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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Jasper County
The Honorable Carmen Mullen, Circuit Court Judge

THE STATE,

Respondent,

v.

RICHARD PASSIO, JR.,

Petitioner.

Appellate Case No. 2021-001007

BRIEF OF RESPONDENT

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

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 that 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.

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. The Court of Appeals properly affirmed the trial judge's denial of Petitioner's motion for a directed verdict of acquittal as to murder because the State presented substantial circumstantial evidence that Petitioner had the motive, means, and opportunity to have killed his wife prior to him calling 911 and reporting that she committed suicide and also that she shot multiple times.

II. The Court of Appeals properly affirmed the trial judge's admission of a screenshot of Petitioner's Facebook profile because it was used to impeach Petitioner's father's testimony and show his bias.

STATEMENT OF THE CASE

In August 2016, the Jasper County Grand Jury indicted Petitioner Richard Passio, Jr. for the June 3, 2016 murder of his wife Michelle Bennington Passio. (Indictment No. 2016-GS-27-00300). Christopher Geier, Esquire, represented Petitioner on the charge. Assistant Fourteenth Circuit Solicitor Hunter Swanson prosecuted the case. (R. p. 2). On July 20, 2018, Petitioner proceeded to a jury trial before the Honorable Carmen T. Mullen. (R. p. 1). After a four-day trial, the jury convicted Petitioner of murder. (R. p. 725, lines 11-15). Immediately following the trial, Judge Mullen sentenced Petitioner to 30 years with credit for 27 days' time-served. (R. p. 735, lines 8-17).

Petitioner appealed his conviction and sentence. On August 4, 2021, the South Carolina Court of Appeals affirmed Petitioner's conviction in a published opinion. *State v. Passio*, 861 S.E.2d (filed August 4, 2021). Thereafter, Petitioner filed a petition for rehearing on August 11, 2021 which was denied on August 18, 2021. On October 4, 2021, Petitioner submitted a Petition for a Writ of Certiorari to this Court. Respondent filed its Return to the Petition on October 14, 2021. Petitioner then filed his Reply on November 3, 2021. This Court granted certiorari by Order dated August 4, 2022. On September 20, 2022, Petitioner filed his Brief of Petitioner. This Brief of Respondent now follows.

STATEMENT OF FACTS

Petitioner Richard Passio Jr. and his wife Michelle (hereinafter "Victim") lived on East Main Street in Ridgeland, South Carolina. Their home was only a few blocks away from a family-owned restaurant, Jasper's Porch, as well as a bar called Schooner's they often visited. With eight children ranging from the ages of seven-weeks to pre-teen, and a dog, the Passio family equaled eleven. Petitioner's brother and father also lived in town and worked at Jasper's Porch.

Victim's death came as a result of a .9 millimeter gunshot wound to the head suffered during the early morning hours of June 3, 2016 – the time of the shooting being one of the critical issues at trial, as it was the State's theory that Petitioner murdered Victim and waited a number of hours before calling 911 to get his story straight and pacify the seven children and one infant living in the family's home. The testimony elicited at trial demonstrated the following facts.

On the morning of June 3, 2016, Petitioner dialed 911 at 5:52 AM[1] claiming his wife, Michelle, had committed suicide. During the initial portion of the 911 call Petitioner first tells the operator that his wife had *shot in the air twice*, and then shot a third time when she put the gun under her neck. (R. p. 97, lines 3-4; R. p. 221, lines 4-5); R. p. 421, lines 16-19; State's Ex. 1 at 1:39 to 1:45). His initial explanations to the operator also made known that he was trying to get the gun out of her hand, that his hand was either cut or shot in the process[2], and that his contacts were knocked out. (State's Ex. 1 at 0:43-0:47; 1:20-1:38). He further explained to the operator that his wife was "really drunk",[3] that they were fighting, and that she had attacked him a few times. Petitioner told the operator that "she does this a lot". (State's Ex. 1 at 3:30-3:42).

[1] EMS was dispatched at 5:53 AM to respond.

[2] Petitioner may have been cut by the slide on the pistol. (R. p. 165, line 6 – p. 167, line 7).

[3] Victim's toxicology report demonstrated that Victim's blood alcohol level was only 0.07. (R. p. 236, lines 14-15).

Lieutenant Ginn arrived on the scene while the 911 call was still ongoing – only 5 minutes and 13 seconds since the call was placed – and Petitioner can be heard talking to the officer. (State's Ex. 1, at 5:13). Petitioner tells Lt. Ginn that his wife shot "*3 times in the air, one time right here.*" (State's Ex 1, at 5:13-5:18). He then gave Lt. Ginn directions inside the house and said: "yes, there's eight children. They're all still asleep. *She shot three times*, I don't know how they didn't wake up." (State's Ex. 1, 5:20-5:34).

Lt. Ginn testified that upon his arrival a white male (later identified as Petitioner) came off his porch to meet him. He testified that Petitioner "had large amounts of blood on his person", specifically his "right hand, and a lot on his – if I remember correctly, the right side of his pants." Lt. Ginn testified that *the blood on Petitioner's pants appeared dry.* (R. p. 99, line 19 through p. 100, line 16; p. 109, lines 9-23). Upon entering the home, Lt. Ginn noted that the lights were off, it was "completely dark", and he needed his flashlight to see his way through the home. (R. p. 100, lines 4-10).

Victim's body was found lying on the sofa with her head back. She had a bullet hole to the bottom of her chin and a pistol lying on the floor right beside her. Lt. Ginn collected the gun from the scene. (R. p. 101, line 4 – p. 104, line 4; R. p. 211, lines 11-16; R. 221, lines 16-18; State's Ex. 3). In the room just a few feet away from Victim's body, was their infant baby, *sound asleep.* (R. p. 101, lines 2-8). Lt. Ginn likewise did not hear anything coming from the other bedrooms, despite there being seven other children and a dog living in the home.[4] (R. p. 102, lines 22-24). Lt. Ginn

[4] Two of the three children who testified for the defense testified that they were asleep and did not hear any gunshots. Angelina Passio testified that she was in the bedroom she shared with her two younger sisters. She does not have a clock so she did not know what time it was, but she thought it was the middle of the night. She "heard two bangs; and [her] mom saying, do you want me to do it again; and then another bang." (R. p. 535, lines 3-11). She said her mom sounded "kind of angry" and her dad was crying. She stayed in her bedroom until later that morning when her grandpa ushered her out of the house. On cross-examination, she testified she sort of remembered

testified that when he stepped outside to tell Petitioner his wife was dead, Petitioner informed him that the two had fought over the gun, that three rounds were fired, and that the fourth round fired killed Michelle. Lt. Ginn testified that Petitioner was only "a little" emotional, and that he never once saw a tear in Petitioner's eyes. (R. p. 105, lines 16-22). In addition to the explanations offered to the 911 operator and Lt. Ginn, Petitioner also spoke about the shooting to an employee of the restaurant, Otto Helbig, and offered a new explanation. Mr. Helbig testified that months after the shooting, Petitioner met up with him at a gas station to pay back a debt. Without prompting Petitioner on the subject, he "all of the sudden," told him his hand was injured during the shooting because "he had the hand on the gun when the fatal shot was triggered." Petitioner told Otto the Victim *shot twice towards him*, missing him and hitting the wall. (R. p. 352, line 13 – p. 353, line 17).

As Lt. Ginn's direct examination continued, the State did not elicit any testimony about an "odd smell". Instead, on cross-examination, Lt. Ginn confirmed that in his report he noted an "odd smell" inside the home, specifically the room where Victim died. The defense also asked if he was aware that his colleague, Sergeant McIntosh, had described it as the "smell of decomposition". Lt. Ginn confirmed that he had been around dead bodies before, but was uncertain what to attribute the smell to at the time. (R. p. 112, lines 8-19). In response to further questioning Lt. Ginn seemingly likened the smell to that of decomposition. He noted that though there was quite a bit of trash in the home, it did not smell like trash to him, and stated: "once again, later on, I was able to figure out it's – as you said, I have smelled it several times before." (R. p. 113, lines 1-4).

Lead investigator Corporal Chris McIntosh testified next. He testified that he arrived at the

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telling the investigator that she thought the bangs she heard sounded like her mom hitting something, like a hand smack on a table. (R. p. 535, line 14 – p. 538, line 5).

scene at approximately 6:00 AM. He too testified that Victim's body was cold to the touch, and that the blood on the floor and in Victim's ear had coagulated. There was no dripping blood anywhere, and no blood coming from the exit wound at the top of her head. He testified that Victim's wound appeared "*dry*". He testified that he noticed an odor in the room that he associated with the early stages of decomposition. (R. p. 126; p. 133, lines 1-15). Though he had been dispatched to a suicide, Corporal McIntosh began an investigation to determine whether a suicide or a homicide had occurred. (R. p. 181, line 13 – p. 182, line 6; R. p. 206, lines 3-5). Corporal McIntosh located two spent shell casings from the room and three bullet strike locations, each being behind the Victim's head. (R. p. 126, line 23 through p. 127, line 4). "It appeared, from the way she was lying," that the gunshot wound underneath the Victim's chin aligned with the bullet strike in the ceiling. (R. p. 159, lines 8-18). Lt. Ginn recovered one more empty shell casing from the chamber of the pistol. (R. p. 122, lines 1-23). Petitioner showed no signs of bruising or scratching, other than the injury to his hand from the gun. (R. p. 133-134). Corporal McIntosh also found a hard-shell case, believed to be the gun case, in the trunk of Petitioner's car.[5] (R. p. 143, line 1 through p. 144, line 14; *Infra*).

Emergency medical services arrived at the scene at 6:00 AM, just eight minutes after the 911 call. (R. p. 210, line 7 through p. 211, line 13; p. 220, line 24 through p. 221, line 8). EMT Ryan Altman testified that the blood on and around Victim had become "very thick" and "very pliable", was no longer "liquid-like" and more akin to the consistency of jello. He also testified that Victim's arm was "very cold" to the touch. Mr. Altman also testified that Petitioner's injury to his hand had dried and crusted. He provided Petitioner with sterile water and a bandage to self-treat his wound. (R. p. 211, line 17 through p. 212, line 20). Similarly, paramedic Michael

[5] The car belonged to Petitioner's sister-in-law, but Petitioner's had been using the vehicle.

Singleton testified that the pool of blood on Victim's chest had already coagulated, and that her skin was cyanotic, ashen, and cool to the touch. (R. p. 221, line 16 through p. 222, line 11). He testified that there was no dripping blood at the scene. (R. p. 223, lines 2-7). Mr. Singleton further testified that soot and an imprint from the muzzle of the gun appeared underneath her chin, indicating the gun was held in contact with her skin at the time of the shot. (R. p. 242, lines 6-10).

Mr. Singleton testified that upon arriving he attached a cardiac monitor to Victim. Mr. Singleton's testimony articulated that 1) "there was no electrical activity [of the heart]"; 2) that "[w]hen we turned [on] the cardiac monitor she showed ***asystole***[6]; and 3) "which is a -- a workable cardiac rhythm, but with the injuries to her head, she had brain matter and blood in her hair, which, in the opinion of EMS, is something considered inconsistent with life. We do not attempt to revive those patients." (R. p. 223, lines 8-24). Mr. Singleton testified that in his ten years of EMS experience, he has responded to approximately 300 suicide efforts by firearm – only one involved a female Victim and none involved multiple gunshots. (R. p. 220, lines 3-16). The pathologist cursorily estimated that perhaps twenty percent of the female suicides she had seen occurred by gunshot. (R. p. 241, lines 10-19). As for Victim's death, the forensic pathologist could not rule out

[6] There appears to be either a misstatement by the witness or a mistranscription of some kind in the record. "Asystole" is defined as: "Complete cessation of contraction of the heart." 139 Am. Jur. Proof of Facts 3d 327 (Originally published in 2014); See also Stedmans Medical Dictionary (2014) (81680) (Asystole: "Absence of contractions of the heart."). Such would describe the absence of a heart rhythm, or an "unworkable" heart rhythm, and such a term would be consistent with the clearly stated lack of "electrical activity". The apparent stutter transcribed immediately before the word "workable" would further support the contention of a misstatement. Respondent would argue that Mr. Singleton's testimony demonstrates that there was no heartbeat or "electrical activity" of Victim's heart when he arrived, and that he did not attempt to resuscitate Victim due to the nature and severity of her injury. She was dead upon their arrival, and arguments by Petitioner that Victim still showed signs of life so as to counter the timeline and theory of the State, fail to fairly and critically consider the record testimony. Respondent is aware that the recitation of facts from its Return to the Petition for Writ of Certiorari noted the "workable heartrate" and failed to identify the discrepancy. Respondent now brings it to the Court's attention in an effort to ensure a thorough and accurate recitation of facts.

suicide or homicide as the manner of death; she recorded it as undetermined. (R. p. 237, lines 1-8).

The State put forth the testimony of Ms. Ivy Bryan, who was sixteen at the time of the crime. She testified that she knew of the Passios and lived 2 houses from their home. She testified that on the night of the crime, she was outside with friends relaxing by the fire. (R. p. 261; p. 263, lines 4-24). She testified that, coming from the direction of the Passio's home, she heard the sound of male and female voices arguing, followed by a door slamming, and then shortly after she heard gunshots. (R. p. 263, line 25 through p. 264, line 6). She testified that she was outside around 2:30 to 3:00 AM at the time of the gunfire; she recalled going inside by 3:10 AM. (R. p. 264, lines 7-17; p. 266, lines 3-6). She testified that she heard the first two gunshots, followed by a pause, and then two more gunshots. Upon learning of Victim's death later that morning, she told her father what she had heard and then spoke with the investigator the day after. (R. p. 264, line 22 through p. 265, lines 12).

Though Ms. Bryan was confident in her 2:30 AM estimation (R. p. 267, lines 13-16), on cross-examination she conceded that in her discussion with law enforcement, she may well have told the officer she was outside between the hours of 1:00 AM and 3:00 AM, and that the gunfire took place within that timeframe. She testified that the gunfire sounded nearby, but conceded that although the gunfire she heard came from the direction of the Passio house, she could not be certain it came from inside the Passio house. (R. p. 266, line 3 through p. 267, line 5).

Another neighbor, Juanita Patrum, testified that she wakes up to get ready for work between 4:30 and 5:00 AM. (R. p. 270, lines 14-21). She lives in a cottage back behind the Passio home, and was close enough to their home to hear them arguing frequently every week. (R. p. 268, line 22 through p. 269, line 16; p. 273, lines 16-20; p. 277). Between 5:30 AM and 6:00 AM (the

time immediately prior to the 911 call), she went outside to walk her puppy and would not have walked far given the young age of the puppy at the time. Though she put the puppy back inside her home, she remained outside to feed the cats and was outside when law enforcement began arriving at the Passio home. She did not hear any gunshots after waking up that morning, nor did she hear any gunshots while she was outside that morning. (R. p. 271, line 21 through p. 273, line 3). She did note the peculiar fact that Petitioner was on his porch that morning, fully dressed in slacks and dark clothes, as opposed to his normal pajamas. (R. p. 273, lines 4-12). She added on cross-examination that she is a deep sleeper, and would not have been woken by loud noises in the middle of the night. (R. p. 277, lines 11-16).

In speaking with friends and family, law enforcement learned that Petitioner had been keeping his gun at the Jasper's Porch restaurant. Witness Brandon Ashcraft[7] testified that one day a few weeks prior to Victim's death, Petitioner took Brandon and one of the cooks to the back area of the restaurant and showed the gun he had. Brandon testified that the gun was a more compact handgun, and that Petitioner kept this gun in a black case at the restaurant. (R. p. 310, line 12 through p. 311, line 4; p. 319-320). Lisa Helbig likewise testified that she saw Petitioner with a gun in the office of the restaurant and that it was sitting inside the open black gun case. (R. p. 345, lines 1-21; p. 352, line 10). Otto Helbig also saw Petitioner with the gun and the "box-like" black gun case at the restaurant. (R. p. 352, lines 2-12). Further investigation led to the discovery of surveillance footage from Jasper's Porch. The video shows Petitioner went to the restaurant and retrieved a black case at 12:55 AM on June 3, 2016 – just 5 hours before the 911 call – and where inevitably the gun was taken into the home while the case remained in Petitioner's trunk. (States

[7] Brandon was a coworker of Victim and Petitioner, and admitted that he and Victim had briefly engaged in an affair together. (R. p. 324).

Exhibit 6; R. p. 333-334; R. p. 143, line 1 through p. 144, line 14).

Brandon Ashcraft would testify to a number of Petitioner's comments regarding the gun and from the night of Victim's murder. First, he noted that Petitioner mentioned keeping the gun at the restaurant for fear that his wife may commit suicide if the gun were in the house. This was within a month of her death. (R. p. 327, lines 13-25). Second, at the bar at approximately midnight on the night Victim died, Brandon heard Petitioner talking about going over to the restaurant to retrieve a bottle of Jager.[8] Brandon testified that this statement made no sense, given that the restaurant had lost its liquor license. He testified that, legally, the restaurant could not have any liquor on the property, and as a result they had already taken efforts to remove all of the liquor. (R. p. 314, lines 1-11). Third, Petitioner contacted him by Facebook message at 2:03am on the morning of the murder in search of a baby bottle. (R. p. 316). Petitioner arrived at Brandon's to obtain the bottle almost immediately after Brandon received the message. Petitioner stayed for approximately six or seven minutes[9] during which he mentioned off-hand that he hoped tonight would not be the night that Victim killed herself. Brandon testified that Petitioner was giving off a "really weird vibe". (R. p. 314, line 14 through p. 319, line 4).

Forensic evidence revealed that *only Petitioner's DNA was located on the handle of that case*. (R. p. 259, lines 11-23). Forensics evidence showed that both Petitioner and the Victim left DNA on the trigger of the pistol. (R. p. 257, lines 14-18). The analyst also located Petitioner's DNA on the pistol slide, (R. p. 258, lines 8-16), and further concluded that the underside of the Victim's fingernails contained a complex mixture of two individuals' DNA. This conclusion applied to fingernail scrapings collected from each of the Victim's hands. (R. p. 251, lines 16-25).

[8] The record also demonstrates that Petitioner left the bar that night separately from Victim.
[9] This would place his departure from Brandon's home at approximately 2:10 AM.

Much of the remaining testimony presented at trial through friends, family, and coworkers, was geared toward depicting the nature of the relationship between Victim and Petitioner. The State's witnesses testified to the dominant control that Petitioner had over all aspects of Victim's life, the mental and sometimes physical abuse suffered by Victim, Victim's recent efforts to consider escaping the situation by divorce, Victim's demeanor on the day of her death, and that Victim's happy demeanor appeared contingent upon Petitioner's absence. (R. p. 282-310; p. 330-337; p. 341-346; p. 356-363; p. 392-401; et al). Numerous witnesses testified that Victim had mentioned plans or intentions for the short and long-term future. (R. p. 271; p. 284; p. 298; p. 385; p. 399). Of particular note was the testimony of Catherine Badgett, a divorce attorney recommended by her friend Carla Ashcraft. (R. p. 361). The record shows that Victim met with Ms. Badgett in March of 2016, and that though Victim did not retain her that day[10], Ms. Badgett referred Victim to Legal Services and the Citizen Opposed to Domestic Abuse shelter in Beaufort – a reference she only gives out when she believes the circumstances are appropriate to do so. Ms. Badgett testified that Victim was very concerned, frightened, and expressed such concern for the wellbeing of her children. Ms. Badgett also testified that concern for Victim's circumstance was made known to her by members of the community as well. (R. p. 378-380).

In contrast, the defense put forth various witnesses in an effort to cast Victim as mentally troubled; these witnesses also noted alcohol, tobacco, and drug use. Petitioner's father testified to what he believed was concerning behavior, and the defense called three of Victim's children to testify to their parents' temperaments and behavior. The defense also put forth the testimony of a psychologist, Dr. Stuchell, who claimed Victim was bipolar. However, on cross-examination she

[10] Victim's mother testified that Victim's plan was to save up enough money for a divorce and start over. (R. p. 399, lines 6-19).

conceded that Victim's medical records never set forth a conclusive bipolar diagnosis. (R. p. 480-484).

Moreover, her discussions with Victim regarding the symptoms of bipolar disorder were conducted *with Petitioner in the room* and were initially brought to Dr. Stuchell's attention by Petitioner based on his independent research of the illness. (R. p. 461, line 23 through p. 462, line 24; p. 483, lines 17-25). Dr. Stuchell's notes also mentioned Victim experienced religious or spiritual problems. In her testimony, she initially attributed such as internal struggles from Victim voluntarily adopting her husband's religion, but she conceded that her notes bear out the possibility that the husband was exerting control over Victim, and that the concern for "religious brainwashing" could have been perpetuated by Petitioner. Dr. Stuchell also conceded that there is no mention in her notes that Victim ever harbored thoughts of self-harm or suicide. (R. p. 476, line 3 through p. 479, line 13).

Additionally on cross-examination, Richard Passio, Sr. (Petitioner's father – hereinafter "Mr. Passio") was asked how well he knew his son. He testified that he supposes "as well as any father can know [their] son." However, he was then questioned on whether he was aware that his son took out a Craigslist ad, "looking for love", less than a month after Victim's death. This question raised an objection on the basis of relevance and a bench conference was held. The question was permitted, and Mr. Passio conceded that he was not aware of that Craigslist ad. She next questioned Mr. Passio on whether he was aware of Petitioner's infidelity. Mr. Passio responded that he was, and that it was an emotional infidelity. Next, Mr. Passio conceded that he was not aware his son was falsely holding himself out as a police officer to a woman he was texting with after Victim's death. (R. p. 573, line 7 through p. 576, line 2).

Lastly, Mr. Passio was asked if he was "friends" with his son on Facebook. He confirmed

that he was, after which another bench conference was held. Questioning continued when Mr. Passio was asked if he was familiar with Petitioner's Facebook profile page. Mr. Passio testified that he was indeed familiar with it. He was then shown State's Exhibit 32, and asked if he recognized the profile page as his son's. Mr. Passio testified that he recognized the picture, but conceded that he was not familiar with the part "underneath". The solicitor then sought to admit the evidence, and an objection was raised to relevance and authentication. The trial court permitted the exhibit to be admitted. The solicitor then had Mr. Passio read the quote from the profile page: "I know [who] I am – I'm a dude, playing a dude, disguised as another dude." On cross-examination, Mr. Passio was questioned further about the profile page exhibit, wherein he identified the two children as Giovanni and Kaleb, but reiterated his unfamiliarity with the quote. (R. p. 576, line 12 through p. 578, line 24).

STANDARD OF REVIEW

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Butler,* 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). The trial court should deny a motion for directed verdict as to any charge when "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. Phillips*, 416 S.C. 184, 193, 785 S.E.2d 448, 452 (2016) (quoting *State v. Littlejohn*, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955)). "In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight." *Id.* at 192, 785 S.E.2d at 452. While "the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) (emphasis in original).

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). To warrant reversal, an appellant must show not only an alleged error, but also resulting prejudice. *State v. Thompson*, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991). Additionally, "[t]he appellate court 'will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion.'" *State v. Fuller*, 425 S.C. 468, 476, 822 S.E.2d 910, 914 (Ct. App. 2019) (quoting *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012)).

ARGUMENT

I.

The Court of Appeals properly affirmed the trial judge's denial of Petitioner's motion for a directed verdict of acquittal as to murder because the State presented substantial circumstantial evidence that Petitioner had the motive, means, and opportunity to have killed his wife prior to him calling 911 and reporting that she committed suicide and also that she shot multiple times.

The trial court found that the State presented substantial circumstantial evidence pointing to Petitioner's guilt. (R. p. 428, lines 16-20). The Court of Appeals affirmed, and that decision was proper.

"If there is any direct evidence, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt," then the court properly submits the case to the jury. *State v. Rogers*, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013). Substantial circumstantial evidence exists when the evidence submitted "reasonably tends to prove" that Petitioner killed the Victim. *Id.* at 555-57, 748 S.E.2d at 271-72. A directed verdict motion should

be denied only "when the evidence merely raises a suspicion that the accused is guilty." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

Circumstantial evidence "gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. at 567, 748 S.E.2d at 272. Parsing some of the facts presented, as Petitioner has done, may appear to establish a "speculative inference" of guilt. (Br. of App. at 27). But the State did not present scarce, singular instances of conduct sufficient to raise only a mere suspicion of guilt. *Cf. State v. Bostick*, 392 S.C. 134, 141-42, 708 S.E.2d 774, 778 (2011) ("No direct evidence linked Bostick to the crime scene or the items found in the burn pile."); *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) (fingerprint on cup lid in Victim's borrowed car, later found short distance from defendant's father's home, raised mere suspicion of guilt when Victim's body was found in separate location); *State v. Buckmon*, 347 S.C. 316, 555 S.E.2d 402 (2001) (while evidence established that defendant walked in the direction where Victim was found, no evidence placed defendant at the scene of the crime and defendant's house was in the same direction); *State v. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127 (2000) ("The only evidence linking respondent to the burglary is the fingerprint."); *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984) ("Nothing in evidence places Schrock at the scene of the crime."). Here, the State established an operative chain of facts from which the jury could reasonably conclude guilt beyond a reasonable doubt, and the trial court did not error in submitting the case to the jury.

The evidence the State presented established motive, means, and opportunity reasonably tending to prove that Petitioner was criminally responsible for the murder of his wife. (R. p. 416, line 17 – p. 428, line 15). Petitioner called 911 and placed himself with the Victim and with his

hands on the gun contemporaneous to the shooting. He told the 911 operator that his wife shot herself, and also that they were arguing. He made it known that their argument got physical, stating that his wife attacked him a few times, knocked his contacts from his eyes, and that he hurt his hand on the bottom of the gun when it went off. (State's Ex. 1). He relayed this information to responding law enforcement and stated that he and his wife struggled over the weapon, and was repeatedly inconsistent about the number of shots fired. (R. p. 98, line 4 – p. 101, line 3; R. p. 105, lines 15-22; R. p. 165, line 6 – p. 167, line 7). Forensic evidence corroborated a physical struggle, as both Petitioner and the Victim left DNA on the trigger of the pistol. (R. p. 257, lines 14-18). And, fingernail scrapings from each of the Victim's hands contained a complex mixture of two persons' DNA. (R. p. 251, lines 16-25). Moreover, the Victim had plans for the days following her death, contrasting Petitioner's assertion that she committed suicide. (R. p. 385, line 22 – p. 386, line 1; R. p. 284, lines 3-6).

Further contrary to Petitioner's report of a suicide were the multiple bullet strikes located in the home. A bullet struck a door frame behind the Victim's head, and another struck a windowpane in the same direction. Yet the Victim was located lying on the sofa with her head back. (R. p. 128, lines 5-25; R. p. 221, lines 16-18). Petitioner reported she fired *into the air*. (State's Ex. 1 at 1:39 to 1:45). Months later, Petitioner, unprovoked, inconsistently told another acquaintance from Jasper's Porch that the Victim shot twice *towards him*, missing him and hitting the wall. (R. p. 352, line 13 – p. 353, line 17). From the evidence of a physical struggle and the stray bullet marks behind the Victim's head, the jury could reasonably conclude the killing occurred at the hands of Petitioner rather than as a result of Victim's personal volition, even in the heat of passion. The jury was instructed they may find Petitioner guilty of voluntary manslaughter if they did not find him guilty of murder beyond a reasonable doubt. (R. p. 713, lines 1-25).

Temporally, it can be fairly and logically deduced from the evidence that Petitioner and the Victim were at home arguing and that the argument culminated with Petitioner killing the Victim. *See State v. Logan*, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013) ("evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded"). The video from Jasper's Porch places Petitioner at the restaurant after the Passios' public argument at Schooner's bar. Their argument at the bar began shortly after midnight and witnesses saw Petitioner and the Victim leave separately. (R. p. 282, line 2 – 286, line 8; R. p. 296, line 10 – p. 300, line 4; R. p. 313, lines 1-25). The bartender testified that she estimated that Petitioner and the Victim left Schooner's by 12:30 AM. (R. p. 286, line 10 – p. 287, line 2). Petitioner made a quick stop at Jasper's Porch minutes before 1 AM. (State's Ex. 6; R. p. 333, line 11 – p. 334, line 18). A neighbor who had been sitting outside most of the night heard arguing and gunshots between 1:00 AM and 3:10 AM—she estimated she actually heard the shots between 2:30 and 3:00 AM. (R. p. 263, line 5 – p. 264, line 25; R. p. 266, lines 3-24). Around 2 AM, Petitioner briefly visited a co-worker to pick up a baby bottle. Petitioner told his co-worker that things were bad at home. Petitioner mentioned suicide, stating that he hoped it was "not the night that something happens" to the Victim. He left by 2:15 AM, which is corroborative to the approximate time Ms. Bryan testified to hearing gunshots (between 2:30 and 3:00 AM). (R. p. 316, line 16 – p. 319, line 14). Petitioner called 911 at 5:53 AM to report the shooting. (R. p. 221, lines 1-8). However, another neighbor who regularly heard fighting at the Passio's house and who ordinarily woke up between 4:30 and 5:00 AM testified she did not hear gunshots at any point after she woke up that morning. (R. p. 270, line 19 – p. 273, line 20). Therefore, because it undisputed the Petitioner was present at the time of the shooting, the evidence

reasonably tends to prove that the shooting occurred after 2:15 AM when Petitioner arrived home with a borrowed baby bottle and before the neighbor woke up around 4:30 or 5:00 AM.

The State also submitted substantial circumstantial evidence that Petitioner went to the family restaurant in the middle of the night to obtain his gun, and then introduced the murder weapon into the home just hours prior to the shooting. This reasonably, if not strongly, indicates malice aforethought, especially in conjunction with Petitioner's seemingly feigned fear of Victim committing suicide *one hour later*. Video surveillance shows Petitioner entering Jasper's Porch just before 1:00 AM on the same night as the murder and leaving moments later with a black case in his left hand. (State's Ex. 6; R. p. 333, line 11 – p. 334, line 18). Witnesses who worked at Jasper's Porch also testified that Petitioner had previously taken them into the restaurant office and showed them a gun in a black case. The case they described was similar to the black object Petitioner can be seen carrying out of the restaurant. (State's Ex. 6; R. p. 310, line 12 – p. 311, line 4; R. p. 345, lines 1-21; R. p. 351, line 3 – p. 352, line 12). Further, one witness who saw Petitioner leave Schooner's said he believed Petitioner said he was going to Jasper's Porch to retrieve bottles of liquor. (State's Ex. 6; R. p. 314, lines 6-11). Yet the black case in the video is not a box or other ordinary receptacle. Finally on this point, when law enforcement arrived at the Passio's at 6 AM in response to Petitioner's 911 call, they found the gun on the floor next to the Victim and an empty hard-shell case in the back of Petitioner's car. Analysis located only Petitioner's DNA on the handle. (R. p. 103, lines 13-17; R. p. 143, line 6 – p. 144, line 7; R. p. 220, line 22 – p. 221, line 5; R. p. 254, lines 10-22; R. p. 259, lines 11-23).

Moreover, the State presented more than a mere suspicion that Petitioner waited to call 911 and report the shooting, indicating consciousness of guilt. *See State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) (as a general rule, any guilty act or conduct by the accused is

admissible as some evidence of consciousness of guilt). First responders arrived at the Passio's house to find all eight children and the dog quietly asleep. (R. p. 102, lines 2-24). The injury to Petitioner's hand appeared crusted and dry rather than fresh. (R. p. 212, lines 5-20). The Victim's blood was not dripping from any wound, but rather had soaked into the sofa and had coagulated on her person and on the floor and was thick like Jell-O. (R. p. 133, lines 3-15; R. p. 212, lines 1-3). Something about the scene smelled off. (R. p. 112, lines 8-19, R. p. 133, lines 1-3). The Victim's arm was cold to the paramedic's touch. (R. p. 211, lines 17-21). And the neighbor who regularly awoke between 4:30 and 5:00 AM to get ready for her 6:00 AM work shift did not hear any gunshots that morning, which would have been fairly contemporaneous to Passio's 5:52 AM call to 911. She also saw Petitioner in slacks rather than his usual pajamas and was home to see the police arrive. (R. p. 221, lines 1-8; R. p. 270, line 16 – p. 273, line 15).

Petitioner argues that these facts are "pseudo-science".[11] But in truth, these facts are just the repeatedly consistent observations of multiple first-responders at the scene of the crime, just minutes after the 911 call was placed. These are factual matters for which the witnesses had every right to testify to, and these factual matters contribute circumstantial evidence that this was not a six minute old shooting.

[11] Respondent also objects to Petitioner's reference and reliance upon journals and websites for supplemental factual matters when such materials were not introduced at trial. Such constitutes an improper expansion of the record, and such materials cannot now be considered on appeal. See Rule 210, SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."); Cf. Rule 212, SCACR ("The appellate court may require copies of all or any part of the transcript of proceedings or other matter which was before the lower court or administrative tribunal to be sent up for its inspection and consideration.").

Additional evidence reasonably tended to prove malice aforethought. Testimony established a number of possible motives, including the Victim's plans to divorce Petitioner, the Victim's prior infidelity, and Petitioner's expression to others that he believed the Victim "wasn't acting right; she was lashing out." (R. p. 382, line 1 – p. 385, line 24). A number of State's witnesses testified that they had witnessed Petitioner act in an argumentative, controlling, or violent fashion with the Victim. (R. p. 341, line 15 – p. 345, line 21; R. p. 396, line 8 – p. 397, line 20). Their dual presence at Jasper's Porch caused tension. (R. p. 292, line 22 – p. 294, line 10; R. p. 309, line 1 – p. 310, line 1; R. p. 330, lines 5-25). Outside of work, by at least one witness account, the Victim acted to conceal her whereabouts from Petitioner, who was "degrading and abusive" of her. (R. p. 354, line 2 – p. 361 line 15). The Victim had recently met with a family court attorney who testified that she planned to divorce Petitioner. The attorney described the Victim as pregnant, concerned, and frightened, and she referred the Victim to a local shelter for Victims of domestic abuse. (R. p. 378, line 4 – p. 380, line 24). Victim's mother corroborated the late wife's plans to leave Petitioner once she set aside enough money. (R. p. 398, line 12 – p. 399, line 20). The State also presented direct testimony that the Victim had an affair with another restaurant employee and that Petitioner was at least aware of the rumors, if not the actual affair, as he confronted that employee about it and thereafter put surveillance cameras around their workplace. (R. p. 307, line 1 – p. 309, line 8).

Respondent submits the fact-driven inquiry of this issue requires affirmance of the trial court. Unlike other cases where our appellate courts have corrected the trial court's failure to direct a verdict, Petitioner places himself at the scene, in a physical struggle with the Victim, with his hands on the murder weapon, and witness to the shooting. There was additional evidence that Petitioner brought the gun into the home mere hours before Victim's death and waited some time after the shooting to call 911. *State v. Lynch*, 412 S.C. 156, 173-74, 771 S.E.2d 346, 355-56 (Ct.

App. 2015) (case properly submitted to jury on substantial circumstantial evidence where defendant was the last person seen with Victim at location of murder and State presented substantial evidence of flight); *State v. Bratschi*, 413 S.C. 97, 112-14, 775 S.E.2d 39, 47-48 (Ct. App. 2015) (substantial circumstantial evidence established by prior violent confrontation between Victim and defendant; defendant getting a ride from a location near where the Victim's vehicle was found with Victim's dated blood on the steering wheel; and by grave-like hole on defendant's family land). In *State v. Frazier*, 386 S.C. 526, 689 S.E.2d 610 (2010), the Court ruled that the State presented substantial circumstantial evidence of guilt with evidence of the following: an affair between the Victim's wife and the defendant, defendant's knowledge of Victim's whereabouts, defendant's confrontation with the Victim shortly before the murder, defendant's actions taken in preparation for the murder, and eyewitness testimony placing defendant near the murder scene at the time of the murder. *Frazier*, 386 S.C. at 531-32, 689 S.E.2d 610, 613. Respondent submits that the State presented substantial circumstantial evidence of the same caliber as the evidence presented in *Frazier*, and Respondent asks the Court to likewise find that "[t]his evidence, when viewed collectively, presented a jury question. . ." as to Petitioner's guilt. *Id.* at 532, 689 S.E.2d at 613.

II.

The Court of Appeals properly affirmed the trial judge's admission of a screenshot of Petitioner's Facebook profile because it was used to impeach Petitioner's father's testimony and show his bias.

During Richard Sr.'s cross-examination and over Petitioner's objection, the trial court admitted a screenshot of Petitioner's Facebook profile page. The screenshot showed a selfie by Petitioner and another photograph of Petitioner with two of his sons. Petitioner's name, Rock Passio, appears underneath these photographs, and then the following: "I know who I am. I'm a

dude, playing a dude, disguised as another dude." (R. p. 577, lines 16-25; R. p. 737). Petitioner objected on the basis of relevance and authentication. (R. p. 577, lines 16-20).

Relevant evidence is defined as "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. "Evidence which assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." *State v. Sweat*, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004); *see* Rule 403, SCRE (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). "Evidence is admissible if 'logically relevant' to establish a material fact or element of the crime; it need not be 'necessary' to the State's case in order to be admitted." *State v. Sweat*, 362 S.C. at 127, 606 S.E.2d at 513.

Additionally, "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. "Our courts have followed the 'general rule' that 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony,' so that 'on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness.'" *Smalls v. State*, 422 S.C. 174, 182–83, 810 S.E.2d 836, 840 (2018), *reh'g denied* (Mar. 29, 2018) (quoting *State v. Brewington*, 267 S.C. 97, 100–01, 226 S.E.2d 249, 250 (1976) (citing 98 C.J.S. Witnesses §§ 460 and 560a)).

Over the course of his direct examination, Richard Sr. delivered accounts of personal interactions with Petitioner which painted the Victim in a derogatory light. Richard Sr. testified that the Victim regularly and wrongfully accused Petitioner of "wild things" that were not

believable and which Petitioner denied; that the Passio's marital issues spawned from the Victim's unpleasant behavior; and that Richard Sr. himself had an issue with the Victim working shifts at Jasper's Porch after giving birth. He attributed these wrongful accusations and unsavory attitudes to the Victim's pregnancies and elevated his son as the morally upright individual in the marriage. (R. p. 555, line 25 – p. 564, line 7; R. p. 569, line 10 – p. 571, line 5). But he also testified that one could not help but like the Victim because she was "outgoing, very personable," and had "a magnetism about her." (R. p. 564, lines 8-13).

On cross-examination, Richard Sr. again represented that he knew Petitioner "as well as any father can know his son." (R. p. 573, lines 7-8). The State established Petitioner in some ways emulated the life led by Richard Sr. They both had eight home-schooled children. (R. p. 572, lines 1-24). However, as cross-examination wore on, the State pointed out facets of Petitioner's personal life Richard Sr. either did not know about or did not divulge in his prior testimony. Richard Sr. testified he "would imagine" Petitioner did not tell him everything. (R. p. 574, lines 13-15). Petitioner did not tell Richard Sr. that he posted a craigslist ad less than a month after the Victim's death asking, "can we have two true loves in our lifetime?" (R. p. 574, lines 5-12). Richard Sr. was not aware that Petitioner began texting another female after the Victim's death and misrepresented to her that he was a law enforcement officer specializing in bank robberies. (R. p. 575, line 9 – p. 576, line 2). Then the State presented State's Exhibit 32. (R. p. 576, lines 1-25).

The Rules of Evidence provided the State with leeway to probe Richard Sr. for truthfulness, bias, or a motive to misrepresent the facts and circumstances of Petitioner's relationship with his wife. Rule 608(c), SCRE. The text on the profile page, which Richard Sr. could identify as

belonging to his son,[12] casts doubt upon the veracity of Richard Sr.'s self-professed closeness with Petitioner. The exhibit bore relevance to Richard Sr.'s credibility, including whether he had reliable knowledge about what went on inside his son's home. Rule 608(c), SCRE; *Smalls v. State, supra*; *see also State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) (noting 608(c) preserves well-established South Carolina precedent). For these same reasons, the screenshot's probative value was not substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

Assuming error *arguendo*, our courts "decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). State's Exhibit 36 could not reasonably have affected the result of the trial. Petitioner's re-examination of Richard Sr. cures any prejudice. Immediately after the State published the text on the screenshot, Richard Sr. responded during re-direct examination that he had seen the photograph of Petitioner and two of his sons but had never seen the text underneath and had "no idea what" it was. (R. p. 578, lines 13-25). Richard Sr. thus disavowed knowledge of its context, origin, or applicability to Petitioner. Moreover, when considering the totality of the evidence adduced, witnesses presented by both parties gave testimony tending to establish that Petitioner and the Victim engaged in volatile behavior behind closed doors, thus corroborating the text that Petitioner "was playing another dude." (*See* R. p. 737). Petitioner's eldest son testified after Richard Sr., establishing that things escalated with Petitioner and the Victim in private. (R. p. 615, lines 1-12; R. p. 628, lines 14-21; R. p. 630, lines 14-17; R. p. 632, lines 10-20). The attorney with whom the Victim consulted

[12] Richard Sr. testified prior to the introduction of the screenshotted profile page that he was Facebook friends with Petitioner. (R. p. 576, lines 12-24). He testified that he was familiar with Petitioner's Facebook profile page. (R. p. 577, lines 1-2). Richard Sr. identified the screenshotted profile page as Petitioner's by the photographs it contained. (R. p. 577, lines 3-13). The State published the screenshot and asked Richard Sr. to read aloud the text that followed Petitioner's name. (R. p. 578, lines 6-10).

about a divorce referred her to a women's shelter and had been approached by other people in the community who were concerned for the Victim. (R. p. 378, line 4 – p. 380, line 24). The Victim concealed bruises under her clothing. (R. p. 274, lines 6-13; R. p. 395, lines 11-21). When Petitioner came to the bar to argue with her the night of the shooting, he addressed the Victim in a quiet tone but bystanders could tell he was angry and watched him knock a cigarette from her hand. (*E.g.*, R. p. 296, line 10 – p. 300, line 4). Witness testimony shows that the Victim felt a need to conceal her individual activities from Petitioner so as to avoid his disapproval and backlash, that Petitioner was degrading and controlling of the Victim, and that Petitioner had displayed violent behavior inside his home. (*E.g.*, R. p. 341, line 15 – p. 345, line 21; R. p. 354, line 2 – p. 361 line 15; R. p. 382, line 1 – p. 385, line 24; R. p. 394, line 1 – p. 395, line 21; R. p. 396, line 8 – p. 397, line 20; R. p. 477, line 24 – p. 478, line 9; R. p. 485, line 13 – p. 486, line 3).

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should affirm the Court of Appeals' decision.

(Signature block on following page)

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