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Stephen A. Hunting, #21648
Franklin County Attorney
220 S. Beech Street, Suite B
Ottawa, KS 66067
shunting@franklincoks.org

**IN THE DISTRICT COURT OF FRANKLIN COUNTY, KANSAS
FOURTH JUDICIAL DISTRICT**

STATE OF KANSAS,
Plaintiff,

vs.

Case No. 13 CR 104

KYLE TREVOR FLACK,
Defendant.

**STATE'S SECOND MOTION FOR PRETRIAL HEARING AND RULING REGARDING
THE ADMISSIBILITY OF GRUESOME PHOTOGRAPHS**

COMES NOW the State, by and through Stephen A. Hunting, Franklin County Attorney, and moves this court to conduct a second pretrial evidentiary hearing regarding the admissibility of gruesome photographs which the State intends to introduce at trial. This Court has previously ruled on the admissibility of certain photographs and the Court wished to revisit others at a later time. The State now requests to revisit the photos which the Court requested consideration of alternatives, as well as two additional photographs that were incorporated into a forensic scientist's report. In support of this motion, the State outlines and argues the following:

PROCEDURAL HISTORY AND PREVIOUS RULINGS TO DATE

At a June 9, 2015 motion hearing, the Court ruled upon the State's first Motion for a Pretrial Ruling on the Admissibility of Gruesome Photographs. The

State submitted to the Court for its review and consideration eight photographs as it pertained to victim Steven White, twenty-four photographs as it pertained to victim Andrew Stout, twelve photos as it pertained to victim Kaylie Bailey, and nine photos as it pertained to Lana Bailey.

The Court reviewed all of the above mentioned photographs. The Court ruled as it pertained to Steven White that photo #2 would not be admissible, but allowed the remaining seven photographs. The Court ruled as it pertained to Andrew Stout that photos #5, #6, and #8 were inadmissible because they were cumulative but allowed the remaining twenty-one photographs. The Court ruled as it pertained to Kaylie Bailey that all twelve of the proposed photographs would be admissible. The Court ruled as it pertained to Lana Bailey that photos #1 through #5 and #9 were not gruesome and were admissible. The Court indicated that it wished to revisit photos #6, #7, and #8.

THE STATE'S PRESENT PROPOSAL

The State, taking into consideration the Court's concerns over photos #6, #7, and #8 of Lana Bailey, re-submits photos #6, 7, and #8 with the face and/or head of Lana Bailey cropped out of each of the photographs. The State submits that this is a viable alternative that allows the State to present its evidence, but address the concerns the Court originally noted at the June 9, 2015 hearing.

In addition, the State requests two additional photographs of L.B. be considered for admission, labeled for purposes of this motion #10 and #11.

All of the above mentioned photographs concerning Lana Bailing highlight the injury she suffered, and help demonstrate what specific type of instrument

and ammunition was used in her murder. The photographs will help assist the medical examiner, the bloodstain pattern analysis scientist, and/or the ballistics expert in their respective testimonies concerning the manner, cause, and circumstances surrounding Lana Bailey's murder.

The State also requests the Court consider for admission two additional photographs concerning victim Kaylie Bailey. For purposes of this motion, the State has labeled the photographs #13 and #14. These particular photographs are used in Lab Report #30, a Bloodstain Pattern Analysis Report authored by Jeremiah A. Morris of the Johnson County Sheriff's Office Criminalistics Laboratory, and the photographs assist Mr. Morris in his testimony concerning the circumstances and facts regarding the murder of Kaylie Bailey.

ARGUMENTS AND AUTHORITIES

The State bears the burden of proving all of the elements of the crimes charged regardless of whether the defendant concedes the cause of death. Consequently, photographs depicting the nature, extent, and number of wounds are generally relevant in a murder case. *State v. Pennington*, 276 Kan. 841, 848, 80 P.3d 44 (2003). K.S.A. 60-407(f) states that all relevant evidence is admissible. Relevant evidence is defined as "evidence having any tendency to prove any material fact." K.S.A. 60-401(b). Although the trial court should take special care to avoid the introduction of overly gruesome autopsy photographs, photographs that illustrate the nature and extent of the wounds are admissible when they corroborate testimony or are relevant to the pathologist's testimony

regarding the cause of death, even though they may be gruesome. *Pennington*, 276 Kan. at 848, 80 P.3d 44 (2003).

The Kansas Supreme Court, when determining the admission of photographs, indicates that:

Photographic evidence, like other evidence offered at trial, is relevant and generally admissible if the photographs have a reasonable tendency to prove a material fact in the case. *State v. Miller*, 284 Kan. 682, 698, 163 P.3d 267 (2007). Although they may sometimes be gruesome, autopsy photographs that assist a pathologist in explaining the cause of death are relevant and admissible. *State v. Riojas*, 288 Kan. 379, 387, 204 P.3d 578 (2009); *State v. Decker*, 288 Kan. 306, 309, 202 P.3d 669 (2009); *State v. Cavaness*, 278 Kan. 469, 477, 101 P.3d 717 (2004). However, admitting **gruesome photographs** simply to " 'inflame the minds of the members of the jury' " is error. *Riojas*, 288 Kan. at 387, 204 P.3d 578 (quoting *State v. Boyd*, 216 Kan. 373, 377, 532 P.2d 1064 [1975]). We have also often said that admission of unduly repetitious photographs can constitute an abuse of discretion. *State v. Hill*, 290 Kan. 339, 362, 228 P.3d 1027 (2010). The key, as with prejudice, is the word unduly. *Cf. State v. Clark*, 261 Kan. 460, 478, 931 P.2d 664 (1997) (prejudice expected; only undue prejudice reversible). The admission of photographs in a murder case has rarely been held to be an abuse of discretion. *State v. Sappington*, 285 Kan. 176, 195, 169 P.3d 1107 (2007).

State v. Rodriguez, 295 Kan. 1146, 1157, 289 P.3d 85 (2012).

Furthermore, the Kansas Supreme Court indicates that:

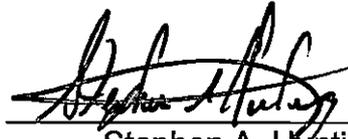
Photographs depicting the extent, nature, and number of wounds inflicted are generally relevant in a murder case. [Citation omitted.] Photographs which are relevant and material in assisting the jury's understanding of medical testimony are admissible. Specifically, photographs which aid a pathologist in explaining the cause of death are admissible. [Citation omitted.] Photographs used to prove the manner of death and the violent nature of the crime are relevant and admissible. [Citation omitted.] *State v. Parker*, 277 Kan. 838, 847, 89 P.3d 622 (2004) (quoting *State v. Green*, 274 Kan. 145, 147, 48 P.3d 1276 [2002]).

Additionally, because the State has the burden to prove every element of the crime charged, photographs used to prove the

elements of the crime, including the fact and manner of death and the violent nature of the crime, are relevant even if the cause of death is not contested. [Citation omitted.] Finally, while we have stated that the “ ‘wholesale admission of similar grotesque and bloody photographs which(Cite as: 293 Kan. 840, *854, 270 P.3d 1115, *1126) add nothing new to the state’s case” is improper,’ a photograph need not be excluded simply because it is gruesome. [Citation omitted.]” *Burnett*, 293 Kan. at 853–54, 270 P.3d 1115.

State v. Backus, 295 Kan. 1003, 1013, 287 P.3d 894 (2012).

Kansas courts routinely, and appropriately, place cautionary measures on the admission of gruesome photographs. However, Kansas law is clear that gruesome photographs are admissible if relevant and serve a legitimate purpose, i.e. go to establishing cause or manner of death, identification, etc. Since the State carries the burden to prove each and every element of all crimes charged beyond a reasonable doubt, photographs, however gruesome, should be ruled admissible so long as they aid in proving the elements. So long as the gruesome photographs are not found to be unnecessarily cumulative or only serving the purpose of inflaming the minds of the jury, the photographs should be ruled admissible.



Stephen A. Hunting #21648
Franklin County Attorney
220 S. Beech Street, Suite B
Ottawa, KS 66067
(785) 229-8970
(785) 229- 8971 (fax)

CERTIFICATE OF SERVICE

I hereby certify that the original State’s Second Motion for Pretrial Hearing and Ruling Regarding the Admissibility of Gruesome Photographs was hand-delivered on the 18th day of February, 2016, to:

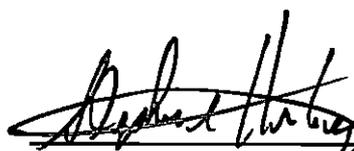
The Clerk of the Franklin County District Court
301 S. Main Street
Ottawa, KS 66067

and, I hereby certify that a true and accurate copy of the State's Second Motion for Pretrial Hearing and Ruling Regarding the Admissibility of Gruesome Photographs was emailed to mwright@sbids.org and tfrieden@sbids.org and via facsimile to 785-291-3979 & 316-0267-3756 and mailed via USPS on the 18th day of February, 2016 to:

Maban Wright
Attorney for the Defendant
700 SW Jackson Street - Suite 500
Topeka, KS 66603

Timothy Frieden
Attorney for the Defendant
266 N. Main, Suite 210
Wichita, KS 67202

and, I hereby certify that a chamber copy of the State's Second Motion for Pretrial Hearing and Ruling Regarding the Admissibility of Gruesome Photographs was delivered to Hon. Eric Godderz on the 18th day of February, 2016 to:



Stephen A. Hunting, S.Ct. #21648
Franklin County Attorney