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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM JASPER COUNTY
Court of General Sessions

Appellate Case No. 2021-001007

The Honorable Carmen Mullen, Circuit Court Judge

Richard Passio Jr.....Petitioner,

v.

State of South CarolinaRespondent.

PETITIONER’S BRIEF

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QUESTIONS PRESENTED

- I. The trial court judge erred when she denied trial counsel's motion for a directed verdict because the State did not offer substantial circumstantial evidence. Petitioner was responsible for the death of his wife.

- II. The trial judge erred when she allowed the State to present a Facebook post posted by Petitioner because it was irrelevant and unduly prejudicial.

STATEMENT OF THE CASE

Richard Passio, Jr. was indicted by the Jasper County grand jury for murder. 2016-GS-27- 00300. He was tried before the Honorable Carmen T. Mullen and a jury between July 30 - August 2, 2018 in Ridgeland, South Carolina. He was represented by Christopher Geier. The Fourteenth Circuit Solicitor's Office was represented by Hunter Swanson. Petitioner was convicted and sentenced to 30 years in prison.

Petitioner filed a timely appeal which was denied by published opinion. *State v. Richard Passio, Jr.*, 861 S.E.2d 785 (filed August 4, 201). Petitioner then timely filed a petition for rehearing which was denied on August 18, 2021.

Petitioner then filed a petition for a writ of certiorari on October 4, 2021. This Court granted certiorari on August 4, 2022. This Petitioner's brief timely follows.

RELEVANT FACTS

Petitioner, Richard Passio, Jr. was charged and convicted of the murder of his wife and mother of his eight children, Michelle Passio. Michelle battled depression and engaged in significant drug and alcohol abuse. During an argument in their home in the early morning hours of June 3, 2016, Michelle suffered a fatal gunshot wound to her head.

Petitioner, Michelle, and other family members owned, managed, and worked at Jasper's Porch, a small restaurant and bar in Ridgeville, South Carolina.

The State offered the following pertinent testimony at trial: Lt. Joey Ginn with the Ridgeland Police Department testified he responded to the Passio residence in downtown Ridgeville before 6:00am on June 3, 2019. ROA 98.

When Ginn encountered Petitioner he noticed a large amount of blood on him. ROA 100. Petitioner told Ginn his wife shot herself as they were struggling over a gun. ROA 100. Beginning what would be a series of witnesses offering testimony to suggest Petitioner's story of his wife's death was a lie, Ginn said he thought the blood on Richard's pants "appeared dry." ROA 100.

Ginn entered the house with EMS after he placed Petitioner's gun in his car. Petitioner told Ginn the two of them fought over the gun, and three rounds were fired. Ginn testified he smelled decomposition in the house. On cross-examination, Ginn confirmed he did not tell anyone at the time he smelled the "decomposition." ROA 112- 113.

Cpl. Chris McIntosh also testified. He was an investigator with the Ridgeland Police Department and arrived on the scene around 6:00am. ROA 125. A third strike was located through a windowpane in the adjacent room. ROA 128. McIntosh recovered two shell casings from the scene. ROA 129. McIntosh testified that he smelled an odor that he believed was "an early stage of decomposition." ROA 132. He testified Michelle's body was "cold to the touch" and some of

the blood in her right ear had “coagulated.” ROA 133. McIntosh testified he did not see any bruising, scratches, or wounds on Petitioner other than a wound to his right hand. ROA 133-34.

Law enforcement’s investigation of the scene was less-than-thorough. For example, McIntosh did not use any evidence markers at the scene, nor did he generate a crime scene sketch to indicate where evidence was collected. ROA 158. He did not use any trajectory rods to determine from where bullets were fired. ROA 159. McIntosh did not have some of the blood on the couch tested to determine whether it belonged to Michelle or to Petitioner. ROA 161-62. He did not test for any gunshot residue on Petitioner’s hands. ROA 163. Michelle’s hands were checked for gunshot residue, but they were not bagged at the scene. It was McIntosh’s responsibility to do so. ROA 164. McIntosh admitted he did not have any training regarding the amount of time it takes a body to decompose. ROA 174. He also admitted he did not have any training in blood coagulation or blood spatter. ROA 175. He did not interview any of the children who were present at the scene. ROA 177. In all, there were only about 21 pictures of this death scene. ROA 156.

McIntosh did, however, interview two of Petitioner and Michelle’s neighbors, Devan and Kayla. In this interview, they told him they left the Passio house at a particular time on the night of Michelle’s death. McIntosh did not put that information into his written report. He testified his failure to do so was a “typo” or “mistake.” ROA 187- 189. Additionally, Devan and Kayla told McIntosh Michelle was “definitely drunk that night” but he failed to include that in his report either. ROA 190. McIntosh destroyed his interview notes before trial. ROA 195.

In another interview McIntosh conducted, he spoke with Michelle’s first child’s grandparents, Tom and Linda Bennington. In that interview, Tom and Linda told McIntosh they believe Michelle’s mother is a “pathological liar.” ROA 200. That, too, did not make it into

McIntosh's written report. They told McIntosh that "Pam is probably going to blame [Petitioner] for this" and McIntosh did not include that in his report either. In yet another interview, this time with one of the children in the house, McIntosh left out a critical fact related by the child and important to Petitioner's defense—that "it was almost day" when she heard her parents arguing. ROA 203-204.

Ryan Altman, a firefighter and EMT also testified. ROA 210. He testified the decedent was "cold to the touch." ROA 211. He noticed the blood on her and on the floor was "thick and very pliable." ROA 212. He testified Petitioner's hand wound was dry. ROA 212. Altman admitted he is not a hematologist, biologist, or bloodstain expert. He also admitted he could not, with any degree of certainty, say how long it takes the average person's blood to clot outside of the body. ROA 216.

Michael Singleton, a paramedic and firefighter for Jasper County Fire and Rescue testified. He claimed Michelle was "cool and ashen," and her blood appeared to have "coagulated." ROA 221-22. He testified he applied a cardiac monitor to her, and that she "showed asystole, which is a – a workable cardiac rhythm." ROA 223, ll. 20-21. They did not attempt to revive her because, with the head injury, in his opinion her condition was inconsistent with life. ROA 223. Singleton also provided testimony that it was "very uncommon" for women to use firearms to commit suicide, but that claim is demonstrably false.¹

¹ Singleton admitted he did not have any authority for this claim other than what he was taught during his EMT training, but his testimony is belied by widely published and available scientific studies. See MS Kaplan, H McFarland, N Huguet, Characteristics of adult male and female firearm suicide decedents: findings from the National Violent Death Reporting System, Injury Prevention, Volume 15, Issue 5, available at: <https://injuryprevention.bmj.com/content/15/5/322> (last visited 6/27/19) (Firearms used in 31.2% of female suicides according to data from the restricted National Violent Death Reporting System (2003-06) for 25,491 male and female suicides decedents aged 18 and older). And see Violence Policy Center, *Who Dies? A Look at Firearms Death and Injury in America*, Revised Edition,

Dr. Erin Presnell is a forensic pathologist from the Medical University of South Carolina. ROA 234. Despite her credentials and being the only witness qualified to opine as to such things, the solicitor did not ask Presnell about the likelihood of smelling human decomposition when arriving at a scene, or whether blood coagulation is a reliable indicator of when a person dies. Presnell noted Michelle had marijuana metabolite, significant nicotine, caffeine, and a blood alcohol level of 0.07 in her system at the time of her death. ROA 236.² The prosecution did not this medical doctor anything about the possible time of death of the decedent.

The state also presented the testimonies of two DNA experts. They testified the DNA profiles on the gun trigger were from both Petitioner and his wife. ROA 257.

Ivy Bryan was a senior in high school at the time of trial; she was 16 when these events occurred. ROA 261. She was a neighbor of the Passio's. ROA 262. She and her friends were hanging outside by a fire on the night Michelle died. ROA 263. She heard a man and a woman, and she testified she thought the sounds were around 2:30 or 3:00am. She thought she heard 4

*available at: <http://www.vpc.org/studies/whofem.htm> (last visited 6/27/19) (The National Center for Health Statistics reports that for all female victims of suicide, the percentage using firearms to kill themselves went from 30 percent in 1970 to 40 percent in 1996). And see Monaco, Kristen, *Suicide Rate in Women Jumps by 50%*, Medpage Today, June 14, 2018), *available at: <https://www.medpagetoday.com/psychiatry/depression/73485> (last visited 6/27/19) (For women aged 25-44 years old, the most common method of suicide is the use of firearms at 32%, as reported by a study conducted by the National Center for Health Statistics based on data collected from 2000 to 2016).**

² The State's commitment to its theory Petitioner must have murdered his wife hours earlier appears based on the testimony of Ivy Bryan, a 16-year-old who was hanging outside with her friends and who gave two different versions of when she heard shots fired, and Juanita Patrum, a neighbor who claims she did not hear a gunshot when she took her dog for a walk at 5:30am. The State evidently rejected the testimony of Petitioner and Michelle's 11-year-old daughter who claimed she heard the gunshots when it was "almost day" or her 12-year-old brother's testimony that corroborated her account. The State did not ask its own pathologist a single question regarding the time of death of the decedent.

gunshots in all. ROA 264. On cross-examination, she admitted she may have told McIntosh the shots occurred between 1:00-3:00am. ROA 266.

Juanita Patrum, another neighbor of the Passio's also testified. ROA 268- 70. Earlier that night, she and Michelle hung out on her porch and drank beer. She testified she and Michelle made plans for the next day to again sit on her porch and drink more beer. ROA 271. Ms. Patrum testified the next morning she woke up around 4:30 or 5:00am. She took her dog for a walk between 5:30 and 6:00am. She did not hear any gunshots. ROA 271-72. She claimed Petitioner had a cabinet of food that was just for him, and the kids and Michelle were not allowed to get into it. ROA 274-75. This testimony was later contradicted by Petitioner and Michelle's children.

Michelle would leave her cigarettes at Ms. Patrum's house so Petitioner would not throw them away. ROA 275.

Jordan Moser, a bartender at Schooner's Bar and Grill, testified. ROA 282. She got to know Petitioner and Michelle because they would come into the bar after Jasper's Porch closed at night. ROA 282. Michelle was at the bar on the night of June 2, 2016. That night, Michelle came in around 11:00pm. ROA 284. Michelle was supposed to be home at midnight, but she remained at the bar. Petitioner called the bar. He arrived at the bar shortly afterwards. ROA 286. Petitioner and Michelle argued, and Moser saw Petitioner knock a cigarette out of Michelle's hand or mouth. ROA 286. Michelle then left, and Petitioner left shortly afterwards. ROA 286. They were probably at the bar for about 30 minutes. ROA 287. Jordan smoked marijuana with Michelle a couple of times. ROA 289.

Angel Rose, an employee of Jasper's Porch, testified. ROA 291. Rose testified that Michelle "had a lot of issues" and that "she was a little sad." ROA 297. She testified Michelle said she was supposed to be home at midnight. Around 5 minutes until midnight, she ordered

another beer. At midnight, Petitioner called the bar but no one answered. A few minutes later, Petitioner showed up. Michelle told Petitioner she was going to finish her beer, and then she started to light her cigarette. Petitioner knocked it out of her hand. ROA 299. At one point, Rose suggested Michelle seek counseling at Coastal Empire Mental Health. ROA 303.

The State called Brandon Ashcraft to testify. ROA 305. He and Michelle had an affair. ROA 307. When it was over, they remained friends. ROA 308. There were rumors about the two of them, and Petitioner confronted him about it. Ashcraft adamantly denied it to Petitioner. ROA 308. On the night Michelle died, Ashcraft was not working. That night, however, he walked down the street and saw Petitioner sitting on his porch. They had a couple of drinks together. ROA 311. There was a kid named Devan at Petitioner's house, too. ROA 311. Afterward, Ashcraft walked to Schooner's Bar. He was there when Petitioner arrived later. ROA 313. He observed Petitioner knock the cigarette out of Michelle's hand. ROA 313. Ashcraft stayed at the bar talking to a girl until it closed. Once home, Petitioner sent him a text message asking if he had a baby bottle. ROA 314. He did because he had two kids himself, but he testified he thought the request was odd because Petitioner had 8 kids. ROA 314.

When Petitioner arrived at Ashcraft's place, he wanted to know why Ashcraft did not come and speak to him earlier when he was at Schooner's bar. Ashcraft told Petitioner that, ever since those rumors of his affair with Michelle, he wanted to stay "on opposite sides" of Petitioner. Also, he was interested in talking to a young woman named Tori. After that, Petitioner's demeanor changed, and he had a seat on Ashcraft's swing. ROA 318. Then Petitioner said that he hoped "tonight's not the night" and mentioned Michelle killing herself. ROA 318. He took the baby bottle and headed back to his car. ROA 319. Ashcraft confirmed on cross-examination that Michelle was getting help at a mental health center and was speaking to a therapist. ROA 323. Ashcraft had

his affair with Michelle when she was about 6 or 7 months pregnant. ROA 325. He knew she was drinking, smoking marijuana, and smoking cigarettes during her pregnancy. ROA 326.

Marian Mims, a former manager at Jasper's Porch, testified. ROA 330. Mims showed McIntosh where the surveillance cameras were located. ROA 331. A video was introduced into evidence that showed Petitioner removing a plastic case from Jasper's Porch before 1:00am on the date Michelle died. Mims testified that sometimes Michelle was depressed. ROA 336.

Lisa Helbig, a shift leader at Jasper's Porch worked with Michelle, and was called to testify. ROA 341. Helbig said Petitioner told her they moved from Ohio to South Carolina so he could get Michelle away from the drugs and kind of lifestyle she was leading. ROA 344.

Carla Ashcraft, Brandon Ashcraft's mother, testified. ROA 355. Ashcraft had custody of her grandchildren, so she and Michelle bonded over an interest in their children. ROA 357. Ashcraft suggested Michelle speak with Cathy Badgett, a lawyer she used when she got divorced and had custody issues with her grandchildren. ROA 361.

Cathy Badgett, an attorney in Jasper County, testified. ROA 377. She indicated she and Michelle spoke for about an hour on March 2, 2016. According to Badgett, Michelle appeared "very concerned, frightened." ROA 379. She was pregnant at the time. Badgett referred Michelle to Legal Services and to Citizens Opposed to Domestic Abuse. ROA 379.

On the night of her death, Simmons saw Petitioner and Michelle hanging out on the porch and they were fine. ROA 386. She got a call from Petitioner around 1:45 am asking for a baby bottle. She told him she did not have one. ROA 386. She heard Michelle in the background. ROA 386-87. Michelle was a drinker and smoker. ROA 390. She heard rumors that Michelle would smoke marijuana. ROA 390. Simmons admitted she did not hang out with Michelle once little Frankie was born. ROA 390-91.

Michelle's mother, Pam Bennington, testified. ROA 392. She was not supportive of Michelle and Petitioner's relationship. ROA 392. Bennington moved in with Michelle and Petitioner at the end of October 2015 to help them out with the children while they worked at the restaurant. Michelle was pregnant at the time. ROA 393. Bennington testified Michelle wanted a divorce. ROA 398. Frankie was 5-6 weeks old when Bennington went back to Ohio. ROA 399. Bennington testified Michelle would never kill herself because she is a Catholic and believed she would go to hell. ROA 400. Bennington testified on cross-examination she was not always able to care for Michelle while she was growing up. Bennington had brain surgery and "then things fell apart." ROA 403. She did not raise her other two sons either due to her struggles. ROA 403. Bennington testified Michelle told her she was ingesting methamphetamine when she and Petitioner were living in Ohio. ROA 406.

After Bennington's testimony, the State rested its case. ROA 413.

During his motion for a directed verdict, trial counsel argued the shortcomings present in the State's case:

MR. GEIER: Thank you, your Honor. Your Honor, this case is—as I've been sitting here the last day and a half, I don't know that there's any direct evidence at all in this case. It's all circumstantial, which, obviously, it's evidence that can be used to obtain a conviction. However, at the directed verdict stage, there has to be substantial circumstantial evidence. And the circumstantial evidence that's out there has to do more than raise just a suspicion of guilt.

As I see it in this case, we have a couple things that have been put on by the state. Michelle was dead, and Richard was there. And we heard the 911 tape that was entered. And in that tape, he said she shot herself, with my gun. So, I think we have those things.

We've had, you know, that to the gun. Yeah, it was his gun. The state DNA expert said her DNA was on the trigger, as was his.

There was—most of the testimony that came in from any sort of fact witness was that Richard would lose control, which is not, in and of itself, evidence that he murdered Michelle.

There were claims of infidelity. And they had Brandon Ashcraft get up there and say, yes, I was having an affair. They never once presented any evidence that Richard knew. Absolutely none.

And it's the same thing with the claims of divorce. They had Ms. Badgett get up there; they had various family members say, yeah, she was talking about the divorce. Never was there any indication that Richard knew. Absolutely no evidence of either of those two things.

They put on some evidence suggesting that Richard didn't call 911 immediately after Michelle's death. They did that partially through the coagulation of blood. But again, their witness, the EMT, testified that, when they got there, that, yeah, the blood was goopy. But they found a working cardiac rhythm in Michelle, so her heart was still beating when they got there.

They put on Ivy Bryan, he said that it happened at—that she heard shots, four shots, at 1:00 am. There's a question there was only three. She couldn't identify exactly where they came from. She couldn't identify who was arguing that she heard, anything at all about that. No one else came on and said they heard shots around that time, including Juanita Patrum, who was next door.

Juanita said that she heard a shot—or didn't hear anything, including at 5:50 in the morning, when—about the time Richard called 911. But She also said that she wasn't outside the entire time; that she walked the dog; she went inside; fed the cats; got ready; and left. She started walking out as—then, again, pulled up.

Then got a case that they called a gun case, and they've asked all kinds of witnesses, did you see Richard with a gun at Jasper's Porch. Yeah. Did he have a case? Yeah. The case sitting right there, and it is entered into evidence, but not one of them testified that, that was the case. None of them identified that. They didn't ask them to. So, I guess that seems—they seem to be implying that Richard kept his gun at Jasper's Porch, in that case. And then, that morning, at one in the morning, I guess it was, with the timestamp being off, that he went there and retrieved this case. Well, again, nobody said that, that was the case that he ever kept any sort a firearm in.

That's all we got. I mean, we got him going to Jasper's Porch. There was some talk about how he was going to go to Jasper's Porch to get Jagermeister, and that was from Brandon Ashcraft. But there's nothing else about any of that.

We have, sounds like, one claim of some sort of prior difficulties, some sort of physical altercation, between Richard and Michelle. But they don't have anything else, and that evidence came from the decedents mother, who admitted she blamed Richard for it before she heard anything.

You know, I understand that these don't get granted very often, your Honor, but I just don't see that there is a causal connection between any of these things. If you're going to prove your case for circumstantial evidence, you've got to have a direct link. And nobody identified that box. That's a big kink in the chain. Nobody is saying that Richard said she was divorcing him; she's leaving me. Nobody is saying Richard new that Brandon was having an—an affair with his wife. Those are huge missing links in that chain, and to be honest, I don't think they got there.

ROA 416, 1. 20- 420, 1. 12.

After the State argued it did present substantial circumstantial evidence, counsel replied the State never showed the box Petitioner retrieved from Jasper's Porch that night contained the gun that was used to kill Michelle. ROA 427. The trial court judge denied the motion. ROA 428.

The defense then put up its case.

Linda Bennington testified on behalf of Petitioner. ROA 429. She is Michelle's grandmother. She has known Pam Bennington for 36 years. ROA 431. McIntosh did not initially reach out to Linda Bennington, but she called him to let him know Pam Bennington was a pathological liar. ROA 431. Linda Bennington testified she thought Michelle was very happy through her fifth child, but that it was harder for her after she had more children. ROA 436.

The defense re-called McIntosh. ROA 438. This second time on the stand, trial counsel elicited additional facts about the night Michelle died. Ivy Bryan initially told McIntosh that she heard four shots at around 1:00am. ROA 439. Also, Ms. Bennington told McIntosh Michelle loved being a mother until her fifth child, and then she began to feel overwhelmed. ROA 439. McIntosh also testified Linda Bennington told him that Michelle told her, during a phone call in June 2015 that she did not care about the children anymore and she just wanted out of the marriage. ROA 444.

The defense called Dr. Sarah Stuchell, a licensed marriage and family therapist. ROA 453. She treated both Michelle and Petitioner at the Jasper Clinic of Coastal Empire. ROA 459. She

first met with Michelle on February 29, 2016 for an initial clinical assessment. ROA 459. About a year before coming to South Carolina, Michelle was treated for depression. She was prescribed Zoloft. ROA 461. She disclosed she drank alcohol and smoked cigarettes during her pregnancy.

Dr. Stuchell next met with Michelle and Petitioner on March 3, 2016. ROA 461. At the end of this second session, Dr. Stuchell diagnosed Michelle with unspecified anxiety disorder, unspecified trauma and stress or related disorder, relationship distress with spouse or intimate partner, religious or spiritual problem, and to rule out bipolar disorder. ROA 462. She next saw them five days later for a marriage counseling session. At that session, Dr. Stuchell pulled out the Diagnostic Manual of Mental Disorders, and they went through the criteria of bipolar disorder. Michelle seemed to think she fit the criteria for bipolar. ROA 463. Dr. Stuchell referred Michelle to a psychiatrist who would be the final authority for that diagnosis. ROA 463. Dr. Stuchell then met again with Michelle and Petitioner on March 14, 2016 for couples' therapy. She testified Michelle cried for most of that session and she acknowledged her behaviors were not okay or appropriate. ROA 464-65. That was her last session with Michelle; Dr. Stuchell left Coastal. ROA 465. The notes of the subsequent psychiatrist noted Michelle had a manic episode that lasted for three to four weeks, and that the patient believed she had been pushed to her limit and wanted a divorce. ROA 466. That psychiatrist discussed with Michelle the potential she had bipolar disorder. ROA 466.

Michelle also met with another mental health clinician for three sessions. ROA 466. That clinician noted unspecified anxiety disorder and unspecified depressive disorder. ROA 467.

The couple's children also testified. The couple's 11-year-old daughter testified her parents argued. ROA 534. Her mother "was happy sometimes, and sad . . ." ROA 534. She testified that, in the middle of the night, she heard two bangs. Then she heard her mother say, "do you want me

to do it again” and then heard another bang. Her mother sounded kind of angry. After that, she heard her dad crying and then he called someone. ROA 535.

Their 12- year-old son testified his mother took a lot of naps, and that she was “more violent towards others.” His 11- year-old sister told him what she heard that morning, and what she testified to. ROA 544.

Petitioner’s father testified. ROA 554. He said during their marriage, his son would call him to ask for advice. ROA 556. At his suggestion, the couple and their children moved to South Carolina. ROA 557. Passio Sr. believed Michelle needed help. ROA 559. He also described that, during Tropical Storm Bonnie, Michelle was not at home at 1:15 in the morning. His son called him and asked him to look for her, since he was at home with their 8 children. He found her, a few blocks from home, walking around in the pouring rain, barefoot. ROA 562. He tried to get her into the car, but she insisted on walking home in the rain. ROA 562.

Richard Passio Sr. described hearing about Michelle’s death. He spoke to McIntosh and asked him what happened. McIntosh told him that “he was about 95 percent sure that it was a suicide, because of the angle of the gun...” ROA 567, ll. 1-3. McIntosh then told Passio Sr. to clean the room, which he did along with a friend. ROA 567.

Kaleb Bennington, the couple’s eldest child, testified. ROA 604. He was 15 years old at the time of his testimony. ROA 605. He is not the biological son of Petitioner. Tr. 605. Kaleb testified Petitioner always treated him like he was his son. ROA 606. He said his mother was “kind of secretive at times” but that she was usually very happy. ROA 607. He said his parents had an agreement she would not smoke, but that she was constantly smoking, and trying to hide it. There were drugs and alcohol involved, and she would hang out with people who would give her drugs

without telling his father. ROA 608. Sometimes Michelle would “go to the gas station” but not come home for hours. ROA 609.

Initially Michelle was calm when they first moved to South Carolina. But she started to get aggravated more easily. Small petty fights between the children would get her “super-annoyed.” ROA 612, l. 15. She also became more secretive. She was constantly on her phone, and she slept often. ROA 612. She would go through large fits where she would sleep for hours during the middle of the day. ROA 612-13. When Michelle stopped working as Jasper’s Porch, she started disappearing more often. ROA 613. He knew his mother was using drugs because she mentioned it to Kalub. ROA 614.

In the last months of her life, Michelle “wasn’t really acting like herself.” ROA 614, ll. 7-8. She was “overly-aggressive” and “she just didn’t want to deal with anything.” ROA 614, ll. 7-13. Kalub remembers when Michelle left in the middle of the night during the storm, and that his grandfather brought her home. ROA 614.

Kalub also testified about his mother’s mother, Pam Bennington. He said she was heavily into drugs and alcohol. He saw her smoke marijuana. ROA 619. Kalub testified he never saw his father hit or push his mother. ROA 620. He has, however, seen his mother hit his father. Once he had to restrain his mother from beating his father. ROA 621.

Sometimes when his mother would leave, Kalub and his dad would try to keep her from leaving. She would not listen. ROA 631.

After another minor witness, the defense rested its case. ROA 643. Defense counsel renewed his motion for a directed verdict which was denied. ROA 644.

ARGUMENTS

I. The trial court judge erred when she denied trial counsel's motion for a directed verdict because the State did not offer substantial circumstantial evidence Petitioner was responsible for the death of his wife.

The State's case against Petitioner did not meet the standard for allowing the case to go to the jury at the directed verdict stage. As is well-established under South Carolina law, a case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). *See also State v. Williams*, 321 S.C.327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict..." *State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. *Id.* at 133, 322 S.E.2d at 452 (citing *State v. Manis*, 214 S.C. 99, 51 S.E.2d 370 (1949)).

Here, the evidence submitted by the State did not raise above a mere suspicion Petitioner was guilty of the murder of his wife. At most it showed Petitioner was present when his wife was killed and they had a disagreement earlier in the evening at the bar.

The State however, interjected several speculative and misleading inferences calculated to have the jury conclude Petitioner was guilty of her murder without there being any support for the inferences. For example, several State witnesses testified to the smell of "decomposition," and that Michelle's blood was "coagulated" suggesting Petitioner's version of what happened was not to be believed. But as discussed below, there are serious problems with that testimony.

The State's Pseudo-Scientific Testimony Relating to Michelle's Time of Death

The State elicited several pieces of “evidence” from four separate witnesses³ it purported showed Petitioner lied about how long his wife had been deceased prior to his calling 911.

During a pre-trial hearing, trial counsel objected to the anticipated testimony of one of the State’s witnesses:

MR. GEIER: Yes, Your Honor. I believe he’s [the EMT who was present at the scene] going to testify that, when he got there, based on the coagulation level of that blood, that, in his opinion, the scene had been there for awhile. In other words, it wasn’t a fresh death.

THE COURT: Can he give any kind of time frame? Can you give any kind of idea as far as time?

MICHAEL SINGLETON: I can give a rough estimate, but I’m not—

THE COURT: What is your rough estimate?

MICHAEL SINGLETON: Probably at least 30 minutes for the coagulation to start setting in.⁴

THE COURT: Okay.

MR. GEIER: Yeah, And—

SOLICITOR SWANSON: Just the fact that it didn’t occur in the past ten minutes. The Dispatch time was 5:52...

MR. GEIER: I mean, he can say, yeah, the blood was kind of gelatinous, or whatever it is he’s going to say. And then, they can—the jury can draw their own conclusions. But there are people out there that are experts in this area that receive training and write papers on it, and go through lots and lots of classes specifically on this area, and I don’t think that EMS is one.

ROA 68, l. 8- 70, l. 25.

³ The following witnesses offered this highly speculative and misleading testimony: Lt. Joey Ginn, Sgt. Chris McIntosh, Ryan Altman, and Michael Singleton.

⁴ This is demonstrably false testimony as Petitioner later argues.

Without exploring the EMT's training as to blood coagulation, the trial court judge found that he was qualified to offer this sort of opinion:

THE COURT: I'm supposing he's taking the totality of the circumstances when he testifies. And again, I think you can cross-examine him on all those questions...I think if he is comfortable and he wants to, and he says that, in my experience, you know, this didn't happen, you know, five, ten minutes ago; this happened at least a half hour ago; I think he can testify to that, if he's comfortable to and wants to, and feels like he can.

ROA 71, l. 19- 72, l. 5.

After Ginn's testimony, the trial court judge attempted to cabin this testimony to some extent:

THE COURT: ...We need to re-visit the paramedic's testimony. Just in thinking about it a little more in detail, I think, as long as he is comfortable, I think he can testify that, when he arrived there, he saw that the blood, potentially, was coagulating. I don't see anywhere in science that tells me that he can, or where he has been trained, or learned in any way to talk about timing, and that it has to be at least 30 minutes.

Ms. Swanson, unless you can point me to something, unless you can point to me he has some kind of specific training, and he can talk about coagulation patterns and bloodstain patterns, I'm real concerned about him going anywhere as far as timing is concerned, because I can't find where there is any scientific studies that will absolutely have experts say that. I think he can say, again, in his experience, he showed up, he saw blood coagulating, provided he knows what that is...I'm very leery of the leap factor that—to a time period, because I just don't see where the science allows him to put a time on it.

ROA 116, l. 11- 117, l. 10.

The court then told the Solicitor she did not need to qualify him as an expert. ROA 118, ll. 23-25.

With the trial court's green light to this evidence, the State presented four witnesses who peppered their testimonies with pseudo-medical facts that would indicate Michelle's body was deceased for a longer period of time than alleged by Petitioner. For instance, Cpl. McIntosh testified he smelled "early states of decomposition" in the room. ROA 133, ll. 3-4. And that

Michelle was “cold to the touch.” ROA 133. He testified the blood on the floor and in her right ear had coagulated. ROA 133.

Ryan Altman, a fireman and EMT also testified, upon questioning by the solicitor, the blood on Michelle was “very thick and very pliable. It wasn’t liquid-like, it was more Jello.” ROA 212, l. 1-3. He also stated Michelle was “very cold,” ROA 212, l. 25, and her blood was in a “gelatinous state.” ROA 213, l. 1.

Then the State called Singleton. He noted her blood “had already started to coagulate” when he arrived on the scene. ROA 221, l. 20. Her skin was “already cyanotic and ashen.” ROA 221, l. 22. He stated she was “already cool and ashen when he got to her.” ROA 221, l. 25- 222, l. 1. The solicitor reiterated,

Q: Her skin was ashen?

A: Yes, ma’am.

ROA 222, ll. 2-3.

Singleton then conceded that Michelle had a “workable cardiac rhythm” when he arrived on the scene. ROA 223, ll. 20-21. He testified there “was no active moving blood when [he] was on-scene.” ROA 224, ll. 23-24.

Importantly, when the State called its forensic pathologist to testify, the one witness who was legitimately qualified to testify to issues relating to the physiology of death it did **not** question her about any of these “facts” the State elicited for purposes of showing Petitioner allegedly lied about when his wife died. Had the State done so, the forensic pathologist may have testified to information readily available that undercuts these witness’s testimonies. For example, there is

abundant literature that confirms blood coagulates very quickly.⁵ And, just as the trial court judge recognized, there are no readily available studies to indicate coagulated blood is used as a reliable measure to determine post-mortem interval. Michael Singleton’s statement to the judge that it would be about 30 minutes for blood to coagulate is without any scientific basis at all, much like his false statistics as to the number of women who commit suicide by firearms.

Additionally, Singleton’s testimony and the solicitor’s pointed questioning about Michelle’s looking “ashen” were misleading. Looking “ashen” is referred to in scientific literature as pallor mortis and has absolutely no value in determining time of death because it occurs almost instantaneously.⁶

And the State witnesses’ testimonies about Michelle being cold to the touch also seems highly problematic. The cooling of the body is referred to in scientific literature as algor mortis, and it typically takes hours before it becomes noticeable.⁷ Several formulas are used to estimate

⁵ See Ross, Heather, and medically reviewed by Deborah Weatherspoon, PhD, RN, CRNA on May 4, 2017, *Prothrombin Time Test*, available at <https://www.healthline.com/health/prothrombin-time-pt#procedure> (last visited 6/27/19) (Finding that blood plasma begins to clot within 11 and 13.5 seconds if the patient is not taking blood-thinning medications); see also *What Is a Partial Thromboplastin Time Test?*, WebMD Available at <https://www.webmd.com/a-to-z-guides/partial-thromboplastin-time-test#1> (last visited 6/27/19) (The typical value for a PTT, or partial thromboplastin time, is 60-70 seconds). And see *Activated Coagulation Time*, University of Rochester Medical Center, available at <https://www.urmc.rochester.edu/encyclopedia/content.aspx?contenttypeid=167&contentid=act> (last visited 7/12/19) (Normally 70-120 seconds for blood to clot without heparin, a blood-thinner).

⁶ See Schafter AT, *Color Measurements of pallor mortis*, Int J Legal Med. 2000; 113(2):81-3, available at <https://www.ncbi.nlm.nih.gov/pubmed/10741481> (last visited 6/27/19) (Paleness develops so rapidly after death that it has no or little use in determining time of death).

⁷ Cohut, Maria, *What happens to the body after death?*, Medical News Today, May 11, 2018) available at <https://www.medicalnewstoday.com/articles/321792.php> (noting it takes 18-20 hours before a body will reach ambient temperature); see also *Decomposition—Body Changes*, November 11, 2018, available at: <https://australianmuseum.net.au/about/history/exhibitions/death-the-last-taboo/decomposition-body-changes/> (indicating it takes 12 hours for a body to be cool to the touch).

the rate of cooling after death, but as a general rule, the body loses an average of 1.5 to two degrees Fahrenheit per hour for the first 12 hours after a person's death. Samuel D. Hodge Jr. and Nicole M. Saitta, *Behind the Closed Doors of the Coroner's Office—the Medical/ Legal Secrets Involving an Autopsy*, 32 Temp. J. Sci. Tech. & Env'tl. L. 1 (2013). At the time Singleton first encountered Michelle, she still had a “workable cardiac rhythm.”

But also, what these witnesses failed to note was the presence of lividity or rigor mortis, or any other well-established methods for approximating time of death in a human being. The forensic pathologist could have testified to those facts, had she been asked. If the State's theory was that Michelle was killed between 1:00 and 3:00am, as testified to by Ivy Bryan, then livor mortis should have been apparent. *See Helton v. Singletary*, 85 F. Supp.2d 1323 (S.D. Fla., 1999) (Livor mortis will usually appear within one-or-two hours following death and is visible to which side the body is lying). In its closing argument, the State appears to imply that is the time frame it is committed to. ROA 680-81.

The State used this pseudo-scientific information to great effect during its closing argument. As the solicitor argued:

They all noted that there was no dripping blood. They all noted that the blood was coagulating, kind of getting to be that jelly-like substance. The blood on Michelle's chest and in her ear almost looks like a piece of wax, I mean, that is solidifying.

They also noted the smell of what they thought was decomposition. Both the EMT and the paramedic said that her body felt cold. Her extremities were cold to the touch. Her skin was turning an ashen color... The scene did not appear fresh. The shooting had not just happened, the way Richard said it did. He needed time to get things under control, get his story straight, tell whatever children were awake what he needed them to do.

ROA 682, l. 14- 683, l. 16.

The State introduced this pseudo-scientific evidence in its trial because it lacked substantial circumstantial evidence to show Petitioner murdered Michelle.⁸

The Gun

In addition to these highly misleading statements, the State introduced a video of Petitioner taking a box out of Jasper's Porch on the night of Michelle's death and suggested—but never offered any evidence to prove—the gun that was used was in that box. Just as trial counsel argued during his motion for a directed verdict, the State failed to show Petitioner retrieved his gun on this particular night, as opposed to already having the gun on him or that it was located in his and Michelle's home. It was a completely speculative inference by the State that Petitioner procured the gun used to kill Michelle that very night from Jasper's Porch. Trial counsel brought this issue to the trial court's attention during the motion for directed verdict:

They've got a case that they called a gun case, and they've asked all kinds of witnesses, did you see Richard with a gun at Jasper's Porch? Yeah. Did he have a case? Yeah. The case sitting right there, and it's entered into evidence, but not one of them testified that, that was the case. None of them identified that. They didn't ask them to. So, I guess that seems—they seem to be implying that Richard kept the gun at Jasper's Porch, in that case. And then, that morning, at 1:00 in the morning, I guess it was, with the time stamp being off, that he went there and retrieved this case. Well, again, nobody said that, that was the case that he ever kept any sort of firearm in.⁹

ROA 419, ll. 1-14.

Just as the State introduced its pseudo-scientific medical testimony, it also relied on Petitioner's removing this case from the restaurant on that evening to imply Petitioner retrieved

⁸ In his petition for rehearing, Petitioner argued the Court of Appeals misapplied the standard used in circumstantial cases and opted instead to use an "any evidence" standard used in direct evidence cases. *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000).

⁹ The State introduced this case into evidence through the testimony of McIntosh, who testified he took it from the trunk of Petitioner's car. ROA 144.

the gun with the expectation he was going to murder his wife later that night. This inference is far too attenuated to support a murder conviction. The trial court erred in allowing this case to go to the jury and the Court of Appeals erred in affirming Petitioner's conviction and sentence.

This Court should vacate Petitioner's conviction and sentence.

II. The trial judge erred when she allowed the State to present a Facebook post posted by Petitioner because it was irrelevant and unduly prejudicial.

During her cross-examination of Petitioner's father, the solicitor moved into evidence, over objection, a Facebook profile picture it took from the internet. State's Exhibit #32 shows a picture of Petitioner's head, with a caption below it that states: "I know who I am. I'm a dude, playing a dude, disguised as another dude." ROA 578. Petitioner's father testified he had no idea what it meant. ROA 578.¹⁰ Defense counsel objected on the bases of relevance and authentication. ROA 577. The State then argued to the jury this post showed Petitioner was somehow dishonest or "disguised." The solicitor argued:

I'm going to leave you with his quote:

I know who I am, I'm a dude playing a dude, disguised as another dude.

Well, he does know who he is, and he does know what he did. He knows the monster inside that he has tried to disguise. Don't be fooled by that disguise. I'm asking you to return a verdict of guilty on murder and speak the truth that Michelle can no longer speak.

ROA 700, l. 22- 701, l. 5.

The trial court erred by allowing this exhibit into evidence because it lacked any tendency to make the existence of any fact that is of consequence to the determination of the action more or

¹⁰ This is a popular quotation from the comedy *Tropic Thunder*, a 2008 film starring Ben Stiller, Jack Black, and Robert Downey, Jr.

less probable than it would be without the evidence. *SCRE*, Rule 401. This Facebook profile picture had absolutely no connection with any of the events of this case.¹¹

Additionally, the solicitor's use of this evidence suggested something nefarious that was not based on any objective fact. The jury, having been admonished not to investigate the case, or discuss any of the evidence with others, likely had no idea this quotation was from a silly comedy movie about a group of actors making a Vietnam War film when their fed-up director abandons them in the middle of the jungle, forcing them to fight their way out (according to various on-line movie websites). Instead, the Solicitor argued to the jury it was relevant in determining whether Petitioner lied about whether he murdered his wife. Yet again, instead of relying on objective facts, the State used Petitioner's innocuous Facebook page to raise a suspicion he was devious and lying about the death of his wife. This "evidence" was irrelevant and put to the task the Solicitor assigned for it, unduly prejudicial. This Court should grant Petitioner a new trial.

CONCLUSION

This Court should vacate Petitioner's conviction and sentence as to Argument I or should grant Petitioner a new trial as to Argument II.

Respectfully submitted,

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¹¹ The Solicitor's Office's flair for the dramatic is also seen in its official video of this case posted on Facebook which, aside from misstating a number of relevant facts, also shows evidence that was not admitted at trial. See <https://www.facebook.com/watch/?v=1310866825683330> (last visited 9/28/21) ("The Death of Michelle Passio" posted August 2, 2018 by the Fourteenth Circuit Solicitors Office). The 911 dispatcher, Tawana Mole, commented on the video and claimed "[She'll] never forget this call..." which garnered 6 responses from others. It has received 8.7K views to date. The video has also been posted on YouTube at <https://www.youtube.com/watch?v=Kp2UTzvg-24> (last visited 9/28/21) where it has received over 2,000 views.

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