

ORIGINAL

STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2011-183266

THE STATE, .....RESPONDENT

v.

TINA DOCKERY, .....APPELLANT.

**BRIEF OF RESPONDENT**

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ATTORNEYS FOR RESPONDENT

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## **RESPONDENT'S STATEMENT OF ISSUE ON APPEAL**

Whether Appellant's argument is preserved for review where her specific contentions were not raised to and ruled upon by the trial court, and to the extent the argument is preserved, whether the trial court properly found testimony regarding Appellant's demeanor was relevant under the South Carolina Rules of Evidence and properly admitted such testimony where its probative value outweighed any danger of unfair prejudice?

## STATEMENT OF THE CASE

Appellant was indicted at the February 22, 2010, term of the grand jury for Spartanburg County for one count of neglect of a child (count 1) and one count of child abuse with great bodily injury (count 2) (Amended Indictment No. 2006-GS-42-4482).<sup>1</sup> She was represented by Andrea Price, Esquire, of the Seventh Circuit Public Defender's Office. The State was represented by Jennifer Jordan and Susan Reese of the Seventh Circuit Solicitor's Office. On January 4-7, 2011, Appellant and co-defendant Leonard Scott Moore (Moore) proceeded to a joint trial by jury pursuant to which they were each found guilty of unlawful neglect of a child, but acquitted of child abuse with great bodily injury. Appellant was sentenced by the Honorable J. Derham Cole to ten (10) years' imprisonment suspended upon the service of one (1) year's imprisonment and three (3) years' probation. Moore received the same sentence. (R.p.1; p.503, line 23-p.511, line 25; p.514-p.515). Appellant timely filed a notice of intent to appeal her conviction and sentence.

On October 26, 2012, Appellant submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing the trial court erred in allowing the State and her co-defendant to introduce evidence alleging Appellant failed to show emotion and remorse for her infant baby's injuries, thereby denying Appellant her constitutional right to a fair trial. Appellant's attorney also moved to be relieved as counsel. On June 19, 2013, this Court issued an Order denying counsel's motion to be relieved and directed the parties to brief the following issue and any other issue of arguable merit:

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<sup>1</sup> Appellant's co-defendant, Leonard Scott Moore, was likewise indicted for the same two offenses.

Whether the trial court erred in finding testimony of Appellant's demeanor was relevant under the South Carolina Rules of Evidence and, even if the testimony was relevant, whether the evidence should have been excluded because it prejudiced Appellant.

On July 9, 2013, Appellant submitted a Brief in support of her appeal. This Brief of Respondent (the State) follows.

## STATEMENT OF FACTS

On the night of October 25, 2005, the four-month-old victim (Victim) was admitted to the emergency room (ER) at Mary Black Hospital in Spartanburg for swelling and bruising associated with two skull fractures. He was later transferred to the children's services floors at Greenville Memorial Hospital. (R.p.86, line 5-p.87, line 11; p.103, line 9-p.105, line 11; p.164, line 1-p.165, line 9). Dr. Michael Thompson, a pediatric radiologist at Greenville Memorial Hospital examined the results of a full skeletal survey of Victim on October 27, 2005, two days after Victim was admitted. He discovered twenty-three rib fractures and a femur fracture that were more than ten days old, as well as two skull fractures that were less than ten days old, which indicated two different episodes of injury. Thompson testified it takes a tremendous amount of force to cause rib fractures in children and that it is not possible for a two-year-old to cause such injuries.<sup>2</sup> He testified that based on his experience, to a reasonable degree of medical certainty, the injuries were consistent with infant abuse. (R.p.80, line 21-p.92, line 1). On cross-examination, he testified it was safe to say the rib fractures were at least three weeks old. (R.p.92, lines 11-23).

Dr. Julius Robinson, a pediatrician at Greenville Memorial Hospital first treated Victim on October 26, 2005, after Victim was transferred from Mary Black in Spartanburg. Victim did not appear to be in any acute distress; however, he was listless, had a bruise on his cheek, had swelling and bruising on the right side of his head, and had a burn on the bottom of his left foot. Robinson described the two skull fractures as well

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<sup>2</sup> Victim has an older sister who was age two at the time of Appellant's admission to the ER.

as a small amount of bleeding underneath one of those fractures, which was revealed by a CT scan. He said the bleeding indicated a greater amount of force than one would expect from a more simple injury. Robinson recounted the twenty-three rib fractures and the femur fracture revealed by the medical imaging. He testified it was not possible for a two-year-old to cause the injuries suffered and that he would not expect them on a child who fell out of an infant swing. Robinson said his diagnosis was child abuse and noted the injuries suffered by Victim would have been extremely painful. (R.p.98, line 24-p.117, line 3).

At the end of the first day of trial, after the jury had been excused, Appellant advised the trial court that she had a motion regarding demeanor testimony. (R.p.129, lines 15-22). She subsequently explained:

I have a motion in limine to preclude the State from referencing my client's demeanor at the hospital and in any subsequent interviews that she had. . . . I will submit that this is absolutely irrelevant to the case at hand. It is not an element of what my client is charged with. It is - - it's just an observation on behalf of - - Ms. Cantrell here. Your Honor, it's just not - - it's just not relevant.

(R.p.159, line 15-p.160, line 2). Moore objected to the motion, stating he believed the testimony was relevant. The State agreed, arguing evidence that Appellant was unemotional and unresponsive when she was at the hospital with her injured child was "completely relevant." (R.p.160, line 7-p.161, line 2). In response, Appellant simply argued the witness is an investigator, not a psychologist or a mind reader. She did not mention Rule 403, SCRE, and never argued the testimony should be excluded because any probative value was outweighed by a danger of unfair prejudice. The trial court

ruled: "I do think it's relevant. So, it will be allowed. Your motion to exclude is denied."  
(R.p.161, lines 3-12).

The State then called Detective Nicki Cantrell of the Spartanburg County Sheriff's Office to the stand. Cantrell, who was assigned to investigate crimes against children, testified about her October 2005 investigation of Appellant, Moore, and the injuries suffered by Victim. On the night of October 25, 2005, she received a call to respond to the Mary Black Hospital ER in Spartanburg where she encountered four-month-old Victim crying and screaming while he was having his blood drawn. An ER doctor told Cantrell about the severity of the injuries to Victim discovered by the medical staff. Cantrell testified Victim's father, Moore, and Victim's mother, Appellant, were both in the room. Moore was standing over Victim trying to comfort him while Appellant was sitting across the room holding their two-year-old daughter. Cantrell was asked about the demeanor of both Moore and Appellant. She described Appellant as completely unemotional and said Appellant was not even looking at Victim while they were drawing blood. (R.p.163, line 10-p.165, line 9).<sup>3</sup>

Cantrell proceeded to describe Appellant's demeanor at various stages of her investigation. She testified that after the blood was drawn, Moore was holding Victim while Appellant was "still sitting across the room completely ignoring him." (R.p.165, lines 12-16). Cantrell told Appellant Victim's injuries were consistent with child abuse, and asked to talk to Appellant in a family room outside the ER. Cantrell testified that during the conversation Appellant was very unemotional and was not crying. She said

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<sup>3</sup> Appellant did not object to the solicitor's question or Cantrell's answer and failed to raise any objection to the remainder of Cantrell's testimony in regard to Appellant's demeanor.

Appellant would sometimes sniff and put her head down like she was crying, but shed no tears, and seemed very unemotional about the whole situation. (R.p.165, line 18-p.168, line 19). The solicitor asked Cantrell if Appellant's demeanor had changed in any way when they finished speaking. Cantrell testified:

No. Again, like I said, she was completely unemotional. She would sniff and rub her eyes, but tears never even fell from her eyes.

It - - it appeared to me she was faking being upset. She would look at me, when we talked about her background, if she worked and that sort of thing.

She would look directly at me when I was talking to her, but whenever I talked to her about [Victim's] injuries, she would always look down and away from me and would not provide eye contact when we talked about [Victim].

(R.p.173, lines 6-18). Cantrell also interviewed Moore at the hospital and was asked about his demeanor. She testified he was crying, his nose was running, he was trembling, and he appeared very remorseful. (R.p.178, lines 12-17).

The next morning, on October 26, 2005, Cantrell was present at Appellant and Moore's home when a search warrant was executed. During a walkthrough of the house, Cantrell described Appellant as "still very unemotional; no crying, just very, very calm and unemotional, and - - which we typically don't see, especially after taking both of their children from them earlier that morning." (R.p.180, line 19-p.181, line 16; p. 186, lines 9-15). Under cross-examination by Appellant, Cantrell admitted some people just are not emotional people. (R.p.197, lines 13-19). Under cross-examination by Moore, Cantrell repeated her testimony about Moore trying to comfort Victim at the hospital while Appellant was void of emotion and ignoring what was taking place. (R.p.202, lines 2-19).

Investigator Theodore Saar of the Spartanburg County Sheriff's Office was present when Moore and Appellant were interviewed, and he testified on behalf of the State. He testified Moore was calm with a lack of emotion during the interview. (R.p.221, lines 15-20). Under cross-examination by Moore, he testified Appellant showed a strong lack of emotion during her interview. (R.p.227, lines 3-16).

Kaushik Kotecha, a pharmacist and Regional Director for the Department of Health and Environmental Control's Bureau of Drug Control, was qualified as an expert in the field of pharmacology. He testified he reviewed Appellant's oral statement to Cantrell, as well as medical records regarding Appellant's prescriptions and a visit she made to the Mary Black Hospital ER on October 25, 2005. Kotecha testified there was a prescription for Lortab (hydrocodone and acetaminophen) that was filled and dispensed on October 24, 2005, as well as a prescription for Vicoprofen (hydrocodone and ibuprofen) that was dispensed on October 25, 2005. He described the various side effects of hydrocodone and said it absolutely could impair a person's judgment. (R.p.230, line 19-p.236, line 25).

Investigator Tracy Moss of the Spartanburg Sheriff's Office assisted Investigator Cantrell by taking photographs of Victim's injuries at the ER. (R.p.242, line 25-p.245, line 18). Investigator Dina Brazil of the Spartanburg County Department of Social Services interviewed Moore and Appellant on October 28, 2005. She testified Appellant said she first thought Victim may have a blood clot when she noticed his head was swollen. Appellant claimed she did not know anything about the bruises on Victim's head and did not have any idea what happened, but she said on one occasion Victim's sister had dumped him out of their travel swing. (R.p.246, line 3-p.250, line 9).

Detective Danny Morgan of the Spartanburg County Sheriff's Office interviewed Appellant on October 27, 2005, and took a written statement. Appellant initially denied doing anything to Victim, but later said the skull fractures may have occurred the morning of October 25, 2005, when she was taking a bath with Victim and dropped him on the floor when she got dizzy. Appellant also said her daughter sometimes played rough with Victim by dumping him out of his swing and jumping on his chest. Appellant admitted taking Lortab on October 25th, and claimed she did not seek medical attention after she dropped Victim because he was not crying much. Morgan testified Appellant later recanted all of these statements and said she did not know how Victim was injured. (R.p.259, line 14-p.264, line 18).

After the State rested, Appellant testified in her own defense. She said she was prescribed Lortab by her dentist on October 24, 2005, after having a tooth pulled. Appellant said she filled the twelve-pill prescription the same day, took six pills on the 24th, and the rest on the 25th. She described caring for the Victim on the 25th and claimed she never dropped him. Appellant testified she left Victim home with Moore that afternoon for about two hours while she went to the ER for more pain medicine, and she noticed Victim's head was swollen when she returned. (R.p.280, line 4-p.288, line 19). She admitted turning her head away when Victim was having his blood drawn at the ER but explained she just did not like to see blood pumping. Appellant claimed she may have appeared unemotional because she was in shock. (R.p.289, lines 3-15). Appellant testified she did not break Victim's ribs or leg and did not drop Victim or otherwise cause his skull fractures. (R.p.292, lines 18-25). On cross-examination, Appellant admitted she did not immediately take Victim to the hospital upon discovering his head injuries, and

she admitted stopping at a convenience store to pick up snacks on the way to the ER. (R.p.310, lines 14-19; p.313, line 8-p.314, line 6). Appellant testified Victim was a “good baby” who did not cry when you touched his chest despite having twenty-three rib fractures. She claimed she did not know about the fractures until Victim went to the doctor. (R.p.316, line 3-p.317, line 20).

Next, Moore testified in his defense. He testified he was not home with Appellant and the kids between 10:30 a.m. and 4:00 p.m. on October 25, 2005, but watched them for about an hour and forty-five minutes that afternoon when Appellant went to the ER for pain medicine. Moore testified that during this time, the Victim was sleeping in the bassinet and seemed content. He did not notice any bruising or swelling on Victim’s head until Appellant returned home and picked Victim up. Moore claims he first suggested taking Victim to the hospital when he noticed swelling. He insisted he did not do anything to cause the head injuries or the older rib injuries to Victim. (R.p.348, line 5-p.359, line 8).

During closing arguments, Appellant referenced the demeanor testimony from Cantrell but emphasized Cantrell’s acknowledgement that not all people respond to bad situations in the same way. (R.p.410, line 19-p.411, line 6). Next, Moore asked the jury to pay close attention to testimony about both his demeanor and Appellant’s demeanor, particularly Appellant’s lack of emotion throughout the investigation. (R.p.420, line 4-p.422, line 2). Finally, the solicitor briefly compared Moore’s demeanor to Appellant’s demeanor and suggested Appellant displayed a similar demeanor during trial. (R.p.457, line 22-p.458, line 13).

Thereafter, the trial judge charged the jury on the applicable law. The judge instructed the jury on the respective roles of judge and jury, the burden of proof, reasonable doubt, the presumption of innocence, the jury's duty to determine credibility of witnesses, the law of expert witness testimony, direct and circumstantial evidence, and the elements of the crimes. (R.p.462, line 10-p.489, line 24). At the conclusion of the trial, the jury convicted Appellant and Moore of unlawful neglect of a child but acquitted them of child abuse with great bodily injury. Appellant was sentenced to ten (10) years' imprisonment suspended upon the service of one (1) year's imprisonment and three (3) years' probation. (R.p.503, line 23-p.511, line 25).

## ARGUMENT

**Appellant's argument is not preserved for review because her specific contentions were not raised to and ruled upon by the trial court, and to the extent the argument is preserved, the trial court properly found testimony regarding Appellant's demeanor was relevant under the South Carolina Rules of Evidence and properly admitted such testimony where its probative value outweighed any danger of unfair prejudice.**

Appellant argues the trial court erred in allowing the State and co-defendant Moore to introduce evidence alleging she failed to show emotion and remorse for her infant baby's injuries. She contends: (1) such "post-incident evidence" was not relevant to whether she had engaged in unlawful conduct towards a child resulting in the child's injuries; (2) if such evidence is relevant, the trial court failed to conduct the required on-the-record balancing test pursuant to Rule 403, SCRE, to determine whether the probative value of such evidence was outweighed by the danger of unfair prejudice; and (3) such evidence was extremely prejudicial and not harmless where culpability was highly disputed at trial and the admission of the evidence encouraged the jury to reach a verdict by not properly weighing the evidence, but upon a mother's emotion or lack of emotion while attending to her injured child at the hospital. The State disagrees and submits Appellant's argument should be denied and dismissed on several grounds. Appellant's specific contentions are not preserved for appellate review because no objection to relevance was made at the time the evidence was introduced at trial, and because Appellant's additional contentions were never raised to or ruled upon by the trial court. Furthermore, even if Appellant's objections are preserved, Appellant's demeanor following the commission of the alleged crimes was circumstantially relevant to the

jury's consideration of her state of mind, intent, purpose and credibility, and its probative value outweighed any danger of unfair prejudice.

#### Issue Preservation

Initially, the State submits the specific contentions now raised in support of Appellant's argument are not preserved for appellate review. First, Appellant's contention that demeanor evidence was not relevant is not preserved because, even though she made a motion in limine to suppress such evidence and the motion was denied, she failed to raise any objection to testimony about her demeanor when it was repeatedly elicited during trial.

Generally, a motion in limine seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary and subject to change based on developments during trial. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999). A ruling on a motion in limine does not constitute a final ruling on the admissibility of evidence. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Therefore, an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993). "However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); see State v. Wiles, 383 S.C. 151, 156-57, 679 S.E.2d 172, 175 (2009) ("This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection.").

Here, Appellant made “a motion in limine to preclude the State from referencing [her] demeanor at the hospital and in any subsequent interviews that she had,” arguing demeanor testimony would not be relevant. (R.p.159, line 15-p.160, line 2). Moore and the State opposed the motion and argued Appellant’s demeanor at the ER was relevant to the charged offenses. (R.p.160, line 7-p.161, line 2). The trial court ruled: “I do think it’s relevant. So, it will be allowed. Your motion to exclude is denied.” (R.p.161, lines 3-12).

After the ruling, the jury returned to the courtroom and Detective Cantrell took the stand to testify on behalf of the State. She described her position and duties with the Spartanburg County Sheriff’s Office, and her role in the October 25, 2005 investigation of Appellant, Moore, and the injuries suffered by Victim. Cantrell testified she received a call to respond to the Mary Black Hospital ER in Spartanburg where she encountered four-month-old Victim crying and screaming while he was having his blood drawn. An ER doctor told Cantrell about the injuries to Victim discovered by the medical staff. Cantrell testified Moore and Appellant were both in the room. Moore was standing over Victim trying to comfort him while Appellant was sitting across the room holding their two-year-old daughter. Eventually, Cantrell was asked about the demeanor of both Moore and Appellant. She described Appellant as completely unemotional and said Appellant was not even looking at Victim while they were drawing blood. (R.p.162, line 8-p.165, line 9). Appellant did not object to the solicitor’s question or Cantrell’s answer; therefore, she is barred from now raising this issue on appeal. See State v. Burton, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997) (“This testimony was admitted

without objection. Because Burton failed to object, he is barred from raising this issue on appeal.”).<sup>4</sup>

To the extent Appellant argues her core relevance argument is preserved because the judge’s ruling came immediately prior to the introduction of the demeanor evidence, the State submits the temporal delay was sufficient to break the required nexus. In Forrester, the Supreme Court found: “No evidence was taken between the trial court’s ruling on the admission of the cocaine and its introduction. Since no opportunity existed for the court to change its ruling, Forrester did not need to object a second time to the introduction of the cocaine for the issue to be properly preserved for review.” Forrester, 343 S.C. at 642-43, 541 S.E.2d at 840 (emphasis added). As described above, significant testimony was elicited from Cantrell before she was asked about Appellant’s demeanor; therefore, an opportunity existed for the trial court to change its ruling. By failing to object, Appellant did not give the trial judge that chance and, as a result, did not preserve the issue for appeal.

In State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009), in a slight twist to this “immediately prior” exception to our longstanding error preservation rules, the Supreme Court held that even though “the evidence was not immediately introduced after the motion in limine,” the trial judge, by his actions, “clearly indicated that his ruling was a final, rather than preliminary, one because he commented to the jury about [Wiles’] escape before any evidence was admitted.” Wiles, 383 S.C. at 157, 679 at 175. Here, the trial judge made no comments to the jury about the possible introduction of testimony

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<sup>4</sup> Appellant also failed to raise any objection to the remainder of Cantrell’s testimony or testimony elicited from other witnesses in regard to Appellant’s demeanor at the ER and throughout the investigation.

regarding Appellant's post-incident demeanor. Thus, unlike the circumstances in Wiles, the trial court did not clearly indicate a final ruling, and Appellant is procedurally barred from raising this entire issue on appeal.

If this court disagrees and finds Appellant's basic challenge to the relevance of the demeanor evidence is preserved, the State nevertheless submits Appellant's additional Rule 403, SCRE, argument, as well as her contention that the demeanor evidence was "extremely prejudicial," are not preserved for appellate review because these claims were never raised to and ruled upon by the trial court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). The South Carolina Rules of Evidence provide that:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

Rule 103, SCRE. This rule is generally in accord with prior South Carolina law which requires a contemporaneous objection with specific grounds to preserve an error for review. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding that a contemporaneous objection is required to preserve an issue for appellate review); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (holding that specific grounds are required and that a general objection preserves nothing).

Here, Appellant objected to the admissibility of the demeanor testimony but only on grounds that it was not relevant. Specifically she argued:

I have a motion in limine to preclude the State from referencing my client's demeanor at the hospital and in any subsequent interviews that she had. . . . I will submit that this is absolutely irrelevant to the case at hand. It is not an element of what my client is charged with. It is - - it's just an observation on behalf of - - Ms. Cantrell here. Your Honor, it's just not - - it's just not relevant.

(R.p.159, line 15-p.160, line 2). Moore objected to the motion, stating he believed the testimony was relevant. The State agreed, arguing evidence that Appellant was unemotional and unresponsive when she was at the hospital with her injured child was "completely relevant." (R.p.160, line 7-p.161, line 2). In response, Appellant only complained the witness was not a psychologist or a mind reader. She did not mention Rule 403, SCRE, and never argued the testimony should be excluded because its probative value was outweighed by a danger of unfair prejudice. As a result, the trial court was not given an opportunity to make a ruling under Rule 403. Instead, the trial court simply concluded the demeanor evidence was relevant, denied Appellant's motion to suppress, and allowed the testimony. (R.p.161, lines 3-12).

Appellant now presumes no additional or specific argument was needed to preserve her Rule 403 claim for review because once she challenged relevance, the trial court was automatically required to conduct an on-the-record balancing test to determine whether the evidence was more prejudicial than probative. The State submits the South Carolina Rules of Evidence do not support Appellant's presumption. Indeed, a comparison to Rule 609, SCRE, illustrates a crucial distinction. According to Rule 609, prior convictions punishable by more than one year's imprisonment "shall be admitted" for impeaching the credibility of a defendant who testifies if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the

accused.” Rule 609(a)(1), SCRE (emphasis added). Prior convictions similar to the one for which the defendant is being tried are not automatically inadmissible; instead, “[t]rial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence.” Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000).

Rule 403, by comparison, is a rule of exclusion rather than a rule of admission. It simply states that relevant evidence: “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE (emphasis added). Contrary to Appellant’s assertion, there is no “required on-the-record balancing test” described by Rule 403. Absent a party moving to exclude otherwise relevant evidence, a trial court would have no reason to conduct a balancing test. Any other result would be absurd, requiring the trial court to sua sponte measure probative value against prejudicial effect for every piece of relevant evidence. Because the Rule 403 claim now argued in this appeal was neither raised to nor ruled upon by the trial court, it is not preserved for review. Rule 103, SCRE; Byers, supra; Hoffman, supra.

#### Discussion/Analysis

To the extent this Court finds Appellant’s claims are sufficiently preserved for appellate review, the State submits her contentions are without merit because: (1) evidence of Appellant’s demeanor, both while her infant son was being treated in the ER for his recently incurred skull fractures, and while police conducted their investigation into whether Appellant played a part in causing Victim’s horrific injuries, tended to establish or make more probable the existence of facts that were of consequence to the jury’s determination of her guilt or innocence; and (2) the probative value of that

demeanor evidence was not substantially outweighed by danger of unfair prejudice to Appellant. In particular, evidence of Appellant's demeanor when she was confronted with Victim's injuries, pain, and suffering was relevant to Appellant's state of mind, intent, or purpose at the time the State alleged she did: (1) "inflict, cause great bodily injury to [Victim], a child under the age of eleven (11), while committing child abuse or neglect,"<sup>5</sup> and (2) "willfully and unlawfully, having charge or custody of [Victim], a minor child, place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety."<sup>6</sup> (Amended Indictment No. 06-GS-42-4482). Additionally, Appellant's demeanor was relevant to the jury's obligation to assess her credibility.

#### Standard of Review

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013); State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support

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<sup>5</sup> S.C. Code Ann. § 16-3-95 (Supp. 2005) (Infliction or allowing infliction of great bodily injury upon a child).

<sup>6</sup> S.C. Code Ann. § 20-7-50 (Supp. 2005) (Unlawful conduct towards child). In 2008 this Section was repealed and recodified as S.C. Code Ann. § 63-5-70 (2010).

or are controlled by an error of law. Kromah, 401 S.C. at 349, 737 S.E.2d at 495; Douglas, 369 S.C. at 429-30, 632 S.E.2d at 848.

### Relevance

As a general rule, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Evidence which assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treatment of Corley, 353 S.C. 451, 577 S.E.2d 451 (2003); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”). It is not required that the inference sought should necessarily follow from the fact proved. See Sweat, 362 S.C. at 127, 606 S.E.2d at 513. Indeed, evidence is relevant if “logically relevant” to establish a material fact or element of the crime; it need not be “necessary” to the State’s case in order to be admitted. Id. (citing State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)).

While the South Carolina appellate courts do not appear to have directly addressed the propriety of admitting post-incident descriptions of a defendant’s “demeanor,” our Supreme Court has recognized the general principle that a witness may offer post-incident observations about the defendant, including a description of his or her lack of emotion. See State v. Weston, 367 S.C. 279, 290-91, 625 S.E.2d 641, 647 (2006) (finding “no basis for objection” where the testifying witness described the accused as

“totally unresponsive” and said he “did not seem concerned” about his mother’s disappearance). In Weston, the Court explained that the witness was simply relaying her personal experience and the fact that she had not encountered anyone so unresponsive as the defendant, which amounted to a permissible statement of her impression or inference with respect to the appearance of the accused. Id. (citing State v. McClinton, 265 S.C. 171, 217 S.E.2d 584 (1975)). Thus, the State submits “demeanor evidence” has been found both relevant and admissible in South Carolina.

This rule has been more explicitly articulated in North Carolina. See State v. Stager, 406 S.E.2d 876, 900 (N.C. 1991) (“Opinion evidence as to the demeanor of a criminal defendant is admissible into evidence.”); See also State v. Shoemaker, 432 S.E.2d 314, 317 (N.C. 1993) (citing Stager). The North Carolina Supreme Court explained the rule as follows:

The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence.

A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, ‘matter of fact,’ as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence presented to his eyes, to the color of a person’s hair, or any other physical fact of like nature.

Shoemaker, 432 S.E.2d at 317; Stager, 406 S.E.2d at 901; State v. Leak, 72 S.E. 567, 568 (N.C. 1911). Evidence describing the demeanor of the accused after the alleged crime

has likewise been generally identified as relevant to the mental state of the defendant, or as to the fact or extent of a defendant's guilt.<sup>7</sup>

Appellant relies on a published opinion from the Supreme Court of Mississippi, Harrelson v. State, 65 So.2d 237 (Miss. 1953), to argue that the testimony from Cantrell and Saar describing Appellant as unemotional was improper and inadmissible. However, Harrelson is not so broad. The Mississippi Supreme Court held a witness could not offer an opinion that the accused showed no signs of grief. The State submits a simple description of demeanor without giving an opinion that it demonstrates a lack of grief is not the same. Indeed, the Mississippi Supreme Court later noted that Harrelson "simply recognized the unfairness of subjecting a defendant to an objective "grieving test." Flanagin v. State, 473 So.2d 482, 486 (Miss. 1985). The testimony offered in Appellant's case does not rise to the level of what the Mississippi Court found improper in Harrelson.

Thus, the State submits evidence of Appellant's post-incident demeanor was of consequence to the jury's determination of her guilt or innocence at trial. The State was

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<sup>7</sup> According to Corpus Juris Secundum:

The acts, conduct, and declarations of an accused person following the commission of an alleged crime may be circumstantially relevant. If state of mind, intent, or purpose is in issue, acts, conduct, and declarations of the accused after the offense which tend to establish such matters are admissible as relevant testimony.

22A C.J.S. Criminal Law § 1010 (2013). Similarly, American Jurisprudence advises:

In homicide prosecutions, as in all other criminal proceedings, the conduct of the accused at or about the time of the offense is alleged to have been committed, or about the time of the arrest may be introduced into evidence as one means of establishing the fact and extent of the defendant's guilt. The prosecution may give evidence which shows or tends to show that the defendant, after the commission of the homicide, sought concealment, or fled from the vicinity, or that after the slaying the defendant appeared to be nervous or frightened, or displayed other emotion.

40A AM. JUR. 2D Homicide § 300 (2013) (emphasis added).

entitled to introduce demeanor evidence to help prove the elements of the charged crimes by refuting Appellant's ever-changing claims of denial, accident, and lack of knowledge about the severity of Victim's injuries. Appellant was charged with: (1) inflicting or causing great bodily injury to Victim while committing child abuse or neglect, and (2) willfully and unlawfully placing Victim at unreasonable risk of harm affecting his life, physical or mental health, or safety. S.C. Code Ann. §§ 16-3-95, 20-7-50 (Supp. 2005). (Amended Indictment No. 06-GS-42-4482). Appellant's state of mind, intent, and purpose in causing the injuries, allowing Moore to cause the injuries, or placing Victim in circumstances where the injuries could occur were certainly relevant to her guilt or innocence of these charges.

In her opening statement, Appellant argued there "are two sides to this case," thereby suggesting Moore was the person responsible for Victim's injuries. (R.p.73, line 24-p.74, line 5). During trial, the State presented evidence of various statements from Appellant, which included her denying of any knowledge about Victim's injuries, her blaming his two-year-old sister's rough play, her admitting she dropped Victim, and her blaming Moore. Appellant also testified in her own defense, claiming she did not break Victim's ribs or leg and did not drop Victim or otherwise cause his skull fractures. (Tr.p.280, line 5-p.293, line 12). In her closing argument, Appellant claimed she did not know about Victim's prior rib injuries because she never observed him in distress and argued this was consistent with medical testimony from Dr. Robinson. She then attacked Moore's testimony by challenging his time frames as well as his overall credibility. Finally, Appellant argued the common denominator in regard to Victim's various injuries was Moore. (R.p.408, line 22-p.415, line 7). Aware of Appellant's strategy of placing

the blame on Moore and understanding that issues of Appellant's state of mind, intent, purpose, and credibility were critical issues to be decided by the jury, the State sought to provide the jury with all evidence having a tendency to make the existence of the consequential facts more probable than not. Testimony describing Appellant's demeanor had a tendency to make the determination of her state of mind, intent, and purpose more probable than it would be without such testimony; therefore, the demeanor testimony was relevant. Rule 401, SCRE.

Rule 403, SCRE: Probative Value

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE; see also State v. Cooley, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001). The appellate courts review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. Id. at 358, 543 S.E.2d at 593. See Aleksey, 343 S.C. at 35, 538 S.E.2d at 256 (trial judge is given broad discretion in ruling on questions concerning relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion).

At trial, Appellant failed to posit how she would be prejudiced by introduction of testimony about her demeanor. On appeal she now argues it was “highly prejudicial” because it “encouraged the jury to reach a verdict not by properly weighing the evidence, but upon a mother’s emotion or lack of emotion while attending to her injured child at the hospital.” She relies on State v. Stokes, 339 S.C. 154, 528 S.E.2d 430 (Ct. App. 2000), to argue that the State portrayed her as someone who did not care about her injured child, which is “the exact type of evidence that would inflame, excite or influence the resentment of the jurors.” (Brief of Appellant, p.12). The State disagrees.

In Stokes, the two-year-old son of the defendant’s live-in girlfriend had nearly been strangled to death by an electrical cord when he was discovered limp, gasping for air, and foaming at the mouth and nose. Stokes, 339 S.C. at 157-58, 528 S.E.2d at 431. The trial court allowed the State to introduce the subsequently recovered and healthy child as an exhibit; however, this Court reversed, finding the demonstration had no evidentiary value and was highly inflammatory and prejudicial. The Court concluded that “exhibiting the child to the jury at the conclusion of the evidence had no direct bearing upon, nor did it tend to establish or make more or less probable any matter in controversy.” Stokes, 339 S.C. at 160, 528 S.E.2d at 433. After determining the evidence had no probative value, the Court found that given the egregious nature of the allegations against Stokes, and the natural sympathy they evoke for the blameless and defenseless victim, “exhibiting the child to the jury is more likely to elicit from the jury an enduring sympathetic response for the helpless victim and a corresponding resentment for the accused.” Id.

In Appellant's case, the circumstances are entirely different. A badly injured infant evokes a sympathetic response and a corresponding resentment for the accused in every case where child abuse or neglect is alleged. In Stokes, the problem was the complete lack of relevance in regard to proving either an element of the offense or some other matter bearing on the matter in controversy. Because the evidence had no probative value, it clearly was outweighed by the danger of unfair prejudice. By comparison, and as argued above, Appellant's demeanor was relevant to several critical matters in controversy before the jury. Additionally, nothing in the record suggests the State's introduction of demeanor evidence was "calculated to arouse sympathy or prejudice of the jury." To the contrary, in closing arguments the solicitor barely mentioned Appellant's post-incident demeanor, and then only did so in comparison to her demeanor while testifying at trial. (R.p.457, line 22-p.458, line 13). The State submits the unfair prejudice claimed by Appellant simply does not exist. Instead, the probative value of the demeanor testimony fully supports the trial court's decision to admit it into evidence. Appellant has shown no abuse of discretion and no exceptional circumstances to warrant reversing the trial court's discretionary ruling to admit the demeanor testimony into evidence. Thus, that ruling should be affirmed. Because Appellant's state of mind, intent, and purpose at the time Victim's skull was fractured were critical to the determination of guilt or innocence, Appellant's acts, conduct and overall demeanor following the commission of the alleged crimes was circumstantially relevant. Rule 401, SCRE. Also, the probative value of this evidence outweighed any unfair prejudice where the only prejudice was the sympathy for Victim, which already existed.

In conclusion, the State submits that the issue raised on appeal was not properly preserved for review, but, in any event, the trial court properly admitted the demeanor testimony into evidence because it was relevant to Appellant's state of mind, intent, purpose and credibility, and because its probative value substantially outweighed any danger of unfair prejudice.

#### Harmless Error

Even assuming that admitting the demeanor testimony was error, it was harmless error in light of the overwhelming evidence of Appellant's guilt for unlawful conduct towards a child. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). When overwhelming evidence of guilt has been established, any trial error may be harmless. State v. Gathers, 295 S.C. 476, 480-81, 369 S.E.2d 140, 143 (1988).

Here, the extent and severity of Victim's injuries were undisputed. Those injuries were committed by Moore, Appellant, or both. Appellant acknowledged having custody and care of Victim a substantial portion of the day he ended up in the ER with multiple skull fractures, which was also a day she took six Lortab pills. Appellant also acknowledged she had custody and care of the victim during the time he was suffering from twenty-three fractured ribs and a fractured femur. Dr. Robinson testified the fractures would have been extremely painful. Given this overwhelming evidence that Appellant placed Victim at unreasonable risk of harm affecting his life, physical or mental health, or safety, the State submits the additional admission of the demeanor testimony could not have affected the outcome of the trial. Indeed, Appellant was found guilty of unlawful conduct towards a child but not of inflicting great bodily injury upon a child. Therefore, any error in admission of the demeanor testimony was harmless. See, e.g., State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (a conviction should not be set aside because of errors not effecting the result when the defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion could be reached). Appellant's conviction should be affirmed.


**CONCLUSION**

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina  
October 9, 2013

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTENBURG COUNTY  
J. Derham Cole, Circuit Court Judge

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Appellate Case No. 2011-183266

THE STATE, .....RESPONDENT

v.

TINA DOCKERY, .....APPELLANT.

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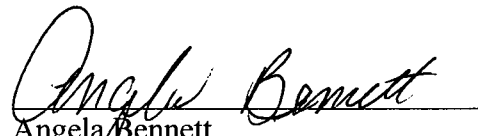
**PROOF OF SERVICE**

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I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Brief of Respondent*, dated October 9, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Carmen V. Ganjehsani, Appellate Defender  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
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I further certified that all parties required by Rule to be served have been served.  
This 9<sup>th</sup>, day of October, 2013.

  
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Administrative Assistant

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**SC Court of Appeals**