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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable J.C. Buddy Nicholson, Circuit Court Judge

Opinion No. 2021-UP-330 (S.C. Ct. App. Filed September 15, 2021)

Lower Court Case No. 2017-GS-10-05922

THE STATE,

RESPONDENT,

V.

CARMIE JOSETTE NELSON,

PETITIONER

APPELLATE CASE NO. 2019-000788

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 22, 2021.

QUESTIONS PRESENTED

1.

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

2.

Whether the Court of Appeals erred finding it was not an abuse of discretion for the trial court to admit gruesome autopsy photographs where the evidence was not needed to aid in the jury's understanding of the decedent's injuries and the probative value of the evidence was substantially outweighed by its potential for being unfairly prejudicial under Rule 403, SCRE?

STATEMENT OF THE CASE

Procedural history

On October 17, 2017, a Charleston County grand jury indicted petitioner for murder (2017-GS-10-05922). R. 496. Petitioner'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 petitioner. R. 1. Assistant solicitor Douglas DuRant and assistant solicitor Daniel Cooper represented the state. R. 1.

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

The Court of Appeals affirmed petitioner's convictions in *State v. Nelson*, 2021-UP-330 (S.C. Ct. App. filed Sept. 15, 2021). Petitioner sought rehearing which was denied on October 22, 2021.¹

This petition for a writ of certiorari follows.

Introduction

Petitioner 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, Daniel Nelson was convicted of criminal domestic violence after he attacked petitioner with a knife. After his arrest, petitioner and Nelson began living separately. R. 46, l. 10-93, l. 6; 162, ll. 17-25. However, Nelson, now homeless, would occasionally visit petitioner at the hotel where she lived. R. 52, ll. 6-17.

In January 2017, petitioner moved in with a woman, Jordan Lum, whom she befriended while they were patients at Palmetto Behavioral Health. R. 360, l. 13-361, l. 12. During this time

¹ Pursuant to the Supreme Court's amended order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), subsection (e), an appendix containing the above referenced documents has not been e-filed with this petition because that requirement has been suspended.

petitioner and Nelson remained in touch, and she frequently allowed Nelson to use her vehicle.

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

On April 2, 2017, Nelson picked up petitioner'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 petitioner's vehicle and ended up taking a cab. R. 64, l. 3-66, l. 12; 67, l. 14-68, l. 25. Petitioner and Nelson had planned to go out together that evening but after the accident petitioner was upset with Nelson and instead made plans with Lum. When Nelson arrived at Lum's home petitioner went to get ready for the evening and while in the shower she heard "yelling." When petitioner emerged, she found Lum dead in the kitchen. R. 371-375.

Nelson held petitioner hostage in the home and would not allow her to access her cell phone for multiple days. R. 373, l. 24-375, l. 4. During that time, petitioner 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, petitioner admitted she left the house to run errands for Nelson during the days between Lum's death and her arrest. R. 378, l. 7-379, l. 7. However, petitioner adamantly denied any involvement in Lum's death 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 petitioner 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.² R. 81, ll. 13-21. Petitioner was arrested and indicted for murder. R. 496.

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

² 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 Court of Appeals erred finding harmless error where the trial court abused its discretion by allowing the jury to have copies of transcripts of a recording during deliberation where the recordings had been played multiple times because it placed undue emphasis on the evidence.

Relevant facts

At trial, the state offered into evidence recordings, state's exhibit #95, stored on Nelson's cell phone where petitioner allegedly described how Lum died. Along with the recordings the state entered transcripts of the recordings, state's exhibits #96 and #97, 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 piece of 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

In affirming petitioner's convictions and sentences, the Court of Appeals 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 [petitioner's] statement that she attacked [Lum] with a hammer and when [Lum] fell, [petitioner] 'commenced to . . . still hitting [Lum] and . . . didn't . . . stop.'" In a footnote the court noted the "disputed information in the transcripts" was "clearly audible on the recording." In its opinion, the Court of Appeals 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.

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 petitioner was at the center of the case.

In *State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982), the 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 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 recordings were 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.

The Court of Appeals 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. Additionally, while defense counsel pointed out one specific portion of the transcripts that he believed was objectionable his overarching argument was “[t]here are a lot of areas of the tape that are very garbled,” therefore, “the tape should speak for itself.”

Petitioner’s credibility was central at trial. Accordingly, this was not an “insubstantial error not affecting the result” of trial but rather a serious error which unduly emphasized this evidence which the state described as their “most critical piece of evidence.” Petitioner 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 petitioner describing how she murdered Lum. R. 76, l. 20-79, l. 2. The jury had to weigh Nelson’s credibility against petitioner’s credibility and decide if it believed Nelson’s version of events or petitioner’s version and those recordings were essential to Nelson’s flimsy 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.

2.

The Court of Appeals erred finding it was not an abuse of discretion for the trial court to admit gruesome autopsy photographs where the evidence was not needed to aid in the jury’s understanding of the decedent’s injuries and the probative value of the evidence was substantially outweighed by its 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. State's exhibit #75 is a close-up photograph of the top of decedent's head. State's exhibit #76 is close-up photograph of decedent's profile displaying the head and neck wounds.

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

The Court of Appeals held the trial court did not abuse its discretion in admitting gruesome autopsy photographs, state's exhibits #75 and #76. The 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 of Appeals 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 the 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 the average juror 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), the 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 crime scene photographs of the body, state’s exhibits #23 and #24. State’s exhibit #75 and #76, autopsy photographs, were both taken close-up have little to no probative value in this case.

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 were necessary to substantiate a material fact or condition. The issue at trial was whether petitioner 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

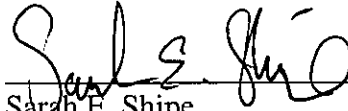
here . . . those are postmortem changes or decomposition; basically, the body breaking down.” R. 305, l. 9-306, l. 14.

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.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.

Respectfully Submitted,

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

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of November, 2021.

RECEIVED

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THE STATE,

RESPONDENT,

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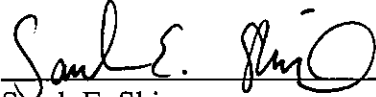
CARMIE JOSETTE NELSON,

PETITIONER

APPELLATE CASE NO. 2019-000788

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari to the Court of Appeals in this case have been served on Tommy Evans, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and Carmie Josette Nelson, #380077, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 19th day of November, 2021.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER