

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY
The Honorable J.C. Nicholson, Jr. Circuit Court Judge

S.C. SUPREME COURT

APPELLATE CASE NO. 2021-001356

Opinion No. 28171 (S.C. Sup. Ct. filed August 9, 2023)

THE STATE,.....RESPONDENT

V.

CARMIE JOSETTE NELSON,.....PETITIONER

PETITION FOR REHEARING

On August 9, 2023, this Court issued a published opinion reversing the decision of the trial court in the above captioned case. Pursuant to Rule 221(a), SCACR, the Respondent is now filing this petition for rehearing.

According to Rule 221(a), SCACR a petition for rehearing must “state with particularity the points supposed to have been overlooked or misapprehended by the court.” Respondent will provide the issues that were overlooked by this court, or which it feels has been misapprehended.

1. The trial court did not err in allowing the autopsy photos into evidence.

This Court’s opinion is that photos placed into evidence violated Rule 403 of the South Carolina rules of evidence, which specifically states:

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.

Rule 403 SCRE

This Court's opinion was that the autopsy photographs "surpassed the outer limits of what our law permits a jury to consider." *State v. Nelson*, Op. No. 28171 (S.C. Sup. Ct. filed August 9, 2023).

The Court misapprehended the fact that the photographs corroborated the confession of the Petitioner. This Court determined that the photographs did not corroborate the statement of Petitioner's husband Daniel; however, this Court never addressed that the photographs did corroborate statements made by the Petitioner herself. Within the recording she discussed hitting the victim in the head with the hammer and she got up. They also discussed the fact that she slit her throat and how she "commenced to fucking still hitting her and I didn't fucking stop" (R. p. 121 l. 18-19). The defense was that Daniel murdered the victim while Petitioner was in the shower. However, this confession matches the photographs which corroborate the statement and proves that what she confessed to is absolutely the truth. In *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010) this Court ruled that, "if the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *Torres*, 390 S.C. at 623, 703 S.E.2d at 229, quoting, *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). This Court never addressed the corroboration these photographs had with the Petitioner's confession.

The Respondent will also argue that regardless if the facts were stipulated by the defense during their opening argument the requirement of proving a defendant guilty beyond a reasonable doubt remains. And what is necessary to achieve that verdict is not up to this court but to a jury and since the solicitor involved with this case does not have any knowledge of the jury's mindset,

any relevant evidence that can prove guilt beyond a reasonable doubt should be allowed regardless of what is stipulated by the defense.

During trial the Solicitor introduced into evidence autopsy photographs that were state exhibits 75, 76, and 77. These were the photographs revealing the victim's head injuries and the body's decomposition. Dr. Nicholas Batalis the medical examiner who performed the autopsy testified. During his testimony Dr. Batalis explained that although he had a diagram it only describes wounds. Dr. Batalis stated that photographs do a much better job of revealing features, diagrams only show estimation. (R. p. 308 l. 2-5). The photos revealed the claw marks on the back of the victim's head that could actually be measured by the murder weapon, the hammer used by the Petitioner to commit this murder. The photograph of the round injury on the side of the victim's head that Dr. Batalis explained was caused by the use of a blunt object which matched the other end of a hammer. (R. p. 326 line 19 – p. 327 l. 10). The murder weapon could also be matched to those injuries. The Respondent will further submit that the knife wounds to her neck and torso according to Dr. Batalis revealed the pattern of wounds most probably caused by a kitchen knife. (R. p. 331 l. 7 – p. 332 l. 8). Petitioner's estranged husband Daniel testified that he found the victim's body in the kitchen, these photographs corroborated that testimony.

Within this Court's opinion they compared the present case with this Court's decision in *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986). This Court reiterated that in *Middleton* they decided that the prejudicial effect of photographs clearly outweighed any evidentiary value. However, in *Middleton*, the State candidly admitted that the photographs were not essential to the prosecution. *Middleton*, 288 S.C. at 24, 339 S.E.2d at 693. That is not so in the present case. The State in this case never relinquished the fact that the photographs were needed to corroborate the testimony of Daniel, Dr. Batalis, and the Petitioner herself. These photographs also proved motive,

and due to the unique patterns of the injuries the jury was able to match the injuries to the murder weapon. The State has always stated the importance of these photos in order to prove the Petitioner committed this murder.

This Court also never considered the harmless error analysis. This Court referenced the decision in *State v. Jones*, Op. No. 28145 WL 2671754 (S.C. Sup. Ct. filed March 29, 2023). In *Jones* this Court determined that the admission of “horrific” photos was harmless because they did not contribute to the jury’s decision to sentence Jones to death; instead, the admittedly horrific facts of the case did. *Nelson*, Op. No. 28171, at 5. In the current case this Court determined that the photos were not necessary for a conviction. “[T]he jury was provided with undisputed evidence as to how the victim died, as well as ample evidence that she had been killed with malice, whether by Carmie or Daniel.” *Id.*, at 7. If the jury was given ample evidence in order to convict, the photographs were not a determining factor in the conviction. Error is harmless when it could not reasonably have affected the result of the trial. *State v. Simmons*, 423 S.C. 552, 566, 816 S.E.2d 566, 574 (2018). In the opinion, this Court stated that the State failed to heed this Court’s warning to resist pushing the envelope on admissibility to gain victory which was likely already assured. *Nelson*, at 7. If victory was already assured then the introduction of these photographs should be considered harmless since according to this Court there was plenty of evidence to convict; therefore, these photographs did not contribute to the verdict.

In *State v. Torres*, this Court delivered a warning to solicitors stating:

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.

Torres, 390 S.C. at 624, 703 S.E.2d at 229.

With all due respect, it is not the job of this Court to determine innocence of guilt. In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The determination of innocence or guilt has remained and will always remain with the jury. And it has always been the duty of the solicitor to prove the guilt of an accused beyond a reasonable doubt. This Court nor any other court can make a determination as to whether sufficient evidence has been presented in order for a jury to determine if the State has satisfied its burden. That is why photographs and other possible gruesome evidence is admissible. This Court cannot make determinations that since evidence is not easy to look at it should not be admissible especially when this evidence corroborates other testimony. It still remains the duty of the State to satisfy all of the elements of a crime they have accused a defendant of committing. In a murder case the most essential element is that of malice. It is not the duty of this Court to determine when that element is satisfied, that duty belongs to the jury. Since the State does not have the luxury to determine prior to the conclusion of the trial when a jury has sufficient evidence to make that determination it is the duty of the State to submit all relevant admissible evidence that will prove the defendant has committed this crime beyond a reasonable doubt.

The Respondent will respectfully request this Court for a rehearing to consider matters that may have been overlooked or misapprehended by this Court. The Respondent requests this rehearing pursuant to Rule 221(a) of the South Carolina Rules of the Appellate Court.

CONCLUSION

For all of the above reasons the Respondent will respectfully request this petition be granted.

Respectfully submitted,

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