STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID DEMIAS WHITE,

APPELLANT

APPELLATE CASE NO. 2024-001528

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In August 2024, the Lancaster County grand jury indicted appellant for one count of homicide by child abuse and six counts of unlawful neglect of a child. R *(Indictments). On August 26, 2024, his case was called to trial before the Honorable Donald B. Hocker and a jury. Vol. 1 Tr. 1. Melissa McGinnis and Luck Campbell represented the state, and William Frick represented appellant. Vol. 1 Tr. 1. The jury ultimately found appellant guilty as indicted. Vol. 3 Tr. 361, l. 24 – 362, l. 24. Judge Hocker imposed a 25-year total sentence comprised of 25-years for the homicide child abuse charge and 10-years as to each unlawful neglect charge, set to run concurrently. Vol. 3 Tr. 383, ll. 8-14. Appellant timely filed a notice of appeal. R *(Notice of appeal).

This brief follows.

ARGUMENTS

I.

The trial court abused its discretion by refusing to grant appellant's motion to sever his homicide by child abuse charge from the unlawful neglect charges because the multiplication of distinct charges prejudiced his right to a fair trial.

Standard of Review

"A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." *State v. Beekman*, 415 S.C. 632, 636, 785 S.E.2d 202, 204 (2016) (quoting *State v. Tucker*, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996)). "In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

Relevant facts

Pretrial motion and hearing

Prior to trial, on August 16, 2024, appellant filed a written motion requesting severance of charges. R *(Motion to sever). He argued that a concurrent trial on the indictments, which concerned separate and distinct incidents, was unfairly prejudicial pursuant to Rule 403 of the South Carolina rules of evidence and did not satisfy the test for joinder of charges.[1] R *(Motion to sever). He asserted that the fourth prong was not met because a trial for homicide by child

[1] Appellant cited *Beekman* for the test for joinder of charges which provides that to join charges, the charges must: (1) arise out of a single chain of circumstances, (2) be proved by the same evidence, (3) be of the same general nature, and (4) no real right of the defendant is prejudiced. R *(Motion to sever).

abuse and several unlawful neglect charges[2] presented a substantial risk to appellant's right to a fair trial due to the number of charges and allegations for those separate incidents. R *(Motion to sever). Ultimately, he argued that because of the number of charges and the allegations the jury was likely to render a verdict on an improper basis. R *(Motion to sever). Thus, appellant requested severance of charges because the joinder of charges was unfairly prejudicial, and any probative value did not outweigh the unfairly prejudicial effect. R *(Motion to sever).

On August 21, 2024, the court held a pretrial hearing concerning, in part, appellant's motion to sever. Mtn Tr. 3, ll. 2-9.[3] Appellant emphasized that the focus of his argument was the prejudice versus the probative value of severing the charges. Mtn Tr. 3, ll. 17-20. He argued that it was extremely prejudicial to try several neglect cases alongside the homicide by child abuse case. Mtn Tr. 4, ll. 7-9. He argued that it was more prejudicial than probative due to the sheer number of cases and the potential for the jury to determine that because all the children were neglected "we're just going to punish him because – because we don't like the way the case looks." Mtn Tr. 4, ll. 16-22.

The state responded that the charges arose out of the same set of circumstances and the same witnesses would be presented. Mtn. Tr. 5, ll. 16-21. The state argued that it was important for the charges to be presented together to show that this was not a mistake. Mtn. Tr. 5, 21-22. The state cited several cases for the court to consider. Mtn. Tr. 6, ll. 2-18. The state argued that the appellate courts were allowing these cases to be tried together if the first three prongs were met but noted that it did not have "anything that determines or that says what the prejudice –

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[2] In this case, appellant was charged with six counts of unlawful neglect of a child, which represented a separate charge for each of appellant's remaining children. R *(Indictments).

[3] The Honorable Donald B. Hocker presided over the hearing. Mtn. Tr. 1. Melissa McGinnis and Nicole Wine appeared for the state, and William Frick represented appellant. Mtn. Tr. 1.

what they're looking at for that." Mtn. Tr. 6, 19-24. Appellant clarified if they were simply trying the neglect charges, he would not be moving for severance. Mtn. Tr. 9, ll. 5-7. He argued that he was requesting to sever the homicide charge from the neglect charges. Mtn. Tr. 9, ll. 7-8.

Trial

During pretrial motions, the court put the defense motion to sever on the record. Vol. 1 Tr. 72, ll. 4-9. Appellant reiterated his arguments from the virtual hearing and cited *Tucker* as to the fourth prong for joinder of charges concerning prejudice. Vol. 1 Tr. 72, ll. 14-23. He argued that his concern was the volume of cases, specifically, that there was a deceased child which was alleged to have died from neglect and six more children with neglect charges which was "just overwhelming." Vol. 1 Tr. 72, l. 24 – 73, l. 5. He asserted that he was concerned the jury would look at the case and determine that "he's guilty of something because he's got all these charges." Vol. 1 Tr. 73, ll. 5-7. He concluded that a real right of the appellant was affected because the jury may be allowed to reach a conclusion on an improper basis due to the number of charges and the particular allegations. Vol. 1 Tr. 73, ll. 7-12. The state reiterated its arguments from the virtual hearing and highlighted the value of the first three prongs. Vol. 1 Tr. 73, l. 16 – 74, l. 9.

The court denied defense's motion to sever the homicide charge from the neglect charges. Vol. 1 Tr. 74, ll. 10-12. The court stated that it reviewed nine cases, all of which upheld the trial judge denying a motion for severance. Vol. 1 Tr. 74, ll. 12-19. The court cited *State v. McGaha*[4] for the proposition that if the charges could come in under a 404 *Lyle*[5] basis it was further support that the evidence was more probative than unfairly prejudicial. Vol. 1 Tr. 74, ll. 19-25. The court determined that it was important that the same witnesses would testify as to all the

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[4] *See State v. McGaha*, 404 S.C. 289, 744 S.E.2d 602 (Ct. App. 2013).

[5] *See State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

charges and thus ruled that there was no unfair prejudice outweighing the probative value. Vol. 1 Tr. 75, ll. 1-5.

Renewed severance motion

As relevant, after Dr. Lamb, a forensic child abuse pediatrician, concluded her testimony, the defense noted that it failed to continue its severance motion when objecting to Dr. Lamb's testimony. Vol. 2 Tr. 306, ll. 10-12. Defense counsel noted that he did not make a contemporaneous objection but wanted the record to reflect that he objected to the testimony. Vol. 2 Tr. 306, ll. 16-21. He continued that he believed that the court, based on its prior rulings, would have overruled his objection. Vol. 2 Tr. 306, ll. 19-21. The court responded that it thought defense counsel was protected. Vol. 2 Tr. 306, l. 22.

Discussion

The trial court abused its discretion by refusing to grant appellant's motion to sever his six unlawful neglect charges from the homicide by child abuse charge because there was a substantial risk of prejudice to appellant concerning his right to a fair trial.

"Charges can be joined by the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) be proved by the same evidence, (3) be of the same general nature, and (4) *no real right of the defendant is prejudiced.*" *Tucker*, 324 S.C. at 164, 478 S.E.2d at 265 (1996) (citing *State v. Tate*, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985) (emphasis added). "Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial [court] has the power, in [its] discretion, to order the indictments tried together *if the defendant's substantive rights would not be prejudiced.*" *State v. Rice*, 368 S.C. 610, 614, 629 S.E.2d 393, 395 (Ct. App. 2006) (alterations in original, emphasis added).

In *Tyler v. State*, this Court concluded that Tyler's substantive rights were violated because trying the charges of second-degree sexual exploitation of a minor with criminal solicitation of a minor, contributing to the delinquency of a minor, and disseminating harmful material to a minor created the risk that the jury would wrongfully convict him on one set of charges based on evidence only admissible as to the other. 437 S.C. 17, 32, 876 S.E.2d 132, 139 (Ct. App. 2022).

However, as discussed by Justice Pleicones in his dissent in *State v. Cutro*, "we have long recognized, circumstances might arise which would render a uniting of several counts unjust to the defendant." 365 S.C. 366, 380, 618 S.E.2d 890, 897 (J. Pleicones, dissenting) (citing *City of Greenville v. Chapman*, 210 S.C. 157, 162, 41 S.E.2d 865, 867 (1947) (internal quotations omitted). Particularly, "[e]ven where joinder is permissible, the trial court must be mindful of protecting the defendant's right to a fair trial because by the multiplication of distinct charges, the prisoner may be confounded in his defense, or prejudiced in his challenges, or the attention of the jury may be distracted." *Id.* (internal quotations and alterations omitted).

In appellant's case, the trial court abused its discretion because it failed to properly consider the significant prejudice appellant would suffer to his rights from the joinder of his charges. *Beekman*, 415 S.C. at 636, 785 S.E.2d at 204; *Wise*, 359 S.C. at 21, 596 S.E.2d at 478. The trial court merely ruled that no unfair prejudice outweighed the probative value of a trial on all charges. Vol. 1 Tr. 75, ll. 1-5. However, such a finding overlooks the impairment of appellant's right to a fair trial and the prejudice he would suffer by facing trial on both the unlawful neglect and homicide by child abuse charges. *See State v. Reaves*, 414 S.C. 118, 125, 777 S.E.2d 213, 216 (2015) ("The Due Process Clause of the Fourteenth Amendment to the United States constitution guarantees a defendant's fundamental right to a fair trial.") (citing U.S.

Const. amend. XIV); *see also State v. Thompson*, 420 S.C. 386, 398, 803 S.E.2d 44, 50 (Ct. App. 2017) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis.").

While it is true that evidence of the six unlawful neglect charges may have been admitted during a separate trial for the homicide by child abuse charge, it cannot be said that the volume of evidence permitted during a joint trial, where the state had the burden to prove each element of each unlawful neglect charge, would be permissible in a separate trial. *See McGaha*, 404 S.C. at 298, 744 S.E.2d at 606-07 (determining that evidence of McGaha's molestation of the other children would be admissible under Rule 404(b), SCRE, as proof of a common plan or scheme if the state could establish a logical connection between the crimes by showing a close degree of similarity). For example, because these charges were tried together, the state presented extensive evidence from Dr. Lamb concerning her evaluation of abuse and neglect for the remaining six children. *See generally* Vol. 2 Tr. 160-202. Through Dr. Lamb, the jury heard significant testimony concerning medical neglect as to each child, the sleeping spaces for the children, nutritional concerns, concerns of physical abuse for some of the children, and that physical needs were not met for the children. *See generally* Vol. 2 Tr. 160-202. Of note, Dr. Lamb testified she had concerns about possible physical abuse as to two of the children. Vol. 2 Tr. 182, ll. 24-25; 196, ll. 15-20; 197, ll. 11-18. While evidence of the existence of appellant's unlawful neglect charges may have come in during a separate trial, it is less certain that specific testimony about concerns for physical abuse for two of the children would be admissible in a separate trial for the deceased child (hereinafter, A.W.), where there was no concern of physical abuse related to A.W. Vol. 2 Tr. 281, ll. 14-17. Evidence of physical abuse pertaining to other children is highly prejudicial and the prejudicial effect of that testimony would have to be considered at a separate trial. *See Cutro*, 365 S.C. at 374-75, 618 S.E.2d at 894 (citing *State v. Braxton*, 343 S.C. 629,

541 S.E.2d 833 (2001) (explaining that in the evidentiary context "bad act evidence that falls within a *Lyle* exception and meets the clear and convincing standard may still be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence.").

Moreover, as argued below, the number of unlawful neglect charges and evidence presented to support those charges had the significant potential to influence the jury's verdict. R *(Motion to sever); Mtn. Tr. 4, ll. 7-22; Vol. 1 Tr. 72, l. 14 – 73, l. 12; *see also State v. Heath*, 433 S.C. 506, 513, 860 S.E.2d 673, 677 (Ct. App. 2021) ("Prejudice occurs when there is a reasonable probability the wrongly admitted evidence influenced the jury's verdict."). Notably, the interplay of the charges may have influenced the jury to convict on the homicide by child abuse charge merely because the state presented evidence that appellant neglected his other six children or convict on the unlawful neglect charges because the state presented evidence that appellant contributed to the death of his child through neglect, both of which would be improper reasons to render a guilty verdict. In fact, witnesses made similar inferences between the conduct underlying the separate charges during the trial. For example, Dr. Lamb testified that in making the determination of the cause of A.W.'s death, and looking at the other siblings, she was "trying to see if there's any pattern, anything that I could see." *See* Vol. 2 Tr. 226, ll. 8-12. The suggestion of a pattern between the six children and A.W. demonstrates the prejudice appellant suffered by having his charges tried together and provides a direct example in the record of an improper basis upon which the jury may have rendered their verdict. *But see State v. Tallent*, 430 S.C. 438, 446-47, 845 S.E.2d 508, 513 (Ct. App. 2020) (finding no prejudice where the trial court did not sever Tallent's delinquency of a minor charge from his first and second degree criminal sexual conduct and lewd act upon a child because evidence of "Tallent's use, manufacture, and sale of cocaine, crack cocaine, and methamphetamine would have a tendency

to suggest an improper basis upon which a jury could rely upon in finding he committed CSC or a lewd act."). Even further, given the nature and particular allegations of the charges, appellant's case presents a circumstance where the uniting of several counts is unjust. *See Cutro*, 365 S.C. at 380, 618 S.E.2d at 897 (J. Pleicones, dissenting).

Therefore, because the joinder of charges presented a substantial risk to appellant's right to a fair trial and the resultant trial ultimately prejudiced appellant, the trial court abused its discretion by denying appellant's motion to sever his charges. This Court should reverse.

II.

The trial court abused its discretion by admitting autopsy photographs of the deceased child, A.W., during trial where the probative value of the photographs was substantially outweighed by the danger of unfair prejudice because the graphic autopsy photographs were unnecessary and designed to inflame the passion of the jury.

Standard of Review

The relevance, materiality, and admissibility of photographs 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. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003).

Relevant facts

During trial, the parties stipulated that the seven children at issue were the biological children of appellant and Shaquanda Page.[6] Vol. 3 Tr. 4, l. 24 – 5, l. 1, 7; 11, ll. 15-21. The state presented evidence that the A.W. died of dehydration and malnutrition. Vol. 2 Tr. 286, ll. 4-9. The state further contended that the remaining six children experienced neglect at varying degrees. *See generally* Vol. 2 Tr. 160-202.

On February 22, 2021, officers were called to appellant's residence regarding an unconscious child. Vol. 2 Tr. 53, ll. 7-16. Appellant's neighbor testified that appellant knocked on her door around 9:30 p.m. because his baby was not breathing. Vol. 2 Tr. 40, ll. 2-7. Page called 911 and appellant attempted to perform CPR while Page was on the phone. Vol. 2 Tr. 45, ll. 4-24. When officers arrived at the scene, A.W. was located lying unconscious in the kitchen.

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[6] At the time of appellant's trial, Page had been convicted of one count of homicide by child abuse and six counts of unlawful neglect towards a child. Vol. 3 Tr. 71, l. 25 – 72, l. 5. The jury heard that Page had been convicted of those charges. Vol. 3 Tr. 71, l. 25 – 72, l. 5. During sentencing, the state informed the court that Page entered an *Alford* plea and received a 27-year total sentence. Vol. 3 Tr. 372, ll. 2-3.

Vol. 2 Tr. 55, ll. 6-12. A firefighter performed CPR and A.W. was transported to MUSC-Lancaster where she was ultimately pronounced dead. Vol. 2 Tr. 55, ll. 13-17; 56, ll. 16-23; 57, ll. 10-14. During the investigation into A.W.'s death, a detective sergeant for the Lancaster police department determined that more information was needed as to the cause of A.W.'s death, so an autopsy was ordered. Vol. 2 Tr. 112, l. 20 – 113, l. 1. An autopsy of A.W. was performed on February 24, 2021. Vol. 2 Tr. 298, ll. 6-8.

Pretrial motion to exclude autopsy photographs

Prior to trial, on August 23, 2024, defense counsel filed a written motion to exclude A.W.'s autopsy photographs as unfairly prejudicial under Rule 403, SCRE, and *State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014). R *(Motion to exclude). He further argued that the photographs were not necessary for a full presentation of the state's case nor were the photographs necessary for the state to prove the elements of their case. R *(Motion to exclude).

Pretrial argument concerning autopsy photographs

The court heard argument concerning the defense motion to exclude the autopsy photographs before trial began. Vol. 1 Tr. 93, ll. 2-5. The state cited *Heyward*,[7] *Benton*,[8] and *Jones*,[9] and argued that our courts have instructed to not put in "things that don't have anything to do with the case." Vol. 1 Tr. 93, ll. 9-22. The state argued that in this case the autopsy was performed the next day, and no decomposition was involved. Vol. 1 Tr. 93, ll. 22-24. The state continued that it did not intend to enter any photographs of A.W. "being cut up or anything of that." Vol. 1 Tr. 93, l. 25 – 94, l. 2. The state emphasized that this was a neglect case about

[7] *See State v. Heyward*, 441 S.C. 484, 895 S.E.2d 658 (2023).

[8] *See State v. Benton*, 443 S.C. 1, 901 S.E.2d 701 (2024).

[9] *See State v. Jones*, 440 S.C. 214, 891 S.E.2d 347 (2023).

starvation and dehydration and argued that the appearance of the child was crucial. Vol. 1 Tr. 94, ll. 2-5. The state maintained it would limit the photographs to just show A.W.'s face and the front and back of her body. Vol. 1 Tr. 94, ll. 10-25. The state argued it would stay within the parameters of *Heyward* and all the other recent cases. Vol. 1 Tr. 95, ll. 1-22. The court asked the state to provide defense counsel with the photographs it intended to enter, and after a break, the state handed six photographs to the court. Vol. 1 Tr. 96, ll. 1-18.

Defense counsel contended that the selection of photographs by the state did not change his objection to the photographs being admitted into evidence. Vol. 1 Tr. 97, ll. 14-16. Defense counsel emphasized that it was "an understatement to say that these pictures are difficult to look at." Vol. 1 Tr. 97, ll. 17-20. He contended that the state could make a full presentation of their case through the pathologist who would opine that the 14-month old child starved to death. Vol. 1 Tr. 97, ll. 21-25. He asserted that the inclusion of these photographs introduced the possibility that the jury would "simply convict him based on looking at the pictures." Vol. 1 Tr. 98, ll. 2-4. Defense counsel argued that while he understood that the state limited the photographs it would present there were still a large number of photographs it sought to admit of this "very tragic situation." Vol. 1 Tr. 98, ll. 5-8. He requested that the court not introduce any of the photographs but asked, in the alternate, if the photographs were allowed in that the pubic area of the child be cropped. Vol. 1 Tr. 98, ll. 8-13. He argued that the pathologist could describe that the mons pubis was prominent and that A.W. had feces on her rather than introducing a visual. Vol. 1 Tr. 98, ll. 15-22. Finally, defense counsel requested that if any of the photographs were introduced that they would not be published on the screens. Vol. 1 Tr. 98, l. 23 – 99, l. 5.

The court noted that before it made its ruling it would likely need to hear the pathologist's testimony to determine whether the photographs would benefit the pathologist in

describing her work in this case. Vol. 1 Tr. 99, ll. 17-25. The court continued that there were several factors that it needed to look at and consider before it could make its ruling. Vol. 1 Tr. 100, ll. 10-12. The state reiterated that because this case involved neglect, "the fact that the parent's didn't recognize that this child needed help . . . is crucial to our case." Vol. 1 Tr. 100, ll. 19-25. The court stated that it understood the state's position but informed the parties that the issue would be held, and the court would make a ruling at the appropriate time. Vol. 1 Tr. 101, ll. 6-15.

Dr. Presnell's in-camera testimony

Before the state called Dr. Presnell, the court informed the parties that it would hear in-camera testimony from the pathologist related to the autopsy photographs. Vol. 2 Tr. 247, ll. 15-19. Dr. Presnell testified that she performed the autopsy on A.W. and classified her cause of death as dehydration and malnourishment with ketosis due to neglect. Vol. 2 Tr. 249, l. 22 – 250, l. 3. She testified that during her autopsy she took photographs of the entire process for both the external and internal examination. Vol. 2 Tr. 250, ll. 4-8. The state handed her six photographs, marked as Court's Exhibit 2, and she described her external findings. Vol. 2 Tr. 250, l. 21 – 251, l. 7. Dr. Presnell explained that the photographs showed that A.W. had sunken eyes, sunken cheeks, prominent ribs from the front and back, and her backbone protruding. Vol. 2 Tr. 251, ll. 4-7. She noted that A.W.'s belly was concave to the ribcage. Vol. 2 Tr. 251, ll. 8-11. Dr. Presnell testified that she believed the photographs did a better job demonstrating the external signs visible on A.W. than her description. Vol. 2 Tr. 251, ll. 12-16. She testified that the external signs were such that an ordinary person could view them and see that the child was in distress. Vol. 2. Tr. 251, ll. 17-21. She reiterated that the photographs would complement the testimony and demonstrate the severity of the child's condition. Vol. 2 Tr. 251, l. 22 – 252, l. 1.

She testified that the photographs would make it easier for the jury to understand her findings. Vol. 2 Tr. 252, ll. 2-4. Dr. Presnell confirmed that the lower half of the photographs were not needed. Vol. 2 Tr. 252, ll. 16-22.

Trial court's ruling

The court ruled that in doing a 403 analysis as to the autopsy photographs, it found that the probative value of the photographs outweighed any unfair prejudice to the appellant as long as the bottom half of the photographs were cropped. Vol. 2 Tr. 253, ll. 8-12. The court determined that its ruling was consistent with *Heyward*, which it believed was the best case on this issue and mentioned that a case had come out that day related to photographs. Vol. 2 Tr. 253, ll. 12-18.

The parties discussed cropping the photographs, and defense counsel reiterated that he objected to the entire photograph but agreed that the pubic area was what should be cropped. Vol. 2 Tr. 254, ll. 7-11. The court also stated that it would not put the photographs on the big screens but would have the photographs available for the doctor and the jury. Vol. 2 Tr. 256, ll. 21-23.

Dr. Presnell's trial testimony

The state entered Dr. Presnell as an expert in forensic pathology. Vol. 2 Tr. 268, ll. 19-25. She explained her process for autopsies and testified that there are typically a lot of photographs from the beginning to the end. Vol. 2 Tr. 269, ll. 15-17. After she conducts an external and internal exam, biopsies, cultures, and receives toxicology results, she puts her findings together in a final report with the conclusion as to the cause and manner of death. Vol. 2 Tr. 269, l. 15 – 270, l. 8. She performed the autopsy for A.W., and explained that she took photographs, that A.W. had a lot of medical intervention, she did the external exam, completed

diagrams, and did a skeletal survey to look for fractures. Vol. 2 Tr. 270, l. 24 – 271, l. 14. Dr. Presnell explained that she took swabs for respiratory viruses, and the coroner drew eye fluid. Vol. 2 Tr. 271, ll. 15-25.

Dr. Presnell described the external examination as follows:

> Well, you could tell that she is very, very, very underweight. She has sunken eyes, her cheeks are kind of sunken in, her abdomen is kind of curved in. Her ribs stick out on the front and then also on the back you can see her ribs as well as her backbone. The other thing about [A.W.] is she had this, we call it tenting, skin tenting, like if you go camping in a tent, it's when you pinch your skin and, you know, normally, if you're normally hydrated, your skin kind of bounces back to lay just flat. But in really dehydrated individuals, when you pinch it, it still remains pointed like that, like a little tent. And so she exhibited a lot of tenting.

Vol. 2 Tr. 272, ll. 11-22. She continued that those observations were suggestive of dehydration. Vol. 2. Tr. 272, l. 24.

The state then showed Dr. Presnell State's Exhibits 193 through 198, which were copies of photographs she took during the autopsy. Vol. 2 Tr. 273, ll. 5-10. The photographs were entered into evidence subject to defense objection. Vol. 2 Tr. 273, ll. 20-24. Dr. Presnell described State's 193 which showed A.W. straight on and that her eyes were very sunken in, and she did not have any fat pad in her cheeks. Vol. 2 Tr. 275, ll. 3-8. In State's 194, she described that you could see how far in her eyes were sunken and that "we're losing some of the periorbital around the eye fat tissue." Vol. 2 Tr. 275, ll. 11-15. She also testified that A.W. was very dehydrated, which was exacerbated. Vol. 2 Tr. 275, ll. 15-16. In State's 195, she described that you could "still see her sunken eyes," and that "she does have this purple contusion or bruise on her forehead." Vol. 2 Tr. 275, ll. 17-20. Dr. Presnell testified that there was no underlying injury inside the head related to that. Vol. 2 Tr. 275,ll. 20-21. As to State's 197, she described that A.W.'s ribs were protruding, and her abdomen was sunken. Vol. 2 Tr. 276, ll. 2-6. For the

two remaining photographs, Dr. Presnell explained that you could see how the abdomen was sunken under the chest cavity and that the ribs along A.W.'s backbone were visible, demonstrating that she did not have enough fat tissue between her skin and bones. Vol. 2 Tr. 276, ll. 7-17.

The state inquired about skin tenting and why it indicated dehydration. Vol. 2 Tr. 276, ll. 18-20. Dr. Presnell explained that the lack of fluids in the body makes the tissues tacky, which was the same for skin tenting. Vol. 2 Tr. 276, l. 21 – 277, l. 2. She continued that the vitreous sodium fluid in the eye was 160, which was very high. Vol. 2 Tr. 276, ll. 6-9. She testified that A.W.'s chloride was high, she had kidney function changes related to dehydration, and thus, the levels and signs were consistent with very severe dehydration. Vol. 2 Tr. 277, ll. 9-13.

Dr. Presnell then described the internal examination and the dissection of organs. Vol. 2 Tr. 278, l. 4 – 280, l. 16. Dr. Presnell explained that "obviously [A.W.] looked really malnourished, but her weight is 14 pounds . . . [h]er weight is less than one percentile for her age." Vol. 2 Tr. 278, l. 23 – 279, l. 2. She continued that "I heard the pediatrician earlier, but I have looked up what's just kind of an average for her age weight, and that would be 22 pounds." Vol. 2 Tr. 279, ll. 3-6. She found no evidence of infection, tumors, scars, or cancers, and everything appeared to be healthy. Vol. 2 Tr. 280, ll. 11-17. Dr. Presnell found no fractures during the skeletal survey. Vol. 2 Tr. 281, ll. 14-19. The toxicology for drugs and alcohol was negative. Vol. 2 Tr. 282, ll. 7-9. She noted that A.W. had elevated ketone levels. Vol. 2 Tr. 285, ll. 3-14. She opined that she narrowed her diagnosis to ongoing malnourishment and dehydration based on "[h]er appearance, her loss of the fat, the sunken eyes, protruding ribs, the no abnormalities, the less than one percentile weight, the normal histology, and no birth defects, no congenital anomalies, no drugs, high elevated ketones, and markedly elevated sodium and

chloride levels." Vol. 2 Tr. 285, ll. 19-25. She testified that her determination as to A.W.'s cause of death as dehydration and malnourishment with ketosis due to neglect. Vol. 2 Tr. 286, ll. 4-9.

Trial testimony continued

The state called Jennifer Collins, the chief deputy coroner, who responded to the hospital on February 22, 2021, for a suspicious death call. Vol. 2 Tr. 327, ll. 1-4; 328, ll. 7-14. She described that she saw A.W., "a fragile female child," lying in the hospital bed with very obvious signs of dehydration and visible ribs. Vol. 2 Tr. 328, l. 23 – 329, l. 1. She testified that A.W. looked "very sickly," and described her as resembling "a holocaust victim." Vol. 2 Tr. 329, ll. 2-4. She did not observe any signs of trauma or foul play that could be seen on her external examination. Vol. 2 Tr. 330, ll. 24-25. She further described that she was unable to draw any blood from A.W. because she was very dehydrated. Vol. 2 Tr. 336, ll. 14-19.

Dr. Garvin testified that based on the toxicology tests that she ran related to A.W., she was concerned about dehydration and explained that acetone in the urine could be a marker of alcoholism in adults, diabetes, sugar diabetes, or fasting and/or starvation. Vol. 2 Tr. 463, l. 23 – 464, l. 8. Based on the circumstances, Dr. Garvin opined that A.W. was not a child suffering from chronic alcoholism or diabetes but rather fasting, malnutrition, or starvation. Vol. 2 Tr. 469, ll. 1-20. She testified that her findings were consistent with malnutrition and dehydration. Vol. 2 Tr. 472, ll. 12-16.

State's closing

During the state's closing argument, the state argued that Dr. Presnell had the "unenviable job" of performing autopsies to "find out what killed [A.W.]." Vol. 3 Tr. 276, ll. 2-23. The state continued that the autopsy photographs were "hard to look at, but they are

incredibly important for y'all to look at and pay close attention to." Vol. 3 Tr. 276, ll. 23-25. The state argued that was "what [A.W.] looked like. This is the child that David White looked at and thought, we don't need to get medical attention for this child." Vol. 3 Tr. 277, ll. 1-3. The state reiterated Dr. Presnell's testimony concerning the autopsy, her findings, and A.W.'s visible condition. Vol. 3 Tr. 277, l. 11 – 281, l. 12. The state also argued that Dr. Lamb reviewed the autopsy photographs and ER photographs which showed that "A.W. was emaciated, with no visible fat on her." Vol. 3 Tr. 291, ll. 4-7.

Sentencing

During the sentencing hearing, defense counsel emphasized that from the beginning of this case he did not know how he would overcome the autopsy photographs. Vol. 3 Tr. 375, ll. 20-24. He emphasized that the autopsy photographs "compounded the difficulty in this case." Vol. 3 Tr. 375, l. 25 – 376, l.2. Defense counsel also presented mitigation on appellant's behalf, particularly that he was 30-years old, had no record, and was a good worker who was trying to provide. Vol. 3 Tr. 376, ll. 8-11. The trial court ultimately imposed a 25-year total sentence comprised of 25-years for the homicide child abuse charge and 10-years as to each unlawful neglect charges, set to run concurrently. Vol. 3 Tr. 383, ll. 8-14.

Discussion

The trial court abused its discretion by admitting autopsy photographs of A.W. during trial because the graphic autopsy photographs were unnecessary and designed to inflame the passion of the jury, and the photographs should have been excluded pursuant to Rule 403, SCRE, as the prejudicial effect was substantially outweighed by the danger of unfair prejudice. This Court should reverse.

All relevant evidence is generally admissible. Rule 402, SCRE. To be relevant, the evidence must have a "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. However, 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.

"It is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." *See State v. Nelson*, 440 S.C. 413, 420, 891 S.E.2d 508, 511 (2023) (quoting *Jones*, 440 S.C. at 225, 891 S.E.2d at 371); *see also State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d. 201, 206 (Ct. App. 2008). In addition, our courts have recognized that the scope of the probative value of autopsy photographs is broader in the context of the sentencing phase of a capital murder trial, however; "in the guilt phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." *Nelson*, 440 S.C. at 420, 891 S.E.2d at 511 (citing *State v. Kornahrens*, 290 S.C. 281, 288-89, 350 S.E.2d 180, 185-86 (1986) (alterations and emphasis omitted).

In *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690 (2009), the defendant was convicted of homicide by child abuse for the death of her minor child. *Id.* at 281, 676 S.E.2d at 692. On appeal, Holder argued the trial court erred in admitting autopsy photographs showing the child's internal injuries. *Id.* at 290, 676 S.E.2d at 697. Holder's unconscious child was taken to the hospital and hospital staff was told that he had fallen off an All-Terrain Vehicle (ATV) earlier in the week. *Id.* at 281, 676 S.E.2d at 692. The child was pronounced dead at the hospital after unsuccessful efforts to resuscitate him. *Id.* At trial the pathologist testified that the contested autopsy photographs would help him in "demonstrating the anatomic relationships and the disruption of those anatomic relationships" because the jury might not have knowledge of internal anatomy. *Id.* at 290, 676 S.E.2d at 697. The Court upheld the admission of the photograph because they "clearly demonstrate the extent and nature of the injuries in a way that would not be easily understood based on the testimony alone" and aided the pathologist testimony. *Id.* at 290-291, 676 S.E.2d at 697.

In *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014), the defendant was convicted of involuntary manslaughter and, pursuant to S.C. Code §47–3–710(A)(2)(a) and 760, of being the owner of a "dangerous animal" that attacked and injured a human being. In *Collins* the South Carolina Supreme Court wrote, "In order to support its assertions about the dangerous propensities of the dogs, the manner and extent of the attack, and Collins's criminal negligence, the State also offered a group of photos taken of the victim by Proctor, the forensic pathologist, before he began the autopsy." 409 S.C. at 532, 763 S.E.2d at 27. In finding no error in the admission of the pre-autopsy photos the Court wrote:

> These are not ordinary dog bites with which most jurors would ever be familiar. Even the pathologist stated he felt compelled to document the injuries prior to the start of the autopsy because he had never come across a situation this extreme. Since there was no

> one else present at the time of the event, the photos aided the jury in evaluating the testimony offered by both the State and the defendant, especially as to determining the dangerous propensities of the dogs and whether or not Collins's conduct was criminally reckless.

Id. at 536, 763 S.E.2d at 29.

In *Heyward*, the state sought to admit two autopsy photographs showing the victim's scalp after it was reflected. 414 S.C. at 500, 895 S.E.2d at 666-67. The *Heyward* court distinguished from *Nelson* because Heyward did make any concession at trial as to the head injuries and the photographs corroborated the pathologists testimony given that the only evidence that the victim suffered multiple blunt force injuries was from the pathologists observations after reflecting the scalp. *Id.* at 502-03, 895 S.E.2d at 668 The Court continued that the trial court engaged in the appropriate 403 balancing and evidence in the record logically supported the trial court's conclusion that the probative value of the photographs was "high." *Id.* at 503, 895 S.E.2d at 668. Further, Chief Justice Kittredge filed a separate concurrence[10] wherein he disagreed with the majority's determination as to the autopsy photographs. *Id.* at 507, 895 S.E.2d at 670 (now C.J. Kittredge, concurring). Chief Justice Kittredge noted that the pathologist testified in great detail and graphically described the nature and extent of the "multiple blunt force injuries." *Id.* He concluded that "[g]iven the graphic and detailed testimony of the pathologist, the horrific autopsy photographs were unnecessary," and thus, the probative value of the photographs were substantially outweighed by the danger of unfair prejudice. *Id.* at 507-08, 895 S.E.2d at 670-71.

The trial court abused its discretion by permitting the state to enter six color autopsy photographs of A.W. during trial because the danger of unfair prejudice substantially outweighed any probative value the photographs may have presented. *Shuler*, 353 S.C. at 184, 577 S.E.2d at

[10] Chief Justice Kittredge ultimately concurred in result based on harmless error. *See id.* at 508, 895 S.E.2d at 671.

442. First, the trial court erred by determining that the photographs presented any probative value. Vol. 2 Tr. 253, ll. 9-12. The state's core argument for admission of the photographs was that they were "crucial" to their case to demonstrate neglect and that the parents did not recognize that the child needed help. Vol. 1 Tr. 100, ll. 19-25. However, there was extensive testimony and evidence presented for the state to establish neglect and A.W.'s visible condition notwithstanding the graphic autopsy photographs. For instance, the chief deputy coroner described A.W. as having obvious signs of dehydration, visible ribs, and a sickly appearance. Vol. 2 Tr. 328, l. 23 – 329, l. 2. The chief deputy coroner further testified that A.W. looked like "a holocaust victim." Vol. 2 Tr. 329, l. 4. Such testimony was extremely evocative and undoubtably communicated A.W.'s physical condition to the jury.

Additionally, Dr. Presnell explained her external examination of A.W. and described that A.W. was underweight, had sunken eyes, sunken checks, protruding ribs, a curved-in abdomen, and skin tenting. Vol. 2 Tr. 272, ll. 11-22. Although Dr. Presnell testified that she believed that the photographs "complemented" her testimony to demonstrate the severity of A.W.'s condition, *see* Vol. 2 Tr. 251, l. 22 – 252, l. 1, the photographs were not relevant or necessary to communicate to the jury that A.W. was underweight and visibly sick, *but see Benton*, 443 S.C. at 8-9, 901 S.E.2d at 705 (determining that under the specific circumstances of this case, the crime scene photographs of the victim's burned body, although gruesome, were relevant because they depicted the crime scene and "drew probative force from their unique power to make Benton's accomplices' testimony more believable," and gave context to the testimony and evidence concerning who did what at the scene). Most importantly, the autopsy photographs were not necessary for the jury to understand her opinion that A.W. died due to starvation and malnutrition, given the extensive testimony elicited that A.W.'s malnourishment was evidence

from looking at her. *But see Holder*, 382 S.C. at 290-91, 676 S.E.2d at 697 (admitting a contested autopsy photograph of the child's internal injuries because the photograph aided the pathologist's testimony and "clearly demonstrate[d] the extent and nature of the injuries in a way that would not be easily understood based on the testimony alone" since the jury might not have had knowledge of internal anatomy); *see also* Vol. 2 Tr. 286, ll. 4-9. Thus, the six graphic autopsy photographs presented minimal, if any, probative value.

Moreover, the prejudice that appellant suffered from the admission of the six graphic autopsy photographs cannot be understated. As our courts have consistently recognized, gruesome autopsy photographs carry the inherent tendency to cause an emotional reaction on the part of the jury. *See Heyward*, 441 S.C at 501, 895 S.E.2d at 667 (citing *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986)). In appellant's case, the graphic nature of the autopsy photographs coupled with the charges for which he was on trial—homicide by child abuse and six unlawful neglect of a child charges—presented the jury with an emotional basis upon which to base their decision. *Franklin*, 318 S.C. at 55, 456 S.E.2d at 361. As discussed, the photographs were unnecessary to the issues presented at trial and functioned only to arouse the sympathies of the jury. *Nelson*, 440 S.C. at 420, 891 S.E.2d at 511. Further, Dr. Presnell testified extensively about A.W.'s physical condition, her internal and external examination of A.W., and described in detail how her observations as to A.W.'s condition led her to her ultimate conclusion. Vol. 2 Tr. 272, ll. 11-24; Vol. 2 Tr. 276, l. 21 – 277, l. 2; 278, l. 23 – 279, l. 2; 285, ll. 19-25; 286, ll. 4-9. Her detailed testimony rendered the admission of the gruesome autopsy photographs unnecessary, as the jury sufficiently heard Dr. Presnell's assessment of A.W.'s condition. *See Heyward*, 414 S.C. at 507-08, 895 S.E.2d at 670-71 (C.J. Kittredge, concurring).

To that end, as trial counsel argued below, the state could make a full presentation of their case through Dr. Presnell's and her opinion that "the 14-month old child starved to death," and the admission of the photographs introduced the possibility that the jury would "simply convict [appellant] based on looking at the pictures." Vol. 1 Tr. 97, l. 21 – Tr. 98, l. 2-4. Considering the entire record, the prejudicial effect of the photographs and their occasion to inflame the passions and arouse the sympathies of the jury substantially outweighed any probative value the photographs may have had. Rule 403, SCRE; *Lyles*, 379 S.C. at 338, 665 S.E.2d. at 206. Finally, appellant was further prejudiced by the admission of the six autopsy photographs as the state emphasized the photographs in its closing argument asking the jury to "look at and pay close attention" to the photographs while acknowledging that the photographs were "hard to look at." Vol. 3 Tr. 276, ll. 23-25. Despite our courts strong warnings to "solicitors to refrain from pushing the envelope on admissibility in order to gain a victory," the state did not heed that warning when seeking to admit the six contested autopsy photographs in appellant's case. *See Heyward*, 441 S.C. at 501, 895 S.E.2d at 667 (quoting *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010)). The potential for an emotional reaction to gruesome autopsy photographs, as is the case in appellant's trial, "is the essence of unfair prejudice." *See id.* (citing *Jones*, 440 S.C. at 259, 891 S.E.2d at 371).

In addition, the trial court's ruling, which it noted it believed was consistent with *Heyward*, merely concluded that the probative value of the photographs outweighed any unfair prejudice so long as the bottom half of the photographs were cropped. Vol. 2 Tr. 253, ll. 7-18. However, the *Heyward* court instructed that "the trial court must acknowledge the significant danger that the photos will cause unfair prejudice." *Heyward*, 441 S.C. at 502, 895 S.E.2d at 667. Although the trial court stated that it conducted a 403 analysis, the court's ruling on the

record does not appear to contemplate the significant danger of unfair prejudice that autopsy photographs posed to appellant. Vol. 2 Tr. 253, ll. 8-9; *but see Heyward*, 441 S.C. at 501, 895 S.E.2d at 667 (describing the trial court's on the record ruling as assessing the probative value of the photographs, summarizing the pathologist's testimony during the proffer, and finding that the "photographs were corroborative of the testimony that has been previously presented . . . and corroborative of the testimony of [the pathologist]," to conclude that the "probative value is high.") (alternations omitted). Particularly, the trial court neither articulated the probative value it believed the photographs had nor provided any reasoning as to how that probative value substantially outweighed the danger of unfair prejudice. *See Heyward*, 441 S.C. at 503, 895 S.E.2d at 668 ("Rule 403 requires the trial court to balance the probative value of the evidence against the danger of unfair prejudice."). Thus, it cannot be said that the trial court exercised its discretion in balancing the inherent danger of unfair prejudice against the probative value, as it did not place its reasoning on the record. *See id.* at 504, 895 S.E.2d at 668-89.

Therefore, the trial court abused its discretion by admitting the six graphic autopsy photographs because the photographs had little, if any, probative value and were substantially outweighed by the danger of unfair prejudice given that the photographs functioned to inflame the passions of the jury and had the tendency to suggest the jury made a decision on an improper, emotional basis. Accordingly, this Court should reverse.

III.

The trial court abused its discretion by refusing to limit Dr. Lamb's testimony because it impermissibly bolstered Dr. Presnell's testimony and expert opinion as to the cause of A.W.'s death and allowed the state to vouch for their credibility during its closing argument.

Standard of Review

"As with any issue regarding the admissibility of evidence, a trial court's decision to admit evidence notwithstanding an objection that it amounts to improper bolstering is to be reviewed on appeal under an abuse of discretion standard." *State v. Taylor*, 404 S.C. 506, 511, 745 S.E.2d 124, 126 (Ct. App. 2013) (citing *State v. Whitner*, 399 S.C. 547, 563, 732 S.E.2d 861, 867 (2012).

Relevant facts

Trial

During trial, the state presented expert testimony from Dr. Susan Lamb, a forensic pediatrician, and Dr. Erin Presnell, a forensic pathologist, concerning their opinions on the cause of death of A.W. Dr. Presnell testified that she was board certified in general pathology and forensic pathology and that she had performed over 5,000 autopsies. Vol. 2 Tr. 268, ll. 5-11. Dr. Lamb explained that a forensic pediatrician was another name for a child abuse predication and noted that she was board certified. Vol. 2 Tr. 137, l. 13 – 138, l. 12.

In addition, Dr. Lamb presented testimony concerning her assessment of each of the children that she saw that were the subject of the unlawful neglect charges. *See generally* Vol. 2 Tr. 160-202. For each of the six children, Dr. Lamb conducted a physical examination and interacted with each of the remaining children. Vol. 2 Tr. 160, ll. 6-23. She also received all of the available medical records for the six children. Vol. 2 Tr. 161, ll. 6-19. She produced reports

of her findings for each of the six children, Vol. 2 Tr. 161, ll. 20-23, but did not create a report for her findings related to A.W, Vol. 2 Tr. 133, ll. 5-7.

Objection to Dr. Lamb's testimony

Defense counsel objected to Dr. Lamb's testimony concerning her consultation of A.W. as bolstering because that testimony would come from the pathologist. Vol. 2 Tr. 218, ll. 15-16. Defense counsel acknowledged that the objection was unusual because what he suggested was bolstering had not been testified to yet but maintained that the testimony that would come from the pathologist was the testimony that Dr. Lamb would be bolstering. Vol. 2 Tr. 218, ll. 19-23. The state responded that Dr. Lamb reviewed the records and came to an independent decision. Vol. 2 Tr. 219, ll. 1-5. The court ruled that if Dr. Lamb made an independent assessment related to A.W., it would not "necessarily be bolstering," and overruled the objection. Vol. 2 Tr. 219, ll. 6-9. The state noted that Dr. Presnell was a pathologist while Dr. Lamb was a pediatric child abuse doctor. Vol. 2 Tr. 219, ll. 10-13.

Dr. Lamb's trial testimony

Dr. Lamb then testified as follows concerning her review of the A.W.'s records. She reviewed records and photographs for the child. Vol. 2. Tr 219, ll. 17-22. She consulted with SLED, law enforcement, Department of Social Services (DSS), "and other people that were involved in this case." Vol. 2 Tr. 219, l. 23 – 220, l. 2. She was able to give opinions as to her evaluation of the child and "her condition that ultimately led to her demise." Vol. 2. Tr. 220, ll. 3-6. Based on reviewing the child's records, she testified that the child was born healthy but stayed in the hospital two days because there was limited prenatal care. Vol. 2 Tr. 220, ll. 7-19. Dr. Lamb testified that it was important that the child had not been born with obvious medical issues or defects and that her newborn screen was normal. Vol. 2 Tr. 220, ll. 20-23. She

testified, however, that the child was never taken for medical care during her life. Vol. 2 Tr. 220, ll. 23-25. When the child was released from the hospital, the child was not suffering from any kind of disease. Vol. 2 Tr. 223, ll. 4-7. Evidence was not found that the child was taken to a pediatrician or a doctor after her birth. Vol. 2 Tr. 223, l. 25 – 224, l. 4.

Dr. Lamb next testified that she reviewed the autopsy, the toxicology reports, and the photographs from the autopsy. Vol. 2 Tr. 224, ll. 5-8. She agreed that she was able to make her own determinations as to what led the child to her death. Vol. 2 Tr. 224, l. 9 – 226, l. 12. She explained what she was looking for when reviewing the records and noted that "[a]s I'm reviewing the autopsy report, the toxicology report, I'm like, okay, what else could have been the cause of this child passing away, why was so tiny." Vol. 2 Tr. 226, ll. 5-12. After reviewing the photographs, autopsy, and toxicology reports she testified that there were no underlying conditions or illness the child was born with. Vol. 2 Tr. 226, ll. 13-19. Dr. Lamb opined that the child died of malnutrition and "dehydration on top of this long standing malnutrition that she suffered during her life." Vol. 2 Tr. 226, ll. 20-24. She then reiterated that there was no evidence of other illnesses because the organs were sectioned during the autopsy and everything was looked at. Vol. 2 Tr. 230, ll. 5-16. She testified that her opinion on the child's death was independently made. Vol. 2 Tr. 233, ll. 1-3. Dr. Lamb opined that the child "died of severe child neglect, medical neglect, nutritional neglect, and that ultimately is what killed her." Vol. 2 Tr. 233, ll. 5-7.

On cross-examination, Dr. Lamb testified that she reviewed the child's case as the assigned child abuse pediatrician under the death review statute and a consultant for the SLED child fatality unit. Vol. 2 Tr. 233, ll. 13-19. She confirmed that she came to her findings by reviewing the autopsy, which she was not present for. Vol. 2 Tr. 235, ll. 1-5. She did not have a

direct conversation with the pathologist. Vol. 2 Tr. 235, ll. 6-9. She agreed that she reviewed the toxicology which was "just looking at the report." Vol. 2 Tr. 235, ll. 10-14. She did not speak directly with the toxicologist for this case. Vol. 2 Tr. 235, ll. 15-17.

Dr. Presnell's trial testimony

Dr. Presnell was then admitted as an expert in forensic pathology. Vol. 2 Tr. 268, ll. 19-25. She performed A.W.'s autopsy. Vol. 2 Tr. 270, l. 24 – 271, l. 2. She described the process of performing an autopsy which included taking photographs, an external exam, x-rays, swabs for viruses, and an internal exam. Vol. 2 Tr. 271, l. 6 – 272, l. 7. As to the external exam, Dr. Presnell testified that the child was underweight, had sunken eyes, a curved-in abdomen, and skin tenting which was indicative of dehydration. Vol. 2 Tr. 272, ll. 8-24. Ater reviewing the autopsy photographs that she took, which discussed above were subject to defense objection, Dr. Presnell continued to explain why skin tents indicated dehydration. Vol. 2 Tr. 276, l. 18 – 277, l. 13. She testified that the child presented signs consistent with very severe dehydration. Vol. 2 Tr. 277, ll. 1-13. She explained that after the external exam she performed an internal exam which included dissection of each organ and looking at the organs under a microscope. Vol. 2 Tr. 278, ll. 4-9.

The state then inquired "can you talk about some of the things specifically that you could see anatomically that could cause that kind – the malnourishment, I believe Dr. Lamb mentioned things like inflammatory bowel disease, can you walk [the] jury a little bit through what else you check to rule out things like that?" Vol. 2 Tr. 278, ll. 12-18. Dr. Presnell testified she was looking for anything abnormal. Vol. 2 Tr. 278, ll. 19-21. She noted that on the child looked "really malnourished," based on the external exam. Vol. 2 Tr. 278, ll. 23-25. She testified that the organs looked normal, but small, and did not see evidence of birth defects, tumors, cancers,

or scarring. Vol. 2 Tr. 279, l. 18 – 280, l. 13. She testified that she drew the blood for the toxicology at the time of the autopsy and sent it to the lab. Vol. 2 Tr. 280, l. 18 – 281, l. 3. Dr. Presnell explained that the skeletal survey showed no fractures or signs of physical, abusive injury and no sign of skeletal disease. Vol. 2 Tr. 281, ll. 14-19. She explained the tests performed on the blood. Vol. 2 Tr. 282, l. 3 – 284, l. 21. Finally, Dr. Presnell opined that her ultimate determination as to the child's cause of death was "dehydration and malnourishment with ketosis because [she] wanted to address the fact that ketones were there, so dehydration and malnourishment with ketosis is due to neglect." Vol. 2 Tr. 286, ll. 4-9. She also testified that she determined the cause was due to neglect because A.W. was a 14-month child that would depend on a caregiver for food, sustenance, water, and medical care. Vol. 2 Tr. 286, ll. 10-14.

On cross-examination, Dr. Presnell testified that she did not conduct any of the tests for toxicology. Vol. 2 Tr. 287, l. 21 – 288, l. 1. She did not receive medical records to review for this case. Vol. 2 Tr. 290, ll. 15-42.

State's closing

During its closing argument, the state argued that Dr. Lamb "agreed with Dr. Presnell's findings of dehydration and malnutrition." Vol. 3. Tr. 291, ll. 12-13. The state continued that, "[t]his was not a condition that happened overnight in the days leading up to her death." Vol. 3. Tr. 291, ll. 13-15.

Discussion

The trial court abused its discretion by refusing to limit Dr. Lamb's testimony concerning her opinion as to A.W.'s death, which was based on her review of Dr. Presnell's autopsy and records, because it allowed the state to improperly bolster Dr. Presnell's credibility and her findings concerning A.W.'s death. This Court should reverse.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Generally, witnesses are not allowed to testify whether another witness is telling the truth and may not improperly bolster the testimony of other witnesses. *Id.* Improper bolstering also occurs where "a witness testifies for the purpose of informing the jury that the witness believes" the witness or where there is no other interpretation than to mean the witness believes the witness is telling the truth. *State v. Chappell*, 429 S.C. 68, 75, 837 S.E.2d 496, 499-500 (Ct. App. 2019).[11]

Moreover, "[t]he legal concept of vouching prohibits a prosecutor from giving the jury any indication she knows something about the credibility of a witness that the jury does not know, or that is based on an event or proceeding outside the presence of the jury." *State v. Busse*, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023) (citing *State v. Kelly*,[12] 343 S.C. 350, 367-370, 540 S.E.2d 851, 859-861 (2001)). Thus, neither a solicitor nor a government law enforcement official witness should be allowed to bolster the state's case by vouching for the credibility of a prosecution witness as it invades the province of the jury and places the government's prestige behind that witness. *See Kelly*, 343 S.C. at 367-370, 540 S.E.2d at 859-861.

In *Chappell*, this Court noted testimony of any witness is improper bolstering if: (1) the witness directly states an opinion about the victim's credibility, (2) the sole purpose of the testimony is to convey the witness's opinion about the victim's credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim is telling the truth.

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[11] Certiorari was denied by our Supreme Court on September 21, 2020.

[12] *Rev'd on other grounds*, *Kelly v. South Carolina*, 534 U.S. 246 (2002).

429 S.C. at 75-76, 837 S.E.2d at 499-500 (citing *Briggs v. State*, 421 S.C. 316, 323, 806 S.E.2d 713, 717 (2017); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); *McKerley*, 397 S.C. at 465, 725 S.E.2d at 142; *see also State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) (improper bolstering of victim's credibility where a forensic interviewer testified she recommended that the defendant not be allowed around the victim); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002) (witness's credibility was essential to the decision to convict because it was the only evidence of guilt).

In *Taylor*, this Court determined that the admission of a SLED report did not bolster the trial testimony of the SLED firearm and tool-mark examiner because it was relevant to the witness's own testimony, "not that of any other witness." 404 S.C. at 515, 745 S.E.2d at 128. This Court continued that the report also did not "vouch for her credibility; rather, it was a written representation of the findings on which her opinions and testimony were based." *Id.*

In this case, the trial court erred by refusing to limit Dr. Lamb's testimony concerning her opinion on A.W.'s death as it only served to bolster the conclusions later drawn by Dr. Presnell concerning A.W.'s cause of death. Notably, it appears that Dr. Lamb was primarily presented to testify as to her evaluations of the six remaining children, which occurred after A.W.'s death. *See generally* Vol. 2 Tr. 160-202; Vol. 2 Tr. 133, ll. 5-7. Unlike her evaluations of the six children, which each came to her office for an evaluation, she never met with A.W. and merely reviewed Dr. Presnell's autopsy report and other records. Vol. 2 Tr. 160, ll. 6-23; 219, ll. 17-22; 224, ll. 5-8; 235, ll. 1-5. By allowing the state to present Dr. Lamb's testimony that she reviewed Dr. Presnell's autopsy and then provide her expert opinion that mirrored Dr. Presnell's, the state was permitted to bolster the credibility of Dr. Presnell's findings as to the cause of A.W.'s death. *McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 (explaining that a witness may not improperly

bolster the testimony of other witnesses). That is improper. Importantly, A.W.'s cause of death was the crux of the state's case and the credibility of the state's witness who opined as to her findings as to A.W.'s cause of death should have been the exclusive province of the jury. *Gilchrist*, 350 S.C. at 221, 565 S.E.2d at 281.

Moreover, this case presents a factually distinct scenario than that in *Taylor*, where this Court determined that the admission of a report did not bolster that witness's own trial testimony. *See Taylor*, 404 S.C. at 515, 745 S.E.2d at 128. Unlike *Talyor*, the state did not seek to bolster Dr. Lamb's own trial testimony but instead the testimony of Dr. Presnell and her findings as to the cause of A.W.'s death. *Compare id.*, *with* Vol. 2 Tr. 224, ll. 5-8; 226, ll. 20-24; 286, ll. 4-9. In fact, Dr. Lamb did not provide a written report of her findings as to A.W.'s cause of death and instead relied in large part on Dr. Presnell's findings, whose credibility she ultimately bolstered through her testimony. *But see id.; see also* Vol 2 Tr. 133, ll. 5-7.

Even further, Dr. Lamb's testimony as to A.W.'s cause of death was merely cumulative of Dr. Presnell's testimony as the forensic pathologist who conducted A.W.'s autopsy. *See* Rule 403, SCRE (Even if evidence is relevant, it should otherwise 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 consideration of undue delay, waste of time, or *needless presentation of cumulative evidence*.") (emphasis added). Specifically, Dr. Lamb's testimony concerning her expert opinion, based on photographs, the autopsy, and toxicology reports, that A.W. died of medical and nutritional neglect, was repetitive of Dr. Presnell's expert opinion that A.W. died due to neglect, malnourishment, and dehydration. *See* Vol. 2 Tr. 233, ll. 5-7286, ll. 4-14. Thus, the two medical experts were permitted to present additional evidence of the same kind to the same point, which was particularly prejudicial where one expert, Dr. Lamb, based the bulk of her

expert opinion on the findings of Dr. Presnell's autopsy report. *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."); *see also State v. Henley*, 428 S.C. 649, 662, 837 S.E.2d 639, 646 (Ct. App. 2019) (quoting *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) ("The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.").

The trial court's error in admitting Dr. Lamb's improper testimony is further illustrated by the state's closing argument. The state argued that Dr. Lamb "agreed with Dr. Presnell's findings of dehydration and malnutrition. This was not a condition that happened overnight in the days leading up to her death." Vol. 3 Tr. 291, ll. 12-15. In so arguing that Dr. Lamb agreed with Dr. Presnell's findings, the state vouched for the credibility of Dr. Presnell. *Busse*, 439 S.C. at 109, 886 S.E.2d at 211. In addition, as the trial court instructed the jury, the jury was entitled to give expert opinions "the weight you think it deserves." *See* Vol. 3. Tr. 352, l. 4. Nor was the jury "required to accept an expert's opinion even though it may not be contradicted." *See* Vol. 3. Tr. 352, ll. 11-15. However, because the court refused to limit Dr. Lamb's testimony, the state was permitted to vouch for the credibility of the expert witnesses it presented despite the credibility and weight afforded to the testimony of an expert witness being in the exclusive province of the jury. Taken together, the state cannot be permitted to improperly bolster one witnesses credibility and findings through the testimony of another witness.

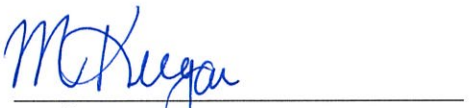
Nor is this testimony at issue mere comparison for corroboration. *See e.g.*, *United States v. Barnett*, 63 Fed. App'x. 643, 646 (4th Cir. 2003) (unpublished) (determining that the government did not improperly bolster Adams' testimony with expert testimony by Carbone with regard to drug code language because "the Government properly compared Adams' and

Carbone's testimony, as corroboration."). The state presented the expert opinion of Dr. Lamb concerning A.W.'s death, which was formed in large part from the review of Dr. Presnell's autopsy, to bolster the credibility of Dr. Presnell's findings and opinion as to the child's death. However, Dr. Lamb was not another forensic pathologist reviewing Presnell's autopsy and corroborating those findings as an individual who also performs autopsies. Vol. 2 Tr. 137, l. 13 – 138, l. 12; 268, ll. 5-11. Further, Dr. Lamb did not attend the autopsy, and thus, it cannot be said that her testimony served only to corroborate that of Dr. Presnell. Vol. 2 Tr. 235, ll. 1-5.

Accordingly, the trial court abused its discretion by overruling defense counsel's objection to Dr. Lamb's testimony as improper bolstering and erred by refusing to limit her testimony accordingly. Thus, this Court should reverse.

CONCLUSION

Based on the foregoing arguments, appellant respectfully requests that this Court reverse his convictions and sentence and remand to the Court of General Sessions of Lancaster County for a new trial.



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ATTORNEY FOR APPELLANT

This 11th day of February, 2026.