STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRENDA BRATSCHI,

APPELLANT

Appellate Case No. 2012-211980.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred by failing to direct a verdict in favor of the appellant in a case where the State had no evidence of how, when, or where the decedent was killed and where no substantial circumstantial evidence supported appellant's conviction.

II.

Whether appellant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated when the trial court admitted a 911 call made by the decedent that contained testimonial evidence and the unfairly prejudicial nature of the evidence outweighed its probative value.

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court, viewing the facts and all reasonable inferences in the light most favorable to the State, erred in denying Appellant's motion for directed verdict on the charges of murder and burying a body without notice or inquiry where substantial circumstantial evidence existed showing Appellant committed the murder.

II.

Whether the trial court erred in admitting a 911 call made by Victim where the call is non-testimonial in nature and, even if the call is found to be testimonial, the admission of the call was harmless error.

RESPONDENT'S STATEMENT OF THE CASE

A Florence County Grand Jury indicted Appellant, Brenda Bratschi, in June 2010 for the murder of Randy Bratschi and for burying the body without notice or inquiry. (R. p. 692). On April 16, 2012, Appellant's case was called to trial before the Honorable D. Craig Brown. (R. p. 1). Appellant was represented by H. Lee Herron and Kaye Fraley during the four-day trial. (R. p. 1). Assistant Solicitors Matthew R. Ozment and Robert N. Wells represented the State. (R. p. 1). On April 19, 2012, the jury returned a verdict of guilty on both counts. (R. p. 660, lines 1–9). Judge Brown sentenced Appellant to life imprisonment for murder and to three years imprisonment for burying a body without notice or inquiry. (R. p. 664, line 21–p. 666, line 8). Thereafter, on April 27, 2012, Appellant filed a timely Notice of Appeal. (R. p. 691).

RESPONDENT'S STATEMENT OF FACTS

July 2009: Victim's Remains Are Found

On July 16, 2009, Marty McDonald and his fiancé were overseeing the removal of a trailer from a lot in Florence County when they made a discovery, which McDonald described as "a shock." (R. p. 108, line 19–p. 109, line 4; R. p. 109, line 22–p. 110, line 11). While cleaning the area that had previously been under the trailer, McDonald noticed a tarp and what he thought was a gourd on the ground. (R. p. 109, line 20–p. 110, line 2). However, upon closer inspection, McDonald realized that he had discovered a skull. (R. p. 110, lines 2–8). McDonald instructed his fiancé to call the sheriff's department. (R. p. 110, lines 13–14).

The Florence County Sheriff's Department responded to the property and began photographing and securing the scene. (R. p. 118, lines 9–21; R. p. 123, lines 14–16; R. p. 124, lines 7–13). Where the trailer had once been, investigators from the Sheriff's Department observed an L-shaped ditch, which they believed had been created as part of the trailer dug underground during the removal process. (R. p. 123, line 22–p. 124, line 6; R. p. 358, line 17–p. 359, line 23). Investigators recovered the tarp and the skull from the ditch, but they also documented human remains scattered throughout the area. (R. p. 126, line 7–p. 127, line 10). Once everything had been photographed and collected from the surface of the ground, investigators began excavating. (R. p. 127, lines 22–25). They found both remains and personal belongings. (R. p. 127, line 22–p. 128, line 2). For instance, part of a steel-toed boot was aboveground, but once the boot was completely uncovered, investigators discovered that socks, "leg bones, foot bones, and all of the small bones of the feet were actually all contained within the work boots themselves." (R. p. 139, line 17–p. 140, line 3; R. p. 140, line 25–p. 141, line 22). Though investigators were unable to find any tissue or "soft" human remains, they

recovered skeletal remains and also found clothing, including a Dickey shirt that was "barely there due to decomposition" and a belt that was attached to the clothing. (R. p. 129, lines 1–13). Investigators also found a tobacco pouch and a pocket knife with the remains. (R. p. 129, lines 8–13; R. p. 142, lines 14–18). At some point during the excavation, it became too dark for investigators to see. (R. p. 129, lines 20–24). When they returned the next day, they continued with their work and recovered one small button and additional small bones. (R. p. 129, line 20–p. 130, line 6).

Keith Von Lutcken, a lieutenant with the forensic and crime scene unit of the Florence County Sheriff's Office, observed that the remains were situated such that they were face down in the shallow grave. (R. p. 351, line 22–p. 352, line 5; R. p. 367, lines 2–10). The remains themselves were wrapped in a blue tarp, which was bound at several points. (R. p. 367, lines 9–15). In Von Lutcken's opinion, if it had not been for the trailer being moved, those remains would not have been found. (R. p. 359, line 24–p. 360, line 2).

Investigators took everything that they recovered from the property to the Florence County Sheriff's Office. (R. p. 129, lines 14–19; R. p. 130, lines 7–9). In August 2009, the skeletal remains were transferred to the University of North Texas Health Science Center in Fort Worth, Texas for DNA testing that could not be done in South Carolina. (R. p. 144, line 11–p. 145, line 3). Kendra Felipe-Ortega, a forensic DNA analyst with the University of North Texas Health Science Center and an expert in the field of DNA analysis, received the remains and tested them. (R. p. 146, line 18–p. 147, line 25; R. p. 148, line 18–p. 149, line 1; R. p. 150, line 1–p. 151, line 3). Felipe-Ortega compared the remains to a DNA profile of Randy Bratschi, which had been provided by the South Carolina Law Enforcement Division, and to DNA samples from four of Randy Bratschi's relatives. (R. p. 149, line 2–p. 152, line 4). Felipe-

Ortega found a direct match between the remains and the DNA profile of Randy Bratschi and determined that that DNA "had a frequency of occurrence in approximately 1.13 quadrillion Caucasian individuals." (R. p. 152, line 5–p. 153, line 10). As to the comparison between the remains and the DNA of Randy Bratschi's relatives, Felipe-Ortega found it was 3.3 trillion times more likely that the remains were related to the submitted DNA samples than that the remains were those of a random individual from the Caucasian population. (R. p. 153, line 11–p. 155, line 5). Felipe-Ortega concluded that the testing was consistent with the theory that the remains belonged to Randy Bratschi (Victim). (R. p. 155, lines 6–9).

Mark Ingraham, a forensic anthropologist at the Center for Human Identification based out of the University of North Texas and an expert in the field of forensic anthropology, also examined the remains, and he, too, concluded that the remains were those of Victim. (R. p. 424, line 23–p. 426, line 14; R. p. 427, line 23–p. 428, line 1; R. p. 436, lines 13–16). Ingraham compared the remains to an incident report from a domestic dispute in which Victim was involved, to CT scans of Victim's chest and skull, to Victim's medical records, and to photographs of Victim. (R. p. 428, line 7–p. 436, line 12). Ingraham noted that the points of comparison he was able to identify, taken as a whole, were "incredibly unique." (R. p. 436, lines 9–10). Ingraham identified the remains as Victim's to a degree of scientific certainty. (R. p. 436, lines 13–16). However, he could not definitively attribute any injuries to Victim's death. (R. p. 439, lines 3–6). According to Ingraham, there were multiple problems with assessing perimortem trauma, including the lack of a complete skeleton and the age and fragility of the skeleton. (R. p. 439, lines 8–16; R. p. 440, lines 13–17). Ingraham noted that he did not observe fractures in the cranium that he could attribute to blunt object injury, (R. p. 441, lines 6–13), but he also noted that "[t]here was enough damage and fragmentation and missing pieces that the

facial skeleton could not be re-approximated or put back together. . . . There aren't enough pieces related to the facial skeleton to see the whole picture." (R. p. 439, lines 10–12).

October 2004: Appellant Assaults Victim

On October 21, 2004, Victim called 911 in the midst of a domestic dispute between himself and his wife, Appellant. (R. p. 189, line 24–p. 190, line 5; State's Ex. 24). The following can be heard on the call between Victim (below, RB) and the 911 operator:

911: 911—what's the address of your emergency?

RB: My wife trying to kill me!

911: Your wife trying to kill you?

RB: Yes yes yes.

911: What's the address?

RB: ***.

911: Ok, what's your name sir?

RB: Randy Bratschi . . . please hurry.

. . . .

911: Ok, what did she do to you?

RB: She hit me with a—with a club and tried to kill me.

911: She hit you with a club. Where are you bleeding from?

RB: In the—from the head.

911: You're bleeding from the head. Stay on the phone with me, ok?

RB: Alright, I've got a gun now. You tell 'em when they come I'm in the house.

911: Ok, sir, where is your wife at right now?

RB: I don't know. She ran—she's outside somewhere.

. . . .

911: Ok, do you know what kind of club it was?

RB: Uh, yeah, it was a—I don't know—one of them tire thumper things that truck drivers use.

911: Ok, so it was an iron club?

RB: No, it was wood.

911: It was a wood club?

RB: Yeah, short wood club.

911: Have y'all been fighting?

RB: No! No! We was running to the store—to where I work—to go to the credit union, and she said she had to use the bathroom, and we—we came back, and she—she went to the bathroom, and we got ready to leave again, and I was going to the car. She started hitting me with a club. I didn't know she—I don't know what the—what's going on.

911: Ok, ok, ok. Just try to calm down and take deep breaths for me ok?

RB: I'm trying. I'm telling you if she comes back here I'm gonna shoot her.

911: Ok, sir, I don't want you to shoot anybody, ok?

RB: I'm gonna have to help myself now!

911: Listen, listen to me.

RB: I'm afraid of her.

. . . .

(State's Ex. 24). The call lasts for a little over eight and a half minutes. (State's Ex. 24).

In the same time frame, Appellant also called 911 about the domestic dispute. (R. p. 186, lines 18–20; State's Ex. 24). While en route to respond to the call, Officer M. Rollins Rhodes learned that Appellant was at the Coward Police Department, and he met her there. (R. p. 182, lines 6–15). Appellant reported to Rhodes that she and her husband had been going to a credit

union. (R. p. 182, lines 17–19). While walking to the car "something told her to look behind her[,]" and when she turned, she saw Victim with a hoe in his hand, which he came at her with. (R. p. 182, lines 19–22). Appellant told Rhodes that she put her hands up and that the hoe struck her on the hand. (R. p. 182, lines 22–24). According to Appellant, she retaliated by grabbing a wooden tire thumper from under the car seat and hitting Victim with it. (R. p. 182, line 25–p. 183, line 4).

Kathleen Streett, a major crimes investigator with specialized training in criminal domestic violence, was contacted about the domestic dispute between the Bratschis. (R. p. 446, line 9–p. 447, line 9). She met Victim and Appellant at the Lake City Hospital. (R. p. 447, lines 10–18). When Streett met with Victim, he looked "all beat up." (R. p. 447, lines 19–23). Rhodes also met with Victim and observed lacerations and swelling on Victim's face and bruising on his chest area. (R. p. 183, line 13–p. 184, line 5). According to Rhodes, Victim looked like he gotten the brunt of the fight. (R. p. 184, lines 9–11).

Dr. Ernest Atkinson treated Victim after he was admitted to the hospital. (R. p. 222, lines 10–17). Dr. Atkinson testified at trial that Victim suffered the following injuries: a basilar skull fracture; a left temporal bone extending through the middle ear with displacement of the ossicles, the small bones in the ears; a fracture to the left maxillary sinus, which appeared to go through the anterior and inferior wall; a large hematoma, which is blood built up in the sinuses; and a fracture to the floor of the left orbit. (R. p. 223, line 16–p. 224, line 2). Victim had to go to an ear, nose, and throat doctor to receive treatment for his fractures. (R. p. 227, lines 17–23). Dr. Atkinson characterized Victim's injuries as "pretty severe[,]" (R. p. 228, lines 12–17), and he further opined that Victim had received "pretty strong blows and . . . if it hit the right place it could have killed him." (R. p. 229, lines 2–4).

Appellant reported to Streett that her injuries consisted of a laceration to her thumb and a knot on her head. (R. p. 448, lines 18–21). Streett testified that the injury on Appellant's thumb could have come from either the hoe or from the tire thumper though it was "more probable" that it happened when the tire thumper split in two. (R. p. 451, line 22–p. 452, line 3).

After the assault, Victim was "terrified" of Appellant. (R. p. 459, lines 6–9). He met with Streett and asked about a restraining order and other measures he could take for his personal safety. (R. p. 459, lines 12–15). Streett had Victim meet with a victim's advocate and complete a petition for an order of protection. (R. p. 453, line 23–p. 454, line 1). Following that, a family court judge held a hearing to determine whether to issue an order for protection. (R. p. 165, lines 2–14). Both Victim and Appellant were present at the hearing. (R. p. 165, lines 4–10). The judge granted the order of protection, (R. p. 165, lines 15–17), and issued

> a restraining order [prohibiting Appellant] from committing further acts of abuse or threats of abuse, also restrain[ing] from any contact with [Victim]. And it was effective until October 28[,] 2005, which would be a year from the date that [the judge] heard the issues. And he also granted [Victim] possession of the vehicles and [ordered that Victim] be responsible for all expenses. And that [Appellant] was temporarily restrain[ed], prohibited and forbidden to abuse, threaten to abuse, molest [Victim] or engage in any other conduct that would place [Victim] in reasonable fear of bodily injury. It also says the evidence establish[ed] that [Appellant] presents a credible threat to the physical safety of the victim. [Appellant] used, attempted to use or threaten[ed] to use physical force against [Victim] and that is reasonabl[y] expected to cause bodily injury.

(R. p. 166, lines 3–18). The restraining order further prohibited Appellant from communicating or attempting to communicate with Victim or entering or attempting to enter Victim's place of residence, employment, or education. (R. p. 166, line 19–p. 167, line 2). Finally, the order specified that Victim had use and possession of the home and furnishings located at his home in Coward, South Carolina. (R. p. 167, lines 7–13).

Streett looked into the finances of the Bratschis during her investigation of the assault. (R. p. 454, lines 9–18). Streett found that at the time of the assault the couple's account was overdrawn. (R. p. 454, lines 19–24). Most of the transactions prior to the assault had been cash withdrawals or checks written as cash by Appellant. (R. p. 454, line 25–p. 455, line 9). According to Streett, though Victim had some collections on his credit report prior to his marriage to Appellant, (R. p. 456, lines 5–25), since the marriage, there were several credit cards that were past due, and the balances on those cards were higher than before, (R. p. 456, line 24–p. 457, line 19).

Streett also went to the scene of the assault during her investigation. (R. p. 457, lines 22–25). There, she found blood on the ground outside and also on a four wheeler in the yard. (R. p. 458, lines 8–11). Additionally, she observed "a blood trail from where the incident occurred back over to the shed around the back of the four wheeler." (R. p. 458, lines 11–13). The blood continued up the back steps to the back door and into the house. (R. p. 458, lines 13–15). Streett also discovered an area of the yard where it looked like fingers had clawed at the dirt, which was consistent with the story that Victim had told Street about the assault. (R. p. 458, line 23–p. 459, line 5). Streett eventually obtained a warrant for assault and battery with intent to kill against Appellant. (R. p. 459, line 21–p. 460, line 4).

Post-Assault 2004: Tensions Escalate

After the assault, Victim developed a relationship with Susan Hill, a woman who was in his circle of friends. (R. p. 255, line 25–p. 256, line 5; R. p. 256, lines 11–23). Hill testified that as her relationship with Victim began to evolve, they started talking on the phone. (R. p. 257, lines 2–19). They also hung out at the home of Russell and Kathy Merrill. (R. p. 257, line 20–p. 258, line 7). Before the assault Victim and Appellant would go over to the Merrills together. (R.

p. 307, lines 13–19). After the assault, Appellant did not hang out with the Merrills. (R. p. 307, lines 15–19).

Two or three weeks after the assault, Appellant showed up at the Merrills' home. (R. p. 307, lines 20–25). Russell Merrill recalled that he, Kathy Merrill, and Hill were at the house when Appellant arrived. (R. p. 308, lines 3–4). Appellant brought a bottle of vodka and drank the entire bottle. (R. p. 308, lines 2–12). According to Russell Merrill, Appellant said, "I get really mean when I drink vodka." (R. p. 308, lines 8–9). Though Russell Merrill testified that he tried to stay out of the conversation, he heard Appellant asking questions about Hill. (R. p. 308, lines 12–19). When she did not get the answers she was looking for, Appellant left. (R. p. 308, lines 12–14).

Kathy Merrill also recalled a time after the assault when Appellant showed up at her home. (R. p. 236, lines 4–12). Appellant told Kathy Merrill that she had hired a private investigator and that the private investigator had taken pictures of Victim and Hill. (R. p. 236, lines 13–18). Kathy Merrill knew that Victim and Hill were seeing each other at the time, but she did not tell Appellant that. (R. p. 240, line 23–p. 241, line 10). Appellant seemed upset when she told Kathy Merrill about the private investigator. (R. p. 243, lines 3–8).

Victim and Hill had their first one-on-one date the Sunday before Thanksgiving. (R. p. 258, lines 5–11). That night, Victim called Hill because "he just didn't want to be alone at the house, [he] just said let's go somewhere." (R. p. 258, lines 8–11). Shortly thereafter, Victim knocked on Hill's back door. (R. p. 258, lines 12–13). He told Hill that he had run into Appellant, who had been sitting on the dirt road near Hill's house when he arrived. (R. p. 258, lines 13–22). According to Hill, Victim appeared "a little nervous" and scared or intimidated by Appellant that night. (R. p. 258, line 23–p. 259, line 1; R. p. 259, lines 6–8). Two or three

minutes later, Appellant called Hill's house phone and said, "have fun with my husband" before hanging up. (R. p. 259, lines 11–22). Victim and Hill then left Hill's house and went to a bar for the rest of the evening. (R. p. 259, line 23–p. 260, line 1). The two stayed there until eleven, and then they returned to Hill's house. (R. p. 260, lines 5–8). That night was the first night Victim and Hill were intimate. (R. p. 266, lines 14–18).

Edward Jeffcoat, an ex-boyfriend of Hill's, testified that he heard from Appellant the Monday before Victim disappeared. (R. p. 282, lines 12–21; R. p. 283, lines 1–5; R. p. 284, lines 6–11). Jeffcoat had a message from Appellant on his answering machine when he got home from work the Monday before Thanksgiving. (R. p. 284, lines 13–19). Appellant's message had to do with Victim and Hill. (R. p. 284, lines 20–24). According to Jeffcoat's testimony, Appellant's message was something along the lines of "you will never guess who Randy is seeing." (R. p. 286, lines 5–12). Jeffcoat guessed that Appellant "was trying to make [him] jealous." (R. p. 284, lines 20–23).

Week of Thanksgiving 2004: Victim Disappears

Victim and Hill got together again Monday night. (R. p. 260, lines 9–10). That night, they went to a bar near Victim's home for a few hours. (R. p. 260, lines 11–23). Victim went to work Tuesday, Wednesday, and Thursday nights the week of Thanksgiving. (R. p. 257, lines 9–10). Victim's shift on Thursday night was from about 6:45 p.m. to about 6:45 a.m. on Friday morning. (R. p. 342, line 17–p. 343, line 3). Victim clocked out right before 7:00 a.m. on Friday morning. (R. p. 464, lines 16–22).

Some time Friday morning, Jeffcoat met with Victim to get some life jackets that Jeffcoat had left in Victim's boat. (R. p. 281, line 4–p. 282, line 1). Victim told Jeffcoat that he would have his stepson, Frankie Miles, bring the life jackets to Jeffcoat when Miles returned with the

boat. (R. p. 281, lines 16–21). But when Jeffcoat got off work, he did not see the life jackets. (R. p. 281, lines 22–23). Consequently, Jeffcoat borrowed some life jackets from someone else and "went on about [his] business." (R. p. 281, line 22–p. 282, line 1).

Friday evening Victim had planned to go to a turkey shoot with Russell and Kathy Merrill, Hill, and some other friends. (R. p. 308, line 20–p. 309, line 12). That evening around 6:00 or 6:30 p.m., the Merrills arrived to pick Victim up. (R. p. 343, lines 9–16). Russell Merrill went to the back door of Victim's house and knocked, but no one came to the door. (R. p. 309, lines 16–23). Russell Merrill noticed that a pot contraption that Victim had rigged to alert him if someone entered his home was not set. (R. p. 309, line 23–p. 310, line 17). Russell Merrill also noticed that Victim's dog, Bud, was inside and had defecated in front of the refrigerator. (R. p. 310, line 23–p. 311, line 5). Russell Merrill thought it was "out of place" for Victim to have left dog feces in the house and not to have set the pot alarm. (R. p. 311, lines 8–14). Nevertheless, Russell Merrill and his friends continued to the turkey shoot, thinking Victim either was asleep or had gone to the turkey shoot ahead of them. (R. p. 311, line 19–p. 312, line 4).

That Friday night as he was driving home from the turkey shoot, Russell Merrill wondered where Victim was, but he got in too late to call. (R. p. 312, lines 17–22). Russell Merrill got up Saturday and called Victim, but no one answered. (R. p. 313, lines 1–2). Also on Saturday, Appellant and Frankie Miles called the Merrills to find out whether the Merrills had seen Victim. (R. p. 313, lines 3–10).

William Rauch, a man who had known Appellant "[p]robably all her life" and who had known Victim since the '90s, saw Appellant leaving Victim's property either the Friday or Saturday after Thanksgiving. (R. p. 416, line 22–p. 417, line 4; R. p. 418, line 20). Rauch was sure it was Appellant because he got a look at her face in the daylight, and he was facing her at

the time. (R. p. 419, lines 2–11). Rauch was close enough to read the expression on Appellant's face though he did not know how to describe it. (R. p. 420, lines 8–15). At the time, Appellant was driving "a little brown tannish car." (R. p. 419, lines 12–16). Seeing Appellant there alarmed Rauch because he had spoken with Victim a few days prior, and Victim had informed Rauch that Appellant was not allowed there. (R. p. 419, lines 17–21). Rauch eventually reported what he had seen to law enforcement. (R. p. 419, line 22–p. 420, line 7).

Victim had volunteered to work shifts the Saturday and Sunday after Thanksgiving. (R. p. 342, lines 14–16). According to Russell Merrill, Victim "volunteered probably more than anybody for his off days." (R. p. 341, lines 22–23). However, Victim did not show up at work for three days, which resulted in automatic termination at his job. (R. p. 313, line 23–p. 314, line 6). That was not like Victim according to Russell Merrill. (R. p. 314, lines 4–6).

Saturday night the Merrills had oysters, and according to Russell Merrill, Victim "never missed oysters. He never missed one of them." (R. p. 312, lines 7–14). But Victim did not come Saturday. (R. p. 312, lines 15–16).

On Sunday Russell Merrill called Kathleen Streett because, at that point, he "felt something wasn't right." (R. p. 313, lines 12–16). Streett told Russell Merrill that she would go to Victim's house to try and find him. (R. p. 463, lines 7–10). Streett then went to Victim's house and walked around looking for signs of forcible entry or that someone had been inside the house. (R. p. 463, lines 11–23). She found none. (R. p. 463, lines 18–19). Streett left her card with a note for Victim to call her, and she called and left a couple messages that night, but Victim never returned her call. (R. p. 463, lines 19–23; R. p. 464, lines 1–2). Streett had Victim put into the national data base of missing persons on Tuesday. (R. p. 464, lines 3–5).

Post-Disappearance 2004: Victim's Isuzu Rodeo

Kathy Merrill, Russell Merrill, and Hill all remember Victim's dark Isuzu Rodeo being at his property the Friday evening that they went to pick him up for the turkey shoot. (R. p. 238, lines 1–5; R. p. 276, line 20–p. 277, line 2; R. p. 343, line 23–p. 344, line 7). Around 8:00 p.m. that Friday night, Carly Arnette, Jr.[1] noticed a dark Isuzu Rodeo at Dewitt's Bluff Landing in Pamplico. (R. p. 587, line 7–p. 588, line 3). He noticed the same vehicle there Saturday afternoon and Sunday morning between 10:00 a.m. and 11:00 a.m. (R. p. 588, line 22–p. 589, line 7). According to Arnette, the vehicle did not look like it had moved all weekend. (R. p. 589, lines 8–12). Another hunter, Billy King was also around Dewitt's Bluff Thanksgiving weekend, and he, too, saw a dark Rodeo parked at the landing on Friday, Saturday, and Sunday. (R. p. 592, line 15–p. 593, line 14; R. p. 593, line 23–p. 594, line 5; R. p. 594, lines 8–16). King also testified that the Rodeo did not appear to have moved. (R. p. 593, lines 15–16; R. p. 594, lines 5–7, lines 17–18).

On the Saturday after Thanksgiving in 2004 around 8 o'clock at night, Robbie Stone, a law enforcement officer, ran the tag of a dark vehicle, which he thought might have been a Nissan Pathfinder, that was parked at Dewitt's Bluff Landing. (R. p. 596, line 25–p. 597, line 11; R. p. 598, lines 2–8). The tag number was 152 NZF. (R. p. 597, lines 12–19). On Sunday another law enforcement officer, Donald Huggins, called the sheriff's office to report a suspicious looking black SUV parked at Dewitt's Bluff Landing. (R. p. 602, lines 1–19). Huggins learned of the suspicious looking vehicle from a concerned citizen. (R. p. 602, lines 4–8). M. Rollins Rhodes with the Florence County Sheriff's Office ran the tags of a black vehicle

[1] Respondent notes that the testimony of Carly Arnette, Jr., Billy King, Robbie Stone, Donald Huggins, Rollins Rhodes, and Alvin Powell with regards to the Isuzu Rodeo was received during the State's case in rebuttal.

parked at Dewitt's Bluff Landing that Sunday evening. (R. p. 608, line 2–p. 609, line 10). The tag number on the vehicle was 152 NZF. (R. p. 608, lines 23–24). The Monday after Thanksgiving Alvin Powell, an investigator with the Florence County Sheriff's Office ran the tag number 152 NZF that was on a small, dark SUV that was parked at Dewitt's Bluff Landing. (R. p. 604, line 20–p. 605, line 11).

Streett entered Randy Bratschi's Isuzu Rodeo into the National Crime Information Computer (NCIC) on Tuesday morning. (R. p. 465, lines 9–24). On December 1, 2004, the Wednesday after Thanksgiving, Brad Bazen, a deputy with the Florence County Sheriff's Office, found the Isuzu Rodeo parked at Dewitt's Bluff Landing. (R. p. 346, line 9–p. 347, line 2). He ran the tag through NCIC and discovered that the vehicle belonged to a missing person, Randy Bratschi. (R. p. 347, lines 5–12). Upon finding that the car belonged to a missing person, Bazen secured the scene for forensics officers. (R. p. 347, lines 13–19).

Keith Von Lutcken arrived at the scene to secure the vehicle. (R. p. 351, line 22–p. 352, line 5; R. p. 352, lines 9–21). He took photographs of the vehicle. (R. p. 352, lines 22–24). He also checked the interior of the vehicle. (R. p. 354, lines 16–18). Von Lutcken noticed that the SUV had not been hot wired or driven without a key to the landing—a key had been used to drive the vehicle there. (R. p. 354, lines 19–24). During his inspection of the vehicle, Von Lutcken collected $900 in $100 denominations from the driver's seat. (R. p. 354, line 25–p. 355, line 8). Von Lutcken also observed blood on the steering wheel, the steering wheel column, the dashboard, and the gear shift. (R. p. 355, lines 13–24). Von Lutcken estimated that the blood was "days to a week" old, (R. p. 371, lines 1–2), but he did not believe the blood was five or six weeks old, (R. p. 370, lines 22–25). The blood was tested, and it was determined that the blood belonged to Appellant. (R. p. 363, lines 1–5). Von Lutcken did not observe anything that

resembled blood in the back of the vehicle. (R. p. 355, line 25–p. 356, line 6). Likewise, he did not find dirt in the back of the vehicle. (R. p. 364, lines 11–13). However, Von Lutcken did find a bag of feed, a road atlas, a little bit of garbage, and a camera bag containing a camera in the SUV. (R. p. 364, lines 11–16). It did not appear to Von Lutcken that a person had been transported in the back of the vehicle. (R. p. 356, lines 10–13).

On the Wednesday, Thursday, and Friday after the Isuzu Rodeo was discovered, investigators spent time looking around the landing and in the river for Victim. (R. p. 356, line 20–p. 357, line 6). Though it would have been almost impossible for investigators to drag the river, they dove the river during their search despite it being "treacherous." (R. p. 363, line 15–p. 364, line 1). Investigators were unable to find any evidence of Victim in that area. (R. p. 357, lines 7–9).

Post-Disappearance 2004: Appellant Gets a Ride from Pamplico to Coward

On the Friday after Thanksgiving 2004, a woman came to the house of Jerome Eaddy and asked for a ride to her home in Coward. (R. p. 373, line 2–p. 375, line 17). Eaddy lived in Pamplico near Dewitt's Bluff Landing. (R. p. 373, lines 2–9). Earlier that night, Eaddy had seen a figure walking on his road when he was driving home from his night shift, which had ended at 11 o'clock. (R. p. 373, lines 10–24). Eaddy saw that the figure was dressed in a camouflage outfit and was wearing a hood—at first, he thought it was a man. (R. p. 373, line 19–p. 374, line 6). However, when the figure approached Eaddy and removed the hood, Eaddy realized it was a woman. (R. p. 375, lines 1–8). Though the woman did not give any explanation as to why she was in the area, she asked for a ride to her home in Coward, and Eaddy, along with his mother, obliged. (R. p. 375, lines 9–21). They dropped the woman off in Coward, South Carolina. (R. p. 377, lines 10–24). Eaddy later picked Appellant out of a photo lineup as the woman he gave a

ride to that night. (R. p. 389, lines 1–19). Eaddy also showed Phillip Hanna, who was with the Florence County Sheriff's Office at the time, exactly where he had dropped Appellant off. (R. p. 387, lines 9–17; R. p. 390, lines 19–23). Hanna noted that Eaddy dropped Appellant off at a spot just a quarter of a mile past Victim's house. (R. p. 390, line 24–p. 391, line 3).

Post-Disappearance 2004: Sheriff's Department Investigates

Streett obtained search warrants to search Victim's trailer several times. (R. p. 466, lines 5–7). The first time was on November 30, 2004. (R. p. 466, lines 8–9). Streett "was looking for anything that would indicate where he was, his whereabouts, what he was doing, who he was with, [and] contact information for family and friends." (R. p. 466, lines 10–14). Streett found Victim's diabetes monitor and learned that the last time that Victim had checked his glucose was Thanksgiving Day at 5:47 p.m. (R. p. 467, line 24–p. 468, lines 15).

Also during the search, Streett found evidence that Appellant liked to hunt. (R. p. 468, lines 10–17). At trial, Russell Merrill testifed that "Brenda could fight like a man and shoot like a man. She kill deer and everything else." (R. p. 330, lines 2–3). Streett and other investigators with the Florence County Sheriff's Office also searched land owned by Appellant's relatives. (R. p. 470, lines 1–15). On that land about an eighth to a quarter of a mile away from Victim's house, Streett discovered a rectangular hole beside a deer stand that Appellant hunted out of occasionally. (R. p. 470, line 16–p. 471, line 13). Another investigator, Philip Hanna, noted that the hole was two feet deep, five feet long, and two and a half feet wide and that it looked to have been dug fairly recently. (R. p. 396, lines 2–16). However, when Hanna talked to neighbors in the area, no one could explain why the hole was there. (R. p. 396, lines 17–24).

Streett went under the trailer during one of the searches of Victim's property. (R. p. 483, lines 12–15). There, she saw dirt, cinder blocks, pieces of wood, various building materials, five

gallon buckets, and building debris. (R. p. 483, lines 16–22). Streett did not notice a shallow grave. (R. p. 484, lines 6–20). Investigators also brought cadaver dogs to Victim's property during one of the searches, but the cadaver dogs did not go under the trailer. (R. p. 509, line 16–p. 510, line 17). The cadaver dogs did not indicate anywhere on Victim's property. (R. p. 510, lines 18–20). Streett explained at trial that cadaver dogs are not perfect and that a number of factors can affect their ability to discern a scent. (R. p. 526, line 16–p. 527, line 8).

As part of their investigation, officers looked into Miles, Appellant's son, and his whereabouts at the time Victim disappeared. (R. p. 403, line 24–p. 405, line 1). Investigators did not think it was possible that Miles had killed Victim because Miles had an alibi for the Friday, Saturday, and Sunday following Thanksgiving. (R. p. 511, lines 7–14).

At trial, three of Appellant's relatives testified that they heard or saw Victim after Friday morning. (R. p. 561, line 7–p. 562, line 8; R. p. 567, line 11–p. 568, line 11; R. p. 579, line 11–p. 581, line 13). None of the witnesses were close with Victim or knew him well—one testified that he had met Victim once, (R. p. 561, lines 22–25); one admitted he had never met Victim though he had seen him, (R. p. 567, lines 4–10); one said he did not know Victim well, but he had seen him several times, (R. p. 580, lines 19–20).

Between Victim's disappearance and the discovery of his remains, investigators continued to follow up on tips about the disappearance. (R. p. 473, line 18–p. 474, line 13). None of those tips proved to be fruitful, but Streett never gave up on the case. (R. p. 474, lines 7–23). Once Streett confirmed that the remains found under the trailer belonged to Victim, she

met with the solicitor's office and eventually got a warrant for Appellant's arrest.[2] (R. p. 477, line 19–p. 478, line 23).

[2] After Appellant's arrest, she failed a polygraph examination where she was asked if she knew who put Victim's body under his trailer. (R. p. 668, line 21–p. 669, line 19; R. p. 670, line 3–p. 672, line 12). Subsequently, Appellant confessed to shooting Victim, wrapping his body in a tarp, and burying the body under his trailer. (R. p. 681, line 16–p. 682, line 21). She indicated that she shot him in self-defense after he pulled out a gun. (R. p. 682, lines 15–21). However, the trial court suppressed that statement because the police told Appellant that they were going to arrest her son for murder (which was untrue) prior to her confession. (R. p. 684, line 12–p. 687, line 14). In fact, an arrest warrant had been issued for Appellant's son at the time of her interview, but the warrant was for misprision of a felony rather than for murder. (R. p. 683, lines 8–25).

ARGUMENT

I.

The trial court, viewing the facts and all reasonable inferences in the light most favorable to the State, did not err in denying Appellant's motion for directed verdict on the charges of murder and burying a body without notice or inquiry where substantial circumstantial evidence existed reasonably tending to prove the guilt of Appellant.

Introduction

At Appellant's trial the State was able to show that Victim disappeared on the Friday after Thanksgiving and that his decomposed body was discovered wrapped in a tarp and buried under his home approximately five years later. Respondent submits that the following evidence, which was presented to the jury, constitutes substantial circumstantial evidence that Appellant is guilty of murdering Victim and of burying his body without notice:

- Appellant assaulted Victim approximately five weeks before he disappeared, and inflicted the following serious injuries: a basilar skull fracture, a movement of left temporal bone through the middle ear with displacement of the ossicles, a fracture to the left maxillary sinus, a large hematoma, and a fracture to the floor of the left orbit;
- after the assault Victim got a restraining order against Appellant, under which Appellant was prohibited from communicating with Victim, from entering his property, and from using his vehicle;
- days before Victim disappeared, Appellant confronted Victim as he was going to his new girlfriend's house thereby violating the restraining order;

- Appellant had hired a private investigator to follow Victim, and she had pictures of him with his new girlfriend;
- Appellant was seen leaving Victim's property around the time that Victim disappeared thereby violating the restraining order;
- Victim's car moved from his property to DeWitt's Bluff Landing Friday night;
- also on Friday night, Appellant hitched a ride from an area close to the location where Victim's car was abandoned (DeWitt's Bluff Landing in Pamplico) to a location close to Victim's property (Coward), which is the location where his remains were eventually discovered;
- Appellant was dressed in camouflage when she got the ride from Pamplico to Coward;
- Appellant's blood was found in Victim's car, and it was testified to that the blood was only days to a week old, which puts Appellant in Victim's car around the time of his disappearance, and which violates the restraining order;
- a shallow hole, similar to the one Victim was buried in, was found on Appellant's family's property, a short distance from Victim's property, and under a deer stand that Appellant was known to have used.

Viewing the facts and all reasonable inferences in the light most favorable to the State, the State has done more than "raise[] a suspicion that the accused is guilty." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Standard of Review

In reviewing a motion for a directed verdict, the trial judge is concerned with the existence of evidence, not with its weight. *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600,

605 (2004) (citing *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). In an appeal from the denial of a directed verdict motion, the appellate court must view the evidence in the light most favorable to the State. *Id.* (citing *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *Id.* (citing *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Arnold*, 361 S.C. 386, 389, 605 S.E.2d 529, 531 (2004).

How the Issue Was Raised at Trial

After the State rested its case, defense counsel moved for a directed verdict, asserting that the State had presented

> no evidence of how Randy Bratschi died, when Randy Bratschi died, [or] where Randy Bratschi died. . . . They didn't even say, well, it look[ed] bad. Everybody on that stand says there's no evidence. . . . There is no evidence as to when, where, how[,] and especially who.

(R. p. 536, lines 9–22). Defense counsel went on to argue

> The State is here—basically trying her for assault and battery with intent to kill in the hopes, in the hopes that if they can buy into that, then the jury's going to somehow say, well, she tried to kill him then. She must have killed him now. And, Your Honor, I don't think that's the way the verdicts should be rendered[,] and I think a reasonable jury cannot find beyond a reasonable doubt that . . . Brenda Bratschi did in fact kill Randy Bratschi when there's simply no evidence. None.

(R. p. 536, line 24–p. 537, line 8).

In response, the State argued the following:

> I think the State has presented evidence in this case that will allow a reasonable jury to find the defendant guilty of murder as well as burying a body without

> notice. Going to the assault and battery with intent to kill, that obviously goes to motive and intent. I think that we have shown that if Randy Bratschi was alive Brenda Bratschi could have been prosecuted for the assault and battery with intent to kill and been going to prison. He already made a filing with the family court. We could assume eventually lead to a divorce, that would have been her income. Also, I think aside from the motive[, w]e've also shown that Ms. Bratschi was on the property on the weekend that he went missing in violation of the family court's protective order.
>
> We've also shown from Mr. Eaddy that she was seen in proximity to where the car was found and dropped off back in proximity of the crime scene again on the same weekend. She was dressed in camouflage operating under darkness. Additionally, Your Honor, I think that the State has shown that there's plenty of evidence that Randy was scared of her, afraid she was going to do something else that's why he got a protective order and that she repeatedly violated that protective order by going to Sue Hill's house and confronting Randy and as we said by going to the residence on the weekend in question. So we certainly think a reasonable jury could find her guilty on both counts.

(R. p. 537, line 10–p. 538, line 12).

The court took the motion under advisement overnight and adjourned court for the day. (R. p. 538, line 15–p. 539, line 19; R. p. 542, lines 20–22). When court resumed the next morning, Judge Brown indicated that he had received a memorandum from defense counsel on the directed verdict issue. (R. p. 542, line 23–p. 543, line 8; Defendant's Memorandum in Support of Motion for Directed Verdict, R. p. 688). The court gave the State the opportunity to respond to the arguments in the memorandum. (R. p. 543, lines 9–14).

The State noted that defense counsel's brief largely relied on the case of *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011), and then distinguished the evidence presented in *Odems* from the evidence it had presented to the jury. (R. p. 543, line 15–p. 544, line 18). In particular, the State had presented Rauch's testimony that he had seen Appellant leaving Victim's property on the day, according to the State's theory, that Victim was murdered, and the State had presented evidence that Appellant's blood had been found in the Rodeo and that that blood was only two to seven days old. (R. p. 543, lines 18–p. 544, line 18). The State also referenced

Eaddy's testimony, which established Appellant's proximity to both the location where Victim's Rodeo was found and the location where Victim's body was buried. (R. p. 544, line 22–p. 545, line 2). Additionally, unlike in the *Odems* case, the State pointed out that it had established "a truck load" of motive. (R. p. 545, line 3–p. 546, line 11). Finally, the State stressed that the evidence it had presented to the jury was particularly compelling considering Appellant was under a court order to stay away from Victim, his home, and his Rodeo—the State had shown that Appellant had violated the court order multiple times during the week Victim disappeared. (R. p. 546, line 12–p. 547, line 9).

In response, defense counsel again argued that the state was primarily relying on the evidence of the assault and battery with intent to kill to show that Appellant murdered Victim. (R. p. 547, line 13–p. 548, line 17).

Trial Court's Denial of the Directed Verdict Motion

The court denied Appellant's motion for directed verdict. (R. p. 548, line 18–p. 550, line 11). After reciting the standard for directed verdict where the State has relied exclusively on circumstantial evidence, the court stated, "looking at the totality of the circumstances and the evidence that's been presented by the State, the Court believes that more than a mere suspicion has been raised as to the defendant's guilt." (R. p. 548, line 18–p. 549, line 17). Though, apparently, defense counsel had focused on the testimony of Eaddy in its memorandum, the Court emphasized that it was basing its decision on "the totality of the circumstances." (R. p. 549, line 14–p. 550, line 11).

Defense counsel renewed the motion for directed verdict at the close of its case and again at the close of the State's case in rebuttal. (R. p. 585, line 20–p. 586, line 1; R. p. 619, lines 2–5). The court again denied the motion. (R. p. 585, line 24–p. 586, line 1).

Analysis

Appellant contends that the trial court should have granted her motion for directed verdict because the State was unable to present evidence of where Victim was killed, how Victim was killed, or when Victim was killed. Respondent, on the other hand, submits that the State presented substantial circumstantial evidence sufficient to show that Appellant murdered Victim and then disposed of his body.

Appellant seeks to compare her case to the following cases: *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984); *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000); *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000); *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004); *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011); *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011). In each of those cases, the South Carolina Supreme Court found that a directed verdict was warranted based on the evidence presented by the State at trial. However, the instant case is distinguishable from all of those cases.

In all of the cases cited by Appellant, the Court specifically noted that the State had failed to present evidence placing the defendant at the scene of the crime. *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984) ("Nothing in evidence places Schrock at the scene of the crime."); *State v. Martin*, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000) ("Most significantly, the State's evidence failed to place either defendant inside the apartment."); *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) ("The fact that respondent's fingerprint was on a screen that was propped up against the house does not prove entry where respondent had been in and around the victim's house at least three times."); *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) ("[T]here is no evidence respondent was at the scene of the crime . . . ."); *State v. Bostick*, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011) ("No direct evidence linked

Bostick to the crime scene or the items found in the burn pile."); *State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (2011) ("[T]here is no evidence before this Court placing Petitioner at the crime scene."). And in her brief Appellant argues that "nothing places Brenda at the scene of the crime because the State could not prove where the crime scene was." Final Br. of Appellant p. 18. However, the Supreme Court of South Carolina has explicitly rejected "the proposition that the trial court must grant a directed verdict if the State fails to present evidence placing the defendant at the scene of the crime." *State v. Frazier*, 386 S.C. 526, 532, 689 S.E.2d 610, 613 (2010). In *Frazier* the Court explained that

> [i]n *Arnold*, *Martin*, and *Schrock* we held that the State did not produce substantial circumstantial evidence of the defendant's guilt and noted that the State presented *no* evidence that the defendant was at the scene. We reject any interpretation that these cases altered or increased the sufficiency of evidence standard a trial court is to apply in a case based on circumstantial evidence.

Id. (emphasis in original).

Respondent submits that, unlike the evidence presented in the cases cited by Appellant, in this case there was evidence that Appellant was at two locations of interest the weekend Victim disappeared. Eyewitness testimony places Appellant at Victim's property—the location where his body was buried—the weekend Victim disappeared. Eyewitness testimony also establishes that Appellant was in close proximity to the location where Victim's car was abandoned during the weekend Victim disappeared. Moreover, the testimony concerning Appellant's blood in the Rodeo places her in Victim's vehicle around that same time period. Evidence of Appellant's physical proximity to those locations so close to the time Victim disappeared is all the more incriminating because Appellant had been specifically prohibited from being at Victim's property or in his car by a court order.

Appellant argues the evidence presented by the State in *Arnold* exceeds the evidence presented in this case. In *Arnold* the victim was shot and his body was found off a dirt road in Colleton County. 361 S.C. at 388, 605 S.E.2d at 530. The car that the victim had been driving the last day he was seen alive was recovered in Johnson City, Tennessee, and a witness testified that Arnold called him the day after the victim was shot from Arnold's father's home ten miles from where the car was found. *Id.* at 389, 605 S.E.2d at 530. Arnold's fingerprint was found on a coffee cup lid in the center console. *Id.*, 605 S.E.2d at 530. The South Carolina Supreme Court found that such evidence "raise[d] a suspicion of guilt, but [was] not evidence that the respondent killed [the victim]." *Id.* at 390, 605 S.E.2d at 531.

According to Appellant, the fingerprint evidence in *Arnold* placed the defendant in a car with the victim on the day of the murder, whereas the blood evidence in this case establishes only that Appellant was in the car at some point either prior to or after victim disappeared. Appellant disregards the fact that Victim had been given exclusive control of the car by a court. Thus, Appellant should not have been in the car in the four weeks prior to Victim's disappearance. The evidence shows, however, that Appellant was in the car and was bleeding around the time that Victim disappeared. Appellant argues that "the fact in *Arnold* that the car was taken out of the state near the defendant's home is far more suspicious than Randy's car being found at a place he was known to frequent when he was troubled." Final Br. of Appellant p. 20. It may be that the location where the victim's Rodeo was found in this case is less suspicious than the location where the car was found in *Arnold*. However, Respondent submits that the fact that Victim's Rodeo was moved from his property to Dewitt's Bluff Landing after he disappeared, combined with the fact that Appellant was in the Dewitt's Bluff area, without a

car, and in need of a ride back to Coward only hours after the Rodeo was moved is "far more suspicious" than the facts established in *Arnold*.

Appellant also compares her case to *Bostick*, a case where the victim was found bludgeoned in her house, which had been set ablaze. 392 S.C. at 136, 708 S.E.2d at 775. The Court recited the following evidence that had been presented against Bostick:

> (1) [victim's] car keys, calculator, and other items from her home were found in the Bostick family's burn pile; (2) the fire in the burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; (3) Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant use for the house fire; and (4) while the DNA from the blood on Bostick's jeans excluded about ninety-nine percent of the population, the blood could not be matched to [victim's] DNA.

392 S.C. at 142, 708 S.E.2d 774, 778. In finding that a directed verdict was appropriate, the Court noted there was no evidence linking Bostick to the crime scene or to the items found in the burn pile, nor was the weapon used to beat the victim ever introduced. *Id.* at 141, 708 S.E.2d at 778. Finally, though the State had theorized that the victim, who was treasurer for her church, was killed for the money she had at her home, the Court pointed out that "no evidence was introduced concerning Bostick's knowledge that [the victim] may have had money in the briefcase or if indeed any money was in the briefcase on that particular Sunday." *Id.* at 142, 708 S.E.2d at 778.

Appellant urges that the evidence in *Bostick* far exceeds the evidence presented by the State in this case. Respondent disagrees. As previously discussed, the evidence presented by the State in the instant case established the following: (1) that Appellant had assaulted Victim weeks before he disappeared, (2) that Appellant was upset about a relationship that Victim had begun shortly before his disappearance, (3) that Appellant confronted Victim days before he disappeared though she had been ordered by a court to stay away from him, (4) that Appellant

was at Victim's residence the day (or day after) he disappeared though she had been ordered by a court to stay off of the property, (5) that Victim's car moved from his home to a location miles away after the time he disappeared, (6) that Appellant got a ride from a location near where Victim's car was abandoned to a location near where his body was discovered, (7) that Appellant bled in the Victim's car in the days surrounding Victim's disappearance though Victim had exclusive possession of the car under a court order, (8) that a "shallow grave," similar to the one Victim's remains were found in, was discovered on Appellant's family's property under a deer stand she was known to have used in the past. Respondent also points out that, unlike in *Bostick*, the State was able to show a "truck load" of motive that Appellant had to kill Victim, including that Appellant was potentially going to be prosecuted for assault and battery with intent to kill and that Victim had begun a new relationship, which had made Appellant upset.

Respondent submits that the evidence presented in the instant case is akin to the evidence presented by the State in *Frazier*, where the South Carolina Supreme Court upheld the denial of a directed verdict motion. 386 S.C. at 531–32, 689 S.E.2d at 613. In that case, the Court ruled that the State had presented substantial circumstantial evidence of guilt by presenting evidence of the following: an affair between the victim's wife and the defendant, defendant's knowledge of victim's whereabouts, defendant's confrontation with the victim shortly before the murder, defendant's actions taken in preparation for the murder, and eyewitness testimony placing defendant near the murder scene at the time of the murder. *Frazier*, 386 S.C. at 531–32, 689 S.E.2d 610, 613. Respondent submits that the State presented substantial circumstantial evidence in the instant case of the same caliber as the evidence presented in *Frazier*, and Respondent asks the Court to find, just as the Court did in *Frazier*, that "[t]his evidence, when

viewed collectively, presented a jury question. . ." as to Appellant's guilt. *Id.* at 532, 689 S.E.2d at 613.

Appellant implies that the trial court only considered the testimony of Eaddy in denying the motion for directed verdict at trial. However, the record shows that the trial court considered "the totality of the circumstances and the evidence that's been presented by the State. . . " in its denial of the motion for a directed verdict. (R. p. 549, lines 14–15). Indeed, a single piece of circumstantial evidence presented in this case may only have been enough to raise a suspicion of guilt, but Respondent submits that the State presented substantial circumstantial evidence in this case, and when viewed collectively, the evidence raised a jury question as to guilt.

Finally, Appellant asserts that the State did not exclude other reasonable hypotheses in the presentation of its evidence as alluded to in the traditional circumstantial evidence definition. The South Carolina Supreme Court has abandoned that definition as a jury charge, but the definition is still used in examining the sufficiency of the circumstantial evidence at the directed verdict stage. *Odems*, 395 S.C. at 590, 720 S.E.2d at 53. Under the traditional circumstantial evidence definition,

> every circumstance relied upon by the State [must] be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. . . .

State v. Cherry, 361 S.C. 588, 595, 606 S.E.2d 475, 479 (2004). Besides the theory that Appellant murdered Victim and buried his body, the next most reasonable theory is that Appellant's son, Frankie Miles, committed the murder. And the State did exclude that hypothesis at trial by presenting evidence of Miles's alibi the weekend Victim disappeared. In her brief, Appellant offers a few alternative hypotheses, which she claims were reasonable but not excluded—namely, that Victim died as a result of a drunken altercation or during a botched

robbery. Respondent denies that such hypotheses are reasonable in view of the facts of the case. Additionally, Respondent believes that some facts presented at trial exclude such hypotheses. For instance, Victim's car moved from his property to another location and was abandoned after he had disappeared—yet, eventually his body was recovered under his trailer. Additionally, Victim's body was wrapped in a tarp and buried in a shallow grave under his trailer. These facts are inconsistent with the hypotheses offered by Appellant.

Respondent submits that the State presented substantial circumstantial evidence of Appellant's guilt at trial and that the State further excluded other reasonable hypotheses through its presentation of the evidence. Thus, the trial court did not err in denying Appellant's motion for directed verdict, and this Court should affirm the trial court's ruling.

II.

The trial court did not err in admitting a 911 call made by Victim where the call is clearly non-testimonial in nature. Even if the call is found to be testimonial, the admission of the call was harmless error. Additionally, the probative value of the call was not outweighed by any unfair prejudice, and, thus, the call was properly admitted at trial.

Introduction

The 911 call introduced at trial was non-testimonial in nature. As such, admission of the call could not have violated Appellant's right under the Confrontation Clause. However, even if the call evolved into testimonial evidence, submission to the jury of such evidence was harmless error.

Standard of Review

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The United States Supreme Court has held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). The Supreme Court has provided the following guidance for trial courts charged with determining whether a statement is testimonial or non-testimonial:

> Statements are nontestimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006).

"A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." *State v. Gracely*, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

> Whether such an error is harmless in a particular case depends upon a host of factors . . . . The factors include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. (quoting *Van Arsdall*, 475 U.S. at 684).

How the Issue Was Raised at Trial

After jury selection, the court held a pre-trial hearing to determine the admissibility of evidence related to a domestic dispute between Victim and Appellant. (R. p. 13, line 20–p. 14, line 11). One piece of evidence that the State sought to have admitted was a 911 call made by Victim. (R. p. 14, lines 3–9).

Excerpts of the call have been transcribed and provided as part of the Respondent's Statement of Facts in this brief. *See supra* pp. 6–7. The call lasts for a little over eight and a half minutes. (State's Ex. 24). At the beginning of the call, Victim gives the 911 operator information about his situation, telling her that his wife is trying to kill him, then giving her his name and location, and asking her to "please hurry." (State's Ex. 24). Victim later warns the operator that he has a gun and states that he does not know where his wife is—"she's outside somewhere." (State's Ex. 24). He repeatedly informs the operator that if his wife comes in he will shoot her. (State's Ex. 24). Victim breathes heavily and sounds upset throughout the call. (State's Ex. 24).

During the call the operator continues to get information from Victim about the nature of his injuries. (State's Ex. 24). She also asks if he is able to secure himself in his house, but he answers that he cannot because he had to break the window of the back door to get in the house. (State's Ex. 24). About half way through the call, the operator asks if Victim hit Appellant with a hoe. (State's Ex. 24). Victim then explains that he used the hoe to break into his house, not to hit his wife. (State's Ex. 24). The operator informs Victim that Appellant is currently at the police department, and the operator instructs Victim to put the gun away. (State's Ex. 24). Victim expresses uncertainty that his wife is at the police department but says he will put the gun in the holster. (State's Ex. 24). The operator again asks about Victim's injuries, and he confirms that he is bleeding. (State's Ex. 24). The operator prompts Victim about the dispute between him and his wife, and he interrupts her to explain what happened—most of the information he gives about the dispute is information that he has already provided. (State's Ex. 24). The operator instructs Victim to step out onto his back porch and leave the gun on the table. (State's Ex. 24). Victim then yells to someone who is not on the phone to inform them of his location. (State's Ex. 24). The call ends shortly thereafter. (State's Ex. 24).

During the pre-trial hearing, the trial court ruled that the call was admissible under 404(b). (R. p. 67, line 1–p. 69, line 8). In arguing that the 911 call was admissible, the State argued that "Mr. Bratschi's call would . . . be hearsay, but it would be subject to exception as an excited utterance and a present sense impression of something that had just happened immediately . . . ." (R. p. 73, lines 21–25). Judge Brown then stated, "[a]nd I think Mr. Herron would agree that it would fall under that exception or one of the hearsay exceptions. However, I don't think he would agree that the probative value outweighs the prejudicial effect." (R. p. 74, lines 1–4). Defense counsel replied, "I couldn't have said it better myself." (R. p. 74, lines 5–6).

Defense counsel also raised Appellant's Sixth Amendment right to confront her accuser, stating, "I cannot cross-examine Mr. Bratschi, obviously, so I would say it . . . violate[s] her constitutional rights to confront the witness." (R. p. 74, line 17–p. 75, line 9; R. p. 83, lines 13–24). Defense counsel also argued that the call was prejudicial multiple times during the discussion with the court about the call. (R. p. 61, line 25–p. 63, line 6; R. p. 64, lines 1–10; R. p. 74, line 22–p. 75, line 6).

After hearing argument from both sides, the court took the motion under advisement but expressed an inclination to admit the 911 calls placed by both Victim and Appellant. (R. p. 86, lines 5–15). The court ultimately decided to let both calls in. (R. p. 91, line 4–p. 92, line 13). Defense counsel renewed his objections to the call immediately prior to the call being played for the jury. (R. p. 192, lines 3–16).

Analysis

Appellant argues that the 911 call in this case evolved into testimonial evidence and, thus, is barred by the Confrontation Clause. Final Br. of Appellant p. 26. Respondent disagrees and submits that the 911 call is clearly non-testimonial evidence. Victim did not make the call to establish or prove some past fact—he made the call to describe his current circumstances requiring police assistance. *See Davis v. Washington*, 547 U.S. at 827. In *Davis*, the Supreme Court compared two 911 calls and identified differences between a call where the primary purpose was to enable police assistance to meet an ongoing emergency and a call where the primary purpose was to describe past events. *Id.* The Court looked at the following: the time of events described, whether the emergency was ongoing, the nature or what was asked and answered, and the level of formality. *Id.* Here, Victim called 911 immediately after breaking into his own home to escape being beaten by his wife. (State's Ex. 24). He was bleeding from

the head and asked the operator for an ambulance. (State's Ex. 24). Victim also expressed fear that his wife would return. (State's Ex. 24). The operator asked questions about his injuries and how he had gotten them. (State's Ex. 24). She also advised Victim to barricade himself in his home. (State's Ex. 24). Throughout the call, Victim's answers to the operator's questions were frantic, as he struggled to catch his breath and to deal with his injuries while he simultaneously kept guard in the event Appellant returned. (State's Ex. 24). Respondent submits that these characteristics of the call clearly render it non-testimonial.

Appellant asserts that the call between Victim and the 911 operator evolved into a testimonial statement because, at some point in the call, the operator learned that Appellant was at the police station and, therefore, was no longer outside Victim's home. According to Appellant, once "the operator knew of Brenda's whereabouts[, she] had ended her function as the dispatcher of emergency personnel and begun her function as investigator of a crime." Final Br. of Appellant p. 25. Respondent disagrees that the call becomes testimonial at that point because the emergency was ongoing—though Victim was no longer fending off an attack by Appellant at that point, he was bleeding and in need of medical assistance. Also, he had a gun and was threatening to shoot his wife if she returned, which he believed was a possibility. The operator had to continue to get information from Victim about his injuries, including how they were inflicted, so that she could advise emergency responders about medical aid that he might need. She also had to discern whether Victim, in his frantic state, might pose any threat to emergency personnel when they arrived on the scene. Moreover, even if the call did evolve into a testimonial statement after the operator learned of Appellant's whereabouts, Respondent submits that the information conveyed by Victim after that point is largely cumulative to the information he had already told the operator.

Appellant directs the court to a case in which the Connecticut Supreme Court ruled that the admission of a 911 call violated the Confrontation Clause. *See State v. Kirby*, 908 A.2d 506, 519–26 (2006). However, the 911 call in *Kirby* is quite different from the 911 call made by Victim in this case. In particular, in *Kirby* "the call at issue was made after the emergency had been averted and the complainant no longer was under any threat from the defendant because she already had escaped and had left him stranded on the side of the road." *Kirby*, 908 A.2d at 523. Additionally, the *Kirby* complainant was back at home with her husband when she told her story to the police dispatcher. *Id.* at 512–14. Victim, on the other hand, had not escaped his emergency when he relayed his story to the 911 operator. Though he had gotten away from Appellant by breaking into his own home, he still felt he was under a bona fide physical threat. And his belief that he was still in danger is evinced by the multiple warnings he made in which he threatened to shoot Appellant if she came into his house.

Even if the court were to find Victim's 911 call to be testimonial, Respondent submits that it was harmless error to present the call to the jury. The jury saw pictures and heard testimony of Victim's injuries from the assault. The jury also heard from law enforcement who investigated the assault, and the jury learned of the restraining order that Victim obtained after the assault. Though the State was able to show motive through the assault, the 911 call was only one piece of evidence presented to the jury regarding that assault. Respondent submits that the 911 call was corroborated by the testimony of multiple other witnesses at trial. Furthermore, though Victim could not be cross-examined at trial, Appellant's version of the assault was also presented to the jury through investigators and through her own 911 call.

Appellant further argues that the 911 call should have been excluded under S.C. R. Evid. 403 because the unfair prejudice of the call outweighed its probative value and that the

admission of the call was calculated to arouse sympathy. Respondent disagrees and submits that there was no need to exclude the 911 call under Rule 403. Under S.C. R. Evid. 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Appellate courts "review a trial judge's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *State v. McLeod*, 362 S.C. 73, 81–81, 606 S.E.2d 215, 220 (Ct. App. 2004) (citing *State v. Hamilton,* 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001)). In this case, the trial court considered defense counsel's argument that the call was unduly prejudicial and admitted the call. Respondent submits the trial court did not abuse its discretion as the call is probative of what happened during the assault. Furthermore, the call served to give the jury background as to how the restraining order against Appellant came about.

For the above reasons, Respondent submits that Appellant's right under the Confrontation Clause to confront her accuser was not violated by the admission of Victim's 911 call at trial. Additionally, the call should not have been excluded under S.C. R. Evid. 403.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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May 2, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
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BRENDA BRATSCHI,

APPELLANT

Appellate Case No. 2012-211980.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Kaycie S. Timmons, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to her attorney of record David Alexander at:

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

This second day of May, 2014.

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