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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Lancaster County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2023-001531

THE STATE,

Respondent,

vs.

KAYLA MARIE COOK,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

I.

“In this trial for homicide by child abuse, did the Court of Appeals err in finding that an instruction sufficiently cured the error of admitting hearsay testimony by the lead investigator as to what Petitioner’s five-year old daughter, who did not testify at trial, said to a forensic interviewer that reinforced to the investigator that Petitioner caused the three-year old minor’s death?”

II.

“In this trial for homicide by child abuse, did the Court of Appeals err in finding the trial judge correctly admitted evidence that Minor suffered an injury to her arm two-to-four weeks prior to her death when (1) the evidence was irrelevant, (2) the evidence was inadmissible character evidence, and (3) the probative value of the evidence was substantially outweighed by its prejudicial effect?”

COUNTER-STATEMENT OF ISSUES ON CERTIORARI

I.

Did the Court of Appeals correctly affirm the trial judge’s ruling declining to grant the extreme remedy of a mistrial after a witness for the prosecution made a brief remark improperly alluding to a purported out-of-court statement that—along with all the other evidence—allegedly “reinforced” the fact Cook was responsible for the minor victim’s death when the occurrence of that isolated error was not sufficiently prejudicial to necessitate the grant of a mistrial in light of the facts: (1) the improper remark was vague and never repeated or referenced again at any point during the lengthy trial; (2) no testimony or evidence was ever presented revealing the specific substance of the purported out-of-court statement alluded to by the remark; and (3) the trial judge properly used alternative means to cure the error by swiftly striking the improper remark from the record and instructing the jurors on multiple occasions they could not consider it all during their deliberations?

II.

Did the Court of Appeals correctly affirm the trial judge’s ruling admitting evidence concerning an arm injury the minor victim sustained several weeks before she died when—just as the trial judge correctly concluded—it constituted evidence of Cook’s mental state and attitude towards the minor victim and, thus, it: (1) was relevant to the extreme indifference element of the charged crime; (2) was admissible pursuant to the intent exception of Rule 404(b) of the South Carolina Rules of Evidence; and (3) possessed a probative value that was not substantially outweighed by its potential for undue prejudice?

STATEMENT OF THE CASE

In December of 2017, Petitioner Kayla Marie Cook was arrested following an investigation into the death of a three-year-old child who died after sustaining fatal injuries caused by significant blunt force trauma. In June of 2019, the Lancaster County Grand Jury indicted Cook for homicide by child abuse. On August 12, 2019, a jury trial was commenced in the Lancaster County Court of General Sessions with the Honorable R. Lawton McIntosh, circuit court judge, presiding. At the conclusion of the six-day trial, the jury convicted Cook as indicted. Following the verdict, the trial judge sentenced Cook to life without parole. Cook then timely filed and perfected an appeal.

On appeal, the Court of Appeals—following briefing and oral argument—issued a published two-to-one split decision affirming Cook’s conviction. State v. Cook, 440 S.C. 308, 891 S.E.2d 35 (Ct. App. 2023). Thereafter, Cook timely filed a petition for rehearing, and that petition was denied. Cook then filed a petition for a writ of certiorari in the Supreme Court.

ARGUMENT

I.

The Court of Appeals correctly affirmed the trial judge’s ruling declining to grant the extreme remedy of a mistrial after a witness for the prosecution made a brief remark improperly alluding to a purported out-of-court statement that—along with all the other evidence—allegedly “reinforced” the fact Cook was responsible for the minor victim’s death because the occurrence of that isolated error was not sufficiently prejudicial to necessitate the grant of a mistrial in light of the facts: (1) the improper remark was vague and never repeated or referenced again at any point during the lengthy trial; (2) no testimony or evidence was ever presented revealing the specific substance of the purported out-of-court statement alluded to by the remark; and (3) the trial judge properly used alternative means to cure the error by swiftly striking the improper remark from the record and instructing the jurors on multiple occasions they could not consider it all during their deliberations.

Relevant Facts

On the fourth day of Cook’s lengthy trial in the connection to blunt-force-trauma-caused death of her three-year-old victim (“Victim”), Agent Trista Baird from SLED testified for the prosecution. (R. pp. 211-212; pp. 223-225; p. 589). As part of her testimony, Agent Baird explained she observed a forensic interview of Cook’s biological daughter that was conducted roughly two weeks after Victim’s death, and the solicitor—while cautioning the witness she could not state what was said during the interview—followed up by asking her if Cook’s daughter had been able to provide the interviewer with some information about the case.¹ (R. p. 601). Immediately in response, defense counsel objected on the basis “[n]one of what [Cook’s daughter] said [was] admissible,” and the solicitor promptly agreed. (R. p. 601). At that point, the trial judge sustained the objection to the extent the witness intended to testify about what Cook’s daughter said but otherwise overruled it. (R. p. 601).

As the questioning continued, the following exchanged occurred:

[Solicitor]: Was she able -- you can’t say what she said at all, okay? But was she able to give you information?

[Agent Baird]: Yes. The forensic interview, along with all the other evidence in the case, reinforced the fact that Kayla Cook did cause [Victim]’s death.

(R. p. 602). Once again, defense counsel immediately lodged an objection, and the trial judge excused the jury from the courtroom so he could address the matter. (R. p. 602).

After doing so, the trial judge quickly explained Agent Baird’s response constituted “back-dooring of what was said all day long” and was violative of the prohibition against hearsay. (R. pp. 602-603). Following that ruling, defense counsel asserted he believed the issue

¹ Earlier during the trial, the solicitor explained during an in camera hearing Cook’s five-year-old biological daughter was forensically interviewed subsequent to Victim’s death and revealed during the interview she had observed Cook hit Victim, leave marks on Victim’s body, and treat Victim in a “mean” manner when Victim’s father was not present. (R. p. 262; p. 378; p. 799).

could not be overcome and moved for a mistrial. (R. p. 603). However, upon considering the matter, the trial judge stated he did not believe a mistrial was manifestly necessary at that point, declined to grant one, indicated he would instead strike the response and present a curative instruction to the jury, and asked defense counsel if he had any specific suggestions for such an instruction. (R. pp. 603-605). In response, defense counsel affirmed he did not believe a curative instruction would be sufficient to cure the error but stated he would nevertheless accept one in an effort to protect the record. (R. pp. 603-605).

Thereafter, the jury returned to the courtroom, and the trial judge instructed the jurors as follows:²

All right. Mr. Foreman, ladies and gentlemen of the jury, the witness's last response to the question posed to her is stricken from the record. You may not and shall not consider it at all in your deliberations, when you're told to begin your deliberations. And that's your job to make sure that's not part of the jury's deliberations, okay, sir?

(R. p. 607). Once that curative instruction had been presented and the offending remark stricken, the trial was resumed, and no additional objections were raised as to the sufficiency of the curative measures that were actually implemented. (R. p. 607).

As the trial continued forward, Agent Baird confirmed she obtained a warrant for Cook's arrest on December 19, 2017, which was more than a week before the agent observed the forensic interview. (R. p. 601; pp. 607-608). In addition to that testimony, Cook testified on her own behalf and—consistent with earlier testimony that had been presented from other witnesses—confirmed her daughter was not present at the home on the date of Victim's death because she had been dropped off at her grandparents' house the night before for an out-of-state trip. (R. pp. 504-505; pp. 540-541; pp. 706-707).

² Before the jury returned to the courtroom, the solicitor candidly accepted responsibility for the "mess-up." (R. p. 606).

Subsequently, just before the case was submitted to the jury, the trial judge instructed the jury on the applicable law. (R. pp. 855-871). In doing so, the trial judge reminded the jurors some evidence had been stricken from the record during the trial, and he again reiterated to them such evidence could not be considered as part of their deliberations and must be treated as if it had not been presented. (R. p. 860).

Standard of Review

When reviewing a decision regarding a mistrial, an appellate court will not disturb a trial judge's discretionary ruling on such a matter absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000); see State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("In order to receive a mistrial, the defendant must show error and resulting prejudice."). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Analysis

When an error occurs during a trial, one potential course of action available to a trial judge is to grant a mistrial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). However, a mistrial is an *extreme* remedy that involves completely abandoning the trial. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). As a result, a mistrial should only be granted when one is manifestly necessary *and* no other legitimate courses of action remain available. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002).

As an alternative to the grant of a mistrial, one potential course of action available to a trial judge confronted with the erroneous presentation of inadmissible testimony or evidence is to strike the improper testimony or evidence and instruct the jury to disregard it. State v. White,

371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006). Generally, if the trial judge does just that, “the error is deemed cure” since jurors are presumed to follow the instructions presented to them. State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-912 (1996). Accordingly, absent some showing the jurors prejudicially failed to follow a curative instruction, a party ordinarily cannot complain after the trial judge strikes objectionable testimony or evidence and properly instructs the jury not to give it any consideration at all. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 480 (1997); see State v. Campbell, 259 S.C. 339, 345, 191 S.E.2d 770, 773-774 (1972) (“When the record shows that objectionable testimony was either disallowed or stricken out on motion and the jury instructed to disregard it, the defendant cannot complain.”).

In the case sub judice, the trial judge correctly sustained the objection to Agent Baird’s improper remark stating “[t]he forensic interview, along with all the other evidence in the case, reinforced the fact” Cook caused Victim’s death. Importantly though, the brief presentation of that vague remark to the jury was not alone sufficient—just as a majority of the Court of Appeals recognized—to create a manifest necessity that warranted a grant of a mistrial in Cook’s case for several different reasons. See White, 371 S.C. at 444, 639 S.E.2d at 162 (“[A] mistrial should not be ordered in every case in which incompetent evidence is improperly admitted[.]”).

More specifically, the remark itself was exceedingly vague and only constituted a single fleeting—and indirect—comment on an out-of-court statement purportedly made by a five-year-old child who was not present in the home on the date of Victim’s death, the actual substance of that statement was never revealed, no further details of any kind were ever provided to the jury about the statement at any other point during the course of the six-day trial, and the remark was never again referenced or repeated by any of the parties. See Council, 335 S.C. at 13, 515 S.E.2d at 514 (recognizing the vague nature of improperly-admitted testimony minimized the

testimony's potential for prejudice even *without* any curative instruction being presented).

Similarly, based on the substance of Agent Baird's improper remark, it was clear Agent Baird not only was not the declarant of the alleged statement but also was not even the person *to whom* the statement was made, and, thus, the jurors would have clearly understood Agent Baird's remark concerned hearsay as opposed to something about which Agent Baird actually possessed first-hand knowledge, which helped to minimize the remark's potential to cause any undue prejudice. See State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (finding the improper admission of hearsay evidence to be harmless where the hearsay evidence was impeached by the jury's exposure to the fact the evidence was not based on any first-hand knowledge). Furthermore, the improper remark was quickly followed by both an objection and a thorough curative instruction, and the curative instruction—which was later reiterated—specifically instructed: (1) Agent Baird's improper remark was stricken from the record; (2) the jurors could not consider it “at all” when deciding Cook's case; and (3) the jury foreman had a duty to ensure the remark was not a part of the deliberations. Based on that, the jurors clearly understood both the remark had been stricken almost immediately after it was uttered and they could not consider it in any manner whatsoever, which meant the error was effectively cured before it could cause any actual prejudice. See State v. Dial, 405 S.C. 247, 258, 746 S.E.2d 495, 501 (Ct. App. 2013) (“A curative instruction is generally deemed to have cured any alleged error.”). Finally, nothing that occurred throughout the remainder of the trial even remotely suggested any of the jurors disregarded the trial judge's easily-understood and unmistakable curative instructions, and defense counsel never identified—or attempted to identify—anything that could have supported such a conclusion. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) (“The jury was instructed to determine petitioner's guilt based only on

the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, *without some showing the jurors disregarded these instructions*, this Court declines to presume prejudice.” (emphasis added and citations omitted)).

Under such circumstances, the trial judge—who was in the best position to evaluate the vague but nonetheless improper remark’s impact on the jurors seated in his courtroom—did exactly what he was supposed to do by attempting to remedy a trial error in an appropriate manner that was far less extreme than aborting a lengthy trial in which other substantial and compelling evidence of Cook’s guilt had been properly introduced. See State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (“The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.”). Moreover, the remedial measures employed by the trial judge were wholly adequate to deal with the unextraordinary trial error with which he was confronted, and, in light of those measures, Cook could only have been prejudiced by the error if the jurors all explicitly defied the instructions presented to them in contravention of the well-established presumption they would not. Cf. State v. Dawkins, 297 S.C. 386, 393-394, 377 S.E.2d 298, 302 (1989) (concluding the trial judge did not abuse his discretion by refusing to grant a mistrial in a criminal sexual conduct with a minor case even though the solicitor elicited testimony from a psychiatrist expressing a personal belief the victim’s symptoms were “genuine” because the trial judge presented a curative instruction to the jurors advising them to disregard the testimony and the testimony—although improper—“was not of such magnitude to effect the outcome of the trial”). Accordingly, the trial judge did not abuse his broad discretion by denying defense counsel’s request for a mistrial after taking sufficient steps to cure the error that had occurred, and the Court of Appeals correctly affirmed on appeal. See Harris, 340 S.C. at 63, 530

S.E.2d at 628 (instructing a trial judge’s ruling on a mistrial motion “will not be disturbed on appeal absent an abuse of discretion amounting to an error of law”); see also State v. Robinson, 426 S.C. 579, 607, 828 S.E.2d 203, 217 (2019) (recognizing it is conceivable the discretionary rulings of two different trial judges who reached opposite conclusions from the same set of circumstances will both be affirmed on appeal due to the deferential nature of the abuse of discretion standard of review). Cook’s petition for a writ of certiorari should be denied.

II.

The Court of Appeals correctly affirmed the trial judge’s ruling admitting evidence concerning an arm injury the minor victim sustained several weeks before she died because—just as the trial judge correctly concluded—it constituted evidence of Cook’s mental state and attitude towards the minor victim and, thus, it: (1) was relevant to the extreme indifference element of the charged crime; (2) was admissible pursuant to the intent exception of Rule 404(b) of the South Carolina Rules of Evidence; and (3) possessed a probative value that was not substantially outweighed by its potential for undue prejudice.

Relevant Facts

Amongst the many injuries to Victim’s body at the time of her death, the upper bone in Victim’s right arm was fractured. (R. p. 193; p. 470; p. 648). However, unlike the fatal blunt force trauma injuries, that particular injury had occurred several weeks earlier and did not cause Victim’s death. (R. pp. 193-194; p. 224; pp. 470-471; p. 473; pp. 485-486; pp. 786-787).

Just before Cook’s trial began, defense counsel submitted a written motion seeking suppression of any evidence of Victim’s arm fracture *unless* the prosecution produced evidence “directly connect[ing]” Cook to it. (R. p. 3; p. 891). In response, the trial judge preliminarily addressed the matter towards the outset of trial. (R. pp. 11-14). During the ensuing discussion, the solicitor indicated she believed evidence of the fracture was relevant to show Cook did not obtain medical care for that injury despite claiming to have done so and *not* as proof Cook was

the one who actually broke Victim's arm. (R. pp. 11-13). After hearing the solicitor's explanation, the trial judge indicated he would consider the matter and instructed the solicitor to proffer any testimony related to Victim's broken arm before it was introduced. (R. p. 14). Following that, defense counsel simply replied: "Fair enough, your Honor." (R. p. 14).

Thereafter, during the evidentiary phase of trial, Earlene Cochran, one of Cook's neighbors, testified for the prosecution about the events surrounding Victim's death. (R. pp. 44-53). During her testimony, she noted—without objection—she had observed Victim a few days before her death, noticed her arm was swollen at that time, and was advised she had fallen. (R. pp. 48-49). Furthermore, on cross-examination, she indicated—again without objection—Victim's injured arm was swollen to twice its normal size, she asked Cook about the swelling, and Cook responded by claiming Victim had fallen. (R. p. 52).

As the trial proceeded forward, Dr. Alexander Vinuya, an emergency room doctor who treated Victim after she was brought to the hospital, indicated he observed bruising, including to Victim's arm. (R. p. 111). At that point, defense counsel objected and—while referring back to a pre-trial motion he had filed seeking the exclusion of any testimony regarding *bruises*—asserted any evidence related to Victim's bruises was irrelevant, highly prejudicial, and not probative unless the prosecution could show the bruises had been caused by Cook.³ (R. p. 112). However, the trial judge overruled that objection, and Dr. Vinuya was permitted to testify he observed bruising to Victim's right bicep over defense counsel's objection. (R. p. 115).

Following that testimony, one of the nurses who unsuccessfully tried to save Victim testified—

³ Prior to Dr. Vinuya's testimony, several law enforcement officers and other medical professionals who were involved in the futile attempt to save Victim's life testified about their experiences and observations on the date of the incident, and many of those witnesses recounted—without objection—they saw bruising all over Victim's body. (R. pp. 54-60; pp. 62-69; pp. 72-85).

without objection—she observed swelling and bruising to Victim’s right arm along with a bruise on Victim’s left arm. (R. pp. 135-136).

Thereafter, the solicitor advised the trial judge she wished to proffer the testimony of Miriam Myers, another of Cook’s neighbors, because it related to Victim’s arm injury. (R. pp. 149-150). During the ensuing proffer, Myers asserted she observed Victim with an apparent arm injury a few weeks before Victim died, she asked Cook about the injury, Cook advised her Victim had hurt her arm by falling off a bed, and Cook stated Victim said her mother did it while pointing to her. (R. pp. 151-152). Following the proffer, the trial judge asked defense counsel for his position on the matter. (R. p. 152). In response, defense counsel acknowledged Victim’s arm was broken. (R. p. 152). However, he contended it was not clear Cook had anything to do with that fracture, and he further asserted the testimony was “not fair” because Victim had accused her mother of inflicting the injury as opposed to Cook, who was not Victim’s mother. (R. p. 152). The trial judge then expressed concern to the solicitor about the hearsay nature of the specific testimony proffered and questioned how that evidence would be admissible, including pursuant to Rule 403 of the South Carolina Rules of Evidence. (R. pp. 152-153). In reply, the solicitor asserted the evidence was relevant and significant to Cook’s ongoing failure to obtain medical care for Victim while citing to Rule 404(b); State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009); and State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008), as support. (R. pp. 153-156). The trial judge then took the matter under advisement so he could review the authorities cited. (R. pp. 156-157).

Ultimately, after completing his review, the trial judge ruled the testimony concerning the arm fracture would be admissible for the limited purpose of proving the extreme indifference element of the charged crime based on Cook’s failure to obtain care for that injury, and he

further noted he would present an appropriate limiting instruction about it to the jury. (R. pp. 176-177). In response to that ruling, defense counsel replied: “As long as it’s clear that it’s failure to . . . pursue medical care.” (R. p. 177).

Following that, Dr. Janice Ross, an expert forensic pathologist, testified about the things she discovered during her autopsy of Victim, including about the several-week-old fracture to Victim’s right arm. (R. pp. 180-183; pp. 193-194). Significantly, defense counsel did *not* raise any objections to that testimony when it was presented. (R. pp. 193-194).

In addition to that, Sergeant Jodi Sims from the Lancaster Police Department testified about her interview of Cook, and a recording of the interview was admitted into evidence and played for the jury. (R. p. 229; pp. 237-239). Through that recording, the jury heard Cook personally make a number of statements about Victim’s arm injury. (State’s Ex. # 36). More specifically, Cook claimed Victim injured her arm falling off a bed a few weeks prior to her death and the fall caused a bruise on Victim’s right elbow. (State’s Ex. # 36). Cook further alleged Victim complained about her arm hurting at some points and always whined whenever she slept on it, including *on the morning of the death*. (State’s Ex. # 36). Nonetheless, Cook insisted she personally believed Cook’s arm was fine. (State’s Ex. # 36). Beyond that, at other points in the interview, Cook claimed she had cried and begged Victim’s father (“Father”) and his mother to let her take Victim to the hospital. (State’s Ex. # 36). Critically though, Cook alleged that had occurred “months ago,” and the reasons she identified for wanting to take Victim to the hospital related to various things she claimed to have noticed after Victim returned from periods spent staying with her biological mother. (State’s Ex. # 36).

Subsequently, Myers began her testimony in front of the jury, and, during her testimony, she indicated she saw Victim a week before her death. (R. pp. 383-384). The solicitor then

alerted the trial judge her next questions would relate to Victim's broken arm, and the following exchange occurred:

[Trial Judge]: Ladies and gentlemen, the evidence you're about to hear, with regard to -- It's the right humerus; is that correct?

[Solicitor]: Correct, sir.

[Trial Judge]: Is to be received by you for the limited purpose, and the only purpose towards whether the State has met what the elements, the statute requiring extreme indifference. I'll charge you about that later, but any consideration of this testimony following in just a moment must be limited to that purpose and that purpose only. Okay.

(R. p. 384). Following the presentation of that limiting instruction, defense counsel renewed his earlier objection to the testimony.⁴ (R. p. 384). Myers then resumed her testimony and stated she noticed something was wrong with Victim's arm a few weeks before Victim died. (R. p. 385). She further indicated Victim cried out in pain when she accidentally bumped Victim's arm while helping her in the bathroom. (R. p. 385). Based on that, Myers confirmed she asked Cook about the matter and Cook responded by claiming Victim hurt her arm when she fell off a bed. (R. pp. 384-385). However, Myers indicated Cook also stated Victim said her "Mommy did it" while pointing to her. (R. p. 386).

Thereafter, Father's mother, Tracy Schroeder ("Grandmother"), testified about the events leading up to Victim's death, and, during her testimony, she stated—without objection—she learned Victim injured her arm around Thanksgiving. (R. p. 405). Upon learning of that injury, Grandmother asserted she asked Cook and Father about it and they advised her it was only a

⁴ In total, defense counsel's earlier objection to Myers's testimony had been: "Well, you Honor, I think there's no doubt that -- that [Victim]'s arm was broken. It's just a matter of we really don't know when, and we really don't know how, or at least we don't know that Kayla Cook had anything to do with the broken arm. Plus, [Cook] saying [Victim] said Mommy did it, Mommy - - the solicitor has made a great point that Mommy is really Michelle Bigham and not Kayla Cook. I just don't think that that is fair testimony." (R. p. 152).

sprain that was being kept wrapped. (R. pp. 405-406). At that point, defense counsel stated:

“Your Honor, I think we’re in dangerous territory here about the arm.” (R. p. 406). In response, the trial judge presented the following limiting instruction to the jury:

All right. Mr. Foreman, ladies and gentlemen of the jury, let me remind you, *any* testimony with regard to the right humerus, or the right arm, is being received solely for the purpose of whether or not the State presented any evidence with regard to the intent required under the statute for extremely indifference.

I’ll charge you further that you may not consider it as being -- this arm being caused by the defendant. That is not in the evidence towards that regard, and that -- and there’s no evidence that that arm had anything to do with this child’s ultimate death.

(R. p. 406) (emphasis added). Following that, text messages Grandmother exchanged with Cook were admitted into evidence over defense counsel’s objection, and, in those messages, Cook stated Victim’s arm had already been checked out, was badly sprained but not broken, and should not be “messed with.” (R. pp. 409-411; pp. 892-894). However, Grandmother further stated both Cook and Father used Cook’s phone, and, therefore, she conceded Father possibly could have sent the text messages. (R. p. 420).

As the trial continued on, several other witnesses for the State referenced Victim’s arm injury as part of their testimony. (R. p. 443; p. 497). More specifically, Dr. Susan Lamb, a child abuse pediatrician who was involved in the state-mandated review of Victim’s death, testified: (1) Victim’s arm was fractured; (2) the injury did *not* contribute to Victim’s death; (3) the injury had occurred at least two weeks earlier; (4) the injury was in the process of healing; and (5) the injury potentially could have been caused by an accidental fall. (R. p. 443; p. 446; p. 448; p. 453; pp. 470-471). Additionally, Cook’s sister, Kerrin Cook, asserted—without objection—she visited with Cook and Victim on the day preceding Victim’s death, Cook showed her Victim’s arm during the visit for reasons not articulated, and what she saw did not “really” cause her any

alarm. (R. pp. 497-499). Likewise, Father stated—without objection—Victim’s arm was swollen around Thanksgiving, Victim complained about the injury some, and Cook told him Victim sprained it by falling off a bed. (R. pp. 528-530; p. 563). Furthermore, Jennifer Cochran, another of Cook’s neighbors, testified—without objection—she remembered Victim having a swollen arm at some point, but she noted she was not present when that injury was sustained. (R. pp. 583-584). Lastly, Agent Baird confirmed—without objection—Cook told her Victim hurt her arm a few weeks earlier by falling off a bed. (R. p. 615).

After that evidence and testimony was presented, the State rested, and defense counsel called several witnesses in Cook’s defense, including Cook herself. (R. p. 625; p. 639; p. 682). Notably, each of those defense witnesses presented testimony directly related to Victim’s arm injury. (R. p. 628; p. 635; pp. 647-648; pp. 734-735; p. 753). More specifically, Jennifer Adams, a case worker from the Department of Social Services, testified—without objection—she hugged Victim during a home visit conducted in December of 2017, Victim “shied away” when she touched Victim’s arm, and Cook advised her Victim had injured her arm by falling off a bed. (R. pp. 625-626; p. 628; p. 635). Likewise, Dr. Nicholas Batalis, a forensic pathologist retained by the defense, confirmed—without objection—Victim’s arm was fractured, and he used that fracture to undermine Dr. Ross by faulting her for not doing more during the autopsy to determine its age. (R. pp. 639-640; p. 643; pp. 647-648). Furthermore, Cook—in addition to claiming she loved Victim “with all of [her] heart” and “would never physically harm” her or any of her children—personally admitted she was present when Victim hurt her arm, confirmed she unequivocally was *aware of the injury*, and acknowledged Victim complained about her arm hurting on some occasions after it was injured. (R. pp. 691-692; pp. 734-735; p. 737; p. 753).

Following that, Dr. Amy Durso, an expert forensic pathologist, briefly in rebuttal discussed Victim’s arm injury. (R. pp. 776-779; p. 786). In doing so, Dr. Durso explained—without objection—Victim’s right arm had been fractured, that “more remote” injury had been sustained two to four weeks earlier, and it did *not* cause Victim’s death. (R. pp. 786-788). Beyond that, Dr. Durso noted the injury would have been “extremely” painful. (R. p. 787).

Once all that evidence and testimony had been presented and before the case was submitted to the jury, the trial judge instructed the jury on the applicable law. (R. pp. 800-871). As part of those instructions, the trial judge properly defined and explained the elements of homicide by child abuse, including the extreme indifference element. (R. pp. 868-869).

Following the presentation of those instructions, the jurors began their deliberations. (R. p. 873). Just under three hours later, the jurors asked to be re-instructed on homicide by child abuse and extreme indifference, and the trial judge presented the requested instructions. (R. pp. 874-876; p. 895). A short time after that, the jury convicted Cook as charged. (R. p. 877).

Standard of Review

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge’s ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Significantly, an abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. McDonald, 343 S.C. at 325, 540 S.E.2d at 467.

Analysis

In South Carolina, the offense of homicide by child abuse occurs when a person “causes the death of a child under the age of eleven while committing child abuse or neglect, and the

death occurs under circumstances manifesting an *extreme indifference to human life*[.]” S.C. Code Ann. § 16-3-85(A)(1) (emphasis added). For purposes of the offense, extreme indifference constitutes “a mental state *akin to intent* characterized by a deliberate act culminating in death.” State v. Phillips, 416 S.C. 184, 196, 785 S.E.2d 448, 454 (2016) (emphasis added and citations and internal quotations omitted); see State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002) (explaining extreme indifference is a culpable mental state akin to intent while citing to State v. Vowell, 634 S.W.2d 118 (Ark. 1982), as support). Thus, in order to establish all the required elements of homicide by child abuse, the State necessarily must prove beyond a reasonable doubt the defendant manifested a mental state of extreme indifference to the minor victim’s well-being. State v. Holder, 382 S.C. 278, 294, 676 S.E.2d 690, 699 (2009).

Generally speaking, homicide by child abuse is inherently difficult to prove because it is a secretive crime by nature that typically occurs behind closed doors. State v. Smith, 406 S.C. 215, 220 n. 7, 750 S.E.2d 612, 614 n. 7 (2013). Moreover, because it requires proof the defendant possessed a specific mental state, circumstantial evidence is ordinarily needed to establish the offense absent a candid confession. State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971). As a result, evidence of anything tending to shed light on the defendant’s attitude or mental state towards the minor victim is *crucial* in a homicide by child abuse case. See generally Holmes v. Goldsmith, 147 U.S. 150, 164 (1893) (“[G]reat latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required; and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be.”).

Pursuant to our evidentiary rules, evidence of other crimes, wrongs, or acts is one type of circumstantial evidence that—while “not admissible to prove the character of a person in order to

show action in conformity therewith”—may be admissible for the purpose of showing “motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or *intent*.” Rule 404(b), SCRE (emphasis added). Based on that, appellate courts in South Carolina—and elsewhere—have traditionally found evidence of earlier acts bearing on a defendant’s mental state towards a victim of child abuse to be relevant and admissible as evidence of intent. See Holder, 382 S.C. at 294, 676 S.E.2d at 699 (finding evidence of past child abuse inflicted by another person to be admissible to demonstrate the required element of extreme indifference in a homicide by child abuse case); State v. Martucci, 380 S.C. 232, 252, 669 S.E.2d 598, 609 (Ct. App. 2008) (concluding evidence of “prior abuse or neglect” was admissible to prove—amongst other things—the required intent in a homicide by child abuse case because the earlier episodes of abuse or neglect that occurred in the weeks leading up to the minor victim’s death were “relevant to the material issue of Martucci’s state of mind” and showed Martucci’s hostility and cruelty towards the minor victim); see, e.g., Estelle v. McGuire, 502 U.S. 62, 69 (1991) (recognizing evidence of a child’s prior injuries, including evidence of some several-week-old bone fractures, was probative of intent in a case in which the child was killed as the result of child abuse).

In the case at bar, the trial judge—recognizing one of the elements of homicide by child abuse was extreme indifference—allowed the State to introduce evidence related to Victim’s several-week-old arm injury *solely* for the purpose of proving the mental state necessary to establish a required element of the charged offense. Through that evidence, the jury heard Victim hurt her arm several weeks before she died, Cook was fully aware of that injury, and Cook was present when it was sustained. Likewise, the jury heard Victim repeatedly complained about arm pain in the weeks that followed, including on the morning of her death. Furthermore,

the jury heard Cook did not obtain professional medical care for the injury despite Victim's complaints, Cook dissuaded others from obtaining such care for Victim by falsely claiming the injury was just a sprain, and Victim's arm was actually broken. Meanwhile, through the trial judge's limiting instructions, the jury heard *any* of the evidence presented concerning Victim's arm injury was solely being admitted for the purpose of establishing the intent required by the homicide by child abuse statute, it could not be considered as—and was not—proof Cook caused the arm injury, and there was nothing establishing the arm injury itself had anything to do with Victim's death.

Initially, the evidence related to Victim's arm injury was relevant to Cook's case because it helped to prove one of the required elements of the charged offense. Specifically, the State was required to establish Cook caused Victim's death under circumstances manifesting an extreme indifference to human life, and extreme indifference has been identified as a mental state akin to intent. Jarrell, 350 S.C. at 98, 564 S.E.2d at 367. Because the extreme indifference element was one directly related to Cook's mental state, evidence bearing on her attitude towards Victim, including in the days and weeks leading up to Victim's death, could and would shed light on whether Cook was indifferent to Victim's well-being, which unquestionably was a material issue during the trial. See Holder, 382 S.C. at 288-289, 676 S.E.2d at 695-696 (concluding evidence of Holder's shift in focus from her child to her new boyfriend in the *weeks* leading up to the child's death was relevant and admissible for purposes of establishing the extreme indifference element of homicide by child abuse); see also State v. Plunkett, 149 P.2d 101, 109 (Nev. 1944) (concluding evidence of Plunkett's prior acts of indifference towards a minor victim, such as his act of leaving the infant alone for hours at a time, that preceded the victim's violent death demonstrated the "feeling of the defendant for the child" and, thus, was

relevant and admissible for purposes of establishing malice during Plunkett’s murder trial). Therefore, the evidence related to Victim’s arm injury and Cook’s response to it was—just as the trial judge recognized—relevant evidence. See State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) (“[E]vidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.”).

Additionally, the evidence related to Victim’s arm injury was established by clear and convincing evidence as to the allegations sought to be established. See Fletcher, 379 S.C. at 24-25, 664 S.E.2d at 483 (“[E]vidence of the prior bad act must be clear and convincing. . . . Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief *as to the allegations sought to be established*. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.” (emphasis added)). Specifically, the *limited* allegations the trial judge ruled could be established concerning Victim’s fractured arm were Cook was aware of the arm injury, did not obtain care for it, and dissuaded others from obtaining such care by falsely claiming it was just a sprain. Based on the medical evidence presented at trial, it was indisputable Victim’s arm had been fractured in the weeks preceding her death, and that fact was readily acknowledged by defense counsel. Similarly, based on Cook’s own testimony and earlier admissions, Cook was present when Victim’s arm injury was sustained, was fully aware of it, and heard Victim complain about ongoing pain resulting from it, including on the morning of her death. Likewise, based on the testimony presented from Father, Cook led Father to believe nothing needed to be done to address Victim’s arm injury because it was just a sprain, and Grandmother also confirmed she had been alerted the injury was a sprain. Thus, since the

limited allegations sought to be established were either entirely undisputed or established by direct testimony, the trial judge's decision to admit the evidence concerning Victim's arm injury was fully supported by what was presented. See State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) (“[W]e do not review a trial judge’s ruling on the admissibility of other bad acts by determining de novo whether the evidence rises to the level of clear and convincing.”).

Furthermore, the evidence fell directly within Rule 404(b)'s intent exception because it was introduced to establish—and was probative of—the extreme indifference element of the indicted offense. Specifically, by failing to obtain medical care for an injured child who repeatedly complained about the pain she was experiencing and by falsely claiming to others the injury was a sprain in an apparent effort to discourage them from obtaining professional treatment for Victim, Cook demonstrated she was—at best—indifferent to Victim's well-being in the days and weeks leading up to Victim's death. Based on that, the evidence of Cook's past indifference towards Victim leading up to Victim's death was logically relevant in regard to the mental state and attitude Cook held towards *the exact same child* at the time of the child's death just a few weeks after the arm injury was sustained. See id. at 7, 545 S.E.2d at 829 (recognizing evidence of intent can be demonstrated through past actions). Meanwhile, the evidence of Cook's behavior towards Victim concerning the arm injury could *not* logically support a conclusion Cook had a propensity to inflict the type of significant blunt force trauma injury that caused Victim's death. Cf. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding evidence Haselden tended to golf, fish, or go to his mother's house presented during a murder trial was not evidence tending to prove Haselden had a tendency towards abusing and murdering his son). Therefore, the evidence of Victim's arm injury and Cook's response to it was properly admitted as evidence of intent pursuant to Rule 404(b) of our state's evidentiary

rules and *not* as improper propensity evidence. Cf. Holder, 382 S.C. at 289, 676 S.E.2d at 969 (“The State’s purpose for offering the testimony [regarding Holder’s behavioral changes in the weeks preceding her child’s death] was not to show Holder had a propensity to abuse her child in conformance with a character trait. Rather, it was to show Holder’s strong desire to please Martucci instead of protecting the welfare of her child and to establish an element of the offense, that she manifested an extreme indifference to the well-being of her son.”).

Finally, the probative value of the evidence concerning Victim’s arm injury was high because it shed light on Cook’s mental state and attitude towards the minor victim, which was a disputed issue at trial, while the evidence’s potential for prejudice was comparatively low under the circumstances involved. Looking to the evidence’s probative value, the State was *required* to prove Cook’s mental state towards Victim was one of extreme indifference, and the evidence regarding Cook’s indifferent response to Victim’s arm injury in the weeks leading up to her death constituted compelling circumstantial proof she possessed just such a mental state. Cf. Wilson, 345 S.C. at 8, 545 S.E.2d at 829 (recognizing evidence of Wilson’s prior acts was “especially probative” because the State had to circumstantially prove Wilson’s intent). Likewise, Cook strongly disputed she possessed a mental state of extreme indifference towards Victim by both claiming to have loved her and asserting she would “never” have hurt her. See Martucci, 380 S.C. at 253, 669 S.E.2d at 609 (“Because Martucci disputed the motive and intent to commit homicide by child abuse, evidence of the prior abuse or neglect was highly probative of his guilt on the homicide charge. The evidence was necessary to establish a material fact or element of the crime charged.”). Based on those factors, the evidence of Victim’s arm injury was exceedingly probative. See State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012) (explaining probative value is the measure of the importance of a piece of evidence’s

tendency to prove or disprove some fact or issue relevant to the outcome of a case), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, looking to the evidence's potential for undue prejudice, the trial judge took proper steps to prevent the arm injury evidence from causing any undue prejudice by specifically instructing the jury on the purposes for which that evidence could and *could not* be considered. See Rule 105, SCRE ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). Moreover, the evidence itself was not particularly graphic or detailed, which helped to ensure it would not have been used by the jury in an improper manner. State v. Roberson, 988 S.W.2d 690, 696 (Tenn. Crim. App. 1998). Under such circumstances, the evidence's high probative value was not "substantially outweighed" by its potential for undue prejudice, and the trial judge did not abuse his broad discretion by choosing to admit it. Rule 403, SCRE.

Accordingly, for all those reasons, the evidence related to Victim's arm injury was properly admitted during trial as proof of the extreme indifference element of the charged crime, the trial judge's decision to admit the evidence for that limited purpose was fully supported by the evidence and testimony presented during trial, and the Court of Appeals correctly affirmed the trial judge's ruling on appeal.⁵ See Martucci, 380 S.C. at 253, 669 S.E.2d at 609 ("If there is

⁵ Moreover, even assuming the evidence's admission was somehow improper, any conceivable error was entirely harmless under the circumstances involved because the challenged portion of the evidence regarding Victim's arm injury was merely cumulative to other unobjected-to evidence presented during trial, including to virtually-identical testimony offered by Cook and her own defense witnesses. See State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence."); cf. State v. Braxton, 343 S.C. 629, 635, 541 S.E.2d 833, 836 (2001) (concluding the trial judge's erroneous admission of "inadmissible character evidence"

any evidence to support the admission of bad act evidence, the trial judge’s ruling cannot be disturbed on appeal.”); see also State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001) (“If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” (citations omitted)), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Cook’s petition for a writ of certiorari should be denied.

CONCLUSION

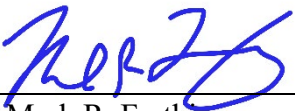
For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

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was harmless because the improperly-admitted evidence was cumulative to other evidence presented).