STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY

James E. Lockemy, Circuit Court Judge

THE STATE

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.

APPELLANT.

FINAL BRIEF OF RESPONDENT

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3. Whether the court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary?

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court erred by admitting the audio tape recording as a prior consistent statement under Rule 801(b)(1)(B), SCRE, when defense counsel implicitly and explicitly asserted that Jonathan G. fabricated his testimony when he stated he told Officer Knochs that it was his stepfather who shot his mother?

2. Whether the trial court erred in allowing the jury to review the transcript of the 911 tape when the jury was only allowed to see the transcript in the courtroom with the defendant and counsel present and only when the audio tape was played as requested by the jury?

3. Whether the trial court correctly held that it was within the court's discretion to grant or deny Appellant's Motion to proceed pro se when the motion was not timely made?

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to the testimony was made, and no argument regarding the allegation was presented on the record?

7. Whether the trial court erred in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11) when there was substantial circumstantial evidence supporting the charge?

STATEMENT OF THE CASE

On January 28 – February 8, 2008, Appellant Louis Michael Winkler ("Winkler") was tried by a jury for murder, first-degree burglary, and assault and battery of a high and aggravated nature. He was tried in the Horry County Court of General Sessions before the Honorable James E. Lockemy, Circuit Court Judge. Ralph J. Wilson, Esquire, and Assistant Public Defender Paul Elbert Rathbun, Esquire, represented Winkler. Solicitor J. Gregory Hembree, Esquire, Deputy Solicitor Francis A. Humphries, Jr., Esquire, and Assistant Solicitor Scott R. Hixson, Esquire, all of the Fifteenth Judicial Circuit, represented the State. On February 2, 2008, Winkler was convicted on all three charges. (R. p. 1903).

The State had filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. (R. p. 1976). In the Notice, the statutory aggravating circumstances asserted were that the murder was committed during the commission of a burglary, S.C. Code Ann. Section 16-3-20(C)(a)(8); and that the murder was of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime under S.C. Code Ann. Section 16-3-20(C)(a)(11). (R. p. 1977). On February 8, 2008, the jury found there was evidence of both asserted aggravating circumstances beyond a reasonable doubt. (R. p. 2940). The jury recommended that Winkler be sentenced to death. (R. p. 2940). Judge Lockemy sentenced Winkler to thirty years confinement on the burglary conviction, and ten years confinement on the ABHAN conviction, both to be

served concurrently with a death sentence for the murder. (R. p. 2949). This appeal follows.

STATEMENT OF FACTS

On March 6, 2006, Appellant Louis Michael Winkler ("Winkler") broke into his estranged wife's condo in North Myrtle Beach, SC. (R. pp. 1430-31, State's Exhibit 1, 51). He knocked her son, Jonathan G., out of a stool and onto the ground. (R. pp. 1431, 1433, State's Exhibit 1, 51). Winkler then shot the victim, Rebekah Grainger Winkler, once in the face at point blank range. (R. p. 1436, State's Exhibit 1, 51). According to Dr. Edward Leroy Proctor, Jr., the forensic pathologist who conducted the victim's autopsy, the victim received a very close range gunshot wound that entered her left cheek, penetrated her brain stem, and exited through the rear right side of her brain. (R. p. 1634). Dr. Proctor noted that the shot was probably fired within a distance of 12 to 18 inches, and no more than 24 inches of the victim. (R. p. 1634). Dr. Proctor further testified there was stippling around the wound that caused by the burning gunpowder coming from the end of the gun. (R. p. 1634). Dr. Proctor testified that death would have been instant. (R. p.1637).

Winkler then walked over and pointed the gun at Jonathan. (R. p. 1437, State's Exhibits 1, 51). Shortly thereafter, Winkler left the condo. (R. p. 1440, State's Exhibits 1, 51).

Mary Elizabeth C., Jonathan G.'s friend, testified that she was on the phone with him when she heard a loud pop noise, and a voice that was not Jonathan's say "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not -- I'm back, I'm back. I'm never going back to jail." (R. p. 1511-1512).

She then heard a hit and the phone went to static. (R. p. 1512). She also heard someone curse a few times, and then the phone went dead. (R. p. 1512).

Andrew Cooper, a former crime scene technician for the Horry County Police Department, took a picture of the door jamb of the victim's condo door. (R. pp. 1546, 1554). He testified that it appeared there had been a forced entry because the door jamb, the door frame, the lock mechanism, and other parts of the door had been busted. (R. pp. 1554-55, See State's Exhibit 8). He also testified that a reddish colored liquid was collected from the kitchen countertop. (R. pp. 1559, 1570-71). Kimberly Hahn, a former SLED scientist, testified that she compared the blood swabs recovered from the counter of the victim's residence to Winkler's blood standard, and the blood from the counter matched Winkler's blood profile. (R. pp. 1744, 1747). Cooper also photographed and collected a broken cordless phone. (R. pp. 1562-63). Cooper also testified that a projectile was recovered from the baseboard of the wall behind the victim. (R. pp. 1566-68). They did not locate a shell casing on the scene. (R. p. 1572).

Toby Boyd, a violent crime detective for the Horry County Police Department, testified that police were unable to find and arrest Winkler in the days after the homicide. (R. p. 1645-46). On March 13, 2006, they formed a task force to apprehend Winkler. (R. p. 1646). On March 20, 2006, two weeks after the homicide, Winkler was spotted in the wood line of a hole at the Eagle Nest Golf Course. (R. p. 1647). The police set up a perimeter around the area where Winkler was last seen on the golf course. (R. p. 1651). Boyd spotted Winkler moving inside the perimeter. (R. p. 1652). He testified that Winkler was

wearing a dark pullover. Boyd requested that the helicopter assisting with the search scan the area. (R. p. 1652). The helicopter had to refuel. As the helicopter returned to the scene of the search, Boyd saw Winkler in the wood line. (R. p. 1653). Police were able to apprehend Winkler without any problems. (R. p. 1653). Boyd noted that Winkler appearance was consistent with someone who had been outside for a period of time. (R. p. 1657).

William Scott Rutherford, captain of the Horry County Police Department's Special Operations Division, testified that he and his team were called in to assist in the apprehension and arrest of Winkler. (R. pp. 1682-83). On March 20, 2006, two of the individuals in the bloodhound tracking team screamed contact in the search of the area. (R. p. 1685). He testified that he went to the sound of where the other officers indicated they had made contact with Winkler. (R. p. 1686). They were standing over Winkler with their guns drawn, and Winkler was laying face down with his hands behind his back. (R. p. 1686). Rutherford handcuffed Winkler and searched Winkler. (R. p. 1686). They recovered a Jennings .380 pistol from his right front pants pocket. (R. pp. 1686-87). Five live rounds were in the pistol, but there was not a live round in the port. (R. p. 1687). During a full search of Winkler, they recovered eighteen rounds of .380 ammunition, a guard lock blade knife, and a brown bi-fold wallet. (R. pp. 1689-91). In the wallet, there was a newspaper clipping about the shooting and Winkler's license. (R. pp. 1691-92). Rutherford also testified that they recovered a green knit cap and a rolled up sweatshirt as part of search for Winkler. (R. pp. 1692-93).

Ann Pitts, the lead detective in Winkler's investigation, testified that she went to Winkler's residence three days after the homicide. (R. p. 1710). Police found the victim's address on a piece of paper at the residence. (R. pp. 1709-10).

Vello Paavel, a firearms and toolmark examiner for SLED,[1] testified that he received a Walther PPK pistol[2] .380 pistol, a Jennings Bryco .380 pistol, 1 fired projectile, and 18 unfired cartridges with the Jennings Bryco pistol. (R. pp. 1757, 1760-61). He testified that there was dust, lint, and oil present in the bore of the Walther PPK, and that indicated it had not been fired since the last time it was cleaned. (R. p. 1769). He also noted that the magazine of the Walther PPK was full when he received it. (R. p. 1773). He also noted that the Bryco Jennings pistol's magazine held six cartridges, but only five were in the magazine when he received it. (R. p. 1777). Paavel concluded that the Jennings Bryco pistol fired the fired bullet. (R. p. 1787).

Sentencing Phase

Several witnesses testified on behalf of the State during the sentencing phase of Winkler's trial. The first witness to testify was Winkler's first ex-wife, Carla Kaiser. She testified that she first met Winkler when she was a freshman in high school and he was a senior. (R. p. 1992). She noted that they never had problems while she was in high school, but when she went to college, things started changing. (R. p. 1992). She testified that he was a jealous boyfriend, and at one point he called her five times in one night to ask her what she was

[1] Paavel was qualified as an expert in firearms and toolmark examination. (R. p. 1760).
[2] This pistol was recovered from underneath the bedroom pillow at the condo where the victim was shot.

doing. (R. pp. 1993-94). Kaiser and Winkler dated for three years, and were then in an on-again, off-again relationship for another two years. (R. p. 1994). When they were broken up, Kaiser testified that if Winkler saw her talking with someone else, Winkler would harass that person. (R. pp. 1994-95). She noted that Winkler was not always like that, but it was his jealousy that pushed her away. (R. p. 1995).

Kaiser related that on her 21st birthday, Winkler punched her square in the nose and knocked her out in front of a bar where her friends took her to celebrate her birthday. (R. p. 1996). She did not have direct contact with him after that. However, she did attempt to recover some coats and other items she had left at his apartment. (R. p. 1997). Kaiser testified that while she was there, Winkler forced himself on her sexually, and that was how she became pregnant with her daughter. (R. p. 1998). The two then married. (R. p. 1999). Kaiser testified that the marriage was good for the first few months. (R. p. 2000). However, she noted things changed when Winkler lost his job with an auto parts store and he started working construction with one of his friend's father's construction company. (R. pp. 2000-01). She noted that he would then start going to a bar right after work, and she would not see him until 1 or 2 a.m. (R. p. 2001). Winkler would come home drunk, and sometimes trouble would start. (R. p. 2001). She noted that Winkler would accuse her of being with someone else or doing something whenever she went out. (R. p. 2001). She testified that he would get very angry and would either kick her or throw her around. (R. p. 2001). Physical violence was a part of their relationship. (R. p. 2001). Sometimes

Winkler would hit her; a lot of times he would throw her up against the wall or kick her while she was against the wall. (R. p. 2002). She also testified that the longer the drinking went on, the worse it got. (R. p. 2002). She testified that he kept a long gun next to the bed, and he would sometimes point it at her and ask her if she wanted to die that day. (R. p. 2002). He did that on three different occasions. (R. p. 2003). He would accuse her of being with someone else. (R. p. 2002). Kaiser also testified that girls who were not her friends would come to their apartment and ask Winkler to go to the bar with them. (R. p. 2003). Winkler would go with them. (R. p. 2003).

Kaiser testified that on the day her daughter was born, Winkler came home early, yelling at her. (R. p. 2004). She testified that he had her up against a wall, and he then kicked her in the stomach six times. (R. p. 2004). He then called her mother, told her mother that Kaiser was about to have the baby, and then told Kaiser to go to the hospital because her mother would be looking for her there. (R. pp. 2004-05). Kaiser went to the hospital and went into labor while there. (R. p. 2005).

When she returned to the family apartment, everything was okay for a couple of weeks. (R. p. 2006). While Winkler did not want any of Kaiser's friends to see the baby or for Kaiser to have any visitors when he was not around, she did note that the violence did initially slow down. (R. p. 2006). One day, he did come home and punched her in the face. (R. p. 2006). Kaiser testified that she talked with Winkler's mother about the violence, and she left the apartment for a little over a week. (R. pp. 2007-08). When she did return,

Winkler was nice and had stopped drinking. (R. p. 2008). However, the final straw in Winkler's and Kaiser's relationship came during Christmas Eve after the baby was born. (R. p. 2008). Kaiser testified that Winkler did not want to go to his mother's for Christmas. (R. p. 2009). Kaiser went to go pick up the baby, who was being kept by Kaiser's mother at the time. (R. p. 2009). When she got back, Winkler stated he did not want to go. (R. p. 2009). He left, but when he came back, he started throwing Kaiser up against the wall. (R. p. 2010). Kaiser testified that Winkler threw framed pictures at her, and her arms were cut by the frames and broken glass. (R. p. 2010). She testified that Winkler then took a gun out, cocked it, and said he would shoot her right then. (R. p. 2010). She testified that he accused her of cheating, then started beating on her. (R. p. 2010). After Winkler finished beating and kicking her, Kaiser wrapped her hands in towels because of the blood, grabbed her purse, and ran. (R. pp. 2010-11). She went to Winkler's mother and showed her what Winkler had done. (R. pp. 2011-12). Kaiser then went to the hospital. (R. p. 2012). She later pressed charges against Winkler. (R. p. 2013). She left with the baby and moved in with her parents in North Carolina. (R. p. 2015). She went back to Ohio for the court hearing on the assault charges. (R. p. 2017). She testified that he was found guilty. (R. p. 2017). They later got divorced. (R. pp. 2019-20). She testified that Winkler somehow got her parents' phone number and he started calling and harassing them. (R. p. 2019).

Denise Ricketts, Winkler's second ex-wife, also testified at trial. (R. p. 2043). She testified that there were no problems when they were initially dating.

(R. p. 2045). However, as time passed, the character of their relationship changed. (R. p. 2045). She noted that Winkler started being controlling, verbally abusive, and physically abusive. (R. pp. 2045-46). Ricketts testified that the problems started about one year into the relationship. (R. p. 2046). The couple was invited to a Super Bowl party, but Ricketts did not want to go. (R. p. 2046). She testified that Winkler grabbed her by the neck and threw her to the floor; they ended up going to the party as a result of the fight. (R. p. 2046). She later forgave Winkler. She did note there were other instances of verbal abuse. (R. p. 2046). She also testified that Winkler was controlling, and he tried to keep her away from family and friends. (R. p. 2047). She testified that in April of 1997, before they were married, he came home one night and wanted to argue. She asserted that he kicked her in the legs and drug her around the house for a while, and then he threw her out the back door in her bedclothes and locked the door. (R. pp. 2047-8). She reported this incident to police, and Winkler was later found guilty of criminal domestic violence as a result. (R. pp. 2049-51).

Ricketts testified that she forgave Winkler after he later apologized. (R. p. 2052). She noted that things between them were fine for a while, but eventually, the same problems arose again. (R. p. 2052). Winkler started drinking a lot, and when he came home he would be mean to her. (R. p. 2052). They married in September 2001. (R. p. 2053). She testified that life was bad during the marriage. (R. p. 2053). He drank a lot, did not come home from work, and he was verbally abusive. (R. p. 2054). Ricketts also noted that Winkler was still controlling. (R. p. 2054). She later left Winkler, in part because she was in fear

he would become physically abusive. (R. pp. 2054-55). She indicated that Winkler began to follow her, and he would leave notes in her car and would call her cell phone. (R. p. 2056). She later took out a restraining order on Winkler after he threatened to kill her when he saw a suitcase in the back of her truck. (R. p. 2057).

Jeff Cauble, a Patrolman First Class with the Horry County Police Department, testified that he responded to a call to a residence where Winkler was present. (R. p. 2067). He initially started to transport Winkler to the North Myrtle Beach Police Department, but he changed course after Winkler started gasping for air and complaining of chest pains. (R. p. 2068). Instead, he took Winkler to the Seacoast Medical Center. (R. p. 2068). At that time, Winkler was very angry with Patrolman Cauble, and it took a couple of people to get Winkler out of the vehicle. (R. p. 2068). Winkler spat on Cauble. (R. p. 2068). That led to a simple assault and battery conviction against Winkler. (R. pp. 2069, 3468-69).

Kidnapping and Criminal Sexual Conduct Against Victim Rebekah Winkler

On October 10, 2005, Winkler kidnapped and sexually assaulted Rebekah Grainger Winkler, the murder victim. Allen Large, a detective with the Horry County Police Department, testified that on that evening, he received a page from dispatch regarding a missing person reference to a possible domestic incident. (R. p. 2077). The missing person was Rebekah Winkler. (R. p. 2077). Winkler's vehicle was first spotted behind the Seacoast Medical Center. (R. p. 2078). Another officer had moved the vehicle out of the roadway. (R. p. 2082).

A floor mat, a shoe, and a cigarette butt were recovered from the vicinity of where the Winkler's vehicle was located. (R. p. 2082). The car was towed. (R. p. 2085). Large testified that while the scene where Winkler's car was being processed, dispatch reported that the victim's car was located. Large left the scene where Winkler's car was found and went to scene where the victim's car was found. (R. p. 2086). Her vehicle was found off the road in some trees. (R. p. 2086). The Horry County Police Department activated its dog team to try to locate two missing persons at that point. (R. p. 2091). The victim was later found next to Stephen's Crossroads, which was where the magistrate's complex and library was located. (R. p. 2092).

Phyllis Richardson, who worked for the Horry County Probate Court on October 11, 2005, testified she was working at the satellite office located over by Stephen's Crossroads. (R. p. 2097). She testified that when she arrived at the parking lot that morning around 7:30am, she saw a woman walking in the lot being followed by a man. Richardson noted that the woman had on a long shirt, but the woman was not wearing any shoes. (R. pp. 2099-2100). According to Richardson, the woman looked distraught and was acting confused. (R. p. 2100). Richardson did not recognize the woman. She also noted that the man was about thirty feet behind the woman, and he was wearing a pair of shorts but not shirt. (R. p. 2101). Richardson noted that his hands were in the air as if he was raging and irritated; however, she could not hear what he was saying. (R. pp. 2101-02). Richardson later entered the office where she worked. She testified that shortly thereafter, she saw the woman from the parking lot in the

room where the probate court performed ceremonies. (R. p. 2104). Richardson noted that the woman was on the phone, but she could not hear what she was saying on the phone. (R. p. 2104). Richardson testified that she did not recognize the woman that was making the call, but described the woman's hair as being very matted, tangled looking, with some bald spots. (R. p. 2109). Richardson also indicated that the building became very active with police and emergency medical personnel later that morning. (R. p. 2109). Richardson later learned it was the victim, Rebekah Winkler, who was making the call in the other room. (R. p. 2110).

Curtis L. Thompson of the Horry County Police Department testified that he was the first officer to arrive at the building. (R. p. 2117). He found a white female who was very afraid in the building. (R. p. 2118). Thompson indicated that it appeared the victim had been in some sort of altercation, and she confirmed that she was Rebekah Winkler. (R. p. 2118). Thompson further testified that the left side of her hear looked like it had been ripped out, she had black eyes, abrasions, and other scratches. (R. pp. 2118-19). After EMS transported the victim to the Seacoast Medical Center, Thompson assisted in the search for Winkler. He and Officer Hemingway located Winkler at a third person's residence. (R. pp. 2124-25). They arrested Winkler, and Hemingway transported him to the M.L. Brown Building. (R. pp. 2125-26, 2130).

Andrew Cooper testified that he processed both the Isuzu Rodeo and Land Rover that were connected to the kidnapping investigation. No evidence was collected from the Isuzu Rodeo. (R. p. 2137). Cooper testified that the Land

Rover, which was registered to Rebekah Winkler, appeared to have been wrecked. (R. p. 2140). Cooper took pictures of the vehicle as he processed it. He testified there was blood on the driver side seat, and that the floor mat was missing from the driver's side of the car. (R. p. 2141). He also noted there was some blood around both seats and around the center console. (R. p. 2141). On the passenger's side, there were several blood smears and spots on the interior panel of the door. (R. p. 2142). Cooper collected blood from the door handle of the interior driver's side door; swabs on the outside edge of the driver's side front seat, swabs from the exterior of the steering wheel; blood spots in the dash; blood spots from the back support; spots in the area between the center console and the edge of the driver's front seat; and blood on the passenger side front seat. (R. pp. 2144-47). Cooper also took pictures of Winkler's face, arms, and legs. (R. p. 2150). Cooper transported the blood swabs and the victim's rape kit to SLED. (R. p. 2151).

Haley Grainger, the victim's younger daughter, testified that she first met Winkler at the house where the Rebekah, Haley's sister, and Haley's brother were staying. (R. p. 2162). She testified that during the early stages of Winkler's and the victim's relationship, Winkler seemed to be fine. (R. p. 2164). Haley testified that after Winkler and Rebekah had been married for a couple of years, Rebekah and Jonathan G. moved out of Winkler's home and moved into Haley's condo. (R. pp. 2165-66). The victim slept in the bedroom on the first floor, and Jonathan slept on the couch. (R. p. 2166). When Haley was not there, Jonathan slept in the bedroom upstairs. (R. pp. 2166-67). On October 10, 2005, she and

her sister became concerned about their mother's whereabouts. (R. p. 2167). Haley's sister had called. (R. p. 2167). That led Haley and her boyfriend to start looking for Rebekah. (R. p. 2168). Initially, they went to Winkler's home. (R. p. 2168). When they found his car was not there, they saw a Land Rover in the woods down the road. (R. p. 2168). It was later identified as her mother's Land Rover. (R. p. 2169).

Haley saw her mother the next morning at the Seacoast Medical Center. (R. p. 2170). Haley testified that Rebekah was in pretty bad shape: her face was really messed up, her hair was all tangled and looked horrible, and she had scratches all over. (R. p. 2170). At first, Rebekah did not want her children to see her, but they talked her into it. (R. p. 2170). Haley testified that after the incident, her mother was very depressed and could not sleep. (R. p. 2172). She also observed that Rebekah was always scared, and she did not take any steps to change her outlook. Haley did note that Rebekah took steps to protect herself. Rebekah borrowed a gun from Haley's father (Rebekah's ex-husband Roger), and Rebekah received a can of mace from her mother (Haley's grandmother). (R. p. 2172).

Haley also identified a toe ring, an earring, a hair clip, shorts, and a shirt with a wad of hair in it that all belonged to Rebekah. (R. p. 2171). Jeff Gause, a police officer with the Horry County Police Department, testified that he recovered the shorts, a shirt with a wad of hair, a hair clip, and some underwear fro ma partly wooded area of the county that he had been informed was part of the area in which the assault took place. (R. pp. 2176-80). Neil Livingston, a

detective with the Horry County Police Department, testified that he recovered an earring and another piece of jewelry from the inside of a commercial building that was under construction in the Little River section of Horry County. (R. pp. 2184-91).

Lisa Gore, a staff nurse at Seacoast Medical Center, treated the victim when she was brought in on October 11, 2005. (R. pp. 2195-96). Gore testified that the victim had injuries to the left eye, some swelling to the jaw area, bruising around the neck, dried blood about the fact, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple bruises and contusions, and a bite mark to the face. (R. pp. 2205-06). Gore also testified that the victim had a large amount of hair removed from her head, along with some matting and disarrangement of her hair with leaves and debris mixed in. (R. p. 2206). Gore also indicated there were bruises to Rebekah's arms and wrists, the tops of her hands, her neck area, scrapes on her torso, belly, and back, and contusions and scrapes to her lower legs, thighs, and feet. (R. pp. 2207-10). A sexual assault evidence kit was collected from Rebekah. (R. pp. 2213-15).

Ann Pitts responded to the Stephen's Crossroads Complex. (R. p. 2220). She later responded to the Seacoast Medical Center to interview the victim. (R. p. 2221). Pitts testified that the victim seemed to be in shock, and was very afraid. (R. p. 2222). Rebekah did tell Pitts what happened and where it happened. (R. p. 2222). The victim also described the clothes she was wearing. (See R. p. 2226). While those clothes were not recovered when Pitts, the victim, and Detective Livingston initially went to the area, they were later recovered

when members from the crime scene unit and dog team searched the area. (R. p. 2226). Pitts testified that Winkler was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping on October 11, 2005. (R. p. 2227). He was found at a friend's house. (R. p. 2227). When he was arrested, he was wearing blue jean shorts, a t-shirt with some type of printing on it, and some brown shoes. (R. p. 2228). Pitts was also present at Winkler's first bond hearing. (R. p. 2230). Bond was initially denied in his case. (R. p. 2231). At a second bond hearing, Winkler's bond was set at $150,000, and he was required to wear an electronic monitor while out on bond. (R. pp. 2231-33). Pitts also testified that at Winkler's third bond hearing, his bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment. (R. pp. 2233-34). According to the bond, the monitor was to be off from 4pm to 6pm.

John Ortuno, a DNA analyst for SLED, testified that the DNA from the semen found in the rectal and vaginal swabs from the sexual assault evidence collection kit matched Winkler's DNA. (R. pp. 2244-49). He also testified that the blood found in the Land Rover belonged to the victim, but there were mixtures with a secondary profile that could not be reliably interpreted. (R. pp. 2249-51).

Tammy Cox was one of Rebekah's friends. (R. pp. 2262-63). They first met when Rebekah trained Cox in medical transcription. (R. pp. 2263-64). Cox testified that Rebekah was shy until you got to know her. (R. p. 2264). She also described Rebekah as a very sweet and caring person who worked all the time. (R. p. 2265). Cox indicated that Rebekah did not like having her picture taken.

(R. p. 2266). Rebekah helped Cox with her work and with her illness during Cox's second pregnancy. (R. pp. 2266-67). Cox testified that Rebekah was married to Roger Grainger before she married Winkler. (R. pp. 2268-69). They split in 2001. (R. p. 2269). When Cox learned of Rebekah's relationship with Winkler, she never saw them out much. (R. p. 2269). After Rebekah married Winkler, Cox hardly ever saw her. (R. p. 2270). Cox testified that they only talked on the phone during the day when Winkler was at work. (R. pp. 2269-70). Cox became aware that there were problems in Rebekah and Winkler's relationship in August or September. (R. p. 2270). She learned of the assault in October 2005. (R. p. 2271). Cox spent time with Rebekah between October 2005 and Rebekah's murder in March 2006. Cox noticed changes in Rebekah's personality. (R. p. 2271). Rebekah could not work any more and did not want to do anything any more. (R. p. 2272). Further, Rebekah did not go out, she lived in fear every day, and she could not sleep at night. (R. p. 2272). Cox stated that she was a totally different person, and that she was never the same person. (R. pp. 2272-73).

Jill Shelley, Rebekah's older daughter, was the last witness to testify for the State during the sentencing phase. Shelley testified that she did not like her mother's relationship with Winkler or Winkler when it started to get more serious. (R. p. 2287). Shelley testified that it was just a few months after they started dating that Winkler was asking Rebekah to move in with him. (R. p. 2288). Shelley indicated that Winkler was not very friendly, and when she visited his home, she felt unwelcome. (R. p. 2288). After Shelley had her first child,

Rebekah's first grandchild, Winkler did not really want them around his house. (R. p. 2289). Winkler also would not let Rebekah leave her house to come see Shelley's family. Shelley testified that she did not know that they had trouble, but she knew something was not right because before Rebekah married Winkler, Rebekah would do things with the rest of the family that she no longer could after they were married. (R. p. 2290).

Shelley relayed to the court an incident that occurred in September 2005 when Shelley went to take her mother shopping. She could not get Rebekah on the phone, so she drove over to Winkler's house. (R. p. 2291). When she got there, she found Rebekah was beat up and her arms were covered in bruises. She also noted that the phone was continually ringing. (R. p. 2291). It was Winkler calling the house because Rebekah had made him leave. (R. p. 2291). Some time thereafter, Winkler returned to the house and started kicking the side door. (R. p. 2292). Winkler was yelling and screaming until Rebekah let him into the house. (R. p. 2292). Shelley threatened to call the police. Winkler responded by warning Rebekah that she knew what would happen if they called the police. (R. p. 2292). Shelley testified that Rebekah moved out of Winkler's home as a result of this confrontation. (R. p. 2292).

Shelley also testified about the night of the kidnapping. (R. p. 2293). Shelley indicated she first became concerned when she found out from her brother that he was not picked up from a football game on October 10, 2005. (R. pp. 2293-94). Shelley called the police when she first heard of the problem. (R. p. 2294). She noted that her mother's Land Rover was found that night, but

there was no sign of either Rebekah or Winkler. (R. p. 2295). Shelley saw her mother the next morning at Seacoast hospital. (R. p. 2295). Shelley testified that her mother was very beat up and dirty. (R. p. 2295). Rebekah's eye was very swollen, and her hair was matted with sand spurs and twigs. (R. p. 2296). Rebekah was also nervous, and she wanted them to do something with Winkler to get him away from her. (R. p. 2296). Rebekah was very depressed. (R. p. 2296). Shelley testified that Rebekah lived in fear all the time and was scared. (R. p. 2296). Rebekah did not go anywhere or do anything. (R. p. 2297). She could no longer work, and she was never the same. (R. pp. 2297-98). The final item of evidence presented by the State was a letter sent by Winkler to Jill Shelley while he was incarcerated. In the letter, Winkler asserted that had Shelley not gotten involved in he and Rebekah's business, Rebekah would still be alive. (R. p. 2300). He complained about Shelley's calling her mother to talk about Shelley's marriage, and he claimed that no one else in the family liked Shelley. (R. pp. 2300-01). Winkler claimed that the victim slept with everyone, and he alleged that he had pornographic movies of him and the victim having sex. (R. pp. 2301-02). He also threatened to post the video online. See (R. p. 2303). Winkler claimed that the victim saw him during the separation after the initial arrest, stated that Rebekah lied to police about the first set of charges, and blamed Shelley for her mother's death. (R. pp. 2302-03).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TAPE OF JONATHAN G.'S INTERVIEW WITH POLICE ON THE EVENING OF THE MURDER; THE TAPE WAS ADMISSBLE UNDER RULE 801(D)(1)(B)

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007).

Relevant Facts

Jonathan G. testified that he saw Appellant shoot and kill his mother on March 6, 2006. Jonathan testified that he was talking on the house phone with his friend Lizzie (Margaret Elizabeth C.). (R. pp. 1428-29). At the time, he was sitting in a bar stool at the bar near the kitchen in the apartment. (R. p. 1428). His mother was sitting on the couch in the living area, and she was watching television. (R. p. 1435). At around 5:30 pm, he heard a loud bam at the door. (R. pp. 1427-28). He testified that it did not sound like it was on the door. It was

just a loud boom. (R. pp. 1427-28). He heard a second bam five to ten seconds later. (R. p. 1430). After the second bam, the door to the apartment flew open. (R. p. 1430). At that point, he saw Appellant. (R. p. 1431). Jonathan described Appellant as wearing a sweater, and noted that he was yelling. (R. p. 1431). He testified that Appellant was stating, "I'm back and you thought I was going to prison, something like that." He was yelling very loud. (R. p. 1431). Jonathan later testified that he did not initially see a gun on Appellant when he entered the apartment. (R. p. 1437). He later saw Appellant pull the gun he used from his waistband after he walked into the apartment and knocked Jonathan onto the ground. (R. pp. 1437-38).

According to Jonathan, Appellant approached him first once he entered the apartment. (R. p. 1432). When Appellant reached Jonathan, Appellant punched Jonathan.[3] (R. p. 1432). Jonathan testified that he fell off the bar stool, and the telephone "smashed and broke." (R. pp. 1433-34). Jonathan testified that as he hit the ground, Appellant walked over towards Jonathan's mother. (R. p. 1435). "He just walked up to her and shot her." (R. p. 1436, l 17). Jonathan further testified that Appellant was "[n]ot very far away. Like point blank." (R. p. 1436, l 19). Appellant fired just one shot. (R. p. 1436). The victim, Rebekah Winkler, fell to the ground face down. (R. p. 1436).

After shooting the victim, Appellant walked back over to Jonathan, who at the time was still lying on the floor. (R. p. 1437). Jonathan testified that he told Appellant not to do anything stupid because Appellant was pointing the gun at

[3] State's Exhibits 2 and 3, photographs of Jonathan from the night of the incident, were entered into evidence at trial. (R. pp. 1432-33). Jonathan testified it showed a red mark under his right eye that was the result of being punched by Appellant. (See R. pp. 1432-33).

him. (R. p. 1437). Appellant stood over Jonathan for five to ten seconds, pointing the gun at his face. (R. p. 1438). Jonathan testified that Appellant did not say anything at this point. (R. p. 1438). After Appellant paced for five to ten seconds, he left. (R. p. 1439-40).

Jonathan testified that after Appellant left, he went and got his cell phone, closed the door to the apartment, and made sure Appellant was not coming back. (R. p. 1440). He then went to the balcony in the apartment and called 911. (R. p. 1440). Jonathan was sitting on the balcony when the first police officer arrived on the scene. (R. p. 1441). Jonathan went downstairs to let the officer into the apartment. (R. p. 1441). According to Jonathan, the officer asked if there were any weapons in the house. (R. p. 1442). Jonathan informed the officer that his mother kept a gun underneath the pillow in her room. (R. pp. 1442-3). Jonathan testified that the officer took him downstairs and put him in the back of his patrol car. (R. p. 1443). He noted that he did call his sister Jill, his friend Lizzie, and he thought he called his other sister, Haley. (R. p. 1443). Sometime later that evening, Jonathan was taken to the police station. (R. p. 1443).

During cross-examination, Jonathan testified that his father was Roger Grainger. (R. p. 1445). Roger was the victim's ex-husband, and the victim had been seeing him during her separation from Appellant. (R. pp. 1446-47). Jonathan testified that Grainger was supposed to come over on the night of the shooting. (R. p. 1446). Jonathan admitted that he forgot he called Roger after the shooting. (R. p. 1446). Defense counsel then asked Jonathan if he remembered telling the first officer who arrived on the scene that it was his dad

who shot his mother. (R. p. 1447). Jonathan denied he told the first officer that, and stated he told the officer it was his stepdad. (R. p. 1447). Jonathan also testified that Roger was supposed to arrive at the apartment at around 6pm. (R. p. 1447). He noted that he told the officer it was his stepdad. (R. p. 1447). He later again affirmed that he did not say his dad was the shooter. (R. p. 1459).

Jonathan also testified that he only called Roger dad. (R. p. 1462). He noted that Roger would have been off from work at the time of the shooting. (R. p. 1462). Jonathan also testified that he did not believe that he spoke with Roger either the day before the shooting, or at any point before he called 911. (R. pp. 1462-63). He also did not call his dad before the police arrived. (R. p. 1463). Jonathan did not recall whether he answered the 911 dispatcher's question about if he was alone or not. (R. pp. 1465-66). He did deny that Roger was at the apartment when the shooting occurred. (R. p. 1466).

Officer Thomas Knoch of the Horry County Police Department also testified at trial. Officer Knoch was the first to arrive on the scene after Jonathan called 911. He noted that personal safety and the safety of anyone at the scene was a major concern. (R. p. 1527). He also noted that he wanted to secure the scene for later investigation. When he opened the door to the apartment, he yelled up to the top of the steps where a young man, Jonathan, was sitting. (R. p. 1527). He had the young man expose his hands around the corner. (R. p. 1527). They had a brief conversation with the officer being at the bottom of the stairs, and the young man at the top of the stairs. (R. p. 1527). Officer Knoch testified that the young man complied with every thing that Knoch asked him to

do. (R. p. 1529). Officer Knoch testified that as he was heading up the steps to the apartment, the young man [Jonathan] stated, "[h]e said he's gone, and I asked him. I said who. . . . He said my dad . . . " (R. p. 1529).

Officer Knoch also testified that when he first entered the apartment, he observed wood splinters on the floor directly adjacent to the door and the jamb. (R. p. 1530). He also observed a female victim laying face down with her head turned so that the left side of her face was exposed upwards. (R. p. 1530). Officer Knoch noted that she had a wound of some sort to her face, and there was blood on the wound and on the floor. (R. p. 1531). He also indicated that there was a chance that Jonathan said it was his stepdad, and not his dad, who shot the victim. (R. p. 1531). "Yes, it very well could have been. There could have been several other things that may have been said that I just don't recall due to the situation being as tense as it was at the time, and I was the only officer of the scene." (R. p. 1531, ll 11-14). Officer Knoch testified that he checked the victim for signs of life, but he did not detect either a pulse or breathing. (R. p. 1531). During cross-examination, Knoch testified that in his report, he wrote "he said - - that I can recall - - he is gone. When I asked him who, he said my dad." (R. p. 1542, ll 4-6). He further testified that he would not have written that if Jonathan had not told him that. (R. p. 1542).

Detective Ann Pitts, who was with the Horry County Police Department in March 2006, was one of the primary investigators in the victim's murder. (R. p. 1707). Pitts testified that she spoke with Jonathan on the evening of the shooting, March 6, 2006. (R. p. 1711). The conversation was audio recorded.

(R. p. 1711). She identified State's Exhibit 51 as the audiotape of her conversation with Jonathan. (R. pp. 1711-12). She also noted that it was authentic, and that it accurately reflected the statement obtained from Jonathan. (R. p. 1712). Detective Pitts was also provided with a transcript of the audiotape. She indicated that the transcript was accurate. (R. p. 1712).

The State submitted State's 51 to be entered into evidence. (R. p. 1713). The defense objected. (R. p. 1713). Initially, the court asked defense counsel how he addresses the 801(d)(1)(B) issue. Then the court overruled the objection under Rule 801(d)(1)(B), SCRE. (R. p. 1713).

The trial court later allowed for more discussion on the admissibility of the statement in a bench conference.

> The Court: Go ahead and say why you want me to state why I shouldn't let you put that in.
>
> Mr. Humphries: Because there's two - - attacking the credibility, specifically the allegation of recent fabrication. These are prior consistent statements.
>
> The Court: Is this about the dad did it? This about the dad, stepdad thing?
>
> Mr. Humphries: Right. Exactly.
>
> The Court: And what would you like to say, Mr. Wilson?
>
> Mr. Wilson: Of course I said I object when he testified. He, he testified that - - he said his story was that - - what he said to me today was the first time that he said it. That's what he said. I didn't make it up. He said it.
>
> The Court: Said what?
>
> Mr. Wilson: That, that what he said on the witness stand was the first time he said that today. . . .
>
> Mr. Humphries: I have no idea what he's talking about.

The Court: I don't either.
Mr. Wilson: When Jonathan testified on the witness stand, I asked him about what he, where he was and what he saw. And he testified to me that he told the solicitor he actually saw the shooting.

The Court: Oh, no, no, I'm not sure the statement's about that, but if it is --

Mr. Wilson: It is.

Mr. Humphries: It's particularly about his saying the stepdad, dad. This is a prior consistent statement which supports his testimony.

The Court: Anyway, I just want to get some stuff on the record. 801(d)(1)(B) is what you are seeking?

Mr. Humphries: Yes, Your Honor.

The Court: In evidence.

The Court: In making my ruling, by the way, of 801(d)(1)(B), I looked at the first sentence and thought that he was here. I assume you'd have him ready if anyone wishes to call him?

Mr. Humphries: Yes sir. No question. He's here.

(R. pp. 1715-16, 1717).

A. This issue is not preserved for appellate review; counsel's objection under 801(d)(1)(B) was that the presentation of statement was not allowable under 801(d)(1)(B) because it discussed whether Jonathan actually saw Appellant pull the trigger, not whether he told the officer it was his dad who shot the victim.

Appellant's claim in this argument is not preserved for appellate review. Appellant argues that the prior statement was inadmissible because there was never any allegation that Jonathan recently fabricated testimony in regards to whether he told the first officer on the scene that it was his dad, not his stepdad, who shot and killed the victim. See Appellant's Brief, pg. 13-15. When asked why he objected, counsel stated that he was challenging the admission of the statement under 801(d)(1)(B) because Jonathan stated for the first time on the

stand that he actually saw the shooting. (R. pp. 1715-16). He never contested the statement was not admissible under 801(d)(1)(B) because of the issue of whether Jonathan told the officer it was his dad, and not his stepdad, who killed his mother. Since this argument was not raised to the trial court, it is not preserved for appellate review. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

B. The statement was not hearsay under 801(d)(1)(B)

The trial court did not abuse its discretion in admitting the statement into evidence because it was not hearsay under Rule 801(d)(1)(B).

> Pursuant to Rule 801(d)(1)(B), SCRE, a statement is not hearsay if
>
> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose....
>
> Thus, in order for a prior consistent statement to be admissible pursuant to this rule, the following elements must be present: (1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Saltz, 346 S.C. 114, 121-122, 551 S.E.2d 240, 244 (2001).

Jonathan's statement to Detective Pitts qualified as a prior consistent statement admissible under Rule 801(d)(1)(B). First, there is no dispute that Jonathan testified at trial, and was subject to cross-examination. Second, Winkler implicitly, if not explicitly, accused Jonathan of recently fabricating the statement. Clearly, Appellant was accusing Jonathan of lying when he testified that he told Officer Knoch it was his stepdad who shot his mother, not his dad. Appellant's questioning indicates that he was asserting that Jonathan was denying making the statement to the officer because he loved his father Roger. Through questioning, counsel also pointed out that Roger was expected at the victim's apartment that evening, Roger was not at work when the shooting occurred, and Jonathan did not answer the 911 dispatcher's question about whether he was alone. (R. pp. 1447, 1454, 1462, 1466). Further, the alleged fabrication was necessarily recent. There was no testimony or probative evidence introduced at trial that indicated that Jonathan was aware of what was in Officer Knoch's report before defense counsel asked him about it.

Third, Jonathan's statement to Detective Pitts was clearly consistent with his testimony at trial. In the statement to Detective Pitts, Jonathan identified Appellant as the one who broke into the apartment and shot his mother. (See State's Exhibit 51, R. p. 3483). This was consistent with Jonathan's testimony at trial that Appellant broke into the apartment and shot Jonathan's mother. (R. pp. 1428-36). Fourth, the statement to Detective Pitts clearly occurred before the alleged recent fabrication. The statement to Detective Pitts was given on the

night of the shooting, March 6, 2006. The alleged fabrication occurred at trial on January 31, 2008.

The circumstances surrounding the admission of Jonathan's statement to police is clearly distinguishable from the improper admission of prior consistent statements in both State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003), and State v. Saltz, supra. In Foster, this Court found the admission of prior consistent statements was improper because the cross examination of the witness had not asserted she fabricated some portion of her testimony, and thus only amounted to simple impeachment. 354 S.C. at 622, 582 S.E.2d at 430. This Court noted that the cross-examination consisted primarily of questions regarding the witness's prior inconsistent statements. Id. at 619, 582 S.E.2d at 428. Similarly, in Saltz, this Court found that the admission of the prior consistent statement of Sydney Johnston was improper because the cross examination of Johnston only questioned the accuracy of the witness's memory, but did not charge her with recent fabrication. Saltz, 346 S.C. at 124, 551 S.E.2d at 245-46. Such a finding cannot be made in this case because Winkler was clearly asserting that Jonathan was lying when he stated he told Officer Knoch it was his stepdad who shot his mother. Winkler's counsel attempted to establish that Jonathan's father, Roger, was the one who actually shot Rebekah. Counsel asked Jonathan about whether his father was going to be at the condo that evening, whether his father was working at the time of the shooting, and confirmed that Jonathan loved his father. Counsel also pointed out that Jonathan did not respond to the 911 dispatcher's question regarding whether he was alone at the scene. Clearly,

counsel was asserting that Jonathan was lying when he stated he told Officer Knoch it was his stepfather who did the shooting. Since defense counsel was clearly intimating that Jonathan was fabricating his story that he told Officer Knoch that it was his stepdad who shot his mother, and that fabrication would have been recent, the trial court properly admitted Jonathan's interview with Detective Pitts. As a result, this claim for appellate relief should be dismissed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE JURY TO VIEW COPIES OF THE TRANSCRIPT OF THE 911 TAPE WHILE LISTENING TO THE TAPE.

Relevant facts

The first witness to testify in Appellant's trial was Sharon Renee Hardwick, of the deputy director of Horry County's 911 system. (R. pp. 1406-07). She maintained the 911 recordings for the county. (R. pp. 1407). She testified that she had the tape from Jonathan's 911 call from the night of the murder. (R. p. 1407). A transcript of the 911 tape was prepared for trial. Hardwick testified that she reviewed the transcript, and it accurately reflected the conversation that was contained on the 911 tape between Jonathan and the 911 operator. (R. p. 1408). The 911 tape was entered into evidence as State's Exhibit 1, and the transcript was tendered as State's Exhibit 35, but was entered as Court's Exhibit 18. Both were entered without objection. (R. pp. 1408-09).

During jury deliberations, the jury sent the judge a question asking if they could read the 911-call transcript. (R. p. 1894). The court noted that it told the jurors the transcripts would not be going back into the jury room. (R. p. 1894). Defense counsel then noted that he thought there might be some inaccuracies in the transcript, and that he would be concerned about sending the transcript back to the jury because of that concern. (R. p. 1895). The court noted that the transcript and tape were introduced without objection during the trial. (R. p. 1895). Defense counsel countered that he did not want the jury to have the transcript because of his concerns about the inaccuracies. (R. p. 1895). The

court stated that he would not be sending the transcript back to the jury room, but asked counsel for both sides if they would have any issues with the court utilizing the same procedure that was used during trial for review of the audio tape of the 911 call. (R. p. 1895). In that procedure, the court would allow the jury to review the transcript while listening to the 911 tape in the courtroom. (R. p. 1895).

Appellant's counsel argued that procedure was not appropriate. "I know they did during the trial without objection, but this is - - the trial is over now. The document is not in evidence and the jury is already in the process of deliberating, and I don't understand - - they're not supposed to get the document again." (R. pp. 1895-96). Appellant went on to note that the document was not in evidence, and the trial was over. (R. p. 1896). The trial court responded that it was concerned that the jury would think the parties were hiding something because it was not allowed to have the transcripts, and the court did not want it to seem as though it was adding too much emphasis on something. (R. p. 1896). Winkler urged the court to inform the jury that the transcript was not in evidence, and allow the jury to play the audiotape until they could discern their concern.

The State noted it was concerned with not providing the jury with the transcript because the quality of the 911 audiotape was not great. (R. p. 1897). The State noted that the reason they made a transcript was to make sure the words were accurate. (R. p. 1897). The State also agreed with the court's assessment that the jury would be curious as to why they could not review the transcript, and it would probably lead to more confusion than help to present it to them in a way different than it was presented at trial. (R. p. 1897). At that point,

the Court noted it was concerned the jury room was not wired like the courtroom, and he could not see how the jurors could all hear the tape because there were no big speakers in the jury room. (R. p. 1898).

Defense counsel argued that the document was not in evidence, was not part of trial record, was only offered as an aid to the tape recording, and was never put into evidence. (R. p. 1899). Defense counsel further stated that the jury was only entitled to review evidence. (R. p. 1899). The trial court decided that allowing the jury to review the transcript while listening to the 911 tape in the courtroom in the presence of Winkler and counsel for both sides would be no different than having the court reporter transcribe what was played on the tape and having her read it aloud to the jury. (R. p. 1900). "That tape and them reading it is as it was put in, them reading it, the words there that were put before them and you note your objection -- I'm going to permit them to do it that way." (R. p. 1900). The 911 tape was replayed before the jury in the courtroom. (R. p. 1901). The jury was allowed to review the transcript while the tape played. (R. p. 1901). However, the jury was not allowed to take the transcripts back to the jury room. (R. p. 1901).

A. To the extent Appellant is challenging the accuracy of the transcript, that issue is not preserved for appellate review because Appellant failed to raise the issue in the first instance.

As reflected in the record and noted by the trial court during the discussion on whether the jury could receive a copy of the transcript during deliberations, Appellant did not challenge the accuracy of the 911 transcript when it was used during trial. Since there was no objection made when the transcript was first

used, Appellant was precluded from asserting the transcript was inaccurate later in the proceeding. Appellant is further precluded from making the assertion in this appeal. State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991)("A defendant must object at his first opportunity to preserve an issue for appellate review.").

Furthermore, the record does not support Winkler's assertion that the transcript was inaccurate. In his brief, Winkler asserts that the transcript is incorrect on page 5 in its recitation of a series of statements made by the operator. (See State's Exhibit 1, R. pp. 3473-79). A review of the transcript while listening to the tape clearly shows that that the text in the transcript is accurate. Thus, to the extent Winkler asserts the trial court improperly allowed the jury to review the 911 tape's transcript during jury deliberations because it was inaccurate, his claims should be dismissed because the record does not support it.

B. The trial court did not abuse its discretion in allowing the jury to review the tape and transcript in the exact same fashion as they did during the testimony presented at trial.

The trial court, in its discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations. State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request. Id. The court is not required to submit evidence to the jury for review beyond that specifically requested but may, in its discretion, have the jury review other evidence relating to the same factual issue so as not to give undue

prominence to the evidence requested. Id. In Plyler, this Court found there was no abuse of discretion by the trial court when it allowed the jury to hear the tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. Id. Only the direct examination of the testimony was played for the jury in Plyler. Id.

The trial court did not abuse its discretion in its handling of the 911 tape transcript. The jury was not allowed to take the transcript back to the jury room for deliberations, and it was only allowed to view the transcript while listening to the 911 tape in the presence of the judge, defendant, and counsel for both sides. This case is clearly distinguishable from State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982). In Gulledge, the trial court allowed the jury to retain during deliberations the transcript of the tape-recorded communication between two highway patrolmen. Id. at 371, 287 S.E.2d at 490. Here, the jury was not allowed to take the transcript back to the jury room. They were only allowed to view the transcript in the judge's presence. The jury was not presented with any facts that were not already in evidence. The transcript was of the 911 tape that was played at trial and during the jury's deliberations. The underlying 911 tape was properly in evidence, unchallenged by Winkler. Clearly, the trial court exercised reasonable discretion in the handling of this issue at trial. Winkler has failed to establish that the trial court abused its discretion in handling the jury's request. As a result, this claim for relief should be dismissed, and Winkler's convictions should be affirmed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO GO PRO SE DURING THE SENTENCING PHASE OF HIS TRIAL.

Relevant Facts

Pre-Trial Discussions Regarding Counsel

At Appellant's first appearance, Ms. Orrie West, Esquire, a public defender for Horry County, was appointed to represent him. (R. p. 2984). One of Appellant's trial counsel, Mr. Thomas Rathbun, Esquire, also of the Horry County's Public Defender's Office, was assigned to help assist with the case. (R. p. 2985). At the appointment of counsel hearing on June 15, 2006, Ralph Wilson, Esquire, was appointed to serve as first chair in Appellant's defense. (R. pp. 2993-94). At the hearing, Appellant indicated that he found the Public Defender's Office to be very inadequate. (R. p. 2991). He complained that Ms. West called him by the wrong first name. (R. p. 2991). Appellant also indicated that he had concerns about Mr. Rathbun because Rathbun told him he had not tried a murder case before. (R. p. 2992). When asked if he had any objections to Rathbun being appointed as second chair, Appellant indicated that he had an objection. (R. p. 2999). He indicated that he and Rathbun had argued more than anything. (R. p. 2999).

At the July 3, 2007 hearing, Appellant's trial counsel put on the record that Appellant was dissatisfied with Mr. Rathbun as counsel because of disagreements they had. (R. p. 3260). Wilson noted that a couple of weeks before the hearing, Rathbun went to see Appellant, and they had a conversation.

(R. p. 3260). Rathbun and Wilson had gone to see Appellant the Friday before, but they were not able to see Appellant because he had been taken to Charleston to meet with a psychiatrist. (R. p. 3260). Rathbun went to see Appellant the following Monday. (R. p. 3260). On Tuesday, Appellant was upset and irate. (R. p. 3260). Appellant told Wilson that Rathbun had said some things. (R. p. 3261). The Court indicated that Appellant needed to know that unless something regarding Rathbun reached the point of incompetence or something that would lead to a preliminary determination of ineffective assistance, it was improbable that the court would remove Rathbun unless it was something that would seriously prejudice Appellant's rights to receive a fair trial. (R. p. 3262). Wilson indicated that even when there have been disagreements between Rathbun and Appellant, Wilson has been able to sit down with Appellant and decide on the correct course of action with Appellant's consent. (R. p. 3262). Appellant was heard in this matter. (R. pp. 3263-64). He informed the court that Rathbun was telling him to take a plea, plead guilty. (R. p. 3264). He told the court that when he sought counsel about the issue, Rathbun told him to plead guilty. (R. p. 3264). Appellant interpreted that to mean that Rathbun thought he was guilty. (R. p. 3264). Rathbun responded that he believed Appellant heard what he wanted to hear and didn't hear what counsel was saying. (R. p. 3265). Rathbun affirmed to the court that he would do his utmost to represent Appellant in a trial. (R. p. 3265).

During an ex parte hearing held before jury selection. Counsel indicated that during the telephonic conference on the Thursday before this hearing,

Appellant started giving details about an incident that occurred between Appellant and Wilson. The Court allowed Appellant the opportunity to get the information on the record. Appellant told the court that he wanted Wilson to go forward as counsel. (R. p. 32). However, he no longer wanted Rathbun to continue as counsel. He noted that eight months prior, he had requested Rathbun be relieved, and he was turned down. (R. p. 32). He informed the court that Rathbun got in his face, put his finger in Appellant's face, and touched his face. (R. p. 33). He then told the court that he gave Wilson his sister's pictures, and told Wilson that Wilson was calling her a liar. (R. p. 33). The court noted that it did not think that was enough to warrant counsel be relieved. (R. p. 33). Appellant asked, "how can I get a fair trial with guys that are against me? I mean, they've actually - -" (R. p. 34). Appellant informed the court that he did not believe they would do their best to get him acquitted. (R. p. 34).

In response, Wilson informed the court that he had done everything he knew to do to represent Appellant in the best fashion he knew. (R. p. 34). He also indicated that Appellant is antagonistic, and has been so since the first day. (R. p. 34). Wilson further noted that they had made every effort to protect every right, hired every expert they could think to hire, and have tried to talk with every witness they could possibly find. (R. p. 34). He informed the court they were prepared for trial. (R. p. 34). The fact that Appellant's personality got on Wilson's last nerve would not affect him and his ability to represent him in the fashion he was entitled to. (R. pp. 34-5). Rathbun also stated he was ready for trial. (R. p. 35). Appellant complained that his attorneys did not find a witness.

(R. pp. 35-6). Wilson told the court that they had made an exhaustive effort to find the witness requested, and according to the witness' family, they did not know where he was. Appellant indicated he thought the witness was still in Horry County. Appellant indicated that his question regarding that witness was answered. He then noted that he was not sure if counsel had done their best efforts to find what he needed because he was in lockup. (R. p. 37). He also complained that no one has gone out to the murder scene and measured couches and counters. (R. p. 39). Wilson noted that they could not because the unit belonged to the daughter of the victim, not the defendant. (R. p. 39).

Appellant continually complained that counsel was advising his family that Appellant was likely going to be convicted. (R. pp. 41-2). The Court responded that it could not chastise counsel for giving him an honest opinion. (R. p. 42).

> Any event, we're going to proceed then. There's no request for you to represent yourself. You're requesting another attorney. Since that's the case, I will not grant your motion. Now, you always have that option to represent yourself, which would be very inadvisable at this stage, but we will continue on with the case.

(R. p. 42, ll 12-17).

Counsel later put on the record that it disagreed with Winkler's request to make a certain argument in the opening statement because counsel believed it would require Appellant testify in the guilt phase of trial. (R. pp. 1376-81).

Winkler Made the Request to Proceed Pro Se Before the Start of the Sentencing Phase

Before the start of the sentencing phase of trial, defense counsel asked the court to explain to Appellant the pitfalls of him participating in the cross examination of witnesses. (R. p. 1915). This led to a court inquiry into whether

Appellant was asking to proceed pro se. (R. pp. 1916-19). Counsel then indicated to the court that Appellant wanted to question each witness and advised the court that after some discussion with Appellant, he may want to go on his own. (R. p. 1921). The court informed Appellant that it was highly unadvisable to go pro se at this point in the proceeding, and further warned Appellant that he would be restrained by the same rules as anyone else as far as questions, and that he could not make any statements at all. (R. p. 1921).

The State's initial position on the matter at trial was that if Appellant wanted to represent himself, the only process was to let his lawyers go and allow him to do so. (R. p. 1922). The State recognized a defendant's right to do so. (R. p. 1922). It agreed with the court that it was a hazardous course, but there are Faretta warnings. (R. p. 1922). The Court again advised Appellant that it was very dangerous and not advisable to represent himself, and it was always better to have a professional do that. (R. p. 1922). He was also informed that he would not be allowed to question witnesses directly if he retained counsel. (R. p. 1922). The State also pointed out that if Appellant decided to represent himself for one witness, he was responsible for questioning all witnesses and all other aspects of the case. (R. p. 1923). The Court then allowed Appellant to think about the matter for a while. (R. pp. 1924-26).

After a recess, the trial court asked Winkler if he wanted to proceed pro se or if he wanted another lawyer. (R. p. 1926). Winkler responded that he wished to proceed in the manner that he requested, i.e., that he be allowed to question the witnesses. (R. p. 1926). He further indicated that he did not want his lawyers

dismissed, and he stated that he did not want to abandon them. (R. p. 1926). After some further discussion, defense counsel articulated that Winkler's request was to represent himself, but he wanted counsel to stay in the courtroom and give him advice, information, and assist him in doing those things. (R. p. 1928). The trial court then asked Winkler if he was requesting to represent himself, but wanted counsel around to consult. (R. p. 1928). Winkler stated that was what he was requesting. (R. p. 1928).

The trial court further inquired into Winkler's understanding of what he was doing. The court advised Winkler it was a very dangerous thing to do, and noted that he would be required to follow court procedure as lawyers would be required to do in the sense of following the rules of evidence. (R. p. 1928). Winkler was also told that he would have to follow the restraints on how and what questions are permitted and how they are permitted to be asked. (R. p. 1929). The court asked Winkler if he had any training in that regard, and Winkler said he had not. (R. p. 1929). The trial court also asked Winkler if he was not concerned about that, noting Winkler might not be able to bring out points that could be brought out by a skilled attorney. (R. p. 1929). Winkler was further asked if he had enough time to consider all of those concerns. (R. p. 1929). The court further noted that Winkler did not even know the ground rules, and he wanted to ensure that Winkler understood the danger of going forward pro se. (R. pp. 1929-30). Winkler indicated that he understood. (R. p. 1930).

The trial court then proceeded to ask Winkler if he understood that his guilt or innocence of the crimes had already been decided, and he could not go into

whether he committed the crime or not. (R. p. 1930). Winkler stated that he understood, and that he understood he could not bring up those issues. Winkler then requested again the court dismiss his attorneys but allow them to stay and consult. (R. p. 1930). The trial court noted that as it was reviewing Winkler's request, it was reviewing Faretta, State v. Brewer, and State v. Fuller. (R. p. 1931). He also asked Winkler about the medication issue, and whether Winkler is confident that the lack of getting his medication yesterday as often as he felt he needed was in any way affecting his decision. (R. p. 1931). Winkler stated that he was not concerned if they got the medication at the appropriate time. (R. p. 1931). The court then asked defense counsel if he had a concern about that. Wilson responded that the medication issue was a concern throughout the trial because Winkler was a different person on his medication and it is in his system appropriately. Counsel further noted that when Winkler is not on his proper dosage of medication, he gets extremely anxious and combative, and he can be argumentative. (R. p. 1931). Counsel could not say that missing one dose the day before the hearing was the difference. (R. pp. 1931-32).

The trial court asked Winkler if he had a chance to review all of the matters that counsel gathered for mitigation. (R. pp. 1932-33). Winkler stated that he had. (R. p. 1933). Winkler also informed the court that he had reviewed all of the evidence that counsel was going to introduce in the sentencing phase of the trial. (R. p. 1933). Winkler demonstrated that he understood what a leading question was, but he state that he had not reviewed the rules of evidence. (R. p. 1933). Winkler indicated that he understood exceptions to hearsay, but when

asked by the court, he did not know what an excited utterance was. (R. pp. 1933-34). In response to the court's question about whether Winkler was concerned that the state might get things in that he would not know how to object to them, Winkler stated that he felt that his view of the guilt phase was that the State won that trial, and he did not have his day in court. (R. p. 1934). Winkler further noted that most of the witnesses that were going to testify were people that he knew better than anyone else, including people who were supposedly friends who turned against him. (R. p. 1934). Winkler stated that he knew them better than anyone in the room. (R. p. 1934).

The trial court then noted that Brewer required Winkler to make his decision before trial, and Fuller indicated that it was within the discretion of the court. (R. p. 1935). The court then asked Winkler if he understood the dangers and pitfalls of proceeding pro se, and reminded him that it was dangerous to do this. (R. p. 1935). The court further asked if Winkler understood the danger, appreciated the danger of the decision he wished to make. (R. p. 1936). The court insisted it wanted to be sure this was not something that Winkler's family or attorneys were telling him to do. (R. p. 1936). Winkler stated that he had not talked to his family about his decision to represent himself. (R. p. 1936). Defense counsel interjected that both Winkler's family and counsel had advised him against representing himself. (R. p. 1936).

The State did request the court determine whether Winkler was capable of representing himself and that his request was a knowing and intelligent waiver of his right to counsel. (R. p. 1937). The State further requested the court engage

in a discussion of all of the factors under Faretta on the record. (R. p. 1937). The trial judge requested that both defense counsel and the solicitors put in writing specific requests for what they wish to be discussed with Winkler. (R. p. 1938). The trial judge noted that he would consider Winkler's request and would ask additional questions. He asked Winkler to consider his request very seriously because it was a serious decision. (R. pp. 1938-39).

The State then argued that under Fuller, the court would have discretion to court says Fuller indicated that it was in the discretion of the judge, but noted that Fuller cited Lawrence, which points out the right to proceed pro se was done prior to the swearing of the jury. (R. p. 1939). The State argued that they were well past that point, and further questioned whether discretion continued after the jury was sworn. (R. pp. 1939-40). The State did agree with the court's statement that if Winkler wanted to represent himself, the court had the discretion to decide, and that it would not be a violation of either Brewer or Faretta if in the court's discretion, Winkler's request was denied. (R. p. 1940). "I believe that if the court in their discretion declines his assertion to proceed pro se, that the court can find that that's appropriate and that it meets the ends of justice to the administration of justice." (R. p. 1940). Winkler's defense counsel disagreed with the court's assessment and argued that the sentencing proceeding was a separate and distinct proceeding from the guilt phase of the trial. (R. p. 1941). Counsel argued that Winkler had the right to defend himself if that is what he wants to do, provided the court believes and understands that Winkler is voluntarily making that decision. (R. p. 1942). In response, the solicitor pointed to State v. Reed, in

which the defendant was qualified and represented himself in guilt phase, convicted, and during the penalty phase moved to have counsel reappointed. (R. p. 1942). The trial court found that since he represented himself in guilt phase, he was no longer entitled to bring his lawyers back. (R. p. 1942). The solicitor argued that Reed was the inverse of what happened here, and asked court to consider Reed. Defense counsel argued there was a distinct difference between Winkler's request and the request in Reed because in Reed, counsel was not prepared to step in. (R. p. 1943). The Court acknowledged that before he can even get to the point of deciding whether Winkler has made a knowing and voluntary decision, until it resolved its concern about Winkler's medication and whether he fully understands what he's doing. (R. pp. 1944-45). The Court asked the attorneys to review Fuller and asked if they knew of any other capital case where the request to dismiss counsel came at the conclusion of the guilt phase. (R. p. 1945, see R. p. 1947).

> After a short recess, the trial court noted on the record that
>
> [t]he research that I've done convinces me that this is the continuation of a trial, and it is not a separate trial. It is a separate proceeding in a bifurcated trial. And pursuant my reviewing Fuller as well as State vs. Reed, by the way, where they make a point of saying that the defendant does not -- that the judge is not required to permit hybrid representation so that part is with counsel and part is without counsel.

(R. p. 1948). The court then noted that it was concerned that Winkler may not have had the opportunity to review the volumes of material collected during the mitigation investigation done by counsel. (R. pp. 1948-49). Further, the trial court was concerned that it would cause a delay of a few days to allow Winkler to review everything, and the court indicated it did not believe that would be

appropriate or fair to delay the proceedings to allow such review. (R. p. 1949). The trial court was also concerned about Winkler's mental health because of the concerns regarding Winkler's medication made by defense counsel. (R. pp. 1949-50). The court was concerned that if there was a problem with Winkler's medication, and the state was objecting to improper questions, it would cause more anxiety because Winkler would have to go to counsel to ask how to respond. (R. p. 1950). The trial court was concerned about Winkler's senses being dulled by the medication, and was afraid he would miss points that he would really need to make to help himself. (R. p. 1951).

Deborah Hipp, the nurse practitioner who administered drugs at the detention center, testified that she was currently prescribing drugs to keep Winkler calm. (R. pp. 1951-52). The current dosage was based upon Winkler not being as actively involved as a lawyer would be. (R. p. 1952). She further indicated that an increase in anxiety would require more medication, and more medication may make Winkler less alert. (R. p. 1952). That caused the trial court great concern. (R. p. 1953).

Defense counsel noted that he did not think that Winkler was making this request to delay the trial or in any way impede justice. (R. p. 1953). Counsel asserted Winkler was ready and willing to go forward. (R. p. 1953). Winkler had indicated that he is familiar with the materials, and Winkler had met with every expert on multiple occasions. (R. p. 1953). Counsel concluded by saying he did not agree with Winkler's decision, but he wanted it on the record that there was

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sequestered, and it would have to remain sequestered while Winkler prepared. (R. p. 1958).

During a recess, the court conducted a telephone conference with Dr. Halanovich, one of Winkler's treating psychiatrists. (R. p. 1959). During the conference, Halanovich expressed the same concern the court had with keeping Winkler calm during the proceedings if he represented himself. Halanovich was concerned regardless of whether they increased the medication because it was his personality to get worked up. (R. p. 1960). While Winkler's personality had been better since Dr. Smith increased his medication, Klonopin could make Winkler think less clearly and impact his ability to make good, clear decisions. (R. pp. 1960-61). Halanovich indicated that increasing the dosage would have the same effect as drinking too much alcohol; however, a possible solution might be to give Winkler a smaller dosage if he got worked upon in the courtroom. (R. p. 1962). However, a low dose still could dull Winkler. (R. p. 1963).

In issuing its decision, the trial court noted that it considered Faretta, State v. Lawrence in the Fourth Circuit, State v. Fuller, State v. McLauren, State v. Reed, State v. Brewer, State v. Walters from North Carolina, Grandson v. Maryland, U.S. v. Dunlap, another Fourth Circuit decision, Kubsch v. Indiana, and State v. Bateman. (R. pp. 1965-66). The trial court found this was a bifurcated trial. (R. p. 1967). Under Fuller, it was clear that it was not an absolute right to waive counsel in the middle of trial. (R. p. 1968). Such requests are within the discretion of the trial court. (R. p. 1968). The trial court noted that both Walters and Lawrence support that position. (R. p. 1968). Furthermore, the

court indicated it was persuaded by Dunlap in the sense that the court had the obligation to minimize disruptions, avoid inconvenience and delay, maintain continuity, and avoid confusing the jury. (R. p. 1968). The judge further noted that in Lawrence, only the jury had been selected; trial had not even proceeded other than the jury being sworn. Thus, in exercising discretion in deciding whether to permit the defendant to proceed pro se, the court must make sure its decision is not an abuse of discretion. (R. pp. 1968-69). The decision must really consider the rights of the defendant, fairness of trial, rights of state, rights of jury to make sure they are presented matters that will let them make a decision after being presented evidence on both sides and with an opportunity to decide those issues. (R. p. 1969). The trial court was concerned with Winkler's ability to proceed without the anxiety situation. (R. p. 1969). Since there was a jury waiting, and it had already been selected and heard the first part of trial, the court found it would be undue delay to wait, and that would be improper in the administration of justice. (R. p. 1970). Further, the court was concerned the jury may be confused to have one half of the case tried by counsel and the second half of the case tried without counsel, especially if the jury could see counsel at the defendant's counsel table. (R. p. 1970). In all, the court determined it would not be in the proper administration of justice to allow Winkler to proceed pro se, so the court decided it would not be proper to grant his motion. (R. p. 1971).

III. THE TRIAL COURT CORRECTLY FOUND THAT THE DECISION REGARDING WHETHER WINKLER WAS ENTITLED TO REPRESENT HIMSELF DURING THE SENTENCING PHASE OF TRIAL WAS WITHIN THE TRIAL COURT'S DISCRETION.

The trial court was correct when it found that it was within the court's discretion whether Winkler should be allowed to represent himself during the sentencing phase of the trial. Winkler's request to proceed pro se during the sentencing phase was made well after the trial began.

It is well-established that an accused may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975). Although a defendant's decision to proceed pro se may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. at 834, 95 S.Ct. at 2541 (internal quotation omitted). A defendant's right to waive the assistance of counsel is not unlimited. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). The request to proceed pro se must be clearly asserted by the defendant prior to trial. Fuller, 337 S.C. at 241, 523 S.E.2d at 170 (citing State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998)); State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991), cert. denied, 502 U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992). "If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge." State v. Fuller, 337 S.C. at 241, 523 S.E.2d at 170 (citing U.S. v. Singleton, 107 F.3d 1091 (4th Cir. 1997); U.S. v. Lawrence, 605 F.2d 1321 (4th Cir.1979)).

Winkler's request to proceed pro se in this case was clearly not timely. Winkler did not make the request until the day the sentencing phase of his trial was to commence. (R. p. 1926). The sentencing phase of a capital trial does not constitute a separate trial. See S.C. Code Ann. § 16-3-20(B); see generally, State v. Stewart, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986). Thus, Winkler's request to proceed pro se could not be considered timely. As a result, it was clearly within the trial court's discretion to decide whether Winkler would be allowed to proceed pro se in this case. This argument for relief should therefore be dismissed.

The cases cited by Winkler to support his argument that it was not within the court's discretion to decide whether he could proceed pro se when the request was made just before the sentencing phase either support the proposition the decision on whether a defendant is allowed to proceed pro se when the request is made after the trial has begun or are clearly distinguishable from Appellant's case. In Commonwealth v. Davido, 582 Pa. 52, 65, 868 A.2d 431, 438 (2005), the Supreme Court of Pennsylvania noted that in its previous decision in Commonwealth v. Owens, 496 Pa. 16, 436 A.2d 129 (1981), it had

> noted that "[w]here the accused does not request to represent himself before trial, the constitutional right to self-representation recognized in Faretta is not implicated. When, during the course of trial, an accused wishes to dismiss counsel and either represent himself or obtain new counsel, his request is addressed to the sound discretion of the trial court." Owens, 436 A.2d at 133 n. 6 (citations omitted); see also United States v. McKenna, 327 F.3d 830, 844 (9th Cir.2003); Commonwealth v. Jermyn, 551 Pa. 96, 709 A.2d 849, 863 (1998).

Davido, 582 Pa. at 65, 868 A.3d at 438.

Winkler's reliance upon United States v. Davis, 285 F.3d 378 (5th Cir.2002), is also misplaced. The defendant in Davis had been granted a new sentencing trial due to an error in his original trial. Id. at 380. The defendant had requested to proceed pro se in his new sentencing trial. Id. After a Faretta hearing, the trial court found that the defendant's decision to represent himself was knowingly and intelligently made. Id. However, the district court concluded that the right to self representation did not extend to sentencing, and that even if it did, Davis's interest were outweighed by the Eighth Amendment requirement that the death penalty not be applied arbitrarily or capriciously. Id. The Fifth Circuit Court of Appeals overturned the trial court's decision when the defendant filed for a writ of mandamus to require the district court to allow him to proceed pro se. Id. at 380. The Fifth Circuit did allow the district court to appoint standby counsel. Id. At issue in the Davis opinion was whether the district court failed to comply with the Fifth Circuit's writ of mandamus when it appointed independent counsel to represent the defendant. Id. The district court had appointed counsel to present a mitigation case that the defendant had indicated that he did not want to present. Id. at 381. The appointed counsel's presentation would have been independent of the defendant's defense case. Id.

The Fifth Circuit's opinion in Davis is not applicable to Winkler's case for several reasons. First, unlike Winkler's case, there was no question that the defendant in Davis timely requested to represent himself in his new sentencing hearing. The timeliness of the defendant's request in Davis was never an issue before either the district court or the Fifth Circuit. Since the defendant in Davis

had timely moved to represent himself in his new sentencing trial, it was not within the trial court's discretion whether the defendant could proceed pro se. This is clearly distinguishable from Winkler, whose request to represent himself was not timely because it was not made before the beginning of trial.

Second, the Fifth Circuit has recognized that a trial court has the discretion to decide whether to grant a defendant permission to proceed pro se when the request to do so is untimely. Wood v. Quarterman, 491 F.3d 196, 201-02 (5th Cir. 2007)(citing Martinez v. Court of Appeal, 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000); United States v. Davis, 269 F.3d 514, 520 (5th Cir.2001) ("The district court was not obliged to honor Davis's mid-trial request to represent himself.") (citing Moreno v. Estelle, 717 F.2d 171, 176 (5th Cir.1983)); see also Haynes v. Cain, 298 F.3d 375, 384 (5th Cir.2002) (en banc) (Dennis, J., concurring)). In Wood, the Fifth Circuit found that the state court did not unreasonably apply federal law when it found the trial court had the discretion to deny a motion to proceed pro se when the defendant made the motion after the guilt phase and immediately before the sentencing phase in his capital trial. 491 F.3d at 202. The state habeas court in Wood held the trial court had the discretion because the motion was not timely. Id. at 201-02.

People v. Miller, 153 Cal.App.4th 1015, 62 Cal.Rptr.3d 900 (2007) is also not applicable. In Miller, a non-capital case, the defendant requested to represent himself at his sentencing hearing. The California Court of Appeals held that the defendant's request to proceed pro se was timely because sentencing in non-capital cases in California are post-trial matters. 153

Cal.App.4th 1023-24; 62 Cal.Rptr.3d at 905-06. Thus, the defendant's request was not untimely when it was made after the trial was completed and after his motion for a new trial was dismissed. In its reasoning, the California Court of Appeals, Fifth District, noted that in People v. Windham, 19 Cal.3d 121, 124, 137 Cal.Rptr. 8, 560 P.2d 1187 (1977), the California Supreme Court concluded "that 'when a defendant has elected to proceed to trial represented by counsel and the trial has commenced, it is thereafter within the sound discretion of the trial court to determine whether such a defendant may dismiss counsel and proceed pro se.'" Miller, 153 Cal.App.4th 1021; 62 Cal.Rptr.3d at 903. Further, the California Court of Appeals acknowledged that the California Supreme Court

> has held that, for purposes of assessing the timeliness of a motion for self-representation, a motion made between the guilt and penalty phases in a capital prosecution is untimely, and therefore subject to the trial court's discretion, because the guilt and penalty phases are not separate trials, but parts of a single trial.

Id. at 1023, 62 Cal.Rptr.3d at 905.

Hojan v. Florida, 3 So.3d 1204 (2009), is not applicable to this case. The issue in Hojan was whether a defendant could waive the presentation of mitigation evidence. Id. at 1211. There was no issue of whether the defendant could proceed pro se in that case. Similarly, Cowans v. Bagley, 624 F.Supp.2d 709 (S.D.Ohio 2008), is not applicable because the defendant never requested to proceed pro se in his case. Also, Lamarca v. Florida, 931 So. 2d 838 (2006), is not applicable because there is no discussion regarding the decision by the trial court to allow the defendant to proceed pro se for the sentencing phase of his trial. This issue was not an appellate issue at any point in time during the

proceedings, either in Lamarca's direct appeal or in his post-conviction relief action appeal. Finally, Chapman v. Commonwealth, 265 S.W.3d 156 (Ky 2007), is not applicable to this issue. In Chapman, the defendant moved to fire his attorneys and proceed pro se well before his trial. Id. at 161. Thus, there was no issue of whether the trial court had the discretion to either grant or deny the request before either the trial or appellate court.

In all, Winkler has failed to establish that the trial court incorrectly determined that it was within the court's discretion to either grant or deny his request to represent himself during the sentencing phase of his trial. Faretta did not apply to this determination because the motion to proceed pro se was not timely made. As a result, it was well within the sound discretion of the trial court to decide to deny the motion. Winkler's argument in the alternative, that his case was not governed by the abuse of discretion standard lacks merit. As a result, this claim for relief should be dismissed, and Winkler's convictions and death sentence should be affirmed.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WINKLER'S REQUEST TO PROCEED PRO SE; THE COURT'S FINDING THAT GRANTING THE MOTION WOULD CAUSE UNDUE DELAY BECAUSE OF WINKLER'S NEED FOR TIME TO PREPARE, CONCERNS ABOUT WINKLER'S ANXIETY, AND CONCERNS REGARDING POTENTIAL JURY CONFUSION SUPPORTED THE COURT'S FINDING THAT IT WOULD IMPEDE IN THE ADMINISTRATION OF JUSTICE IF THE MOTION WAS GRANTED.

As already noted, "[I]f the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge." State v. Fuller, 337 S.C. at 241, 523 S.E.2d at 170 (citing U.S. v. Singleton, 107 F.3d 1091 (4th Cir. 1997); U.S. v. Lawrence, 605 F.2d 1321 (4th Cir.1979)).

> In justifying the need to timely raise the right of self-representation, the courts recognized, among other things, the need to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury. In light of this limitation on the right of self-representation existing before Faretta, the courts held that whether the defendant could dismiss counsel and proceed pro se was within the sound discretion of the trial court.

United States v. Dunlap, 577 F.2d 867, 868 (4th Cir. 1978). "Once trial commences, that right [to proceed pro se] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." United States v. Wesley, 798 F.2d 1155, 1155-56 (8th Cir. 1986). "[O]nce a trial has begun, a defendant's right to rep-resent himself 'is sharply

curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.'" United States v. Stevens, 83 F.3d 60, 66-7 (2d Cir. 1996).

The trial judge clearly exercised due discretion in denying Winkler's request to proceed pro se for the sentencing phase of his trial. The trial court indicated that it had three major concerns regarding Winkler's request. First, the trial court noted that it was concerned that Winkler's medication would affect his ability to properly and fully function as his own counsel. This concern was well founded in the record. During the guilt phase of Winkler's trial, the closing arguments were delayed because Winkler needed to take his medication, and it was not immediately available in the courtroom. (R. pp. 1833-35). Winkler's medication issues were also raised as a concern before he moved to proceed pro se on the morning the sentencing phase was set to begin. (R. p. 1915). The trial court heard from the nurse practitioner who administered Winkler's medication at the detention center. The current dosage was based upon Winkler not being as actively involved as a lawyer would be. (R. p. 1952). She further indicated that an increase in anxiety could require more medication, and more medication may make Winkler less alert. (R. p. 1952). That caused the trial court great concern. (R. p. 1953). Dr. Halanovich also expressed concern about Winkler's anxiety because she felt that he could get more frustrated in handling the case on his own. (R. p. 1960). She indicated that the medication might not prevent that from happening because of his personality. (R. p. 1960). She also

noted that the medication, which had been increased during the course of the trial, could dull Winkler if increased even more. (R. p. 1961).

Second, the trial court was concerned that allowing Winkler to represent himself at this juncture of the trial would require some delay in order for Winkler to fully prepare for trial. Specifically, the court noted that Winkler did not appear to understand some of the basics of courtroom procedure, including the rules of evidence, and Winkler was not aware of the law regarding mitigation. This was supported by Winkler's responses to the trial court's inquiries on those subjects. Winkler asserts that the trial court applied the wrong standard in assessing whether Winkler should have been allowed to proceed pro se. He asserts that the only relevant inquiry in deciding whether Winkler should have been allowed to proceed pro se was whether the accused made a knowing and intelligent waiver of the right to counsel, as outlined in State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). See Brief of Appellant at p. 40. As noted by the trial court, however, Brewer did not apply to Winkler's request to proceed pro se. In Brewer, the defendant appears to have timely filed his motion to proceed pro se. Thus, as noted in the discussion in Section III, the defendant would have an absolute right to proceed pro se as long as his request to do so was voluntarily and intelligently made. See Faretta, supra; Fuller, supra. Unlike Brewer, however, Winkler's request was not timely. As a result, the standard for assessing whether a defendant should be allowed to proceed pro se outlined in Brewer did not apply to Winkler's case. Thus, the trial court could properly consider Winkler's

knowledge of the processes of the court, and the time it would take for Winkler to prepare his case.

Third, the trial court was concerned that allowing Winkler to proceed pro se would confuse the jury, especially in light of the fact that his attorneys for the guilt phase would be sitting at Winkler's counsel table as standby counsel. In all, the trial court found that when considering those three concerns together, those concerns weighed against granting Winkler's motion because they would lead to undue delay and would be improper in the administration of justice. The trial court also indicated that if for no other reason, there would likely need to be a delay if Winkler was allowed to proceed pro se just to determine if Winkler would need additional medication to continue as a result of his anxiety situation. (See R. p. 1973). In light of the reasoned decision by the trial court, Winkler cannot establish that the court's denial of his motion to proceed pro se was an abuse of discretion. As a result, this claim for appellate relief should be dismissed.

V. THE TRIAL COURT DID NOT ERR WHEN IT GAVE ITS WARNINGS TO WINKLER REGARDING SELF-REPRESENTATION: A FULL FARETTA INQUIRY WAS NOT REQUIRED BECAUSE FARETTA DID NOT APPLY; WINKLER'S MOTION TO PROCEED PRO SE WAS NOT TIMELY.

Faretta did not apply to Winkler's request to proceed pro se because Winkler's request was untimely. As noted in Argument Section III, Winkler did not request to represent himself until after the guilt phase was completed, and the sentencing phase was about to begin. The right to self-representation in Faretta is not absolute, and it is within the sound discretion of the trial court whether Since Faretta did not apply to Winkler's request to proceed pro se, the trial court did not err in not providing Winkler with a full, focused waiver hearing.

Contrary to Appellant's assertion in his brief, Fuller does not require reversal. Fuller is clearly distinguishable from Winkler's case. In Fuller, the defendant moved to waive counsel and proceed pro se on the morning of trial before the charges were read and before the jury was selected and sworn. 337 S.C. at 240, 523 S.E.2d at 170. The Supreme Court declined to hold that a motion to proceed pro se is either timely or untimely when the motion is made on the morning of trial prior to the beginning of trial proceedings as a matter of law. Id. at 241, 523 S.E.2d at 171 (citing People v. Mogul, 812 P.2d 705 (Colo.Ct.App.1991)). The Supreme Court further noted that the trial court failed to conduct an adequate hearing to fully assess the purpose behind the defendant's request or to determine what effect the granting of the request would have had on the proceedings. Fuller, 337 S.C. at 242, 523 S.E.2d at 171.

Fuller does not reach the issue of whether a full Faretta hearing is required in every case where a defendant moves to proceed pro se. The Supreme Court only found that when the timeliness or untimeliness of a motion to proceed pro se is in question, a trial court should conduct a hearing to assess the purpose behind the request and to determine the effect granting the request would have on the proceedings. Furthermore, unlike Fuller, it is clear that Winkler's request to proceed pro se was untimely. The jury was selected, and a verdict upon Winkler's guilt was in place when Winkler made his request to proceed pro se. Thus, the concerns raised by the Supreme Court in Fuller were not present. Finally, the trial court did engage in an adequate hearing to determine the motives behind Winkler's request to proceed pro se and the effect granting the request would have on the proceedings as required by Fuller. The request initially arose from Winkler's insistence that he be allowed to question witnesses that would be presented by the state during the sentencing phase of his trial. Winkler was allowed to explain why he wished to proceed pro se. In his analysis, the trial judge noted that he had some concerns about the effect of allowing Winkler to represent himself at that time would lead to undue delay and would have impede the administration of justice. The trial judge pointed out that he had concerns about Winkler's anxiety issues and his preparedness to continue with the trial immediately if the request was granted. The court also indicated it was concerned that allowing Winkler to represent himself would also confuse the jury. Thus, the trial court clearly engaged in the analysis required by Fuller when it denied Winkler's motion to proceed pro se.

Overall, Winkler has failed to establish that he was entitled to a full Faretta hearing because his request to proceed pro se was untimely. As a result, the trial court did not err by not providing Winkler with a full, focused waiver hearing as outlined by Faretta. The trial court also complied with the requirements outlined in Fuller. Since Winkler has failed to establish that he was entitled to a full Faretta hearing in his case, this claim for appellate relief should be dismissed.

VI. THE TRIAL COURT DID NOT ERR BY ALLOWING DEFENSE COUNSEL TO PRESENT MITIGATING SOCIAL HISTORY EVIDENCE: THIS ARGUMENT FOR RELIEF IS NOT PRESERVED FOR APPELLATE REVIEW BECAUSE IT WAS NOT TIMELY MADE; IT WAS NOT FULLY DEVELOPED BEFORE THE TRIAL COURT, AND IT WAS NOT RULED UPON BY THE TRIAL COURT.

Relevant Facts

During Winkler's mitigation case, the defense presented the testimony of several witnesses. First, Dr. Richard Frierson, a forensic psychiatrist, testified that he diagnosed Winkler with having depressive disorder not otherwise specified, anxiety, alcohol abuse, and having some paranoid personality traits. (R. pp. 2338-39, 2343-46). During cross-examination, Frierson noted that Winkler did not have a history of childhood physical abuse, childhood sexual assault or child neglect. (R. p. 2347). Dr. Rikki Halanovich, another forensic psychiatrist, testified that she diagnosed Winkler with borderline personality disorder, major depressive disorder, alcohol dependence and cocaine abuse. (R. pp. 2655-57, 2658-60). Dr. William Morton, Jr., who was qualified as an expert in psychopharmacology, also testified. (R. pp. 2695-2743).

Te Anne Oehler, a social worker, testified that Winkler's father was very controlling of his mother. (R. p. 2752). When Winkler's parents were first married, they moved in with his father's parents. (R. p. 2752). Winkler's father made his mother quit her job, even before they had children. (R. p. 2752). Further, Oehler testified that Winkler's father worked at the family owned bar. Winkler's father would come home late at night, was very controlling of Winkler's

mother, and he would not let her have any money of her won. (R. p. 2752). By the time the second Winkler child was born, Winkler's mother was emphatic that the new family move out into their own home. (R. p. 2752).

Oehler further testified that Winkler's mother was the primary caregiver because she was the person home during the day. (R. p. 2753). His mother was the person involved with Winkler's schoolwork. (R. p. 2753). Winkler's father did coach all of the boys on their sports teams. (R. p. 2753). However, Winkler's father would leave and go out after dinner, and he would not come back until 1 or 2 am. (R. p. 2753). Oehler noted that Winkler's father had frequently been drinking a lot, and he was not always present at home. (R. pp. 2753-54). She stated that Winkler's father was very controlling towards family members, and he had very poor parenting skills. (R. p. 2754). While Winkler denied his father ever beat him, both of the oldest Winkler children informed Oehler that their father had beaten them. (R. p. 2754). The only exception was when Winkler was a junior in high school, and his mother found marijuana in the bathroom. (R. p. 2754). Oehler testified that when she told Winkler's father that evening after work, Winkler's father grabbed Winkler by the throat and started choking him. (R. p. 2754). According to Oehler, Winkler's mother informed Oehler that she did not tell his father of any other transgressions out of fear that he might hurt Winkler worse. (R. pp. 2754-55).

Oehler also testified that Winkler got his first drink from his father on a camping trip when Winkler was 13. (R. p. 2755). By the time Winkler graduated from high school, he was using alcohol and marijuana frequently. (R. p. 2755).

At that point, if there was any problem with one of the Winkler children, Winkler's mother addressed it. (R. p. 2755). Winkler's father was out of the home working more with his insurance business. (R. p. 2755).

Oehler also testified about Winkler's personal history with women. She noted that Winkler tended to seek out women who had children. (R. p. 2758). She also noted that Winkler was a chronic drinker throughout the years, starting when he was a teenager. (R. p. 2760). She testified that the drinking affected his ability to hold down a job, and she noted that the longest tenure for Winkler at a job was his last one with the property management company. (R. p. 2760). Oehler asserted that Winkler did not immediately trust others, and he would remain suspicious of others until they proved otherwise. (R. p. 2761). Winkler grew up in a strict Catholic home where his father was very rigid. (R. pp. 2761-62). There was no physical abuse later in Winkler's upbringing. (R. p. 2762). Also, Winker's father controlled his wife and children through finances. (R. p. 2762). This was a source of conflict in the family among the older children because Winkler's father helped Winkler out financially every time. (R. pp. 2762-63). Oehler indicated that Winkler lived a happy-go-lucky life growing up that he tried to replicate by seeking women with children. (R. p. 2763). She testified that Winkler had difficulty in relationships with peers because he sought to be the center of attention, and he wanted affirmation from others. (R. p. 2766). Some of his family relationships focused around holiday times, and he always seemed to be surrounded by children. (R. pp. 2766-67).

After further testimony from Oehler, Rosemary Wolfe, a tenant in the Tillman property where Winkler worked testified on his behalf. (R. pp. 2782-87). During the break after Wolfe's testimony, defense counsel stated the following on the record:

> As you know, the record will reflect that I put up a social, social history through a sociologist, Ms. Oehler, in -- regarding the defendant and his history and his family. And the defendant wants me to let the court know that he had asked me not to put up any social history and that I put that up in spite of his objections. And for the record, I'm noting that he did ask me not to put any social history in because he didn't want anything derogatory said about his family. But in my judgment as a lawyer, I felt it was the appropriate thing to do and I did it.

(R. p. 2788). The trial court noted the statement on the record. Winkler then stated

> Sir, I'd like to also again put for the record that, that again disobeying what I, I asked him, what I -- you know, I told him specifically that I did not want my family dragged through the mud, and he did it anyway.
>
> I'm asking again for a new lawyer. This is the third time that he's done that. He did it on the witness stand earlier today, and it's everything I'm asking him to do, he's going against me. I asked him for a recess, he ignored me while that was going on, while his, while his -- Ms. Te Anne was doing that, and he ignored me.

(R. p. 2789).

Argument

First, Winkler failed to preserve this issue for review on direct appeal. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court." State v. Goodwin, 384 S.C. 588, 603, 683 S.E.2d 500, 508 (Ct.App.2009)(citing State v. Turner, 373 S.C. 121, 126 n. 1, 644 S.E.2d 693, 696 n. 1 (2007)). Respondent submits that no proper objection was ever made to any of the testimony of the social worker Te Anne Oehler

before or during her testimony. Counsel only had the court note for the record that Winkler did not want Te Anne Oehler to testify about his family history. This was not sufficient to preserve this issue for appellate review. The trial court was not asked to rule upon any objection. Further, the trial court did not rule upon the notation made in the record. Thus, there is no alleged preserved error to review on appeal. As a result, this claim for relief should be dismissed. Note that this case is not similar to the circumstances in Hojan, supra, in which the defendant waived the presentation of certain mitigating evidence on the record. In Winkler's case, no such motions were ever presented to the trial court. Thus, there was no issue upon which the trial court could rule regarding the presentation of evidence during the sentencing phase.

Second, the issue raised in Winkler's sixth appellate argument is not an appropriate claim for direct appeal. This Court has held that ineffectiveness assistance of counsel claims are "not appropriate for review on direct appeal, and may be asserted only in proceedings under the Post-Conviction Procedure Act." State v. Kornahrens, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986). Winkler's claim in this argument is the equivalent of an ineffective assistance of counsel claim. In Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551 (2004), the United States Supreme Court stated

> An attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy. Strickland, 466 U.S., at 688, 104 S.Ct. 2052. That obligation, however, does not require counsel to obtain the defendant's consent to "every tactical decision." Taylor v. Illinois, 484 U.S. 400, 417-418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval).

Nixon, 543 U.S. at 187, 125 S.Ct. at 560.[4] Resolution of this claim for relief on direct appeal would necessarily require examination into whether the decision regarding what questions to ask Te Anne Oehler constituted tactical decisions within the control of counsel or were instead important decisions within the control of the defendant. In all, the record is clearly insufficient to support a finding on this issue in this case. As a result, this claim for appellate relief should be dismissed.

[4] Florida v. Nixon reversed Nixon v. Singletary, which was cited by the Florida Supreme Court in Hojan.

VII. THE TRIAL COURT CORRECTLY DENIED WINKLER'S MOTION FOR A DIRECTED VERDICT ON THE STATUTORY AGGRAVATING CIRCUMSTANCE OF THE MURDER OF A WITNESS TO IMPEDE OR DETER PROSECUTION OF A CRIME; THERE WAS SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE SUPPORTING THE CHARGE.

Relevant Facts:

At the close of the State's case during the sentencing phase of Winkler's trial, counsel moved for a directed verdict on the second aggravating factor asserted by the State, which was the murder was of a witness or potential witness committed at any time during a criminal process for the purpose of impeding or deterring the prosecution of any kind. (R. p. 2307).

> I would submit to the court that while there has certainly been evidence produced of a crime, there has been no evidence produced that it was for the purpose of deterring or impeding the criminal procedure which would have followed. And, and, and because of that, I would think that they failed, then, to have proven this particular statutory aggravating circumstance as a matter of law. And I would ask the court to rule as a matter of law that the state has failed to prove that as an aggravating circumstance.

(R. p. 2307). The trial court noted that the state had had introduced evidence that there was an allegation, and Winker was arrested for several charges: criminal sexual conduct in the first degree, kidnapping, and assault and battery with intent to kill. (R. p. 2307). Further, there was evidence introduced that the victim was a witness to that crime, so based on the circumstances the death of the victim would have been the death of a witness of the prosecution. (R. pp. 2307-08). The State asserted that was exactly what it was going to argue, and further contended that if you take the defense's argument to its logical

conclusion, the state would never be able to prove that a killing was for the purpose of impeding or deterring a prosecution unless the defendant stated that he killed her so she could not testify. (R. p. 2308). The trial court found there was sufficient evidence for the jury to find the aggravating circumstance beyond a reasonable doubt based on circumstantial information. (R. pp. 2308-09).

At the close of the defense's case, defense counsel renewed its motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11). (R. p. 2817). The trial court again denied the motion because of the existence of circumstantial evidence. (R. p. 2817).

Argument

"In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned with the existence of the evidence, not its weight." State v. Smith, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989). "The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it." State v. Lindsey, 372 S.C. 185, 194-195, 642 S.E.2d 557, 562 (2007)(citing State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000)).

There was substantial circumstantial evidence to support the aggravating circumstance enumerated in S.C. Code Ann. § 16-3-20(C)(a)(11): '[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." First, the State clearly established there was an ongoing criminal process against Winkler when he murdered his estranged wife. During the sentencing phase, the

State presented evidence establishing that there was an open case against Winkler for kidnapping, criminal sexual conduct in the first degree, and assault and battery with intent to kill. On October 10, 2005, Haley Grainger and her sister became concerned about their mother's whereabouts. (R. p. 2167). Haley's sister had called. (R. p. 2167). That led Haley and her boyfriend to start looking for Rebekah. (R. p. 2168). Jill Shelley, Rebekah's other daughter, also testified about the night of the kidnapping. (R. p. 2293). Shelley indicated she first became concerned when she found out from her brother that he was not picked up from a football game on October 10, 2005. (R. pp. 2293-94). Shelley called the police when she first heard of the problem. (R. p. 2294). She noted that her mother's Land Rover was found that night, but there was no sign of either Rebekah or Winkler. (R. p. 2295). Shelley saw her mother the next morning at Seacoast hospital. (R. p. 2295). Shelley testified that her mother was very beat up and dirty. (R. p. 2295). Rebekah's eye was very swollen, and her hair was matted with sand spurs and twigs. (R. p. 2296). Rebekah was also nervous, and she wanted them to do something with Winkler to get him away from her. (R. p. 2296).

Lisa Gore, a staff nurse at Seacoast Medical Center, treated the victim when she was brought in on October 11, 2005. (R. pp. 2195-96). Gore testified that the victim had injuries to the left eye, some swelling to the jaw area, bruising around the neck, dried blood about the fact, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple bruises and contusions, and a bite mark to the face. (R. pp. 2205-06). Gore also testified that the victim

had a large amount of hair removed from her head, along with some matting and disarrangement of her hair with leaves and debris mixed in. (R. p. 2206). Gore also indicated there were bruises to Rebekah's arms and wrists, the tops of her hands, her neck area, scrapes on her torso, belly, and back, and contusions and scrapes to her lower legs, thighs, and feet. (R. pp. 2207-10). A sexual assault evidence kit was collected from Rebekah. (R. pp. 2213-15).

Ann Pitts responded to the Stephen's Crossroads Complex. (R. p. 2220). She later responded to the Seacoast Medical Center to interview the victim. (R. p. 2221). Pitts testified that the victim seemed to be in shock, and was very afraid. (R. p. 2222). Rebekah did tell Pitts what happened and where it happened. (R. p. 2222). The victim also described the clothes she was wearing. (See R. p. 2226). While those clothes were not recovered when Pitts, the victim, and Detective Livingston initially went to the area, they were later recovered when members from the crime scene unit and dog team searched the area. (R. p. 2226). Haley also identified a toe ring, an earring, a hair clip, shorts, and a shirt with a wad of hair in it that all belonged to Rebekah. (R. p. 2171). Jeff Gause, a police officer with the Horry County Police Department, testified that he recovered the shorts, a shirt with a wad of hair, a hair clip, and some underwear fro ma partly wooded area of the county that he had been informed was part of the area in which the assault took place. (R. pp. 2176-80). Neil Livingston, a detective with the Horry County Police Department, testified that he recovered an earring and another piece of jewelry from the inside of a commercial building that was under construction in the Little River section of Horry County. (R. pp. 2184-

91). John Ortuno, a DNA analyst for SLED, testified that the DNA from the semen found in the rectal and vaginal swabs from the sexual assault evidence collection kit matched Winkler's DNA. (R. pp. 2244-49).

Pitts testified that Winkler was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping on October 11, 2005. (R. p. 2227). He was found at a friend's house. (R. p. 2227). When he was arrested, he was wearing blue jean shorts, a t-shirt with some type of printing on it, and some brown shoes. (R. p. 2228). Pitts was also present at Winkler's first bond hearing. (R. p. 2230). Bond was initially denied in his case. (R. p. 2231). At a second bond hearing, Winkler's bond was set at $150,000, and he was required to wear an electronic monitor while out on bond. (R. pp. 2231-33). Pitts also testified that at Winkler's third bond hearing, his bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment. (R. pp. 2233-34). According to the bond, the monitor was to be off from 4pm to 6pm.

Second, Rebekah, the victim, was clearly a witness or potential witness in Winkler's trial on these three charges. Third, there was clear circumstantial evidence to support a finding that he killed his estranged wife to impede or deter the kidnapping and criminal sexual conduct prosecution. First, during the guilt phase of the trial, Jonathan testified that He testified that Winker was stating, "I'm back and you thought I was going to prison, something like that," when he broke into the condo. (R. p. 1431). He was yelling very loud. (R. p. 1431). Mary Elizabeth C., Jonathan's friend, testified that she was on the phone with

Jonathan when she heard a loud pop noise, and a voice that was not Jonathan's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not -- I'm back, I'm back. I'm never going back to jail." (R. pp. 1511-1512). Jill Shelley testified that during the incident on September 2005, Winkler warned Rebekah that she knew what would happen if someone called the police on him. (R. p. 2292). Further, the last item of evidence introduced during the sentencing phase of Winkler's trial was a letter that Winkler asserted that Rebekah had lied to the police about the first set of charges against him (i.e. the kidnapping, criminal sexual conduct, and ABWIK). (R. p. 2302). He claimed that the evidence clearly showed that Rebekah was driving the Land Rover when it crashed, and she lied to establish the charges against him (i.e. the kidnapping, criminal sexual conduct, and ABWIK). (R. p. 2302). He claimed that the evidence clearly showed that Rebekah was driving the Land Rover when it crashed, and he alleged that Rebekah lied because she was afraid to tell Shelley. (R. p. 2302). Winkler also asserted that Rebekah would not be dead had Shelley not initially called the police. (R. p. 2302).

In all, there was clearly sufficient circumstantial evidence to support the statutory aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11). As a result, Winkler's claim for appellate relief in his seventh argument should be dismissed.

Even if the trial court erred in not granting Winkler's motion for a directed verdict, the error was harmless. "[A] death sentence supported by at least one valid aggravating circumstance need not be set aside ... simply because another

aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty." Zant v. Stephens, 462 U.S. 862, 884, 103 S.Ct. 2733, 2746 (1983). Since the jury also found there was evidence beyond a reasonable doubt to support the aggravating factor enunciated in S.C. Code Ann. § 16-3-20 (C)(a)(1)(c), and the burglary aggravating circumstance was supported by sufficient evidence, any error in charging the jury with the second aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11) was harmless. State v. Elkins, 312 S.C. 541, 545, 436 S.E.2d 178, 180 (1993) ("[T] the failure of one aggravating circumstance does not so taint the proceedings as to require reversal where there remains a valid aggravating circumstance upon which the sentence of death is based."); see United States v. Higgs, 353 F.3d 281 (4th Cir. 2003).

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny Winkler's appeal and affirm his convictions for murder, burglary in the first degree, assault and battery of a high and aggravated nature, and his death sentence.

Respectfully submitted,

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April 14, 2010.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY

James E. Lockemy, Circuit Court Judge

THE STATE

RESPONDENT,

V.

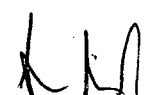
LOUIS MICHAEL WINKLER, JR.

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 14th day of April, 2010.



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CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via United States mail, first class, postage prepaid to his attorney of record, Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211-1589.

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

This the 14th day of April, 2010.

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