RECEIVED
Jun 12 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

Opinion No. 2025-UP-171

THE STATE,

RESPONDENT,

V.

ARIEL ROBINSON,

APPELLANT

APPELLATE CASE NO. 2022-000716

PETITION FOR REHEARING

On May 28, 2025, this Court affirmed the trial court's admission of graphic photographs of the horrific injuries to a child holding, "that the photographs were necessary to refute Robinson's claims that Victim's injuries were caused by Robinson's CPR attempts and by J.E.'s abuse." This Court further found that "the photographs were probative of the cause of death as well as the elements of the offense of homicide by child abuse." State v. Robinson, Op. No. 2025-UP-171 (S.C. Ct. App. file May 28, 2025). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter and consider significant points overlooked and/or misapprehended by this Court as discussed below.

This Court's holding overlooked the fact that the extensive lay and medical testimony elicited during trial greatly reduced the probative force of the photographs such that their probative value could not substantially outweigh the danger of unfair prejudice. In State v. Nelson, 440 S.C. 413, 420, 891 S.E.2d 508, 511 (2023), our Supreme Court reversed the trial court's admission of graphic photographs because "the photos had little probative value *as to any disputed fact* in this case." (emphasis added). Our Supreme Court found limited probative value in the photographs at issue in Nelson for two reasons: First, in defense counsel's opening statement he admitted that the only disputed fact was who committed the murder, thus "the information gained from the autopsy photos was not in question," and the "facts evidenced by the autopsy photos" were "undisputed." Id. at 417, 891 S.E.2d at 510. Second, our Court found the "photos provide no insight as to who killed Victim." Id. 426, 891 S.E.2d at 514.

In analyzing the propriety of admitting the photographs during Nelson's trial, our Supreme Court recognized that the majority of our State's case law surrounding the admission of graphic photographs arose in the context of the *sentencing* phase of a capital murder trial. The Court then reiterated a long standing principle of law in our State: "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 by competent testimony.*" Id. at 420, 891 S.E.2d at 512 quoting State v. Kornahrens, 290 S.C. 281, 288-89, 350 S.E.2d 180, 185 (1986) (emphasis in original) (emphasis added); see also State v. Waitus, 224 S.C. 12, 27-28, 77 S.E.2d 256 (1953) (There was no dispute as to these facts. All of them were fully established both by uncontradicted medical and lay testimony. These pictures were calculated to inflame and arouse the passions of the jury and their introduction was wholly unnecessary to establish the facts claimed. They should have been excluded.).

As this Court's opinion reflected, the medical testimony at Appellant's trial was extensive, detailed, graphic, and emotional. Six separate witnesses testified at length about the nature, severity, and extent of the injuries the child. Both the expert and lay medical testimony fully established the injuries the child. Further, the testimony was uncontradicted by defense counsel. The full cross-examination of the six witnesses that gave medical testimony amounted to a mere eleven pages (R. 144-147; 156-157; 176-177; 272; 316-319; 329-331) in the over four-hundred-page record and was limited to clarifying questions about testimony elicited on direct. Nor was defense counsel's opening statement full of contradictory assertions about what occurred the morning of child's death. He in fact conceded that a horrific crime had occurred and that it was the jury's sole job to determine if the State could prove Appellant was the one who committed the crime. R. 89-90.

This Court noted the photographs were probative to disprove Appellant's statements to first responders that child's younger brother was likely responsible for the bruising. However, the other testimony at trial established that the injuries occurred the morning of child's death when no one else was home other than Appellant and her husband/co-defendant. The medical and lay testimony also established the impossibility that a seven-year-old child could inflict the injuries that caused child's death. Further, it must be noted that this was testimony the State knew it would elicit when it made its arguments in support of the admission of the photographs. Had Appellant truly asserted the defense that V.S.'s older brother was the cause of the injuries and death, the State would have been able to preclude admission of such evidence under the third-party guilt rules because the evidence would not raise a reasonable inference or presumption as to Appellant's own innocence and it would only serve to cast a bare suspicion upon J.E. as the guilty party. See State v. Brown, 437 S.C. 550, 566, 878 S.E.2d 364, 373 (Ct.

App. 2022) citing State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) (Evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible....). Further, Appellant conceded when she took the stand that it was only possible that she or her husband inflicted the injuries that resulted in the child's death.

Much like in Nelson the only issue before the jury was who killed the child. Appellant used no defense at trial that J.E. inflicted the injuries. Had defense counsel asserted in opening that J.E. caused the injuries, the probative force of the photographs would have been high, and it would have been logical for the State to seek to introduce the photographs during its case in chief. Similarly, if Appellant had taken the stand and asserted J.E. caused the injuries, then the State could have asked to introduce the photographs in reply. However, the State should not have been allowed to introduce inflammatory, cumulative, graphic, and unnecessary photographs to a jury to rebut a defense *until the defendant* has raised the defense to the jury. Particularly when one considers that the State, as the party with the burden of proof, has the reply phase of a trial to address actual defenses raised by the defendant.

While this Court's opinion found the photographs at issue were "necessary" and "probative," it did not fully address how the probative value of the photographs was not substantially outweighed by their unfairly prejudicial effect. The photographs admitted were extremely inflammatory and graphic. State's 2-5 show the bruising to V.S.'s abdomen, thighs, and back from various angles. In each photograph V.S. is overwhelmed by medical equipment as medical staff was still attempting lifesaving measures at the time of the photographs. In

State's 61 V.S.'s face is visible. Her eyes are open, and someone is actively pushing oxygen into her lungs with a breathing bag. Her legs are being held up showing confluent, dark purple-black bruising extending up both legs. State's 42 shows the top of V.S. thighs down to her feet. The back of her thighs have been excised, showing bone, fat, tissue, muscle, and coagulated blood. All of the photographs were entered in full color.

Throughout the testimony, the State showed the various photographs at issue to the jury at least nineteen times. By the time the State's final witness (Dr. Goben) testified, the solicitor declined to republish the images as the jury had seen them "lots of times." R. 327, ll. 7-11. The solicitor even declined to republish the photographs during closing arguments due to the difficulty of viewing them. R. 397. Even more telling, the experienced trial judge felt compelled to admonish the gallery regarding the graphic nature of the autopsy photograph because she herself "if this were someone – a loved one of mine, I might have a very difficult time keeping my emotions in check with regard to it." R. 274, l. 19-R. 275, l. 1. The extensive lay and medical testimony in the record greatly reduced the probative value of the photographs while the gratuitous use of the full color, graphic photographs by the State enhanced the unfair prejudice to Appellant.

This Court further failed to consider the emotional influence the photographs would have on the jury, particularly where Appellant's co-defendant had pled to a lesser crime at the time of Appellant's trial. As our Supreme Court recognized in Nelson, *supra*, the admission of graphic photographs "*unnecessarily* created the potential for the jury to convict Carmie of the murder based on inflamed emotions in a case where the jury was provided with undisputed evidence as to how Victim died, as well as ample evidence that she had been killed with malice, whether by Carmie or Daniel." Nelson 440 at 426, 891 S.E.2d at 514 (emphasis added). Our Court

continued, "[t]he 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." Id. (emphasis added). The same was true for Appellant, except that the emotional influence was much higher for Appellant because the victim was a small child, as compared to the adult victim in Nelson. The State presented ample undisputed testimony of how V.S. died, as well as ample testimony that her death occurred under circumstances manifesting an extreme indifference to human life. The jury was also informed that Appellant's husband, originally charged as a principle, had been allowed to plead to aiding and abetting homicide by child abuse. Further, the solicitor in closing argument repeatedly called for justice to be served for V.S. by finding Appellant guilty. The emotional, graphic pictures when coupled with the jury's knowledge that Appellant was the only one who could be held to account for V.S.'s death amplified the likelihood that the jury would determine the case on emotion instead of fact. This is even more true where, as here and in Nelson, the information in the photographs was not at issue. See also, State v. Jones, 440 S.C. 214, 259, 891 S.E.2d 347, 371 (2023) ("It 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.")

The infinitesimal probative value of the photographs in this case when compared to the high prejudice suffered by Appellant weighed in favor of exclusion of the evidence. The emotional toll of a homicide by child abuse case inevitably weighs on even the most seasoned in the legal profession, and it undoubtedly impacts a jury. When the medical testimony describes the uncontested injuries in such comprehensive technical terms and vivid common ways (such as force being relative to a person being struck with a car) the probative force of the photographs

becomes nearly non-existent. The repeated use of the photographs, along with the trial court and State's recognition of their extremely graphic nature, highlighted the unfair prejudice suffered by Appellant.

Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

This 12th day of June, 2025.

RECEIVED
Jun 12 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARIEL ROBINSON,

APPELLANT

APPELLATE CASE NO. 2022-000716

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-referenced case has been served upon Ambree M. Muller, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Ariel Robinson, #387938, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 12th day of June, 2025.

Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

Leverett, Scott

From: Leverett, Scott
Sent: Thursday, June 12, 2025 5:00 PM
To: Ambree Muller
Cc: Grace Sommer; Saxon, Jessica
Subject: 2022-000716 - State v. Ariel Robinson - Petition for Rehearing
Attachments: 2022-000716 - State v. Ariel Robinson - Petition for Rehearing.pdf

Dear Ms. Muller,

Attached please find a copy of the Petition for Rehearing in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Jessica Saxon
Appellate Defense