

STATE OF NEW HAMPSHIRE

COÖS, SS.

JULY 2022

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-78

**STATE'S OBJECTION TO DEFENDANTS MOTION *IN LIMINE* RE STATE'S
EXHIBITS 171-173**

NOW COMES the State of New Hampshire, by and through the Offices of the Coös County Attorney and the Attorney General, and objects in part to the defendant's Motion *In Limine* Re State's Exhibits 171-173. In support of its objection, the State submits the following:

1. The defendant objects to the introduction of three photographs of Albert Mazza, taken as part of the formal autopsy conducted the day after his death. The defendant claims that the State should not be allowed to introduce these photographs because they are cumulative of, and more graphic and disturbing, than another photograph of Mr. Mazza that has already been admitted into evidence.

2. In its order dated April 29, 2022, this Court ruled that a number of photographs of the deceased victims in this case were admissible, denying the defendant's objection. This Court specifically found that, for the reasons articulated by the State, each of the photographs had significant and particularized probative value, which was not outweighed by the danger of unfair prejudice. See Court's 4/29/22 Order, p. 2. The same is true in this instance.

3. The defendant's motion with regard to the State's proposed Exhibits 171-173 should be denied as well. The photographs in question, State's proposed Exhibits 171-173, constitute three images of Mr. Mazza taken during his formal autopsy. The autopsy was conducted on June 22, 2019, one day after the fatal crash that is the subject of this case.

4. Dr. Jennie Duval, who conducted the autopsy, will testify in this case and will describe Mr. Mazza's autopsy in some detail. During trial preparation, Dr. Duval specifically identified the photos that are submitted as Exhibits 171-173 as the photos she would need to explain the nature of Mr. Mazza's head wound, and her conclusions regarding how it could have been sustained. These photos are only three of approximately 67 photos taken during Mr. Mazza's autopsy.

5. These photos are distinguishable from the previously admitted photo of Mr. Mazza for several reasons. While the previous photo was taken at the scene of the crash, the photos at issue in this motion were taken in a controlled setting as part of a formal autopsy. This alone makes them distinguishable from the previous photos the defendant references. Exhibits 171 to 173 are not cumulative of photographs taken of Mr. Mazza or others at the scene of the crash, since they portray a completely different setting. As the defendant notes in paragraph 9 of his objection, in these exhibits, the wound on Mr. Mazza's head has been cleaned. Dr. Duval will explain that cleaning and photographing the individuals upon whom she conducts autopsies is a regular and important step in every autopsy. These photos are therefore not cumulative of any other photos.

6. Also, these three photos are the photos Dr. Duval identified as the only ones that she thought were necessary to explain the nature of Mr. Mazza's head injury, and her opinion regarding how it could have been sustained. The photos provide three separate and distinct perspectives of Mr. Mazza's head, allowing the jury to have a complete picture of his head

wound, and giving Dr. Duval the necessary context she needs to explain her findings and opinions to the jury. Indeed, these photos show Mr. Mazza as he was when Dr. Duval examined him. These photographs are therefore necessary as they are required to explain the basis of Dr. Duval's expert opinion, and provide unique perspectives of Mr. Mazza's head wound that are not available from any other evidence.

7. When assessing the credibility of photographs that contain gruesome or potentially inflammatory material, courts must "give serious attention to defense request to remove the most offensive and inflammatory portions" of the photographic evidence. *State v. Seymour*, 140 N.H. 736, 794 (1996). The legal test for admission, however, is whether or not the probative value is substantially outweighed by the danger of unfair prejudice. *Id.*, at 742-743. *See also State v. Stayman*, 138 N.H. 397, 401-402 (1994) (applying Rule 403 balancing test to photographs of injuries to child victim).

8. Here, the photographs are not being offered for the purpose to appeal to the jury's "sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in this case." *State v. Fernandez*, 152 N.H. 233, 240 (2005). Instead, the photographs have probative value that is separate and distinct from any aspect of their graphic nature. "Relevant evidence is not unfairly prejudicial if it merely causes detriment to a defendant because it tends to prove his guilt. Otherwise, all of the State's evidence would be considered unfairly prejudicial to the defendant." *State v. Scott*, 149 N.H. 170, 172 (2003).

9. While Exhibits 171-173 are certainly graphic, they are not being offered to appeal to the jury's sympathies or sense of horror, or for any other inadmissible reason. Instead, they are

necessary for the State's expert witness, Dr. Duval, to explain her findings and opinion with regard to Mr. Mazza's head wound.

10. The mere fact that the parties have stipulated that the collision caused the death of each victim does not rob the photographs of their probative value. Nor does the stipulation, in and of itself, lead to any increase in the possibility of unfair prejudice. The stipulation therefore does not provide any support for the defendant's motion.

11. Since these photographs provide the basis for Dr. Duval's opinion, they are highly probative. The danger of any unfair prejudice is minimal, and certainly does not substantially outweigh the probative value of the photos.

12. The defendant's concerns regarding potential prejudice can also be addressed by a request for a cautionary instruction to be given to the jurors at the time the photographs are admitted. *See Commonwealth v. Winfield*, 76 Mass.App.Ct. 716, 725 (2010) ("the chance that the jury might place improper weight on the photographs was palliated by the judge's instructions at the time the photographs were admitted."); *and State v. Bare*, 669 S.E.2d 882, 886 (N.C. App. 2008) (at defendant's request, jury in murder case can be instructed to consider photos of victim for illustrative purposes only).

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Deny the defendant's motion; and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

July 22, 2022

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CERTIFICATE OF SERVICE

I certify that this pleading has been provided to counsel of record, through the Superior Court's electronic filing system.

/s/ Joshua L. Speicher
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