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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
The Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DIONICIO NAVA ABARCA,

APPELLANT.

Appellate Case No. 2024-000180

FINAL BRIEF OF RESPONDENT

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APPELLANT'S QUESTION PRESENTED

Whether the court erred by admitting the 911 call in this case since it contained highly prejudicial, inadmissible prior consistent statements about appellant allegedly being angry with his decedent wife the night before they disappeared for cheating on him where the 911 call was also needlessly cumulative under Rule 403, SCRE, it violated appellant's right to confrontation, and it did not qualify as an excited utterance or under any other hearsay exception which would have made the 911 call admissible since there was no ongoing emergency involved?

STATEMENT OF THE CASE

On July 18, 2020, appellant Dionisio Nava Abarca ("Abarca") murdered his wife, Alicia Garcia, in Cherokee County. On July 19, 2020, Abarca was arrested in the State of Alabama. Abarca was then returned to South Carolina. Abarca was indicted at the March 2021 term of the Cherokee County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. (2021-GS-11-00148). Abarca proceeded to a jury trial on January 22, 2024, before the Honorable R. Keith Kelly. James Farr represented Abarca. Assistant Solicitors Adrienne Elizabeth Barry and Evan Haney prosecuted the case. On January 26, 2024, the jury found Abarca guilty of murder and the weapon charge. (R. 373, ll. 7-14). Judge Kelly sentenced Abarca to life imprisonment for murder and 5 years concurrent for the weapon charge. (R. 377, ll. 19-23). Abarca appealed his convictions and sentences raising 1 issue. (IBOA). This is the Final Brief of Respondent.

RESPONDENT'S STATEMENT OF FACTS

On July 19, 2020, at approximately 11:24 a.m., Cherokee County 911 received an emergency 911 call from a home located in Chesnee but in Cherokee County, S.C. The 911 call was from a then 16-year-old boy, Juan A. ("Juan"), his uncle Simon Abarca, and Juan's 12-year-old sister Dulce A. ("Dulce"). The call was to report Juan's and Dulce's parents, appellant Dionisio Abarca ("Abarca") and Alicia Garcia ("Victim"), were missing persons and the children had been left abandoned and alone at their home. Juan and Dulce also had a 4-year-old brother Emanuel A. ("Emanual") who was also abandoned and there at the home with them. As a result of what Juan and Dulce told the 911 operator, the operator dispatched a police officer to the home. Thus began the criminal investigation of this case, and the ultimate discovery that Abarca had murdered Victim, buried her in a garden on property he owned, and fled the State of South Carolina. (Court's Ex. 1.; State's Ex. 2; R. 32-41).

Abarca, his wife the Victim, their son Juan, daughter Dulce, and son Emanuel all lived in their family home located near Chesnee but in Cherokee County, the residence from which the 911 call originated. (R. 65, 38-53). Abarca also owned a tract of land located several miles away at the end of Concord Heights Road, specifically 186 Concord Heights Road, which is also located in Cherokee County, that contained a field in which Abarca had a vegetable garden. In the garden, Abarca grew corn, watermelon, peppers, etc. The Abarca family would go to the land together and work on the garden. Abarca had tools which he kept in his truck or in a storage building adjacent to the Chesnee home, to work the garden including shovels, hoes, and numerous machetes. Abarca also owned and drove a truck, a brown Toyota Tacoma with an extra cab containing a toolbox in the truck bed. (R. 42-54). Abarca also owned a rental property located several more miles away

at 175 Small Farm Road, also in Cherokee County, S.C. This rental property contained a mobile home that could be lived in but was vacant at the time of this crime. (R. 42-54).

On the night of July 17, 2020, 12-year-old Dulce and her older brother, 16-year-old Juan, witnessed their father, Abarca, and their mother, Victim, fighting. At trial, Juan could not remember what his parents were fighting over; however, Dulce testified without objection that she "*believed*" Abarca and Victim were fighting over Abarca's belief that Victim was cheating on him. (R. 55-57; 61; 65; 43-44).[1] After the fight ended, Abarca left the home, and Victim called her sister to talk. The following day, July 18, 2020, Abarca and Victim told Juan and Dulce that they, Abarca and Victim, were going to the land [the garden] that Abarca owned at the end of Concord Heights Road, then they were going to the rental home, and then to Walmart. (R. 43, 57). Dulce asked if she could go with them, but her father Abarca said no, she could not go. (R. 58). At about 3:00 p.m., Juan and Dulce witnessed Abarca and Victim leave the family home together in their father's brown Toyota Tacoma pick-up truck headed to the land [the garden]. Juan and Dulce never saw their mother alive again. They never saw their father again except after he was under arrest for the murder of their mother. (R. 42-54; 55-65).

Shortly after leaving their home in Chesnee headed to the land [the garden], Abarca and Victim passed Concord Baptist Church on Concord Road which intersects with Concord Heights Road. A truck, perfectly consistent with Abarca's truck was captured on surveillance video passing Concord Baptist Church on Concord Road and turning onto Concord Heights Road at 2:57 p.m. July 18, 2020. Concord Heights Road is a dead end which ends with a cul-de-sac off of which is

[1] At trial, the State began their case by introducing the 911 call that began the police investigation in which Juan and Dulce reported their parents missing on the morning of July 19, 2020. In that call, an emotional Dulce clearly remembered that her parents were fighting over her father's belief that her mother was cheating on him. (State's Ex. 2; Court' Ex. 1).

a path that leads to the land owned by Abarca where the garden was located. The garden itself is secluded and cannot be seen by anyone at any of the few houses on Concord Heights Road. On July 18, 2020, the field and garden were wet or muddy. Approximately 30 minutes after passing Concord Baptist Church and turning onto Concord Heights Road, July 18, 2020, the truck consistent with Abarca's truck was captured again on surveillance video at Concord Baptist Church returning up Concord Heights Road from Abarca's land and the garden and turning back onto Concord Road and leaving the area. Victim Alicia Garcia did not make the return trip from Abarca's land and the garden. (R. 235-41; 248-51; 271-75; 366-77; 67-74; 84-89; 92-95; 257-59; State's Ex. 54).

Abarca next drove to his rental property at 175 Small Farm Road. This property contains a rental home located in a secluded area. Small Farm Road is a gravel road located off a paved road. To reach this home, one has to drive some distance on the gravel road and turn into a driveway that leads to the mobile home. Once Abarca reached the secluded home, he parked his brown Toyota Tacoma pickup truck behind the home where it could not be seen from Small Farm Road. Abarca entered the home and washed off in the home's bathtub. (R. 96-107; 193-217; 259-65; 298).

While Abarca was at the rental home, his nephew Luis A. ("Luis"), age 17, son of Abarca's brother, arrived at the home to pay Abarca some rent. Luis lived just over the state line in North Carolina. Abarca asked Luis for a ride in Luis' car. Luis had given his uncle Abarca short rides before and thought Abarca wanted Luis to take him somewhere nearby. Because Abarca was Luis' uncle, Luis agreed to give Abarca a ride. Luis got into the driver's side of his vehicle, and Abarca got into the back passenger seat of Luis' vehicle. Luis found this strange but did what his uncle directed him to do. Abarca had no luggage or clothing when he got into the back of Luis' car.

Abarca told Luis to drive to I-85 and head south. Luis complied with his uncle's directions and got onto I-85 and drove south out of Cherokee County, through Spartanburg County, and then Greenville County. Luis continued to drive Abarca south on I-85 and into the State of Georgia. At some point after entering Georgia, Luis told his uncle he wanted to turn around. Abarca said no and told Luis to continue to drive. Luis continued to drive Abarca through the Atlanta, Georgia area, through western Georgia, and into the State of Alabama. At some point, Abarca told Luis to turn his phone off and put Houston, Texas in the GPS. Luis testified that there came a point that he, Luis, no longer felt he was free to make his own choices about whether he continued to drive or could turn around. Luis became afraid that his uncle Abarca had done something bad, and Luis was afraid for his own safety. Around 3:00 a.m. on July 19, 2020, Luis finally told Abarca that he was too tired to drive any longer. Abarca became angry, but Luis pulled off the interstate into a closed gas station and parked the vehicle. Luis and Abarca were now about a 1-hour drive from the Mississippi State Line. Luis and Abarca both fell asleep in the car. Luis was awakened by Abarca shaking his shoulder and demanding that Luis drive. Luis looked in front of his vehicle and there was a police officer in his police vehicle. Luis ignored his uncle's instructions and did not attempt to drive away. (R. 192-17; 218-30).

The Alabama police officer approached Luis' vehicle and asked Luis what they were doing there and where they were headed. Luis told the officer that he and Abarca were headed to New Orleans, Louisiana to see a relative who was in the hospital with COVID. The officer did not believe the story. Luis asked the officer to move him away from Luis' car. Eventually, Luis told the officer they were coming from North Carolina [Luis' actual home] and there was something wrong with his uncle Abarca. Luis communicated to the officer that he was afraid, and he believed his uncle had done something bad and was trying to get away from whatever he had done. Luis

asked the officer to place him in handcuffs so his uncle Abarca would not think he was telling on him. The officer complied. The officer then approached Abarca on the other side of the vehicle and the back passenger window where Abarca was seated. Abarca now had a COVID mask over his face and was staring straight ahead not responding to the officer's questions. Abarca was removed from the vehicle and handcuffed as well. The car was searched and in the back floorboard of the car, the officer found 2 passports for Abarca and $1,000 in cash. Luis also told the officer they were not headed to New Orleans, but Houston, Texas. Abarca was held in custody, but Luis was released to return home to his parents in North Carolina. (R. 218-30; 192-17).[2]

On the evening of July 18, 2020, when Luis was initially giving his uncle Abarca a ride out of South Carolina, Abarca's children, who he had abandoned, were becoming worried and concerned about their parents when they did not return home. That night, Juan and Dulce called Abarca and Victim at least 4 times each trying to locate them. Neither Abarca nor Victim answered the phone calls and neither returned the children's phone calls. Dulce actually reported to the 911 operator the following day that she had called her mother a total of 7 times, and her mother had not answered or returned the calls. (State's Ex. 2). In the past, if Abarca or Victim were going to be late they would call the children and let them know. This time there was no phone call from either parent. (R. 46-47). The children were so worried and concerned about their parents the following morning, July 19, 2020, they went looking for their parents, even though the 16-year-

[2] Police in Alabama contacted Luis' father about 6:00 a.m. on July, 19, 2020, Eastern Standard Time, and informed Luis' father that they had taken Luis and Abarca out of Luis' vehicle sleeping at a gas station in Alabama and that Luis had informed them that Abarca had forced Luis to drive him all the way to Alabama. Victim was not in the car with Luis and Abarca. Police told Luis' father they were releasing Luis to come home but holding Abarca because he was acting suspiciously. When Juan and Dulce called 911 at approximately 11:24 a.m. to report their parents missing and that they had been abandoned, they put Luis' father, their uncle, on the phone with 911 and he related the above information to the 911 operator in Juan and Dulce's presence. (Court's Ex. 1, unredacted 911 call; State's Ex. 1[CAD report]; State's Ex. 2 [redacted 911 call).

old Juan only had a learner's permit. Juan drove his mother's vehicle and took his sister and little brother with him to the land at the end of Concord Heights Road. They did not find their father's truck or anything else at the field. (R. 47-48). Juan then drove himself, Dulce, and Emanuel in their mother's car to the rental property at 175 Small Farm Road and found their father's brown Toyota Tacoma pick-up truck parked behind the rental home, but no one was in the home or truck. Juan then drove himself, his sister, and little brother to their uncle's home to see what their uncle knew. The uncle directed them to call the police. The children then returned to their home after being unable to locate their parents. (R. 48).

At 11:24 a.m. that morning, July 19, 2020, Abarca's and Victim's children, Juan and Dulce, were so upset and worried that their parents had not returned home the previous evening, all night, or in the morning, and that they could not find them after going out and looking for them, that they call 911 to report their parents were missing persons and that they, the children, had been left alone all night and up until the time of the 911 call and were still alone [i.e. they were abandoned]. In the 911 call, a worried and concerned Juan and a frightened and tearful Dulce informed the 911 operator that their parents are missing persons, and their parents disappeared the afternoon of July 18, 2020. A frightened and tearful Dulce reported to the 911 operator that the evening previous to her mother and father disappearing, July 17, 2020, the mother and father had a fight, and the fight was about her father's belief that her mother was cheating on him. She also told the 911 operator that during the fight her father accused her mother of cheating. Three and a half years later at trial, Juan testified that the night previous to his parents going missing, July 17, 2020, his parents had an argument or fight. Juan could not remember what the fight was about. Also 3 ½ years later, Dulce testified at trial that she *believed* the fight on July 17, 2020, was about her father's belief her mother was cheating on him. Based on what the children, and their uncle, related to the 911

operator on July 19, 2020, at approximately 11:24 a.m.,[3] the 911 operator dispatched a Sheriff's Deputy to further investigate the missing persons [Abarca and Victim] and the fact that the children had been left alone at the family home without parental supervision. (R. 33-41; 42-54; 55-65; State's Ex. 1 [CAD report of 911 call]; State's Ex. 2 [Redacted 911 call]; Court's Ex. 1 [unredacted 911 call not played for the jury]).

The Deputy Sheriff arrived at the family home and took the missing person's report from Juan and Dulce. The children related to the police that Abarca and Victim had left the family home the previous day about 3:00 p.m. in Abarca's brown Tacoma pick-up truck headed to the land [garden] and were then going to the rental property and then to Walmart. Deputy Sheriffs were dispatched to the land at the end of Concord Heights Road where the garden was located. Deputies drove to the end of Concord Heights Road and walked into the field where the garden was located. Deputies found muddy footprints into the garden area. There, in the garden, Deputies found Victim's dead body buried in a shallow grave and covered with corn stalks and other crops near a row of growing corn. When Victim's body was exhumed, police immediately noticed Victim had cut and stab wounds to her face, front neck, and the back of her neck. (R. 67-74; 84-89; 91-95; 301-20).

The autopsy determined that Victim had defensive stab or cut wounds to the palm of 1 hand and the back of the other arm. The autopsy also determined that Victim had cuts and stabs to her face and the back of the neck. The autopsy also found Victim had 4 chop wounds, including 2 to

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[3] The portion of the 911 call in which Juan's and Dulce's uncle, Abarca's brother, got on the 911 call was redacted because Abarca's brother [the uncle] did not testify at trial. Further, he was not emotional and almost all of what he related to the 911 operator was hearsay related to him from the police in Alabama. (Court's Ex. 1[unredacted 911 call]; State's Ex. 2 [redacted 911 call]). The uncle's son, Luis, and the Alabama police officer who arrested Luis and Abarca did testify at trial to everything that they witnessed. (R. 192-205; 218-25).

the top of her head that fractured her skull, 1 to her face, and 1 to her neck that severed her trachea. These chop wounds were consistent with having been caused by a "machete." The pathologist also determined Victim had chemical burn injuries to her skin that were caused around the time of her death. The pathologist testified the injuries were caused by someone pouring a chemical consistent with bleach on Victim's body as she was dying. The pathologist testified the cause of death was bleeding to death from the numerous injuries and the manner of death was homicide, Victim's life was taken by another. (R. 301-20).

After Victim's body was located in Abarca's garden, police next went to the rental property located at 125 Small Farm Road. When police arrived at the rental home, they could not see a vehicle anywhere around the home. However, upon looking behind the home, police found Abarca's brown Toyota Tacoma parked behind the home. Abarca was not at the rental home but in custody in western Alabama. Police had a search warrant to search the rental home and Abarca's truck. Inside the truck, police found several machetes. Another machete was later recovered from the field where the garden was located. Police found a pair of muddy boots in the floorboard of the truck. Police also found in the back seat of the truck a bottle of bleach. Upon searching the rental home, Abarca was not there, but police found mud in the bathroom tub that was still wet where it appeared someone had attempted to wash and clean themselves up. (R. 96-114, 105-06).

At trial, the State introduced the live testimony of Juan and Dulce. (R. 42-54; 55-65). The State also introduced the surveillance video taken from Concord Baptist Church that captured the truck perfectly consistent with Abarca's truck turning onto Concord Heights Road and headed to the garden at approximately 3:00 p.m. on July 18th and then returning approximately 30 minutes later and leaving the area. (R. 235-41; 248-51; 271-75; 366-377; 67-74; 84-89; 92-95; 257-59; State's Ex. 54). The State also introduced the testimony of Luis and the officer who arrested Abarca

in Alabama and how Luis was forced to drive Abarca on his flight across the southeastern United States with no luggage, 2 passports, and $1,000 in cash. (R. 218-30; 192-217). The State also introduced the bodycam footage of the Alabama officer's arrest of Luis and Abarca. The State also introduced the testimony of the officers who discovered Victim's murdered body buried in a shallow grave in Abarca's garden. (R. 67-74; 84-89; 91-95; 301-20). The State also introduced the testimony of the officers who found and searched Abarca's brown truck parked behind the secluded rental property on Small Farm Road and what they found in Abarca's truck, machetes, knives, and a bottle of bleach, and in the home itself, wet mud in the bathtub; the home from which Abarca obtained a ride out of state from his nephew Luis. (R. 96-114; 265; 298). And, the State introduced the testimony of the pathologist who determined the victim was brutally assaulted and murdered with an instrument consistent with a machete. (R. 301-20). Abarca chose not to testify and presented no evidence in his defense. The jury deliberated for approximately 2 ½ hours and found Abarca guilty as charged. (R. 371-73).

ARGUMENT

Judge Kelly did not abuse his discretion in admitting the redacted 911 call because the children's statements on the 911 call were: (1) excited utterances of the startling event they were witnessing and experiencing that their parents were missing persons and had not returned home and left them abandoned and alone; (2) present sense impressions of the startling event or condition they were experiencing, i.e. their parents going missing and leaving them abandoned and alone; and 3) the 911 call was a business record kept in the ordinary course of business as testified to by the custodian of records; and, the probative value of the redacted 911 call was not substantially outweighed by the danger of unfair prejudice; regardless, the admission of the redacted 911 call was harmless as it was cumulative, not needlessly cumulative, to the testimony of the children at trial and also given the clear evidence of Abarca's guilt; finally, the correct result was reached as Abarca essentially conceded his guilt to Judge Kelly.

What occurred below

Pre-trial, the Solicitor informed Judge Kelly that despite what occurred the previous day, the Solicitor now believed that Abarca objected to the introduction of the redacted 911 call from Juan and Dulce to Cherokee County 911 reporting their parents as missing persons and that they, the children, had been left alone. Judge Kelly noted that he thought the redacted 911 call had been agreed by both sides the previous day to be admissible. The Solicitor stated he thought the same. (R. 11). Defense counsel stated that he had an objection to how "stuff" came in and the procedure because he had case law on point about "how things come in." He clarified that he had an objection if the State presented the 911 call at the beginning of the case, but he didn't know how the State was going to present their case. Judge Kelly responded he did not know how the State was going to present witnesses or their case either. The Solicitor explained the first witness would be the 911 Director of Communications for Cherokee County who was the custodian of records for Cherokee County 911. The first exhibit would be the Computer Aided Dispatch (CAD) sheet from Cherokee 911 for the 911 call from the children on July 19, 2020, reporting their parents were missing persons and the children abandoned. And the second exhibit would be the redacted 911 call [State's

Ex. 2]. Judge Kelly expressed that he previously understood from the previous day of trial that the 911 call was redacted and the children on there would be testifying, and the redacted 911 call was agreed to as far as admissibility. The Solicitor stated that now that it seemed there was in fact an objection to the redacted 911 call, he, the Solicitor wanted to go ahead and make the unredacted 911 call a Court's Exhibit for the purpose of this pre-trial hearing. The redacted version would be entered later but not referenced before the jury as redacted. The Court and the parties agreed and the unredacted 911 call was marked as Court's Exhibit 1. Judge Kelly also noted on the record that he did not listen to the tape the previous day of Court because he understood there was an agreement by both the State and Abarca that the redacted tape would be admitted since both children were going to testify at trial. (R. 11, ln. 20 – 40, ln. 9).

Abarca then proceeded to argue that State v. Barrett[4] prevented the admission of the redacted 911 tape in this case. Abarca admitted that in Barrett the Court allowed someone to testify first, and the appellate Court said ordinarily when a witness has taken the stand and not been impeached, a prior consistent statement is not admissible. Abarca then argued that putting the 911 tape in at the very beginning of the trial in this case and then putting the children on the stand, is simply re-questioning them on what's on the 911 tape, and admitting a prior consistent statement that's bolstering and would fall under Rule 403 as cumulative evidence as well. Abarca admitted that Barrett is read as applying to Criminal Sexual Conduct (CSC) cases and the trial court is given leeway after the witness has testified whether another witness can follow and testify about statements the first witness previously made, but Abarca was arguing that this, putting the children up is basically a consistent statement. Abarca questioned why the children should be put on the stand if it's going to be the exact same testimony. (R. 13, ln. 10). Both Judge Kelly and the Solicitor

[4] 299 S.C. 485, 386 S.E.2d 242 (1989).

stated on the record that they did not read Barrett that narrow. (R. 13, ll. 9-12). The Solicitor then argued there were not going to be separate witnesses who testified to statements the children made in the past. It was going to be the same children who testified during the trial that are also on the 911 tape. The State informed the Court that the children were going to testify and be subject to cross-examination, including about what is on the redacted 911 call. The State argued it is not going to be bolstering because there is not going to be a separate witness, a distinct witness, who is going to come in and say these children are credible. The Solicitor argued that while it is somewhat cumulative, it is not totally cumulative because this is different and distinct evidence and its probative value is not substantially outweighed by the danger of unfair prejudice because the indictment shows the time and location of the report and this case happened 3 ½ years ago and the witnesses' memory may not be as accurate as when the contemporaneous 911 call was made reporting the parents as missing persons. The Solicitor also argued the 911 call is an exact record, a business record, of what took place that day. So, it is different and not cumulative. (R. 14, ln. 13 – 42, ln. 5).

Abarca argued that if the children's memories were fuzzy, then the proper way to do that is to play the 911 call to refresh their memories. Abarca argued that if nothing was going to change, he still believed the evidence was cumulative and he was going to object for that reason and that it was bolstering their testimony with a prior consistent statement. (R. 15, ll. 10-16). Judge Kelly then stated the witnesses would not be present during the playing of the redacted 911 tape. The Solicitor confirmed they would not. Judge Kelly ruled that the redacted 911 call was admissible over Abarca's objection. (R. 15, ll. 17-21).

As the State informed Judge Kelly and opposing counsel, when the State called its first witness, it called Dennis Gardner, the Director of Communications for Cherokee 911 who is also

the custodian of records for Cherokee County 911. (R. 32). At that time, Abarca interposed an additional objection. Abarca objected to this witness testifying alleging a Confrontation Clause violation under Crawford v. Washington,[5] Davis v. Washington,[6] and Michigan v. Bryant,[7] because this witness was not the person that actually took the call. (R. 32, ll. 18-23). The Solicitor responded that the witness was the custodian of records of Cherokee County 911 and could testify as to the admissibility of the 911 call itself. (R. 32-33). Judge Kelly also overruled this objection of Abarca. (R. 33, ln. 3). Judge Kelly already knew Abarca's children, who made the 911 call, would testify before the jury. (R. 11-15).

Dennis Gardner then testified before the jury that he was the Director of Cherokee County 911. Garner testified he had been with Cherokee County 911 for 13 years and had been the Director for 5 years since 2018. He testified that as the Director his responsibilities and duties included overseeing all versions of 911, all jobs, all employment, and all aspects of Cherokee County 911. Director Gardner testified that every and all 911 calls to Cherokee County 911 are recorded. This included telephone calls and regular traffic. He also testified the 911 calls are recorded in the ordinary course of business, and they are recorded 24 hours a day. Director Garner testified that all 911 calls are saved and stored on a voice logger and the company used is Carolina Recording. All 911calls are maintained and monitored by the custodian of records, and they are maintained because they are evidence in court cases such as this one and they are reviewed for training purposes. Further, a written record is also generated when a 911 call is made, the CAD sheet or report, to further ensure accuracy. That report starts as soon as a 911 call comes in, as soon as the dispatcher starts the call. It generates a call for service. These are also maintained by Cherokee

[5] 541 U.S. 36 (2004).
[6] 547 U.S. 813 (2006).
[7] 562 U.S. 344 (2011).

County 911 records and can be supplied to anyone pursuant to a FOIA request. It is the paper version of the phone call or the transaction once the 911 call starts and deputies, law enforcement, and E.M.S. go enroute to the scene in question. The CAD sheets are also maintained in the ordinary course of business and stored in computers like the 911 calls. The CAD sheets are stored in a program called Central Square, and they are stored for 5 years, and Cherokee County just renewed all aspects of Central Square with that company. If anything is added to the CAD sheet there is a notation and date and time stamp. After 3 days, no one can go back in and change anything on the CAD sheet. Judge Kelly admitted the CAD sheet as a business record. And, the custodian of records made a copy of the 911 call recorded by the Cherokee County 911 computer and its program in this case, listened to it before testifying, and provided that disc to the court and authenticated it on the stand as State's Ex. 2. Judge Kelly admitted State's Ex. 2 over Abarca's objection, and the State published to the jury the redacted 911 call in this case of Abarca's children reporting Abarca and Victim missing and that the children were left alone and the circumstances surrounding Abarca and Victim's disappearance. (R. 33, ln. 7 – 67 ln. 13; see also 40, ln. 20 – 41, ln. 25).[8]

After laying the proper foundation with this witness, when the State offered the actual redacted 911 call (State's Ex. 2), Abarca renewed his previous objection under Barrett and Rule 403 as well. Judge Kelly overruled the objection and admitted the redacted 911 call (State's Ex. 2) which was published to the jury. (R. 39, ln. 10 – 40, ln. 13).

During the trial, both Juan and Dulce, who made the 911 call, testified that they made the 911 call reporting that their parents were missing and they, the children, had been left alone. Both

[8] The jury never heard the portion of the 911 call in which Juan's and Dulce's uncle, Abarca's brother, spoke to the 911 operator. (State's Ex. 2 [redacted phone call]).

Juan and Dulce were subject to cross-examination about what they told the 911 operator. Juan and Dulce testified to other facts in the case in addition to making the 911 call. (R. 42-54; 55-65).

Analysis

Standard of Review

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court, and the decision of the trial court and its' ruling will not be disturbed in the absence of an abuse of discretion accompanied by probable prejudice. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429-30, 632 S.E.2d at 848.

There is no Confrontation Clause violation

First, there is no Confrontation Clause violation because both Juan and Dulce, the individuals who made the 911 call [the declarants], testified under oath and were subject to and available for cross-examination. (R. 42-54; 55-65). State v. Stokes, 381 S.C. 390, 398-404, 673 S.E.2d 434, 438-441 (1989)(following Crawford v. Washington, *supra*; Kentucky v. Stincer, 482 U.S. 730, 739 (1987); California v. Green, 399 U.S. 149 (1970); & United States v. Owens, 484 U.S. 554, 559 (1988)). Both Juan and Dulce were subject to cross-examination by Abarca about what they said on the 911 call that they made. Id. Case precedent recognizes that when an out of court statement is introduced and the individual or individuals who made the statement testify and are available for cross-examination by the defendant, there is no Confrontation Clause violation. Id. This portion of Abarca's brief has no merit.

If this were not enough to resolve this issue, which it is, Juan's and Dulce's 911 call including those statements volunteered and those made in response to the 911 operator's questions

to determine the nature of the call and what type of response was needed, were non-testimonial under Davis v. Washington, 547 U.S. 813 (2006) and did not implicate the Confrontation Clause. Davis, 547 U.S. at 827-29 (911 call of victim of domestic violence reporting domestic violence and even answering questions of 911 operator including the identity of the perpetrator were non-testimonial and did not implicate the Confrontation Clause); Id. at 828 (italics in original)("We conclude from all this that the circumstances of McCottry's interrogation [by the 911 operator] objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She [McCottry] simply was not acting as a *witness;* she was not *testifying*. What she said was not "a weaker substitute for live testimony" at trial."); State v. Thompson, 420 S.C. 386, 401-02 803 S.E.2d 44 (2017)(911 caller's statements to 911 operator even those in response to questions were to allow for police to properly respond to ongoing emergency and were not testimonial); Crawford, 541 U.S. at 53–54(statements made to police "are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency"); Id. (holding statements are "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution") Id. ("A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance."). There was no Confrontation Clause violation here. The children's statements to the 911 operator were non-testimonial and a cry for help that their parents were missing, and they had been abandoned. State v. Bratschi, 413 S.C. 97, 775 S.E.2d 39 (Ct. App. 2015)(victim's 911 one call recorded shortly after fight between defendant and victim,

several weeks before murder, was non-testimonial and, thus, did not violate defendant's right of confrontation). This argument of Abarca has no merit.

The great majority of the 911 call is non-hearsay

"Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Here, the record shows the State offered the 911 call [State's Ex. 2] first in its case in chief to establish how law enforcement first became involved in the case and why they dispatched police officers to the home of the children, not emergency medical services (EMS) or the Department of Social Services (DSS), and eventually went to Abarca's garden and discovered the body of Victim. (R. 33-41; Court's Ex. 1; State's Ex. 2). In the 911 call, the children reported their parents missing, the parents fought the night before they disappeared, and Dulce reported the fight was about Abarca's belief that Victim was cheating on him and someone had checked and Abarca's gun was still in his closet (Court's Ex. 1; State's Ex. 2). Dulce also reported to the 911 operator that her father had been violent with her mother in the past, Dulce had to watch Abarca when Abarca and her mother fought, and Dulce's uncle Simon reported Abarca had been captured in Alabama and Victim was not with him. (Court's Ex. 1).[9] This is how the Solicitor began his opening statement, i.e. discussing how the investigation began with the 911 call from the children. (R. 25-30). This is how the State began its case. (R. 33-41; State's Ex. 1 [CAD report]; State's Ex. 2 [Redacted 911 call]). The great majority of the 911 call was not offered for the truth of the matter asserted and was therefore non-hearsay and admissible. Rule 801, SCRE.

[9] The jury did not hear this specific information, it was redacted from the 911 call, but the 911 operator did hear this information and dispatched the Sheriff's Office to the home.

The redacted 911 call was admissible as an excited utterance

Regardless, the redacted 911 call was admissible because it fell under a well-recognized exception to the hearsay rule, an excited utterance. Rule 803(2), SCRE; State v. Prather, 429 S.C. 583, 611, 840 S.E.2d 551, 565-66 (2020)("[T]o be an excited utterance[,] '(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.'" (quoting State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)). The 911 call was an excited utterance made by Juan and Dulce to Cherokee County 911 under the influence of the startling event of both of their parents being missing persons **and** the 3 children being left abandoned and alone. Rule 803(2), SCRE; State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002); State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999); State v. Sledge, 428 S.C. 40, 832 S.E.2d 633 (Ct. App. 2019)(statement of victim's 10-year-old son in recording of 911 call fell under excited utterance exception to hearsay rule). To fully understand the fact that the 911 call is an excited utterance, this Court must review the un-redacted version of the 911 call and the redacted version. (Court's Ex. 1; State's Ex. 2). From reviewing both the unredacted and redacted version of the 911 call of July 19, 2020, this Court will be able to discern this 911 call from Juan and Dulce constitutes an excited utterance by both 16-year-old Juan and 12-year-old Dulce. (Court's Ex. 1 & State's Ex. 2). In the 911 call, Juan is concerned and worried and communicates to the 911 operator that his parents left the day before and never returned leaving the children alone and he is only 16. A tearful, frightened, worried, and concerned Dulce, without being specifically asked, communicates to the 911 operator that her father and mother were fighting the night before they went missing and then upon request tells the 911 operator the fight was about her father believing her mother was cheating on him. (Court's Ex. 1 and State's Ex. 2;

See also R. 333-35 [the Solicitor describing the 911 call in closing argument]). She also told the operator her father had accused her mother of cheating. When asked for her mother's phone number, a tearful, frightened, and worried Dulce also communicated to the 911 operator that since her mother disappeared Dulce had phoned her mother 7 different times and her mother had not answered any of her calls. (Court's Ex. 1 & State's Ex. 2). Dulce also communicated to the 911 operator her worry about her mother because she informed the operator that either she or her brother *had checked the closet* and *her father's pistol was still in the closet* where he kept it. (Court's Ex. 1; State's Ex. 1). She also communicated to the 911 operator that her father had been violent with her mother before, and she had to watch her father when her father and mother got into a fight. (Court's Ex. 1).[10]

"In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances." Sims, 348 S.C. at 20, 558 S.E.2d at 521; State v. McHoney, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001)(citing State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)). "Additionally, such a determination is left to the sound discretion of the trial court." Sims, 348 S.C. at 21, 558 S.E.2d at 521. "The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor." State v. Stahlnecker, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010). "Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." Id. (quoting Sims, 348 S.C. at 22, 558 S.E.2d at 521). "The excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'"

[10] This particular information was redacted from the 911 call but is contained in the 911 call to the 911 operator. (Court's Ex. 1; State's Ex. 2).

State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007)(quoting Dennis, 337 S.C. at 284, 523 S.E.2d at 177). The determination of whether a statement qualifies as an excited utterance "is left to the sound discretion of the trial court." Sims, 348 S.C. at 21, 558 S.E.2d at 521. The burden of establishing facts that would qualify a statement as an excited utterance is upon the proponent of the evidence. State v. Davis, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006); Sledge, 428 S.C. at 50, 832 S.E.2d at 639.

Abarca is correct in his assertion that the children could not have been excited by or under the influence of the murder of their mother because they did not even know of her murder at the time of the 911 call, approximately 11:24 a.m., July 19, 2020. However, the startling event that they were under the influence of was not the murder, which neither the children nor police even knew about at the time of the 911 call on July 19th. The startling event was the fact the children's parents had fought on the night of July 17, 2020, with the fight being about their father believing their mother was cheating on him, the children's parents left together the previous day, July 18, 2020, around 3:00 p.m. in their father's brown truck and never returned; their parents did not answer numerous phone calls from their own children on the night of July 18, 2020; their parents were not in 2 locations the children went and looked on the morning of July 19, 2020; their father's truck was located at the rental property on July 19th but not their parents; their parents were missing persons; their parents' 3 children were abandoned and alone at their home; and, it was now 11:24 a.m. July 19th, 2020 and their parents were still missing and the children had been abandoned. (Court's Ex. 1 & State's Ex. 2).[11] The startling event the children were under the influence of was

[11] It must also be remembered, considering the unredacted 911 call [Court's Ex. 1], that the children's uncle was present when Juan and Dulce made the 911 call, and the uncle got on the phone with the 911 operator and explained he had been contacted by Alabama police about 6:00 a.m. that day and informed that his brother Abarca, **the children's father**, and 17 year old Luis, the uncle's son, had been arrested in Alabama and Victim was not with them, and the uncle did not

the fact that their parents had gone missing and left them abandoned and the circumstances surrounding their parents going missing and leaving the children abandoned. It must be remembered the 2 individuals who made the 911 call were children. One (1) was 16 years old and worried and concerned and only had a driver's permit, and the other was only 12 years old and upset, tearful, and scared. What child would not be under these circumstances. Sims, *supra* (considering as 1 factor in determining whether a statement is an excited utterance the age of the child at the time of the utterance); Sledge, 428 S.C. at 52-55, 832 S.E.2d at 640 (considering as 1 factor the age of the child at the time of the utterance). The 911 call was admissible as an excited utterance. Sims; Sledge; McHoney, 344 S.C. 85, 544 S.E.2d 30; Burdette, 335 S.C. 34, 515 S.E.2d 525; State v. Harrison, 298 S.C. 333, 380 S.E.2d 818 (1989); State v. McFadden, 318 S.C. 404, 458 S.E.2d 61 (Ct. App. 1995).

It is for this reason that the case Abarca cites, Barrett, *supra*, is not apposite. Barrett involved the State admitting the improper testimony of a DSS social worker who testified to what the child victim of a sexual assault told her of the details of the sexual assault beyond time and place of the assault. The statement of the child victim was taken by the DSS social worker during an interview which took place some time period after the sexual assault and was not an excited utterance or present sense impression. Id.

Abarca also references Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991). For the same reason as discussed above, Simpkins is not apposite. Simpkins again dealt with the

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know where Victim was. Dulce then got on the phone and told the 911 operator her father had previously talked about going to work in Alabama several months earlier. She then volunteered her parents had been in a fight the night before her parents disappeared. She then responded the fight was about her father believing her mother was cheating on him. (Court's Ex. 1). The 911 call was an excited utterance made under the influence of the parents' disappearance and the children's abandonment and all of the circumstances surrounding the disappearance and abandonment.

admission of a hearsay statement of a child C.S.C. victim beyond the report of time and place of the assault. In fact, a witness testified that the victim identified the defendant as the perpetrator, and the victim did not identify the defendant as the perpetrator on the witness stand. Further, Simpkins has been overruled in light of Crawford v. Washington and other United States Supreme Court precedent. State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009).

In his brief, Abarca also cites Jolly v. State, 314 S.C. 17, 443 S.E.22d 566 (1994). Again, like the cases just discussed, Jolly is not controlling. In Jolly, a PCR case, Jolly claimed his trial counsel was ineffective in not objecting to an uncle's testimony that the victim related to him that her grandfather had molested her. Again, the statement was inadmissible because it went outside the time and place of the sexual assault. It also did not fit under any other hearsay exception including an excited utterance or prior inconsistent statement after a charge of recent fabrication. The applicant was prejudiced because the failure to object kept applicant from proving prejudice because the uncle's testimony was cumulative to another witness who counsel did object to which was also inadmissible for similar reasons. Id. Further, Jolly was overruled to the extent it imposed a categorical or per se rule precluding a finding of harmless error given the inadmissible hearsay testimony. Thompson v. State, 423 S.C. 235, 245-246, 814 S.E.2d 487, 492 (2018); State v. Jennings, 394 S.C. 473, 482, 716 S.E.2d 91, 95-96 (Kittredge, J., concurring), and 394 S.C. at 483, 716 S.E.2d at 96 (Toal, C.J., dissenting)(collectively overruling Jolly).

Present sense impression

The 911 call of Juan and Dulce is also a present sense impression of the disappearance of their parents and the abandonment of Juan, Dulce, and their 4-year-old brother and the circumstances surrounding the same. (State's Ex. 2 & Court's Ex. 1). Rule 801(3), S.C.R.E., provides:

Hearsay Exceptions: Availability of Declarant Immaterial

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> **(1)** Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000). A declaration that is merely a narration of a past event, is not a present sense impression. State v. Way, 76 S.C. 91, 56 S.E. 653 (1907); State v. Belcher, 13 S.C. 459 (1880). There are 3 elements to the foundation for the admission of a hearsay statement 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*. *See* Rule 803(1), SCRE; *see also* United States v. Mitchell, 145 F.3d 572, 576 (3d Cir.1998)(listing the "three principal requirements" for a statement to be admissible as a present sense impression). State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014).

Here, Juan and Dulce were describing *an event* and *a condition*, their parents' disappearance and their [the children's] abandonment and the circumstances surrounding both. Rule 803, SCRE; Mitchell, *supra*; Hendricks, *supra*. This was the very purpose of the phone call to 911. It was a cry for help. Juan and Dulce related to the 911 operator that their parents had gone missing and abandoned them; their parents were last seen together leaving their home in their father's truck at about 3:00 p.m. the previous day; the night before their parents disappeared and the children were abandoned, their parents fought and Abarca believed their mother was cheating on him; their parents did not return since leaving at 3:00 p.m. on July 18th even up until the time of the 911 call; their parents had not answered or returned numerous phone calls; their parents were still missing, and Juan, Dulce, and their little brother Emanuel were still left abandoned at

their home by their parents except for an uncle who was now there with them. (Court's Ex. 1 [unredacted 911 call]; State's Ex. 2 [redacted 911 call]). This event and condition had been building for several days. The 911 call was admissible as a present sense impression of their parents going missing and abandoning them and the circumstances surrounding the same. Prather, 429 S.C. at 611, 840 S.E.2d at 565 ("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.**'")(emphasis added)(quoting State v. Hendricks, 408 S.C. at 533, 759 S.E.2d at 438).

Business record

Further, the 911 call was introduced as a business record of Cherokee County 911. Rule 803(6), SCRE; S.C. Code Ann. Section 19-5-510. As previously discussed, the custodian of records for Cherokee County 911 testified each 911 call is recorded exactly as the conversation took place between the 911 caller and the 911 operator and kept and maintained in the normal and ordinary course of business. (R. 33-42). The record of the 911 call is recorded by a computer and a recording program that the Cherokee County maintains and the 911 call recording is made for retaining evidence in court cases and for training purposes for 911 and its' staff; and, the entries on the recording of the 911 call were made at the time of the transaction which they relate. (R. 33-42). State v. Sarvis, 317 S.C. 102, 450 S.E.2d 606 (Ct. App. 1994)(discussing the requirements of a business record to be admissible); State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007)(same). The 911 call is what it is. It is an actual recording of the actual 911 call from the children who were the victims of their parents becoming missing persons *and* the children being abandoned made in real time when the 911 call was made to Cherokee 911 on January 19, 2020, at approximately 11:24 a.m. (State's Ex. 1; State's Ex. 2; Court's Ex. 1; R. 33-41).

The order of the evidence

Abarca also complains about the order of the presentation of the evidence, i.e. the State introduced the 911 call through its first witness, the custodian of records for Cherokee County 911, and then introduced the live testimony of Juan and Dulce. He argues this is improper bolstering of Juan and Dulce with a prior consistent statement when there was no charge of recent fabrication.[12] There is no merit to this argument as recently determined by the South Carolina Supreme Court. State v. Davis-Kocsis, 443 S.C. 127, 902 S.E.2d 491 (2024). In Davis-Kocsis, the State introduced a 911 call from a surviving victim of a home invasion, kidnapping, and murder, **to corroborate** the 911 caller's trial testimony. Similar to this case, the appellant complained that the State should not be able to introduce the 911 call until the witness **to be corroborated** testified. The Supreme Court rejected this argument finding "the trial court has discretion to base an assessment of probative value on testimony or evidence that has not yet been presented but appears likely to be presented later. Thus, this argument has no merit." Id. at 137, 902 S.E.2d 491. Here, in the present case, Judge Kelly was aware that both Juan and Dulce were going to testify after the 911 call was introduced through the custodian of records of Cherokee County 911. (R. 11-15). That was stated in the pre-trial hearing. (R. 11-15). Further, the witnesses Juan and Dulce testified before the jury as the State represented to the trial judge pretrial. (R. 42-54; 55-65). The phone call was not admitted as a prior consistent statement as Abarca alleges. Additionally, here the 911 call was admissible on its own as non-hearsay, an excited utterance, present sense impression, and

[12] Although not offered or admitted as a prior consistent statement, the 911 tape was arguably admissible for that purpose after Abarca cross-examined both Juan and Dulce about whether they had met with the Solicitor prior to trial, how many times, and for what purpose. The only purpose of this questioning could have been to create in the mind of the jury an implied charge of recent fabrication, i.e. coaching. Defense counsel certainly was not trying to prove the Solicitor had properly prepared the case for trial. (R. 50, ll. 15-14; 62, ln 16-63, ln 1).

business record as previously discussed. The fact that the 911 call was admissible under several different theories but also corroborated Juan and Dulce's trial testimony is not improper.

Rule 403 objection

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999); State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." Rule 403, SCRE. "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial judge'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." State v. McLeod, 362 S.C. 73, 81–82, 606 S.E.2d 215, 220 (Ct.App.2004) (citations omitted); State v. Lyles, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."). State v. Green, 412 S.C. 65, 79, 770 S.E.2d 424, 432 (Ct. App. 2015) ("A trial [court]'s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." (alteration in original) (quoting Lyles, 379 S.C. at 339, 665 S.E.2d at 207).

"Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013)(internal quotation marks omitted). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (brackets and internal quotation marks omitted).

Abarca's Rule 403 objection is without merit. The 911 tape was properly admitted as its' probative value was not substantially outweighed by the danger of unfair prejudice or needlessly cumulative. First, the 911 call was relevant as it captured Abarca's children's concern for Abarca and their mother immediately after Abarca and Victim disappeared and did not return numerous phone calls of the children. This established that Abarca's and Victim's disappearance on July 18th was not normal and justified contacting authorities which led directly to police discovering their mother's murdered body. Second, the 911 tape captured what the children knew contemporaneous with their parents' disappearance and their mother's murder and the circumstances surrounding the same. In fact, at trial, 3 ½ years later, Dulce testified she *believed* her parents were arguing the night before they disappeared over the fact that her father believed her mother of cheating on him. In the 911 tape, she is clearly emotional and informs the 911 operator without hesitation or doubt that her parents were arguing about her father's belief her mother was cheating on him. (Court's Ex. 1 & State's Ex. 2). The 911 tape was properly admitted as it was relevant to establish Dulce's

accurate memory at the time. State v. Shuler, 353 S.C. 176, 184–85, 577 S.E.2d 438, 442–43 (2003). Finally, it was relevant because it established a motive for the murder; Abarca and Victim had argued, and the argument was about Abarca's belief his wife was cheating on him. The murder followed the day after the argument, and Abarca fled the State the same day as the murder. Sledge, 428 S.C. at 55–56, 832 S.E.2d at 641–42. *See also* State v. Davis-Kocsis, 443 S.C. 127, 135-136, 903 S.E.2d 491, 495-96 (2024); State v. Bratschi, 413 S.C. 97, 118, 775 S.E.2d 39, 50 (Ct. App. 2015).

Furthermore, the 911 tape was not so unfairly prejudicial so as to substantially outweigh its probative value. The 911 tape is what it is. It is Abarca's own son and daughter in a concerned and worried state in real time reporting their father and mother missing and the circumstances surrounding their parents going missing. (Court's Ex. 1 & State's Ex. 2). Abarca's own children's emotional distress is not so disturbing as to suggest Abarca's determination of guilt was made on an improper basis. The children testified live before the jury and Juan is now an adult and Dulce a teenager. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991)(unfair prejudice exists where evidence creates a tendency to suggest decision on an improper basis, commonly though not necessarily, an emotional one); Shuler, 353 S.C. at 184–85, 577 S.E.2d at 442–43. As this Court stated in State v. Sledge, a case that held the trial court properly admitted a 10-year-old child's statements in a 911 call that his parents were arguing before his stepdad shot his mother:

> We also disagree with Sledge's assertion the statements should have been excluded because they were more prejudicial than probative. All relevant evidence is generally admissible. Rule 402, 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." Rule 401, SCRE. "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. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). Rule 403, SCRE, has sometimes been misstated, incorrectly providing that for evidence to be admissible under a Rule 403 analysis the probative value of evidence must substantially outweigh the danger of unfair prejudice to the defendant, whereas "[t]he correct test is the opposite: whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." State v. King, 424 S.C. 188, 200 n.6, 818 S.E.2d 204, 210 n.6 (2018). The misstated test "incorrectly places the burden on the proponent of the evidence to establish admissibility, while the proper test places the burden on the opponent of the evidence to establish inadmissibility" under Rule 403. Id. An appellate court reviews a trial court's Rule 403, SCRE ruling pursuant to an abuse of discretion standard and gives great deference to the trial court's determination. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014). "A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." Id. (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).
>
> Here, the statements at issue were clearly relevant as to motive, opportunity and identity. Further, while we acknowledge the prejudicial effect is great—particularly as to M.W.'s statement that Sledge shot his mother—the child's trial testimony provides additional damaging details not included in the 911 call, including that he witnessed a physical altercation between Sledge and Victim prior to the shooting and, during this time, Victim told M.W. that Sledge was really mad at her and might kill her. His trial testimony also established a scenario that explains why M.W. would have perceived Sledge was the person who shot his mother. Accordingly, we cannot say the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, and we find no abuse of discretion in the trial court's determination the evidence was admissible under Rule 403.

Sledge, 428 S.C. at 55–56, 832 S.E.2d at 641–42. *See also* Davis-Kocsis, 443 S.C. at 135-136, 903 S.E.2d at 495-96 (finding surviving victim's 911 call's significant probative value was not substantially outweighed by the minimal danger of unfair prejudice and trial court did not err in admitting the 911 call over the Rule 403 objection); Bratschi, 413 S.C. at 118, 775 S.E.2d at 50 (trial court did not err in admitting murder victim's 911 call from previous assault by the defendant

over defendant's Rule 403, objection as its probative value was not substantially outweighed by the danger of unfair prejudice).

Petitioner also argues the 911 tape is cumulative; therefore, it was error to admit it. Petitioner is wrong. A trial court has particularly wide discretion in ruling on Rule 403 objections. *See* State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("We ... are obligated to give great deference to the trial court's judgment [regarding Rule 403]." (internal citation omitted)), *overruled on other grounds* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Rule 403 states: "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.*" (emphasis added). Rule 403 states the trial judge may exclude evidence if it involves **the needless** presentation of cumulative evidence. But it does not say the trial judge has to exclude cumulative evidence, only that it may exclude it due to considerations of undue delay, waste of time or *needless presentation of cumulative evidence.* None of those occurred here. The 911 tape was not needlessly cumulative. K.S. by & through Seeger v. Richland Sch. Dist. Two, 445 S.C. 111, 912 S.E.2d 240, 247 (2025), *referencing* State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968) ("Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point."); United States v. Williams, 81 F.3d 1434, 1443 (7th Cir. 1996) ("Evidence is 'cumulative' when it adds very little to the probative force of the other evidence in the case, so that if it were admitted its contribution to the determination of truth would be outweighed by its contribution to the length of the trial ...."). Determining whether evidence is cumulative necessarily requires an exercise of discretion on the part of the trial court. Determining whether

evidence is "needlessly" cumulative under Rule 403 requires the trial court to exercise another layer of discretion. K.S. by & through Seeger, 445 S.C. 111, 912 S.E.2d at 247.

The 911 tape was not additional evidence of the same kind. The 911 tape was an excited utterance, a present sense impression, and a business record whereas Juan's and Dulce's testimony 3 ½ year later was eyewitness testimony years after the incident. The 911 tape captured the real time event which started the police investigation and led to the discovery of Victim's murdered body. It captured in real time the children's emotional report of their parents being missing and that they were abandoned **when the event was fresh in their mind** ***and*** **they had no motive to fabricate and only a motive to accurately report the events surrounding their parents' disappearance and their own abandonment.** As Dulce's trial testimony shows, 3 ½ years' later she was now 16 years old and could only testify that she *believed* her parents were arguing over her father's belief her mother was cheating on her. The 911 tape recorded in real time the report of Dulce's parents being missing and the children's abandonment and Dulce's emotional and firm response to the 911 operator that her parents were fighting the night before her mother's disappearance about her father's belief that her mother was cheating on him. (Court's Ex. 1 and State's Ex. 2). In the 911 call, under the influence of the events surrounding her parents' disappearance, Dulce is sure what her parents were fighting about. And she stated her father accused her mother of cheating. The trial court did not abuse its discretion in admitting the 911 tape as it was not needlessly cumulative.[13] K.S. by & through Seeger ; Funderburke, 251 S.C. 536,

[13] Several times in his brief, Abarca seems to argue that Juan's and Dulce's trial testimony is improper bolstering of the 911 tape or improperly cumulative to the 911 tape instead of the reverse. This argument has no merit as Juan and Dulce were eyewitnesses to the argument between their father and mother the night before their mother disappeared and was murdered, and they were eyewitnesses to the mother's disappearance on July 18th when their mother left with their father in their father's brown truck, and they were eyewitnesses to attempting to locate their parents, locating their father's abandoned truck, and calling 911 to report their parents missing and that

540, 164 S.E.2d at 311 (1968); Williams, 81 F.3d at 1443; *See* State v. Stephens, 398 S.C. 314, 728 S.E.2d 68 (2012). Further, the redacted 911 call was short and did not unduly delay the trial. (State's Ex. 2).

Harmless Error

Further, even assuming arguendo some error in the admission of the redacted 911 call, the error was harmless given the 911 call was cumulative to the testimony of Juan and Dulce at trial **and** given the other convincing evidence of Abarca's guilt. Thompson v. State, 423 S.C. 235, 245-46, 814 S.E.2d 487, 492 (2018); *See* State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93–94 (2011) ("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless."); State v. Brockmeyer, 406 S.C. 324, 356, 751 S.E.2d 645, 662 (2013) (holding "the improper admission of hearsay constitutes reversible error only when it results in prejudice, [and because the appellant] failed to show he was prejudiced, [he] failed to show reversible error"); Hendricks, 408 S.C. at 536, 759 S.E.2d at 440.

In State v. Caldwell, 283 S.C. 350, 322 S.E.2d 622 (1984), the Supreme Court "held the fact testimony is hearsay is unimportant if the declarant testifies and is available for cross examination. Boyce and Parish testified at trial and both were cross-examined. The admission of Boyce's statement to Parish through Adams was proper." Caldwell, 283 S.C. at 351, 322 S.E.2d at 662. The Court in Caldwell followed its previous decision in State v. Huggins, 275 S.C. 229, 231; 269 S.E.2d 334, 335 (1980). In Huggins, the Court held the admission of a statement of an informant to a police officer, whether it was hearsay or not, was rendered harmless when the

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they, the children, had been abandoned. The 911 tape was admissible in its' own right as excited utterance, present sense impression, or business record. The State can introduce an excited utterance, present sense impression, or business record despite the witness being available to testify and then present the eyewitness' testimony at trial. The availability of the declarant is irrelevant under these S.C.R.E.

informant, the declarant of the statement, took the stand and testified and was available for cross-examination. Id. In the present case, both Juan and Dulce testified and were subject to cross-examination about what they stated on the 911 call. As a result, any error in admitting the 911 call was rendered harmless. Caldwell; Huggins; *See* State v. Sims, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010) (even though certain challenged testimony was inadmissible hearsay the error was harmless "in view of the overwhelming evidence of guilt"). Their trial testimony was in some respects cumulative to what they said on the 911 call. (R. 42-54; 55-65). State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (finding the admission of improper evidence is harmless where the evidence is merely cumulative to other evidence).

Again, there was no Confrontation Clause violation because both Juan and Dulce were available for cross-examination about what they said on the 911 call. And, their statements were not testimonial but a cry for help because their parents were missing, and their parents' children were abandoned.

Further, they both testified that their father, Abarca, and their mother, Alicia Garcia, fought the night before they both disappeared, July 17, 2020. (R. 42-54; 55-65). Dulce testified 3 ½ years later before the jury, without objection, that she believed her parents fought over her father's belief her mother was cheating on him. (R. 42-54; 55-65). Both Juan and Dulce testified that the following day, July 18, 2020, around 3:00 p.m., their father and mother left their home together in their father's brown Toyota pick-up truck headed to the land [the garden], then to the rental property, and then to Walmart. (R. 42-54; 55-65). Dulce asked to go with them, but her father told her she could not go. (R. 55-65). Both testified their parents did not return that evening and their repeated phone calls to their parents went unanswered and were not returned. (R. 42-54; 55-65). Both testified that the following morning, July 19th, their parents had still not returned, and they

decided to go look for their parents. (R. 42-54; 55-65). Juan and Dulce testified that they started looking at the land [the garden], but their parents were not there nor was their father's truck. (R. 42-54; 55-65). They then drove to the rental property and found their father's truck but no one around the rental home. (R. 42-54; 55-65). They then drove to their uncle's home, and their uncle told them to call the police. (R. 42-54; 55-65). They drove back home and called 911 and reported their parents were missing and the fact that they were abandoned. (R. 42-54; 55-65).

The State introduced video surveillance footage from Concord Baptist Church that showed a brown pick-up truck perfectly consistent with Abarca's truck passed the church on Concord Road at 2:57 p.m. according to the surveillance cameras and turned onto Concord Heights Road and was headed toward the crime scene, the garden where Victim was horribly murdered. Just 30 minutes later, the same surveillance cameras captured the same brown pick-up truck consistent with Abarca's Toyota Tacoma coming back up Concord Heights Road and turning back onto Concord Road and leaving the area. This evidence is perfectly consistent with and corroborates the testimony of Juan and Dulce presented at trial before the jury. (R. 235-41; 242-51; 271-75; 366-67; State's Ex. 54 [surveillance video]; See 42-54; 46-55).

The evidence showed that Abarca next drove to his rental property on Small Farm Road and parked his brown Toyota Tacoma pick-up truck behind his rental mobile home so it could not be seen from the road. He then cleaned up in the bathtub where police later found wet mud still in the bathtub. (R. 96-107; 193-17; 298).[14]

While he was there, his nephew Luis Abara pulled up the driveway of the rental home to pay his uncle Abarca rent money. Abarca asked his 17-year-old-nephew Luis to give him a ride.

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[14] Not only had Abarca viciously murdered his wife at the garden, but also he had buried her in a shallow grave in the muddy wet garden. Abarca would have needed to clean himself up after committing the crime and burying Victim. (R. 67-74; 84-89; 92-95; 257-59).

Luis thought his uncle just wanted a ride somewhere nearby. Abarca got in the back of Luis' car and had no luggage or change of clothes. Luis found it strange that his uncle got in the back seat. His uncle then ordered Luis to drive to I-85 and head south. Abarca then ordered Luis to drive through Spartanburg, Greenville, Pickens, and Oconee County and into Georgia. Luis asked to turn the car around, but Abarca said no. Luis eventually passed through the Atlanta Georgia area and into western Georgia. Abarca eventually told Luis to turn off his phone. When Luis asked to turn around Abarca became upset or angry and told Luis to keep driving. Eventually, Abarca told Luis to enter Houston, Texas into his G.P.S. At some point, Luis came to believe he was not free to turn around or stop. However, Luis eventually could drive no longer and pulled off the interstate and parked behind a closed gas station and fell asleep. Around 3:00 a.m., Luis was awakened by Abarca shaking his shoulder. Abarca told him to drive but when Luis looked there was a police officer in front of him. Luis refused to flee the police officer as directed by his uncle Abarca. Luis eventually told the officer that Abarca had done something bad and had forced him to drive all the way to within 1 hour of the Mississippi State Line. Luis also told the officer he and Abarca were headed to Houston, Texas. Abarca refused to respond to the officer's commands, and the officer eventually made Abarca get out of the back of the vehicle and took him into custody. A search of the back floorboard revealed 2 passports for Abarca and $1,000. Police were unable to locate either Abarca's or Victim's cellphones. (R. 193-217; 218-31; 276-77).

Shortly after 11:24 a.m. on July 19, 2020, the Cherokee County Sheriff's Office responded to the missing persons call at Juan and Dulce's home near Chesnee. They then dispatched deputies to the land [the garden], whereupon deputies saw footprints leading into the garden and discovered Victim buried in a shallow grave near a row of corn. Deputies could see cuts, chop wounds, and stab wounds to Victim's face and neck. (R. 67-74; 84-89; 92-95; 257-59).

Deputies then responded to the rental home finding Abarca's truck parked behind the rental home so that it could not be seen from the road. Deputies lawfully searched Abarca's truck and the interior of the rental home. They found muddy boots and numerous machetes in Abarca's truck toolbox. Another machete was later found in the garden on Abarca's land [the garden]. Inside the rental home, police found wet mud in the bathtub where it appeared someone had attempted to clean up. However, Abarca was nowhere to be found. As previously discussed, Abarca had abandoned his 3 children and fled South Carolina headed toward Houston, Texas and the Mexican border with his passport. He was now in custody of police in western Alabama near the Mississippi State Line after fleeing South Carolina after murdering his wife. (R. 96-107; 259-65; 298).

When Victim's body was examined at autopsy it was discovered she had several chop injuries to her body including 2 to her head that fractured her skull. The injuries were consistent with being inflicted by a machete. Victim also 2 defensive wounds in 1 hand and 1 arm where she tried to fend off the horrible assault. Her trachea was also cut. Victim bled to death from her numerous chop wounds and cuts and stabs to her body. (R. 302-20).

Based on all of the above, any error in the admission of any portion of the 911 call reporting Abarca and Victim as missing and that their children had been left abandoned was harmless. Thompson v. State; State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) ("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless."); State v. Hughes, 419 S.C. 149, 159, 796 S.E.2d 174, 179 (Ct. App. 2017) (finding no reversible error when evidence was erroneously admitted because the same evidence was admitted by other witnesses without objection).

The correct result was reached

A review of Abarca's colloquy with Judge Kelly regarding whether he would testify or not **and** his colloquy at sentencing, combined, shows Abarca essentially conceded his guilt of the crimes. (R. 323-27; 376-78). As a result, the correct result was reached, and his appeal should be denied. State v. Sroka, 267 S.C. 664, 665; 230 S.E.2d 816 (1976); State v. Whetsell, 276 S.C. 295, 297, 277 S.E.2d 891 (1981).

CONCLUSION

For the above stated reasons, Abarca's convictions and sentences for murder and possession of a weapon during a violent crime must be affirmed.

Respectfully Submitted,

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June 2, 2025.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
The Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DIONICIO NAVA ABARCA,

APPELLANT.

Appellate Case No. 2024-000180

PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to J. Anthony Mabry, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent has been forwarded to Appellant's counsel, Robert M. Dudek, Esq., via email today, June 2, 2025 to RDudek@sccid.sc.gov, and to his assistant at Kwarren@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 2nd day of June, 2025.

s/ Donna D'Alessio
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