STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JUSTIN JERMAINE JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-001219

Appeal from Clarendon County

Honorable William Jeffrey Young, Circuit Court Judge

Opinion No. 5533

PETITION FOR REHEARING

On January 31, 2018, this Court affirmed Appellant Justin Johnson's convictions for two counts of murder, kidnapping, first degree burglary, and possession of a firearm during the commission of a violent crime, in a published opinion. State v. Johnson, Opinion No. 5533 (S.C. Ct. App. filed Jan. 31, 2018) (Shearouse Adv. Sh. No. 5 at 26). The issues that Johnson continues to pursue on appeal relate to: (1) the improper admission of the pre-death photographs of the victims; (2) the improper use of remote video testimony for State's witness Mason Moore; (3) the improper admission of Johnson's involuntary statement to police; and (4) the improper sentencing of Johnson to five-years incarceration for the weapons offense where he was sentenced to life

imprisonment. Pursuant to Rule 221(a), SCACR, Johnson respectfully petitions this Court for a rehearing of its opinion based upon the following points overlooked or misapprehended by the Court:

1. **The trial court's error in admitting the irrelevant pre-death photographs of each of the victims was not harmless.**

In accordance with State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), and State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), this Court properly ruled that the trial court erred in admitting the pre-death photographs of Son and Maxine, because they were not relevant to establishing Johnson's guilt. However, this Court erred in finding that the trial court's error was "harmless based on the overwhelming evidence of guilt in the case and the nature of the error." This Court reasoned:

> Johnson's statement and Kaisha's testimony indicate Johnson was the shooter. The physical evidence in the case corroborated Kaisha's testimony. Additionally, the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status. Overall, we conclude the introduction of the photographs could not have reasonably affected the outcome of the trial.

Respectfully, the evidence in this case was not overwhelming and sympathy is not a proper basis for the jury to render a verdict under any circumstance.

Whether an error is harmless depends on the circumstances of the particular case. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Id. "[P]hotographs 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." State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008). "To constitute unfair prejudice, the photographs must create a tendency to suggest a

decision on an improper basis, commonly, though not necessarily, an emotional one." Id. (internal citations and quotations omitted).

Beginning with the prejudicial impact of the pre-death photographs themselves, it is notable that the Livingston Court found that though the testimony that accompanied the introduction of the pre-death photograph was "not extensive," "it create[d] a poignant image." 327 S.C. at 19, 488 S.E.2d at 314. Here, the pre-death photographs were admitted in conjunction with the testimony of Maxine Caraway's husband, John Caraway, Jr., and the testimony of the minor victim's mother, Kaisha Caraway. R. 162, l. 20 – 163, l. 20; R. 186, l. 13 – 189, l. 5. Mr. Caraway was conveniently called to testify on what would have been Maxine's sixty-second birthday, a fact the prosecution elicited on direct examination. He also testified that he and Maxine were married for thirty-seven years. R. 162, l. 20 – 163, l. 20. The minor child's picture was admitted while Kaisha Caraway testified about the child's birth and the purported lack of support that she received from Johnson in caring for their children. R. 186, l. 13 – 189, l. 5.

Notably, the pre-death photograph of Maxine was immediately preceded and followed by photographs of her injuries in the numerical order of the State's exhibits. See State's Exhibits 36, 37, 38, and 39 (Photographs). As such, the pre-death photograph appeared between the other photographs of the victim's injuries when presented to the jury during deliberations. In a case such as this, where the jury was also shown postmortem photographs of the victims, both of whom were shot in the face or head with a shotgun, the juxtaposition of the pre-death photographs is even more impactful upon the jury. Compare State's Exhibits 38 and 54 (Pre-death Photographs of Victims) (on file with this Court) with State's Exhibits 15 and 36 (Postmortem Photographs of Victims) (on file with this Court).

As this Court found, the pre-death photographs in this case were not relevant to establishing Johnson's guilt. Rather, their sole and improper purpose was to pull on the heart strings of the jury and encourage them to view the case through a lens of emotion and prejudice. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."). This Court's determination that the prejudice to Johnson was somehow lessened because "the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status" is contrary to the fundamental precept of our justice system that a jury's verdict will be rendered based upon the evidence and not emotion. If anything, the fact that there was an intrinsically emotional element to the case increased the prejudice to Johnson from the admission of the pre-death photographs.

This Court further erred in finding that there was overwhelming evidence of Johnson's guilt. This Court seems to have adopted Respondent's harmless error argument, which was premised only upon the evidence that supported the solicitor's theory of the case. See Brief of Resp., pp. 6-14. However, a harmless error analysis cannot be based solely upon the State's perceived strength of its case alone. See Holmes v. South Carolina, 547 U.S. 319, 331, 126 S.Ct. 1727, 1735 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt"). While that evidence may have been sufficient to present the case to a jury, it fails to establish overwhelming evidence of Johnson's guilt. See Langley, 334 S.C. at 101, 515 S.E.2d at 649.

Both Respondent and this Court omitted that there was an unknown third parties' DNA and footprint found at the crime scene and never identified. R. 701, ll. 16-24; R. 702, ll. 7-13; R. 663, l. 10 – 666, l. 6; R. 674, ll. 1-8. Though Kaisha Caraway later changed her story, both she and Johnson originally told law enforcement that Kaisha's boyfriend, Robert, shot the victims. State's Ex. 55 (Recording of 911 calls) (on file with this Court); State's Ex. 59-63 (DVDs of Apr. 6, 2011 Interrogation). Johnson maintained that Robert was the responsible party throughout the majority of his interrogation. Johnson continues to challenge the admissibility of his statements to police. However, to the extent that the interrogation was admissible, the defense's position was that Johnson eventually provided an account consistent with the information fed to him by the officers.

Regarding the physical evidence, the discovery of Maxine Caraway's blood on Johnson's shoe and gunshot residue on Johnson's hand were explained by Johnson's admission that that he was there when the incident occurred and fired one shot at Robert as he fled. Thus, the only evidence that actually placed Johnson as the triggerman when the deadly shots were fired was the testimony of Kaisha Caraway, who was angry with Johnson due to what she perceived as his deficient support for their children and his possible infidelity. In light of the gaps and flaws in the State's evidence, there is a reasonable probability that the improper admission of the pre-death photographs affected the outcome of the trial. See State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003) ("A defendant is not required to present a defense and can instead rely entirely on the weakness of the State's case since the State has the burden of proving guilt beyond a reasonable doubt."). Johnson is accordingly entitled to reversal of his convictions and a new trial.

2. **The trial court's error in allowing State's witnesses, Mason Moore, to testify via video was not harmless.**

This Court properly ruled that the trial court erred in admitting the testimony of investigator Mason Moore. As an initial matter, Johnson must respectfully request that this Court reconsider the inclusion of footnote 4 in the opinion, which states: "Tragically, Moore was shot and killed in the line of duty earlier this year in Montana." This information was not contained in the Amended Record on Appeal, which was filed with this Court on May 11, 2016, and is not the proper subject for judicial notice. See Rule 201, SCRE. The implication of including this type of information in the Court's opinion is either that this Court reviewed media reports in conjunction with its review of this case or has some other personal knowledge upon which it relied for the information. Neither is proper. Moreover, to the extent that this Court's harmless error analysis was impacted in any manner by the unavailability of Moore for a future retrial, such is not a proper consideration. Any reference to Moore's death following Johnson's trial should be removed from this Court's opinion.

Further, this Court erred in ruling that the circuit court's erroneous decision to permit Investigator Moore to testify via Skype was harmless. The reasoning for the finding of harmlessness set forth in this Court's opinion was:

> We are cognizant that Johnson's confession was an important piece of evidence in this case. Likewise, we recognize the admission of his confession turned on a finding of voluntariness that must be proven by the State through its witnesses and evidence. In this case, Investigator Coker's testimony plus the recordings of Johnson's interrogation met this burden. Investigator Moore's testimony was only relevant to events *not* presented by the videos or covered by Investigator Coker. Johnson does not allege wrongdoing by Investigator Moore other than through conduct contained in the videos. Consequently, Investigator Moore's testimony was largely cumulative to what was already before the jury.

This ruling essentially condones the approach taken by the trial court in this case, which required the defense to prove prejudice at the trial level rather requiring the prosecution to meet its burden

of showing that the video testimony was reliable and, most importantly, that denial of the right to confrontation was necessary to further an important public policy. R. 63, l. 2 – 69, l. 11; Maryland v. Craig, 497 U.S. 836, 850 (1990); State v. Bruce, 412 S.C. 504, 772 S.E.2d 753, 755-56 (2015) ("[I]t is clearly improper for the trial court to perform a harmless error analysis on its own evidentiary ruling. Trial courts cannot sit in judgment of their own rulings and proceedings.").

As more fully discussed in the brief and reply brief of appellant, the right to confrontation attaches to every witness and the proper inquiry for determining harmlessness is the impact on the jury's verdict. "The United States Supreme Court has dispensed with the notion that some witnesses for the prosecution are exempt from the Confrontation Clause." State v. Rogerson, 855 N.W.2d 495 (Iowa 2014) (citing Melendez–Diaz v. Massachusetts, 557 U.S. 305, 313-14 (2009) ("Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."). In State v. Schwartz, 327 P.3d 1108, 1116 (N.M. App. 2014), the court found that "even if the video testimony was cumulative, improperly admitted evidence that is cumulative is not ipso facto harmless beyond a reasonable doubt. Rather, even cumulative evidence may be harmful if it had an impact on the jury's verdict." Id. (internal citation and quotations omitted). Thus, the court held that, despite the State's efforts to minimize the role of witness Labance's video testimony, "there is no reasonable possibility that this evidence did not contribute to Defendant's conviction." 327 P.3d at 1117. The Schwartz court likewise rejected the State's argument that the video testimony was harmless because the documents admitted through the witness "could have been authenticated another way." The court ruled that "the State chose to rely on Labance to get the documents admitted. Having made that choice, the State cannot now argue, simply because there was another method for admission of the documents, that the jury did not rely on Labance's testimony to convict

Defendant." Id. Accordingly, the court reversed Schwartz's convictions and remanded for a new trial. Id. at 1119.

Here, the State chose to call Investigator Moore as a witness and he was not merely cumulative. Their purpose was obvious, as a review of the entirety of Johnson's interrogation made clear that Coker was the "bad cop" and Moore was the "good cop." In fact, one of the DVDs mysteriously cut off just as Coker was yelling at Johnson. See State's Ex. 59 (DVD of Apr. 6, 2011 Interrogation) (on file with this Court). Given that ultimately the jury would determine the voluntariness of Johnson's statements and the breaks in the video recording, the State did not want to rely solely on Coker's testimony regarding the interrogation. See State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (stating that after the trial judge makes an initial determination allowing a confession into evidence, "[i]t then is for the jury ultimately to decide whether the confession was voluntary."), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). In addition to Coker's lies and threats to Johnson shown on the videos of the interrogation, his credibility was further damaged on cross-examination, where he made bold, unsupported accusations against Johnson and minimized his conduct during the interrogation as interview "techniques." R. 461, l. 4 – 501, l. 15. Thus, the State relied upon Moore's testimony to convince the jury of the voluntariness of Johnson's confession. As a result, it cannot be said that Moore's testimony did not impact the verdict and that its improper admission was harmless beyond a reasonable doubt. Johnson is accordingly entitled to reversal of his convictions and a new trial.

3. The trial court erred in admitting Appellant's statement where, under the totality of the circumstances, it was not involuntarily given.

This Court ruled that Johnson's statement to law enforcement was voluntary despite law enforcement's misrepresentations of evidence, threat of the death penalty, and emotional appeals and threats related to Johnson's two-year old daughter. Finding that none of these factors alone rendered Johnson's statement involuntary, this Court concluded that "the circuit court did not abuse its discretion in admitting Johnson's statement as the evidence supports a finding his will was not overborne by the various tactics employed during his interrogation." As discussed more fully in the brief of appellant, the threats and coercion utilized by the officers in this case to extract Johnson's alleged confession rendered his statements involuntary and inadmissible. Brief of Appellant, pp. 3-7 and 41-45.

In the initial phase of review by the trial judge, if a defendant was advised of his Miranda rights, but chose to make a statement anyway, the "burden is on the State to prove *by a preponderance of the evidence* that his rights were voluntarily waived." State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (emphasis in original). The State bears this burden of proof even where a defendant has signed a waiver of rights form. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980), *cert. denied*, 449 U.S. 1037, 101 S.Ct. 616 (1980). The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused. State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982). When considering the voluntariness of a statement, the court and jury should consider "not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745 (1993) (omitting internal citations). "Coercion is determined from the

perspective of the suspect." State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). Statements given pursuant to threats or under inherently coercive circumstances are not admissible. See Mincey v. Arizona, 437 U.S. 385, 398-99, 98 S.Ct. 2408 (1978); Minnesota v. Murphy 465 U.S. 420, 427, 104 S.Ct. 1136 (1984).

Here, the trial judge's assessment fell far below the required consideration of the totality of the circumstances. While Johnson was read his Miranda rights and offered breaks, food, and bathroom facilities, Judge Young failed to consider the false, coercive, and threatening statements made by the officers throughout the lengthy interrogation or Johnson's lack of experience with the criminal justice system. See R. 63, ll. 10-21. The investigators in this case continuously lied about the evidence in an effort to "wear on his [Johnson's] psyche" and "break him [Johnson] down." They told Johnson that the trunk of his car was analyzed and only his fingerprints were found, that his shoe matched a footprint left from kicking in the door, that his ring matched a wound left on Kaisha, and that you could hear him in the background of the 9-1-1 calls made by Maxine and Kaisha. None of that was true. R. 463, l. 2 – 484, l. 16; R. 487, l. 13 – 488, l. 2; State's Ex. 55 (Recording of 911 calls) (on file with this Court).

Further, investigators told Johnson that if he continued to tell them the same thing he was either going to go to prison or get the death penalty. Ex. 59 (DVD of Apr. 6, 2011 Interrogation, 1:17:33) (on file with this Court). Immediately prior to Johnsons' alleged confession they spoke with him about what they would tell his daughter about him – threatening to tell her that he was a cold-blooded killer, that he did not "give a shit about her," and that the only reason he did not kill her was because he ran out of shells. They also told him that he was not going to get the opportunity to see his daughter. Ex. 64 (DVD of Apr. 6, 2011 Interrogation, 0:20:21) (on file with this Court). Both investigators denied making any threats or coercive statements to Johnson, but

agreed that it was only after the discussion of Johnson's daughter that Johnson changed his story. Coker also agreed that Johnson's original story matched the evidence at the scene and that it was countered only by Kaisha's statement and his alleged confession that followed seven hours of Johnson proclaiming his innocence. R. 387, ll. 8 – 402, l. 3; R. 461, l. 4 – 462, l. 20; R. 484, l. 17 – 485, l. 1; R. 496, l. 24 – 501, l. 15.

What this Court misses in its analysis is that the officers increased the coercive nature of their "tactics" throughout the lengthy interrogation because they were continually unsuccessful in extracting a confession. They finally found either the right combination of coercive techniques or the most effective one – the threats related to Johnson's daughter – to overbear Johnson's will. Thus, while no one factor may have rendered Johnson's statement involuntary on its own, the totality of the circumstances in this case necessitated exclusion of his statement to police. Johnson is accordingly entitled to reversal of his convictions and a new trial.

4. The trial court erred in sentencing Appellant to five years incarceration for possession of a weapon during the commission of a violent crime.

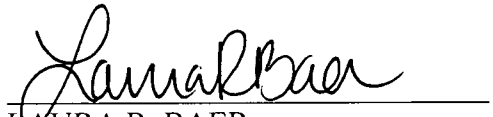
Though the error in imposing a sentence for the weapons offense was not preserved for appeal, Johnson asked the Court to vacate the sentence in the interest of judicial economy. The majority refused to do so because "the State does not concede the circuit court erred in sentencing Johnson to five years for possession of a weapon during the commission of a violent crime." In the concurring opinion authored by the Honorable Paul E. Short, Jr., he agreed that the trial judge erred in sentencing Johnson for possession of a firearm in the commission of a violent crime because S.C. Code Ann. § 16-23-490(A) prohibits such a sentence where life imprisonment without parole is imposed and would vacate the sentence in the interest of judicial economy.

The State's refusal to concede the issue is based upon their contention that "sentencing on the weapons charge was mandatory under § 16-23-490 because the weapon was used to effectuate the kidnapping, he was convicted of kidnapping, and he could not and did not receive a life sentence for that offense." Brief of Resp., p. 57 n.31. As discussed more fully in Appellant's brief, the trial judge made no finding of a nexus between the actual or constructive possession of the firearm and the furtherance of the crime of kidnapping. See State v. Whitesides, 397 S.C. 313, 725 S.E.2d 487 (2012) (holding that "[a] nexus between possession of the firearm and the underlying violent crime must be established in order for a defendant to be convicted of possession of a firearm during the commission of a violent crime"). Kaisha's testimony at trial made clear that the shotgun was left at the house and was not in the vehicle with them after they left. R. 230, l. 23 – 232, l. 8; R. 249, l. 25 – 251, l. 8. As such, the evidence would not have supported a conviction for possession of a firearm during the commission of the kidnapping. Johnson's sentence for the weapons offense should accordingly be vacated, or at the very least remanded for a finding regarding the nexus requirement.

CONCLUSION

For the reasons set forth herein, Appellant Justin Johnson respectfully requests that the Opinion of the Court of Appeals be withdrawn, that his convictions and sentences be reversed or vacated, and that his case be remanded for a new trial.

Respectfully Submitted,



LAURA R. BAER
Appellate Defender

This 15th day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

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V.

JUSTIN JERMAINE JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Justin Jermaine Johnson, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 15th day of February, 2018.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 15th day of February, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .