RECEIVED
Aug 10 2022
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Appellate Case No. 2022-000457

The Honorable Roger Young, Circuit Court Judge

State of South Carolina……Respondent,

v.

Tamika Williams ……..…Appellant.

# INITIAL BRIEF OF APPELLANT

Ranee Saunders
Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, SC 29204
803-445-1333
ranee@franklinbestlaw.com
elizabeth@franklinbestlaw.com

*Counsel for Appellant*

*Other Counsel:*

Melody Jane Brown
SC Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
803-734-3727

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**South Carolina Statute**



**Other Authority**

## STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in finding Tamika's police interview was freely and voluntarily made and therefore allowing it into evidence.

II. Whether the trial court erred in admitting unfairly prejudicial autopsy photographs.

III. Whether the trial court erred in denying Tamika's motion for directed verdict where the State failed to put forth evidence of extreme indifference.

## STATEMENT OF THE CASE

Tamika Williams was indicted in December 2018 for homicide by child abuse. She proceeded to a jury trial before the Honorable Roger M. Young, Sr. April 4, 2022, which concluded April 7, 2022. Upon her conviction, Judge Young sentenced her to twenty-five years' imprisonment. Tamika filed a timely notice of intent to appeal her conviction April 11, 2022 and this brief follows.

## STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only." *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019). "[T]the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had." *State v. Heath*, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958). An abuse of that discretion occurs where the trial court's conclusions are based on unsupported factual conclusions or controlled by an error of law. *State v. Prather*, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020).

## ARGUMENT

### FACTUAL BACKGROUND

On June 26, 2018, Patrick Wells from Charleston County Emergency Medical Service Department (EMS) responded to an emergency call on Remount Road and found Tamika Williams holding her three-day-old baby (Baby). Tr. 209, 211. Beside Tamika, there was a bassinette with blood on it and on the floor beside it, and a young child was sleeping on a chair nearby. Tr. 211, 212. Wells approached Tamika and observed Baby was unresponsive and had blood on him. Tr. 212. Wells talked with Tamika as he assessed Baby and she stated she thought her older child, M.W. may have dropped Baby. Tr. 212.

Wells observed Baby was not breathing, had no pulse, and saw no other signs of life. Tr. 213. Baby exhibited no irreversible signs of death, and his skin was warm, which would indicate he was either alive or had not been deceased long. Tr. 213-14. Wells did not discern any active bleeding or visible wound. Tr. 214. Wells asked Tamika to place Baby on the floor so he could begin cardiopulmonary resuscitation (CPR). Tr. 215. Wells continued treating Baby, who was transported to Trident Medical once an ambulance arrived, but there was no change in condition. Tr. 218. He was pronounced dead in the emergency room. Tr. 223.

North Charleston Police Department (NCPD) also responded while EMS was working on Baby and began interviewing the family, which was documented by body camera. Tr. 192-94; Ex. 62. She explained M.W. often tried to play with Baby and he must have dropped him and then put him back in the bassinette when she and Marcus were asleep. Ex.62; Tr. 198-99. She stated they had to tell M.W. not to try to pick up Baby and he was the only person in the room with Baby. Ex. 62. M.W. was asleep when EMS arrived and once, he was wakened, he was agitated and began continuously rocking in his chair. Ex. 62; Tr. 204.

Detective Jerry Jellico arrived shortly after and attempted to interview M.W. but could not get him to communicate. Tr. 389. Baby had already been transported to the hospital and Detective Jellico asked Tamika and Marcus to come to the police station with him. Tr. 389. After they were escorted there in separate cars, the coroner met them there to inform them Baby had died. Tr. 389. M.W. was taken to the Medical University of South Carolina (MUSC) so the Department of Social Services could interview him, but the pediatrician ultimately made the decision not to do that based on his inability to communicate meaningfully.[1] Tr. 334, 392. After the autopsy the following day, Detective Jellico returned to the Williams' home and asked Marcus and Tamika to accompany him to the station. Tr. 393. He and another officer drove them in separate vehicles. Tr. 393. Detective Jellico read Tamika the form indicating her rights and had her sign the waiver of rights form, so he began his interview. Tr. 395-96; Ex. 69. Afterwards, Tamika was arrested and charged with homicide by child abuse. Indictment; Tr. 429, 88.

Prior to start of trial, defense counsel moved to suppress the taped interview with Detective Jellico arguing it was not freely and voluntarily made. Tr. 47. At the *Jackson v. Denno*[2] hearing, defense counsel argued Tamika was in a vulnerable state both physically and mentally, having just given birth and just lost her baby. Tr. 47. The Court denied the motion, concluding she was not under any coercion and that any discrepancies in her story throughout the interview were credibility considerations for the jury. Tr. 78.

Marcus testified for the State at trial. He explained that the morning before Baby died, they woke up early and Tamika asked him to go get a more sensitive type of formula that Baby would tolerate better. Tr. 134. When he left Tamika was holding Baby while she was in the

[1] Dr. John Melville, the pediatrician who examined M.W., testified he "could understand less than ten percent of what he was saying to [him]." Tr. 334.
[2] 378 U.S. 368 (1964).

bathroom addressing some post-delivery trauma, and she was still there holding him when Marcus got home. Tr. 134-35. M.W. was playing in the living room. Tr. 138. Marcus warmed some food for Tamika and fed Baby the new formula before putting him down in his bassinette. Tr. 140. After doing so, he reminded M.W. not to try to climb in the bassinette, so M.W. instead tried to play-fight with his dad, who was busy with Baby. Tr. 140. Marcus noted the reason M.W. had not gotten in the bassinette was because he stopped him. Tr. 141. Then he went to sleep and woke up when Tamika tapped him to turn on the air and check on Baby. Tr. 144. While checking on Baby, Marcus noticed he had blood on him and that he was not breathing so he shook him repeatedly. Tr. 146. He then called 911. Tr. 145.

The State also presented testimony from Anita Moore, an investigator at NCPD. Moore testified she photographed the home on the day of the incident and was asked to use BLUESTAR[3] to check the living room for blood that may not have been visible the day prior when detectives where at the home. Tr. 250-51. According to Moore, BLUESTAR is a presumptive test for blood, if it illuminates on an object, that reaction presumptively indicates the presence of blood but does not confirm the substance is human blood or even blood at all. Tr. 286. Her photos from the day of the incident reveal blood in and around the bassinette that had been tracked through by slippers and by M.W., who had not been removed from the scene and had blood on his elbow, legs, and feet. Tr. 253-557. Blood samples were taken from M.W.'s forearm—all of which matched his baby brother. Tr. 274.

She also stated after reviewing photographs from the autopsy, she was specifically looking in the home for something that could have created a square shaped injury on Baby's head. Tr.

[3] "BLUESTAR is a[n] agent that we can use to enhance blood that you can't see with the naked eye so we can see where it's been and be able to analyze it from there." Tr. 245.

251-52. Her testimony is that there was a strong reaction of BLUESTAR in the area of the television stand, which had had no visible signs of blood the day before. Tr. 261-68. Moore testified there are very small stains in the area which correlate to a greater velocity of the blood. Tr. 269. She stated BLUESTAR illuminated in the bathroom as well. Tr. 270. Moore also noted that because the family had been at home the night before (the night after the incident) the visible blood had been cleaned up. Tr. 272. Despite these observations, Moore admitted none of the objects or areas highlighted were sent for deoxyribonucleic acid (DNA) or forensic testing—including the television stand—so there was no way of knowing whose blood it may have been (if it was blood). Tr. 287, 296. Moore also admitted that the use of BLUESTAR had been limited—it was not used on Marcus' chair or the chair where M.W. had been sleeping. Tr. 289-90. Moore further testified that multiple things could have caused blood transfer prior to her use of BLUESTAR testing, including M.W. walking freely through the blood and the family spending the night in the home and cleaning up any visible blood. Tr. 293.

The State also offered the evidence of Dr. Susan E. Presnell, a forensic pathologist who performed the autopsy on Baby. Prior to her testimony, the trial court conducted an *in-camera* hearing to review several objectionable autopsy photographs. Tr. 337-48. The State argued the photographs were admissible under *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014), and *State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014), and were necessary to explain the injuries and demonstrate extreme indifference from the severity of the injuries. Tr. 338-39. The photos at issue were full color versions of non-objected-to autopsy photographs. Tr. 344. The defense argued the photos were extremely prejudicial and not sufficiently probative because Dr. Presnell could just as well explain the injuries with black and white photographs. Tr. 346. The Court

disagreed and allowed the State to present the color photographs in addition to the black and white photos in three instances. Tr. 348.

Dr. Presnell testified Baby had multiple skull fractures, hemorrhages inside the skull, scalp and soft tissue contusions, facial contusions and abrasions, other pinpoint and retinal hemorrhages, and a torn frenulum. Tr. 356-57. She determined the manner of death to be homicide and the cause to be blunt force trauma. Tr. 358. In discussing her diagram, she indicated there were three square-shaped impact sites on the forehead and bruising. Tr. 340; Ex. 58. She noted that she saw photographs of the stand but did not see it. Tr. 379.

At the close of the State's case, defense counsel moved for a directed verdict. Tr. 401. The Court denied the motion noting that there was only circumstantial evidence as to extreme indifference, but concluding it was enough that she at some point admitted she dropped Baby. Tr. 403.

Tamika testified in her own defense. She explained she gave birth June 23, 2018, and was discharged two days later. Tr. 416. The morning after they came home, she asked Marcus to go buy a different formula. Tr. 418. She was hemorrhaging and in pain. While she was in the bathroom, she played Baby lullabies on her phone while she held him on the toilet; Tr. 418. After Marcus came back, he fed Baby and put him down to sleep, and Marcus and Tamika also fell asleep while M.W. sat watching television. Tr. 420. She woke up when the house got too hot, and she leaned over in the chair to wake up Marcus and ask him to turn on the air and check on Baby. Tr. 420. Marcus obliged, but when he got to the bassinette, she saw the look on his face, and got up. Tr. 421. There was blood in the bassinette. Tr. 421. Marcus called 911 and Tamika eventually tried to explain to them what was happening. Tr. 422. Then she picked up Baby and held him until the paramedic arrived. Tr. 422.

The following morning detectives asked her and Marcus to come to the station again. Tr. 425. M.W. had still not been brought home since he was taken to MUSC the day before. Tr. 427. Tamika testified that on the ride, Detective Jellico told her someone was going to jail, and she thought about her son M.W. and Marcus. Tr. 426. She stated she was in shock that day and she ended up telling Detective Jellico that she dropped Baby because she was trying to save her family, with whom she wanted to go home. Tr. 428.

At the close of evidence, defense counsel renewed the motion for directed verdict, which was denied. Tr. 458. The jury ultimately convicted Tamika of homicide by child abuse and the trial court sentenced her to twenty-five years imprisonment. Tr. 529, 541: Sentencing sheet.

**ANALYSIS**

Tamika was trying to learn to live with the unimaginable. She had lost the child that her body was still weak from bearing. But as the matriarch, she was still responsible for her husband and her young son, both of whom relied on her. She tried to be helpful to the people attempting to assist their family. She spoke to 911 when Marcus could not; she talked to the police when they arrived; she talked to the coroner. She openly shared she did not know what happened, but she and her husband were asleep and the only person up was M.W. Still, the investigation focused entirely on her; the detective had simply decided she did it. She must have done it even though there is absolutely no evidence she abused M.W.[4] or that she did anything but cradle her infant and make sure he got the right formula for his tummy.[5] They brought her in for questioning and essentially told her they knew she did it and would take no other statement than one admitting

[4] Specifically, Dr. Melville testified M.W. displayed "no signs of inflicted trauma." Tr. 333.
[5] And though the detective and the trial court allude generally to the threat of women's hormones after childbirth, there is no evidence of postpartum depression or even the baby blues. *See* Ex. 63 at 14:29; Tr. 541.

that—even when she tried to recant and even though the story they decided to accept was inconsistent with their theory of what had transpired.

Because there was simply no evidence she would harm her baby, the State tried to paint her as unfeeling, a sharp contrast to Marcus who grieved out loud. But then who would take care of them if she responded similarly. In her absence, Marcus is not able to care for M.W.[6] Passions are easy to play, though, and the State made sure the jury knew how awful it is to see the dead body of a three-day-old baby. The State lacks credible evidence Tamika committed this crime and instead relies on suspicion and coerced statements of an exhausted, grieving mother. Tamika was trying to save her family. She is always trying to save her family.

The State's case was no more than an argument that someone should pay for this tragedy, and it might as well be the mother. The trial court allowed this to play out by erroneously admitting her involuntary statement to police and graphic images of Baby. These admissions were error and Tamika asks this Court to reverse her conviction.

## I. The Trial Court Erred in Allowing the State to Introduce the Evidence of Tamika's Police Interview

The trial court erred in finding Tamika's statement to the police was freely and voluntarily given. Instead of considering the deeply concerning circumstances of the statement, the trial court decided her demeanor is enough to show she was not coerced. This review was insufficient and completely ignores the relevant facts attendant to this inquiry.

This Court reviews a trial court's admission of a defendant's confession under an abuse of discretion standard and will affirm if there is any evidence to support the trial court's conclusion. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). To properly admit a defendant's

[6] M.W. lives with Marcus' father. Tr. 186.

statement, the State must demonstrate by a preponderance of the evidence that the statement was voluntary and obtained in compliance with *Miranda*.[7] *State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). "The test of voluntariness is whether a defendant's will was overborne by the circumstances surrounding the giving of a confession." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "When considering the voluntariness of a statement, the court and jury should consider 'not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health.'" *Id.* (quoting *Withrow v. Williams*, 507 U.S. 680, 693 (1993)). Furthermore, "certain circumstances may render an innocent defendant's will to have been overborne resulting in a confession induced by fear of extraneous adverse consequences." *State v. Register*, 323 S.C. 471, 479, 476 S.E.2d 153, 158 (1996). "If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process." *Id.* "Coercion is determined from the perspective of the suspect." *State v. Miller*, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007).

The trial court failed to consider the totality of the circumstances under which the statement was given.[8] At the time of the questioning Tamika was in weak and fragile physical condition. She had delivered a baby via vaginal birth only four days earlier. Tr. 62. Her feet were still swollen, she had a hernia, and was still hemorrhaging blood. Tr. 47, 68, 75. She had not been sleeping for at least the past few days. Tr. 47, 75. She had lost her baby less than twenty-four hours earlier and instead of being able to grieve with her family, she was at the police station for

[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[8] The trial court was given the full interview to review but it admitted it relied primarily on the transcript, which may explain why it was so little troubled by the circumstances the video reveals. *See* Tr. 78.

the second time in as many days and was again separated from her husband for questioning. Tr. 60. M.W. had been taken away from them and she was not sure where he was or where he would be taken. Tr. 69. With this backdrop, Detective Jellico undertook to question her in the station for three hours. Tr. 56. He told her it was bad and "someone could go to jail." Tr. 61. Although he does go through the waiver of rights form with her, he never tells her she does not have to sign it.[9] He tells her it is "so [he] can talk to her" and that they "read everybody their rights" and "then [he'll] talk to [her] and [she] can ask [him] questions, too." Ex. 63 at 2:35, 5:14. They go through it and tells her to "put [her] initials . . . on those little lines" she simply complies. Ex. 63 at 7:04.

Furthermore, she consistently makes statements indicating she feels she has no other choice than to tell Detective Jellico she dropped Baby. Specifically, she asks him what will happen if she just says she did it and reiterates she is trying to save her family. Ex. 63 at 15:46. She mentions trying to save her family repeatedly on the video. Ex 63 at 16:06, 28:34, 55:50, 1:03:16, 1:17:08, 1:18:17, 1:20:32; *see id.* at 56:32 (praying she is just thinking about what is best for her and her family right now), 57:05 (stating she had to do something to sacrifice for her family). She also repeatedly indicated Detective Jellico had told her M.W. said she did it, so she knew she was already getting blamed regardless of what she said. Ex. 63 at 44:37, 52:14, 54:48 (describing how they were already accusing her and Detective Jellico told her on the car ride that M.W. said "momma did it"); *see* 1:16:01 (telling Detective Jellico that it seemed like she was going to be charged anyway no matter what she said), 1:21:22. Most troubling, however, are her statements outside the presence of Detective Jellico, when her prayers consist of her entirely recanting her previous statements. Ex. 63 at *e.g.*, 44:10 ("I have made a lie but I don't want [M.W.] taken away

[9] Near the end of the interview, he mentions that he told her on the way to the station that he did not want to talk in the car because it was a serious matter, and the traffic was loud. Ex. 63 at 1:25:33. Apparently, he never told her it was because he needed her to waive her rights first.

from me"); 46:07 ("I know I don't need to explain this because I know in my heart I didn't do this but I didn't want to argue with him."); 54:30 ("I'm just talking to you lord, I know you know I didn't do this.").

And when Detective Jellico came back and said he heard her taking to herself, he becomes more aggressive and he raises his voice asking her to admit that she "did drop the baby." Ex. 63 at 1:00:30. She finally tries again to fully recant and explains she woke up and found her baby dead, which she is still dealing with, so she can only think M.W. must have done something, Ex. 63 at 1:22:00. Detective Jellico immediately begins to wear down and after he stands over her, she acquiesces with his statements that she dropped Baby. Ex. 63 at 1:22:43. It is clear Detective Jellico is going to berate her until she says she dropped him because he is willing to accept that as the "truth" even though it is inconsistent with his narrative.[10] She specifically states she *knows* she is going to jail and is simply trying to go with a clear conscience, so the suggestion she is trying to work out a better deal simply makes no sense. Ex. 63 at 1:21:45. She is in grief, exhausted, hungry, and had to endure that three-hour interview. She had not been able to see M.W. that morning and no one would let her talk to her husband privately. Her will was overborne, and the statement should have been excluded.

Furthermore, this error cannot be deemed harmless. For an error to be deemed harmless, it must "not reasonably have affected the result of the trial." *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006). The Court must determine "whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d

[10] Detective Jellico consistently seems much more interested in securing an inculpatory statement than the truth. Toward the end of the video, before unconvincingly stating he wants the truth and "don't want [her] to make up nothing," he coaches her on the believability of her story, explaining it sounds much better for her to say that she dropped the baby than saying she did not know what happened. Ex. 63 at 1:23:20.

468, 475 (2012). This video formed the backdrop of the State's narrative that Tamika was a self-interested liar, vacillating between stories as she hedged her bets on what may result in her best deal. It also formed the basis of the trial court's denial of directed verdict. Tr. 403 ("You know it's a circumstantial evidence case on the extreme indifference issue but there is evidence in the record that she admitted that she dropped the child."). The video was therefore essential to the State's case and its admission was not harmless.

Considering the totality of the circumstances, the State failed to demonstrate by a preponderance of the evidence that this statement was freely and voluntarily given and there is simply no evidence supporting the trial court's ruling. Accordingly, this Court should reverse and remand for a new trial.

**II. The Trial Court Erred in Admitting Unfairly Prejudicial Autopsy Photographs.**

The trial court also allowed into evidence several grisly color photographs from the autopsy. In so doing, it failed to consider Rule 403 of the South Carolina Rules of Evidence and the prejudicial effect of the photographs. These photographs were highly prejudicial and of little probative value. Instead, they merely served to enflame the jury and should therefore been excluded.

This Court reviews a trial court's ruling on the relevance, materiality, and admissibility of photographs under and abuse of discretion standard. *State v. Torres*, 390 S.C. 618, 622–23, 703 S.E.2d 226, 228 (2010). Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." In determining the probative value of evidence, the Court "considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). "To constitute unfair prejudice, the photographs must create a

'tendency to suggest a decision on an improper basis, commonly, though not necessarily, 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, 401 S.E.2d 146 (1991)).

The State relied on *State v. Gray*, and *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014) for the admissibility of the photographs. In *Gray*, the photos in question included three autopsy photographs depicting: the brain protruding through the skull of the victim; a gloved hand holding the sawed-off skull cap; and a close up of the inside of the victim's skull. *Gray*, 408 S.C. at 609, 759 S.E.2d at 165. The Court of Appeals ruled the trial court did not err in allowing in the photographs based on their significant probative value and minimal prejudice. In considering the probative value, the Court of Appeals emphasized that the cause of death and malice were at issue and the photographs (which the witness said were essential) aided in that inquiry. *Id.* at 614-15, 759 S.E.2d at 167-68.

Turning to *Collins*, it is important to note that the majority of the Supreme Court not merely found that the unfair prejudice of the admission of the photographs substantially outweighed any probative value, but they also more forcefully stated the *very attempt* to admit the photos reflected the State's disturbing habit of using sensationalism to secure a conviction. *State v. Collins*, 409 S.C. 524, 540, 763 S.E.2d 22, 30 (2014) (Pleicones, J., dissenting) (concluding that "any minimal probative value of the admitted photographs was substantially outweighed by the danger of unfair prejudice and that their admission violated Rule 403, SCRE" and reiterating the reprobation of the Court in *Torres* that solicitors "refrain from pushing the envelope on admissibility in order to gain a victory"); *Id.* at 539, 763 S.E.2d at 30 (Kittredge, J., concurring in result) (with Hearn, J., concurring) ("The primary, if not sole, purpose of these horrific photographs was to inflame the passions of the jury. The detailed and graphic testimony of the pathologist was more than

sufficient to enable the State to establish the elements of the offense. I agree with Justice Pleicones that these challenged photographs far exceed 'the outer limits of what our law permits a jury to consider.'" (quoting *Torres*, 390 S.C. at 624, 703 S.E.2d at 229)).

Unlike in *Gray*, the photographs here were duplicative and were not even used to explain the expert's findings—Dr. Presnell relied on the black and white copies for discussion and provided detailed testimony handily explaining the nature and extent of the injuries, as was the case in *Collins*. *See id.* ("The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense."). The color versions of Exhibits 51, 53, 54, and 56 are gruesome, particularly Exhibit 54, which shows the skull after it was sawed open. Tr. 372. Although the State argued it needed the photos to show extreme indifference, the black and white versions and the testimony of Dr. Presnell are at least equally probative that this was a purposeful and severe injury. In addressing admissibility, the trial court does not meaningfully engage in a prejudice analysis but simply states "these pictures are very unsettling obviously but if they are relevant, they are relevant. What I would like to do is minimize the gruesomeness to the jury if at all possible . . .." Tr. 346. Relevance and the weak stomachs of the jury are not the test for admission at issue. The issue is whether "its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. It is a balance that must be struck, and that analysis was simply not undertaken. Because the black and white versions of the photographs were admitted, the probative value of the color ones is minimal compared to the undue prejudice they created.

And this error is simply not amenable to a harmless error conclusion. "The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained." *Collins*, 409 S.C. at 537, 763 S.E.2d at 29. The State had at best weak

circumstantial of extreme indifference, so enflaming the jury mattered. Not only were the photographs disturbing, that fact was repeatedly highlighted. The solicitor goes so far as to ask Dr. Presnell if she took them "so that they would turn out to be rather gruesome for the jury" and invites the imagination of the jury in telling Dr. Presnell "we did not get to enter all of the face pictures to make it milder for the jury." Tr. 366, 375. The jury was then free to speculate how awful the excluded photographs must be if the disturbing photos that were admitted were the mild ones. And the trial court spoke to the importance of the pictures, apologizing for their grisliness and stating that "it's just necessary for you to see what you are about to see," again drawing special attention to the photos by calling them "necessary." Tr. 367. Hardly harmless, the significance of the photographs is emphasized by both the State and the trial court.

The trial court abused its discretion in admitting the photographs and that error was not harmless. This Court should reverse and remand for a new trial.

**III. The Trial Court Erred in Denying Tamika's Directed Verdict Motion**

The trial court erred in failing to direct a verdict in favor of Tamika. The State failed to present evidence of every element of the crime, specifically extreme indifference.

When ruling on "a motion for direction of verdict, the [Court] is concerned with the existence or non-existence of evidence, not with its weight; and, although [it] should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty. . .." *State v. Littlejohn*, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955). "When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." *State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 353 (2016). "[I]n ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence

presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *Id.* at 237, 781 S.E.2d at 354. A case should only be submitted to the jury "if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Section 16-3-85(A)(1) of the South Carolina Code provides: "A person is guilty of homicide by child abuse if the person: (1) causes the death of a child . . . while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." "For purposes of this statute, 'extreme indifference' has been characterized as 'a mental state akin to intent characterized by a deliberate act culminating in death.'" *State v. Phillips*, 416 S.C. 184, 196, 785 S.E.2d 448, 454 (2016) (quoting *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008)). Therefore, to prove extreme indifference, "the State must submit evidence the defendant consciously engaged in a life-threatening act with indifference as to whether Victim lived or died." *State v. Avery*, No. 2011-194506, 2013 WL 8596560, at *3 (S.C. Sup. Ct. June 12, 2013).

Here, the State failed to submit direct or substantial circumstantial evidence to allow a jury to reasonably conclude Tamika acted with extreme indifference. The trial court based its ruling on the part of the interview where she "admitted that she dopped the child" and that there was evidence Marcus was asleep and the injuries could not have been caused by M.W. Tr. 403. At the outset, even accepting Tamika's statement that she accidentally dropped Baby would not prove extreme indifference, which would be characterized by a "deliberate" act. So, the State has only circumstantial evidence in the form of Dr. Presnell's testimony regarding the extent of the injuries, and that it was unlikely the injuries were sustained by a fall. Tr. 375. The State suggests that *only* Tamika could have caused the injury, but she was not the only adult present, and it is simply

speculation to say a child who is roughly 37.4 pounds, 3'5" tall,[11] and eight days shy of turning four[12] could not inflict a significant injury on an infant. Even construing this evidence in the light most favorable to the State, this simply does not amount to *substantial* circumstantial evidence, but raises no more than suspicion that Tamika suddenly decided to brutally murder her three-day-old infant, which is the inference the State attempts to elicit. Presented only with speculation and suspicion, the trial court erred in refusing to a grant directed verdict in Tamika's favor, and this Court should reverse her conviction.

## CONCLUSION

Based on the foregoing, the trial court committed reversible error in admitting Tamika's recorded statement and the disturbing and unfairly prejudicial color photographs from the autopsy. Moreover, the trial court erred in denying Tamika's motion for directed verdict and on that basis, she asks that this Court reverse her conviction.

Respectfully submitted,

/s/ Ranee Saunders
SC Bar # 100073
Elizabeth Franklin-Best
Ranee Saunders
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, SC 29204
(803) 445-1333

August 10, 2022

[11] Dr. Melville testified M.W. was 104 centimeters tall and weighed 17 kilograms. Tr. 333
[12] Marcus testified M.W.'s birthday was July 4, 2014. Tr. 121.

**CERTIFICATE OF SERVICE**

Counsel certifies that she has provided a copy of this motion on Melody Brown of the South Carolina Attorney General's Office via email on this date, August 10, 2022.

/s/ Ranee Saunders