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**Mar 21 2022**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Sumter County

Honorable Kristi F. Curtis, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

NIKEEN D'AUNDRE JOHNSON,

APPELLANT

APPELLATE CASE NO. 2021-000674

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INITIAL BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in admitting graphic photographs depicting the injuries of complaining witnesses under Rule 403, SCRE, where: (1) there was testimony about the injuries, rendering the photographs a needless presentation of cumulative evidence, and (2) the probative value of the photographs was substantially outweighed by their potential for being unfairly prejudicial?

## STATEMENT OF THE CASE

On July 30, 2020, appellant was indicted by a Sumter County grand jury for four counts of attempted murder.<sup>1</sup> R\*. Appellant's case was called to trial on June 21, 2021, before the Honorable Kristi Curtis and a jury. Tr. 1. Timothy Griffith represented appellant and John Meadors, assistant solicitor, represented the state. Tr. 1.

On June 24, 2021, the jury found appellant guilty of one count attempted murder and two counts of assault and battery of a high and aggravated nature (ABHAN). Tr. 405-06. Judge Curtis sentenced appellant to concurrent terms of thirty years' imprisonment for attempted murder, fifteen years' imprisonment for ABHAN, and fifteen years' imprisonment for ABHAN. Tr. 409.

This appeal follows.

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<sup>1</sup> Appellant went to trial on three counts of attempted murder.

## 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); *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); *State v. Wood*, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); *State v. Williams*, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997); *State v. Patterson*, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); *State v. Landis*, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

## ARGUMENT

The trial court erred in admitting graphic photographs depicting the injuries of complaining witnesses under Rule 403, SCRE, where: (1) there was testimony about the injuries, rendering the photographs a needless presentation of cumulative evidence, and (2) the probative value of the photographs was substantially outweighed by their potential for being unfairly prejudicial.

### **Relevant facts**

On August 16, 2019, Willie Graham had a gathering in his yard. Graham lived in a mobile home park with his girlfriend, Shamika Bracey, and their two minor children. Tr. 141, ll. 16-25. The gathering consisted of Graham, friends from the mobile home park, Kwodel Johnson, and Johnson's cousin, appellant. Tr. 144, l. 8-146, l. 8. At some point Graham got upset and thought someone had taken his wallet. Graham brought a machete outside and threw it in the ground. Tr. 147, ll. 9-13; 148, ll. 9-23; 152, l. 19-153, l. 11. Later in the day it started raining and everyone left except Johnson and appellant. Tr. 149, ll. 8-21. Graham said at trial that he and appellant got in an argument because he wanted Johnson and appellant to leave, and they refused. Graham claimed that appellant, standing outside at the bottom of his front steps pulled out a gun and started shooting at him as he stood in his doorway with his family behind him. Tr. 151-55.

When police arrived, they found Graham in his trailer with multiple gunshot wounds. Tr. 123, ll. 1-11. Graham's girlfriend, Shamika Bracey, and one of their children were found injured at a neighbor's home. Tr. 134, ll. 13-16; 190, ll. 14-24. All three were taken to the hospital for care. Tr. 196, ll. 2-3; 201, ll. 6-12; 207, ll. 5-8. No statements were given by any of them with regard to the shooter's identity. Tr. 196, ll. 5-7; 201, ll. 24-25; 207, ll. 17-20. A few days after the incident Graham was shown a photographic lineup and he identified appellant as the person who shot him. Tr. 213, l. 5-215, l. 10.

Graham testified that on the day of the incident he had people over socializing in his yard including, Kwodel Johnson and appellant whom Graham had not met. Tr. 145, l. 2-146, l. 1. Graham claimed that he did not interact with appellant throughout the day. Tr. 146, ll. 7-16. Graham said that he went inside his home to get the machete and “stuck it in the ground,” because he was suspicious of appellant. Tr. 148, ll. 6-23. When it began raining everyone left except Johnson and appellant. Tr. 149, ll. 8-21. Graham claimed he asked Johnson and appellant to leave, and they refused. Tr. 151, ll. 3-13. That led to an altercation out in front of Graham’s home and Graham claimed appellant pulled out a gun started shooting him. Tr. 153, ll. 12-21.

Graham testified that he sustained gunshot wounds to his legs, his arm, and his stomach. Tr. 160, l. 13. During his testimony the prosecutor offered state’s exhibits 7 and 8, photographs of Graham’s injuries, taken at the hospital.<sup>2</sup> Tr. 161. Defense counsel previously objected to state’s, exhibits 7-9, photographs, on the basis that they were graphic depictions of the injuries and were not necessary to establish the fact that Graham was shot. Defense counsel asserted that Graham’s testimony about his injuries was sufficient and showing photographs of the injuries was unduly prejudicial. Tr. 137, l. 20-138, l. 1. The trial court, summarily, ruled that state’s exhibits 7 and 8 were admissible and state’s exhibit 9 was inadmissible. Tr. 138, ll. 2-7.

Defense counsel also objected to the admission of state’s exhibits 17-19, photographs of Shanika Bracey’s and minor’s injuries, taken at the hospital. Defense counsel argued that the photographs were substantially more prejudicial than probative and that the minor child was testifying and could describe their own injuries. Tr. 176, ll. 15-22.

The court ruled the photographs were probative because they showed the injuries and even though the court declared, they were “difficult to look at,” the court allowed state’s exhibits 17

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<sup>2</sup> State’s exhibits 7 and 8 are on file with the Court.

and 19 in but not state's exhibit 18.<sup>3</sup> Tr. 176, l. 23-177, l. 8.

State's exhibits 17 and 19 were admitted during the testimony of paramedic, Daren Avins. Avins testified that state's exhibit 17, was a close-up of minor's wound in the center of her chest. Avins explained that this wound was not a gunshot wound but was possibly caused by "shrapnel from the bullet" or "bone fragments." Tr. 191, l. 19-192, l. 19. State's exhibit 19, photograph of Bracey's injury, was described by Avins as photograph of the gunshot wound in Bracey's abdomen. Tr. 193, l. 11-194, l. 22.

Kwodel Johnson, also charged in this incident, testified for the state. Tr. 260. Johnson testified that he and Graham had a friendly relationship, and, on that day, Johnson was at Graham's home to "hang out and barbecue." Tr. 268-70. Johnson testified that he told police that he thought he heard Graham say he was going to get his gun. Tr. 291, ll. 16-23. Johnson denied knowing that appellant had a gun and denied seeing who shot Graham.<sup>4</sup> Tr. 272; 278; 281; 292.

### **Discussion**

The trial court abused its discretion by admitting graphic photographs of the injuries of Graham, Bracey, and minor because the photographs were not necessary and they were unduly prejudicial under Rule, 403, SCRE. The admission of these graphic photographs, including one depicting the injury of minor, likely influenced the jury's verdict where the jury had heard evidence of and was instructed on self-defense.

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

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<sup>3</sup> State's exhibits 17 and 19 are on file with the Court.

<sup>4</sup> Investigator Randall Stewart testified that Johnson told him he knew appellant had a gun that day and saw appellant firing the gun. Tr. 327-30.

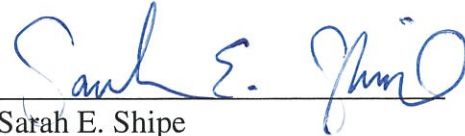
by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule, 403 SCRE. Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. *State v. Brazell*, 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).

Photographic evidence of the injuries was not necessary in this case where Graham, minor, and multiple paramedics testified about the injuries. *See State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). The photographs were not necessary to corroborate the testimonies of Graham or minor where it was uncontested by the defense that they were shot and injured. The case did not center around the severity of the injuries of Graham, Bracey, or minor. Rather the case hinged on the circumstances that led up to the incident. Evidence was presented, through Johnson and through Investigator Stewart, that appellant acted in self-defense where Graham admittedly displayed a machete and later remarked that he was going to get a gun.

The photographs were as the trial court stated, “difficult to look at,” and any probative value was substantially outweighed by danger of unfair prejudice. All the inadmissible photographs were taken at the hospital and were close-up photographs depicting the injuries of Graham, Bracey, and minor. The graphic photographs were unnecessary, and their only purpose was to create an emotional response in the jurors, which “tends to suggest decision on an improper basis.” *See State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998).

**CONCLUSION**

By reason of the foregoing argument, appellant requests this Court reverse his conviction and remand his case for a new trial.

A handwritten signature in blue ink, appearing to read "Sarah E. Shipe", written over a horizontal line.

Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR APPELLANT

This 21<sup>st</sup> day of March, 2022.

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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 a true copy of the Initial 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 Nikeen D'Aundre Johnson, #347962, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC, 29010, this 21<sup>st</sup> day of March, 2022.

  
Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR APPELLANT