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Sep 08 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

Opinion No. 28171

THE STATE,

RESPONDENT,

v.

CARMIE JOSETTE NELSON,

PETITIONER.

APPELLATE CASE NO. 2021-001356

RETURN TO 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. *State v. Nelson*, Opinion No. 28171 (S.C. Sup. Ct. filed August 9, 2023). The state filed a petition for rehearing pursuant to Rule 221(a), SCACR on August 24, 2023. Petitioner is now filing this return to the state's petition for rehearing.

This Court's well-reasoned, unanimous opinion did not overlook or misapprehend any points where it found the court of appeals erred by affirming the admission of autopsy photos over petitioner's Rule 403, SCRE, objection. Specifically, this Court found "the danger of unfair

prejudice substantially outweighed any minimal probative value of the autopsy photos in this case.” *State v. Nelson*, No. 2021-001356, 2023 WL 5075051, at 7 (S.C. Aug. 9, 2023).

“Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to substantiate material facts or conditions.” *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). Rule 403 of the South Carolina Rules of Evidence provides that even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Photographs are unfairly prejudicial when they have a “tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” *Id.* (citing *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

This Court properly found the photos had little probative value as to any disputed fact in the case. The state argues it is of no import that this evidence supported facts not in dispute because it is the state’s burden to prove a defendant guilty beyond a reasonable doubt. Petition at 2. However, the opinion of this Court does not prohibit the state from proving its case beyond a reasonable doubt through competent evidence. Instead, this Court’s opinion makes clear the state must follow the established rules of evidence in its prosecutions.

In *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014), autopsy photographs of a child who had been killed by defendant’s dog were admitted. In that case, this Court found that the trial court did not abuse its discretion in admitting the photographs because the photographs were highly probative, corroborative, and material in establishing the elements of the offenses charged.” *Collins*, 409 at 535, 763 at 28. *Collins* is distinguishable from the case at hand because neither of the autopsy photographs were necessary to substantiate a material fact or

condition. The issue at trial was whether petitioner or Daniel killed decedent, not the way she died.

The autopsy photographs in this case were not highly probative, corroborative, or material to establish the elements of the charged offense. As noted by this Court, Dr. Batalis's testimony established the extent of decedent's injuries, manner of death, and that decedent was killed with malice. *State v. Nelson*, No. 2021-001356, 2023 WL 5075051, at 6 (S.C. Aug. 9, 2023). These photographs were not necessary to the state's prosecution and crossed the line of what the rules of evidence allow. This Court issued several warnings in prior cases alerting prosecutors as to what is and is not admissible and the prosecution chose to ignore those warnings in this case.

Dr. Batalis's testimony alone made clear the autopsy photographs were horrific. In his proffered testimony Dr. Batalis described one of the photographs as follows, "[y]ou can actually see down to the brain there. So basically, the skull has been shattered away." Later he goes on to describe the photograph, "[t]his green coloration here . . . those are postmortem changes or decomposition; basically, the body breaking down." R. 305, l. 9-306, l. 14. The jury had likely never seen anything as disturbing as what these autopsy photographs depict and the erroneous admission of them at trial created "an undue tendency to suggest a decision on an improper basis." See *State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)). The trial court abused its discretion by admitting autopsy photographs, because they were unnecessary to Dr. Batalis's testimony and their only purpose was to create an emotional response in the jurors.

The state contends this Court failed to address "the fact that the autopsy photographs corroborated the confession of petitioner." Petition at 2. In support of this argument the state

cites one sentence from *State v. Torres*, “if the photograph serves to corroborate testimony it is not an abuse of discretion to admit it.” 390 S.C. 618, 623, 703 S.E.2d 226, 229. Initially, petitioner’s case is distinct from *Torres*, in important ways. In that case this Court affirmed the lower court’s admission of autopsy photographs during the sentencing phase of a capital murder trial.¹ *Id.* The photographs in *Torres* were offered to demonstrate aggravation, “[t]he net effect of the photographs was to show what Torres did to the [victims], which goes straight to circumstances of the crime.” *Id.* Statutory aggravating circumstances must be satisfied by the state in capital sentencing. See S.C. Code Ann. § 16-3-20. As this Court noted, “[t]his case does not involve the admission of evidence during the sentencing phase of a capital murder trial; therefore, the trial court did not have broader discretion to allow evidence that would generally be inadmissible during the guilt phase of a trial.” *State v. Nelson*, No. 2021-001356, 2023 WL 5075051, at 6 (S.C. Aug. 9, 2023); see also *State v. Kornahrens*, 290 S.C. 281, 288-89, 350 S.E.2d 180, 186 (1986) (“In the guilt phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established”).

Additionally, it cannot be the rule that all evidence that corroborates any testimony is automatically admissible. Corroboration is part of the analysis, not the end of the analysis otherwise Rule 403, SCRE would be meaningless. A balancing test is necessary to determine whether the probative value of the potentially corroborative evidence is substantially outweighed by the danger for unfair prejudice. Moreover, as this Court discussed in its opinion the autopsy photographs do not corroborate Daniel’s testimony that petitioner killed decedent. It follows that the autopsy photos do not corroborate the coerced recordings made of petitioner because “these

¹ Notably, *Torres* was the case where this Court, “strongly encourage[ed] all solicitors to refrain from pushing the envelope on admissibility to gain a victory, which, in all likelihood was already assured.” *State v. Torres*, at 624, 703, S.E.2d at 229.

photos provide no insight as to *who* killed [decedent].” *State v. Nelson*, No. 2021-001356, 2023 WL 5075051, at 7 (S.C. Aug. 9, 2023).


The state also argues this Court failed to consider harmless error. Their argument, “if victory was already assured then the introduction of these photographs should be considered harmless,” misses the point that while there was ample evidence that decedent was brutally murdered there was not ample evidence of *who* killed her, and the autopsy photographs do not prove the *who*, the photographs only prove the how.

Contrary to the state’s argument this Court made no *factual* determinations regarding “innocence o[r] guilt.” Petition at 5. Neither was this Court making a determination that the evidence was inadmissible because it was difficult to look at. Instead, this Court properly found it was an error of law for the autopsy photographs to be admitted over petitioner’s Rule 403, SCRE objection. Specifically, this Court found:

The admission of the excessively gruesome autopsy photos unnecessarily created the potential for the jury to convict [petitioner] of the murder based on inflamed emotions in a case where the jury was provided with undisputed evidence as to how [decedent] died, as well as ample evidence that she had been killed with malice, whether by [petitioner] or Daniel. The potential for a verdict based on emotion was amplified by the fact the jury was informed that Daniel had also been charged in connection with this case but only faced an accessory after the fact of murder charge.

State v. Nelson, No. 2021-001356, 2023 WL 5075051, at 7 (S.C. Aug. 9, 2023).

Accordingly, this Court should deny the state's petition for rehearing where there were no points that were overlooked or misapprehended by this Court.



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This 8th day of September, 2023.