STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
James R. Barber, III, Circuit Court Judge

Appellate Case No. 2013-002799

THE STATE .....RESPONDENT

v.

DWAYNE LEE RUDD .....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Dwayne Lee Rudd (Rudd) was indicted by the grand jury for Aiken County for five counts of criminal sexual conduct with a minor, second degree, and five counts of criminal sexual conduct with a minor, third degree. (Indictments) Two indictments were withdrawn, and the counts remaining at trial were three counts of criminal sexual conduct with a minor, third degree, and five counts of criminal sexual conduct with a minor, second degree. (Indictments, Tr. 6)

Rudd was represented by Aimee J. Zmroczek, Esquire, and Robert K. Bank, Jr., Esquire. (Tr. 1) Following a trial by jury, Rudd was found guilty of all eight charges. (Tr. 462-363) He was sentenced by the Honorable James R. Barber, III. For each of the criminal sexual conduct second degree charges, he was sentenced to fifteen years imprisonment. For one of the criminal sexual conduct third degree charges, he was sentenced to five years imprisonment. For the second criminal sexual conduct third degree charge he was sentenced to five years plus costs and assessments. For the final criminal sexual conduct third degree charge, he was sentenced to five years, suspended to three years probation upon the payment of costs and assessments. All of the sentences, except for the final criminal sexual conduct third degree with probation, were run concurrent. (Tr. 471-572) Wingard timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Dwyane Lee Rudd (Rudd) is the father of Victim 1 and Victim 2.[1] This action arises out of charges that Rudd committed criminal sexual conduct with a minor, second degree (CSC 2nd) and criminal sexual conduct with a minor, third degree (CSC 3rd) for acts against Victim 1 and Victim 2.

Rudd and his wife, Jennifer Rudd (Jennifer), were separated at the time of trial. (Tr. 192-193) Victim 1 and Victim 2 are Rudd and Jennifer's children. Jennifer works approximately forty to fifty hours a week as a director of financial reporting for a hospital. (Tr. 192) Rudd worked flipping houses and had flexible hours. The children originally attended Midland Valley Prep and were later home-schooled through a virtual public school. While Jennifer worked, Rudd stayed home with the children because he had a more flexible schedule. (Tr. 192-194)

Jennifer testified that she had a conversation with Victim 1 and Victim 2 on May 22, 2013, that caused her concern. As a result of the conversation, in which the girls alleged inappropriate behavior by Rudd, she called the police. She also left the residence with the girls. She explained that she called the police because "I was told that he was hurting them. I was told a lot of things." (Tr. 210)

Victim 1 was in eighth grade at the time of trial. Victim 1 testified that Rudd touched her in his room in a place "that was not okay to touch." (Tr. 123) She stated that he would ask her to go into his room, and only the two of them would be there. He would lock the door. (Tr. 124-125) Sometimes the activity would happen in her bedroom, and it also happened in the bathroom when she was getting out of the shower and did not have any clothes on. (Tr. 130-131) She would have her pants and underwear

[1] Victim 1 and Victim 2 are minors whose names have been redacted.

off pursuant to Rudd asking her to take them off. She stated that he would put his finger in her "hole" which was her vagina. (Tr. 126-127) When this occurred, he would put a blanket or pillow on her head. (Tr. 127) She also stated that one time he touched her with his "thing" which she identified as his penis. She explained that he would move her bra and shirt up and touch or squeeze her "boobs." (Tr. 129) When he would complete this, he would say "hurry up and get your pants on and underwear on" and "I'm sorry for hurting you." (Tr. 130)

When Victim 1 was in 7th grade, she had surgery on her "private." (Tr. 134) She stated that she and her mom put the medicine on and her dad did not. (Tr. 135-136) She explained that her dad touched her "private" after the surgery, and he touched her "boobs" after the surgery. She testified that the last time he touched her was the Monday before the police came to her house on Thursday. (Tr. 152) On that Monday, he "put his finger in [her] hole" and touched her "boobs." (Tr. 136-137) She explained that she did not tell anyone about what happened any earlier because Rudd told her not to, stating that her mom would not understand. (Tr. 138) She finally told her mom because she "was getting tired of him hurting me." (Tr. 138)

Victim 2 is Victim 1's younger sister. She was thirteen years old at the time of trial and in 7th grade. (Tr. 156-157) Victim 2 testified that Rudd touched her in places that it was not appropriate to touch. (Tr. 168-169, 183-184). She identified these as her "breasts, my private and my bottom." (Tr. 159-160) The touching happened in her parent's room with only Victim 2 and Rudd in the room. The door would be closed and locked. (Tr. 161) Victim 2 testified that Rudd touched her private areas with his finger and told her he was checking to see if she was "maturing properly or to see if [her] sister

was healing properly." (Tr. 161) She stated he would touch the inside and outside of her private area, and she would have her clothes off with her shirt on. (Tr. 162) He would put a pillow or blanket on her head so she "wouldn't squirm." (Tr. 163) She explained that it hurt when he tried to stick his finger in her, and she told him that it hurt. She stated he also squeezed her breasts and told her he was doing this to "see if [she] was maturing properly." (Tr. 163-164) He would also touch her bottom when she was sitting on him. She would not have her pants or underwear on. He told her he touched her there because "he liked to touch my bottom." (Tr. 164-65) Afterwards, if it hurt, he would say "that he was sorry that he hurt me." (Tr. 165) He told her that "he had thoughts in his head, and if he did it it (sic) would go away." (Tr. 165) She stated it happened sometimes in his bedroom and sometimes in the bathroom when she was in the shower. (Tr. 166-67) She did not tell anyone what happened earlier because Rudd "said that I don't need to tell anybody unless they asked." (Tr. 170)

Victim 1's surgery in October 2012 was related to a medical condition she was born with. (Tr. 196) The surgery was approximately ten hours, and she remained in the hospital for seven nights. (Tr. 196) Jennifer testified that she performed post-procedure care on Victim 1 at home by applying a cream to Victim 1's vagina twice a day for approximately two weeks. (Tr. 198) The application was external, and she applied the cream with a Q-tip. (Tr. 197) Jennifer testified that Rudd "was not supposed to [help with the application]. We had agreed that she was too old for that and I would do it." (Tr. 220)

Dr. Jeff Donohoe, a pediatric urologist, was qualified as an expert in pediatric urology. He performed Victim 1's surgery. He explained that Victim 1 has congenital

adrenal hyperplasia, which is a disorder where a person lacks a specific enzyme. In Victim 1's case, her condition required surgery where Dr. Donohoe performed a clitoroplasty, a labioplasty, and a vaginoplasty. After the surgery, she stayed in the hospital for pain management. Dr. Donohoe explained that the surgery was a lot of work in her "private parts." (Tr. 273-286) Regarding post-operative care at home, Dr. Donohoe testified that she needed to take baths to keep her clean, and there was an indication for external cream that needed to be applied. He stated that he would not advise the family to internally check or examine their child after this type of surgery, stating "we generally see the baby back, child back, like, 30 days later and do another examination under anesthesia. And I believe she had that done." (Tr. 286-287) He explained that he would not advise a parent to insert their finger into the child's vagina after surgery and would not advise a parent to compare their child to a normal child's genitalia. (Tr. 287-288)

Esther Timmerman, a supervisor with the Department of Social Services in Aiken, testified that DSS received a report of sexual abuse allegations on May 23, 2013, and she responded. (Tr. 231-233) When Timmerman arrived at the Rudd house, Rudd was standing outside and Timmerman approached him. (Tr. 235) She identified herself as a DSS employee. (Tr. 237) She was wearing her badge that said DSS on it. (Tr. 238) Rudd talked to her at that time for about fifteen to twenty minutes, though he could have walked away if he had wanted to. (Tr. 239) She said that Rudd denied the allegations, and he said that Victim 1 "had surgery in 2012 and that he was checking her to make sure that she was healing properly." (Tr. 239) He stated "that he used [Victim 2], the other child, that he would examine her too because she was normal. And that he said he would

never do anything with a sexual intent and that he might have, his fingertip might have brushed the vagina while he was looking at her but that he would, he never put his finger inside her or anything like that." (Tr. 239-240) She testified that he said as follows: "And that, he said but, you know, I'm the father of this, of these girls so I can touch their vagina if I want to." (Tr. 240)

Rudd testified, and he stated that he did not put his finger in Victim 1's vagina or Victim 2's vagina. (Tr. 328) He stated that he "had to apply cream to her vaginal area on her stiches." (Tr. 329) He also explained that he checked Victim 1 as follows: "I would just, you know, ask her to let me look at her by pulling down her underwear, laying her on – asking her to lay on the bed and just looking at her and that's it. Told her to put her clothes back on." He stated he did this "[b]ecause I was concerned with her clitoris and her development of how her surgery was going and just how, how it was healing, how it was looking, if it was done correctly." (Tr. 329)

Shannon Brown, a human services specialist/treatment caseworker at DSS, met Rudd at the Aiken County Detention Center. (Tr. 257, 260) She explained that "he said that during the time that he checked his children and compared them to one another." (Tr. 262)

ARGUMENT

I. The trial court did not err in failing to suppress Rudd's statement to the Department of Social Services employee during the initial DSS investigation.

The trial court properly denied a motion by Rudd's counsel to suppress the statement he made to an employee of the Department of Social Services (DSS), Esther Timmerman (Timmerman).[2]

Esther Timmerman, a DSS supervisor, went to the Rudd residence in a state government car on May 23, 2013. She testified that when she arrived, Rudd was standing outside next to his car. She got out of her car and approached Rudd. (Tr. 18-19) She introduced herself and told him who she was and where she worked. She explained that DSS received allegations of sexual abuse, and she read the allegations to him. (Tr. 19-20) She was wearing her DSS ID badge at the time. (Tr. 20-21) She explained that law enforcement will go out with DSS when they receive any allegations of sexual abuse or severe physical abuse, and they also have law enforcement because they want to secure the safety of a child. (Tr. 21) Timmerman does not work for law enforcement. Law enforcement does not tell her what to ask or say to people. When she talked to Rudd, she did not have a police badge, a gun, or handcuffs, and she does not carry these things in her duties as a DSS worker. (Tr. 21-22) Timmerman explained that Rudd did not have to talk to her, and that if he had walked away, she would not have stopped him. (Tr. 23) She did not promise him anything to get him to talk, and she did not threaten him if he did not talk to her. (R. 22-23) She said he spoke freely when she talked to him for about 15-20 minutes and never said he did not want to talk to her. (Tr. 23-24)

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[2] Rudd spoke with DSS employees Esther Timmerman and Shannon Brown. Only the statements made to Timmerman are the subject of this appeal.

During their conversation, Rudd told Timmerman that "he was checking [Victim 1] to make sure that she was hearing properly." He also told her the following:

> that he used [Victim 2], the other child, that he would examine her too because she was normal. And that he said he would never do anything with a sexual intent and that he might have, his fingertip might have brushed the vagina while he was looking at her but that he would, he never put his finger inside her or anything like that. And that he, that he has sex with his wife and that he would never do that to his children. And that, he said but, you know, I'm the father of this, of these girls so I can touch their vagina if I want to.

(Tr. 239-240)

Investigator Kristopher Evensen of the Aiken County Sheriff's Office testified that he went to the Rudd residence on May 23, 2013. (Tr. 30) He explained that he arrived at the house before DSS and that he was not involved with the DSS investigation. He was not standing there when Timmerman spoke to Rudd. He further testified that he cannot tell Timmerman what to say or who to talk to. (Tr. 33)

Rudd testified that several sheriff cars came to his house that day, and he stated that he stood at the front of one of the sheriff's cars throughout the events. He stated that he talked to the DSS worker, and he described the questions she asked him as follows: "she asked me my name, my again, you know, general information. And asked me, I believe she asked me if my daughters were [Victim 1] and [Victim 2]." Rudd was not arrested until seventeen days after this incident. (Tr. 38-40)

Rudd argues he had every right to believe he was in custody and should have been given *Miranda* warnings prior to questioning by the DSS employee. The trial court properly allowed the statements to be considered. The questioning with a DSS worker was not a custodial interrogation and did not require *Miranda* warnings. Further, this issue is not preserved for appellate review.

A. Standard of Review

Appellate court review of the issue of custody is limited to a determination of whether the ruling by the trial court is supported by the testimony. *See State v. Primus*, 312 S.C. 256, 258, 440 S.E.2d 128, 129 (1994), *modified on other grounds*, 327 S.C. 121, 489 S.E.2d 617 (1997) (whether appellant was "in custody" presents a factual issue that cannot be resolved by this Court). *See also State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003) (holding appellate review of whether a person is in custody for *Miranda* purposes is limited to a determination of whether the trial judge's ruling is supported by the record).

B. The statements made to the DSS employee were not part of a custodial investigation, and *Miranda* warnings were not required.

A statement, whether exculpatory or inculpatory, obtained as a result of custodial interrogation is inadmissible unless the person was advised of and voluntarily waived his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *State v. Easler*, 322 S.C. 333, 337, 471 S.E.2d 745, 748 (Ct. App. 1996). The purpose of the *Miranda* warnings is to apprise the defendant of his constitutional privilege to not incriminate himself while in the custody of law enforcement. *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003) (citing 410 *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612). Law enforcement must state the *Miranda* warnings "after a person has been taken into custody or otherwise deprived of his freedom of action in any way." *Id.* A suspect in custody may not be subjected to interrogation unless he is informed that: he has the right to remain silent; anything he says can be used against him in a court of law; he has a right

to the presence of an attorney; and, if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires. *Miranda v. Arizona*, *supra*.

To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which includes factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *United States v. Helmel*, 769 F.2d 1306, 1320 (8th Cir. 1985); *Kaupp v. Texas*, 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003). An examination of the totality of the circumstances in the present case shows that the trial court correctly determined that Rudd was not in custody. As to place, the questioning by the DSS officer took place outside of Rudd's house next to a car. (Tr. 19) Regarding the purpose of the investigation, Timmerman explained that DSS followed its policy to talk to everyone in the household when it receives a report. She explained that she introduced herself to Rudd and told her where she worked. She was wearing her ID badge which indicated that she worked for DSS. (Tr. 20-21) She did not have a police badge on her, and she did not have a gun. She did not place Rudd in handcuffs. Timmerman testified that she does not work for law enforcement and that law enforcement does not tell her what to ask people. (Tr. 21-22) She explained that Rudd seemed to understand why she was there. She stated that he did not have to talk to her, and if he had walked away, she would not have stopped him. She further stated that "[h]e spoke freely because we do not usually ask a lot of questions. We read the allegation and then we want to hear what they have to say." (Tr. 23) The interrogation lasted approximately 15-20 minutes. (Tr. 24)

Investigator Evensen of the Aiken County Sheriff's Department explained that he was not involved in this DSS investigation and that he arrived at the house before DSS. Evensen testified that he was not standing with Timmerman when she talked to Timmerman. (Tr. 31) Based on the totality of the circumstances, including the fact that Timmerman could leave if he wanted, he knew Timmerman worked for DSS, and the length of the interrogation, the trial court properly determined that Rudd was not in custody and *Miranda* warnings were not required.

Significantly, determining whether an individual was in custody depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being questioned. *State v. Sprouse*, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996) (citing *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994)). While Rudd may have testified that he thought he was not free to leave and Timmerman was with the police officers, a review of the totality of the circumstances supports the trial court's finding. (Tr. 37-38)

In *State v. Sprouse*, 325 S.C. 275, 478 S.E.2d 871 (Ct. App. 1996), the Defendant voluntarily met with a social worker at the DSS parking lot. The social worker did not wear a uniform or carry a gun, and at no time did the social worker tell Sprouse that he was under arrest. The social worker was not a law enforcement officer, and the Court found that the defendant's statement was not the product of a coercive, police-dominated interrogation.

As explained in *Sprouse*, a number of jurisdictions have held *Miranda* inapplicable to statements made to social workers in similar circumstances. *See, e.g.*, *Fain v. Alabama*, 462 So.2d 1054 (Ala. Crim. App. 1985) (defendant who admitted

committing sexual assault to social worker not in custody, even though social worker asked defendant to come to her office after having interviewed victim and receiving a notice from the police; defendant was not deprived of his freedom of action and came to the office of his own free will; court noted it is the custody, and not being the focus of an investigation, which marks the point at which a *Miranda* warning becomes necessary); *California v. Battaglia*, 203 Cal.Rptr. 370 (Cal. App. 2 Dist. 1984) (statute requiring a clinical social worker to report incidents of child abuse to the State does not turn social worker into an arm of the State for *Miranda* purposes; in a noncustodial setting, a listener who knows he or she will report statements to a state agency need not give the speaker a *Miranda* warning); *Gresh v. Florida*, 560 So.2d 1266 (Fla. Dist. Ct. App. 1990) (*Miranda* inapplicable due to lack of custodial setting where defendant was interviewed by social workers in a parking lot); *Louisiana v. Hathorn*, 395 So.2d 783 (La. 1981) (defendant who admitted poisoning her children during interview by social worker at the hospital was not the subject of custodial interrogation; therefore, defendant's statements were properly admitted in the absence of a *Miranda* warning); *Massachusetts v. Berrio*, 551 N.E.2d 496 (Mass. 1990) (defendant's statement to Department of Social Services investigator and observing social worker during investigation of child sexual abuse report was not a "custodial interrogation" requiring *Miranda* warnings); *Minnesota v. Holden*, 414 N.W.2d 516 (Minn. Ct. App. 1987) (defendant, who voluntarily went to police station and was interviewed by social worker and police officer in room located just inside unguarded lobby and exit, was not in custody and was not entitled to *Miranda* warning; police officer left interview on two occasions and left defendant alone with social worker, who did most of the questioning; restraints equivalent to formal arrest

were not present); *Wicker v. Texas*, 740 S.W.2d 779 (Tex. Crim. App. 1987) (social worker was not required to advise defendant of his *Miranda* rights where defendant voluntarily went to employee's office to provide confession; defendant was not in custody or otherwise deprived of his freedom of action in any significant way at time he confessed to social worker that he had had intercourse with his daughter; the court concluded the circumstances did not amount to a "custodial interrogation").

Because the trial court objectively examined the totality of the circumstances and concluded that Rudd was not in a custodial interrogation setting, there was no requirement that he be read his *Miranda* rights. Accordingly, the trial judge was justified in denying Rudd's motion to suppress the statements.

C. This issue is not preserved for appellate review.

Prior to trial, Rudd moved to exclude the statements made to the DSS agent. Because defense counsel failed to make a contemporaneous objection when the evidence was introduced at trial, this issue is not preserved for appellate review. "Making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." *State v. Moses*, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct. App. 2010) (quoting *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)). Notwithstanding an motion in limine, if the court makes a ruling on the admission of evidence immediately prior to the evidence at issue being introduced at trial, then the aggrieved party need not renew the original objection. *Id.* Here, Rudd does not meet the exception to the rule because the evidence was not immediately introduced following the court's ruling at the pretrial

hearing. Thus, it was necessary for defense counsel to renew the objection to the introduction of the statements in order to preserve the issue for appellate review. Because counsel did not renew the objection when the statements were made, this issue is not preserved for appellate review. (Tr. 239-241)

II. The trial judge did not err in allow allowing two photographs to be admitted as evidence.

Prior to trial, Rudd moved to exclude the photographs taken on June 10 of Victim 1's room and Victim 2's room, arguing the photographs were not relevant. (Tr. 45) The Court ruled that the photographs were admissible and that they could be relevant. (Tr. 49) During the trial, the State moved to introduce two photographs into evidence, State's Exhibits 3 and 4. When Jennifer left the house with the children on May 23, 2013, she and the girls left and went to the beach because Jennifer knew her way around. When she returned to Aiken, she moved in with her parents. She did not return to the home she shared with Rudd until June 10, 2013. When she returned to the home, she noticed writing all over the girls' walls. (Tr. 201) State's Exhibit 3 is a photograph of how the wall in Victim 2's room looked when Jennifer Rudd went to the resident on June 10, several weeks after she and the children originally left the house on May 23. (State's Exhibit 3, Tr. 202-203) State's Exhibit 4 is a photograph of how Victim 1's room looked on June 10. (State's Exhibit 4, Tr. 202-203) Jennifer testified that she recognized the handwriting on the walls as that of Rudd. When the evidence was introduced at trial, defense counsel stated "[s]ubject to my previous objection, Your Honor." The Court admitted the photographs at that time. (Tr. 202)

Rudd argues that the photographs should not have been admitted because they were not relevant. Rudd also argues that the photographs were prejudicial. The photographs were relevant, and the prejudicial effect was outweighed by the probative value of the photographs. Accordingly, the trial court did not err in admitting the photographs.

A. Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001); *State v. Wood*, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *See State v. Abdullah*, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support. *Id.*

B. The trial court did not err because the photographs were relevant evidence and their probative value outweighed any prejudicial effect.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *State v. Martucci*, 380 S.C. 232, 251, 669 S.E.2d 598, 608 (Ct. App. 2008); Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." *Martucci*, *supra*; Rule 402, SCRE. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Aleksey*, 343 S.C. 20, 35, 538 S.E.2d 248, 256

(2000). The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Unfair prejudice from the introduction of evidence occurs when it has an undue tendency to induce a decision on an improper basis. *State v. Brown*, 306 S.C. 448, 449, 412 S.E.2d 440, 441 (Ct. App. 1991).

The photograph from Victim 1's room has writing that states the following: "[Victim 1], Daddy's sorry!! Please forgive me!! I Love u Baby Girl!!" (State's Exhibit 4) The photograph from Victim 2's room states as follows: "[Victim 2], Daddy's Sorry. Please forgive me [. . .] I love you so much!! Daddy" (State's Exhibit 3)

The trial judge correctly found that these statements were relevant because the jury could infer that Rudd was apologizing for his behavior and exhibited remorse for his actions. "An apology is evidence of a then-existing state of mind or emotion: remorse." *U.S. v. Samaniego*, 345 F.3d 1280 (11th Cir. 2003) (citing *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc.*, 931 F.2d 816, 827-28 (11th Cir. 1991)). In addition, Rudd had the opportunity to explain the photographs when he testified. Regarding the writing on Victim 1's wall, Rudd explained, "I wrote sorry on that wall for that, you know, she had to stay in that room that she was – it was like a prison to her. And I just, I just wanted her to know that, that, that I was sorry that she had to go through that." (Tr. 354) As to the writing on Victim 2's wall, Rudd explained, "So I wrote on the wall . . . And I was telling her I'm sorry. Forgive me for not seeing this before, not seeing that message before, not knowing what she wrote to me before, not paying that much attention to her, her little cards and notes that she wrote to me." (Tr. 355) These writings on the wall are probative because they show Rudd's thought and state of mind regarding the situation. Also, the

fact that the writings were on the wall only after Jennifer and the victims had been out of the house creates an inference that the writings were about the recent events. Since Jennifer and the girls left because of the allegations, these were the only relevant recent events. The photographs had significant probate value, and any prejudicial effect was outweighed by the probative value of the photographs.

III. Any error in the admission of the statements to the DSS employee or the photographs was harmless given the overwhelming evidence of Rudd's guilt.

A. Harmless Error Standard for Statements

The overwhelming evidence of Rudd's guilt renders any error harmless. In *State v. Creech*, 314 S.C. 76, 441 S.E.2d 635 (Ct. App. 1993), the court reiterated the Supreme Court of the United States' holding in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that error of even constitutional magnitude may be deemed harmless if, "considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict." *Id.* at 86, 441 S.E.2d at 640 (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)); *see also Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993).

Similarly, in *State v. Easler*, the Court explained that any error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis. 327 S.C. 121, 129, 489 S.E.2d 617, 621–22 (1997); *see also State v. Newell*, 303 S.C. 471, 477, 401 S.E.2d 420, 424 (Ct. App. 1991) (finding failure to suppress evidence for *Miranda* violation harmless where record contained overwhelming evidence of guilt); *State v. Lynch*, 375 S.C. 628, 636, 654 S.E.2d 292, 296 (Ct. App. 2007) ("The failure to suppress evidence for possible *Miranda* violations is harmless if the record contains

sufficient evidence to prove guilt beyond a reasonable doubt."). Harmless error rules, even in dealing with constitutional errors, "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22, 87 S.Ct. 824.

B. Harmless Error Standard for Photographs

Even if evidence was not relevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial. *State v. Langley*, 334 S.C. 643, 647-48, 515 S.E.2d 98, 100 (1999) (citing *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991), *cert. denied*, 503 U.S. 993, 112 S.Ct. 1691, 118 L.Ed.2d 404 (1992)). "Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Because there was overwhelming evidence of Rudd's guilt, any error in admitting the two photographs was harmless.

C. There was overwhelming evidence of Rudd's guilt.

Because there is overwhelming evidence of Rudd's guilt, any error in either the admission of the DSS statements or the photographs was harmless. Both Victim 1 and Victim 2 testified that Rudd touched them in his room with the door locked while their pants and underwear were off. (Tr. 125, 161) Jennifer testified that as a result of the conversation she had with her daughters, she called the police and left the residence. (Tr.

220) Shannon Brown, a caseworker for the Aiken County Department of Social Services met with Rudd at the Aiken County Detention Center. She stated that Rudd told her "that during the time that he checked his children and compared them to one another." (Tr. 262) Dr. Donohoe, the urologist who performed Victim 1's surgery, explained that he did not examine two patients compared to each other to determine if things were proceeding normally. He also explained that he would not direct a parent to insert their finger into their child's vagina after surgery, and he would not advise a parent to compare their child to a normal child's genitalia. (Tr. 284-285, 288) In recorded from conversations from the Detention Center, Rudd stated that he should have made better choices. (State's Exhibit 5) Rudd also testified that he checked Victim 1 as follows: "I would just, you know, ask her to let me look at her by pulling down her underwear, laying her on – asking her to lay on the bed and just looking at her and that's it. Told her to put her clothes back on." (Tr. 329) He later explained that "I checked one of my daughters and compared her because she had surgery." (Tr. 344)

In addition to the overwhelming evidence of Rudd's guilt, the statements to Timmerman, the DSS employee, are cumulative evidence and therefore any error in their admission was harmless. *See State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (recognizing admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) (finding any error in admission of evidence cumulative to other unobjected-to evidence is harmless); *State v. Johnson*, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (instructing admission of improper evidence is harmless where it is merely cumulative to other evidence). Timmerman testified that Rudd told her he was checking to make sure that

Victim 1 was hearing properly. (Tr. 239-240) Shannon Brown, another DSS employee, met Rudd separately at the Aiken County Detention Center. She testified that Rudd explained that he checked his children and compared them to one another. (Tr. 262) Rudd himself testified as follows: "I checked one of my daughters and compared her because she had surgery." (Tr. 344) Because the statements to Timmerman were cumulative to other evidence regarding comparing the victims, the admission of the statements was harmless.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
March 23, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
James R. Barber, III, Circuit Court Judge

Appellate Case No. 2013-002799

THE STATE.....RESPONDENT

v.

DWAYNE LEE RUDD .....APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated March 23, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 23 day of March 2015.

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March 23, 2015

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Re: The State v. Dwayne Lee Rudd
Appellate Case No. 2013-0002799

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mary Frances Jowers
Assistant Deputy Attorney General
S.C. Bar No. 68413

MFJ/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services