STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Marlboro County
The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-001409

THE STATE,

Respondent,

v.

ALEXANDER CARMICHAEL HUCKABEE, III,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II and III. LaRosa's testimony as an expert in crime scene reconstruction and crime scene analysis was admissible non-scientific expert testimony. The court acted as gatekeeper when it conducted *in camera* hearing in which LaRosa testified to his extensive experience and training. 23

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STATEMENT OF ISSUES ON APPEAL

I.

LaRosa's testimony before the jury was not in the vein of a profiler who paints a picture of a "typical offender" and leads the jury to conclude that because the defendant has those characteristics, he must be a member of the "typical offender" group and therefore must be guilty. Rather, LaRosa's testimony before the jury was in the vein of a crime scene expert, making deductions about the likely culprit from physical evidence at the scene. LaRosa was clear that he could not identify any particular person as the perpetrator of the crimes against Victim. Further, in the facts and circumstances of the case, any error in admitting LaRosa's testimony did not affect the verdict.

II. & III

LaRosa's testimony as an expert in crime scene reconstruction and crime scene analysis was admissible non-scientific expert testimony. The court acted as gatekeeper when it conducted *in camera* hearing in which LaRosa testified to his extensive experience and training.

IV.

The trial court did not abuse its discretion in admitting LaRosa as an expert witness. The testimony was relevant and its admission did not constitute unfair prejudice.

V.

The issue raised by Appellant is not preserved for appellate review where Appellant only objected generally to all three statements as involuntarily given. Even if the issue were preserved, it would be without merit. The trial court properly considered the totality of the circumstances and found the October 13 statement admissible. Moreover, as Appellant testified to the key portions of his third statement during his trial testimony, any error in admitting the statement is harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

Alexander Carmichael Huckabee, III, (Appellant) was indicted for Homicide by Child Abuse, Inflicting Great Bodily Injury upon a Child, Unlawful Conduct toward a Child, and Criminal Sexual Conduct with a Minor (First Degree). (R. pp. __, Indictments.) There were multiple pre-trial hearings in 2012, and a jury trial commenced on June 17, 2013, before the Honorable J. Michael Baxley.[1] Appellant was found guilty of all counts. Judge Baxley pronounced life sentences for Homicide by Child Abuse and Criminal Sexual Conduct with a Minor (First Degree), twenty years for Inflicting Great Bodily Injury upon a Child, and ten years for Unlawful Conduct toward a Child. All sentences were to be served concurrently. (Tr. Vol. II p. 107.)

STATEMENT OF FACTS

Appellant met Atelia Hunt ("Hunt") in an online chatroom in 2009, and after Hunt separated from her husband in 2011, the two arranged to meet. (Tr. pp. 275-276, pp. 369-372, p. 712.) A relationship ensued, and Hunt moved from North Carolina to Bennettsville, South Carolina, to live with Appellant in the summer of 2011. (Tr. p. 364, pp. 373-375, p. 713, p. 715.) Appellant's seven-year-old (Son), and Hunt's daughters, six-year-old Sister and three-year-old Victim, also lived in the home. (Tr. p. 235, p. 343, p. 375.) Victim went to stay with Hunt's parents in August 2011 as a result of a Department of Social Services ("DSS") investigation, and Victim remained there for about four weeks. (Tr. pp. 279-280, pp. 343-345, pp. 379-382.) In mid-September 2011, Victim returned to the home Hunt shared with Appellant and the other children in Bennettsville. (Tr. pp. 385-386.)

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[1] The prosecution was initially going to try jointly Appellant and co-defendant Atelia Hunt. Hunt pled guilty prior to trial. (Tr. p. 454.)

On October 6, 2011, just before 10:00 pm, Hunt brought Victim to the hospital. (Tr. pp. 112-113.) Victim's head was shaven. (Tr. pp. 113-114.) The nurse who treated her in the emergency room noted bruises all over Victim's body – the top of her head, the bottoms of her feet, and her legs. (Tr. pp. 115-116, pp. 120-121.) Victim had cigarette burn marks to her private area and buttocks. (Tr. p. 116, p. 437.) The nurse who first encountered Victim had difficulty talking about the Victim's extensive visible injuries at trial, saying she had "never seen anything like it, and [she hoped she never would] again." (Tr. p. 116.) Despite efforts to resuscitate Victim for approximately twenty-five minutes, Victim died. (Tr. p. 115, p. 121.) She was about one month shy of her fourth birthday. (Tr. p. 155.)

Law enforcement officers and two DSS employees were sent to the home that night. (Tr. p. 235.) When the foster care supervisor for DSS, Rebecca Jorgensen ("Jorgensen"), arrived, Appellant was standing on the porch smoking a cigarette. (Tr. p. 222.) Appellant claimed Victim had been acting normally then started shaking and fell to the floor. (Tr. pp. 223-224.) He showed Jorgensen the sofa and said, "Look, that's where [Victim] peed, and she peed on me." (Tr. p. 223.) Appellant also stated that when Victim started shaking and fell to the floor, "he picked [Victim] up and took her to the kitchen, and put her on the table in the kitchen to do CPR." (Tr. p. 223.) He demonstrated picking the child up and carrying her into the kitchen as he talked. (Tr. pp. 223-224.) Jorgensen observed stains on the sofa, two pairs of girls' underwear on the floor in the living room, a hammer on the floor next to the bed where Sister slept, and a cigarette butt in the bathroom sink. (Tr. p. 224.) Jorgensen and a co-worker woke Son and Sister and removed them from the home. (Tr. p. 226.)

Autopsy Findings

An autopsy was conducted on October 8, 2011, by Dr. Cynthia Schandl ("Dr. Schandl"). (Tr. p. 153.) Dr. Schandl began with an external examination, noting numerous injuries consistent with abuse. (Tr. p. 179, p. 184.) She noted Victim's head was shaven. (Tr. p. 165.) Dr. Schandl also detailed extensive external injuries – numerous bruises (seven or eight to Victim's face and head, several to the inner thighs, and on her vagina), round ulcerations which appeared to be burns in various stages of healing, and subdural hemorrhage indicating trauma to the head. (Tr. pp. 158-159, pp. 165-166.) Victim had obvious bruises to the left and right sides of her head, her face, her chin, her neck, and "the angle of her mandible." (Tr. p. 165, pp. 180-181.) The bruises to her head went into the scalp. (Tr. p. 165.) There were hemorrhages around the optic nerves, further suggesting significant trauma to the head. (Tr. p. 166.) The bruises about the head suggested blunt trauma. (Tr. p. 167.) Dr. Schandl was very suspicious of abuse based on the head injuries. (Tr. p. 168.)

Victim suffered several other injuries. Notably, hemorrhaging inside Victim's vagina indicated a blunt trauma within two to three days of her death, an injury suspicious for some sort of sexual assault. (Tr. pp. 171-172.) There were other more superficial bruises on the child's body. There was a long, narrow bruise on Victim's abdomen, and there were two bruises on her inner thighs. (Tr. pp. 166-167, pp. 182-183.) There were scrapes and bruising further down her legs, particularly around the ankles. (Tr. p. 167.)

There were at least five burn marks on Victim's body. (Tr. p. 169.) Dr. Schandl described five places on the Victim's buttocks where "the skin is basically, simply absent." (Tr. p. 169, p. 182.) Those burns occurred within forty-eight hours of death. (Tr.

p. 172.) The injuries were consistent in size with a cigarette burn. (Tr. p. 169.) Dr. Schandl noted several other similar round areas that had healed and scarred. (Tr. p. 169.) There were two healing areas in Victim's vaginal area very consistent with the fresher burn injuries to her buttocks. (Tr. pp. 169-170, p. 183.)

Victim was also missing two front teeth. (Tr. pp. 173-174, p. 181.) Dr. Schandl noted this was unusual for a child of Victim's age because normally children begin to lose teeth around age six or seven, and normally the bottom incisors are lost before the top. (Tr. p. 173.) The area where the teeth were missing had healed, so they had not come to be missing very recently. (Tr. p. 174.)

The extensive injuries did not cause Victim's death, however. Victim was found to have suffered a "massive infection that started as a urinary tract infection." (Tr. p. 156.) The infection spread to Victim's bladder and kidneys. (Tr. p. 156.) From there, it became a blood infection. (Tr. pp. 156-157.) The blood infection affected the way the blood clotted. (Tr. p. 157.) Victim began having blood clots which "went to her brain, and she had basically small strokes in her brain from those clots caused by the infection." (Tr. p. 157.) The blood clots would cause small areas of the brain to die.[2] (Tr. p. 160.) Dr. Schandl found evidence that Victim was suffering brain damage during the 5-7 days before her demise. (Tr. p. 160.)

Dr. Schandl opined Victim would have first displayed symptoms of the urinary tract infection (UTI) – burning with urination, frequent urge to urinate, leakage, and bloody or foul-smelling urine. (Tr. p. 161.) As the infection progressed to her kidneys, in addition to the symptoms of the UTI, she would have experienced back pain. (Tr. p. 161, p. 187.) As the infection progressed, Victim would have suffered the effects of extremely

[2] While extensive bruising could also cause blood clots, Dr. Schandl believed the infection "was enough to kill her." (Tr. p. 192.)

high fever. (Tr. p. 161.) As the blood infection raged, brain damage could cause symptoms such as tiredness, not wanting to eat, difficulty waking, coma, and seizures during Victim's final days. (Tr. pp. 160-161.) During the final week of her life, Victim would have been wobbly, lethargic, slow, and non-reactive when people spoke to her. (Tr. p. 162, p. 187.) It would have been obvious that the child was very sick. (Tr. pp. 162 - p. 163.)

Background

Suspicion was first aroused about Victim's treatment in mid-August 2011. Prior to Victim going to live with Hunt's parents, Victim had odd markings behind her ears. Appellant told Hunt he would rub Victim's ears and Victim liked it. (Tr. p. 379-380.) Victim developed raw marks behind her ears, and her hair would stick to the wounds. (Tr. p. 379.) Hunt also noticed bruises on Victim, but testified when she questioned Appellant, "he always came up with an excuse that she fell or she ran into a table." (Tr. p. 380.) Specifically, when Victim left to stay with Hunt's parents, Hunt told her father that Victim's ears were raw and a bruise on Victim's back was, according to Appellant, the result of a seizure "where she had been caught between the foot of the bed and the mattress."[3] (Tr. pp. 380-381.) Upon seeing Victim, Hunt's mother reported the matter to DSS. (Tr. pp. 381-382.) DSS visited the home Appellant and Hunt shared, and Victim would be placed with Hunt's parents for a time. (Tr. pp. 279-280, pp. 343-345, pp. 379-382, p. 384; R. p. __ Court's Exhibit 2 pp. 36-39.) When Hunt brought Victim back to South Carolina in mid-September 2011, around two weeks before her death, she had no bruises, had hair down to her neck, and had all her teeth. (Tr. pp. 385-386.) Within a week of returning to Bennettsville on September 16, bruises began appearing on Victim.

[3] Hunt never saw Victim suffer seizures. She only witnessed two "episodes" where Victim would "go into a mold," not a violent seizure, and both of these occurred in the weeks before Victim died. (Tr. pp. 390-391.)

(Tr. p. 388.) By October 6, she would be battered from head to toe and dead from an infection.

During the investigation, Hunt and Appellant were each interviewed several times, and both Hunt and Appellant testified at trial. From their various statements, certain facts were consistent. Hunt would generally get up in the morning with Son and Sister, ensure Son took his ADHD medicine, and take them to the bus stop. (Tr. p. 286, p. 403, p. 716.) Hunt ran errands and cared for Appellant's ill mother. During these times, Victim stayed home with Appellant. (Tr. p. 286, pp. 396-398.) They both noticed Victim had a grayish pallor the week of her death. (Tr. p. 241, p. 352-353, p. 429, p. 432; Ct. Ex. 2 p. 46.)

Hunt's Testimony

Prior to Appellant's trial, Hunt pled guilty to homicide by child abuse under the aiding and abetting provisions and to unlawful neglect or conduct toward a child. (Tr. p. 454.)

Hunt attempted to explain the bruises around Victim's ankles, describing Appellant grabbing Victim by the ankles and trying to make her do splits. (Tr. pp. 388-389.) According to Hunt, Appellant pulled one of Victim's teeth, claiming it was loose, but when he showed her the tooth he pulled "the root [was] still connected to it." (Tr. p. 389.) Hunt testified that the second missing tooth was pulled, but it was loose. (Tr. pp. 389-390.) Again, Hunt noted the pulled tooth still had root attached to it. (Tr. p. 390.) Appellant bathed Victim. (Tr. pp. 391-392.) Where Victim had usually worn clothing around the house, usually shorts and a tank top, when Victim came home after September 16, she would usually be in only panties. On several occasions Hunt returned home to find Victim completely naked. (Tr. p. 392.) Hunt also described incidents in the bathroom

where Victim was naked against the wall while Appellant was on the toilet. (Tr. pp. 392-393.) Hunt recounted that Appellant shaved Victim's hair. (Tr. p. 393, pp. 525-526.) According to Hunt, Appellant explained he had done so because Victim had "sores in her head, and he wanted to see how deep the sores was and the bruises." (Tr. p. 393.) Hunt said Appellant demonstrated how he would sometimes hit Victim on top of her head with his knuckles. (Tr. p. 394.)

The week before Victim died, Hunt's father picked Sister up from school and brought her home. Appellant told Hunt's father that Victim was at a friend's house. Once Hunt's father left, he admitted to Hunt that Victim was inside the house, but he did not want Hunt's father to see her because she was so bruised. (Tr. pp. 433-434.)

Hunt also recalled another incident in the days before Victim's death. Appellant told Hunt Victim climbed a chair and hit her "nusie," the word she used for vagina. He used a burgundy towel to clean up blood in the kitchen. (Tr. pp. 419-420, pp. 425-426, pp. 505-507.)

Hunt admitted that by October 4-5, Victim had assumed a grayish pallor and had difficulty walking. (Tr. pp. 430-432.) Hunt described Victim trying to stand up but falling to one side, and Appellant would "jerk her up…where she'd be standing straight back up." (Tr. p. 430.) October 5 was Appellant's birthday. Hunt and Appellant both testified they went to Pizza Time restaurant to pick up carry-out for lunch. At the restaurant, Hunt got spaghetti for Victim, but she did not see her eat it. (Tr. p. 431, p. 726.) Later that night Appellant, Hunt, Sister, and Son went to the home of their neighbors, the Malachis, for a cookout for Appellant's birthday. (Tr. p. 435, p. 727.) They left Victim at home. (Tr. pp. 435-436.) Even though Appellant, Hunt, Son, and Sister interacted with the Malachis fairly regularly, the Malachis never met Victim. (Tr. p. 436, pp. 637-638.)

On the morning of October 6, Hunt walked Sister and Son to the bus stop. (Tr. p. 406.) She left Appellant and Victim at the home and took Appellant's mother for cataract surgery in Laurinburg, North Carolina. (Tr. p. 406.) After tending to Appellant's mother, she picked up vitamins for Victim on her way home. (Tr. p. 407.) She dropped off the vitamins then went to pick Sister and Son from bus stop just after 3:00 pm. (Tr. p. 407.) Upon returning to the house, she checked on Appellant and Victim in the bedroom, and Victim was laying on the floor. (Tr. pp. 407-408.) Hunt then did some household chores. (Tr. p. 408.)

She left the house to take Son to Cub Scouts. (Tr. p. 408.) She was at the meeting for about two hours. (Tr. p. 408.) Other parents at the Cub Scout meeting testified and affirmed that Hunt was with Son at the Cub Scout meeting. The sign-in sheet also reflected Hunt and Son were present. Hunt was already present when the meeting began at 5:30 pm, and the meeting was long that night, until around 7:00 pm, because they were planning a camping trip. Hunt stayed particularly late to talk to the group leaders about financial assistance in purchasing a shirt for Son. (Tr. pp. 624-626, 628-633.)

When Hunt got home, Sister was alone in the front room watching television. When Hunt asked why Sister was alone, Sister stated that Appellant did not want her in the bedroom with him and Victim. Hunt went in the bedroom, and Victim was laying in the bed wearing only panties with a blanket up to her waist. Appellant was in the chair. They argued briefly about why he had not helped with chores. (Tr. p. 408.) Hunt started to make hot dogs for Sister and Son and told them to shower while she made dinner. She checked on Appellant and Victim again and found Victim laying on cushions on the floor in front of the air conditioner, turned as if watching her favorite cartoon, Spongebob. (Tr. p. 409.) Assuming everything was alright, Hunt went back to the kitchen and plated the

hot dogs for the children. She returned to the bedroom and saw Victim still laying on the floor but now staring up at the ceiling. Hunt turned her head back, and she asked Appellant to have Victim eat. (Tr. p. 410.)

After Sister and Son ate, Hunt again went to the bedroom. Again, Victim lay with eyes fixed on the ceiling. Appellant denied moving Victim. Victim was now having difficulty breathing. Hunt felt something wasn't right and decided to take Victim to the hospital. She recalled that Appellant touched Victim's stomach and she grunted. Hunt ran next door and asked the neighbor to watch the children so she could take Victim to the hospital. (Tr. p. 411.) Sister and Son collected some stuffed animals, and Hunt took them to the neighbor's house. Appellant directed Hunt to run some hot water in the bathtub. She insisted on taking Victim to the hospital and wanted him to come with her. (Tr. p. 412.) He refused to come to the hospital, and told her to get the children back from the neighbor's house. (Tr. pp. 412-413.)

When Hunt came back with the children, Appellant was on the couch with Victim wrapped in a burgundy towel. Hunt grabbed some clothing to put on Victim. She came back in the room. Victim fell off the loveseat onto her right side. She lay there a few seconds, and Appellant picked her up by the waist. As he laid her on his lap, she urinated. (Tr. p. 413.) Appellant wiped his leg "and said that she didn't make it to the 25th."[4] (Tr. pp. 413-414.) He took her into the kitchen to do CPR. (Tr. p. 414.) Hunt ran next door and begged Denea Malachi to come to the hospital with her. They got in the car, and Appellant put Victim in the back seat. During the trip, Hunt had Denea take over driving so she could perform CPR on the child. (Tr. p. 414.) Hunt testified she ran into the hospital with Victim, and the staff took Victim to a room.

[4] Victim had an appointment for a checkup on October 25.

Hunt was taken to a waiting room. Denea came in with Hunt's purse. A few minutes later, Appellant's father arrived. (Tr. p. 415.) Appellant's father assisted Hunt in calling her parents. Appellant called, and Hunt informed Appellant that Victim was dead. In response to this news, Appellant specifically asked her if she had talked to anyone from DSS or law enforcement. He told Hunt "that he'll take care of all this, that he'd let them know what had happened." (Tr. p. 417, p. 439.)

Hunt denied causing any of the injuries. (Tr. p. 438, p. 453-454.) Hunt also testified Appellant watched pornography on her computer with Son. (Tr. p. 453.) She believed Appellant sexually assaulted Victim. (Tr. p. 453.) Hunt testified that she did not take Victim to the doctor because Appellant would tell her to wait until the bruises healed up as a doctor would see them and then DSS would get involved. (Tr. p. 460, pp. 516-517.)

Appellant's Statements and Testimony

Appellant conceded several times that if he was guilty of anything it was not getting medical attention for Victim. (Tr. p. 283, p. 348, p. 362, p. 754; Ct. Ex. 2 p. 40, p. 86, p. 101, pp. 103-104, p. 152.[5])

When asked about the burn marks on Victim's vagina, Appellant said Hunt told him Victim "just blistered up." (Tr. p. 280, p. 289, p. 334.) In response to questioning about the marks on Victim's legs, Appellant reported Victim fell in the bathroom once and on another occasion he popped Victim because she was about to touch a wall socket. (Tr. p. 281, p. 717.) He also remarked Victim had fleas from the rabbit where she slept on the floor, so he shaved her head with Hunt's approval. (Tr. pp. 281-282, pp. 290-291, p. 720.) However, there was no evidence of flea bites on Victim. (Tr. p. 282.) He reported

[5] Ct. Ex. 2 is a transcript of a videotaped statement which was played for the jury as State's Exhibits 81, 82, and 83.

Hunt would yell at the girls and make them stand in the corner. (Tr. p. 283.) Notably, during interviews, Appellant did not refer to Victim by her name but as "that girl." (Tr. p. 283.)

Appellant was also asked about caring for the child. He claimed he bathed Victim, but Sister would wash Victim's bottom area. (Tr. p. 284.) He discussed having issues potty training her. (Tr. pp. 285-286.) As for Victim's missing teeth, Appellant only said that she had a loose tooth, and he pulled it. (Tr. pp. 291-292.) He claimed Hunt pulled the second tooth on the morning of October 6. (Tr. p. 292, p. 719.) This claim was contrary to the autopsy findings that the area around the missing teeth had healed.

Appellant testified that Victim sustained two accidental injuries on October 3. Victim ran into one of his cigarettes and burned her arm. (Tr. p. 721.) She also slipped and fell in the bathroom. (Tr. p. 722.)

Appellant also stated he feared DSS would become involved, and he did not want to lose his son Alex. (Tr. p. 293, p. 363, p. 755, p. 756; Ct. Ex. 2 p. 115.) Contrary to his asserted fear of DSS, he also defended his failure to notify authorities about Victim's condition, stating, "DSS done been called before and they ain't did nothing. I mean, what's the point." (Tr. p. 757.)

Appellant, like Hunt, testified that he stayed home with Victim when Hunt took his mother to the doctor's appointment. Appellant claimed Victim watched cartoons and colored that morning. (Tr. pp. 286-287, p. 728; Ct. Ex. 2 p. 41, p. 43, p. 52.) He then went to his shop for a short time. When he got home, Son and Sister were home from school. Tr. p. 729.) Hunt took Son to a Cub Scout meeting around 5:30 pm.[6] (Tr. pp. 729-730.) While Son and Hunt were at Cub Scouts, Appellant testified that he, Victim, and Sister

[6] Appellant initially told police that Hunt never left the house again that day, (Ct. Ex. 2 p. 62.)

watched TV in the living room. Victim went into the other room and laid down, so only Appellant and Sister were in the living room when Hunt got home. (Tr. pp. 730-731.)

Appellant testified that after Hunt got home, she told him Victim was having "one of her little episode. Little episode is when she's got her fist clenched up … [Hunt] come got me and showed [Appellant] [Victim] was having a little episode, and it lasted like three minutes and she went back to normal." (Tr. pp. 731-732.) Victim was warm, so they put her in front of the air conditioner. Appellant laid down in the same room while Hunt went to make dinner. He heard a grunting noise but wasn't sure if it was Victim or the dog. (Tr. pp. 732-733.) Hunt came back in the room. Appellant touched Victim's stomach and she made the grunting noise. She felt cold so they ran warm water in the bath. (Tr. pp. 734-735.) He put her in the bath, stating "it ain't my child. If the parent tell me how to do something, I did it." (Tr. p. 736.) He then wrapped her in a burgundy towel and sat her on the love seat while Hunt collected clothes for Victim. At that point, Victim made a "squealing noise" and rolled off the love seat and onto the floor. Victim was not breathing, and Appellant carried her to the kitchen table to attempt CPR. (Tr. p. 737.) He later put Victim in the back seat of the car when Hunt and Denea Malachi left for the hospital. (Tr. p. 738.)

Computer

Appellant stated the computer belonged to Hunt, and she had limited his access to it. (Tr. pp. 761-762; Ct. Ex. 2 p. 54) An analysis of the computer revealed that there were two usernames being used on the laptop, Atelia and Guess. Guess is a default. (Tr. p. 668.) Between 3:08 pm and 3:56 pm on October 6, 2011, the day Victim died, several searches were made ranging from what to do when a child is unconscious to how to treat "sores on the butt" which look like cigarette burns. (Tr. pp. 661-664.) At 6:26 pm, while

Hunt was with Son at Cub Scouts, a search was made regarding what to do when a child is unconscious. (Tr. p. 663.) A web site called familydoctor.org was accessed at 6:35 pm, again while Hunt was with Son at Cub Scouts. (Tr. p. 666.) There was also an extensive history of pornography on the computer.

Other Evidence

A pair of girls' panties, a hammer, a red towel, and a leather strap were collected from the house during execution of a search warrant on October 10. (Tr. pp. 129-131.) When officers arrived, a pet rabbit was running loose in the home, and there was rabbit's urine and feces in the house. (Tr. p. 130.) There were girls' clothes strewn in the living room. (Tr. pp. 141-142.) There were cigarette butts on the floor. (Tr. p. 141.) During that search, officers also noted a latch lock on the outside of the girls' bedroom. (Tr. pp. 131-132, p. 143.) A sheet covered the mirror in the girls' room. (Tr. p. 132, p. 144.) There was at least one cigarette butt underneath the bed in the girls' room. (Tr. p. 144.)

Agent Bass also collected a rod from the house which was inscribed with "Tommy Hammer," and DNA swabs were collected and tested. (Tr. pp. 263-264, p. 269-270.) Hunt revealed that Appellant used the rod and the leather strap to hit her and the children. (Tr. pp. 425-428.) DNA testing found a mixture of DNA from at least three people on the rod. Hunt, Appellant, and Victim could not be excluded as contributors (probability of a randomly selected unrelated individual who could have contributed: 1 in 5). (Tr. p. 612.) Appellant and Victim could not be excluded from one DNA sample found on the belt (probability of an unrelated contributor: 1 in 1700). (Tr. pp. 613-614.) A second sample from the belt could not exclude Victim (probability of an unrelated contributor: 1 in 410,000). (Tr. pp. 614-615.)

The burgundy towel which Hunt claimed had been used to clean up Victim's blood and was later wrapped around her in the moments before her death contained Victim's DNA, with a probability of a randomly selected unrelated person matching the profile 1 in 7.8 quadrillion. (Tr. p. 616.)

ARGUMENT

I.

LaRosa's testimony before the jury was not in the vein of a profiler who paints a picture of a "typical offender" and leads the jury to conclude that because the defendant has those characteristics, he must be a member of the "typical offender" group and therefore must be guilty. Rather, LaRosa's testimony before the jury was in the vein of a crime scene expert, making deductions about the likely culprit from physical evidence at the scene. LaRosa was clear that he could not identify any particular person as the perpetrator of the crimes against Victim. Further, in the facts and circumstances of the case, any error in admitting LaRosa's testimony did not affect the verdict.

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" State v. Commander, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417 (2011)(citing State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted).)

As a preliminary matter, LaRosa's testimony before the jury was limited to facts regarding the crime scene (in this case, the Victim's body) and the logical inferences that he, as an experienced investigator, was able to make. As such, LaRosa's testimony does not comport with the models of inadmissible "profile testimony" propounded by Appellant. Moreover, LaRosa's testimony was largely cumulative to that of the forensic pathologist, Dr. Schandl, and there was substantial evidence of Appellant's guilt such that any error in admitting LaRosa's testimony was harmless beyond a reasonable doubt.

Appellant first attempts to paint LaRosa's testimony as being in the same vein as that of the forensic interviewer in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). This is a faulty analogy, however. In Kromah, the Supreme Court discussed the testimony

of a "forensic interviewer," "' a person specially trained to talk to children when there is a suspicion of abuse or neglect.'" Id. at 357, 737 S.E.2d 499. Appellant makes note of Kromah's holding that experts may give opinions but "may not offer an opinion regarding the credibility of others." Id. at 358, 737 S.E.2d 499. However, nothing in LaRosa's testimony speaks to the credibility of any witness. As such, Kromah is not controlling in this matter.

Appellant next explores a selection of authority from other jurisdictions regarding psychological profile testimony found to be inadmissible. These cases all raise the concern that an expert is permitted to testify to what the "typical offender" looks like. These cases are distinguishable from the present case. For example, in one case cited by Appellant, State v. Clements, 244 Kan. 411, 770 P.2d 447 (1989), a psychologist testified about the characteristics of pedophilia and its various subcategories. The expert psychologist had not examined the defendant and made no claim that the defendant suffered from the disorder. Clements argued that the testimony did nothing to aid the jury and only gave rise to the inference that Clements was guilty because he fit the profile of the typical child sex offender. Id. at 418, 770 P.2d 453. While not referencing the evidence as improper character evidence, the Clements court expressed concern that, under the circumstances of that case, the psychologist's testimony allowed the jury to conclude that the defendant exhibited some of the stated characteristics of pedophilia, therefore he must be a pedophile. The remaining logical step would be that because he is a pedophile, he is guilty of the sex crime for which he is on trial.

In another case cited by Appellant for the proposition that testimony of criminal profilers has been nearly universally excluded, People v. Robbie, 92 Cal. App.4th 1075 (2001), a special agent with the California Department of Justice was called to testify as

to the typical conduct of rapists, and the agent was to opine that the defendant's conduct was typical of rapists. The California court found the problem with the testimony offered in the case summarized in a syllogism:

> Criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal. Guilt flows ineluctably from the major premise through the minor one to the conclusion. The problem is the major premise is faulty. It implies that criminals, and only criminals, act in a given way. In fact, certain behavior may be consistent with both innocent and illegal behavior… .

92 Cal.App. 4th 1084. In Robbie, the investigator "was asked hypothetical questions assuming certain behavior that had been attributed to the defendant and was allowed to opine that it was the most prevalent kind of sex offender conduct."

LaRosa was tendered as an expert in crime scene reconstruction and crime scene analysis.[7] His testimony before the jury really went "back more to [his] crime reconstruction days."[8] (Tr. p. 592.) LaRosa reviewed evidence of the autopsy report and photos of Victim at the hospital. (Tr. p. 591.) He noted the cigarette burns to her vagina were "specific and direct." (Tr. p. 593.) He stated that typically, someone who is burned will move away from the burn, resulting in a "flashing" pattern. (Tr. p. 593.) Since Victim's burns were specific and direct, she must not have moved when they were inflicted. (Tr. p. 593.) If a child did not move when burned, it was likely that she was prevented from doing so. (Tr. pp. 593.) LaRosa also testified that he believed that

[7] LaRosa's qualification as a crime scene analyst is also variously referred to during trial as criminal profiler or criminal behaviorist. LaRosa testified "you can be a crime scene reconstructionist and not be a criminal profiler, or a crime analyst, or crime analytic, but you can't be a profiler without being a reconstructionist." (Tr. p. 582.)

[8] During *voir dire*, LaRosa did discuss certain profiles of offenders, e.g. the situational child molester with sadistic overtones. (Tr. p. 546.) LaRosa discussed different types of child molesters. (Tr. pp. 540-543.) He also stated that the sexual gratification aspect of the offender's behavior may not be immediate physical gratification, rather the offender may even save the memory of the behavior for later physical gratification. (Tr. pp. 542-543.) This type of testimony was not permitted or elicited before the jury.

because the burns were inflicted to Victim's genital area, there was a sexual gratification element to the abuse. (Tr. p. 594.) Because of the sexual aspect of the crime, the perpetrator was likely a male. (Tr. p. 594.) LaRosa stated his experience, and the research he reviewed showed that most violent sexual crimes were perpetrated by men, and he had never come across such a case solely perpetrated by a female. (Tr. p. 594.) He also extrapolated that because the burns were in various stages of healing, they were inflicted over a course of time. This would tend to suggest that the person inflicting the burns had control over Victim for a course of time as opposed to a single violent episode. (Tr. p. 595.) In sum, LaRosa's testimony was that the Victim's wounds were most likely perpetrated over a period of time by a male who was physically larger than three-year-old Victim.

LaRosa's testimony before the jury is not testimony about the profile of the "typical offender" and does not cause the same concerns raised in Clements, Robbie, and other such cases. Rather than discuss traits of typical sex offenders, LaRosa discussed the actual injuries sustained by Victim. He then used the characteristics of those particular injuries in conjunction with his own law enforcement experience and review of other like cases to opine that further investigation should be made into a male who is larger than a three-year-old girl who had been around the Victim on multiple occasions over a period of time. LaRosa's assertion that the perpetrator is likely a male who is larger than a three-year-old girl does not impugn the defendant's character or attribute a profile akin to "pedophile" or "rapist" to him. Here, the deductions from the crime scene point to a male larger than a three-year-old girl (a "profile" that would probably fit about half of the population and would not stir prejudice in an average juror) who had the opportunity to be in contact with the Victim on more than one occasion. Appellant is not being lumped

into a class of offender to prove he behaved in conformity with a set of behaviors or manifested a given psychology. Rather, LaRosa was asked to look at a crime scene and make deductions based on what he saw. The testimony set before the jury in this case was more Sherlock Holmes than Sigmund Freud.

Officers are often asked to testify from their experiences in areas where juries may be unfamiliar. For example, officers are often called upon to testify about their experience in investigating drug activity. Officers may testify as to typical methods of packaging, pricing, and other details which aid the finder of fact. State v. Robinson, 396 S.C. 577, 722 S.E.2d 820 (2012) (officer with extensive experience in narcotics enforcement properly qualified as expert in how crack is sold and packaged, information not commonly known by the average juror).

Appellant also urges this Court to espouse a *per se* rule forbidding expert "criminal profile" or "offender behavior" testimony. Whether "profile" evidence is admissible should remain committed to the trial court's discretion, ruled upon based on the circumstances of each case under the applicable rules of evidence governing expert testimony, character, and relevance. In doing so, courts are able to distinguish:

> ...whether [the testimony] is designed improperly to illuminate the defendant's character or propensity to engage in criminal activity, or whether instead it seeks to aid the jury in understanding a pattern of behavior beyond its ken. Thus, experts may testify regarding the modus operandi of a certain category of criminals where those criminals' behavior is not ordinarily familiar to the average layperson, as in the case of the modus operandi of persons involved in illegal drug dealing or prostitution. Still, there is "'a line that expert witnesses may not cross.'" "[W]hat is proscribed is questioning that produces responses suggesting some special knowledge of the defendant's mental processes.

United States v. Long, 328 F.3d 655, 666, 356 U.S.App. D.C. 117, 128 (D.C. Cir. 2003).

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. LaRosa was careful to avoid testifying on the ultimate question of guilt or innocence in this case. He expressly emphasized that he could not say that Appellant was the perpetrator of the abuse in the case. (Tr. p. 546, p. 567, p. 597.) Nothing in LaRosa's assertion that he believed that law enforcement should focus on a male, larger than a three-year-old, who had access to the child on multiple occasions, usurped the jury's role in determining guilt. The testimony was helpful, however, in assessing how Victim's injuries could have occurred.

Finally, any error in admitting LaRosa's testimony is harmless beyond a reasonable doubt. LaRosa's testimony regarding the burn marks was largely cumulative to the testimony of the forensic pathologist, Dr. Schandl. Dr. Schandl opined that several of the burn marks were round, and those would indicate that Victim was "held, or asleep, or who knows what." (Tr. p. 170.) Dr. Schandl was even able to find that some of the burns, those to Victim's buttocks, occurred within 24-48 hours of Victim's death. (Tr. p. 169, p. 172, p. 182.) In that she placed the most damning injuries being inflicted within 48 hours of Victim's death, Dr. Schandl noted several other similar round areas that had healed and scarred which she opined could also have been similar burns which had healed over time. (Tr. p. 169.) This parallels LaRosa's observation that Victim suffered burn marks over a course of time, not as a result of a single encounter. (Tr. p. 595.) As such, LaRosa's testimony was largely cumulative to other testimony in the record. State v. Johnson, 298 S.C. 496, 381 S.E.2d 732 (1989) (admission of evidence is harmless where it is merely cumulative).

Moreover, the substantial evidence of guilt in this case, including Appellant's own admission that he should have done something to help "that girl," (he tended not to even use her name when questioned about her) renders the error harmless. In addition to Appellant's admission of neglect, it is unquestioned that Victim suffered countless injuries in the two weeks before her death, all inside the home shared by Appellant and Hunt. Her injuries were so visible that Appellant made sure she stayed inside when Hunt's father visited. Victim suffered cigarette burns throughout her last weeks, and Appellant admitted inflicting at least one of them, though he claimed it happened by accident. He is the only person mentioned smoking cigarettes in the trial transcript. In the last 24-48 hours of Victim's life, she suffered burn injuries to her vagina and buttocks. During that time frame, Appellant was admittedly home with her a great deal of the time. In light of all the evidence presented, it is unimaginable that LaRosa's testimony alone tipped the scale. As Appellant himself argued to the trial court, the "jury can draw their own conclusions from that without expert testimony." (Tr. p. 560.) LaRosa's testimony, as permitted by the trial court, essentially set forth fairly common sense conclusions from the evidence. Under the circumstances of this case, it is clear that LaRosa's testimony did not change the outcome of the trial. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

II. & III.

LaRosa's testimony as an expert in crime scene reconstruction and crime scene analysis was admissible non-scientific expert testimony. The court acted as gatekeeper when it conducted *in camera* hearing in which LaRosa testified to his extensive experience and training.

The admission of expert testimony is within the sound discretion of the trial court. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). Rule 702, SCRE addresses the admissibility of expert testimony as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

All expert testimony, whether scientific, technical, or otherwise, must meet the requirements of Rule 702. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

The admissibility of scientific evidence is dependent on whether the experts relied on scientifically and professionally established techniques. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). Under State v Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the trial court must consider the following concerning expert testimony for scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality of control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517.

However, the South Carolina Supreme Court has found these factors fail to serve a useful analytical purpose for non-scientific evidence. White, 382 S.C. at 274, 676 S.E.2d at 688. Instead, the Supreme Court has declined to offer specific factors for non-

scientific expert evidence and simply requires that the trial court exercise its role as gatekeeper and determines if the proffered evidence is reliable. Id.

In the instant case, the trial court properly exercised its gatekeeper role to determine that the expert testimony was reliable, finding the testimony would assist the finder of fact and that LaRosa was qualified by his knowledge, skill, experience, and training.[9] The trial court also made a finding that the underlying science is reliable. Although application of Council was unnecessary, the trial court nonetheless applied the factors, noting that the procedures were recognized, that work is peer reviewed, and that the methodology is recognized and consistent with methods used throughout the country among criminal behaviorists, also called profilers. (Tr. pp. 564-565.) The trial court qualified LaRosa to "give some analysis of the crime scene, which actually is the body of the child."[10] (Tr. p. 565.) The Court's finding is supported by evidence in the record.

LaRosa has been employed by SLED since 1994. (Tr. p. 534, pp. 578-579.) He worked from 1994 to 2000 in the Latent Print Crime Scene Unit, the major statewide crime scene response unit for violent crime scenes. (Tr. p. 579.) He became certified in crime scene reconstruction. (Tr. p. 535.) In 2000, LaRosa went to the blood hound tracking team for five years. (Tr. p. 535, p. 579.) He was promoted to team leader on the SWAT team over the containment team. (Tr. p. 535.) In 2005, he moved to the midlands region where he was a general investigator, a training officer, and a team leader. (Tr. p. 535, p. 579.)

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[9] It is interesting that Appellant objected, in part, to LaRosa's testimony on the basis that it was within the purview of laymen, stating the "jury can draw their own conclusions from that without expert testimony." (Tr. p. 560.) However, he now also argues that LaRosa's qualifications were not adequate to render such testimony.

[10] LaRosa was not permitted to say that Appellant was the only person with access to the child, and LaRosa was not permitted to discuss his analysis of Hunt's diary entries. (Tr. p. 567.)

In 2010, LaRosa was accepted as an understudy in the criminal behavioral science unit, a national fellowship program in which applicants become trained as criminal profilers or crime scene analysts. (Tr. p. 535, p. 579.) The program requires three to five years of training under another qualified analyst. Due to LaRosa's extensive previous experience in crime scene reconstruction, he was required to train for only two years. (Tr. p. 536.) The understudy program included training in cases of criminal sexual conduct. (Tr. p. 584.) He trained with various agencies throughout the southeast, including the US Marshal Service and the Naval Criminal Investigative Service (NCIS). (Tr. pp. 579-580.) He attended courses in topics such as blood spatter, deviant sexual behavior, and child sexual crimes. (Tr. p. 580.) As part of the program, he was expected to be able to teach and lecture at the level of a crime scene reconstruction expert. (Tr. pp. 536-537.) He teaches a class on offender behavior in criminal sexual conduct with a minor cases on a quarterly basis with twenty to thirty police officers in South Carolina, and he teaches at the American Academy of Forensic Sciences in Charlotte, North Carolina. (Tr. pp 557-558, pp. 584-585.) He also completed an eight week fellowship in criminal profiling and crime analysis under the tutelage of two supervisor agents who were qualified criminal profilers at FBI headquarters. He successfully completed the program, receiving certification as a criminal profiler in the FBI's Behavior Analysis Unit. (Tr. pp. 536-537, p. 580.)

LaRosa also completed a one-month internship with the Department of Mental Health Forensic Behavioral Forensic Services Unit where he worked with a forensic psychiatrist covering a variety of criminal behaviors. (Tr. pp. 537-538.)

LaRosa has been qualified to testify as an expert in crime scene and crime scene reconstruction approximately thirty or forty times. (Tr. p. 535, p. 543, p. 581.) He

testified in General Sessions court as an expert on crime analysis or criminal profiling in one murder case approximately six months before Appellant's trial. (Tr. p. 543, p. 583.) He has also testified in Federal Court "on the dangerousness of an individual, as an expert of threat assessment and recognition of management." (Tr. pp. 543-544, p. 581.) Appellant's case was the first case in which he was qualified as an expert involving sexual misconduct. (Tr. p. 558.)

With regard to his role as a criminal behaviorist, LaRosa explained his role as looking at evidence left behind at a crime scene and using that evidence to "look at what type of offender would commit that crime." (Tr. p. 538.) The traditional role of behaviorists involves assisting law enforcement when they are trying to figure out who committed a crime – answering the question, "what kind of a [person] would have done this?" (Tr. p. 588.) The profiler then reviews the facts of the case and combines that information with statistical research to come up with "a general idea of who we're looking for." (Tr. p. 588.) LaRosa stated his analysis is based upon research of "thousands and thousands of violent offenders," databases containing case studies of past behaviors to predict future behaviors. (Tr. p. 540, p. 550-551.) He also explained that profilers or analysts are often contacted by law enforcement for assistance in how to question a suspect. (Tr. p. 539, pp. 588-589.)

While criminal behaviorists are not a psychologists or psychiatrists themselves, they are "good seasoned police officers" trained "in a little bit of psychiatry" and working with psychiatrists to investigate crimes. (Tr. pp. 548-549, p. 589.) He consults with others in the profession, both other behaviorists and psychiatrists or psychologists. (Tr. p. 540, pp. 589-590.) LaRosa is one of three qualified criminal profilers or analysts in South Carolina, and he also consults with analysts at the FBI. (Tr. p. 549.)

Profiling is subject to a peer review system. (Tr. p. 544, pp. 548-549.) He has other analysts review his conclusions. In this case, after reviewing a basic investigative packet, LaRosa contacted other profilers and a forensic psychiatrist to seek out other cases with similar circumstances. (Tr. pp. 544-545, pp. 548-549, pp. 589-590.)

LaRosa was contacted in Victim's case before the autopsy results were received. (Tr. p. 539.) Based on the information provided, LaRosa opined that the perpetrator in Victim's case was likely a male due to the injury to the Victim's vaginal area as the injury would tend to indicate a sexual arousal element. (Tr. pp. 539-540, pp. 594-595.) LaRosa stated that in his review, 90%-99% of child sexual assaults were perpetrated by men, and there were no cases he could find similar to Victim's where the sole perpetrator was female. (Tr. pp. 594-595.) He believed the injuries to Victim were most consistent with someone with private access to the Victim over a period of time. He noted this conclusion was based on the fact that the burns were in various stages of healing. (Tr. pp. 595-596.)

Further looking at the burns, based on a review of prior cases, he noted that children often move when touched with something hot. (Tr. p. 546, p. 593.) In LaRosa's view, burns perpetrated by other children are often "flashing burns" because the victim moves away from the burning object. However, the burns in Victim's case were "direct and specific" which indicated that Victim was unable to move from the burning. It was therefore likely that someone older and stronger than Victim burned her. (Tr. p. 547, pp. 592-593.) He noted the common sense inherent in his statements regarding the burns:

> *It's not a profiler thing.* But a three year old that runs into a hot object is going to move, and they're going to wiggle free. There was no wiggling. So the person who was doing this would have control over her where she could not move as the burns were being inflicted to her vagina.

(Tr. pp. 593-594.) [Emphasis supplied.] LaRosa stated his analysis in this case was reviewed by others in the field. (Tr. p. 550.)

LaRosa was clear that he could not determine whether Appellant inflicted the wounds to the child. (Tr. p. 546, p. 597.) He can only say that "it would've been somebody, a male, who would have had direct influence over this child. Would have the ability to be alone over a period of time, to inflict over a period of time these --- these burns and this abuse to this three year old's vagina." (Tr. p. 554.) Nothing in this description of the likely offender speaks to state of mind in psychological terms.

Finally, as previously asserted in section I, any error in the admission of LaRosa's testimony is harmless beyond a reasonable doubt.

IV.

The trial court did not abuse its discretion in admitting LaRosa as an expert witness. The testimony was relevant and its admission did not constitute unfair prejudice.

"The question of whether to admit or exclude testimony of an expert witness is within the discretion of the trial court. Absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (1999). The trial court did not abuse its discretion in excluding the statement under Rule 403, SCRE. Rule 403, SCRE, states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)); see also, State v. Dickerson, 341 S.C. 391,

400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.").

The trial court conducted an analysis under Rule 403, SCRE. (Tr. pp. 565-566.) The trial court found that the testimony would assist the jury in finding how the child's injuries occurred as they could not be self-inflicted. Judge Baxley did not permit LaRosa to testify regarding Hunt's diary entries.[11] Judge Baxley also found it would not be appropriate for LaRosa to testify "that the only male that had access to this child is the Defendant." (Tr. p. 567.) In sum, Judge Baxley limited LaRosa's testimony before the jury to "his analysis of [Victim's] body and the infliction of the wounds... ." (Tr. pp. 567-568.) As discussed in Section I, LaRosa's testimony before the jury was more in the vein of crime scene reconstruction than profile development.

While the testimony was relevant to the issue of Appellant's guilt, it was not unfairly prejudicial. Appellant complains that the testimony unfairly prejudiced him as it eliminated Hunt as a suspect. LaRosa's testimony really only analyzed Victim's injuries and the likely mode of infliction, and he did not expressly eliminate or include either Hunt or Appellant. This is not the type of prejudicial evidence which leads to a decision on an improper basis. Appellant's suggestion that LaRosa's testimony led to the conclusion that Appellant was a more likely perpetrator than Hunt embodies why the

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[11] LaRosa was also provided with Hunt's diary entries from the computer and testified regarding his opinions on them during in camera testimony. (Tr. pp. 551-553.) Based on the diary entries, it appeared to LaRosa that Hunt was most concerned with herself, noting that of 81 lines of text, she never mentioned Victim until line 79. (Tr. p. 552.) When asked whether he believed the diary entries showed any indication that Hunt would be the person harming the child, LaRosa said, "she doesn't care enough about anybody but herself to even put [Victim] on the radar, that she wants to harm." (Tr. p. 552.) LaRosa opined the entries were free-flowing and bore no indicators that Hunt was dangerous. (Tr. p. 553.) None of this testimony was presented to the jury.

evidence is relevant. It was particularly relevant in light of the defense portrayal of Hunt as "wicked, evil woman" who controlled and manipulated the situation and "let her child die after inflicting God knows what kind of injury on the child." (2nd Trial Tr. pp. 11-30.)

Moreover, as argued in previous sections, any error in admitting LaRosa's testimony was harmless under the particular facts of this case.

V.

The issue raised by Appellant is not preserved for appellate review where Appellant only objected generally to all three statements as involuntarily given. Even if the issue were preserved, it would be without merit. The trial court properly considered the totality of the circumstances and found the October 13 statement admissible. Moreover, as Appellant testified to the key portions of his third statement during his trial testimony, any error in admitting the statement is harmless beyond a reasonable doubt.

1. The issue is not preserved for review.

The only argument advanced to the court following the Jackson v. Denno hearing was:

> Your Honor, just to say that we would like His Honor to exclude the statements, based on them not being voluntarily given.

(2nd Supp. Tr. p. 4.)[12] The use of the plural "statements" reveals just how general the objection was. "[A] specific objection to the admission of evidence must be made to preserve the issue for appeal." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." Id. "The same ground argued on appeal must have been argued to the

[12] For ease of reference, Respondent uses the same designations of the various transcript as Appellant. (See Initial Brief of Appellant p. 33)

trial judge." Id. Nothing in this brief objection can be said to call attention to the specific argument that Appellant's third statement is inadmissible.

However, the court did state:

> The defense raises the issue that on the third occasion that [Appellant] was being interviewed, that he did not sign a Miranda form, and that in the discussion between Agent Bass and [Appellant], he was not specifically advised of the right to counsel at the time of the third statement, as well as the fact that he had a right to stop – that is to have counsel present or to stop making a statement in order to consult with counsel.

(2nd Supp. Tr. p. 6.) The trial court noted Appellant signed Miranda forms during his first two interviews, and he fully understood his rights at those times. (2nd Supp. Tr. pp. 6-7.) The trial court noted that the third interview was conducted as a "courtesy" to Appellant, a carryover from the second interview where he was unable to completely write his statement. (2nd Supp. Tr. p. 7.) The trial court found that the failure to specifically advise Appellant of the right to counsel or the right to stop and talk to counsel was not coercive in that, by the third interview, he had:

> ...heard that right at least twice, and initialed the form so he that he was aware of that right. And he expressed clearly an intention to go forward in the statement on the third occasion without reservation.

(2nd Supp. Tr. p. 8.) The court found all three statements admissible. (2nd Supp. Tr. pp. 8-9.)

While the trial judge discussed the third statement in the terms now raised by Appellant, "an issue is not preserved for appeal merely because the trial judge mentions it." State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) (rev'd on other grounds by State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008)). The trial court's

discussion of the matter does not relieve Appellant of his duty to bring the matter to the court's attention. As such, this issue is not preserved for review.

2. **Under the facts and circumstances of this case, the statement was admissible.**

Even if preserved for review, the issue would be without merit. Here, Appellant was properly advised of his Miranda rights on two occasions prior to his interview with Lt. Kathy Bass of SLED on October 13. Appellant was first interviewed in the early morning hours of October 7 by two officers, Lt. Larry Turner and Sgt. John Hepburn. He was given Miranda warnings before this interview. (1st Supp. Tr. p. 31, pp. 33-37; Tr. pp. 237-238; R. p. ___, Exhibit 77, Miranda form; Exhibits 80 and 103, videos.) Appellant was not arrested following the first interview. (1st Supp. Tr. p. 66, Tr. pp. 249-250.)

On October 10, Appellant was interviewed again. This time the interview was conducted by Lt. Turner and Lt. Bass at the jail. He was again given Miranda warnings. (1st Supp. Tr. p. 67, p. 88, pp. 90-93; R. p. __, Exhibit 78, Miranda forms.) Appellant had difficulty providing a written statement. At the close of the October 10 interview, he expressly agreed to meet with Lt. Bass to give a video-recorded statement as he was not very good at writing. (Tr. pp. 257-258.)

The recorded statement took place on October 13 at the Bennettsville Police Department. (Exhibits 81, 82, and 83.) Agent Bass of SLED reminded Appellant of Miranda warnings verbally. (1st Supp. Tr. p. 106, pp. 116-117; Exhibits 81, 82, and 83, videos.) In her interview with the Appellant, Lieutenant Kathy Bass states:

> Q: Well, let's do this before—you know me and my house keeping rules. I got to make sure you understand that. I read you your rights the last time you were here, so you understand that you have the right to remain silent.

A: On everything.

Q: And everything you say can be held against you. And you realize if you at any point say, Kathy I don't want to talk to you anymore, that's all you got to tell me and we're done.

A: I know.

Q: Okay. I'm not forcing you to talk with me.

A: I know

Q; So you're okay talking with me?

A: I'm fine –fine.

(Ct.'s Ex. 2 pp. 3-4.)

Though she did not have Appellant initial a form, Lt. Bass' verbal reminder of covered the primary areas required by Miranda. "The precise wording of a Miranda warning is flexible; 'no talismanic incantation is required to satisfy Miranda.'" California v. Prysock, 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981)." Lt. Bass informed the Appellant that he did "have the right to remain silent." (Ct.'s Ex. 2. p.3.) She also explained to him that "anything you say can be held against you." (Ct.'s Ex. 2 p 3.) The Appellant said he understood. (Ct.'s Ex. 2 p. 3.) In this case, though a signed Miranda acknowledgement was not obtained a third time, Lt. Bass made every effort to make the Appellant aware of his Miranda rights before the interview began. She reminded him of rights read to him on the prior occasions, and she repeated those rights in language he could understand to ensure he was speaking with her voluntarily. (Ct.'s Ex. 2 p. 3.) She thus incorporated the full Miranda warnings by reference to the prior acknowledgements. The trial court correctly concluded that the Appellant was properly advised of his rights, that he waived those rights, and that though Lt. Bass failed to

mention his right to counsel again, Appellant was fully aware of that right. (2nd Supp. Tr. p. 7.)

Moreover, courts have held that repeated warnings are not necessary to a finding that a defendant knowingly and intelligently waived them in similar instances. See United States v. Frankson, 83 F.3d 79 (4th Cir.1996) (two and one-half hours); Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir.1984) (three hours); Commonwealth v. Silanskas, 746 N.E.2d 445 (Mass.2001) (two hours); Bush v. State, 461 So.2d 936 (Fla.1984) (eleven hours); Fagan v. State, 412 So.2d 1282 (Ala.Crim.App.1982) (three and one-half hours).

Our Supreme Court has directed that "the question of whether Miranda warnings, having been once given, should be repeated at later stages of the interrogation must be determined upon the basis of the facts and circumstances surrounding each case." State v. Smith, 259 S.C. 496, 499, 192 S.E.2d 870, 871-872 (1972). The trial court correctly noted Appellant's rights advice on two prior occasions and the reminder of those rights on October 13th . The October 13 interview was, in effect, a continuation of the October 10 interview. The October 13 interview was necessary because Appellant was unable to write well, and he willingly agreed to be videotaped instead. On October 13, Appellant did not hesitate to talk to Lt. Bass. In fact, he was friendly and engaged. He expressed his preference to talk with her rather than other officers. Lt. Bass reminded him of the rights that she herself had provided him on October 10. There was clearly nothing coercive about the atmosphere on October 13. For all these reasons, the trial court did not abuse its discretion in denying Appellant's motion to suppress.

3. Any error in admitting the statement was harmless.

Any error in admitting the October 13 statement was harmless where Appellant testified before the jury in substantially the same way. "The admission of improper

evidence is harmless where the evidence is merely cumulative to other evidence." State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct.App. 2008). The most incriminating portion of the October 13 statement was Appellant's admission that he should have sought help or done something for Victim. (Ct. Ex. 2 p. 40, p. 86, p. 101, pp. 103-104, p. 152.) Appellant testified at trial, "just like I told Mrs. Bass [in the third interview], I wish --- I should have did something." (Tr. p. 747.) He later repeated his feeling that he "should have done something," but couched the statement with "If I knew something, I should have done something." (Tr. p. 755.) Assuming, *arguendo*, that admission of the statement was error, such error was harmless.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 19, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County
The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-001409

THE STATE,

Respondent,

v.

ALEXANDER CARMICHAEL HUCKABEE, III,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 19th day of June, 2015.

ANNE MUELLER
Legal Assistant

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ALAN WILSON
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RECEIVED
JUN 19 2015
SC Court of Appeals

June 19, 2015

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RE: State v. Alexander Carmichael Huckabee, III
Appellate Case No. 2013-001409

Dear Mr. Strom:

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

Sincerely,

Susan R Cole
for Mary Williams Leddon
Assistant Attorney General
Bar # 76192

MWL/aam
Enclosures

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

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