court charged the jury as follows:

Malice can be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case. I'll just give you some examples of deadly weapons. There's [sic] a lot of them, and I'm not—this is obviously not an exhaustive list. It could be a knife, a dagger, a slingshot, metal knuckles, a rifle, a shotgun, a pistol, a razor, gasoline. Any number of things that you determine from the facts would be a deadly weapon.

Gibson at 263, 123.

The Gibson Court found this charge to be erroneous because it deviated from the charge suggested in Elmore and omits the permissive inference component. “The charge given by the trial judge in this case clearly deviates from the suggested Elmore charge as it does not contain the permissive inference language.” Gibson at 264-265, 123-124. Important here, the Gibson Court went on to note “The complete omission of the permissive inference language is not a “slight deviation” that would be permissible under Elmore. ” Id.

The charge given by the trial court here is almost identical to the charge the Court found to be erroneous in Gibson. Both charges omit any reference what an inference is, what evidentiary weight it bears, and how jurors should consider it during deliberations. The omission of this legally significant language in this case is clear, reversible error.

Appellant suffered prejudice because of this erroneous charge. Other than the weapon, the record is scant of evidence of actual malice. No witness testified about observing a fight between Appellant and Decedent on the date of her death. No witness testified about ill-will or hatred between the parties. The only evidence that could be deemed as reflecting malice came from Appellant himself, when he told investigators about a confrontation that took place between

he and Decedent immediately prior to her death. The story about the confrontation came during the interview where Appellant confessed to killing Decedent following his son being charged with murder. Appellant recanted this story at trial. (R. p. 161, lines 5-25, p. 162, lines 1-2.)

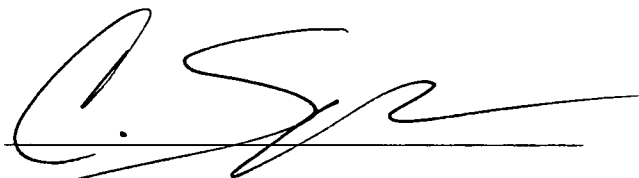
CONCLUSION

In light of the foregoing errors, Appellant respectfully requests this court reverse his conviction and remand this case for a new trial.

RESPECTFULLY SUBMITTED

This 19th Day of June, 2019

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Counsel for Appellant certifies that this Final Brief and Final Reply Brief conforms with Rule 211(b).

Respectfully Submitted,



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