



Fourth Court of Appeals San Antonio, Texas

CONCURRING OPINION

No. 04-15-00585-CR

Devin Donell **FIELDS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2013CR9124
Honorable Lorina I. Rummel, Judge Presiding

Opinion by: Jason Pulliam, Justice
Concurring Opinion by: Luz Elena D. Chapa, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Jason Pulliam, Justice

Delivered and Filed: November 30, 2016

I agree with the majority that the State presented legally sufficient evidence to support the jury's verdict of capital murder. I also agree that the trial court did not commit harmful error by admitting the crime scene video and Breanna's note. I write separately because in my opinion the slight probative value of the autopsy photo of Baby Girl Harrison's "unborn child"¹ was substantially outweighed by its unfair prejudice and the trial court abused its discretion in

¹ Under the Texas Penal Code, the definition of "person" includes an "individual," which includes "an unborn child at every stage of gestation from fertilization until birth." TEX. PENAL CODE ANN. §1.07(a)(26), (38) (West Supp. 2016).

admitting it. However, because I conclude the error was harmless, I concur in the court's judgment.

Over Fields's objection under Texas Rule of Evidence 403, the trial court admitted State's exhibit 89, the autopsy photograph of the deceased unborn child. The color photograph shows the unclothed victim lying on its side on a table with the umbilical cord still attached to the placenta. The table is covered with red liquid. The majority accurately describes the photograph as gruesome. The admitted autopsy photos were so grossly inflammatory that the prosecutor felt the need to state, before publishing them, "I just want to warn the spectators that these photos are graphic and we would urge anybody that does not want to see them to please leave the courtroom."

In reviewing the trial court's evidentiary ruling under rule 403, we consider (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004); *Montgomery v. State*, 810 S.W.2d 372, 380-90 (op. on reh'g). When the evidence consists of photographs, we also consider the number and size of the photographs, whether they are in color, whether they are gruesome, whether the body depicted is clothed or naked, and whether the body has been altered by autopsy. *Erazo*, 144 S.W.3d at 489. "An abuse of discretion occurs when the probative value of the photograph is small and its inflammatory potential great." *Rolle v. State*, 367 S.W.3d 746, 750 (Tex. Crim. App. 2012).

The probative value of the evidence

The State and the majority rely exclusively on the alleged probative value of the evidence to justify its admission in the trial of this case. The majority holds that because the State was required to prove as an element of its case that Fields's actions caused the death of the unborn

child, the photograph is logically relevant to the State's case and helpful to the jury. However, the photograph added little probative evidence to the evidence already before the jury. The State had presented uncontested evidence that Baby Girl Harrison was pregnant, that Fields knew she was pregnant, that the unborn child was otherwise healthy, and that it died as a result of Baby Girl Harrison's death. The unborn child was not struck by any of the bullets, and thus State's exhibit 89 did not show any gunshot wounds.

"A crime-scene photograph or an autopsy photograph is not admissible simply to show the death of the individual. These photographs are admissible despite the fact, *and because*, they show more than the testimony. But that 'something more' must be relevant and helpful to the jury." *Erazo*, 144 S.W.3d at 493. As noted by the majority, the Court of Criminal Appeals in *Erazo* discussed several cases in which autopsy photographs of unborn children were held admissible over a rule 403 objection. The *Erazo* court found that in each of those cases the photographs showed "something more," making them helpful to the jury, either because they showed the wounds suffered by the victim or demonstrated an element of the case beyond a deceased victim. *Id.* at 493-94. Contrary to the majority's suggestion, the court in *Erazo* did not hold the photographs in those cases were admissible *merely* because they showed a named victim of the charged offense. *See id.* at 494.

Nevertheless, I agree that because the unborn child was a charged victim in this capital murder case, the photograph was relevant. But because the photograph did not demonstrate "something more" that the State was required to prove or that was in dispute, it was not particularly helpful to the jury and its probative value was slight.

Ability to impress the jury in some irrational yet indelible way

The State argues that autopsy photos depicting only the injuries that caused death and not mutilation caused by the autopsy itself, are not unfairly prejudicial. However, in this case, the unborn child's death was caused by the mother's death. The photograph does not depict the injuries that caused the death and the medical examiner did not use the photograph to explain how or why the unborn child died. Rather, the photograph depicts a small unborn child with the umbilical cord attached to the placenta, all of which had been removed from the mother as part of the autopsy. The photograph shows the unborn child lying on a table in a pool of red liquid. "The unborn child in the photograph appears tiny, innocent, and vulnerable. Society's natural inclination is to protect the innocent and the vulnerable." *Reese v. State*, 33 S.W.3d 238, 242 (Tex. Crim. App. 2000); *see Rolle*, 367 S.W.3d at 751; *Erazo*, 144 S.W.3d at 495. As counsel for Fields argues, the photograph is "toxic." I agree. The content of the photograph is so toxic that the prosecutor felt compelled to warn courtroom spectators before the photograph was published. The image appeals solely to the jury's emotions and encourages a decision on an improper basis. This factor weighs strongly in favor of exclusion.

Time to develop the evidence

The State asked relatively few questions of the medical examiner regarding the photograph, and this factor weighs in favor of admissibility.

The State's need for the evidence

In addressing this factor, we are to consider (1) whether the State had other available evidence to show the fact of consequence that the photograph was relevant to show; (2) if so, how strong was that other evidence; and (3) whether the fact of consequence related to an issue that was in dispute. *Erazo*, 144 S.W.3d at 495-96; *Montgomery*, 810 S.W.2d at 390.

The only fact of consequence the photograph was relevant to show was that Baby Girl Harrison's unborn child died. That fact of consequence was not in dispute. Moreover, that fact was established by the testimony of several witnesses, including Dr. Samantha Evans, a forensic pathologist in the medical examiner's office. Dr. Evans testified Baby Girl Harrison had been twenty-one to twenty-two weeks pregnant when she died, and that, although "the generally accepted time frame" for "when a baby is viable . . . is about twenty-four weeks" of gestation, the unborn child was "an individual" within the meaning of the relevant Texas law. Dr. Evans testified that as part of the autopsy, she removed the unborn child from the mother's uterus and found no abnormalities or defects that would have caused its death. Dr. Evans testified that the mother's death is what caused the unborn child's death. The State had Dr. Evans identify the photograph as being of the unborn child she removed from the uterus of Baby Girl Harrison, but did not use the photograph to explain or add anything helpful to Dr. Evans's testimony. Fields did not cross-examine Dr. Evans or present any controverting evidence on these issues.

The autopsy photograph could conceivably have been relevant to show by inference that Fields knew Baby Girl Harrison was pregnant. However, the State presented three witnesses who testified Fields knew she was pregnant. Fields did not deny or controvert that evidence and never disputed or argued that he was not aware Baby Girl Harrison was pregnant.

In sum, State's exhibit 89 was not relevant to any disputed fact of consequence. With respect to the facts to which the photograph was relevant, the State had other strong, uncontroverted, and admissible evidence with which to establish its case. The photograph was therefore completely unnecessary, and this factor also weighs strongly in favor of exclusion.

Conclusion

The majority appears to hold that an autopsy photo of a victim is always admissible over a rule 403 objection if it shows a victim of the offense charged unless it depicts mutilation of the victim caused by the autopsy. That conclusion completely discounts the other three factors in the rule 403 analysis, two of which — the potential for prejudice and the State's need for the evidence — weigh strongly in favor of exclusion in this case. Where, as here, the nature of the photograph is such that its content will surely inflame the jury's passions and where the photograph, although relevant, is not probative of any issue in dispute and the State has shown no particular need for the evidence, the trial court abuses its discretion in admitting the photo. I therefore disagree with the majority's conclusion on this issue and would hold the trial court abused its discretion by admitting State's exhibit 89. However, I have reviewed the entire record and conclude that the error, even when considered together with the improperly admitted note, State's exhibit 3, did not affect Fields's substantial rights. In light of the evidence as a whole and the arguments of counsel I am fairly assured that the error did not influence the jury's verdict or had but a slight effect. I therefore concur in the judgment.

Luz Elena D. Chapa, Justice

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