STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN JERMAINE JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-001219

FINAL BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in admitting the irrelevant pre-death photographs of each of the victims where their sole purpose was to arouse the sympathy and prejudice of the jury?

II. Whether the trial court erred in allowing one of the State's witnesses, Mason Moore, to testify via Skype in violation of Appellant's right under the Confrontation Clause of the Sixth Amendment and pursuant to S.C. CODE ANN. § 17-23-60, where the State failed to show any important public policy necessitating the use of video testimony and the trial court improperly required Appellant to show prejudice?

III. Whether the trial court erred in finding that Appellant's statement was voluntary where it was coerced by the investigators continuous lies regarding the evidence, threat of the death penalty if he did not change his "story," and emotional appeals and threats related to Appellant's two-year old daughter?

IV. Whether the trial court erred in denying Appellant's motion for mistrial and request to empanel a new jury where Appellant was led into the courthouse wearing orange handcuffs and accompanied by three to four armed guards prior to voir dire of the jury in violation of his right to due process?

V. Whether the trial court erred in denying Appellant's motion for mistrial and request to empanel a new jury where two of the State's witnesses discussed the facts and merits of the case in the hallway within arms-length of jurors in violation of Appellant's Sixth Amendment right to a fair and impartial jury?

VI. Whether the trial court erred in sentencing Appellant to five-years incarceration for possession of a weapon during the commission of a violent crime where (1) Appellant was sentenced to life for murder and first degree burglary and S.C. CODE ANN. § 16-23-490 expressly provides that the "five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime" and (2) the evidence did not show a sufficient nexus between possession of the firearm and the offense of kidnapping?

STATEMENT OF THE CASE

On July 7, 2011, the Clarendon County grand jury indicted Appellant Justin Jermaine Johnson for the offenses of murder (two counts), attempted murder, first degree burglary, kidnapping, and possession of a weapon during the commission of a violent crime. R. 971.

On March 6, 2014, Johnson appeared before the Honorable William Jeffrey Young for a pre-trial Jackson v. Denno[1] hearing. R. 1. Subsequently, on March 10-14 and 18-20, 2014, he appeared before the same judge and a jury for trial on the above offenses. Johnson was represented at the pre-trial hearing and trial by Scott Robinson, and the State was represented by solicitor Ernest Finney and assistant solicitor Christopher DuRant. R. 75. The jury found Johnson guilty of the murder of the minor victim, the murder of Maxine Caraway, first degree burglary, kidnapping, and possession of a weapon during the commission of a violent crime. Johnson was found not guilty of the attempted murder of Kaisha Caraway. R. 932, ll. 9-24. Judge Young sentenced Johnson to three terms of life imprisonment for the two murders and first degree burglary and thirty years for kidnapping, to be served consecutively, and five years for possession of a weapon during the commission of a violent crime, to be served concurrently to the sentences on the other charges. R. 948, l. 19 – 949, l. 17.

This appeal follows.

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[1] 378 U.S. 368, 84 S.Ct. 1774 (1964).

STATEMENT OF FACTS

Johnson had two minor children in common with Kaisha Caraway, a son and a daughter. He was accused and convicted of the murder of Kaisha's grandmother, Maxine Caraway, and the murder of his nine month old son. He was also accused and convicted of first degree burglary, associated with the alleged forced entry into the home of Maxine and John Caraway; kidnapping, associated with driving Kaisha away from the home where the incident occurred; and possession of a weapon during the commission of a violent crime, associated with possessing or displaying a 12 gauge shotgun during the commission of the murders, kidnapping, and burglary. During the majority of his lengthy interrogation, Johnson maintained that Kaisha's boyfriend, Robert, was responsible and that he only fired one shot, which was directed at Robert when he fled the scene.

Motion to Suppress Appellant's Statement

A pre-trial Jackson v. Denno hearing was held on March 6, 2014. Both investigators, Mason Moore and Kippton Coker, who conducted the interrogations of Johnson, testified at the hearing. The court also reviewed the videotape of the gunshot residue ("GSR") testing and interrogation that were conducted in an interview room at the Clarendon County Sheriff's office. R. 12, ll. 14-22; State's Ex. 56-65 (DVDs of Apr. 6, 2011 GSR test and Interrogation) (on file with this Court).[2] The video system does not record constantly and requires a manual restart such that there are portions of Johnson's

[2] State's Exhibits 56, 57, and 58 show the GSR testing of Johnson. The aggregate length of these DVDs is 2 hours, 52 minutes, and 47 seconds. State's Exhibits 59, 60, 61, 62, 63, 64, and 65 show the majority of the interrogation of Johnson, though it is obvious that the recording equipment stopped at the end of the first three DVDs. The aggregate length of these DVDs is 7 hours, 57 minutes, and 46 seconds.

interrogation that were not captured on the video. R. 41, l. 7 – 42, l. 23; R. 56, l. 6 – 57, l. 20.

Moore advised Johnson of his Miranda[3] rights both prior to conducting the GSR test and prior questioning Johnson, the latter of which began at 2:08 p.m. on April 6, 2011. R. 7, l. 3 – 9, l. 9; R. 36, ll. 14-18; State's Ex. 59 (DVD of Apr. 6, 2011 Interrogation) (on file with this Court). Moore testified that after agreeing to waive his Miranda rights, Johnson never asked to stop the questioning nor asked for an attorney. R. 8, l. 21 – 9, l. 17. Johnson was emotional at times and the questioning lasted almost eight hours, though Johnson was given several breaks and offered food, drink, and access to the restroom. R. 9, l. 21 – 10, l. 21; R. 39, ll. 1-21; State's Ex. 59-65 (DVDs of Apr. 6, 2011 Interrogation) (on file with this Court).

The investigators went into the interrogation knowing that Kaisha had identified Johnson as the shooter and with an admittedly preconceived idea that Johnson was guilty. R. 53, ll. 24. Moore testified that the story provided by Johnson during the first seven hours of the interrogation provided a detailed account of a third party committing the crime. Though Moore opined that there were some inconsistences and variations in Johnson's "story," he did not point to anything specific. R. 28, l. 13 – 29, l. 9. Coker likewise said that they "picked his story apart" and that the details being relayed to them from the crime scene were not "adding up," but provided no examples to support his assertions. R. 40, ll. 3-22. Moore agreed that they ended the interview when they obtained what they believed to be a confession from Johnson during the last forty to forty-five minutes of the interrogation. R. 19, l. 19 – 22, l. 5. Neither investigator could point to anything distinct in Johnson's

[3] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

"confession" that was not something that they had already presented to him during the interrogation as their theory of events. R. 22, ll. 20-25; R. 53, l. 25 – 56, l. 1.

Both officers testified in conclusory fashion on direct examination that there were never any threats made in exchange for Johnson's statement and the statement was voluntary. R. 11, ll. 3-9; R. 39, l. 22 – 40, l. 2; R. 42, l. 24 – 43, l. 2. However, Moore admitted on cross-examination that he told Johnson that "God would take this weight from him," that Coker yelled at Johnson during the interrogation, and that they discussed what they would tell Johnson's daughter about him. R. 23, l. 1 – 24, l. 1. Coker also admitted to yelling at Johnson and to discussing Johnson's daughter, including what the officers would tell her and whether he would see her, which had a noticeable impact at Johnson. R. 48, l. 22 – 50, l. 11.

In addition to the myriad of lies that the investigators presented to Johnson, purportedly in search of the truth, the video of the interrogation showed the use of intimidation and threats by the investigators. Just prior to his yelling outburst at Johnson, Coker told him "It's up to you whether you keep up this dumb, bull shit story. But, you go ahead, alright. You're going to go to prison with that bullshit story, if not the death penalty." State's Ex. 59 (DVD of Apr. 6, 2011 Interrogation, 1:17:33) (on file with this Court). The investigators also brought up Johnson's two year old daughter, discussing her for approximately twenty minutes prior to his alleged confession. State's Ex. 64 (DVD of Apr. 6, 2011 Interrogation, 0:20:21) (on file with this Court). Coker asked: "You want me to tell her that you're a cold-blooded killer or it was an accident?" Moore then asked, "Or, that it's just something that, that happened. You got mad and angry?" And later, "What do you want me to tell her? Daddy was out of ammunition? Sometimes good people do bad

things? What do you want me to tell her? Or do you want me tell her daddy just didn't give a shit? Daddy didn't give shit about her. He didn't give a shit about grandma. He didn't give a shit about brother, mama. What do you want me to tell her?" When Johnson responded that he did not want the investigators to tell his daughter anything, Moore told him: "The problem is, is that you aren't going to be seeing your daughter." Coker said "You're not going to have that opportunity. This is your opportunity." The investigators told Johnson that his daughter would remember what happened and that "You know it might not be until she's fifteen when she reads it, the transcript. Hey, daddy was just a cold-blooded killer. Only, the only, the only reason I'm still breathing today is because he was out of ammunition when he [inaudible] that damn front door." State's Ex. 64 (DVD of Apr. 6, 2011 Interrogation, 0:25:37) (on file with this Court).

Regarding the interview conducted on April 7, 2011, Moore said that it was Johnson who requested to speak to him again and that he was again advised of his Miranda rights.[4] R. 29, ll. 10-23; State's Ex. 66 (DVD of Apr. 7, 2011 Interrogation) (on file with this Court). Moore said that Johnson did not recant his "confession" from the prior day and did not reassert his claim that the crimes were committed by a third party. R. 27, l. 9 – 28, l. 2; R. 30, ll. 2-8. Johnson said that he knew that he could not do that to his son and needed to know from the officer whether he really did it or not. He said that he could not remember how it happened and that the gun just went off. State's Ex. 66 (DVD of Apr. 7, 2011 Interrogation) (on file with this Court).

[4] Coker was not a part of the second interview that occurred on April 7, 2011. R. 41, l. 1-7.

The day after the hearing, Judge Young issued his ruling allowing admission of Johnson's "confession," stating:

> I have reviewed the testimony from yesterday's hearing. I have reviewed the videotapes myself, and I find that the statement made by Mr. Johnson was given freely, voluntarily, knowingly, and intelligently. Although it was over an 11-hour period, he was -- he was Mirandized twice during that. He was very talkative.
>
> He was offered ample times to take breaks. He was offered food. He was offered drink. He certainly did not appear to be under excessive I guess oppression in the giving of the confession, and I am going to allow the confession to come into evidence.

R. 63, ll. 10-21. Defense counsel renewed his prior objection to the admission of Johnson's statements at trial. R. 417, ll. 14-23.

Motions for Mistrial

Following jury selection, defense counsel made two motions for mistrial. R. 91 – 99. The first motion related to Johnson's entering the courthouse, in full view of where the jurors were assembling, wearing street clothes but with his hands secured by orange handcuffs and escorted by three or four jail personnel. Defense counsel argued that the "at that point in time the jury saw him come through there with all indicia of being incarcerated under heavy guard" and that the appearance of being "in custody" was prejudicial. He requested that the court declare a mistrial until another jury panel could be assembled because the entire jury pool was tainted. R. 91, l. 12 – 92, l. 18.

The solicitor argued that Johnson was wearing street clothes and that any prejudice was minimal. R. 92, ll. 20-24. He noted that Johnson was "charged with two murders" and stated that he did not "believe the jury is under any illusions that a Defendant charged with multiple murders would have to be in custody or potentially could be in custody." R. 92, l.

24 – 93, l. 3. He also cited the fact that none of the jurors brought up seeing Johnson that morning during the voir dire. R. 93, ll. 3-15.

Defense counsel responded that the State's argument is contrary to the presumption of innocence, as the jurors should not have any preconceived notions about whether a defendant is or would be in custody based on the charges against him. R. 93, l. 19 – 94, l. 7. He also argued that looking at this through the lens of the jurors is too speculative and that the inconvenience of assembling a new jury pool is outweighed by Johnson's constitutional rights. R. 94, ll. 8-21. Further, voir dire of the jurors could not adequately address the matter because it would have "re-rung the bell." R. 94, ll. 21-25.

The trial court noted that Johnson entered the courtroom unhandcuffed, with his counsel such that their "last view" of him was "as a free man." R. 95, ll. 1-4. Defense counsel responded that, even so, it was only an hour prior that the jurors potentially saw him wearing the *same* clothes but handcuffed and accompanied by guards. R. 95, ll. 5-12. He argued that given the important constitutional rights involved, the court should err on the side of caution and declare a mistrial. R. 95, ll. 12-15. Though he found defense counsel's argument "compelling and sincere," the trial judge denied the motion. R. 95, ll. 16-22. The trial judge later mentioned that had presided over a trial in Sumter where the defendant won despite being in his prison garb and had his feet shackled and stated "[s]o it's just hard to judge on that." R. 98, l. 23 – 99, l. 1.

The basis for the second motion for mistrial was that two individuals on the State's witness list, Investigator Richards and Robert Brogdon,[5] were discussing the case in the hallway within arms-length of potential jurors. This occurred after the initial qualification of the jury but prior to voir dire. R. 95, l. 25 – 96, l. 24. Counsel noted that, in response to this concern, the trial court asked the jurors if they knew anything about the case "that did not come from within the four walls of this courtroom" and did not get any affirmative response. R. 97, ll. 8-13; see R. 87, ll. 1-6. However, he argued that the jurors may not realize that the information they overheard pertained to Johnson's case until they see Investigator Richards or Brogdon take the stand. It may be only then that "the light goes on" and they realize "that's the one that said he was overwhelming guilty." R. 97, ll. 13-18.

The trial judge likened the hallway conversation to the solicitor saying in his opening statement that Johnson committed the murder, both of which would be addressed by his instructions to the jury. R. 97, l. 19 – 98, l. Despite counsel's request to proffer the testimony of Brogdon for the record, the judge responded "I don't need – I assume if it was said, it was said." R. 98, ll. 12-16. The judge indicated that even so, he had no way to know whether the jurors heard it, or even if they read about the case in the newspaper. He agreed that the jurors may not realize until later on in the trial that something they overheard or read was actually related to Johnson's case. R. 98, ll. 16-20. Even so, he denied the motion for mistrial. R. 98, ll. 1-2.

[5] Though both individuals were listed on the State's witness list, only Investigator Richards actually testified at the trial. R. 76, ll. 6-19; R. 325 – 378.

State's Witness Allowed to Testify via Skype

Investigator Mason Moore was one of the two officers who conducted Johnson's interrogation on April 6, 2011 and participated in a second interview of Johnson on April 7, 2011. Defense counsel did not object to Moore testifying via Skype[6] for purposes of the pre-trial Denno hearing held March 6, 2014, but indicated that he may object to that for trial purposes. R. 4, ll. 1-7.[7] The parties returned to court the next day for the trial court's ruling regarding the admissibility of Johnson's statement, after which Judge Young began to address "the question as to the testimony by Skype whenever the trial begins." He indicated that he had reviewed the relevant case law and "checked around with other circuit court judges." Judge Young found that "apparently it's a pretty common practice, provided that there are certain situations." R. 63, l. 2 – 64, l. 1. He noted that in the present case the witness was 2500 miles away, was an "ancillary witness," "everything that was going on with him is available on videotape," and that there was another officer in the room for the majority of the interrogation. R. 63, ll. 1-9. He thus found that there would not be any prejudice to Johnson by allowing the testimony of Moore via Skype. R. 63, ll. 9-11.

Defense counsel responded that he understood the Court's ruling but stated that he had not yet presented his argument on that matter and requested the opportunity to do so. R. 64, ll. 12-17. The trial judge responded that he would be glad for him to do that "if it changes [his] mind," but asked counsel to begin by telling him what prejudice there

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[6] Skype is a telecommunications application software product that specializes in providing video chat and voice calls from computers, tablets, and mobile devices via the Internet to other devices.

[7] Two pages of the pre-trial hearing transcript are denoted as page "3." This citation refers to the second page 3.

would be to Johnson. R. 64, ll. 18-20. Defense counsel responded that it violates the confrontation clause, which contemplates actual "face-to-face confrontation" that cannot be replicated by a video screen. Additionally, witnesses who are not located in the courtroom may have a greater propensity to lie. He argued that the mere convenience to the witness in this case "should [not] trump the defendant's right to literally have face-to-face confrontation with his accuser where the jury is able to evaluate his credibility much more candidly, clearly, and visibly with him sitting in the room a few feet away versus an image of him broadcast from several states away." R. 64, l. 21 – 67, l. 12.

The solicitor parroted back the reasoning that the trial court previously announced for its allowance for the use of Skype, i.e. that Moore's testimony is cumulative, that another officer was present during the interrogation, and that the basis for the testimony is the videotaped interrogation. R. 66, ll. 14-24. He further argued that "a compelling or a substantial need exists to avoid costs, to avoid inconvenience to the witness, and to pretty much put on the record something that it not substantive but is a matter of tying the chain together." R. 67, l. 24 – 69, l. 15. In issuing his ruling, the trial judge said that this case "begs for the use of Skype" and that he would therefore allow it. R. 68, ll. 16-24. He further commented on the improvement in technology and said "So if the Supreme Court gets an opportunity to look at it through this case, well, so be it." R. 69, ll. 3-11.

Defense counsel renewed his object to the use of Skype both before and after Moore's testimony at trial. R. 379, ll. 14-17; R. 403, ll. 3-16. The trial judge overruled the objection, stating "Skype has been used in many courts in this state and [has] been used in death penalty trials as well, so I'm satisfied that based upon some the testimony that I heard that it'll be fine." R. 379, ll. 18-22. The audio-visual connection was interrupted many

times during Moore's testimony, allowing him time to regroup and preventing a continuous cross-examination. R. 383 – 398. The trial judge denied the motion to strike and for mistrial made after the testimony. R. 404, l. 20 – 405, l. 1.

Introduction of Pre-Death Photographs of Victims

Given the volume of exhibits involved in the case, the court conducted a pre-trial review of the photographs that the State expected to introduce. R. 100, l. 8 – 101, l. 17. Defense counsel objected to the admission of pre-death, color photographs of the victims. R. 117, ll. 1-17; R. 119, l. 12 – 120, l. 3. The photograph of Maxine Caraway showed her from the waist up, dressed up and with her done, and the photograph of the minor victim showed him from the chest up, with a large grin on his face. State's Ex. 38 (Living Picture of Maxine Caraway) (on file with this Court); State's Ex. 54 (Living Picture of minor victim) (on file with this Court). He argued that the photographs were irrelevant and unduly prejudicial, citing the lack of issue regarding the identity of the victims and the likelihood that the photographs would appeal to the sympathy, passion, and caprice of the jury. R. 117, ll. 7-17; R. 119, l. 14 – 120, l. 3.

With respect to the photograph of Maxine Caraway, the solicitor argued that the photographs were not meant to "arouse any passion or prejudice," but were instead so that the jury could "know... something about Ms. Caraway while she was alive" and see what "she looked like prior to her injuries on April the 6th." R. 117, ll. 19-25. The trial court overruled the objections and said "I think who the person was is a part of this case." R. 118, ll. 1-2; R. 120, ll. 4-6. Both pre-death photographs of the victims were introduced at trial, over defense counsel's renewed objections. R. 162, l. 20 – 163, l. 20; R. 187, ll. 2 – 188, l. 6.

Testimony and Evidence Presented at Trial

a. *Johnson's Statements*

The jury was shown the eleven hour interrogation of Johnson, the first approximately three hours of which were comprised of GSR testing without any questioning. State's Ex. 56-65 (DVDs of Apr. 6, 2011 GSR test and Interrogation) (on file with this Court). Miranda warnings were given to Johnson, after which he described what happened on the date of incident. For the first approximately seven hours of the questioning portion of the interrogation, Johnson remained consistent regarding the events of the day, though he did provide additional details as the officer's questions became more specific. Johnson arrived at Kaisha's house on the morning of April 6, 2011 to take Kaisha and their two minor children to the doctor's office. He and Kaisha argued about the fact that she had changed his PIN number on his ATM card and the fact that she then decided not to attend the children's doctor's visits with him. When he arrived at the doctor's office, another patron told him that they were not accepting walk-ins until 4:00 p.m.

When he returned to the house with the children, Kaisha and her boyfriend, Robert, were on the front porch. They were in the midst of an argument, which then turned into an argument between Robert and Johnson. Maxine Caraway then came outside and, after failing in her attempt to get them to stop fighting, told Robert that he needed to leave. Robert became angry and Maxine picked up a brick. Johnson got between the two in an effort to separate them, but Robert was able to strike Maxine. Robert then went to the trunk of Johnson's vehicle and retrieved Johnson's shotgun. Johnson ran inside the house, not knowing where his children were, and hid in a bedroom. He heard two gun shots, but could not tell whether they were fired, inside or outside. After he heard the second shot, he peeked

out of the room and saw his minor child sitting in his highchair with an apparent gunshot wound to the head. He then saw Robert down the hallway. Robert tried to make his way into the bathroom where Kaisha was hiding and fired one shot at the door. When he lowered the shotgun, Johnson attacked him from behind and held his arms to his side in an attempt to immobilize him. The two tussled and Johnson was able to get the gun away from Robert. Robert then fled through the front door and drove away in a white vehicle, similar in appearance to Crown Victorias sold at police auctions. Johnson took a shot at the vehicle but believed that he missed. He then saw his minor daughter outside near the body of Maxine, who had evidently been shot. He got Kaisha to come out of the bathroom so that they could get away in case Robert returned. They flagged down a police officer who they saw as they were driving away and led him back to the house. State's Ex. 59-63 (DVDs of Apr. 6, 2011 Interrogation) (on file with this Court).

After many misrepresentations of the evidence against Johnson and the investigator's threats that they would tell his daughter that he was a cold-blooded killer, that the only reason she was alive was that he ran out of shells, and that he would never get the opportunity to speak to her again, Johnson finally relented and told the officers the story that they wanted to hear. Johnson then told investigators that he never meant for anything to happen that day and that he was not *that* mad. He said that it did not seem like it was even him, and that it was like "stuff was just happening." He remembered grabbing the gun but did not remember shooting Maxine or pulling the trigger at all. He also did not remember hitting or shooting Kaisha. Johnson said that he did not know the minor victim was even in the room and the gun just went off. Kaisha then told him "look what you did" and came up with the idea to say that someone named "Robert" did it. He said that he could not believe

what happened, and though he hated Kaisha, he did not hate "him [the minor victim] at all." He maintained that the shooting was unintentional, though he said that it does not change that it happened. State's Ex. 64 (DVD 9 of Apr. 6, 2011 Interrogation) (on file with this Court). After this, the officers encouraged Johnson that he had done the right thing and should "turn to God" and ask for forgiveness.

Johnson initiated a second meeting with Investigator Moore the next day, April 7, 2011, where he recalled some of the same things that he said at the end of the prior day's interview. However, he said that he knew that he could not do that to his son and needed to know from the officer whether he really did it or not. He said that he could not remember how it happened and that the gun just went off. State's Ex. 66 (DVD of Apr. 7, 2011 Interrogation) (on file with this Court).

b. ***Testimony of Kaisha Caraway***

At trial, the State's star witness was Kaisha Caraway. She testified that she and Johnson had not been in a romantic relationship for at least nine months prior to the incident and that their only interactions related to their two children. R. 194, l. 23 – 195, l. 19. Kaisha was surprised to see Johnson on the morning of April 6, 2011 because he had told her the night before that he would not be able to take the children to the doctor that morning. R. 189, l. 6 – 191, l. 24. He waited outside and got their infant son dressed while Kaisha finished dressing their two year old daughter inside. R. 191, l. 25 – 192, l. 10. Johnson wanted Kaisha to attend the medical appointments with them, but she refused because she "didn't feel comfortable with it." He then waited another twenty minutes before leaving, a portion of which the two spent arguing on the telephone until Johnson's phone battery died. R. 193, l. 25 – 197, l. 25; R. 264, l. 12 – 274, l. 13.

Though not discussed on direct examination, Kaisha admitted that she and Johnson argued during a telephone conversation the night before. The topics of contention included Kaisha's suspicion that Johnson was talking to another woman and Kaisha's perception that Johnson was doing for his other daughter than he was doing for their two children. She claimed that despite the end to their romantic involvement, Johnson had his GI bill check go into her account, on which he was a secondary signer. After their argument on April 5, 2011, she changed the PIN number so that Johnson could not access the funds in the account. Kaisha testified that she was upset that Johnson did not bring her any money or items for the children on the morning of April 6, 2011, but she also testified that she did not expect Johnson that morning. Further, Kaisha could not explain why or how Johnson would provide money when his check was deposited in what was allegedly her account that morning, then accessible only by her due to the changed PIN number. R. 254, l. 15 – 262, l. 6; R. 264, ll. 7-11; R. 277, ll. 1-21.

Johnson was gone for approximately thirty minutes, during which Kaisha contacted the doctor's office because she forgot to tell Johnson something to tell them and learned that Johnson was not there. R. 198, l. 2 – 199, l. 8. He eventually called Kaisha, asked about whether she changed the PIN number, and indicated that he was on the way back to the house with the children. When he arrived, he took their daughter out of her car seat and she walked in the house. She testified both that Johnson brought their son into the house in his car seat and that he just brought him up to the porch and that she took him inside. R. 199, ll. 9-13; R. 200, ll. 12-13; R. 268, l. 5 – 272, l. 20; R. 272, ll. 3-17. Johnson told Kaisha that the doctor's office was not taking walk-ins that morning. R. 199, ll. 14-19. Kaisha asked if he had items for the children, which he was allegedly "supposed to bring," and he gave her a

baby cup out of the trunk of his car. R. 199, l. 19 – 200, l. 6; R. 251, l. 9 – 252, l. 23. They also discussed the PIN number, at which point she told him that she had changed it. R. 257, l. 16 – 258, l. 3.

Kaisha alleged that Johnson continued to ask her to leave with him. However, she also testified that she was supposed to go back into the house to change the PIN number back. According to Kaisha, Johnson got in his car to leave but as she was shutting the door to the house, he got out of the car, ran back to the house, pushed through the door, and began punching her [Kaisha]. R. 200, l. 19 - 203, l. 16; R. 274, ll. 1-19. Kaisha said that the minor victim was in his highchair and that their daughter was sitting in a chair in the same room. R. 203, ll. 17-19. Maxine came to the area and asked "what was going on," at which time Johnson allegedly "jumped onto her [Maxine] and began fighting her [Maxine]." R. 207, ll. 7-24. Kaisha later recalled that Johnson told Maxine about Kaisha changing the PIN number in the midst of the original struggle and that Maxine told Kaisha to go change it back. When Kaisha got up to get the phone so she could call to change the PIN number, Johnson "came behind [her] and began dragging [her] out of the house." R. 208, l. 15 – 209, l. 10; R. 280, l. 6 – 281, l. 1.

Kaisha said that Maxine had scratches and a broken nose and ran past Kaisha and Johnson purportedly so that she could get treatment at a hospital. Kaisha learned after the incident that Maxine did not have her car keys, but instead had a phone in her hand. R. 210, l. 3 – 211, l. 22; R. 281, l. 2 – 282, l. 11. Johnson allegedly tried to stop Maxine, causing him to loosen his grip on Kaisha such that she was able to slip out of her shirt and run into the house, leaving Johnson, Maxine, and the minor daughter outside. R. 212, l. 17 – 214, l. 15.

Kaisha was able to locate Maxine's cell phone and began to run down the hall when she realized that their son was still in his highchair. Johnson then entered the house. R. 214, l. 16 – 215, l. 16. Johnson allegedly had the shotgun in his hand and pointed it at Kaisha. He then said "you made me do this" and Kaisha closed her eyes, thinking he was going to shoot her. After hearing the gun go off, she realized that she was not hit and that it was their son, the minor victim, who had been shot. R. 215, l. 17 – 217, l. 10; R. 246, ll. 5-14. That was the first of only two gunshots that Kaisha heard that day. R. 245, l. 19 – 246, l. 4. Kaisha ran down the hallway and locked herself in the bathroom, pushing a cabinet in front of the door. She then called 9-1-1 using Maxine's cell phone but ended the call when Johnson shot through the bathroom door. That was the second and final gunshot that Kaisha heard. Though she did not realize it at the time, she was injured by one of the shots in the left shoulder. Kaisha told Johnson that emergency services were on their way, before and after which Johnson did not say anything. R. 217, l. 1 – 220, 1; R. 227, l. 25 – 229, l. 6; R. 246, l. 17 – 247, l. 15.

Kaisha claimed that they moved out of the bathroom into the living room where the minor victim was located. Johnson was allegedly whispering in the background when she answered the return call from the 9-1-1 operator and told her to tell them that the call was a mistake, pretend to be her grandmother, and give them the name "Robert." R. 220, l. 2 – 221, l. 24; R. 229, l. 7 – 230, l. 22; R. 278, l. 4 – 279, l. 20. They were in the living room for approximately five minutes when Kaisha heard their daughter crying and Johnson retrieved her from outside. Kaisha then went to the door and realized that her grandmother, Maxine, had been shot and was lying on the ground beside her car. R. 221, l. 25 – 222, l. 12. Kaisha put a shirt on and got into Johnson's car, along with him and their daughter, so that they

could go to the police station. Though Johnson had the shotgun with him at first, he removed the remaining shells and left the gun in the yard at Kaisha's suggestion. R. 230, l. 23 – 232, l. 8; R. 249, l. 25 – 251, l. 8.

According to Kaisha, she and Johnson discussed the details of the story that they would tell the police and then saw Officer Eaddy. They made contact with him and led him back to the residence. Kaisha was eventually separated from Johnson by Investigator Richards and wrote "he did it" on a piece of paper, referring to Johnson. R. 233, l. 19 – 236, l. 14; R. 286, l. 22 – 287, l. 24. She then received treatment at the hospital and met with law enforcement at approximately 5:00 p.m. for a GSR test and to make a statement. R. 236, l. 15 – 238, 20. Kaisha admitted that she did not see what happened to Maxine, only heard two gunshots neither of which were directed at Maxine, and had no idea what happened to her. R. 282, l. 14 – 283, l. 7. Kaisha also claimed that the only part of the shotgun that she touched was the barrel, in order to move it. She also stated did not wash her hands between the time of the incident that morning and when the GSR test was conducted that evening. R. 283, l. 8 – 285, l. 14.

c. *Physical Evidence*

Blood of both Maxine Caraway and Kaisha was found on Johnson's shoes and clothing, but that is not unexpected since he never denied being present at the scene during the incident. Notably, Maxine's blood was also found on Kaisha's shoes. R. 705, l. 24 – 715, l. 5. Additionally, the presence of gunshot residue on the back of Johnson's left hand is not inconsistent with his statement that he shot the gun once toward Robert's vehicle. R. 800, ll. 4-23. The DNA testing of the shotgun is much more probative because Johnson was excluded as a DNA contributor on the four samples taken and the DNA of an unknown third

party was found. DNA testing was conducted on the shot gun recovered at the scene, with samples taken from the trigger, barrel opening, pump action, and handgrip. R. 701, ll. 3-15.

Testing of the samples taken from both the trigger and the pump action revealed a mixture of at least two individuals. No conclusion could be made as to whether Maxine Caraway was one of the contributors in either sample, but Johnson, Kaisha, and the minor victim were all excluded as possible contributors to the mixtures. R. 701, ll. 16-24; R. 702, ll. 7-13. Only a partial DNA profile could be developed from the swab of the barrel opening. No conclusion could be made as to whether Kaisha was one of the contributors, but Johnson, Maxine and the minor victim were all excluded as possible contributors. R. 701, l. 25 – 702, l. 6. The DNA profile developed from the handgrip of the shotgun was a mixture of at least two individuals. Maxine Caraway was determined to be the major contributor to the mixture and the profile developed from the minor contributor was not sufficient to conduct a reliable analysis. R. 702, l. 14 – 703, l. 14.

The solicitor elicited testimony from the DNA expert regarding the ability to wipe away touch DNA, which she confirmed. R. 730, ll. 2-4. However the theory that Johnson was able to wipe away only his own DNA and leave behind the DNA of Maxine, possibly Kaisha, and a third party seems incredulous. The solicitor also elicited testimony from Lativia Brogdon, who resided in the same home with Johnson prior to his arrest and was the younger sister of Johnson's then fiancé. Lativia testified that Johnson's shotgun was in her room on May 5, 2011 and that she moved it to under her bed that night. R. 770, l. 2 – 772, l. 3. The fact that the gun was no longer under Lativia's bed when she returned from school the next day is not surprising since Johnson admitted that the gun used at the crime scene and found in the front yard belonged to him. In closing arguments, the solicitor attempted to

discount the third party DNA found on the gun by referring to Lativia's testimony and stating "So we have a third person. We know who touched that gun." R. 910, l. 15 – 911, l. 1. This is quite the overstatement of the facts since Lativia's DNA was never actually collected or compared to the third party DNA.

No fingerprints were collected at the scene, but footwear impressions were found using leucocrystal violet, a compound which enhances blood, and documented for examination. R. 622, l. 18 – 623, l. 16. The State's expert, Vicki Hallman, compared the photographs of the impressions to both the shoes of Johnson and Kaisha. None of the three impressions matched Johnson's shoes. While the impression shown in State's Exhibits 82 through 86 and the impression shown in State's Exhibits 89 and 90 were consistent with the tread pattern on Kaisha's shoes, they were not a definitive match. Most importantly, the impression shown in State's Exhibits 87 and 88 did not match the shoes of Johnson or Kaisha, indicating that it was made by a third party. R. 663, l. 10 – 666, l. 6; R. 674, ll. 1-8. Hallman also examined the shotgun left at the crime scene for fingerprints but none were found. R. 658, l. 23 – 660, l. 4.

ARGUMENT

I. The trial court erred in admitting the irrelevant pre-death photographs of each of the victims where their sole purpose was to arouse the sympathy and prejudice of the jury.

The trial court admitted pre-death photographs of both victims over defense counsel's objections that the photographs were irrelevant and unduly prejudicial. R. 117, ll. 1-17; R. 119, l. 12 – 120, l. 3. The solicitor's contrived explanation of relevance was:

> If Your Honor please, we believe that it is within the jury's province to know Ms. -- something about Ms. Caraway while she was alive. That picture represents her separate and apart from this proceeding. It is not shown to arouse any passion or prejudice. It is just a picture to substantiate what she looked like prior to her injuries on April the 6th.

R. 117, ll. 19-25. In overruling defense counsel's preliminary objection to the photographs, the trial judge said "I think who the person was is a part of this case." R. 118, ll. 1-2; R. 120, ll. 4-6. This was an abuse of discretion given this State's jurisprudence precluding admission of such photographs where they are not relevant to any matter in dispute. This error was not harmless.

Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Although evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. Rule 403, SCRE. Further, a photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts. State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997).

The State continues to offer irrelevant pre-death photographs of victims, alleging a dubious relationship between the photograph and some "issue" in the trial. In Livingston the defendant was charged with felony driving under the influence. Id. at 18,

488 S.E.2d at 313. A photograph of the victim and her husband taken shortly before her death was admitted into evidence, along with testimony about their employment, marriage just two months prior to the accident, and her young age of twenty-two. Id. at 19-20; 488 S.E.2d at 314. Our Supreme Court noted that while the husband's testimony was not extensive, "it creates a poignant image, especially in light of the fact that the trial took place only three months after the incident." Id. The Livingston court rejected the State's contention that both the testimony and the photograph were relevant to "establish the victim's identity," finding that the identity of the victim was not in dispute and that the photograph was "of no consequence to the determination of this action." Id. at 20; 488 S.E.2d at 314. Thus, the trial judge erred in admitting the photograph where it was irrelevant to any matter in issue. Id. The court found that the error was not harmless, as "[t]he husband's testimony and the photograph were highly inflammatory" and the evidence against Livingston was not overwhelming. Id.

In State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 100 (1999), the court again found error in the introduction of a pre-death photograph of the victim in a murder trial. The court rejected the State's claim that the photograph of the victim in his high school band uniform was relevant to establish the identity of the victim, finding that the victim's identity was not at issue such that the photograph was not admissible for that purpose. 334 S.C. at 648 n.3, 515 S.E.2d at 100 n.3. Rather, "the only possible purpose of this testimony and introduction of the photograph was to distance the victim from the drug dealing that was occurring at 28 Moultrie Street and to neutralize testimony by the State's witnesses regarding his drug use." Id. The court found that the evidence should not have been admitted for that purpose either since Rule 404(a), SCRE, precludes the State from

offering evidence of the victim's good character unless the defendant first attacks the victim's character. Id. In ordering reversal of Langley's convictions, the Court found that while the circumstantial evidence was sufficient to present this case to a jury, it failed to establish overwhelming evidence of his guilt. Id. at 649, 515 S.E.2d at 101.

Here, the pre-death photograph of Maxine Caraway was introduced through her husband after he testified that they were married for thirty-seven years. Mr. Caraway's testimony was conducted on Maxine's birthday, such that he testified that she would have turned sixty-two that day and was fifty-nine years old in the photograph. R. 162, l. 20 – 163, l. 20. The pre-death photograph of Maxine was immediately preceded and followed by photographs of her injuries in the numerical order of the State's exhibits. See State's Exhibits 36, 37, 38, and 39 (Photographs). As such, the pre-death photograph appeared between the other photographs of the victim's injuries when presented to the jury during deliberations.

The pre-death photograph of the minor victim was introduced through his mother, Kaisha. The photograph of the child, with a large grin on his face, was taken by Kaisha when he was approximately seven months old. R. 187, l. 2 – 188, l. 6. Kaisha also testified that the minor victim was nine months old at the time of his death, that Johnson was absent from the hospital for his birth, and that Johnson provided "very little" support for the two children. R. 186, l. 13 – 187, l. 1; R. 188, l. 7 – 189, l. 5. While no objection was made to the testimony itself, the introduction of the pre-death photographs along with the testimony increased their prejudicial affect by preying upon the juror's emotions and sympathy.

The present case is distinguishable from State v. Salley, 398 S.C. 160, 727 S.E.2d 740 (2012), where admission of the pre-death photographs of the child victim in a trial for homicide by child abuse was not determined to be an abuse of discretion. The photograph in Salley was relevant because it substantiated the doctor's testimony "that the child's sickle cell trait was not outwardly apparent and that the she was an otherwise healthy and vibrant child." 398 S.C. at 170, 727 S.E.2d at 745. Without the photograph, the doctor's testimony "could have elicited an impression of a sickly and fragile child, which may have affected the establishment of guilt." Id. Thus, the court found that there was a legitimate purpose for admitting the photograph other than arousing the sympathy of the jury. Id. No such legitimate purpose existed in this case.

Neither what the victims looked like prior to their death nor "who they were" was relevant or necessary to substantiate any disputed fact in this case. Rather, the sole purpose of admitting the pre-death photographs of the victims was to impermissibly arouse the sympathy and prejudice of the jury. Moreover, in a case such as this, where the jury was also shown postmortem photographs of the victims, both of whom were shot in the face or head with a shotgun, the juxtaposition of the pre-death photographs is even more impactful upon the jury. Compare State's Exhibits 38 and 54 (Pre-death Photographs of Victims) (on file with this Court) with State's Exhibits 15 and 36 (Postmortem Photographs of Victims) (on file with this Court).

Because the trial judge abused his discretion in admitting the pre-death photographs of the victims, Johnson is accordingly entitled to a new trial.

II. The trial court erred in allowing one of the State's witnesses, Mason Moore, to testify via Skype in violation of Appellant's right under the Confrontation Clause of the Sixth Amendment and pursuant to S.C. CODE ANN. § 17-23-60, where the State failed to show any important public policy necessitating the use of video testimony and the trial court improperly required Appellant to show prejudice.

The use of two-way video for the State's witness, Mason Moore, violated Johnson's constitutional right to confront the witnesses against him. See R. 381 – 406. Moore was one of the investigators who conducted the eleven hour gunshot residue (GSR) testing and interrogation of Johnson on the date of the incident and the investigator who conducted an additional interview of Johnson the next day. State's Ex. 56 – 65 (DVDs of Apr. 6, 2011 GSR test and Interrogation) (on file with this Court); State's Ex. 66 (DVD of Apr. 7, 2011 Interrogation) (on file with this Court). The State failed to assert any important public policy concern necessitating Moore's testimony via Skype, citing only convenience and cost-savings – interests which are insufficient to overcome a defendant's important constitutional right to confront the witness against him face-to-face. Moreover, the trial court erred as matter of law in failing to make the requisite findings that "denial of such confrontation is necessary to further an important public policy" and that "the reliability of the testimony is otherwise assured." Maryland v. Craig, 497 U.S. 836, 850, 110 S.Ct. 3157, 3166 (1990). Instead, the trial court bypassed this threshold requirement and placed the burden on Johnson to show how he would be prejudiced since it viewed the witness as "ancillary." Not only was the wrong standard applied in this case, the State's argument must fail under the proper standard.

Confrontation Right and Applicability of Craig Test to Two-Way Video

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, establishes that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S.

CONST. AMEND. VI. The South Carolina Constitution similarly provides that "[a]ny person charged with an offense shall enjoy the right... to be confronted with the witnesses against him...." S.C. CONST. ART. I, § 14. Further, section S.C. CODE ANN. § 17-23-60 states: "Every person accused . . . shall have a right to . . . meet the witnesses produced against him face to face." The Confrontation Clause:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930 (1970) (footnote omitted). Together, these "elements of confrontation" serve to safeguard "that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." Maryland v. Craig, 497 U.S. 836, 846, 110 S.Ct. 3157, 3163 (1990) (citations omitted). To this end, United States Supreme Court precedent establishes that the Confrontation Clause reflects a preference for physical face-to-face confrontation. Id. at 849, 110 S.Ct. at 3172; see also Coy v. Iowa, 487 U.S. 1012, 1019, 108 S.Ct. 2798 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"). "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with." Id. at 850; 110 S.Ct. at 3166.

The United States Supreme Court's decision in Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157 (1990), is the seminal case on the use of a video medium in lieu of physical confrontation. In Craig, the Court addressed the constitutionality of Maryland's

statutory procedure that allowed a child victim to testify without seeing the defendant via a one-way closed circuit television. Id. at 841; 110 S.Ct. at 3160-161. After reviewing the history and purpose of the Confrontation Clause, the Craig court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial ***only* where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.**" Id. at 850; 110 S.Ct. at 3166 (citations omitted) (emphasis added). In applying this two-pronged standard, the trial court is required to make a fact-specific finding of necessity in order to allow substitution of video for live testimony. Id. at 855-56, 110 S.Ct. at 3169 ("The requisite finding of necessity must of course be a case-specific one."); State v. Rogerson, 855 N.W.2d 495, 499 (Iowa 2014).

While the United States Supreme Court has not yet considered "the constitutionality of new types of video technology available to facilitate remote testimony," the Rogerson court noted that the United States Supreme Court issued an Order rejecting a proposed change to Federal Rule of Criminal Procedure 26 to permit unavailable witnesses to testify via two-way video. Rogerson, 855 N.W.2d at 500. In Justice Scalia's accompanying statement to that Order, he wrote:

> I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added. As we made clear in *Craig*, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

Order of the Supreme Court, 207 F.R.D. 89, 93-94 (2002) (internal citations omitted) (emphasis in original).

A majority of appellate and state courts have applied the Craig test to the use of two-video testimony and in contexts outside of the testimony of alleged child victims. Id. at 500-03 (citing United States v. Bordeaux, 400 F.3d 548, 554 (8th Cir. 2005) (discussing concerns about virtual confrontation of any kind and applying the Craig standard to two-way as well as one-way video systems); United States v. Yates, 438 F.3d 1307, 1315–16 (11th Cir. 2006) ("**The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation**.... [T]he two are not constitutionally equivalent. The Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium.") (emphasis added); State v. Smith, 308 P.3d 135, 136 (N.M. Ct. App. 2013); Commonwealth v. Atkinson, 987 A.2d 743, 751–52 (Pa. Super. Ct. 2009); Harrell v. State, 709 So.2d 1364, 1368-69 (Fla.1998); People v. Buie, 775 N.W.2d 817, 825 (Mich. Ct. App. 2009)); see also State v. Schwartz, 327 P.3d 1108 (N.M. Ct. App. 2014), *cert. denied*, 328 P.3d 1188 (N.M. 2014), *and cert. denied*, 135 S.Ct. 1397 (2015); White v. State, 116 A.3d 520 (Md. Ct. Spec. App. 2015).

The Rogerson court also noted that many state courts have applied the Craig standard without making any express findings regarding the distinctions between one-way and two-way video. Id. at 502-503 (citing United States v. Weekley, 130 F.3d 747, 753–54 (6th Cir. 1997) (applying Craig's necessity standard to a two-way video system without discussion of the one-way/two-way distinction); United States v. Garcia, 7 F.3d 885, 887–88 (9th Cir. 1993) (same); United States v. Farley, 992 F.2d 1122, 1124–25 (10th Cir. 1993) (same); State v. Stock, 256 P.3d 899, 905 (Mont. 2011) (same); People v. Beltran, 970 N.Y.S.2d 289, 296 (N.Y. App. Div. 2013) (same); State v. Seelig, 738

S.E.2d 427, 434 (N.C. Ct. App. 2013) (same); Gonzales v. State, 818 S.W.2d 756, 764 (Tex. Crim. App. 1991) (same); Johnson v. Commonwealth, 580 S.E.2d 486, 491 (Va. Ct. App. 2003) (same); Bush v. State, 193 P.3d 203, 215–16 (Wyo. 2008) (same); United States v. Rosenau, 870 F.Supp.2d 1109, 1112 (W.D. Wash. 2012) (same)).

Only the United States Court of Appeals for the Second Circuit has formulated a standard outside of the Craig necessity test. In United States v. Gigante, 166 F.3d 75 (2nd Cir. 1999), the court held that "[u]pon a finding of exceptional circumstances,... a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice" based upon the federal standard for when depositions may be used to perpetuate testimony for trial purposes. Id. at 81. Even so, the court cautioned that "the use of remote, closed-circuit television testimony must be carefully circumscribed." Id. at 80. Notably, application of the Craig test would likely have resulted in allowing the witness in Gigante to testify via video conference because the witness was in the federal witness protection program and was fatally ill with cancer such that his doctor advised against travel.

In adopting the majority view and applying the Craig test to two-way video testimony, the Rogerson court found that even though the two-way videoconferencing technology available today more closely approximates face-to-face confrontation than one-way video, it is still not constitutionally equivalent to the face-to-face confrontation envisioned by the Sixth Amendment. 855 N.W.2d at 504. The court noted the historical basis for the Confrontation Clause and held that while technology will continue to evolve and improve such that "[s]ome day virtual electronic presence in the courtroom may

become an adequate constitutional substitute for actual physical presence," "we are not there yet." Id. at 504-06.

Similarly, in White v. State, the Maryland Court of Special Appeals determined that two-way video testimony, although it provides some additional confrontation assurances than the one-way video testimony provided in Craig, nevertheless falls short of providing the same guarantees as physical, in-court testimony. 116 A.3d 520, 544 (Md. Ct. Spec. App. 2015). **"Even the most cutting-edge technology cannot wholly replace the weight of in-court testimony, for the electronic delivery of that testimony—no matter how clearly depicted and crisply heard—is isolated from the solemn atmosphere of the courtroom and compromises human connection to emotions like fear, apprehension, or confusion."** Id. In reviewing the application of the Craig test, this Court must resolve whether the officer's testimony via a two-way medium was reliable; whether the denial of Johnson's right to confront him in person furthered an important public policy; and whether the trial court made a sufficient finding of necessity. Id.

Reliability of Two-Way Video

Two-way video conferences undoubtedly provide some of the same hallmarks of the confrontation right present in the one-way video scenario: the witness is sworn under oath; the defendant, attorneys, court, and jury can see a video image of the witness; and the witness is available for contemporaneous cross-examination. See White v. State, 116 A.3d 520, 544 (Md. Ct. Spec. App. 2015). In addition, two-way video allows the witness to see an image of the defendant. Id. "Two-way mediums—absent any technological complications—therefore provided the traditional indicia of reliability under the

Confrontation Clause." Id. However, two-way video also continues to lack the solemnity and gravity of the courtroom and diminishes the "social pressure to tell the truth," implicating both a defendant's confrontation and due process rights. See Rogerson, 855 N.W.2d at 504-05 ("Two-way video technology may permit the witness and defendant to see one another, but the screen and the physical distance between the two tend to reduce the truth-inducing effect of the confrontation.") ("[T]he criminal defendant is also entitled to be present for all critical phases of the proceedings . . . . Yet this right to be present loses some meaning if witnesses are permitted to appear on a video monitor."); White, 116 A.3d 520, 544 (Md. Ct. Spec. App. 2015).

In Johnson's case, there were multiple interruptions in the video testimony. R. 383, ll. 8-9; R. 384, l. 9; R. 385, ll. 15-16; R. 386, l. 20-21; R. 387; ll. 22-25; R. 388, l. 18; R. 389, l. 16; R. 392, ll. 19-21; R. 394, l. 22-24; R. 398, ll. 2 and 25. While the connection was ultimately restored, the jury was unable to observe Moore's facial expressions and appearance continuously. R. 403, ll. 3-16. Effective cross-examination is hampered when the witness, like a boxer nearing the end of a round and up against the ropes, hears the bell ring and returns to his corner to regroup. Thus, the reliability of the two-way video used in Johnson's case was affected by the multiple interruptions. Despite the many breaks in the testimony at trial, the judge overruled defense counsel's motion to strike. R. 404, l. 20 – 405, l. 1.

Lack of Important Public Policy and Absence of Finding of Necessity

Even if this Court finds that the two-way video testimony was reliable, the State cannot overcome the lack of any important public policy and the absence of any finding of necessity in this case. Both the solicitor and the trial judge ignored the threshold

requirement to overcome a defendant's right to face-to-face confrontation, which is that the remote testimony "is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Craig, 497 U.S. at 850; 110 S.Ct. at 3166. The only policy concerns referenced by the solicitor were the avoidance of costs and the inconvenience to the witness. He asserted that these were sufficient in light of the fact the Moore was a "cumulative witness," supported by the testimony of the other officer who engaged in the interrogation and the videotapes of the interrogations. R. 67, l. 14 – 68, l. 15; R. 403, l. 18 – 404, l. 19 ("[W]e certainly believe that [Moore is] an ancillary witness that we didn't even need").

The trial judge likewise glossed over the threshold issues of important public policy and necessity. R. 64, ll. 3-11 and 18-20. He noted that Moore was 2500 miles away, but focused more on his determination that Moore's testimony was ancillary and cumulative. R. 64, ll. 1-11; R. 68, ll. 16-23. He also cited the improvement in technology, indicating that the jury would be able get "the full flavor" of Moore's testimony. R. 69, ll. 3-11. The trial judge's focus on prejudice was the equivalent of engaging in a harmless error analysis in order to excuse his own erroneous ruling. See State v. Bruce, 412 S.C. 504, 772 S.E.2d 753, 755-56 (2015) ("[I]t is clearly improper for the trial court to perform a harmless error analysis on its own evidentiary ruling. Trial courts cannot sit in judgment of their own rulings and proceedings."). Had the proper analysis been conducted, the only conclusion would have been that the State failed to meet its burden to show that the use of Skype was necessary to further any important public policy to overcome Johnson's right to confrontation.

"There is... a general consensus among courts that mere convenience, efficiency, and cost-saving are not sufficiently important public necessities to justify depriving a defendant of face-to-face confrontation." State v. Rogerson, 855 N.W.2d 495, 507 (Iowa 2014); see also White v. State, 116 A.3d 520, 547 (Md. Ct. Spec. App. 2015) ("We **emphatically caution**... that the State must demonstrate necessity—not simply convenience or expediency—in order to deny a defendant his right to physically confront his adversaries in a court of law." (emphasis added)); State v. Rogerson, 855 N.W.2d 495, 507 (Iowa 2014) ("There is also a general consensus among courts that mere convenience, efficiency, and cost-saving are not sufficiently important public necessities to justify depriving a defendant of face-to-face confrontation."); State v. Schwartz, 327 P.3d 1108, 1112 (N.M. Ct. App. 2014), *cert. denied*, 328 P.3d 1188 (N.M. 2014), *and cert. denied*, 135 S.Ct. 1397 (2015) ("Mere inconvenience to the witness is not sufficient to dispense with face-to-face confrontation"); see also United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (en banc) (vacating defendants' convictions where the government's needs for the testimony to meet its burden and to expeditiously resolve that case were "not the type of public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face"); State v. Smith, 308 P.3d 135, 138 (N.M. Ct. App. 2013) (reiterating that neither "the witness's convenience or the convenience of his employer" nor "expedit[ing] a hearing" are sufficient to demonstrate the necessity required to overcome the Confrontation Clause's preference for face-to-face testimony); State v. Almanza, 160 P.3d 932, 935 (N.M. App. 2007) ("Where there are requirements of important public policy and showing of necessity, mere inconvenience to the witness is not sufficient to dispense with face-to-face confrontation.");

Commonwealth v. Atkinson, 987 A.2d 743, 750-51 (Pa. Super. Ct. 2009) ("While efficiency and security are important concerns, they are not sufficient reasons to circumvent Appellant's constitutional right to confrontation." "[C]onvenience and cost-saving are not sufficient reasons to deny constitutional rights.").

"Where considerations beyond mere convenience and expedience are involved, however, the factual setting of a case may support a finding of necessity to justify the absence of a witness's physical presence at trial." White, 116 A.3d at 547 (finding that "the combined public policy justifications of resolving cold cases and simultaneously protecting the physical well-being of a significant witness are sufficient under Craig" where the witness had a nerve condition and was under doctor's orders not to travel); see also New York v. Wrotten, 923 N.E.2d 1099, 1100 (N.Y. 2009), cert denied, 560 U.S. 959, 130 S.Ct. 2520 (2010) (approving use of two-way live video testimony of 85 year old victim-witness who had moved to California after the incident, had a history of coronary disease, and could not travel to New York without endangering his health such that it furthered the important policies of justly resolving criminal cases and protecting the well-being of a witness); Bush v. State, 193 P.3d 203, 214 (Wyo. 2008), cert. denied, 556 U.S. 1185, 129 S.Ct. 1985 (2009) (approving use of video conference for testimony of witness who suffered congestive heart failure one week prior and could not travel from Wyoming to Colorado such that it "was necessary to further the important public policy of preventing further harm to his already serious medical condition").

In State v. Joseph, 328 S.C. 352, 356-57, 491 S.E.2d 275, 277 (Ct. App. 1997), the trial judge allowed the State to utilize an affidavit in place of in-court testimony from chemist Susan Kilmer, who had moved to Michigan such that she was purportedly

"beyond the reach of the State's subpoena power. This Court found error in that ruling, stating "[t]he fact that Kilmer had moved to Michigan does not render Kilmer unavailable or make it impracticable for the State to produce her for trial once Joseph objected to the use of her affidavit." Id. The same was true here, where Moore was residing in Montana and was not unavailable due to any health or safety concern.

Two recent cases out of New Mexico and Iowa regarding the application of the Craig test are both instructive. State v. Schwartz, 327 P.3d 1108 (N.M. App. 2014); State v. Rogerson, 855 N.W.2d 495 (Iowa 2014). In Schwartz, the New Mexico Court of Appeals reversed the defendant's convictions where four witnesses were allowed to testify by two-way video without the trial court making the requisite findings that the use of the video was necessary. 327 P.3d at 1112. Schwartz was convicted of second degree murder and evidence tampering in connection with the death of his roommate, McEachin. Id. at 1111. The deceased woman's "badly decomposed body was discovered wrapped in a blue air mattress and sheets and covered with a mattress in an alley approximately 500 feet from Defendant's apartment." Id. The witnesses who testified remotely included FBI agent Bas, forensic scientists Gross and Pearn, and Defendant's mother Labance. Id.

The Schwartz court accepted the State's concession on appeal that the defendant's confrontation rights were violated as to the first three witnesses.[8] Id. The court also found error in Labance's appearance by video. Id. The State averred that Labance could not travel due to her age, distant residence in Florida, and suffering from severe stress, anxiety, and depression, it also said that "she will come if necessary." Id. at 1113.

[8] The trial court only referenced Bas and Gross' residence outside of New Mexico and made no individualized factual findings regarding Pearn. Schwartz, 327 P.3d at 1112.

However, the testimony at trial revealed that Labance's health issues were minimal. Id. The trial court nonetheless denied defense counsel's motion to strike, saying it would accept "on the basis of good faith that there's a legitimate basis for Labance to appear by the Skype." Id. On review, the Schwartz court found that the evidence was inadequate to conclude that Labance could not testify in person. Id. at 1114. Additionally, the State's averment that Labance could travel to testify "if necessary" highlighted the inadequacy of the evidence to support the district court's conclusion. Id. The Schwartz court thus concluded "that it was error to permit video testimony by Bas, Pearn, Gross, and Labance because the necessity for video testimony was not supported by sufficient findings." Id.

While Appellant asserts that under our State's law the violation of his right to confrontation constitutes a structural error such that the harmless error doctrine should not apply, the Schwartz court conducted a harmless error analysis. Id. at 1114-17; see State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013). The court concluded that the defendant was prejudiced by the testimony of Pearn, Gross, and Labance. Schwartz, 327 P.3d at 1114-17. Bas, on the other hand, testified only regarding the chain of custody regarding the blood sample that he obtained from McEachin's daughter. Id. at 1115. The court found that Bas's testimony by video, solely regarding the chain of custody, was harmless because "there is no reasonable possibility that Bas's testimony had the evidentiary importance to impact Defendant's conviction." Id.

The Schwartz court rejected the State's argument that that the testimony of the forensic scientists, Pearn and Gross, was harmless. Id. The State argued that the use of the video had "only a marginal impact on his right of confrontation." Id. However, the court concluded that "whether and how Defendant cross-examined the witnesses is not

dispositive of the ultimate question of harmlessness because that analysis focuses on whether the evidence affected the verdict, not how Defendant responded to it." Id. The State's second argument was that "the video testimony was relatively insignificant in comparison to the overall evidence of guilt." Id. Specifically, the State argued that "(1) the video testimony as to identity was duplicative of other evidence and therefore insignificant, and (2) the video testimony tying Defendant to the body was of 'minor significance' compared to evidence of 'the victim's blood on the carpet in Defendant's bedroom,' which was established through in-person testimony." Id. at 1115-16. The court disagreed that the DNA evidence regarding identity was cumulative, finding that it was much more reliable than the other identity testimony at trial. Id. at 1116. The court further found that "even if the video testimony was cumulative, **improperly admitted evidence that is cumulative is not *ipso facto* harmless beyond a reasonable doubt**. Rather, even cumulative evidence may be harmful if it had an impact on the jury's verdict." Id. (internal citation and quotations omitted) (emphasis added). Thus, the court held that, despite the State's efforts to minimize the role of the video testimony, "there is no reasonable possibility that this evidence did not contribute to Defendant's conviction." Id. at 1117.

The Schwartz court likewise rejected the State's argument that Labance's video testimony was harmless because the documents admitted through her "could have been authenticated another way." The court ruled that "the State chose to rely on Labance to get the documents admitted. Having made that choice, the State cannot now argue, simply because there was another method for admission of the documents, that the jury

did not rely on Labance's testimony to convict Defendant." Id. Accordingly, the court reversed Schwartz's convictions and remanded for a new trial. Id. at 1119.

In State v. Rogerson, 855 N.W.2d 495 (Iowa 2014), the Supreme Court of Iowa found, on interlocutory appeal, that the admission of six witnesses testimony via remote video violated the defendant's confrontation right where the State failed to show necessity. Rogerson was charged with four counts of unintentionally causing serious injury by intoxicated use of a motor vehicle. 855 N.W.2d at 497. The witnesses who the State sought to have testify remotely via two-way videoconferencing technology included three of the parties injured in the crash, Rohman, Barrett, and Totse, who resided outside the state of Iowa and three employees of the Division of Criminal Investigation (DCI) Criminalistics Laboratory who worked in Ankeny, approximately 200 miles from the courthouse. Id. The State did not present any evidence that the witnesses were unable to travel. Id.

The Rogerson court noted that protecting child victims from trauma, illness, and foreign residence may be sufficient to satisfy the policy and necessity prong of Craig but recognized "the general consensus among courts that mere convenience, efficiency, and cost-saving" will not suffice. Id. at 506-07. The court found that despite their residence in Louisiana, Florida, and West Virginia, the State failed to present any evidence that the victim-witnesses could not be subpoenaed or were unable to travel because of their injuries. 855 N.W.2d at 507. Regarding the DCI lab employees, the State abandoned its original justification "that their testimony was not 'accusatory.'" Id. However, the court noted that such an argument would have been unsuccessful, stating:

> The United States Supreme Court has dispensed with the notion that some witnesses for the prosecution are exempt from the Confrontation Clause. *See Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 313–14, 129 S.Ct. 2527, 2533–34, 174 L.Ed.2d 314, 323 (2009) ("Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."). The DCI employees in the present case are witnesses for the prosecution and are, therefore, subject to the Confrontation Clause.

855 N.W.2d at 507 n.7. Instead, the State simply maintained that "it would save time and money if these witnesses did not have to attend trial in person." Id. The Rogerson court reversed the district court's order allowing for the video testimony, finding that "the State's justifications of mere distance, cost, and efficiency are insufficient to overcome Rogerson's Sixth Amendment rights, and there is no evidence the witnesses are unable to travel." Id.

In the present case, the trial judge erred as a matter of law by requiring the defendant to prove prejudice rather than properly requiring the State to meet its burden of showing that the Skype testimony was reliable and, more importantly, that denial of the right to confront Moore was **necessary** to further an **important public policy**. While the solicitor argued that Moore's testimony was "cumulative" and later stated that they did not even need to call Moore as a witness, the fact remains that the State did call Moore as a witness. The reason was obvious – a review of the entirety of Johnson's interrogation made clear that Coker was the "bad cop" and Moore was the "good cop." In fact, one of the DVDs mysteriously cut off just as Coker was yelling at Johnson. See State's Ex. 59 (DVD of Apr. 6, 2011 Interrogation) (on file with this Court). Given that ultimately the jury would determine the voluntariness of Johnson's statements and the breaks in the video recording, the State did not want to rely solely on Coker's testimony regarding the interrogation. See State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (stating that after

the trial judge makes an initial determination allowing a confession into evidence, "[i]t then is for the jury ultimately to decide whether the confession was voluntary."), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

Johnson's confrontation right attached to every witness, including Moore, and could not be overcome by the mere convenience and cost-savings asserted by the State. The trial judge failed to make the requisite findings to allow Moore to testify by Skype and the State's sole policy argument was insufficient to overcome Johnson's important constitutional right of confrontation. Johnson is accordingly entitled to a new trial.

III. The trial court erred in finding that Appellant's statement was voluntary where it was coerced by the investigators continuous lies regarding the evidence, threat of the death penalty if he did not change his "story," and emotional appeals and threats related to Appellant's two-year old daughter.

During the eight hours of active interrogation, which followed a three hour collection of gunshot residue, the investigators repeatedly lied to Johnson about the evidence that was collected at the scene, requiring Johnson to account for alleged inconsistencies that they created. The investigators also told Johnson that if he continued to tell them the same thing, he was "going to go prison...if not the death penalty," threatened to tell his two-year old daughter that he was "cold-blooded killer," and told him "you aren't going to be seeing your daughter." State's Ex. 59-64 (DVDs of Apr. 6, 2011 Interrogation) (on file with this Court). Under the totality of the circumstances Johnson's statements were not voluntary.

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda . . . ." State v. Aleksey, 343 S.C. 20, 30, 538 S.E.2d 248, 253 (2000). In Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630 (1966), the Court determined that the Fifth and Fourteenth

Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. In the initial phase of review by the trial judge, if a defendant was advised of his Miranda rights, but chose to make a statement anyway, the "burden is on the State to prove *by a preponderance of the evidence* that his rights were voluntarily waived." State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (emphasis in original). The State bears this burden of proof even where a defendant has signed a waiver of rights form. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980), *cert. denied*, 449 U.S. 1037, 101 S.Ct. 616 (1980).

The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused. State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982). When considering the voluntariness of a statement, the court and jury should consider "not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745 (1993) (omitting internal citations). "Coercion is determined from the perspective of the suspect." State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). Statements given pursuant to threats or under inherently coercive circumstances are not admissible. See Mincey v. Arizona, 437 U.S. 385, 398-99, 98 S.Ct. 2408 (1978); Minnesota v. Murphy 465 U.S. 420, 427, 104 S.Ct. 1136 (1984).

In State v. Rochester, the Supreme Court held that a confession "may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises,

however slight, or by the exertion of improper influence." 301 S.C. 196, 200, 391 S.E.2d 244, 246-47 (1990) (internal quotations omitted) (emphasis added). The Court found that a polygraph examiner telling the defendant it would be in his best interest to tell the truth was neither a threat nor a promise. Id. at 201, 391 S.E.2d at 247. This was nonetheless a factor to consider when determining whether appellant's statement was a knowing, intelligent, and voluntary tendered confession under the totality of the circumstances. See State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001); State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987).

The investigators in this case continuously lied about the evidence in an effort to "wear on his [Johnson's] psyche" and "break him [Johnson] down." They told Johnson that the trunk of his car was analyzed and only his fingerprints were found, that his shoe matched a footprint left from kicking in the door, that his ring matched a wound left on Kaisha, and that you could hear him in the background of the 9-1-1 calls made by Maxine and Kaisha. None of that was true. R. 463, l. 2 – 484, l. 16; R. 487, l. 13 – 488, l. 2; State's Ex. 55 (Recording of 911 calls) (on file with this Court).

Further, investigators told Johnson that if he continued to tell them the same thing he was either going to go to prison or get the death penalty. Ex. 59 (DVD of Apr. 6, 2011 Interrogation, 1:17:33) (on file with this Court). Immediately prior to Johnsons' alleged confession they spoke with him about what they would tell his daughter about him – threatening to tell her that he was a cold-blooded killer, that he did not "give a shit about her," and that the only reason he did not kill her was because he ran out of shells. They also told him that he was not going to get the opportunity to see his daughter. Ex. 64 (DVD of Apr. 6, 2011 Interrogation, 0:20:21) (on file with this Court). Both investigators denied

making any threats or coercive statements to Johnson, but agreed that it was only after the discussion of Johnson's daughter that Johnson changed his story. Coker also agreed that Johnson's original story matched the evidence at the scene and that it was countered only by Kaisha's statement and his alleged confession that followed seven hours of Johnson proclaiming his innocence. R. 387, ll. 8 – 402, l. 3; R. 461, l. 4 – 462, l. 20; R. 484, l. 17 – 485, l. 1; R. 496, l. 24 – 501, l. 15.

The threats made by the investigators to Johnson are analogous to those made in State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992). In Corns, this Court found that the trial court erred in admitting Corns' oral statements that were involuntarily made in response to threats that his wife could be arrested and his children taken by D.S.S. In Corns, the officers conceded that they "informed Corns his wife could be arrested, that she could be 'involved in the marijuana,' and that their children could be taken from them." 310 S.C. at 552, 426 S.E.2d at 327. These "veiled threats against his family" amounted to an exertion of improper influence and rendered Corns's statement involuntary, necessitating reversal of Corns' conviction and a new trial. Id. Similarly, in Lynumn v. Illinois, 372 U.S. 528, 534, 83 S.Ct. 917, 921 (1963), Lynumn was granted a new trial because her involuntary confession "was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her."

In the present case, the statements regarding Johnson's two year old daughter were equally coercive. The investigators attempted to ameliorate some of their conduct by making their threats in the form of questions rather than statements. They all but said that if Johnson did not give them an alternate story, they were going to tell his daughter

their version of events – that he was cold-blooded killer who intended to kill her too. Miraculously, approximately five minutes later Johnson gave them the accidental shooting story that the officers suggested to him. Their threats that he would never see his daughter and would potentially receive the death penalty if his story did not change were likewise coercive.

The trial judge's assessment fell far below the required consideration of the totality of the circumstances. While Johnson was read his Miranda rights and offered breaks, food, and bathroom facilities, Judge Young failed to consider the false, coercive, and threatening statements made by the officers throughout the lengthy interrogation or Johnson's lack of experience with the criminal justice system. See R. 63, ll. 10-21. Therefore, Johnson's statements were not voluntary and he is accordingly entitled to a new trial.

IV. The trial court erred in denying Appellant's motion for mistrial and request to empanel a new jury where Appellant was led into the courthouse wearing orange handcuffs and accompanied by three to four armed guards prior to voir dire of the jury in violation of his right to due process.

On the first day of trial, Johnson was escorted into the courthouse wearing street clothes, orange handcuffs, and surrounded by three to four armed jailhouse personnel. Within an hour, Johnson appeared before the jury panel for voir dire in those **same** street clothes. How many of the jurors saw Johnson and whether it would influence their ability to be fair could not properly be determined through voir dire because it would have "re-rung the bell." R. 92, ll. 2-18; R. 93, l. 19 – 94, l. 25; R. 95, ll. 5-15. Despite the early stage of the proceedings and his finding that defense counsel's argument was "compelling and sincere," the trial judge denied the motion for mistrial and request to empanel a new jury. R. 95, ll. 16-22.

Due process requires that persons accused of a crime receive the "fundamental liberty" of a fair and impartial trial, and that such persons be afforded the presumption of innocence. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975). To implement this presumption courts must guard against factors which may "undermine the fairness of the fact-finding process" and thereby dilute "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt...." Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692 (1976). "The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require." Eaddy v. People, 174 P.2d 717, 718-19 (Colo. 1946).

While the present case did not involve a defendant forced to stand trial in prison garb or shackled, the same constitutional rights and danger to the presumption of innocence are presented. Even though defense counsel promptly brought this matter to the trial court's attention, in an effort to minimize delay and inconvenience, the trial judge refused to empanel a new jury. The prejudice is best illustrated by the solicitor's argument that the jury would not be surprised that Johnson was in custody because he was charged with multiple murders. R. 92, l. 25 – 93, l. 3. That is the antithesis of the presumption of innocence. Johnson is accordingly entitled to a new trial.

V. The trial court erred in denying Appellant's motion for mistrial and request to empanel a new jury where two of the State's witnesses discussed the facts and merits of the case in the hallway within arms-length of jurors in violation of Appellant's Sixth Amendment right to a fair and impartial jury.

Prior to the voir dire of the jury, defense counsel overheard two of the State's witnesses, Investigator Richards and Robert Brogdon, discussing the facts and merits of the case outside of the courtroom within earshot of potential jurors. R. 95, l. 25 – 96, l. 24. The voir dire of the jurors regarding whether they had heard anything about Johnson's case was insufficient to address this matter, as they were unlikely to realize that the hallwaty discussion involved Johnson's case until Richards or Brogdon actually testified or they heard more details beyond just the indictments. R. 87, ll. 1-6; R. 97, ll. 13-18. Given that this matter was brought to the court's attention before the jury was even sworn, the trial court should have granted the motion for mistrial.

A defendant in a criminal prosecution is constitutionally guaranteed the right to a fair trial by an impartial jury. U.S. CONST. AMEND. VI; S.C. CONST. ART. I, § 14. "It is the duty of the trial [court] to see that a jury of unbiased, fair and impartial persons is impaneled." State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 118 (1998). Additionally, "[i]n a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." State v. Hill, 394 S.C. 312, 320, 714 S.E.2d 879, 883 (Ct. App. 2011). "Relevant factors a court should consider in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice." Id. at 320, 714 S.E.2d at 884.

In State v. Cameron, this Court held that where there is a private communication between a court official and a member of the jury, "a new trial must be granted unless it

clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." 311 S.C. 204, 208, 428 S.E.2d 10, 12 (1993) (quoting Holmes v. United States, 284 F.2d 716, 718 (4th Cir. 1960)). While the present case involved indirect communication to the potential jurors by State's witnesses rather than a court official, there is a parallel importance in protecting the sanctity of the jury system from any outside influence. The Cameron court noted that "[j]urors are simply not to consider the opinions of neighbors, officials or even other juries." Id. (quoting State v. Thomas, 287 S.C. 411, 413, 339 S.E.2d 129, 129 (1986)). This would certainly include the opinions of State's witnesses who would ordinarily be limited in providing any opinion testimony and certainly not allowed to provide any testimony without being subject to cross-examination. See Rule 701, SCRE; U.S. CONST. AMEND. VI; S.C. CONST. ART. I, § 14. Notably, the State did not call Robert Brogdon as a witness. As such, any statements that he made in the hallway were not able to be addressed by the defense.

Even more troubling here is the trial court's blasé attitude toward the statements made by the State's witnesses in front of the potential jurors. This was not the equivalent of statements made by the solicitor during argument that Johnson committed the charged offenses. R. 97, l. 19 – 98, l. 20. At least with respect to that the trial judge gave an express instruction that the opening arguments were not evidence in the case. R. 126, l. 24 – 127, l. 7. Additionally, defense counsel had an opportunity to respond to the State's opening statement. The motion for mistrial involved two third parties who commented on the facts and weight of the evidence, which are determinations that should be left to the sole province of the jury. Johnson is accordingly entitled to a new trial based on this violation of his constitutional right to a fair and impartial jury.

VI. The trial court erred in sentencing Appellant to five-years incarceration for possession of a weapon during the commission of a violent crime where (1) Appellant was sentenced to life for murder and first degree burglary and S.C. CODE ANN. § 16-23-490 expressly provides that the "five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime" and (2) the evidence did not show a sufficient nexus between possession of the firearm and the offense of kidnapping.

Johnson was sentenced to a term of life for the offenses of murder and first degree burlgary. R. 948 – 949. Under S.C. CODE ANN. § 16-3-20(A), a life imprisonment for murder "means until the death of the offender without the possibility of parole " such that Johnson was sentenced to life without parole for the offenses of murder and first degree burglary. He was also sentenced to a concurrent term of five years for possession of a firearm during the commission of a violent crime.

"If a person is in possession of a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime . . . he must be imprisoned for five years, in addition to the punishment provided for the principal crime." S.C. CODE ANN. § 16-23-490(A). This statute expressly provides, however that "the five-year sentence does not apply in cases where . . . a life sentence without parole is imposed for the violent crime" Id.

Here, Johnson was sentenced to life without parole for the offenses of murder and first degree burglary, and under § 16-23-490(A), it is clear that he should not have been sentenced to an additional five years for possession of weapon during the commission of a violent crime based on those offenses. See State v. Owens, 346 S.C. 637, 666-67, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (holding a defendant sentenced to death could not also be sentenced to five years for possession of a firearm during the commission of a violent offense).

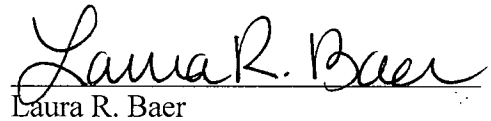
While the indictment in this case also alleged that the weapon was used in commission of the offense of kidnapping, the trial judge made no finding of a nexus between the actual or constructive possession of the firearm and the furtherance of the crime of kidnapping. See State v. Whitesides, 397 S.C. 313, 725 S.E.2d 487 (2012) (holding that "[a] nexus between possession of the firearm and the underlying violent crime must be established in order for a defendant to be convicted of possession of a firearm during the commission of a violent crime"). Kaisha's testimony at trial made clear that the shotgun was left at the house and was not in the vehicle with them after they left. R. 230, l. 23 – 232, l. 8; R. 249, l. 25 – 251, l. 8. As such, the evidence would not have supported a conviction for possession of a firearm during the commission of the kidnapping.

Therefore, the trial judge erred as a matter of law in sentencing Johnson and the five year sentence for possession of weapon during the commission of a violent crime should be vacated.

CONCLUSION

For the foregoing reasons, Appellant Justin Jermaine Johnson respectfully requests that this Court reverse his convictions and grant him a new trial (Issues I-IV) and vacate his sentence for possession of weapon during the commission of a violent crime (Issue V).

Respectfully submitted,



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

This 23rd day of May, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 23rd, 2016

Laura R. Baer

Laura R. Baer
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN JERMAINE JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, on this 23rd day of May, 2016.

Laura R. Baer

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of May, 2016.

Maria Mendoza (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.