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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Grace Gilchrist Knie, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENARDIS JAMON KILGO,

APPELLANT

APPELLATE CASE NO. 2024-000567

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Did the trial court err in admitting photographs taken of the decedent's mutilated and severed lower legs when the evidence was not probative of any disputed fact, was a direct appeal to the jury's emotions, and unreasonably prejudicial under Rule 403, SCRE?

II. Did the trial court commit reversible error in limiting cross-examination of a prison informant on his pending charges thereby infringing on appellant's right to effectively cross-examine the witnesses against regarding potential bias and motivation to mislead the jury?

III. Did the trial court commit reversible error in sentencing appellant under the kidnapping conviction in light of appellant's life sentence for murder since the victim was the same for both offenses?

STATEMENT OF THE CASE

A Greenville County grand jury indicted appellant for the murder and kidnapping of Carolyn Jackson. R. * indictments. Appellant was tried before the Honorable Grace G. Knie and a jury from March 25 - 28, 2024. Aaron DeBruin and Elizabeth Blackwell represented appellant at trial. Courtney Landsverk and Caroline Davis prosecuted the case. The jury found appellant guilty of the crimes charged. R. 486, ll. 5 - 19. Judge Knie sentenced appellant to a life sentence for the murder conviction and a concurrent sentence of thirty years for kidnapping. R. 495, ll. 14 -25; sentence sheets. This appeal follows.

ARGUMENT

I. The trial court erred in admitting photographs taken of the decedent's mutilated and severed lower legs when the evidence was not probative of any disputed fact, was a direct appeal to the jury's emotions, and unreasonably prejudicial under Rule 403, SCRE.

A. Standard of Review.

"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. 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) (internal citations omitted). "Moreover, "[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Nelson, 440 S.C. 413, 420, 891 S.E.2d 508, 511 (2023) (*quoting* State v. Jones, 440 S.C. 214, 891 S.E.2d 347 (2023). "It remains true, however, that when the trial court actually exercises its discretion in balancing the inherent danger of unfair prejudice posed by these photographs against 'high' probative value, and puts its reasoning on the record for the appellate court to review, the trial court's ruling that the danger of unfair prejudice does not substantially outweigh the probative value is a decision that we will almost always find within the trial court's discretion." State v. Heyward, 441 S.C. 484, 504, 895 S.E.2d 658, 668–69 (2023).

B. Relevant facts.

Here, there was no probative value to the photographs as the question before the jury was not how Jackson was killed or how her body was treated after death. The sole question for the jury was the role, if any, appellant played in her death. In arguing for the admission of the photographs, the state claimed relevance based upon a need to show malice:

> Your Honor, as we discussed in chambers, we have several gruesome pictures in this case. And The State does not want to push the envelope as far as that is concerned. We do not want to enter in lots of difficult to view photos. However, in order to illustrate how the victim died and the circumstances surrounding her burial, also, to point out malice and what happened in the aftermath and her -- and the victim's legs being chopped off, The State feels that it's important for our case in chief to show some photos.

Tr. 52, l. 20 – 52, l. 5.

Appellant's counsel objected since the photographs did not provide any evidentiary value as to the ultimate question, whether appellant was the source of the decedent's horrible condition:

> MR. DEBRUIN: Your Honor, The Defendant would request The Court to keep those pictures out. They don't go toward the cause of death for the victim at all. We believe that it is to inflame the emotions of the jury. She was already deceased when her legs were cut off. It wasn't part of how she died. So it doesn't go towards her cause of death at all. So we would object to the pictures coming in.

Tr. 52, l. 19 – 53, l. 1.

When asked about the probative value, the state again relied solely upon concepts of malice and the disregard for human life, phrases loaded with emotional appeals.

> MRS. LANDSVERK: Yes, Your Honor, I think in order to prove malice that this went beyond just her murder, he went back and severed her legs off. It's important for the jury to understand the

> picture. And also, the fact that he dug up a very shallow grave, put her body in it shows just the disregard of human life.

Tr. 53, ll. 4 – 10.

The trial court, despite referencing State v. Nelson, 440 S.C. 413, 891 S.E.2d 508 (2023) as discussed below, allowed the photographs to be introduced since the state "has good reason for offering them." Tr. 53, ll. 11 – 19.

C. Discussion.

Under Rule 403, SCRE, the introduction of graphic photographs, like those involved here, turns in part on whether the evidentiary value is truly present and touches on a disputed fact. When the essential fact in question is not in dispute, there is no need to corroborate with graphic photos that tend to encourage the jury to base a verdict on emotional responses. *Compare* State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) ("[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial. Appellant's counsel offered to stipulate to any relevant information contained in the photographs, and it is clear the information was not really at issue. Furthermore, the testimony of the forensic pathologist negated any arguable evidentiary value of the photographs. The prejudice created by the photographs clearly outweighed any evidentiary value.") *with* State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 29 (2014) ("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."). The need for such photographs to address a disputed fact has been

stressed in the recent decisions from our Supreme Court when reviewing cases in which prosecutors, despite the continued warnings from the appellate courts, push the envelope on the admission of graphic photographs. *See* State v. Benton, 443 S.C. 1, 9, 901 S.E.2d 701, 705 (2024) (noting the challenged photographs "drew probative force from their unique power to make Benton's accomplices' testimony more believable. The pictures gave important context to the testimony and other evidence about who did what at the scene.").

This case falls within the scope of the Supreme Court's warnings to solicitors not to needlessly rely upon the emotions generated by using graphic photographs to depict matters that were not in dispute. In State v. Nelson, 440 S.C. 413, 891 S.E.2d 508 (2023), the state introduced autopsy photographs when the only matter in dispute was the identity of the killer, not the manner of death. As in Nelson, this case only concerned the identity of the perpetrator, not the manner of death or nature of the crime itself. The Nelson court noted the importance of this distinction in reversing the conviction, noting that if "this were a case such as Collins where the nature of the victim's injuries was in dispute or a case where there was no other convincing evidence of malice or the manner in which the victim died, then the photos may have had sufficient probative value to warrant their admission." Nelson, 440 S.C. at 426, 891 S.E.2d at 514. As in Nelson, the trial court here erred in admitting the photographs that provided no "high" probative value and raised the prospect that the jury would decide guilt based upon emotion and not the evidence presented. Here, appellant did not contest the manner of Jackson's death or the treatment of her remains after death. The sole question before the jury was whether appellant was an active participant in that death. The photographs provided no evidentiary value to those issues and were, as claimed be the solicitor, relevant to a showing of malice and disregard of life. Such evidence was extensively pulled from other sources, including numerous witnesses who

testified regarding the condition of Jackson's remains and the manner of her death. This included testimony from members of the investigative team that found Jackson's body, such as Crystal Minwegen, and those that attended the autopsy, such as Allyson White. Tr. 237 – 242; 253-254. Dr. Grace Dukes testified extensively about the condition of the remains and cause of death. Tr. 329 – 339. The state had extensive evidence of the malicious nature of Jackson's murder and the treatment of her remains following death. The addition of photographs on top of this evidence was unduly prejudicial and unnecessary.

D. Prejudicial impact.

This case does not involve overwhelming evidence of guilt that discounts a finding of prejudice. Appellant lived with Carolyn Jackson just prior to her disappearance and death. Tr. 181, ll. 1 - 14. Following Jackson's disappearance, appellant was arrested inside the Jackson home while hiding in a closet. Tr. 216, l. 1 – 218, l. 25. When he was arrested, appellant had several forms of identification for Jackson on his person. Tr. 218, l. 16 – 220, l. 18. During his police interrogation, appellant provided authorities with information that Jackson had been killed by two individuals, LA and Jason. Tr. 399, ll. 10 – 20. While law enforcement discounted this lead, other facts discovered in the case supported this accusation, including the presence of a shotgun found behind Jackson's house that matched appellant's assertions that LA and Jason had threatened him with just such a weapon. Tr. 399, l. 24 – 400, l. 14. Rather than follow those leads, the state relied upon the testimony of Amanda Scott as to the events surrounding Jackson's death. While Scott certainly testified that Jackson was killed by appellant, her story was constantly changing and, when challenged by contrary evidence, altered to fit the correct narrative. Tr. 400, l. 15 – 401, l. 2.

The lead investigator was forced to acknowledge that investigators had indeed uncovered the full name of "LA" and was able to identify her in some detail. Tr. 402, l. 11 – 403, l. 21. According to appellant, Jackson was killed by these other individuals and appellant was aware of what had happened to Jackson and the location of her body. Tr. 371, l. 13 – 374, l. 13. While police were able to connect appellant to Jackson's automobile through fingerprints and DNA, appellant lived with Jackson before her disappearance. Tr. 181, ll. 1 – 14. Scott claimed appellant used a pair of gloves in cleaning up Jackson's blood after her murder. Tr. 146, l. 13 – 147, l. 18. While these gloves were found to have appellant's DNA, Jackson's DNA was notably absent from them. Tr. 315, l. 2 – 319, l. 16. There was no blood apparent on these gloves and they tested negative for the presence of blood. Tr. 274, ll. 11 – 22. None of the material used to wrap Jackson's body or found on her body was tied to appellant either through DNA or fingerprinting.

While law enforcement discounted appellant's version of events in favor of Scott's, the jury should have been allowed to evaluate these conflicting accounts of Jackson's death free of the unnecessary taint of the photographs of her dismembered corpse that served no evidentiary purpose and were likely to inflame the passions of the jury and dictate a verdict based upon emotion rather than a just weighing of the evidence. Appellant is entitled to a new trial free of the improper influence of these photographs.

II. The trial court committed reversible error in limiting cross-examination of a prison informant on his pending charges thereby infringing on appellant's right to effectively cross-examine the witnesses against regarding potential bias and motivation to mislead the jury.

A. Standard of review.

Rule 608(c), SCRE, provides that "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." "Evidence of a witness's bias can be compelling impeachment evidence, and for that reason 'considerable latitude is allowed' to defense counsel in criminal cases 'in the cross-examination of an adverse witness for the purpose of testing bias.'" Smalls v. State, 422 S.C. 174, 182, 810 S.E.2d 836, 840 (2018) (*quoting* State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001)). "As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion." State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000).

B. Relevant facts.

To bolster the case against appellant, the state called Tony Dillard to testify regarding conversations he claimed to have had with appellant while both were incarcerated together before trial. During direct examination, Dillard claimed appellant admitted his involvement with Jackson's death and the disposal of her remains. Tr. 358, l. 18 0 359, l. 7. The solicitor also had Dillard testify that the solicitor's office had not promised Dillard anything for the testimony. Tr. 360, ll. 6 – 13.

During cross-examination, as soon as appellant's counsel challenged Dillard regarding the pending charges Dillard faced and the benefits he expected for his testimony, both the solicitor and Dillard's own counsel objected.

> Q Okay. Now you have a new charge; is that right?
>
> A I plead the fifth on that.
>
> MRS. LANDSVERK: Your Honor.
>
> THE COURT: Okay, that would be sustained.
>
> MR. DEBRUIN: Your Honor –
>
> THE COURT: Can you come up, please?
>
> (WHEREUPON, an off-the-record bench conference was held in the presence of the jury but out of hearing of the jury.)
>
> MR. MARTINEZ: Michael Martinez on behalf of Mr. Dillard. I'm objecting on behalf of Mr. Dillard regarding the questioning relating to the fact that he has pending charges.
>
> THE COURT: Okay. And for the record, counsel present in the courtroom for Mr. Dillard is Michael Martinez, who just made an objection on the record, okay.
>
> All right. Counsel, please move along.
>
> MR. DEBRUIN: Thank you, Your Honor.

Tr. 365, l. 18 – 366, l. 11.[1]

The following day, the trial court noted that "there was an objection by Michael Martinez, counsel for Mr. Dillard, regarding Mr. Dillard's pending charges. That was sustained."

Tr. 427, ll. 8 – 10.

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[1] The trial judge informed counsel there would be no speaking objections during trial and remined counsel of this rule during trial. Tr. 388, ll. 11 – 12. The trial court did take time to recount the various points of objections prior to the start of testimony from the previous days. See Tr. 132, l. 4 – 15; 321, l. 1 – 323, l. 15.

C. Discussion.

The trial court erred in limiting appellant's ability to challenge Dillard's testimony regarding his potential motivation to mislead the jury in hopes of obtaining leniency or other potential favorable treatment by the solicitor's office related to his pending charges. *See* State v. Sims, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) (holding the trial court erred in not allowing cross-examination of a witness regarding pending charges); Smalls v. State, 422 S.C. 174, 183, 810 S.E.2d 836, 841 (2018) (finding trial counsel was ineffective for not cross-examining a witness regarding the dismissal of pending charges the day of trial testimony). Under Rule 608(c), SCRE, a witness may be challenged on "bias, prejudice or any motive to misrepresent" and such may be explored "either by examination of the witness or by evidence otherwise adduced." In State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), our Supreme Court addressed this same scenario where an accused was not allowed to fully cross-examine various informants who stood to gain some degree of assistance from the state in exchange for favorable testimony. The court noted that the trial court "improperly prevented questioning which would have examined the extent of that bias and the witnesses' possible motivations for testifying against Appellant." Id., 399 S.C. at 373–74, 731 S.E.2d at 885.

In allowing Dillard's counsel to interject an objection placed Dillard's rights to refuse to answer questions under the 5th Amendment over appellant's rights to confront the witnesses against him protected by the Confrontation Clause of the United States Constitution and the Constitution of the State of South Carolina. This was an error of law under Sims and Gracely and the trial court committed reversible error in limiting appellant's counsel from challenging Dillard's motivations to gain favor regarding his pending charges.

D. Prejudice.

Dillard's testimony was critical in bridging the lack of direct evidence of guilt with the widely changing and evolving claims of Amanda Scott. As investigator King said, Scott was a known liar who changed her story frequently. Tr. 400, l. 15 – 401, l. 2; 411, l. 24 – 412, l. 1. The state needed Dillard to add weight to the various claims made by Scott who was challenged extensively regarding her changing and evolving claims regarding Jackson's death. This was highlighted in the solicitor's closing argument to the jury:

> Then we heard from Tony Dillard. *And this is somebody who is very unexpected, who had noinvolvement with the case.* He got to know The Defendant in jail. They got to know each other over a period of two years. They both decided to join the Muslim religion. And through that experience, they were able to talk and it was determined that The Defendant decided to give him this information, to let him know, hey, look I want to get your opinion on this. Do you think I'll get away with it? I murdered her and, by the way, Amanda Scott was with me the whole time. She didn't do anything, but she's going down with me. I don't want her to be with anybody else. *And it was the same story that Amanda Scott told us about the fact that she felt dragged into this.* That she had nothing to do with it.

Tr. 444, ll. 3 – 19 (emphasis added). The state further emphasized this need to corroborate Scott's testimony through Dillard noting: "But as far as meeting her, I think it's very interesting that he had this information and it lined up to exactly what Amanda Scott told us, somebody that she didn't know." Tr. 445, ll. 1 – 4.

Due to the state's obvious need to bolster the changing and evolving Scott story, Dillard became a critical supporting witness whose bias and motivation to lie was essential to appellant's right to confront the witnesses against him. It was reversible error to restrict the examination of Dillard's pending criminal charges and appellant is entitled to a new trial.

III. The trial court committed reversible error in sentencing appellant under the kidnapping conviction in light of appellant's life sentence for murder since the victim was the same for both offenses.

A. Standard of Review.

"In criminal cases, the appellate court sits to review errors of law only." State v. Johnson, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). "Generally, a challenge to sentencing must be raised at trial or the issue will not be preserved for appellate review." State v. Davis-Kocsis, 443 S.C. 127, 134, 903 S.E.2d 491, 495 (2024). However, this preservation requirement may be waived in "exceptional circumstances." Id.

B. Relevant facts.

At the close of evidence, the jury found appellant guilty of the murder and kidnapping of Carolyn Jackson as indicted. R. 486, ll. 5 – 19. Without objection by counsel for appellant, the trial court sentenced appellant to life for the murder conviction and a concurrent thirty-year sentence for the kidnapping conviction. R. 495, ll. 14 -25. While this omission by trial counsel raises an issue preservation concern for this Court's review, appellant would argue that, with the consent of the state, this matter may be addressed on direct appeal. *See* State v. Plumer, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023) (holding that "when a trial court imposes what the State concedes is an illegal sentence, the appellate court may correct that sentence on direct appeal or

remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence.").

C. Discussion.

At the time of this conviction, S.C. Code Ann. § 16-3-910 (1991) specifically prohibited this sentence. As such, the sentence for the kidnapping conviction was an error of law. While the Legislature has recently amended the language of S.C. Code 16-3-910 by removing the statutory prohibition from sentencing someone for kidnapping and murdering the same victim, the effective date of this change was July 2, 2024.[2] At the time of appellant's trial, the law required the trial court to forgo a sentence under the kidnapping conviction. *See* Davis-Kocsis, 443 S.C. at 133–34, 903 S.E.2d at 494; *see also* State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359 (2005) (abrogated on other grounds by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006)). At the time of appellant's conviction, the inclusion of a thirty-year sentence on the kidnapping conviction was specifically prohibited by S.C. Code Ann. § 16-3-910 (1991) and established precedent. This Court should review and vacate appellant's sentence for kidnapping.

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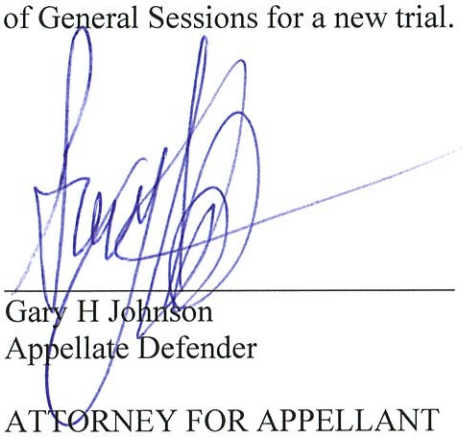
[2] *See* 2024 Act No. 213 (S.142), § 4.A, eff July 2, 2024, which amended 16–3–910 to allow sentencing for the kidnapping offenses when also sentenced for murder.

CONCLUSION

By reasons of the foregoing arguments, appellant's conviction should be reversed, and the case remanded to the Greenville County Court of General Sessions for a new trial.



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This 5th day of March, 2025.