STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
J.C. Nicholson, Jr., Circuit Court Judge

The State,

Respondent,

v.

Hank Eric Hawes,

Appellant.

Appellate Case No. 2014-002288

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

State Cases:

Rules:

Other Authorities:

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err by permitting the State to introduce numerous graphic photographs of the decedent's body where the probative value, if any, of those photographs was outweighed by the resulting unfair prejudice, and where the State successfully, though improperly, employed those photographs in closing argument by juxtaposing them with smiling photos of the decedent to elicit an emotional response from the jury?

2. Did the Trial Court err by permitting the State, a day after it concluded its cross examination of Mr. Hawes, to recall him to the stand for a single question intended solely toelicit testimony from him that would permit the State to then call "impeachment" witnesses to testify about Mr. Hawes' prior acts that would otherwise be inadmissible?

3. Did the Trial Court err by permitting testimony regarding a prior argument between Mr. Hawes and the decedent?

4. Did the Trial Court err by refusing to recuse the Fifth Circuit Solicitor's office from prosecuting a case in which two fact witnesses were an assistant solicitor and her husband?

(FBOA, p. 1).

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

1. Whether the trial judge abused his discretion in admitting photographs offered to prove malice beyond a reasonable doubt by demonstration of the details of the bloody murder in the multiple and varied wounds suffered by the victim, including twelve stab wounds (three to the back), eleven slashes, multiple bruises and one clear bite mark, when Appellant admitted the killing, but a critical issue at trial was the presence or absence of malice?

2. Whether the trial judge abused his discretion in allowing the State a complete opportunity to cross-examine and impeach the defendant who chose to take the stand in his defense?

3. Whether the trial judge abused his discretion in admitting the specifics from the written statement offered in redirect describing a prior argument between Appellant and Ms.Wilson when defense counsel opened the door to the specifics of statement that he omitted from the cross-examination that would bear on the witness's recall and ability to perceive the events described?

4. Whether the circuit court judge in pre-trial abused her discretion in declining to order the entire Fifth Circuit Solicitor's Office be recused from the trial of this case where one assistant solicitor and her husband lived next to the murder victim, the assistant did not participate in trial nor was called as a witness, and her husband testified only to seeing Appellant leave the home which was not contested ?

STATEMENT OF THE CASE

A Richland County grand jury indicted Appellant, Hank Eric Hawes, in October 2011, charging him with the murder of Jennifer Lee Wilson. (R. pp. * [indictment]). Public Defenders Doug Strickler, Fielding Pringle, and Megan Eigenbrot represented him on the charge. A jury trial was held October 6-16, 2014, before the Honorable J.C. Nicholson, Jr. The jury convicted as charged. (Tr. p. 1377, lines 12-20). Judge Nicholson sentenced Appellant to life imprisonment. (Tr. p. 1388, line 24 – p. 1389, line 2). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

Appellant admitted at trial that he killed Jennifer Wilson in her home in Richland County in the early morning hours of August 28, 2011. Appellant testified he acted in self-defense. (Tr. p. 1065, line 10 –p.1074, line 9; p. 1150, line 20 – p. 1151, line 1). Defense counsel argued the evidence demonstrated self-defense and/or the evidence supported the lesser offense of voluntary manslaughter. (Tr. p. 1314, lines 9-17). The jury, finding the State had shown malice beyond a reasonable doubt, convicted Appellant of murder upon hearing the following evidence:

Ms. Wilson's neighbor Kelly Smith testified that he woke up at approximately 2:29 am to the sounds of screaming and physical violence coming from the bedroom area of victim's home. He testified that he "heard screaming and physical violence" and he "recognized Jen's voice immediately" but did not hear another voice. (Tr. p. 256, line 5 – p. 257, line 4). He testified he could feel the energy of the attack, "it literally, was a violent situation. Her scream was she was being harmed." (Tr. p. 257, lines 9-11). He then noticed a pause, movement to the hallway, progressing into the kitchen area, then:

> ... there was a second wave of more aggressive, just brutal, carnal instant violence. And I could physically feel the vibration in my bedroom from what was coming from the other room. ... I could hear what sounded like a table slamming against the wall, like her body being thrown against the wall.

(Tr. p. 257, lines 13-22).

He heard then heard Ms. Wilson for he last time, yelling "no, no, no" and pleading for her life. (Tr. p. 257, line 24 – p. 258, line 1). Mr. Smith knew Appellant from Appellant's romantic relationship with Ms. Wilson. He also knew the relationship had turned "rocky." (Tr. p. 250, line 8). Mr. Smith testified he called 911. (Tr. p. 259, lines 1-9). Though he did not become involved at that time, Mr. Smith had assumed the officers talked to "Jen and Hank." (Tr.

p. 262, lines 4-11). Later that morning, at approximately 7:45 am, Mr. Smith left his home and noticed Appellant's vehicle, a Range Rover, in the driveway along with Ms. Wilson's car and his own car. (Tr. p. 262, lines 21-25).

An officer had responded having been called at 2:41 am. He arrived at approximately 2:47 am and backup arrived a few minutes later. (Tr. p. 283, line 17 – p. 284, line 5; p. 285, lines 20-21). However, the lights in Ms. Wilson home were off, and after hearing and seeing nothing out of the ordinary, and having no cause to enter the home, the officers only stayed outside briefly, then left. (Tr. p. 284, line 11 – p. 287, line 25). They noted a Range Rover in the back with two other cars. (Tr. p. 286, lines 5-12).

Inside the darkened home, Appellant had unclothed the victim, washed her body, and placed her body on the couch in the living area. (Tr. p. 1077, lines 12-17; p. 1089, line 7 – p. 1092, line 23). He cut his own wrists yet collected blood in a bag. (Tr. p. 1125, line 2 – p. 1127, line 7). He stayed in the home for hours, calling an ex-girlfriend, Stacy Newsom. The first call was at 2:37 am. (Tr. p. 540, lines 10-12). He was crying and upset, and sometimes would keep the connection eventhough he said nothing was said. (Tr. p. 539, line 11 – p. 540, line 21). He eventually left and drove a short distance to his own home. Another one of Ms. Wilson's neighbor's, Mr. Ashton, testified that he saw Appellant leave that morning, driving his authomobile in an odd way – with his forearms instead of hands. (Tr. p. 295, line 15 – p. 296, line 8). Starting at 8:48 that morning, Appellant searched the internet for defense attorneys. (Tr. p. 708, line 15 – p. 709, line 3).

Around 10:00 he called another ex-girlfriend, Kimberly Williams, and confided that he could be charged with murder. He stated he had been in contacted with an attorney and needed $25,000.00 for representation. She advised she did not have such money. Further, he stated he

had acted in self-defense though no one was going to believe him. He also stated that he had tried to commit suicide by slitting his own wrists. She advised him to seek medical attention. (Tr. p. 462, line 2 – p. 463, line 1).

Appellant called Ms. Newsom again later in the moring, and she advised he needed to call EMS if he was not feeling well. (Tr. p. 540, line 18 – p. 541, line 6).

Eventually, Appellant spoke to well-known defense attorney Jack Swerling. Mr. Swerling testified that with Appellant's permission, Mr. Swerling placed a 911 call to the City of Columbia Police Department reporting a possible murder. (Tr. p. 202, line 23 – p. 204, line 22).

During the time Mr. Swerling was reporting the murder, Appellant had called 911 for help, reporting he had cut his wrists. An officer was dispatched at 11:45 am to meet EMS at the scene. (Tr. p. 557, lines 7-12). Robin Haselden with Richland County EMS testified Appellant's clothes were wet, his cuts were not bleeding, and there "was no blood noted on him anywhere." (Tr. p. 562, line 21 – p. 563, line 10). An emergency room doctor, Dr. John Robinson, treated Appellant. Appellant would not answer questions. The doctor noted a concern that Appellant "was being deceptive" about self-inflicted wounds, or had some type of amenesia from trauma, however that "was inconsistent with the fact hat he was alert and oriented with everything else." He determined the wounds were self-inflicted, not life threatening, and nothing accounted for "amnesia" he appeared to present. He released Appellant into the custody of officers who had arrived at the hospital. (Tr. p. 574, line 16 – p. 580, line 21).

Officer Hudson testified the Police Department had responded to Ms. Wilson's home at approximately 11:30 am as a result of Mr. Swerling's report. (Tr. p. 215, lines 15-23). The officers noted blood on the rear entry. Ms. Wilson's neighbor was out and also adviced of the sounds of violence he had reported earlier that morning. (Tr. p. 207, lines 18 – 25). The officers

entered the home at the back and were met with a bloody scene in the kitchen. (Tr. p. 210, lines 1-4). Upon further investigation, the officers found Ms. Wilson's body, on the living room couch, covered with the exception of one portion of one arm, by a "blanket" (later described as a comforter). (Tr. p. 212, line 9 – p. 213, line 25; p. 225, lines 2-4). Officer Hudson testified that upon moving the "blanket":

> I observed the victim with multiple stab wounds, the front area (indicating) over her body, and she was unclothed, naked. And her hair seemed to be like it was wet, but sort of dry. … No signs of life.

(Tr. p. 214, lines 3-8).

EMS was called at 11:33 and arrived at 11:51 am. (Tr. p. 233, lines 4-5). EMS pronounced Ms. Wilson dead at the scene. (Tr. p. 214, lines 18-22; p. 225, line 2 – p. 231, line 16). Though the scene was exceptionally bloody, there was little blood on the comforter that had covered the body. (Tr. p. 225, lines 11-24). In fact, the body appeared to have been cleaned, showered, apart from one smeal of blood near the neck that had "a curved angle to it like the obdy had been wiped." (Tr. p. 226, lines 8-19). However, EMS noted multiple "straight cuts stab wounds," and bruising along the neck wound. (Tr. p. 226, line 19 – p. 227, line 17).

The pathologist who performed the autopsy would note multiple defense wounds on Ms. Wilson's hands; blunt force trauma to her head ("at least three blows"); cuts, bruises on arms and legs, lip and chin injury; twelve stab wounds; eleven slashes; and, one bite mark. The case of death was blood loss from the stab wound, with the neck wound most likely being the fatal wound. However, the sum total of her wounds was fatal. The pathologist opined she would have died within approximately two minutes. (Tr. p. 957, lines 5 – 23; p. 959, line14 – p. 960, line 6; p. 966, line 22 – p. 993, line 23). He testified it was a brutal homicide. (Tr. p. 994, lines 16-19).

As noted, the hospital examination for Appellant, as discussed above, noted only his self-inflicted wounds. While in custody, officers found only one small mark on one of Appellant's fingers. (Tr. p. 634, line 5 – p. 635, line 20; pp. * [State's Exhibits 297, 298. 300, 301, 302, 303, and 304]; see also p. 1150, lines 9-17).

Appellant opted to testify in his defense that Ms. Wilson was the aggressor, and, though he remembered little else, it was clearly her fault. (See Tr. p. 1065, line 10 –p.1074, line 9; p. 1150, line 20 – p. 1151, line 1). The cross-examination uncovered a series of implausible assertions by Appellant when considering the forensic evidence and other testimony. For example, he claimed she had a large knife, but no large knife was found. He claimed his shirt "may have been damaged" during the fight, and buttons pulled off, but there were no buttons to be found. He claimed she had on a top at the time of the violence but no top was recovered with any stab wound tears. He had collected his blood in an isolated bag to not get it on the carpet, and yet his blood was on the scene. (See Tr. p. 1102, line 20 – p. 1150, line 24).

In addition to her neighbor, Mr. Smith, several friends testified to the rocky relationship Ms. Wilson shared with Appellant, and the fact that she was freightened. Ms. Wilson's friend, Janelle Bondr, testified that she knew about the relationship from the start in Feburary 2011. She further testified that she a change in her friend. Ms. Wilson had become anxious, her health seem to be poor, "she had been terrified" during the months before her murder, and demonstrated becoming upset during a SKYPE call when Appellant "arrived at the house." (See Tr. p. 305, line 11 – p. 307, line 24).

At a dinner party at another friend's home on August 14, 2011. That friend, David Virtue, testified the two were together but "seldom on the same side of the room or part of the house during that evening." He also testified that Ms. Wilson had confided in him over the

summer that she was attempting to withdraw from Appellant and end the relationship. (Tr. p. 316, line 18 – p. 319, line 2).

Ms. Wilson had remained friends with a former boyfriend, Drew Kabbe, and they had been communicated fairly frequently. He testified that he spoke to her the night of August 27, 2011/early morning of August 28, 2011. She was in a good mood and happy at that time, returning home from a birthday party. However, she had previously told Mr. Kabbe about Appellant, though they normally did not, by agreement, discuss their romantic relationships. She told Mr. Kabbe "[s]he was freightened of him." He heard her arrive safely home the night of the party before their telephone conversation ended. (Tr. p. 362, line 14 – p. 365, line 15).

Other friends testified consistent with his testimony that on the night before the early morning hour murder, Ms. Wilson attended two birthday parties and appeared to be in a happy mood, enjoying herself. (See Tr. p. 332, line 12 – p. 335, line 18; p. 342, lines 1-7).

Another friend, Tasha Laman also heard Ms. Wilson express and/or demonstrate distress over the relationship. Ms. Laman advised Ms. Wilson to go to a counselor. (Tr. p. 473, line 15 – p. 476, line 4). Ms. Laman also testified that Ms. Wilson had confied that Appellant had threatened to "ruin her life." (Tr. p. 488, line 23 – p. 489, line 1; p. 499, lines 5-18). Ms. Laman, like Ms. Bondr, similarly noticed a loss of weight and an anxiousness in Ms. Wilson. (Tr. p. 489, lines 9-19). Ms. Laman testified that Ms. Wilson did go to counsel and went to couple's counseling on at least one occasion. (Tr. p. 502, lines 7-12). Ms. Laman testified that Ms. Wilson "was very nervous after talking with Ms. Stewart and Ms. Stewart telling her this was a classic case of domestic violence," and, further, that Ms. Wilson intended to break the relationship with Appellant. (Tr. p. 501, lines 1-7).

Ms. Wilson's counselor, Ms. Stewart, testified that she was very concerning about a new relationship that had so quickly turned to "constant contact," and that Appellant had "threatened to expose something embarrassing about her" should she break the relationship. (Tr. p. 509, lines 8-14). She responded that she did have reservations about domestic violence. (Tr. p. 510, line 25 – p. 511, line 12). Ms. Stewart testified that Ms. Wilson did not want to stay in the relationship but had difficulty with making the break. She noted Ms. Wilson was concerned about Appellant's constant contact and jealousy. (Tr. p. 514, line 12-24). She was killed just four days later. (Tr. p. 515, lines 13-17).

A series of text messages between Appellant and Ms. Wilson showed a back and forth relationship between the two, turning accusatory and threatening toward Ms. Wilson. (See, for example, Tr. p. 666, line 1 – p. 667, line 25; p. 850, line 25 – p. 851, line 3). Her messages reflect both a fear of him and her confusion about him. (See, for example, Tr. p. 794, line 4 – p. 795, line 10). The last call to Ms. Wilson from Appellant was at 2:14 am. The next call was at 2:37 to Stacey Newsom. (Tr. p. 706, lines 7-23). The murder occurred in that brief time. (Tr. p. 256, line 5 – p. 258, line 1).

Appellant's phone records also reflected contacts with multiple other women. (See Tr. p. 819, line 3 – p. 838, line 25; p. 854, line 10 – p. 855, line 25). In fact, he was making plans to meet a woman matched to him through a dating website on August 28th according to a text message sent August 27th. (Tr. p. 1001, line 20 – p. 1006, line 7). Also, the night of the murder, he was happy, outgoing and expressed that he was excited about "getting back together with his girlfriend." (Tr. p. 1013, line 3 – p. 1016, line 7).

In sum, the jury was asked to consider the varied stories and a variety of evidence. As noted above, after due consideration, the jury found Appellant guilty of murder.

ARGUMENT

I.

The trial judge did not abuse his discretion in admitting photographs offered to prove malice beyond a reasonable doubt by demonstration of the details of the bloody murder in the multiple and varied wounds suffered by the victim, including twelve stab wounds (three to the back), eleven slashes, multiple bruises and one clear bite mark, when Appellant admitted the killing, but a critical issue at trial was the presence or absence of malice?

Relevant Facts:

Upon objection to several of the photographs showing the home and Ms. Wilson's body in the home, the trial judge took an overnight break in the proceedings and had counsel reviewed all the photographs at one time. (See Tr. p. 386, line 1 – p. 387, line 12). The next morning, the trial judge, having considered counsel's arguments during the break, first announced that he would not admit State's Exhibits 32, 34, 35, 36, 37, 39, 43, 44, 50 and 61. (Tr. p. 387, lines 19-25). The trial judge later marked these as Court Exhibit 3 to ensure the photographs would not be submitted to the jury in error. (Tr. p. 346, lines 14-23). The remaining objections were to State's Exhibits 31, 33, 38, 41, 42, 45, 46, 54, 60 and 62. (Tr. p. 388, lines 1-19). Each of these photographs showed a specific scene of the crime area along with the wounds and/or angle of wounds, bruise, and bite mark. (Tr. p. 388, lines 5-19). The ten (10) photographs were offered to show evidence of malice – a highly contested issue. (Tr. p. 390, lines 7-15).

The defense did not contest the photographs were relevant; rather, the defense argued "under 403 due to the fact that these photographs would be unfairly prejudicial and that unfair prejudice would substantially outweight the probative value of these photos." (Tr. p. 388, line 24 – p. 389, line 2). However, the defense only tied the relevancy of the photographs to "corroborat[ion of] CSI Nelson's observations when he first walked throught he house and took the photographs." (Tr. p. 389, lines 3-6). The defense offered that the testimonial description

would suffice. The defense further argued "the wounds on the nude body" were "gruesome" and would only work to "elicit an emotional response" where the defense was not "contesting how the body was found or that CSI photographs and did not disturb the body on discovery. (Tr. p. 389, line 6 – p. 390, line 4).

The State, relying on *State v. Collins,* 409 S.C. 524, 535–36, 763 S.E.2d 22, 28 (2014), and this Court's opinion in *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014), argued the photographs were "necessary to substantiate material facts" regarding the "nature of the crime" which included not only the wounds but the treatment of the body. The State argued the jury should "see the nature of these wounds in determing how they were inflicted in order to make a determination in this case." (Tr. p. 391, line 23 – p. 393, line 15).

The defense argued the case law relied upon was distinguishable form the intant matter as the case law only referenced autopsy photographs where the instant photographs were made at the crime scene. (Tr. p. 393, line 20 – p. 394, line 18). Defense counsel noted the CSI officer was "not a doctor, he's not qualified to talk about the injuries specifically," and his verbal description of the injuries he observed was sufficient without "illustration" by photograph. (Tr. p. 394, lines 5-13).

The trial judge ruled:

> ... Having reviewed all of the pictures earlier, the Court has ruled out the pictures that the Court felt would elicit a strong emotional response because of the amount of blood in the pictures ... The Court finds that the probative value of the pictures in question, the Court just enumerated on the record, the probative value outweighs any prejudicial value. It, basically, depicts the scene as it occurred. It depicts the scene as to where the body was found in the house. It, also, depicts the wounds that were inflicted upon the victim, which would go to the issue of malice, and that's a requirement.
>
> I don't know how else the State could prove it other than with the extent of the wounds, the positions of the wounds and position of the body as well as the extraordinary fact in this case that the body was cleaned up, washed, placed on the

> sofa flat on the back covered by a a comforter with the head placed on a pillow and, apparently, according to the testimony, the hair appeared to be washed. So the Court finds the probative value outweighs any prejudicial value as to these picture[s]. ...

(Tr. p. 394, line 19 – p. 395, line 15).

Appellant complains to this Court that the trial judge erred in admitting Exhibits 33, 38, 41, 42, 45, 46, 54, 60 and 62.[1] (FBOA, p. 11). Consequently, Appellant appears to have abandoned his objection to State's Exhibit 31, but contests the ruling as to the remaining photographs. Appellant argues the photographs were "not necessary to substantiate material facts," that State intended to use the photographs for an improper purpose, *i.e.* for an emotional appeal, and that the fact of the wounds could be adequately established with testimony. (FBOA, p. 12).

Discussion:

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance,* 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *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. Lyles,* 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct.App.2008) (internal quotation marks omitted).

The murder was gruesome. The photographs offered captured the victim's ferocious fight to live and the multiple and various types of wounds she suffered in doing so. Appellant admitted the fight and stabbing in the victim's home; he testified, though, that he acted only in self-

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[1] In his brief, Appellant references Exhibit 142 instead of 42. The transcript does reflect number 142, (see Tr. p. 388, lines 10-12); however, it appears to be either a inadvertent misstatement at trial or a scriverner's error in the transcript. State's Exhibit 42 shows the victim and several of the wounds while Exhibit 142 reflects the kitchen area in the victim's home.

defense. (Tr. p. 1065, line 10 – p. 1074, line 9; p. 1150 line 20 – p. 1151, line 1). The details of the murder – especially the three stab wounds to the victim's back, (see Tr. p. 388, lines 16-19; pp. * [State's Exhibits 60 and 62]), the wound to the neck evidencing a twisting effect, (see Tr. p. 388, lines 13-16; p. 974, lines 17-22; pp. * [State's Exhibits 45 and 46]); the pronounced and vicious bite mark, (see Tr. p. 388, lines 8-10; p. * [State's Exhibit 38]), in particular – together work to disprove beyond a reasonable doubt the testimony of self-defense. In this case, it is especially important not to limit the proof of malice that is reflected by the victim's own body.

As this Court has previously noted: ""[T]he more essential the evidence, the greater its probative value." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014) (quoting *United States v. Stout,* 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted)). In fact, contrary to the position taken on appeal, defense counsel did not contest the critical relevance of the information in the photographs; rather, defense counsel asserted defendant would suffer unfair prejudice in admission of the photographs due to their graphic nature. Thus, to the extent Appellant argues a lack of relevance, (see FBOA, p. 12), such argument is barred from review. *See, e.g., State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."). Even so, the record not only supports the concession of relevance, it also supports that trial judge's ruling the relevant evidence did not raise a danger of unfair prejudice sufficient to block admissibility.

"To constitute *unfair* prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *Alexander*, 303 S.C.377, 377, 401 S.E.2d 146, 149 (1991)) (emphasis added). "The evaluation of probative value cannot be

made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case." *State v. Gray*, 408 S.C. at 610, 795 S.E.2d at 165.

Here, the photographs were used to specifically demonstrate, explain, and corroborate the location, extent, and order of individual woulds which, in turn, gave evidence of malice. Appellant incorrectly assert the admission was "not necessary to substantiate material facts or condition," (FBOA, p. 10), when malice was the key issue in the case. In *State v. Kelly*, 319 S.C. 173, 460 S.E.2d 368 (1995), our Supreme Court found photogaphs showing blood patterns on the victim and area around the victim was probative as to the element of malice. The Court noted the defense position that the defendant should only be convicted of voluntary manslaughter, and reasoned the evidence reflecting "the entire crime scene," which included "charts, photographs, and video [that] also were relevant to establish malice." *Id.*, 319 S.C. at 178, 460 S.E.2d at 370. In particular, the Court reasoned:

> ... The charts, photographs, and video here depicted the excess nature of the killing. The relevance of ... these items and their probative value on the issue of malice was great enough to negate the risk of the jury's basing its decision on an improper passion.

Id., 319 S.C. at 178, 460 S.E.2d at 371.

In discussing similar evidentiary rulings in their cases, the Pennsylvania courts have oft quoted:

> A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt. Further, the condition of the victim's body provides evidence of the assailant's intent, and, even where the body's condition

> can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs.

Com. v. Robinson, 864 A.2d 460, 502 (Pa. 2004) (quoting *Com. v. Rush*, 646 A.2d 557, 560 (Pa. 1994)). The Georgia courts have concisely rejected such an argument on unfair prejudice on the basis of its own paradox: "...a defendant cannot complain about photographs that simply "portray the havoc wreaked by [his] own hand." *McKibbins v. State*, 750 S.E.2d 314, 322 (Ga. 2013) (quoting *Null v. State*, 402 S.E.2d 721 (Ga. 1991). Appellant's malice in the killing is aptly demonstarated by the work of Appellant's hands. It is critical evidence where Appellant admits the killing but claims self-defense. *See generally Kelly, supra. See also State v. Durand*, 963 So. 2d 1028, 1036-38 (La. App. 5 Cir. 2007) (finding that graphic photographs were more probative then unfairly prejudice "[g]iven defendant's claim he did not intend to kill the victim and instead had acted in self-defense"). In fact, the jury was charged that the brutality of the crime was a fact to consider in determining malice. (Tr. p. 1362, lines 4-14). *See State v. Jones*, 86 S.C. 17, 19-20, 67 S.E. 160, 162 (1910) (approving charge that "[m]alice ... may be implied from brutal conduct on the part of the person committing the crime...."). See also 40 C.J.S. Homicide § 46 (April 2016 Update) ("The fact that cruelty or brutality was manifested in the killing will raise an inference of malice....").

Appellant's assertion the photographs were not needed to corroborate the testimony of the responding officers and pathologist, (see FBOA, p. 12), misses the point. The State was not tasked with proving beyond a reasonable doubt that the crime scene photographs were taken, or the autopsy was performed[2]; rather, the value of the evidence is in *how* Ms. Wilson was stabbed, where and how many times, along with the evidence of cuts on extremeties and brusing all over

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[2] In fact, the pathologist identified and testified according to separate photographs that were admitted over defense counsel's objection. (See Tr. p. 961, line 14-p. 962, line 6). Appellant does not contest that ruling on appeal.

her body and the one clearly visible and shockly pronounced bite mark. In compliment to this relevant evidence, the State presented two photographs of Ms. Wilson just hours before her murder. These photographs show Ms. Wilson in sleeveless attire and her arms and shoulders do not have the bite mark and bruises that are on her body at death several hours later. (Compare R. p. * [State's 38] with R. pp. * [State's 322 and 325]).[3] Appellant's complaints that the in-life photographs were "irrelevant" and used merely to inflame the emotions, (see FBOA, pp. 12-13), ring hollow in light of the specific and substantial probative value in the instant case – proof that Appellant not only killed her, but did so great malice as evidenced by the multiple stabs, bruises, cuts, and the vivid bite mark.

Further, the photographs corroborated not just the investigator's testimony on how the scene presented, the photographs also tended to corroborate the testimony from the neighbor who heard the violence from one end of the home to the other. Consequently, there were discrete and necessary reasons to submit the photographs. The photographs would similarly be admissible under this rule. *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) ("'If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'") (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353); *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct.App. 2008) ("Admitting photographs which serve to corroborate testimony is not an abuse of discretion."). *See also State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution to corroborate testimony concerning condition of victim's

[3] While Appellant later complained the photos were admitted for "state of mind," (see Tr. p. 1372, line 11 – p. 1373, line 9), the photographs were obviously in evidence the solicitor reference the bite mark directly before making the contrast, (see Tr. p. 1352, lines 9-13). The contrast is plain. Moreover, as the judge indicated, the State is allowed to make persuasive arguments on the evidence already admitted. (See Tr. p. 1371, line 25 – p. 1372, line 1).

body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim's mouth); *State v. Edwards*, 10 S.E.2d 587, 588 (1940) ("In our opinion the trial Judge did not abuse his discretion in admitting the photograph [depicting head, torso, neck wound, decomposition and maggots] as being relevant, nor can we attach any importance, in view of the facts of this case, to the contention that the photograph prejudiced the jury against the defendant. Everything depicted by the photograph was, subsequent to its introduction, testified to in detail by the witnesses.").

Additionally, Respondent asserts there is no merit to Appellant's argument that the photographs were not needed to prove malice. (See FBOA, p. 12, "not necessary to substantiate material facts"). As an initial point, that is not the appropriate inquiry. Rather, the proper question for determining relevance was whether the photographs had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "[A] defendant cannot dictate the manner in which the prosecution tries its case by stipulating to certain facts or by not challenging an element of the offense" and "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *See Estelle v. McGuire*, 502 U.S. 62, 69 (1991); *State v. Martucci*, 380 S.C. at 249, 669 S.E.2d at 607 (citing *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)) ("The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation.").

Respondent also submits that Appellant's argument the photographs were too gruesome to allow, (see FBOA, pp. 11-12), does not rely on the proper test for admissibility. It has long been established that "[a] trial judge is not required to exclude relevant evidence merely because

it is unpleasant or offensive." *Martucci*, 380 S.C. at 250, 669 S.E.2d at 607. *See also Farris v. State*, 328 So.2d 640, 641 (Ala.Crim.App. 1976) ("The colored photograph in question is clearly ghastly; but, gruesomeness is not grounds for excluding this type of evidence, if relevant. ... This photograph was properly admitted into evidence notwithstanding the unpleasant subject matter. We cannot, and should not, gloss over the fact that violent death is itself loathsome."). Simply, gruesomness alone does not render the photograph inadmissible. *State v. Collins,* 409 S.C. 524, 535–36, 763 S.E.2d 22, 28 (2014).

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). At worst, the photographs were cumulative to the other evidence, *i.e.* the testimony on the wounds, condition of the body, and the crime scene. *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587, 588 -589 (1942) ("The photographs, it is true, were only corroborative of the spoken word, and proved to be unnecessary in this particular case, but they were no more than harmless surplusage. They showed material conditions which existed, and were not inflammable fuel to be consumed by the minds of the jurors, nor do we think that they were calculated to arouse the prejudices of the jury."). *See also State v. Haselden,* 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 378 S.C. 296, 299, 662 S.E.2d 489, 491 (Ct. App. 2008) (evidence "merely cumulative,

insubstantial" did not affect the result of trial and considered harmless). This is especially so in light of the crime scene video that was also admitted. Defense counsel objected to the video on the same grounds of showing the body, but he has not raised an issue on the admission of the video in this appeal. (See Tr. p. 605, line 4 – p. 607, line 6). However, the record supports the basis for the trial judge's ruling admitting the photographs over Appellant's objection. His ruling should not be disturbed on appeal.

Appellant's argument to the contrary should be rejected.

II.

The trial judge did not abuse his discretion in allowing the State a complete opportunity to cross-examine and impeach a defendant who chose to take the stand in his defense.

Relevant Facts:

Appellant opted to take the stand in his defense case. Appellant admitted the killing but claimed self-defense. (Tr. p. 1065, line 10 –p.1074, line 9; p. 1150, line 20 – p. 1151, line 1). The State asked to take up a matter of law after Appellant firmly testified that Ms. Wilson was the aggressor. (Tr. p. 1150, line 20 – p. 1151, line 1).

The State then asked permission to present Rule 404(b), SCRE evidence, specifically physical abuse against Andrea Frazier; physical abuse upon Erin Doughtery; physical abuse and threaten use of a kitchen knife against Christine Dalheimer; and physical abuse against Stacey Newsom. The State noted also in regard to Ms. Newsom, Appellant had threated that if she made a domestic violence report, "he would make sure she looked like the aggressor." (Tr. p. 1151, line 11 – p. 1153, line 20; p. 1155, lines 21-23). The State further noted evidence of phsycial violence agains Amy Hate and actual former convictions for some of the violence. (Tr. p. 1154, lines 2-15). The State offered to pare down the proffer to the two, most recent and similar events:

> ... the two that I fell like are most prevalent would be Christine Dalheimer and Stacey Newsom. Those were the most recent in time. The fact that he pulled a knife on Christine Dalheimer in the same manner he's alleging a knife was pulled on him and that he had to pull a knife.
>
> And in addition to that, Your Honor, specifically, as to Stacey Newsom, as far as the physical aggression, which he's - - and it's in the text messages that's in evidence that that he stays he was never aggressive with Stacey. Our information would refute that. And, more specifically, he told her he would make sure she looked like the aggressor if she ever reported him. ... Which is exactly what he's doing here.

(Tr. p. 1154, line 22 – p. 1155, line 11).

The State argued these events "should come in under a 404(b) analysis" and it was Appellant's testimony that made the events relevant. The State noted that in Ms. Dalheimer's case, Appellant "pulled a knife on her, which is the exact same situation that we have here." (Tr. p. 1155, lines 21-23; 1156, lines 9-12). The State relied upon *State v. Sweat*, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004), for admissibility of the prior acts and threats. (Tr. p. 1156, lines 16-19). The defense argued *Sweat* could be distinguished as the act of former act of violence was tied to the victim.[4] (Tr. p. 1157, lines 4-20).

The State then added as "to the specific threat that he would make her out to be an aggressor ... I think State v. Beck would, also, apply there," noting in that case there was a threat "several moths ealier" to "rob or do something to a person like that" and he later followed through with the crime. (Tr. p. 1157, line 22- p. 1158, line 5).

The trial judge ruled that "these cases are too remote in time" to support the exceptions for motive and intent under Rule 404(b). (Tr. p. 1158, line 22 – p. 1159, line 6). The trial judge did not find that Appellant had opened the door to the prior bad acts testimony. (Tr. p. 1159, lines 7-10).

After the ruling, the trial judge asked if there was anything further from the State for the witness, and if the defense would "have any questions in reply?" Both parties answered in the negative. (Tr. p. 1159, lines 11-19). The defense also advised it would have only one other witness. (Tr. p. 1160, lines 4-8). The trial judge then adjourned the proceedings for the day. (Tr. p. 1160, line 20 – p. 1162, line 17).

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[4] In *Sweat*, the prior act of domestic abuse admitted was one inflicted by Sweat on his girlfriend/wife approximately eleven days before the burglary and assault charges where girlfriend/wife's romatic interest was involved. *State v. Sweat*, 362 S.C. 117, 121, 606 S.E.2d 508, 510 (Ct. App. 2004)

For clarity in the record, the trial judge set out that reply as to Appellant's testimonywould be the next day, and reply to Appellant's other witness would be addressed after that witness testified. Further, the trial judge specifically allowed the proffer from Ms. Newsom and Ms. Dalheimer and stated he would "listen to that testimony listen to arguments" after which he would "make a decision." (Tr. p. 1163, lines 7-17). The trial judge clarified, "I've already made one, but I will be glad to revisit it after I listen to testimony." (Tr. p. 1163, lines 19-20). Both the State and defense expressed they understood the Court's position. (Tr. p. 1163, lines 21-24).

The following day, outside the presence of the jury, Ms. Dalheimer testified that around the end of 2010, Appellant "pulled a knife on me one night in the kitchen when we were cooking," and on another occasion placed his thumb on her neck "in a chocking manner." (Tr. p. 1171, line 1- p. 1172, line 8). Ms. Newsom testified that around "July and October 2010," she and Appellant had "intense fights," and Appellant had threatened that should Ms. Newsom "ever phone the police regarding any violence that - - the words that I recall are you will be the one to go to jail" essentially that "something would be said or done to make it look like my fault." (Tr. p. 1175, line 2 – p. 1176, line 14). She also testified that Appellant attempted to head butt her, though he stopped short of doing so, and "wrapped his arms around [her] and pulled [her] to the ground." (Tr. p. 1176, lines 15-24). She recalled that Appellant had at one point shown her "some knives," perhaps shortly after they met, prior to the events of violence she suffered. (Tr. p. 1177, lines 4-12).

The State requested to limit the testimony even further, offering only "the conversation when they were arguing when he talked about what he would do if she called the police that would make it to her fault" as to Ms. Newsom, (Tr. p. 1183, lines 8-14), and the incident where

Appellant pulled the knife on Ms. Dalheimer in her kitchen, (Tr. p. 1183, lines 15-19). The State relied primarily upon *State v. Beck* for admission of the statement, and noted the act would not be admissible under the same logic. (Tr. p. 1184, line 1 – p. 1185, line 3; p. 187, line 25 – p. 1188, line 21).

The defense argued the statements could not be "pulled apart" from the bad act, which was not admissible. (Tr. p. 1186, line 7 – p. 1187, line 22).

In reply, and in addition to relying on *Beck,* the State also submitted that in order for the statement to be admissible under Rule 613, SCRE, the State would have to have the opportunity to ask Appellant if he made the statement, and conceded that if he admitted the statement, then they could not offer the extrinsic evidence of same. (Tr. p. 1188, line 22 – p. 1189, line 2). The trial judge again found the proffer evidence was "too remote in time" and would not be admitted. (Tr. p. 1189, lines 19-24).

After a short break in the proceedings, the State again narrowed the evidence to only to Ms. Newson's evidence and offered that Appellant was technically still on the stand. (Tr. p. 1192, lines 1-16). Over defense counsel's objection, the trial judge, recalling his own statement that he would revisit the cross-examination issue upon hearing the testimony, allowed the State to posed one question about the statement to Ms. Newsom that "he would make it look like it was her fault." (Tr. p. 1194, line 18 – p. 1195, line 19). Upon further objection to the testimony, the trial court clarified for the defense that it was not coming in as 404(b) evidence but he would allow the State to "lay the foundation on cross, then impeach him" on his prior statement. (Tr. p. 1196, lines 5-19). Upon further complaint by the defense, the trial judge again noted he was not allowing prior bad acts in but was allowing opportunity for impeachment with the prior

statement. He also offered "to give a charge to the jury" that such evidence would only be for impeachment. (Tr. p. 1197, lines 14-18).[5]

On continuation of the cross-examination, the State asked:

> In the fall of 2010, specifically, in October, November, that area, do you remember making a statement to Stacey Newsom at her home, I believe, that's in Simpsonville, stating that if she ever called law enforcement, you would make it look like it was her fault?"

(Tr. p. 1199, line 22 – p. 1200, line 2).

Appellant's response was," "No, I do not." (Tr. p. 1200, line 3). No other questions were asked and the cross concluded. (Tr. p. 1200, lines 5-7).

Before the State's reply, the trial court noted the limitation that the evidence could only reference the statement, "not … threats or any violence or anything else. No pushin and shoving or anything." (Tr. p. 1218, lines 13-22).

In the State's reply, Ms. Newsom gave narrowly tailored testimony reflecting her conversation with Appellant and his statement that if she ever "were to call law enforcement about," and the State actually interjected to confine the testimony to the narrow limits of the statement alone, "that I would be the one to go to jail." (Tr. p. 1225, lines 2-17).

Appellant asserts on appeal that "the State concocted a scheme to recall him to the stand for a single question – a question designed solely to implicitly inform the jury of his past bad acts" for impeachment purposed. (FBOA, p. 13). He also complains that the testimony inferred a bad act which should not have been admitted. (FBOA, p. 17-18). Appellant submits the re-opening of cross-examination and allowing the testimony constituted reversible error. (FBOA, p. 18).

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[5] Such a charge was given, referencing credibility determinations by consideration of whether prior statement made by the witness were consistent or inconsistent with the testimony. (Tr. p. 1357, lines 15-17).

Discussion:

Appellate courts in this State "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). Here, Appellant argues the manifest abuse of discretion in allowing the cross-examination is dependent upon finding the admission of the testimony was error. However, the trial judge correctly found the question posed was a necessary pre-step to impeachment under 613(b), SCRE. Thus, there was no error in allowing the question. In short, because this was a matte rof impeachment, it is not the posing of the question that allowed the evidence to become admissible, but Appellant's answer. Where a witness admits such a statement, no extrinsic evidence may be offered. Here, Appellant unequivocally denied the properly identified statement (*i.e.*, the substance of the statement, the person to whom the statement was made, and the time and place of statement). Thus, his answer allowed the State to offer extrinsic evidence of the prior inconsistent statement and impeachment was proper under Rule 613(b).[6]

"When an accused takes the stand, he becomes subject to impeachment, like any other witness." *State v.Major*, 301 S.C. 181, 183, 391 S.E.2d 235, 237 (1990). Specifically, "an accused who takes the stand may be cross-examined about 'past transactions tending to affect his credibility.'" *Id.* (quoting *State v. Allen,* 266 S.C. 468, 482, 224 S.E.2d 881, 886 (1976)).

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[6] Defense counsel did not question the actual impeachment value of the statement; consequently, that issue is not before the Court in the appeal. Defense counsel only questioned whether the cross-examination could continue and whether the extrinsic evidence constituted forbidden propensity evidence under Rule 404(a), *i.e.* did not fit the exceptions of 404(b). (See Tr. p. 1186, line 22 – p. 1187, line 2). As the trial judge noted, he ruled the prior bad *acts* could not come in as substantive evidence, but Appellant's own prior *statement*, not covered by Rule 404(b), was admissible for its impeachment value. (Tr. p. 1196, lines 15-18).

Appellant submits that the cross-examination at issue offended the prohibitions of Rule 404(b), SCRE. (FBOA, pp. 17-18). However, a prior statement of bad intent is not a prior bad act. *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) ("statements of intent to commit crimes" are not prior bad acts). Rule 404(b) is inapplicable to the evidence at issue. Even so, as the trial judge correctly found, at issue was impeachment by the statement, not evidence of intent under Rule 404 (b), SCRE. (Tr. p. 1196, lines 8-18).

As noted above, whether extrinsic evidence of the statement could be admitted was controlled by whether Appellant admitted the statement. Rule 613, SCRE. Indeed, the State agreed that if a defendant admits to the statement referenced, the State would not be able to offer extrinsic evidence to show the contrary. (Tr. p. 1198, lines 19-21). Further, in limitation to any possible prejudice, the circumstances in which the statement was made were not allowed before the jury. (See Tr. p. 1218, lines 13-21).

Additionally, the impeachment value of the statement is exceedingly strong in context of this case.[7] Appellant's credibility as to his statements that Ms. Wilson, his victim, was the aggressor was critical evidence for the jury's consideration. The prior statement that, if ever the legal need arose, he would make it appear his girlfriend was at fault, bears directly on the credibility of testimony regarding his intent and actions against his then girlfriend, Ms. Wilson. Thus, it was sound impeachment evidence. Further, the admissibility of the statement is relevant and proper.

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[7] Again, Appellant has not contested the relevance of the statement for impeachment value. At any rate, there is little doubt that any "witness under cross-examination may be asked whether he has made any former statement relative to the subject matter of the action and inconsistent with his present testimony." *Aakjer v. Spagnoli*, 291 S.C. 165, 170, 352 S.E.2d 503, 507 (Ct. App. 1987).

In *State v. Galloway*, 263 S.C. 585, 593, 211 S.E.2d 885, 889 (1975), our Supreme Court, relying on *State v. Brock*, 130 S.C. 252, 126 S.E.28 (1925), found that the question of relevance is key to admissibility and may be resolved by considering whether "the testimony sought to be impugned is material, while the impugning testimony, except for that purpose, is not." *See also State v. Bailey*, 279 S.C. 437, 440, 308 S.E.2d 795, 797 (1983) (matter collateral where it "did not go to any material issue at trial"). Further, *State v. Beck*, 342 S.C. 129, 536 S.E.2d 679 (2000), establishes the basis for the relevance as to statements of intent and distinguishes the matter from evidence of a pattern of prior bad acts as anticpated under Rule 404(b), *i.e.* what was ruled inadmissible below.

In *Beck,* our Supreme Court found that a statement of intent by "one accused of a crime" may be admitted if relevant to the crime at bar. In particular, the Court found a statement made by the defendant regarding his intent "to call escort services for dates and then rob and have sex with the employees" made some four months before the murder of a victim from an escort service was admissible in the defendant's trial for the murder. 342 S.C. at 134-35, 536 S.E.2d at 682. Similarly here, the statement bears on the credibility of Appellant's assertion that the victim was the aggressor – a material matter at trial. The trial judge did not abuse his discretion in admitting the statement for purpose of impeachment on a relevant matter. *See State v. Williams*, 263 S.C. 290, 302, 210 S.E.2d 298, 304 (1974) ("The difficulty in applying this rule lies in determining what are collateral matters. Because of such difficulty, *Brock* recognized that considerable latitude and discretion should be allowed the trial judge in determining the admissibility of impeaching testimony.").

The intent with which Appellant acted was of critical relevance in his trial for murder thus impeachment was proper. "While it is true that threats against a third party are normally not

admitted to show malice against the deceased, the rule is not an inflexible one." *State v. Alford*, 264 S.C. 26, 32, 212 S.E.2d 252, 254 (1975) *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). Here, the statement shows, contrary to Appellant's testimony of his intent that he had actually expressed that he would make his girlfriend appear at fault in a serious situation where police would investigate. These details, like the specific details in *Beck* as to a specific type of crime and type of victim, compel the finding that the statement, which *Beck* would support could have been substantive evidence, is certainly relevant for impeachment purposes. *See United States v. Queen*, 132 F.3d 991, 996 (4th Cir. 1997) ("The more similar the extrinsic act or state of mind is to the act involved in committing the charged offense, the more relevance it acquires toward proving the element of intent."); *cf. People v. Cruz*, 187 P.3d 970, 998 (Cal. 2008) ("The prior threat to kill a deputy by shooting him in the back of the head was 'manifestly admissible [under state evidentiary law] to show defendant's state of mind' at the time he fatally shot Deputy Perrigo in the back of the head."); *People v. Rodriguez*, 726 P.2d 113, 129 (Cal. 1986) (upholding admission of a threat to third party under state evidentiary rule finding "a generic threat is admissible to show the defendant's homicidal intent where other evidence brings the actual victim within the scope of the threat"). At any rate, any possible error could only be harmless.

Appellant courts "[i]n determining harmless error regarding any issue of witness credibility, ...will consider the importance of the witness's testimony ... whether the ... testimony was cumulative, whether other evidence corroborates or contradicts the ... testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case." *State v. Fossick*, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998). Respondent submits the importance of any testimony on intent is clear where the only issue is whether there was malice

aforethought. This in turn also heavily supports the importance and necessity of full cross-examination and impeachment. Even so, the overall strength of the case would still have been prodigious – the neighbor's recounting of the waves of violence, (Tr. p. 256, line 17 – p. 258, line 24), undermines Appellant's story, as does the blood evidence in the home, and the victim's own body reflecting bruising, stabs to the back, knife twisting to the throat, and a bite mark to the upper arm, the unresponsiveness to police inquiry at the home, the treatment of the body after the attack – all weight heavily against Appellant's story. Further, the remaining cross-examination shows Appellant merely relied upon a purported failure to remember the attack – except, of course, that he was only acting in self-defense during the entirety of his vicious attack –and offered attacks on the victim's character. (See, for example, Tr. p. 1128, line 17 – p. 1129, line 23; p. 1143, lines 9-24). Further, the impeachment statement was skeletal and did not involve concomitant collateral evidence of prior bad acts, rather the allowed evidence was limited to the prior statement alone. The evidence neither showed a pattern of bad acts or *res gestae.* At any rate, should one extract the short statement, such extraction does not reasonably push the scales away from proof beyond a reasonable doubt. However, the trial judge did not abuse his discretion in allowing impeachment based on the inconsistent statement. There is no error.

Appellant's argument to the contrary should be rejected.

III.

The trial judge did not abuse his discretion in admitting the specifics from the written statement offered in redirect describing a prior argument between Appellant and Ms.Wilson when defense counsel opened the door to the specifics of statement that he omitted from the cross-examination that would bear on the witness's recall and ability to perceive the events described.

Relevant Facts:

Outside the presence of the jury, the State advised the Court that Mr. Kelly Smith, the victim's neighbor, informed officers in his initial statement not only that he had heard the vicious fighting the night of the murder, but had had heard victim and defendant fighting June or July before the August murder. In particular, the State advised his testimony would be he heard the victim "yell out no, again, in fear." (Tr. p. 241, lines 9-15). The defense moved to exclude the "characterization 'like he was hurting her,'" which the Court granted. (Tr. p. 243, lines 12-13). The Court allowed the State to question the witness about what he actually heard. (Tr. p. 243, lines 7-8).

The State therafter called the witness. Mr. Smith testified that he had heard a prior argument, through the walls of the duplex. He explained the duplex residences were "mirrored" and he could "hear everything that they said in the living room," could hear telephone calls, essentially, "[i]f it was above speaking volume, I heard it." (Tr. p. 253, lines 1-9). He testified he recalled hearing an argument between Appellant and Ms. Wilson around the"end of May, beginning of June." (Tr. p. 253, lines 12-13). Specifically, he testified he "heard mumbling and then it lead to her saying no very loudly. Like, No. No." (Tr. p. 253, lines 16-17). He recalled that this alarmed him and Ms. Wilson later approached him in their backyard and he stated in their discussion that "sometimes relationships get heated and" he advised Ms. Wilson she could call on him "if she needed anything." (Tr. p. 254, lines 7-12). He noted at that point that her

relationship with Appellant "was on the mend." (Tr. p. 251 line 14). Mr. Smith noted that Ms. Wilson was absent a great deal of the time over the summer with trips to Bali and to see her parents. (Tr. p. 254, line 15 – p. 3). In August of 2011, he noted Appellant at Ms. Wilson's home. (Tr. p. 255, line 7-15). He testified he was alarmed at that point and talked to her about the situation as at that point in time he understood them to be "on the outs" and she was not seeing him anymore. (Tr. p. 255, line 17- p. 256, line 4). He thereafter described the sounds of violence that he heard as Ms. Wilson was murdered, her screams of "no, no, no" and "pleading for her life," that the violence began in the bedroom area and the "second wave" sounded from the the kitchen. (Tr. p. 256, line 17 – p. 258, line 24).

On cross-examination, Appellant questioned Mr. Smith as to whether he could actually hear where the violence occurred, pointing out neither the bedroom or the kitchen were referencing in his original statement describing the violence. (Tr. p. 273, line 11 – p. 274, line 7). Appellant also asked about the "one time before" that he heard Appellant and Ms. Wilson fighting. He asked:

> So when you describe prior difficulties between Ms. Wilson and Hank in that summer and you're asked whether you ever remember it, you mentioned yes, one time before.

(Tr. p. 275, lines 19-22).

Mr. Smith confirmed "one time" and added, "[o]ne time that stood out." (Tr. p. 275, line 23-25). Appellant suggested that the relationship was not rocky, but they had been in "constant contact." (Tr. p. 276, lines 16-17). He noted Mr. Smith's direct testimony that Appellant and Ms. Wilson "had been involved with each other one way or another for about eight or nine months prior to the incident," and that Mr. Smith had been living in the duplex for "that entire period of time" as had Ms. Wilson. (Tr. p. 277, lines 1-5).

On re-direct, the solicitor noted that the statement did, in fact, reflect that the last struggle was at the back door. (Tr. p. 278, line 22 – p. 279, line 5). Further, the solcitior asked about him to continue his answer from cross-examination to explain what was also in his statement about the prior difficulties. Mr. Smith testified he "heard her screaming like he was hurting her and Jen saying no." (Tr. p. 279, lines 11-12). The defense thereafter objected and the Court, after a bench conference, overruled the objection. (Tr. p. 279, lines 6-20). Mr. Smith then confirmed that the description of the prior fight was in his statement. (Tr. p. 279, lines 23-24).

Outside the presence of the jury the defense placed its objection on the record:

> ... Ms. Campbell went through the statement and elicited his testimony that I heard her screaming like he was hurting her. Specifically, like he was hurting her, which was the portion of the statement that we dealt with earlier and had been excluded earlier.
>
> I submit I did not open the door to that in my examination of him. My questioning of him was whether or not he had told the police one time before, that he heard them arguing one item [sic] before. And he responded yes. And he responded that's what I testified to today.
>
> So I don't see how that opens the door to her then elaborating on what she had just been ruled as inadmissible. So the objection is on that basis and I move for a mistrial on that basis.

(Tr. p. 280, line 24 – p. 281, line 13).

The trial judge summarily denied the motion for mistrial but requested the solicitor place her argument on the objection on the record. (Tr. p. 281, lines 14-15). The solicitor noted the defense inferred Mr. Smith gave incomplete information in his statement and admission of the rest of the statement showed there was more complete information which the defense failed to publishe or acknowledge, citing Rule 106, SCRE. (Tr. p. 281, lines 16-21).

The trial judge ruled:

> ... I overrule the objection based upon opening the door on cross-examination. It was insinuated directly towards that the man did not hear properly through the

> walls and he heard properly enough to realize or, at least, thinking that she was in danger of being hurt. Therefore, I think the door was opened. And your motion is denied....

(Tr. p. 281, line 22 – p. 282, line 3).

Discussion:

"The scope of redirect rests in the discretion of the trial court." *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984). *See also State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (2000) (The "[a]dmission of evidence falls within the trial court's discretion and will not be disturbed on appeal absent abuse of that discretion."). "An abuse of discretion occurs when the trial court's ruling is based on an error of law," *State v. Cope*, 405 S.C. 317, 335, 748 S.E.2d 194, 203 (2013), or when the ruling lacks factual support in the record, *Wilder v. State*, 388 S.C. 282, 285, 696 S.E.2d 587, 588 (2010). *See also State v. McEachern*, 399 S.C. 125, 137, 731 S.E.2d 604, 609 (Ct. App. 2012) (same). Appellant submits that the ruling lacks factual support for finding the statement admissible, *i.e.* lacks factual support for finding defense counsel opened the door. (FBOA, pp. 18-21). However, the record lends significant support to the trial judge's ruling.

First, it cannot be contested that defense counsel questioned the witness' specifically about the lack of detail in his written statement. (See Tr. p. 272, line 24 – p. 273, line 1, specifically referencing statement given at 12:45 on august 28, 2011). Defense counsel questioned the witness' testimony on hearing the violence from the confrontation and murder and placing the violence in various locations. Defense counsel directly questioned the witness about the absence of the location detail in his written statement. (Tr. p. 273, line 8 – p. 274, line

7).[8] Defense counsel also directly questioned the witness's knowledge of any difficulties or state of the relationship as referenced in the statement. (R. p. 275, line 10 – p. 276, line 2). This, in turn, logically brings into question whether the testimony on direct regarding a prior confrontation was a product of *post hoc* reasoning, or if there was some reason to have express recollection of the prior argument. The State was able to dispel the defense suggestion of *post hoc* reasoning by relying on the detail in the statement given at 12:45 on August 28, 2011.

In short, defense counsel posed questions on the basis of the sufficiency and correctness of the written statement. The redirect was narrowly tailed to the details in the statement supporting the testimony – the very statement defense counsel repeatedly challenged. (See Tr. p. 278, line 11 – p. 279, line 24). There is no error as the redirect was proper pursuant to Rule 106, SCRE. The matter is settled by reference to *State v. Patterson*, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006).

In *Patterson*, the trial judge allowed the admission of an entire statement under nearly identical circumstances:

> After eliciting testimony from Richardson regarding how careful she was in giving police a correct depiction of the events that led to Clark's murder, defense counsel in essence insinuated Richardson's statement to police was incomplete. The defense put Richardson's statement to police at issue, and fundamental fairness required the entire statement be admitted into evidence. Patterson would have us construe Rule 106 in such a way that inquiries that probed at alleged omissions from a statement would not open the door to the admission of the statement. The purpose behind Rule 106 would be frustrated if the rule's application in a given case depended upon whether an alleged oral assertion was or was not in a written statement. We find the rule of completeness applies to insinuations, innuendos, and omissions. Thus, the trial judge properly admitted Richardson's statement.

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[8] It is rather telling that defense counsel did not object to the remainder of the redirect when the redirect was based on the extensive questioning about the written statement. His position appears to concede the response, as a whole, was proper. Again, the response was based on the questions posed about the written statement and a fair presentation of the evidence by admission of the statement as a whole.

Patterson, 367 S.C. at 227-28, 625 S.E.2d at 243.

The trial judge reasonably and logically found that the defense had opened the door to response by its "insinuations, innuendos, and omissions" in its examination of the witness concerning the witness' written statement. There is no error. However, should this Court find error in these discrete circumstances, such error could only be harmless givent he wealth of evidence of malice and Appellant's concession that he inflicted the fatal wounds. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). This is so for several reasons.

Initially, Respondent notes the reference to "screaming like he was hurting her and Jen saying no," but without evidence that Appellant hurt Ms. Wilson at that time, does not show an actual bad act of significance. Further, there was ample, un-objected to evidence of a tumultuous relationship between the two so the evidence was harmlessly cumulative. *See State v. Haselden,* 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 378 S.C. 296, 299, 662 S.E.2d 489, 491 (Ct. App. 2008) (evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless). However, and critically, Applicant admitted inflicting the fatal wounds, and the number and position of the wounds is an artful articulation of malice proven by the victim's own body. The evidence well supports the jury's murder verdict such that the admission of the minor statement, if considered error, could only be harmless on this record. *Bailey, supra.*

Appellant's argument to the contrary should be rejected.

IV.

The circuit court judge in pre-trial did not abuse her discretion in declining to order the entire Fifth Circuit Solicitor's Office be recused from the trial of this case where one assistant solicitor and her husband lived next to the murder victim, the assistant did not participate in trial nor was called as a witness, and her husband testified only to seeing Appellant leave the home which was not contested. She correctly found Appellant failed to show prejudice in this set of circumstances.

Relevant Facts:

On December 12, 2012, defense counsel moved to recuse the Fifth Circuit Solicitor's Office based upon the following assertion:

> Through the production of discovery materials by the Fifth Circuit Solicitor's office, it has been revealed to defense counsel that an assistant solicitor with the Fifth Circuit Solicitor's office is a material witness in this case. In order to avoid the appearance of impropriety and to allow the Defendant to receive a fair trial, defense counsel respectfully requests the Court to recuse the Fifth Circuit Solicitor's office.

(R. p. * [Motion to Recuse the Fifth Circuit Solicitor's Office]).

On December 19, 2012, the Honorable DeAndrea G. Benjamin heard the defense motion. (R. p. *[December 19, 2012 Transcript]). The defense asserted Ms. Ashton, an assistant solicitor in the circuit, was "a material witness" as she was "the next-door neighbot to the alleged victim, Ms. Jennifer Wilson." (Tr. p. 3, lines 20-24). The defense asserted "Ms. Ashton was intereviewed, provided a statement" and that both she and her husband ... saw my client leaving the crime scene, driving from the scene away in a car that they claimed to recognize" and identified Appellant in a photographic lineup. (Tr. p. 3, line 25 – p. 4, line 8). Defense counsel also asserted that the couple "would be material to prove, amongst other things, that he was at the crime scene." (Tr. p. 4, lines 12-14). The defense did not claim bias or any unfair treatment, "but for appellate things down the road, it is really the appearance of impropriety." (Tr. p. 4, lines 20-25).

The State first noted Ms. Ashton was not in the courtroom, and that Ms. Ashton immediately informed the solicitor's office when law enforcement identified her as a witness. According to the State:

> From that moment on, there has been no contact with Ms. Ashton in our office. We have built a Chinese wall around her. Nothing has been dicussed with her from me or any member of law enforcement tht is involved in this case with her, other than when she went to - - I don't evben know if she went to CP or they took a statement from her at her home....
>
> She is not going to have anything to do with this case, as well as certainly - - honestly, I mean, from what she sees, she is obviously an important witness, but strategically, Judge, I don't even know if I would call her to the stand at this time. I may just call her husband.

(Tr. p. 7, line 2- p. 8, line 3).

The State also offered that her testimony could be restricted and/or heard in limine to avoid any hint of impropriety. (Tr. p. 8, lines 4-10). After hearing additional argument, the judge took the matter under advisement. (Tr. p. 11, lines 3-5).

On February 1, 2013, Judge Benjamin issued an Order Denying Defendant's Motion to Recuse the Fifth Circuit Solicitor's Office. The motions judge found that there was no right to recusal, a defendant must show actual prejudice, and Appellant had failed to show how Ms. Ashton's position "prejudicies him or impedes his right to a fair trial." (R. p. * [Order Denying Defendant's Motion to Recuse the Fifth Circuit Solicitor's Office, p. 2]).

Ms. Ashton did not testify at trial. Mr. Ashton testified to seeing Appellant leave Ms. Wilson's home. (Tr. p. 295, line 15—p. 298, line 13). Appellant testified not only that he was at the home, but also admitted the killing, though he maintained Ms. Wilson was the aggressor. (See Tr. p. 1065, line 10 –p.1074, line 9; p. 1150, line 20 – p. 1151, line 1).

In this appeal, though asserting no precedent in this State directly addresses a similar fact pattern on recusal, Appellant nonetheless complains the motions judge erred in failing to order

recusal of the entire office "to avoid the appearance of bias and to maintain the public's confidence and the defendant's confidence in the integrity and impartiality of the juridical system." (FBOA, p. 21).

Discussion:

As it first matter, it is not disputed that Ms. Ashton did not participarte in the prosecution. She did not, in fact, even testify. Her husband testified but only to a fact that was not contested by Appellant. It is difficult to see any legitimate claim of prejudice in light of this record. Yet, Appellant claims he is entitled to a new trial as the proceedings may have presented an appearance of impropriety by the Fifth Circuit Solicitor's office having prosecuted in these circumstances. This claim is not well-supported by legal principles.

As Judge Benjamin found: "Recusal of an entire ... office is an extreme step, and the threshold necessary for recusing an entire office is higher than that for an individual prosecutor." 81 Am.Jur. 2d Witnesses § 229. (R. p. * [Order Denying Defendant's Motion to Recuse the Fifth Circuit Solicitor's Office, p. 2]). *See also State v. Inman*, 395 S.C. 539, 558, 720 S.E.2d 31, 41 (2011) (""[t]here is no inherent right to disqualification when a member of the state attorney's office is called as a witness in a case prosecuted by a state attorney in the same office, unless actual prejudice can be shown."")(quoting 81 Am.Jur.2d Witnesses § 229 (2004 & Supp.2011)).[9]

South Carolina law "places upon the moving party the burden of showing actual prejudice from the failure to disqualify. *State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767

[9] Respondent agrees with Appellant that the nub of the issue in *Inman* was whether the prosecutor would be called by the defense, but the authority does not rest on that narrow distinction. The argument for disqualification of the office must be based upon whether there are facts or circumstances where the disqualifying fact is imputed to the entire office. That does not depend upon which party calls the witness. Respondent submits Appellant's offered distinction is a distinction without a difference.

(1997). "Appellant must show actual prejudice from the failure to disqualify the solicitor's office." *State v. Chisolm*, 312 S.C. 235, 238, 439 S.E.2d 850, 852 (1994). Our State Supreme Court has rejected both a constitutional aspect to the claim and a presumption of prejudice upon showing of potential conflicts. *State v. Smart*, 278 S.C. 515, 518-19, 299 S.E.2d 686, 688 (1982) *overruled by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Disqualification, however, has occurred.

Our Supreme Court found the necessity of disqualification of a solicitor's office based upon significant misconduct, in particular a showing that "a deputy solicitor of the Eleventh Circuit Solicitor's Office eavesdropped on a privileged conversation between appellant and his attorney...." *State v. Quattlebaum*, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000). *Accord State v. Cooper*, 386 S.C. 210, 214, 687 S.E.2d 62 (2009) (trial court granted solicitor's motion to be excused from prosecution for a re-trial where the deputy solicitor had been a law clerk to the prior trial judge and had knowledge of attorney-client matters). However, our courts have found the failure to show "such deliberate prosecutorial misconduct" is a failure to show cause for disqualification of the office. *State v. Bell*, 374 S.C. 136, 143-44, 646 S.E.2d 888, 892 (Ct. App. 2007). *See also State v. Chisolm*, 312 S.C. at 238, 439 S.E.2d at 852 (1994) ("We find that the assistant solicitor acted inappropriately by communicating with a party known to be represented by counsel and by surreptitiously tape recording the conversation. However, in view of the full record before the Court, we do not find any prejudice."); *State v. Smart*, 278 S.C. at 519, 299 S.E.2d at 688 ("We hold that the appellant was properly required to do more than allege a violation of ethical canons.").

In his argument to this Court, Appellant relies heavily on the California case *People v. Conner*, 666 P.2d 5 (Cal. 1983), and the suggestion that an "appearance of impropriety" is

enough to support disqualification. (See FBOA, pp. 25-26). His reliance on the California case is misplaced as *Conner* is distinguishable on many points, but, critically, it does not even support disqualification based merely on the "appearance of impropriety."

In *Conner*, the prosecutor was not only a witness but a "potential victim" of defendant's rampage in the courthouse while waiting trial on the very charges at issue. 666 P.2d at 6. The stabbing of an officer and discharge of a weapon while awaiting trial culmintated in escape, for which the defendant was thereafter charged with additional crimes as a result of the escape. The prosecutor "reported the incident to his immediate supervisor, made a written report to the district attorney, and subsequently discussed his experience directly with approximately 10 of the 25 deputy felony prosecutors in his office" and also gave media inerviews "describing the event [and he] characterized defendant both as a dangerous felon and as an escape risk." 666 P.2d at 7. The case was reassigned, but to one within the felony unit. The trial judge did not order recusal on the original charges, but did order recusal of the entire office on the charges stemming from the escape finding that the prosecutor "was a witness to the event and a potential victim." *Id.* Given the prosecutor's involvement, the discussion of his experiences with other prosecutors in his section, and with a liberal dose of deference to the trial judge's exercise of discretion, the appellant court upheld the ruling. *Id.*, at 9.

In contrast factually, here, the witness was not a witness to the crime. The most the assistant solicitor witnessed was the admitted fact that Appellant left Ms. Wilson's home after the murder. However, the assistant did not testify. Nor did the assistant solicitor participate in the litigation.

Further, as asserted above, the *Conner* court did not depend on the "appearance of impropriety" that Appellant wishes to rely upon. Rather, interpreting its own state statute, the *Conner* court found:

> ... the legislative history of section 1424 reflects concern about the effects of the elimination of the "appearance of conflict" standard. While it is conceivable that an "appearance" of conflict could signal the existence of an "actual" conflict which, although prejudicial to the defendant, might be extremely difficult to prove, we think that the additional statutory requirement (that a conflict exist such as would render it unlikely that the defendant would receive a fair trial) renders the distinction between "actual" and "appearance" of conflict less crucial.

Conner, 666 P.2d at 8.

Another California court noted the state statute "does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system," rather disqualification must be shown to be necessary based upon a showing of conflict '"so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.'" *People v. Eubanks*, 927 P.2d 310, 317 (1996) (quoting *Conner*). Appellant is not incorrect that have been cases where the courts have found disqualification of the prosecutor's office was warranted, or, at least, upheld under the deferential standards of review afforded discretionary rulings. However, he can point to no one fact or one circumstance that would inevitably lead to disqualification as it must necessarily be a case specific consideration.

Moreover, the majority of cases cited in n. 8 of the Final Brief of Appellant (*Cooper, Latigue, Stenger, Banton, Tippecanoe County Court*), present situtations where a prosecutor had

formerly represented the defendant. That is not the case here.[10] The *Gonzales* case cited alleged a personal animosity toward a defendant who had previously been employed by the office, and rested disqualification of the office on the fact the office failed to screen the prosecutor from the litigation. *State v. Gonzales*, 119 P.3d 151, 163 (N.M. 2005). Lastly, Appellant cites to *Tate* case; however, the *Tate* case has an unusual factual background of having a former judge who presided over the defendant's case become a prosecutor in the office. Like *Gonzales*, the office failed to screen the former judge from the matter; thus, the state court found disqualification of the office was warranted. *State v. Tate*, 925 S.W.2d 548, 557-58 (Tenn. Crim. App. 1995). [11]

Appellant also cites to *People v. Shinkle*, 415 N.E.2d 909 (N.Y. 1980), to assert a separation barrier is ineffective. (FBOA, p. 25). However, the attorney at issue was a Chief Assistant District Attorney and he had personally initially represented the defendant in the very case at issue. Moreover, "the People circuitously resorted to an affirmation from Leopold himself" to show the barrier was effective. *People v. Shinkle*, 51 N.Y.2d 417, 421, 415 N.E.2d 909, 910 (1980). In *People v. Stevens*, 642 P.2d 39 (Colo.Ct.App. 1981), the attorney at issue similarly has actively represented the defendant in the same case. In fact, the state court followed *Shinkle*. *Id.*, at 41. However, as more cases have been considered, these *per se*

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[10] At any rate, we need not look to these out of jurisdiction cases to inform the appropriate test. In *State v. Bell*, 374 S.C. 136, 646 S.E.2d 888 (2007), this Court consider the implications of an investigator who interviewed the defendant while at the Public Defender's Office who then "switched sides" to the solicitor's office. This Court applied the test in *State v. Smart* and *State v. Chisolm* which required a showing of actual prejudice, and cited with favor the evidence that the investigator only had "minimal" involvement and then only with "ministerial acts." *Id.*, at 142, 646 S.E.2d at 892. This Court concluded: "There is simply no evidence investigator Penn was involved with any substantive or strategic prosecution work suggestive of betrayal of any secrets or confidences." *Id.*

[11] Appellant also cites to *Thorpe v. Ancell*, 367 Fed.Appx. 914, 916 n. 5 (10th Cir.). However, that is simply a reference to a footnote notation that a special prosecutor was appointed, and that the defendant had filed a motion to recuse because "some employees were potential witnesses." That does not guide the instant analysis at all.

disqualification cases have been rejected as "unpersauasive." *State v. Camacho*, 329 N.C. 589, 598, 406 S.E.2d 868, 873 (1991) (collecting cases).

In *Camacho,* the Supreme Court of North Carolina summarized: "Rather than apply an all-encompassing draconian rule automatically disqualifying a prosecutor's staff from performing the duties of public office, those courts consider whether the prosecutor who formerly represented the defendant obtained any confidential information as a result of that representation and, if so, whether it has been or is likely to be used to the detriment of the defendant." *Id.,* (collecting cases). Many jurisdictions have found a simple witness issue did not support automatic disqualification of the prosecutor's office. *See, for example, State v. Edwards*, 837 N.W.2d 81, 90 (Neb. 2013) (defendant sought to have Attorney General's office disqualified and have the appointment of a special prosecutor on possibility the chief of the criminal division could be a witness; the state supreme court found no error in disallowing chief's appearing as advocate but allowing the office to prosecute noting it was not a matter of confidences given, but separate roles of advocate and witness); *State v. Clausell*, 474 So. 2d 1189, 1191 (Fla. 1985) ("We realize that if actual prejudice can be shown, a motion for disqualification should be granted. We find, however, there is no inherent right to disqualification when a member of the state attorney's office is called as a witness in a case prosecuted by a state attorney in the same office."); *State v. Johnson*, 702 S.W.2d 65, 71 (Mo. 1985) ("The mere fortuity that a nonparticipating assistant prosecutor is to appear as a witness in a particular case does not by itself lodge in an entire prosecutor's staff an impermissible personal interest in the outcome of the case."). The Tenth Circuit has noted that "because disqualifying government attorneys implicates separation of powers issues, the generally accepted remedy is to disqualify 'a specific Assistant United States Attorney ..., not all the attorneys in' the office. In light of these

principles, every circuit court that has considered the disqualification of an entire United States Attorney's office has reversed the disqualification." *United States v. Bolden*, 353 F.3d 870, 879 (10th Cir. 2003) (reversing disqualilfication order concluding the order lacked specific factual findings of misconduct or conflicts for the office as a whole) (internal citations omitted).

At bottom, however, is that our jurisdiction already has a test for determining disqualification – a showing of actual prejudice. *State v. Patterson.* Petitioner failed to show actual prejudice in his pre-trial motion. Further, the lack of participation in the trial as either advocate or witnesses simply affirms the lack of prejudice in this case. The motions judge did not abuse her discretion in denying the motion to recuse.

Appellant's argument to the contrary should be denied.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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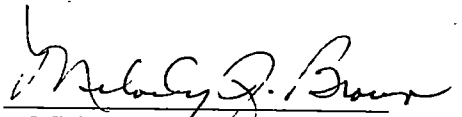
BY: 
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April 29, 2016.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
J.C. Nicholson, Jr., Circuit Court Judge

The State, Respondent,

v.

Hank Eric Hawes, Appellant.

Appellate Case No. 2014-002288

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Initial Brief of Respondent* and *Designation of Matter* on Appellant by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorneys of record:

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This 29th day of April, 2016.

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April 29, 2016

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Hank Eric Hawes
Appeal from Richland County
Appellate Case No. 2014-002288

Dear Ms. Kitchings,

Enclosed please find the original and one (1) copy of the ***Initial Brief of Respondent and Designation of Matter***, dated April 29, 2016, along with proof of service, in the above-referenced case.

By copy of this letter, I am serving opposing counsel with same. Thank you for your asssitance in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/pc
Enclosure

cc: Miles E. Coleman, Esquire
A. Mattison Bogan, Esquire
Robert M. Dudek, Esquire, Chief Appellate Defender
The Honorable Daniel E. Johnson, Solicitor, Fifth Judicial Circuit
Trisha Allen, Victim Services

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