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Sep 30 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

CARMIE JOSETTE NELSON,

APPELLANT

APPELLATE CASE NO. 2019-000788

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

Opinion No. 2021-UP-330

PETITION FOR REHEARING

On September 15, 2021, this Court affirmed appellant's murder conviction and life sentence where appellant argued the lower court erred by (1) placing undue emphasis on an audio recording entered in evidence by allowing the jury to have copies of a transcript of the recording during deliberations when the recordings had been played multiple times and (2) admitting gruesome autopsy photographs. Pursuant to Rule 221(a), SCACR, appellant respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

Harmless error analysis

In affirming appellant's convictions and sentences, this Court found that any error in allowing the jury to have a transcript of the recordings during deliberations was harmless because "the jury received the transcript during trial while they listened to the recordings; the recordings were sent back with the jury during deliberations; and the recordings themselves included [appellant's] statement that she attacked [Lum] with a hammer and when [Lum] fell, [appellant] 'commenced to . . . still hitting [Lum] and . . . didn't . . . stop.'" In the opinion, the Court cited *State v. Chavis*, 412 S.C. 101, 107, 771 S.E.2d 336, 340 (2015), for the proposition that appellate courts will decline to set aside a conviction due to insubstantial errors not affecting the result.

This Court's reasoning—that any error in allowing the jury to have a transcript of the recordings during deliberations was harmless because the jury had already listened to the recordings multiple times—is the very reason why it was not harmless. It is not only that the jury had the unreliable transcripts during deliberation, it is the combination of the recordings being played multiple times and the transcripts going back with the jury which placed undue emphasis on the evidence.

Appellant's credibility was central at trial. Accordingly, this was not an "insubstantial error not affecting the result" of trial but rather a critical error which unduly emphasized this evidence. Appellant testified that she was forced by her estranged husband, Daniel Nelson, to make the recordings. R. 377, l. 17-378, l. 2. Conversely, Nelson claimed he secretly recorded appellant describing how she murdered Lum. R. 76, l. 20-79, l. 2. The jury had to weigh Nelson's credibility against appellant's credibility and decide if it believed Nelson's version of events or appellant's version and those recordings were crucial to Nelson's fragile credibility.

By allowing the recordings to be played over and over and then sending inaccurate transcripts back with the jury during deliberation, the trial court 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.

Abuse of discretion

This Court held the trial court did not abuse its discretion in admitting state's exhibits #75 and #76, gruesome autopsy photographs. This Court found the photographs assisted the medical examiner, Dr. Nicholas Batalis, in his testimony regarding injuries to the decedent's body, allowed the jury to better understand his testimony, and did not constitute unfair prejudice. The Court cited *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690 (2009), for the proposition that in order to constitute unfair prejudice, the photographs must create an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.

This case is distinguishable from *Holder*, where our Supreme Court held that the admission of the child victim autopsy photographs was not an abuse of discretion. *Id.* at 280, 676 S.E.2d at 691. In *Holder*, the Court noted that the pathologist testified regarding all of the ways, in which the photographs would aid in "demonstrating the anatomic relationships" because of the jury's "lack of knowledge of internal anatomy." *Id.* at 290, 676 S.E.2d at 697. The Court found that the photographs demonstrated the extent and nature of the injuries in a way that would not be as easily understood based on testimony alone. *Id.*

Here, the injuries, blunt force trauma and stab wounds, were not outside the knowledge of lay jurors and thus the photographs were not needed to aid in the jury's understanding of the injuries. Batalis testified that the photographs would assist him in describing his findings to the jury because the photographs indicated the fatal wounds and showed characteristics of the

wounds, but 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.

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 also 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 the 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.

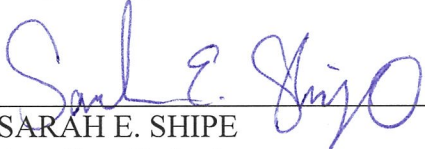
In *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014), autopsy photographs of a child who had been killed by defendant’s dog were admitted. In that case, the Supreme Court found that the trial court did not abuse its discretion in admitting the photographs because the photographs were highly probative, 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 already seen, state's #23 and #24, photographs of the body as it was found at the scene. Without even looking at the gruesome autopsy photographs, it was clear from Batalis' testimony that they were 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.

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.

Respectfully Submitted,



SARAH E. SHIPE
Appellate Defender

ROBERT M. DUDEK
Chief Appellate Defender

This 30th day of September, 2021.

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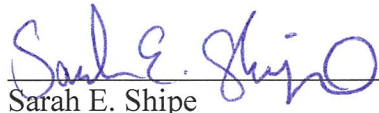
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CERTIFICATE OF SERVICE

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 Tommy Evans, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 30th day of September, 2021.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT