

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APR 26 2013

SC Court of Appeals

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGORY GATHERS,

APPELLANT

Appellate Case No. 2011-203951

AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the trial court reversibly erred by admitting photographs from the decedent's autopsy depicting her bruised and cut face and body where the State already obtained evidence of the same through the pathologist's testimony and use of diagrams from his examination of decedent?

STATEMENT OF THE CASE

Appellant Gregory Quinn Gathers was indicted by the Charleston County Grand Jury on September 8, 2010, for murder. Tr. 8, lines 10-18; R. * (Indictment). His case proceeded to trial before the Honorable J.C. Nicholson, Jr., and a jury from November 14th through 17th, 2011. Tr. 1; Tr. 183; Tr. 431; Tr. 487. Martha Kent Runey (Counsel) and Ted Smith represented Appellant, while E. Culver Kidd and Adam D. Young represented the State. Tr. 2.

The jury found Appellant guilty of murder. Tr. 545, line 23—Tr. 546, line 8. The trial court imposed a life sentence. Tr. 563, lines 19-22; R. * (Sentence sheet).

STATEMENT OF THE FACTS

Appellant Gregory Gathers finished doing side-work for his employer on the morning of June 6, 2010. After he ate breakfast and was paid, he left and met with friends in the Liberty Hill neighborhood of North Charleston. Tr. 437, line 8—Tr. 438, line 5. Appellant testified that he had approximately \$620 when he went to Liberty Hill; he specifically placed \$420 of that into his buttoned back pocket to keep separate from the remaining spending money. Tr. 481, lines 15-25. While there, Appellant drank with his friends all day and smoked marijuana, collectively consuming approximately one case of beer and a half-gallon of liquor. Tr. 438, lines 4-16. By about midnight, Appellant walked to the bus stop to go home. After he missed his bus, Appellant met Renee Nevarez (Nevarez), who was also at the bus stop. Nevarez asked Appellant “if [he] wanted to have fun with her,” which Appellant understood to mean drugs and sex; he accepted. Tr. 438, line 21—Tr. 439, line 11.

After obtaining a quantity of crack cocaine, Appellant and Nevarez went to Nevarez’s apartment where they smoked crack and had sex. Approximately three to four times after that, Appellant left, bought more crack, returned, and again smoked it with Nevarez and had sex. Tr. 439, line 12—Tr. 440, line 12. At some point, Appellant blacked out and fell asleep. Tr. 440, lines 13-18.

He awoke to the alarm clock on his cell phone at approximately 4:30 am to get ready for work. Tr. 440, line 19—Tr. 441, line 1. Appellant started getting dressed, and Nevarez helped by giving Appellant his clothing. However, when Appellant felt his pocket, he realized that the \$420 he put aside was missing. Tr. 441, lines 10-24. Appellant asked Nevarez for the money, and the two began to argue. A physical fight ensued in the

bedroom; Appellant slapped Nevarez and then hit her in the nose, which began to bleed. Nevarez then told Appellant that she would give him his money. Tr. 442, lines 2-13. When Nevarez did not, Appellant grabbed her by the hair and pulled. Nevarez then told Appellant that the money was in the living room. Appellant walked to the living room while still holding Nevarez's hair. Once there, Nevarez looked through the sofa for the money. Tr. 442, lines 14-25.

Nevarez said she would give the money back, and then said it was not there. After Appellant inquired about its location, Nevarez told Appellant she would give it to him. She then went to the kitchen, pulled a knife from the butcher block, and the two began fighting over the knife. Tr. 443, line 6-15. Appellant was able to grab Nevarez's wrist and got the handle of the knife. However, Nevarez grabbed the blade of the knife, and the handle broke off leaving Nevarez with the blade. The fight continued over the blade. Appellant testified that he again hit Nevarez and, as she fell to the ground, Nevarez hit her head on the counter. Tr. 443, lines 17-25. Appellant then asked for his money again; he further indicated that, while Nevarez faced the ground, she said she did not have the money and that she would give it to him later. Tr. 444, lines 1-9; Tr. 466, lines 18-20; Tr. 479, lines 10-12. Appellant got scared and left. He took with him the handle to the knife and Nevarez's cell phone, both of which he threw across the street toward the nearby train tracks. Tr. 444, line 25—Tr. 445, line 5.

As he walked, Appellant stopped at the home of his eighty-year old father, Harry Gathers, Jr., who lived approximately three blocks away. Tr. 145, lines 9-21; Tr. 445, lines 6-8. However, Appellant's father already left to pick-up Appellant at Appellant's residence to take him to work. 445, lines 10-14.

Appellant continued to walk to his girlfriend's apartment where he lived. He called his brother in Walterboro. He told his brother that he was in a fight, that he messed up, and that a woman might be hurt. Appellant then asked his brother to check on Nevarez. Tr. 445, lines 17-25.

Appellant also stopped at gas station on his walk home, and purchased a beer. He then called his girlfriend and told her he was in a fight. Tr. 446, lines 4-24. After arriving at his residence, he called his brother and told him that he was home. He then washed his hands, and drank another beer. Shortly after, his father and brother arrived and indicated they stopped by the location of the incident; Nevarez was still lying on the floor. Appellant testified that he told his father and brother to get some help by calling an ambulance and the police. Tr. 446, line 25—Tr. 447, line 20.

Later that morning, Officers Lewis Bazzle (Bazzle) and Fred Houtz (Houtz) of the North Charleston Police Department arrived at Appellant's residence. Appellant stated to them that he was the one they were looking for, and that he "F'd up." Tr. 157, line 5—Tr. 159, line 5. Bazzle and Houtz arrested Appellant, and Houtz took him to the North Charleston Police Department to meet with detectives. Tr. 77, lines 6-17; Tr. 159, line 17—Tr. 7; Tr. 448, lines 8-21. At the station, Appellant gave a statement to Detective Justin C. Holt (Holt), of the North Charleston Police Department, over the course of approximately two hours of interrogation. Tr. 82, line 1; Tr. 8—Tr. 96, line 8; Tr. 166, lines 9-11; Tr. 170, line 3—Tr. 176, line 21.

During Appellant's trial Doctor Nicholas Batalis (Batalis), of the Medical University of South Carolina (MUSC) in Charleston, testified as well. Tr. 381, lines 18-25. Batalis was the forensic pathologist who performed the autopsy of Nevarez on June 8, 2010. Tr.

386, lines 7-19. Based on his examination, Batalis determined the cause of Nevarez's death was blunt-force trauma of the head. Tr. 387, lines 6-10. Utilizing diagrams he created, Batalis explained and showed that Nevarez's injuries included swelling of her neck, large bruising on her face and scalp, scrapes on the left side of her face, lacerations over each eye, incise wounds over each eye, and bleeding in and around her brain, which was swollen. Tr. 388, lines 9-15; Tr. 389, line 10—Tr. 397, line 10. Additionally, Nevarez had three relatively superficial incise wounds on her hands. Tr. 399, line 22—Tr. 400, line 21.

Thus, Batalis explained Nevarez's injuries in detail not only through the use of Batalis' report, but also through the use of visually displaying diagrams created by Batalis to the jury during Batalis' testimony. Yet, the State further sought to introduce photographs of Nevarez's injuries taken during the autopsy; over Counsel's objections that the photographs were prejudicial, and that the injuries were already explained to the jury through Batalis' testimony and through the use of diagrams, the trial court admitted the photographs because they showed less blood and gore compared to the photographs taken at the scene of the incident. Tr. 198, line 20—Tr. 204, line 25; Tr. 402, line 10—Tr. 408, line 24; Tr. 422, line 2—Tr. 423, line 10; R. * (State's Exhibit Numbers 10 through 15, Photographs).

Additionally, the State emphasized the graphic nature of the autopsy photographs—particularly those depicting Nevarez's "swollen and mangled" face—in its closing argument, and encouraged the jury to examine them. Specifically, the State admitted that "it's hard to look at, and it's not easy," and then relied upon the photographs to argue that "if there is anything that can show maliciousness, it's those photos." Tr. 514, lines 2-4; Tr. 515, lines 1-5.

The jury found Appellant guilty as charged, and the trial court imposed a sentence of life imprisonment. Tr. 545, line 23—Tr. 546, line 8; Tr. 563, lines 19-22; R. * (Sentence sheet). This appeal follows.

ARGUMENT

The trial court reversibly erred by admitting photographs from the decedent's autopsy depicting her bruised and cut face and body where the State already obtained evidence of the same through the pathologist's testimony and use of diagrams from his examination of decedent.

The trial court erroneously admitted autopsy photographs into evidence, which included close-up depictions of Nevarez's "swollen and mangled" face. R.* (State's Exhibit # 10); R.* (State's Exhibit # 11); R. * (State's Exhibit # 12). Counsel timely objected, and later placed on the record that the photographs that the photographs were prejudicial, and that the injuries were already explained to the jury through Batalis' testimony and through the use of diagrams. Regardless, the trial court admitted the photographs simply because they showed less "blood" and "gore" compared to the photographs taken at the scene of the incident, which the court suppressed. Tr. 198, line 20—Tr. 204, line 25; Tr. 402, line 10—Tr. 408, line 24; Tr. 422, line 2—Tr. 423, line 10; R. * (State's Exhibit Numbers 10 through 15, Photographs). This was error as the photographs were not necessary to substantiate material facts or conditions, and their probative value was substantially outweighed by the danger of unfair prejudice by creating a tendency to suggest a decision on an improper basis.

"Although photographs may be used to corroborate other evidence, 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. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (emphasis added) (internal citations omitted) (reversing and remanding where the information contained in the photographs was not really at issue, and other testimony negated any arguable evidentiary value of the photographs); see State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (agreeing with the same evidentiary principles, but factually different); State v. Waitus, 224 S.C. 12, 77

S.E.2d 256, 263 (1953); State v. Elders, 386 S.C. 474, 483, 688 S.E.2d 857, 862 (Ct. App. 2010) (agreeing with the same evidentiary principles, but factually different); see also Rule 401, SCRE (defining relevant evidence); Rule 402, SCRE (prohibiting admission of irrelevant evidence). Stated differently, “[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not *necessary* to substantiate *material* facts or conditions.” State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012) (emphasis in original) (internal quotations omitted) (quoting State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010)).

Additionally, Rule 403 of the South Carolina Rules of Evidence allows for even relevant evidence to be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE; see also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) (“It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect.”). In order to constitute unfair prejudice, “the photographs must create a tendency to suggest a decision on an improper basis, commonly, although not necessarily, an emotional one.” Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

In the present case, the State was allowed to admit several autopsy pictures of Nevarez’s remains after its expert forensic pathologist, Batalis, already provided detailed testimony regarding the injuries and cause of death. Furthermore, the State visually illustrated the injuries to the jury through Batalis’ diagrams as Batalis testified. Thus, the injuries to Nevarez were fully presented, explored, and explained to the jury through testimonial and demonstrative means. Accordingly, the autopsy photographs depicting

Nevarez's remains were not necessary to substantiate material facts or conditions in the case.

Additionally, the photographs were not needed to prove the elements of murder.¹ First, as previously indicated, the cause of death blunt-force trauma of the head was established by Batalis through the use of his autopsy report and his diagrams. Second, Batalis' testimony also encompassed what would be required to produce such injuries. Specifically, Batalis testified that such bruising and lacerations to Nevarez's face and scalp indicate she was struck anywhere from five to as many as twenty or more times. Furthermore, Batalis explained to the jury that a person would not die simply due to bruising of the face and scalp, as in a bad fight or car accident; rather, Batalis indicated that Nevarez was beaten so badly that her brain "sloshed" back and forth causing it to markedly swell. Tr. 388, lines 9-15; Tr. 389, line 10—Tr. 397, line 10. Thus, Batalis' testimony indicated the blunt-force trauma here was so severe that it caused brain dysfunction in Nevarez. As a result, the State did not need the autopsy photographs of Nevarez to prove the element of malice. Therefore, the autopsy photographs of Nevarez's remains were not necessary to substantiate material facts or even elements of the charged offense: "the photos in this case are hardly 'necessary,'" and are of little significance to the State's case." Collins, 398 S.C. at 202, 727 S.E.2d at 754 (citing Torres, 390 S.C. at 623, 703 S.E.2d at 228). Accordingly, the probative value of the photographs in question was, at best, minimal.

¹ Murder is defined as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (West, Westlaw current through end of 2011 Sess); see also State v Dickerson, 395 S.C. 101, 119 n.5, 716 S.E.2d 895, 905 n.5 (2011).

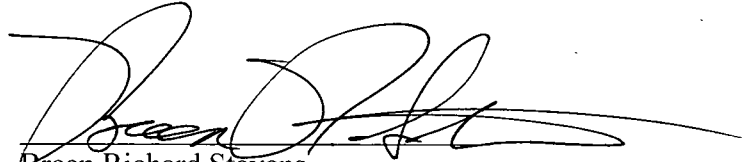
Additionally, the photographs of Nevarez served to create an unfair prejudice against Appellant. The photographs displayed to the jury close-up imagery of Nevarez's remains on a slab during autopsy. In fact, the State itself emphasized the graphic nature of the photographs depicting Nevarez's "swollen and mangled" face in its closing argument, and encouraged the jury to examine them. Specifically, the State admitted that "it's hard to look at, and it's not easy," and then relied upon the photographs to argue that "if there is anything that can show maliciousness, it's those photos." Tr. 514, lines 2-4; Tr. 515, lines 1-5. Yet, as in Waitus, the information contained in these photos was not disputed, and was established by testimony. Id. 224 S.C. 12, 77 S.E.2d at 263 (reversing where four pictures of the victim at the crime scene that showed marks, bruises and abrasions, and the condition of the victim's clothes, were admitted into evidence even though that those facts were not disputed and were already established by testimony); see also Collins, 398 S.C. at 203-04, 727 S.E.2d at 755. Therefore, the only remaining value of the autopsy photographs of Nevarez was to arouse the sympathies and the prejudices of the jury. Middleton, 288 S.C. at 24, 339 S.E.2d at 693.

Accordingly, the trial court erred in admitting the autopsy photographs in Appellant's trial, and Appellant was prejudiced by the erroneous admission as "[t]he prejudice created by the photographs clearly outweighed *any* evidentiary value." Id. (emphasis in original) (citing Waitus, 224 S.C. 12, 77 S.E.2d 256, and State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940)). Appellant therefore seeks reversal of his conviction, and remand of his case.

CONCLUSION

For the forgoing reasons, Appellant Gregory Gathers respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of April, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

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THE STATE,

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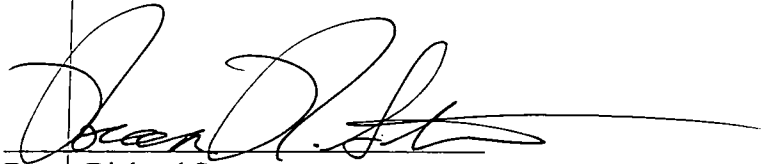
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Trial transcript (November 14, 2011), pp. 1-5; pg. 8; pg. 53; pp. 67-68; pp. 72-132; pp. 135-153; pp. 155-179;
- (3) Trial transcript (November 15, 2011), pp. 183-206; pp. 211-215; pp. 224-282; pp. 293-308; pp. 349-379; pp. 381-420; pp. 422-424;
- (4) Trial transcript (November 16, 2011), pp. 432-433; pp. 435-484;
- (5) Trial transcript (November 17, 2011), pp. 487-489; pp. 491-564;
- (6) State's Exhibit Number 10 (Photograph);
- (7) State's Exhibit Number 11 (Photograph);
- (8) State's Exhibit Number 12 (Photograph);
- (9) State's Exhibit Number 13 (Photograph);
- (10) State's Exhibit Number 14 (Photograph);
- (11) State's Exhibit Number 15 (Photograph);
- (12) Sentence sheet.

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

April 26, 2013.

A handwritten signature in black ink, appearing to read "Breen R. Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

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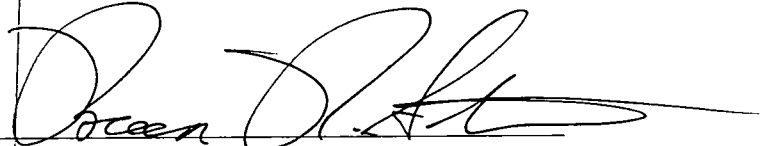
GREGORY GATHERS,

APPELLANT

Appellate Case No. 2011-203951

CERTIFICATE OF SERVICE

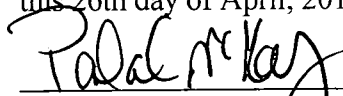
The undersigned attorney hereby certifies that a true copy of the Amended Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and on Mr. Gregory Gathers, #161538 at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of April, 2013.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of April, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.