STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable L. Casey Manning, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH RAY GLEATON,

APPELLANT

APPELLATE CASE NO 2019-002072

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

1. **The trial judge erred in refusing to bifurcate the proceedings with regard to the possession of a firearm by person convicted of violent felony to allow the jury to first determine possession and then allow the State to introduce evidence of the prior felony.**

The trial judge abused his discretion in denying the motion to bifurcate the proceedings with regard to the possession of a firearm by a person convicted of a violent felony to allow the jury to first determine possession and then allow the State to introduce evidence of the prior violent felony. Prior to trial the trial judge said, "Before we get started, I glanced at some preliminary motions and one of those motions involved not letting the jury know about the firearms conviction or something. I can't remember exactly what it was. Now, how do I keep the panel from knowing about the indictments? That's my question to the defense. There's no way to do that, is there, that I know of?" (Tr. p. 21, lines 12-18). Counsel for Appellant then told the trial judge, "What we're asking is to bifurcate it so it –" (Tr. p. 21, lines 19-20). The judge responded, "No. I'm not bifurcating it. I'm not gonna do that. We're gonna do it all. We're gonna go through the whole thing one time. I'm not bifurcating anything." (Tr. p. 21, lines 21-24).

Appellant offered to stipulate to the prior conviction. (Tr. p. 21, line 25 – p. 22, lines 1-2). The State would not agree to the stipulation but agreed to only reference a prior violent felony conviction without referring to the fact that the prior conviction was for arson, one of the charges for which Appellant stood trial. (Tr. p. 22, lines 5-16). Appellant objected. (Tr. p. 22, lines 19-20). The judge overruled the objection. (Tr. p. 22, lines 21-22). The judge then said, "You know, I don't want to sound curt or anything, I read these motions and I don't know how you keep me from mentioning the indictment, but if y'all revolved [sic] that in the sense that

he's been convicted of a felony, don't mention that felony, I think that I'm splitting the baby as much as I can. Anything else I need to take up before we bring this jury in?" (Tr. p. 22, line 24 – p. 23, lines 1-5). During the trial Investigator Hinson with the Richland County Sherriff's Department testified that Appellant was convicted of a violent crime in Orangeburg in 1996. (Tr. p. 692, line 21 – p. 693, lines 1-4). The judge did not give a limiting instruction. At the end of the trial when instructing the jury about the prior conviction the judge said, "There was a stipulation at the beginning of the trial that Mr. Gleaton had been convicted of a violent crime." (Tr. p. 951, lines 1-3).

The trial judge's comments indicate that he did not believe he had the authority to bifurcate the proceeding. As the South Carolina Supreme Court found in State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), the trial judge has the authority to bifurcate the proceeding. The Cross case was specifically cited in the pre-trial motion, marked as Court's Exhibit # 13. (R. p. ** - Motion to Stipulate Felon Status or Bifurcate and Exclude any Mention of Prior Record). The trial judge's ruling constitutes an abuse of discretion. The trial judge failed to consider the arguments made by Appellant and included in the pre-trial motion. The judge failed to determine if the probative value of the prior conviction for a violent crime was substantially outweighed by the danger of unfair prejudice as required by Rule 403, SCRE. The judge failed to exercise discretion. 'A failure to exercise discretion amounts to an abuse of that discretion.' Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997) (citations omitted)." State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015).

If the trial judge had conducted a proper analysis pursuant to Rule 403, SCRE, he would have found that the probative value of the prior conviction for a violent crime was substantially outweighed by the danger of unfair prejudice and granted the motion to bifurcate. While the

present case did not involve a prior sex related offense as in Cross, the jury learning that Appellant had a prior conviction for a violent crime was prejudicial and not necessary for the jury to determine if Appellant committed the murder, arson, and desecration charges. Bifurcation of the proceeding would have allowed the jury to determine guilt on all of the charges, including the possession of a weapon charge, before learning about the prior violent conviction. The error requires reversal.

2. The trial judge erred in admitting photographs of the burned naked body of the deceased at the crime scene when any probative value of the photographs was substantially outweighed by the danger of unfair prejudice.

The judge abused his discretion in admitting State's exhibits #46 - #51, the black and white photos of the naked and burned body and hand of the deceased taken at the crime scene. These photos are in addition to the color autopsy photos that were admitted, over objection as State's exhibits #136 - #141, and addressed in issue three below. Respondent asserts that the photographs from the crime scene were necessary to prove the desecration of human remains charge. (BOR p. 26). It is unclear how the photos from the crime scene proved that the deceased was dead prior to the fire. The forensic pathologist testified, as a result of conducting the autopsy, that the lack of soot in the airway indicated she was dead before the fire.

Respondent's reliance on State v. Thompson, 420 S.C. 192, 802 S.E.2d 623 (Ct. App. 2017), a homicide by child abuse case, is misplaced. The photos of the child at the crime scene in Thompson showed the nature of the injuries such that mother and father, who were both charged with homicide by child abuse, should have known about the injuries and taken action. "Likewise, the photographs of Victim as he was found at the crime scene helped the jury to understand the nature and extent of Victim's injuries as well as his condition near death.

Moreover, the photographs were highly probative of Appellants' awareness of Victim's injuries." State v. Thompson, 420 S.C. 192, 215, 802 S.E.2d 623, 635 (Ct. App. 2017). Cause of death and knowledge of injuries were not at issue in the present case. The forensic pathologist testified later at trial that the deceased did not die as a result of the fire but instead from a combination of a blow to the head, strangulation and two gunshot wounds, all of which happened before the fire. (Tr. p. 537, line 8 – p. 538, lines 1-2).

State's exhibits #46 - #51, the black and white photos of the naked and burned body and hand of the deceased taken at the crime scene were unnecessary to the issues at trial and were calculated to arouse the sympathies and prejudices of the jury. In State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986), the South Carolina Supreme Court wrote:

> Although photographs may be used to corroborate other evidence, See State v. Robinson, 201 S.C. 230, 22 S.E.2d 587 (1942), it is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial. State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940). Appellant's counsel offered to stipulate to any relevant information contained in the photographs, and it is clear the information was not really at issue. Furthermore, the testimony of the forensic pathologist negated any arguable evidentiary value of the photographs. The prejudice created by the photographs clearly outweighed *any* evidentiary value. See State v. Waitus, 224 S.C. 12, 77 S.E.2d 256 (1953); See also State v. Edwards.

Rule 403, SCRE provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The probative value of the photographs from the crime scene was substantially outweighed by the danger of unfair prejudice. This is especially true as additional autopsy photos were admitted over objection as discussed below. The trial judge

abused his discretion in admitting all of these photos from the crime scene. The error is not harmless and requires reversal.

3. The trial judge erred in admitting autopsy photos when the probative value of the photographs was substantially outweighed by the danger of unfair prejudice.

The trial judge abused his discretion in admitting color autopsy photos, State's exhibits #136 - #141, that were projected on a screen before the jury. Cause of death was not an issue in this case. The testimony of the pathologist fully explained the injuries, the location and the manner of death. The color autopsy photographs, projected on a screen before the jury, were not necessary to establish a material fact or condition. The pathologist adequately and convincingly testified as to lack of soot. The color autopsy photos in this case projected on a screen only served to arouse the sympathy of the jury.

Respondent's reliance on State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008), another homicide by child abuse case, is misplaced. In Martucci, the South Carolina Court of Appeals wrote:

> In the present case, the photographs were introduced to corroborate the testimony of Dr. Ward, who testified regarding the various injuries inflicted on Child, including the discoloration of the bruises and the internal trauma which caused his death. The photographs were relevant to prove Child was abused, that the abuse was the cause of his death, and that the abuse manifested an extreme indifference to human life, all of which support the charge of homicide by child abuse. *See* S.C.Code Ann § 16–3–85(A)(1) (2003). Furthermore, the photographs were necessary to depict the severity of the bruises and the resulting trauma, which was inconsistent with accidental injury or play. The photographs were relevant and necessary, and they were not introduced with the intent to inflame, elicit the sympathy of, or prejudice the jury. The trial judge did not abuse his discretion in admitting the photographs.

380 S.C.at 250, 669 S.E.2d at 608. In the present case the testimony of the pathologist did not need to be corroborated because the cause of death was not an issue and there was certainly no

question that the fatal injuries were not the result of accident or play. The autopsy photos in the present case did not need to be in color or projected on a screen in order for the State to prove cause and manner of death.

Respondent's reliance on State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002), another homicide by child abuse case, is similarly misplaced. In Jarrell the Court of Appeals found that judge did not abuse his discretion in admitting autopsy photos because, "[a] photograph displaying the anal injuries due to the sexual abuse corroborated both the pathologist's testimony regarding the extent of those injuries and the witnesses' testimony that Jarrell's motive for planning to kill the baby was because the sexual abuse was readily apparent." 350 S.C. at 106, 564 S.E.2d at 371. The color autopsy photos in the present case did not corroborate any testimony about motive. There was nothing complicated or unique or even challenged about the cause of death that required corroboration of the pathologist's testimony.

Rule 403 provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In light of the forensic pathologist's expert testimony that did not require use of the autopsy photos, certainly not the use of color autopsy photos projected on a screen, the probative value of the autopsy photos was substantially outweighed by the danger of unfair prejudice. The trial judge abused his discretion in admitting the autopsy photos. The error is not harmless and requires reversal.

4. The trial judge erred in admitting a photograph of the deceased prior to her death when any probative value of the photograph was substantially outweighed by the danger of unfair prejudice.

The trial judge abused his discretion in admitting an irrelevant photograph of the deceased prior to her death, State's exhibit #119. Respondent argues the admission of the photograph was harmless like the admission of the photograph in State v. Owens, 427 S.C. 325, 831 S.E.2d 126 (Ct. App. 2019) (cert. granted Mar. 12, 2020). In Owens, however, the defendant admitted to the shooting but argued that it was accidental. Appellant in the present case never admitted to the shooting and did not argue accident. The error in the present case was not harmless. In State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), the Court found that the admission of an irrelevant photo of the deceased constituted reversible error. As in Langley, the photo of the deceased in the present case prior to her death was irrelevant. Pursuant to Rule 403, any probative value of the photograph was substantially outweighed by the danger of unfair prejudice. The error was particularly prejudicial in light of the gruesome photos of her naked and burned body admitted from the crime scene and the color autopsy photos projected on a screen for the jury to view. The error in the admission of the photo, in this case, is not harmless and requires reversal.

5. The trial judge erred in allowing a witness to testify that the deceased told her that on a previous occasion Appellant pulled a gun on her.

The trial judge erred in allowing witness Jessica Gantt to testify that the deceased, Amanda Peele, told her that Appellant pulled a gun on her. Gantt's statement that the deceased told her that Appellant pulled a gun is inadmissible hearsay, not an admission by adoption pursuant to Rule 801(d)(2)(B), SCRE. Gantt testified pre-trial, "And I asked him, I said, did you

put a gun on her? And he just nodded his head and dropped his head down like that (indicating.)" (Tr. p. 115, lines 9-11). Importantly, however, at trial before the jury Gantt did not testify that she asked Appellant about pulling a gun. Instead Gantt testified, "I asked him if he, you know, did what she said he did and he just nodded his head yes and dropped his head down like this (indicating)." (Tr. p. 660, line 23 – p. 661, lines 1-2). The improper hearsay was admitted when the prosecutor then asked, "Back up. When you told him what she said he did, did he agree to what was it that he did?" (Tr. p. 661, lines 3-4). Gantt answered, "He pulled a gun on her." (Tr. p. 661, line 5). The prosecutor did not ask Gantt specifically what she asked Appellant. Instead, the prosecutor asked Gantt what the deceased told her and if Appellant agreed. The question called for a hearsay answer. Gantt was allowed to testify that the deceased told her that Appellant pulled a gun on her. Gantt's statement is hearsay. Appellant did not adopt the purported hearsay statement that the deceased told Gantt Appellate pulled a gun.

Respondent concedes that Gantt's statement that the deceased told her that Appellant pulled a gun on her is hearsay writing, "Finally, Appellant's interpretation of the rule is nonsensical because regardless of whether Victim was present when Appellant adopted the statement, her statement would, by definition, be hearsay without his adoption of its veracity." (BOR p. 36). Respondent's theory, however, takes the admission by adoption rule found in Rule 801(d)(2)(B), SCRE, one step too far. Importantly, Appellant never heard the deceased accuse him of pulling a gun on her. The rule does not extend to the hearsay statement made by Gantt that the deceased told her that Appellant pulled a gun.

Respondent writes in footnote #5, "Appellant misquotes Knoten in his brief. Notably, Appellant's brief quotes nearly the same section of Knoten cited in this brief but omits the sentence immediately following his quoted passage in which the Supreme Court acknowledged

that Knoten's later confession, made outside the presence of his mother, functioned as an adoption of his mother's statements to him. Compare (Br. Of Appellant, pp. 24-25) with (Br. Of Respondent, pp. 35)" (BOR p. 36). The following section from Knoten was omitted, not misquoted, from the brief of appellant:

> We agree that Appellant adopted the statement when he later confessed to the crimes. "A party who has agreed with or concurred in an oral statement of another has adopted it." 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence,* § 801.31[3][b] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2000).
> Because Appellant did not refute his mother's statement, and later admitted he was lying when he denied involvement in or knowledge of the offenses charged, his mother's statement was not hearsay. Therefore, there is no merit to Appellant's third issue.

State v. Knoten, 347 S.C. 296, 312–13, 555 S.E.2d 391, 400 (2001). In Knoten the officer was allowed to testify as to a statement made by the mother to Knoten because Knoten's failure to refute the statement made the statement an admission by adoption and not hearsay pursuant to Rule 801(d)(2)(B). The above quoted section from the Knoten case was omitted because it references Knoten's later confession. In the present case Appellant never admitted to pulling a gun on the deceased in the prior incident. The adoption in Knoten first came when he did not refute the mother's statement and then again when he confessed. Appellant never had an opportunity to refute the accusation by the deceased that he pulled a gun on her and never confessed to pulling a gun.

Appellant did not adopt the hearsay statement that he pulled a gun. Instead, according to the properly admitted testimony of the witness, Appellant simply agreed that he did what she said he did. The admission of the hearsay statement constituted an abuse of discretion as an error of law. The error was not harmless when the statement about the prior incident alleged the use of a gun and the deceased was later shot.

6. The trial judge erred in refusing to recess for the day on Friday at 5:00 PM after a week-long trial and instead moving forward with closing arguments, jury instructions and deliberations.

The trial judge abused his discretion in allowing the jury to decide to continue with closing arguments, jury instructions and deliberations on Friday at 5:00 PM after a week-long jury trial. The record reflects that tensions were running high. Appellant made a reasonable request to recess until Monday or alternatively, the next day, Saturday morning. (Tr. p. 889, line 24 – 890, lines 1-4). That request was denied. The jury reached a verdict at 8:30 PM.

In State v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (Ct.App. 2000), the South Carolina Court of Appeals found no abuse of discretion in the trial judge denying a motion to recess for the day because the expert witness on the subject of the reliability of eyewitness identifications could not testify until the following day. The Court of Appeals noted that the expert witness was not under subpoena and the defendant failed to show prejudice when he rejected the State's offer to stipulate to the substance of the expert's proposed testimony and failed to make an offer of proof. The request for a recess in the present case was not due to any fault of Appellant or his attorneys. Additionally, it would be very difficult to demonstrate prejudice under these circumstances. Under the unusual facts of this case, this Court should find an abuse of discretion and not require a particularized showing of prejudice.

7. The trial judge erred in refusing to defer sentencing to allow the presentation of mitigation evidence after a week-long trial in which the jury reached a verdict at 8:30 PM on Friday night.

The trial judge's refusal to conduct a meaningful sentencing hearing violated due process. Respondent submits that, "The trial judge did not abuse his discretion in refusing Appellant's request to defer sentencing because the reason for Appellant's request, the absence of a character

witness, was due to his own failure to act with due diligence in securing the witness's attendance." (BOR p. 39). The jury reached the guilty verdicts and was released from service at 8:45 PM. (Tr. p. 962, lines 22-23). Counsel for Appellant asked that sentencing be deferred. (Tr. p. 962, line 25 – p. 963, lines 1-15). The judge denied the request for deferred sentencing and stated, "Let's do it now. I want to end this matter now." (Tr. p. 963, lines 18-19). The absent "character witness," at 8:45 PM, was Appellant's mother and other family members who did not have phones. (Tr. p. 963, line 20 – p. 964, lines 1-24). Contrary to Respondent's assertion of the lack of due diligence on the part of trial counsel, it was reasonable for counsel to believe that sentencing would not take place at 8:45 PM and that the sentencing hearing would be continued until Monday. Instead, the trial judge sentenced Appellant without hearing from either the defense or the prosecution. The lack of due diligence cases cited by Respondent are not analogous to the unusual facts of this case.

The error in refusing to defer sentencing and in refusing to hear mitigation is not harmless. A post-trial written motion for a new trial and sentencing hearing was filed on November 12, 2019. (R. p. **– Motion for New Trial and Sentencing Hearing). This motion was denied in a written order signed December 9, 2019, without a hearing. (R. p. ** – Order Denying Motion for New Trial and Sentencing Hearing). The affidavits of Appellant's mother and grandmother that were attached to the motion do not take the place of in person testimony with regard to mitigation. The trial judge failed to conduct a meaningful sentencing hearing.

"'Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution.' Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008).

Fundamentally, due process requires notice, a meaningful opportunity to be heard, and judicial review. Id." Thompson v. State, 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016). The failure to defer sentencing and the failure to hear mitigation deprived Appellant of a meaningful opportunity to be heard at sentencing and violated due process. The error is not harmless. Appellant is, at the least, entitled to a new sentencing hearing. As discussed below in issue eight, this error, in combination with the numerous other errors committed by the trial judge, require a new trial.

8. The trial judge erred in refusing to grant a new trial based on the cumulative effect of the trial errors.

The trial judge's refusal to grant a new trial based on the cumulative effect of all the errors that took place during this trial is preserved for appellate review. As discussed in issue seven above, the trial judge refused to defer sentencing, refused to hear mitigation and instead, at 8:45 PM, sentenced Appellant to life in prison without hearing from either side. (Tr. p. 965, lines 2-22). Prior to sentencing counsel for Appellant hastily moved for a new trial and renewed the previously made motions. (Tr. p. 963, lines 1-6). Counsel did not move for a new trial based on cumulative error at this time. On November 12, 2019, however, Appellant filed a motion for new trial and sentencing hearing. (R. p. **, Motion for new trial and sentencing hearing). On page 13 of the motion Appellant moved for a new trial based on the cumulative effect of the trial errors. (R. p. **). On December 9, 2019, in a written order, the judge denied the motion for new trial. (R. p. **, Order Denying motion for new trial and sentencing hearing). The issue was raised in the timely filed motion for new trial and ruled upon by the trial judge. The issue is preserved for appellate review.

The issue was not abandoned. Respondent writes that, "Even if this Court determines that Appellant properly preserved this issue for appeal, Appellant abandoned the issue by addressing it in a conclusory and unsupported manner in his brief." (BOR p. 45). The following is included in the initial brief:

In State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013), the Court wrote:

> The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground. Id.

The combination of errors in this case involving the admission of numerous prejudicial photographs, the admission of inadmissible hearsay about Appellant pulling a gun on the deceased in a prior incident, the coercion of the verdict by refusing to recess at Friday at 5:00 PM after a week- long trial, the refusal to conduct a meaningful sentencing hearing, the refusal to bifurcate the proceeding and the judge's demeanor, volume and tone when dealing with defense counsel and a defense witness adversely affected Appellant's right to a fair trial qualifying for reversal.

In State v. Freeman, 319 S.C. 110, 123–24, 459 S.E.2d 867, 875 (Ct. App. 1995), the Court wrote:

> We are aware that every instance of trial error does not entitle an appellant to prevail on appeal. However, the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal. In their totality, the cumulative effect of the lack of latitude allowed the defense in cross-examining the State's investigating officers along with the court's comments, unfairly prejudiced the defense and necessitates the convictions be set aside.

The aggregation of errors in the present case resulted in prejudice requiring reversal. (BOA, pp. 31-32). The issue was not abandoned.

Appellant maintains that six of the above issues require a new trial individually and issue seven requires a new sentencing hearing. Alternatively, if these errors do not independently warrant reversal, the combination of all of the errors raised on direct appeal in addition to the judge's demeanor, volume and tone[1] when dealing with defense counsel warrant reversal. The errors affected the outcome of the trial and denied Appellant the right to a fair trial.

[1] See affidavits of trial counsel attached to the motion for new trial. (R. pp. ***).

CONCLUSION

Based on the above arguments this Court should reverse Appellant's convictions and sentences and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of July, 2021.

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STATE OF SOUTH CAROLINA

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Appeal from Richland County

Honorable L. Casey Manning, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH RAY GLEATON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant and Designation of Matter in the above referenced case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant and Designation of Matter have been served on Kenneth Ray Gleaton, #290601, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 1st day of July, 2021.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT