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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Lexington County
The Honorable Knox R. McMahon, Circuit Court Judge

Opinion No. 5157 (S.C. Ct. App. filed 7/10/13)
Appellate Case No. 2013-001970

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LEXIE DIAL, III,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. **The Court of Appeals properly affirmed the trial judge's conclusion that the arrest of Petitioner was lawful where Sgt. Dukes had jurisdiction to arrest Petitioner in Richland County by virtue of his status as a Special Deputy of the U.S. Marshal's Service who was a member of a federally-authorized fugitive task force. In any event, the arrest of Petitioner was proper as a citizen's arrest pursuant to S.C. Code § 17-13-10. Even assuming the arrest was unlawful, suppression of Petitioner's confession was not appropriate because the good-faith exception precluded application of the exclusionary rule. Finally, even if Petitioner's confession should have been excluded, its admission was harmless error because there was overwhelming evidence of guilt separate and apart from the confession.**

II. **The Court of Appeals properly held that the connection between an investigator's personal relationship with a prosecutor and the investigator's alleged bias was merely speculative. In any event, any error in disallowing the purported bias evidence would have been harmless beyond a reasonable doubt.**

III. **The Court of Appeals correctly affirmed the trial judge's denial of Petitioner's motion for mistrial after the mother of victim carried a small urn with her to the witness stand where the judge found no prejudice to Petitioner and where he cured any possible prejudice with an instruction to the jury.**

IV. **The Court of Appeals properly concluded that the denial of Petitioner's request to admit the original and amended pathologist's reports, if error, was harmless and would not have affected the outcome of trial.**

V. **The Court of Appeals properly concluded that the sentencing issue raised on appeal was not preserved for review. In any event, the trial judge did not abuse his discretion when he sentenced Petitioner to life imprisonment under S.C. Code § 16-3-85(D).**

STATEMENT OF THE CASE

Petitioner was indicted in Lexington County in July 2010 for homicide by child abuse. On April 11-15, 2011, he proceeded to trial before the Honorable R. Knox McMahon and a jury. The jury found Petitioner guilty as indicted. On April 19, 2011, Judge McMahon heard Petitioner's post-trial motions. The motions were denied, and Judge McMahon thereafter imposed a sentence of life without parole pursuant to S.C. Code Ann. § 16-3-85(D). A timely notice of appeal was served and filed.

On July 10, 2013, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. See State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013). Petitioner's request for rehearing was denied on August 22, 2013. Petitioner timely submitted a Petition for Writ of Certiorari, and this Return follows.

ARGUMENT

Brief Statement of Facts

On the evening of January 19, 2010, Petitioner was at his Lexington County home alone with the victim, his five-month-old son. (R. p. 285-86; p. 855-59). At 8:14 pm, a 911 call was made by Petitioner's father indicating that the victim was not breathing, and EMS, fire service, and law enforcement responded. (R. p. 226). At the scene, Petitioner claimed that he fell while holding the victim and the victim hit his head on the coffee table. (R. p. 282). CPR was performed on the victim and he was ultimately transported to Lexington Medical Center. (R. p. 234-95). However, the emergency room doctor in Lexington determined that the victim needed services beyond the capabilities of the hospital, so he sent the victim to the children's hospital in Richland County. (R. p. 299-300). Early the next afternoon, the victim passed away. (R. p. 122).

The autopsy revealed that the victim had bilateral subdural hemorrhages and bilateral subarachnoid hemorrhages, extremely serious injuries not caused by a typical household fall. (R. p. 581-87; p. 753-54). The autopsy also revealed that the victim did not have a bruise on his head, proving his injuries did not result from hitting his head as Petitioner claimed. (R. p. 578-80). Retinal photographs revealed that the victim had hemorrhages "too numerous to count" in both eyes "in all quadrants to the back of the eyes," and that he had "retinoschisis," which is generally caused by back and forth acceleration, i.e., shaking. (R. p. 400-405). Dr. Webb-Wood, Dr. Cheeseman, Dr. Harper, and Dr. Luberoff all opined that the victim's injuries and death were the result of non-accidental trauma; specifically, shaken baby syndrome. (See R. p. 342, lines 15-17; p. 400-417; p. 455-466; p. 749-87). The pathologist listed the manner of death as homicide. (R. p. 586, lines 3-8). After Petitioner was arrested, he confessed that he shook the victim in a fit of

anger and frustration. (R. p. 115-16; p. 705-25; p. 1022-23). However, at trial, Petitioner claimed that he tripped over a steam cleaner while holding the victim and they both hit the coffee table. (R. p. 857-58). The jury ultimately rejected Petitioner's trial testimony and found him guilty of homicide by child abuse. (R. p. 966).

I. The Court of Appeals properly affirmed the trial judge's conclusion that the arrest of Petitioner was lawful where Sgt. Dukes had jurisdiction to arrest Petitioner in Richland County by virtue of his status as a Special Deputy of the U.S. Marshal's Service who was a member of a federally-authorized fugitive task force. In any event, the arrest of Petitioner was proper as a citizen's arrest pursuant to S.C. Code § 17-13-10. Even assuming the arrest was unlawful, suppression of Petitioner's confession was not appropriate because the good-faith exception precluded application of the exclusionary rule. Finally, even if Petitioner's confession should have been excluded, its admission was harmless error because there was overwhelming evidence of guilt separate and apart from the confession.

The Memorandum of Understanding ("MOU") regarding the Fugitive Task Force (see Court's Exhibit # 3), under which Sgt. Dukes was operating when he effected Petitioner's arrest in Richland County, states, in pertinent part:

> This Memorandum of Understanding (MOU) is entered into by the Lexington County Sheriff's Dept. and the United States Marshals Service (USMS) pursuant to the Presidential Threat Protection Act of 2000 (Public L. 106-544, § 6 December 19, 2000, 114 Stat. 2718, 28 USC § 566 note.) As set forth in the Presidential Threat Protection Act of 2000 and directed by the Attorney General, the USMS has been granted authority to direct and coordinate permanent Regional Fugitive Task Forces consisting of Federal, state, and local law enforcement authorities for the purpose of locating and apprehending fugitives.
>
> The authority of the USMS to investigate fugitive matters as directed by the Attorney General is set forth in 28 USC § 566. The Director's authority to direct and supervise all activities of the USMS is set forth in 28 USC § 561(g) and 28 CFR 0.111. The authority of United States Marshals and Deputy U.S. Marshals to, "in executing the laws of the United States within a State . . . exercise the same powers which a sheriff of the State may exercise in executing the laws thereof" is set forth in 28 USC § 564. Additional authority is derived from 18 USC § 3053 and Office of Investigative Agency Policies Resolutions 2 & 15. See also "Memorandum for Howard M. Shapiro, General Counsel, Federal Bureau of Investigation" concerning the "Authority to Pursue Non-Federal Fugitives", issued by the U.S. Department

> of Justice, Office of Legal Counsel, dated February 21, 1995. See also: Memorandum concerning the Authority to Pursue Non-Federal Fugitives, issued by the USMS Office of General Counsel, dated May 1, 1995. See also: 42 USC § 19641(a) (the Attorney General shall use the resources of federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements.
>
> The primary mission of the task force is to investigate and arrest, as part of joint law enforcement operations, persons who have active state and federal warrants for their arrest. . . .
>
> . . . State or local fugitive cases will be entered into NCIC (and other applicable state or local lookout systems) as appropriate by the concerned state or local agency. . . .
>
> . . . Non-USMS law enforcement officers assigned to the task force will be deputized as Special Deputy U.S. Marshals. . . .
>
> Task force personnel may be required to travel outside of the jurisdiction to which they are normally assigned in furtherance of task force operations. . . .

(See Court's Exhibit # 3, p. 1-2).[2]

It is undisputed that Sgt. Dukes was, at the time of Petitioner's arrest, a properly sworn-in Special Deputy U.S. Marshal who was authorized to "carry firearms, make arrests, serve warrants, and conduct other business as directed by the U.S. Marshal." (R. p. 690, lines 14-16). It is also undisputed that the MOU between the Sheriff of Lexington County and the United States Marshal was properly signed and was therefore in effect at the time of Petitioner's arrest. (See Court's Exhibit # 3, p. 4). Finally, it is undisputed that the MOU creating the fugitive task force indicates that its primary mission is to investigate and arrest "persons who have active state and federal warrants for their arrest." (See Court's Exhibit #

[2] Other jurisdictions have also created United States Marshal's Service fugitive task forces pursuant to nearly identical MOUs. See, e.g., http://www.miamidade.gov/govaction/legistarfiles/Matters/Y2013/130897.pdf; http://www.ci.salisbury.md.us/wp-content/uploads/2013/06/Res1943.pdf.

3, p. 1). Thus, the MOU, consistent with federal law,[3] appears to define "fugitive" in a broad sense, referring to persons with active warrants for their arrest who are located outside the jurisdiction where the crime occurred.

The testimony established that Petitioner's outstanding arrest warrant for great bodily injury to a child was properly entered into NCIC; therefore, Petitioner could properly be arrested outside of Lexington County. (See R. p. 667, lines 2-24). Accordingly, Sgt. Dukes, based upon his status as a member of the federally-authorized fugitive task force created by the MOU, had proper jurisdiction to arrest Petitioner in Richland County, since Sgt. Dukes, as a United States marshal, had the same arrest powers as the sheriff of Richland County. See 28 U.S.C. § 564 ("United States marshals, deputy marshals and such other officials of the Service as may be designated by the Director, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof."); see also Presidential Threat Protection Act of 2000, Public L. 106-544, § 6 December 19, 2000, 114 Stat. 2718, 28 USC § 566 note; 28 USC § 561(g); 28 USC § 566(e)(1)(B); 28 CFR 0.111; 18 USC § 3053; see also Authority

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[3] See Hogan v. O'Neill, 255 U.S. 52, 56 (1921) ("To be regarded as a fugitive from justice it is not necessary that one shall have left the state in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there an act which by the law of the state constitutes a crime, he afterwards has departed from its jurisdiction and when sought to be prosecuted is found within the territory of another state."); Strassheim v. Daily, 221 U.S. 280, 285 (1911) ("A]ll that is necessary to convert a criminal under the laws of a state into a fugitive from justice is that he should have left the state after having incurred guilt there."); see, e.g., Gee v. State of Kansas, 912 F.2d 414, 418 (10th Cir. 1990) ("A fugitive from justice is a person who is 1) suspected of or has been convicted of committing a crime, 2) sought by the jurisdiction so that the jurisdiction may subject the person to its criminal justice system, and 3) has left the jurisdiction and is found within the boundaries of another. Thus, 'all that is necessary to convert a criminal under the laws of a State into a fugitive from justice is that he should have left the State after having incurred guilt there.'") (citations omitted); White v. Armontrout, 29 F.3d 357, 359 (8th Cir. 1994) (rejecting defendant's contention that he was not a fugitive because he had no notice of the charges at the time he left the state, noting "[t]hat argument has long been rejected by the courts"); see also King v. Noe, 244 S.C. 344, 347, 137 S.E.2d 102, 103 (1964) (a fugitive from justice may be defined as "a person who, having committed or been charged with a crime in one state, has left its jurisdiction and is found within the territory of another when it is sought to subject him to the criminal process of the former state"); Ex parte Swearingen, 13 S.C. 74, 79-80 (1980) (defendant was a "fugitive from justice" where he committed an offense in another state and was subsequently found in South Carolina; the defendant needed not actually "flee," in the literal sense of the term, from the other state).

of FBI Agents, Serving as Special Deputy United States Marshals, to Pursue Non-Federal Fugitives, 19 U.S. Op. Off. Legal Counsel 33 (1995).

Even assuming Sgt. Dukes did not have proper jurisdiction to make an official arrest of Petitioner outside Lexington County, the judge correctly ruled that the arrest was nevertheless valid as a citizen's arrest pursuant to S.C. Code § 17-13-10. This code sections states as follows:

> Upon (a) view of a felony committed, (b) *certain information that a felony has been committed* or (c) view of a larceny committed, *any person* may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law.

S.C. Code § 17-13-10 (emphasis added). In this case, Sgt. Dukes had "certain information" that a felony had been committed, since he received information regarding probable cause for Petitioner's arrest from trusted fellow officers and was physically present when the victim passed away at the hospital. (See R. p. 695-96; see also p. 702-703). See State v. Swilling, 249 S.C. 541, 558, 155 S.E.2d 607, 617 (1967) (the term "certain information" in the citizen's arrest statute "means the existence of reasonable grounds to suspect the party arrested may be guilty of a felony," not the actual fact that a felony has been committed); see also State v. Cooney, 320 S.C. 107, 109-111, 463 S.E.2d 597, 598-99 (1995).

Moreover, although Sgt. Dukes did not take Petitioner *directly* "to a judge or magistrate," such a strict interpretation of the citizen's arrest statute has not been required by our Supreme Court. See State v. Swilling, 249 S.C. at 556, 155 S.E.2d at 616 ("We may assume that, under the [citizen's arrest] statute, upon arresting the defendant without a warrant, the officers were required to take him before a judge or magistrate *within a reasonable length of time thereafter.*") (emphasis added). Dukes did take Petitioner to the Lexington County Sheriff's Department complex, of which the jail and the bond court is a

part.[4] (R. p. 726, lines 2-8). Dukes' taking Petitioner to a location where judges are in fact found and where Petitioner would necessarily be taken before a judge within a reasonable time "to be dealt with according to law" clearly satisfied the statutory requirement of taking Petitioner "to a judge or magistrate." See S.C. Code § 22-5-510(B); Rule 2(a), SCRCrimP. Therefore, since all of the statutory requirements were met, Petitioner's arrest qualified as a proper citizen's arrest under S.C. Code § 17-13-10.

However, even if the trial judge erred in concluding that Petitioner's arrest was valid, the exclusionary rule should not apply because the officers were acting in good faith when Petitioner was arrested. Sgt. Dukes and his fellow officers acted under an objectively reasonable and good faith belief that Dukes had state-wide jurisdiction to arrest Petitioner in Richland County by virtue of his status as a Special Deputy of the U.S. Marshal's Service who was a member of the federally-authorized fugitive task force created by the MOU. (See R. p. 106; p. 649-50; p. 662-69; p. 670-76; p. 694-96; p. 702-703; see *supra*, p. 4-7). Therefore, the exclusionary rule did not apply and suppression of Petitioner's confession was not warranted. See Davis v. U.S., 131 S.Ct. 2419, 2427 (2011) ("Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a 'last resort.' For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.") (citations omitted); Herring v. U.S., 555 U.S. 135 (2009) (good faith exception applied where an officer reasonably believed that the

4 In fact, Petitioner was served with the homicide by child abuse arrest warrant the same day around 4:10 pm, was thereafter taken to the county jail, and subsequently appeared before a judge for a bail proceeding. (See R. p. 106; p. 137; p. 724-26). The bond court, jail, and Sheriff's Department are all located at 521 Gibson Road in Lexington. This complex is known as the "James R. Metts Law Enforcement Complex."

defendant had an outstanding arrest warrant but that belief was actually incorrect due to a negligent bookkeeping error by another police employee); see also Arizona v. Evans, 514 U.S. 1 (1995).

Finally, even assuming Petitioner's confession should have been suppressed, its admission would not warrant a new trial in this case because there was overwhelming evidence of guilt independent of the confession. It was undisputed that Petitioner was the only person with the victim when the injury that killed the victim occurred. (R. p. 285-86; 855-59). The autopsy revealed that the victim had bilateral subdural hemorrhages and bilateral subarachnoid hemorrhages, extremely serious injuries not caused by a typical household fall. (R. p. 581-87; p. 753-54). The autopsy also revealed that the victim did not have a bruise on his head, proving his injuries did not result from hitting his head as Petitioner claimed. (R. p. 578-80). Retinal photographs revealed that the victim had hemorrhages "too numerous to count" in both eyes "in all quadrants to the back of the eyes," and that he had "retinoschisis," which is generally caused by back and forth acceleration, i.e., shaking. (R. p. 400-405). Dr. Webb-Wood, Dr. Cheeseman, Dr. Harper, and Dr. Luberoff all opined that the victim's injuries and death were the result of non-accidental trauma; specifically, shaken baby syndrome. (See R. p. 342, lines 15-17; p. 400-417; p. 455-466; p. 749-87). The pathologist listed the manner of death as homicide. (R. p. 586, lines 3-8). Petitioner's claim that the injury occurred because he fell while holding the victim was wholly inconsistent with the overwhelming medical evidence. No rational juror could find that the victim's catastrophic injuries came about in the manner suggested by Petitioner rather than due to shaken baby syndrome. Therefore, the State submits that any error in the admission of Petitioner's confession was harmless beyond a reasonable doubt. See State v. Easler, 327 S.C. 121, 129, 489 S.E.2d 617, 621-22 (1997) (any error in failing

to suppress the defendant's statements was harmless where there was overwhelming evidence of guilt).

II. The Court of Appeals properly held that the connection between an investigator's personal relationship with a prosecutor and the investigator's alleged bias was merely speculative. In any event, any error in disallowing the purported bias evidence would have been harmless beyond a reasonable doubt.

Relevant Facts

On cross-examination in a pre-trial hearing, Lt. Russell testified that, at the time he interviewed Petitioner in January 2010, he had been investigating child abuse cases for approximately seven-and-a-half years. (R. p. 129, lines 5-7). He stated he investigated another "shaken baby" case prior to Petitioner's case. (R. p. 129, lines 8-13). Lt. Russell testified that a particular assistant solicitor had been the prosecutor in that previous child abuse case and that he had worked on other cases with this same prosecutor in the past. (R. p. 129-30). Lt. Russell acknowledged that he began a personal relationship with this prosecutor in October 2010. (R. p. 131, lines 1-7). He stated that it was around that time that Petitioner's case was initially scheduled to go to trial. (See R. p. 130-31).

Prior to October 2010, he and the prosecutor had worked together for several years and had been friends. (R. p. 132; p. 136). Lt. Russell admitted that, after commencing the relationship with the prosecutor in October 2010, he ended up separating from his then-wife. (R. p. 132, lines 5-14). When asked whether or not he wanted to put together a good case if this particular prosecutor was on the case, Lt. Russell responded that – as the lead investigator in the case – he wanted to "put together a good case, no matter who the prosecutor was." (R. p. 132, lines 15-18). He testified that his relationship with the prosecutor had no effect whatsoever on his actions in taking the statement from Petitioner in January 2010, particularly since the personal relationship did not begin until about ten

months later and since he had no idea whether this prosecutor would be assigned Petitioner's case or not. (R. p. 136, lines 2-14). The prosecutor was removed from the case when the personal relationship was discovered, and the Attorney General's Office took over the case. (See R. p. 100-101; p. 729, lines 6-9).

Following the pre-trial hearing, the court ruled that evidence of a relationship that undisputedly began about ten months after Lt. Russell became involved in Petitioner's case was not relevant. (R. p. 180, lines 3-7). The court found that "[t]here is no connection between the personal relationship of the Detective ten months after the event and the death of the child." (R. p. 180, lines 8-10). The court stated, "[i]t is just not relevant, as there is no way to connect those dots." (R. p. 180, lines 11-12). The court further found that, even if the evidence was somehow relevant under Rule 401, SCRE, it was not relevant as evidence of bias under Rule 608(c), SCRE, because "there is no relevancy of a relationship that developed thereafter that would in any way bias the testimony of this witness, Lt. Russell, in this case." (R. p. 180, lines 14-16). Moreover, the court concluded, even if the evidence was admissible under Rule 608(c), it was still not admissible under Rule 403, SCRE, since Rule 403 provides for exclusion of even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. (R. p. 180, line 23 – p. 181, line 11). The court specifically found that if admitted, the evidence would have been "misleading to the jury" in violation of Rule 403. (R. p. 983, lines 15-16).

Argument

The admission or exclusion of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Orr, 389 S.C. 286, 291, 698 S.E.2d 633, 636 (Ct. App. 2010) (citation omitted). "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. (citation omitted). Rule 401, SCRE, provides that "[r]elevant 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 608(c), SCRE, provides as follows: "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 403, SCRE, provides, in pertinent part, that, "[a]lthough 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."

In this case, the trial judge properly excluded evidence of the personal relationship between Lt. Russell and the prosecutor.[5] After hearing all the testimony and arguments in the pre-trial hearing, the judge found it was undisputed that the personal relationship began ten months after Petitioner provided a statement to Lt. Russell and that the relationship would not have in any way biased the testimony of Lt. Russell.[6] (R. p. 180, lines 14-16; p. 180-82; p. 738, lines 7-10; p. 983, lines 8-19). See, e.g., State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 n2 (1997) (noting that the trial judge is in a superior position to judge credibility and that great deference must be given the trial judge's determination); id. at 193, 493 S.E.2d at 352 ("In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of

[5] Petitioner raised no constitutional challenge regarding this issue at trial, nor has Petitioner raised a constitutional challenge on appeal. See, e.g., State v. Baker, 390 S.C. 56, 65, 700 S.E.2d 440, 444 (Ct. App. 2010) (no constitutional issue regarding cross-examination of a witness was preserved where the defendant failed to raise a constitutional issue to the trial judge below).

[6] Although the judge gave Petitioner the opportunity to present his own evidence to show that personal relationship began sooner than October 2010, Petitioner presented no such evidence. (See R. p. 182, lines 17-19).

law."). In light of these findings, the trial judge concluded that evidence of the personal relationship was simply not relevant to any issues in the case, was not relevant as evidence of bias under Rule 608(c), SCRE, and was impermissible under Rule 403 because such irrelevant evidence would have been misleading to the jurors. The judge did not abuse his discretion by limiting the cross-examination of Lt. Russell. See State v. Orr, 389 S.C. 286, 290-91, 698 S.E.2d 633, 636 (Ct. App. 2010) (trial court properly excluded defendant's proffered evidence of bias under Rule 608(c), SCRE, where the witness denied the allegations of bias in her proffered testimony and therefore the defendant was therefore unable to demonstrate any bias or motive existed; further, evidence was properly excluded where defendant failed to show that the event that caused the alleged bias occurred within a reasonable time prior to the time the witness made allegations against the defendant); State v. Baker, 390 S.C. 56, 66, 700 S.E.2d 440, 445 (Ct. App. 2010) (trial judge properly disallowed evidence of two incidents that the defendant contended would show bias or motive to misrepresent on the part of the victim under Rule 608(c) where, as to the first incident, it was "extremely unlikely that this simple incident would have a legitimate tendency to show [the purported bias]," and as to the second incident, "it could not have been used to demonstrate bias or a motive to misrepresent" because it occurred after the victim made her allegations against the defendant); State v. Burgess, 393 S.C. 396, 405, 712 S.E.2d 1, 5 (Ct. App. 2011) (trial judge did not err in excluding evidence proffered under Rule 608(c) where judge concluded that the proffered evidence was "irrelevant and highly prejudicial and I don't think it is relevant to any of the issues in this case"); see also State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate

tribunal."), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Harmless Error

Finally, even if the trial judge had erred in refusing to admit evidence regarding the personal relationship between Lt. Russell and the prosecutor, the error was harmless beyond a reasonable doubt. As the trial judge concluded, this evidence was simply not relevant and was too speculative and tenuous to constitute evidence of bias. (R. p. 180, lines 14-16; p. 180-82; p. 738, lines 7-10; p. 983, lines 8-19). For the same reasons the evidence was not admissible, its omission from the record could not have affected the jury's evaluation of Lt. Russell's credibility and therefore did not prejudice Petitioner. See, e.g., State v. Ferguson, 300 S.C. 408, 411, 388 S.E.2d 642, 644 (1990) (refusal to allow certain impeachment evidence is not reversible error when the particular evidence would not have had a meaningful impact on the witness's credibility). Furthermore, as discussed above, there was overwhelming evidence of guilt, even separate and apart from Petitioner's confession. See *supra*, p. 9-10. Accordingly, the judge's refusal to admit the purported bias evidence was harmless beyond a reasonable doubt. See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial).

III. The Court of Appeals correctly affirmed the trial judge's denial of Petitioner's motion for mistrial after the mother of victim carried a small urn with her to the witness stand where the judge found no prejudice to Petitioner and where he cured any possible prejudice with an instruction to the jury.

Relevant Facts

The victim's mother, Misti Richard, was called as the fourteenth witness at Petitioner's trial. (See R. p. 5). As Ms. Richard proceeded to the witness stand, the trial

judge, from his unique vantage point on the bench, noticed that Ms. Richard had a small object in her hand and asked the jurors to step out for a moment. (See R. p. 498, lines 10-19). After Ms. Richard explained that the object in her hand was an urn containing the victim's ashes, the judge ruled that Ms. Richard would not be allowed to sit on the witness stand with the urn in her hand. (R. p. 498, lines 14-19). The judge then stated that he was not "fussing at" Ms. Richard and that since she "approached the witness stand in a very low-grade manner" he did not believe "any members of the jury would have seen [the urn] or know[n] what it was." (R. p. 499, lines 1-5). Notably, the urn was not readily identifiable as such since it was a small, heart-shaped box. (See R. p. 500-502).

After hearing arguments from the attorneys, the trial judge requested that the clerk of court measure the urn with a ruler. (R. p. 500-501). The object measured just shy of three inches in width, two-and-a-half inches in length, and one inch in depth. (R. p. 501, lines 4-7). The urn was bronze in color. (R. p. 501, lines 8-9).

In making his ruling, the trial judge first pointed out the "small size" of the object, "the manner in which the witness approached the clerk to be sworn in" - that is, with "her left side and left posterior" toward the jury, cupping the object in both hands - and the fact that the judge himself "wasn't sure and I had a much better view of [Ms. Richard] than any member of the jury panel - I wasn't sure that was what it was but out of an abundance of caution I directed the jurors outside the courtroom to take the matter up." (R. p. 501, lines 11-25). The judge stated that he did not agree with Petitioner's counsel's assessment that the jury knew what the object was; in fact, the judge did not necessarily agree "that the jury even saw the item." (R. p. 504, lines 3-7). The judge indicated that he would be happy to give whatever curative instructions Petitioner wished to be given, and pointed out that he had previously instructed the jurors that their verdict could not be based upon passion,

prejudice, sympathy, or any other arbitrary factors, but only upon the evidence produced in the courtroom. (R. p. 504, lines 1-2 & lines 11-15; see also p. 233, lines 10-24). The judge stated that he would be happy to reiterate that same instruction or say nothing at all, upon Petitioner's request, but stated that he was denying the motion for mistrial. (R. p. 504, lines 16-21). Petitioner's counsel requested that the judge instruct the jurors that "the actions of a witness in trying to take the urn to the witness stand was a blatant attempt to gain the sympathy of the jury, and that they are to specifically disregard that and those efforts by the witness." (R. p. 505, lines 18-22). The State objected to the curative instruction requested by the defense. (R. p. 506, lines 10-11).

The judge found that the curative instruction requested by the defense would be inappropriate inasmuch as the judge had not questioned Ms. Richard and had no evidence that her bringing the urn with her was in fact an attempt to gain sympathy from the jury panel. (R. p. 506, line 19 – p. 507, line 9). The judge declined to give the requested instruction but offered to give a general curative instruction if the defense wished him to do so. (R. p. 507, lines 7-9). Petitioner's counsel indicated that although he would have preferred the requested charge, he would accept a general curative instruction in light of the court's ruling. (R. p. 507, lines 10-21). Before the jury returned to the courtroom, the judge admonished all the witnesses regarding controlling their emotions in light of the defendant's right to a fair and impartial jury. (R. p. 509, lines 4-23). When the jurors returned, the judge instructed them that they could not allow themselves to be swayed by sympathy, prejudice, passion, public opinion, emotion, or any other arbitrary factors, since the defendant was entitled to a fair and impartial trial. (R. p. 510, lines 5-22). He also instructed the jurors that they were required to carefully and impartially consider all of the evidence in the case and follow the law as the judge instructed it to them. (R. p. 510, lines 9-12).

Argument

Petitioner argues that the trial judge erred in denying his motion for mistrial based upon the urn incident, arguing that the incident was extremely prejudicial to Petitioner.[7] "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct. App. 2006) (citations omitted). The granting of a motion for mistrial is an extreme measure that should be taken only where an incident is so harmful that the prejudicial effect can be removed in no other way. State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). In order to receive a mistrial, the party must show both error and resulting prejudice. See id. (citations omitted). In determining whether to grant a mistrial, the court should determine whether or not the mistrial is dictated by manifest necessity or the ends of public justice. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002). "The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000).

In this case, the trial judge acted within his discretion when he denied Petitioner's mistrial motion. The judge, who personally witnessed the incident and was therefore in the best position to determine any potential prejudice from it, concluded that the jurors either

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[7] Arguably, this issue is not preserved for appellate review, since Petitioner did not object to the sufficiency of the curative instruction given. (See R. p. 506-510). See State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) ("If a trial court issues a curative instruction, a party must make a contemporaneous objection to the sufficiency of the curative instruction to preserve an alleged error for review."); State v. McEachern, 399 S.C. 125, 146-47, 731 S.E.2d 604, 615 (Ct. App. 2012) ("Because Hollie failed to object to the curative instruction, and additionally failed to move for a mistrial after the trial court gave its curative instruction, we find the mistrial issue is not preserved for review."); cf. State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999) (mistrial issue was preserved for review where defendant renewed his mistrial motion following the curative instruction).

did not see the object in Ms. Richard's hands or were not able to tell what the object was. He pointed out that the small urn measured three inches by two-and-a-half inches and was one inch deep and that the urn would not have been obvious to the jurors because of the way Ms. Richard approached the witness stand and held the object cupped in her hands. In that vein, there is absolutely no evidence in the record showing that any jurors saw the urn, knew what it was, or were prejudiced against Petitioner because of it. Cf. State v. Paige, 375 S.C. 643, 649, 654 S.E.2d 300, 303-304 (Ct. App. 2007) (no actual or inherent prejudice to defendant based upon spectators wearing buttons containing the victim's picture where the was "absolutely no evidence of record that the jurors in this matter were ever exposed to these button photos, and, if they were, whether they could perceive that they depicted the victim"). Contrary to Petitioner's argument, the incident with the urn in this case was a far cry from the deliberate, staged display of a shrouded baby carriage during closing argument in State v. Northcutt, which the jurors obviously all observed. (See Petition for Writ of Certiorari, p. 7). See State v. Northcutt, 372 S.C. 207, 222-23, 641 S.E.2d 873, 881-82 (2007).

Further, the judge properly concluded that even if the jurors did see that Ms. Richard had an object in her hands when she approached the witness stand, the incident was not so prejudicial as to inflame the passions of the jurors. Assuming the jurors somehow figured out that the small object Ms. Richard carried to the stand was an urn containing the victim's ashes, it was obviously no surprise to the jurors that the victim was deceased, and the fact that his mother carried his ashes with her in an urn did not in any way suggest that Petitioner was the one who killed the victim. Instead, a reasonable juror would perceive the carrying of the victim's urn to be a normal sign of the grief occasioned by the loss of a loved one.

Petitioner failed to meet his burden to show that he suffered any tangible prejudice from the urn incident. See State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989) ("The burden on motion for mistrial because of anything occurring during trial is upon movant to show not only error, but resulting prejudice.") (citation omitted); State v. Paige, 375 S.C. at 648, 654 S.E.2d at 303 ("Ideal conditions, it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result.") (citation omitted); see also State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) ("The burden is upon the Petitioner to satisfy this court that there has been prejudicial error.") (citations omitted); State v. Bonneau, 276 S.C. 122, 125, 276 S.E.2d 300, 301 (1981) ("It is, of course, incumbent upon an Petitioner in this court to prove that he was denied a fair trial."); State v. Crocker, 366 S.C. 394, 408, 621 S.E.2d 890, 897-98 (Ct. App. 2005) ("To warrant reversal, an Petitioner must show both error and resulting prejudice.") (citations omitted).

Even assuming Petitioner was somehow prejudiced, the trial judge cured any such prejudice when he promptly delivered a thorough instruction advising the jurors that they could not allow the verdict to be influenced by passion, sympathy, or prejudice. (See R. p. 510, lines 5-22). Notably, this instruction had already been given once previously and was again repeated during the final jury instructions. (See R. p. 233, lines 10-24; p. 956, lines 2-13). See, e.g., State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) ("A curative instruction is usually deemed to cure an alleged error."); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) (it is the duty of the jury to take the law from the court in the case on trial and "[i]t must be presumed that they do so."); State v. Ard, 332 S.C. 370, 386, 505 S.E.2d 328, 336 (1998) (citation omitted) (we are to presume that juries follow

their instructions and that proper instruction of the jury by the court cures most errors), *overruled on other grounds by* State v. Shafer, 340 S.C. 291, 304, 531 S.E.2d 524, 531 n. 12 (2000). Therefore, since any conceivable prejudice was cured by the judge's instruction, Petitioner is not entitled to a new trial.

IV. The Court of Appeals properly concluded that the denial of Petitioner's request to admit the original and amended pathologist's reports, if error, was harmless and would not have affected the outcome of trial.

On cross-examination, Dr. Janice Ross, the forensic pathologist, identified her original death report and her amended death report. (R. p. 588-591). She indicated that the original report was created following the autopsy and was thereafter transmitted to the coroner's office "to give the coroner an idea of how to word the death certificate." (See R. p. 588, lines 15-19). She prepared the original report to state that the cause of death was "head hit object." (R. p. 588-589). When she returned to the office and reviewed her notes, she decided to change the report because she realized that "the head could have been hit by something or could have hit an object," so she entirely removed the language about the cause of death "in order to open up the possibilities because the investigation was still going on." (R. p. 589, lines 19-24; p. 590, lines 13-23).

Petitioner contends that the trial judge should have admitted the two reports because they would have allowed the jury to "visualize the dramatic change" in the doctor's opinion. (Petition for Writ of Certiorari, p. 8). Again, the first report contained a description stating, "head hit object," while the second document did not contain any description and simply had a blank space. The doctor's written amendment leaving a blank space was not as dramatic as Petitioner suggests. In fact, Dr. Ross's *testimony* was necessary to explain the change to the written report and the reason for the change.

Petitioner further asserts that the trial judge's exclusion of the two reports is in "direct conflict" with this Court's ruling in McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). The State disagrees. In McKnight, this Court found trial counsel ineffective after she "just forgot" to introduce the autopsy report into evidence in McKnight's second trial because the autopsy report was a "powerful piece of documentary evidence that was crucial to McKnight's defense" since the autopsy report would have served as hard evidence to undermine the conclusion of the only doctor who opined that cocaine alone caused the baby's death. McKnight at 54-55, 661 S.E.2d at 365. This Court pointed out that, since even McKnight's own expert could not rule out cocaine as a cause of death, the introduction of the autopsy report listing three causes of death was especially important. Id. at 55, 661 S.E.2d at 365.

The issue being raised in Petitioner's case is not at all the same as the issue in McKnight. Again, in this case, the *reports themselves* do not show any reason for the amendment regarding the cause of death; only Dr. Ross's *testimony* explains the reason. Therefore, the jury's having copies of the original and amended reports would not have added anything to the defense case and certainly would not have been a "powerful piece of documentary evidence" as was the autopsy report in McKnight.[8] The McKnight case does not support Petitioner's position and does not afford Petitioner relief.

Harmless Error

Even assuming the trial judge committed error by disallowing the reports, such error was entirely harmless. Again, the first report contained a description stating, "head hit object," and the second document did not contain any description and simply had a blank

[8] Notably, as the trial judge pointed out, both certificates reflect that the manner of death was "homicide" (R. p. 843, lines 8-13), and both reports contain the same "Immediate Cause of Death," specifically, "Subdural Hemorrhage & Cerebral Edema; Closed Head Injury; Blunt Force Injury of Head." (See R. p. 1005-1006).

space. Dr. Ross's testimony in front of the jury fully explained the change to the report and her reason for the change. As the Court of Appeals pointed out, Petitioner had the opportunity to fully cross-examine Dr. Ross about the death certificates and the changes made to them. The reports themselves would have been cumulative and were insignificant when considered in the context of the entire record. Admission of the reports would not have affected the outcome of trial, especially considering the overwhelming evidence of Petitioner's guilt. See *supra*, p. 9-10. Accordingly, any error with respect to the judge's exclusion of the reports was harmless beyond a reasonable doubt. See, e.g., State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence."); State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial).

V. The Court of Appeals properly concluded that the sentencing issue raised on appeal was not preserved for review. In any event, the trial judge did not abuse his discretion when he sentenced Petitioner to life imprisonment under S.C. Code § 16-3-85(D).

Petitioner argued to the Court of Appeals that the trial judge failed to properly consider the aggravating and mitigating circumstances when he imposed the sentence. (See Final Brief of Appellant, p. 23-25). However, Petitioner never raised this objection below. (See R. p. 985-994). Therefore, as the Court of Appeals found, the issue was not preserved for appellate review.[9] See, e.g., State v. Sheppard, 391 S.C. 415, 424, 706 S.E.2d 16, 20

[9] The case of State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999), cited by Petitioner in his Petition for Writ of Certiorari, is distinguishable because Johnston presented "the exceptional circumstance in which the State has conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence." Johnson at 463, 510 S.E.2d at 425. The Supreme Court held that if "this Court unyieldingly enforces PCR as the only avenue of relief in this case, there is the real threat that Defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to pursue such a remedy. Under these exceptional circumstances, we hold that this case should be remanded for resentencing." Id. at 464, 510 S.E.2d at 425. However, the Court was careful to note that its holding "is not intended to disrupt our

(2011) (defendant's argument regarding an excessive sentence was not preserved for review where no objection was made on this ground below).

In any event, it is clear from the record that the trial judge properly considered all of the relevant circumstances and properly exercised his discretion in sentencing Petitioner to life imprisonment. After hearing from Petitioner and his family members, the judge discussed his reasoning regarding the sentence in great detail, specifically listing both mitigating and aggravating factors,[10] then imposed a sentence within the range set forth in S.C. Code § 16-3-85(D). (See R. p. 987-94). Petitioner does not allege that the judge operated under "partiality, prejudice, oppression, or corrupt motive;" therefore, there is no basis for this Court to disturb the sentence imposed. See State v. Dozier, 263 S.C. 267, 271, 210 S.E.2d 225, 226 (1974) & Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) (the length of a prison sentence rests in the sound discretion of the trial court; absent a showing of "partiality, prejudice, oppression or corrupt motive," an appellate court will not correct a sentence that is within the limits prescribed by statute); see also State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974); State v. Sanders, 251 S.C. 431, 444-45, 163 S.E.2d 220, 228 (1968); State v. Queen, 264 S.C. 515, 521-22, 216 S.E.2d 182, 185 (1975); State v. Patrick, 255 S.C. 130, 133-34, 177 S.E.2d 545, 547 (1970) (all finding no abuse of discretion even though the maximum sentence was imposed).

In his Petition for Writ of Certiorari, Petitioner argues that Miller v. Alabama, 132 S.Ct. 2455 (2012), which was decided after Petitioner's trial in April 2011, mandates

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settled rules on issue preservation and PCR applications. The facts here are unique and demand an expedited result." Id. The exceptional circumstances existing in Johnston are not present in Petitioner's case.

[10] The aggravating factors relied upon by the trial judge were the extent and severity of the traumatic injuries and the fact that the baby had to have been shaken violently, repetitively, and with velocity; testimony indicating "a lack of concern for the child's condition" after the injuries were inflicted; the judge's impression that Petitioner was "trying to help [himself], not [his] child;" the fact that the judge did not find credible the version of events Petitioner described at trial; and that the judge did not see "one ounce of remorse" from Petitioner. (See R. p. 992, line 17 – p. 994, line 13).

reversal of his sentence. In Miller v. Alabama, the United States Supreme Court held that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. Miller, 132 S.Ct. at 2475. Miller v. Alabama is not applicable to Petitioner's case for two reasons. First, the statute at issue in Petitioner's case, S.C. Code § 16-3-85(D), does not require a *mandatory* sentence of life without parole. To the contrary, it provides a sentencing judge with discretion to sentence a person convicted of homicide by child abuse to anywhere from twenty years up to life imprisonment. See S.C. Code § 16-3-85(D). Second, Miller is also inapplicable because, at the time of Petitioner's crime, he was not under the age of eighteen.[11] (See R. p. 847, lines 3-4; p. 985, lines 22-23). Accordingly, Miller v. Alabama affords Petitioner no relief, and the sentence must be upheld.

[11] Petitioner turned eighteen on January 11, 2010, and the crime occurred on January 19, 2010.

CONCLUSION

For the reasons discussed above, Respondent submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

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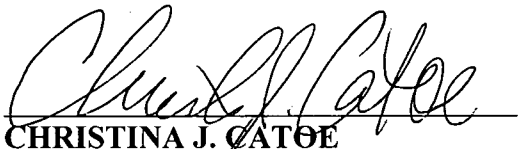

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December 18, 2013

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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Lexington County
The Honorable Knox R. McMahon, Circuit Court Judge

Opinion No. 5157 (S.C. Ct. App. filed 7/10/13)
Appellate Case No. 2013-001970

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LEXIE DIAL, III,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the **Return to Petition for Writ of Certiorari** in the above-referenced case has been served upon **H. WAYNE FLOYD**, Post Office Box 3972, West Columbia, South Carolina 29171, this **18th day of December, 2013.**

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