THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of General Sessions
Robert E. Hood, Circuit Court Judge

Court of Appeals Case No. 2012-001203

The State of South Carolina,

Respondent,

v.

Robert Antonio Guinyard,

Appellant.

Initial Brief of Respondent

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STATEMENT OF ISSUES

I.

Inasmuch as the State presented substantial circumstantial evidence of Appellant's guilty on both homicide by child abuse and unlawful conduct toward a child, did the trial court err in denying Appellant's motion for directed verdict

II.

Inasmuch as State's Exhibits 13, 15 through 19, 75, 80 through 85, 130, 136 through 139, 144, 146, 147, 225, and 227 through 231 were highly probative to the issues of whether Victim was abused or neglected, whether the abuse or neglect was the caused his death, and whether his condition would have been apparent, and their probative value substantially outweighed the danger of unfair prejudice, did the trial court err in admitting them?

STATEMENT OF THE CASE

Appellant was indicted for the offenses of homicide by child abuse (Indictment 2013-GS-40-06520) and unlawful conduct toward a child (Indictment 2013-GS-40-06521). He pled not guilty and was tried with his co-defendant, Courtney Shante Thompson, before a jury in Richland County on May 19 – 28, 2014. At the conclusion of his trial, the jury found Appellant guilty as charged. The trial court thereafter sentenced Appellant to a sentence of life imprisonment without parole on the homicide by child abuse conviction and a concurrent ten-year term of incarceration of the conviction for unlawful conduct toward a child. The trial court also ordered Appellant to be placed on the Central Registry of Child Abuse and Neglect.

This appeal follows.

STATEMENT OF FACTS

Victim was born on April 18, 2009 to Appellant and his co-defendant, Courtney Shante

Thompson[1] (hereafter "Co-Defendant"). His premature birth, as well as the very limited prenatal care Co-Defendant obtained, led to health issues[2] which resulted in his stay in the intensive care unit after his birth. When he was stable, he was released. He was eight days old. (Tr. p. 480, line 20 – p. 481, line 13; p. 499, line 15 – p. 500, line 11; p. 826, line 16 – p. 828, line 8.) While he was in the hospital, he was diagnosed with congenital hydronephrosis, which can sometimes result in obstruction in the urethra. An appointment with a pediatric urologist was made for after he was discharged; the appointment was not kept. Later efforts by the hospital to reach his parents about other tests results were unsuccessful. (Tr. p. 828, line 9 – p. 829, line16.) Three days after Victim was discharged from the hospital – when he was 11 days old – he was brought into the emergency room for follow up on a condition with his hands; at that time, he was spitting up a lot because he was being overfed. (Tr. p. 830, line 19 – p. 831, line 3.) Victim was not seen again until he was brought in for his first well child check-up in June 2009; such check-ups should be done two weeks after birth. (Tr. p. 829, line 16 – p. 830, line 2.)

On June 18, 2009, Victim was placed in foster care. (Tr. p. 831, lines 6-14; p. 955, lines 9-19.) From that point, Victim had regular pediatric check-ups and, at his 15-month well child check-up, Victim was where he should have chronologically been in his development. (Tr. p. 932, line 15 –

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[1] Describing their relationship, Co-Defendant's sisters, Crystal and Natalie, testified that Appellant would do whatever Co-Defendant said. (Tr. p. 505, lines 15-20; p. 660, lines 1-3.) Crystal said that, while it was rare, Co-Defendant had kicked Appellant out of the home a couple of times. (Tr. p. 513, lines 14-21.) Crystal also testified that Co-Defendant not only complained that Appellant did not punish Victim, but she would also get angry about it. Co-Defendant also told Crystal that Appellant acted like he was afraid of Victim. (Tr. 515, line 18 – p. 517, line 4.) Natalie also said that Appellant saw the things that Co-Defendant did. (Tr. p. 660, lines 4-5.)

[2] At trial, the State presented the testimony of Dr. Olga Rosa, the Chief of the Division of Forensic Pediatrics for the U.S.C. School of Medicine and Medical Director of the South Carolina Child Abuse medical Response System. She was qualified as an expert in the field of child abuse pediatrics. (Tr. p. 819, lines 4-23; p. 822, lines 13-22.) Dr. Rosa testified that she had received Victim's medical records from birth through September 2012, as well as photographs taken around the time of his death and the pathology report. She reviewed all of these documents in order to have a complete history of Victim up to that point. (Tr. p. 823, line 8 – p. 825, line 16.) She testified as to Victim's physical, medical, and developmental history.

p. 832, line 6.) When he was 18 months old, a brain M.R.I. was done because his foster mother was concerned with his speech and because he had a large head circumference. The M.R.I. showed that the structure and the anatomy of his brain were fine. He was "big, chunky, and healthy" – he was above the 97% percentile for everything on all of the growth charts. As a result of recommended speech therapy[3] and a little bit of occupational or physical therapy, by March 26, 2012, Victim was talking in two or three word sentences, was socialized, and he was toilet trained. He was on par with his peers and had reached his potential for his age.[4] (Tr. p. p. 544, lines 16-23; p. 832, line 6 – 833, lines 7-11; p. 836, line 1 – p. 837, line 15.) A genetic consult reveal no metabolic or medical cause that would affect his development. Victim was not autistic. (Tr. p. 835, lines 2-25.) Victim was set up to be enrolled in a three-year-old program at Richland I. (Tr. p. 838, lines 11-17.)

On April 6, 2012, Victim was returned to his parents, Appellant and Co-Defendant. (Tr. p. 481, line 9 – p. 482, line 6; p. 520, lines 4-7; p. 613, lines 8-13; p. 838, lines 22-25; p. 955, lines 9-19.) At that time, he was a happy, healthy little boy, who just wanted to play and talk. He looked to be well nourished. (Tr. p. 959, line 19 – p. 960, line 6.)

After Victim had been returned,[5] one of Co-Defendant's sisters, Crystal Thompson, moved

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[3] Dr. Rosa testified that speech is the first thing that goes in children in foster care. Children in foster care have trouble developing speech. Victim was in different foster care settings initially, but from sometime in late 2010 until he was returned to his parents in 2012, Victim was with a solid foster family and he flourished. (Tr. p. 834, lines 6-24.)

Denise Jones, Victim's foster mother from August 2009 through April 6, 2012, testified that, when he came to her at 15 months, he was not doing much crawling or moving around, but once she started working with him, he began to crawl and walk and became more active. She also said that, by the time he left her, his speech was improving well and he was completely toilet trained. (Tr. p. 940, line 13 – p. 943, line 7.) A couple of days after Victim was returned home, Ms. Jones talked to Co-Defendant who reported that Victim was not using the bathroom. Ms. Jones told her she did not understand that and told her to let her know if she needed any help. Ms. Jones never heard from Co-Defendant again. (Tr. p. 943, line 8 – p. 944, line 4.)

[4] Medical and therapeutic services were provided for Victim at no cost to his parents or foster parents. (Tr. p. 837, line 16 – p. 838, line 10.)

[5] After victim was returned to Appellant and Co-Defendant in April 2012, he stayed with them except for a couple of weeks when one of her sisters, Natalie, took care of him. The other children of

in with Appellant and Co-Defendant. While living with them, Crystal saw or witnessed Co-Defendant beat Victim with clothes hanger, coat hanger, drop cord, cable cord,[6] her hand, and her knees. (Tr. p. 481, line 24 – p. 484, line 9; p. 504, line 16 – p. 505, line 1; p. 510, line 25 – p. 511, line 3; p. 518, line 9 – p. 520, line 3; p. 614, lines 3-5.)

The coat hanger beating occurred sometime before the summer of 2012. Crystal was present when Co-Defendant and Victim visited the home of their other sister, Natalie. Once there, Victim began to cry when he could not go out the door after Natalie's husband. Co-Defendant told him to stop crying. When he would not, she "popped him in the mouth, and jacked him around in the house and went to grab a clothes hanger." (Tr. p. 507, lines 5-7; see also p. 506, line 9 – p. 507, line 3.)

On September 11, 2012, Victim was taken for his first doctor's visit since he was returned to his parents. Dr. Monica McCutcheon, a board certified pediatrician, saw Victim for his three-year-old well child visit (Victim was three years and almost five months old at the time). He had not been seen by the practice since he was two months old. (Tr. p. 539,lines 408; p. 540, line 18 – p. 541, line 13; p. 542, lines 8-15; p. 839, lines 3-21.)

Dr. McCutcheon found Victim to be a well nourished child. Although his speech was a little difficult to understand, he was able to answer questions and seemed developmentally appropriate. Dr. McCutcheon did not see that Victim demonstrated any of the signs of autism. (Tr. p. 543, line 15 – p. 544, line 2; p. 548, line 25 – p. 549, line 2; p. 550, lines 8-17.) Co-Defendant expressed

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Appellant and Co-Defendant lived with them on a less regular basis. (Tr. p. 613, line 11 – p. 615, line 2; p. 643, line 19 – p. 644, line 4.)

When Victim stayed with Natalie and her fiancé, he had his own room and was fed regularly. (Tr. p. 644, lines 5-10.)

[6] Crystal testified that the cable cord incident was a single incident. Co-Defendant beat Victim with the cord while upstairs and others were downstairs and heard. Victim was crying for his father for help, but no one helped him. Crystal testified that while she did not call the police of DSS, she did call tell her other sister to report it to DSS (Tr. p. 508, lines 21-23; p. 511, line 4 – p. 514, line 13.)

concern over Victim's development, and mentioned that he had issues with urinating and defecating on himself, as well as with his speech. (Tr. p. 544, line 3 – p. 545, line 25.) Dr. McCutcheon determined that Victim had regressed – *i.e.*, he had lost things that he had accomplished such as his speech, ability to engage in symbolic play, and recall of his name, age, sex or gender[7] – and she referred Victim for a hearing evaluation, speech therapy, and, out of respect for the parents' concerns, to a developmental pediatrician. (Tr. p. 546, lines 1-10; p. 840, line 2 – p. 841, line 16.) After Victim left her office, Dr. McCutcheon placed a call to the DSS case worker because of her concern over his parents' lack of knowledge and follow up on medical care. (Tr. p. 547, line 546, line 1 – p. 548, line 9; p. 842, lines 4-7.) Victim was never seen by any of the referrals and not seen again by Dr. McCutcheon's practice or any other doctor prior to his death. (Tr. p. 546, lines 11-23; p. 547, lines 13-18; p. 842, lines 10-21.)

One day in the fall of 2012, Victim was supposed to go to the bathroom, but he defecated and began playing with his feces. Co-Defendant asked Crystal to hold his legs so she could "whoop" him. Instead of holding his legs, Crystal left. (Tr. p. 508, lines 7-20.) On another occasion that fall, Crystal walked in on Co-Defendant beating Victim. He was on his back on the floor, and she was on her knees straddling him and punching him in the face. (Tr. p. 508, line 24 – p. 509, line 8.)

Sometime after Crystal moved into her own apartment – in the same complex where Appellant and Co-Defendant were living – in October 2012, Crystal gave Victim some juice to drink when he came over. Co-Defendant came in and slapped the juice out of his mouth knocking him back a little. (Tr. p. 509, line 9 – 510, line 12.)

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[7] Dr. Rosa, testifying as an expert at trial, testified that this regression by Victim was significant "[b]ecause, you know, a child that has acquired mile stones to this point and then suddenly in a period of time is regressing those mile stones, then you have to ask what's going on in the environment or the child that is causing this regressions. When we have already a history --- I mean, a diagnostic work up, that his brain M.R.I. is normal, that his genetic consult was normal, then what else is going on." (Tr. p. 841, line 20 – p. 842, line 3; see also p. 822, lines 13-22; p. 841, lines4-18.)

By the spring of 2013, Angela Metze, the grandmother of one of Victim's sisters,[8] noticed that Victim had changed. He had lost a significant amount of weight, he was not active, he would not talk when told to do so, and he was withdrawn. (Tr. p. 956, line 16 – p. 957, line 10; p. 950, lines 7-25.) Sometime in February 2013, Ms. Metze received some photographs of Victim showing bruises, scars, and marks from beatings on his back. She contacted DSS several times. (Tr. p. 959, line 18 – p. 960, line 5.) Ms. Metze offered to help with Victim, but they never let her do so and, to her knowledge, Victim never went with anyone else. He always stayed with them. (Tr. p. 973, lines 17-25.)

Maria Thompson, another sister of Co-Defendant, heard Co-Defendant "spanking, you know, beat[ing]" Victim sometime around Easter in 2013[9] because he had urinated on the floor at Maria's house. She also heard Victim crying. (Tr. p. 615, line 9 – p. 616, line 9.) He was limping that day and he had bruises on his back. (Tr. p. 617, line 19 – p. 618, line 13.) Maria called DSS several times about Victim's condition. (Tr. p. 619, line 25 – p. 621, line 21.) After Victim was returned to his parents, Natalie Thompson, another of Co-Defendant's sisters, saw Co-Defendant hit Victim with a belt, a shoe, and a hanger. (Tr. p. 628, lines 12-13; p. 629, line 1 – p. 631, line 12; p. 632, lines14-16.) Natalie also called the police and DSS several times on both Appellant and Co-Defendant. When DSS told her that she needed proof of his condition, Natalie took photographs[10] of Victim once when Appellant and Co-Defendant were not present – the photographs were of his face to show who he was and his body to show bruises. (Tr. p. 631, line 16 – p. 633, line 23; p. 634, lines 20-22; p. 651, line 24 – p. 652, line 5.)

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[8] Ms. Metze's granddaughter was the daughter of her son and Co-Defendant. She primarily lived with Ms. Metze. (Tr. p. 956, line 12 – p. 957, line 24.)

[9] In 2013, Easter Sunday was observed on Sunday, March 31, 2013. (*http://www.timeanddate.com/holidays/us/easter-sunday*.)

[10] The photographs were admitted into evidence without objection as States Exhibits 215 through 222.

Crystal also witnessed Appellant hit Victim twice, punch him, and make him sit on the toilet for three hours. (Tr. p. 485, line 19 – 486, line 24; p. 505, line 21 – p. 506, line 8.) Natalie never saw Appellant beat Victim; but she did see him get angry with and spank him.[11] She also saw Appellant present on some of the occasions when Co-Defendant beat Victim. (Tr. p. 631, line 24 – p. 632, line 18; p. 633, line 24 – p. 634, line 12; p. 648, lines 1-17.)

Victim would sometimes eat of trashcans. On occasion, Natalie or her fiancé, Charles Robinson, would sneak or try to sneak him something; if Co-Defendant caught them, she would become angry. Natalie never saw Appellant try to give food or water to Victim when he was hungry or thirsty.[12] (Tr. p. 643, lines 2-18.)

Gladys Thompson, Co-Defendant's mother, observed that Victim was not treated as nicely as his sisters were treated.[13] (Tr. p. 696, line 16 – p. 697, line 11.) She saw Co-Defendant hit Victim with a cable cord once, and she saw her punch him with her fist once. (Tr. p. 699, lines 2-9.) Ms. Thompson felt that, when Co-Defendant beat Victim, she was get angry with him. (Tr. p. 703, lines 13-15.) Ms. Thompson observed that Victim was not fed and given water or something to drink on a regular basis. (Tr. p. 702, lines 13-16.) She was told by Co-Defendant once that Victim had drunk out of a toilet. (Tr. p. 703, lines 5-7.) When Ms. Thompson tried to stand up for Victim, Co-

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[11] Natalie testified she had "seen [Appellant] hit [Victim], but in the way of a father should, he smacked in the back of the head, but not to hurt him.... And spanked him" (Tr. p. 659, lines 2-6.). She did, however, also testify that she remembered telling law enforcement both that Appellant would beat Victim and that she actually saw Appellant knock Victim in the head once. (Tr. p. 659, lines 20-25.)

[12] Natalie testified about one occasion when Appellant and Co-Defendant argued over how many pieces of pizza Victim could eat, with Appellant finally agreeing with Co-Defendant that Victim would only have one slice while the other children had three. (Tr. p. 649, line 4 – p. 650, line 5.)

[13] At trial, Ms. Thompson testified she remembered telling Investigator Wagner that animals should not have been treated the way Victim was treated, and that if Victim spilled anything, he would be slapped hard with an open hand by Co-Defendant. (Tr. p. 698, lines 17-24.)

Co-Defendant's sister testified that, while Victim's siblings had parties on their birthdays, Victim "never had a proper birthday party or anything done especially for him." (Tr. p. 646, lines 1-2; p. 646, lines 1-7.)

Defendant kicked her out of the house. (Tr. p. 698, line 25 – p. 699, line 1; p. 707, lines 19-21.) After her church helped her find a place to stay, Ms. Thompson stood up for Victim. (Tr. p. 708, lines 1-7; 707, line 19 – p. 708, line 2.)

On April 5, 2013, Ms. Metze went to the Five Points Pediatric Group and talked to Dr. Kiersten Lofton, who had seen Victim's sisters, but had never seen Victim. Ms. Metze told Dr. Lofton that she was concerned that Victim was being abused and she showed Dr. Lofton photos on her phone, which showed Victim's back, which had been taken approximately one month earlier. Ms. Metze wanted Dr. Lofton's help in reporting to police or DSS that Victim was being abused. (Tr. p. 677, lines 14-18; p. 679, line 19 – p. 682, line 20; p. 960, lines 5-10.) Dr. Lofton was concerned by the photographs of Victim's lower to mid back area. She observed what appeared to be patterned markings on Victim's back, indicating to her that the markings were caused by Victim having been struck with something that left a pattern, rather than resulting from a rash or infection. (Tr. p. 682, line 21 – p. 683, line 10.) Dr. Lofton reported her observations and opinion to DSS on that same day and asked them to follow up. (Tr. p. 683, line 11 – p. 684, line 7.) Later that same day, Dr. Lofton was contacted by the police department and told that Victim had a skin condition. (Tr. p. 684, lines 8-23.) Dr. Lofton, who had considered and rejected the possibility that the markings were the result of a skin condition, followed up with DSS. She told them that she had reviewed Victim's records from her clinic and the clinic that had previously seen Victim, and she had found no documentation of a skin condition. She also told DSS that they needed to look into possible medical neglect because her clinic's records indicated that there had been no follow up on the earlier referral's made for Victim's possible urology and developmental issues. (Tr. p. 684, line 24 – p. 686, line 15.)

Sometime around the end of May or first of June 2013, Natalie went with Appellant and Co-Defendant to the grocery store in a van driven by someone else. After shopping at the grocery store, they stopped at a cell phone business so that Co-Defendant could obtain a government assistance

telephone. When Appellant left the van to check on Co-Defendant, Natalie heard a "drinking noise" and, for the first time, realized that Victim was sitting in the cargo area of the mini-van. He was drinking a soda that Natalie had bought at the grocery store. He then asked her if she had anything to eat. She only had frozen food and chips, and gave him some of the chips.[14] (Tr. p. 640, line 6 – p. 642, line 20; p. 646, lines14-24.) Victim was only able to eat about half of the bag before Appellant and Co-Defendant returned to the van. He threw the bag to Natalie, who wrapped it up and put it under the seat to hide it from Appellant and Co-Defendant. She found it, however, and became angry with Natalie. (Tr. p. 642, line 20 – p. 643, line 1; p. 648, line 18 – p. 649, line 3.)

Also in May or June, Co-Defendant spoke to Ms. Metze over the telephone. She had just moved into the house and was overwhelmed with bills; she said life was treaing her fairly and she complained about Victim defecating on himself. Ms. Metze suggested she take Victim to counseling or, it things got bad, to take him back to DSS. (Tr. p. 960, line 20 – p. 961, line 11.) Co-Defendant told Ms. Metze that she was going to get Appellant's mother to take him and that she had already taken Victim to get help, a representation that Ms. Metze determined later to be false. (Tr. p. 962, lines 16-24.)

On occasions prior to July 1, 2013, Co-Defendant made statements about killing Victim. When confronted by Crystal, Co-Defendant said that she did not care and did not care "if the retarded bastard died," and that "if DSS did not take him, that she was going to kill him and bury him so DSS would not take her other baby." (Tr. p. 496, line 10 – p 497, line 6.) Co-Defendant also told Natalie – not in Appellant's presence – that she wanted Victim to go back to DSS and that she wanted him to be beaten, raped and killed once in DSS custody. (Tr. p. 644, lines 11-15; p. 645,

[14] Natalie testified at trial that, on this day, Appellant's mouth was really messed up – "his mouth was real, real dry as if he was dehydrated. His lips were cracked up. They were bloody. The top lip was all pussie [sic]. I had asked about it, but [Co-Defendant] told me that it was something he picked up and ate and it was something wrong. The doctor said it was because of something he ate off the ground or something that she had cream for it." (Tr. p. 642, lines 5-11.) Natalie never saw the cream and never saw Co-Defendant apply any cream. (Tr. p. 642, lines 12-15.)

lines 8-14.)

Co-Defendant went into labor at approximately 7:00 a.m. on Saturday, June 29, 2013. She called Kimberly Gooden, with whom her one year old daughter normally lived, and asked if she would pick the girl up from Co-Defendant's home and take her back home with her. Ms. Gooden did so. She did not see Victim. (Tr. p. 925, line 5 – p. 927, line 4.)

On that same day, Saturday, June 29, from the hospital, Co-Defendant called Ms. Metze and asked her to come get her three year old daughter because Appellant wanted to come see her. Ms. Metze, who already had Co-Defendant's two year old daughter, agreed. When she drove up to their home, Appellant was outside with the three year old. Ms. Metze did not see Victim that day and, in fact, had not seen him since around Easter. (Tr. p. 963, line 10 – p. 965, line 23; p. 979, line 22 – p. 980, line 3.)

Co-Defendant's seventh child was born in the early morning hours of Sunday, June 30. At 1:06 p.m. on July 1, Co-Defendant and her new baby were discharged from the hospital and, using her cellphone, she called Blue Ribbon Taxi at 1:12 p.m. for a taxi to take her home. (Tr. p. 1176, line 22 – p. 1179, line 8; p. 1180, lines 11-19; p. 1274, line 20 – p. 1275, line 24; State's Exhibits 2A and 250-A.)

Approximately nine minutes after the call to Blue Ribbon Taxi, Co-Defendant received a call from Crystal lasting 40 seconds. An hour later, at 2:17 p.m., Co-Defendant called her voice mail; six minutes later, she missed a call from Nicole. Fifty-three minutes later, at 3:14 p.m. and she missed a call from her mother's home. She called Nicole at 3:17 and talked to her for 34 seconds. Upon ending that call, she called her mother's house and spoke to someone. She thereafter missed two calls in a row from Nicole, at 3:24 p.m. and 4:03 p.m. At 5:05 p.m., she received a call from Crystal and talked to her for a little over two minutes. (Tr. p. 1274, line 20 – p. 1276, line 15; State's Exhibit 2A.)

During their telephone conversation, Co-Defendant told Crystal that Victim had gotten a

cracker out of the bag she had brought home from the hospital and was trying to eat it. Crystal heard Co-Defendant tell Appellant to go see what Victim was doing. (Tr. p. 487, line 1 – p. 489, line17.) Co-Defendant said she going to take a shower and they hung up. The phone then "dialed back" or "butt dialed" Crystal. When Crystal answered, she could hear Victim getting beat and screaming for help. She heard him say, "Lord, help me." She also heard Co-Defendant tell him to "hush," and then heard Appellant and Co-Defendant talking, with Co-Defendant telling Appellant to hold his legs and Appellant later saying that Victim was not moving. The phone then went dead. (Tr. p. 489, line 21 – p. 492, line 8; p. 495, lines 23-25; p. 523, lines 7-10.)

At 5:07 p.m., almost as soon as the call with Crystal ended, Co-Defendant called Nicole and spoke for 20 seconds. After that call, Co-Defendant conducted five Google searches on her cellphone on what to do if a child has a seizure. The next call after the searches is the first of seven calls in a row, each between 17 and 26 seconds long, to Kimberly Gooden; the first call was made at 6:40 p.m. and the last at 6:48 p.m. (Tr. p. 1274, line 20 – p. 1279, line 3; State's Exhibit 2A.)

At 6:12 p.m., Co-Defendant called 911 and reported that Victim had fallen and was having problems breathing. (Tr. p. 1278, lines 16-20.) Esther Curran, an EMT with Richland County EMS, and her partner were dispatched at approximately 6:14 or 6:15 p.m. to the home of Appellant and Co-Defendant in response to a cardiac arrest call. They arrived at the house in less than five minutes. (Tr. p. 405, line 2 – p. 407, line 6; p. 416, lines 14-19.) Upon their arrival, they retrieved their equipment and went to the front door. The screen door was locked and the house was silent. They knocked a few times and a woman came and opened the door. (Tr. p. 407, lines 7-19; p. 416, lines 20-22.)

When the door opened, EMT Curran saw Victim, a four-year-old boy[15], laying face up on

[15] EMT Curran did not know the name of the child. She just testified to seeing a small male child. Other testimony established the child to be four-year-old Victim, the child of Appellant and Co-Defendant. (Tr. p. 430, lines 4-5; p. 480, line 20 – p. 481, line 13; p. 541, lines 4-9).

the floor just inside the living room. He was not wearing a shirt or socks – just jeans, which had a stain like children have when they have wet themselves. (Tr. p. 407, lines 20-24; p. 411, line 22 – p. 412, line 2.) She was not told anyone had performed CPR on the boy and she saw no one doing so. Without turning him over, EMT Currant saw a small cut to the Victim's lip and "Raccoon like" bruising around both eyes, which indicated to her the injuries had happened at some earlier time. He was still, cold to the touch, and he was not breathing and had no pulse. (Tr. p. 407, line 25 – p. 409, line 8; p. 412, lines 3-21.) Prior to anyone else arriving at the house, EMT Curran only saw Victim's mother, Co-Defendant, in the house. The EMTs questioned her about the Victim's health history, and about what had happened. Co-Defendant, who was very agitated, said that, while she was in the shower, Victim was playing and had jumped off the dresser, hit his head, and had a seizure. She said he was autistic, and that, when she got out of the shower, she found him unresponsive. Co-Defendant, who did not appear to EMT Curran to be wet, did not indicate when this had happened. (Tr. p. 413, line 1 – p. 414, line 25; p. 415, lines 10-24.)

In order to determine if there was any activity in Victim's heart, the EMTs hooked their monitor up to him using three leads that they attached to his chest area using stickers. The monitor indicated there was no activity in the heart, and that Victim was dead. (Tr. p. 409, line 9 – p. 410, line 9.) EMT Curran noticed that, in addition to the Victim's body being cold, his hands and soles and his feet were "gray, like a dusky color" indicating that he had been dead for some period of time. (Tr. p. 410, line 18 – p. 411, line 21.)

The EMTs notified law enforcement that a child was dead. (Tr. p. 413, lines 1-12.) Apparently at about that same time – sometime between 6:15 and 6:30 p.m. – Fire Department personnel arrived. Three firefighters entered the home where the EMTs were still located, saw Victim laying on the floor, and were told that he was dead. (Tr. p. 413, lines 1-12; p. 419, line 14 – p. 420, line 4; p. 424, lines 7-10.) Firefighter Peter Biviano saw Co-Defendant, who did not appear to be wet; she was visibly upset, screaming, and asking them to save her child. (Tr. p. 420, lines 5-

10; p. 423, lines 21-25; p. 424, lines 14-19.) Because neighbors had indicated to a firefighter who remained outside with the truck that a boyfriend and newborn child should be in the house and they did not see them, the firefighters conducted a "hasty search" for them, going through quickly, opening doors to each room and scanning the rooms. Because they were unable to locate boyfriend or newborn in the house, Firefighter Biviano called his dispatcher and requested that the Richland County Sheriff's Office upgrade their response, *i.e.*, respond quicker. (Tr. p. 420, line 11 – p. 421, line 14; p. 422, line 18 – p. 423, line 3.)

At that point, Firefighter Biviano noticed a change in Co-Defendant's demeanor. (Tr. p. 422, lines 1-6.) "She immediately just went blank. It was like nothing had happened. She wasn't upset anymore. There was no crying, no screaming. She was out front on the front steps and she got on the phone and was having a conversation with somebody on the phone, just a normal conversation." (Tr. p. 421, lines 18-25.)

Corporal Wilder, Master Deputy Shaw, Deputy Williams, Deputy Diaz, and Deputy Johnson responded to the firefighters' call. (Tr. p. 556, lines 3-14; p. 568, line 19 – p. 569, line 4.) The only non-emergency personnel they saw were Co-Defendant and Victim[16], whose body was laying face up on the floor of the living room. (Tr. p. 557, lines 1-9.) As soon as he walked into the house, Master Deputy Shaw heard Co-Defendant yell out, "SIDS." (Tr. p. 599, lines 17-25.) Co-Defendant yelled at both Corporal Wilder and Deputy Shaw, as they came in to the house, that the others would not help her son and that he was not dead.[17] (Tr. p. 569, lines 15-17; p. 591, lines 13-23.)

Although they were not aware that a crime had been committed, Victim's death was considered suspicious and Master Deputy Wilder asked everyone – the firefighters, the EMS crew,

[16] Deputy Johnson noticed the bruising to Victim's face. (Tr. p. 563, lines 15-25.)

[17] Corporal Wilder observed that Co-Defendant was making crying noises, but there were no tears. (Tr. p. 569, lines 13-23.) Deputy Shaw said that Co-Defendant was not crying, but she was yelling about getting help for Victim. (Tr. p. 591, lines 13-23.)

some of the deputies, and Co-Defendant –to step outside the front of the house. Co-Defendant, who had not said whether anyone else was in the house, would not leave at first, but eventually went outside and sat on the front step. (Tr. p. 557, line 14 – p. 558, line 11; p. 570, lines 4-16; p. 592, line 13 – p. 593, line 25.)

Sergeant McLendon remained in the driveway area to ensure that the scene was secured. From his position he could both see and hear Co-Defendant, who was on the front porch. He did not notice if she was wet. (Tr. p. 610, lines 8-10.) He heard her cry out loudly that no one had helped her child[18] and was there anything anyone could do. She said she was in the shower when she heard a noise; she came out and found Victim laying on the floor biting his lip. She said she dialed 911 and tried to follow directions to administer CPR. She was talking loudly to anyone who would listen. (Tr. p. 605, line 18 – p. 607, line 8; p. 610, lines 4-7; p. 610, line 18 – p. 611, line 2.)

When walking onto the driveway after exiting the house as it was being cleared, Master Deputy Shaw noticed the gate to the backyard was open and that, because the tall (18 – 24 inches tall) grass had been flattened, it appeared as if someone had recently gone through the backyard. He brought it to the attention of Sergeant McLendon. While Sergeant McLendon stood in the driveway, Master Deputy Shaw went back inside the house, through the front door, to clear it room-by-room. (Tr. p. 594, line 1 – p. 595, line 25; p. 602, line 18 – p. 603, line 5; p. 607, lines 19-22.) In the kitchen, he noticed that the door to the outside – described as a non-transparent screen door – looked like it had been opened. He opened it and discovered Appellant holding a small child on the step in the backyard. (Tr. p. 570, line 19 – p. 571, line 1; p. 595, line 23 – p. 596, lines 19; p. 602, line 18 – p. 603, line 5.)

Appellant said nothing to Master Deputy Shaw – he did not ask about Victim and he did not

[18] Sergeant McLendon said that Co-Defendant was sobbing, but explained later that "it was no tears or nothing. It was like she was trying to, you know, make it look like something that wasn't there." (Tr. p. 607, lines 6-8; p. 606, lines 8-10.)

respond to Master Deputy Shaw's question of what was he doing. He was escorted through the house and out the front door. Deputy Johnson, Sergeant McLendon, and Firefighter Biviano saw Appellant walk out of the front door of the house holding the baby. Sergeant McLendon asked Appellant what he was doing, but Appellant did not respond. He also did not appear upset and did not ask for help. Appellant walked to the sidewalk in front of the house near the steps on which Co-Defendant was sitting. (Tr. p. 422, line 7 – p. 423, line 14; p. 561, lines 1-8; p. 563, lines 20-22; p. 570, line 19 – p. 571, line 1; p. 596, line 20 – 597, line 17; p. 603, lines 2-16; p. 607, lines 22 – p. 608, line 12; p. 611, lines 3-6.)

While he was in front of the house, Master Deputy Shaw heard Co-Defendant say, about four times, that she was in the shower and heard a loud bang. (Tr. p. 598, line 13 – 16.)

A crowd gathered outside the home, and people appeared to be upset about what had happened. Although they were not under arrest, Appellant and Co-Defendant were placed inside separate patrol cars for their safety. (Tr. p. 562, lines 6-22; p. 571, line 12 – p. 572, line 5; p. 597, line 17 – p. 598, line 9; p. 608, line 18 – p. 609, line 3.)

Investigator Holdorf responded to the scene and took over as the designated lead investigator. (Tr. p. 462, lines 7-13; p. 609, lines 3-12.) He asked Sergeant Lindler to obtain a search warrant before officers made further entrance into the home was made. (Tr. p. 463, line 8 – p. 464, line 15.) Once the search warrant was received, the scene was turned over to responding members of the crime scene unit. (Tr. p. 464, lines 12-15.)

Upon their separate arrivals, Sergeant Richards and Investigator Oates, crime scene investigators, saw Victim laying on his back on the floor in the living room. (Tr. p. 425, lines 13-24; p. 426, lines3-9; p. 429, line 9 – p. 430, line12; p. 431, lines 5-10; p. 717, lines 3-8; p. 720, lines 6-24; p. 722, line 25 – p. 723, line 8; p. 724, line 21 - .) After the coroner arrived, he and Sergeant Richards looked at Victim, including his back (by rolling him over), while Investigator Robert Oates took photographs. (Tr. p. 431, line 11 – 432, line 12.) The visible injuries on Victim's body were

photographed at the scene. (Tr. p. 724, line 21 – p. 729, line 16; see also State's Exhibits 13, 75 through 81, 83 through 85, 130, 131 through 147.) Other than blood coming from a cut in Victim's mouth, Sergeant Richards did not notice any fresh blood coming from any wound on Victim's body. (Tr. p. 458, line 13 – p. 459, line 3.) After the setting of and injuries to Victim were photographed, Victim was taken from the home for an autopsy and Sergeant Richards and Investigator Oates processed the house. (Tr. p. 432, lines 13-23; p. 730, lines 4-11.)

The investigators walked from the living room down a hall to the far bedroom (identified as bedroom two on the diagram) where they had been told a large stain had been found.[19] While walking through the hallway, Sergeant Richards noticed some reddish brown stains on the wall and informed Investigator Oates. (Tr. p. 432, line 23 – p. 433, line12; p. 730, lines 12-19; p. 731, lines 19-21.) In the far bedroom, they saw two pieces of furniture, a bed and a dresser. They found the stain on the carpet and other items of potential value, including a washcloth with reddish brown stains they believed to be blood. They photographed the room, to include the rug, the dresser and items on the dresser. They also performed two tests that could be conducted on the carpet in the house to see if it had any blood in it. One of those tests revealed the presence of blood in the carpet and the presence of a cleaning fluid. Moving some bags in the room, a portion of the carpet was cut and collected for further processing. (Tr. p. 434, line 6 – p. 435, line 21; p. 730, line 15 – p. 735, line 15; p. 736, line 18 – p. 737, line 17; State's Exhibits 46 through 59, and 224.)

Investigator Oates also photographed a green shirt in the hall by the bedroom door and a broom in the hall, both of which were collected on a later day. (Tr. p. 728, line 4 – p. 739, line 15; State's Exhibits 17 through 19). They proceeded to another bedroom (identified as bedroom three on the diagram), in which they saw a bed, a bassinette, and a television on a table (the television was on). (Tr. p. 739, line 16 – p. 740, line 21; State's Exhibits 36 through 40.) In the last bedroom

[19] State's Exhibit 211, a not-to-scale drawing of the residence, provides a general layout of the home. (Tr. p. 452, line 14 – p. 456, line 21.)

(bedroom one on the diagram), they saw a bed, a crib, and a television that was off. (Tr. p. 741, lines 1-21; State's Exhibits 41 through 44.)

The investigators also examined and photographed the kitchen, including the stove top, the counters, inside the cabinets, and inside the refrigerator and freezer. The photographs showed the kitchen as it was at approximately 7:00 p.m. on July 1, 2013 – there was some food on the stove and counter near the stove. Also found in the kitchen, in a plastic bag hanging from the door handle, investigators found, documented, and collected a burgundy colored washcloth that was damp. (Tr. p. 743, line 2 – p. 746, line 11; State's Exhibits 20 through 35, 62, 63, and 74.)

The investigators also marked, photographed, and swabbed reddish brown stains observed throughout the house:

- on a wall in bedroom two (where the stained carpet was located): subsequent testing established that the DNA matched that of Victim;
- on the hallway wall: subsequent testing established that there was a mixture of at least two persons, one of whom was Victim (Appellant was excluded as the second person, but Co-Defendant could not be excluded);
- on the hallway carpet: subsequent testing established that the DNA matched that of Victim
- on and around the light switch and light switch cover in bedroom one: subsequent testing established that it was blood, but the DNA did not match either Victim, Appellant, or Co-Defendant; and
- on the living room wall: subsequent testing established that the DNA matched that of Victim.

(Tr. p. 435, line 22 – p. 437, line 7; p. 439, line 4 – p. 442, line 15; p. 741, line 15 – p. 743, line 1; p. 746, lines 12-23; p. 1031, line 8 – p. 1033, line 19; p. 1033, line 20 – p. 1038, line 17; p. 1041, line 1 – p. 1042, line 13; p. 1043, line 10 – p. 1045, line 6; State's Exhibits 18, 19, 64, 65, 67, 68, 69, 71, and 72.) The stains on the hallway wall and living room wall were of a linear pattern, indicating that they were castoff from some object that was swung, while the others were round or elliptical, indicating spatter. (Tr. p. 436, line 15 – p. 438, line 6; p. 440, lines 3-15; p. 441, line 24 – p. 442, line 1.) The age of or how long the blood had been present was not able to be determined.

(Tr. p. 457, line 21 – p. 458, line 12.)

When the investigators left the home on the night of July 1, the house was secured and locked and a deputy was posted outside. On later days, other crime scene investigators returned to the house and processed it further. (Tr. p. 747, line 19 – p. 748, line 15.)

Later on the night of July 1, Crystal talked to Co-Defendant and asked her what had happened. Co-Defendant said that Victim was jumping off the dresser or jumped from the dresser to the bed, fell, hit his head, and had a seizure. (Tr. p. 492, line 13 – p. 493, line 22.) When she asked her a second time what had happened, Co-Defendant told her that she had been in the shower, heard a big boom, and when she went into the bedroom she found Victim in the corner having a seizure. She picked him up and he passed out in her arms. (Tr. p. 494, lines 2-11.) The third time Crystal asked her what had happened, Co-Defendant said she was about to get in the shower when she heard the boom, and that Victim had jumped off the dresser and onto his bed and she found him on the floor, foaming at the mouth. (Tr. p. 494, line 12 – p. 495, line 14.) Crystal told Co-Defendant she could talk to her. Co-Defendant was too upset, and kept repeating that she did not kill him. She and Appellant then walked out. (Tr. p. 496, lines 1-9.)

On the night of July 1, Co-Defendant's sister and other family gathered and talked about doing something for Victim. Co-Defendant responded by saying that he was in a room and would be walking out any minute. She kept saying he was in the room like she did not believe he was dead. (Tr. p. 497, lines 7-24.) At one point, Co-Defendant started laughing and said that another of her children had bitten Victim on his back, leaving a bite mark. (Tr. p. 498, lines 1-8.)

Both Appellant and Co-Defendant were taken to the Sheriff's Department. They were not under arrest, but investigators wanted to see what they could tell them about Victim's death. (Tr. p. 910, line 18 – p. 913, line 17.) Appellant, after being advised and of and waiving his rights, told Investigator Laurita that, leaving Victim asleep in the house, he went to the store that day and pulled some money off the card, bought some beer and cigarettes, and walked back to the house where he

drank a 24-ounce beer at approximately 8:00 or 9:00 a.m.. He then fell asleep. Co-Defendant called to let him know that she was on the way home from the hospital and his mother called to check. At some point, Victim woke up and watched television and played with Appellant for a while. At some point, Victim apparently went to the back bedroom where he stayed by himself. When Co-Defendant arrived in a taxi, Appellant gave her the money and went out to the taxi and got her bags. (Tr. p. 911, lines 13-24; p. 913, lines 18-21; p. 914, line 22 – p. 915, line 12; p. 918, line 18 – p. 919, line 8.) Co-Defendant told Appellant she was in pain, and talked to him about having the baby. She then walked around, straightening things up. She became angry at Victim for urinating on the floor in the back bedroom and went back to clean it. She then went into the bathroom to take a shower. Appellant stayed with and loved on the new baby until he began cooking dinner by cutting up onions and cooking steaks. The water was running and he had music on his telephone when he heard a boom. (Tr. p. 915, lines 13-17; p. 917, lines 10-24; p. 919, line 9 – p. 920, line 12.) Because he was not sure what he had heard and he had to turn things off, it took him four or five minutes to go see what the noise was; as he did so, Co-Defendant came down the hall with four-year-old Victim and went into the front room. Co-Defendant was saying, "look baby, look baby." Victim's eyes were open and he was breathing, but he "was in and out." (Tr. p. 916, lines 4-11; p. 917, lines 20-25.) Co-Defendant called the ambulance and they told her to breathe into his mouth and press on his stomach. (Tr. p. 916, lines 11-13.) Before the police and the ambulance arrived, Appellant grabbed the baby and hid in the closet so that they would not take him away as he said they usually do when "accidents like this" happen. (Tr. p. 918, lines 1-17; p. 919, lines 19-25.)

Appellant was interviewed by Investigator Laurita

After their interviews were finished, they wanted to see each other. Officers let them sit together in the break room. In the presence of the officers, Appellant handed Co-Defendant some of the money from his pocket and told her "to take the charges so he could go home and take care of the kids." (Tr. p. 469, lines 20-21; see also p. 467, line 17 – p;. 470, line17.) When they left the

Sheriff's Office, Appellant and Co-Defendant went to Co-Defendant's mother's home. At about 3:00 in the morning, she called Ms. Metze and asked her to come pick them up. She told Ms. Metze that she could not "deal with" all of the crying and everybody being so upset. (Tr. p. 968, lines 6-16.) Ms. Metze picked them up from Co-Defendant's sister house at approximately 8:00 a.m. and took them to get something to eat. When the investigator called, she drove Co-Defendant to her house where the deputies were waiting for her. Co-Defendant told Appellant to go to the store down the street, and Ms. Metze drove him there. Ms. Metze then drove back to their house to wait on Co-Defendant. A short time later, Co-Defendant got into one of the investigators' car and called Ms. Metze. She told her she was going with them to discuss the autopsy results and asked Ms. Metze to pick her up in a couple of hours. Ms. Metze agreed. (Tr. p. 968, line 17 – p. 971, line 19.) Ms. Metze then went and picked up Appellant from the store; Co-Defendant called and said that Appellant need to go to the Sheriff's Department to sign some papers so Ms. Metze took him there. (Tr. p. 972, lines 9-24.)

On July 2, Investigators Holdorf and Wagner and Investigator Lee went to the house to meet Co-Defendant and Deputy Coroners Powell and Burns. Once the officers arrived, they released the deputy who had been securing the scene. Once Co-Defendant arrived, complete custody and control of the house was released to her. Then, Deputy Coroner Powell explained to Co-Defendant[20] that she wanted her, using a doll, to show them exactly where Victim was when she discovered him and what she did. (Tr. p. 750, lines 19-20; p. 751, line 9 – p. 752, line 2; p. 752, line 23 – p. 753, line 6; p. 767, line 1 – p. 768, line 2; p. 783, lines 9-13; p. 873, line 14 – p. 874, line 18.)

Co-Defendant told Deputy Coroner Powell that she arrived home at approximately 2:00

[20] During this meeting at the house, Co-defendant told Deputy Coroner Powell that Victim had been diagnosed with Autism. She also said that Victim's siblings did not interact with him very much because he was different, but that when they rough-housed sometimes, the younger children would climb all over Victim. Co-Defendant also told Deputy Coroner Powell that Victim would bit at himself and poke at his eyes. (Tr. p. 753, line 16 – p. 754, line 7.)

p.m. from the hospital, having delivered her fourth child on June 29. While she was in the hospital, Appellant took care of Victim; she had talked to Victim on the telephone from the hospital and he told her that they had played ball. After unpacking the new baby's things – and putting some papers and prefilled bottles on the dresser in the bedroom at the right end of the hall – Co-Defendant started to cook some food. Then, wanting to take a shower, she told Victim to play in his bedroom and she went and got into the shower. (Tr. p. 754, lines 15-20; p. 757, line 22 – p. 758, line 3; p. 761, line 14 – p. 762, line 3.) She got out of the shower when she heard a loud boom. She immediately went to the kitchen because she had been kitchen and she thought maybe something had come off the stove. When she realized things in the kitchen were fine, she went to look in the bedroom at the right end of the hallway and that is when she saw Victim on the floor. She also saw some things from the dresser on the floor, including some of the bottles and papers she had just put there. (Tr. p. 755, lines 9-18; p. 758, lines 3-7.) Because the doll was not the right size and was not flexible, Co-Defendant demonstrated the position she found Victim in[21] – he was on his stomach, with his knees tucked up under him and his butt up in the air, and his head was turned to the side. Co-Defendant said he was making a funny noise and shaking. She tried to get him up and called his name; she put her finger in his mouth because he had his lip in his mouth and she wanted to get it out, but she could not. (Tr. p. 755, line 19 – p. 756, line 21; p. 768, lines 1-5.) She then picked him up and ran into the den, where he went limp and she laid him on the floor. She then ran back to find a phone to call 911. (Tr. p. 756, lines 21-24; p. 761, lines 2-4.) Co-Defendant told Deputy Coroner Powell that she told the 911 operator she did not know if Victim was breathing and she administered CPR as directed after wiping out Victim's mouth with a rag she found on the floor. She stopped when EMS arrived. (Tr. p. 757, line 25 – p. 758, line 19.) During the reenactment, Co-Defendant

[21] Co-Defendant did not want to get in the exact spot on the floor where Victim had been because she said she did not want to lay on the urine that was on the floor. So Deputy Coroner Powell told her just to get next to it. (Tr. p. 756, lines 9-14.)

was calm; she was not upset. She kept telling Deputy Coroner Powell that she was tired because she had just had a baby, and Deputy Powell told her she could take her time, but that that was a very important part of the investigation into how Victim died. (Tr. p. 758, line 25 – p. 759, line 7; 1666, line 2 – p. 1667, line 17; State's Exhibit 258.)

After the reenactment, Investigator Lee photographed certain items, including the doll on the floor where Co-Defendant placed it to show where Victim had been, and collected some measurements. (Tr. p. 769, line 6 – p. 769, line 25; State's Exhibits 106, 110, and 111.[22]) Investigator Lee determined that the distance from the dresser to where Co-Defendant placed the doll (to the top of the doll's head) was 44 inches. The dresser was measured and determined to be 30 inches tall. (Tr. p. 770, lines 1-23.)

After the reenactment concluded, Co-Defendant was asked to meet the officers back at the Sheriff's Office so that the Coroner could review the Coroner's report with her and discuss arrangements for Victim. Co-Defendant arrived shortly after the officers did, and Investigator Holdorf advised her of her rights. Co-Defendant acknowledged receipt and waiver of her rights. (Tr. p. 875, line 2 – p. 876, line 9; Thompson AOR). After Deputy Coroner Powell explained to Co-Defendant that Victim's death was consistent with abuse, Co-Defendant said she did not understand and that she did not and could not have killed Victim. (Tr. p. 876, line 13 – p. 877, line 1.) At about that time, Appellant showed up at the station, and Investigator Holdorf left the room to go talk to him. (Tr. p. 877, lines 2-10.)

After Investigator Holdorf left the room, Co-Defendant said that she had been in the shower when she heard a thud. She ran, got the child from the back room, carried him to the front room, and called 911. (Tr. p. 877, lines 16-18.) When told that the injuries to Victim were so extensive

[22] Neither party objected to the admission of the photographs admitted as State's Exhibits 110 and 111, but Co-Defendant objected to the admission of State's Exhibit 106 (a photograph of the bedroom at the right end of the hall, showing where Co-Defendant had placed the doll on the floor to indicate where she found Victim). (Tr. p. 769, lines 1-10.)

they could not have been caused by a single event or fall, she kept saying that she did not do "this" to her child, she could not have done it, and she was in the shower when she heard a thud. (Tr. p. 878, lines 3-6.) She said that she would discipline Victim by putting him in time out and making him sit with his hands up, or by giving him a little spank on the bottom. She said she never hit Victim hard. (Tr. p. 878, lines 9-18.) At some point, Captain Melton came into the room and joined them. (Tr. p. 709, line 17 – p. 711, line 23.) She introduced herself to Co-Defendant and explained again how the autopsy established that the injuries to Victim were not a singular event, Co-Defendant asked if it was possible that Victim could already have been dying prior to her getting home from the hospital. When Captain Melton responded that she did not know and why did she ask that, Co-Defendant said that Victim was not acting right. (Tr. p. 710, line 19 – p.711, line 6; p. 878, line 22 – p. 878, line 2; p. 879, line 17 – p. 880, line 22.) Co-Defendant then asked to speak to Appellant and told them she would tell them what happened if she could speak to him. (Tr. p. 711, lines 6-8; p. 879, lines 3-5.)

Investigator Wagner left to speaker with Investigator Holdorg, who was talking to Appellant. (Tr. p. 879, lines 8-13.) They decided to allow Appellant and Co-Defendant to meet by themselves for about 15 minutes in a conference room. (Tr. p. 711, lines 8-21; p. 881, lines 5-10.)

After Appellant and Co-Defendant talked, Investigator Wagner talked to Appellant. He said that the day before Co-Defendant came home, he and Victim had stayed up to 4:00 a.m. watching television. When he got up around 10:00 a.m., he realized that she was coming home that day, and he walked to the store to get some money. He did not take Victim with him, but left him asleep in his room lying in his urine. Appellant did not clean up the urine before Co-Defendant got home. He said that he had been in the kitchen cooking and did not know anything about what happened to Victim. When confronted by the fact that Co-Defendant said that she had gone into the kitchen after she heard a thud and had not seen anyone in there, he maintained that he had been in the kitchen, he was not going to change his story, and he did not have anything else to say. (Tr. p. 882, line 16 – p. 884, line 18; p. 899, lines 17-21.)

While Appellant was talking to Investigator Wagner, Co-Defendant was giving an oral statement, which was reduced to written form by Investigator Holdorf who typed it on his computer. Co-Defendant was then allowed to review the statement and signed it indicating that it was her version of what had happened. Captain Melton witnessed the taking of the statement and the signing of it by Co-Defendant. (Tr. p. 711, line 22 – p. 713, line 4; p. 714, lines 12-14; Thompson Statement.)

Afterward, Appellant and Co-Defendant sat in the break room waiting for the transport van; several investigators were present. Investigator Wagner walked in and saw money on the table. Investigator Lindler heard Appellant, who did not appear upset, tell Co-Defendant to take the charges so he could go home and take care of the kids. As they stood up to leave, Investigator Wagner saw them hug each other and heard Appellant repeating to Co-Defendant, "Free me, free me." (Tr. p. p. 468, line 5 – p. 470, line 17; 884, line 19 – p. 885, line 10.)

On July 4, Investigators Holdorf and Wagner obtained and executed a search warrant for the house; they were looking for a Time Warner Cable system that may have recorded from security cameras, poles, rods, and brooms. Investigator Polis assisted them. (Tr. p. 783, line 2 – p. 785, line 11; p. 885, lines 16 – p. 887, line 1; p. 891, line 13 – p. 892, line 8.) Investigator Polis photographed the bathroom, some pictures on the outside of the door to the bedroom at the right end of the hall, a broken white wooden rod found in the hallway closet, a broom in the hallway, a hole in the closet door and some reddish brown stains, and a white metal pole or dowel with red stains on it found on the floor between the bed and the floor in the bedroom at the right end of the hall. She also collected the physical evidence that was discovered, including the rods or dowels, a hospital gown, and a green shirt. (Tr. p. 785, line 19 – p. 790, line 4; p. 790, line 23 – p.793, line 16; p. 892, line 12 – p. 894, line 1; State's Exhibits 172 through 198 and 200.) No fingerprints were recovered from the either the broom or the wood rod or dowel, but swabs were taken from them for DNA testing. (Tr. p. 794, lines 2-11; p. 796, lines 17-21.) The white metal rod appeared to have

some ridge detail on it, and Investigator Polis secured it for her supervisor, Sergeant Richards to process further. (Tr. p. 794, line 12 – p. 796, line 16; p. 797, line 24 – p. 798, line 9.)

On July 5, Investigators Holdorf and Wagner accompanied Appellant's mother to the house at her request so that she could retrieve some of Appellant's and the newborn's clothes. (Tr. p. 894, lines 2-12.) She entered the home and allowed the investigators to enter. Mrs. Guinyard went to the back bedroom and was pulling things out of the closet when she was overcome with emotion. She turned around and handed Investigator Holdorf a little gray and white or blue and white striped child's shirt, with reddish brown stains all over it, that she had found going through the pile of clothes in the closet. She began to cry and left the room for a minute. After a few minutes she regained her composure, and finished getting the clothes she needed and they left. (Tr. p. 894, line 16 – p. 895, line 25; p. 896, lines 17 – p. 897, line 4.) Investigator Holdorf delivered the shirt and a pair of red shoes, from the house to Investigator Lee. That evidence, which had to be placed in a drying cabinet because it was wet – were two red shoes and a gray striped shirt, both of which had reddish brown stains on them. Investigator Lee photographed them. Subsequent testing on the shoes and shirt established that the stains were blood and that the DNA matched that of Victim (Tr. p. 771, line 10 – p. 777, line 4; p. 897, lines 5-10; p. 1043, line 10 – 1045, line 19; State's Exhibits 112 through 129.)

On July 9, 2013, Sergeant Richards took possession of a white pipe collected from Appellant's by Investigator Polis. (Tr. p. 442, line 25 – p. 443, line 19.) The next day, Sergeant Richards and Investigator Oates examined the pipe. Sergeant Richards used markers to indicate four different areas of brown reddish stains on the pipe, Investigator Oates then photographed the pipe and the stains, and Sergeant Richards swabbed the stains in order to submit them for DNA testing. While two of the stains appeared to have ridge detail of the type seen in fingerprints and palmprints, there was insufficient ridge detail to match. (Tr. p. 444, lines 3-24; p. 445, line 15 – p. 447, line 14; State's Exhibits 86, 87, 88, 93, 94, 95, 98 and 100.) On July 28, 2013, Sergeant Richards took more

swabs from the stains on the pipe to submit for DNA testing. (Tr. p. 448, line 15 – p. 449, line 16.) Later Sergeant Richards used leuco-crystal violet (LCV) to determine if more blood was present on the pipe; no addition blood was revealed and the use of LCV prevented any other type of testing of the pipe. (Tr. p. 450, line 7 – p. 452, line 10.) Sergeant Richards testified at trial that he was unable to determine when the blood was transferred to the pole because blood in droplets of the size noted can dry fairly quickly. (Tr. p. 457, line 21 – p. 458, line 12.)

Testing on the swab from white dowel rod revealed that there was blood on it, and the blood was a mixture of two persons. The major contributor was Victim; the minor contributor could not be determined. (Tr. p. 1046, lines 6-17.) Testing on the broom handle swab revealed it was a mixture of the blood of at least two individuals. Neither Victim, Appellant or Co-Defendant could be excluded as contributors. (Tr. p. 1046, line 25 – p. 1047, line 15.) Testing on the three swabs of the white pipe revealed that it was blood belonging to Appellant, Victim, and one that was a mixture of at least two persons, Appellant and either Victim or C-Defendant. (Tr. p. 1048, line 3 – p. 6.)

Sometime after Victim died and the police identified Appellant's blood on the curtain rod found in their home, Co-Defendant spoke to her cousin, Latoya Anderson, and told her that Victim had been possessed, that they had been tired of him, and that she had starved him for eight days by not giving him either food or water. Co-Defendant told her they were relieved when Victim died. (Tr. p. 1055, line 7 – p. 1056, line 25.)

Appellant, who changed her statement to police twice, was also recorded on a call from the jail in which she gave a third version of events leading up to Victim's death. (State's Exhibits 2A, 6A, and 254.) She and Appellant were also overhead in the Courthouse talking one day. Appellant told her to do what he said and everything would be okay. She said that there were other women at the jail who had killed their children and their attorneys had gotten them off. (Tr. p. 1173, line 9 – p. 1175, line 13.)

Dr. Amy Durso, a forensic pathologist, performed the autopsy of Victim. (Tr. p. 1100,

lines17-21; p. 1105, lines 10-18.) She first x-rayed his body. The x-rays indicated possible rib fractures, as well as a possible fracture to the upper right arm. (Tr. p. 1121, lines 5-25.) Dr. Durso then conducted an external examination of Victim, during which she observed the following:

- on his head: a scar on his nose, a scar on his forehead, both eyes had orbital contusions (black eyes), a small abrasion under his left eye, lacerations to his lips, and quite a few injuries to the inside of his lip;
- to his torso: a small crusted abrasion (state of healing), scarring over the right hip, and dark discoloration over his right hip;
- on his arms: five scars, two small superficial abrasions around his elbow, a small abrasion on the back of his shoulder that appeared to be healing, a deep puncture wound, and a sharp force injury (which was starting to heal even though it did not appear to have had any medical intervention);
- on his back and buttocks: a lot of discoloration, superficial abrasions along the buttocks, scars, a healing bite mark (the measurements of which match up with a teenager or adult), abrasion on the right hip, discoloration of the right hip and lower buttock; and
- on his legs: few little abrasions on back of upper legs, and one knee was "really, really" swollen.

(Tr. p. 1108, line 22 – p. 1121, line 2; State's Exhibits 31, 130, 144, 225, 227-231, 255, and 256.)

During Dr. Durso's internal examination of Victim, she discovered the following injuries:

- his thyroid was really pale indicating significant blood loss;
- two fractured ribs: the left lateral ninth rib fracture was dated between 10 days and six weeks and was healing but would have been "pretty painful" when coughing, sneezing or taking a deep breath, and the right posterior tenth rib fracture was dated to have been suffered within 24 hours of death;
    - injuries of this type are the result of blunt force injury – either the body striking a hard flat surface or a hard flat surface striking the body – that do not generally break or puncture the skin;
- a fracture to his left humerus, the left upper arm bone, which was actually a healing fracture under an acute hemorrhage indicating a site of repeated injury;
    - the healing fracture was dated to be one to two weeks old, the acute hemorrhage overlying the fracture was dated to have occurred within 24 hours of death;
    - this injury could have been caused by any hard impact to the bone or by someone yanking the arm;
    - this injury would have been extremely painful and Victim would not have been able to use the arm in any meaningful way;

- injuries to his head and brain, including
    - four areas of impact of bruising to the head, which were not consistent with just one impact or a fall from any height and were indicative of abuse;
    - subdural hemorrhage over the left side of the brain, which was dated to be between five and seven days prior to death;
        - not consistent with a fall from any height or any natural cause, but is caused by blunt force trauma;
        - this injury would have resulted in obvious symptoms, including lethargy, vomiting, and maybe loss of consciousness after the blow; and
- injuries to the back of his body, including
    - extensive bleeding and hemorrhage of different ages;
        - the majority of blood loss was in the lower back and buttocks, with hemorrhage two and half inches deep in the left buttocks that could not have been caused by spanking, but by a hard object hitting the child;
        - hemorrhage to the back of the legs and arms;
    - some the bruising was dark and bright red indicating they were probably less than 18-24 hours old, but there was just as much bruising that was older;
    - Dr. Durso testified that she had never seen a child with this many areas of bruising this severe; and
    - the blood loss from all of the bruising – old and new – contributed to the blood loss so that he was no longer able to circulate enough blood to provide oxygen to his brain to maintain his body's vital functions.

(Tr. p. 1122, lines 1-17; p. 1124, line 1 – p. 1140, line 1; State's Exhibits 240-242.) Dr. Durso concluded that Victim was repeatedly and consistently beaten, and those beating caused him to lose so much blood from his circulatory system into his soft tissue that his body ceased being able to function. (Tr. p. 1140, lines 2-21.) She stated that Victim would have been in excruciating pain from the time he woke up until he went to sleep; even just trying to sit down would have been painful. His pain would have been noticeable. (Tr. p. 1140, line 22 – p. 1141, line 13.)

Dr. Durso concluded the injuries suffered by Victim were not the result of spanking or falling, but were all intentionally inflicted injuries. Victim did not die from disease or any natural cause. (Tr. p. 1123, lines 18-25; p. 1141, lines 14-23.) In her opinion, the last incident alone would not have killed him, but it was the cumulative effect of all the injuries he sustained. (Tr. p. 1141, line

23 – p. 1142, line19.) Had Victim received medical treatment, he would have survived. He might have needed a transfusion, but he would have survived. (Tr. p. 1142, lines 20-25.) She determined the cause of his death to be extensive soft tissue hemorrhage and bleeding due to multiple acute and healing blunt force injuries due to non-accidental trauma, *i.e.*, persistent and repeated abuse. (Tr. p. 1143, lines 1-8.)

Dr. Rosa, a child abuse pediatrician, reviewed the pathology report and photographs of Victim taken after his death. (Tr. p. 818, line 16 – p. 819, line 14; p. 823m kube 8 – p. 825, line 16.) She found injuries on his different organ systems. Starting with his skin, Victim had injuries to his face, trunk (the neck, chest, back, and buttocks), upper legs, and arms. The injuries were bruises, abrasions, scrapes, scars, an open wound, and a healing bite mark on his back. (Tr. p. 842, line 22 – p. 844, line 4; p. 857, line 10 – p. 859, lines 16.) She also found Victim had suffered injuries to his brain – there were multiple contusions to the front and back of the scalp that were not visible on the outside, blood had accumulated underneath the dura covering all of the left side and on the back of the brain, and blood had accumulated underneath the arachnoid. (Tr. p. 844, line 5 – p. 845, line 12.) The injuries to the brain were found by Dr. Rosa to be inconsistent with a fall from a dresser. Instead, she found them to be consistent with multiple blunt impact trauma inflicted by either hitting Victim with an object multiple times or by hitting Victim up against something multiple times. Dr. Rosa testified that, in her opinion, the injuries to Victim's brain had been inflicted 72 hours to a week before his death. (Tr. p. 860, line 21 – p. 862, line 14.) While Victim would have been exhibiting signs of brain injury, including lethargy, nausea, drowsiness, pin, seizures and abnormal movements of a limb, he would have still been able to move if motivated enough by hunger or something else. (Tr. p. 862, line 15 – p. 863, line 3; p. 866, lines 14-20.)

Dr. Rosa also testified Victim also had two refractures, one to the ninth rib on the left side, which was the older of the two (10 days to six weeks) and showed evidence of healing, and one to the tenth rib on the right on the back posterior, which was very acute (within 24 hours of death).

The rib fractures were consistent with blunt trauma to two different places, and were caused by something hitting Victim, rather than a fall. These injuries would have caused pain when Victim coughed, sneezed or took a deep breath. He also had a fracture on the left humerus that had evidence of healing (dating the original injury seven to 14 days before death) and acute trauma meaning that the bone was rebroken around the time of death. The injuries to the humerus were caused by trauma of some sort, blunt trauma or someone grabbing Victim's arm forcibly. Before it was rebroken at the time of death, the older fracture would have been painful and would have prevented Victim from using his arm in an appropriate manner. (Tr. p. 845, lines 13 – p. 851, line 23; p. 863, lines 4 – p. 864, line 11.)

Dr. Rosa also testified that there was significant discoloration of the skin in the area of the right hip, lower back, buttocks extending to the upper thigh, and the area around the back of both elbows indicating moderate to severe injuries. During the autopsy, Dr. Durso made cuts across those areas to expose the soft tissue and revealed a "substantial, substantial" amount of blood had collected in those areas. Some areas were worst than others, with "almost a cavity of blood, like a balloon of blood, in between the layers of muscles of the right buttocks." The bright and dark red color of the blood indicated that it was newly released from the blood vessels. (Tr. p. 851, line 24 – p. 854, line 19; p. 858, line 9 – p. 859, line 16.) The amount of blood that had collected under the bruised skin of Victim's buttocks would have made the area hard and painful, especially when sitting. Victim would have been in excruciating pain. (Tr. p. 858, line 18 – p. 859, line 22; p. 864, lines 12-18.) Victim also had lacerations to his lower and right upper lips, which could have been caused either by falling and hitting his lips, impact to the face, or the Victim biting his face because he was in pain while being beaten or because he had a seizure. (Tr. p. 854, lines 20-25; p. 866, line 21 – p. 867, line 11.)

Dr. Rosa testified that Victim did not appear to be in the same physical condition at the time of his death as when he left his foster home – he had no soft tissue on this chest and his rib cage was

clearly visible; his arms were also thin. His condition could have been consistent with a lack of proper nutrition. (Tr. p. 865, line 2 – p. 866, line 13.) She opined that the injuries sustained by Victim were the result of child abuse. (Tr. p. 855, lines 3-8; p. 867, lines 22-24.) She also gave her opinion that Victim died from massive blood loss caused by blunt impact trauma resulting from having been beaten with an object multiple times, which was compounded by the fact that he was already compromised by the previous injuries he had sustained from multiple instances of abuse over the two month period prior to his death. (Tr. p. 855, line 9 – p. 857, line 9; p. 864, lines 19-21; p. 867, line 22 – p. 868, line 5.) Dr. Rosa testified that, even without seeing all of the bruising, scars, and injuries, it would have been obvious in the days leading up to Victim's death that something was wrong and he needed treatment. (Tr. p. 868, line 13 – p. 869, line 6.) Had Victim been taken to a doctor in the several days before his death, he could have been saved. (Tr. p. 871, lines 5-10.)

ARGUMENT

I.

Inasmuch as the State presented substantial circumstantial evidence of Appellant's guilty on both homicide by child abuse and unlawful conduct toward a child, the trial court properly denied Appellant's motion for directed verdict. (Issue I)

Background

At the close of the State's case, Appellant moved for a directed verdict on the homicide by child abuse indictment on the ground that the State presented no evidence that Appellant either physically abused Victim between June 15 – July 1, 2013 (the time period covered by the indictment) or neglected him such that death resulted. He asserted the only direct evidence of neglect presented by the State was that Appellant left Victim lying in a puddle of urine and did not feed him that day, and the State's own expert, Dr. Durso, testified that that was not the kind of neglect that led to Victim's death. (Tr. p. 1431, lines 8-25.) Appellant also argued that, while the State presented circumstantial evidence that he beat Victim, the evidence was not substantial as

required to survive a directed verdict motion in that there was no evidence as to when Appellant's blood was left on the white pole, Appellant's blood on the pole does not support the State's theory that Appellant used it to beat Victim, the testimony of Appellant's mother and sisters as to Appellant punching Victim was impeached, and Crystal Thompson's testimony about the phone call was not credible. (Tr. p. 1432, line 1 – p. 1434, line 11; p. 1436, line 24 – p. 1437, line 14.) The State opposed the motion, contending that it had presented sufficient evidence that Appellant caused Victim's death, while committing child abuse or neglect, and the death occurred under circumstances manifesting extreme indifference to human life. It contended that there was substantial circumstantial evidence that he inflicted at least one of the victim's injuries and that, because he was with the victim – alone most of the time – June 29 through his death on July 1, the rapidly deteriorating condition of Victim would have been readily apparent yet he did nothing. The State pointed out the medical evidence that, had Victim received medical treatment, he would have survived his injuries. (Tr. p. 1434, line 13 – p. 1436, line 18.)

Appellant also moved for a directed verdict on unlawful conduct toward a child on the ground that there was no direct or circumstantial evidence to support the charge. (Tr. p. 1437, lines 15-17.)

Finding the existence of sufficient evidence to survive a directed verdict motion, the trial court denied the motions. (Tr. p. 1437, line 18 – p. 1438, line 1.)

At the end of the presentation of Appellant's case, the trial court asked if he was renewing his previous motions, and he responded affirmatively. The trial court denied the motions. (Tr. p. 1594, lines 5-11.)

The motion for a directed verdict was not renewed at the end of the State's case in rebuttal.

Argument

On appeal, Appellant argues the trial erred in not granting his motions for directed verdict because the State had presented no direct evidence of his guilt and the circumstantial evidence

presented was not substantial.

Respondent strongly disagrees. Inasmuch as the State presented substantial circumstantial evidence of Appellant's guilt, the trial court properly denied the motion for directed verdict.

In a criminal case, a trial court ruling on a motion for directed verdict must view the evidence in the light most favorable to the State. *State v. Hepburn*, 466 S.C. 416, 753 S.E.2d 402 (2013); *State v. Buckmon,* 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001); *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004). The trial court is concerned with the existence or nonexistence of evidence, not its weight. *Id.*; *State v. Jarrell*, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged, *State v. McHoney,* 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001), and the court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the defendant is guilty. *State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2014); *State v. Phillips*, 411 S.C. 124, 132, 767 S.E.2d 444, 448 (Ct. App. 2014); *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004); *State v. Jarrell*, *supra*. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the defendant, the appellate court must find the case was properly submitted to the jury. *State v. Hepburn*, *supra*; *State v. Pinckney,* 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); *State v. Phillips*, *supra*; *State v. Smith*, *supra*.

Appellant was indicted and tried on two charges: homicide by child abuse, under S.C. Code Section 16-3-85(A)(1), and unlawful conduct toward a child, under Section 63-5-70(A). Looking first to the homicide charge, it is defined as follows.

> A person is guilty of homicide by child abuse if the person:
> (A) (1) causes the death of a child under the age of eleven while

> committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life....
>
> (B) For purposes of this section, the following definitions apply:
>
> (1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
>
> (2) "harm" to a child's health or welfare occurs when a person:
>
> (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;
>
> (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or
>
> (c) abandons the child resulting in the child's death.

Section 16-3-85(A). This Court has addressed the element of "extreme indifference."

> Extreme indifference is in the nature of "a culpable mental state ... and therefore is akin to intent." *State v. Vowell,* 276 Ark. 258, 634 S.W.2d 118, 119 (1982) (citation omitted). In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care. *See State v. Rowell,* 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (discussing the requisite mental state for recklessness); *see generally Hooper v. Rockwell,* 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999) ("Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as wilful because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent."). At least one other jurisdiction with a similar statute has found that "[a] person acts 'under circumstances manifesting extreme indifference to the value of human life' when he engages in deliberate conduct which culminates in the death of some person." *Davis v. State,* 325 Ark. 96, 925 S.W.2d 768, 773 (1996). Therefore, we ...hold that in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death.

State v. Jarrell, 350 S.C. at 98, 564 S.E.2d at 367.

The evidence presented during the State's case, as set out in the Record on Appeal and summarized in the Statement of the Facts herein, established that Victim suffered repeated and persistent child abuse, with injuries dating from 24 hours to two months before his death. No single

injury he suffered would have killed him, but his death was the result of the cumulative effect of all the injuries he sustained. Even without seeing all of the bruising, scars, and injuries, it would have been obvious to Appellant in the days leading up to Victim's death that something was wrong and he needed treatment. Had Victim received medical treatment in the several days before his death, he would have survived. There was circumstantial evidence that Appellant was angry and frustrating with Victim for not being toilet trained, that Victim was beaten in the home, that both Appellant and Co-Defendant had hit Victim prior to July 1, and that on July 1 one or both of them hit him. Appellant was by himself with Victim during most in the fifty or so hours preceding his death – during which some of the blunt trauma injuries to Victim were, according to the evidence, intentionally inflicted. Moreover, as the State's evidence established, the cumulative impact of the abuse over the two month period would have been readily apparent, yet Appellant took no steps to obtain medical treatment for him when such would have prevented his death. The statute makes clear that child abuse may be committed by either an act or an omission which results in harm to a child's physical health, and harm occurs when a person either personally inflicts or allows someone else to inflict physical injury upon a child. The State presented substantial circumstantial evidence[23] that Appellant engaged in deliberate conduct evincing extreme indifference to Victim's life – through either action or inaction – that culminated in Victim's death and the trial court properly denied the motion for directed verdict on the homicide by child abuse indictment. *State v. Smith*, *supra*; *State v. Jarrell*, *supra*.

Appellant was also tried on an indictment for unlawful conduct toward a child, which is defined as

> (A) It is unlawful for a person who has charge or custody of a child,

[23] The State maintains that direct evidence of Appellant's guilt was also presented. See Testimony of Crystal Chapman at Tr. p. 489, line 21 – p. 492, line 8; p. 495, lines 23-25 (Crystal said she heard, over the telephone, Victim being beat and Co-Defendant tell Appellant to hold Victim's legs followed by Appellant saying the Victim was not moving).

> or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
>
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
>
> (3) wilfully abandon the child.

Section 63-5-70. Section 63-7-20 (16) defines "Person responsible for a child's welfare" to include the child's parent or an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child.

Here, Appellant was Victim's father and had assumed that role and responsibility. As set out in the Record on Appeal and summarized in the Statement of Facts herein, the evidence presented by the State supports two scenarios that reasonably tend to prove Appellant's guilt of this charge. First, the evidence supports that Co-Defendant injured the child, but, if so, the injuries were such that they would have been readily apparent to Appellant. Second, the evidence also supports that Appellant could have inflicted at least one of Victim's injuries himself. Under either of these scenarios – supported by substantial evidence presented by the State – the trial court properly denied the motions for directed verdict. *See State v. Palmer*, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014), *cert. granted*, (S.C.S. Ct. September 24, 2014); *State v. Williams*, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013).

II.

The trial court properly admitted State's Exhibits 13, 15 through 19, 75, 80 through 85, 130, 136 through 139, 144, 146, 147, 225, and 227 through 231 because they were highly probative to the issues of whether Victim was abused or neglected, whether the abuse or neglect was the caused his death, and whether his condition would have been apparent, and their probative value substantially outweighed the danger of unfair prejudice. (Issue II)

Background

During an in camera hearing, Co-Defendant objected to the admission of the following photographs: 75 through 85, 106 through 109, 12, 13, 14, and 130 through 150. (Tr. p. 663, line 19 – p. 664, line 2.) Noting the defense was objecting to every photograph of Victim at the scene, the State contended that the photographs were neither overly bloody or gory, nor were they being used to arouse the passions or sympathy of the jurors. (Tr. p. 664, lines 5-11.) The State argued that – as an element of the crime of homicide by child abuse, it was required to show Appellant and Co-Defendant manifested an extreme indifference to human life – the challenged photographs[24] were relevant to not only establish a pattern of continuous abuse and neglect (which made it more probable that Victim's injuries were the result of child abuse than an accident such as a fall from a dresser), but to also establish Victim's physical condition would have been readily apparent to anyone such that Appellant and Co-Defendant would have been aware of the ongoing abuse and neglect. (Tr. p. 664, line 5 – p. 666, line 15.) The State, providing citations of authority to the trial court, also noted that South Carolina law did not require the exclusion of probative and relevant evidence merely because it is unpleasant or offensive. (Tr. p. 668, lines 5-11.)

Upon questioning by the trial court, Appellant, without setting forth any argument, joined in the objection. (Tr. p. 666, lines 16-20.)

Co-Defendant thereafter argued that the photographs of Victim at the crime scene were

[24] An examination of the challenged exhibits themselves reveals that State's Exhibits 13. State's Exhibit 15 is a photograph of the room in which Victim was found, but his body is not visible. State's Exhibits 75 through 85 are photographs of Victim taken as he lay on the floor of the home some show his entire body, while others are focused on specific parts of his body. State's Exhibits 130 through 147 are photographs of Victim taken as he lay either on the carpet of the home or on some sort of fabric; some show his entire body, while others are focused on specific parts of his body. The only photographs in which blood is readily visible are in those showing Victim's mouth, where blood appears on his lower lip. Some of the other photos show bruising and wounds, of which one is a deep, gaping wound to his right arm but no blood is present.

State's Exhibits 106 through 109 are photographs of various views of the rear bedroom where the wet spot on the carpet was located.

inadmissible because

- the photographs had no probative value because "[a]ll they show is a dead child on the floor," and how Victim appeared at the crime scene was not relevant inasmuch as the defense was not disputing the fact that he was dead and the defense had not asked anyone about what injuries they did or did not see on Victim at that time;
- the photographs did not corroborate "any sort of testimony," including that of the pathologist who would be testifying about injuries she observed on Victim and his cause of death; and
- the photographs would do nothing but inflame the passions of the jury leading them to make an improper decision.

(Tr. p. 666, line 21 – p. 668, line 3.)

The trial court thereafter admitted some of the photographs, while excluding others.

> I find that that the photographs are highly probative to the issues of whether or not the victim was abused and whether or not the abuse was the cause of his death. These are integral elements of the charge of homicide by child abuse and the charge of unlawful conduct towards a child. Thus, I find that the nature of any potential unfair prejudice does not outweigh the photograph's probative value. I find that these photographs are directly relevant under the South Carolina Rules of Evidence, that the proper analysis is a 403 analysis, which I just conducted.

(Tr. p. 668, line 16 – p. 669, line 2.) The court ruled that State's Exhibits 121, 14, 76, 77, 82, and 142 were not admissible because they were repetitious of other photographs. State's Exhibits 13, 15 through 19, 75, 80, 81, 83 through 85, 130, 136 through 139, 144, 146, and 147 were determined to be admissible subject to a proper foundation being laid. (Tr. p. 669, lines 3-14.)

At that point, Co-Defendant asked the trial court to rule on the admissibility of State's Exhibits 106 through 109. (Tr. p. 669, lines 15-17.) Those photos were of the rear bedroom, where the wet spot was located; they were taken during a reenactment by Co-Defendant of what she maintained happened and one included a ruler for measurements. Co-Defendant argued that the

photographs showed an infant-sized doll on the floor – used during the reenactment to show where Victim was found by Co-Defendant – which, being much smaller and an infant, would affect the jury "in an overly prejudicial way." (Tr. p. 670, line 12 – p. 676, line 3.) The trial court ruled that State's Exhibit 106 was admissible because it relevant to the defense presented by Co-Defendant. The court found the presence of the baby doll in the photograph was not prejudicial unless the State failed to establish that it was for demonstrative purposes. The court determined State's Exhibits 107 through 109 were inadmissible. (Tr. p. 676, lines 4-24.) Appellant then joined in Co-Defendant's objection. (Tr. p. 676, line 25 – p. 677, line 2.)

When the State later offered State's Exhibits 13, 15 through 19, 75, 80, 81, 83 through 85, 130, 136 through 139, 144, 146, and 147 into evidence during Investigator Oates' testimony,[25] the trial court admitted them over Appellant's and Co-Defendant's renewed objections. (Tr. p. 723, line 9 – p. 724, line 15.)

On May 20, 2014, the trial sent the jury home at 5:05 p.m. After briefly discussing the schedule for the next day, the trial court asked if anyone had anything else. Appellant asked when their witness list for their proffer should be ready. After that was addressed, the court asked if anyone had anything else before they stopped for the night. Counsel for all parties responded negatively and court adjourned for the day. (Tr. p. 800, lines 1 – p. 802, line 6.) When court resumed at 9:30 the next morning, the trial court questioned the State about lesser-included offenses and Co-Defendant's counsel moved for a mistrial based upon on an alleged discovery violation; the motion was denied. (Tr. p. 802, line 7 – p. 810, line 6.) Co-Defendant then moved for a mistrial based upon comments made by Appellant's counsel during his opening statement, the emotional outburst by Ms. Thompson when called to the witness stand the day before, and the admission of the

[25] Investigator Oates testified that the photographs were taken by him on July 1 and that they depicted Victim as he found him in the living room and the injuries that he observed on Victim's body. (Tr. p. 723, lines 9-21.)

crime scene photos the day before. Defense counsel reported that one juror could not even look at the photos at one point, which she alleged reinforced her argument that the photographs would inflame the jury and their probative value was substantially outweighed by the prejudicial value of the photographs. (Tr. p. 810, line 8 – p. 812, line 9.) The motion was denied, with the trial court noting that even with the reaction of the jurors, the photographs that had been admitted were directly probative, and that it had used its discretion in admitting some photographs while excluding some. The court also stated that, while Ms. Thompson did have an emotional outburst, the jury was removed from the courtroom at that time and, when they returned, Ms. Thompson was already on the stand. The trial court also noted that the emotional response was because Ms. Thompson did not want to testify against her daughter, Co-Defendant but was under subpoena. (Tr. p. 812, line 10 – p. 813, line 16.)

Argument

On appeal, Appellant claims the trial court erred in admitting the State's Exhibits 13, 15 through 19, 75, 80 through 85, 130, 136 through 139, 144, 146, 147, 225, and 227 through 231 because any probative value they had was substantially outweighed by the danger of unfair prejudice. He asserts that the challenged crime scene photographs showed "a cold, lifeless four-year-old child" and the autopsy photographs showed Victim's body being cut into pieces. (Initial Brief of Appellant at p. 12.)

Respondent strongly disagrees with Appellant's assertion of error. The photographs were not gruesome or unduly prejudicial, and were relevant to the jury's understanding of the evidence and issues in the case. Moreover, none of the autopsy photographs showed victim's body being cut or having been cut.

It is well settled that the relevance, materiality, and admissibility of photographs are left to the sound discretion of the trial court. *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit

it." *State v. Nance,* 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996).

Even though relevant, evidence is to be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. The balance of the danger of unfair prejudice against the probative value must be based on the entire record, and will turn on the facts of each case. *State v. Collins*, 409 S.C. at 534, 763 S.E.2d at 27-28 ; *State v. Lyles,* 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008). As noted by our Supreme Court in *State v. Collins*, *supra*,

> Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder. As one court has astutely observed, it is the duty of courts and juries to examine the evidence in even the most unpleasant of circumstance[.]

Id., 409 S.C. at 535, 763 S.E.2d at 28 . Just because photographs are gruesome – especially where they mirror the "unfortunate reality" of the case – they are not inadmissible. *Id.*

"A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Collins*, 409 S.C. at 534, 763 S.E.2d at 28, quoting *State v. Adams,* 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *Id.*

Here none of the photographs were gory or gruesome. The only blood seen on the body is on the lips. They depict how he appeared at the time of his death. The photographs were probative because they established it would have been impossible for Appellant not to have been aware of the injuries. The challenged photographs were also probative because they corroborated the testimony of State's witnesses, including the forensic pathologist and child abuse pediatriction, as well as some of the family members and first responders, regarding Victim's appearance and visible injuries.[26] It was important for the jury to see the condition of Victim's body at the time of his death and the nature

[26] See Statement of Facts, *supra*.

and location of Victim's injuries in order to understand the witnesses' testimony as to his condition and the intentional nature of the infliction of the injuries, and to make a decision whether a parent, even if not inflicting the injuries him or herself, could have been ignorant of them. As in *State v. Gray*, 408 S.C. 601, 609, 759 S.E.2d 160, 164 (Ct. App. 2014), the photographs here contain no blood or gory anatomical details, and thus pose little, if any, danger of unfair prejudice. Because the challenged photographs had high probative value and little danger of unfair prejudice, it was clearly within the trial court's discretion to admit them. See also *State v. Salley*, 398 S.C. 160, 727 S.E.2d 740 (2012) (professional photograph of victim taken when she was alive because it substantiated pathologist's testimony that her sickle cell trait was not outwardly apparent) *State v. Dial*, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013) (no error in admission of autopsy photographs which corroborated pathologist's testimony that victim's injuries were inconsistent with accidental injury).

CONCLUSION

For the foregoing reasons and any other appearing in the Record on Appeal (as provided for in Rule 220, SCACR), the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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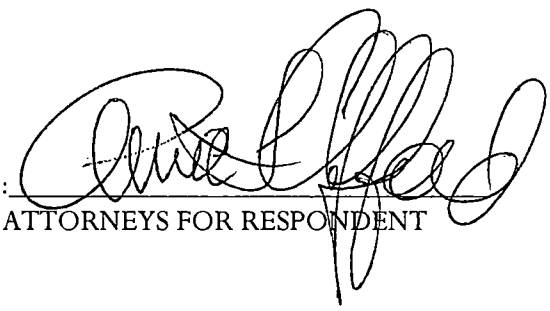
BY: 
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