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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

Respondent,

v.

KENNETH WAYNE CARLISLE,

Appellant

Appellate Case No. 2019-001702.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in admitting a photograph of decomposed skeletal remains when any probative value of the photograph was substantially outweighed by the danger of unfair prejudice?

2. Did the trial judge err in admitting autopsy photos when the probative value of the photograph was substantially outweighed by the danger of unfair prejudice?

3. Did the trial judge err in refusing to declare a mistrial when the jury viewed a video of Appellant wearing an ankle monitor but the judge earlier ruled that evidence of the ankle monitor was inadmissible as more prejudicial than probative?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES PRESENTED

I. Did the trial judge abuse his discretion by allowing the State to introduce State's Ex. 50, a photograph of the victims' remains taken at the location where they were found, where the photograph depicted the victims as they were left by the defendants and their positions relative to each other, it corroborated testimony from several witnesses, it was probative of the element of malice, and the probative value of this photograph was not substantially outweighed by the danger of unfair prejudice to Appellant.

II. Whether, assuming that Appellant's challenge to the probative value of the photographs is preserved for appellate review, the trial judge abused his discretion by allowing the State to introduce eight autopsy photographs accurately depicting the victims' injuries (State's Exs. 58-59, 61-64, 66 and 128) through the pathologist who conducted the autopsy because these photographs corroborated and illustrated the pathologist's findings, they were probative on the issue of malice, and their probative value was not substantially outweighed by the danger of unfair prejudice.

III. Did Appellant preserve his third issue for appellate review, since he refused the trial judge's offer to give a curative instruction.

IV. Did the trial judge properly deny Appellant's mistrial motion based on jurors seeing a Walmart video (States Ex. 120), in which he was wearing an ankle monitor because (1) trial counsel had viewed the video pretrial and did not specifically ask that it be redacted, (2) the State inadvertently failed to redact the video, (3) the ankle monitor is only seen for a total of roughly twenty-eight seconds in the 2:24 video and was not the focal point of jurors watching the video, (4) neither party referred to Appellant wearing an ankle monitor, (5) counsel repeatedly admitted that he did not think jurors could determine that an ankle monitor was on his leg, (6) the trial judge's finding jurors could not determine from the video that Appellant was wearing an ankle monitor is supported by the record, (7) trial counsel twice expressly declined the trial judge's offer of a curative instruction, and (8) there was overwhelming evidence of Appellant's guilt.

STATEMENT OF THE CASE

Respondent agrees with Appellant's Statement of the Case.

STATEMENT OF FACTS

Viewed in the light most favorable to the prosecution, the direct and circumstantial evidence presented at trial was that on July 3, 2017, Appellant Carlisle and his jointly-tried girlfriend, Jordan Marie Hodge, murdered Hodge's grandmother Linda McCallister, and Linda's husband, William Chester "Chet" Clemmons. Their motive? They lusted for Linda's money.

Linda, a sixty-three year old contractor, was married to Chester or "Chet," and they lived in Conway, South Carolina. Linda had recently sold her house on the Waccamaw River and had approximately $75,888.39 after purchasing her new Conway residence. Those proceeds were in a BB&T joint account she shared with Chet. ***R. 168-69; 177-79; 183-84; 399-402.***

Robin Cole testified that Linda was her very close friend. Ms. Cole was having a barbeque on July 4, 2017, and Linda was planning to come to it around noon. Ms. Cole last spoke to Linda on July 3rd, to confirm their plans for the next day. In their conversation, Linda said that she was going to Hodge's residence on the 3rd after she finished a job and ran errands. Linda did not attend the party on the 4th. When Ms. Cole's repeated efforts to reach Linda by voicemail and text messaging for days were unsuccessful, she became worried because Linda had never failed to respond to her calls in the ten years that they had been friends. ***R. 140-43; 149-51.***

On July 8th, Ms. Cole received a call from Robert Byrd, a carpenter who was doing some work on Linda's new home. Following this call, Ms. Cole tried to contact Linda's family members. She first tried to contact co-defendant Jordan Hodge. Although she did not reach

Hodge, she eventually spoke to Linda's son, Bo. Following that conversation, Ms. Cole went to Linda's residence. Inside, she noticed that a wedding picture of Linda and Chet was face down on the nightstand in the master bedroom. Also, Linda's dogs were in the house, without water, and there was dog feces in the house. Ms. Cole testified that Linda loved the dogs more than herself and would never leave the dogs in this poor of a condition. Finally, Ms. Cole testified that Linda would not loan her truck to anyone. ***R. 143-49; 159-60; 164.***[1]

Robert Byrd testified that Linda had hired him to do some "custom stuff" on her residence in July of 2017. He went to her residence on July 8th, but no one was home. He proceeded to do his scheduled work. At some point, he went into the residence's game room. He saw the dogs, who were acting erratically and barking constantly. Also, they did not have water and there was feces throughout the house. This was suspicious. So, he called the Coles. ***R. 164-66.***

Muriel Roberts lives on Golden Leaf Rd. in Aynor, South Carolina. She hired Linda to hang wallpaper for her in mid-June 2017.[2] Linda began the project on Thursday, June 29th and returned with Chet on both the 30th and Monday, July 3rd. Because they did not complete the job, Linda said that she would come back on July 5th to finish their work. When Linda did not show on the 5th, Ms. Roberts called and left a message. She called and left a message again on July 6th because this was "very different" from Ms. Roberts' other dealings with Linda. ***R. 167-69.***

James "Bo" Moran, Linda McAllister's son, testified that he last spoke to her "around Father's Day, June 18th." Bo received the call from Ms. Coles on July 8th, in which she expressed

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[1] Hodge elicited that she and Linda had a somewhat strained relationship. On redirect, the State established that Linda would occasionally help Hodge financially but there would be conditions attached, such as working off any money that was loaned. ***R. 153; 159.***

[2] Linda had done this for her in the past. ***R. 167-68.***

concern that Linda "was missing and ... more so that the dogs were ... left unintended and in bad shape." This was unusual because she treated the dogs well. He immediately called his mother and unsuccessfully continued to do so for several days. On the 8th, he also contacted his sister, Dara, and her husband, and he asked them to check on the residence. ***R. 170-72; 184; 191.***

Bo also contacted Hodge, his niece, via text message on the 8th. She replied that she had not seen Linda, or Nanner, in two days, and claimed that there was a family emergency in Ohio. He did not accept this. So, he asked her to call him on the same date. In the subsequent call, Hodge reiterated that there was an emergency in Ohio and claimed that she was caring for Linda's dogs. When Bo said that the dogs had not been cared for, she claimed that "she had a migraine headache and did not go for a day or two." Bo last spoke to Hodge on July 12th and asked if she had heard from Linda and checked on the dogs. She said that she had checked on the dogs and abruptly ended the conversation, falsely claiming, "I'm at work." She gave the same false response to Bo's text message. ***R. 173-76.***

Linda's family filed a missing person's report on July 13th. Bo was later contacted after authorities recovered the bodies of Linda and Chet at a location that was "relatively close" to the location of her former home on the river and with which Hodge was familiar. ***R. 176-77.*** Bo also testified that Linda loved her 2011 blue, Dodge RAM pickup truck. ***R. 177.***

Det. Heath Watford, of the Conway Police Department, and Det. Tyres Nesmith assisted Det. Mark Bobbitt with the missing persons case. On July 13, 2017, they went to the victims' residence. They both noticed that the wedding picture was face down on the nightstand and Det. Watford testified that the bathroom light and the T.V. were on. Further, dog urine and feces was present throughout the residence, and a frozen dinner sitting on the kitchen counter had thawed and molded. Linda's wallet, containing an un-activated BB&T Visa debit card in her name and

Chet's business card, was likewise found. In the back of the residence, there were two live .38 caliber rounds lying on the ground next to the patio. ***R. 207-08; 258-62; 339-45.***

After they had inspected the victims' residence, Dets. Watford and Nesmith went to Appellant and Hodge's Aynor, South Carolina mobile home because the officers were told that Appellant and Hodge were the last ones to see the victims alive and that the victims' primary means of transportation, Linda's blue, Dodge RAM pickup truck, was at the defendants' residence. An Horry County Police officer accompanied them for jurisdictional purposes. Upon arriving at the mobile home park, the officers saw Linda's truck parked on "the far back side of what appeared to be the lot for that mobile home." It was "behind the house [and] backed up to the ... woodline area that separated a field and that mobile home community." The truck was "extremely dirty," with mud and other debris on it. ***R. 208-09; 262-65.***

Although the defendants' roommate, Robert Bell, was the only person at the trailer when the officers arrived, the defendants soon returned. Hodge then came out and spoke to them. When questioned about the victims' whereabouts, Hodge claimed that "they had gone to Ohio for a family emergency in Chet's family. Also, Linda supposedly left the truck for them to use because the defendants' vehicle had broken down and she asked Hodge "to take care of the dogs and stuff at their house." There was another truck on the property and the defendants had come home in a Jeep Cherokee. Asked the obvious question of why they had not driven her grandmother's truck, Hodge claimed that they had borrowed the Jeep instead because her grandmother kept the truck very clean and didn't want anyone smoking in it. ***R. 209; 265-67; 315-16.***[3]

[3] While cooperative, Hodge "appeared to be fairly nervous" and she avoided making eye contact as Det. Watford questioned her. ***R. 267-68.***

The defendants agreed to the detectives' request to go to the Conway police station and give statements. Yet, when Hodge was asked for the keys to her grandmother's truck, she said that she had lost them. Also, Appellant's demeanor changed from normal to "extremely nervous" and shaking, as soon as Det. Watford asked about the keys to the truck. He claimed that "he had misplaced or lost them while drinking with a friend the night before." He claimed his friend's name was "Don" but he did not know "Don's" last name or where "Don" lived. Det. Watford looked in the truck and saw papers, fast food wrappers and a cigarette pack in it. ***R. 209; 268-72***

The defendants drove the Jeep to the police station and were there when the detectives arrived. Neither defendant was in custody. Det. Nesmith interviewed Hodge and Det. Watford eventually interviewed Appellant in a separate office. The interview of Hodge was introduced as State's Ex. 5 and was published to the jury. In her interview, Hodge claimed that she last saw the victims on July 4th, when they sought Chet's help in repairing their broken-down vehicle.[4] She again claimed that she had last seen the victims on July 4th, that the victims had gone to Ohio because of a family emergency, that Linda said Hodge and Appellant could use Linda's truck, and that Hodge was caring for Linda's dogs. (By this point, police knew that there was dog urine and feces in Linda's home and that the large dogs did not look like anyone had cared for them). Hodge also mentioned that Linda did not like that Hodge dyed her hair, but the investigation revealed that Hodge did not purchase the dye until July 5th. ***R. 210-19; 272-73***.

Appellant had written a statement (State's Ex. 6, ***R. 790***) before Dets. Watford and Nesmith arrived at the station. Both this statement and the video-recorded interview with Det. Watford (State's Ex. 8) were published to the jury. Appellant claimed that he last spoke to the victims on July 4th and he said they had gone to Ohio for a family emergency. Chet supposedly

[4] Chet was a mechanic. ***R. 215***.

was upset and "very vocal about Linda getting ready and they needed to go." Also, Appellant saw Chet with small handgun that Chet put in his pocket. Appellant did not know if Chet took the handgun to Ohio supposedly because he and Hodge left before the victims. When asked if it was normal for the victims to take trips like this, he said it was not that unusual and that they sometimes did "off-the-wall things." ***R. 217-18; 274-78; State's Ex. 8.***

Det. Watford and Inv. John Caulder, from the Horry County Police Department, searched the trailer in which the defendants lived pursuant to a search warrant following the interview of the defendants. The officers found brand-new ... kitchen appliances ... [and] knife sets" in the kitchen. There were also five or six Walmart bags sitting in the kitchen-living room area that "appeared to be full of merchandise." Elsewhere, they found a "brand-new weed-eater," a new PlayStation 4, food items, and a new window air conditioning unit. ***R. 278-80; 348-50; 352-54.***

Det. Watford found "a keychain lanyard" bearing Linda's name on the top shelf of the closet of the defendants' bedroom. He also found a Conway National Bank bag in the bedroom and a "Conway National Bank ... debit MasterCard in the name of Linda McAllister." The keys and key fob for Linda's Dodge RAM truck were likewise in the bank bag. Inv. Caulder also discovered a small, "two shot derringer" in the closet, and new men's and women's underwear in the bedroom. ***R. 280-87; 321; 354-57.*** He recovered a burned holster and cell phone in a burn pit behind the trailer. ***R. 350-51.***

The Conway Police Department obtained possession of Linda's blue Dodge RAM truck on the night of July 13th and Inv. Caulder and Inv. Dennis Lewis searched it the following day, in Det. Watford's presence. ***R. 287-88; 358; 396; 418.*** Officers immediately smelled the "extremely strong odor of chlorine bleach" when the hard cover for the truck bed was removed. There were a number of paper towels and tissues in the truck's bed and swabs were taken of

reddish-brown stains found in the bed. There was also a camouflage Ducks Unlimited baseball cap (State's Ex. 75) in the truck bed. This was the same cap that Chet was wearing in the wedding picture found in Linda's bedroom and which he was wearing on July 3rd.[5] Police discovered a Marlboro 100 cigarette pack that had reddish-brown stains on it in the truck's cab,. Swabs of reddish-brown stains were likewise taken from the rear floorboard area, the back of the seats, the back of the center console, and a small plastic storage area in the floorboard. ***R. 288-98; 357-70.***

Another significant break in the case occurred on the morning of July 15th, when three campers, who investigated a foul odor they smelled the previous night, found the victims' decomposed bodies in a wooded area near Browns Chapel landing.[6] One of the campers, Britzi Waddell, notified the Horry County Police Department of what they had found. ***R. 249-53***. Cpl. Adam Skellett was the first officer from the Horry County Police Department to arrive. He interviewed the campers and remained on the scene until detectives arrived. ***R. 254-57.***

Inv. Caulder responded to that scene and photographed it as well. S*ee* State's Exs. 50-52. *See also* Argument I. He testified that the victims' bodies were "badly decomposed," and they were covered with brush and wood debris. He also noticed the foul smell and he discovered that one victim's skull was separated from the body. When he looked closely, he saw that one victim had what appeared to be a gunshot wound in the skull. The bodies were turned over to the coroner's office, which transported the bodies for autopsy. ***R. 370-72; 379-81***. At this point, the

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[5] The State introduced four photographs of a drive-through transaction at Conway National Bank on the morning of July 3rd, which show Chet wearing the cap. *See* ***R. 239-44; 292-93; 311.***

[6] The landing is on Browns Chapel Avenue.

investigation changed from a Conway missing persons case to an Horry County murder case. ***R. 300.***[7]

On August 25, 2017, Bo, his sister and brother-in-law retrieved Linda's truck after law enforcement released it to them. They briefly took possession of the truck and drove it slightly outside the impound lot. Bo confirmed that there were stains, coagulated blood, and debris in the truck. In fact the condition of the truck was so bad he thought "[i]t may have been a biohazard." More importantly, a .25 caliber shell casing fell out of the seat and onto the rear floorboard when the passenger seat was moved forward. Bo contacted Det. Matthew Singleton, who immediately came out with Inv. Dennis Lewis. Either the family or Inv. Lewis found another .25 caliber shell casing in the truck. Inv. Lewis seized both shell casings (State's Ex. 76). ***R. 180-83; 191-93; 418-22.***

Dr. Cynthia Schandl, a forensic pathologist, testified that she conducted autopsies on both victims. Both bodies were in state of decomposition. Most of the skin from Linda's head and the front of her body were missing, as were many of her organs. Linda was identified by comparing dental x-rays taken at autopsy to known dental x-rays, and by the presence of a metal pin in her wrist.[8] Dr. Schandl found "a small round defect ... to the left side of her head and a larger defect that was also somewhat round to the right side of her head." Dr. Schandl opined that this was "a single gunshot wound that went through and through" the skull. She utilized State's Exs. 58-61 to demonstrate her findings. ***R. 472-80.*** *See also* Argument II.

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[7] Because Linda's truck had an Ocean Lakes Campground sticker on it (***R. 360***), Inv. Caulder searched a trailer belonging to a family member of one of the defendants there, several days after the bodies were found. He found a .22 caliber handgun and a box of .38 caliber bullets. ***R. 384-85.***

[8] Bo Nolan testified that Linda had broken her left arm in a motorcycle accident and a "metal rod" was inserted in it. ***R. 183.***

Dr. Schandl found that the entrance wound to the left side of Linda's skull was "0.28 by 0.28 [inches]." The exit wound on the right side of the skull was "0.4 by 0.4 [inches]." She explained that an exit wound may be larger than the entrance wound because after a bullet hits a person's body it "may be tumbling or otherwise not going ... in quite a straight fashion." Dr. Schandl x-rayed Linda's remains (see State's Ex. 128) and discovered a bullet in Linda's hair, which she collected. ***R. 479-82***. *See also* Argument II. Dr. Schandl opined that the gunshot wound to the head was the cause of Linda's death.[9] ***R. 483-84***.

Chet's body was in a more advanced state of decomposition. Because he did not have any teeth, his body was identified through DNA.[10] Dr. Schandl, using photographs (State's Exs. 62-64) to demonstrate her findings, opined that Chet had a "very, very similar pattern" of gunshot wounds to his head. Again, the entrance wound was on the left side of his skull and measured 0.31 inches by 0. 25 inches. The exit wound was on the right side of his skull. She opined that the gunshot wound to his head was the cause of death. As she had done with Linda, Dr. Schandl testified that she also x-rayed Chet's remains, but in his case she did not find a projectile. ***R. 484-90***.[11] *See also* Argument II.

SLED Agent James Green, a forensic firearms examiner, testified that he examined the two cartridge casings found in Linda's truck (State's Ex. 76) and the fired bullet recovered at autopsy (State's Ex. 77). He opined that the bullet "was most consistent with being a 25-auto

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[9] A toxicology screen, performed using "skeletal muscle" showed that the presence of caffeine, acetaminophen and "a breakdown product" caused by decomposition.

[10] Law enforcement got buccal swabs from Chet's son, William Clemons, Jr., and his son's biological mother. ***R. 194-98; 204-205***. William Clemons testified that Chet had all of his teeth removed when he was younger and had dentures that he did not like to wear. ***R. 204-05***.

[11] A toxicology screen reflected the presence of caffeine and the same "breakdown product" caused by decomposition.

caliber" because the bullet had "the same diameter at the base and it weighed approximately the same[,] and [it] had the same overall profile and shape."[12] He further opined that his examination of the casings in State's Ex. 76 was inconclusive as to whether they were fired by the same gun or two different weapons. He explained that:

> 25 auto is a relatively low pressure cartridge. When you combine that with maybe a poor quality firearm or just hard ammunition components, like ... the brass used on the primers were a little harder than normal, it just didn't take on any markings enough for me to say, ... yes, they were fired by the same firearm or no, they were not.

R. 570-75; 573-80. He would expect to see State's Ex. 77 in one of the casings he examined, but he could not conclusively say it was. ***R. 576***.

The prosecution's remaining evidence unerringly identified Appellant and Hodge as the persons who murdered Linda and Chet beyond any *reasonable* doubt. Jerry Bullard testified that he is the general manager for an Advanced Auto Parts in Conway. His store's records reflected that Linda's debit Visa card was used on July 4, 2017, to purchase "a steering wheel cover, runner floor mat that would probably be for the back that goes all the way across and then floor mats for the front and back." ***R. 244-47***.

Ernie Yost testified that he is a tattoo artist. A friend of his sent the defendants to his shop in May 2017. On their first visit, he sold Appellant a .25 caliber pistol for $125.00. He sold Appellant a .40 caliber pistol for $500.00 three days before the defendants' arrest. Hodge was present on both occasions and got a butterfly tattoo on the July visit. Mr. Yost also recalled that the defendants were driving a blue truck on the July visit, which he offered to buy. ***R. 328-33; 335***.

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[12] "A 25 auto caliber bullet is .25 inches in diameter or 25 hundredths of an inch." ***R. 574***.

Thirty-three year old Robert Bell testified that he had worked with Appellant in 2017 and that he was the defendants' roommate in late June through July 2017. Bell slept on the couch, while the defendants occupied the master bedroom. Also, the defendants appeared to get along well with each other. Bell was in Pennsylvania visiting his mother from July 1st through the 8th. When he returned, he met the defendants at a tattoo shop and they were in a blue truck Bell had never seen. Additionally, they had several new items at their residence, including a PS4, and a remote control helicopter. In fact, Bell accompanied them on a trip to Walmart in the blue truck. ***R. 545-51.***

He had seen Appellant with a .25 and a 9 mm, which they bought at the tattoo shop. However, he did not tell law enforcement about the .25 because he did not know which weapon they were seeking. Also, he had sold the 9 mm to an acquaintance because he was a heroin addict. ***R. 552-56.***

Perhaps the most damaging evidence against the defendants was presented through the records of and still photographs from ATM transactions from four area BB&T banks, receipts of purchases and video surveillance from several area Walmarts, and the GPS information from Linda's truck. Michael Dowd testified that he is the corporate investigator for BB&T bank for the region covering from Hilton Head to Little River, South Carolina and the Southeastern North Carolina, "from all the way up to Jacksonville and then out to [the] Pinehurst area." His duties include handling cases of "check fraud, debit or credit card fraud, missing night bag claims, transaction disputes with clients, elder exploitation cases as well as teller shortages, [and] internal issues." He also has access to BB&T's computer records and surveillance photographs of transactions by clients. ***R. 397-99.***

At the State's request, Mr. Dowd pulled the bank statement for a joint BB&T account for Linda and Chet for June 29-July 15, 2017. State's Ex. 78. On June 29, 2017, the account had $75,888.39. The account was debited over $11,000.00 from July 3rd until July 13th. An ATM withdrawal by a male driving a blue truck was photographed at the Saybrook branch at 1:26 p.m. on July 4th (see State's Exs. 82-85).[13] Another ATM withdrawal at the same location by a male driving a blue truck was also photographed (State's Exs. 86-88). On July 10th there was a cash withdrawal of $ 500.00 at the North Conway branch (see State's Ex. 81), which was photographed (State's Exs. 89-95). The vehicle was a Jeep Cherokee. A second ATM withdrawal at the same location - made by a man driving a blue vehicle - was likewise photographed. (State's Exs. 96-99). ***R. 399-416.***

Robin O'Kane is an asset protection associate at the Church Street Walmart in Conway. Her duties include observing customers "via videos," researching "cash register receipts and other transactions, [as well as] theft and accidents." She is able to retrieve receipts and surveillance videos by specific dates and times if requested. She explained that "Walmart's video system is synced directly to its receipt registers. .... Whatever is on the register is going to happen on video at the same time, and it's all recorded and maintained via DVR system through the home office." At the request of the Conway Police Department, Ms. O'Kane obtained surveillance footage and transaction receipts of purchases the defendants made in July 2017. ***R. 444-48.***

At 1:34 a.m. on July 4th, the defendants spent $505.34 and made a $100.00 cash withdrawal at the Church Street Walmart. (State's Ex. 105 [video]; State's Ex. 106 [receipt]). (State's Ex. 107 [video]; State's Exs. 108 & 109 [receipts]). On July 5th, they spent $ 704.21 on a

[13] This is only a few miles from Ocean Lakes, in Myrtle Beach.

Sony PS4 game system, two games: Sky Viper and Four Wave Blue, a three year service plan for the PS4, and hair dye, and they received $100.00 cash back. (State's Ex. 110 [video]; State's Exs. 111 & 112 [receipts]). On July 7th, they spent $48.39 on Clorox, Febreeze carpet freshener, another Febreeze product, and a sponge. (State's Ex. 113 [video]; State's Exs. 114 & 115 [receipts]). At 12:07 on July 7th, they spent $ 442.53 on food items and a "couple of men's shirts." (State's Ex. 113 [video]; State's Exs. 116 & 117 [receipts]). They bought a $98.00 security chain (State's Ex. 118 [video]; State's Exs. 119 [receipt]) on July 8th. On July 10th they spent $384.97 on a window air conditioning unit and $100.00 in cash back (State's Ex. 120 [video]; State's Exs. 121 [receipt]), and on yet another visit, they received $100.00 in cash back and purchased $848.94 in merchandise. This included a cookware set, as well as pots and pans. (State's Ex. 123 [still photograph]; State's Exs. 122 and 124 [receipts]). Finally, they spent $475.45 and received $100.00 in cash back on July 12th. (State's Ex. 125 [video]; State's Exs. 126 [receipts]). ***R. 448-65; 468-69***. *See also* Argument III.

Det. Ryan Seipt, of the Horry County Police Department, assisted the Conway Police Department in removing the GPS system from Linda's truck, and another search warrant was obtained to extract the data on it. Neither agency had the ability to extract the data from the hard drive. So, it was sent to Columbia and then to the FBI in Quantico, Virginia. ***R. 499-503***.

Dwight Falkofske, a member of the FBI's electronic device analysis unit, was qualified, without objection, as an expert in that field. ***R. 534-36***. He explained that global positioning system (GPS) is commonly used in vehicles today, in order to provide consumers with mapping services. Mr. Falkofske personally examined and extracted the data from the memory device of

the GPS system in Linda's truck (State's Ex. 129).[14] After extracting the data, he processed it into two formats: an Excel electronic spreadsheet and a GPX file that can be used with mapping software, such as Google Earth. ***R. 536-40***. *See also* ***R. 590-91***.

FBI Agent Nathaniel Dingle is a member of the FBI's "cellular analysis survey team or CAST," which performs "analysis on records," including cell phones, cars and watches, or any other device that has location information on it. He was qualified, without objection as an expert in "historical location analysis." ***R. 584-90***. Agent Dingle confirmed the prevalence of GPS in automobiles today. He testified that he had received the thumb drive containing the GPS information of Linda's truck (State's Ex. 132) from Quantico. Using a PowerPoint presentation (State's Ex. 136), he testified to what the GPS data revealed. ***R. 590-94***.

Most importantly, he was able to track the truck's movement from 2:00 p.m. on July 3rd until 2:00 p.m. on July 4th. The truck left a location on Golden Leaf Rd. in Aynor[15] at 2:42 p.m. on the 3rd and returned to Linda's residence at 3:19 p.m. It followed a route that it had consistently followed in the past when driving between Aynor and her residence. Beginning at 3:23 p.m., the truck left Linda's residence and drove to several locations and returned to her house without stopping. After the final such trip, the truck returned home at 6:58 p.m. The truck remained at Linda's until 9:00 p.m., when it left and followed the usual route to Aynor. ***R. 595-600; 609-10***.

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[14] The GPS hard drive was introduced as State's Ex. 131 and the USB drive was introduced as State's Ex. 132.

[15] This is consistent with Ms. Roberts' testimony.

However, after turning onto the road where the defendants lived, it stopped for twelve minutes (from 9:25 to 9:37 p.m.) on a stretch of the road that has a field and no residences.[16] It then continued to the defendants' trailer and it stayed there until 10:18 p.m. The truck then left the trailer and drove to a Speedway on Hwy 501, arriving at 10:30 p.m.[17] Nine minutes later, it left the Speedway on Hwy. 501. After driving a circuitous route around Conway, the truck went to Browns Chapel Rd. and stopped near the area where the victims' bodies were found. It remained there from 11:29 until 11:56 p.m. From there, the truck went to the victims' home, where it remained for roughly nine minutes. After leaving the victims' home, the truck went to a coin operated car wash that is open 24 hours a day and remained there from 12:38 to 12:50 a.m. on July 4th. ***R. 300-01; 599-602; 610-11.***

Once it left the car wash, it went straight to the Church St. Walmart, arriving at 12:55 a.m. It left the Walmart at 1:39 a.m. and arrived at the defendants' trailer at 2:16 a.m. At 7:47 a.m. on the 4th, the truck went to a gas station in Conway and then back to the defendants' trailer. The truck thereafter went to two unknown residences in the Aynor area for brief periods. It left the second residence at 10:31 a.m. and went to the Family Dollar store in Aynor. From there, it went to the Advance Auto Parts in Conway. It arrived at 11:19 a.m. and departed that location at 11:28 a.m. Next, it went to the BB&T, where it remained from 1:20 to 1:29 p.m. The truck then traveled to the Surfside Beach Walmart, arriving at 1:35 p.m. At 4:14 p.m., the truck went to Ocean Lakes Campground. ***R. 603-06; 611-12.***

Likewise, Agent Dingle was able to corroborate evidence of trips to BB&T and Walmart following July 3rd. GPS showed that: the truck went to the BB&T at 4:14 p.m. on July 4th; it was

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[16] This was near the intersection of Edwards Rd. and Pleasant Union Rd. ***R. 599.***

[17] The truck parked either under an overhang or on the side of the building, so GPS was lost while the truck was at the Speedway. ***R. 600-01.***

at the Church St. Walmart from 8:35 to 9:32 on July 5th; it returned to that Walmart from 12:05 to 12:19 a.m. and, again, from 10:47 a.m. until 12:15 p.m. on July 7th; it went to a BB&T at 8:09 p.m. on July 8th; it was then at the Walmart from 8:26 p.m. until 9:10 p.m. on July 8th; and it was at the North Conway BB&T at 7:57 until 8:01 a.m. on July 12th. ***R. 606-08.***

The paper towel and the Ducks Unlimited cap that police found in the bed of Linda's truck were submitted to SLED. Both a cutting from the paper towel and swabs from the Ducks Unlimited cap presumptively tested positive for blood and were sent for DNA testing. ***R. 618-24.*** Donna Money, the SLED DNA analyst who conducted the testing, had a known standard from Linda that was derived from analysis of Linda's toothbrush. She had to conduct "kinship analysis" or paternity testing" for Chet's DNA.[18] In addition to the cutting from the paper towel and swabs from the Ducks Unlimited cap, Ms. Money tested other swabs taken from Linda's truck. (State's Ex. 13, SLED items 3-5). Swabs from the rear passenger floorboard of the truck, SLED item 3 presumptively tested positive for blood. ***R. 626-34.***

Ms. Money opined that the DNA profile developed from SLED item 3 was a mixture of at least two persons and that she was able to determine there was a major contributor. Performing kinship analysis, she opined that the DNA profile developed from Chet's biological son was "consistent with being a biological offspring of Sara Lewis and the major contributor." She further opined that it was "approximately 340 billion times more likely to see the genetic results of William Clemons, Jr., if the major contributor is the true biological father than if a random man is the father." Although there was not a full profile of the minor contributor, Linda could not be excluded as a possible contributor. "The probability of randomly selecting an unrelated

[18] This was done by developing the DNA profiles of Chet's biological son, William Clemons, Jr., and his son's biological mother. Then, the mother's DNA is excluded. ***R. 631-32.***

individual who could have contributed to this mixture [was] approximately one in 240." ***R. 634-36.***

SLED item 4, swabs from rear passenger storage compartment, presumptively tested positive for blood. Again, the DNA profile developed was a mixture of at least two persons. While there was insufficient DNA to determine the minor contributor, she was able to determine there was a major contributor and she opined that "[t]he DNA profile from William Clemons, Jr., is consistent with being a biological offspring of Sara Lewis and the major contributor to [SLED item 4]." She explained that it was "approximately 100 million times more likely to see the genetic results of Williams Clemons, Jr., if the major contributor is the true biological father than if a random man [was] the father." ***R. 636-37.***

SLED item 5, swabs from the truck bed, presumptively tested positive for blood and the DNA profile developed was a mixture of at least two people. "The DNA profile developed from William Clemons, Jr., is consistent with being a biological offspring of Sara Lewis and the major contributor to this mixture." Ms. Money explained that it was "approximately 5.1 trillion times more likely to see the genetic results of William Clemons, Jr., if the major contributor is the true biological father than if a random man is the father." There was insufficient DNA to determine the minor contributor. ***R. 637-39.***

The DNA profile of the cutting from the paper towel (State's Ex. 14) was likewise a mixture to two people. "[T]he DNA profile developed from William Clemons, Jr., [was] consistent with being a biological offspring of Sara Lewis and contributor one to this mixture." Further, it was "approximately 5.1 trillion times more likely to see these genetic results of William Clemons, Jr., if contributor one is the true biological father than if a random man is the father." ***R. 539-41.***

Ms. Money also testified that:

> After determining that contributor one was that of William Clemons I was then able to compare the alternate known profile for Linda McAllister to this mixture. .... For STRmix we use ... a likelihood ratio, which is the comparison of two possible explanations for ... the DNA profile. So the proposition set for Linda McAllister is ... Linda McAllister and an unidentified unrelated individual contributed to the mixture or two unidentified unrelated individuals contributed to the mixture. If the DNA profile developed from ... the toothbrush, is from Linda McAllister, then the DNA profile is approximately 680 septillion times more likely if Linda McAllister and an unidentified unrelated individual contributed to the mixture than if two undefined unrelated individuals contributed to the mixture.

R. 641-42.[19]

Finally, Ms. Money analyzed a cutting from the Ducks Unlimited cap (State's Ex. 75), a swab taken from a scraping of the bill and back inside of the cap, and three hairs. She developed DNA profiles from the cutting, the swab from the scraping, and one hair. She performed kinship analysis on the profile from the cutting because it was a single source, and she opined that the DNA profile developed from William Clemons, Jr., was "consistent with being a biological offspring of Sara Lewis and the contributor of this item." She explained that it was "approximately 5.1 trillion times more likely to see the genetic results of William Clemons, Jr., if the contributor to this item is the true biological father than if a random man is the father." Her testing of the swab from the scraping of the cap revealed in a mixture of DNA. She opined that the DNA profile developed from William Clemons, Jr., was "consistent with being a biological offspring of Sara Lewis and the contributor to this [mixture]" Further, it was roughly "500,000 times more likely to see the genetic results of William Clemons, Jr., if the contributor to this item

[19] Ms. Money did further testing to determine the probability of Chet and Linda contributing to this mixture of DNA, as opposed to Chet and an unknown person or two unknown people contributed to it. The statistical probability that it was Chet and Linda contributing to it, as opposed to either of the other scenarios, resulted in even vastly greater probabilities that it was Chet and Linda. ***R. 642-43.***

is the true biological father than if a random man is the father." Linda could not be excluded as the minor contributor to this mixture. ***R. 643-47.***

STANDARD OF REVIEW

Appellate courts sit to review errors of law only in criminal cases, *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001), and an appellate court is bound by a trial judge's factual findings unless they are clearly erroneous. *Id.* at 6, 545 S.E.2d at 829. The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. *State v. Bridges,* 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). As to evidentiary issues, the Court is "limited to determining whether the trial judge abused his discretion." *Id.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (quoting *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011)). "To warrant reversal, an error must result in prejudice to the appealing party." *Id.* at 16-17, 732 S.E.2d at 884.

Further, the grant or denial of a mistrial lies within the sound discretion of the trial court, and the trial judge's ruling will not be disturbed on appeal absent an abuse of discretion or an error of law. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000); "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." *State v. White*, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct. App. 2006) (citations omitted).

ARGUMENTS

I. The trial judge did not abuse his discretion by allowing the State to introduce State's Ex. 50, a photograph of the victims' remains taken at the location where they were found, where the photograph depicted the victims as they were left by the defendants and their positions relative to each other, it corroborated testimony from several witnesses, it was

probative of the element of malice, and the probative value of this photograph was not substantially outweighed by the danger of unfair prejudice to Appellant.

Notwithstanding Appellant's argument to the contrary, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce State's Ex. 50, a photograph of the victims' remains taken at the location where they were found. Unlike the crime scene photographs admitted without objection (State's Exs. 51 and 52), this photograph depicted the victims as they were left by the defendants and their positions relative to each other. It also corroborated testimony from several witnesses, and it was probative of the element of malice. Further, the probative value of this photograph was not substantially outweighed by the danger of unfair prejudice to Appellant.

A. Proceedings at trial.

As discussed, the victims' remains were discovered on July 15, 2017, in woods near Browns Chapel landing. The State sought to introduce photographs from the scene as State's Exs. 50-52. Although neither defendant objected to State's Ex. 51 or State's Ex. 52, both defendants objected to State's Ex. 50 and the trial judge heard their objections outside of the jury's presence. ***R. 372-73***. Hodge argued that the photograph should be excluded because it depicted "a partial skeletal remain" and was "graphic." She further argued that it was extremely prejudicial because it was in color and a close-up. **R. 374**.

Appellant joined in Hodge's objection and argued that:

> Your Honor, all I would add and I would join in Mr. Wilson's objection here is that ... the prejudicial effect would be the potential to inflame the passions of the jury by seeing this body in a decomposed state, in a decomposed manner in a photo that I believe has very limited probative value to what the State is seeking to prove, which is the location of where the bodies were found. I believe that are least restrictive, less prejudicial matter -- manner in which the State could present

> that evidence. So I believe under State v. Collins[20] it would be inappropriate to introduce that photo into evidence as it currently sits.

R. 374-75.

The State pointed out that unlike the other photographs, State's Ex. 50 showed the victims' "bodies uncovered ... [and] exactly how they were found." It also depicted the position of the bodies relative to each other, which State's 51 and 52 did not, and this would allow the State to argue how they were carried there. ***R. 375.***

Applying *Collins*, the trial judge overruled the defendants' objections because he found that State's Ex. 50 was "clearly relevant" and that it "simply mirrors the unfortunate reality of this case." He further found that a photograph is not inadmissible simply because it is gruesome. He also found that State's Ex. 50 corroborated testimony and that it was being introduced to show "the unaltered condition of the victims upon finding their remains." ***R. 375-76.*** He then observed that the Supreme Court in *Collins* cited an Arkansas case that

> stands for the proposition that even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony or, or if they are essential in proving a necessary element of a case or useful to enable a witness to testify more effectively or enable the jury to better understand the testimony. Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries and the position in which the bodies were discovered.

R. 376-77.

When the jury returned, the State moved to introduce all three photographs and the trial judge noted that State's Ex. 50 was admitted over objection. ***R. 378, lines 18-21.*** Det. Caulder thereafter testified that State's Ex. 50 depicted "the victims in their state after ... the brush and

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[20] *See State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014) (trial judge's admission of pre-autopsy photographs of the victim, who had been mauled by dogs, was not an abuse of discretion).

... wood had been removed." It likewise accurately depicted the position in which they were found. ***R. 379, line 20-380, line 1.***

While the State did not refer to State's Ex. 50 in closing argument, the State emphasized several times that the victims' bodies were found in the woods near Browns Chapel landing, the location where they were "dumped." The State also pointed to Dr. Schandl's testimony regarding the condition both bodies were in when found in the humid area and exposed to July heat. The State argued that these facts showed malice and that defendants committed murder. *See* ***R. 703, line 1 – 705, line 15; 708, lines 6-9; 713, lines 4-5***. The State further argued that:

> I'll tell you what certainly didn't happen is it wasn't [a] murder suicide. To believe that you'd have to believe that there was a murder or suicide, then those corpses got back in the truck, remember who put the hat on by the way, and then walked to the landing with the truck still back and the hat. That's about how valid a murder suicide argument could be here, walking up to any bodies.

R. 715, lines 10-16.

Discussion.

Appellant cannot show an abuse of discretion. Generally, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." Rule 403, SCRE. This Court recently set forth the applicable standard for the admissibility of photographs in *State v. Heyward*, Op. No. 5776 (S.C. Ct.App., Oct. 14, 2020) (Shearouse Adv. Sh. No. 40, at 32):

> "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 court'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, 534, 763 S.E.2d 22, 28 (2014) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). In balancing the danger of unfair prejudice with the probative value of a piece of evidence, "the determination must be based on the entire record and will turn on the facts of each case." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008).
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> "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. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). "[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). However, "[i]t is well settled in this state that '[i]f the [...] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.' " *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (first alteration in original) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353). Our courts have found autopsy photographs may be admitted "in an effort to show the circumstances of the crime and character of the defendant." *Id.* " '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)).

Heyward, Op. No. 5776, (Shearouse Adv. Sh. No. 40, at 48).

Unlike the crime scene photographs admitted without objection – State's Exs. 51 and 52 - State's Ex. 50 depicted the victims in precisely the position as they were left by the defendants, as well as their positions relative to each other, after law enforcement had removed the wood and other debris under which their bodies had been secreted. Also, this photograph corroborated the testimony of Britzi Waddell as to where she and her friends found the bodies (***R. 251-53***), and Cpl. Adan Skellett's testimony as to where the campers pointed the bodies out to him. ***R. 255-56.*** It also corroborated the testimony of Inv. Caulder, who photographed the scene that the victims' bodies were "badly decomposed" and were covered with brush and wood debris. ***R. 371-72; 378-81***. *See State v. Hawes*, 423 S.C. 118, 130-31, 813 S.E.2d 513, 519-20 (Ct. App. 2018) (finding the trial judge did not abuse its discretion when it admitted crime scene photographs that

established the circumstances of the crime scene, corroborated the testimony of a witness and a responding officer, and were relevant to the issue of malice). Also, when viewed with the GPS testimony and other evidence, discussed in the Statement of Facts, *supra*, it was circumstantially probative of the victims' identity.

Moreover, the State indicted Appellant and Hodge for murdering the victims. *See* ***R.784-85***. This required the State to prove that he and Hodge killed them "with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). *See also State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Ct.App. 2013); *State v. Judge*, 208 S.C. 497, 38 S.E.2d 715, 719 (1946). Contrary to Appellant's argument, State's Ex. 50 was very probative of the element of malice,[21] since it showed that the victims' bodies had been secreted in a wooded area near the Waccamaw River in July, so that the ravages of both high heat and high humidity would escalate their decomposition and make identification of their bodies more difficult. *See People v. Garceau*, 6 Cal.4th 140, 181, 24 Cal.RpR.2d 664, 667, 862 P.2d 664, 667 (1993) (photograph of mummified victims hidden within a dresser was highly probative because it corroborated testimony relating to concealment of the bodies); *Cf. id.* at 131, 813 S.E.2d at 520 (noting "the crime scene photographs were relevant to the issue of malice because they showed how, where, and how many times [the victim] was attacked").

Nor was the probative value of State's Ex. 50 substantially outweighed by its prejudicial effect under Rule 403, SCRE. It was highly probative of the matters enumerated above.

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[21] "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *State v. Johnson*, 291 S.C. 127, 352 S.E.2d 480 (1987)." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002). *See also State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000) ("[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it").

Appellant contends the photograph "was calculated to arouse the sympathy of the jury." Yet, this photograph did not confuse the issues or mislead the jury. Instead, it merely depicts the scene where the victims were found and the condition of the victims' bodies resulting from the actions of Appellant and Hodge. *See Williams v. State*, 301 S.W.3d 675, 693 (Tex. Crim.App. 2009) (close-up photos of injuries were gruesome but they portrayed no more than the gruesomeness of the injuries inflicted by the defendant); *Narvaiz v. State*, 840 S.W.2d 415, 430 (Tex. Crim.App. 1992) (although photographs were gruesome, they merely depicted the gruesomeness of the crime scene as found by the police). Also, the State did not expressly rely upon it in closing argument.

Particularly in this day and age, where forensic matters are graphically shown in various and sundry popular prime time television programs and documentaries - such as "Forensic Files," "CSI" and its spin-offs, 48 Hours, Dateline, and similar programs – and when many people annually choose to adorn their residences with skeletons for Halloween, the jurors simply would not be so shocked by these photographs or the autopsy photographs discussed, *infra*, that they would have rendered a verdict based on an emotional basis.

Finally and to the extent the Court finds that the trial judge erroneously allowed the prosecution to introduce State's Ex. 50, any error in its admission could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not

affecting the result"). "Whether an error is harmless depends on the circumstances of the particular case." *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012).

Here, any error must be viewed as harmless and non-prejudicial because, at worst, this photograph was cumulative to the testimony which it corroborated. The admission of improper evidence is harmless when the evidence is merely cumulative to other evidence. *See State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003). *See also See State v. Brazell*, 325 S.C. 65, 79, 480 S.E.2d 64, 72 (1997) ("Even if the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage") (citing *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587 (1942) (finding the photographs unnecessary but harmless because they were not prejudicial or inflammatory).

Further, the guilt of both Appellant and Hodge was conclusively established beyond any reasonable doubt. "Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless.'" *State v. Brown*, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018) (quoting *State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011)). The State presented inconsistent and materially false statements by both defendants, photographic surveillance at the BB&Ts (where cash was withdrawn from the victims' joint account), receipts and video surveillance from area Walmarts where the defendants purchased goods and received cash withdrawals from the victims' joint account, testimony and a receipt from the Advance Auto, testimony from the man who sold what the State theorized was the murder weapon to Appellant and Hodge, testimony of the defendants' roommate at the time, and perhaps most damning evidence of all, the GPS information from Linda's truck, that placed the truck in the

area where the bodies were found on the night of July 3rd and which circumstantially corroborated trips to Walmart and the BB&Ts. Although this was a circumstantial evidence case, all that was missing was an eyewitness to the murders and the defendants' secreting the victim's bodies near the landing. Therefore, Appellant is not entitled to relief.

II. Assuming *arguendo* that Appellant's challenge to the probative value of the photographs is preserved for appellate review, the trial judge did not abuse his discretion by allowing the State to introduce eight autopsy photographs accurately depicting the victims' injuries (State's Exs. 58-59, 61-64, 66 and 128) through the pathologist who conducted the autopsy because these photographs corroborated and illustrated the pathologist's findings, they were probative on the issue of malice, and their probative value was not substantially outweighed by the danger of unfair prejudice.

Assuming *arguendo* that Appellant's challenge to the probative value of the photographs is preserved for appellate review even though it was not presented to the trial judge, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce eight autopsy photographs that accurately depicted the victim's injuries (State's Exs. 58-59, 61-64, 66 and 128) through the pathologist who conducted the autopsy because these photographs corroborated and illustrated the pathologist's findings, they were probative on the issue of malice, and their probative value was not substantially outweighed by the danger of unfair prejudice.

A. How issue arose at trial.

When the prosecution moved to introduce State's Exs. 58-61 during Dr. Schandl's testimony, both defendants stated the photographs were admitted "subject to a sidebar." ***R. 480, lines 15-22***. Similar objections were made when the State moved to introduce State's Exs. 127-128 (***R. 482, lines 4-21***), State's Exs. 62-64 (***R. 482, line 13 – 486, line 2***), and State's Ex. 66 (***R. 488, lines 13-18***).

During a subsequent break in the trial testimony, the trial judge placed on the record that there had been a sidebar with counsel before Dr. Schandl testified at which the trial judge informed counsel that he was admitting the challenged photographs but excluding three others. The excluded photographs, State's Exs. 57, 60 and 65, showed the "frontal portion of each of the victim's skull" and a photograph of the arm that had the metal rod in it." He then gave each defendant an opportunity to place the objection on the record. ***R. 504, line 10 – 505, line 9.***

Hodge argued that "those photographs were unduly prejudicial, especially in light of the fact that they were in color, some of them." She also claimed the same evidence could be presented "without creating the amount of prejudice ... to the Defendant" resulting from admitting the photographs. ***R. 505, lines 12-18.*** Appellant joined in this objection. ***R. 505, lines 20-21.***

After the trial judge observed that only black and white photographs were introduced (***R. 505, line 22 – 506, line 7***), Hodge maintained her objection. When she stated that one photograph depicted a metal rod, the trial judge noted this photograph had been removed. ***R. 506, line 8 – 507, line 7.*** The trial judge then placed his extensive findings on the record:

> Well, ... let me point out the fact, and I've kind of hit on it earlier in the photographs where the bodies were found and the photographs that were taken and were admitted into evidence at that point in time, pursuant to State v. Collins, the Court believes that each of these photographs that were admitted, 58, 59, 61, 62, 63, 66 and 128 ... were the least, so to speak, prejudicial photographs that could be admitted into evidence. I understand that these photographs do show skeletal remains. Again, that was, that was the condition that ... the bodies were found in. 58, as testified to -- by Dr. Schandl, showed an entry wound of the bullet on the left side of the skull. 59 showed the right side of the skull with the exit wound, along with the measurement of such on the exit side. 61 is a photograph of the top of the skull with the metal rod ... through the skull showing the trajectory of that bullet. 62 was simply photographs with -- and each of these photographs have identifying information on them as testified by Dr. Schandl identifying them as Mr. Clemons or Ms. McAllister's remains, but 62 was an upper and lower jaw of Mr. Clemons reflecting that he did not have any teeth, which was corroborated by earlier testimony. 63 was an entry wound on the left side of a skull, again with a measurement and identifying number as testified by Dr. Schandl. 64 is the opposite side of the skull indicating the exit wound with a measurement of such exit. 66 was, again, a picture of the top of the skull with the

measurement, ... with an identifying marker identifying the respective victim along with a metal rod showing trajectory of bullet and 128, which is admitted, was simply a -- an x-ray taken of Ms. McAllister's frontal skull which showing the location of a bullet that was located in her hair as testified to by Dr. Schandl, and as previously said, even the most gruesome photographs are admissible as stated previously if they tend to shed light on any issue or to corroborate testimony. In retrospect, the Court could have let, I believe, State's Exhibit 57 which showed the metal rod, where it kept that out. Furthermore, these photographs shed light on and give character to other evidence in the case. There's no testimony, I mean, these photographs showed unaltered conditions of the victims as they were viewed in, in autopsy conducted by Dr. Schandl. They show the nature and extent of each of the victim's injuries and provide evidence as to what happened on the date that these individuals lost their lives, and therefore, pursuant to such I do not believe that the prejudicial effect outweighs any probative value in this case, but each of you gentlemen's ... objections ... are so noted for the record.

R. 507, line 8 – 509, line 5.

B. Discussion.

Respondent initially submits that Appellant's challenges to the probative value of State's Exs. 58-59, 61-64, 66 and 128 is not preserved for appellate review because it was not presented to the trial judge. As shown, Appellant joined in co-defendant Hodge's objection, which was that the photographs were more prejudicial than probative. Her objection was also based on the mistaken impression that the State was introducing color photographs and one depicting a metal rod in Linda's arm. Yet, those photographs (State's Exs. 57, 60 and 65) were excluded. Because an objection must first be presented to and ruled upon by the trial judge to be preserved for appellate review, and because a party on appeal may not argue one ground at trial and a different ground on appeal, Appellant's challenge to the probative value of the photographs is not preserved for review. *See State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal"); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal").

Alternatively, Respondent submits that Appellant cannot show an abuse of discretion. Again, "[t]he relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court," *Nance*, 320 S.C. at 508, 466 S.E.2d at 353 (1996), and a trial judge's "decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28. "[T]he [Rule 403] determination must be based on the entire record and will turn on the facts of each case." *Lyles*, 379 S.C. at 338, 665 S.E.2d at 206.

> "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. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). "[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). However, "[i]t is well settled in this state that '[i]f the [...] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.' " *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (first alteration in original) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353). Our courts have found autopsy photographs may be admitted "in an effort to show the circumstances of the crime and character of the defendant." *Id.* " '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)).

Heyward, Op. No. 5776, (Shearouse Adv. Sh. No. 40, at 48).

Here, the trial judge correctly stated what each photograph depicted. Further, and despite Appellant's hyperbole as to what is depicted in the photographs, the trial judge correctly found that Dr. Schandl used the photographs to corroborate and illustrate her findings. Further, Dr. Schandl testified that the photographs would help her explain her findings to the jury. *See, e. g.*, ***R. 478, lines 16-21***. State's Exs. 58 and 59 corroborate and illustrate her findings with respect to the entrance and exit wounds on Linda's skull, including the size of those wounds. State's Ex. 61 clearly illustrates her finding with respect to the trajectory of the bullet wound to Linda's head.

State's Ex. 62, which depicts Chet's upper and lower jaw without any teeth was probative as to identity because Chet had previously had all of his teeth removed. This photograph of her findings corroborated the kinship DNA. See ***R. 204-05*** (testimony of William Clemmons, Jr.); ***484-85*** (testimony of Dr. Schandl). State's Exs. 63 and 64 corroborate and illustrate her findings with respect to the entrance and exit wounds on Chet's skull, including the size of those wounds. State's Ex. 66 clearly illustrates her finding with respect to the trajectory of the bullet wound to his head. Finally, State's Ex. 128 is merely an x-ray corroborating her finding that she located a fired bullet in Linda's hair.

Nor was the probative value of these photographs substantially outweighed by their prejudicial effect under Rule 403, SCRE. First, the photographs were extremely probative of each of the matters discussed. They were likewise extremely probative on the element of malice. Second, the photographs were presented in the course of the Dr. Schandl's clinically scientific and almost educational discussion of her findings. For most of the photographs, Dr. Schandl explained precisely what was depicted, how the photograph supported her finding(s), and why the matter depicted in the photograph was significant. *See, e.g., Heyward*, Op. No. 5776, (Shearouse Adv. Sh. No. 40, at 48-49); *Collins*, 409 S.C. at 534, 763 S.E.2d at 28 ("'A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances'") (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App.2003)). *See also State v. Gray*, 408 S.C. 601, 612-16, 759 S.E.2d 160, 166-68 (Ct. App. 2014) (Court finding that three autopsy photographs that showed the victim's exposed skull and brain were probative because they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and the cause of death, and they were important to the State's ability to prove malice); *Torres*, 390 S.C. at 623, 703

S.E.2d at 229 ("It is well settled in this state that '[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it'") (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353)); *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009).

Relying on *Torres*, Appellant contends that "[t]he solicitors in the present case pushed the envelope on admissibility in regard to the autopsy photos." Yet, his contention in this regard lacks merit. *Torres* is readily distinguishable for several reasons. In *Torres*, the prosecution introduced sixteen autopsy photographs and a number of crime scene photographs of the victims in the **sentencing phase** of the appellant's capital trial. *Id.* at 622, 703 S.E.2d at 228. Also, the photographs in *Torres* are far more graphic than those presently at issue, with some depicting the male victim's skull crushed in completely and others showing the female victim's eye was missing, her face was unrecognizable, her mouth was where her cheek should be, and her dental bridge was essentially sticking out of her neck. As the Court in *Torres* acknowledged, however, the scope of the probative value is much broader in the sentencing phase of a capital murder trial, than in the guilt phase. *Id.* at 623, 703 S.E.2d at 229.

Further, unlike the pre-autopsy photographs in *Collins*, the autopsy photographs here depicted precisely what Appellant, personally, did to the victims and, with the exception of the photographs where a rod was utilized to demonstrate the wounds' trajectory, nothing more.[22]

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[22] In *Collins*, the appellant was charged with involuntary manslaughter and three counts of owning a dangerous animal. At trial, the trial judge admitted into evidence seven pre-autopsy photographs of the child victim, who died of "extensive traumatic injury" after being severely mauled by dogs. *Collins*, 409 S.C. at 528-33, 763 S.E.2d at 25–27. This Court reversed, finding the circuit court erroneously admitted the photographs, and the error was not harmless. *Id.* at 533, 763 S.E.2d at 27. However, the Supreme Court reversed, with two members finding that the photographs were "highly probative, corroborative, and material in establishing the elements of the offenses charged; [their] probative value outweighed [their] potential prejudice; and the appellate court should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented." *Id.* at 534–35, 763 S.E.2d at 28. Justice Kittredge, who was joined by Justice Hearn, concurred in the result. He

Also, the trial judge excluded the more graphic photographs (State's Ex. 57, 60 and 65) and the challenged photographs are all black and white. Given the manner in which the photographs were presented, they would not "create a 'tendency to suggest a decision on an improper basis, ... [such as] an emotional one.'" *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

As the Court observed in *Collins*:

> 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, without citations, *Nichols,* 267 Ala. 217, 100 So.2d at 756).

As discussed in Argument II, particularly in this day and age, jurors simply would not be so shocked by these photographs that they would have rendered a verdict based on an emotional basis. In addition to the above authorities, Respondent submits the following cases also support the trial judge's ruling. *E.g.*, *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) (black and white photograph of the victim's right upper chest with the breast exposed showing the location of the bullet wound was admissible to corroborate pathologist's testimony regarding location of wound, and did not prejudice defendant, since there was explicit testimony that victim's blouse and brassiere had been removed by medical personnel when they arrived at scene in order to administer medical assistance); *State v. Jarrell*, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002) (upholding the admission of graphic autopsy photographs in homicide by child

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found that the photographs were erroneously admitted but that any error was harmless and non-prejudicial. *Id.* at 539, 763 S.E.2d at 30 (Kittredge, J., concurring in result). Justice Pleicones dissented. *Id.* at 540, 763 S.E.2d at 30-31.

abuse case because they corroborated testimony and demonstrated the extent of the injuries); *State v Dial*, 405 S.C. 247, 260-61, 746 S.E.2d 495, 501-02 (Ct.App. 2013) (probative value of three autopsy photographs of five-month-old victim's head injuries was not outweighed by danger of unfair prejudice in prosecution for homicide by child abuse; where photographs were introduced to corroborate testimony of forensic pathologist who performed autopsy that victim's various injuries were inconsistent with an accidental injury as defendant claimed had occurred, and they were highly probative of whether victim was abused and whether abuse was cause of his death, both integral elements of charged offense); *State v. Nichols*, 325 S.C. 111, 121, 481 S.E.2d 118, 124 (1997) (admitting a photograph of the victim's face because it demonstrated the angle and distance from which the victim was shot).[23]

Finally and to the extent the Court finds that the trial judge erroneously allowed the State to introduce one or more of these photographs, any error in its (or their) admission simply could not reasonably have affected the result of the trial, as required for reversal. *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596 ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). "Whether an error is harmless depends on the circumstances of the particular case." *Tapp*, 398 S.C. at 389, 728 S.E.2d at 475.

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[23] Further, there is no merit to Appellant's contention that State's Ex. 128, the "x-ray showing the bullet and the necklace worn by Ms. McAllister is also prejudicial as it personalizes the deceased." While there is nothing prejudicial about this photograph, whatsoever, Respondent submits that neither crime scene photographs nor photographs taken at autopsy are inadmissible because they personalize or humanize a victim. After all, a murder victim is a person whose life was maliciously ended by a wrongful act, intentionally and without just cause or excuse. *Tate*, 351 S.C. at 426, 570 S.E.2d at 527 (2002).

Here, any error must be viewed as harmless and non-prejudicial because, at worst, these photographs were cumulative to the testimony which they illustrated and corroborated. The admission of improper evidence is harmless when the evidence is merely cumulative to other evidence. *See Haselden*, 353 S.C. at 197, 577 S.E.2d at 448-49; *Brazell*, 325 S.C. at 79, 480 S.E.2d at 72 ("Even if the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage") (citation omitted). Further, the guilt of both Appellant and Hodge was conclusively established beyond any reasonable doubt. "Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless.'" *Brown*, 424 S.C. at 493, 818 S.E.2d at 743 (quoting *Byers*, 392 S.C. at 447, 710 S.E.2d at 60). In light of the evidence set forth in the Statement of Facts and as discussed in Argument I, any error must be viewed as harmless and non-prejudicial. Thus, Appellant is not entitled to relief based on the admission of the autopsy photographs.

III. Appellant's third issue is not preserved for appellate review, since he refused the trial judge's offer to give a curative instruction. Alternatively, the trial judge properly denied his mistrial motion based on jurors seeing a Walmart video (States Ex. 120), in which he was wearing an ankle monitor because (1) trial counsel had viewed the video pretrial and did not specifically ask that it be redacted, (2) the State inadvertently failed to redact the video, (3) the ankle monitor is only seen for a total of roughly twenty-eight seconds in the 2:24 video and was not the focal point of jurors watching the video, (4) neither party referred to Appellant wearing an ankle monitor, (5) counsel repeatedly admitted that he did not think jurors could determine that an ankle monitor was on his leg, (6) the trial judge's finding jurors could not determine from the video that Appellant was wearing an ankle monitor is supported by the record, (7) trial counsel twice expressly declined the trial judge's offer of a curative instruction, and (8) there was overwhelming evidence of Appellant's guilt.

Appellant contends that the trial judge abused his discretion by denying his mistrial motion based on jurors seeing a Walmart video (States Ex. 120), in which Appellant was

wearing an ankle monitor. Assuming *arguendo* that this issue is preserved for appellate review, even though Appellant refused the trial judge's offer to give a curative instruction, Respondent submits that the trial judge properly denied his motion because (1) Appellant's trial counsel had viewed the video pretrial and did not specifically ask that it be redacted, (2) the State inadvertently failed to redact the video in response to a general request to redact any evidence showing the ankle monitor, (3) Appellant's ankle monitor is only seen for a total of roughly twenty-eight seconds in the 2:24 video and was not the focal point of jurors watching the video, (4) neither party referred to Appellant wearing an ankle monitor, (5) trial counsel repeatedly admitted that he did not think jurors could determine that an ankle monitor was on his leg, (6) the trial judge's finding jurors could not determine from the video that Appellant is wearing an ankle monitor is supported by the record, (7) trial counsel twice expressly declined the trial judge's offer of a curative instruction, and (8) there was overwhelming evidence of Appellant's guilt.

A. Proceedings in the trial court.

At an August 9, 2019, pretrial hearing, Appellant's counsel objected to any reference that Appellant was on bond from charges in North Carolina and wearing a GPS ankle monitor at the time of the shootings. As part of the Horry County Police Department's investigation, a search warrant was executed on Omni-Link, the company that provided and monitored the ankle monitor Appellant was supposed to wear. Although results were returned between June 1 and June 25, 2017, Omni-Link sent a letter "stating that the ankle monitor was not functional during the time of these alleged murders." Appellant had not been convicted of the North Carolina charges. So, any mention of the other charges or the ankle monitor was inadmissible evidence of a prior bad act and the evidence was more prejudicial than probative. ***R. 25, line 18 – 28, line 9.*** Counsel supported his *in limine* motion with a Memorandum.

The State confirmed the Memorandum's representation the State's position was Appellant "intentionally let the battery die so [Omni-Link] couldn't track him." The State argued this evidence would pass a Rule 403, SCRE, analysis because "the day before the murders occurred, for the only time he was wearing it, the battery was allowed to die, and then it brought back up the day after the bodies were disposed of." ***R. 26, line 10 – 27, line 5***. The trial judge entertained further argument before concluding that such evidence "would be more prejudicial than probative." Accordingly, he granted counsel's motion. ***R. 29, lines 13-19***.

During Appellant and Hodge's joint trial, the State introduced seven surveillance videos (State's Exs. #105, #107, #110, #113, #118, #120, and #125) of the defendants purchasing items at Wal-Mart using a debit card belonging to victim Linda McAllister. During a break in proceedings before the State introduced these exhibits, Appellant's counsel stated, "Your Honor, just that in accordance with the motion *in limine* the Court heard earlier I have spoken with the State regarding the evidence they're going to present next, and it has been modified to comply with the motion *in limine* regarding my client's ... monitoring device." ***R. 442, lines 15-19***.

In response to the trial judge's statement he thought "it was removed, the photo or whatever" (***R. 442, lines 23-24***), the State indicated "[a]ll ... evidence of any ankle monitor was removed therefrom. [Trial counsel] had an opportunity to review that. I apologize for misspeaking ... at our sidebar." ***R. 442, line 25 – 443, line 4***. Counsel did not object when the videos were introduced or when the State published them to the jury. *See* ***R. 448-64***.

However, the trial judge addressed State's Ex. 120 following Dr. Schandl's testimony. He stated that Appellant's counsel had brought to his attention at a sidebar after the Walmart surveillance videos had been played that State's Ex. 120 had not been redacted. The judge also stated that his impression was counsel had seen all of the videos before court. Counsel stated that

he had viewed the videos at the Solicitor's Office the previous weekend. He stated that one video was not presented at trial because it could not be redacted and that, with the exception of State's Ex. 120, the remaining videos had been redacted. The failure to redact State's Ex. 120 was a mistake by counsel and the prosecution. ***R. 509, line 8 – 510, line 10.***

The trial judge had not seen the videos and asked if jurors "automatically could tell" Appellant was wearing an ankle monitor. ***R. 510, lines 11 -14.*** Appellant replied as follows:

> Your Honor, my concern is that the other videos were redacted in a proper manner with the consent of the Defense. This video was not redacted, be it an oversight on my part, either oversight on Mr. Oskin's part, whatever the case may be. I can't recall if I actually saw a redacted copy of that particular video or not copies of the July 5th. I did view the redacted I recall that one, as well as the one that was eventually not played for the jury. My issue is, Your Honor, the fact that that ankle monitor was shown. First off, ... *I honestly do not believe the jury will be able to tell what it is.* However, I am concerned that based upon its appearance on the video, as well as the redaction on the other ones, taken in conjunction it may carry more weight ... than it should for the jury. The jury might read into it in an improper manner and that gives me concern.

R. 510, line 15 – 511, line 4 (emphasis added).

When the trial judge observed that counsel said he did not think jurors "could tell what it was," counsel stated, "Your Honor, being honest with the Court, being an officer of the court, required to be honest ... it was on for a very short period of time." Counsel's concern was that a juror may think "it was a holster of some sort based upon it being visible and obstructed in the other ones." ***R. 511, lines 5-13.*** Counsel added that:

> *As an officer of the court, I'm being honest with the Court, that I do not believe they could tell ... what it was based on how short a time period it appeared.* However, my concern is its appearance at all and the potential ... for it to affect the jury.

R. 511, lines 13-19 (emphasis added).

Counsel asked the trial judge to view this video and compare it to one that had been redacted and at that point he would move for a mistrial based on the motion *in limine* "for the

benefit of my client". The trial judge observed that "mistrial is granted in very, very rare circumstances. .... And the obvious situation comes about whether or not to give some type of instruction to the jury concerning such." Counsel indicated that if the judge denied a mistrial, he did not want a curative instruction. Instead, he said, "I would ask that a redacted copy be provided for the purposes of jury review if the Court so felt, but before the Court made that ruling I would just ask the Court to observe it." ***R. 511, line 21 – 512, line 20.***

The trial judge denied the mistrial motion because he found that counsel had not shown sufficient prejudice in light counsel's candid admission counsel did not believe jurors could tell what the monitor was. ***R. 512, line 21 – 513***, line 2. Counsel replied, "It is not readily apparent to me," which was why he asked the trial judge to watch the video. ***R. 513, lines 3-4.***

Counsel then stated that he was unsure if it was an oversight by him or the State, but moved for a mistrial because the State had not complied with the motion in limine and because of the exhibit's "potential to unfairly prejudice the jury." ***R. 513, line 19 – 514, line 2.***

The State observed that after counsel stated he had only seen the July 4th video, he came to the Solicitor's Office and viewed them all, date by date. The State made every redaction that was requested. The State offered to "further redact that video up to excluding it if that were proper, that portion of it. ***R. 514, line 4 – 515, line 3.*** While counsel was uncertain of whether he specifically asked for State's Ex. 120 to be redacted, he had asked for "anything that shows the ankle monitor to be redacted. At counsel's request, the trial judge watched the video at the bench. ***R. 515, lines 4-18***

Afterwards, counsel stated, "I have reviewed the notes that I handed the solicitor about the redactions that I requested. That video was not included in my request for redactions." Still, counsel made "a general request that any and all videos, including the ones from the Walmart, be

redacted and I believe that to have been carried out." Although counsel did not believe that the oversight was intentional particularly since State's Ex. 120 was "the least obtrusive of all the videos," the jury had seen it and he moved for a mistrial. ***R. 516, line 3-24.***

The trial judge observed that "a mistrial occurs in very, very rare situations. A moving party has to show error and resulting prejudice, and the case law is pretty clear that a curative instruction, even when it relates to inadmissible evidence, ordinarily cures such." Counsel confirmed that he did not want a curative instruction because he felt the instruction would cause jurors to focus on it. The trial judge found that the error did not rise to the level requiring a mistrial because after viewing the video, the judge agreed with counsel's assessment that what Appellant had on his ankle was not readily apparent. Still, the trial judge agreed at counsel's request to order that State's Ex. 120 would not be shown to jurors again or, that it would need proper redaction if counsel wanted it shown. ***R. 516, line 25 – 519, line 22.***

Counsel later renewed his motion. ***R. 656, lines 10-18.***

B. Discussion.

Initially, Respondent submits that this issue is not properly before the Court because Appellant twice refused the trial judge's offer to give a curative instruction. Alternatively, Respondent submits that there was no abuse of discretion. The grant or denial of a mistrial lies within the sound discretion of the trial court, and the trial judge's ruling will not be disturbed on appeal absent an abuse of discretion or an error of law. *Harris*, 340 S.C. at 63, 530 S.E.2d at 627-28; *State v. Arnold,* 266 S.C. 153, 157, 221 S.E.2d 867, 868 (1976) (noting that, generally, "the ordering of, or refusal of a motion for mistrial is within the discretion of the trial judge and such discretion will not be overturned in the absence of abuse thereof amounting to an error of law"). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution

for very plain and obvious reasons." *White*, 371 S.C. at 444, 639 S.E.2d at 162 (citations omitted); *State v. Stanley*, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) ("The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way") (citing *State v. Beckham*, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999)). *See also State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) ("The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment"); *see also State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999).

"Whether a mistrial is manifestly necessary is a fact specific inquiry." *State v. Rowlands,* 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct.App.2000). The burden is on the moving party to establish both error and prejudice. *State v. Wasson*, 299 S.C. 508. 510, 386 S.E.2d 255, 256 (1989). Appellate courts in South Carolina favor the exercise of the wide discretion of the trial judge in determining the merits of a motion for mistrial. *State v. Howard*, 296 S.C. 481,483, 374 S.E.2d 284, 285 (1988).

Appellant cannot meet his burden to prove that the trial judge abused his discretion by denying the "extreme measure" of a mistrial for several reasons. First, although counsel did request that any evidence of Appellant's ankle monitor be redacted after reviewing the various Walmart videos, he failed to specifically ask that State's Ex. 120 be redacted through oversight. Likewise, the State overlooked redaction of this video prior to trial. So, there was no bad faith by the prosecution. Third, Appellant's ankle monitor is only seen at different times for a total of roughly twenty-eight seconds in the 2:24 video, which was only one of over 130 exhibits. Surely, such a brief glimpse of the ankle monitor in a lengthy trial with so many exhibits is not so

prejudicial that it warranted a mistrial. Fourth, neither party referred to the fact Appellant was wearing an ankle monitor. *See State v. Thompson*, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial [when] there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes").

Fifth, although counsel moved for a mistrial, he repeatedly admitted that he did not think jurors could determine that an ankle monitor was on his leg. Sixth, the trial judge, who was "in an advantaged position to determine the impact of courtroom events on the total proceedings," *State v. Allen*, 2005 UT 11, ¶ 39, 108 P.3d 730, 738 (Utah 2005), made an identical finding after viewing State's Ex. 120, and the record supports his finding. In this regard, Respondent notes that the parties and the Court are looking for the ankle monitor when watching State's Ex. 120. However, a reasonable juror would not be looking at the feet or legs of either defendant. Instead, the jurors' focus would properly be on whether State's Ex. 120 circumstantially corroborated that Appellant and Hodge purchased goods at the Walmart with Linda's credit card, as they had on previous occasions.

Seventh, counsel twice expressly declined the trial judge's offer of a curative instruction. *State v. Wilson,* 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct.App.2010) ("Moreover, as the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review").[24] Eighth, there was overwhelming evidence of Appellant's guilt, as argued

[24] Appellant's contention "[t]he jury could easily have concluded that Appellant was wearing an ankle monitor because he was a convicted felon" was not presented to the trial judge. *See Watts*, 321 S.C. at 167, 467 S.E.2d at 278 ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal"); *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("A party may not argue

above. In light of this evidence, evidence he was wearing an ankle monitor could not have been prejudicial. *See State v. Clark*, No. M2017-02525-CCA-R3-CD, 2019 WL 410705, at *9 (Tenn. Crim. App. Jan. 31, 2019) (refusal to grant mistrial based on witness' testimony appellant was wearing an ankle monitor was not abuse of discretion where "the reference to the ankle monitor was brief and isolated, and the jury did not hear any proof regarding the nature of the Defendant's prior offenses;" the witness had been instructed "not to mention the ankle monitor, but the witness disregarded the instruction;" appellant was offered curative instructions "but chose to avoid putting any further emphasis on the testimony. And proof of appellant's guilt "was strong"). *Accord State v. Whytock*, 2020 UT App 107, ¶¶ 14-24, 469 P.3d 1150, 1155-57 (Utah 2020).

Accordingly, the trial judge properly denied Appellant's mistrial motion.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment, conviction and sentence.

Respectfully submitted,

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one ground at trial and an alternate ground on appeal"). Yet, even if his claim was preserved for appellant review, it lacks merit because who are not convicted felons may be subjected to electronic monitoring. *See, e.g.*, S.C. Code Ann. § 24-21-430(2)(11) (2020) ("**Conditions of Probation**"). Indeed, the fallacious nature of this argument is underscored by the fact Appellant did not have any prior convictions at the time of his murder trial. ***R. 770, lines 20-21.***

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January 21, 2021.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

Respondent,

v.

KENNETH WAYNE CARLISLE,

Appellant

Appellate Case No. 2019-001702.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 21st day of January, 2021.

s/William Edgar Salter, III
William Edgar Salter, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT