

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

RECEIVED

Jul 15 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CARMIE JOSETTE NELSON,

APPELLANT

APPELLATE CASE NO. 2019-000788

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court abused its discretion by allowing the jury to have copies of transcripts during deliberation where the recordings had been played multiple times because it placed undue emphasis on the evidence?

II.

Whether the trial court erred in admitting autopsy photographs, state's exhibits #75 and 76, where the photographs were gruesome and the probative value of the photographs was substantially outweighed by their potential for being unfairly prejudicial under Rule 403, SCRE?

STATEMENT OF THE CASE

On October 17, 2017, a Charleston County grand jury indicted appellant for murder (2017-GS-10-05922). R. 496. Appellant's case was called to trial on May 6, 2019, before the Honorable J.C. Nicholson, Jr., and a jury. R. 1. William Smith, Jr. and Taylor Semen represented appellant. R. 1. Assistant solicitor Douglas DuRant and assistant solicitor Daniel Cooper represented the state. R. 1.

On May 9, 2019, the jury found appellant guilty of murder. R. 494, ll. 17-22. Judge Nicholson sentenced appellant to life imprisonment. R. 495, ll. 2-6; R. 498.

This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); *State v. Wood*, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); *State v. Williams*, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997); *State v. Patterson*, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); *State v. Landis*, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

STATEMENT OF FACTS

Appellant met Daniel Nelson at Fort Benning and they married in 2001. R. 44, ll. 9-24. In 2013, they moved to the Charleston area. In 2015, Nelson was convicted of criminal domestic violence after he attacked appellant with a knife. After Nelson's arrest, appellant and he began living separately. R. 46, l. 10-93, l. 6; 162, ll. 17-25. However, Nelson, now homeless, would occasionally visit appellant at the hotel where she lived. R. 52, ll. 6-17.

In January 2017, appellant moved in with Jordan Lum, a woman, whom she met and befriended while they were patients at Palmetto Behavioral Health. R. 360, l. 13-361, l. 12. During this time Nelson and appellant remained in touch, and she frequently allowed Nelson to use her vehicle.

In the days leading up to the incident appellant and Nelson texted and called each other several times and throughout the messages there are references to Lum. Appellant and Lum were not getting along and many of the text messages displayed appellant's irritation with Lum. R. 90-99.

On April 2, 2017, Nelson picked up appellant's vehicle from a hotel where she left it parked and they arranged for him to pick her up at Lum's home. Nelson, grossly intoxicated, wrecked appellant's vehicle and ended up taking a cab. R. 64, l. 3-66, l. 12; 67, l. 14-68, l. 25. Initially appellant and Nelson had planned to go out together that evening but after the accident appellant was upset with Nelson and instead made plans with Lum. When Nelson arrived at Lum's home appellant went to get ready for the evening and while in the shower she heard "yelling." When appellant emerged, she found Lum dead in the kitchen. R. 371-375.

Nelson held appellant hostage in the home and would not allow her any access to her cell phone for multiple days. R. 373, l. 24-375, l. 4. During that time, appellant said Nelson forced

her to make two recordings, on his cell phone, where she described the murder. R. 377, l. 17-378, l. 2. At trial, appellant admitted she left the house to run errands for Nelson during the days between Lum's murder and her arrest. R. 378, l. 7-379, l. 7. However, appellant adamantly denied any involvement with the murder of Lum including helping Nelson in any way with moving the body or cleaning up the house. R. 377, ll. 13-17; 382, ll. 1-9; 385, l. 15-387, l. 12.

On April 4, 2017, Nelson called 911 and claimed appellant killed Lum by hitting her with a hammer, slashing her throat, and stabbing her multiple times. R. 79, ll. 8-12; 168, ll. 11-14. When law enforcement arrived, Nelson directed them to where the body was located and where the murder weapons were. R. 166, l. 15-167, l. 5; 168, l. 15-169, l. 10. After changing his story countless times, Nelson maintained Lum was dead when he arrived, and his involvement in the crime was limited to: conspiring to hurt and/or kill Lum, moving the body from the house to the garage, and cleaning up the house. R. 80-85; 125, l. 20-127, l. 11; 130-91; 172, ll. 8-21. Nelson was arrested and indicted for accessory after the fact of murder.¹ R. 81, ll. 13-21. Appellant was arrested and indicted for murder. R. 496.

During trial, the recordings Nelson made on his cell phone of appellant allegedly admitting to the murder along with transcriptions, created by investigator for the state, and autopsy photographs were admitted over objection.

¹ At the time of trial Nelson had other pending charges including criminal domestic violence, unlawful use of 911, and filing a false report. R. 156, ll. 2-11.

ARGUMENT

1.

The trial court abused its discretion by allowing the jury to have transcripts of the cell phone recordings during deliberation where the recordings had been played multiple times during trial because it placed undue emphasis on the evidence.

Relevant Facts

At trial, the state offered into evidence two cell phone recordings, state's exhibit #95, made by Nelson where appellant allegedly described how she murdered Lum. Along with the recordings the state entered state's exhibits #96 and #97, transcripts of the recordings created by their investigator. R. 100, l. 22-101, l. 5. Defense counsel objected, arguing: "[T]here are a lot of areas of the tape that are very garbled," therefore, "the tape should speak for itself." R. 101, ll. 7-14; 102, ll. 6-12. Defense counsel pointed to the second to last paragraph in state's exhibit #97 and argued that portion of the audio was not audible on the recording. R. 58, l. 21-59, l. 4. At that time, the trial judge ruled the transcriptions should be marked for identification only until Nelson could authenticate the documents. The trial judge asked defense counsel if that was the only objectionable portion, to which defense counsel responded that was one portion, but he maintained his overall objection was that the recordings should speak for themselves. R. 105, l. 7-106, l. 5.

After listening to that specific part of the recording the trial judge overruled the objection as to that portion. The judge also overruled defense counsel's overall objection as long as Nelson could authenticate the recordings properly. R. 106, l. 20-107, l. 4. During Nelson's testimony the recordings were played for the jury and state's exhibits #96 and #97 were handed to the jury to read while they listened. R. 121, l. 5-123, l. 7.

Later during Raymond Haupt's, the chief investigator for the solicitor's office, testimony the state offered an edited version of the same recordings, state's exhibit #133, into evidence. Defense counsel objected under Rule 403, SCRE because the recordings had already been played and the jury had seen transcripts of the recordings. R. 343, ll. 6-24. The state argued the recordings were their most critical evidence and this enhanced version made it easier to understand. The trial judge overruled defense counsel's objection finding it would "help the jury to be able to listen to it more clearly." R. 344, ll. 3-22. At the end of trial, the judge sent back all exhibits admitted into evidence for the jury to use during deliberations. R. 493, ll. 3-25.

Discussion

The trial court has discretion to allow the jury to review evidence and testimony at their request. *State v. Plyer*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). However, in this case the trial court abused its discretion by allowing the recordings to be played more than once and by allowing copies of the transcripts of the recordings to go back during jury deliberations because it placed undue emphasis on a disputed piece of evidence in a trial where the credibility of both Nelson and appellant was at the center of the case.

In *State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982), our Supreme Court held the trial judge abused his discretion by allowing the jury to have transcripts of a recording during deliberations because it unduly emphasized that evidence. *Gulledge*, 277 at 371-72, 287 at 490. In that case the defendant was indicted for assault and battery with intent to kill in the shooting of an officer. *Id.* at 369, 287 at 489. At trial, the state presented testimony that the officer returned to his car and radioed headquarters he had been shot and needed help. The communication was recorded and transcribed. *Id.* at 371, 287 at 490. The recording was played in court and the officer who received the call testified about the conversation, as did another

witness. *Id.*

In *State v. Hess*, 279 S.C. 14, 301 S.E.2d 547 (1983), the Supreme Court held any error in allowing jury to take copies of tape transcripts was harmless. In that case, defendant, former chief of police, was found guilty of misconduct in office. *Hess*, 279 at 16, 301 at 548. At trial the jury had copies of tape transcripts during deliberation. *Id.* at 18, 301 at 549. Ultimately, the Court found any error harmless because there was no dispute as to whether the transcripts were accurate. *Id.*

Here, like in *Gulledge*, the recording was played for the jury, Nelson testified about the recordings, and the transcripts were sent back with the jury while it deliberated. The combination of the transcripts going back with the jury and the recordings being played multiple times placed undue emphasis on those recordings. The case at bar is distinguishable from *Hess* because in this case the accuracy of the transcripts was disputed, by defense counsel, at trial.

Nelson claimed he secretly recorded appellant describing how she murdered Lum. Conversely, appellant stated she was forced by Nelson to make the recordings. The jury had to decide if it believed Nelson's version of events or appellant's version and those recordings were critical to Nelson's fragile credibility. The trial court allowing the recordings to be played over and over and then sending potentially inaccurate transcripts back with the jury during deliberation improperly signaled to it that, not only were the transcripts accurate, but that this evidence should carry more weight than other testimony and evidence presented at trial.

The trial court erred in admitting autopsy photographs, state's exhibits #75 and 76, where the photographs were gruesome and the probative value of the photographs was substantially outweighed by their potential for being unfairly prejudicial under Rule 403, SCRE.

Relevant Facts

During the state's case, photographs of decedent's body at the scene, state's exhibits #23 and #24, were admitted over defense counsel's objection. R. 213, l. 17-214, l. 10 (These photographs are on file with this Court). State's witness Wade Rollings, responding officer, explained to the jury that the body was found in a large crate that had been stored in the garage for multiple days. R. 207-56; 222, ll. 9-18.

Later, state's witness Dr. Nicholas Batalis, the medical examiner who performed the autopsy, testified regarding the cause of death. Dr. Batalis testified there were two fatal wounds, one above the right ear where there was blunt and sharp force trauma and one on the lower right side of the neck where there was sharp force trauma to the carotid artery. R. 305, ll. 9-19. During Batalis' testimony, the state offered state's exhibits #75-77, autopsy photographs. Defense counsel objected to the autopsy photographs arguing the photographs were gruesome in nature and would inflame the passions of the jury. Defense counsel asserted Batalis' testimony in conjunction with his prepared diagram would be an alternative to showing autopsy photographs. The state countered the photographs were probative as to the cause of death and explained the injuries. The state further argued the photographs demonstrated malice. The trial judge overruled the objection finding based on the testimony of Batalis the photographs would aid him in explaining the cause of death. The trial judge also found the photographs did have "some probative value" that outweighed the prejudicial value under Rule 403, SCRE. R. 308, l.

19-310, l. 13.

Discussion

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. *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Under Rule 403, SCRE, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” 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. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted).

This case is distinct from cases where our courts have found the photographs did not inflame the jury and were not prejudicial. In *State v. Brazell*, 325 S.C. 65, 480 S.E.2d 64 (1997), our Supreme Court held three photographs of victim’s body at the crime scene were properly admitted. In that case, the photographs were not close-ups and accurately reflected the scene of the crime. Here, the autopsy photographs were not necessary to reflect the scene of the crime because that had been accomplished by state’s exhibits #23 and #24, crime scene photographs of the body. State’s exhibit #75 is a close-up shot of the top of decedent’s head. State’s exhibit #76 is close-up on decedent’s profile displaying the head and neck wounds.

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 the Supreme 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 state’s exhibit #75 or #76 was necessary to substantiate material facts or

conditions. The issue at trial was whether appellant or Nelson killed Lum not the way she died.

The jury had seen photographs of the body as it was found at the scene. Without even looking at the photographs it was clear from Batalis' testimony that they are horrific. In Batalis' proffered testimony he 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. Batalis admitted he could use his diagram to demonstrate to the jury the type and location of the injuries and that his testimony would not change even without the use of the autopsy photographs. R. 307, l. 21-308, l. 15.

The jury had likely never seen anything as disturbing as what these photographs depict. State's exhibits #75 and #76, were improperly admitted at trial because they were unnecessary to Batalis' testimony and their only purpose was to create an emotional response in the jurors.

CONCLUSION

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

A handwritten signature in blue ink, appearing to read "Sarah Shipe", is written over a horizontal line.

Sarah Shipe
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 15th day of July, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 15, 2020.



Sarah E. Shipe
Appellate Defender

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