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SC Court of Appeals

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

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

In April of 2018, the Richland County Grand Jury indicted Appellant, Kenneth Ray Gleaton, for murder and arson first degree, indictments #2018-GS-40-1418, 1419. (R. pp. 914-915, 917-918). In June of 2019, the Richland County Grand Jury indicted Appellant for possession of a firearm by person convicted of violent felony and desecration of human remains, indictments #2019-GS-40-4077, 4079. (R. pp. 922-923, 925-926). In July of 2019, the arson indictment was amended from first degree to second degree. (R. pp. 919-920). On Monday, October 28, 2019, Appellant proceeded to jury trial before the Honorable L. Casey Manning. Sarah Jurick, Maise Osteen and Laura Young represented Appellant at trial. April Sampson, Vance Eaton and Stephanie Taylor prosecuted the case. On Friday, November 1, 2019, the jury returned verdicts of guilty on all four indictments. Judge Manning sentenced Appellant to life for murder, twenty (20) years concurrent for arson second degree, five (5) years concurrent for the firearm charge and ten (10) years concurrent for desecration of human remains. (R. p. 899). Appellant filed a timely motion for new trial and sentencing hearing on November 12, 2019. (R. p. 928). Judge Manning denied the motion for new trial in a written order signed December 9, 2019. (R. p. 959). A timely notice of intent to appeal was served on December 19, 2019. (Supp. R. p. 19). This appeal follows.

STATEMENT OF FACTS

Just prior to midnight on October 9, 2017, first responders were called to a house fire at the home of Amanda Peele, Appellant's girlfriend. (R. p. 122, line 23 – p. 123, lines 1-3). Peele's burned body was found inside the house. (R. p. 116, line 13 – p. 117, lines 1-21; R. p. 169, lines 11-24). She was pronounced dead at the scene. A forensic pathologist testified that Peele 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. (R. p. 471, line 8 – p. 472, lines 1-2). A gun was not recovered. The fire was determined to have not been accidental. (R. p. 229, line 5 – p. 230, lines 1-22).

Investigators interviewed Roderick "Mike" Dukes at the scene of the fire. (R. p. 613, lines 12-20). Dukes testified at trial that he was at the house with Appellant and Peele earlier on the evening of October 9, 2017. (R. pp. 493-500). Dukes claimed that while he was playing a video game he heard gunshots and went back to a bedroom where he saw Appellant choking Peele with a belt. (R. pp. 501-507, lines 1-16). According to Dukes, Peele was already dead. Dukes testified that he ran out of the house and to the Circle K where he could use their Wi-Fi to contact his friend Toya. (R. p. 509, lines 1-25). In the messages, which were introduced at trial, he asked Toya to come and get him because he was in big trouble and needed to leave this side of town. (R. p. 512, line 8 – p. 513, lines 1-25; Supp. R. p. 4).

Dukes' friend, LaToya Riley, testified at trial that Dukes contacted her via Facebook messenger at 9:30 PM on October 9, 2017, asking for help. (R. p. 568, line 9 – p. 569, lines 1-25; Supp. R. p. 1). Riley testified that she picked Dukes up at the Circle K a half of a mile from Peele's house around 11:45 PM. (R. p. 579, line 9 – p. 580, lines 1-9). Dukes told Riley a story of what happened at Peele's house and she told him that he needed to call the police. (R. p. 580,

line 21 – p. 581, lines 1-5). Dukes, however, did not want to call the police. (R. p. 581, lines 4-5). Instead, they drove to the Waffle House where Dukes talked to Peele's roommate, Jessica Gantt. (R. p. 581, lines 6-14). While Dukes was speaking with Gantt, Riley called the police. (R. p. 537, lines 1-12; p. 581, lines 15-23). Riley, Dukes and Gantt then drove to Peele's house and found that the house was on fire. (R. p. 522, line 3 – p. 523, lines 1-7). Investigators interviewed Dukes and tested his hands for gun shot residue [GSR]. (R. p. 266, lines 6-24; p. 523, lines 9-21). The State's expert testified that no particles characteristic of GSR residue primer were detected from the kit collected from Dukes. (R. p. 556, lines 5-14). The defense expert, however, testified that he would classify the particles found as consistent with GSR. (R. p. 719, lines 5-6).

The next day, Dukes sent Riley a message that he found one of "her" bloody bags in the woods. (R. p. 538, lines 15-17; Supp. R. p. 8-9). When Riley told Dukes he needed to turn the bag in as evidence, Dukes replied, "Oops. Did I say I was keeping it? I meant to say turn it in." (R. p. 538, lines 18-20; Supp. R. p. 9-10). The bag was never turned over to police. (R. p. 636, lines 16-25). When Riley told Dukes that the investigators wanted to speak with him again, Dukes replied, "Let them know I'm watching porn." (R. p. 539, lines 13-18; Supp. R. p. 12-13).

After speaking with Dukes, investigators obtained an arrest warrant for Appellant. (R. p. 615, lines 5-13). Appellant was arrested the next day under the Gervais Street bridge where he told a witness his girlfriend just died. (R. p. 241, lines 16-18; pp.246-249). The witness saw Appellant remove a SIM card and throw a cell phone into the river. (R. p. 241, line 4 – p. 242, lines 1-6). The phone was recovered from the river and introduced in evidence at trial as State's exhibit #108. (R. p. 323, line 1 – p. 324, lines 1-12). A SIM card was found in Appellant's pocket when he was arrested. (R. p. 326, line 22 – p. 327, 328, lines 1-15). A witness testified

that the SIM card found in Appellant's pocket belonged to the phone found in the river and was associated with phone number 803-201-5645 belonging to the deceased, Amanda Peele. (R. p. 359, line 15 – p. 360, lines 1-17; p. 382, lines 15-16).

After his arrest, Appellant provided a written statement to law enforcement which was introduced in evidence as State's exhibit #115. (R. p. 346, lines 1-22; R. p. 901). In the statement Appellant admitted having an argument with Peele but denied harming her or setting the fire. (R. pp. 902, 904). Appellant stated that "Mike" was at the house when he left and Peele was in bed after taking pain medication. (R. p. 902). Appellant admitted to taking Peele's cell phone and throwing it in the river. (R. pp. 902-903). Appellant stated that after he left Peele's house, he walked to his friend Roy's house but then slept under a bridge by the river. (R. p. 903). Appellant returned to Roy's house the next morning and Roy gave him a clean pair of shorts and twenty dollars in cash. (R. p. 904).

Cyril "Roy" Brasley testified that the police came to his salon looking for Appellant. (R. p. 669, lines 13-24). Appellant came to the salon after the police left and Brasley recorded part of their conversation on his phone. (R. p. 670, line 17 – p. 671, lines 1-24). The video was admitted in evidence as State's exhibit #111 over defense objection. (R. p. 672, lines 9-23). Brasley agreed that in the video Appellant told him he set the house on fire. (R. p. 674, line 25 – p. 675, line 1). Brasley also testified that Appellant told him that Mike was a part of it. (R. p. 675, lines 14-15). On cross-examination Brasley testified, "He said he – he said it wasn't me. I didn't – I didn't hurt her. I didn't do something. And that's when he started talking about Mike's involvement it and that's what prompted meo to like get my phone out" (R. p. 687, lines 11-14). Roderick "Mike" Dukes admitted that he had a habit of lying to the police. (R. p. 541,

lines 2-6). Dukes, however, was never charged in connection with the incident. (R. p. 541, line 25 -p. 542, lines 1-3).

ARGUMENTS

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.**

Standard of Review

In State v. Cross, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019), the South Carolina Supreme Court wrote:

> In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The appellate court reviews a trial [court's] ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006). "[T]he conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had." State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958).

Argument

Prior to trial Appellant moved 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. (R. p. 21, line 12 – p. 22, p. 23, lines 1-4). The judge denied the request stating, "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." (R. p. 21, lines 21-24). Alternatively, Appellant offered to stipulate to the prior conviction. (R. 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. (R. p. 22, lines 5-16). Appellant objected. (R. p. 22, lines 19-20). The judge overruled the

objection. (R. p. 22, lines 21-22). At trial Investigator Hinson with the Richland County Sherriff's Department testified that Appellant was convicted of a violent crime in October of 1996. (R. p. 626, line 21 – p. 627, lines 1-4). The objection to the refusal to bifurcate was renewed at the close of the State's case. (R. p. 696, lines 23-25). The trial judge erred in refusing to bifurcate the proceedings. The probative value of the prior conviction, at the time it was admitted at trial, was substantially outweighed by the danger of unfair prejudice.

Appellant was indicted for violating S.C. Code §16-23-500 which provides that "It is unlawful for a person who has been convicted of a violent crime, as defined by Section 16-1-60, that is classified as a felony offense, to possess a firearm or ammunition within this State." A prior violent felony conviction is an element of the crime. A bifurcated proceeding would allow the State to present evidence of both the element of possession and the element of a prior violent felony conviction without unfairly prejudicing Appellant. The fact that the State only referred to a "prior violent felony" conviction rather specifically naming the prior conviction for arson does not remove the prejudicial effect of the jury learning that Appellant had a prior violent felony conviction before deciding guilt on the other felony charges for which Appellant stood trial.

In State v. Cross, 427 S.C. 465, 479, 832 S.E.2d 281, 288–89 (2019), a case decided before Appellant's October 2019 trial, the South Carolina Supreme Court addressed a trial judge's refusal to bifurcate the proceedings in a trial for first degree criminal sexual conduct with a minor charge where a prior conviction for criminal sexual conduct with a minor was an element of the offense, and wrote:

> Rule 403, SCRE, provides the trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, etc. Here, the probative value of the evidence of the prior conviction is undeniable, as the State must prove the

> conviction as an element of the crime charged. However, even evidence with such significant probative value remains subject to the application of Rule 403, and the trial court is duty-bound to determine whether the probative value of this evidence is substantially outweighed by one or more of the considerations identified in Rule 403. Evidence of the 1992 conviction is in no way probative of the threshold issue of whether Cross committed a sexual battery upon Minor in 2005. Necessarily, therefore, the question of when evidence of the prior conviction should be admitted comes sharply into focus. In this case, the integrity of Rule 403 and the obligation of the State to introduce necessary evidence are both salvaged by the application of Rule 611(a), SCRE, which provides in pertinent part: "The court *shall exercise reasonable control over the mode and order of* interrogating witnesses and *presenting evidence* so as to (1) make the interrogation and presentation effective for the ascertainment of the truth ...." (emphasis added). Under the facts before us, Rule 611(a) required the trial court to exercise control over the order of presenting evidence in such a way that (1) allowed the State to prove an element of the crime, and (2) at the same time guarded against a violation of Rule 403.

A majority of the Court found that the trial judge should have bifurcated the proceedings and reversed the conviction and remanded for a new trial.

While the present case involves a prior violent felony conviction with no reference to the specific violent felony, the reasoning of the Cross case should still apply. The prior violent felony conviction is not probative of whether Appellant committed the crimes for which he was charged and convicted. The prior conviction is only probative because it is an element of the weapon charge. The jury, however, hearing of the prior violent felony conviction in one proceeding, could have decided guilt on an improper basis. Pursuant to Rule 403, SCRE, the probative value of the prior conviction, at the time it was introduced, was substantially outweighed by the danger of unfair prejudice. The bifurcated proceeding would have allowed the State to introduce evidence of the prior conviction element without undue prejudice to the Appellant. The trial judge erred in refusing to bifurcate the proceedings and the error requires reversal, as in Cross.

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.**

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). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id. "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. State v. Collins, 409 S.C. 524, 529–30, 763 S.E.2d 22, 25 (2014).

Argument

At trial and outside of the presence of the jury, Appellant raised concerns about six color photos marked for identification as State's exhibits #4, #7, #8, #9, #10 and #11. (R. p. 124, line 5 – p. 125 – 131). The judge initially ruled that the photos were not admissible. (R. p. 125, lines 3-5). The State argued, "The coroner would be testifying to these, Your Honor, in terms of what the body looked like when the coroner first saw the body in terms of the markings - -" (R. p. 125, lines 14-17). The coroner responded to the scene on the night of the fire. (R. pp 161-162). The judge then asked the prosecutor, "Can't you have them changed to black and white? These are gruesome." (R. p. 125, lines 23-24). The State agreed to substitute the color photos for black and white photos. (R. p. 125, line 25 – p. 126, lines 1-25). Appellant objected to the substituted black and white photos stating, "- - - in black and white. They're still gruesome. They're overly prejudicial. They're not probative to anything in issue in this case. The coroner can testify what

the body looked like when she arrived and what she observed." (R. p. 127, lines 15-19). Counsel for Appellant argued, "The pictures don't demonstrate anything more than what she's able to testify about." (R. p. 127, lines 21-22). Counsel for Appellant cited to State v. Collins, S.C. 409 S.C. 524, 763 S.E.2d 22 (2014). (R. p. 128, lines 1-21). The State argued, "The State's position, Your Honor, is that they're not overly gruesome." (R. p. 128, lines 24-25).

The judge then ruled, "I agree. These ones are in black and white. Your requested motion is respectfully denied. Anything further?" (R. p. 129, lines 1-3). Counsel for Appellant stated, "It's not the substance of the photographs. It is, is it probative to anything in dispute in this particular case." (R. p. 129, line 24 – p. 130, line 1). Once counsel confirmed that the judge was allowing all six of the black and white photos, she objected to the photos on the ground that they are duplicative. (R. p. 130, lines 12-17). The judge ruled, "All right. You have objected three times. My decision has not changed." (R. p. 130, lines 18-19). The State then noted that the black and white photos were re-numbered State's exhibit's #46 - #51 and were "submitted." (R. p. 131, lines 8-13).

When the coroner was called as a witness there was some confusion as to whether the black and white photos, State's exhibits #46 - #51, had been admitted in evidence. (R. p. 157, lines 10-11; p. 159, lines 4-25). The State appears to seek to introduce the photos, in a proffer outside the presence of the jury without establishing who took the photos. (R. p. 159, line 24 – p. 160, lines 1-7). Appellant, through defense counsel Osteen, again objected. (R. p. 160, lines 6-7). The judge ruled, "Overruled with all caps on all basis. Bring the jury in." (R. p. 160, lines 8-9). After some questioning, the prosecutor approached the coroner with State's exhibits #46 - #51. (R. p. 166, lines 10-11). The transcript reflects that another member of the defense team, Ms. Jurick stated, "No objection." (R. p. 166, line 12). The judge then asked if the photos had

already been admitted and the prosecutor confirmed that State's exhibits #46 - #51 had been admitted in evidence. (R. p. 166, lines 13-15). Although there is an apparent statement of "no objection" in the transcript, State's exhibits #46-#51 were strongly objected to and had already been admitted in evidence. The objections to these photos are preserved for appellate review. The objection to the photos was renewed at the close of the State's case. (R. p. 697, lines 2-4).

The black and white photographs, State's exhibits #46-#51, show the naked and burned body and hand of the deceased. State's #46 and #47 show the naked burned body face up on a stretcher. State's #48 and #50 show the charred skin on the hand of the deceased. State's #49 is a close-up of her burned head and shoulder with a belt around her neck. State's #51 is a close-up of her burned face and shoulders with her eyes open. The trial judge erred in admitting these six photographs, State's exhibits #46-#51, of the burned body of the deceased from the crime scene when any probative value of the photographs was substantially outweighed by the danger of unfair prejudice. The six gruesome photographs served no purpose other than to inflame the passions of the jury. The photographs did not establish an element of the crimes charged that could not have been adequately addressed by testimony alone. The deceased did not die as a result of the fire. A 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. (R. p. 471, line 8 – p. 472, lines 1-2). The State certainly did not need six inflammatory photographs.

In State v. Collins, S.C. 409 S.C. 524, 763 S.E.2d 22 (2014), the defendant was convicted of involuntary manslaughter and, pursuant to S.C. Code §47–3–710(A)(2)(a) and 760, of being the owner of a "dangerous animal" that attacked and injured a human being. In Collins the South Carolina Supreme Court wrote, "In order to support its assertions about the dangerous

propensities of the dogs, the manner and extent of the attack, and Collins's criminal negligence, the State also offered a group of photos taken of the victim by Proctor, the forensic pathologist, before he began the autopsy." 409 S.C. at 532, 763 S.E.2d at 27. In finding no error in the admission of the pre-autopsy photos the Court wrote:

> These are not ordinary dog bites with which most jurors would ever be familiar. Even the pathologist stated he felt compelled to document the injuries prior to the start of the autopsy because he had never come across a situation this extreme. Since there was no one else present at the time of the event, the photos aided the jury in evaluating the testimony offered by both the State and the defendant, especially as to determining the dangerous propensities of the dogs and whether or not Collins's conduct was criminally reckless.

State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 29 (2014). In contrast, the six photographs of the burned body did not aid the jury in evaluating testimony. The cause of death was not in question in this case. The identity of who caused the death was in question. These six gruesome photos did not aid the jury in determining who caused the death.

In State v. Hawes, 423 S.C. 118, 129, 813 S.E.2d 513, 519 (Ct. App. 2018), the South Carolina Court of Appeals wrote:

> "The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). "However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *Id.* "To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.' " State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

The six photographs of the burned body found at the crime scene should have been excluded because the photos were calculated to arouse the sympathy of the jury, were not necessary to an issue at trial and tended to suggest a decision based on an improper emotional basis.

As noted in the concurring opinion in Collins:

> In my judgment, the admission of the autopsy photographs was clear error. The primary, if not sole, purpose of these horrific photographs was to inflame the passions of the jury. The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense. I agree with Justice Pleicones that these challenged photographs far exceed "the outer limits of what our law permits a jury to consider." State v. Torres, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). I fully understand that there are circumstances where autopsy photographs are relevant and that the relevance of the photographs is not substantially outweighed by the danger of unfair prejudice. *See* Rules 402, 403, SCRE. But this is not such a case. I nevertheless believe the error was harmless for the reasons set forth in the majority opinion. I note this case was tried in 2009, prior to our decision in *Torres,* where we expressed our concern over the State's seeming practice of seeking admission of highly prejudicial and inflammatory autopsy photographs.

409 S.C. at 539, 763 S.E.2d at 30.

The six photographs of the burned and naked body with close-ups of her face and charred hand were highly prejudicial and inflammatory, even in black and white. The photos had very little probative value. The photos did not help establish an element of the crimes charged and were not needed to assist a witness with their testimony. 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 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 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.**

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). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id. "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. State v. Collins, 409 S.C. 524, 529–30, 763 S.E.2d 22, 25 (2014).

Argument

Dr. Amy Durso was qualified, without objection, as an expert in forensic pathology. (R. p. 461, lines 9-14). Dr. Durso performed the autopsy of the deceased in this case, Amanda Peele. Dr. Durso testified that the cause of death was from a combination of a blow to the head, strangulation and two gunshot wounds, all of which happened before the fire. (R. p. 471, line 8 – p. 472, lines 1-2). Prior to Dr. Durso's testimony, the State sought a ruling on the admissibility of autopsy photos. (R. p. 441, line 6 – 22). The State proffered the testimony of Dr. Durso. (R. pp. 442 – 451). The State sought a ruling on photographs marked State's exhibits #136-#141. Dr. Durso testified that State's exhibit #136 shows the side of the head of the deceased with a belt around the neck and no soot under the belt indicating that the belt was around her neck before the fire started. (R. p. 444, line 19 – p. 445, lines 1-15). Dr. Durso testified that State's exhibit #137 shows the upper airway with the epiglottis and trachea with no soot, again

indicating that she was dead when the fire was set. (R. p. 445, lines 17-22). Dr. Dursa testified that State's exhibit #138 shows the right eye with red hemorrhage and petechia indicating that she was alive when she was strangled. (R. p. 446, lines 18-24). Dr. Dursa testified that State's exhibit #139 shows the gunshot wound to her back with soot from the fire explaining why she could not estimate distance for the gunshot. (R. p. 446, line 25 – p. 447, lines 1-12). Dr. Dursa testified that State's exhibit #140 shows the laceration on the left side of her head. (R. p. 447, lines 15-20). Finally, Dr. Durso testified that State's exhibit #141 shows the laceration on the left side of her head with the skin pulled back to show the hemorrhage indicating that she was alive when she was hit. (R. p. 447, lines 21-25). Dr. Durso testified that she believed that black and white photographs would not explain the injuries. (R. p. 446, lines 2-9; p. 447, lines 6-9).

Appellant objected to admission of the autopsy photos arguing:

> Just that they're more prejudicial than probative. Her cause of death isn't an issue or how she dies. It's not something that we're contesting at all. It's not part of our case, to make it consistent with the other pictures where she dies, we would submit that they cannot be admissible at all, but if so, black and white is sufficient to show what she's talking about. Specifically with some of the more graphic ones, the injury to her head that just shows a cut, I think you can see that in black and white so we'd ask that they be in black and white.

(R. p. 449, lines 6-16). The judge overruled the objection to the photos stating, "All right. Your request is denied. The photos are in over your objection. Is there anything further?" (R. p. 453, lines 17-19).

Appellant renewed the objection to the autopsy photos when the State moved to introduce them in front of the jury. (R. p. 472, lines 8-9). Appellant additionally objected to the State publishing the photographs by projecting them on a screen stating, "I additionally say that the size makes it extra prejudicial. I'm renewing my objection and adding that it being on the screen is making it extra prejudicial." (R. p. 472, lines 12-15). The judge overruled the objection

stating, "Thank you, ma'am. The decision has already been made. Those photos are in evidence so over their objection you may publish them." (R. p. 472, lines 16-18). The objection to the autopsy photos was renewed at the close of the State's case. (R. p. 697, lines 1-2). The trial judge erred in admitting the color autopsy photos and allowing the State to display the photos on a large screen before the jury.

In State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010), the South Carolina Supreme Court wrote:

> Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Under Rule 403, SCRE, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted). In the sentencing phase of a capital murder trial, the scope of the probative value is much broader than the guilt phase. See State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986).

In Torres the Court found that the trial judge did not abuse his discretion in admitting autopsy photos "to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed." The Court in Torres noted that due to the extent of the injuries neither body could be identified and noted that the crime was "particularly horrific." In the present case the pathologist testified that the deceased suffered fatal injuries before the fire was set. This issue was not contested. 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, especially in light of the fact that the jury had already been subjected to the gruesome photos of the naked burned body of the deceased from the crime scene. While Dr. Dursa, upon questioning by the trial

judge, opined that black and white photos would not show lack of soot, the doctor 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.

The Court in Torres additionally noted:

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

390 S.C. at 624, 703 S.E.2d at 229.

The solicitors in the present case pushed the envelope on admissibility in regard to the color autopsy photos projected on a screen before the jury. Dr. Dursa credibly testified as an expert as to cause of death and the fact that the injuries occurred before the fire. The photos were not necessary to her testimony or to establish an element of the State's case. Instead, the autopsy photographs were calculated to arouse the sympathy of the jury and should have been excluded.

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 photos. The error 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.**

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). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id. "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. State v. Collins, 409 S.C. 524, 529–30, 763 S.E.2d 22, 25 (2014).

Argument

During the direct examination of the son of the deceased the State moved to admit a photograph of the deceased prior to her death. (R. p. 411, line 4 – p. 412, lines 1-19). Appellant objected and a sidebar was held off the record. (R. p. 411, lines 19-21). The trial judge overruled the objection. (R. p. 411, lines 22-24). When defense counsel tried to place the objection on the record the trial judge responded, "You can do it later on, but your objection is overruled. You may proceed." (R. p. 411, line 25 – p. 412, lines 1-3). The photograph was admitted, over defense objection, as State's exhibit #119. The objection was renewed at the close of the State's case. (R. p. 697, lines 16-19).

The photo of the deceased prior to her death had no probative value. In State v. Owens, 427 S.C. 325, 831 S.E.2d 126 (Ct. App. 2019) (cert. granted Mar. 12, 2020), the Court found that

the trial judge exceeded his discretion in admitting a family photograph of the deceased prior to his death. The State argued that the photograph showed the size of the deceased which was important given the available space in the backseat of the car where the shooting took place. The Court disagreed writing:

> What little relevance the photograph had was vastly outweighed by its danger of unfair prejudice. Rule 403, SCRE. Victim's identity was not at issue and the photograph did not depict an objective measure of his size; Victim's actual height and weight were included in the autopsy results the jury heard. All the photograph could accomplish was to counteract testimony that Victim was selling Owens drugs when he was shot, and arouse sympathy for Victim. The trial court therefore exceeded its discretion in admitting it. Morin v. Innegrity, LLC, 424 S.C. 559, 576, 819 S.E.2d 131, 140 (Ct. App. 2018) ("Abuse of discretion occurs when the ruling rests on a legal error or inadequate factual support."). See State v. Hawes, 423 S.C. 118, 129, 813 S.E.2d 513, 519 (Ct. App. 2018) ("To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.' " (quoting State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010))); see also State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) (holding photograph of murder victim in high school graduation regalia irrelevant to prove the defendant's guilt, victim's identity was not in issue, and photo was an attempt to distance victim from drug dealing activity); State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997) (holding photograph of victim and husband taken before she was killed in an automobile accident irrelevant to the determination of defendant's guilt for felony DUI).

Owens, 427 S.C. at 334–35, 831 S.E.2d at 130–31. The Court in Owens, however, found the error in admitting the photo harmless. The error in admitting the photo in the present case was not harmless.

The photo of the deceased prior to her death had no probative value and was irrelevant to any issue at trial. Identity was not an issue. In State v. Langley, 334 S.C. 643, 647–48, 515 S.E.2d 98, 100 (1999), the Court wrote:

> All relevant evidence is admissible. Rule 402, SCRE. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Although evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. Rule 403,

> SCRE; State v. Alexander, supra. Further, a photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts. State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997). Even if the evidence was not relevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial.

In Langley 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.

Standard of Review

"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. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (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. at 429–30, 632 S.E.2d at 848.

Argument

At trial the State questioned Jessica Gant, the roommate of the deceased, about a prior incident involving Appellant. (R. pp. 590-593). The State then asked the witness about a conversation she had with Appellant the following day. (R. p. 592, line 20 – p. 593, lines 1-6).

The witness answered, "Okay. Well, when Amanda [the deceased] called me that night –So I'm gonna back. When Amanda called me that night and told me what happened - -" (R. p. 593, lines 7-9). Appellant objected. (R. p. 593, line 10). The prosecutor stated, "Let's skip that." (R. p. 593, line 12). The judge, however, asked, "She called and said what happened. What's your objection? What's your objection?" (R. p. 593, lines 13-14). Counsel for Appellant answered, "I believe the witness was going to go into hearsay." (R. p. 593, lines 15-16). The judge then stated, "No, ma'am. What is your objection? Not what you believe she might say." (R. p. 593, lines 17-18). Counsel answered, "Hearsay." (R. p. 593, line 19). The judge stated, "It's premature. You're premature. Go ahead." (R. p. 593, lines 20-21). The prosecutor then asked the witness, "Now, Ms. Gantt, if you would, describe the conversation with Mr. Gleaton in the kitchen the day that you are describing." (R. p. 593, lines 23-25).

The following then took place:

> A: Oh, okay. Well, it's about three in the afternoon when he came back and he sat down and he shook his head. He said, I've had a long night. I said, I bet you have. And he asked me, did Amanda tell you anything? I said, yes. She did. And he asked me, well, what did she say? And I said, well, she told me that you –
>
> MS. OSTEEN: Objection, Your Honor.
>
> THE COURT: Basis.
>
> MS. OSTEEN: Hearsay. She said - -
>
> THE COURT: I disagree. I disagree, ma'am.
>
> MS. OSTEEN: She said she told me.
>
> THE COURT: Overruled. Sit down. Continue. This is a conversation with the defendant; am I correct?
>
> MR. EATON: Yes, Your Honor.
>
> THE COURT: All right.

MS. OSTEEN: Your Honor, she stated she told me based on a conversation with Amanda Peele. That is hearsay. She is not here.

THE COURT: Continue.

MR. EATON: It's a statement of which he has adopted the truth, Your Honor.

THE COURT: All right.

(R. p. 594, lines 1-22). The prosecutor then asked the witness about the conversation with Appellant and the witness 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)." (R. p. 594, line 23 – p. 595, lines 1-2). 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?" (R. p. 595, lines 3-4). The witness answered, "He pulled a gun on her." (R. p. 595, line 5). The witness was improperly allowed to testify about what the deceased told her. The witness's answer that, "He pulled a gun on her" constitutes inadmissible hearsay that defense counsel earlier was trying to prevent from being admitted.

After the direct examination of the witness but before the cross-examination and outside the presence of the jury the judge stated to defense counsel, Ms. Osteen, "One more outburst from you like I just witnessed and you're gonna regret it. Do you understand?" (R. p. 601, lines 5-6). Defense counsel replied, "Yes, Your Honor." (R. p. 601, line 7). The trial judge erred. According to the testimony of witness Jessica Gantt, the deceased told her that Appellant pulled a gun on her. Appellant did not make this statement. The testimony from witness Jessica Gantt that the deceased told her that Appellant pulled a gun on her is inadmissible hearsay. The trial judge erred in overruling the objection.

In regard to the hearsay objection but during a mistrial motion made by the defense, the State later argued:

> Well, Your Honor, I think that the objections that have been made have been properly ruled upon and specifically as to that hearsay objection, I believe that that was a statement in which the defendant adopted the truthfulness which as a statement by party opponent that would fall under that as not hearsay so I would ask that you deny the motion, Your Honor.

(R. p. 642, lines 12-18). Rule 801(d)(2)(B), SCRE, provides that a statement is not hearsay if the statement is offered against a party and is a statement of which the party has manifested an adoption or belief in the truth.

In State v. Knoten, 347 S.C. 296, 312, 555 S.E.2d 391, 399–400 (2001), the South Carolina Supreme Court found that a statement made by the defendant's mother to the defendant in the presence of an officer was not hearsay and wrote:

> The State argues, *inter alia,* that under Rule 801(d)(2)(B) SCRE, the statement was not hearsay. That rule provides "A statement is not hearsay if ... the statement is offered against a party and is ... a statement of which the party has manifested an adoption or belief in its truth." The comments to that section indicate that this rule is consistent with South Carolina law, citing State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961), *rev'd on other grounds,* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).
>
> The defendant in State v. Sharpe, supra, was on trial for assault with intent to ravish. The Court recounted that
>
> > After the appellant had been arrested and placed in jail, his mother came to the jail and an officer explained to her why he was under arrest. The mother was then permitted to see the appellant in the presence of an officer and she said: 'Israel, as many colored women as it is in this town why in the world did you go and get messed up with a white woman and you will just have to pay your penalty.' The appellant made no reply to this statement.
> >
> > Upon the trial of the case, when this testimony was given by the officer, an objection was made to its admission only on the ground that the appellant was not present when the statement was made. The record shows otherwise. The objection was properly overruled. This Court has held that statements **in the presence of the accused** by a third person are admissible as evidence when such accused remains silent and does not deny such statements.... Under this rule, when appellant's mother made the foregoing statement to him and he remained silent and did not deny same, such statement was admissible.

Id. at 271, 122 S.E.2d at 628–29 (citations omitted)(emphasis added). The rule does not extend to the hearsay statement made by the witness that the deceased told her that Appellant pulled a gun. The rule would apply if, for example, at the time of the prior incident, the roommate, Jessica Gantt, overheard Amanda Peele accuse Appellant of pulling a gun on her and he remained silent, or dropped his head and nodded, adopting the truth of the statement. Under that fact pattern, at Appellant's trial for the murder of Amanda Peele, Rule 801(d)(2)(B) would allow Jessica Gantt to testify about what Amanda Peele said **in the presence of Appellant**. That, however, is not what happened in the present case. Instead, Jessica Gantt was allowed to testify that Amanda Peele told her that Appellant pulled a gun on her. This was error.

In United States v. Robinson, 275 F.3d 371, 382–83 (4th Cir. 2001), the Fourth Circuit Court of Appeals wrote:

> Rule 801(d)(2)(B) provides that "[a] statement is not hearsay" if the statement is offered against a party and if the party against whom the statement is offered "has manifested an adoption [of] or belief in" the truth of the statement.
>
> When a statement is offered as an adoptive admission, the primary inquiry is whether the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and whether there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.
>
> United States v. Jinadu, 98 F.3d 239, 244 (6th Cir.1996). A party may manifest adoption of a statement in any number of ways, including [through] words, conduct, or silence. See Marshall v. Young, 833 F.2d 709, 716 n. 3 (7th Cir.1987).

In Robinson a witness was allowed to testify about statements she overheard made by two co-defendants describing the crime. The Court found that each co-defendant adopted the statements of the other making the witness's testimony non-hearsay as an adoptive admission pursuant to Rule 801(d)(2)(B). The witness's statement in the present case that "he pulled a gun on her" is not an adoptive admission. If Appellant had admitted to pulling a gun on the deceased

during the prior incident, the State would not have to rely on Rule 801(d)(2)(B) and instead could have argued admissibility as a statement against interest. Appellant, however, did not admit to pulling a gun. Appellant did not acquiesce to a 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. There are simply not sufficient foundational facts from which it could be inferred that Appellant heard, understood and acquiesced to pulling a gun during the prior incident. 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.**

Standard of Review

"As with requests for a trial continuance, requests for a recess during trial are within the trial judge's discretion, and will be reversed on appeal only upon a showing of an abuse of that discretion. *State v. Durden,* 264 S.C. 86, 212 S.E.2d 587 (1975); *State v. Meyers,* 262 S.C. 222, 203 S.E.2d 678 (1974)." State v. Mitchell, 330 S.C. 189, 192, 498 S.E.2d 642, 644 (1998)

Argument

Appellant's trial started on Monday, October 28, 2019. The defense called their final witness at 2:35 PM on Friday, November 1, 2019. (R. p. 644, line 1: p. 775, lines 23-24). At 4:00 PM, after the final witness testified, the jury was excused and the Judge made the following comments:

> All right. So this is the issue. It will probably be around 6:00 – excuse me. It will probably be around 6:00 before this jury gets the case. Everybody agrees with that. So I didn't ask them out of politeness and courtesy. No more witnesses and maybe 20, 30 minutes, something like that, some argument on charges, so

> you see what I'm getting to. Do they wasn't to stay the rest of the day until they finish. Do they want to come back Monday. I need to ask them these questions. They need to talk about it and let me know. Is that fair enough?

(R. p. 823, lines 8-18). Defense counsel responded, "Yes, your honor. I think our position would be that we would prefer, we think that it's been a long day, a long week, we would prefer that closings and the jury is charged on Monday." (R. p. 823, line 24 – p. 824, lines 1-2). Counsel alternatively agreed to resume the next day, Saturday morning. The State preferred to continue rather than resume on Saturday or Monday. (R. p. 824, lines 13-14). The judge acknowledged that everybody was tired but let the jury decide how they wished to proceed. (R. p. 824, lines 5 – 25). The jury indicated that it wished to continue. (R. p. 825, lines 2-6; Court's Exhibit #17 or #18). Defense counsel objected stating:

> Thank you, Your Honor. Pursuant to the Fifth, Sixth, and Fourteenth Amendments and in violation of due process, it has been a long week. People have been needing multiple breaks for being tired. We need people to be concentrating through the end and through deliberation and obviously at 4:25 we have not even started closings yet so I think the likelihood of it getting to the jury before six, before seven even might be wishful thinking and that would cause the jurors to deliberate and have more fervor than actually taking the time and really –

(R. p. 825, lines 11-21). The judge denied the motion to recess and resume the trial the next day or Monday. (R. p. 825, line 22 – p. 826, line 1). Closing arguments started at 5:00 PM. (R. p. 830, line 3 – p. 831, lines 1-2). Jury instructions began at 6:25 PM. (R. p. 872, lines 18-21). Jury deliberations began at 7:00 PM. (R. p. 891, lines 8-9). The jury reached verdicts of guilty at 8:30 PM. (R. p. 891, line 11). The 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 instruction and deliberations.

In State v. Hughes, 419 S.C. 149, 160, 796 S.E.2d 174, 180 (Ct. App. 2017), the South Carolina Court of Appeals wrote, "[T]he conduct of a criminal trial is left largely to the sound

discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)." By refusing to recess for the evening at 5:00 PM, the trial judge forced the jury into deliberations. The forced deliberations resulted in a coerced verdict.

In the context of an Allen charge South Carolina Appellate courts have held that while a trial judge has a duty to urge the jury to reach a verdict, the trial judge must not coerce the verdict. State v. Pauling, 322 S.C. 95, 470 S.E.2d 106, 108–09 (1996); State v. Singleton, 319 S.C. 312, 460 S.E.2d 573, 575–76 (1995). The judge should not have given the jury the option to stay and continue with the proceedings. The judge's refusal to recess and continue the proceedings to another day is the equivalent of the judge giving a coercive Allen charge. The refusal constitutes an abuse of discretion as an error of law. The error requires reversal.

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.

Standard of Review

"A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

Argument

After the jury reached the guilty verdicts and was released from service at 8:45 PM, counsel for Appellant asked that sentencing be deferred. (R. p. 896, line 22 – p. 897, 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." (R. p. 897, lines 18-19). Defense counsel noted that some of Appellant's

family members, including his mother who did not have a phone, were not present. (R. p. 897, line 20 – p. 898, lines 1-24). The State preferred to go forward with sentencing. (R. p. 898, lines 14-16). The judge asked, "I can send the jury home. We can wait until she gets here. Is that what you want me to do?" (R. p. 898, lines 22-24). Counsel for Appellant asked that sentencing be deferred until Monday. (R. p. 898, line 25 – p. 899, line 1). The judge then said, "No. No. No. I'm not gonna do that. I'm gonna do it now. Anything further? Bring him around. Do you have a sentencing sheet, Pat? How long has Mr. Gleaton been in jail, time served.?" (R. p. 899, lines 2-6). The trial judge then sentenced Appellant to life in prison without hearing any mitigation evidence and without hearing from the State. The trial concluded at 8:50 PM, five minutes after defense counsel requested deferred sentencing. (R. p. 899, line 25). The trial judge erred. By refusing to defer sentencing or hear mitigation the judge deprived Appellant of a meaningful sentencing hearing.

A post-trial written motion for a new trial and sentencing hearing was filed on November 12, 2019. (R. p. 928). This motion was denied in a written order signed December 9, 2019. (R. p. 959). The trial judge's refusal to conduct a meaningful sentencing hearing violates due process.

In State v. Dukes, 404 S.C. 553, 558, 745 S.E.2d 137, 140 (Ct. App. 2013), the South Carolina Court of Appeals wrote:

> Procedural due process requires "adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008). It does not, however, require any particular form of procedure. See S.C. Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002) (stating "due process is flexible and calls for such procedural protections as the particular situation demands" (citation and quotation marks omitted)). Due process also does not require all witnesses to testify. See United States v. Morsley, 454 Fed.Appx. 191, 193 (4th Cir.2011) (stating the constitution

> "does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses" (citation omitted)). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Wilson, 352 S.C. at 452, 574 S.E.2d at 734.

Appellant was denied the opportunity to be heard at sentencing.

In Hayden v. State, 283 S.C. 121, 123, 322 S.E.2d 14, 15 (1984), the Court wrote, "At sentencing, a judge has an obligation to consider information material to punishment. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). A sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited as to either the kind of information he may consider, or the source from which it may come.' United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976).

The trial judge failed to fulfill his obligation to consider information material to punishment. The failure to defer sentencing and the failure to hear mitigation deprived Appellant of a meaningful sentencing hearing and violated due process. The sentence should be overturned as an abuse of discretion as an error of law. A remand for re-sentencing at this point, however, will not cure the error. Appellant is entitled a new trial.

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

Each of the errors discussed above require reversal on their own. Alternatively, the cumulative effect of all of these errors deprived Appellant of a fair trial and requires reversal. In the motion for new trial and sentencing hearing filed on November 12, 2019, Appellant moved for a new trial based on the cumulative effect of the trial errors. (R. p. 940). On December 9, 2019, in a written order the judge denied the motion for new trial. (R. p. 959). In the order the judge wrote, "Furthermore, the cumulative effect doctrine does not apply to this situation as the

defendant has failed to show that the cumulative effect of any errors affected the outcome of the trial and, as such, failed to show that they adversely affected his right to a fair trial. *State v. Beekman*, 405 SC 225 (app. 2013)." (R. p. 959). The trial judge erred.

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.

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 16th day of August, 2021.

RECEIVED
Aug 16 2021
SC Court of Appeals

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 16th day of August, 2021.

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SC Court of Appeals

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

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above referenced case has been served upon William F. Schumacher, IV, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 16th day of August, 2021.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT