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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

KENNETH WAYNE CARLISLE,

APPELLANT

APPELLATE CASE NO. 2019-001702

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

Opinion No. 2022-UP-197

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Appellant, Kenneth Wayne Carlisle, respectfully petitions this Court for rehearing. Counsel respectfully submits that in finding that the trial judge did not abuse his discretion in admitting a photograph of skeletal remains taken where the remains were discovered, State's exhibit #50, and admitting eight autopsy photographs, State's exhibits #58, #59, #61-#64, #66 and #129, this Court misapprehended the Rule 403, SCRE, analysis required. The main question to be resolved by the jury in the present case was who shot and killed the two victims. The skeletal remains photograph and the eight autopsy photographs do not establish the identity of the perpetrators making the probative value of the photographs minimal. The probative

value of the skeletal remains photograph is further minimized by the fact that two other less graphic photographs of the scene, State's exhibits #51 and #52, were admitted in evidence without objection. The cause of death was straight forward further minimizing the probative value of the autopsy photos. Pursuant to Rule 403, SCRE, the minimal probative value of the exhibits must be balanced against the danger of unfair prejudice.

State's exhibit #50, the photograph of the uncovered decomposing skeletal remains, is highly prejudicial and inflammatory. The eight autopsy photographs are, as to be expected, gruesome and were not needed in order for the pathologist to explain the cause of death as gunshot wounds to the head. The State certainly did not need to introduce all eight autopsy photographs. State's exhibit #59 is particularly gruesome and prejudicial as the jaw is open and the skull appears to be screaming. (R. p. 796). The minimal probative value of the challenged photographs is substantially outweighed by the danger of unfair prejudice. Under the facts of this case, the trial judge abused his discretion in admitting the photos. Counsel respectfully seeks rehearing.

- 1. The trial judge erred in admitting a photograph of decomposed skeletal remains when any probative value of the photograph was substantially outweighed by the danger of unfair prejudice.**

The jury found Appellant and the co-defendant guilty of the shooting death of Linda McAllister, the co-defendant's grandmother, and William "Chet" Clemmons, the grandmother's husband. Their bodies were discovered on July 15, 2017, in a wooded area in the Bucksville area of Horry County near the Brown's Chapel Landing. (R. p. 255, line 5 - p. 256, lines 1-16). During the trial the State moved to admit three photographs, marked State's exhibits #50, #51, #52, of the bodies where they were discovered. (R. p. 372, lines 9 - 18). Appellant and the co-

defendant objected to one of the three photographs offered, State's exhibit #50. (R. p. 372, line 20 – p. 373, lines 1-5).

Counsel for the co-defendant argued:

My objection, your Honor, is that it, it shows a skeletal, a partial skeletal remain, and, and I think it's graphic, and I think if it were in black and white it wouldn't be as prejudicial, but I find it extremely prejudicial especially because it's in color, and it's more of a close-up than, than just a picture which would show where the, where the skeletal remains were. So I think that there is certainly a less, I won't say intrusive, but a way to, to present the same evidence without the extensive prejudicial effect that come from the way it, it is in that photograph.

(R. p. 374, lines 6-15). Counsel for Appellant additionally argued:

Your Honor, all I would add and I would join in Mr. Wilson's objection here is that I do ask – the prejudicial effect would be the potential to inflame the passions of the jury by seeing this body in a decomposed state, in a decomposed manner in a photo that I believe has very limited probative value to what the State is seeking to prove, which is the location of where the bodies were found. I believe that are least restrictive, less prejudicial matter – manner in which the State could present that evidence. So I believe under State v. Collins it would be inappropriate to introduce that photo into evidence as it currently sits.

(R. p. 374, line 17 – p. 375, lines 1-2).

The State responded, "State's 50 shows the bodies uncovered, not, not covered as they were in the other two, show exactly how they were found. It shows their position relative to each other. It shows the position of the bodies which would allow us to argue how they were carried there, Your Honor. It's not shown in the other photos." (R. p. 375, lines 19-24). The trial judge, citing State v. Collins, S.C. 409 S.C. 524, 763 S.E.2d 22 (2014), overruled the objections and admitted the photograph. (R. p. 375, line 25 – p. 376, 377, lines 1-11). The trial judge erred.

The trial judge's reliance on the plurality opinion in Collins is misplaced. In the present case the photograph of the decomposed skeletal remains was not probative, corroborative or material in establishing an element of murder. In Collins 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, in the present case there was nothing particularly unusual about the uncovered skeletal remains depicted in State’s exhibit #50, especially in light of the fact that other photos, State’s exhibits #51 and #52, of the location where the remains were found were admitted without objection. (R. p. 791-793).

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 photograph of the uncovered decomposed skeletal remains should have been excluded because it was calculated to arouse the sympathy of the jury, was 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 photograph of the uncovered decomposing skeletal remains was highly prejudicial and inflammatory. The photo had very little probative value. The photo did not help establish an element of murder or corroborate challenged testimony or assist a witness with their testimony. There was no question that the bodies were carried into the woods. Other unchallenged photos, State's exhibits #51 and #52, established the location of where the bodies were found. (R. p. 792, 793). 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.” The probative value of the photograph of the decomposed skeletal

remains was substantially outweighed by the danger of unfair prejudice. The trial judge abused his discretion in admitting the photo. The error requires reversal.

In affirming the convictions this Court wrote, “The trial court did not abuse its discretion by admitting into evidence Exhibit 50—a photograph of the victims’ skeletal remains taken in the location where the remains were discovered—because the photograph corroborated trial testimony about the location and condition of the victims’ remains upon discovery.” State v. Carlisle, No. 2019-001702, 2022 WL 1562367, at *1 (S.C. Ct. App. May 18, 2022). While the photograph corroborated trial testimony about the location and condition of the remains upon discovery, the probative value is minimal as the location and condition of the remains was not challenged and the other two photos, admitted without objection, corroborated the testimony about the location and condition of the remains. Importantly, the photograph did not establish the identity of the perpetrators, the key question to be determined by the jury.

In State v. Phillips, 430 S.C. 319, 327, 844 S.E.2d 651, 655 (2020), the South Carolina Supreme Court, addressing a Rule 403, SCRE, analysis wrote:

We begin our analysis of a Rule 403 objection with probative value. To understand the probative value of any evidence, we must consider what was practically in dispute at trial. State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). Woods was clearly murdered; the only significant issue—as a practical matter—was who murdered him. We must then consider how important the challenged evidence is to resolving the practically disputed questions. See State v. James, 355 S.C. 25, 35, 583 S.E.2d 745, 750 (2003) (stating “the probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point” (quoting Old Chief v. United States, 519 U.S. 172, 185, 117 S. Ct. 644, 652, 136 L. Ed. 2d 574, 590 (1997))); Gray, 408 S.C. at 610, 759 S.E.2d at 165.

Respectfully, counsel submits this Court failed to properly consider the minimal probative value of the photograph showing the uncovered decomposing skeletal remains. The victims were

clearly murdered. The significant issue was who murdered the victims. The challenged photo has very little importance in regard to the identity of the perpetrators.

This Court also wrote, “Additionally, Exhibit 50 was relevant to and probative of whether Carlisle was guilty of murder because the photograph tended to show whether Carlisle acted with malice.” State v. Carlisle, No. 2019-001702, 2022 WL 1562367, at *1 (S.C. Ct. App. May 18, 2022). Again, the victims were clearly murdered. The person or persons who shot these two people in the head and dumped their bodies in the woods clearly acted with malice. The photograph of the uncovered decomposed skeletal remains was calculated to arouse the sympathy of the jury, was not necessary to an issue at trial and tended to suggest a decision based on an improper emotional basis. The minimal probative value of the photograph was substantially outweighed by the danger of unfair prejudice. The trial judge abused his discretion in admitting the photo.

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

Dr. Cynthia Schandl was qualified, without objection, as an expert in forensic pathology. (R. p. 473, line 6 – p. 474, lines 1-5). Dr. Schandl performed the autopsies of both Linda McAllister and William “Chet” Clemmons. She testified that the cause of death for both was a single gunshot wound to the head. (R. p. 484, lines 6-11; p. 489, line 21 – p. 490, line 1). Although the cause of death was straight forward and not an issue at trial, the trial judge admitted, over objection, eight photographs from the autopsy, State’s exhibits #58, #59, #61, #62, #63, #64, #66 and #128. (R. p. 480, lines 15-22; p. 482, lines 4-21; p. 485, lines 20-25; p. 487, lines 9-16; p. 505, lines 2-9; R. pp. 795, 796, 798-801, 803, 804). The judge explained his ruling but failed to note why the pathologist’s testimony, without the use of autopsy photographs, was not sufficient to allow the State to establish the elements of the offense.

The autopsy photos in the present case are distinguished from the pre-autopsy photos in Collins. The photos in Collins were used to support the assertions about the dangerous propensities of the dogs, the manner and extent of the attack, and Collins's criminal negligence. Like the skeletal remains photo discussed above, there was nothing unusual or complicated about the manner of death in the present case that would require the admission of the gruesome autopsy photographs.

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 contrast, each of the deceased in the present case died from a single gunshot wound to the head. The testimony of the pathologist fully explained the injury, the location and the manner of death. Reference to the autopsy photos was not necessary. There was nothing particularly unusual about the injuries in the present case that required admission of the autopsy photos. 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 autopsy photos. State's exhibits #58 and #59 are photos of the entrance and exit wounds on Ms. McAllister's skull, from left to right. (R. p. 795, p. 796). State's exhibit #61 shows her skull with a rod going through it to show the trajectory of the bullet. (R. p. 798). State's exhibit #128 is an x-ray showing the bullet and a necklace worn by Ms. McAllister. (R. p. 804). The pathologist sufficiently testified as to the bullet, the entrance and exit wounds and the trajectory of the bullet. The photos were not necessary to her testimony or to establish an element of the State's case. State's exhibit #59 is particularly gruesome and prejudicial as the jaw is open and the skull appears to be screaming. (R. p. 796). The x-ray showing the bullet and the necklace worn by Ms. McAllister is also prejudicial as it personalizes the deceased. The pathologist did not need a photo of the bullet to establish that the deceased dies as a result of a single gunshot wound. State's exhibit #62 shows Mr. Clemmons' jaw with no teeth.¹ (R. p. 799). State's exhibits #63 and #64 are photos of the entrance and exit wounds on Mr. Clemmons' skull, from left to right. (R. p. 800, p. 801). State's exhibit #66 shows his skull with a rod going through it to show the trajectory of the bullet. (R. p. 803). As with the autopsy photos of Ms. McAllister, the pathologist sufficiently testified as to entrance and exit wounds and the trajectory of the bullet. The photos were not

¹ The identity of both Ms. McAllister and Mr. Clemmons was confirmed at trial by DNA testing.

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, 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.

In affirming the convictions this Court wrote, "Exhibit 62—a photograph of victim 2's jawbone—was relevant to and probative of victim 2's identity. Exhibits 58, 59, 61, 63, 64, 66, and 128—photographs and an x-ray from the victims' autopsies—were relevant to and probative of the victims' causes of death." State v. Carlisle, No. 2019-001702, 2022 WL 1562367, at *2 (S.C. Ct. App. May 18, 2022). Victim 2's identity was established by DNA. The cause of death was simple and straight forward – gunshot wound to the head. Again, counsel respectfully submits that this Court failed to properly consider the minimal probative value of the autopsy photographs. The gruesome autopsy 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. The State certainly did not need all eight autopsy photographs. The minimal probative value of the autopsy photographs was substantially outweighed by the danger of unfair prejudice. The trial judge abused his discretion in admitting all eight of the autopsy photos.

Respectfully Submitted,

A handwritten signature in blue ink, reading "Kathrine H. Hudgins", written over a horizontal line.

KATHRINE H. HUDGINS
Appellate Defender

This 2nd day of June, 2022.

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Jun 02 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.


KENNETH WAYNE CARLISLE,

APPELLANT

APPELLATE CASE NO. 2019-001702

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon W. Edgar Salter, III, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Kenneth Wayne Carlisle, #381561, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 2nd day of June, 2022.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

From: [Stock, Chris](#)
To: [SC - SALTER WILLIAM; "Brandy Rankin"](#)
Cc: [Hudgins, Kathrine](#)
Subject: Carlisle, K. - Petition for Rehearing - 2019-001702
Date: Thursday, June 2, 2022 3:00:00 PM
Attachments: [Carlisle, K. - Petition for Rehearing - 2019-001702.pdf](#)
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Good Afternoon,

Please find attached for service the petition for rehearing for Kenneth Carlisle's appeal which will be filed with the Court of Appeals today.

If you have any questions, please let me know.

Thank you,

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330