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STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM CHARLESTON COUNTY
Honorable J.C. Buddy Nicholson, Circuit Court Judge

S.C. SUPREME COURT

Unpublished Opinion No. 2021-UP-330

THE STATE,

RESPONDENT,

v.

CARMIE JOSETTE NELSON,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI
Appellate Case No. 2021-001356

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PETITIONER'S 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 in 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?

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding harmless error where the trial court decided to allow the jury to have in their possession during deliberations a transcript of the recording of the Petitioner's confession which was played before the jury, the only emphasis clearly being the fact that on this recording you can hear clearly the Petitioner confessing to committing an act of murder?
2. Did the Court of Appeals err in allowing into evidence autopsy photos of the victim due to the fact these photos corroborated testimony, so its probative value outweighed any prejudicial effect it may have had toward the jury, thereby not violating Rule 403?

STATEMENT OF THE CASE

On October 10, 2017, the Charleston County Grand Jury indicted Petitioner for the offense of murder. (Indictment No. 2017-GS-10-05922)(R. pp. 496-497). On May 6, 2019, Petitioner was brought before a jury of her peers for a trial on the indicted offense. Presiding over this trial was Circuit Court Judge, the Honorable J.C. Nicholson, Jr. Present defending the Petitioner was Public Defenders William Ted Smith, Jr. and Taylor Semen. Representing the State of South Carolina were Assistant Solicitors Douglas Bruce DuRant, and Daniel Cooper of the Ninth Circuit Solicitor's office.

After four days of testimony Petitioner was found guilty of the offense of murder. (R. p. 494 l. 17-22). After the guilty verdict she appeared before the trial judge receiving a sentence of incarceration for the remainder of her natural life. (R. p. 495 l. 2-4). Petitioner later filed a timely notice of appeal.

On June 1, 2021, the Court of Appeals submitted an unpublished opinion unanimously affirming the decision of the trial court. Within their opinion, the Court of Appeals decided that any error regarding the trial judge allowing a transcript of the Petitioner's confession with the jury during deliberations was harmless. The Court of Appeals also decided that the inclusion of autopsy photographs corroborated evidence already presented, so the probative value outweighed any prejudicial effect it might have caused. *See, State v. Nelson*, 2021 WL 4197727 (2021).

Petitioner now requests a granting of certiorari from this Honorable Court. The Respondent argues that the decision of the Court of Appeals does not fall within any of the parameters found in Appellate Court rule 242. This Petition should be subject to dismissal. The return of the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

The Supreme Court reviews Court of Appeals by writ of certiorari only where special reasons justify the exercise of that power. *Douglas v. State*, 369 S.C. 213, 216, 631 S.E.2d 542, 544 (2000). Pursuant to Rule 242 of the South Carolina rules of the Appellate Court, “a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicates the character of reasons which will be considered:

1. Where there are novel questions of law;
2. Where there is a dissent in the decision of the Court of Appeals;
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
4. Where substantial constitutional issues are directly involved;
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.”

Rule 242 SCACR.

Though not controlling this criteria indicates what can be considered if a petition for writ of certiorari is presented to this Court. In reviewing each of these criteria the present case does not apply. The Court of Appeals properly and unanimously affirmed the decision of the trial court. This decision should not be subject to review.

One of the issues Petitioner wishes this Court to review is the Court of Appeals affirming the trial judge’s decision to allow autopsy photos into evidence. It should be a novel question of law in order for this court to grant certiorari. The introduction of autopsy photographs is hardly a new issue that has been presented before this Court. There have been numerous cases decided by

this Court pertaining to autopsy photographs being allowed to be introduced as evidence, *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986)(prejudicial effect of photographs of one murder victim clearly outweighed any evidentiary value); *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690 (2009)(admission of child victim's autopsy photograph was not abuse of discretion); *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010)(autopsy photographs of victims were admissible at sentencing phase of a capital murder prosecution); *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014)(trial court's admission of pre-autopsy photographs of the victim, who had been mauled by dogs was not an abuse of discretion). There is nothing novel about the facts of the present case. Nothing presented within this petition would create a different decision not previously litigated before this Court. There exists no novel question of law.

This case does not have a question pertaining to the Constitution. This question regarding the rules of evidence has been raised before and decided. There was no dissenting opinion by the Court of Appeals; this decision was not in conflict with any other prior decision made by this Court; and, there was no federal question included within this opinion that conflicted with a prior decision made by the United State Supreme Court. The Court of Appeals decision was lawful; therefore, this decision should not be subject to review. This Court should dismiss this petition for certiorari.

STATEMENT OF FACTS

Petitioner, Carmie Josette Nelson met Jordan Brooke Lum (victim) while both were patients in Palmetto Behavioral Health. During their stay they created a friendship, and upon their release, the victim decided to allow the Petitioner to move into her house. Not long after moving in, Petitioner began sending derogatory texts concerning the victim to her estranged husband Daniel Nelson. (R. p. 55 l. 15 – p. 56 l. 6) Petitioner would constantly text Mr. Nelson about how much she despised the victim. At the time Mr. Nelson was homeless, living out of a tent behind Walmart. He testified that the Petitioner gave him the victim's landline phone number, social security number, address and code to the outside gate of the community. (R. p. 56 l. 23 – p. 57 l. 1). Mr. Nelson also testified that the Petitioner gave him this information because she had devised a plan. She wanted him to call harass and intimidate the victim for money. (R. p. 56 l. 13-20, p. 57 l. 4). Petitioner also wanted him to go by their house and assault the victim. (R. p. 56 l. 19-20). Petitioner later changed that plan wanting Mr. Nelson to assist her in killing the victim. (R. p. 57 l. 6-7).

On April 2, 2017, the Petitioner called Mr. Nelson requesting that he bring her veteran's administration disability check. At that time Mr. Nelson had the Petitioner's truck which was parked in a parking lot of a hotel. Mr. Nelson left to meet her, however, due to him being very intoxicated while driving, he collided with a tree. (R. p. 64 l. 8-13). After wrecking her truck he got a ride back to Walmart. He then informed Petitioner about the accident. Petitioner called Mr. Nelson a cab to pick him up and take him to the victim's residence. While in route, Mr. Nelson received three phone calls from the victim's landline, he thought this was odd because the Petitioner never call him from the victim's landline. Petitioner wanted him to get over to the

victim's house immediately because she just killed her and needed his help to dispose of the body and clean the crime scene. (R. p. 66 l. 14-19).

When Mr. Nelson arrived at the victim's house he found the body on the kitchen floor covered in blood. He assisted with the cleaning, placed the victim's body in a crate, and then placed the crate into the garage. (R. p. 69 l. 12-14). Mr. Nelson testified that the Petitioner told him she hit the victim with a hammer and stabbed her multiple times. (R. p. 71 l. 22 – p. 72 l. 4). He also testified that the Petitioner told him that she murdered the victim because she felt like she was being held hostage and the victim constantly beat her dog. (R. p. 72 l. 9-11).

While at the house they discussed numerous scenarios on how to dispose of the body. They talked about burying her in the back behind a cemetery, abandoning her inside her vehicle, or burning her house down. (R. p. 74 l. 3-6). They finally decided to bury her in the cemetery and to remain in the house informing everyone she checked herself into a rehabilitation center. (R. p. 74 l. 8-15).

Later, when cleaning the crime scene was complete, Mr. Nelson worried that he would be accused of committing this murder. He devised a plan to secretly record the Petitioner confessing on his cell phone (R. p. 76 l. 20-24). Mr. Nelson's first attempt failed due to the Petitioner not discussing the crime. She only wanted to talk about the fact he wrecked her truck, and she think he did it on purpose. (R. p. 78 l. 14-16). He eventually coaxed her into telling him how she murdered the victim. (R. p. 78 l. 21-24). Upon receiving the Petitioner's confession, Mr. Nelson left the house and called 911. He informed the authorities that Petitioner committed murder. (R. p. 79 l. 3-10).

Mr. Nelson met law enforcement at the front gate of the subdivision, and led them to the victim's house. Once they arrived they found Petitioner locked inside. They knocked and once she

opened the door they discovered she was highly intoxicated, holding a knife to her throat, threatening to commit suicide. (R. p. 26 l. 5-15). Officers had no success convincing her to put the knife down, so they finally decided to rush into the house. Officers forced the knife out of her hand and placed her into custody. (R. p. 27 l. 5-18). Once taken into custody the Petitioner was questioned about the location of the victim. She initially informed them that the victim was in a drug rehabilitation center. (R. p. 425 l. 19 – p. 426 l. 10). Upon law enforcement locating the victim's body, Petitioner quickly blamed Mr. Nelson for her murder. (R. p. 426 l. 14-20). She was eventually arrested and charged with the offense of murder. Mr. Nelson was also arrested and charged with accessory after the fact of murder.

ARGUMENTS

- 1. The Court of Appeals did not err in finding harmless error where the trial court decided to allow the jury to have in their possession a transcript of the Petitioner's audiotaped confession. The emphasis being the fact you can clearly hear the Petitioner confessing to murder.**

During trial, the State introduced Exhibits #95, 96, and 97 which were cell phone recordings of a conversation between Petitioner and Mr. Nelson. Over Petitioner's objections the State later introduced Exhibit #133 a cleaned up version made by Raymond Haupt, an investigator with the solicitor's office. He testified that he did not alter the contents, just removed background noise, and raised the volume of the Petitioner's voice so the sound could be clearer. (R. p. 342 l. 6-9). The trial judge overruled Petitioner's objection allowing the recording into evidence, "to help the jury be able to listen to it more clearly." (R. p. 344 l. 13-16.)

Standard of Review

In criminal cases, an appellate court can only review errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1996). Error is harmless where it could not reasonably have affected the trial's outcome. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985).

Analysis

Petitioner argued to the Court of Appeals that the trial judge allowing the transcript of the audio recording into the jury room during deliberations was done in error. Since the recording was played numerous times during trial, the Petitioner argues that this placed an undue influence on this one piece of evidence. Within her petition, the Petitioner compares the present case with this Court's decision in *State v. Gullede*, 277 S.C. 368, 287 S.E.2d 488 (1982). In *Gullede*, this Court

ruled that the playing of the audio was lawful but that the court erred in allowing the jury to take the transcript into the jury room because it unduly emphasized that evidence. The facts of the present case are different from *Gulledge*. In *Gulledge*, there was an audio conversation between a patrolman who was shot and the patrolman who was the first to receive the call. This transcript was not between the patrolmen and the defendant confessing to a crime. In the present case this recording is between co-defendants where the Petitioner is confessing to murder. As a general rule statements or declarations made by one accused of a crime are admissible against him. *State v. Plyer*, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980). The transcript did not unduly emphasize the evidence. The fact this was a defendant confessing to murder emphasize this evidence. Since the Petitioner's defense was that Mr. Nelson was the guilty party this piece of evidence proved her testimony was untrue.

This statement was voluntary and given without any coercion. It has been uniformly held that a confession may be introduced upon proof of voluntariness by a preponderance of the evidence. *State v. Washington*, 296 S.C. 54, 370 S.E.2d 611 (1988). The recording and transcripts were properly introduced so they were both lawfully entered and admissible. *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2010)(The judge exercised proper discretion and committed no error in allowing the jury to read the transcript while listening to the 911 tape).

The jury had to weigh the Petitioner's credibility against Mr. Nelson's. Allowing the recordings to be played more than once did not sway the jury not to believe the Petitioner. What swayed the jury was the confession that could be clearly heard and was very convincing. In the opinion of the present case, this is what was stated by the Court of Appeals,

As to whether the trial court erred in allowing the jury to have a transcript of the recordings during deliberations we find any error 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 Nelson's statement that she attacked Victim with a hammer and when Victim fell Nelson "commenced to ... still hitting [Victim] and ... didn't stop."

Nelson, 2021 WL 4197727, p. 1.

The jury had the audiotape in deliberations and the confession was clear. The transcript, nor the clearer audio did not bring more emphasis to the evidence, the fact she confessed did. In *Gulledge*, the court held that the transcript unduly emphasized the evidence. However, in *Gulledge* that audio was never a confession made by the defendant. If the audio was a confession like in the present case that decision could certainly have been different.

- 2. The Court of Appeals did not err in allowing in evidence autopsy photos of the victim due to the fact these photos corroborated testimony, so its probative value outweighed any prejudicial effect it may have toward the jury, thereby, not in violation of Rule 403.**

During trial the State introduced photographs during the testimony of Dr. Nicholas Batalis, the medical examiner who performed the autopsy. The Petitioner objected to these photographs being allowed into evidence, arguing that they were so gruesome that the prejudicial affect outweighed any probative value they may have. Petitioner objected to exhibits number 75, 76, and 77 which were autopsy photos of the victim. During his testimony Dr. Batalis stated that it was better to use the photographs than the diagram so the jury can fully see how the injuries matched previous testimony and the murder weapon. (R. p. 323 l. 17-22). The trial court decided to allow the autopsy photographs into evidence. In the Court of Appeals opinion of *Nelson* they stated,

As to whether the trial court abused its decision in admitting into evidence Victim's autopsy photographs, we find the photographs assisted the medical examiner in his testimony regarding Victim's injuries, allowed the jury to better understand his testimony and did not constitute unfair prejudice.

Id.

The Petitioner now seeks certiorari regarding this decision. The Respondent will reveal why the decision by the trial court, later affirmed by the Court of Appeals was lawful and should not be subject to review.

Standard of Review

The materiality, relevance, and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Rosemond*, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law. *State v. Anderson*, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009). The relevancy, materiality and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). “A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22, 28 (2014).

Argument

A trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decisions will be reversed only if there is a clear abuse of discretion. Evidence is relevant if it tends to establish or make more or less probable some matter which is an issue upon which it directly or indirectly bears. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991).

During trial, Dr. Batalis testified that the victim suffered multiple injuries to the head and neck. He explained that some of these injuries revealed wound patterns matching that of the claw end of a hammer, the murder weapon. (R. p. 323 l. 17-22). Other wounds were considered blunt force injuries matching the other end of a hammer. (R. p. 326 l. 19 – p. 327 l. 10). The measurements from these injuries matched that of the murder weapon, which definitely makes

these photos more probative than prejudicial; therefore, relevant and necessary to be introduced as evidence. He also testified regarding the knife wounds to her torso. In the photographs were patterns revealing that probably a kitchen knife was the weapon used to cause these injuries. (R. p. 331 l. 7 – p. 332 l. 8).

Within her petition the Petitioner states that the issue at trial was whether Petitioner or Mr. Nelson killed the victim, not the way she died. These photographs corroborated prior testimony and the Petitioner's confession. The head wounds revealed that the victim was beaten with both sides of a hammer. The wound patterns matched the murder weapon. During the audiotape of the Petitioner's confession Mr. Nelson stated, "I still can't believe that after you hit her in the head a couple of times with that **hammer** and she got up." Petitioner also stated, "And she walked over by that damn table and fell and I commenced to fucking still hitting her." (R. p. 121 lines 18-19). In *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690 (2009), this Court held, "if the offered photograph serves to corroborate testimony it is not an abuse of discretion to admit it." *Id.* 382 S.C. at 290, 676 S.E.2d at 697, quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353.

The Petitioner argues that the jury had likely not seen anything like these photographs. And these photos only purpose was to create an emotional response from jurors and due to that reason this Court should grant certiorari. It is clear by the record there were probative reasons as to why these photographs were allowed to be admitted. These photographs also showed malice which is an essential element of murder. As to the nature of these photographs, this Court previously stated in *Collins*,

Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder. As one court has astutely observed, it is the duty of courts and juries to examine the evidence in even the most unpleasant of circumstances: "Courts and juries cannot be too

squeamish about looking at unpleasant things, objects or circumstances in proceedings to enforce the law and especially if truth is on trial. The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.

Collins, 409 S.C. at 535, 763 S.E.2d at 28, quoting, *Nichols v. State*, 267 Ala. 217, 100 So.2d 750, 756 (1958).

The Respondent understands this Court's position in *Torres* and *Collins*, that autopsy photographs are only acceptable in the narrow offering that these photos are more probative than prejudicial. The State made a point to emphasize the probative reasoning as to why these photographs should be allowed into evidence. The State adhered to the warnings made by this Court in both *Torres* and *Collins*. Testimony of the medical examiner as to why the photographs and not a mere diagram was the best evidence to reveal his findings was fully explained. This reasoning should be accepted that these photographs were more probative than prejudicial.

The opinion of the Court of Appeals revealed that they decided to affirm the decision of the trial court due to the fact it was shown that these photographs were being admitted due to their probative value. The decision made by the Court of Appeals followed previous decisions made by this Court; therefore, this petition for certiorari should be denied.

CONCLUSION

Based on the foregoing reasons, Respondent submits Petitioner has failed to show that the question presented warrants certiorari review. This Court should deny this petition for writ of certiorari and let stand the decision of the Court of Appeals.

Respectfully submitted,

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