THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARLES JASON CARMICHAEL,

APPELLANT

APPELLATE CASE NO. 2022-001717

FINAL BRIEF OF APPELLANT

Yasmeen Ebbini
Nelson Mullins Riley & Scarborough LLP
1320 Main Street/ 17th Floor
P.O. Box 11070
Columbia, SC 29211
(803) 255-9724

ROBERT M. DUDEK
Chief Appellate Defender
S.C. Commission on Indigent Defense
P.O. Box 11589
Columbia, SC 29211
(803) 734-1330

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

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

III. Whether the solicitor committed a flagrant error by improperly pitted Appellant against adverse witnesses on cross-examination constituting prejudice and warranting review.

STATEMENT OF THE CASE

On November 17, 2021, a Richland County Grand Jury indicted Appellant for two counts of murder, and two counts of possession of a weapon during the commission of a violent crime (R. pp. 295, 299.) Appellant's case was called to trial on November 28, 2022, before the Honorable Clifton Newman and a jury (R. p. 1.) Senior Assistant Solicitor Kathryn Cavanaugh, and Assistant Solicitors Paul Walton and Grayson Hill represented the state (R. p. 1.) Deon O'Neil represented Appellant (R. p. 1.)

On December 2, 2022, the jury found Appellant guilty as indicted (R. pp. 292-93.) He was sentenced to life imprisonment on each charge of murder and five years' imprisonment on each weapons offense, to be served concurrently (R. pp. 297, 303.)

This appeal follows.

STATEMENT OF FACTS

On March 13, 2021, Ashli Haigler ("Haigler") and Rufus Carmichael ("Rufus") the decedents, were awoken in the middle of the night by knocking on the door. Rufus went to answer the door and thereafter disappeared from the home. After noticing Rufus was gone, Haigler went to wake up her son R.C., who was five years old at the time, and put him in the car while she left the home to locate Rufus. Surveillance footage from the intersection of Pine Straw and Two Notch Road showed Haigler in Rufus' Toyota Tundra following a U-Haul Truck and turning right onto Albritton Road at 4:43 in the morning. At approximately 4:46, the footage shows the U-Haul returning down Albritton Road and turning onto Two Notch towards the City of Columbia, no driver was visible in the footage.

Investigator Allison Davis with the Richland County Sheriff's Department responded to a 911 dispatch to the intersection of McCaw Road and Malcom Drive in Richland County where she observed the Toyota Tundra and R.C. hanging out the back window of the vehicle. Upon approaching the car, Davis spoke to R.C. and observed Haigler in the front seat with a gunshot wound to her chest. Law enforcement responded and began to process the scene as a homicide while contacting R.C.'s aunt and grandmother and interviewing R.C. regarding the shooting. Additional surveillance footage from a gas station in Aiken County showed a U-Haul passing the gas station at 5:28 in the morning traveling in the direction Rufus' body was eventually located the next day. At 5:34 am, surveillance footage shows the U-Haul returning to the I-20 interstate back to Columbia.

During the homicide investigation of Haigler, law enforcement was advised of Appellant's address and potential that he could be at home while they searched for the U-Haul. Law enforcement went to Appellant's home and observed a U-Haul in the back driveway. They then

began surveillance on the property. A few hours later, Appellant began to drive the U-Haul down Koon Road when the special response fugitive team initiated a traffic stop and placed Appellant into custody. Law enforcement observed a pistol in plain view in the cab of the truck and what they believed to be blood on Appellant's clothing. Two shell casings were found in Appellant's pocket which matched the pistol observed. The projectiles recovered from Haigler and Rufus additionally matched the pistol.

Law enforcement later executed search warrants for the homes of Haigler and Rufus, and Appellant but did not find any evidence or signs of a crime scene. A search warrant was later executed for the U-Haul. During the search, numerous blood stains were documented inside the vehicle and several items of evidence were collected from a white plastic bag in the cab of the truck which contained towels, washcloths, and a sun visor covered in a reddish-brown liquid which was later determined to be blood. Swabs of these stains were collected by crime scene investigators and submitted to the South Carolina Law Enforcement Division (SLED) for analysis. The blood was determined to be Rufus Carmichael's.

After Appellant was arrested, his clothing was collected and swabs and cuttings from various items were submitted to SLED for DNA analysis. The CW-40 handgun removed from the U-Haul by law enforcement which matched the projectiles recovered from the decedents was additionally swabbed and processed. Stains from Appellant's pants was determined to be a DNA match for Rufus Carmichael, the remainder of Appellant's clothing was not forwarding for DNA testing. DNA results from the handgun resulted in a mixed allele result containing four DNA profiles. Rufus' DNA was present on the gun, but there was not sufficient DNA to say Appellant's DNA was conclusively or statistically present on the gun.

ARGUMENT

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "The admission or exclusion of evidence is left to the sound discretion of the [circuit court], whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law ...." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). "The [circuit] court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996).

A. 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.

The Confrontation Clause of the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amen. VI; *Maryland v. Craig*, 497 U.S. 836, 844 (1990). The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Id.* While there is no *absolute* right to a face-to-face meeting with witnesses against a defendant at trial, any exception to the right "would surely be allowed only when necessary to further an important public policy." *Id.* at 845.

Protecting a child witness in the context of a criminal trial has been widely recognized as a significant interest warranting deviation to testifying under the confrontation clause, however in

recognizing how important the confrontation right is, deviation from traditional testimonial procedure requires specific findings by the court. As noted by the Supreme Court in *Craig*,

> The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma.

Id. at 856-7.

Here, Appellant's Sixth Amendment right to confrontation was violated when the trial court erred by permitted R.C. to testify outside the Appellant's presence based on insufficient evidence R.C. had a direct fear of Appellant. As a result, R.C.'s testimony was the catalyst for a snowball of hearsay which was the sole evidence identifying Appellant as involved in the deaths of Appellant's brother and Ashli Haigler. These actions prejudiced Appellant and constituted reversible error.

I. <u>There was insufficient evidence to support conducting R.C.'s testimony via CCTV, violating Appellant's confrontation rights.</u>

In addition to the constitutional protections and requirements prescribed by *Craig*, South Carolina Code § 16-3-1550(E) codifies the State's interest in protecting minor witnesses while testifying in legal proceedings. *State v. Murrell,* 302 S.C. 77, 393 S.E.2d 919 (1990); *State v. Bray,* 342 S.C. 23, 535 S.E.2d 636 (2000). Notably, § 16-3-1550(E) does not outline a specific procedure or considerations for the trial court to use when determining whether a minor witness should be permitted to testify outside the presence of the defendant. Rather, the Supreme Court articulated these requirements in *Murrell,* where it stated:

> First, the trial judge must make a case-specific determination of the need for videotaped testimony. In making this determination, the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child. Second, the court should place the child in as close to a courtroom setting as possible. Third, the defendant should be able to see and

> hear the child, should have counsel present both in the courtroom and with him, and communication should be available between counsel and appellant.

Id. 302 S.C. at 80-81, 393 S.E.2d at 921 (footnote omitted). The "*Murrell* test" involves a case-specific and factual inquiry into the necessity for the child to testify via CCTV and the evidence supporting a finding must be more than *de minimis. State v. Bray*, 335 S.C. 514, 517, 517 S.E.2d 714, 717 (Ct. App. 1999).

In *Murrell*, the defendant appealed his conviction for criminal sexual conduct with a minor and alleged his right to confrontation was violated when the victim was permitted to testify via videotape. *Murrell*, 302 S.C. at 78, 393 S.E.2d at 920. The trial court, in considering whether to allow the child to testify via CCTV, took testimony from the child's mother, aunt, and an expert regarding the child's behavior and demeanor following the incident but did not personally interview the child regarding their emotions and comfort with appearing before the defendant in weighing whether the child should be allowed to testify via CCTV. *Id.* at 79, 393 S.E.2d at 920. Despite this, the trial judge viewed the expert's explicit testimony of "the traumatic impact an in-court confrontation [with the defendant] would have on the child" as specific and convincing of the "significant harm" the child would suffer "if he were required to testify in the presence of the Defendant." *Id.* Thus, the Supreme Court upheld the trial court's decision to allow the child to testify on videotape as supported by explicit evidence from the expert and family of particularized fear without requiring the judge interview the child on the issue directly. *Id.* at 78, 393 S.E.2d at 920.

Conversely, in *State v. Bray*, the Court relied in part on *Murrell's* strong suggestion that the trial judge should personally interview the child regarding the impact of testifying before the defendant in ruling whether to permit testimony via CCTV. *Bray* 342 S.C. 23, 535 S.E.2d 636. The Supreme Court affirmed the finding of the Court of Appeals which found insufficient evidence

was presented to show it was necessary for the child victim to testify via CCTV, violating defendant's right to confrontation and prejudicing the defendant. *Id.* at 31, 535 S.E.2d at 640. In *Bray*, the child victim and key witness was five at the time of the alleged abuse and seven at the time she was asked to testify at defendant's trial. The Supreme Court found that although there was evidence indicating the victim was afraid of testifying in the presence of Bray, "there was also more generalized testimony concerning her fear of the courtroom and her relatives. As the trial court failed to set forth case-specific findings mandated by *Murrell*, the matter must be reversed and remanded for a new trial." *Id.* The Court reiterated its holding in *Murrell* that the better practice in cases with minor witnesses is for the trial judge to personally interview the child to determine that testifying in the defendant's presence specifically would have a traumatic effect on the child prior to determining whether use of CCTV is necessary. *Id.* at 31, 535 S.E.2d 641.

> [W]hile *Murrell's* suggestion that the trial judge interview the child is not mandatory, **it was strongly suggested as appropriate in all such cases**. . . we hold that only when the considered testimony is **strong, specific, and persuasive** about the child's fear of the defendant and the harm the child will suffer if forced to testify in front of the accused may the trial judge forego interviewing the child directly.

Bray, 335 S.C. at 523-24, 517 S.E.2d at 719 (Emphasis added). The court held because of the reasons above, there was insufficient evidence to determine the child needed to testify via CCTV. *Id.*

Here, the trial court was not presented with strong, specific, and persuasive evidence to make a finding that R.C. would experience harm if required to testify in the presence of Appellant. In making its determination the trial court heard testimony from R.C.'s therapist Hannah Hucks ("Hucks") and R.C.'s grandmother Rachel Alston ("Alston"), each of which expressed their concern about R.C. testifying, but neither stated with certainty that testifying in front of Appellant would trigger or be harmful to R.C.

Hucks admitted that while she thought there was a possibility that R.C. could experience post-traumatic stress symptoms which would impact his ability to communicate in court, she could not speak to how likely it was that would happen, (R. p. 18, lines 1-7); and additionally, could not state with certainty whether or not R.C. would be unable to communicate what happened even in the presence of Appellant (R. p. 19, lines 6-22.) Similarly, Alton provided generalized testimony that she believed if R.C. were to testify in the presence of Appellant "he may stutter a bit and it may just make him nervous where he can't give the answer that he normally would have given." (R. p. 23, lines 6-11.) Based on this testimony, the evidence presented was insufficient to support use of a CCTV procedure for R.C. because 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.

In circumstances where the evidence presented by parties is non-specific and generalized, our Supreme Court through *Bray* and *Murrell* noted that best practice would be for the trial judge to interview the potential witness and inquire about the particularized harm themselves "in all such cases", rather than rely primarily on expert or familial testimony. Instead, the court here made its determination on general and non-specific testimony from Hucks and Alston. Indeed, the court's only exchange with R.C. was in the context of the competency hearing where R.C. was asked about his age, grade, favorite subjects, what he wanted for Christmas, and what he ate for Thanksgiving (R. pp. 2–5.) R.C. was not asked about his fear of testifying before Appellant nor was Appellant even discussed. As such the court did not follow the strong suggestion set forth in *Murrell* that the trial judge *interview* the child specifically regarding the necessity to testify outside the presence of the defendant, despite the solicitor in this case informing the judge he had the option to do so (R. p. 24, lines 16-21.)

Finally, much like the child witness in *Bray,* R.C. is the only direct evidence linking the defendant to the crime and the only alleged witness to the crime. In *Bray* the court noted the child witness' testimony was the *only* direct evidence of the defendant's alleged crime and therefore her testimony via CCTV was not only a violation of the defendant's right to confrontation, but prejudicial and a reversible error resulting in a reversal of the conviction and a remand for a new trial. *Id.* at 525, 517 S.E.2d at 720. Similarly, the decision to allow R.C. to testify via CCTV as based on insufficient evidence was a violation of Appellant's right to confrontation amounting to a prejudicial and reversible error.

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

The trial court abused its discretion by improperly admitting several instances of hearsay testimony which were prejudicial to Appellant. An abuse of discretion occurs when a trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016). Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE; *see State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) (holding hearsay is defined as an out of court statement offered to prove the truth of the matter asserted). Notably, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. Under the South Carolina Rules of Evidence, hearsay within hearsay is admissible if each level of hearsay satisfies an exception to the hearsay rule. *See* Rule 805, SCRE; *State v. Hendricks*, 408 S.C. 525, 530, 759 S.E.2d 434 (2014).

I. The trial court erred in admitting R.C.'s hearsay testimony as an excited utterance under Rule 803(2), SCRE.

Over objection from counsel, the court improperly allowed R.C. to introduce various hearsay testimony regarding Haigler's statements the night of the incident as an excited utterance exception to the hearsay rule. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" and may be admitted at trial as an exception to the hearsay rule. Rule 803(2), SCRE. The rationale underlying the excited utterance exception is that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." *State v. Dennis*, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999).

Three elements must be met to show a statement is 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 the excitement; and (3) the stress must have been caused by the startling event or condition. *State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). The court must consider the totality of the circumstances in determining whether a statement falls within the excited utterance exception. *State v. LaCoste*, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001); *State v. McHoney*, 344 S.C. 85, 544 S.E.2d 30 (2001). "The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." *LaCoste*, 347 S.C. at 160, 553 S.E.2d at 468 (quoting *Dennis*, 337 S.C. at 284, 523 S.E.2d at 177. However, "[s]tatements which are not based on firsthand information, as where the declarant was not an actual witness to the event, are not admissible under the excited utterance or spontaneous declaration exception to the hearsay rule." *State v. Hill*, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998).

As an initial matter, the trial court improperly admitted the hearsay testimony of both R.C. and investigator Allison Davis ("Davis") regarding statements R.C. made to her at the scene. At trial, Davis testified that upon arriving at the scene where Haigler was shot, she observed R.C. in the vehicle where he provided two statements, the first that his mother was dead, and the second that "Uncle Jason shot my mommy." (R. p. 27, lines 21-25; –p. 28, lines 1-2.) Pursuant to Rule 805, Davis's testimony repeating R.C.'s declaration, which were based on Haigler's statements, constituted hearsay within hearsay under which each level must be covered by an exception to be admissible. At the broadest level, Davis's testimony reiterating R.C.'s statement that "Uncle Jason shot my mommy" was inadmissible hearsay introduced to prove the truth of the matter asserted, specifically that Appellant was the shooter.

In *State v. Burroughs*, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997), the trial court allowed the police officer who first took the victim's statement and a nurse who examined the victim in the emergency room to testify about the victim's statements to them describing the assault. The Court held that "the testimony was hearsay and amounted to impermissible bolstering of the victim's trial testimony." *Id.* Specifically, the Court held that the testimony was "double hearsay, or hearsay within hearsay" and there were no exceptions to the hearsay rule which would support the admission of the challenged testimony. *Id.* at 498 n. 5,492 S.E.2d at 412 n. 5.

Similarly, in *State v. Hendricks*, the Court held that a mother's statement to a 911 operator repeating her daughter's statement detailing the sexual assault she experienced was inadmissible hearsay. 408 S.C. at 533, 759 S.E.2d at 438. The Court considered the foundational elements for admitting hearsay as a present sense impression, namely that the statement must: (1) have described or explained an event or condition, (2) be made contemporaneously with the event, and (3) the declarant must have personally perceived the event. *Id.* (citing Rule 803(1), SCRE; *United*

States v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998). Ultimately the court determined "the evidence does not support the admission of [mother's] statement as a present sense impression. The 'event' [mother] described in her statement was the rape, which [mother] did not perceive." *Id.* (citing *State v. Davis*, 371 S.C. 170, 180-81 n.6, 638 S.E.2d 57, 63 n.9 (2006) (noting the declarant's statement about a shooting was not admissible as a present sense impression because there was no evidence the declarant saw the shooting)). Additionally, the statement did not qualify as an excited utterance because the totality of the circumstances did not establish the mother's statement had sufficient spontaneity. As such, the Court determined the trial court had abused its discretion in allowing the mother's hearsay statements to be admitted. *Id.* at 535, 759 S.E.2d at 49.

In response to the objection of trial counsel for bolstering, the court noted the solicitor was seeking to introduce further evidence regarding R.C.'s statements without having established a basis for the court to include R.C.'s testimony in the first place (R. p. 30, lines 6-19.) The solicitor thereafter questioned Davis on R.C.'s demeanor at the scene and the court held the statements made by R.C. constituted an excited utterance (R. p. 34, lines 18-21.) This was an erroneous finding on the part of the trial court.

While some elements of an excited utterance may have been satisfied, namely that a startling event had occurred and R.C. made a statement under the stress of the event, his statement was not based on actual firsthand knowledge and therefore does not meet the requirements of an excited utterance. As provided in his own testimony, R.C. was hiding on the floor in the backseat of vehicle and did not actually observe the shooting:

> Q: How did you know - - when you testified earlier that you heard your mom say, Uncle Jason, where is my baby's daddy, did you see anything beside her truck?
> A: No.
> Q: Did you see any other vehicle beside her truck?
> A: No, ma'am.

> Q: Before she said that, was - - did you see anyone approach her truck, get near her truck?
> A: No, ma'am.

(R. p. 89, lines 15-23.)

Because R.C. did not witness the event, his only knowledge of what happened was based on what he believes he heard Haigler say. He did not see the shooting or shooter, and therefore has no actual knowledge to support his statements regarding the incident. Thus, the court erred in admitting his testimony as an excited utterance exception to the hearsay rule initially, and every time it was permitted in testimony of witnesses thereafter. (R. p. 106, lines 11-23 (testimony of Tiara Haigler); -p. 249, lines 1-7 (testimony of Glen Oxendine)). *See Davis*, 371 S.C. at 180, 638 S.E.2d at 63. (finding there was no evidence the declarant actually saw the victim get shot and therefore the declarant's statements about the shooting were not an excited utterance).

II. R.C.'s statements did not fall under the present sense impression hearsay exception of Rule 803(1), SCRE, and the trial court's error in admitting the statements was not harmless.

Consistent with this Court's analysis in *Davis*, because there is insufficient evidence R.C. witnessed the shooting, any alternate argument that his statement could be properly admitted under the present sense impression exception is without merit. *See* 371 S.C. at 180, n. 6, 638 S.E.2d at 63, n.9; Rule 803(1), SCRE.

To qualify as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event. *State v. Prather*, 429 S.C. 583, 611, 840 S.E.2d 551, 565 (2020). As R.C. did not perceive the event sufficient to satisfy the elements of an excited utterance, his statement also does not meet the observation requirements of a present sense

impression. Further, the statements also fail to fall under the hearsay exception because they were not made to Davis contemporaneous with the event.

Ultimately, the admission of R.C.'s and Davis's hearsay testimony was a material and prejudicial error that cannot be deemed harmless in this case. South Carolina courts assess harmless error where an insubstantial error which does not affect the result of the trial is considered harmless. *State v. Byers*, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011). A harmless error analysis is contextual and specific to the circumstances of the case: "[n]o definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990).

The trial court's error here was not harmless because the R.C.'s testimony and statement was an essential component of the State's case against Appellant. Permitting the hearsay testimony in one instance, let alone the cumulative reiterations of the hearsay bolstered through multiple witnesses, "enhances the devastating impact of improper corroboration." *State v. Whisonant*, 335 S.C. 148, 156, 515 S.E.2d 768, 772 (Ct. App. 1999) (quoting *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994) ("Improper corroboration testimony that is merely cumulative, ... cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.").

Further, the admission of these statements and absence of consideration to their prejudicial nature was not harmless when considering the general inconsistency and variability of R.C.'s testimony. R.C.'s statements before trial, such as his interview with Davis and other law enforcement providing details of the incident was highly inconsistent and unreliable. R.C.'s

testimony about the vehicle he observed while hiding in the backseat of his mother's car ranged from stating his uncle was in a blue vehicle to then indicating the car resembled a box shaped truck like an ambulance (R. p. 48, lines 15-23; –p. 50, lines 10-16.)

R.C.'s contradictory recollection renders his hearsay statement that Appellant was the individual who shot his mother highly prejudicial. The statement identifying Appellant is additionally prejudicial to Appellant in light of R.C.'s testimony where he initially indicated had never actually seen Appellant before:

> Q: Prior to this, had you ever been around the person that you call Uncle Jason or that you used to call Uncle Jason?
> A: No.
> Q: All right. Prior to this had you ever seen him?
> A: No.
> Q: Has he ever come to your house to visit?
> A: No.
> Q: I'm talking about – let me clarify my question, in your whole life?
> A: No, ma'am.
> Q: From the time you were born until you were five years old, you've never seen Uncle Jason?
> A: No, ma'am.
> Q: Did your daddy ever take you to his house?
> A: Yes, ma'am.
> Q: And when you went to his house, was Uncle Jason there?
> A: Yes, ma'am.
> Q: Okay. So you have seen him before?
> A: Yes, ma'am.

(R. p. 95, lines 2-24.)

Respectfully, this Court should hold the trial judge abused his discretion by erroneously admitting R.C.'s hearsay testimony, and by admitting the hearsay within hearsay testimony of Tiara Haigler, Allison Davis, and Glen Oxendine, reverse Appellant's convictions and sentence, and remand for a new trial.

III. The court erred in admitting hearsay testimony under Rule 803(3), SCRE.

The trial court erred in admitting hearsay testimony under the "state of mind" exception to the rule against hearsay at 803(3), SCRE, which provides a "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed. . . ." are not excluded by the hearsay rule.

Here, the court improperly admitted hearsay evidence regarding text messages between Appellant and his brother, under the state of mind exception, prejudicing Appellant. While the state of mind of a declarant may be admissible, testimony concerning the declarant's statements must be carefully evaluated as a state of mind exception to the hearsay rule.

Rule 803(3) does not permit a statement of memory or belief to prove the fact remembered. *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999). The purpose of this exclusion is "to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as a basis for an inference of the happening of the event which produced the state of mind." Advisory Committee Note to Rule 803(3), FRE. Consequently, while the present state of the declarant's mind is admissible as an exception to hearsay, **the reason for the declarant's state of mind is not**. *Garcia*, 334 S.C. at 76, 512 S.E.2d at 509. (Emphasis added) (citing *United States v. Cohen*, 631 F.2d 1123, 1125) (5th Cir. 1980) ("But the state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind. If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition—'I'm scared'—and not belief—'I'm scared because [someone] threatened me'.").

Text messages between Appellant his brother were improperly admitted under Rule 803(3), SCRE. The State moved to introduce call logs and text messages between Appellant and Rufus Carmichael from March 12, 2021, the day before Rufus' death (R. p. 201, lines 20-24.) Trial counsel objected to admission of the text responses from Rufus as hearsay which the State argued were admissible under 803(3) claiming the messages reference Rufus' plan as it related to dealing with his brother. (R. p. 202, lines 9-22.) After reviewing the messages, trial counsel reiterated his hearsay objection and argued the only portion of the statements which went to Rufus' state of mind were two sentences where he told Appellant he loved him; the remaining statements merely reflected what Rufus wanted Appellant to do (R. p. 203, lines 5-25.) The trial court overruled the objection, finding the messages were admissible under the state of mind exception to the hearsay rule (R. p. 204, lines 10-20.)

While 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). *See United States v. Joe*, 8 F.3d 1488 (10th Cir. 1993) (under Rule 803(3), FRE, witness could testify declarant stated she was "afraid sometimes," but not because she thought her husband was going to kill her); *State v. Wood*, 180 Ariz. 53, 881 P.2D 1158 (1994) (witness' testimony " [declarant] told me that she did not want to stay at the apartment because [defendant] had threatened her life" was inadmissible under Rule 803(3), Ariz.R.Evid.); *State v. Bell*, 950 S.W.2d 482 (Mo.1997) (testimony that decedent had stated defendant had assaulted her on prior occasions was inadmissible hearsay); *State v. Reynolds*, 80 Ohio St.3d 670, 687 N.E.2d 1358 (1998) (declarant's statements that she was fearful or concerned are admissible but reasons

for emotions are not admissible). Accordingly, the trial judge erred in admitting the messages as they served only to bolster the State's argument as to the reason for Rufus' state of mind.

C. The solicitor improperly committed a flagrant error by improperly pitting Appellant against adverse witnesses on cross-examination constituting prejudice and warranting review.

In evaluating the continuing errors which occurred at trial, it is additionally necessary to discuss how Appellant's substantial rights were violated during cross-examination when the solicitor repeatedly and improperly pitted Appellant against adverse witnesses. Appellant acknowledges South Carolina courts require a party present a contemporaneous and specific objection to preserve an issue for appellate review. *See generally* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 185 (3rd ed. 2016). However, limited exceptions to issue preservation rules have been recognized authorizing the appellate court to consider unpreserved issues in the interest of judicial economy and under other appropriate circumstances. *See Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 441 n. 6, 633 S.E.2d 143, 147 n. 6 (2006) (holding the appellate court would address an issue in the interest of judicial economy despite any preservation problems); *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994) (appellate court has authority to review flagrant errors); *South Carolina State Highway Department v. Nasim*, 255 S.C. 406, 179 S.E.2d 211 (1971) (argument was highly prejudicial). "We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011).

Here, the circumstances of the solicitor's cross-examination of Appellant and improper pitting of his testimony against the testimony of prior adverse witnesses is precisely the sort of prejudicial and flagrant error warranting appellate review absent a contemporaneous objection by trial counsel. "Uncalled for personal abuse of a witness by counsel is objectionable, and will not

be condoned or allowed by the court." *State v. Kennedy*, 143 S.C. 318, 141 S.E. 559, 560 (1928). "Whether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." *Nasim*, 255 S.C. at 411–12, 179 S.E.2d at. 213. In *Nasim*, the Supreme Court stated it found the following language from *Ryan v. Monson*, 33 Ill. App. 2d 406, 179 N.E.2d 449 (1961) very persuasive on the issue of flagrant error and prejudice:

> "If the argument of counsel is seriously prejudicial, a court should, of its own motion, stop the argument and direct the jury not to consider it. *McWilliams v. Sentinel Publishing Co.*, 339 Ill.App. 83, 89 N.E.2d 266; *Rudolph v. City of Chicago*, 2 Ill.App.2d 370, 119 N.E.2d 528. **If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon**."

Nasim, 255 S.C. at 412, 179 S.E.2d at 213 (Emphasis added).

Thus, in highlighting the language from *Monson*, this Court endorsed the potential for a trial court to *sua sponte* intervene and prevent an improper argument from prejudicing a defendant, and in the absence of such intervention or objection, an appellate court may still consider a flagrant error where an inflammatory argument results in clear prejudice. *See e.g., Toyota*, 314 S.C. 257, 442 S.E.2d 611 (1994). Here, not only were comments by the solicitor inflammatory and prejudicial, but they were exacerbated by the additional and independent flagrant error of the solicitor of improper pitting.

It 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, improper "pitting" constitutes reversible error if the accused was unfairly prejudiced. *State v. Brown*, 297 S.C. 27, 374 S.E.2d 669 (1988); *State v. Sapps*, 295 S.C. 484, 369 S.E.2d 145 (1988). "No matter how a question is worded, anytime a

solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper." *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (citing *State v. Bryant*, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994); *Sapps*, 295 S.C. at 486, 369 S.E.2d at 145-46; *Brown*, 297 S.C. at 29, 374 S.E.2d at 670. Particularly when credibility is the crucial issue in a case, improper pitting of witnesses is prejudicial and cannot be deemed harmless. *Sapps*, 295 S.C. at 486, 369 S.E.2d at 146; *Brown*, 297 S.C. at 29, 374 S.E.2d at 670.

Here the solicitor's improper pitting of Appellant against adverse witnesses clearly prejudiced Appellant as credibility of the various witnesses was a crucial issue in the case. On numerous occasions during cross-examination, Appellant was forced to attack the veracity of adverse witnesses and challenge the truthfulness of their statements. These include:

- The solicitor commenting "That wasn't the truth?" when asking about Jessica Edwards' testimony that the Appellant went by the name Jason; asking Appellant about Miko Dreher's testimony that he went by the name Jason, forcing Appellant to respond that their testimony was incorrect (R. p. 278, lines 1-9.)
- The solicitor stating it was "just coincidental right" that Appellant had purchased a shovel to do yardwork after Dreher testified he told his brother he was going to bury him, forcing Appellant to deny he made the comments and indicate Dreher was lying (R. p. 279, lines 18-23; -p. 280, lines 1-3.)
- The solicitor stating "So it's just a coincidence" that Dreher overheard Appellant telling his brother he was going to bury him, forcing Appellant to reiterate Dreher was lying because he never said that to his brother (R. p. 284, lines 3-6.)
- The solicitor stating it was "just a coincidence" that earlier in the evening Edwards testified Appellant had purchased shovel and was digging a hole (R. p. 284, lines 7-11.)
- The solicitor stating, "so the lady that you're dating for two weeks [Edwards] is also lying about that?" in response to Appellant's testimony he had already been digging a hole in his yard, forcing Appellant to ask what Edwards was lying about and restate the hole was present previously (R. p. 285, lines 4-9.)
- The solicitor restating Edwards' testimony that Appellant held a gun to her head and told her to help him kill his brother and asking, "She's lying, too?", forcing Appellant to contradict Edwards' testimony and deny he made threats about killing his brother or putting a gun to her head (R. p. 285, lines 10-17.)
- The solicitor questioning "so its just a coincidence" Appellant's phone had placed calls to Edwards despite Appellant's testimony his brother had his phone, forcing Appellant

to dispute Edwards' testimony he had a gun at all, dispute he held a gun to her head, dispute he made any threats or threatened to kill his brother, and dispute he made the referenced calls (R. p. 286, lines 8-19.)

- The solicitor stating, "So it's just a coincidence that [R.C.] heard his mommy say, Uncle Jason where is my baby's daddy right before she was shot twice in front of him?", forcing Appellant to disagree and indicate he heard R.C.'s testimony was that Haigler said "Jason, where is my baby daddy?" (R. p. 286, lines 20-25.)

The solicitor's cross examination of Appellant was additionally improper and inflammatory when she erroneously questioned Appellant's testimony regarding the incident as "just a coincidence" sixteen times, including twice during closing arguments (R. p. 287, lines 1, 5, 7, 10, 20, 23; -p. 288, lines 10, 19; -p. 291, lines 14, 18.) At a minimum, the trial court should have, by its own motion, objected to the flagrant error and continued abuse of Appellant. The court's failure to do so constituted an abuse of discretion in light of this Court's clear standards concerning the impropriety of a solicitor pitting witnesses against one another. The issue in the case at bar is not merely whether the solicitor made improper arguments or comments at trial, but rather that she engaged in clearly prohibited conduct which violated Appellant's rights and infected the trial with unfairness.

This case presents a novel issue of the intersection between reversible error, issue preservation, and prejudice regarding a solicitor's improper pitting of witnesses during trial. The facts here are distinguishable from those involved in *Toyota* and others, where here the solicitor's inflammatory and harassing questions to Appellant compounded the prejudicial effect of the solicitor pitting and forcing Appellant to attack the veracity of other witnesses during examination. Because the credibility of each witnesses' statement was an integral component to the jury's decision, these actions clearly rise to the level of flagrant error warranting appellate review despite the absence of a contemporaneous objection as the errors wholly prejudiced Appellant and denied him the right to a fair trial.

CONCLUSION

Based on the foregoing, Appellant Charles Jason Carmichael respectfully requests this Court reverse his convictions and remand this case for a new trial.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: */s/ Yasmeen Ebbini*

Yasmeen Ebbini
SC Bar No. 104681
1320 Main Street / 17th Floor
P.O. Box 11070
Columbia, SC 29201
yasmeen.ebbini@nelsonmullins.com

Robert M. Dudek
S.C. Bar No. 1767
Chief Appellate Defender
S.C. Commission on Indigent Defense
P.O. Box 11589
Columbia, SC 29211
rdudek@sccid.sc.gov

Attorneys for Appellant

This 1st day of April 2024.

RECEIVED
Apr 01 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

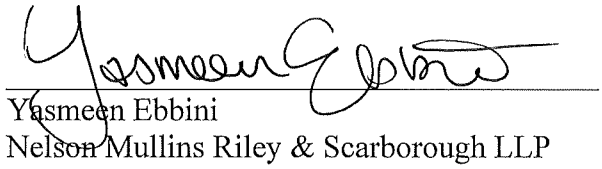
CHARLES JASON CARMICHAEL,

APPELLANT

APPELLATE CASE NO. 2022-001717

CERTIFICATE OF COUNSEL

Undersigned Counsel hereby certifies that the Final Brief of Appellant Charles Jason Carmichael complies with Rule 211(b), SCACR.



Yasmeen Ebbini
Nelson Mullins Riley & Scarborough LLP
1320 Main Street/ 17th Floor
P.O. Box 11070 (29211-1070)
Columbia, SC 29201

Attorney for Appellant

This 1st day of April 2024.