

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

**COMMONWEALTH OF VIRGINIA                    )**       **CRIMINAL NUMBER FE-2017-1245**  
**VERSUS    )**  
**DARWIN MARTINEZ TORRES                    )**       **INDICTMENT - CAPITAL MURDER**

**MEMORANDUM OPINION AND ORDER REGARDING DEFENSE MOTION #50**

On May 24, 2018, Casey Lingan and Robert McClain, the Assistant Commonwealth’s Attorneys, DARWIN MARTINEZ TORRES, the Defendant, Joseph Flood, Daniel Goldman, and Joni Robin, Counsel for the Defendant, and Lindsay Wilhelm and Jaime de Castellvi, Interpreters fluent in the Spanish language, appeared before this Court. The Defendant is indicted for the felonies of CAPITAL MURDER IN THE COMMISSION OF ABDUCTION (COUNT I), ABDUCTION (COUNT II), CAPITAL MURDER IN THE COMMISSION OF RAPE (COUNT III), RAPE (COUNT IV), CAPITAL MURDER IN THE COMMISSION OF OBJECT SEXUAL PENETRATION (COUNT V and COUNT VII) and OBJECT SEXUAL PENETRATION (COUNT VI and COUNT VIII) and he appeared while in custody.

The Court heard argument and received evidence on Defense Motion #50, Motion *In Limine* to Exclude Evidence of Animal Predation.

The Court **ORDERED** that Defense exhibits #1, 2, and 3, which consist of two photographs and the autopsy report, be placed **UNDER SEAL**.

This motion arises out of evidence indicating that subsequent to death, the victim's body was subject to animal predation. This post-mortem animal predation is alleged to have occurred while the victim's body was in the lake from which she was recovered. Defense Motion #50 seeks a determination by the Court that, as a matter of law, there should be no reference to animal predation in the trial of this matter, whether through the admission of photographs, the admission of the autopsy report, or through the testimony of the medical examiner or other witnesses. In other words, Defense Motion #50 seeks to exclude from the trial “all evidence and argument” regarding post-mortem animal predation. *Defense Motion #50, at 6.* In particular, the Defense asserts that the “prejudicial effect of the photographs outweighs their probative

value.” *Id.* However, Defense Motion #50 goes beyond seeking exclusion of all photographs that depict animal predation; it also seeks to exclude any reference *in any form* to indications of post-mortem animal predation, including through the testimony of the medical examiner or the admission of the autopsy report.

To the extent that the Defense seeks a blanket prohibition of any reference to post-mortem animal predation – including redaction of the autopsy report to remove references to post-mortem animal predation and prohibiting the medical examiner from making any reference to post-mortem animal predation – that motion is **DENIED**.

The Defense argues that *Kelly v. Commonwealth*, 8 Va. App. 359 (1989) warrants such a blanket prohibition of any reference to post-mortem animal predation. The Commonwealth argues that *Kelly* is distinguishable because, in *Kelly*, the body of the victim was not moved; rather, it was left in the house where the murder occurred, where it was subject to animal predation by the family’s dogs. The Commonwealth argues that, in the instant case, “the Defendant’s actions of putting the victim’s body into water was an attempt to cover up the crime and is evidence of premeditation, method, intent, as well [as] the atrociousness of the crime.” *Commonwealth’s Opposition to Defense Motion #50, at 2*. The Commonwealth further argues that “the subsequent decay of the victim’s body<sup>1</sup>, including the ‘animal predation’ are directly attributable to the actions of Defendant and his commission of this crime [and are] relevant to depict the manner in which Defendant committed and hid this crime” and were “foreseeable.”<sup>2</sup> *Id.*

The Court finds the instant case and *Kelly* to be distinguishable. First, *Kelly* involved the admission of a “highly inflammatory” photograph, not the testimony of the medical examiner or the admission of an autopsy report. 8 Va. App. at 372. Second, in *Kelly*, the Defendant was not alleged to have taken any additional measures which resulted in the victim being subject to animal predation. The victim was left where she was murdered. In contrast, in the instant case the Defendant is alleged to have dumped the

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<sup>1</sup> The Court in *Kelly* makes clear that evidence of decomposition is admissible, as long as it is sufficiently explained to avoid distortion of the scene or confusion to the jury and its prejudicial effect does not outweigh its probative value. 8 Va. App. at 373.

<sup>2</sup> At oral argument, Defense counsel distinguished the instant case from a situation where an individual placed the victim in a lion’s cage. In other words, this argument suggests that animal predation testimony could only come in if the Defendant either knew there would be animal predation or intended there to be animal predation. The Court does not agree that this is necessary to make the testimony relevant.

victim's body in the lake in order to conceal the body and hide the crime.<sup>3</sup> These acts made possible the animal predation which the Defense now seeks to exclude from trial. This evidence is relevant to premeditation, method, intent, malice<sup>4</sup> and "to show the degree of atrociousness of the crime." *Stockton v. Commonwealth*, 227 Va. 124, 144 (1984) (citations omitted).

Further, Virginia Code Section 32.1-283(B) provides that the Chief Medical Examiner "shall cause an investigation into the cause and manner of death to be made and a full report, which shall include written findings, to be prepared." That report certainly includes a description of the decedent's body at the time the medical examiner "take[s] charge of the dead body." *Id.* To the extent that an accurate and complete factual description of the decedent's body includes references to post-mortem animal predation, such testimony and references in the autopsy report are not excluded, if otherwise admissible. *See also* Virginia Code Section 19.2-188 ("[C]ertified reports of autopsies made under the authority of Title 32.1[] shall be received as evidence in any court....") This is especially true where there is ante-mortem trauma in the same part of the body (head and neck) where post-mortem animal predation occurred. The medical examiner, however, must make clear in her testimony what bodily damage is the result of post-mortem animal predation and what bodily injuries are the result of ante-mortem trauma.<sup>5</sup>

With respect to photographs, which the Court understands to include both crime scene and autopsy photographs, the Court makes no ruling at this time regarding the admissibility of particular photographs.

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<sup>3</sup> "The conduct of an accused following the crime is often relevant, particularly when its purpose is to conceal his guilt." *Stockton v. Commonwealth*, 227 Va. 124, 143 (1984). (citation omitted).

<sup>4</sup> In *Kelly*, the Court noted that the animal predation testimony was not relevant to the issue of malice because "[t]he malice required in a murder conviction is 'malice aforethought.'" 8 Va. App. at 372 (citation omitted). Thus, "because the injury to the victim's arm was inflicted by animals after the victim's death instead of by criminal activity, the photograph showing her arm is not probative on the issue of malice." *Id.* In *Kelly*, the defendant took no affirmative steps which made the animal predation possible. In the instant case, the Defendant is alleged to have taken specific actions intended to conceal the crime and it is those actions which are alleged to have made the animal predation possible.

<sup>5</sup> It should be emphasized here that the particulars of the medical examiner's testimony will be, like any other evidence, subject to evaluation under Virginia Rule of Evidence 2:403.

The admission of particular photographs, including photographs depicting animal predation,<sup>6</sup> will be determined only after the universe of Commonwealth case-in-chief photographs have been submitted to the Court for its review and the defense has had an opportunity to express its position regarding the admission of specific photographs.

The Court would note that it is well established that "[i]f a photograph accurately portrays the scene created by a criminal in the commission of the offense on trial, it is not rendered inadmissible merely because it is 'gruesome' or shocking."<sup>7</sup> *Washington v. Commonwealth*, 228 Va. 535, 551 (1984) (citation omitted).<sup>8</sup> Nor is the Commonwealth precluded from offering a photograph of the victim's body because it has already sought and obtained admission of the autopsy report. "The fact that the autopsy reports reflect the same facts as the photographs does not make the photographs inadmissible." *Williams v. Commonwealth*, 248 Va. 528, 547 (1994) (citation omitted). Even when the cause of death is not in dispute or has been stipulated, crime scene photographs, *see Orbe v. Commonwealth*, 258 Va. 390, 402 (1999), and autopsy photographs, *see Burnette v. Commonwealth*, 60 Va. App. 462, 484-85 (2012), may be admitted.<sup>9</sup>

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<sup>6</sup> This includes the two photographs placed under seal which, according to defense counsel, show indications of animal predation.

<sup>7</sup> See also *Teleguz v. Commonwealth*, 273 Va. 458, 482 (2007) ("Accurate photographs of a crime scene are not rendered inadmissible solely because they are gruesome, and autopsy photographs of the victim are admissible to show the atrociousness or vileness of a crime.") (citations omitted).

<sup>8</sup> Moreover, a photograph may be admissible even if it portrays an injury not inflicted directly by the Defendant. See *Washington v. Commonwealth*, 228 Va. at 552 ("The defendant further argues that the photograph was improperly admitted because it showed a surgical scar, not present at the time of the offense, which was caused by the emergency operation undertaken to stop the victim's internal bleeding in an effort to save her life. When the photograph was introduced, the jury had already heard the testimony of Dr. Grahame Henson, who described the emergency surgical procedures undertaken at Culpeper Memorial Hospital, and that of Dr. Beyer, the medical examiner, who described the condition of the body at autopsy. By this means, the evidence of surgical procedures was fully explained to the jury and differentiated from the wounds left by the assailant. Thus, there was now way in which the jury could have been confused or prejudiced against the accused by the evidence of emergency surgery shown on the photograph.")

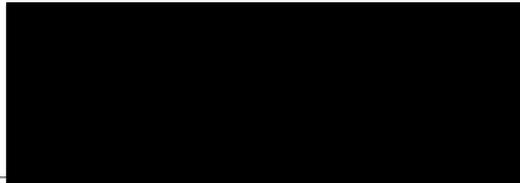
<sup>9</sup> "A defendant's stipulation with regards to the cause of the victim's death does not allow the appellant to sanitize the evidence and thus preclude the Commonwealth from

Ultimately, the admission of photographs of the victim's body will be subject to the balancing required by Rule 2:403 of the Virginia Rules of Evidence.<sup>10</sup> The fact that the autopsy report and the medical examiner's testimony will already place before the jury the condition of the victim's body after being recovered from the lake will be a consideration for the Court in determining the admissibility of particular photographs. Another consideration may be whether there are available other photographs without the animal predation which accurately and fairly reflect the crime scene.

The Court further **ORDERED** that the Commonwealth's Attorney file with the Court by December 6, 2018, the universe of photographs that may be introduced at trial in the Commonwealth's case-in-chief in which the victim's body appears. The photographs shall be filed **UNDER SEAL**. The Defense shall file its position with regard to the admissibility of particular photographs by December 13, 2018. Any photographs filed by the Defense shall also be filed **UNDER SEAL**. The Court will then rule on the photographs at the December 20, 2018 motions hearing.

The Defendant was remanded to the custody of the Sheriff.

Entered on June 4, 2018.

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JUDGE RANDY I. BELLOWS

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introducing photographs showing the dead victim, even if the pictures may be considered gruesome." 60 Va. App. at 485 (citations omitted).

<sup>10</sup> "Relevant evidence may be excluded if: (a) the probative value of the evidence is substantially outweighed by (i) the danger of unfair prejudice, or (ii) its likelihood of confusing or misleading the trier of fact; or (b) the evidence is needlessly cumulative."