STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

CHARLES JASON CARMICHAEL,

APPELLANT.

Appellate Case No. 2022-001717

INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

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I.

The trial court erred in admitting the testimony of child witness R.C., where the court failed to assess R.C.'s state of fear to permit his testimony via CCTV, and where R.C.'s testimony as the sole witness was inconsistent and permitted inadmissible hearsay to be introduced, prejudicing Appellant.

II.

The trial court erred in admitting hearsay testimony which was improperly used to bolster the declarant and resulted in material prejudice to Appellant.

III.

The Solicitor committed a flagrant error by improperly pitt[ing] Appellant against adverse witnesses on cross-examination constituting prejudice and warranting review.

STATEMENT OF THE CASE

Charles Jason Carmichael (hereinafter "Appellant") was indicted for four charges: two counts of murder and two counts of possession of a weapon during the commission of a violent crime. (2021-GS-40-5204, 5205; 2022-GS-40-4327, 4328). Appellant proceeded to a jury trial before the Honorable Judge Clifton Newman on November 28, 2022 through December 2, 2022. Appellant was represented by attorney Deon O'Neil, Esq. The State was represented by Senior Assistant Solicitor Kathryn Cavanaugh for the 5th Circuit, along with Assistant Solicitors Grayson Hill and Paul Walton.

At the conclusion of the trial Appellant was found guilty of all four charges. (Tr. p. 969-970). Judge Newman sentenced Appellant to life without parole for each murder conviction. (Tr. p. 998). This appeal now follows.

STATEMENT OF FACTS

The Crime

In the early morning of March 13, 2021, Ashli Haigler (hereinafter "Ashli" or "Victim Ashli") was found murdered with two gunshot wounds to the chest while inside her boyfriend's Toyota Tundra at the corner of Malcom and McCaw in Columbia, South Carolina. Her five year old son, R.C. was in the back seat of the truck at the time of the crime. Hours later, Ashli's boyfriend, Rufus Carmichael (hereinafter "Rufus" or "Victim Rufus")[1], was found dead off the side of the road in Aiken County with three gunshot wounds. The State put forth the following evidence at trial:

Events leading up to the murder of Ashli Haigler

[1] Victim Rufus is often referred to as "R.J." by witnesses during the trial.

Jessica Edwards testified that she met Appellant at the store and had not known him long before the events pertaining to the crime took place. She had wanted him to take a look at her car, since he had told her he was a mechanic by trade. (Tr. 392-393). Over the course of the week prior to the crimes in question, Ms. Edwards learned that Appellant was angry at his brother, Victim Rufus, though she did not know the precise reason for his anger. (Tr. 393). She testified that she was with Appellant on March 12, 2021, when they went to the U-Haul rental vendor together. She had some furniture she needed to move from her mom's house. (Tr. 394-396). She rented the U-Haul in her name with Appellant being listed as a secondary contact. (Tr. 396-397). Appellant's credit card, ending in 7461, was used to pay for the U-Haul. (Tr. 581-582).

She testified that they also went to Wal-Mart that night (March 12, 2021). While there they bought clothes and Appellant purchased a shovel. (Tr. 398-399). They also went out drinking, during which time Appellant did both marijuana and cocaine. Ms. Edwards testified that she noticed a change in Appellant's mood during that time. He was more aggressive than when she had first met him. This mood escalated to the point that Ms. Edwards feared that Appellant was having psychotic hallucinations. (Tr. 398-400).

During the night of the 12th she witnessed Appellant digging a hole in the front of his yard, and it appeared as if he was seeing things come out of the hole. She recalled Appellant's reference to the hole and testified that he described it as "a grave that his brother made for him or something like that." (Tr. 401-402). He also stated that he believed Victim Rufus was trying to spiritually attack him and he explicitly stated that he wanted to kill Rufus. The night ended when Appellant put a gun in Ms. Edwards' face insinuating that he wanted her to help him hurt his brother. (Tr.

403-405). She later escaped the situation, hid at a neighbor's house, and then fled to her mother's home. Appellant came looking for her but did not find her.[2] (Tr. 405-407).

Ms. Edwards testified that she called Appellant that night out of concern for the U-Haul being in her name, and the financial consequences that may arise if he did not return it. Records show that Appellant's phone dialed her xxx-5965 number multiple times in the early morning hours of March 13, 2021. She did not see the U-Haul in person again after fleeing that night. The following day she filed a report with the police about the U-Haul and how she believed Appellant was in possession of it. (Tr. 410-412; 706-714).

Miko Dreher testified that she was with Victim Rufus in his truck on the evening of March 12, 2021. She was present when Rufus received a phone call from Appellant through the Bluetooth connection of Rufus's truck. She testified that she knew Appellant to be the caller because she is familiar with Appellant's voice and because Appellant was calling Rufus "bro". The conversation that Ms. Dreher heard was not pleasant in nature. (Tr. 359-360).

She described Appellant as being "very upset," "very belligerent," and cursing. She testified that Appellant explicitly said he was going to "bury him" and that he was "going to kill him". (Tr. 361). The call ended when Rufus hung up the phone. She testified that Appellant tried to call again but that Rufus blocked the number. (Tr. 363). Ms. Dreher later learned of Rufus's murder from the news and called the Crimestoppers hotline to report her knowledge of the matter. (Tr. 364-365).

Tracey Sandel testified that she lives at 1357 Gilmore Street, with her property also abutting Senn Street. (Tr. 273-274). She had surveillance cameras on her property that captured

[2] Ms. Edwards also indicated that in her time with Appellant, it appeared as though he had two different personalities.

Senn Street on March 13, 2021. Her surveillance footage from 4:00am on March 13, 2021 was provided to police, and said footage was admitted at trial. (Tr. 274-276). She testified that 621 Senn Street (Victims' address) is just two blocks away. She identified the video as showing the U-Haul truck in question going down Senn Street in the direction of 621 Senn Street. (Tr. 277; 784; 910-911).

Victim Ashli's sister, Tiara Haigler (aka Aunt T.T.), testified that she received a call from her sister at 4:25am on March 13, 2021. It was not uncommon that her sister would call her in the early morning hours each day. However, she could tell by Victim Ashli's voice that she was frantic and worried. (Tr. 232). She testified that Ashli had heard a loud noise outside. Ashli told her that when she ran to the door and looked out she saw the tail end of a truck leaving the neighborhood.

Ms. Haigler testified that the reason she went to look out and investigate was because Victim Rufus (aka R.J.) had gone to investigate the noise but had disappeared. (Tr. 234; 796). Ms. Haigler testified that before Victim Ashli ended the telephone call, Victim Ashli told her that she was "going over to Jason's house to see if Rufus had went over there or to see if he knew what had happened to Rufus because he disappeared." She also learned that Ashli was taking her son R.C. with her.[3] (Tr. 235). The last time she spoke with Ashli was when Ashli was about to pull up to Appellant's home. (Tr. p. 244). In response to all of this, Ms. Haigler called 911 for the West Columbia area. (Tr. 236).

The Murder of Ashli Haigler

Ms. Haigler testified that after the phone call with Ashli ended, she later received a phone call from R.C. Based on his voice, and her familiarity with how he normally sounds, she could tell

[3] On cross-examination Appellant demonstrated that Ms. Haigler harbored concern that this was a set up to harm or kill Ashli, and that Victim Rufus may be involved. This was stated to the police, but her assertion was made before learning that Rufus had been murdered as well.

that he was scared. He told her on the phone that "Uncle Jason shot mommy four times." (Tr. 238). She then communicated with the police and drove to the scene.

Two separate calls to 911 were placed at 5:12am. The first call came from 1601 McCaw Road and reported hearing gunshots in the area approximately 20 to 25 minutes prior. (Tr. 185). A second call from 1831-1843 area of Malcom Drive also came in at 5:12am and reported a "shooting hit" (indicated someone has sustained a gunshot wound). Additional comments from the caller indicated that the shots were approximately 30 minutes prior to the call, and that they could now see a boy getting in and out of the truck looking for help. (Tr. 187-190). Karen Boyd, a nearby resident of the scene, testified that she heard a voice, maybe two voices. She heard frustration rise in the voice and then heard two gunshots. She then heard a vehicle speed away. (Tr. 263).

Law enforcement arrived at the corner of Malcom and McCaw. Investigator Davis saw a young child (R.C.) hanging out of truck's back window. (Tr.158-259). He went to assist the child and asked what happened. In response the child stated that his mommy was dead, and that his Uncle Jason had shot his mommy. (Tr. 159-160). The officer's efforts to assist, along with the statements by the R.C., were recorded via Officer Davis's body-cam, and a clip of R.C.'s statements was admitted. (Tr. 161-166).

R.C. is the son of Victims Ashli and Rufus, and was seven years old at the time of his trial testimony. He testified that he last saw his dad at home the night before the crimes. (Tr. 218). He testified that he was asleep when his mom woke him up, got him dressed, and put him in the truck. R.C. testified that his mom was in a hurry, "going real fast", and telling him to hurry up. He testified that the reason they were getting up and getting in his daddy's truck was to go look for his daddy and that his mom seemed worried. (Tr. 216-218). R.C. testified that they stopped at some houses, but he did not recall seeing any other vehicles until the final stop. At the last stop his mom

stopped in front of some trees and began to look around. He then says that his Uncle Jason pulled up. He testified that he knew it to be his Uncle Jason because his mom said: "Jason, where is my baby's daddy?" (Tr. 219-220).

He was in the back seat hiding and he testified that after his mom asked the question, his Uncle Jason shot her. He heard yelling and four gunshots. (Tr. 221). He testified that the vehicle that approached their truck that night was a "square" van. (Tr. 223). He also described the van as blue, but agreed that a portion of the van he saw was blue.[4] He testified that the "van" stayed for two minutes and then left. (Tr. 223-224).

After the van left, R.C. went to check on his mom but her eyes were closed. He then got out of the truck and knocked on houses to try and get help, but no one would answer. He then got back in the truck and used his mom's phone to call his Aunt T.T. He told Aunt T.T. what he had seen and also told the police when they arrived. (Tr. 226).

Video surveillance from the area showed two vehicles, a U-Haul and a Toyota Tundra truck following closely behind turn onto Albritton (near and headed toward Malcom and McCaw) at 4:43am. (Tr. 346; 776-777). At 4:46am only one vehicle returns and turns back onto Two Notch coming from Albritton. (Tr. 347-348; 776-777). Deputy Smith was on patrol and handling a separate crime in the area. He testified that he heard approximately four gunshots in the nearby area and alerted dispatch. At 4:46am he saw a U-Haul box truck come speeding through, screeching its tires, and nearly topple over while turning at the intersection of Two Notch and Cushman. (Tr. p. 268-269). His body-cam also caught this moment on video, and the tape was played for the jury. (Tr. p. 270-272).

[4] The witness appeared confused by this questioning, as he stated both that the portion he saw was blue, and that van was "only" blue as well.

The Discovery of Rufus Carmichael's Body

At 2:04pm on March 13, 2021, Officer Scott Neel received the call that a body had been found in Aiken County. (Tr. 310). The body was identified as Victim Rufus Carmichael. He was found 65 feet off the roadway at 129 Holder Road, with gunshots wounds and concrete blocks placed on his abdomen. (Tr. 311; 314). Officer Neel testified that there was very little blood at the scene, and in light of his years of experience, that fact led him to conclude that this was not where the murder took place. (Tr. 317).

Officer Neel obtained surveillance footage from an Exxon gas station near I-20; the gas station was approximately half a mile from the location where Rufus's body was found. (Tr. 325). The video showed that a U-Haul style truck drove past the station away from I-20 and in the direction of Holder Road. The video then shows a U-Haul drive back toward I-20 approximately six minutes later. (Tr. 326-327). The time stamp for the video was 5:27am on March 13, 2021. (Tr. 327). Investigator Glenn Oxendine testified that the location of the two bodies were 43 miles apart, and the video evidence shows that 40 minutes passed between the cameras surveilling the U-Haul near the two crime scenes. (Tr. 782-783).

Appellant's Arrest

Officer Sean Kilcoyne, with the Fugitive Task Force, learned of the U-Haul's connection to the crime and went back to Appellant's home to investigate. He found the U-Haul parked at the back of Appellant's residence. He called it in and proceeded to conduct surveillance of the U-Haul. When the U-Haul began to drive away from the home a traffic stop was initiated by the surrounding officers. (Tr. 376-378).

Appellant was driving the U-Haul and when the police vehicles pursued him he attempted to evade arrest by putting the truck into reverse and fleeing. He was responsible for causing a traffic collision with a SLED vehicle as a result, and the U-Haul truck was quickly stopped. (Tr. 506). During his pat down Appellant was found to be in possession of two fired cartridge casings in his left pocket. (Tr. 507). He was also in possession of Victim Rufus's drivers license and the credit card ending in 7461 that he used to pay for the U-Haul. (Tr. 508; 581-582). Inside the U-Haul cab, in plain view, was a pistol. Appellant's clothing appeared to have blood on them. Also inside the passenger side of the cab was a substantial amount of blood – so much so that it was essentially dripping out of the vehicle and seeping through the hull components of the truck and coming out of the undercarriage of the truck. (Tr. 382-385; 459; 499). The cabin also contained a bag with four towels, three wash cloths, and a sun visor which all appeared to have blood stains on them. More blood was also found in the cargo area of the U-Haul truck. (Tr. 457-458).

The pistol recovered from driver's seat of the U-Haul was a Car Arms CW-40 handgun. (Tr. 436). It contained an unfired cartridge in the chamber, and two more in the magazine. (Tr. 438). Beyond asking for his name, which Appellant did not provide, Appellant was not questioned and did not speak to the officers. Appellant's identity was ultimately confirmed by fingerprint technology. (Tr. 382-384).

Forensic Analysis

The autopsies of Victim Ashli Haigler demonstrated that she had two gunshot wounds, one to the heart and another to her bowels. Two projectiles were recovered from her body, no soot or stippling was present, suggesting the shooting was committed a distance of more than two feet. (Tr. 736-744). Victim Rufus suffered three gunshot wounds, one to each of his cheeks, and one to his back. Two projectiles were recovered from his body, with evidence of stippling present,

suggesting a shooting as close as possibly nine inches, and up to three feet. (Tr. 749-758). Two fired shell casings were recovered from the crime scene of Ashli's murder. (Tr. 768-771). Two fired shell casings were recovered from Appellant's pocket. (Tr. 507; 572). The State's ballistics expert testified that the four shell casings and the four projectile bullets were all fired by the recovered CW-40 handgun. (Tr. 814-821).

The blood from the U-Haul was determined to be that of Victim Rufus Carmichael. Among the many DNA evaluations performed, the DNA analysis concluded that, via likelihood ratio of 29 octillion, Appellant had three different bloodstains from Victim Rufus on his pants. (Tr. 605-606). Via a likelihood ratio of 28 sextillion, Appellant's fingernail scraping from Appellant's left hand (Item 1.1) contained DNA of Victim Rufus. (Tr. 634-636). GSR tests performed on the inside of the U-Haul cabin were positive, suggesting that the gun was discharged while inside the cabin. (Tr. 727-729).

Cellular data analysis demonstrated that Appellant's phone was active during the hours immediately prior to and after the murder of Ashli Haigler. *Of particular importance, Appellant's phone left an outgoing voicemail on Victim Rufus's phone at 4:02am.*[5] (Tr. 703). The tower sector data demonstrated that Appellant's phone was in the area of Victims' home. (Tr. 705). Based on the tower and sector data, expert Houck testified that the movement of the phone also demonstrated that Appellant's phone left the West Columbia area and continued to get closer to the Columbia area and his home at 5757 Koon Road, as time progressed between 4:00am and 4:16am. The records also demonstrated that Appellant's phone called his girlfriend, Jessica Edwards' xxx-5965

[5] In light of the *many* shortcomings of Appellant's testimony and explanation of events, he claims to have lent his phone to Rufus because Rufus left his phone at home. This leaves no logical reason that Rufus would then call his own cell phone a couple of hours later. Nor did Appellant have an explanation for why Rufus would be repeatedly calling his girlfriend, Ms. Edwards.

number multiple times during that time frame. (Tr. 703-715). Lastly, the cellular data provided a text message history between Appellant and Victim Rufus on March 12, 2021, which reflected Victim Rufus's concern over Appellant's mental health and drug use. (Tr. 693-696).

Appellant's Case-in-Chief at Trial

Appellant took the stand and testified in his own defense. He testified that in addition to Ms. Edwards needing the U-Haul for moving furniture, he needed it to move an engine for his business and expected to do so with his Rufus on March 13th. (Tr. 860-861). He claims that the dispute with his brother during this time was the result of his Rufus doing poor work on a vehicle repair and not owning up to it. (Tr. 858-859). Appellant testified Victim Rufus showed up at his house at approximately 2:15am on March 13, 2021. Appellant claims Rufus was upset with Ashli, and asked to borrow both his cell phone and the U-Haul. He testified that Rufus had a pistol and was accompanied by a man he knew as Alonzo. Appellant testified that his understanding was that Victim Rufus was "supposed to get rid of Ashli and her things." He claims that the two men left with Alonzo driving and Rufus in the passenger seat, after which he went back to bed. (Tr. 867-869).

He testified that he then woke up "in the morning, that afternoon" and saw that the U-Haul had been returned. He proceeded to get in the U-Haul to leave his house at 3:00pm and sees blood everywhere. Appellant claims that he panicked. He had no other explanation for why he put the cell phone back in his pocket, why he put the spent shell casings in his pocket, why he did not call the police, and why he chose to try and drive the U-Haul in its bloody condition. Appellant testified that the reason he was in possession of Rufus's drivers license was because his license was suspended, and that since they look a lot alike, they often share a license when the other is dealing with a suspended license issue. (Tr. 855-856). Appellant testified that the reason there was a large

hole in his front yard was because he had a dead tree he wanted to dig up and remove. (Tr. 863). Appellant also testified that he "did not see" the pistol sitting in the open in the front seat of the U-Haul, and says that he got Victim Rufus's DNA under his fingernails when he moved one of the bloody rags in the U-Haul cabin. (Tr. 888; 893).

STANDARD OF REVIEW

"Rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party." *State v. LaCoste*, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001). "Whether a statement is admissible under the excited utterance exception to the hearsay rule depends on the circumstances of each case and the determination is generally left to the sound discretion of the trial court." *State v. Burdette*, 335 S.C. 34, 44, 515 S.E.2d 525, 530 (1999). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Halcomb*, 382 S.C. 432, 438, 676 S.E.2d 149, 152 (Ct. App. 2009). An appellate court "does not reassess the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Id.* "A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception, and that determination is left to the sound discretion of the trial court. *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an

insubstantial error that does not affect the result of the trial is considered harmless." *State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011).

ARGUMENT

I. The trial court did not err in permitting child witness R.C. to testify while Appellant watched via CCTV.

The trial court did not err in permitting child witness R.C. to testify while Appellant watched in a separate room via CCTV, pursuant to S.C. Code of Laws §16-3-1550(E). Appellant did not lose any constitutional rights and his defense and representation were not impeded in any way. Moreover, the trial court properly considered the case law on the issue, reached factual findings under the framework of the law, and provided a proper and well supported decision to allow special procedures for R.C.'s testimony.

The resolution reached by the trial court did not detract from Appellant's constitutional rights under the Confrontation Clause.

> The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The right of confrontation "is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." *State v. Martin,* 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility.

State v. Dinkins, 339 S.C. 597, 601, 529 S.E.2d 557, 559 (Ct. App. 2000), aff'd, 345 S.C. 412, 548 S.E.2d 217 (2001). The arrangement reached in this case was that R.C. would testify in open court, in person, in front of the judge and jury, and be subject to cross-examination by Appellant's trial counsel. Appellant was temporarily moved to a different room where he was able to watch the testimony given, and was assigned a second attorney to facilitate communications to his attorney during R.C.'s testimony. Under the circumstances of this case, Appellant was

represented by counsel and was not undertaking any self-representation at trial. Moreover, the trial court went to great lengths to make sure that Appellant had a second attorney assigned to ensure that Appellant could communicate with his trial attorney during the testimony offered by R.C. This effectively provided him the same abilities as if he were sitting next to counsel in the courtroom. Arguably, under these circumstances it is difficult to even argue that the witness actually "testified outside the presence of the defendant" in any materially significant way. (Tr. 200-206). Regardless, the trial court heard appropriate testimony for consideration under § 16-3-1550(E), made a factual finding that R.C. was a youthful witness requiring special dispensation due to his trauma, and the record supports that finding.

The case most closely reflects the facts, findings, and holding of *State v. Carter*, 433 S.C. 352, 857 S.E.2d 910 (Ct. App. 2021). Therein, the 12 year old victim was shown to suffer from PTSD resulting from alleged sexual abuse by her stepfather. The court heard from victim's therapist regarding her PTSD diagnosis and symptoms, victim's fear of the defendant, and the possibility of victim "freezing" in defendant's presence and being unable to testify. The court heard similar testimony from the mother, and asked two question of the 12 year old witness herself about her ability to testify in defendant's presence. Carter challenged that victim was too old to qualify under the statute. He further argued that considering the inconsistent and insufficient testimony offered at the hearing, the record did not demonstrate a need for 16-3-1550(E) dispensation. The Court of Appeals relied on *State v. Murrell*, rejected Carter's arguments, and noted that it found no abuse of discretion in the matter.

"An 'adequate showing of necessity' exists when the special procedure is needed to protect the child's welfare, when the child would be traumatized by the defendant's presence, and when the child's emotional distress caused by the defendant's presence is 'more than mere nervousness

or excitement or some reluctance to testify.'" *State v. Carter*, 433 S.C. 352, 358, 857 S.E.2d 910, 912 (Ct. App. 2021) (citing *State v. Lewis*, 324 S.C. 539, 545, 478 S.E.2d 861, 864 (Ct. App. 1996) (quoting Craig, 497 U.S. at 856–57, 110 S.Ct. 3157). The Court of Appeals found that "[t]he trial judge made precisely these findings and explicitly grounded them on testimony." *Id.* The Court of Appeals went on to say that "Carter's argument that 'the overall testimony here did not justify such an extreme measure' of denying face-to-face confrontation" was insufficient. *Id.* at 358. The Court held: "We are not permitted to re-weigh the testimony. There is evidence supporting the judge's decision, and thus no abuse of discretion." *Id.*

With careful consideration of the case at hand, the same result arises. The trial court learned that R.C. had just turned seven years old and was five at the time of the crime. The trial court heard from R.C.'s licensed therapist, Hannah Hucks, who testified that she has formally diagnosed R.C. with PTSD resulting from the crimes committed by Appellant. She described the myriad of symptoms he has experienced as a result, the progress that had thus far been made in his care, and the crucial endeavor of prevention R.C. from being further exposed to the individual who has caused his PTSD. (Tr. 109-117). She testified that R.C. was "extremely nervous" about testifying. She opined that R.C. would likely experience a severe setback in his recovery, expose him to recurring flashbacks, and otherwise be detrimental to the management of his symptoms if he were to be forced to testify in front of Appellant. Moreover, Ms. Hucks also expressed concern that being forced to testify in Appellant's presence might also potentially impact his ability to even communicate and testify at all. (Tr. 118-122).

The trial court then heard from Rachel Alston, R.C.'s grandmother. She shared Ms. Hucks' concerns, reiterated R.C.'s fear of Appellant, and reiterated the symptoms that R.C. has exhibited since the crime.[6] (Tr. 123-126).

Specifically addressing Appellant's argument that "the trial court was not presented with strong, specific, and persuasive evidence ... that R.C. would experience harm" and that "no overwhelming or specific evidence was provided that he had a direct fear of testifying in the presence of Appellant and would suffer detrimental harm if required to do so," Respondent would reference the following excerpts from Ms. Hucks' and Ms. Alston's testimony, respectively.

> THE WITNESS: Okay. So your question is who had caused the trauma?
> BY MS. CAVANAUGH:
> Q Right. Why was Rayvon experiencing the trauma?
> A So according to Rayvon, he told me was that his Uncle Jason had killed his mother and his father.
> Q So part of the trauma therapy is avoiding exposure, you said?
> A Yes.
> Q To who? To what?
> A It would be to Uncle Jason in this case, avoiding that exposure.
> Q What do you think -- what would be -- what do you believe the consequences of having Rayvon testify in front of the defendant would be?
> A I believe that there is a very strong possibility that there would be a severe step back in his symptoms if he were to have to testify in front of the defendant. Right now, Rayvon is making really good progress in his therapy, but I do believe if he does have to testify in front of the defendant that he's likely to become very symptomatic again and, most likely, he will start again with the intrusive symptoms, having flashbacks, having the negative arouse, the sadness all the time, feeling like he constantly has to watch his back all the time, just always feeling scared all the time, just always getting pictures of what happened in his head over and over again. I believe that it is very, very likely that that will happen

[6] The trial court also had R.C.'s school records, held under seal, on the topic. (Tr. p. 127).

if he has to testify in front of the defendant.
Q Do you feel that that would be lessened if he didn't have to see the defendant in the courtroom?
A Yes.

(Tr. p. 117-118) (Testimony of Ms. Hucks).

Q Do you have concerns about Rayvon testifying in front of the defendant?
A Very much so.
Q And what are your concerns based on?
A Well, my concerns are based on, at the house, he just say he did not ever want to say, as he said, Uncle Jason again. It makes him nervous. One time, he had start pulling -- he stares out and he states that he's seeing what happened to his mom as I tried to break his stare.
Q So in other words, it appeared to you he was going back to the incident?
A All the time, yes.
Q Have you seen that on more than one occasion?
A A lot.
Q Do you believe that Rayvon -- not considering whether the defendant is present or not can articulate what observed that night?
A He can articulate what was observed that night precisely, but if he is present, I don't think he would be able to.
Q If who is present?
A If Jason is present.
Q Has Rayvon himself expressed any concerns about being around the defendant to you?
A He says he is scared of him and he never wants to see him again.
Q So, again, based on Rayvon being under your care for the past year-and-a-half, what is your concern -- what is your concern that could happen if he were forced to testify in front of the defendant while he's sitting there.
A That, actually, will just put him completely back in a state that he was in when I got him, total fear, not wanting to go outside, not wanting to be around others because he don't know who is who. He is just scared. He won't go outside and play much now because he don't know who is who, or granny, where is that car coming from? He asks those questions to be seven years old.

(Tr. 124-125) (Testimony of Ms. Alston).

The trial court found that in light of the evidence presented it was convinced that R.C. would be traumatized by having to face the defendant during his testimony. The court noted that the law provides exception for sensitive witnesses, such as the young and vulnerable, where undue damage would result beyond "mere nervousness or excitement of the court process." With specific reference to *State v. Carter*, the trial court found that forcing R.C. to testify in the physical presence of Appellant would likely cause a significant relapse in the child's condition, and leave him to experience further flashbacks, nightmares, and the like. The court held that he found the testimony of the witnesses clearly demonstrates the satisfaction of 16-3-1550(e) and ruled that R.C. would not be forced to testify in Appellant's presence. The trial court then made arrangements that were effectively identical to those taken in *Carter*. (Tr. 128; 200-206). The record is clear, R.C. harbors a state of fear concerning Appellant, and significant detriment would come to his mental health and recovery if dispensation under 16-3-1550(E) had not been granted. The trial court was completely within its discretion to render the findings and rulings it did. The findings of fact and ruling by the trial court were proper under state law, and no violation of the Confrontation Clause arose. See *State v. Murrell*, 302 S.C. 77, 78, 393 S.E.2d 919, 920 (1990); *Maryland v. Craig*, 497 U.S. 836, 841–42, 51, 110 S. Ct. 3157, 3161, 166 111 L. Ed. 2d 666 (1990).

Moreover, the cases relied upon by Appellant do not support his arguments due to the distinguishing facts of those cases and the law being applied. In *Bray*, the facts demonstrate that the "State moved to have the victim testify via closed-circuit television (CCTV), out of the presence of Bray and the jury." *State v. Bray*, 342 S.C. 23, 26, 535 S.E.2d 636, 638 (2000). Moreover, the holding in *Bray* to affirm in result was strictly due to the trial court's failure to make case-specific findings for its ruling. Here, R.C. testified before the jury and the court made specific findings of fact based upon the testimony presented at the pretrial hearing and relied upon those

findings in ruling that R.C. would be permitted to testify outside Appellant's physical presence. (Tr. 128; 202).

Murrell, though it provides the applicable legal standard, is likewise limited in its factual comparison, as "Appellant challenge[d] the admission of the *minor child's videotaped testimony at trial in lieu of in-court testimony* in appellant's presence." *State v. Murrell*, 302 S.C. 77, 78, 393 S.E.2d 919, 920 (1990) (emphasis added). Such did not take place in this case. Moreover, Appellant attempts to rely upon these cases ***as a means of finding error by the trial court for not personally interviewing the child.*** No such legal standard exists. In fact, *Murrell* was decided without the child being questioned, and *Bray* explicitly denotes the Court's desire not to place a strict evidentiary requirement on this matter.[7]

Maryland v. Craig is the controlling authority for this matter as it relates to the Confrontation Clause, and in *Craig* the Supreme Court found no violation of the Confrontation Clause where public policy demonstrated the need for vulnerable witness dispensation and where the reliability of the testimony is maintained. The Supreme Court noted that:

> Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.
>
> . . .
>
> Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the

[7] Appellant's quoted language does not originate from the South Carolina Supreme Court's opinion *State v. Bray*, 342 S.C. 23, 32, 535 S.E.2d 636, 641 (2000), but from the Court of Appeals decision which was affirmed in result only.

> defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.

Maryland v. Craig, 497 U.S. 836, 841–42, 51, 110 S. Ct. 3157, 3161, 166 111 L. Ed. 2d 666 (1990). Here, the public policy need was met and the reliability of the testimony is not only maintained, it is practically unchanged in any way. The trial court's arrangements, along with its factual findings support its decision that the State had met its standard under 16-3-1550(E) to protect vulnerable young witnesses and the same finding is proper under federal law.

Additionally, and in the alternative, Respondent would argue that even if error were to be found in this matter, such error was harmless. "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless." *State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011). Appellant has failed to demonstrate how an alleged error in the dispensation provided to R.C., which did not materially affect Appellant's rights, reasonably led to a differing result at trial.

II. The trial court did not err in admitting the disputed evidence under excited utterance, present sense impression, and then-existing mental condition.

Appellant asserts that the trial court abused its discretion in admitting certain hearsay statements as permissible under the exceptions set forth in Rule 803 of the South Carolina Rules of Evidence. Appellant's arguments fail to demonstrate an abuse of discretion by the trial court in admitting the hearsay statements and conflates the elements for exceptions to hearsay.

"The hearsay exceptions of present sense impression and excited utterance have replaced the *res gestae* hearsay exception in South Carolina law." *State v. Burdette*, 335 S.C. 34, 41, 515 S.E.2d 525, 529 (1999). Rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party. *State v. LaCoste*, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001). Hearsay included within hearsay is not necessarily inadmissible; such may be admitted if each part of the combined statements satisfies an exception to the hearsay rule. *See* Rule 805, SCRE. *State v. Prather*, 429 S.C. 583, 610, 840 S.E.2d 551, 565 (2020).

a. R.C.'s statement that his mommy is dead and that Uncle Jason killed her

Looking at the rule, there are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. *Ladner*, 373 S.C. at116, 644 S.E.2d at 691. Here, all three elements are met concerning R.C.'s statement, regardless of whether its admission is challenged via Officer Davis, via body-cam footage, or via R.C.'s direct testimony. (See Tr. 159-160; 168; 220-221). R.C.'s statement is simple: "My Mommy is dead. Uncle Jason shot my mommy." The circumstances of the statement and Officer Davis's testimony demonstrate that R.C. was in fact "frantic". Thus, his statement was 1) related to a startling event or condition, 2) it was made while R.C. was under the stress of excitement, and 3) the stress of excitement was

caused by the startling event. See *State v. Burdette*, 335 S.C. 34, 43, 515 S.E.2d 525, 530 (1999)(noting that the passing of an hour was insufficient to remove the condition of excitement from the witness); *State v. Burroughs*, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997) ("[T]he mere fact that a statement was made some time after the incident occurred does not mean the statement cannot qualify as an excited utterance, provided that the circumstances surrounding the statement indicate its reliability.").

Nowhere in the statement by R.C. does he purport to say what someone else said. However, Appellant attempts to argue against R.C.'s basis of knowledge for his statement, claiming that since he did not personally see the shooter, his statement cannot meet the excited utterance standard. No such limitation exists, and it would appear that Appellant has conflated an element necessary for present sense impression with those needed for excited utterance.[8] The statement is admissible, and while the basis of knowledge for which the statement is made can be attacked on cross examination to suggest to the jury that it be given little weight, that does not render the statement inadmissible as an exception to hearsay under Rule 803(1).

Secondly, even if this issue were to be viewed as a hearsay within hearsay type of matter (which Respondent argues it is not), Ashil's statement of "Jason, where is my baby's daddy?" is likewise admissible as an excited utterance.[9] "A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception,

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[8] Appellant misinterprets the assertion from *State v. Hill* that requires firsthand information. Such addresses the fact that a witness cannot provide an excited utterance to a circumstance that they did not actually experience. R.C. was present for the murder, the fact that he could not see his Uncle Jason does not render him no longer "an actual witness to the event." In any case, he can and did testify at trial to the same assertion, rendering this argument about hearsay ultimately unprejudicial.

[9] Appellant has not challenged on appeal the trial court's ruling on the admission of Victim Ashli's statement.

and that determination is left to the sound discretion of the trial court." *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). The record demonstrates that Victim Ashli was concerned and in a hurry based on R.C.'s testimony and the fact that these events took place at 4:00am. The record also demonstrates that the basis for her concern and efforts to hurry were because they needed to look for his daddy who had disappeared. These facts are further bolstered by Tiara Haigler's testimony which demonstrated that Ashli was specifically seeking out Appellant to ask about Rufus's disappearance. Lastly, the video evidence shows that Ashli purposefully followed the U-Haul to where this confrontation with Appellant ultimately ended up taking place. As such, Ashil statement of "Jason, where's my baby's daddy?" was related to the startling event of having her baby's daddy disappear in the middle of the night less than an hour before her confrontation with Appellant, was made under the stress of trying to find her baby's daddy, and the stress she was experiencing was "caused" by the disappearance of her baby's daddy.[10]

Appellant's reliance upon *Burroughs* and *Hendricks* do not support his arguments. *State v. Burroughs* is not applicable, because the ruling reached by the Court of Appeals was that the nearly ten hours of lapsed time between the event and the reporting of the event to nurse and police officer could not satisfy the present sense impression standard, and that this timeframe for reflection by the victim rendered excited utterance inapplicable as well. *State v. Burroughs*, 328 S.C. 489, 500, 492 S.E.2d 408, 413 (Ct. App. 1997) The basis for these rulings bear no similarity to R.C.'s statement to police in this case. In *Hendricks*, the 911 recording provided two levels of hearsay: the first being Victim's statement to her mother, Lisa Gilstrap, and the second being Gilstrap's

[10] Respondent would also argue that Ashil's statement would constitute a present sense impression, as she is 1) identifying the person she is talking to and asking where her baby's daddy is, 2) the statement/question was made contemporaneous with the events of looking for the disappeared victim, and 3) she personally experienced Victim disappearance that night after investigating a noise and immediately attempted to find him.

statement to the 911 operator. The court found the first level of hearsay was admissible as an excited utterance by the daughter, but because Gilstrap was not present to see the rape crime occur her statement could not qualify for the exception. It was likewise not a present sense impression because, the actual rape was not contemporaneous to Gilstrap's 911 call reporting it. *State v. Hendricks*, 408 S.C. 525, 532-34, 759 S.E.2d 434, 438 (Ct. App. 2014). *Hendricks* is simply not applicable to the facts of this case.

The trial court's admission of R.C.'s statement was well within its discretion and was indeed proper under the law.

b. The trial court did not err in admitting the text message evidence under the state of mind exception.

The trial court admitted a group of text messages which were shared between Victim Rufus and Appellant the day before the murder. The trial court did not abuse its discretion in admitting the disputed texts messages under the state of mind exception to hearsay.

The text messages in question follow just minutes after a verbal conversation was held between Victim Rufus and Appellant via the truck's Bluetooth speakers. (See Tr. 692-693). Ms. Dreher was able to hear this conversation and testified that it included Appellant's threat to Victim Rufus that he would kill him. (Tr. 359-361). The State then sought to admit the disputed text messages in order to demonstrate Victim's state of mind as to how he was going to handle his brother in light of recent communications. The substance of the text messages is as follows:

> (Texts from Rufus)
> It's time for you to take a break again, dog.
> You're clearly not thinking right at this time. I love
> you, Bruh. Bye. You're too old to be regressing over and
> over again. Please Jason, take a break, get your mind right and
> continue to prosper in life. That's all I have to say.
> And dog, jail is not an illusion. Your mindset you have
> right now is the only illusion. I wish you well. Peace.
> And I'm sure you know you ain't fucking nothing up over
> here, so just get your mind right, little brother. Love

you man.

(Texts from Appellant)

No, the brainwash has stopped. I see clearly now. You be safe. We fight different. I already fucked you up.

(Text from Rufus)

Who's acting like a bitch now? You

(Text from Appellant)

I came direct. You chose a sneak attack.

(Text from Rufus)

Ain't nothing sneaky about me. I'm going to end the talking because it's the dope. I love you, little brother.

(Tr. 693-695).

The State sought to have this evidence admitted to demonstrate Victim Rufus's plan as it relates to dealing with his brother and his mental state following the threat. (Tr. 671; 674). The trial court found that the texts were admissible because it provided context following Appellant's threat against Victim Rufus's life that had just occurred, and the Victim's existing emotional state of mind in response to those threats. (Tr. 679). Appellant claimed at trial that most of the texts do not demonstrate the state of mind of the victim. However, that is clearly not the case. Victim Rufus's first statement demonstrates his state of mind concerning his brother's behavior and that his brother is not in a good place and "needs to take a break." The second is a clear indication of love. The third is an expression of hope, or a plea for his brother to get his mind right because he had concerns that jail may await his brother's behavior. The fourth is a clear instance of love and wishing his brother well. The fifth is further indication of what Rufus felt was poor behavior from his brother, and the sixth is both another confession of love along with the demonstration that his brother was not prepared to continue arguing with him because Appellant was under the influence of drugs. None of these matters run afoul of the limitation that 803(3) "does not permit a statement of memory or belief to prove the fact remembered", or that "the testimony improperly reveals the reason for [his] state of mind" (i.e., that Appellant had threatened Rufus.) That fact was already

admitted, and therefore these texts do not offend the limitations of Rule 803(3). See *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 510 (1999). As the court pointed out in its ruling to allow the evidence as an exception to hearsay, the text messages provide the *context* and the mental state of Rufus in response to the previous threatening conversation. (Tr. 679).

Collectively, this all demonstrated the mental and emotional state of Victim Rufus of 1) loving his little brother and 2) wanting to separate himself from Appellant with the hope that Appellant gets help or in some way helps himself by taking a break and getting his mind right. And, as the court noted, they provide important context of Victim Rufus's state of mind having just had his life threatened by his little brother. Rufus clearly did not respond with aggression and demonstrated a desire to no longer communicate with Appellant, given his mental state. The texts were clearly admissible for that purpose. In any case, the texts messages are of no real prejudice to Appellant as it does not convey any intent to harm or otherwise contribute to the evidence of guilt. Appellant argues that "the testimony presented circumstantial evidence of Rufus' state of mind towards his brother, it was primarily used to wrongly substantiate and provide context for the supposed reason for Rufus' state of mind (i.e., that witness Miko Dreher testified Appellant had threatened Rufus during a previous phone call)." However, since the texts messages do not convey a sense of "fear" by Rufus, Appellant cannot demonstrate that his brother's expressions of love, and hope of recovery are somehow incriminating for Appellant in his murder trial.

For the above stated reasons, the trial court did not abuse its discretion in admitting the various evidence, as each was supported by an applicable exception to hearsay. Indeed, the rulings of the trial court were proper. However, and in the alternative, if error were to be found in the court's hearsay rulings discussed above, such would constitute harmless error. "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result.

Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless." *State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011). While Respondent maintains that each of the trial court's rulings was proper, in light of the overwhelming amount of evidence set forth at trial and summarized herein, the alleged errors raised by Appellant do not rise to a level that would have reasonably affected the result at trial.

III. Appellant's claim of improper pitting of witnesses is not preserved for review, is largely not indicative of a pitted witnesses paradigm, and falls well short of establishing prejudice to warrant reversal.

Appellant's claim that the solicitor's questions constituting the pitting of witnesses is not preserved for appellate review because no objection was raised. As such, the issue cannot be reached on appeal. In the alternative, the nature of most of the solicitor's disputed questions did not force Appellant to attack the veracity of an adverse witness, it merely sought to address the inherent lack of credibility that Appellant's explanations carried against the evidence presented against him, and Appellant cannot otherwise demonstrate prejudice so as to warrant reversal.

Appellant's third issue is not preserved for appellate review for lack of an objection to the complained of questions, and Appellant properly concedes this issue. "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court." *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." *Id.* "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *Id.* Similarly, preservation requirements cannot be circumvented by claiming error on the part of the court for not *sua sponte* addressing an issue at trial. See *State v. Peay*, 321 S.C. 405, 411, 468

S.E.2d 669, 673 (Ct. App. 1996). Our Court of Appeals has also specifically ruled that the failure by a defendant to raise objection to solicitor's questioning of witness on the grounds of pitting witnesses, renders the issue unpreserved for appellate review. *State v. Fletcher*, 363 S.C. 221, 257, 609 S.E.2d 572, 591 (Ct. App. 2005), rev'd on other grounds, 379 S.C. 17, 664 S.E.2d 480 (2008).

Appellant's invitation for this court to take up the issue despite the lack of preservation, fails as a matter of law, but it also fails in light of a practical consideration of the circumstances. Respondent disagrees with Appellant that a majority of the complained of questions actually constitute a pitting of witnesses. (*Infra*). Regardless, having an appellate court consider this issue would allow Appellant to benefit greatly from his own failures to object by compounding his alleged legal issue in the hope of satisfying his nearly insurmountable burden of proving prejudice. (*Infra*). Here, had counsel believed the questions inappropriate he could have raised objection, *and if successful, he would have prevented the repetition of the style of question he now argues was improper.* By failing to challenge the solicitor's first question, or any subsequent question, he gains the benefit of presenting a compounded legal issue that would not otherwise have come to exist. This cannot be permitted and it highlights one of the many fundamental purposes of preserving legal issues at trial.

The nature of the disputed questions from the solicitor is also not a cut and dry matter. "[I]t is improper for the solicitor to cross-examine a witness in such a manner as to *force* him to attack the veracity of another witness." *Thrift v. State*, 302 S.C. 535, 537–38, 397 S.E.2d 523, 525 (1990) (emphasis added). Improper pitting of witnesses constitutes reversable error "only if the accused was unfairly prejudiced." *Id.* Here there are only a few instances where the Solicitor's question forced Appellant to comment on the veracity of the State's witness. These include the question regarding what name he goes by, whether Ms. Edwards lied about his effort to begin

digging a hole in his yard, and whether Ms. Edwards was lying about him pointing a gun at her head and making threats against his brother Rufus.[11] The rest of the questions simply asked whether Appellant's explanation offered on direct examination was a matter of coincidence to the testimony offered during the State's case-in-chief. Such does not force the Appellant to testify as to the veracity of another witness. He may respond how he wishes. His response *could* be asserted as a matter of coincidence or he can provide some other explanation. Nothing about these questions forced him to confirm or deny the veracity of the other witness's testimony. It is merely a leading questions cross examination of Appellant's testimony given on direct examination.

Additionally, a few of Appellant's disputed questions are entirely disconnected from the issue of pitted witness. Appellant's bullet point four is already admitted to by Appellant: he confirmed that he purchased a shovel and he confirmed that he was digging a hole. (Tr. 864; 895). There is no disagreement in the stated testimonies. Similarly, bullet point seven asks whether it was "just coincidence' that Appellant's phone had placed calls to Ms. Edwards despite Appellant's testimony that his brother had his phone. That is not a pitted witnesses testimonial dispute. The cell phone records confirm it as evidentiary *fact.*[12] (Tr. 703-715). The gist of Appellant's argument is not a matter of pitted witnesses impacting credibility, but pitted evidence against improbable explanation. The problem that really exists here is that Appellant's explanations for things are so far-fetched and lacking plausibility that any question about any matter in this case presents at least some issue of Appellant having to respond to the testimony and evidence against him.

Lastly, and simply, even if all of Appellant's disputed questions were to be considered

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[11] The first, fifth, and sixth bullet points set forth in Appellant's brief.

[12] For the same reason, Appellant's additionally disputed matters from Tr. 898, ll. 1, 5, 7, 10, 20, 23; Tr. 899, ll. 19.; Tr. 928, ll. 14, 18 are not improper. They each deal with undisputed facts or are permissible closing arguments constituting reasonable inferences from the evidence.

improper – which Respondent does not concede – Appellant would still fail to demonstrate prejudice resulting from these questions. Disregarding *all* witness testimony, the facts demonstrate 1) the U-Haul was rented and paid for by Appellant, 2) video evidence shows the U-Haul in Victims' neighborhood at 4:00am, 3) video shows the Toyota Tundra driven by Ashli following the U-Haul into the Malcom and McCaw area around 4:43am, 4) gunshots are reported at that time, 5) the U-Haul is seen fleeing the scene at 4:46am without the truck following, 6) the U-Haul is seen driving to the location of the Victim Rufus's body after an appropriate amount of time needed to travel the distance between the two crime scenes, 7) the U-Haul is seen driving away from the location of Rufus's body six minutes later, 8) the U-Haul is soaked in Victim's blood, 9) Appellant did not call 911 after discovering the blood, 10) Appellant is arrested while driving the U-Haul away from his home, 11) Appellant had Rufus's blood/DNA on his pants and under his fingernails, 12) Appellant was in possession of Rufus's drivers license, 13) Appellant had ballistically matched shell casing to both murders in his pocket, 14) Appellant "failed to see" the murder weapon visibly lying in the seat of the U-Haul, and 15) his cell phone records coordinate with the movements of the U-Haul that night. Prejudice cannot be established in light of such overwhelming evidence.

For the reasons set forth, Appellant's third issue on appeal is not preserved for review and is otherwise without merit. Respondent also argues that if error were to be found regarding the alleged pitting of witnesses, such error was harmless under the law. (*Supra*).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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