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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Sumter County
Court of General Sessions

The Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

Respondent,

v.

JASON EDWARD BARNES,

Appellant.

Appellate Case No. 2025-001361

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

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Appellant failed to renew his objection to the playing of his recorded statement after redactions were applied both by order of the court and agreement of the parties. Moreover, when asked for the defense's position on admissibility during trial, defense counsel affirmatively stated there was no objection. Consequently, appellant acquiesced and/or affirmatively waived the prior objection leaving the issue challenging admissibility of the recorded statement unpreserved for appellate review. Even so, there is no abuse of discretion demonstrated in the trial judge's ruling on admissibility of the redacted statement and appellant would be due no relief even if the issue could be considered on the merits. 8

II.

Appellant made only a general objection to the two photographs of the victim's body in State's Exhibit 7 and failed to state with any particularity why the photographs in circumstances of this case should warrant a finding that the danger of unfair prejudice substantially outweighed the probative value. Appellant's issue is not adequately preserved for appellate review. It is, nevertheless, also without sufficient merit to warrant relief. 18

III.

Appellant's closing argument suggested a significant omission in the State's case by failing to show motive for the murder, which logically prompted the State's request for a clarifying jury instruction that motive is not a necessary element of murder that the State must prove beyond a reasonable doubt. However, appellant's precise issue is not preserved for review as he did not argue the instruction amounted to a charge on the facts that would offend the state constitutional provision against same; thus, his issue is procedurally barred. It is nevertheless, also without sufficient merit to warrant relief. 23

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1.

Did the trial court abuse its discretion by failing to suppress statements made by law enforcement during the recorded interrogation of Appellant where the statements were hearsay and shifted the burden of proof to Appellant?

2.

Did the trial court abuse its discretion by admitting gruesome photographs of the decedent's body where any probative value of the photographs was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE?

3.

Did the trial court err by instructing the jury after the conclusion of the full instruction on the law that the state is not required to prove "why it happened" and that "the motive of why it happened is not part of the elements they have to prove" since the instruction was an improper comment on the facts and the timing of the instruction placed undue emphasis on the charge?

STATEMENT OF THE CASE

A Sumter County grand jury indicted Appellant Jason Edward Barnes in August of 2023 for the murder of Richard "Ricky" Preusser and possession of a weapon during the commission of the violent crime, 2023-GS-43-00766. (R. p. *). The case was called for trial before a jury on June 23, 2025. (Tr. 8). Elaine Cook, Esq., and Warren Anderson, Esq., represented Appellant on the charges. Assistant Attorneys General Angela Tanner and Chris Scalzo represented the State. The Honorable R. Ferrell Cothran presided. The jury convicted as charged. (Tr. 449-451). Judge Cotheran sentenced Appellant to imprisonment for thirty-eight years for murder and imposed a concurrent five-year term for the weapon conviction. (Tr. 459). This appeal follows.

RESPONDENT'S STATEMENT OF THE FACTS

On August 18, 2022, the victim, Ricky Preusser, returned to the home he shared with his long-term companion, best friend, and fiancée, Ms. Nicole Townsend. (Tr. 305-307). Ms. Townsend had a son who lived with them. She testified that when Mr. Preusser came into the home, she detected from the way he interacted with her that he had used methamphetamine, a fact that he admitted to her. (Tr. 307). Ms. Townsend described him as "very calm and laid back" but "it's almost like he's looking through you because he's just too relaxed to even acknowledge you." (Tr. 307). She asked Mr. Preusser to "leave for the day, get cleaned up and come back home" because she "didn't want him around [her] son" in such a condition. (Tr. 307-308). Mr. Preusser resolved to go to his home on Antelope Drive, which was the couple's former home, simply for the night to sleep, telling Ms. Townsend that with sleep, he would be "good for the next day." (Tr. 307, 309). Ms. Townsend and Mr. Preusser were friends with her son's father, the appellant, Jason Edward Barnes. (Tr. 308). They planned to have a cookout the following day with appellant and appellant's girlfriend. (Tr. 308). Mr. Preusser left. It was the last time Ms. Townsend would see him alive. Over the next several hours, Mr. Preusser would be fatally shot at close range, his body folded into a closet area of their former home. (Tr. 156, 184).

The following day, August 19, 2022, Ms. Townsend tried to reach appellant to go to the store for the cookout, but neither Ms. Townsend nor their son could reach him. (Tr. 310). Appellant stayed in the Antelope Drive home while making repairs. (*See* Tr. 312, State's Exhibit 25 at 8:19). Around 4:30 in the afternoon, appellant called their son and informed him "that the ambulance was there … Ricky was dead and we needed to get there." (Tr. 310). Appellant and another individual, Joshua Rentz, were present at the house that afternoon. Rentz was apparently also

living in the home. (Tr. 252).[1] Rentz called 911 at approximately 4:28 pm. (Tr. 150-151, 158, 149). The call prompted a response by law enforcement and emergency medical services. (Tr. 150). When the first responders from the Sumter County Sheriff's Office arrived, it was under the impression of a medical call, perhaps related to an overdose event; then, upon closer inspection, officers saw a small bullet hole in Mr. Preusser's chest. (Tr. 152, 156-157, 167-170). The men outside the home, appellant and Rentz, were detained for officers to seek further information. (Tr. 170). Rentz complied; appellant gave a false name. (Tr. 161-163).

Ms. Townsend, who had arrived on the scene shortly after appellant's call to their son, testified that appellant informed her that he was asleep in the home until approximately 4:00, close to the time that he called, and that he did not know what happened to Mr. Preusser. (Tr. 311). Appellant asked her, though, to tell the officers his name was "Corey Cheatham," a false name that he had given the responding officer earlier. (Tr. 312, 159-160). Ms. Townsend left the scene to shield her son from seeing the bag with Mr. Preusser's body being taken out of the home. (Tr. 312). Appellant left the scene, as well, just before officers learned his real name was Jason Barnes. (Tr. 162). Appellant, it turned out, had active warrants for simple possession of marijuana, and trespassing. (Tr. 161-164). Later that day, appellant called Ms. Townsend to ask that she go by the Antelope Drive home and pick up his things. She refused. (Tr. 314). That evening, he came to her home but she asked him to leave, noting that the police were looking for him. (Tr. 312). She reported that to the police. (Tr. 313).

[1] Rentz cooperated with the investigation. Investigator Elmore, then with the Sumter County Sheriff's Department, obtained a statement from Rentz, and "followed up" on what Rentz had told him. As a part of the follow up, the investigator was able to "rule him out as a suspect in the murder." (Tr. 253).

The police were actively looking for appellant and the next day, August 20, 2022, located, in the woods near his girlfriend's home. (Tr. 253-254). After being tracked with the help of a police K9, appellant was located, arrested, and taken to the Sheriff's Department where he gave a series of conflicting stories/assertions. (Tr. p. 253-254, 295-296, State's Exhibit 25). Appellant never asserted his right to remain silent and never attempted to end the interview. (State's Exhibit 25). Appellant first told investigators that he did not have gun; then asserted someone else left a gun at the home and at one point that he had thrown he gun into a nearby area. Eventually appellant admitted, after he understood his initial assertions were inconsistent with the facts already known to law enforcement, that he had a revolver. (Tr. 263-265). Appellant went back to Antelope Drive home to direct investigators where to find his belongings, which included the gun, "a revolver that shot both 38s and 357s.". (Tr. 268-271).

At autopsy, the pathologist found the bullet that had created the one, fatal chest wound and internal damage, lodged in the back, partially visible. (Tr. 372-373, 377-378; *see also* 217). The bullet was extracted for comparison to the revolver. (Tr. 377). The pathologist also testified that the bullet's path was not just front to back, right to left, and downward; three directions. This made the possibility of suicide, based on the angle, a very remote possibility. (Tr. 379). Toxicology screening for the victim showed no alcohol but did find "methamphetamine along with its breakdown product or metabolite, amphetamine, and the second substance was tetrahydrocannabinol, or THC, or marijuana, along with a breakdown product of that marijuana." (Tr. 384). The doctor opined, however, that the substances would not have been a contributing factor in death. (Tr. 384-385). The gunshot wound inflicted such damage that the victim would have died "within a number of minutes." (Tr. 382).

Upon examination, investigators confirmed that appellant's gun was a "Smith & Wesson eight-shot, 357 revolver." (Tr. 218). The gun was fully loaded, but one empty casing confirmed that one shot had been fired. (Tr. 221). Appellant's backpack also had a box of ammunition, matching that in the gun. The box had eight bullets missing. (Tr. 225).

A SLED firearms analysist determined, that based on distinctive markings, that appellant's gun fired the bullet that killed the victim. (Tr. 401-403). Further, the hammer had to be intentionally pulled on the gun for it to fire, as the "double-action modifier … was not working reliably." (Tr. 398).

Further, when appellant was arrested, he had a cell phone that he had been using. (Tr. 255-256). After obtaining a search warrant, the contents of the phone were examined. (Tr. 339). The examination revealed a series of communications confirming that appellant: 1) knew the police were looking for him and though perhaps he had committed the murder; 2) had been searching the new; 3) wanted his former girlfriend, Ms. Townsend, to get his backpack, computer and wallet from the home; 3) failed to answer calls Investigator Phillips' call or return a text; 4) had his then girlfriend, Samantha Maya, help him to continue to hide; and 5) underscored to Samatha Maya that it was "f*cking important" she get his bag from the home. (Tr. 345-363). The texts had been deleted but recovered in the investigation. (Tr. 345, 363).

On this evidence, the jury convicted appellant of murder. (Tr. 449).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 199 S.E.2d 61, 65 (1973)).

Admissibility of Evidence

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Brewer*, 411 S.C. 401, 406, 768 S.E.2d 656, 658 (2015) (quoting *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012)).

Jury Instructions on the Law

"The law to be charged must be determined from the evidence presented at trial." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). To show error in the trial court's jury instructions, an appellant must show the trial court abused its discretion. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.*

ARGUMENT

I. Appellant failed to renew his objection to the playing of his recorded statement after redactions were applied both by order of the court and agreement of the parties. Moreover, when asked for the defense's position on admissibility during trial, defense counsel affirmatively stated there was no objection. Consequently, appellant acquiesced and/or affirmatively waived the prior objection leaving the issue challenging admissibility of the recorded statement unpreserved for appellate review. Even so, there is no abuse of discretion demonstrated in the trial judge's ruling on admissibility of the redacted statement and appellant would be due no relief even if the issue could be considered on the merits.

Appellant admits that defense counsel did not raise an objection to the playing of his recorded statement during the trial. (BOA at 5). However, he asserts that *State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) relieves him of the normally applicable procedural bar because he raised the issue of burden shifting questions by police in pretrial argument. (BOA at 5 n. 1). However, unlike the defendant in *Jones,* appellant made no attempt to maintain an objection in pretrial or outside the presence of the jury when the redactions are discussed, nor did he object when the tape was offered. This is a case of acquiesce and waiver, not a question of simple preservation requirements. Should this Court disagree, in the alternative the State argues that there is no basis to find an abuse discretion in the trial judge's careful ruling considering the arguments before the Court and the context of the case. Essentially, either way –by resolution on a procedural or substantive basis—appellant is not entitled to any relief.

Relevant facts from trial:

In pre-trial motions, defense counsel argued that appellant's recorded statement to police officers should not be admitted. Counsel posited that two grounds support finding the statement inadmissible. First, the statement did not have a confession of any kind and was irrelevant, and further, because the interview presented evidence of bad character, the interview was more prejudicial than probative. Second, counsel argued that at the very least the video should be

redacted to remove hearsay and burden shifting language pursuant to *State v. Washington*[2] and *State v. Brewer*.[3] (Tr. 92-94, 99-100). Defense counsel asserted appellant did not claim the statement was involuntary; just that it is irrelevant or subject to redaction.[4] (Tr. 97, 99).

The arguments in the pretrial hearing generally followed the argument made in the defense's motion regarding the recorded statement. The defense in the motion set out its position that the recorded statement was, overall, irrelevant because it is not a confession and also should be disallowed as improperly cumulative to testimony. The defense further argued in the alternative, for redaction, and requested specific redactions, setting out 30 cited portions of the recorded statements. The defense argued in the motion that the portions were either burden shifting, improper character evidence, or included mention of a polygraph which should not be allowed. (R. [Court Exhibit 6]). The trial judge homed in on the requirement in our precedent that situations where officers "come up with some version" of events or present something which is "either hearsay or inappropriate," generally require redaction. (Tr. 101-102). At the conclusion of the pretrial hearing on June 23, 2025, Judge Cothran began a review of the entire video considering the arguments and the controlling precedent. (Tr. 130).

At the resumption of proceedings the following day, the judge announced his ruling. The judge found that nothing cited from the interview constituted the forbidden burden shifting

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2 431 S.C. 619, 848 S.E.2d 794 (Ct. App. 2020).

3 411 S.C. 401, 768 S.E.2d 656 (2015).

4 Even so, the trial judge, having reviewed the entirety of the taped statement, found that appellant was in custody, that Miranda warnings were appropriately given with the right to counsel explained and that appellant could stop the interview "at any time." The trial judge then concluded that appellant "freely and voluntarily gave a statement to the police[.]" (Tr. 279, line 16 - p. 280, line 2). There was no objection to that ruling.

assertions referenced in *Brewer* or *Washington*, rather, the video demonstrated merely a "standard … police interview." (Tr. 130, line 24- p.131, line 3). However, toward the end of the statement, there were references to potential sentencing and polygraph testing; a police narrative of events; and references to appellant's criminal history.[5] Those references, he ruled, were inadmissible, and the judge ordered that the video be stopped prior to those assertions being made; specifically, from 9:28:35 to the end of the video was inadmissible. (Tr. 131). This corresponded with disallowing items 24 through 30 on the defense listing. (R. [Court Exhibit 6 at 3-4]). Judge Cothran asked if "any other issues" should be addressed, and defense counsel answered, "I don't believe so. Nothing from the Defense, your Honor." (Tr. 131, lines 17-18).

On the day the recording was to be played in court to the jury, the State advised the trial judge that out of an abundance of caution, so as to not go over the time stamp cut off, the State would stop the tape at 9:10:15. (Tr. 248-249). Notably, the trial judge stated that he was guided by the number the defense had requested but left the offer of playing less to the State's discretion and preference. (Tr. 248-249; *see also* Court's Exhibit 6, requesting redaction of items from 9:28:35 through end of tape).[6] The prosecutor noted that she had discussed the matter with defense

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[5] The defense argued the "discussion" beginning at 8:37:30 references appellant's prior record. (Court Exhibit 6 at 2). However, that portion is appellant talking about his trespassing warrant and "trying to get that sh*t paid[.]" Further, he introduces that he has "not been in trouble for a long time" and that he "wants to do the right thing[.]" That is not the officers speaking. Moreover, the trespassing warrant was the reason he was arrested and clearly was part of the case. The remaining comments—again, introduced by appellant—are generalized, non-specific descriptions, not amounting to a "discussion" of his prior record.

[6] For the entry at 9:28:35, the defense asserted there was burden shifting in the portion of the tape that began with "You can go to jail for the rest of your life…." (Court Exhibit 6 at 3). The trial judge apparently did not agree that was the reason to disallow that portion, but did not want to go into "potential sentencing." In other words, the portion was suppressed but not for the reason argued.

counsel who appeared to be in agreement. (Tr. 248). Defense counsel confirmed to the trial judge that she had nothing more to add for the record. (Tr. 249).

The State requested to play the recording during the testimony of Investigator Russell Elmore. Inv. Elmore first described the progress of the statement, from denial of knowledge of the gun to admission that the gun was appellant's gun, and that it was in the house where the murder occurred. (Tr. 263-268). There was no objection to the testimony.[7] When the recording was offered, the defense asserted: "No objection." (Tr. 280, line 22- p. 281, line 3).

Discussion:

This issue is not preserved for appeal. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). True, appellant objected generally in the pretrial proceedings to "burden shifting" within the interview and requested specific redactions,[8] but the defense also *prevailed* on a portion of the redaction requests and entered no objection to the ruling. As such, defense counsel appeared to be satisfied with the redacted recording at that time and did not renew any assertion regarding relevance or otherwise. Further, when specifically asked if there was an objection when the redacted recording was offered, defense counsel responded, "No objection." There is no preserved issue here to review. *State v. Jackson,* 364 S.C. 329, 336, 613

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[7] Defense counsel did objection to the prosecutor "repeating the answer in testify," (Tr. p. 266, lines 17-18), but made no objection to the substance of the testimony. The prosecutor offered that the follow-up questioning was merely clarification, and the trial judge overruled the objection. (Tr. 266).

[8] The defense never articulated *how* the questions were burden shifting. Had the issue been preserved otherwise, the argument itself may have been insufficient for lack of specificity. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector."). The trial judge only saw a standard interview. (Tr. 131).

S.E.2d 374, 377 (2005) (finding that, even though appellant had previously contended he was entitled to submit "polygraph evidence in rebuttal" to the State's case, he "waived any argument he had when he acquiesced the next morning" and decided not to offer the evidence); *see also State v. Dicapua*, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion *in limine* to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."), *aff'd*, 383 S.C. 394, 680 S.E.2d 292 (2009); *Burke v. AnMed Health,* 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review.") (citing *Dicapua*). Appellant's reliance on *State v. Jones* in these circumstances is misplaced.

The general rule is that when a dispute about admissibility is resolved pre-trial, "a contemporaneous objection must be raised during trial when the evidence is admitted, whereas a party need not renew an objection if the decision is final." *Jones*, 435 S.C. at 144, 866 S.E.2d at 561 (citing *State v. Wiles*, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009)). In *Jones,* our Supreme Court recognized that, for constitutional questions, a pre-trial ruling is final without the necessity of renewing an objection prior to admission of the evidence at trial. *Jones*, 435 S.C. at 144, 866 S.E.2d at 561. However, the record in Jones showed many efforts to maintain his objection, though not consistently so. The facts of the opinion are instructive. In *Jones*, the defendant had moved *in limine* to suppress evidence from a search which was rejected, but his motion to change venue was granted. Jones noted his objection regarding the search evidence before the trial in the different

county began, and the new trial judge advised he would not change the previous ruling. At trial, Jones objected to some, but not all, of the evidence obtained from the search being admitted at trial. *Id.,* at 142-143, 866 S.E.2d at 560. Our Court explained that after a pre-trial hearing on a constitutional matter, "unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review." *Id.*, at 144, 866 S.E.2d at 561. *Jones* is factually different from appellant's case. Here, the defense won part of its motion and further discussion among the parties followed. The opportunity for change was not simply available, it was demonstrated. But critically, there is no mention in the opinion that the defendant in *Jones* affirmatively stated "no objection" to any of the evidence. Thus, *Jones* does not address acquiescence or waiver. In short, the *Jones* preservation exception does not work to save the issue on appeal in the circumstances presented in this case. Even so, the record does not support an abuse of discretion by the trial judge even if the issue could be considered on the merits.

Again, appellant did not contend at trial that the statement was involuntary, (Tr. 97, 99), and that is not suggested, raised or argued in the appeal. Instead, appellant argues that the portions of the tape identified in the pre-trial motion were inappropriately admitted because they constituted burden shifting. (BOA at 5).[9] As noted above, n. 7, *infra*, the record is sparse both on the specific of arguments or the specifics of the ruling, but the record does show that the trial judge considered the statements in comparison to those in *Brewer* and found the statements contested in this case did not introduce a belief that appellant had to prove his innocence, *i.e.*, statements suggesting the burden shifted to appellant to prove his innocence. The case law supports the trial judge.

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[9] These must refer to items 2-23 in the defense listing, *see* R. [Court Exhibit 6]), as they were the only remaining admitted portions which defendant had labeled "burden shifting."

In *Brewer*, our Supreme Court found that a recorded statement of Brewer's interrogation contained impermissible hearsay, specifically, the officers' part in the interview, but it did not adopt "a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial." *Brewer,* 411 S.C. at 407, 768 S.E.2d at 659; *see also State v. Washington,* 431 S.C. at 623, 848 S.E.2d at 796 (this Court acknowledging same). [10] Rather, the main concern in *Brewer* focused on admission of *false* factual assertions, perfectly fine for interrogation, but unfair to present at trial without a proper ground for admissibility. *Brewer,* at 407-408, 768 S.E.2d at 659. Specifically, the jury in Brewer's trial heard purported quoted statements from witnesses identifying Brewer as the shooter of the two victims in that case. That was false and our Court found those assertions were "offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." *Id.,* at 406-407, 768 S.E.2d at 659. Notably, Brewer attempted to exercise his right to stop the interview and the officers failed to honor his request. *Id.,* at 405, 768 S.E.2d at 658.

Much different than Brewer's situation, appellant voluntarily engaged in the interview and did not seek to end the interview. Further still, and critically different, appellant fails to identify any *false* quotes from non-existent witnesses or *false* assertions regarding the evidence. Indeed, an officer testified to the interaction and was subject to cross-examination as to the facts discovered from the investigation and how those facts were used in questioning appellant. (*See* Tr. p. 262-

[10] To be clear, the identified objection for many of the requested redactions in the motion was simply the label of "burden shifting," but counsel also argued that the entire statement of irrelevant since the interrogation did not produce a confession, and if not irrelevant, was cumulative to the officers' testimony. The motion had other minor references to hearsay, bolstering and opinion evidence while citing *Washington*. (R. [Court Exhibit 6]).

264). Having voluntarily given the statement, the statement was evidence that the jury was entitled to see, particularly to assess appellant's verbal and non-verbal reactions.

Though the hearsay issue was the basis of the ruling in *Brewer*, our Court also "comment[ed] on the grave constitutional error" which was demonstrated by "[l]aw enforcement's *ad nauseam* insistence that Brewer prove his innocence" which it underscored had "*no* place before the jury" *Id.,* at 408, 768 S.E.2d at 659 (emphasis in original).[11] Both the argument below and the argument on appeal keenly focus on the concept of burden of shifting, but present little on why the statements or questions at issue would suggest that appellant had any legal burden at all. Further, the precise words found offensive to the constitutional principle in *Brewer* used left little room to argue what the officers meant to convey; they repeatedly told "Brewer that he should 'prove himself innocent'" and "if Brewer were innocent, he could prove his innocence by producing his gun" presumably to compare with evidence from the shooting in that case. *Id.* In contrast here, officers confronted appellant with what they knew, and how that showed appellant was being untruthful, which he eventually admitted. Particularly, they challenged him on running from officer and having a gun. Both were facts demonstrated in the evidence; nothing was false.

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[11] In both *Brewer* and *Washington*, there is an acknowledgement that a hearsay-for-context was unsupported in prior arguments before our courts. *See* p. 14, *supra.* The State notes that there is precedent that some statements may come for context but also support for requiring a limiting instruction. *See State v. Evans,* 37 N.W.3d 641, 665 (Neb. 2026) (rejection motion for mistrial noting the giving of a limited instruction and the observation that "statements during police interrogations are part of common interrogation techniques and not attempts by the officer to convince anyone that the defendant was lying. This fact is not outside of a jury's common understanding…..."). While the police assertions here run more toward a lack of truthfulness based on known facts rather than an obligation to produce proof which itself is distinguishing from *Brewer* and *Washington*, it may be that the context point should be revisited along with a proper limiting instruction. The Nebraska cases are careful to set out that a limiting instruction does not negate all possibility of unfair prejudice, and cautioned admissibility should be limited, *see State v. Rocha,* 890 N.W.2d 178, 201 (Neb. 2017), thus, that reasoned exception does not appear to exceed what our Supreme Court envision in *Brewer.*

Moreover, much different from Brewer, appellant continued to engage in the interview even when he was aware of his right to stop the interview; even when his statements were untrue. *See generally State v. Carter,* 438 S.C. 463, 474, 884 S.E.2d 195, 200–01 (Ct. App. 2022) (recognizing there could be degrees of prejudice in the statements at issue). However, should the interview even inferentially suggest some type of improper hearsay and inferential legal burden, in context of these circumstances, such a vague concept would not undermine the verdict.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (citing *State v. Sherard*, 303 S.C. 172, 399 S.E.2d 595 (1991)). The "[i]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." *State v. Jennings,* 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (citing *State v. Garner,* 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct .App. 2010)). Since appellant shows no false statement nor plain suggestion he carried any burden of proof, any potential unfair prejudice is greatly limited. Moreover, the officer who questioned appellant about his owning a gun and challenged appellant on his story compared with the known facts testified at trial, greatly reducing the possibility of potential unfair prejudice and rendering potential error harmless. *See State v. Vick*, 384 S.C. 189, 200, 682 S.E.2d 275, 281 (Ct. App. 2009) (noting hearsay was harmlessly cumulative to other unobjected to testimony). Further, defense counsel, rather than shying away from the recording, used it as part of her closing argument to the benefit of the defense. Defense counsel allowed the recording to convey appellant's denials, and his protests that he would never harm his friend, the person his own son was close to, as well, while appellant avoided the danger of cross-examination. (Tr. 427, 429). *See generally State v. Terry*, 339 S.C. 352, 355-56, 529 S.E.2d 274, 276-77 (2000) (holding a defendant may not introduce his own statement while simultaneously asserting the right not to testify as the assertion

of his right did not make him "unavailable" under the hearsay rules: "Terry could not use his fifth amendment privilege against self-incrimination as both a sword and a shield."). In this context, there is little basis to find unfair prejudice.

For all these reasons, appellant cannot show prejudice that would warrant relief on this issue.

II. Appellant made only a general objection to the two photographs of the victim's body in State's Exhibit 7 and failed to state with any particularity why the photographs in circumstances of this case should warrant a finding that the danger of unfair prejudice substantially outweighed the probative value. Appellant's issue is not adequately preserved for appellate review. It is, nevertheless, also without sufficient merit to warrant relief.

Appellant asserts that admission of State's Exhibit 7 – two photographs, in black and white, showing dark areas explained as the blood that drained from the mouth when the coroner turned the body – was an abuse of discretion. (BOA at 14). Appellant also admits, however, that other photographs – in color showing the body and blood from the mouth while in the closet – were admitted without objection. (BOA at 11-12, *see* State's Exhibit 4 and 5). In fact, defense counsel initially stated she had no objection when State's 7 was offered at trial. (Tr. 185). The trial judge reminded counsel that she had objected at the bench, and she thereafter made only a general "objection for the record." (Tr. 186). The exhibit was admitted over the objection. (Tr. 186).

In the written motion filed for the pre-trial proceedings, the defense did not challenge that "the crime occurred, where it occurred, nor the cause of death, due to a gunshot wound." (Tr. [Ct. Exhibit 3 at 1]). Notably, though, the defense did not agree on the timing of the death or appearance of the body. Further, in pre-trial argument, the defense asserted that State's 7 should not come in because it is "pretty gory … a lot of blood coming out of his mouth … eyes are wide open." (Tr. 60). The State countered that when appellant "was initially interviewed" he stated, "he thought [the victim] was sleeping" and showing that the victim is "lying there with his eyes open, bleeding from the chin is relevant to show that … is not true." (Tr. 62).

At the close of the motion argument in pre-trial proceedings, the trial judge tasked the parties with reviewing photographs together, noting that Supreme Court requires a showing of "strong probative" value for admissibility, and that an admissible photograph must have "evidentiary value." (Tr. 61-64). Because some of the context may develop at trial, the judge

resolved that he would rule on any remaining objections at trial. (Tr. 64). The defense later reported that it had only problems with two of the photographs, arguing the photos were "redundant and … a little excessive for the jury to see, especially since" the State will present other "pictures of the body and the blood." (Tr. 122). The defense also conceded that "[t]here are probative reasons for those photographs." (Tr. 122). Though the trial court did not consider the two photographs "shocking," if, at the time of the objection during the trial, he should determine that "the prejudicial value outweighs the probative value" he would not admit the photographs. (Tr. 123). Notably, the defense, in their pretrial written motion, had asked if such photographs be found necessary and admissible, that the State produce black and white photographs. (Tr. [Ct. Exhibit 3, p. 2]). That was clearly done for this exhibit, while other photographs are in color; however, there is no particular or specific discussion of this in the record.

The trial testimony developed showed that appellant had given a voluntary statement and among the changing stories, he asserted that he had taken a gun away from the victim as he was "sleeping," removing the gun from the victim's right hand, down by his side, sometime around "midday" and threw the gun outside. (Tr. 266, 297, State Exhibit 4). In the Exhibit, the victim's right hand is shown in a "frozen" position with fingers unclenched near the chest wound; his eyes are clearly open rather wide; and, his back shows a lightness (as witnesses would testify) that indicated he had been in that position for some time. (State's Exhibit 7). That goes directly to the credibility of appellant's story (at least the particular "he was sleeping" and "arm at his side" story).

Further, the coroner testified that he moved the body out of the home and in doing so, turned the body over, causing more blood to come out of the mouth clarifying the amount of blood (shown as simply a darker color in the black and white photographs). (Tr. 185, 187; *see also* State's Exhibit 7). The coroner further explained that the victim had been dead, and in the same

position, for a lengthy though unspecified period of time, such that rigor mortis had set in and the victim's arms could not be moved. (Tr. 186-187). Also, the back showed where the blood had "settled" indicating the victim had been lying on his back, (Tr. 186-187), a fact further explained by the pathologist with a closeup of the bullet protruding from the exit wound, a photograph that was not objected to by the defense, (Tr. 372-374, State's Exhibit 36).

Discussion:

An appellant must state his specific argument for the record to secure appellate review. *See, e.g., State v. Hoffman,* 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994); *State v. Holliday,* 333 S.C. 332, 338, 509 S.E.2d 280, 283 (Ct.App.1998). *See also* Rule 103(a)(1), SCRE; *State v. Blalock*, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003) ("The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge.") (citing *McKissick v. J.F. Cleckley Co.,* 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct.App.1996)). Here, there is no explanation and no clear context on the record. Though there appears to be a reference to a bench conference, the failure to make a bench conference objection and argument a part of the record renders the issue unpreserved for review. *See York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review."); *see also State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

Further, the initial, pre-trial discussion and advice by the trial judge not only clearly meant to be provisional, the judge specifically instructed he would rule on an objection based in part on how the testimony developed; in other words, during the trial. Nothing in pretrial could preserve

the issue raised here. *State v. Simpson,* 325 S.C. 37, 479 S.E.2d 57 (1996) (a ruling *in limine* is not final, and unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review). Indeed, the circumstances originally argued clearly changed to some extent as the State used the photographs in black and white rather than color. With the defense request honored in that regard, it is difficult to decipher the context for objection. For these reasons, appellant's issue is not preserved for review. Indeed, it is not clear that the defense even wanted to preserve an argument at all, making only a general objection even after prompting by the trial judge. Regardless, there is no preserved, on the record objection for this to consider in review of the trial judge's ruling. Even so, if this Court should disagree, appellant has failed to show an abuse of discretion considering grounds generally raised as reasons not to admit photographs of the victim's wounds.

"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. Torres*, 390 S.C. 618, 622–23, 703 S.E.2d 226, 228 (2010) (quoting *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003)). "[P]hotographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a [trial] if they are irrelevant or not substantially necessary to show material facts or conditions." *State v. Kornahrens,* 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

The photographs here were offered for discrete reasons and worked to provide visual evidence for the jury's consideration. Consider that while a statement the victim's eyes were open, the visual evidence demonstrates that the eyes were very clearly open to anyone who would have been close enough to take something from the victim's person. Further, the photographs show the advanced stage of rigor mortis and lividity, indicative of the fact that the body had been left in that

position for some time. This tends to negate the possibility that a gun was taken from his hand, or that his arm could have been down by his side when a gun was taken from his hand. *See State v. Benton*, 443 S.C. 1, 9, 901 S.E.2d 701, 705 (2024) (finding no abuse of discretion in admitting "gruesome and revolting" photo of murder victim's burned body when "[t]he pictures gave important context to the testimony and other evidence about who did what at the scene"); *State v. Holder,* 382 S.C. 278, 290–91, 676 S.E.2d 690, 697 (2009) (find no error in admission of autopsy photographs when "the photographs clearly demonstrate[d] the extent and nature of the injuries in a way that would not be as easily understood based on the testimony alone" and would rebut defendant's contention "she was unaware of any marks on her son prior to his death" and the "photographs demonstrate that the damage to the child would have been difficult to ignore").

Further still, the State complied with the defense request to use black and white photographs. (*see* R. * [Court Exhibit 3 at 2]), and explained that turning the victim caused more blood to discharge from the mouth so as to keep the accuracy of what appellant would have seen before the body was moved. Lastly, even if some abuse of discretion could be discerned, which the State maintains it cannot, the photograph could only be harmless in light of the unobjected to distant, color photo of the victim's body in the closet with the blood as would have been apparent before the body was moved, (State's Exhibit 4), or the closer view limited to the blood discharge around the face and neck, (State's Exhibit 5). [12]

For all these reasons, appellant cannot show prejudice that would warrant relief on this issue.

[12] Of no little note is the prosecutor's observation that "this jury is going to see worse things on the news tonight than any photograph we're going to show in this trial." (Tr. 62).

III. Appellant's closing argument suggested a significant omission in the State's case by failing to show motive for the murder, which logically prompted the State's request for a clarifying jury instruction that motive is not a necessary element of murder that the State must prove beyond a reasonable doubt. However, appellant's precise issue is not preserved for review as he did not argue the instruction amounted to a charge on the facts that would offend the state constitutional provision against same; thus, his issue is procedurally barred. It is, nevertheless, also without sufficient merit to warrant relief.

Appellant argues that the trial judge committed reversible error because his instruction of motive constituted an improper comment on the facts in violation of the state constitution. (BOA at 17). That was not an argument raised below. Again, the issue he raised on appeal has not been preserved for review. Even so, the motive instruction was a correct principle of law and blended with the instruction that the State bears the burden of proven the murder occurred and who did the murder while simply letting the jury know that the why of the murder was not a legal element the State has to prove. There is no comment on the facts; there is only instruction on the correct and relevant law. Even if the issue should be reviewed, appellant would not be able to show error on this record.

Relevant Facts from Trial:

During the closing argument, defense counsel asserted that the State showed no motive for appellant to kill the victim, his friend and a man his son "idolizes." (Tr. 420, lines 16-17). Counsel argued that there was 'no evidence of any ill will" or "an argument between them." (Tr. 420, lines 4-6). She also plainly argued:

> … There's no motive. There's no motive in the evidence. There's no motive why would he kill him? Do you know why he'd kill him? If you don't, that's a doubt.

(Tr. 420, lines 6-8).

Counsel continued argument on the evidence and the burden the proof the State bears which she submitted was not met; however, she returned again to motive:

> You cannot use conjecture and speculation like they did. They have not proven that he killed Ricky. All they've proven is that he's on meth and he lied about the gun, and he had reasons to do so. He had absolutely no motive, whatsoever, to kill his best friend and his son's idol. If you have any doubts, you must have them today because after you render your verdict, it's over and it's too late.

(Tr. 429, lines 15-21).

Counsel continued again to attack the evidence, arguing the State had "cherry-picked their witnesses" who in turn "cherry-picked their answers." (Tr. 430, lines 5-6). Counsel returned to the lack of motive in closing out her argument before the jury:

> … The police officers didn't want to cooperate and answer my questions, there's absolutely no reason in the world Jason would want his best friend, his son's idol dead. There's no evidence of a fight, there's no evidence of arguing. So I guess you just have to trust them. I'm asking you to find my client "not guilty."

(Tr. 430, lines 13-19).

After the initial jury charge,[13] the State requested a supplemental charge. Noting the defense argument on motive, and that the judge did not define criminal intent in the initial jury charge, the State requested a supplemental instruction that motive was not an element that the state was tasked with proving. (Tr. 442). The defense argued that there was no comment that the State had to prove motive as an element, simply "that there was no reason for him to kill him." (Tr. 443, lines 1-3).

[13] The trial judge repeatedly instructed that the State bears the burden of proof. (*See* Tr. 432, 435, 436, 437).

The defense agreed that the legal concept that the State was not required to prove motive was correct but apparently did not believe her comments suggested that it did and warranted a separate charge. (Tr. 442-443). The trial judge gave this instruction to the jury:

> Ladies and gentlemen, I need to clear up one short matter with you all. In this case, the Defendant is charged with the crime of murder. The State had the burden to prove to you that a crime occurred. That a murder occurred. That it – that it was not suicide. It was not accidental. It was in fact a murder. That is part of the burden they must prove to you.
>
> They also must prove to you, beyond a reasonable doubt, who did that murder. They are not required to prove to you why it happened. That - - that- - the - - the motive of why it happened is not part of the elements they have to prove. They have to prove the fact the murder occurred beyond a reasonable doubt, and they have to prove to you beyond a reasonable doubt who did.
>
> They're not required to prove why it was done under our law, okay? …

(Tr. 444-445). And with that charge, the judge sent the jury back to the jury room. (Tr. 445).

The defense objected to the charge because the isolated charge given apart from the general charge would bring undue emphasis to the consideration of the defense argument questioning the factual basis for motive. (Tr. 445-446).

Discussion:

Judges are not just allowed to charge juries on questions of law; they must do so. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but *shall declare the law*." (emphasis added)).[14] "[T]he purpose of jury instructions is to enlighten the jury as to what law is applicable to a certain state of facts in order that a just, fair and proper verdict can be reached." *State v. Peer*, 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996). Consequently,

[14] The trial judge explained this both in his opening comments and his jury instructions. (*See* Tr. 135, 431).

"[t]he law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993); *see also State v. Bowers*, 428 S.C. 21, 28, 832 S.E.2d 623, 627 (Ct. App. 2019) ("Unless justified by the evidence, an instruction should not be given because it can confuse the jury.") (citing *State v. Commander*, 384 S.C. 66, 75, 681 S.E.2d 31, 36 (Ct. App. 2009)).

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *State v. Custer*, 443 S.C. 172, 179, 903 S.E.2d 237, 240 (Ct. App. 2024) (quoting *State v. Lemire*, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013)). This requires a showing that the trial judge's decision to instruct the jury on a particular principle of law was an incorrect statement of law or that it was not warranted in context of the facts of the case. *Id.* To state it differently, the trial court does not abuse its discretion by instructing the jury on a correct principle of law that is warranted based on the factual context of the case. That is precisely what happened here. More to the point, the need for clarification became necessary because of the defense argument, an invited clarification. The defense recognized the instruction as correct as a matter of law. (Tr. 445-446). The argument appeared to be that it would hurt the impact of the defense argument. (Tr. 446). That is not an argument that the trial court violated the constitutional prohibition; thus, the argument is not preserved for appeal. *Dunbar, supra.* Moreover, the instruction was fair and correct. Even if it could be reached, the argument on appeal would not afford relief.

"Motive is inherently different than intent." *State v. Perry*, 440 S.C. 396, 405, 892 S.E.2d 273, 278 (2023). "[M]otive represents the reason *why* a person intends an action" and "the State never has to prove motive to a jury as the element of a crime." *Id.* Thus, "absence of motive is a mere circumstance to be considered by the jury." *State v. Edwards*, 127 S.C. 116, 120 S.E. 490,

491 (1923). The charge given here simply clarified the State's burden; it said nothing about weight of the evidence or consideration of the evidence. The legal definition was correct and there was no abuse of discretion in defining the legal difference considering that the defense placed repeated emphasis on the lack of motive evidence particularly in context of the State's burden of proving the case beyond a reasonable doubt. (*See* Tr. 420).[15]

Further, there is no basis in this record to find the judge's charge crossed the line into a comment on the facts. *See State v. Bagwell,* 201 S.C. 387, 23 S.E.2d 244 (1942) ("A Judge cannot express in his charge, or intimate any opinion as to the weight or the sufficiency of testimony… without violating the prohibition of the Constitution as to charging upon the facts."). *Accord State v. Hartley*, 307 S.C. 239, 241, 414 S.E.2d 182, 183–84 (Ct. App. 1992) (finding trial judge proper denied defendant's request to charge "the jury to 'duly consider' the absence of motive in 'weighing' the question of … guilt, if the jury determines Hartley had no motive to murder the victim" as it essentially established that lack of motive evidence "is entitled to receive weight or consideration"). Again, the charge correctly instructed the jury not to task the State with providing proof beyond a reasonable doubt of motive as the law did not require it. No error is demonstrated in this record.

Therefore, appellant cannot show an abuse of discretion and is not entitled to any relief on appeal.

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[15] Though the charge was legally correct and factually warranted, even it should be deemed incorrect, it would only be harmlessly so as it does not place any burden on the defendant or prevent any consideration of the evidence or argument; rather, the charge states a correct principle that State is not tasked with proving beyond a reasonable doubt a fact not required to convict. "An erroneous instruction alone is insufficient to warrant this Court's reversal." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019). Reversal is only required where prejudice is shown, i.e., when the reviewing court cannot find beyond a reasonable doubt that the instruction "did not contribute to the verdict." *Id.*

CONCLUSION

For all the foregoing reasons, this Court should affirm.

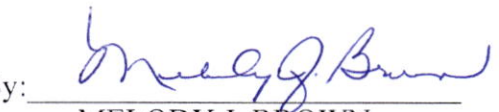
Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

By: 
MELODY J. BROWN
S.C. Bar No. 14244
ATTORNEYS FOR RESPONDENT

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