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**Nov 08 2021**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JOSHUA THOMAS ROTHWELL,

APPELLANT.

APPELLATE CASE NO. 2020-001444

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ANDERS BRIEF OF APPELLANT

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DAVID ALEXANDER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in admitting gruesome photographs of the complainant's injuries?

## STATEMENT OF THE CASE

On June 6, 2019, a Florence County grand jury indicted appellant for criminal domestic violence of a high and aggravated nature. R. 246. On October 2, 2020, the Honorable D. Craig Brown presided over pretrial motions. R. 1. David A. Richardson represented the State. R. 1. Tamara A. Greer and Emily M. Crayton represented appellant. R. 1. On October 12, 2020, appellant was tried before Judge Brown and a jury. R. 30. The jury acquitted appellant of kidnapping and CDVHAN. R. 238, l. 1 – 12. The jury convicted appellant of the lesser-included offense of first-degree CDV. R. 238, l. 1 – 12. Judge Brown sentenced appellant to ten years' imprisonment. R. 242, l. 18 – 21. This appeal follows.

## STANDARD OF REVIEW

“The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion.” State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). “A trial court has particularly wide discretion in ruling on Rule 403 objections.” State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); see also State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) (“A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances.” (citation omitted)). In exercising its discretion on a Rule 403 objection to the admissibility of autopsy photographs, the trial court “must balance the [unfair prejudice] of graphic photos against their probative value.” Dial, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted).

## ARGUMENT

The trial court erred in admitting gruesome photographs of the complainant's injuries.

Complainant Michaline Publik ("Publik") met appellant in April 2018 and moved in with him in September 2018. R. 160, l. 22 – 161, l. 9. On Saturday night, December 1, 2018, the couple began arguing. R. 162, l. 3 – 13. Publik claimed appellant told her he was going to kill her. R. 162, l. 14 – 23. Appellant beat her with a baseball bat, punched her, and kicked her. R. 162, l. 14 – 134, l. 3. He choked her. R. 162, l. 14 – 163, l. 3. Publik claimed when she tried to run away, he would grab her. R. 173, l. 4 – 8. At some point, appellant broke her phone. R. 171, l. 14 – 172, l. 8.

Publik woke up the next day in the bed. R. 165, l. 2 – 22. Appellant was asleep next to her. R. 166, l. 7 – 12. She went to the bathroom and saw her eyes were swollen shut. R. 165, l. 23 – 166, l. 6. Publik claimed she wanted to leave the house, but appellant threatened her with a knife. R. 166, l. 22 – 167, l. 10.

Publik told appellant that if he let her leave she would say she was injured in a car wreck. R. 168, l. 7 – 17. Publik did not leave the house on Sunday. R. 167, l. 13 – 168, l. 23. On Monday mornings, their routine was to carpool to work with a friend, Clint Miles ("Miles"). R. 169, l. 3 – 9. R. 125, l. 19 – 126, l. 25.

Miles arrived at the house on Monday morning. R. 127, l. 9 – 128, l. 6. Appellant came out of the house. R. 127, l. 9 – 128, l. 6. Appellant told Miles that Publik had been in a car accident and he needed to stay home to take care of her. R. 127, l. 9 – 128, l. 6. Appellant told Miles to come back the next day. R. 127, l. 9 – 128, l. 6. Publik said she did not leave the house on Monday. R. 170, l. 7 – 10.

Publik had again told appellant she would say she had been in a car wreck if they could leave with Miles on Tuesday morning. R. 173, l. 17 – 174, l. 5. Miles arrived and appellant and Publik both came out of the house. R. 128, l. 7 – 20. Miles saw that Publik had a black eye and bruising on the other side of her face. R. 128, l. 7 – 25. No discussion about Publik’s injuries took place. R. 129, l. 24 – 130, l. 1. He dropped Publik and appellant off at appellant’s workplace. R. 130, l. 2 – 19. Miles said Publik’s demeanor was typical. R. 134, l. 1 – 6.

Publik told appellant she was going to a friend’s house to clean it. R. 173, l. 23 – 176, l. 7. She promised she would say she had been in a wreck. R. 173, l. 23 – 176, l. 7. Publik then walked to the house of her former romantic interest, Justin Paris (“Paris”). R. 176, l. 2 – 22. R. 145, l. 3 – 6. Paris said Publik had significant bruising. R. 138, l. 2 – 4. Paris called 911 and the police arrived. R. 143, l. 1 – 12.

Publik declined EMS services. R. 152, l. 6 – 7. She went to an emergency room and had no fractures. R. 181, l. 10 – 23. She did not get any stitches. R. 181, l. 24 – 182, l. 3.

Paris took eight photographs of Publik that were admitted into evidence over appellant’s objection. R. 138, l. 17 – 142, l. 16. (State’s Ex. 1 – 8). The admissibility of these photographs was the subject of a pretrial hearing on October 2, 2020. R. 20, l. 16 – 27, l. 15. Appellant argued that the graphic nature of the photographs would cause the jury to render a verdict on an improper, emotional basis. R. 20, l. 16 – 27, l. 15. Publik was fully capable of testifying about her injuries, including the fact that she had no broken bones, no stitches, and no concussion. R. 20, l. 16 – 27, l. 15. Appellant argued that the photographs would make Publik’s injuries seem much worse than they actually were. R. 20, l. 16 – 27, l. 15. The trial judge took the matter under advisement at the hearing, but admitted the photographs at trial. R. 20, l. 16 – 27, l. 15. R. 138, l. 17 – 142, l. 16. (State’s Ex. 1 – 8).

The trial judge erred in admitting the photographs. Rule 403, SCRE, requires the court to weigh the probative value of evidence against the danger of unfair prejudice. “Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent.” State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). However, even relevant evidence must “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.” Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011).

“Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6<sup>th</sup> Cir. 1993)). The Supreme Court also addressed the danger of unfair prejudice in the introduction of gruesome autopsy photographs in State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). A majority of the Court held the introduction of the photographs was erroneous. Collins, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge, J. and Hearn, J., concurring); Id., at 540, 763 S.E.2d at 30-31 (Pleicones, J., dissenting). However, four members of the Court determined the erroneous admission was harmless. Id., at 536, 763 S.E.2d at 28-29 (majority opinion); Id., at 539, 763 S.E.2d at 30 (Kittredge, J. and Hearn, J., concurring).

Here, trial counsel correctly argued the photographs had the tendency to suggest a verdict based on sympathy and to overstate the extent of Publik’s injuries. Publik’s eyes are both black and swollen. (State’s Ex. 1 – 8). The bruising continued down into her neck and chest. (State’s

Ex. 1 – 8). The dramatic nature of the photographs does not comport with injuries that received no stitches.

This case was close and admission of the photographs surely prejudiced appellant. The jury clearly did not believe all of Publik's testimony because they acquitted appellant of kidnapping and the greater offense of CDVHAN. Had they not seen these photographs, appellant likely would have been acquitted of all charges. This Court should reverse.

**CONCLUSION**

For the foregoing reasons, appellant's conviction should be reversed and this case remanded for a new trial.

s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of November, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua Thomas Rothwell states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge D. Craig Brown, which was held from October 12 - 13, 2020, and in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Joshua Thomas Rothwell.

Respectfully Submitted,

s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of November, 2021.

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

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

- (1) Transcript of Hearing dated October 2, 2020
- (2) Transcript of Trial dated October 12 - 13, 2020
- (3) State's Exhibit Nos. 1 - 8 (photographs - transported)
- (4) Indictment
- (5) Sentence Sheet

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

s/David Alexander  
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 8<sup>th</sup> day of November, 2021.

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CERTIFICATE OF COUNSEL

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

s/David Alexander  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
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ATTORNEY FOR APPELLANT

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Anders Brief of Appellant and Designation of Matter in the above-referenced case have been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Joshua Thomas Rothwell, 384230, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 8th day of November, 2021.

s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT